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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

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

Plaintiffs,

v.

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

Defendants.

Case No. SACV 07-0335 FMC (FMOx)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' *EX PARTE* APPLICATION TO VACATE PRELIMINARY INJUNCTION OR TO PARTIALLY STAY PENDING APPEAL

Judge: Hon. Florence-Marie Cooper
Ctrm: 750

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I. INTRODUCTION

Plaintiffs hereby submit this opposition to Defendants' *Ex Parte* Application for a partial stay or vacature of the Court's January 3 Order Issuing Preliminary Injunction, as subsequently modified by the Court's January 10 Modified Order Issuing Preliminary Injunction ("Mitigation Order").

In their zeal to overturn this Court's carefully balanced Mitigation Order following more than ten months of litigation, Defendants have transformed a dispute over environmental compliance into an Executive Branch attack on the authority of this Court. Disappointed with their failure to persuade the courts that the Navy is unable to simultaneously fulfill its training mission and obey U.S. environmental laws, Defendants have purported to use a private quasi-judicial proceeding – conducted by the White House Council on Environmental Quality ("CEQ") – to overturn this Court's injunction under NEPA. But the rulings of an Article III court may not be "appealed" to the White House. There is no regulatory, statutory, or constitutional basis for CEQ's Executive Branch review of this Court's Mitigation Order, and Defendants' application for relief must therefore be rejected.

As the Court evaluates the "developments" on which Defendants premise their application, it is useful to consider the context in which Defendants seek relief. For more than two years, the parties have been litigating in three separate cases over Defendants' refusal to obey U.S. environmental laws in their training with mid-frequency active ("MFA") sonar. Defendants have argued in the instant case that exigencies of national security require them to refrain from completing an EIS before conducting their exercises and have further argued that those same exigencies excuse their obligation to mitigate the harmful effects of their actions in the meantime. This Court and the Ninth Circuit have carefully considered Defendants' evidence and arguments and have ruled that Defendants are wrong and must obey the law.

Not satisfied with the result, Defendants have resorted to an unprecedented strategy. *First*, they presented their Executive Branch colleagues in the CEQ with a

portion of the record that was submitted to this Court – but only the portion containing Defendants' evidence and arguments. *Second*, they secured a decision from their Executive Branch colleagues which states that, contrary to this Court's findings, Defendants cannot both fulfill their national-security mission and obey NEPA. Based on this finding, the agency has ordered substitute mitigation measures that are *virtually identical* to those that this Court previously held "woefully inadequate and ineffectual" in place of those imposed by this Court. CEQ's findings and order are based on no new developments. They amount to nothing more than the Executive's self-serving belief, based on reading only the Navy's half of the record, that the Navy's submissions to this Court should have won the day. *Third*, Defendants proffer their own Executive Branch ruling that simply restates their long-held positions and argue that it requires this Court to stay or vacate its injunction.

There is no sudden "emergency" here, as required by 40 C.F.R. § 1506.11 – the CEQ regulation under which it has purported to exempt the Navy from compliance *prospectively through January 2009*. The same naval exercises, on the same proposed dates, using the same woefully inadequate mitigation, were planned in February 2007 as are planned today. The only difference between then and now is that, after extensive litigation, Defendants have been repeatedly adjudged to be in violation of the law and ordered to mitigate the harms they are causing as they proceed with their sonar training. A ruling from this Court that an Executive agency is violating the law and must remedy that violation is not an "emergency"; it is simply justice under our Constitution.

If Defendants' interpretation of NEPA and the power of CEQ to exempt the Defendants from compliance with this Court's injunction were correct, it would open a gaping hole in NEPA and the Article III judiciary's power to enforce that statute. The Executive Branch could await the results of any judicial proceeding based on NEPA, and then, once having been ordered to obey the law, declare that the Court's order constitutes an "emergency" authorizing the Executive Branch to trump the law.

With this new-found power, CEQ could, for example, declare an "emergency" to expedite oil and gas leasing on environmentally sensitive lands, on the theory that additional energy production is a national "emergency." As we demonstrate below, CEQ has no such authority, and its misuse of a regulation designed to enable public agencies to temporarily avoid preparing an EIS in true emergency circumstances – such as the sudden need to repair a breached dam to prevent massive flooding – by employing it to review and vacate a federal court injunction vastly exceeds the purpose, meaning, and scope of that regulation.

