

# CRS Report for Congress

## Whales and Sonar: Environmental Exemptions for the Navy's Mid-Frequency Active Sonar Training

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# Whales and Sonar: Environmental Exemptions for the Navy's Mid-Frequency Active Sonar Training

## Summary

Mid-frequency active (MFA) sonar emits pulses of sound from an underwater transmitter to help determine the size, distance, and speed of objects. The sound waves bounce off objects and reflect back to underwater acoustic receivers as an echo. MFA sonar has been used since World War II, and the Navy indicates it is the only reliable way to track submarines, especially more recently designed submarines that operate more quietly, making them more difficult to detect.

Scientists have asserted that sonar may harm certain marine mammals under certain conditions, especially beaked whales. Depending on the exposure, they believe that sonar may damage the ears of the mammals, causing hemorrhaging and/or disorientation. The Navy agrees that the sonar may harm some marine mammals, but says it has taken protective measures so that animals are not harmed.

MFA training must comply with a variety of environmental laws, unless an exemption is granted by the appropriate authority. Marine mammals are protected under the Marine Mammal Protection Act (MMPA) and some under the Endangered Species Act (ESA). The training program must also comply with the National Environmental Policy Act (NEPA), and in some cases the Coastal Zone Management Act (CZMA). Each of these laws provides some exemption for certain federal actions. The Navy has invoked all of the exemptions to continue its sonar training exercises.

Litigation challenging the MFA training off the coast of Southern California ended with a November 2008 U.S. Supreme Court decision. The Supreme Court said that the lower court had improperly favored the possibility of injuring marine animals over the importance of military readiness. The Supreme Court's ruling allowed the training to continue without the limitations imposed on it by other courts.

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# Whales and Sonar: Environmental Exemptions for the Navy's Mid-Frequency Active Sonar Training

## Introduction

The use of sonar in Navy training exercises has been contentious. Some argue that the noise harms marine mammals. Others note that a well-trained military is a national priority. In the case of mid-frequency active sonar training exercises, the controversy was brought before the U.S. Supreme Court. The Supreme Court did not consider the merits of the action — meaning it did not evaluate whether the Navy had met all of its environmental obligations in preparing for the training — but it held that the Navy could not be enjoined from training in this case based on the evidence of merely the possibility of harming marine life.<sup>1</sup> This report will discuss that litigation.

Mid-frequency active (MFA) sonar emits pulses of sound from an underwater transmitter to help determine the size, distance, direction, and speed of objects. The sound waves bounce off objects and reflect back to underwater acoustic receivers as an echo.<sup>2</sup> MFA sonar has been used since World War II, and, according to the Navy, “is the only reliable way to identify, track, and target submarines.”<sup>3</sup> MFA sonar has a range of up to 10 nautical miles (nm). Active sonar differs from passive sonar in that passive sonar only *receives* sound waves and does not emit them. The Navy indicates that passive sonar is ineffective at detecting quiet submarines, such as those that run on batteries.

To prepare its fleet, the Navy conducts training exercises on a regularly scheduled rotation. This report considers the MFA training exercises conducted off the coast of California, which have been challenged on environmental grounds.<sup>4</sup>

Scientists have suggested that MFA sonar may harm some marine mammals, especially beaked whales. Some opponents have noted that the sonar is emitted at

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<sup>1</sup> Winter v. NRDC, No. 07-1239 (November 12, 2008).

<sup>2</sup> For more on the Navy's sonar program, see online at [<http://www.navy.mil/oceans/sonar.html>].

<sup>3</sup> [<http://www.navy.mil/oceans/sonar.html>].

<sup>4</sup> For a broader discussion of active sonar, see CRS Report RL33133, *Active Military Sonar and Marine Mammals: Events and References*, by Eugene H. Buck and Kori Calvert.

170 to 195 dB, eight to more than 10 times louder than levels for which OSHA requires hearing protection for humans.<sup>5</sup> However, noise intensities in air and water are different because of the different densities of the media and cannot be directly compared. Excessive noise can rupture the ears of mammals, or can disorient the animals so that they surface too quickly, giving them what is commonly called “the bends,” when nitrogen is released from solution in the blood, which can be fatal.

The Navy agrees that the sonar could harm marine mammals under certain circumstances, but argues that the Navy takes additional protective measures to prevent harm. In a press release of December 20, 2007, the Navy indicated that it takes 29 mitigation measures to protect marine mammals during sonar exercises, and that no injuries have been attributed to sonar use since the measures were put in place in January 2007.<sup>6</sup>

The Navy’s program could affect marine mammals that are protected under the Marine Mammal Protection Act (MMPA) and some under the Endangered Species Act (ESA). The training program must also comply with the National Environmental Policy Act (NEPA) and in some cases, the Coastal Zone Management Act (CZMA). Each of these laws has provisions where a federal action may be exempted from full compliance. The Navy has invoked exemptions under each of these laws to continue this program.

This report will discuss each of these laws generally, and then review the litigation surrounding the Navy’s compliance with these laws in the context of mid-frequency active sonar for training purposes off California’s coast.

