No. 07-56157

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,

Plaintiffs-Appellees,

-v.-

DONALD C. WINTER, Secretary of the Navy, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(Civil Action No. 07-0335 FMC)

BRIEF OF *AMICUS CURIAE* LAW PROFESSORS HOPE BABCOCK, DAVID CASSUTO, STEPHEN DYCUS, JAMES R. MAY, ANN POWERS, AND GERALD TORRES IN SUPPORT OF PLAINTIFFS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF AMICI vii

ARGUMENT 1

I. THE SEPARATION OF POWERS DOCTRINE REQUIRES THE COURT TO ENSURE THAT THE NAVY COMPLIES WITH NEPA 3

A. The Military Must Follow NEPA as a Legitimate Limitation on Its Authority 3

B. The Issue In This Case Is Whether the Navy Has Violated NEPA, Not Whether the District Court Exceeded Its Authority 5

II. THE DISTRICT COURT PROPERLY ENJOINED THE NAVY FROM CONTINUING ITS SOCAL SONAR TESTING 9

A. NEPA's Requirement That the Navy Prepare an Environmental Impact Statement is Clearly Triggered In This Case 9

B. Allowing the Navy to Conduct the SOCAL Training Exercises Using Mid-Range Sonar Will Cause Irreparable Harm 11

C. An Injunction Is the Only Remedy In This Case That Will Ensure the Navy's Compliance with NEPA 12

D. The Public Interest Prong of the Balancing Test for Injunctive Relief Should Not Be Construed To Provide an Exemption from NEPA 15

CONCLUSION 20

CERTIFICATE OF COMPLIANCE 21

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES

Cases:

Alpine Lakes Protection Soc. v. Schlapfer,
518 F.2d 1089 (9th Cir. 1975). 14

American Motorcyclist Ass'n v. Watt,
714 F.2d 962 (9th Cir. 1983). 11

Amoco Prod. Co. v. Village of Gambell,
480 U.S. 531 (1987). 11

Andrus v. Sierra Club,
442 U.S. 347 (1979). 15

Chadha v. Immigration and Naturalization Service,
634 F.2d 408 (9th Cir. 1980). 8

Concerned About Trident v. Rumsfeld,
555 F.2d 817 (D.C. Cir. 1977). 9, 16

Dept. of Navy v. Egan,
484 U.S. 518 (1988). 6, 7

Gilligan v. Morgan,
413 U.S. 1 (1973). 7, 8

Hamdan v. Rumsfeld,
126 S.Ct. 2749 (2006). 5

High Sierra Hikers' Ass'n v. Blackwell,
390 F.3d 630 (9th Cir. 2004). 11, 12

Little v. Barreme,
6 U.S. (2 Cranch) 170 (1804)..... 3, 4

Natural Resources Def. Council v. Winter,
---F.3d---, 2007 WL 2481465 (9th Cir. Aug. 31, 2007). 11, 17

Natural Resources Def. Council v. Winter, 8:07-cv-00335-FMC-FMOx, (C.D.Cal. Aug. 7, 2007). 10

National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974). 8

No GWEN Alliance v. Aldridge, 855 F.2d 1380 (9th Cir. 1988). 9, 16

Northern Cheyenne Tribe v. Norton, ---F.3d---, 2007 WL 2595476 (9th Cir. 2007). 17, 18

Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985). 5, 8

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978). 13, 14, 19

Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985). 11

Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974). 14

U.S. v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483 (2001). 19

Weinberger v. Catholic Action of Hawaii/ Peace Educ. Project, 454 U.S. 139 (1981). 9, 10, 15

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982). 12, 13, 14

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). 1, 3, 4

Statutes:

Comprehensive Environmental Response Compensation and Liability Act
42 U.S.C. § 9620(j) 16

Clean Air Act
42 U.S.C. § 7418(b) 16

Clean Water Act
33 U.S.C. § 1323(a) 16

Coastal Zone Management Act
16 U.S.C. § 1456(c)(1)(b) 16

Endangered Species Act
16 U.S.C. § 1536(j) 16

Marine Mammals Protection Act
16 U.S.C. § 1371 (a)(5)(f)(1). 6

National Environmental Policy Act
42 U.S.C. § 4321 *et. seq.* 1
42 U.S.C. § 4332(2)(c) 10