Even if CEQ had somehow arrogated such power to itself in propounding section 1506.11, its exercise of such power in the present circumstances squarely conflicts with the statute that Congress enacted. NEPA provides that agencies must comply with its mandates "to the fullest extent possible." 42 U.S.C. § 4332. Congress, the Supreme Court, and CEQ itself have consistently interpreted this language to mean that an agency must fully comply with NEPA unless compliance is "*impossible*." 40 C.F.R. § 1500.6 (emphasis added); 115 Cong. Rec. (Part 29) 39702-39703 (1969) (same); *Flint Ridge Dev. Co. v. Scenic Rivers Assoc.*, 426 U.S. 776, 787-88, 96 S.Ct. 2430, 49 L.Ed.2d 205 (1976) (same). This is not such a case. CEQ's actions run afoul of the governing statute and can be given no effect.

Finally, the Executive's effort to exercise purported "emergency" powers to review an Article III court's injunction violates the constitutional doctrine of Separation of Powers. For more than two centuries it has been common ground among our co-equal branches of government that it is the province of Congress to make the laws (*e.g.*, NEPA), the Judiciary to decide cases according to those laws, and the President to enforce those laws showing respect and obedience to the courts' decisions. There is no good reason to abandon that constitutional compact here.

For the reasons stated herein, the Navy's purported "exemptions" cannot excuse the Navy from compliance with the law.[1]

[1] Plaintiffs also join in intervenor California Coastal Commission's arguments that the presidential exemption provision of the CZMA – as it was

II. PROCEDURAL BACKGROUND

In preliminarily enjoining the SOCAL exercises on August 7, 2007, this Court concluded that Plaintiffs are likely to prevail on the merits of their claims that Defendants have violated NEPA and CZMA, that a "near certainty" of irreparable harm exists in the absence of an injunction, that the balance of the harms favors an injunction, and that the public interest is served by its issuance. On appeal, the Ninth Circuit affirmed each of these conclusions, but stated that "having considered the effect that narrowly tailored mitigation conditions might have on the parties' interests, we conclude that such an injunction would be appropriate." *Natural Resources Defense Council, Inc. v. Winter*, 508 F.3d 885, 887 (9th Cir. 2007). The Court of Appeals thus remanded to this Court to order specific mitigation measures for the protection of the marine environment that would permit the Navy to carry out its training activities subject to those measures. *Id.*

This Court did just that. On January 3, 2008, after considering the briefing and substantial evidence submitted by both parties, the Court issued a tailored preliminary injunction imposing reasonable mitigation measures on the Navy, including, *inter alia*, measures requiring the Navy to cease use of MFA sonar when marine mammals are spotted within 2200 yards and power down sonar by 6 dB when significant surface ducting conditions are detected. Navy Exs. 4 & 6.

On January 9, the Navy applied for stay pending appeal, which this Court denied on January 14 finding that the public interest weighs against issuing a stay and citing record evidence showing that the Navy has employed such mitigation measures in the past without sacrificing training objectives. Navy Ex. 3 at 3-4.

On January 10, the Navy initiated a quasi-judicial *ex parte* proceeding before CEQ – part of the Executive Office of the President – in an attempt to overturn this Court's orders. It presented CEQ with a one-sided portion of the record that was

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applied in this case – raises serious constitutional issues under *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 1 L.Ed. 436 (1792), and its progeny, and oppose Defendants' application on this basis as well.

before this Court – containing only the Navy's evidence and arguments – and argued to CEQ that the Court's injunction would have an adverse impact on the Navy's training and therefore create "emergency circumstances." Navy Ex. 16 at 3. Notably, the Navy waited more than five months after this Court's August 7 Order before seeking relief from CEQ due to this alleged "emergency." *See* Navy Exs. 16 & 18.