## Marine Mammal Protection Act (MMPA)

The Marine Mammal Protection Act (MMPA) (16 U.S.C. §§ 1361 *et seq.*) prohibits harming marine mammals so that their populations would not diminish below their “optimal sustainable population.”<sup>7</sup> The MMPA is intended to “protect essential habitats ... for each species of marine mammal from the adverse effect of man’s actions.”<sup>8</sup> The act imposes a *moratorium* on the taking of or transporting marine mammals or products from marine mammals.<sup>9</sup> Moratorium is defined in the

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<sup>5</sup> See 29 C.F.R. § 1910.95(a).

<sup>6</sup> *Navy Invests in Protecting Marine Mammals*, Navy Story Number NNS071220-22 (December 20, 2007), online at [[http://www.navy.mil/search/print.asp?story\\_id=34061&VIRIN=&imagetype=0&page=1](http://www.navy.mil/search/print.asp?story_id=34061&VIRIN=&imagetype=0&page=1)].

The cause of death of a dolphin in the area of sonar use has not been determined, although hemorrhaging in the ears and ear canals was found. Kenneth R. Weiss, *Dolphin Dies Near Sonar Site*, Los Angeles Times (February 22, 2007).

<sup>7</sup> 16 U.S.C. § 1361(2).

<sup>8</sup> 16 U.S.C. § 1361(2).

<sup>9</sup> 16 U.S.C. § 1371(a).

act as “a complete cessation.”<sup>10</sup> There are exceptions, however. Some of those exceptions were created by amendments in 2003 in the National Defense Authorization Act of 2004 to allow for military readiness exercises and national defense.

Maritime military actions may be exempt from the MMPA if, after conferring with the Secretary of Commerce, the Secretary of Defense determines the actions are necessary for national defense.<sup>11</sup> The exemption may apply for up to two years and additional exemptions are allowed. Congress must be given notice of the exemption.

The MMPA has other adjustments for military actions. The MMPA has a different definition for *harassment* when conducted as part of a military readiness activity. Under the 2003 Amendments, the two types of harassment were redefined for military readiness activities: “Level A harassment,” meaning an act that injures or has the significant potential to injure a marine mammal or marine mammal stock; and “Level B harassment,” meaning the act disturbs or is likely to disturb a marine mammal or marine mammal stock by causing disruption of behavioral patterns, such as migration, breathing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered.<sup>12</sup> This is distinct from the other definition of harassment, which is an act that

- (i) has the potential to injure a marine mammal or marine mammal stock in the wild; or
- (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering. 16 U.S.C. § 1362(18).

In other words, more harm is required for military readiness activities before they rise to the statutory level of harassment.

The other aspect of the MMPA that is different for the Department of Defense than for others is the provision for incidental take permits. For any taking, it must be shown that the activity will make “the least practical adverse impact on such species or stock and its habitat.”<sup>13</sup> As mentioned earlier, activities for the national defense are exempt if invoked. For military readiness activities, the factors to consider in determining the *least practical adverse impact* include personnel safety, practicality of implementation, and impact on the effectiveness of the activity.<sup>14</sup>

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<sup>10</sup> 16 U.S.C. § 1362(8).

<sup>11</sup> P.L. 108-136, § 319(f), 117 Stat. 1434.

<sup>12</sup> P.L. 108-136, § 319, 117 Stat. 1433; 16 U.S.C. § 1362(18). These definitions also apply to federal scientific research activity.

<sup>13</sup> 16 U.S.C. § 1371(5)(A)(i)(II)(aa).

<sup>14</sup> P.L. 108-136, 319, 117 Stat. 1434; 16 U.S.C. § 1371(a)(5)(A)(ii).

## Endangered Species Act (ESA)

The Endangered Species Act (ESA) (16 U.S.C. §§ 1531 *et seq.*) protects certain species and their habitats. It is illegal under the ESA to harm a species that has been listed as *endangered* (a species that is in danger of extinction).<sup>15</sup> Additional protections are provided for *threatened* species (a species that is likely to become an endangered species within the foreseeable future).<sup>16</sup> While the MMPA protects marine mammals, the ESA covers only those marine mammals that are listed.

Just as under the MMPA, the ESA has some exceptions. The law provides that species may be killed or harmed without penalty if the injury is incidental to a lawful purpose and certain procedures are followed.<sup>17</sup> Actions by the federal government, including the military, require the agency to consult with either the Secretary of Commerce or the Secretary of the Interior to ensure that the project is not likely to jeopardize the continued existence of any endangered or threatened species or result in destruction or adverse modification of critical habitat.<sup>18</sup> This process is called a Section 7 consultation. The Secretary is required to use the “best scientific and commercial data available” to identify whether any endangered or threatened species *may* be present, in which case the agency will prepare a biological assessment to identify any such species likely to be affected. The Secretary must issue an *incidental take statement* with reasonable and prudent alternative actions for the agency to take if the action is likely to jeopardize a species. If a “no jeopardy” conclusion is reached, the incidental take statement will specify reasonable and prudent measures to take to minimize impacts of the action. Where a marine mammal is involved, the incidental take statement must also consider compliance with the MMPA.<sup>19</sup>

## National Environmental Policy Act (NEPA)

The purpose of the National Environmental Policy Act (NEPA) is to have federal agencies consider the impacts of their actions on the environment.<sup>20</sup> For major federal actions that significantly affect the environment, an agency is required to produce an environmental impact statement (EIS), evaluating the environmental impact, any adverse environmental effects of the proposed action, and alternatives to the action. When an agency is not certain that its action will significantly affect the environment, it will prepare an environmental assessment (EA). The EA also considers the environmental impacts and alternatives, but is not as in-depth as the EIS. If the EA concludes that there are no significant impacts, no EIS is required, and a Finding of No Significant Impact (FONSI) is issued.

