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U.S. Navy Torpedoes NEPA: Winter v. Natural Resources Defense Council May Sink Future Environmental Pleas Brought under the National Environmental Policy Act

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U.S. NAVY TORPEDOES NEPA: WINTER V. NATURAL RESOURCES DEFENSE COUNCIL MAY SINK FUTURE ENVIRONMENTAL PLEAS BROUGHT UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

I. INTRODUCTION: OVERVIEW OF THE CASE: CAUSE OF ACTION, RELEVANT LEGISLATION AND THE COURT’S DECISION

Over the last half-century, increasing concerns regarding the human impact on the environment have led to legislative reform designed to prevent or limit adverse effects on animal life, vegetation and the overall human environment. In 1969, Congress enacted the National Environmental Policy Act (NEPA)¹ as the “basic national charter for the protection of the environment.”² NEPA imposes a duty on federal agencies to consider and evaluate potential environmental impacts resulting from their actions.³

2. 40 C.F.R. pt. 1500.1 (stating NEPA’s purpose); see also 42 U.S.C. § 4321 (2006) (declaring NEPA’s purpose); see also 42 U.S.C. § 4331(a) (explaining Congress’s recognition of profound impact of human activity on natural environment and need for maintaining harmonious conditions between humans and environment); see also William S. Éubanks, Damage Done? The Status of NEPA After Winter v. NRDC and Answers to Lingering Questions Left Open By the Court, 33 VT. L. Rev. 649, 650 (2009) (citing 40 C.F.R. pt. 1500.1 (2009)). Éubanks is an Associate Attorney at Meyer Glitzenstein & Crystal in Washington, D.C., and participated in the firm’s amicus brief to the Court. Éubanks at 670 n.al, n.d1. NEPA declares the following:

The Congress, recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

42 U.S.C. § 4331(a). NEPA also states Congress’s recognition “that each person shall enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.” 42 U.S.C. § 4331(c).

3. See 42 U.S.C. §§ 4331, 4332 (describing duties NEPA imposes on Federal Government); see also Éubanks, supra note 2, at 650 (stating NEPA’s objective). Congress obliges the Federal Government to:

(353)
In 2008, the United States Supreme Court in *Winter v. Natural Resources Defense Council* (*Winter*) vacated the District Court for the Central District of California's preliminary injunction against the Navy. The Court based its decision on the grounds that the lower courts applied too lenient a standard for analyzing irreparable harm, and that the lower courts abused their discretion by improperly weighing the factors considered in deciding whether to issue injunctive relief. While the Court's grounds for vacating appear sturdy and the holding narrow, the Court attacked NEPA by circumventing the central feature of the statute—the Environmental Impact Statement (EIS). Although the Natural Resources Defense

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.


5. *Id.* at 382 (vacating lower court's holdings).


7. *See Eubanks, supra* note 2, at 649 (discussing Supreme Court's holding in *Winter* in relation to environmental protection available under NEPA); 42 U.S.C. § 4332 (mandating all Federal Government agencies comply with NEPA). Section 4332(C) particularly describes the EIS:

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
Council (NRDC) brought an action for injunctive relief against the Navy for failing to prepare the necessary EIS and the two lower courts agreed, the Supreme Court allowed the Navy to continue its activity, despite a direct violation of NEPA.  

Overall, this Note discusses NEPA, the criteria and discretion involved in issuing equitable relief, and the requisite measure of irreparable harm required for obtaining equitable relief in the form of a preliminary injunction as presented in Winter. Part II recounts the issues that led to litigation, specifically why the NRDC argued error on part of the Navy in foregoing an EIS, and why the NRDC sought injunctive relief. Part III explores NEPA, the underlying legal precedents, theories and standards for acquiring equitable relief. Part IV addresses the Court’s decision to vacate and reverse the lower courts on two grounds: (1) improper analysis of irreparable harm and (2) abuse of discretion by improperly weighing the factors for injunctive relief. Part V focuses on the rationale and reasoning of the Court’s holding in Winter, in particular

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(C)(i)-(v). CEQ regulations state the following about the EIS:
The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.


8. Winter, 129 S. Ct. at 371 (describing plaintiffs: NRDC, Jean-Michael Cousteau, and several other environmental groups). The NRDC’s claims and interests in this Note represent the claims and interests of all plaintiffs.


10. For further discussion of NEPA and equitable relief, see infra notes 16-191 and accompanying text.

11. For further discussion of the facts of the noted case, see infra notes 16-38 and accompanying text.

12. For further discussion of NEPA’s background and the precedents and standards of equitable relief, see infra notes 39-92 and accompanying text.

13. For further discussion of the Court’s decision in the noted case, see infra notes 93-121 and accompanying text.
the Court’s decision to undercut NEPA and ignore the EIS requirement. Part VI concludes with a discussion of the potential lasting effects of the *Winter* holding.

II. FACTS: COSTS AND BENEFITS OF THE NAVY’S ACTIONS IN SOUTHERN CALIFORNIA WATERS

When engaging in the critical practice of antisubmarine warfare, the Navy deploys “strike groups” comprised of surface ships, submarines, and aircrafts. These strike groups undergo extensive integrated exercises, which include the use of mid-frequency active (MFA) sonar. MFA sonar is not only a complex technology requiring comprehensive training, but it is also the most effective means of detecting enemy submarines—especially near-silent diesel-electric submarines, which are otherwise undetectable. Navy sonar operators are responsible for coordinating with the other sea-bound and air-bound craft of the strike group, while avoiding any interference. To ensure sonar operators will perform perfectly, the Navy regularly executes training exercises under realistic conditions.

14. For further discussion of the Court’s reasoning and rationale, see *infra* notes 122-74 and accompanying text.

15. For further discussion of the noted case’s impact on future NEPA claims, see *infra* notes 175-91 and accompanying text.

16. *See Winter,* 129 S. Ct. at 370 (describing strike group composition and acknowledging antisubmarine warfare is Pacific Fleet’s top priority). The use of mid-frequency active (MFA) sonar is “mission critical” because MFA sonar is the only method of locating nearly silent, submerged, diesel-electric enemy submarines running solely on battery power. *Id.* at 371.

17. *See id.* at 370-71 (explaining Navy uses MFA sonar and describing differences between active sonar (including MFA sonar) and passive sonar). Active sonar emits pulses of sound underwater and receives acoustic waves echoing off the target, whereas passive sonar merely receives sound waves without emissions. *Id.* at 370, n.1. Passive sonar has neither the range of active sonar nor active sonar’s capacity to determine exact location of an enemy submarine. *Id.* at n.1.

18. *See id.* at 370-71 (describing complexities of using MFA sonar). Many factors affect sonar reception: water density, salinity, currents, weather conditions and sea floor contours. *Id.* The Court notes MFA sonar is a useful tool because it enables the Navy to determine both the bearing and distance of target submarines, as well as permits the Navy to track enemy submarines operating more quietly than the surrounding marine environment. *Id.* at 370. The Court also notes the Navy’s need for MFA sonar training: “The use of MFA sonar during these exercises is ‘missions-critical,’ given that MFA sonar is the only proven method of identifying submerged diesel-electric submarines operating on battery power.” *Id.* at 371.

19. *See id.* at 370-72 (demonstrating intricacies of sonar use). Strike groups must complete training exercises to be certified for deployment. *Id.* at 371.

20. *See id.* at 370-71 (discussing regular training in realistic conditions and need for training with MFA sonar).
conducting this training, which is vital to the Navy's success in anti-submarine warfare.\textsuperscript{21}

While ideal for Navy training operations, Southern California is also home to an array of marine mammals, including dolphins and whales.\textsuperscript{22} The NRDC contends that the Navy has underestimated the amount and degree of MFA sonar-induced injuries to marine mammals, including permanent hearing loss, decompression sickness and major behavioral disruptions.\textsuperscript{23} The NRDC submits that marine mammals' mass strandings are linked to active sonar, and that certain species, such as beaked whales, are uniquely susceptible to injuries from active sonar.\textsuperscript{24} Sonar directly affects the beaked whale's behavioral patterns, and necropsies of beaked whales reveal hemorrhaging and embolisms in the bloodstream, which lead to deaths and strandings.\textsuperscript{25} Because these whales dive so deep, the rapid rise from the depths to the surface in response to MFA transmissions causes injuries and fatalities.\textsuperscript{26}

Justice Ginsburg's dissent in Winter notes the likely occurrence of 170,000 behavioral disturbances of mammals, which includes

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\textsuperscript{21} See Winter, 129 S. Ct. at 371 (explaining that Southern California is ideal training location). Southern California waters are the only areas on the West Coast relatively close to land bases, air bases, sea bases and amphibious landing areas. Id.

