

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**



DATE: July 3, 2006

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REGARDING: CV 06-4131: NRDC v. WINTER

****ORDER RE BRIEFING****

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NATURAL RESOURCES
DEFENSE COUNCIL, INC., ET
AL.,

Plaintiffs,

vs.

DONALD C. WINTER, Secretary
of the Navy; ET AL.,

Defendants.

CV 06-4131 FMC (JCx)

TEMPORARY RESTRAINING
ORDER

The Application of Plaintiffs Natural Resources Defense Council, Inc.; International Fund for Animal Welfare; Cetacean Society International; Ocean Futures Society; and Jean-Michel Cousteau (collectively, the "Plaintiffs"), for Temporary Restraining Order pursuant to Federal Rule of Civil Procedure 65(b) and Local Rules 7-19 and 65-1, after notice to Defendants, was duly considered by this Court. After considering Plaintiffs' Application and Defendants' briefing and supporting documentation, and good cause appearing therefor, the Court concludes that Plaintiffs' Application for a Temporary Restraining Order should be **GRANTED**. This conclusion is based on the following findings of fact and conclusions of

1 law:

- 2
- 3 1. Defendant the United States Navy (“the Navy”) plans to use high
4 intensity mid-frequency active (“MFA”) sonar in its Rim of the Pacific
5 2006 training exercise (“RIMPAC 2006”), which is scheduled to take
6 place from June 26 to July 28, 2006, in the waters off the coast of Hawaii.¹
7 Ships and submarines are scheduled to begin exercises on July 5, 2006;
8 and “anti-submarine warfare training exercises utilizing mid-frequency
9 active sonar [will begin] on July 6, 2006.” (Donnelly Decl. ¶ 37.)
- 10 2. Plaintiffs have submitted considerable convincing scientific evidence
11 demonstrating that the Navy’s use of MFA sonar can kill, injure, and
12 disturb many marine species, including marine mammals. Additionally,
13 Defendants’ own report regarding the environmental impact of RIMPAC
14 2006 estimates a potential for a total of 33,331 “Level B harassment
15 exposures,”² to over 20 species of marine mammals. (AR 316, AR 4849.)
- 16 3. The Marine Mammal Protection Act (“MMPA”), 16 U.S.C. §§ 1361-1407,
17 provides for the protection of marine mammals: “resources of great
18 international significance, esthetic and recreational as well as economic.”

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20 ¹Plaintiffs’ Complaint alleges that, during the course of RIMPAC 2006, the Navy
21 will broadcast high-intensity sonar, “known to kill and injure whales and other marine life,
22 into some of the richest marine habitat in the United States and the world, including the
23 Northwestern Hawaiian Islands Marine National Monument, created just two weeks ago by
24 Presidential Executive Order.” (Compl. ¶1.) Defendants’ maintain that “RIMPAC 06
25 activities will not occur within the newly designated Northwestern Hawaiian Islands
26 Marine National Monument.” (Donnelly Decl. ¶25.)

27 ²Level B harassment is defined as “any act that disturbs or is likely to disturb a
28 marine mammal by causing disruption of natural behavioral patterns. . . .” Level A
harassment is defined as “any act that injures or has the significant potential to injure a
marine mammal in the wild . . .” 16 U.S.C. § 1362. The threshold for Level A harassment
is estimated at 215 dB. (Fromm Decl. ¶ 9.)

1 16 U.S.C. §1361(6). The MMPA provides that “it is the sense of the
2 Congress that they should be protected and encouraged to develop to the
3 greatest extent feasible commensurate with sound policies of resource
4 management and that the primary objective of their management should
5 be to maintain the health and stability of the marine ecosystem.
6 Whenever consistent with this primary objective, it should be the goal to
7 obtain an optimum sustainable population keeping in mind the carrying
8 capacity of the habitat.” *Id.* Although the MMPA provides for
9 exceptions to its moratorium on the “taking” of marine mammals, such
10 exceptions apply where the contested activities are not having, or do not
11 have the potential to have, more than a “negligible impact” on the
12 affected animals. 16 U.S.C. § 1371(a)(5)(A).

- 13 4. Defendant National Marine Fisheries Service (“NMFS”) is the branch of
14 the Commerce Department that is responsible for enforcing the MMPA.
15 As this Court has previously noted, “[t]he implementing regulation
16 requires that the NMFS base its finding on the ‘best scientific evidence
17 available.’ 50 C.F.R. § 228.2. NMFS has defined ‘negligible impact’ as an
18 ‘impact . . . that cannot be reasonably expected to, and is not reasonably
19 likely to, adversely affect the species or stock through effects on annual
20 rates or recruitment or survival.’ 50 C.F.R. § 228.4.” *Natural Resources
21 Def. Council v. U.S. Dept. of Navy*, 857 F.Supp. 734, 737 (C.D. Cal. 1994).
- 22 5. On June 30, 2006, Defendants obtained a National Defense Exemption
23 (“NDE”), relieving them of their obligations to comply with the MMPA
24 requirements for a six-month period.
- 25 6. The National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-
26 4347, which is primarily a procedural statute, *Save the Yaak Committee v.*
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1 *Block*, 840 F.2d 714, 717 (9th Cir. 1988), requires federal agencies to
2 prepare an environmental impact statement (“EIS”) for “major federal
3 actions significantly affecting the quality of the human environment.” 42
4 U.S.C. § 4332(2)(C).³ Additionally, the Ninth Circuit has concluded that,
5 in furtherance of NEPA’s goal “that federal agencies infuse in project
6 planning a thorough consideration of environmental values,” federal
7 agencies must sufficiently study, develop, and describe alternatives as
8 part of the “environmental decisionmaking process.” *Bob Marshall*
9 *Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988) (internal quotations
10 and citations omitted).