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<sup>15</sup> 16 U.S.C. § 1538.

<sup>16</sup> 16 U.S.C. § 1532(20).

<sup>17</sup> 16 U.S.C. §§ 1536(o)(2), 1539.

<sup>18</sup> 16 U.S.C. § 1536(a)(2).

<sup>19</sup> 16 U.S.C. § 1536(b)(3)(C).

<sup>20</sup> 42 U.S.C. § 4332.

There is no blanket exemption for NEPA, although alternative arrangements may be provided in the case of emergencies, and certain statutes excuse specific actions from compliance. Under the regulation applying to emergencies, 40 C.F.R. § 1506.11, the Council on Environmental Quality (CEQ), an office of the White House, may allow an agency to take different steps to be in compliance, or allow an action to commence prior to completion of the required review. Section 1506.11 states:

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

According to CEQ, this provision has been requested just 41 times since the regulations took effect in 1978.<sup>21</sup> It provides for alternative provisions for those instances where there is not enough time to complete the required environmental document, but limits those alternatives to just what is necessary to “control the immediate impacts of the emergency.”

## **Coastal Zone Management Act (CZMA)**

The Coastal Zone Management Act (CZMA) sets up a scheme for states to manage their coastal resources with federal oversight.<sup>22</sup> States develop coastal management plans (CMP) that regulate private and public development of coastal resources. *Coastal zone* is defined under the act to include coastal waters and adjacent shorelands “strongly influenced by each other.”<sup>23</sup> The plans must be approved by the Secretary of Commerce. The state must find that actions that could affect coastal resources are consistent with its CMP. If so, the state will issue a certificate of consistency. Once the state has made its final determination, if the federal agency objects to the state’s conclusions, it may bring the matter before the Secretary of Commerce. Where the Secretary finds that the project was consistent with the objectives of the CZMA, or necessary for national security, the state decision may be overturned.

An exemption from the CZMA is provided within the law, giving the President the right to excuse a federal agency from complying with a state CMP if the action is in the paramount interest of the United States. However, it is not available until after a court has ruled against the federal agency:

After any final judgment, decree, or order of any Federal court that is appealable ... or under any other applicable provision of Federal law, that a specific Federal

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<sup>21</sup> Information obtained via written communication with CEQ (January 22, 2008).

<sup>22</sup> P.L. 92-583, 86 Stat. 1280 (1972); 16 U.S.C. § 1451 et seq.

<sup>23</sup> 16 U.S.C. § 1453(1). A state’s coastal waters generally reach three nautical miles (nm) beyond its shores. 43 U.S.C. § 1301.



agency activity is not in compliance with subparagraph (A), and certification by the Secretary that mediation under subsection (h) of this section is not likely to result in such compliance, the President may, upon written request from the Secretary, exempt from compliance those elements of the Federal agency activity that are found by the Federal court to be inconsistent with an approved State program, if the President determines that the activity is in the paramount interest of the United States. No such exemption shall be granted on the basis of a lack of appropriations unless the President has specifically requested such appropriations as part of the budgetary process, and the Congress has failed to make available the requested appropriations.<sup>24</sup>

After a court has ruled an action conflicts with a state's CMP, the President may find that the action is of paramount interest to the nation, and exempt the federal agency from the measures imposed upon it by the court.<sup>25</sup>

There is no private right of action under the CZMA, so suits brought by non-parties to challenge an activity must be brought under the Administrative Procedure Act (APA).

## Mid-Frequency Active Sonar Litigation

The battle over sonar use in Navy training exercises and the impact on marine mammals has been ongoing for years. Legal challenges to the use of *low-frequency* sonar were brought before the District Court for the Northern District of California, but were settled by the Navy in 2008.<sup>26</sup> The challenges to the use of MFA sonar began in the District Court for the Central District of California. The lead plaintiff in the MFA cases is the Natural Resources Defense Council (NRDC); four other environmental groups are plaintiffs, as well as Jean-Michel Cousteau. The defendants include the Secretary of the Navy and the National Marine Fisheries Service (NMFS) of the Department of Commerce.

The first decision in the MFA challenge was issued in August 2007.<sup>27</sup> It granted a preliminary injunction to halt the eleven remaining Navy training exercises that were planned. The plaintiffs claimed that the Navy had violated three laws: ESA, NEPA, and CZMA. The court agreed that the plaintiffs were likely to prevail on their claims under the CZMA and NEPA and issued the injunction, but held that the ESA claim was not likely to succeed. Since neither NEPA nor CZMA provides a separate

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<sup>24</sup> 16 U.S.C. § 1456(c)(1)(B).

<sup>25</sup> In a decision dated February 4, 2008, a federal judge suggested that this provision may be unconstitutional when it was used not to change an underlying law but to revise a court decision. The court stated that this could have the effect of the President acting as a reviewing court in violation of Article III of the Constitution. *NRDC v. Winter*, 527 F. Supp. 2d 1216 (C.D. Cal. 2008). This report does not evaluate this argument.