Resource Conservation and Recovery Act
42 U.S.C. § 6961(a) 16

Pub. L. No. 98-94, § 110, 97 Stat. 614. 16

Pub. L. No. 100-256, § 204(c), 102 Stat. 2623. 16

Safe Drinking Water Act
42 U.S.C. § 300(j)(6) 17

Toxic Substances Control Act
15 U.S.C. § 2621 17

Regulations:

40 C.F.R. § 1502 10
40 C.F.R. § 1508 10

Other Sources:

Brief of Federal Defendants-Appellants,
Natural Resources Def. Council v. Winters, No. 07-56157 (9th Cir. Sept. 14, 2007) 6

Michael D. Axline, "Constitutional Implications of Injunctive Relief Against Federal Agencies in Environmental Cases,"
12 Harv. Envtl. L. Rev. 1 (1988). 19

The Federalist No. 47(James Madison) available at http://thomas.loc.gov/home/histdox/fed_47.html. 9

The Federalist No. 48(James Madison) available at http://thomas.loc.gov/home/histdox/fed_48.html. 9

The Federalist No. 51(Alexander Hamilton or James Madison) available at http://thomas.loc.gov/home/histdox/fed_51.html. 9

INTERESTS OF AMICI

The Amici Curiae are professors of law with expertise in the fields of national security law, constitutional law, and environmental law who have a particular interest in ensuring the proper understanding of the intersection among these areas of the law. Professor Hope Babcock teaches in the areas of environmental and natural resources law at Georgetown University School of Law, and includes among her scholarship the article National Security and Environmental Laws: A Clear and Present Danger?, 25 Va. Envtl. L.J. 105 (2007). Professor David Cassuto writes and teaches at Pace Law School in the area of environmental law. Professor Stephen Dycus of Vermont Law School writes and lectures in the area of national security law; his publications include NATIONAL DEFENSE AND THE ENVIRONMENT (University Press of New England 1996). Professor James R. May of Widener University School of Law writes and lectures in the area of environmental and constitutional law, is chair of the ABA's Section on Environment and Energy Resource's Inaugural Task Force on Constitutional Law, and is the founder and co-director of his law school's Master's of Marine Policy program. Professor Ann Powers writes and teaches in the area of environmental law with a particular focus on coastal and ocean law issues and citizen litigation. Professor Gerald Torres is Bryant Smith Chair in Law at the

University of Texas at Austin and a former advisor to the United States Attorney General on environmental issues.

We respectfully submit this brief to clarify the proper limitation of Executive authority where Congress has clearly spoken. The case before this Court involves an effort by the United States Department of the Navy and the other Appellants (collectively "Navy") to avoid the express congressional mandate to comply with the National Environmental Policy Act ("NEPA") as it applies to the use of sonar in Naval training exercises in Southern California. The effect of the Navy's arguments, if accepted, would be to create a national security exemption to NEPA not found in the statute. We submit this brief to urge this Court to decline the Navy's invitation to have the Court rewrite NEPA. Instead, we urge this court to uphold the District Court's preliminary injunction against the use of mid-range sonar in the Navy's training exercises to ensure that the Navy accords the proper respect for an act of Congress.

No counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief. Filing and printing costs were paid by the Environmental and Natural Resources Law Clinic at the Vermont Law School.

We have received consent to file this amicus brief from the parties to this litigation.

ARGUMENT

> It is quite impossible, however, when Congress did specifically address itself to a problem, . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring).

Though writing about a different exercise of executive authority more than fifty years ago, Justice Frankfurter might well have been writing an opinion in this case. Here, the Court is presented with an unavoidable conflict between this Court's obligation to ensure that the Navy complies with a clear congressional mandate on the one hand, and the Navy's assertion of a national security excuse for non-compliance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et. seq., on the other. A proper regard for the Constitution's division of authority between the President and Congress demands that NEPA's provisions be given effect. Accordingly, the Navy should not be authorized to avoid these requirements through a bald assertion of national security concerns.

This is not, as the Navy suggests, a case about judicial interference with the affairs of the military. This is, instead, a case of the military's proffering claims of a threat to national security as a justification for the judiciary to ignore an

unambiguous congressional mandate in the form of NEPA, a statute that has long been determined to apply to the actions of the military. United States Supreme Court precedent makes plain that, except in limited circumstances not present in this case, adherence to the constitutional doctrine of separation of powers requires that the military conform its actions to such a plain congressional directive.

