Washington Legal Foundation
Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

Critical Legal Issues: *WORKING PAPER SERIES*

A CHILL WIND FOR PRECAUTION?:
BROADER RAMIFICATIONS OF SUPREME COURT'S *WINTER* DECISION

By
Lawrence A. Kogan, Esq.
Institute for Trade, Standards and
Sustainable Development, Inc.

Washington Legal Foundation
Critical Legal Issues WORKING PAPER Series

Number 163
April 2009

TABLE OF CONTENTS

Copyright © 2009 Washington Legal Foundation

ABOUT WLF'S LEGAL STUDIES DIVISION

The Washington Legal Foundation (WLF) established its Legal Studies Division to address cutting-edge legal issues by producing and distributing substantive, credible publications targeted at educating policy makers, the media, and other key legal policy outlets.

Washington is full of policy centers of one stripe or another. But WLF's Legal Studies Division has deliberately adopted a unique approach that sets it apart from other organizations.

First, the Division deals almost exclusively with legal policy questions as they relate to the principles of free enterprise, legal and judicial restraint, and America's economic and national security.

Second, its publications focus on a highly select legal policy-making audience. Legal Studies aggressively markets its publications to federal and state judges and their clerks; members of the United States Congress and their legal staffs; government attorneys; business leaders and corporate general counsel; law school professors and students; influential legal journalists; and major print and media commentators.

Third, Legal Studies possesses the flexibility and credibility to involve talented individuals from all walks of life - from law students and professors to sitting federal judges and senior partners in established law firms - in its work.

The key to WLF's Legal Studies publications is the timely production of a variety of readable and challenging commentaries with a distinctly common-sense viewpoint rarely reflected in academic law reviews or specialized legal trade journals. The publication formats include the provocative COUNSEL'S ADVISORY, topical LEGAL OPINION LETTERS, concise LEGAL BACKGROUNDERS on emerging issues, in-depth WORKING PAPERS, useful and practical CONTEMPORARY LEGAL NOTES, interactive CONVERSATIONS WITH, law review-length MONOGRAPHS, and occasional books.

WLF's LEGAL OPINION LETTERS and LEGAL BACKGROUNDERS appear on the LEXIS/NEXIS® online information service under the filename "WLF" or by visiting the Washington Legal Foundation's website at www.wlf.org. All WLF publications are also available to Members of Congress and their staffs through the Library of Congress' SCORPIO system.

To receive information about previous WLF publications, contact Glenn Lammi, Chief Counsel, Legal Studies Division, Washington Legal Foundation, 2009 Massachusetts Avenue, NW, Washington, D.C. 20036, (202) 588-0302. Material concerning WLF's other legal activities may be obtained by contacting Daniel J. Popeo, Chairman.

Copyright © 2009 Washington Legal Foundation

ABOUT THE AUTHOR

Lawrence A. Kogan is an international business, trade, and regulatory attorney licensed to practice law in New York, New Jersey and the District of Columbia. He operates the Washington, D.C. risk consultancy, Sound Science Business Strategies, LLC and directs the Princeton, NJ-based Institute for Trade, Standards and Sustainable Development, Inc. (ITSSD). Mr. Kogan has served as an Adjunct Professor of International Trade Law at the John C. Whitehead School of Diplomacy and International Relations at Seton Hall University, South Orange, New Jersey, and has advised former Bush Administration officials, congressional subcommittee chairs, and foreign trade officials about World Trade Organization (WTO), World Intellectual Property Organization (WIPO), United Nations Convention on the Law of the Sea (UNCLOS), United Nations international environmental treaty, European Union (EU), U.S. environmental regulatory, and customary international law and technical standards issues. During 2008, Mr. Kogan was a panelist at National Defense University where he spoke about the potential impact that U.S. adoption of Europe's Precautionary Principle would have on the U.S. economy and military security.

Copyright © 2009 Washington Legal Foundation

A CHILL WIND FOR PRECAUTION?:
BROADER RAMIFICATIONS OF SUPREME COURT'S *WINTER* DECISION

By
Lawrence A. Kogan, Esq.
Institute for Trade, Standards and
Sustainable Development, Inc.

I. INTRODUCTION

A. The Environmental Focus of this Article

This WORKING PAPER discusses the significance of the U.S. Supreme Court's recent decision in *NRDC v. Winter*[1] from the perspective of U.S. environmental regulatory law. The Obama administration[2] and the Chairman of the Senate Foreign Relations Committee[3] have already expressed their intention to incorporate Europe's Precautionary Principle within U.S. administrative law and practice as part of a 'smart' U.S. multilateral environmental diplomacy.[4] Europe's Precautionary Principle, which has already been expressly adopted by San Francisco, Portland and Seattle, provides: "Where threats of serious or irreversible damage to people or nature exist, lack of full scientific certainty about cause and effect shall not be viewed as sufficient reason for the City to postpone cost effective measures to prevent the degradation of the environment or protect the health of its citizens."[5]

No doubt, the *Winter* majority's opinion and the manner in which the Bush administration addressed environmental issues domestically and internationally has incited the environmental and academic communities. As a result, these protagonists did not wait until after President's Obama's inauguration to issue a policy report containing environmental regulatory recommendations for the new administration's first 100 days in office.[6] The

Copyright © 2009 Washington Legal Foundation

'green report', which was issued shortly after the *Winter* decision, proposes not only the reversal of past and present Bush administration federal agency environmental actions,[7] but also a revision and strengthening of the policymaking and enforcement roles of the Department of Justice (DOJ)'s Environment and Natural Resources Division (ENRD). The stated objective is to ensure greater alignment between legislative and administrative environmental governance initiatives and the new administration's policy positions.[8] Not surprisingly, the report highlights, as its *first* policy recommendation in this area, the thorough administrative "Review of Supreme Court environmental cases [by the] ENRD [and]…the Solicitor General's Office [SGO]…and [the] reconsider[ation of] any case in which a cert. petition might be filed." If "there is no conflict, [the DOJ and SGO should] avoid filing [, especially] where there is a significant risk of a decision that will not increase protection of the environment."[9] The report continues:

> Four environmental cases will have been briefed and/or argued before the U.S. Supreme Court by the time the next administration takes office [including]: *Winter v. NRDC (NEPA challenge to the Navy's use of sonar, decided November 12)*.
>
> …Little can be done to affect most of these cases now but…Going forward, *the question of whether to seek Supreme Court review in additional environmental cases should be addressed by a new administration as soon as possible* and any decision to seek review should be fully consistent with the new administration's priorities and policies. The Department should move quickly to review any environmental case where a cert petition is being considered, avoid petitioning where possible, and *only petition to advance critical environmental goals of the new administration*.[10]

In addition, the report clearly set forth a regulatory framework pursuant to which the Obama administration could discretely adopt Europe's Precautionary Principle as a central tenet of its domestic and international environmental and oceans policies.[11]

> The new Administration should take the lead in proposing the adoption of a new framework environmental convention that would implement an integrated, ecosystem-based management approach to managing new

Copyright © 2009 Washington Legal Foundation

> and expanded industrial activity in the Arctic. This convention should: reaffirm the authority of existing international agreements such as the Convention on the Law of the Sea (UNCLOS); recognize the overarching role of widely-accepted principles and approaches to govern human activities in the Arctic Ocean, including ecosystem-based management, *the precautionary principle in decision-making when dealing with less than complete information*...[12]
>
> 8. Adoption of a new high seas implementing agreement under the UN Convention on Law of the Sea (UNCLOS) - The new Administration should seek an innovative agreement under UNCLOS that would (1) provide for the establishment of multi-sector Marine Protected Areas (MPA)s; (2) *require prior environmental impact assessment for human activities with the potential to adversely affect high seas ecosystems*; (3) integrate assessment and management of impacts across sectors; and (4) require application of modern ocean management principles and approaches...[13]

THIS WORKING PAPER will explain how activists creatively, but unsuccessfully, labored to convince the Supreme Court to incorporate at least one of three different applications of Europe's Precautionary Principle when deciding *Winter*. They had hoped that the Court would adopt as a general rule the Ninth Circuit's presumption of irreparable environmental injury, its presumption in favor of issuing preliminary injunctions in environmental matters, and/or its presumption against issuing a military exemption in NEPA cases.

B. Decision Overview

Last November, the U.S. Supreme Court declared that the U.S. Court of Appeals for the Ninth Circuit incorrectly upheld a preliminary injunction that placed onerous restrictions upon the U.S. Navy's ability to conduct mid-frequency active (MFA) sonar training deemed critical to national security. The Navy's decision to continue that training, the Court found, was based on its preparation of a 239-page environmental assessment (EA) concluding that such activities would not have a significant impact on the environment, and the

Copyright © 2009 Washington Legal Foundation

underlying "district court [factual] record contained *no* evidence that marine mammals have been harmed by the Navy's exercises."[14]

In an opinion authored by Chief Justice Roberts, the Court took note of how the Navy had "used MFA sonar during training exercises in [southern California] SOCAL for 40 years, without a single documented sonar-related injury to any marine mammal."[15] It also considered environmentalist allegations that MFA sonar "*can* cause more serious injuries to marine animals than the Navy" could capably and knowingly detect, that several mass marine mammal strandings *outside of* SOCAL "have been *'associated' with* the use of active sonar" (emphasis added), and that beaked whales are viewed as uniquely susceptible to injury from sonar because of their deepwater diving.[16] However, the Court ruled that the Ninth Circuit's reliance upon its precedent of "Issuing a preliminary injunction based only on a *possibility* of irreparable harm[,] [was] inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."[17] The Court did not otherwise "address the underlying merits of plaintiffs' claims."[18]

The Supreme Court, instead, undertook a 'balancing of the equities' and "[found] that the Navy's interests, and the documented risks to national security, clearly outweigh[ed] the harm on the other side of the balance."[19] The Court reasoned that Respondents' "ultimate legal claim" was that an injunction should issue because the Navy had violated the National Environmental Policy Act (NEPA), by having failed to prepare the required EIS, rather than a claim that the Navy was required to "cease sonar training." Given the absence of any credible evidence demonstrating that continued sonar exercises posed an environmental threat greater than that posed to national security by the preclusion of such exercises, and considering the district court's ability to exercise other options to ensure Navy EIS compliance, the Court ruled against upholding the injunction.[20] Apparently, the Court was disturbed by the district

Copyright © 2009 Washington Legal Foundation

court's failure "to explain why it [had] rejected the Navy's affidavit-supported contentions,"[21] the district and appellate courts' failure to "adequately explain [their] conclusion that the balance of the equities tips in favor of plaintiffs,"[22] and the Supreme Court dissent's refusal to "barely mention[] the Navy's interests."[23]