<sup>26</sup> *NRDC v. Gutierrez*, No. 07-4771-EDL (N.D. Cal. August 12, 2008) (order approving the settlement agreement wherein the Navy agreed to limit low-frequency sonar training to certain areas of the Pacific Ocean, rather than the worldwide scope as originally planned).

<sup>27</sup> *NRDC v. Winter*, 2007 WL 2481037 (C.D. Cal. August 7, 2007).

right for litigation, the court reviewed claims brought related to these statutes under the standard set by the APA — to see whether the agency action was arbitrary and capricious.

The Navy had prepared an EA-FONSI under NEPA, concluding that there were no significant adverse environment effects that would require an EIS. Among the adverse environmental affects the environmental review estimated to occur as a result of the training exercises were 170,000 incidents of Level B harassment to marine mammals, 466 permanent injuries to beaked or ziphiid whales (some of which are endangered), and 28 Temporary Threshold Shift exposures to endangered blue, fin, humpback, sei, and sperm whales. The court said it was likely to be held that the Navy should have prepared an EIS after finding these effects, and that the Navy did not adequately review alternatives to its training plan.

The court also found that there was a likelihood that the Navy violated the CZMA. According to the Navy, the MFA training was consistent with the state CMP because it would not affect California’s coastal resources, and the Navy did not need to adopt the mitigation measures California deemed necessary. The court suggested that the Navy’s determination that its exercises would not harm coastal resources could be found arbitrary and capricious.

The court issued a preliminary injunction, halting the training activities until a full review could be conducted. The Navy appealed, and on August 31, 2007, the Ninth Circuit Court of Appeals *stayed* the injunction, meaning the injunction was put aside, but not rejected outright.<sup>28</sup> Later, in November, the Ninth Circuit dissolved the stay, meaning the Navy was again enjoined from conducting MFA exercises.<sup>29</sup> The case was remanded to the district court, with instructions from the Ninth Circuit that the injunction should be fitted to the circumstances.

On January 3, 2008, the district court again issued a preliminary injunction, stopping the Navy from conducting MFA training unless certain mitigation measures were taken. According to the court order, those measures were

- 12-mile exclusion zone off California coast,
- 2200-yard sonar shut down,
- 60-minute monitoring period using two trained monitors at all times and using helicopters,
- for active dipping sonar, helicopter monitoring for 10 minutes,
- where surface ducting conditions are found, sonar reduced by 6 dB,
- no MFA in Catalina basin, because it is a choke point for animals,
- no MFA within 5 nautical miles (nm) of San Clemente Island, and
- mitigation measures from the 2007 National Defense Exemption (“NDE II”) to the MMPA unless they are not as strict as this order.<sup>30</sup>

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<sup>28</sup> NRDC v. Winter, 502 F.3d 859 (9th Cir. 2007).

<sup>29</sup> NRDC v. Winter, 508 F.3d. 885 (9th Cir. 2007).

<sup>30</sup> NRDC v. Winter, 530 F. Supp. 2d 1110 (C.D. Cal. 2008). See **Table 3** for the mitigation (continued...)

A second order on January 10, 2008, was issued to clarify the January 3, 2008, decision.

On January 10, 2008, the Navy wrote CEQ asking for alternative arrangements to NEPA that would allow them to conduct the remaining training exercises as scheduled. CEQ said the Navy indicated that some of the mitigation measures required by the district court would “create a significant and unreasonable risk that Strike Groups will not be able to train and be certified as fully mission capable.”<sup>31</sup> On January 15, 2008, CEQ provided alternative arrangements that paralleled the 2007 NDE mitigation measures (see **Table 3**).

Also on January 15, 2008, the President of the United States exempted the Navy exercises from compliance with the CZMA, using the authority under 16 U.S.C. § 1456(c)(1)(B). In the memorandum granting the exemption, the President stated that “the use of mid-frequency active sonar in these exercises [is] in the paramount interest of the United States.”

After the two exemptions granted on January 15, the Navy applied to the Ninth Circuit to vacate the injunction. The Ninth Circuit remanded the action to the district court on January 16, 2008.<sup>32</sup>

On February 5, 2008, the district court reconsidered the preliminary injunction in light of the developments. The court held that the CEQ had acted arbitrarily and capriciously in granting alternative arrangements to the Navy when there was no actual emergency:

CEQ apprehended the phrase “emergency circumstances” to refer to sudden, unanticipated events, not the unfavorable consequences of protracted litigation. CEQ’s contrary interpretation in this case is “plainly erroneous and inconsistent” with the regulation and, concomitantly, not entitled to deference.<sup>33</sup>

The court held that the Navy still had to comply with NEPA. Therefore, its injunction remained in place and the Navy could conduct MFA training only if it used the mitigation measures required by the court. The court stated that public interest was best served by requiring those mitigation measures. In that way the Navy would have the benefit of conducting training, and the natural resources would have limited harm from the training. The court reviewed, but did not rule on, the CZMA exemption.

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<sup>30</sup> (...continued)  
measures.