For this reason, the District Court correctly enjoined the Navy's use of mid-range sonar as part of its training in Southern California ("SOCAL"). Given the District Court's finding that the use of this sonar risks significant harm to marine species, there can be no question that the Navy is obligated to fully comply with NEPA. To allow less in this case would result not only in irreparable harm, as the District Court found, but would constitute a repudiation of a congressional enactment signed into law by the President. Congress has already determined that, on balance, the benefits of requiring the military to engage in a public analysis of the environmental impacts of its proposed actions outweigh the risks to national security.

This conclusion is evident from the fact that Congress has included national security exemptions in a broad range of environmental laws but has not done so in NEPA. This Court should not accept the Navy's invitation to revisit this congressional determination under the guise of considering the public interest as part of the Court's deliberations over the appropriateness of injunctive relief.

Courts should not, indeed must not, second-guess Congress by allowing the Navy to avoid its NEPA obligation to engage in a public process in which the Navy evaluates alternatives to the use of mid-range sonar in the SOCAL training exercises.

I. THE SEPARATION OF POWERS DOCTRINE REQUIRES THE COURT TO ENSURE THAT THE NAVY COMPLIES WITH NEPA.

A. The Military Must Follow NEPA as a Legitimate Limitation on Its Authority.

As eloquently explained by Justice Frankfurter in his Youngstown concurrence, respect for the constitutional division of authority between the President and Congress requires the federal courts to defer to Congress where that branch of government has spoken clearly. Youngstown, 343 U.S. at 609 (Frankfurter, J., concurring). Even in cases where Congress has spoken in terms far less specific than NEPA, the Supreme Court has held that presidential power must yield to legislative enactments.

For instance, more than two centuries ago, in Little v. Barreme, the Supreme Court upheld as a valid limitation on presidential authority, an act of Congress decreeing that only vessels bound for a French port could be seized. 6 U.S. (2 Cranch) 170, 177-79 (1804). Chief Justice Marshall, writing for a unanimous Court, clearly laid out the distinction between unilateral presidential power regarding military matters in the absence of congressional action and the limited

scope of such unilateral authority in the face of countervailing congressional enactments. Id. While acknowledging the potential that compliance with the statute at issue might be less efficacious than the President's noncompliant orders to the Navy, the Supreme Court nonetheless held that the presidential orders were invalid as contrary to the statute. Id. The Supreme Court recognized, as should this Court, that the judiciary has a responsibility to ensure that the military is not given free reign to rewrite enactments of Congress, such as NEPA, no matter how important the ends sought to be achieved.

The appropriate and historic reluctance of the Supreme Court to authorize an expansion of executive authority into the legislative arena, based upon claims of concern for national security, has become part of the fabric of the nation's history. As all law students learn in their Constitutional Law courses, the Supreme Court rejected President Truman's argument in Youngstown that he was authorized, as Commander in Chief of the Armed Forces, to direct the Secretary of Commerce to take control of and operate the nation's steel mills. 343 U.S. at 587. The Supreme Court easily recognized this as an improper encroachment on the legislative function, and it held that the President's military authority did not authorize this violation of the Constitution's separation of powers doctrine. Id.

Correspondingly, in the present case the Navy's assertions of national security

risks cannot provide a basis for interfering with the prerogative of Congress to prescribe the manner in which the military exercises its authority.

A recent case demonstrating the Supreme Court's dim view of such efforts by the executive branch is Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006). In Hamdan, the Supreme Court held that the President was not authorized to convene a military commission to try an alien prisoner detained at Guantanamo Bay, Cuba. Justice Stevens wrote for the majority, stating that "[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." Id. at 2774 n. 23. Similarly, in the case before this Court, the Navy may not disregard the limitations that Congress has imposed on its actions through the enactment of NEPA.

B. The Issue In This Case Is Whether the Navy Has Violated NEPA, Not Whether the District Court Exceeded Its Authority

The D.C. Circuit Court of Appeals has held that matters of national security should be "committed to the care of the political branches." Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208 (D.C. Cir. 1985) (emphasis added). In its argument to this Court, the Navy ignores that there is, in fact, another political branch apart from the Executive. The Navy improperly relies upon Sanchez-Espinoza as support for its argument that the Court should decline to order compliance with NEPA, in this instance, because of national security concerns. Brief of Federal

Defendants-Appellants at 26, 31. The Navy tacitly asks this Court to ignore the fact in this case that the District Court was applying NEPA, an act of Congress, not exercising independent judicial authority. In this way, the Navy neatly side-steps the central issue in this case, namely whether the military can rewrite NEPA to include a national security exemption not provided by Congress.