C. Factual Overview

On March 7, 2007, California's Attorney General filed suit on behalf of the California Coastal Commission under the Coastal Zone Management Act (CZMA) in the United States District Court for the Central District of California, seeking to enjoin the U.S. Navy from conducting planned military training exercises scheduled between February 2007 and January 2009 off the Southern California coast. These exercises involved the deployment of mid-frequency sonar devices alleged by the State as being dangerous to large marine mammals and sea turtles.[24] California filed suit notwithstanding the Secretary of Defense's issuance of an exemption under Marine Mammal Protection Act (MMPA)[25] and Navy's release during February 2007 of "an environmental assessment [EA]…[that bore] a finding of no significant impact – for the training exercises."[26]

The Commission alleged that the Navy's sonar program did not satisfy the conditions imposed by California law because it failed to "protect marine mammals and sea turtles from the effects of mid-frequency sonar."[27] These conditions required the Navy to "*take precautionary measures*", consistent with California's coastal management program.[28] The Navy challenged the injunction, claiming that it already "had made an effort to use *the precautionary approach*…in the absence of scientific information to the contrary, [by] assess[ing] that the proposed training [was] harmful to the environment"[29] (i.e., by intentionally overstating its estimate of potential

Copyright © 2009 Washington Legal Foundation

injuries to beaked whales). In addition, the Commission alleged that the Navy had violated the reporting requirements of Section 1456 of the CZMA.[30]

On March 22, 2007, the Natural Resources Defense Council (NRDC) and other environmental groups joined the litigation, challenging the Navy's EA and impact findings as violating the CZMA[31] and its failure to prepare an environmental impact assessment as required by NEPA.[32] The district court agreed with NRDC, identifying two ways the Navy likely violated the CZMA. First, the court found that the Navy had failed to mention in its Consistency Determination (CD) that it intended to conduct such activities and did not adequately show that its sonar operations would not have a significant impact on the marine environment and/or would not affect the coastal zone (effectively imposing a reversal of the burden of proof). Second, the court found that the Navy's CD had failed to incorporate mitigation measures required by the California Coastal Commission program (effectively amounting to more than a precautionary approach).[33] Having identified the *possibility* of irreparable harm, on August 7, 2007, the court issued a preliminary injunction against the Navy of potentially infinite duration – "until the Navy adopt[ed] mitigation measures that would substantially lessen the likelihood of serious injury and death to marine life." [34]

The Navy appealed the decision to the Ninth Circuit which, on August 31, 2007, stayed the District Court's broad injunction, pending the Navy's appeal.[35] On November 13, 2007, the Circuit Court upheld the District Court's findings and vacated the stay.[36] It also remanded the case back to the District Court instructing it to "narrow the scope of the injunction by using its findings to craft mitigation measures uniquely tailored to fit the Navy's…sonar operations."[37]

On January 3, 2008, the District Court issued a narrower preliminary injunction.[38] The ruling required the Navy to employ six mitigation measures as a condition to conducting its MFA training exercises.[39] In particular, the District Court determined consistent with the CZMA that the Navy must "maintain a 12

Copyright © 2009 Washington Legal Foundation

nautical mile exclusion zone from the California coastline at all times [a zone that corresponds to the U.S. territorial sea under the UNCLOS]. . . [and that] a twenty-five mile exclusion zone [corresponding to the contiguous zone under the UNCLOS] would…[have been] unduly burdensome to the Navy."[40] The court also ruled that the Navy had to cease operation of sonar when marine mammals were spotted within 2200 yards, finding that the maintenance of such a 'zone of protection' would impose only a minimal burden upon the Navy.[41] The court issued a second order on January 10, 2008 to clarify the January 3, 2008 decision,[42] and it imposed other conditions.[43] "The Navy filed a notice of appeal the following day. On January 14, 2008, the District Court denied the Navy's stay application."[44]

On January 15, 2008, President Bush issued a memorandum exempting the Navy from compliance with the CZMA, declaring that the Navy's use of mid-frequency active sonar, in conjunction with its planned military exercises in Southern California coastal waters, was in the paramount interest of the United States and that the Navy's forced compliance with the CZMA would undermine its combat readiness.[45] On the same day, the Navy filed an *ex parte* emergency motion to vacate the injunction with both the District Court[46] and the Ninth Circuit.[47] The court remanded the action to the District Court on January 16, 2008 to consider the impact of both the military CZMA exemption and the Council on Environmental Quality's grant to the Navy of a waiver from NEPA's EIA requirement (i.e., "a finding [of] 'emergency circumstances' [that] provided for 'alternative arrangements'[48] to accommodate those emergency circumstances").[49] The District Court, however, was not persuaded; it struck down the CEQ waiver and refused to vacate the injunction.[50] The Ninth Circuit Court affirmed.[51] In addition to determining that the Navy's EA was "cursory, unsupported by cited evidence, or unconvincing" and that the balance of hardships and consideration of the public interest weighed in favor of the plaintiffs, the Court of Appeals determined that: "(1) the 2,200-yard shutdown

Copyright © 2009 Washington Legal Foundation

zone imposed by the District Court was unlikely to affect the Navy's operations [...]"and (2) the powerdown requirement during significant surface ducting conditions was not unreasonable [...]."[52] Although the Court of Appeals, in a separate opinion,[53] subsequently modified two of the conditions of the District Court's injunction about which the Navy was most concerned, the Navy, nevertheless, petitioned the U.S. Supreme Court to review that decision.[54]

D. Overview of Environmental Activists' Strategy

The Supreme Court's decision in *NRDC v. Winter* was significant not merely because it quashed well choreographed, and perhaps even assisted,[55] environmentalist efforts to unreasonably impede U.S. Naval training exercises. It was also significant for revealing the broader agenda of the environmental and academic communities: reformation of the U.S. environmental legislative and regulatory landscape in the image of the European Union.

The following discussion explains how these communities creatively labored to convince the Supreme Court in *Winter* to incorporate at least one of three different applications of Europe's Precautionary Principle within its evaluation of this case: i) for 'risk' identification purposes, as an evidentiary presumption of possible irreparable environmental harm; ii) for risk management purposes, as a presumption in favor of the issuance of preliminary injunctions where there is a possibility of irreparable harm; and iii) for risk management purposes, as a presumption against the issuance of military exemptions from U.S. environmental laws.

1. *Application of the Precautionary Principle for 'risk' identification purposes as an evidentiary presumption of possible irreparable environmental harm*

Winter represents the Supreme Court's rejection of environmental groups' efforts to read Europe's Precautionary Principle[56] into U.S. laws like the

Copyright © 2009 Washington Legal Foundation

National Environmental Policy Act (NEPA) and the Marine Mammal Protection Act (MMPA).[57]

In this regard, the Court's ruling effectively rebukes a politically antagonistic resolution passed by the EU Parliament's European Federation of Green Parties on November 16, 2002. The resolution publicly applauded a U.S. federal district court's 2002 issuance of a temporary injunction blocking the Navy's use of sonar during training exercises off the California Coast. The resolution also declared the Navy's continued use of sonar a violation of customary international law, grounded in Europe's Precautionary Principle (which the U.S. has not adopted), and in the UN Law of the Sea Convention and the UN Convention on Biological Diversity (neither of which the U.S. has ratified).[58] Now, as the result of the *Winter* decision, EU member state governments with Federation of Green Party members arguably have something *real* to be worried about. Will the U.S. Supreme Court's refusal to interpret the NEPA and the other statutes as incorporating Europe's Precautionary Principle *in spirit* encourage similar judicial efforts in other countries? And, will this decision ultimately diminish the political pressure that European governments can, in turn, exert on the U.S. to adopt the Precautionary Principle as U.S. law?[59]

2. *Application of the Precautionary Principle for risk management purposes, as a presumption in favor of the issuance of preliminary injunctions where there is a possibility of irreparable harm*

The Supreme Court may have been aware of environmental and academic community efforts to indirectly enact the Precautionary Principle as U.S. federal environmental law. President Obama's presumptive administrator for the Office of Management and Budget's influential Office of Information and Regulatory Affairs,[60] Professor Cass Sunstein, believes that the Precautionary Principle is analogous to preliminary injunctions in cases where there is a possibility (or is it a likelihood?) of irreparable environmental harm. According to Mr. Sunstein,

Copyright © 2009 Washington Legal Foundation

> Within the [U.S.] federal courts, a special precautionary principle underlies the analysis of preliminary injunctions in cases involving a risk of irreparable environmental harm.[61]
>
> … At first glance…irreversibility matters only because of its connection with the magnitude of the harm; irreversibility operates as a kind of amplifier. In law, a comparison might be made with the idea that courts will refuse to issue a preliminary injunction unless the plaintiff can show that there is a likelihood of an 'irreparable harm' if the injunction is not granted. Irreparability is not a sufficient condition for granting the injunction; the harm must be serious as well as irreparable. And if irreversibility is to be analyzed in the same way, then an Irreversible Harm Precautionary Principle is really part of a Catastrophic Harm Precautionary Principle, or at least a Significant Harm Precautionary Principle.[62]
>
> When courts of appeals spoke in terms of a presumption in favor of injunctive relief, they might be understood as adopting a version of the Irreversible Harm Precautionary Principle.[63]

Mr. Sunstein opines that under the 'right' circumstances, the application of the Precautionary Principle in the form of a presumption in favor of a preliminary injunction might be called for.[64]

3. *Application of Europe's Precautionary Principle for risk management purposes, as a presumption against the issuance of military exemptions from U.S. environmental laws*

The Court's ruling repudiated the District and Appellate Courts' failure to undertake a true balancing of the interests – i.e., a socio-economic cost-benefit analysis *before* having decided to issue and then uphold the preliminary injunction. Such an analysis, had it been performed appropriately, would have weighed a) the actual or likely economic and national security costs the Navy, and by extension, all U.S. taxpayers, would have been forced to bear as the result of the repeated interruption and/or banning of sonar training exercises in SOCAL; *as against* b) the possible or likely aesthetic costs that NRDC members and the State and residents of California would have been forced to bear (i.e.,

Copyright © 2009 Washington Legal Foundation

the loss of environmental protection for their ecological, scientific, and recreational interests in marine mammals that might be physically displaced, at least temporarily) as the result of the Navy's continuation of sonar activities. In effect, the Supreme Court rejected the application of the Precautionary Principle, notwithstanding a lack of demonstrable causation-based evidence of environmental harm to marine mammals, to determine whether the national security interests at stake justify, as a matter of equity, the issuance of military exemptions from environmental laws. According to at least one legal commentator, "the precautionary principle exhorts that if exemptions may cause severe or irreparable harm to the public through the destruction of natural resources, decision makers should protect natural resources, even if some cause and effect relationships are not fully established scientifically."[65]