<sup>31</sup> Letter from James L. Connaughton, Chairman, CEQ, to Donald C. Winter, Secretary of the Navy (January 15, 2008), p. 3, available online at [[http://www.whitehouse.gov/ceq/Letter\\_from\\_Chairman\\_Connaughton\\_to\\_Secretary\\_Winter.pdf](http://www.whitehouse.gov/ceq/Letter_from_Chairman_Connaughton_to_Secretary_Winter.pdf)].

<sup>32</sup> NRDC v. Winter, 513 F. 3d 920 (9<sup>th</sup> Cir. 2008).

<sup>33</sup> NRDC v. Winter, 527 F. Supp. 2d 1216, 1229 (C.D. Cal. 2008).

The Navy moved to have the injunction stayed, but the Ninth Circuit denied the request.<sup>34</sup> On February 29, 2008, the Ninth Circuit rejected the Navy's appeal of the preliminary injunction.<sup>35</sup> It found that CEQ's interpretation of emergency circumstances was "overly broad."<sup>36</sup> The Ninth Circuit described the course of litigation that ended in the injunction as "a series of events [that] gives rise to a predictable outcome" and not a sudden and unexpected occurrence. The Ninth Circuit compared it to CEQ's response to Hurricane Katrina, in which alternative arrangements were provided because "there was not sufficient time to follow the regular EIS process."<sup>37</sup>

In a separate opinion, the Ninth Circuit modified two of the mitigation measures required by the district court.<sup>38</sup> 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 **Table 3** for details.) Therefore, the Navy can conduct its training exercises provided it uses the mitigation measures indicated by the court. The Navy petitioned the U.S. Supreme Court to review the Ninth Circuit decision.<sup>39</sup>

The Supreme Court reviewed two claims brought by the Navy: whether the CEQ acted within its authority to grant the alternative arrangements, and whether the injunction based on NEPA violations was appropriate. In a 5-4 decision, the majority of the Supreme Court held that the balance of public interests favored allowing the training to continue. It did not review the merits of the case. Instead, the majority ruled that the district court did not consider the correct balance of public interests. The majority found that the public interest in national defense outweighed the public interest in protecting marine mammals:

we conclude that the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy. For the plaintiffs, the most serious possible injury would be harm to an unknown number of the marine mammals that they study and observe. In contrast, forcing the Navy to deploy an inadequately trained antisubmarine force jeopardizes the safety of the fleet.<sup>40</sup>

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<sup>34</sup> NRDC v. Winter, 516 F.3d 1103 (9th Cir. 2008).

<sup>35</sup> NRDC v. Winter, 518 F.3d 658 (9th Cir. 2008).

<sup>36</sup> NRDC v. Winter, 518 F.3d 658, 680 (9th Cir. 2008).

<sup>37</sup> NRDC v. Winter, 518 F.3d 658, 682 (9th Cir. 2008).

<sup>38</sup> NRDC v. Winter, 2008 U.S. App. LEXIS 4458, \*4 (9th Cir. February 29, 2008).

<sup>39</sup> NRDC v. Winter, No. 07-1239 (March 31, 2008).

<sup>40</sup> Winter v. NRDC, No. 07-1239 (November 12, 2008) (JJ. Roberts, Scalia, Kennedy, and Thomas).

The dissenting opinion focused on the balance of interests in the context of NEPA.<sup>41</sup> Rather than an issue of a well-trained military versus animal safety, it considered the issue as what harm would occur to the Navy by delaying training until it complied with NEPA.<sup>42</sup> Based on that view of the case, the dissenters found the balance weighed in favor of protecting the marine mammals. The dissenters indicated that the Navy's agreement to prepare an EIS after the training was completed was contrary to the purpose of the statute.

Only the dissenting opinion discussed the alternative arrangements provided by CEQ. The opinion said, "CEQ lacks authority to absolve an agency of its statutory duty to prepare an EIS," indicating that legislative options were available to the Navy. The legislative option would be to obtain a statutory exemption from NEPA for the training program.

## Legal Analysis

The injunction ultimately was put in place by a holding that CEQ had been arbitrary and capricious in granting an emergency exception under NEPA. A legal analysis of the court's decision is somewhat hampered by the few court decisions and the brief regulatory history of Section 1506.11. CEQ has recorded only 41 instances where it was contacted to obtain alternative arrangements since the regulation went into place in 1978, and only three (until this case) have led to published decisions.<sup>43</sup> While the dissenting opinion openly challenges the authority of the CEQ to circumvent NEPA, noting that alternative arrangements are issued based on a "one-sided record," it is persuasive authority only, and not legal precedent for interpreting the regulation.

Section 1506.11 was part of the initial regulations created for CEQ to implement NEPA in response to an Executive Order.<sup>44</sup> The regulation has no direct statutory authority, but can be supported by 42 U.S.C. § 4331(b), which states it is the responsibility of the U.S. government to "use all practicable means, consistent with other essential considerations of national policy" to consider the environmental

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<sup>41</sup> Two justices participated in this opinion (JJ. Ginsberg and Souter). Two others concurred in part and dissented in part (JJ. Breyer and Stevens).

<sup>42</sup> The majority had discussed the EA, finding that, at 293 pages, it evidenced a hard look at the environmental consequences of the training.