The Navy's reliance on Dept. of Navy v. Egan, 484 U.S. 518 (1988), ("Egan") is also a diversion from the proper framework for analyzing the present case. The Navy's reliance on Egan is misplaced in at least two fundamental ways. First, in discussing the balance between environmental and national security concerns, the Navy recalls its invocation of a national security exemption under the Marine Mammals Protection Act ("MMPA"), pointing out that "Congress expressly left this important balancing decision to the Executive Branch, and Congress' judgment should be respected." Brief of Federal Defendants-Appellants at 31, citing Egan, 484 U.S. at 530.

The Navy thus appears to suggest that, in deciding the Plaintiffs' NEPA claims, the Court should be guided by the MMPA. In the MMPA, Congress recently amended the statute to expressly authorize the Secretary of Defense to exempt some military actions. 16 U.S.C. § 1371(a)(5)(f)(1). Unlike the MMPA, however, Congress has not amended NEPA to add an exemption for national security. Therefore, the Navy's suggestion lacks any merit. This Court should not

defer to congressional intent expressed in the MMPA, a completely separate statute, when it assesses the Plaintiffs-Appellees' NEPA claim.

The absence of a national security exemption in NEPA highlights a second and even deeper flaw in the Navy's reliance on Egan. Egan is cited by the Navy for the proposition that "unless Congress specifically has provided otherwise, courts have traditionally been reluctant to intrude upon the authority of the Executive in military and national security affairs." Egan, 484 U.S. at 530 (emphasis added). In this case, Congress has specifically and plainly required that all federal agencies, including military departments, comply with NEPA.[1] Thus, this case falls squarely outside of even the quoted dictum in Egan.

Gilligan v. Morgan, 413 U.S. 1 (1973), ("Gilligan") is also inapposite. Cited in Brief of Federal Defendants-Appellants at 25. In Gilligan, the plaintiffs asked the court to assume a supervisory role over the military (the Ohio National Guard in that case). The Gilligan decision includes an extensive discussion of the fact that the responsibility for making decisions regarding the management of the military should rest with the elected branches of government, both Congress and the Executive:

> The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of

[1] See Section II, page 9, below for a more complete discussion of the relevant NEPA requirements.

> the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system.

Gilligan, at 10 (emphasis added). This analysis supports the conclusion, discussed above in relation to Sanchez-Espinoza, that the issue before this Court is not whether the District Court has overreached, but whether the Navy has upset the balance between the Legislative and Executive Branches.

It is appropriate, in fact necessary, for this Court to address this balance. The Judicial Branch has a constitutional obligation to ensure that the Executive Branch has not exceeded its constitutional authority and to restrain any unlawful exercise of power. See, e.g., Chadha v. Immigration and Naturalization Service, 634 F.2d 408, 419 (9th Cir. 1980) ("It is the Judiciary's prerogative . . . to adjudicate a claimed excess by a coordinate branch of its constitutional powers.") judgment aff'd, 462 U.S. 919 (1983); National Treasury Employees Union v. Nixon, 492 F.2d 587, 604 (D.C. Cir. 1974) ("[T]he judicial branch of the Federal Government has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch.").

The exercise of judicial authority in this case falls squarely within our nation's system of checks and balances of separated powers. The Framers placed the obligation and authority in the courts to oversee the Executive Branch's actions

in order to prevent the centralization and abuse of federal power. The Federalist Nos. 47, 48 (James Madison), No. 51(Alexander Hamilton or James Madison) available at http://thomas.loc.gov/home/histdox/fedpapers.html.[2] In order for NEPA, as a duly enacted law passed by Congress and signed by the President, to have meaning, this Court must require the Navy to comply with NEPA's provisions.