On January 15, based upon this partial record, CEQ agreed with the Navy that this Court's orders created "emergency circumstances" and ordered "alternative arrangements" for the SOCAL exercises under the alleged regulatory authority of 40 C.F.R. § 1506.11. Navy Ex. 16 at 3-4. In particular, CEQ concluded that the measures this Court adopted in its Mitigation Order created a "significant and unreasonable risk" to the Navy's training. *Id.* at 3. It further stated that (private) "discussions between our [*i.e.*, CEQ and Navy] staffs," together with the Navy's one-sided record, "have clearly determined that the Navy cannot ensure the necessary training . . . under the terms of the injunction orders." *Id.* at 4. CEQ then ordered its own suite of mitigation measures in place of this Court's measures and NEPA's statutory requirements. The CEQ's measures, which purport to apply to the SOCAL exercises through *January 2009* pending completion of an Environmental Impact Statement ("EIS") for the SOCAL range complex, are virtually identical to those that this Court previously held "woefully inadequate and ineffectual" to prevent significant impacts on the environment, as NEPA requires. The Navy has issued a decision adopting CEQ's "alternative arrangements." Navy Ex. 17 at 1.

Also on January 15, President Bush purported to exempt the Navy's MFA sonar use during its SOCAL training activities from the CZMA.

On the evening of January 15 – nearly two weeks after this Court issued its Mitigation Order – the Navy filed an emergency motion in the Court of Appeals seeking to vacate this Court's preliminary injunction or, alternatively, to partially stay mitigation relating to the 2,200 yard safety zone and power-downs in significant surface ducting conditions. The Navy's emergency motion, which was based

substantially on the President's and the CEQ's actions, not only requested relief that was never considered by this Court, but also improperly relied on new evidence in doing so. Accordingly, on January 16, the Ninth Circuit remanded to allow this Court to determine the effect, if any, of the Navy's eleventh-hour "exemptions" on its Mitigation Order and its January 14 stay order.

On January 17, the Navy filed an *ex parte* application for a temporary, partial stay of the injunction while the Court considers the effect of the "exemptions" on its prior rulings, or, in the alternative, to vacate the preliminary injunction or partially stay the injunction pending appeal. On the afternoon of January 17, the Court issued an order temporarily staying the 2200 yard safety zone and 6 dB power-down in significant surface ducting conditions pending full consideration of Defendants' *ex parte* application and ordered expedited briefing of this matter.

III. THE NAVY'S ELEVENTH HOUR "EXEMPTIONS" DO NOT SUPPORT A STAY

A. CEQ's Actions Cannot Exempt the Navy from NEPA

CEQ has no legal authority to exempt the Navy's long-planned sonar training from NEPA. *First*, CEQ's "emergency" regulation does not apply in this case, because there is no emergency: 40 C.F.R. § 1506.11 does not provide an "emergency" appellate forum for footdragging agencies that disagree with court orders. *Second*, CEQ's interpretation of 1506.11 directly conflicts with its governing statute. CEQ cannot alter the fact that "[t]here is no 'national defense' exception to NEPA." *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1035 (9th Cir. 2006). "'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 security implications.'" *Id. Third*, Defendants' expansive interpretation of the "emergency" regulation would violate the Separation of Powers doctrine enshrined in our Constitution. The Executive Branch has neither the power to review an Article III

court's order that commands a federal agency to obey the law, nor the power to instruct the offending agency that it need not comply. The rulings of an Article III court are subject to review only by superior Article III courts, not by the Executive Branch. In sum, the Navy's invocation of the emergency exception is invalid and can have no effect on the Navy's obligation to comply with NEPA and this Court's Mitigation Order.

1. The Navy's Actions Do Not Fall Within the Plain Scope of Section 1506.11

The CEQ regulation on which the Navy relies here states in its entirety:

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

40 C.F.R. § 1506.11. On January 15, five days after the Navy first sought approval from CEQ to implement "alternative arrangements" under section 1506.11, CEQ determined that "emergency circumstances are present for the nine [remaining SOCAL] exercises and alternative arrangements for compliance with NEPA under [section 1506.11] are warranted." Navy Ex. 16 at 4. CEQ, however, does not specify what alleged "emergency" actually exists here. In light of this critical omission, section 1506.11 cannot validly be applied in this case.

The only emergency CEQ even *alludes* to is the allegation that *this Court's Mitigation Order itself* creates a "significant and unreasonable risk" by requiring the Navy to conduct its remaining SOCAL exercises in compliance with the law. *See id.* at 3 ("[T]he modified injunction imposes training restrictions, in particular the unaltered 2200 yard shut down requirement and the 6 dB power down requirement during significant surface ducting conditions, that continue to create a significant and unreasonable risk that Strike Groups will not be able train and be certified as fully mission capable."). Defendants similarly allude to this Court's Order as the source of the purported "emergency." Navy Br. at 3.