<sup>43</sup> Two other court decisions refer to alternative arrangements by CEQ, but the emergency exemption was not in dispute. See *Miccosukee Tribe of Indians of Florida v. United States*, 509 F. Supp. 2d 1288, 1291 (M.D. Fla. 2007) (discussing how the Corps of Engineers obtained alternative arrangements for a temporary operating plan); *NRDC v. Peña*, 20 F. Supp. 2d 45, 50 (D.D.C. 1998) (discussing that if the CEQ issued alternative arrangements, the DOE could act before completing the NEPA document required by the court's order).

<sup>44</sup> 43 Fed. Reg. 25230 (June 9, 1978) (draft regulations); 43 Fed. Reg. 55978 (November 29, 1978) (final regulations). Executive Order 11991 (June 9, 1978).

impacts of its actions.<sup>45</sup> The final version of the alternative arrangements regulation differed only slightly from the draft. The initial wording had said that under emergency circumstances “the Federal agency proposing to take the action should consult with the Council about alternative arrangements.”<sup>46</sup> Out of concern that the regulation could be construed as requiring consultation before an emergency occurred,<sup>47</sup> the regulation was modified to read as follows:

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the council about alternative arrangements. Agencies and the council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.<sup>48</sup>

The regulation has not changed since then.

The court in the MFA cases found CEQ had acted beyond the scope of Section 1506.11 when it provided alternative actions for the Navy to conduct rather than requiring the Navy to complete an EIS as directed by the court. Courts give agencies deference regarding the interpretation of their regulations, including the emergency provision, and the CEQ’s interpretation of its regulations is entitled to substantial deference.<sup>49</sup> However, where an agency’s interpretation defies the plain meaning of a regulation, courts have rejected the agency’s interpretation.<sup>50</sup> That has not happened before in the context of the NEPA emergency provision.

The few courts that have considered challenges to a CEQ alternative arrangement have upheld the CEQ’s determination. Those requests included agencies seeking alternative arrangements for these actions:

- capturing all remaining California condors to remove them from the wild;

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<sup>45</sup> The dissenting opinion in *Winter v. NRDC*, No. 07-1339 (November 12, 2008) appeared to have trouble with the congressional authority behind the regulation. The dissent said that a “rapid, self-serving resort to an office in the White House ... is surely not what Congress had in mind when it instructed agencies to comply with NEPA ‘to the fullest extent possible.’”

<sup>46</sup> 43 Fed. Reg. 25230, 25243 (June 9, 1978).

<sup>47</sup> 43 Fed. Reg. 55978, 55988 (November 29, 1978).

<sup>48</sup> 43 Fed. Reg. 55978, 55988 (November 29, 1978); 40 C.F.R. § 1506.11.

<sup>49</sup> *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979); *Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301, 1309-1310 (1974).

<sup>50</sup> *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (“we must defer to the Secretary’s interpretation unless an ‘alternative reading is compelled by the regulation’s plain language or by other indications of the Secretary’s intent at the time of the regulation’s promulgation’” (*quoting* *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988))); *Bowles v. Seminole Rock and Sand*, 325 U.S. 410, 414 (1945) (“the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation”).

- releasing HUD funding for an urban redevelopment project in Detroit; and
- allowing night flights from an Air Force base to assist in Operation Desert Storm.

The alternative arrangements illustrated by these cases differ from the MFA alternative arrangements by the fact that each of these agency actions was backed by a satisfactory NEPA document, either before or after the action.<sup>51</sup> In the instant case, the only NEPA document, an EA-FONSI, was found insufficient.

A reviewing court will look at the underlying agency action to decide whether the CEQ's determination is rational. In the case of the California condor, the court considered why the Fish and Wildlife Service (FWS) had changed its policy. The EA-FONSI preferred alternative had been to leave some condor in the wild and to capture others. The district court had found no emergency because FWS had reviewed the situation just months earlier in an EA. The D.C. Circuit reversed, holding that the district court erred in substituting its judgment for the CEQ. The D.C. Circuit found that FWS had a rational basis for changing its policy, especially in light of the lead poisoning death of a condor in an area believed safe. The court said that once it had determined that the underlying agency decision "reflects sufficient attention to environmental concerns and is adequately reasoned and explained" its review was completed.<sup>52</sup> The capture was consistent with the alternatives examined in the EA-FONSI. The MFA sonar case differs in that the underlying EA-FONSI has been found insufficient. Also, the court suggested the Navy lacked a rational basis for declaring the training exercises an emergency.

The emergency in the case of Detroit was not one of military readiness. Instead, it was argued that a major corporation would leave the city if funding were not provided for an urban renewal project, putting the city in immediate financial peril. The Department of Housing and Urban Development (HUD) was allowed to release funding prior to the completion of an EIS.<sup>53</sup> The EIS was subsequently completed. This differs from the MFA alternative arrangements in which an EIS was waived, rather than deferred.

The only military action reviewed by the courts in response to a challenge to the application of Section 1506.11 related to night flights out of an Air Force base. An EIS completed years earlier had supported the decision that flights would not occur between the hours of 10 pm and 7 am. However, concurrent with the U.S. commitment of forces to Operation Desert Storm, the Air Force began 24-hour operations out of that base. The plaintiffs asked the Air Force to conduct a supplemental EIS prior to the flights, but the Air Force sought alternative arrangements from the CEQ. The alternative arrangements proposed by CEQ

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<sup>51</sup> See also *Miccosukee Tribe of Indians of Florida v. United States*, 509 F. Supp. 2d 1288, 1291 (M.D. Fla. 2007) (referring to how CEQ required an EIS after the alternative arrangements were completed).