II. THE DISTRICT COURT PROPERLY ENJOINED THE NAVY FROM CONTINUING ITS SOCAL SONAR TESTING

A. NEPA's Requirement That the Navy Prepare an Environmental Impact Statement is Clearly Triggered In This Case

NEPA does not provide for any special treatment of the Navy. As this Court ruled in No GWEN Alliance v. Aldridge, "[t]here is no 'national defense' exception to NEPA." 855 F.2d 1380, 1384 (9th Cir. 1988). In No GWEN Alliance, this Court cited the D.C. Circuit's holding in Concerned About Trident v. Rumsfeld that "[t]he Navy, just like any federal agency, must carry out its NEPA mandate 'to the fullest extent possible.'" 555 F.2d 817, 823 (D.C. Cir. 1977), citing 42 U.S.C. § 4332. Also, in Weinberger v. Catholic Action of Hawaii/ Peace Educ.

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[2] The Federalist No. 47 (James Madison) ("The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts"); The Federalist No. 48 (James Madison) ("These Departments Should Not Be So Far Separated as to Have No Constitutional Control Over Each Other"); The Federalist No. 51 (Alexander Hamilton or James Madison) ("The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments").

Project, ("Catholic Action") a case clearly implicating national security, the Supreme Court ruled that the Navy must comply with NEPA. 454 U.S. 139, 146 (1981) ("The Navy must consider environmental consequences in its decisionmaking process, even if it is unable to meet NEPA's public disclosure goals by virtue of FOIA Exemption 1.").

Turning to the merits in this case, there can be no reasonable disagreement that the requirements of NEPA are triggered. The Navy's proposal to use mid-range sonar in the SOCAL training clearly falls within the category of "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1508. Therefore, the Navy is required to prepare an environmental impact statement before proceeding. 40 C.F.R. § 1502.

As the District Court found in this case, the Navy admits that the SOCAL exercises "will disturb or injure nearly thirty species of marine mammals, including endangered and threatened species." Order in Natural Resources Def. Council v. Winter, 8:07-cv-00335-FMC-FMOx, at 8-9 (C.D.Cal. Aug. 7, 2007). The Navy's report also concluded that its actions "will result in approximately 170,000 instances of Level B harassment, including 8,000 temporary threshold shifts exposures and 466 cases of permanent injury to beaked and ziphiid whales." Id. In addition, in this Court's decision staying the District Court's preliminary injunction, Judge Kleinfeld has acknowledged the possibility of damage to whales,

stating that "[t]he loud noise may be quite harmful to whales and other marine mammals." Natural Resources Def. Council v. Winter, ---F.3d---, 2007 WL 2481465 at *2 (9th Cir. Aug. 31, 2007). Given the risk to whales as acknowledged by the Navy and the court, it is clear that NEPA applies to the Navy's proposed use of mid-range sonar.

B. Allowing the Navy to Conduct the SOCAL Training Exercises Using Mid-Range Sonar Will Cause Irreparable Harm

The traditional bases for injunctive relief are irreparable injury and inadequacy of legal remedies. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987). With regard to the irreparable harm prong of this analysis, the Supreme Court has stated that "[e]nvironmental injury, by its nature, can seldom be remedied adequately by money damages and is often . . . irreparable." Id. at 545. As this Court has noted, "[i]n the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action." High Sierra Hikers' Ass'n v. Blackwell, 390 F.3d 630, 642 (9th Cir. 2004), citing Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985). For this reason, "the presence of strong NEPA claims gives rise to more liberal standards for granting an injunction." Id. citing American Motorcyclist Ass'n v. Watt, 714 F.2d 962, 965 (9th Cir. 1983). In High Sierra, based upon facts closely analogous to the facts of the present case, this Court upheld an order issued by the district court enjoining the issuance of special use permits by the United States Forest Service until an

environmental impact statement was completed. High Sierra at 645. In the instant case, the District Court appropriately enjoined the Navy from further sonar use pending compliance with NEPA's mandates. This injunction was proper in light of the potential damage to marine species and their environment, and the possibility that this harm could be avoided if the Navy were required to prepare an environmental impact statement, engage in the public process mandated by NEPA, and implement feasible mitigation measures.

C. An Injunction Is the Only Remedy In This Case That Will Ensure the Navy's Compliance with NEPA

A careful review of the Supreme Court's jurisprudence regarding available remedies and the appropriateness of injunctions in environmental cases shows that the district court properly granted injunctive relief in this case. An injunction is the only means, under the facts here, and in light of the purposes and language of the statute, to ensure that the Navy complies with NEPA.

In Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982), ("Romero-Barcelo") the Supreme Court plainly states that the question of whether injunctive relief should be granted turns on whether such a remedy is necessary to ensure compliance with the applicable statute. Id. at 314-15, 320. In this case, the only way to ensure that the Navy will comply with NEPA is an injunction barring the Navy's use of mid-range sonar until it completes an environmental impact statement and provides the opportunity for public review and comment.

A careful reading of Romero-Barcelo bears out this conclusion. In Romero-Barcelo, the Court looked to the purpose and structure of the Clean Water Act and carefully parsed the range of remedies contemplated by Congress. Based on this analysis, the Supreme Court noted first that the purpose of the Clean Water Act is to ensure the protection of the "integrity of the nation's waters." Id. at 314. The Court further noted that remedies available under the Act to accomplish that purpose include not only permanent injunctions, but also temporary injunctions, penalties, and compliance schedules. Id. at 314-317. Based on this range of potential remedies, the Supreme Court concluded that Congress did not intend to require all non-permitted discharges immediately cease and held that the district court retained its traditional power to consider equitable factors in crafting appropriate relief. Id. Significantly, the Supreme Court made it clear that the measure of appropriate relief is whether the relief is "necessary to ensure prompt compliance with the Act." Id. at 320.

In light of Romero-Barcelo, it is clear that this Court's analysis cannot hinge on a brief recital of snippets from that decision, as provided by the Navy, but that this case requires a more careful analysis of NEPA and the statute's application to the present facts. A review of the Supreme Court's decision in Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978), ("TVA") provides important context for that analysis. The TVA decision involved explicit provisions of the Endangered

Species Act prohibiting the destruction of critical habitat. Id. at 173. Given the language of the Endangered Species Act, and the fact that the proposed dam would destroy critical habitat, "only an injunction could vindicate the objectives of the Act." Romero-Barcelo, 456 U.S. at 314 (discussing TVA). Again, the Supreme Court's decision makes clear that, while injunctions do not issue automatically as a general matter, there are circumstances in which an injunction is the only option, depending on the facts of the case and the statute involved.

In the present case, nothing short of an injunction against the Navy's use of mid-range sonar in the SOCAL exercises will ensure compliance with NEPA. In part, this is due to the unique nature of NEPA's requirements. As noted by this Court,

> NEPA is essentially a procedural statute and we have recognized that careful compliance with its provisions is necessary to fulfill the statute's fundamental goals: "(The EIS's) form, content, and preparation (must) substantially (1) provide decision-makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in the light of its environmental consequences, and (2) make available to the public, information of the proposed project's environmental impact and encourage public participation in the development of that information."

Alpine Lakes Protection Soc. v. Schlapfer, 518 F.2d 1089, 1090 (9th Cir. 1975) (citations omitted), quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1282 (9th Cir. 1974).

Further, as the Supreme Court has explained, "[t]he thrust of [NEPA] is that environmental concerns be integrated into the very process of agency decisionmaking. The 'detailed statement' it requires is the outward sign that environmental values and consequences have been considered during the planning stage of agency actions." Catholic Action, 454 U.S. at 143, citing Andrus v. Sierra Club, 442 U.S. 347, 350 (1979).

Here, NEPA's purposes cannot be achieved if the Navy proceeds with the use of mid-range sonar before fully understanding the potential environmental consequences and providing an opportunity for public participation in the development of that information. The Navy cannot achieve compliance with NEPA by preparing an environmental impact statement that evaluates the impacts of a decision already made and actions already taken. Such an effort, apart from being a waste of time and resources, could only serve as a post-hoc rationalization and with no legitimate purpose. The only remedy that will ensure compliance with NEPA under the facts of this case is an injunction.