This Court's Mitigation Order is not the kind of "emergency" contemplated by section 1506.11. The manifest purpose of the regulation is to permit the government to take immediate remedial measures in response to urgent and unforeseen circumstances not of the agency's own making (as in the case of Hurricane Katrina, or similar exigent circumstances) that render the preparation and submission of NEPA documentation on the timetable provided by the Act impossible, even though the required emergency response measures may themselves have significant environmental consequences otherwise requiring preparation of an EIS. Indeed, Nicholas C. Yost, the General Counsel of CEQ at the time the regulation was promulgated and the principal drafter of the regulation, has submitted a declaration stating that section 1506.11 was intended only to "address[] the immediate, unexpected, and significant threat" of a true emergency "characterized by the severity of its unexpected and imminent occurrence."[2] CEQ "did not intend for agencies to avoid their NEPA obligations by labeling as 'emergencies' planned occurrences or ones that could have been anticipated." *Id.*; *see also id.* ¶ 6 (citing 2005 CEQ guidelines issued after Katrina stating that the purpose of section 1506.11 is to enable agencies to take "immediate actions necessary to secure lives and safety of citizens"). This understanding of the regulation is confirmed by its plain language. The second sentence of the regulation reads: "the Council will limit such arrangements to actions *necessary to control the immediate impacts of the emergency*." 40 C.F.R. § 1506.11 (emphasis added).[3]

Here, neither CEQ nor the Navy has identified any exigencies that meet this

[2] Declaration of Nicholas C. Yost in Support of Plaintiffs' Opposition To Defendants' *Ex Parte* Application To Vacate Preliminary Injunction Or To Partially Stay Pending Appeal ("Yost Decl.") ¶ 5.

[3] The plain meaning of the word "emergency" also supports this interpretation. "'[E]mergency' is defined in the dictionary as 'a state of things unexpectedly arising, and urgently demanding immediate action.'" *Wash. Toxics Coalition v. U.S. DOI*, 457 F.Supp.2d 1158, 1195 (D. Wash. 2006) (interpreting the term "emergency" in ESA's general consultation regulations, 50 C.F.R. § 402.05, to require a situation that is "unpredictable or unexpected in some way"). The "general-purpose ordinary language meaning of 'emergency' itself includes the element of surprise and unexpectedness." *Id.*

standard. It cannot be the case, as the Navy claims, that the "emergency" purportedly triggering the exception can be an Order of an Article III court requiring the agency to comply with the law. *See* Yost Decl. ¶ 7 ("I would not consider the holding of a planned set of maneuvers or an unfavorable judicial ruling an 'emergency' within the meaning of [1506.11]"). If an Executive agency could effectively excuse itself from NEPA compliance *because* of an Order of an Article III Court redressing the agency's violation of the statute, judicial determinations under NEPA would be rendered meaningless. *See infra* § III.A.3.

Nor can it be the case that the Navy's failure to prepare adequate environmental documentation in a timely manner, thus creating its own inability to carry out its action as originally proposed, creates the emergency that excuses it from compliance with the law. The Navy has been on notice of its NEPA violations since at least July 2006 – seven months before the improper EA was issued – when this Court temporarily enjoined the Navy's RIMPAC 2006 exercise; NRDC and the CCC put the Navy on notice of its legal obligations for the SOCAL exercises more than a year ago; and as far back as August 7, this Court held that the Navy was likely to lose on the merits of the NEPA and CZMA claims – a ruling affirmed by the Ninth Circuit in November. Yet the Navy waited until January 10 before even *requesting* the NEPA and CZMA waivers relied on here. *See* Navy Exs. 16 & 18. Because its claimed "emergency" relates to routine training exercises that have been planned for more than a year, and because the Navy has been on notice for many months that these exercises are unlawful, its attempt to manufacture an "emergency" at this late date must be rejected. To excuse an agency's statutory violations simply because it has failed to comply in a timely manner would defy common sense, undermine the purposes of the Act, and impermissibly *reward* an agency for its non-compliance.