II. THE SUPREME COURT REJECTED THE NINTH CIRCUIT'S STANDARD OF REVIEW FOR ISSUING PRELIMINARY INJUNCTIONS

A. Majority Opinion Objections

The U.S. Supreme Court rejected the lower courts' efforts to improperly employ the Ninth Circuit's 'precedent of presumption' of possible irreparable harm. Indeed, the Court acknowledged how the Ninth Circuit had, for many years, adopted a *de facto* "presumption of irreparable damage…when environmental harm was alleged", as well as a *de jure* "presumption in favor of injunctive relief."[66]

According to the Majority,

> The [District] court also determined that equitable relief was appropriate *because, under Ninth Circuit precedent*, plaintiffs had established at least a 'possibility' of irreparable harm to the environment…Based on scientific studies, declarations from experts, and other evidence in the record, the District Court concluded that there was in fact a 'near certainty' of irreparable injury to the environment, and that this injury outweighed any possible harm to the Navy (emphasis added).[67]

Copyright © 2009 Washington Legal Foundation

> ...The District Court and the Ninth Circuit also held that when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based *only on a 'possibility' of irreparable harm*. The lower courts held that plaintiffs had met this standard because the scientific studies, declarations, and other evidence in the record established to 'a near certainty' that the Navy's training exercises would cause irreparable harm to the environment" (emphasis added).[68]

In the Court's view, "the Ninth Circuit's 'possibility' standard is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction."[69]

B. Dissenting Opinion Support

In their dissenting opinion, Justices Ginsburg and Souter sought to justify the California federal courts' deviation from established Court precedent by focusing on the singular significance of an environmental impact assessment (sometimes referred to as an environmental impact statement (EIS)). They noted that, while "[t]he Court is correct that relief is not warranted 'simply *to prevent the possibility of some remote future injury*'... 'the injury need not have been inflicted when application is made *or be certain to occur*; [rather,] a strong *threat of irreparable injury* before trial is an adequate basis'" (emphasis added).[70] In effect, the dissenting Justices reasoned that, because the purpose of an EIA/EIS is to "uncover[] [unknown/uncertain] harm, environmental plaintiffs may often rely more heavily on their probability of success [based on the information contained in the EIA/EIS] than the likelihood of harm."[71]

C. Concurring Opinion Objections

The Court's concurring opinion, meanwhile, focused in part on the factual evidence relied upon by the District and Appellate Courts in determining whether Respondents would be successful on the merits and therefore entitled to an injunction. Justices Breyer and Stevens considered not only the figures

Copyright © 2009 Washington Legal Foundation

contained within the Navy's original EA, but also the Navy's 40-year SOCAL sonar exercise record. They also cited scientific studies that had found a *correlation* between certain Navy sonar exercises and some subsequently reported whale beachings.[72] These Justices concluded, in light of the uncertainty surrounding whether the EA's raw numbers indicated a *likelihood* of harm, and the absence of proof demonstrating that marine mammals had previously suffered harms *as the result of* the Navy's past sonar exercises, that the record contained insufficient evidence demonstrating the Navy's original training plans had *caused* environmental harm.[73]

The concurring Justices then examined whether the two additional conditions the District Court imposed upon remand, and later upheld by the Appellate Court, were necessary:

> The controversy between the parties now concerns the two measures that the Navy is unwilling to adopt. The first concerns the 'shutdown zone,' a circle with a ship at the center within which the Navy must try to spot marine mammals and shut down its sonar if one is found. The controverted condition would enlarge the radius of that circle from about one-tenth of a mile (200 yards) to one and one-quarter mile (2,200 yards). The second concerns special ocean conditions called 'surface ducting conditions.' The controverted condition would require the Navy, when it encounters any such condition, to diminish the sonar's power by 75%.[74]

They found that "the evidence of need for the two special conditions weak or uncertain."[75] In their view, Respondents had failed to show that "the Navy's exercises with the four *un*contested mitigation measures (but without the two contested mitigation measures) in place" would *likely* cause the prospective significant "environmental harm" alleged. The Justices then proceeded to balance the relative equities – the costs and benefits of issuing a preliminary injunction requiring the Navy to comply with the two contested conditions[76] – in order to avert the prospect of significant environmental harm occurring sometime during the uncertain future.

Copyright © 2009 Washington Legal Foundation

III. RESPONDENTS' EFFORTS TO ESTABLISH AS PRECEDENT A STANDARD OF REVIEW OF MERE *POSSIBILITY* OF IRREPARABLE HARM

The following discussion details how Respondents and supporting *amici curiae* attempted to replace the U.S. Supreme Court's longstanding equity balancing approach with Europe's Precautionary Principle.

A. NRDC's Efforts

NRDC had argued that the Ninth Circuit's ostensible sliding-scale irreparable harm standard is entirely consistent with Supreme Court precedent and with the rule in other circuits.[77] It claimed that the Ninth Circuit standard provides courts of equity with broad latitude to consider all kinds of evidence proffered in support of a motion for an injunction. NRDC also alleged that such flexibility was essential in light of NEPA's overarching public policy purpose – namely, to "insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which *may* have an impact on man's environment" (emphasis added).[78] According to NRDC, this objective (the unearthing of information relevant to the environment) can be achieved, and perverse results avoided, only if equity courts are able to hold federal agencies to their obligation of preparing an EIA *as a condition* precedent to administrative action.

NRDC had unsuccessfully advanced a similar argument before the Supreme Court more than twenty years ago in a prior case involving the Alaska National Interest Lands Conservation Act (ANILCA) and the Outer Continental Shelf Lands Act (OCSLA).[79] In *Amoco Production Co. v. Gambell*, NRDC had pursued a preliminary injunction to prevent the U.S. Secretary of the Interior from "grant[ing] oil and gas leases to…oil companies off the Alaska coast under the [OCSLA]." It had been alleged that the U.S. Department of Interior had violated the notice provisions (Section 810) of the ANILCA and the EIA/EIS

Copyright © 2009 Washington Legal Foundation

provisions of NEPA.[80] The Supreme Court subsequently overturned the Ninth Circuit's reversal of the District Court ruling, which had denied issuance of a preliminary injunction. As in the present case, the Supreme Court emphasized how the Appellate Court's interpretation of the preliminary injunction standard was in error *and* in contradiction with Court precedent:

> The Court of Appeals…reversed the District Court's denial of a preliminary injunction. The [appellate] court held, *inter alia,* that irreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action, and that injunctive relief is the appropriate remedy for a violation of an environmental statute, absent rare or unusual circumstances…*Held* The Court of Appeals' direction of a preliminary injunction conflicted with *Weinberger v. Romero-Barcelo,* 456 U. S. 305, and was in error… The Court of Appeals erroneously focused on § 810's procedure, rather than on its underlying substantive policy of preservation of subsistence resources…The Court of Appeals did not dispute that the Secretary could meaningfully comply with ANILCA § 810 in conjunction with his review of production and development plans. Instead, the court stated that '[i]rreparable damage is *presumed* when an agency fails to evaluate thoroughly the environmental impact of a proposed action.' 774 F.2d 1423 (emphasis added). This presumption is contrary to traditional equitable principles, and has no basis in ANILCA. Moreover, the environment can be fully protected without this presumption.[81] [emphasis in original]

As can be seen, notwithstanding the Court's decision in *Amoco Production Co.*, NRDC argued in *Winter* that equity courts should retain the "discretion to issue injunctions [even] where litigants show [only] a possibility of harm,"[82] given the nature of environmental injuries. For all intensive purposes, the NRDC was alluding to the Ninth Circuit's *presumption* of irreparable harm or injury. "This Court has itself recognized that most environmental injuries will not be 'adequately remedied by money damages' and are often 'permanent or at least of long duration, *i.e.*, irreparable.'" [83]

NRDC then endeavored to build its factual case against the Navy by employing inverse logic and by cobbling together various pieces of indirect circumstantial evidence. First, NRDC alleged that "scientific evidence [generally] show[ed] that MFA sonar causes serious, debilitating, and even

Copyright © 2009 Washington Legal Foundation

lethal injuries as well as 'profound' and widespread behavioral disruptions in marine mammals."[84] Second, NRDC alleged that by merely seeking a military exemption under the MMPA, the Navy had "effectively conceded that the SOCAL exercises will have a significant effect on the environment…" [85]

Third, NRDC emphasized how the Navy's 239-page EA document itself had "estimated that the SOCAL exercises would cause 'takes' (within the meaning of the MMPA)[86] of up to 25 percent of the eastern Pacific population of endangered blue whales, and 436 Level A harassments of Cuvier's beaked whales out of an entire west-coast population of as few as 1,121 members."[87] For this reason, the NRDC claimed that such figures supported the Ninth Circuit's determination that "marine mammals would be adversely impacted by the SOCAL exercises at the species or stock level."[88] Consequently, the NRDC argued that, "the Navy's pre-litigation decision…to assess beaked whales differently from other species…and to categorize those takes as permanent injuries" had been justified.[89]

The District Court agreed, concluding that the EA did not contain 'overestimations of harm', as the Navy had asserted. Instead, it found, as the National Marine Fisheries Service (NMFS) did, that "on the whole it represent[ed] a 'reasonable approximation' of the number of exposures that would result from the exercises."[90] The District Court seemed to overlook the fact that the EA "did not account for the effect of the Navy's proposed mitigation measures" (*not* the four uncontested mitigation conditions the District Court imposed).[91] Apparently, both the District Court and the Ninth Circuit rejected 2001 congressional testimony from former Admiral William J. Fallon, who stated that, in undertaking its training exercises, the Navy had made an effort to use the *precautionary approach*, which he defined as follows: "in the absence of scientific information to the contrary, the regulators must assess that the proposed training is harmful to the environment."[92] Presumably, such rejection followed from NRDC convincing these courts to employ the lower scientific

Copyright © 2009 Washington Legal Foundation

threshold of *possibility of harm* and the less rigorous scientific evidentiary standard of *correlation*, consistent with Europe's Precautionary Principle.