D. The Public Interest Prong of the Balancing Test for Injunctive Relief Should Not Be Construed To Provide an Exemption from NEPA

This Court should not second-guess Congress by creating a de facto national security exemption from NEPA for the Navy based upon an application of the so-called fourth prong (i.e. public interest analysis) when weighing whether to grant

an injunction. As noted above, "There is no 'national defense' exception to NEPA... 'The Navy, just like any federal agency, must carry out its NEPA mandate 'to the fullest extent possible' and this mandate includes weighing the environmental costs of the [project] even though the project has serious national security implications.' " No GWEN Alliance, 855 F.2d at 1384; quoting Concerned About Trident, 555 F.2d at 823. Congress knows how to expressly exempt specific national defense activities from strict compliance with NEPA, and it has done so in other cases.[3]

NEPA was enacted more than thirty-five years ago. Since then, nearly all major substantive environmental laws include an expressed exemption from their provisions for "overriding" or "paramount" national security concerns.[4] Congress

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[3] See, e.g., Pub. L. No. 98-94, § 110, 97 Stat. 614 (procurement and deployment of the MX missile); Pub. L. No. 100-256, § 204(c), 102 Stat. 2623 (1988) (military base closures and realignments).

[4] See, e.g., Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9620(j) (2002) ([t]he President may issue orders to exempt specific Dept. of Energy or Dept. of Defense facilities as necessary for national security reasons); Clean Air Act, 42 U.S.C. §7418(b) (2003) (the President may exempt any executive branch emission source for one year if in the paramount interest of the United States); Clean Water Act, 33 U.S.C. §1323(a) (1996) ([t]he President may exempt for up to one year if in "the paramount interest of the United States"); Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1)(b) (1996) ([t]he President may exempt an activity that is in the "paramount interest of the United States" if a federal court finds a federal activity to be inconsistent with an approved state program); Endangered Species Act, 16 U.S.C. §1536(j) (2003) ([a]n exemption may be granted if the Secretary of Defense finds it necessary for national security reasons); Resource Conservation and Recovery Act, 42 U.S.C. § 6961(a) (1996) ([t]he President may exempt from application of the law but a

knows how to exempt the Navy from the requirements of NEPA and Congress has *not* done so.

To properly consider the equities in this case, the public interest in national security must be balanced against the Navy's own lack of planning and minimal efforts at compliance with NEPA. As Judge Smith noted in his dissent to the recent decision by this Court granting the Navy's emergency motion to stay the preliminary injunction, "It is the Navy's sharp starboard tack from its recent training practices that has left it in irons fighting environmental laws, not a failure by the district court to consider national security or the public interest." Natural Resources Def. Council v. Winter, ---F.3d---, 2007 WL 2481465 at *14-15 (9th Cir. Aug. 31, 2007) (Smith, J., dissenting).

This Court's recent decision in Northern Cheyenne Tribe v. Norton, ---F.3d---, 2007 WL 2595476 (9th Cir. 2007), is instructive in this regard. In Northern Cheyenne, the district court was able to craft a phased injunction that allowed an initial, limited phase of a coal bed methane project to proceed while enjoining development of the majority of the proposed project until an adequate

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report must be filed with Congress each year, including a list of the reasons for the exemption); Safe Drinking Water Act, 42 U.S.C. § 300(j)(6) (1996) (facilities may be exempted by the President if it is within the "paramount interest of the United States to do so."); Toxic Substances Control Act, 15 U.S.C. § 2621 (2006) (when requested by the President for national security reasons the Administrator of the Environmental Protection Agency is to exempt the action from compliance with the TSCA).

environmental impact statement was completed. The district court in Northern Cheyenne took into account, as part of its public interest analysis, that "[coal bed methane] is an efficient and clean-burning fossil fuel that produces fewer emissions than other fossil fuels" and that "the public interest favors both developing [coal bed methane] and protecting the environment." Id. at *3 (quoting district court decision).

In this case, as in Northern Cheyenne, the District Court might have been able to craft an injunction that minimized impacts on national security had the Navy made a meaningful effort to comply with NEPA. As the case stands, however, and in contrast to the facts in Northern Cheyenne, the only means available to the District Court to ensure that the Navy complies with NEPA was to enjoin the use of mid-range sonar as part of the SOCAL training exercises. For this reason, this Court should uphold the District Court's decision.

If this Court, however, accepts the Navy's invitation to lift the injunction based upon a public interest analysis, it would effectively authorize the Navy to avoid its obligation to comply with NEPA on the basis of national security, a result entirely inconsistent with the intent and express will of Congress. Lifting the District Court's injunction would thus conflict with this Court's duties under the separation of powers doctrine, as discussed supra in Section I. The Supreme Court has made clear that the Judiciary's discretion is not boundless, explaining that,

> A district court cannot . . . override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited. "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is ... for the courts to enforce them when enforcement is sought." Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute. Their choice (unless there is statutory language to the contrary) is simply whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not whether enforcement is preferable to no enforcement at all.