Caselaw interpreting section 1506.11 confirms this view. There are no cases allowing "alternative arrangements" to NEPA requirements because of an "emergency" allegedly brought on by an order of an Article III court finding that an

agency has violated NEPA. To the contrary, cases allowing deviation from NEPA, whether through section 1506.11 or otherwise, without exception identify *unanticipated* emergencies that require a federal agency to respond quickly to new and changing events, not *self-made* "emergencies" arising from a court decision that requires only that a federal agency finally conduct its long-planned activities without violating the law. For example, in *Valley Citizens for a Safe Environment v. Vest*, No. 91-30077, 1991 WL 330963 (D. Mass. May 6, 1991), the Air Force was permitted, pursuant to section 1506.11, to operate nighttime flights despite a previously prepared EIS's prohibition of such flights. *Id.* at *5. CEQ permitted this non-compliance in August 1990 in response to the emergency caused by Iraq's invasion of Kuwait that same month and the United States' subsequent response. *See id.* In that case, a rapidly evolving emergency – Iraq's sudden invasion of Kuwait – required an urgent response. *See also Miccosukee Tribe of Indians of Fla. v. United States*, 509 F.Supp.2d 1288, 1290-91 (S.D. Fla. 2007) (agency requested and received approval from CEQ for emergency alternative arrangements *before* deviating from NEPA requirements to avoid pending extinction of species). Here, in contrast, the claimed "emergency" is an adverse court order rendered after months of litigation over long-planned, routine training exercises.

Finally, the "alternative arrangements" prescribed by CEQ in this instance are clearly not limited to "actions necessary to control the *immediate impacts of the emergency*." Indeed, CEQ's alternative measures purport to excuse the Navy's proposed activities from compliance with the substantive provisions of NEPA prospectively *through January of 2009*. Moreover, some measures, such as the requirement to conduct research on marine mammals, are clearly not directed toward the containment of any imminent emergency; rather, as explained more fully below, CEQ has simply crafted its own equitable remedy to substitute for the injunction crafted by this Court. In sum, there is no emergency within any reasonable reading of section 1506.11, and CEQ's order goes far beyond the limited scope of the regulation.

2. The Navy's Overbroad Interpretation of Section 1506.11 Is Contrary to NEPA

It is well-settled that Administrative agencies have no authority to promulgate regulations that are inconsistent with their governing statutes. But if CEQ's emergency exception is truly as broad as the Navy suggests – such that the Court's injunction here constitutes an "emergency" sufficient to excuse the Navy's activities from substantive compliance with the statute prospectively for over a year – the regulation is *ultra vires* and contrary to NEPA. Because of this, the Court should reject the Navy's grossly overbroad interpretation of section 1506.11 and construe the regulation narrowly to avoid such a conflict. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 481 F.3d 1224, 1237 (9th Cir. 2007) (an agency's construction of its regulation must be "consistent with and in furtherance of the purposes and policies embodied in the Congressional statute authorizing the regulation"); *Progressive Corp. and Subsidiaries v. United States*, 970 F.2d 188, 192-93 (6th Cir. 1992) ("[An agency's] construction that thwarts the statute which the regulation implements is impermissible.").

NEPA requires federal agencies to prepare an EIS for any major federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Failing that, an agency must implement mitigation measures sufficient to "render such impacts so minor as to not warrant an EIS." *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001) (reversing denial of injunctive relief under NEPA); *Found. for N. Am. Wild Sheep v. U.S. Dept. of Agr.*, 681 F.2d 1172, 1179 (9th Cir. 1982) (same). Even significant national security concerns are insufficient to trump this clear statutory mandate. As the Ninth Circuit has repeatedly acknowledged, NEPA contains no "national defense" exemption, *San Luis Obispo*, 449 F.3d at 1035, and although Congress knows well how to exempt Defense Department activities from its NEPA obligations, *see, e.g.*, National Defense Auth. Act, Pub. L. No. 106-398, § 317, 114 Stat. 1654, 1654A-57 (2000)

(specifically exempting Defense Department from preparing nationwide EIS for low-level flight training), it has not done so here.

The Navy argues that CEQ has enacted an administrative regulation that can exempt the Navy from long term compliance with NEPA even though NEPA contains no such provision. It further argues that CEQ can exempt the Navy from compliance in an "emergency" situation despite the fact that the SOCAL exercises have been planned since 2006, and compliance with NEPA's mandates has never been, and is not now, impossible. This unprecedented and grossly overbroad interpretation of section 1506.11 stands in irreconcilable conflict with the governing statute.