<sup>52</sup> *National Audubon Society v. Hester*, 801 F.2d 405, 407 (D.C. Cir. 1986).

<sup>53</sup> *Crosby v. Young*, 512 F. Supp. 1353 (E.D. Mich. 1981).

allowed the flights to continue and allowed the Air Force to prepare an EA within the year. The court considered whether the Air Force or CEQ had been arbitrary and capricious in allowing the NEPA exception.<sup>54</sup> The court found that “the crisis in the Middle East” was an emergency. The court noted that the Air Force was particular in describing the emergency need: “defendants have pointed to specific military concerns with regard to troop redeployment, flight scheduling, cargo transport, and other operations that necessitate the use of Westover AFB for C-5A operations on a twenty-four hour basis.”<sup>55</sup>

In the instant case, the court distinguished the facts from the Air Force exception, noting the Air Force’s circumstances had changed after an EIS had been prepared, but in this case no change had occurred. Also, the court criticized the Navy’s characterization of the emergency, noting that these routine training exercises had been planned for a long time, and suggesting that the Navy was seeking ways to avoid preparing the EIS ordered by the court. The court said CEQ had not used the plain meaning of “emergency.”<sup>56</sup> The court found CEQ chose mitigation measures that had already been rejected by the court. According to the court, this “raises serious constitutional concerns under the Separation of Powers doctrine,” but the court found that because CEQ’s application of Section 1506.11 was invalid, it did not need to examine the constitutional issue.<sup>57</sup>

The Ninth Circuit agreed with the rationale of the lower court, noting that there was no national security or military exemption within NEPA.<sup>58</sup>

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<sup>54</sup> Valley Citizens for a Safe Environment v. Vest, 1991 WL 330963 (D. Mass. May 6, 1991).

<sup>55</sup> Valley Citizens for a Safe Environment v. Vest, 1991 WL 330963, \*5 (D. Mass. May 6, 1991).

<sup>56</sup> NRDC v. Winter, 527 F. Supp. 2d 1216, 1229-30 (C.D. Cal. 2008).

<sup>57</sup> NRDC v. Winter, 527 F. Supp. 2d 1216, 1232 (C.D. Cal. 2008).

<sup>58</sup> NRDC v. Winter, 518 F.3d 658, 684-85 (9<sup>th</sup> Cir. 2008), *cert. granted sub nom.* Winter v. NRDC, No. 07-1239 (June 23, 2008).



**Table 1. Listed Species Found Off the California Coast<sup>a</sup>**

<b>Classification</b>	<b>Common Name</b>	<b>Scientific Name</b>
T	Salmon, Chinook CA Central Valley spring-run	<i>Oncorhynchus (=Salmo) tshawytscha</i>
T	Salmon, Chinook CA coastal	<i>Oncorhynchus (=Salmo) tshawytscha</i>
E	Salmon, Chinook winter Sacramento R.	<i>Oncorhynchus (=Salmo) tshawytscha</i>
T	Salmon, Coho OR, CA pop.	<i>Oncorhynchus (=Salmo) kisutch</i>
E	Salmon, Coho central CA coast	<i>Oncorhynchus (=Salmo) kisutch</i>
T	Sea turtle, green except where endangered	<i>Chelonia mydas</i>
E	Sea turtle, leatherback	<i>Dermochelys coriacea</i>
T	Sea turtle, loggerhead	<i>Caretta caretta</i>
T	Sea turtle, olive ridley except where endangered	<i>Lepidochelys olivacea</i>
T	Sea-lion, Steller eastern pop.	<i>Eumetopias jubatus</i>
E	Sea-lion, Steller western pop.	<i>Eumetopias jubatus</i>
T	Seal, Guadalupe fur	<i>Arctocephalus townsendi</i>
T	Steelhead Central Valley CA	<i>Oncorhynchus (=Salmo) mykiss</i>
T	Steelhead central CA coast	<i>Oncorhynchus (=Salmo) mykiss</i>
T	Steelhead northern CA	<i>Oncorhynchus (=Salmo) mykiss</i>
T	Steelhead south central CA coast	<i>Oncorhynchus (=Salmo) mykiss</i>
E	Steelhead southern CA coast	<i>Oncorhynchus (=Salmo) mykiss</i>
E	Blue whale	<i>Balaenoptera musculus</i>
E	Finback whale	<i>Balaenoptera physalus</i>
E	Humpback whale	<i>Megaptera novaeangliae</i>
E	Killer Southern whale Resident DPS	<i>Orcinus orca</i>
E	Sei whale	<i>Balaenoptera borealis</i>
E	Sperm whale	<i>Physeter catodon (=macrocephalus)</i>

a. Information obtained from Fish and Wildlife Service website: [[http://ecos.fws.gov/tess\\_public/StateListing.do?status=listed&state=CA](http://ecos.fws.gov/tess_public/StateListing.do?status=listed&state=CA)].