Fourth, NRDC persuaded the District Court to believe in what neither the Navy nor the NMFS could prove itself. That is, although the Navy and the NMF were unable to detect (over a 40-year period) that prior sonar exercises had caused marine mammals to suffer any harm, scientists' predictions of likely future harm should be accepted as proof that prior harm had occurred anyway:

> …NMFS's own stock assessments for the impacted beaked whale populations concede that injuries and mortalities *would rarely be documented* given the offshore location of the Navy's exercises and the 'low probability that an injured or dead beaked whale would strand'…Indeed, NMFS scientists have determined it highly improbable that even a catastrophic decline of 5% per year over 15 years *would be detected* in California beaked whale populations — or in nearly any other California stock of marine mammals — given the lack of adequate survey effort.[93]

It is thus clear that the District and Appellate Courts accepted as circumstantial proof of 'likely' future harm an extrapolation of the Navy's prior mitigation records, which had reflected "the Navy's difficulty in visually spotting marine mammals from fast-moving vessels, at night and during other periods of low visibility."[94]

With regard to the balancing of opposing interests that a court of equity should appropriately undertake, NRDC attempted to place the burden on the Navy to establish a presumption *against* issuance of an injunction. It did this by arguing that the Navy must show that there exists a statutory presumption within NEPA that would relieve the Navy from satisfying NEPA's EIS requirement. NRDC claimed, however, that the Navy was unable to satisfy this burden, because neither the NEPA statute nor the legislative history underlying it, support a presumption in favor of such a military exemption. NRDC also alleged that had such a presumption existed, it would have effectively denied a federal court its equitable discretion.[95]

Copyright © 2009 Washington Legal Foundation

Perhaps NRDC's position on this issue had been informed by some within the academic community. At least one legal commentator has argued that the Bush Administration needlessly and without legal foundation sacrificed U.S. environmental and natural resources laws for the sake of national security. This took place via the issuance of military exemptions that "relieved the military of its obligation to comply with many of the nation's environmental and natural resources laws." To resolve this problem and effectively restore "the appropriate balance with respect to laws protecting the nation's natural resources", she recommended that decision makers "use the precautionary principle…even with its acknowledged limitations."[96]

B. California Coastal Commission's Efforts

The other named Respondent to the action, the California Coastal Commission (CCC), argued that the standard of review was not a "'mere' possibility of injury standard" as the Navy had alleged, but rather a "possibility of *irreparable* injury" (emphasis added):[97]

> Contrary to petitioners' arguments, the court below correctly focused on *irreparable* injury to the environment. Such a focus is entirely appropriate in NEPA litigation… In environmental litigation, the injunction serves to prevent the defendant from causing environmental *damage that cannot be undone*.[98]

In addition, the CCC's brief also focused on the magnitude of the evidence that a State must provide to secure a preliminary injunction for protecting its natural resources from alleged environmental harm or injury. According to the CCC, a State need not provide substantial proof that irreparable environmental injury has already occurred or is likely to occur *as the result of* a specific activity, and need not clearly show that an injunction is necessary to prevent such injury. Rather, it is adequate to show only that there is a 'possibility' of irreparable injury to natural resources associated with a given activity:

> Further, the Commission should not have to wait until injury to a species at a population level has occurred before it can seek judicial intervention

Copyright © 2009 Washington Legal Foundation

> to protect California's valuable coastal resources. Additionally, this Court should reject petitioners' argument that plaintiffs must proffer substantial proof and make a clear showing that injunctive relief is necessary to prevent irreparable injury. *Where the injury sought to be enjoined is to a state's natural resources, a showing of the possibility of irreparable injury to those natural resources is sufficient*.[99]

Sensing that the Supreme Court might overturn the District Court's ruling, specifically with respect to the burden of proof that it and NRDC must satisfy, the CCC took pains to argue away any distinction that could be inferred between the phrases 'possibility' of irreparable injury and 'significant threat' of irreparable injury:

> [T]he court of appeals stated that NRDC had the burden of demonstrating the 'possibility of irreparable injury'…While the court of appeals cited to a case holding that a district court erred in requiring that plaintiff show *a significant threat of* irreparable injury rather than *a 'mere possibility* of irreparable harm' (App. 76a-77a), that is not how the court formulated the standard in reviewing the district court decision here…[T]he court of appeals stated that NRDC had the burden of demonstrating the 'possibility of irreparable injury' and that 'NRDC must show the possibility of harm to its membership.'[100]

The CCC also argued, as did NRDC,[101] that there was effectively little, if any, difference between the phrases 'possibility of injury' and 'likelihood of injury', given the irreversible nature of environmental injuries:

> The Supreme Court has held that, '[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment.'[102]
>
> …The court of appeals' decision comports with this Court's formulation, cited by the district court, of the standard for review of a preliminary injunction in cases involving harm or injury to the environment. *Amoco Production Co. v. Gambell*, 480 U.S. at 545 (if such injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment). [I]t is doubtful that there is any material difference between the terms 'possibility of harm' and 'likelihood of harm'.[103]

Copyright © 2009 Washington Legal Foundation

It would seem that, at the very least, the CCC was probing the Supreme Court to see if it had experienced a change of heart since its earlier ruling in *Amoco Production Co.*, where the Court held that *there is no automatic presumption in favor of an injunction where the government has not prepared an EIA/EIS*. Until the Court's ruling in *Amoco Production Co.*, Ninth Circuit precedent apparently controlled: "Irreparable damage [was] presumed when an agency fail[ed] to evaluate thoroughly the environmental impact of a proposed action."[104]

At most, the CCC employed the same logic as did NRDC. It argued that the Navy's own conservative but unsubstantiated estimates of beaked whale 'takes', circumstantially 'show' the potential for irreparable injury arising from the Navy's deployment of sonar devices upon which the district court relied to grant the injunction. It elaborated:

> With regard to beaked whales, the Navy considered one stranding where Navy MFA sonar was identified as 'the most *plausible* contributory source to the stranding event.' The Navy acknowledged that beaked whales are expected in the deeper portions of the area where the training exercises will occur. The Navy stated that since *the exact cause of stranding events are unknown and meaningful impact thresholds cannot be derived specifically* for beaked whales, the Navy took a conservative approach and treated all behavioral disturbance of beaked whales as *a potential injury*.[105]

It must be emphasized at this point that the CCC's brief focused on the 'potential' that future environmental injury, mostly to beaked whales, would arise in relationship to continued sonar deployments. It did not focus on actual reported or documented injuries, past or present. Interestingly, the plain meaning of the word 'potential' is something "existing in possibility: capable of development into actuality."[106] Similarly, the plain meaning of the word 'capable' is "susceptible", "having attributes required for performance or accomplishment", or "having traits conducive to or features permitting."[107] And, the plain meaning of the word 'possible' is "being within the limits of ability, capacity, or realization", "being something that may or may not occur" and

Copyright © 2009 Washington Legal Foundation

"having an indicated potential."[108] In other words, the CCC, like NRDC, argued that, as a matter of equity, it need only show a relationship of *correlation*[109] or *plausibility*[110] between sonar exercises and environmental injury rather than one of *causation*,[111] to justify the Court's issuance of a preliminary injunction, especially where a State's natural resources are at stake:

> [T]his Court should reject petitioners' argument that plaintiffs must proffer substantial proof and make a clear showing that injunctive relief is necessary to prevent irreparable injury. The Commission must be able to seek such relief against a defendant *when the Commission demonstrates that irreparable injury to coastal resources is possible*. There is no justification for curtailing the authority of States to seek injunctive relief to protect their sovereign resources, particularly when a State has established a strong likelihood of prevailing on the legal merits of its claims against the federal government. Given the value and importance to California of protecting its coastal resources, this Court should refuse to limit the Commission's ability to protect those resources from *the possibility of harm*.[112]

However, scientists and statisticians are quite aware that correlation does not imply causation,[113] notwithstanding the confusion that persists surrounding these two concepts,[114] and that possibility is not to be interpreted as probability where uncertainties arise.[115]

Moreover, the CCC brief addressed in a cursory fashion whether the Navy's preparation of an EA satisfied both the purpose and the letter of NEPA's technical requirements – i.e., the preparation of an EIS. It argued that since NEPA's purpose "is to provide decision makers such as the Navy with sufficient information to prevent harm, not to generate useless [EIS'] after the harm has occurred…[that] purpose [was] clearly *not* fully served by the mere preparation of an EA."[116]

Finally, the CCC brief argued that Congress had not provided within the NEPA statute or its underlying legislative history any basis that would justify, especially in light of Ninth Circuit precedent, a presumption in favor of granting a military exemption on national defense or national security grounds.[117]

Copyright © 2009 Washington Legal Foundation

C. Activist Groups' *Amicus Curiae* Briefs

The NRDC and CCC briefs were accompanied by several *amicus curiae* briefs submitted by a virtual 'who's-who' of environmental and animal rights nongovernmental organizations. These briefs supported the Ninth Circuit's 'possibility of irreparable environmental harm' standard.

1. *Ecological Society of America*

The Ecological Society of America (ESA) brief,[118] for one, argued that the irreparable nature of the environmental harm sought to be prevented has procedural as well as substantive elements. As concerns the first of its procedural elements, this means that, but for an equity court's intervention via issuance of a preliminary injunction, there is otherwise no adequate remedy of law available to an aggrieved party to restore the status quo ante:

> The irreparable injury inquiry 'does not focus on the significance of the injury, but rather, whether the injury, irrespective of its gravity, is *irreparable* — that is, whether there is any adequate remedy at law.'[119]

As concerns its second procedural element, the ESA claimed that such harm becomes irreparable when agency action goes beyond the point of no return in violation of the law. Clearly, it was referring to the situation where an agency fails to prepare a formal EIA/EIS required by NEPA before undertaking a contemplated action:

> NEPA is designed and structured to put critical environmental information in decisionmakers' hands before they take action…The environmental impact statement that NEPA requires 'is the outward sign that environmental values and consequences have been considered during the planning stage of agency actions'…*NEPA logically assumes that increased study, articulation, and public discussion of environmental effects will result in fewer federal decisions that cause harm to the environment*.[120]

Unlike Respondents NRDC and CCC, however, the ESA accepted that the Navy's (EA) had been prepared *in compliance with* NEPA,[121] but that its conclusions were flawed as a matter of science. [122]

Copyright © 2009 Washington Legal Foundation

The ESA brief essentially referred to the science underpinning the Navy's EA as the substantive element of irreparable injury. To this end, it expressly spoke in terms of 'overwhelming' correlation rather than causation:

> Scientific evidence indicates an 'overwhelming' *correlation* between the use of MFA sonar and the strandings and injury of cetaceans, particularly beaked whales. Beaked whales have repeatedly been found beached *at the same time and place* as naval exercises using mid-frequency sonar.[123]
>
> …Having established the connection between sonar use and cetacean injury and death, scientists began seeking *the cause*.[124]