The sole statutory support that the Navy cites for its sweeping interpretation of the regulation is section 4332 of the Act, which requires federal agencies to comply with NEPA's substantive requirements "to the fullest extent possible." 42 U.S.C. § 4332. Similarly, section 4331 requires agencies to use "all practicable means and measures" to fulfill their duties under NEPA. *Id.,* § 4331(b). Any suggestion that these provisions may be used to excuse the Navy from compliance with the law here is absurd. The Supreme Court has made clear that NEPA's "fullest extent possible" language was intended to address only cases in which there is an "irreconcilable and fundamental conflict" between NEPA's requirements and the requirements of another statute. *Flint Ridge*, 426 U.S. at 787-88. Indeed, the CEQ regulations themselves interpret the phrase "to the fullest extent possible" to mean that "each agency of the Federal Government shall comply with that section unless *existing law … expressly prohibits or makes compliance impossible.*" 40 C.F.R. § 1500.6 (emphasis added). The legislative history of the section confirms this view:

> The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directions set out in…[Section 102(2), *viz.*, 42 U.S.C. § 4332(2)] unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible…. Thus, it is the intent of the conferees that the provision "to the fullest extent possible" shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section "to the fullest extent possible" under their statutory authorizations and

> that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.

115 Cong. Rec. (Part 29) 39702-39703 (1969); *see also Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114-15 (D.C. Cir. 1971) (discussing legislative history).

In short, the statutory language, the legislative history, the caselaw interpreting this provision, and the CEQ regulations themselves all clearly demonstrate that the "fullest extent possible" provision of NEPA does not and was never intended to excuse compliance with the statute simply because an agency has failed to prepare adequate environmental documentation in a timely manner and an Article III court has subsequently mandated compliance with the law. Indeed, courts have uniformly held that section 4332 "does not provide an escape hatch for footdragging agencies." *Calvert Cliffs'*, 449 F.2d at 1114 ("We must stress as forcefully as possible that [the 'to the fullest extent possible'] language does not provide an escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow 'discretionary.'").[4]

It is difficult to imagine a more blatantly improper attempt to use section 4332 as an "escape hatch" than the Navy's actions here. Here there are no unanticipated events (save, possibly, for the Navy's failure to appreciate that it might be required to obey the law), no law preventing the Navy from complying, and no obstacles rendering compliance with the law "impossible" other than the Navy's own longstanding refusal to follow it. Indeed, there is no *legal* barrier at all to the Navy's compliance with NEPA, as the Supreme Court and CEQ both agree the statute requires. There is no "existing law" that precludes the Navy from complying with NEPA. The fact that the Navy submitted faulty environmental documentation for the

[4] At most, section 4332 supports the enactment of a narrowly drawn regulation to address situations in which a *bona fide* emergency (*i.e.*, an emergency not of the agency's own making) renders the preparation and submission of environmental compliance documentation impossible. This was the clear intent of CEQ in promulgating the regulations, *see* Yost Decl. ¶ 5, and insofar as the regulation is construed to reach no further, Plaintiffs do not assert that the regulation on its face is contrary to NEPA.

exercises does not render compliance impossible – on the contrary, it demonstrates that there is clearly no "irreconcilable and fundamental conflict" between the Navy's statutory mandate and NEPA. The only barrier is, and has been, the Navy's refusal for ten months to adjust its plans to conform to the law.

Because the Navy's compliance is not *impossible* within the meaning of 4332, the Navy's attempt to use CEQ's regulation as an "escape hatch" for its own footdragging cannot be countenanced. The Navy's and CEQ's overbroad extension of the emergency regulation would have the impermissible effect of creating a new, broad exemption to NEPA although Congress has refused to do so. If the governing statute "does not provide an escape hatch for footdragging agencies," certainly the implementing regulations cannot create that hatch either. And if the governing statute does not contain a "national defense exemption" to its substantive provisions, certainly the implementing regulations cannot create such an exemption.

The Navy's interpretation, if accepted, would do serious violence to "our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). Agencies could simply manufacture their own emergencies, just as the Navy has done here, to retroactively excuse their failure to comply with the law. Any agency faced with a judgment of an Article III court could make an end-run around the will of Congress and the courts simply by ignoring its NEPA obligations until the last possible moment. For example, under Defendants' view, CEQ could declare an "emergency" to expedite timber leasing on the theory that the cut is necessary to eliminate future fire hazards; or to expedite oil and gas leasing in protected preserves on the theory that additional energy production is a national "emergency." If such actions were permissible, NEPA's requirements would be effectively eviscerated and rendered "discretionary." As demonstrated above, section 1506.11 was never intended to sweep that broadly. Yost Decl. ¶¶ 5-7. But insofar as it does, it stands in irreconcilable conflict with NEPA itself.