\textsuperscript{22} See id. (informing at least thirty-seven species of marine mammals live in Southern California waters).

\textsuperscript{23} See id. (describing more serious injuries).

\textsuperscript{24} See id. (associating active sonar with strandings of marine mammals). The NRDC explained that beaked whales are very deep divers and spend little time at surface, thus making detection of injuries difficult to ascertain. Id. at 392 (Ginsburg, J., dissenting). The NRDC notes a known sensitivity of beak whales to sonar. Id. Justice Ginsburg describes the sonar's irreparable harm: "Sonar is linked to mass strandings of marine mammals hemorrhaging around the brain and ears, acute spongiotic changes in the central nervous system, and lesions in the vital organs." Id.


[T]he reason [sonar causes strandings] especially to beak whales is because they dive for very long periods of time. And when they dive for very long periods of time, and they are then bombarded with sonar, which by the way in sound intensity, in this courtroom, if we had a jet engine, and you multiplied that noise by 2,000 times, correcting for water, that's the sound's intensity that would be going on in the water if you were a marine mammal near that source.

Id. Because beaked whales dive so deep for such long periods of time, they are extremely susceptible to injury and death due to active sonar interference causing them to adjust diving patterns and rise from the depths too quickly. Id.

\textsuperscript{26} See id. (noting mammals' necropsy results).
8,000 instances of temporary hearing loss.\textsuperscript{27} The predicted number of long-lasting and permanent injuries to mammals was 564, including 436 injuries to beaked whales—a population of only 1,121.\textsuperscript{28} All the beaked whale injuries are considered long-lasting and permanent.\textsuperscript{29}

The Navy prepared an Environmental Assessment (EA) prior to executing the training exercises to determine the necessity of an EIS.\textsuperscript{30} Concluding that NEPA did not require an EIS, the Navy forewent preparation of an EIS and continued with its plan for the training exercises.\textsuperscript{31} The NRDC claimed the Navy erred in judgment, and argued that the Navy should have continued with an EIS.\textsuperscript{32} Subsequent to the commencement of the strike group exercises, the NRDC filed an action seeking injunctive relief on the grounds that the Navy violated, \textit{inter alia}, NEPA.\textsuperscript{33}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{27} See Winter, 129 S. Ct. at 393 (Ginsburg, J., dissenting) (discussing projected harm to marine mammals).
\item \textsuperscript{28} See id. (addressing potential harm to beak whales in Southern California). For further discussion of the types of injuries, namely level A and level B, see infra note 25 and accompanying text.
\item \textsuperscript{29} See id. at 372 (defining level A disturbance). Level A disturbances are defined as “potential destruction or loss of biological tissue (i.e. physical injury).” \textit{Id.} (citing Navy's appellant petition). Level B harassment is defined as “temporary injury or disruption of behavioral patterns such as migration, feeding, surfacing, and breeding.” \textit{Id.} (citing Navy's appellant petition).
\item \textsuperscript{30} See id. (stating Navy prepared EA prior to commencing training). In accordance with CEQ regulations, an agency will prepare an EA if it is unsure whether its actions’ effects will significantly affect the environment. \textit{Save Strawberry Canyon v. Dep’t of Energy}, 613 F. Supp. 2d 1177, 1181 (citing 40 C.F.R. pt. 1501.4 (2009)). The CEQ has established the following concerning an EA:
\begin{itemize}
\item Environmental Assessment:
\begin{itemize}
\item (a) Means a concise public document for which a Federal agency is responsible that serves to:
\begin{itemize}
\item (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.
\item (2) Aid an agency’s compliance with the Act when no environmental impact statement is necessary.
\item (3) Facilitate preparation of a statement when one is necessary.
\end{itemize}
\item (b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.
\end{itemize}
\item (40 C.F.R. pt. 1508.9 (2009)). CEQ regulations also state that an agency may prepare an EA on any action at any time in order to assist agency planning and decisionmaking. 40 C.F.R. pt. 1501.3(b).
\end{itemize}
\item \textsuperscript{31} See Winter, 129 S. Ct. at 372 (stating Navy concluded Southern California strike group training exercises would not significantly impact environment).
\item \textsuperscript{32} See id. at 372 (noting NRDC argues EIS was necessary prior to commencement of proposed actions).
\item \textsuperscript{33} See id. (stating NRDC sought relief for violation of NEPA, Endangered Species Act of 1973 and Coastal Zone Management Act of 1972).
\end{itemize}
\end{footnotesize}
In August 2007, the District Court for the Central District of California enjoined the United States Navy from using MFA sonar during the Navy's strike group training exercises in Southern California. The Navy appealed the District Court's ruling, and the Ninth Circuit Court of Appeals remanded the injunction for modification. The Navy challenged two of the six modified injunction conditions and, after losing at both the district and circuit court levels, the Navy appealed to the Supreme Court, which granted certiorari. The Supreme Court held that the Navy's interests in effective and realistic training outweighed the plaintiffs' ecological, recreational and scientific interests. The Supreme Court, therefore, vacated the two challenged injunction conditions.

III. BACKGROUND: THE NATIONAL ENVIRONMENTAL POLICY ACT AND THE STANDARDS FOR OBTAINING EQUITABLE RELIEF

NEPA is the United States' premiere federal legislation for holistic protection of the environment. In Winter, the NRDC alleged that the Navy has violated NEPA by failing to follow particular procedures governing federal agency decision making and action, particularly by failing to prepare an EIS for the Navy's strike group

34. See Nat. Res. Def. Council, Inc. v. Winter, 645 F. Supp. 2d 841, 855 (C.D. Cal. 2007) (enjoining Navy for violation of NEPA), stay granted pending appeal, 502 F.3d 859, 859 (9th Cir. 2007), vacated and remanded, 508 F.3d 885, 885 (9th Cir. 2007).


36. See Winter, 129 S. Ct. at 372-74 (granting certiorari). The six conditions included:

(1) imposing a [twelve]-mile “exclusion zone” from the coastline; (2) using lookout to conduct additional monitoring for marine mammals; (3) restricting the use of “helicopter-dipping” sonar; (4) limiting the use of MFA sonar in geographic “choke points”; (5) shutting down MFA sonar when a marine mammal is spotted within 2,200 yards of a vessel; and (6) powering down MFA sonar by 6dB during significant surface ducting conditions, in which sound travels further than it otherwise would due to temperature differences in adjacent layers of water.

Id. at 373. The Navy appealed the fifth and sixth conditions. Id.

37. See id. at 381. (holding in favor of Navy).

38. See id. (vacating lower court's injunction).

training exercises in Southern California. The Supreme Court discussed the various characteristics of NEPA and addressed the standards for injunctive relief.

A. Keeping Environmental Integrity Afloat: The National Environmental Policy Act of 1969

Congress designed and crafted NEPA to promote an overarching commitment to prevent and eliminate environmental damage. NEPA focuses on the particular environmental effects of any proposed federal agency actions. When major federal action proposes to "significantly [affect] the quality of the human environment," NEPA mandates that the acting agency prepare an EIS—a detailed statement of potential environmental effects accompanied by a discussion of reasonable alternative courses of action. Before preparing the more detailed EIS, the Council on Environmental Quality's (CEQ) regulations permit an agency to prepare an EA to determine whether an EIS is necessary.