U.S. v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483, 497–98 (2001)(internal citations omitted) quoting TVA; see also Michael D. Axline, "Constitutional Implications of Injunctive Relief Against Federal Agencies in Environmental Cases," 12 Harv. Envtl. L. Rev. 1, 54 (1988) ("The [separation of powers] doctrine tells us that agencies are exercising legislative power when they violate nondiscretionary statutory commands, and that courts are exercising a legislative type of power when they decide not to enjoin such violations.").

Accordingly, this Court should reject the Navy's invitation to employ its equitable powers to overturn the obvious policy choices made by Congress and repeatedly recognized by the courts, including this one. The Court's decision in this case will have significant implications for the military's compliance with NEPA in a broad range of settings. We naturally assume that our nation's armed forces invariably act with the goal of protecting our national security. If the Navy's assertion of national security risks were deemed sufficient to overcome a clear and specific mandate of Congress, a broad range of military activities would

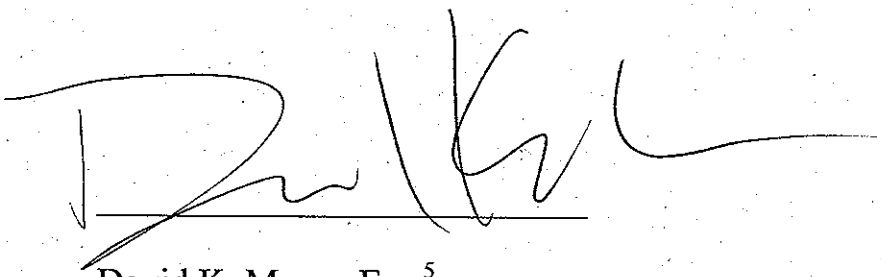
inevitably be effectively insulated from NEPA compliance and, presumably, from other congressional authority. Such a result would have major implications not only for our environment, but also for our system of government.

Conclusion

This Court should affirm the District Court's decision and reinstate the District Court's injunction on the Navy's use of mid-range sonar in the SOCAL training exercises until the Navy fully complies with NEPA by completing an environmental impact statement.

October 1, 2007

Respectfully submitted,



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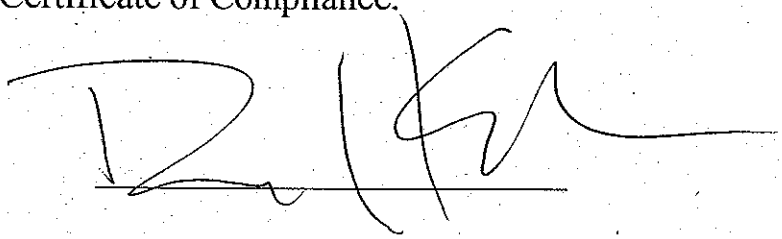
[5] I gratefully acknowledge the invaluable assistance of law students Michael Cretella, Rebecca Turner, and Emily Stark in the preparation of this brief.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(C), and Ninth Circuit Rule 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points or more, and, as determined by the undersigned's word processing program, contains 5,338 words, not including the Table of Contents, Table of Authorities, and Certificate of Compliance.

October 1, 2007



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CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing **BRIEF OF *AMICUS CURIAE* LAW PROFESSORS HOPE BABCOCK, DAVID CASSUTO, STEPHEN DYCUS, JAMES R. MAY, ANN POWERS, AND GERALD TORRES IN SUPPORT OF PLAINTIFFS- APPELLEES** to be served by United States Mail and electronic mail, this 1st day of October, 2007, upon the following:

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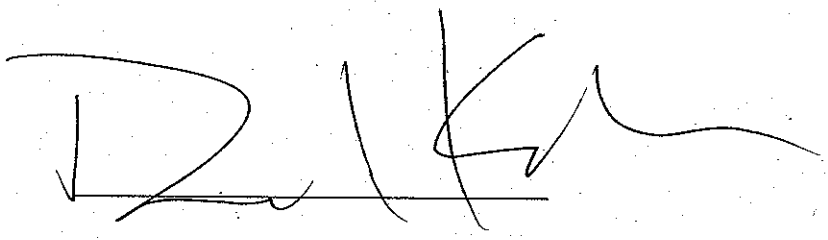

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