In addition, it employed the terms 'possibility', 'potential', 'plausible', and 'susceptible' when citing general peer-reviewed studies that referred only to beak whale diving proclivities or otherwise to past events for which correlations had been drawn between Navy sonar exercises and observed lower beaked whale populations. Nevertheless, the ESA failed to produce any study that conclusively analyzed the specific impacts that the disputed Navy sonar activities would have upon the whales in and around the area in question:

> Beaked whales and other deep-water species *may be particularly susceptible* to these pathologies because of their extraordinary diving behavior. Several peer-reviewed studies indicate that the most *plausible mechanism of harm* is a disruption of whale diving behavior, causing the animals either to surface too rapidly or to alter their shallow dive cycles…*Regardless of the precise mechanism of harm*, it is established that mid-frequency active sonar can injure whales at sea.[125]
>
> …[A]fter at least 16 whales were killed during the Navy's use of sonar in the Bahamas in 2000, investigators who had been conducting long-term studies of the Cuvier's beaked whale population there reported that those whales had disappeared entirely from the area and were not seen again, in any number, for well more than a year. They reported that it was '*entirely plausible* that most, if not all, of the local population was killed on that day; or, at the very least, there has been a very serious displacement of these whales.'[126]

In addition, the ESA argumentation employed inductive reasoning[127] reminiscent of the NRDC and CCC positions. In other words, the ESA alleged that, merely because there have been no reported/documented killings of or

Copyright © 2009 Washington Legal Foundation

injuries to beaked whales *as the result of* the Navy's forty years of sonar training exercises, does not mean that beaked whales have not been seriously harmed:

> Although the Navy argues…that it has conducted these exercises for 40 years off the California coast without any sonar-related injuries, this claim is misleading. *Scientists have only recently become aware of the correlation between sonar use and cetacean injuries, so they have not previously sought evidence to explain any possible causation*. In other words, because they were not previously looking for such evidence, they did not find it. Moreover, a recent study showed that scientists could overlook even catastrophic declines in some marine mammal populations…In general, wildlife managers primarily measure '*direct, human-caused mortalities*' *of marine mammal populations*, focusing on easily observable harms such as bycatch in commercial fisheries. When animal populations decline from other, *less obvious causes*, managers can overlook the decline entirely, even when populations decline precipitously.[128]

This recycled NRDC argument was essentially another formulation of the Bishop Berkeley riddle: "If a tree falls in a forest and no one is around to hear it, does it make a sound?"[129]

> *The district court rejected* as a factual matter the Navy's claim *that the absence of evidence meant that no harm had occurred in previous exercises*…It pointed to NOAA's stock assessments, which explained that '[s]uch injuries or mortalities [from anthropogenic noise] would rarely be documented, due to the remote nature of many of these activities and the low probability that an injured or dead beaked whale would strand.'[130]

In other words, considering that scientists have only begun to identify a correlation between sonar use and marine mammal injuries or displacement, the ESA argued that the district court was justified in not requiring Respondents NRDC and CCC to produce evidence of causation in order secure a preliminary injunction.

2. *Defenders of Wildlife, Humane Society of the United States, Center for Biological Diversity, Oceana, Inc., Sierra Club, Wilderness Society, Animal Legal Defense Fund and Greenpeace, Inc.*

The collective *amicus curiae* brief submitted by the above-noted groups focused, largely on the Navy's alleged procedural/statutory violation – its

Copyright © 2009 Washington Legal Foundation

preparation of an EA rather than an EIS - and the significant environmental harm that is *presumed* to flow from it. These groups sought to persuade the Supreme Court to adopt the Ninth Circuit's triple *presumption* – that irreparable injury is presumed and injunctive relief is warranted not only where possible environmental harm is alleged, but also where a federal agency fails to prepare and submit an EIA/EIS that satisfies NEPA's technical requirements before engaging in a major proposed action.[131] In effect, these groups argued that the Navy misapprehended the purpose of the NEPA and its relationship to preliminary injunctions:

> NEPA's core purpose, as it has been articulated by this Court in many precedents, and how it should factor into a preliminary injunction analysis. Those precedents dictate the conclusion that, *when there is a likely NEPA violation – and particularly a failure to prepare an EIS* – a significant risk of harm to the environment occasioned by the violation is ordinarily sufficient to *constitute 'irreparable injury' warranting issuance of a preliminary injunction.*[132]

To substantiate this claim, the brief cited two decisions authored by then-Circuit Judge Breyer (*Sierra Club v. Marsh* and *Massachusetts v. Watt*[133]) as standing for the proposition that, "an increased risk that environmental harm will result from poorly informed decision making [and that such risk] can constitute irreparable injury."[134] The brief added:

> [T]he 'harm at stake' in a NEPA violation consists of the added *risk* to the environment…of uninformed choice.[135]
>
> …NEPA accomplishes its objectives solely by injecting environmental considerations into the decisionmaking calculus. [W]hen an agency is permitted by a court to implement its action without first preparing a legally required EIS, the specific injury that Congress enacted NEPA to prevent – i.e., 'the risk…that real environmental harm will occur through inadequate foresight and deliberation' by agency decisionmakers – is, as both a practical and a legal matter, rendered 'irreparable'…[136]

The brief then proceeded to identify how the Navy's EA did not meet the technical requirements of a NEPA-sanctioned EIA/EIS, and thereby, violated the statute:

Copyright © 2009 Washington Legal Foundation

> [T]he Navy's preparation of an EA did not eliminate either the legal need for, or the practical value of, an EIS. The courts have rejected identical arguments because the central legal function of an EA is to determine *whether* an EIS is even required and, moreover, EISs are subject to far more stringent requirements which were not followed here. In any case, the lower courts made specific findings that the EA did not even *address* important impacts and alternatives, let alone 'fulfill the purposes' of an EIS.[137]

However, this comparison failed to persuade Justice Breyer who, within his concurring opinion, acknowledged that, while NEPA's EIS requirement seeks to ensure that government officials are fully aware of all relevant environmental considerations prior to taking action, the "EIS does not force them to make any particular decision." [138]

At least one legal commentator has also questioned the validity and scope of this presumption – that where no or an inadequate EIA/EIS is provided, the risk to the environment is automatically deemed irreparable and necessitates the issuance of a preliminary injunction. In his estimation, the Supreme Court has rejected not only "the idea that environmental violations should give rise to automatic injunctions,"[139] but also "the presumption of irreparable harm in environmental cases…[which] is contrary to traditional equitable principles."[140] He acknowledged, however, that where "an environmental injury is *likely*, the Court's balancing 'of the harms will usually favor issuance of an injunction to protect the environment.'"[141]

Consequently, if a district court issues a preliminary injunction in a situation where harm to the environment *per se* is *not* involved, but rather, only the perception of 'the increased risk of harm to the environment that arises 'when governmental decision makers act' without adequate information (essentially a decision making risk), that court may be effectively applying the Precautionary Principle:

> When courts of appeals sp[eak] in terms of a presumption in favor of injunctive relief, they might be understood as adopting a version of the Irreversible Harm Precautionary Principle – assuming that

Copyright © 2009 Washington Legal Foundation

> environmental harm is irreversible in the relevant sense, and requiring a strong showing by those who seek to proceed in the face of that harm.[142]
>
> Judge Breyer suggested that injunctions are often appropriate in NEPA cases. The discussion endorses an appropriately constrained Irreversible Harm Precautionary Principle, adapted to the NEPA setting…[143]

And, should a district court, in NEPA cases, issue "preliminary injunctions as a matter of course", without closely examining the facts, in this expert's view, it is actually "endors[ing] the Irreversible Harm Precautionary Principle in its crudest form."[144]

CONCLUSION

This WORKING PAPER has described in detail how the environmental and academic communities have surreptitiously worked to steer the U.S. Supreme Court in the direction of incorporating one of three different applications of Europe's Precautionary Principle within U.S. jurisprudence. As the pleadings and surrounding literature reveal, Respondents and *amici* urged the court to embrace as a general rule the Ninth Circuit's presumption of irreparable environmental injury, its presumption in favor of issuing preliminary injunctions in environmental matters, and/or its presumption against issuing a military exemption in NEPA cases.

These efforts were unsuccessful, as the Court was seemingly cognizant of the Respondents' deeper objectives. Yet, activists are likely to continue testing the proverbial waters in future legal challenges. Indeed, environmentalists have already interpreted the *NRDC v. Winter* decision as narrowly as possible given the Court's refusal to address their non-'science' claims.[145] As the environmentalist report referenced in the introduction above indicates, this is only the opening play of a very detailed and well thought out theatre production targeted at enshrining Europe's Precautionary Principle as U.S. law.

Copyright © 2009 Washington Legal Foundation

ENDNOTES

[1] *Winter v. Natural Resources Defense Council*, 555 U. S. _____ (2008), 518 F. 3d 658, reversed; preliminary injunction vacated in part, at 1, at: http://www.law.cornell.edu/supct/pdf/07-1239P.ZO.

[2] "Concerned about the problem of irreversibility, sensible nations might consider adopting a distinctive (if admittedly vague) principle for handling certain risks: the *Irreversible Harm Precautionary Principle*. Indeed, some such principle seems to underlie prominent accounts of the Precautionary Principle, which point explicitly to the problem of irreversibility...The concern about irreversibility, and hence *an Irreversible Harm Precautionary Principle*, are based on the idea that regulators should be willing to buy an option to maintain their own flexibility. (I am using terms that suggest monetary payments, but the basic point holds even if we are skeptical about the use of monetary equivalents; 'purchases' can take the form of precautionary steps that do not directly involve money)" (emphasis added). *See* Cass R. Sunstein, *Irreversibility* (July 12, 2008) Oxford University Press, Law, Probability and Risk, Forthcoming; Harvard Public Law Working Paper No. 08-25; Harvard Law School Program on Risk Regulation Research No. 08-1 at 2 and 6, accessible at SSRN: http://ssrn.com/abstract=1260323.