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41. See generally id. at 372-77 (discussing NEPA and addressing equitable relief).
43. See Eubanks, supra note 2, at 649 (describing NEPA's focus); see also 42 U.S.C. §§ 4321 (stating NEPA's purpose).
44. See 42 U.S.C. § 4332(C) (explaining EIS application); Save Strawberry Canyon v. Dept of Energy, 613 F. Supp. 2d 1177, 1181 (N.D. Cal. 2009) (discussing detailed statement commonly referred to as EIS and application to federal agency action). Federal actions are defined as actions potentially subject to federal control and responsibility. Strawberry Canyon, 613 F. Supp. 2d at 1181. A proposed action need not jeopardize a threatened or endangered species to be considered as having a significant effect on the environment, triggering the agency's obligation to prepare an EIS. Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv., 373 F. Supp. 2d 1069, 1080 (E.D. Cal. 2004).
46. See 40 C.F.R. pt. 1501.4 (instructing whether to prepare EIS); see also Eubanks, supra note 2, at 650 (explaining agency may prepare EA to determine whether EIS is necessary); see also 42 U.S.C. § 4332 (requiring EIS only where action will significantly impact environment); see also Klamath-Siskiyou, 373 F. Supp. 2d at 1069 (discussing requisite significant harm for obliging agency to prepare EA or EIS). An agency may forego an EIS if the agency determines its action will not significantly impact the environment; however, an agency's determination can be judicially reviewed. Eubanks, supra note 2, at 650. CEQ regulations provide the following instructions on whether to prepare an EIS:

In determining whether to prepare an environmental impact statement the Federal agency shall:
The most crucial element of NEPA is the requirement for preparing the EIS before any proposed agency action occurs. Preparing the EIS prior to agency action enables the agency to adequately assess the potential environmental impacts, and informs the agency of any reasonable alternatives.

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:
(1) Normally requires an environmental impact statement, or
(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).
(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).
(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.
(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.
(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.
(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.
(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:
(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or
(ii) The nature of the proposed action is one without precedent.

47. See Eubanks, supra note 2, at 650-51 (describing crux of Winter case); see Massachusetts v. Watt, 716 F.2d 946, 952 (1st Cir. 1983) (discussing NEPA's design to influence decision-making process), aff'g 560 F. Supp. 561 (1983); see also Sierra Club v. Marsh, 827 F.2d 497, 500-01 (1st Cir. 1989) (emphasizing NEPA's informed decision-making objective), vacating in part, 701 F. Supp. 886 (D. Me. 1988).

48. See Eubanks, supra note 2, at 650 (explaining crucial timing of EIS preparation); see also 40 C.F.R. pts. 1501.1-2 (commanding agencies to integrate NEPA procedures as early as possible in decisionmaking making process). CEQ regulations mandate that "[a]gencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." 40 C.F.R. pt. 1501.2.
1. **NEPA’S Sweeping Purpose and Requirements: Environmental Assessments and Environmental Impact Statements**

For almost four decades, NEPA has served as the Nation’s policy to “encourage productive and enjoyable harmony between man and his environment” by reducing or preventing damage to the environment, and by promoting an understanding of the complex ecological systems which humans influence and in which humans interact.49 Rather than mandating certain results to fulfill NEPA’s objectives, NEPA imposes procedural requirements as the means to achieving its end.50 These requirements compel federal agencies to analyze the potential impact of their actions on the environment.51

To ensure compliance with NEPA and appropriate interpretations of its procedural requirements, NEPA established the CEQ.52 The CEQ promulgated regulations to assist agencies in determining which of their actions are subject to an EIS.53 These regulations allow an agency to first produce an EA, a more limited document than an EIS, to determine if the agency’s action will significantly effect the environment.54 The EA is concise and brief, providing only sufficient evidence and analysis in the course of determining

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The purposes of this Act are: to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and to stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation. . .


50. See *Pub. Citizen*, 541 U.S. at 756-57 (stating NEPA is comprised of procedural requirements rather than commanding specific results form agency action); see also *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 370 (1989) (stating NEPA does not mandate agencies achieve specific results in regards to environment, but promotes goals to prevent or mitigate environmental damage by focusing agency and public attention on environmental effects of proposed agency action).

51. See *Pub. Citizen*, 541 U.S. at 756-67 (explaining NEPA duties imposed on federal agencies).

52. See 42 U.S.C. § 4321 (establishing CEQ); see also *Pub. Citizen*, 541 U.S. at 757 (addressing formation of CEQ).

53. See *Pub. Citizen*, 541 U.S. at 757 (stating CEQ promulgates regulations under NEPA’s authority to guide agencies in determining which of its actions are subject to EIS).

54. See id. (stating basic threshold for requiring EIS after preparing EA). The Court also explained: “The EA is to be a ‘concise public document’ that [b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS].” *Id.*
whether an EIS is required. The EIS, conversely, is a “detailed written statement” that must discuss “all environmental impacts, unavoidable impacts, and alternatives to the proposed action.” Effectuating an EIS places a greater burden on the preparer.

Where an agency conducts an EA and determines an EIS is unnecessary under NEPA and CEQ regulations, the agency must issue a Finding of No Significant Impact (FONSI), which briefly explains why the agency’s actions will not have a significant impact on the environment. An agency’s decision to issue a FONSI and forgo the preparation of an EIS, however, is not final. The decision can be challenged and set aside if the challengers show the decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” The Navy’s decision to forgo the EIS preparation is precisely the NRDC’s concern in this NEPA action.

2. “Action-forcing” Characteristics of NEPA

The Supreme Court has referred to section 102(2)(c) as one of NEPA’s “action-forcing procedures,” designed to ensure its implement:

55. See 40 C.F.R. pt. 1508.9 (describing EA); see also Eubanks, supra note 2, at 663-64 (discussing specifications of EA).

56. Eubanks, supra note 2, at 663-64 (discussing EIS’s specifications and obligations); see also 42 U.S.C. § 4332(C) (discussing EIS requirements). An EIS carries a greater burden on the preparer than an EA: “EISs are subject to far more stringent requirements for public participation than EAs, including such duties as requiring agencies to provide notice of draft, final, or supplemental EIS; inviting public comment on all EISs; and responding to all comments to EISs.” Eubanks, supra note 2, at 663-64.

57. See Eubanks, supra note 2, at 663-64 (discussing increased burden of EIS on preparer).

58. See 40 C.F.R. pts. 1501.4, 1508.13 (prescribing FONSI procedure); see also Pub. Citizen, 541 U.S. at 757-58 (describing issuance of FONSI). CEQ regulations provide that an agency shall issue a FONSI if the agency determines an EIS is unnecessary after preparing an EA. 40 C.F.R. pt. 1501.4. A FONSI is a report issued by a federal agency which includes the EA and briefly describes why an action, not otherwise excluded under 40 C.F.R. pt. 1508.4, will not significantly impact the human environment. 40 C.F.R. 1508.13.

59. See Pub. Citizen, 541 U.S. at 763 (stating agency’s decision to forgo EIS can be challenged and set aside). If a plaintiff can show the FONSI was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,” then the agency’s decision to not prepare an EIS can be set aside. Id. (citing Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006)).

60. Pub. Citizen, 541 U.S. at 763 (discussing procedure and burden of proof pursuant to 5 U.S.C. § 706(2)(A)).


62. 40 C.F.R. pt. 1502.1 (stating primary purpose of EIS is action-forcing device); see also 40 C.F.R. pt. 1500.1 (labeling section 102(c) of NEPA). CEQ regulations state, “Section 102(2) contains ‘action-forcing’ provisions to make sure
Section 102 provides that Congress shall direct all federal agencies to include a detailed statement on proposals for any "major federal actions significantly affecting the quality of the human environment." The rationale for this detailed statement is to incorporate the environmental concerns into the decision-making process of the agency action.

NEPA's EIS action-forcing characteristic accomplishes two objectives: (1) consideration of environmental impacts and (2) assurance that relevant information is made available to the public for potential input. The EIS ensures that the agency obtains and carefully considers information regarding significant impacts on the environment during the decision-making process. Additionally, the EIS guarantees that the relevant information pertaining to a proposed action's environmental impacts are disseminated to the


63. See Andrus v. Sierra Club, 442 U.S. 347, 350 (1979) (stating NEPA contains action-forcing procedures to ensure policy implementation); see also 40 C.F.R. pt. 1500.1 (discussing NEPA's action-forcing characteristics).