Although CEQ is ordinarily afforded "substantial deference" in its

interpretation of the governing statute, such deference does not apply in these circumstances. *First*, the fact that Congress did not delegate to CEQ the authority to enact implementing regulations suggests that CEQ may not be entitled to *Chevron* deference, but only to some lesser degree of deference, such as that applied in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944) (agency interpretation is "entitled to respect" only to the extent it has the "power to persuade").[5] *Second*, because this is clearly an instance in which Congress did *not* vest the agency with a full complement of enforcement, adjudicative and rulemaking powers, *see Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 154, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991), any "substantial deference" owed to CEQ extends only to CEQ's interpretation of the governing statute, not to its actions in a quasi-judicial proceeding, such as it has held in this instance. *Id.* (stating that a court may not infer adjudicative powers beyond those that Congress has vested in the agency by statute); *see also infra* n.7. *Third*, deference is not due when an agency's interpretation of a regulation conflicts with the agency's intent at the time the regulation was promulgated. *See State of Oregon v. Ashcroft*, 368 F.3d 1118, 1130 (9th Cir. 2004). As shown above, CEQ's application of its regulations in the context of the proceeding at issue here was contrary to the plain language and the intent of the regulation. *See supra* § III.A.1; Yost Decl. ¶¶ 5-7.

Fourth, an agency's interpretation of its own regulation is entitled to deference "only when the language of the regulation is ambiguous." *Christensen v. Harris County*, 529 U.S. 576, 588, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000). The meaning of "emergency" is clear, and it plainly does not encompass a federal agency's desire to evade a court order compelling the agency to conform its long-planned, routine

[5] The CEQ regulations were promulgated pursuant to a presidential Executive Order instructing CEQ to adopt regulations and instructing other federal agencies to follow them. Exec. Order No. 11991 3 C.F.R. 123 (1977), *reprinted as amended in* 42 U.S.C. § 4331 (2000). While the Supreme Court in *Andrus v. Sierra Club*, 442 U.S. 347, 358, 99 S. Ct. 2335, 60 L. Ed. 2d 943 (1979), stated that "CEQ's interpretation of NEPA is entitled to substantial deference," the Supreme Court has never defined the precise contours of that deference.

activities to NEPA requirements. Here, as in *Christensen*, because the regulation is clear, "deference is unwarranted," and "[t]o defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation." *Id.* Finally, even an agency that is ordinarily entitled to *Chevron* deference is not entitled to such deference where, as here, the agency exercises its authority inconsistent with the statute.[6] In sum, both the Navy's overbroad interpretation of section 1506.11 and CEQ's actions in reliance on that same overbroad interpretation in a quasi-judicial proceeding should be rejected. To hold otherwise would render the regulation itself *ultra vires* and contrary to the statute.

3. The Navy's Overbroad Interpretation of Section 1506.11 Would Render the Regulation Constitutionally Invalid

It is a "cardinal rule" of construction that courts must interpret an agency's regulations so as to avoid constitutional infirmities. *See Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1476 (9th Cir. 1994) ("When the constitutional validity of a statute or regulation is called into question, it is a cardinal rule that courts must first determine whether a construction is possible by which the constitutional problem may be avoided.... Indeed, we have said that 'a court must construe a statute so as to avoid raising constitutional questions.'") (citation omitted). The interpretation that the Navy presses here violates this cardinal rule of construction and must be rejected.

Under the Separation of Powers doctrine, "Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995). Separation of Powers has been a bedrock constitutional doctrine recognized since our

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[6] *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, 255-56, 126 S. Ct. 904; 163 L. Ed. 2d 748 (2006) (Chevron deference "is warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority'") (citation omitted); *Gorbach v. Reno*, 219 F.3d 1087, 1092-93 (9th Cir. 2000) ("An agency ordinarily entitled to Chevron deference may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.") (citation and internal quotations omitted).

nation's founding. As early as 1792, it was held that:

> "[B]y the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either. . . . [B]y the Constitution, neither the Secretary of War, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this [Article III] court."