- 11 7. Plaintiffs have demonstrated a likelihood of success in establishing that,
12 in light of the available scientific evidence, Defendants’ failure to prepare
13 an EIS or take a “hard look” at the potential environmental impact of
14 their activities before issuing a Finding of No Significant Impact
15 (“FONSI”) is violative of NEPA and, as such, represents agency action
16 that is “arbitrary, capricious, an abuse of discretion, or otherwise not in
17 accordance with law” or conducted “without observance of procedure
18 required by law,” 5 U.S.C. § 706(A), (D).

19
20 ³The EIS decision-making process properly includes the following steps, as
21 summarized by the Ninth Circuit:

22 In order to determine whether an EIS is required, the federal agency
23 concerned prepares an environmental assessment. 40 C.F.R. § 1508.9 (1987).
24 Based on that assessment the agency may conclude that the action will not
25 significantly affect the environment and issue a ‘Finding of No Significant
26 Impact’ (“FONSI”) in lieu of an EIS. *Id.* § 1508.13. We have held that an
27 EIS is required at the point where a federal agency makes an ‘irreversible and
28 irretrievable commitment of the availability of resources.’ *Environmental*
Defense Fund, Inc. v. Andrus, 596 F.2d 848, 852 (9th Cir.1979).
Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1225 (9th Cir. 1988).

- 1 8. The Navy identifies the normal operating level for the MFA sonar used
2 in RIMPAC exercises as 235 dB. (AR 4851.) The NMFS issued a FONSI
3 based on the Navy's acknowledgment that the sound energy level
4 threshold for determining when an exposure constitutes Level B
5 harassment is 173 dB. The mitigation measures in place for RIMPAC
6 anticipate the use of EMF sonar at and above 235 dB. (AR 4851.)
- 7 9. The mitigation measures the Navy has in place provide for
8 "watchstanders" or "personnel on lookout with binoculars" to notify
9 RIMPAC participants of marine mammal sightings. (AR. 4851.) When a
10 marine mammal is sighted, RIMPAC participants are to follow a
11 graduated formula to lower the dB levels. However, this process is
12 premised on an assumption that marine mammals can and will be visible
13 at distances of 1000 to 2000 meters from the bow of a ship.
- 14 10. Additionally, Defendants have not demonstrated that the Navy satisfied
15 its obligation under NEPA to give "full and meaningful consideration" to
16 reasonable alternatives, *e.g.*, less densely populated marine habitats, or to
17 elucidate for the Court its analysis of alternative sites as impracticable.
18 *Natural Resources Defense Council v. U.S. Dept. of the Navy*, 857 F.Supp.
19 734, 738-39 (C.D. Cal. 1994); *Natural Resources Defense Council v. Evans*,
20 279 F.Supp.2d 1129, 1165-66 (N.D. Cal. 2003).
- 21 11. Accordingly, Plaintiffs have shown a probability of success on the merits
22 of their claims under NEPA, and they have shown a strong possibility of
23 irreparable harm. Plaintiffs have also demonstrated that they are entitled
24 to a temporary restraining order because they have raised serious
25 questions on the merits of their claims under NEPA, and the balance of
26 harm tips decidedly in Plaintiffs' favor. In particular, Plaintiffs have

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1 shown a possibility that RIMPAC 2006 will kill, injure, and disturb many
2 marine species, including marine mammals, in waters surrounding the
3 Hawaiian Islands.

4 12. Conversely, the harm to Defendants if the Navy is temporarily enjoined
5 from proceeding with RIMPAC 2006, as scheduled, until such time as a
6 preliminary injunction hearing can be held, is substantially outweighed
7 by the potential harm to the human environment.

8 13. The issuance of this Temporary Restraining Order, pending a
9 preliminary injunction hearing, serves the public interest by ensuring the
10 protection of endangered marine species threatened by the Navy's
11 proposed MFA sonar training and testing activities off the coast of
12 Hawaii.

13 14. Because this is a noncommercial case brought by non-profit groups
14 seeking private enforcement of environmental protection statutes, and
15 because the likelihood of success on the merits favors a minimal bond or
16 no bond at all, the Court deems it proper that no security shall be
17 required. *Cal. ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766
18 F.2d 1319, 1325 (9th Cir. 1985) (citing *Friends of the Earth v. Brinegar*, 518
19 F.2d 322, 323 (9th Cir.1975), and *Natural Resources Defense Council v.*
20 *Morton*, 337 F.Supp. 167 (D.C.D.C.1971)).

21
22 WHEREFORE, the Court GRANTS Plaintiffs' Application for a
23 Temporary Restraining Order. Together with its officers, agents, servants,
24 employees, attorneys, and those persons in active concert or participation
25 with them who receive actual notice of this Order by personal service or
26 otherwise, the Navy is hereby enjoined from using mid-frequency active
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1 sonar during its Rim of the Pacific 2006 training exercise ("RIMPAC 2006")
2 for 10 court days from the date of this Order, pending a hearing on the Order
3 to Show Cause why a preliminary injunction should not be granted.

4 Defendants are further ORDERED to meet and confer with Plaintiffs
5 to determine if an agreement can be reached on mitigation measures that
6 would avoid the need for further provisional relief in this case. The parties
7 are instructed to advise the Court in writing within 7 court days of the date
8 of this Order whether these efforts have been successful. Such written notice
9 shall be provided to the Court no later than 4:00 p.m. on Wednesday, July
10 12, 2006.

11 This Temporary Restraining Order shall remain in effect until July
12 18, 2006, or until dissolved by further Order of the Court. No security shall
13 be required.

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15 IT IS SO ORDERED.

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19 July 3, 2006



FLORENCE-MARIE COOPER, Judge
UNITED STATES DISTRICT COURT