64. 42 U.S.C. § 4332(C) (2006); see also Marsh, 490 U.S. at 372 (discussing section 102(2)(C)). CEQ regulations define the term "significantly" as requiring considerations of both context and intensity:

Context . . . means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national) the affected region, the affected interest, and the locality. Significance varies with the setting of the proposed action . . . Intensity . . . refers to the severity of the impact . . .

40 C.F.R. pt. 1508.27. The EIS must include:

[T]he environmental impact of the proposed action; any adverse environmental effects which cannot be avoided should be proposed action be implemented; alternatives to the proposed action; the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and, any irreversible and ir- retrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C); see also Andrus, 442 U.S. at 350 (discussing NEPA section 102(2)(C)).

65. See 40 C.F.R. pt. 1501.1 (stating importance of integrating NEPA process at early stages of planning and decision making); see also Andrus, 442 U.S. at 350 (discussing rationale for incorporating concerns of significant impact into decision making).


67. See 40 C.F.R. pt. 1501.1 (explaining NEPA integration at early stages of planning); see also Robertson, 490 U.S. at 349 (stating action-forcing purposes).
public, who might then have input in both the decision-making process and the execution of agency action.68

Without taking the environmental concerns into consideration, an agency vitiates the entire purpose of the action-forcing qualities of NEPA.69 The CEQ and its regulations promote and emphasize the significance of preparing an EIS, when appropriate.70 The CEQ has promulgated regulations mandating that agencies integrate NEPA's procedural requirements at their earliest planning stages to ensure adequate consideration of the environment.71 The NRDC brought the action at issue to enjoin the Navy from using MFA sonar because the NDRC claims that the Navy's failure to prepare an EIS violated NEPA.72 The NRDC also claims that the only way to enforce NEPA and its objectives is for the Court to grant injunctive relief.73

68. See 40 C.F.R. pt. 1502.1 (explaining EIS will foster full and fair discussion of environmental impacts and inform decision-makers and public); see also Robertson, 490 U.S. at 349 (stating action-forcing purposes). NEPA attempts to ensure environmental effects are not ignored or downplayed by forcing the agency to give due attention and consideration to these effects when deciding whether to act and how to act. Robertson, 490 U.S. at 349.

69. See Robertson, 490 U.S. at 351 (addressing vitality of EIS and its role in agency action decision-making process).

70. See id. at 351 (noting CEQ's regulations implementing NEPA).

71. See 40 C.F.R. pts. 1501.1-2; see also Robertson, 490 U.S. at 351 (noting environmental concerns were traditionally ignored and omitted from early agency planning). The Andrus Court noted:

CEQ regulations state that "[t]he primary purpose of an environmental impact statement is to serve as an action forcing device to ensure that the policies and goals defined in [NEPA] are infused into the on-going programs and actions of the Federal Government... An environmental impact statement is more than a disclosure document. It shall be used by Federal official in conjunction with other relevant material to plan actions and make decisions."

Andrus v. Sierra Club, 442 U.S. 347, 351 n.3 (1979) (citing 40 C.F.R. pt. 1502.1 (2009)). President Carter’s Executive Order No. 11991 mandated that CEQ regulations impose duties on agencies to prepare EISs early in the decision-making process. Id. CEQ regulations, therefore, require that the EIS should be prepared "early enough so that it can serve practically as an important contribution to the decisionmaking [sic] process and will not be used to rationalize or justify decision already made..." Id. (quoting 40 C.F.R. pt. 1502.5 (2009)). It should also be noted that the CEQ's interpretations of NEPA should be given substantial deference. Id. at 358.


73. See Eubanks, supra note 2, at 655 (stating injunctive relief is only means of enforcing NEPA and its EIS to protect environment).
B. Equitable Relief, Preliminary Injunctions, and Irreparable Harm

1. Equitable Relief and Obtaining a Preliminary Injunction

As an equitable remedy, injunctive relief is not issued as a matter of course. Rather, courts of equity issue injunctive relief only where the court's intervention is essential to effectuate protection against what would otherwise be an irremediable injury. Injunctions require a demonstration that irreparable harm is likely and that legal remedies would be inadequate; courts must balance competing claims of injury while considering the effect on each party of granting or denying the relief. Courts also give particular regard to public interest when deciding whether to issue an injunction.

An applicant for preliminary injunction must establish four criteria: "(1) likelihood of success on the merits, (2) likelihood of suffering irreparable harm without preliminary relief, (3) the balance of equities tips in favor of the applicant, and (4) an injunction is in the public interest." Arguably, one of the most important criteria for an applicant seeking a preliminary injunction is demonstrating the likelihood of irreparable harm. When faced with competing

74. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-12 (1982) (describing injunction as equitable relief never awarded out of right or to restrain merely trifling injurious acts); see also Amoco Prod. Co. v. Vill. of Gambell, AK, 480 U.S. 541, 542 (stating bases for injunctive relief). For further discussion of elements required to obtain injunctive relief, see Wright, infra note 73 and accompanying text.

75. See Romero-Barcelo, 456 U.S. at 312 (noting criteria for issuing injunctive relief and threshold for obtaining injunctive relief); see also GambelU, 480 U.S. at 542 (discussing criteria for injunctive relief).

76. See Gambell, 480 U.S. at 542 (discussing bases for injunctive relief). The Court discussed the bases for relief as follows: "[T]he bases for injunctive relief are irreparable injury and inadequacy of legal remedies. In each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. Although particular regard should be given to the public interest, "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggest an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." Id. at 542.

77. See id. at 545 (noting importance of public interest factor when exercising equitable discretion).

78. Winter, 129 S. Ct. at 374 (describing requirements for obtaining preliminary injunction).

79. See Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice and Procedure, § 2948.1, 11A FPP § 2948.1 (2010) (explaining standards for obtaining preliminary injunction); see also Romero-Barcelo, 456 U.S. at 312 (stating basis for injunctive relief is both irreparable injury and inadequacy of remedies at law). The applicant for a preliminary injunction must prove a likelihood that irreparable harm will occur—speculative injury will not suffice. Wright,
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claims of injury, a court must balance the parties’ potential injuries resulting from the grant or denial of the injunction.\textsuperscript{80}

2. \textit{Environmental Injuries and the Irreparable Harm Standard}

The Supreme Court in \textit{Amoco Production Company v. Village of Gambell, AK} (\textit{Gambell}),\textsuperscript{81} a case on which the \textit{Winter} Court relied, noted that environmental injuries by their very nature rarely find adequate remedies at law through monetary damages—they are often permanent or at least of long duration, otherwise known as irreparable.\textsuperscript{82} Where environmental injury is sufficiently likely, the balance of harms will usually favor issuing an injunction.\textsuperscript{83}

Despite the presumption of irreparable harm tied into environmental injuries, the Court has emphasized the totality of the factors it must consider in deciding whether to issue injunctive relief.\textsuperscript{84} In \textit{Weinberger v. Romero-Barcelo} (\textit{Romero-Barcelo}),\textsuperscript{85} the Court reversed the First Circuit’s issuance of an injunction against the Navy.\textsuperscript{86} Although the ground for reversal was the First Circuit’s improper appellate review, the Court discussed the factors for issuing injunctive relief at length and Justice Powell’s concurrence notes the “reasonableness of [the district court’s] decision in light of all the pertinent factors” to withhold relief.\textsuperscript{87}