[3] "Using their recently written book entitled *This Moment in Time* as a stepping off point, John Kerry and his wife spoke about their ongoing concerns regarding real threats to the future of 'Mother Earth.' John Kerry derided the Bush Administration for going backwards on dealing with environmental threats to our future and said that it was 'intolerable.' Citing environmental concerns today as broader than global climate change with its impending threats, he said we are 'facing tipping points on a series of issues' dealing with the environment...The incentive for the Kerry's to write their book was to give people hope and to write about what individuals across the country have been doing despite the wanton assault by Bush. The book details stories of people fighting to protect our future. The book ends with a series of things individuals can do to help, noting it is important to act because the *U.S. contributes 25% of the global pollution contributing to Global Warming*. And if we hope to get action on reducing China's threat to build a new coal plant every week, we must be sincere in reducing our contribution to greenhouse gas emissions. *Citing that 928 peer reviewed scientific studies point to man's impact on global warming and not one peer reviewed study speaks to the contrary, Kerry says the prudent thing to do is to apply the 'Precautionary Principle'* (emphasis in original). *See* Steve Zemke, Bush Going Backward on Environment says John Kerry, Majority Rules Blog (Apr. 14, 2007) at: http://www.majorityrules.org/blog/2007/04/bush-going-backward-on-environment-says.html; *see also* John Kerry, Teresa Heinz Kerry, THIS MOMENT ON EARTH: TODAY'S NEW ENVIRONMENTALISTS AND THEIR VISION FOR THE FUTURE (Public Affairs © 2007) at 48-51, at: http://books.google.com/books?id=DSgVX-5sIEoC&pg=PA48&lpg=PA48&dq=john+kerry+%2B+precautionary+principle&source=bl&ots=6G_VyQfT2v&sig=4HZE-X8owcW5uGWpKvYD66QJfu4&hl=en&sa=X&oi=book_result&resnum=1&ct=result#PPA51,M1.

[4] "In her opening statement to the U.S. Senate Committee on Foreign Relations confirmation hearings, now Secretary of State Hillary Clinton referred repeatedly to a 'smart power' [i.e., soft power] approach to international relations, in which 'diplomacy will be the vanguard of foreign policy,' and where the US will seek multilateral partnerships wherever possible...To tackle climate change, President Obama advocates an 'economy-wide cap-and-trade program'

Copyright © 2009 Washington Legal Foundation

to reduce US greenhouse gas emissions 80% by 2050. He has named Todd Stern, who led the 1997 US delegation to the Kyoto Protocol talks, to be the first US climate-change envoy. Stern will be the US chief negotiator in efforts to achieve a comprehensive climate treaty beyond the Kyoto Protocol, which expires in 2012." *See* Gerald Schmitz, *The Obama Administration and Canadian Foreign Policy*, Library of Parliament – Parliamentary Information and Research Service (Feb. 12, 2009) at 1 and 3, at: http://www.parl.gc.ca/information/library/PRBpubs/prb0837-e.pdf. *See also* Announcement of Appointment, *Appointment of Special Envoy for Climate Change Todd Stern*, U.S. Department of State (Jan. 26, 2009) at: http://www.state.gov/secretary/rm/2009a/01/115409.htm.

[5] *See, e.g.*, "San Francisco Precautionary Principle Ordinance", at: http://www.rachel.org/files/document/San_Francisco_Precautionary_Principle_Ordinanc.pdf.; Multnomah County, Or. Resolution 04-140: Recognizing National Pollution Week (Sept. 23, 2004), at: http://www2.co.multnomah.or.us/jsp/Public/EntryPoint?ct=f81cdf87476cc010VgnVCM1000003bc614acRCRD; Multnomah County, Or., Resolution 06-073: Adopting the Toxics Reduction Strategy (May 11, 2006), at: http://www2.co.multnomah.or.us/County_Management/Sustainability/toxics/Toxics%20Reduction%20Strategy%20resolution%205-06.pdf; *see also* MOLLY CHIDSEY ET AL., CITY OF PORTLAND & MULTNOMAH COUNTY, TOXICS REDUCTION STRATEGY (2006), at: http://www.oregon-health.org/assets/Precaution/MultCo-Portland%20Toxics%20Reduction%20Strategy%202006.pdf (outlining a comprehensive plan including recommendations and implementation strategy for reducing environmental toxins in Portland and Multnomah County); DEP'T OF PLANNING & DEV., CITY OF SEATTLE, COMPREHENSIVE PLAN: TOWARD A SUSTAINABLE SEATTLE 357 (2005), *available at* http://www.seattle.gov/DPD/stellent/groups/pan/@pan/@plan/@proj/documents/Web_Informational/cos_004504.pdf (adopting the Precautionary Principle as part of the city's overall long-term development plans). For more information about which U.S. cities have adopted or otherwise proposed Europe's Precautionary Principle as U.S. law, *see* Lawrence A. Kogan, *The Extra-WTO Precautionary Principle: One European 'Fashion' Export the United States Can Do Without*, 17 TEMPLE POLITICAL & CIVIL RIGHTS L. R. 491, 591-95 (Spring 2008), at: http://www.itssd.org/Kogan%2017%5B1%5D.2.pdf.

[6] See *Transition to Green: Leading the Way to a Healthy Environment, A Green Economy and a Sustainable Future,* ENVIRONMENTAL TRANSITION RECOMMENDATIONS FOR THE OBAMA ADMINISTRATION (NOV. 2008), at: http://www.scstatehouse.gov/citizensinterestpage/EnergyIssuesAndPolicies/CommentsReceived2ndRequest/Sierra%20Club%20Attachment%20No.%202%20to%2012-01-08%20Comments.pdf.

[7] "Another important priority for ENRD should be to assist client agencies in properly rescinding, revising, and suspending agency actions taken by the Bush administration." *Id*., at 10-4.

[8] "TOP THREE ISSUES –…2. ALIGN LITIGATION POSITIONS WITH POLICY DIRECTION Review and evaluate litigation positions in ENRD cases to ensure consistency with priorities and positions of a new administration, including seeking stays or other schedule adjustments where necessary (e.g., where important decisions that may involve policy change are imminent) to allow for such review and adjustment. 3. LAUNCH ENVIRONMENTAL PROTECTION AND ENFORCEMENT INITIATIVES *Identify and commence priority*

Copyright © 2009 Washington Legal Foundation

environmental protection and enforcement initiatives in order to reestablish the Division as the premier advocate for the environment" (emphasis added). *Id*., at 10-1 and 10-6.

[9] *Id*., at 10-3 to 10-4.

[10] *Id*. (emphasis added).

[11] *See also Transition to Green: Leading the Way to a Healthy Environment, A Green Economy and a Sustainable Future*, ENVIRONMENTAL TRANSITION RECOMMENDATIONS FOR THE OBAMA ADMINISTRATION (NOV. 2008), at 1-3, 1-10, 1-12 to 1-13, 9-28, 14-21 and 15-4 to 15-5.

[12] *Id*., at 1-12 to 1-13 (emphasis added)..

[13] *Id*., at 15-4 (emphasis added).

[14] Maj. Op. at 1 (emphasis added).

[15] *Id*., at 4.

[16] *Id*. at 4, 6-7.

[17] *Id*., at 12 (emphasis added).

[18] *Id*., at 21.

[19] *Id*., at 22, fn 5.

[20] *Id*., at 23. "A court concluding that the Navy is required to prepare an EIS has many remedial tools at its disposal, including declaratory relief or an injunction tailored to the preparation of an EIS rather than the Navy's training in the interim."

[21] *Winter v. Natural Resources Defense Council*, 555 U. S. _____ (2008), 518 F. 3d 658, Concur. Op. at 5, at: http://www.law.cornell.edu/supct/pdf/07-1239P.ZX.

[22] *Id*., at 9.

[23] Maj. Op. at 22, fn 5.

[24] *See California Coastal Commission v. U.S. Department of the Navy*, Case No. CV07-01899 (filed Mar. 22, 2007) http://www.coastal.ca.gov/fedcd/sonar/ccc-v-navy-2-22-2007.pdf . The California Coastal Commission ultimately alleged violations of the Marine Mammal Protection Act (MMPA) and NEPA in their U.S. Supreme Court brief. *See* discussion *supra*.

[25] Previously, during January 2007, the U.S. Department of Defense had "granted the Navy a 2-year exemption from the MMPA for the training exercises at issue in this case" on the condition that "the Navy adopt[] several [seven] mitigation procedures. *Maj. Op*. at p. 5.

[26] *California Coastal Commission v. U.S. Department of the Navy*, Case No. CV07-01899, *supra* at 7.

[27] *Id*., at 2-3.

[28] *See* Carolyn Raffensperger, *A State Preempts the U.S. Navy*, ENV'T LAW INST. (May/June 2007) http://www.sehn.org/pdf/may-jun2007.pdf (emphasis added).

Copyright © 2009 Washington Legal Foundation

[29] *Id* (emphasis added).

[30] *See California Coastal Commission v. U.S. Department of the Navy*, Case No. CV07-01899, *supra* at 4; CZMA Sections 1456(c)(1)(A) and (C). *See* Coastal Zone Management Act of 1972, as amended through P.L. 104-150, The Coastal Zone Protection Act of 1996, U.S. Department of Commerce National Oceanic and Atmospheric Administration website, at: http://coastalmanagement.noaa.gov/about/czma.html#section307.

[31] NRDC had also alleged violations of the Endangered Species Act of 1973 (ESA), and the MMPA.

[32] *Natural Res. Def. Council v. Winter*, No. 8:07-cv-00335-FMC-FMOx, slip op.

[33] *See NRDC v. Winter -- Green Trumps the Blue and Gold -- National Security Takes a Back Seat to Natural Resources*, American College of Environmental Lawyers (Jan. 22, 2008), at: http://www.acoel.org/2008/01/articles/nepa/nrdc-v-winter-green-trumps-the-blue-and-gold-national-security-takes-a-back-seat-to-natural-resources.

[34] *Id*.

[35] *Natural Res. Def. Council, Inc. v. Winter*, 502 F.3d 859, 862 (9th Cir. 2007).

[36] *NRDC v. Winter*, 508 F.3d. 885 (9th Cir. 2007), at: http://docs.nrdc.org/water/wat_07111301A.pdf.

[37] *Id*.

[38] *NRDC v. Winter*, 530 F. Supp. 2d 1110 (C.D. Cal. 2008), at: http://docs.nrdc.org/water/wat_08011601A.pdf .

[39] *Id*; *see* Kristina Alexander, *Environmental Exemptions for the Navy's Mid-Frequency Active Sonar Training Program*, CRS Report for Congress RL34403 (updated Apr. 15, 2008), at CRS-7, at: http://assets.opencrs.com/rpts/RL34403_20080827.pdf; *NRDC v. Winter*, Maj. Op. at 7.

[40] *NRDC v. Winter* -- Green Trumps the Blue and Gold, *supra* note 33.

[41] *Id*.

[42] *NRDC v. Winter*, 530 F. Supp. 2d 1110 (C.D. Cal. 2008), *supra*.

[43] Kristina Alexander, *supra* note 39.

[44] *NRDC v. Winter*, 513 F.3d 920 (9th Cir. 2008), at 4, at: http://docs.nrdc.org/water/wat_08011601A.pdf.

[45] *Presidential Exemption from the Coastal Zone Management Act - Memorandum for the Secretary of Defense and the Secretary of Commerce*, White House Press Release (Jan. 16, 2008), at: http://www.whitehouse.gov/news/releases/2008/01/20080116.html.