**Table 2. Litigation Timeline**

<b>Date</b>	<b>Action</b>	<b>Decision</b>
August 7, 2007	Preliminary injunction granted.	NRDC v. Winter, 8:07-cv-00335-FMC-FMOx, 2007 WL 2481037 (C.D. Cal. Aug. 7, 2007)
August 31, 2007	Injunction stayed.	NRDC v. Winter, 502 F.3d 859 (9th Cir. 2007)
November 13, 2007	Ninth Circuit dissolves stay. Remands to district court to narrow injunction.	NRDC v. Winter, 508 F.3d. 885 (9th Cir. 2007)
January 3, 2008	District court enjoins Navy, but allows training if certain measures are taken.	NRDC v. Winter, 530 F. Supp. 2d 1110 (C.D. Cal. 2008)
January 9, 2008	Navy seeks stay pending appeal.	
January 10, 2008	District court issues modified injunction.	
January 15, 2008	President exempts Navy from CZMA, pursuant to 16 U.S.C. § 1456(c)(1)(B).	
January 15, 2008	CEQ issues alternative arrangements under NEPA for Navy, pursuant to 50 C.F.R. § 1506.11.	Online at [ <a href="http://www.whitehouse.gov/ceq/Letter_from_Chairman_Connaughton_to_Secretary_Winter.pdf">http://www.whitehouse.gov/ceq/Letter_from_Chairman_Connaughton_to_Secretary_Winter.pdf</a> ]
January 16, 2008	Ninth Circuit remands to district court to consider Jan. 15 actions.	NRDC v. Winter, 513 F. 3d 920 (9 <sup>th</sup> Cir. 2008)
February 4, 2008	District court finds that CEQ's actions were arbitrary and restores injunction.	NRDC v. Winter, 527 F. Supp. 2d 1216 (C.D. Cal. 2008)
February 19, 2008	Ninth Circuit rejects Navy's motion for a stay.	NRDC v. Winter, 516 F.3d 1103 (9 <sup>th</sup> Cir. 2008)
February 29, 2008	Ninth Circuit affirms preliminary injunction.	NRDC v. Winter, 518 F.3d 658 (9th Cir. 2008)
February 29, 2008	Ninth Circuit modifies two mitigation measures, allowing sonar reduction when at critical point of the exercise and during surface ducting conditions.	NRDC v. Winter, 2008 U.S. App. LEXIS 4458 (9th Cir. Feb. 29, 2008)
March 31, 2008	Navy petitions the U.S. Supreme Court to review the Ninth Circuit decision.	NRDC v. Winter, No. 07-1239 (March 31, 2008)
November 12, 2008	U.S. Supreme Court finds in favor of the Navy.	Winter v. NRDC, No. 07-1239 (Nov. 12, 2008)

**Table 3. Mitigation Measures**

(data gleaned from court documents; may be incomplete)

Type of Action	2007 NME	Plaintiffs	Court	CEQ
<b>Powering down sonar</b>	Reduce by 6 dB when marine mammals spotted within 1,000 m.; reduce another 4 dB when within 500 m.; shut down sonar at 200 m.		<p>2200 yd. sonar shut down when animals are spotted; reduce by 6 dB where surface ducting conditions are found</p> <p>Modified by Ninth Circuit: if during “critical point in the exercise,” reduction by 6 dB if within 1000 m., 10 dB if within 500 m., and suspend the activity if within 200 m.</p> <p>Surface ducting modification: reduce by 6 dB if within 2,000 m., 10 dB within 1,000 m., and suspend sonar use if within 500 m.</p>	Reduce by 6dB if within 1,000 m.; reduce by additional 4 dB if within 500 m.; shut down transmissions at 200 m.
<b>Lookouts</b>	2 dedicated, and 3 non-dedicated marine mammal lookouts, provide lookouts with binoculars, night vision goggles, and infrared sensors.		60-minute monitoring period prior to each day’s training; two NMFS trained monitors at all times during exercise; passive acoustic monitoring to be used to the maximum extent practicable; use helicopters.	2 lookouts and 3 non-dedicated watchstanders.

Type of Action	2007 NME	Plaintiffs	Court	CEQ
<b>Helicopters</b>			At least one dedicated helicopter for monitoring; aerial monitoring to begin 60 mins before and throughout training; additional helicopter monitoring 10 minutes before active dipping sonar.	“Aerial platforms” will monitor during their missions.
<b>Geographical Restrictions</b>	Outside Channel Islands Nat’l Marine Sanctuary; 5 nautical miles (nm) from western shore of San Clemente Island; 3 nm from its other shores.	25 nm coastal exclusion; excluded from Catalina Basin; excluded from the Westfall seamount; excluded from Cortez and Tanner Banks; and exercises located to the maximum extent possible in waters deeper than 1,500 m.	12 mile exclusion zone off California coast; barred in Catalina basin; 5 nm exclusion from western shore of San Clemente Island.	5 nm exclusion from western shore of San Clemente Island.
<b>Changes for Migration</b>	Aerial monitoring for 60 mins before MFA exercises along Tanner & Cortez Banks during blue whale migration (July to Sept. 2008); pre-exercise monitoring of gray whale migration patterns between March 7-21, 2008, and April 15 - May 15, 2008.			
<b>Other</b>				Navy to submit after-action reports to NMFS 120 days after any exercise.