In \textit{Gambell}, the Court emphasized its need to balance competing injuries of the parties and consider the effects thereupon in

\begin{itemize}
  \item \textsuperscript{80} See \textit{Romero-Barcelo}, 456 U.S. at 312 (describing court of equity’s duty to balance competing interests of injury between opposing parties when deciding to grant or deny injunction).
  \item \textsuperscript{81} 480 U.S. 531 (1987).
  \item \textsuperscript{82} See \textit{Gambell}, 480 U.S. at 545 (describing inability to cure environmental injury via money damages).
  \item \textsuperscript{83} See \textit{id.} (stating balance will usually tip in favor of injunction if environmental injury is likely).
  \item \textsuperscript{84} See \textit{Winter}, 129 S. Ct. at 381-82 (holding that upon consideration of factors, decision tips in favor of Navy); see also, \textit{Gambell}, 480 U.S. at 542 (addressing factors to be considered in issuing relief).
  \item \textsuperscript{85} 465 U.S. 305 (1882).
  \item \textsuperscript{86} See \textit{id.} (reversing First Circuit’s instructions ordering District Court to issue injunctive relief).
  \item \textsuperscript{87} \textit{Id.} at 321 n.* (Powell, J., concurring) (noting district court’s reasonableness).
\end{itemize}
granting or denying relief. 88 The Gambell Court vacated and remanded the Ninth Circuit’s issuance of an injunction, addressing the error in presuming irreparable damage where an agency fails to evaluate the environmental impact of the agency’s action as “contrary to traditional equitable principles . . . .” 89 The Court also emphasized with particularity the significant role of the public interest factor in exercising equitable discretion. 90 While the Court discusses the nearly inherent irreparability of environmental harms and damages, it constantly reminds lower courts of the other factors involved in equitable discretion and the issuance of injunctive relief. 91 Meeting the burden of proving likelihood of success on the merits and irreparable harm can be vastly outweighed by the public interest or competing interest of the other party. 92

IV. NARRATIVE ANALYSIS: THE COURT ESTABLISHES THE IRREPARABLE HARM STANDARD AND REVIEWS THE LOWER COURTS’ DISCRETION

The Court faced two significant issues when it reversed the Ninth Circuit’s decision to affirm two of the six preliminary injunction conditions. 93 One issue was the district court’s improper standard for issuing the preliminary injunction under the possibility of irreparable harm. 94 The other issue was the district court’s abuse of equitable discretion in issuing the injunction. 95

88. See Gambell, 480 U.S. at 542 (discussing balance of competing injuries as significant factor in deciding whether to issue injunctive relief).
89. Id. at 544-45 (noting error in presuming irreparable harm where agency fails to properly evaluate environmental impact of proposed action).
90. See id. (emphasizing factor of public interest in exercising equitable discretion); see also Romero-Barcelo, 456 U.S. 312 (highlighting public interest factor).
91. See Gambell, 480 U.S. at 545 (addressing importance of other facts considered in issuing injunctive relief despite inherent irremediable nature of environmental injuries).
92. See id. (describing importance of public interest factor); see also Romero-Barcelo, 465 U.S. 312 (emphasizing particular regard for public consequences in exercising discretion for equitable relief); see also Internet Specialties W., Inc. v. Milon-DiGiorgio Enter., Inc., 559 F.3d 985, 993-94 (9th Cir. 2009) (distinguishing Winter on grounds of insufficient similarity between public interest in national security and public interest in customer’s interests at issue); see also Save Strawberry Canyon v. Dept. of Energy, 615 F. Supp. 2d 1177, 1180 n.2 (N.D. Cal. 2009) (distinguishing Winter via second prong of injunctive relief determination in Ninth Circuit).
94. See id. (holding lower court failed to use proper irreparable harm standard).
95. See id. (holding lower court abused discretion by failing to properly account for public interest).
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A. Preliminary Injunction Standard: Possibility of Irreparable Harm is Too Lenient

While the NRDC demonstrated a sufficient likelihood of success of winning on the merits, the NRDC did not establish that there was a likelihood of irreparable harm. The district court and the Ninth Circuit held in favor of the NRDC based “only on a ‘possibility’ of irreparable harm.” The Supreme Court emphasized that the proper threshold for issuing a preliminary injunction is for the applicant to prove a likelihood of irreparable harm—not merely a possibility of irreparable harm.

Distinguishing between these two standards is extremely important because the issuance of a preliminary injunction based on mere possibility is inconsistent with the Court’s classification of injunctive relief. Injunctive relief is an “extraordinary remedy.” As an extraordinary remedy, injunctive relief shall only be awarded where the applicant has met the higher burden of proof—likelihood—whereby the applicant is entitled to this remedy.

B. Granting Injunctive Relief: The Lower Courts’ Abuse of Discretion in Issuing Equitable Relief

1. Underestimating the Burden of Injunctive Relief

The Supreme Court held that the district court and the Ninth Circuit gave inadequate consideration to the burden that the preliminary injunction would impose on the Navy’s ability to effectively train its sailors. The complexities, subtleties and professional decisions concerning the training and control of armed forces are “es-

96. See id. at 375 (noting NRDC demonstrated only possibility of irreparable harm). The NRDC did not meet the proper standard of likelihood of irreparable harm. Id. It should be noted that courts have proposed a relaxed standard of irreparable harm for claims brought under NEPA. Eubanks, supra note 2, at 655. Justice Breyer’s First Circuit opinions in Massachusetts v. Watt and Sierra Club v. Marsh call for courts to account for the potentially irreparable nature of uninformed decision-making. See Massachusetts v. Watt, 716 F.2d 946, 952 (1st Cir. 1983) (making uninformed decisions to which NEPA obligations attach is harm suffered); see Sierra Club v. Marsh, 872 F.2d 497, 500-01 (1st Cir. 1989) (failing to make informed decisions in violation of NEPA is harm suffered).

97. Winter, 129 S. Ct. at 374-82 (discussing lower courts’ holdings).

98. See id. (agreeing with Navy’s argument that possibility standard is too lenient).

99. See id. at 375-76 (rationalizing distinction between possibility standard and likelihood standard for issuing injunctive relief).

100. Id. (noting extraordinary quality of injunctive relief).

101. See id. 375-76 (requiring proof of likelihood to issue injunctive relief).

102. See Winter, 129 S. Ct. at 377 (holding lower courts understated preliminary injunction burden imposed on Navy).
sentially professional military judgments," and thus entitled to great
deference.\textsuperscript{103} Upon review, the Court accepted the officers' reports
that the MFA sonar use under the realistic Southern California
training exercise conditions was "of the utmost importance to the
Navy and the Nation."\textsuperscript{104}

In deeming the Navy's concerns about the injunction as "spec-
culative," the majority found that the district court failed to give due
weight to the military officers' judgments in predicting the relief's
adverse impact on the vital training exercises.\textsuperscript{105} The preliminary
injunction would "clearly increase the number of disruptive sonar
shutdowns" during training.\textsuperscript{106} The Navy stated the dire impor-
tance of limiting the number of sonar shutdowns during its Joint
Tactical Forces Training Exercises, which can last up to two weeks
at a time.\textsuperscript{107} The increased frequency of stopping and starting
would cause operational commanders to "lose awareness of the tac-
tical situation," and receive inadequate training.\textsuperscript{108} The Court fur-
ther noted that it did not discount the importance of the NRDC's
claims and interests, particularly ecological, scientific and recrea-
tional interests in marine mammals.\textsuperscript{109} These interests, however,
are greatly outweighed by the Navy's interest in effective and realistic
training.\textsuperscript{110}

2. Error in Balancing the Public Interest

Despite the discussion of the proper standards for granting a
preliminary injunction, the Court found that the NRDC would lose

\textsuperscript{103.} \textit{Id.} (addressing complexities of case details concerning military officers' professional judgments). Justices and federal judges are generally unfamiliar with the complexities and gravity of the training and control of the armed forces. \textit{Id.} The Court reaffirmed "giving great deference to the professional judgments of military authorities concerning the relative importance of a particular military interest." \textit{Id.} (citing \textit{Goldman v. Weinberger}, 475 U.S. 503, 507 (1986)) (establishing deference to military judgments concerning importance of particular military interest).

\textsuperscript{104.} \textit{Winter}, 129 S. Ct. at 377 (accepting military officer reports on significance of using MFA sonar and hosting realistic conditions).

\textsuperscript{105.} See \textit{id.} at 378 (addressing lower courts' lack of deference to professional judgments).

\textsuperscript{106.} \textit{id.} at 379 (addressing burden of preliminary injunction on Navy).

\textsuperscript{107.} See \textit{id.} (discussing Navy officers' concerns regarding inadequate training).

\textsuperscript{108.} \textit{id.} (discussing Navy Admiral's explanation of adverse results of training interruptions).

\textsuperscript{109.} See \textit{Winter}, 129 S. Ct. at 382 (noting importance of environmental group activities).