[46] *NRDC v. Winter*, EX PARTE APPLICATION to Stay Pending Consideration of Ex Parte Application to Vacate Preliminary Injunction, at: http://www.scribd.com/doc/2052829/EX-PARTE-APPLICATION-to-Stay-Pending-Consideration-of-Ex-Parte-Application-to-Vacate-

Copyright © 2009 Washington Legal Foundation

Preliminary-Injunction. "In light of these actions, the Navy then moved to vacate the District Court's injunction with respect to the 2,200-yard shutdown zone and the restrictions on training in surface ducting conditions." Maj. Op. at p. 9.

[47] *NRDC v. Winter*, 513 F. 3d 920 (9th Cir. 2008).

[48] "Under the alternative arrangements, the Navy would be permitted to conduct its training exercises under the mitigation procedures adopted in conjunction with the exemption from the MMPA. The CEQ also imposed additional notice, research, and reporting requirements." Maj. Op. at 8.

[49] *NRDC v. Winter*, 513 F. 3d 920, at 4-5. A consortia of environmental groups later held a press conference at which they alleged that the President's exemption "flout[ed] the will of Congress, the decision of the California Coastal Commission and a ruling by the federal court." *See Activists Vow to Push Fight Against Navy Sonar*, Associated Press (Jan. 17, 2008) http://www.msnbc.msn.com/id/22683062; *Navy Exempted from Sonar Curbs*, Reuters (Jan. 16, 2008) http://www.reuters.com/article/environmentNews/idUSN1610615020080117.

[50] *Natural Resources Defense Council vs. Winter*, 527 F. Supp. 2d 1216 (C.D. 2008).

[51] *Winter v. Natural Resources Defense Council*, 555 U. S. _____ (2008), 518 F. 3d 658, 681.

[52] *NRDC v. Winter*, Maj. Op. at 8-9.

[53] "In a separate opinion, the Ninth Circuit modified two of the mitigation measures required by the district court. The Ninth Circuit allowed the 2,200-yard suspension to remain in place unless the training was at "a critical point in the exercise," in which case the Navy would reduce the sonar by 6 dB if a marine mammal was detected within 1,000 m., 10 dB if within 500 m., and suspend the activity if within 200 m. The second modification was for when significant surface ducting conditions were detected. Rather than shutting down the training, as required by the district court, the Ninth Circuit required the Navy to reduce the decibels of the activity." See Kristina Alexander, *Whales and Sonar: Environmental Exemptions for the Navy's Mid-Frequency Active Sonar Training*, CRS Report for Congress RL 34403 (Feb. 18, 2009) at 8, at: http://www.fas.org/sgp/crs/weapons/RL34403.pdf *citing NRDC v. Winter*, 2008 U.S. App. LEXIS 4458, *4 (9th Cir. Feb. 29, 2008). This CRS Report devoted considerable effort to analyzing those instances in which federal agencies sought 'alternative arrangements' from CEQ in order to circumvent NEPA. *Id*., at 9-11. The CRS Report ultimately expressed agreement with the Ninth Circuit's decision in *NRDC v. Winter* that, "The Ninth Circuit agreed with the rationale of the lower court, noting that there was no national security or military exemption within NEPA." *Id*., at 11, citing *NRDC v. Winter*, 518 F.3d 658, 684-85 (9th Cir. 2008).

[54] *See NRDC v. Winter*, 2008 U.S. App. LEXIS 4458, *4 (9th Cir. Feb. 29, 2008).

[55] At least one legal commentator has questioned whether legal challenges of the type brought against the U.S. Navy in *NRDC v. Winter* are independent actions by well-intentioned non-governmental organizations solely interested in 'saving the whales', or [are]...part of a comprehensive, long-term, and extremely sophisticated form of asymmetric attack against military anti-submarine war-fighting capabilities...Nations and NGOs have long practiced lawfare in international relations. In their 1999 book UNRESTRICTED WARFARE, Colonels Qiao Liang and Wang Xiangsui of the Chinese People's Liberation Army...describe international

Copyright © 2009 Washington Legal Foundation

lawfare as 'seizing the opportunity to set up regulations.' The party that sets up the regulations defines the problem and structures the process to achieve desired results." *See* Michael T. Palmer, *The Asymmetric Challenge of Environmental Lawfare*, National Maritime Foundation (Jan. 30, 2009) at: http://www.maritimeindia.org/modules.php?name=Content&pa=showpage&pid=166.

[56] *See What Goes Around, Comes Around: How UNCLOS Ratification Will Herald Europe's Precautionary Principle as U.S. Law*, 7 SANTA CLARA J. INT'L L. (forthcoming 2009), abstract at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1356837.

[57] Environmental activist groups are also endeavoring to read the 'standard-of-proof diminishing', 'burden of proof-reversing', 'guilty-until-proven-innocent', 'I fear, therefore I shall ban', 'hazard-not-risk-based', civil law-not-common law, extra-WTO Precautionary Principle – i.e., Europe's Precautionary Principle, into a number of other U.S. federal environmental statutes which do not expressly provide for it. In addition to those noted in this article, they include the Coastal Zone Management Act, the Endangered Species Act, the Clean Water Act, the Clean Air Act, The Magnuson-Stevens Fishery Conservation and Management Act and the proposed The Oceans Conservation, Education, and National Strategy for the 21st Century Act. *Id*. For a more extensive discussion of this movement and its progress within the United States, *see also* Lawrence A. Kogan, *The Extra-WTO Precautionary Principle: One European 'Fashion' Export the United States Can Do Without*, supra.

[58] *See European Greens on LFAS*, Resolution Adopted by the European Federation of Green Parties (Nov. 16, 2002) at pars. (C-E), (2), (5) and (6), at: http://www.buergerwelle.de/pdf/grn/omega74.htm; Kenneth R. Weiss, *Navy's Use of Sonar Halted, to Spare Whales*, Los Angeles Times (Nov. 2, 2002) at: http://community.seattletimes.nwsource.com/archive/?date=20021101&slug=whale01.

[59] "[D]espite U.S. acceptance of the precautionary principle in international treaties and other statements, little work has been done to implement the principle. In some cases, especially those involving trade and proactive legislation in places like Europe, the U.S. government is actively lobbying against precautionary actions by other governments. This has happened most recently with regards to phthalates in children's PVC toys, beef hormones, electronic take-back and genetically engineered foods. *This lobbying threatens to undermine use of the precautionary principle in other countries, which will ultimately affect the pressure that other countries can exert on the U.S. to invoke the principle*" (emphasis added). *See* Joel Tickner, Carolyn Raffensperger and Nancy Myers, *The Precautionary Principle in Action – A Handbook*, Science and Environmental Health Network (First Edition) at 3, at: http://www.biotech-info.net/handbook.pdf ; http://www.mindfully.org/Precaution/Precaution-In-Action-Handbook.htm.

[60] "In his new position, Sunstein will oversee reform of regulations, seeking to find smarter approaches and better results in health, environment and other domestic areas…" *See* Michael D. Shear, *Obama to Name Lawyer Friend To Regulatory Affairs Position*, Washington Post (Jan. 8, 2009) at: http://www.washingtonpost.com/wp-dyn/content/article/2009/01/07/AR2009010704311.html.

[61] Sunstein, *Irreversibility* supra at p. 3, citing *Sierra Club v. Marsh*, 872 F.2d 497 (1st Cir. 1989) at: http://www.altlaw.org/v1/cases/564035 for the general proposition that a federal agency's failure to prepare an environmental impact statement that meets the minimal requirements of NEPA before undertaking a proposed federal action can justify an equity court's finding of irreparable environmental injury and its issuance of a preliminary injunction

Copyright © 2009 Washington Legal Foundation

to prevent the disputed activity from taking place. Perhaps Mr. Sunstein's motivation for citing this First Circuit decision, *written by then Circuit Judge Breyer*, was to emphasize that the district and appellate courts in *Marsh* employed the same or similar rationale as did the district and Ninth Circuit appellate courts in *Winter*, thus suggesting that it is more than a 'Ninth Circuit rule'. Alternatively, Sunstein indicates, this case reflects "then-Circuit Judge Breyer['s] suggest[ion] that injunctions are often appropriate in NEPA cases." *Id.*, at 16-17.

[62] *Id.*, at 10.

[63] *Id.*, at 16.

[64] *See* discussion *infra*.

[65] *See* Marcilynn A. Burke, *Green Peace? Protecting Our National Treasures While Providing for Our National Security*, 32 WILLIAM & MARY ENVT'L LAW AND POLICY REV. 803, 811 (2008), accessible on SSRN at http://ssrn.com/abstract=1317074.

[66] *See* Sunstein, *Irreversibility* supra at 15, citing *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir 1985).

[67] *Winter v. Natural Resources Defense Council*, 555 U. S. _____ (2008), Maj. Op. at 6-7.

[68] *Id.*, at 11

[69] *Id.*, at 12.

[70] *Winter v. Natural Resources Defense Council*, Dissent Op. at 10, at:

http://www.law.cornell.edu/supct/pdf/07-1239P.ZD.

[71] *Id.*, at 9-10.

[72] *Winter v. Natural Resources Defense Council*, Concur. Op. at 4.

[73] *Id.*

[74] *Id.*, at 1-2.

[75] *Id.*, at 3.

[76] *Id.*, at 4.

[77] *Winter v. Natural Resources Defense Council*, NRDC Brief for the Respondents, at 49 at: http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-1239_Respondent.pdf.

[78] NRDC Brief at 50.

[79] "[T]he Alaska National Interest Lands Conservation Act (ANILCA) provides, inter alia, that, before allowing the use, occupancy, or disposition of public lands that would significantly restrict Alaskan Natives' use of those lands for subsistence, the head of the federal agency having primary jurisdiction over the lands must give notice, conduct a hearing, and determine that the restriction of subsistence uses is necessary and that reasonable steps will be taken to minimize adverse impacts." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987), at: http://supreme.justia.com/us/480/531/case.html.

[80] 480 U.S. 531, 537-538.

Copyright © 2009 Washington Legal Foundation

[81] 480 U.S. 531, 537-538.

[82] NRDC Brief at 51.

[83] *Id*., at 47.

[84] *Id*., at 42.

[85] *Id*.

[86] The Supreme Court did not review the District Court's findings concerning the issues surrounding the MMPA, since the only conditionalities in dispute were issued pursuant to the CZMA. "On remand, the District Court entered a new preliminary injunction allowing the Navy to use MFA sonar only as long as it implemented the following mitigation measures (in addition to the measures the Navy had adopted pursuant to its MMPA exemption) [...]" Majority Op. at 7. "

[87] *Id*., at 48.