\textsuperscript{110.} See \textit{id.} at 378 (concluding balance of equities and public interest tips in favor of Navy).
regardless of proving the irreparable harm.\textsuperscript{111} Even if the NRDC had shown irreparable harm resulting from the Navy's Southern California exercises, the public interest in national security linked with the Navy's interest in effective training simply outweighs any such injuries.\textsuperscript{112} The competing interests of the Navy and the public interest notably intertwine because they both focus on national security.

Preliminary injunctions are extraordinary remedies and are never granted as of right.\textsuperscript{113} Courts must balance the competing injury claims, as well as consider the potential effects on each party if the injunction is granted or denied.\textsuperscript{114} When exercising their discretion, courts of equity must also account for their decisions' consequences, particularly those concerning the public interest.\textsuperscript{115} Here, the Court found that the district court and the Ninth Circuit understated the burden of the preliminary injunction on the Navy's ability to train and the subsequent adverse impact on the public interest in national defense.\textsuperscript{116}

The Court discusses, at length, its deference to the judgments and assessments of military personnel.\textsuperscript{117} The majority accepts the officers' assertions regarding the dire necessity of realistic training, which the two challenged conditions would inhibit.\textsuperscript{118} If the Court affirmed the injunction, it might well force the Navy to deploy inadequately trained antisubmarine forces, jeopardizing the fleet's safety and the safety of American citizens.\textsuperscript{119} If the Court vacated the injunction, however, it faced the near certainty of injuries to marine mammals in Southern California waters and injuries to the

\textsuperscript{111} See id. at 376 (stating any injuries outweighed by national security interest).

\textsuperscript{112} See id. (weighing factors in consideration of issuing injunctive relief). According to the majority, "A proper consideration of these factors alone requires denial of the requested injunctive relief." Id.

\textsuperscript{113} See id. at 375-76 (explaining injunctive relief is extraordinary remedy never awarded as of right).

\textsuperscript{114} See Winter, 129 S. Ct. at 375-76 (describing balancing of equities factor for consideration in deciding whether to issue injunctive relief).

\textsuperscript{115} See id. at 376-77 (addressing public interest factor for consideration in deciding whether to issue injunctive relief); see also Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (discussing particular regard for public consequences in fashioning injunctive relief).

\textsuperscript{116} See Winter, 129 S. Ct. at 377 (stating lower courts understated preliminary injunction's burden imposed on Navy).

\textsuperscript{117} See id. at 377-78 (noting Court's deference to military officials and Navy officers).

\textsuperscript{118} See id. (deferring to military officials' and Navy officers' professional judgments).

\textsuperscript{119} See id. at 378 (discussing effects of affirming injunction).
public’s ecological, scientific and recreational interest. Weighing the interests of the public, the Court found that the overall public interest strongly favored the Navy.

V. CRITICAL ANALYSIS: SAVE THE EIS FOR LATER: THE NATIONAL SECURITY INTEREST TIDAL WAVE AND THE CRESTING OF IRREPARABLE HARM

The Supreme Court’s holding in Winter allowed the Navy to avoid preparing an EIS in accordance with NEPA. This holding is inconsistent with NEPA’s protective characteristics, which may increase the burden on future NEPA pleas for environmental protection. The Court’s holding fails to adhere to NEPA’s action-forcing procedural requirement—the EIS—which is the center of the legislation. The Court also directed its focus to national security. In exercising its equitable discretion by balancing the equities and evaluating the public interest, the Court bypassed the Navy’s failure to comply with NEPA and skirted the issue of irreparable harm.

A. Failure to Adhere to NEPA’s Action-forcing Procedures

Serving as the heart of NEPA, the EIS fulfills Congress’s environmental protection objectives by ensuring that NEPA’s policies and goals are intertwined with the Federal agencies’ actions. NEPA’s primary goal is informed decision making. Agencies operating under NEPA’s obligations also have an affirmative duty to garner public involvement, giving the public an opportunity for

120. See id. at 378 (discussing effects of vacating injunction).
121. See Winter, 129 S. Ct. at 378 (concluding public interest in Navy’s training outweighs potential environmental injuries and irreparable harms).
122. Eubanks, supra note 2, at 649 (analyzing effects of Court’s holding).
123. See id. (discussing holding’s effects on NEPA).
124. See id. at 650 (affirming EIS is NEPA’s lynchpin).
125. See id. (describing Winter as national security case).
126. See id. at 649-50 (viewing matter as national security case rather than substantive environmental case).
127. See Eubanks, supra note 2, at 650 (noting EIS is crux of NEPA and serves to ensure fulfillment of Congressional goals and objectives). The EIS must “provide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” Id. (citing 40 C.F.R. pt. 1502.1 (2009)).
128. See Eubanks, supra note 2, at 649-50 (stating NEPA’s primary goal); see also 42 U.S.C. §§ 4321, 4332 (2006) (explaining NEPA’s goals and obliging federal government to use practicable means to improve plans and actions affecting environment).
meaningful participation in the NEPA process as Congress intended. The EIS, therefore, must be prepared prior to implementing agency action.

The EIS "shall be used . . . in conjunction with other relevant materials to plan actions and make decisions, rather than to justify decisions already made." In other words, the timing of an agency's EIS submission is essential to NEPA's primary goal. Justice Ginsburg's dissent in Winter highlights NEPA's procedural nature and the pre-action EIS preparation requirement. Justice Ginsburg frames the central issue as "whether the Navy must prepare an EIS." Justice Ginsburg points out that the Navy did not challenge its obligation to prepare an EIS pursuant to NEPA. In fact, the Navy submits that it will prepare and complete an EIS about a month after the completion of its Southern California exercises.

Justice Ginsburg's main argument against the majority is that the Navy acted first, "thwarting the very purpose an EIS is intended to serve." The dissent would have upheld the district court's imposition of injunctive conditions until the Navy's completion of the EIS as a careful balancing of the equities, and not as an abuse of its equitable discretion.

129. See Eubanks, supra note 2, at 651 (describing how public input is required part of NEPA process); see also 40 C.F.R. pt. 1500.2 (2009) (commanding federal agencies to encourage and facilitate public involvement in decision-making process for NEPA governed actions).

130. See Eubanks, supra note 2, at 651 (addressing timing of EIS preparation); see also 40 C.F.R. pt. 1502.2(f) (stating agencies must complete EIS before taking any action considered therein).

131. Eubanks, supra note 2, at 651 (discussing CEQ regulations regarding EIS's use and purpose); see also 40 C.F.R. pts. 1502.1-2. CEQ regulations mandate, "Agencies shall not commit resources prejudicing selection of alternatives before making a final decision. [EISs] shall serve as the means of assessing the environmental impact of proposed actions, rather than justifying decisions already made." 40 C.F.R. pt. 1502.2(f)-(g).

132. See Eubanks, supra note 2, at 650-51 (noting importance of submitting EIS for planning and decision-making); see also 40 C.F.R. pt. 1502.1 (explaining purpose of EIS).


134. Id. at 387 (framing dissent's view on issue in question).

135. See id. (noting Navy concedes obligation to prepare EIS).

136. See id. (stating Navy will complete EIS after training).

137. Id. (offering dissent's conclusion).

138. See Winter, 129 S. Ct. at 387 (Ginsburg, J., dissenting) (discussing reasons for dissenting opinion).
B. Stranding Environmental Pleas in the Wake of National Security Interests

The Court placed overwhelming emphasis on the national security interest of the public and the Navy when it considered the district court's exercise of discretion to offer a preliminary injunction. The balance of equities and consideration of public interest are significant factors in assessing the propriety of issuing injunctive relief. Although these are only two of the factors involved in determining whether to issue equitable relief, the Winter Court makes vastly dominant factors, especially by combining the joint interests of the public and the Navy in national security.

Unlike Justice Ginsburg's dissent, the majority did not address the underlying merits of the case because the majority found the grant of injunctive relief to be an abuse of discretion: "[W]e find [the Navy's] interests, and the documented risks to national security, clearly outweigh the harm on the other side of the balance." The Court admitted that even if the NRDC did in fact prove a likelihood of irreparable harm (and likelihood of success on the merits), the Ninth Circuit would still have abused its discretion in affirming the injunction because the public interest in national security and the Navy's interest in effective training to ensure national defense outweigh any injury presented by the NRDC.

In recent history, the Court has vacated and reversed Circuit Courts for exercising equitable discretion to issue injunctions. In Gambell, the Court found that injury was not at all probable, and

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139. See id. at 370, 373, 376, 378, 380, 382 (emphasizing national security interest). It is interesting to note that the majority opens and closes its opinion with quotes from former presidents regarding national security. Id. at 370, 382. George Washington is quoted, "To be prepared for war is one of the most effectual means of preserving peace." Id. at 370. Theodore Roosevelt is quoted, "[T]he only way in which a navy can ever be made efficient is by practice at sea, under all the conditions which would have to be met if war existed." Id. at 382.

140. See id. at 381 (describing several factors for assessing propriety of injunctive relief).

141. See id. 374, 382 (describing criteria required for issuing preliminary injunction and explaining Navy and public interests in national security outweigh environmental interests).

142. Id. at 381 (addressing Justice Ginsburg's dissent).

143. See Winter, 129 S. Ct. at 376 (noting extraordinary weight of public interest in Navy's effective training and Navy's interest in effective, realistic training). "A proper consideration of these factors alone requires denial of the requested relief." Id. (showing overwhelming significance of public interest and balance of equities factors).

that the enjoined party would suffer greatly because it had already invested financially in its project.\textsuperscript{145} The \textit{Romero-Barcelo} Court found that although the Federal Water Pollution Control Act (FWPCA) does not preclude courts' equitable discretion, the FWPCA limits the exercise of this discretion to order relief necessary to ensure compliance therewith.\textsuperscript{146}

In \textit{Winter}, the Court hangs its harpoon on the public interest and the balance of equities factors.\textsuperscript{147} Because the lower courts used an insufficient standard for irreparable harm, the majority quickly addressed that issue and focused mostly on the public and Navy's interests in national security.\textsuperscript{148} The Court emphasizes, however, that the lower courts would have abused their discretion in issuing the injunction even if the NRDC proved a likelihood of irreparable harm.\textsuperscript{149} The majority justifies this conclusion by claiming that the NRDC's issue is the preparation of an EIS, not that the Navy must cease MFA sonar practice.\textsuperscript{150} Accordingly, courts have other remedial options to force the preparation of the EIS, rather than enjoining Navy training in the interim.\textsuperscript{151}

Justice Ginsburg's dissent highlights that this rationale defeats NEPA's entire purpose.\textsuperscript{152} National security is an extraordinary interest for the Navy in the balance of equities and for the public interest, but the majority stranded environmental pleas in the wake of national security.\textsuperscript{153} The Navy previously trained under similar conditions imposed by the injunction, and has even certified strike groups not having completed all requisite training exercises.\textsuperscript{154}

\begin{itemize}
  \item \textsuperscript{145} See \textit{Gambell}, 480 U.S. at 545 (finding injury to subsistence resources was not probable).
  \item \textsuperscript{146} See \textit{Romero-Barcelo}, 456 U.S. at 320 (finding legislation limits court's exercise of equitable discretion).
  \item \textsuperscript{147} See \textit{Winter}, 129 S. Ct. at 376 (holding abuse of discretion even if NRDC proved irreparable harm).
  \item \textsuperscript{148} See id. at 381 (examining balance of equities and consideration of public interest in assessing injunctive relief). The district court used the word "probability" concerning irreparable harm, and the Ninth Circuit used the phrase "near certainty" in regards to irreparable harm. \textit{Id.} at 372-73.
  \item \textsuperscript{149} See \textit{id.} at 376 (acknowledging vast weight of Navy's and public's interest).
  \item \textsuperscript{150} See \textit{id.} at 381 (stating NRDC's ultimate claim is EIS preparation, and not against MFA sonar in and of itself). The majority saw "no basis for jeopardizing national security, as the present injunction does." \textit{Id.}
  \item \textsuperscript{151} See \textit{id.} (mentioning alternative remedial options including declaratory relief or injunction tailored to preparing EIS).
  \item \textsuperscript{152} See \textit{Winter}, 129 S. Ct. at 389-90 (Ginsburg, J., dissenting) (addressing NEPA objectives in relation to timing of EIS preparation, namely obliging consideration of environment in decision making).
  \item \textsuperscript{153} See \textit{id.} at 382 (addressing how weight of national security interest outweighs environmental interests).
  \item \textsuperscript{154} See \textit{id.} at 380-81 (explaining training conditions).
\end{itemize}
The Court's majority seems to usher in a parade of horribles: the injunction conditions impaired or extended training; impaired or extended training makes for less well-prepared sailors; less well-prepared sailors weaken the Navy; the weakened Navy leaves the United States vulnerable to foreign attacks or reconnaissance; and, therefore, our national security would be at risk. Despite the interest in national security, the Navy failed to comply with NEPA, and the only way to enforce compliance with NEPA is to stop that activity—which requires an EIS—until the EIS is prepared.

The district court's blanket injunction was initially revamped into six measures designed to mitigate damages allegedly resulting from the training. The Navy could still train in Southern California and use MFA sonar, but would be obliged to do so in compliance with the conditions of the District Court's injunction. These conditions may or may not cause increased stoppage in the training, but without the EIS it is unclear whether training should have commenced in the first place. Regardless of all the prior litigation, the majority used national security as the overbearing interest and drowned the lower courts' exercise of equitable discretion in issuing the relief.

C. Irreparable Harm Help—Except for the Whales

The Court seemingly raised the bar on the irreparable harm standard for NEPA claims, thus making all things equal—except for the whales. Gambell made clear that the presumption of irreparable harm where an agency fails to adequately evaluate the potential environmental impact is impermissible. Simultaneously, the Gambell Court also announced that because environmental injury can seldom find an adequate remedy, when such injury is suffi-
ciently likely the balance of equities generally favors issuing an injunction to prevent damage or harm to the environment. The post-\textit{Gambell} trend, therefore, has been to apply a more lenient irreparable harm standard when NEPA is at issue.

Under the "statutory scheme and purpose" approach, NEPA's text supports the theory that injunctive relief is the only means through which courts can ensure agency compliance. NEPA differs greatly from the Alaska National Interest Land Control Act (ANILCA) in \textit{Gambell} and the FWPCA in \textit{Romero-Barcelo} because NEPA contains only procedural requirements. Courts have demonstrated a more relaxed showing of irreparable harm for injunctive relief for a NEPA claim, contrary to claims under ANILCA and FWPCA, because of NEPA's unique procedure-only status.

Justice Breyer, while serving on the First Circuit, provided an analysis of the relaxed irreparable harm standard for NEPA actions. When NEPA obligates an agency to consider environmental implications in its actions and that agency acts uninformed, then the harm intended to be prevented has already occurred. NEPA seeks to minimize any risk of harm to the environment by having agencies evaluate the circumstances of their proposed actions in relation to the environment. Justice Breyer held that courts should take into account the "potentially irreparable nature" of unin-

\begin{itemize}
  \item 163. See \textit{Gambell}, 480 U.S. at 545 (addressing lack of remedy for environmental damage and general practice to issue protective injunction); see also \textit{Eubanks}, supra note 2, at 654 (stating Court's rationale in \textit{Gambell} regarding severity of environmental injury).
  \item 164. See \textit{Eubanks}, supra note 2, at 656 (noting more lenient standard of irreparable harm under NEPA).
  \item 165. See id. at 654 (supporting with NEPA text assertion that injunction is only means by which to ensure compliance with NEPA). Under the "statutory scheme and purpose" approach, the statute's text guides the court's equitable balancing test. Id. NEPA's substantive goal to serve as the national charter for environmental protection, as indicated by Congress, can be accomplished only through compliance with the legislation. Id.
  \item 166. See id. (distinguishing NEPA from FWPCA and ANILCA on grounds that FWPCA and ANILCA contain substantive requirements, whereas NEPA only contains procedural requirements); see also \textit{Massachusetts v. Watt}, 716 F.2d 946, 952 (1st Cir. 1983) (distinguishing FWPCA from NEPA).
  \item 167. See \textit{Eubanks}, supra note 2, at 654 (describing relaxed requisite showing of irreparable harm for NEPA claims, as opposed to claims under FWPCA and ANILCA).
  \item 168. See id. at 654 (explaining relaxed irreparable harm standard for claims brought under NEPA).
  \item 169. See \textit{Watt}, 716 F.2d at 952 (describing NEPA's aim to inform government officials and that NEPA seeks to prevent harm from uninformed decision making).
  \item 170. See \textit{Sierra Club v. Marsh}, 872 F.2d 497, 500-01 (1st Cir. 1983) (discussing relationship between risks of irreparable harm and NEPA's objective to minimize risk of uninformed decision-making).
\end{itemize}
formed decision making and its increased risk of harm to the environment when considering preliminary injunction application.\(^{171}\)