[88] *Id*. at 48.

[89] *Id*., at 44.

[90] NRDC Brief at 43.

[91] *Id*., at 45.

[92] *See* Carolyn Raffensperger, *A State Preempts the U.S. Navy*, The Environmental Forum, (May/June 2007) at: http://www.sehn.org/pdf/may-jun2007.pdf.

[93] NRDC Brief at 45.

[94] *Id*., at 43-44.

[95] "To the contrary, since first enacting NEPA 39 years ago, Congress has never amended the Act to provide a national security exemption, despite the near ubiquity of such exemptions in other environmental laws...Nowhere in NEPA has Congress indicated that the Navy must be allowed to harm marine mammals during training exercises without first sufficiently investigating that harm and determining, as NEPA requires, "the extent to which adverse effects can be avoided." *Id*., at 40.

[96] Marcilynn A. Burke, *Green Peace? Protecting Our National Treasures While Providing for Our National Security*, supra at 805, 864 and 870.

[97] "Contrary to petitioners' argument, the appellate court did not use a 'mere' possibility of injury standard; it stated correctly that, in the district court, NRDC had the burden of demonstrating the 'possibility of irreparable injury'". *Winter v. Natural Resources Defense Council*, California Coastal Commission (CCC) Brief for the Respondents, at 10 at: http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-1239_RespondentCACoastalCommission.pdf.

[98] *Id*.

[99] *Id*., at 12 (emphasis added).

Copyright © 2009 Washington Legal Foundation

[100] *Id*., at 25 (emphasis added).

[101] *See* discussion *supra*.

[102] CCC Brief at 24.

[103] *Id*., at 26.

[104] *See Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir 1984).

[105] *Id*., at 29-30 (emphasis added).

[106] *See* "Potential", Merriam Webster Dictionary at: http://www.merriam-webster.com/dictionary/potential.

[107] *See* "Capable", Merriam Webster Dictionary at: http://www.merriam-webster.com/dictionary/capable.

[108] *See* "Possibility", Merriam Webster Dictionary at: http://www.merriam-webster.com/dictionary/possible.

[109] A correlation is defined as "a relation existing between phenomena or things or between mathematical or statistical variables which tend to vary, be associated, or occur together in a way not expected on the basis of chance alone". *See* "Correlation", Merriam Webster Dictionary at: http://www.merriam-webster.com/dictionary/correlation.

[110] Something is plausible if it "appear[s] worthy of belief". *See* "Plausible", Merriam Webster Dictionary at: http://www.merriam-webster.com/dictionary/plausible . Plausible is also defined as "having an appearance of truth or reason; seemingly worthy of approval or acceptance; credible; believable". *See* "Plausible", Dictionary.com, at: http://dictionary.reference.com/browse/Plausibility.

[111] Causation is defined as "the act or agency which produces an effect". *See* "Causation" Merriam Webster Dictionary at: http://www.merriam-webster.com/dictionary/causation.

[112] CCC Brief at 44 (emphasis added).

[113] "'Correlation does not imply causation' is a phrase used in the sciences and the statistics to emphasize that correlation between two variables does not imply that one causes the other. Its negation, correlation proves causation, is a logical fallacy by which two events that occur together are claimed to have a cause-and-effect relationship. The fallacy is also known as *cum hoc ergo propter hoc* (Latin for 'with this, therefore 'because of this') and false cause." *See* "Correlation Does Not Imply Causation", Wikipedia at: http://en.wikipedia.org/wiki/Correlation_does_not_imply_causation.

[114] *See* Devroop, Karendra, *Correlation versus Causation: Another Look at a Common Misinterpretation*, Paper Presented at the Annual Meeting of the Southwest Educational Research Association (Jan. 2000) at: http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/16/75/f1.pdf. *See also* George Lakoff and Mark Johnson, "Philosophy in the Flesh: The Embodied Mind and its Challenge to Western Thought", (Basic Books © 1999) at 218-226, at: http://books.google.com/books?id=KbqxnX3_uc0C&pg=PA219&lpg=PA219&dq=causation+vs.+correlation+%2B+probability&source=bl&ots=leKd9f5rkl&sig=xyp3BLHJ-

Copyright © 2009 Washington Legal Foundation

g_lCKsHzS9IO96pgYs&hl=en&ei=NridScq0E4T8NMuU2Y4F&sa=X&oi=book_result&resnum=7&ct=result (discussing the 'Causation is Correlation metaphor').

[115] *See e.g.*, See Jon Gertner; Ellen Mcgirt; Joan Caplin; Cybele Weisser, *What Are We Afraid Of? Why we tend to worry about the wrong things--and why knowing more about life's real risks can help*, Money Magazine (May 1, 2003) at: http://money.cnn.com/magazines/moneymag/moneymag_archive/2003/05/01/341314/index.htm (discussing how people react to risk and anxiety and the differences between possibility and probability); Hans-Jürgen Zimmermann, "Fuzzy Set Theory--and Its Applications, Fourth Edition" (Springer © 2001) at 133-138) at: http://books.google.com/books?id=Uqtwf6bcUxMC&pg=PA133&lpg=PA133&dq=possibility+vs.+probability&source=bl&ots=WvW51LXLfu&sig=5XT1V6jjuy7qCDH8-yjsRodCxnk&hl=en&ei=G72dSc_ALpmatwfSnaXrBA&sa=X&oi=book_result&resnum=2&ct=result (discussing the distinction between possibility and probability); Didier Dubois and Henri Prade, *Possibility Theory, Probability Theory and Multiple-valued Logics: A Clarification*, Institut de Recherche en Informatique de Toulouse (© 1997) presented at the 12th National Conf. on Artificial Intelligence (AAAI'94) at: ftp://ftp.irit.fr/IRIT/RPDMP/AMAI-Dub.Pra.revised.pdf (discussing "the role of many-valued logics, fuzzy sets, and possibility theory for uncertainty modeling, in contrast to probability theory.").

[116] *Winter v. Natural Resources Defense Council*, California Coastal Commission (CCC) Brief for the Respondents, *supra* at 35-36.

[117] *Id*., at 18, fn 4 and 19.

[118] *Winter v. Natural Resources Defense Council*, Brief for the Ecological Society of America as Amicus Curiae in Support of Respondents (hereinafter ESA Brief) at: http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-1239_RespondentAmCuEcologicalSociety.pdf (emphasis added).

[119] *Id*., at 19.

[120] *Id*., at 27 (emphasis added).

[121] "Pursuant to NEPA, the Navy conducted an environmental assessment of its ongoing training exercises." *Id*., at 11.

[122] "[T]he [Navy's] environmental assessment significantly understated the magnitude and the source of the threat to beaked whales and other marine mammals." *Id*.

[123] *Id*., at 6.

[124] *Id*., at 7.

[125] *Id*., at 8.

[126] *Id*., at 9.

[127] "[I]nductive reasoning, sometimes called inductive logic, is reasoning which takes us 'beyond the confines of our current evidence or knowledge to conclusions about the unknown.' The premises of an inductive argument support the conclusion but do not entail it; i.e. they do not ensure its truth. Induction is used to ascribe properties or relations to types based on an observation instance (i.e., on a number of observations or experiences); or to formulate laws based on limited observations of recurring phenomenal patterns." *See* "Inductive Reasoning",

Copyright © 2009 Washington Legal Foundation

Wikipedia at: http://en.wikipedia.org/wiki/Inductive_reasoning. "Inductive arguments intend to support their conclusions only to some degree; the premises do not necessitate the conclusion. Traditionally, the study of inductive logic was confined to either arguments by analogy or else methods of arriving at generalizations on the basis of a finite number of observations. A typical argument by analogy proceeds from the premise that two objects are observed to be similar with respect to a number of attributes to the conclusion that the two objects are also similar with respect to another attribute. The strength of such arguments depends on the degree to which the attributes in question are related to each other." *See* "Inductive Logic", Encyclopedia Britannica.com at: http://www.britannica.com/EBchecked/topic/346177/logic/65967/Inductive-logic.

[128] ESA Brief at 15-16 (emphasis added).

[129] *See* "If a Tree Falls in a Forest", Wikipedia, at: http://en.wikipedia.org/wiki/If_a_tree_falls_in_a_forest.

[130] *Id.*, at 17 (emphasis added).

[131] *Winter v. Natural Resources Defense Council*, Brief for Defenders of Wildlife, the Humane Society of the United States, the Center For Biological Diversity, Oceana, Inc., Sierra Club, the Wilderness Society, the Animal Legal Defense Fund, and Greenpeace, Inc. in Support of Respondent at 5, at: http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-1239_RespondentAmCu8ConservationOrgs.pdf (hereinafter referred to as the 'Green-Animal Brief').

[132] *Id.*, at 9-10 (emphasis added).

[133] *Sierra Club v. Marsh*, 872 F.2d 497 (1st Cir. 1989); *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983).

[134] Defenders of Wildlife, et al. Brief, at 19.

[135] *Id.*, at 20, citing *Sierra Club v. Marsh*, 872 F.2d at 500-01 (emphasis in original). According to Professor Sunstein, "That harm is not adequately described as a harm to the environment as such. The harm is instead the increased risk of harm to the environment that arises 'when governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment.'" *See* Sunstein, *Irreversibility*, supra at p. 17, citing *Sierra Club v. Marsh*, 872 F.2d at 504 and 500.

[136] *Id.*, at 21.

[137] *Id.*, at 5-6. "[T]he Navy's notion that its preparation of an EA somehow rendered its failure to prepare an EIS harmless error conflates the legally distinct roles these documents play in the statutory scheme, and also disregards the lower courts' factual findings that, notwithstanding its length, the Navy's EA gave short shrift to several important issues." *Id.*, at 10.

[138] *Winter v. Natural Resources Defense Council*, Concur. Op. at 2.

[139] *See* Sunstein, *Irreversibility*, supra at 15, citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

[140] *Id.*, citing *Amoco Production Co. v. Village of Gambell*, 480 US 531 (1987).

Copyright © 2009 Washington Legal Foundation

[141] *Id*. at 16 (emphasis added).

[142] *Id*.

[143] *Id*., at 17.

[144] *Id*., at 18.

[145] *See e.g.*, "Science in the Court: Guns and Oil", Acronym Required (Nov. 25, 2008) at: http://acronymrequired.com/2008/11/science-in-the-court.html; "Whales in The Supreme Court Acronym Required" (Oct. 9, 2008) at: http://acronymrequired.com/2008/10/whales-in-the-supreme-court.html.

Copyright © 2009 Washington Legal Foundation