Following Breyer’s First Circuit analysis and the statutory scheme and purpose approach, courts in the First Circuit, Ninth Circuit, and D.C. Circuit, among others, adopted the relaxed view of irreparable injury for actions brought for NEPA violations.\(^{172}\) The Court in *Winter*, however, marooned the lenient perspective on irreparable harm—despite its rational application in light of NEPA’s uniquely procedural nature.\(^{173}\) By doing away with the lenient standard under NEPA claims, the *Winter* Court effectively precludes NEPA plaintiffs from achieving preliminary injunctive relief where “likelihood” of irreparable harm is difficult or impossible to prove in litigation.\(^{174}\)

VI. IMPACT: *WINTER’S EFFECT ON NEPA CLAIMS*

The *Winter* holding has shown the significance of national security interests when the Court exercises discretion in deciding to fashion equitable relief.\(^{175}\) The Court also expressly set, and arguably raised, the bar for a requisite showing of irreparable harm to obtain a preliminary injunction for NEPA actions.\(^{176}\) Although narrow, the Court’s decision is binding upon all courts, and thus may affect all NEPA claims brought in the lower courts.

A. Weight of National Security

The *Winter* majority demonstrated the importance of national security for both the public interest and for the Navy’s interest in

\(^{171}\) See *id.* (stating harm to environment includes increased risk to environment through uninformed decision making).

\(^{172}\) See Eubanks, *supra* note 2, at 656 (illustrating use of more lenient irreparable harm analysis); see also *Winter v. Nat. Res. Def. Council*, 129 S. Ct. 365, 391-92 (2008) (Ginsburg, J., dissenting) (discussing flexibility of equity jurisdiction). Justice Ginsburg’s dissent discusses the inherent flexibility in equity jurisdiction: “The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility, rather than rigidity has distinguished it.” *Id.*

\(^{173}\) See Eubanks, *supra* note 2, at 656 (addressing end of lenient standard). The Court subtly and inconspicuously factored NEPA’s scheme and purpose into its balancing of the factors, thus calling attention to the importance of its procedure, but the national security interest was overwhelming. *Id.* at 657-58.

\(^{174}\) See *id.* at 657 (claiming *Winter* holding regarding irreparable harm standard precludes NEPA plaintiffs from obtaining preliminary injunction where plaintiffs cannot establish likelihood of irreparable harm).

\(^{175}\) See *Winter*, 129 S. Ct. at 381 (discussing weight of national security interest).

\(^{176}\) See Eubanks, *supra* note 2, at 656 (noting Court established strict likelihood standard for irreparable harm).
effectively trained sailors. Although the Court discounts neither the public’s environmental interest nor the effect of denying the preliminary injunction on the NRDC’s interests, the majority’s focus on national security serves as the Court’s justification for finding an abuse of discretion by the lower courts in fashioning equitable relief, and it may be used persuasively in future cases. Potential national security arguments in future cases could appeal to the Winter rationale, serving as a proverbial trump card.

Courts could distinguish Winter on its narrow scope or on the facts. The Ninth Circuit distinguished Winter six months later in Internet Specialties West, Inc. v. Milon-DiGiorgio Enterprises, Inc., a case dealing with trademark issues, which affirmed an injunction despite an appeal to Winter’s heavy public interest factor. The weight of the national security argument, however, has not yet been disturbed and may weaken pleas for environmental protection under NEPA if these NEPA claims will infringe military activities or other actions relating to national security. NEPA and the environment may fall victim to this appeal to the national security interest.

B. Raising the Irreparable Harm Bar

NEPA plaintiffs seeking relief in the form of a preliminary injunction have an increased burden after Winter. The relaxed standard for irreparable harm for NEPA claims, as established in previous cases, appears to have been set to the ordinary requisite level of establishing a likelihood of irreparable harm. The District Court for the Northern District of California in Save Strawberry

177. See Winter, 129 S. Ct. at 376 (holding courts’ abused discretion by issuing injunctive relief regardless of whether NRDC proved irreparable harm).
178. See id. at 382 (noting importance of environmental group activities).
179. 559 F.3d 985 (9th Cir. 2009).
180. Internet Specialties W., Inc. v. Milon-DiGiorgio Enter., Inc., 559 F.3d 985, 993-94 (9th Cir. 2009) (distinguishing Winter on grounds of insufficient similarity). The Ninth Circuit distinguished between the public’s national security in Winter from the defendant-appellant’s customers’ interest. Id. The Internet Specialties majority notes that the dissent would have held the Ninth Circuit defied the Winter holding by affirming the injunction and not giving more weight to the public interest. Id. at 994.
181. See Winter, 129 S. Ct. at 381 (discussing weight of national security interest).
182. See id. at 376 (discussing proper irreparable harm standard).
183. See Eubanks, supra note 2, at 656, 670 (noting effects of Winter on lenient standard of irreparable harm for claims brought under NEPA); see also Winter, 129 S. Ct. at 375-76 (setting standard of likelihood for irreparable harm); cf. Massachusetts v. Watt, 716 F.2d 946, 952 (explaining relaxed irreparable harm standard for claims brought under NEPA).
Canyon v. Department of Energy (Strawberry Canyon), however, distinguished Winter and issued injunctive relief for the plaintiff.

The Strawberry Canyon court found that Winter only addressed one of the two prongs of the preliminary injunction standard as established by the Ninth Circuit prior to Winter—the likelihood of success on the merits and possibility of irreparable harm prong. The Supreme Court in Winter neglected, according to Strawberry Canyon, to address the second prong: "A preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." The Winter holding, therefore, might not preclude injunctive relief where the plaintiff cannot show a likelihood of success on the merits, but can show irreparable injury is likely and imminent and demonstrates serious meritorious issues with a favorable balancing of the hardships.

While this holding allows plaintiffs to obtain injunctive relief without showing a likelihood of success on the merits, it still requires a showing of a likelihood of irreparable harm. The Winter likelihood standard may continue to impose an increased burden for NEPA plaintiffs seeking relief via equitable remedies. The Winter holding also forecloses relief for NEPA plaintiffs who have difficulty establishing likelihood of irreparable harm, or any degree of irreparable harm acceptable in court. For NEPA's and the environment's sake, hopefully the Winter holding continues to remain narrow and tailored to the Navy's particular interest in antisubmarine warfare training in California, other significant military operations and activities, or when national security is truly and directly at issue. Finally, to meet the Court's seemingly established likelihood standard of irreparable harm for all NEPA claims, future NEPA

185. See id. at 1180 n.2 (distinguishing Winter).
186. See id. (addressing two distinct prongs for determining appropriateness of injunctive relief). The District Court emphasized "possibility," the standard set by Ninth Circuit prior to being overruled in Winter. Winter, 129 S. Ct. at 375.
187. Strawberry Canyon, 613 F. Supp. 2d at 1180 (quoting The Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008)) (discussing second prong of preliminary injunction standard as established by Ninth Circuit before Winter decision).
188. See Strawberry Canyon, 613 F. Supp. 2d at 1181 (discussing legitimate issuance of injunctive relief via second prong of preliminary injunction standards established by Ninth Circuit).
189. See id. at 1180 (noting plaintiff must show irreparable injury is likely and imminent).
190. See Eubanks, supra note 2, at 656-57 (claiming greater difficulty for NEPA plaintiffs to obtain preliminary injunctions).
191. See id. (discussing failure to show likelihood of irreparable harm).
plaintiffs must meet a higher burden of proof in litigation before the courts.

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