Muskrat v. United States, 219 U.S. 346, 352-53, 31 S.Ct. 250, 55 L.Ed. 246 (1911) (quoting *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410, 1 L.Ed. 436 (1792)); *see also, e.g.*, *United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 647, 22 L.Ed. 772 (1874) (orders of Article III courts are not "open . . . to revision by any one of the executive department or of all such departments combined"); *Town of Deerfield, N.Y. v. F.C.C.*, 992 F.2d 420 (2d Cir. 1993) (holding that FCC regulation permitting agency review of matters on which an Article III court had already ruled violated the Separation of Powers doctrine). Article III courts have the power "not merely to rule on cases, but to decide them, *subject to review only by superior courts in the Article III hierarchy*." *Plaut*, 514 U.S. at 218-19 (emphasis added). Moreover, allowing the Executive Branch to review the rulings of the Judicial Branch would turn such rulings into mere advisory opinions in violation of Article III. *Deerfield,* 992 F.2d at 427 ("[A]n Article III court is not permitted to render advisory opinions.... [I]f a decision of the judicial branch were subject to direct revision by the executive or legislative branch, the court's decision would in effect be merely advisory"); *see also Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803) ("It is, emphatically, the province and duty of the judicial department, to say what the law is"). Thus, only other Article III courts, *not* administrative agencies such as CEQ, can review this Court's injunction to determine whether the Court properly weighed the various interests and factors in crafting injunctive relief.

Here, the Navy effectively sought *ex parte* review of this Court's Mitigation Order from CEQ. In that proceeding, the Navy "explained that the district court's preliminary injunction, as amended on January 10, 2008, created a significant and unreasonable risk that the Navy will not be able to successfully conduct its MFA

sonar training...." Navy Ex. 21 at 9. In support of its claims of error, the Navy presented to CEQ a "record," which, by all appearances, consisted only of the Navy's submissions to this Court. *See* Navy Ex. 16 at 3-4. Based on that one-sided record and *ex parte* "discussions" with the Navy, CEQ "determined that the Navy cannot ensure the necessary training to certify strike groups for deployments under the terms of the injunctive orders," and, on this basis, concluded that this Court's ruling created "emergency circumstances" justifying CEQ's intervention under section 1506.11. CEQ then crafted its own mitigation measures to serve as "alternative arrangements" in place of this Court's tailored injunction.[7]

In purporting to review and vacate this Court's Mitigation Order, CEQ has sorely mistaken its role in both the statutory scheme and constitutional scheme. Congress never delegated to CEQ the power to review injunctions and orders issued by an Article III court, and CEQ may not arrogate to itself such power. *See La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374-75, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986) ("[W]e simply cannot accept an argument that the [agency] may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself."); *see also Gorbach*, 219 F.3d at 1092-93 (same). Moreover, under the doctrine of Separation of Powers, CEQ, an agency of the Executive Branch, has no constitutional authority to determine whether an injunction requiring compliance with NEPA issued by an Article III court creates a "significant and unreasonable risk" to the public interest. That power is entrusted to superior Article III courts, not to the Executive Branch. *Plaut*, 514 U.S. at 218-19.

In sum, the Executive Branch has engaged in a blatant usurpation of judicial authority. By CEQ's own account, it purported to preside over an *ex parte* review of

[7] In so doing, CEQ was clearly acting in a quasi-judicial capacity, not exercising its rule-making authority. "A decision by the [agency] is quasi-judicial if it does 'not purport to engage in formal rulemaking or in the promulgation of any regulations' but instead amounts to an adjudication of the rights and obligations of parties before it. The mere presence in the decision of general statements that might have applicability to controversies between other persons does not change the character of an order from one that is essentially adjudicatory to one that is quasi-legislative." *Deerfield*, 992 F.2d at 427 (citations omitted).

this Court's injunction based on just the Navy's portion of the record that was before this Court, concluded (contrary to this Court's ruling) that the Navy's evidence demonstrated "that the Navy cannot ensure the necessary training to certify strike groups for deployments under the terms of the injunctive orders," and proceeded to substitute its own mitigation measures for the Court's Mitigation Order. Navy Ex. 16 at 4. CEQ's actions are wholly unhinged from any constitutionally permissible interpretation of section 1506.11 (CEQ's purported regulatory authority), and can thus have no effect on the Navy's obligation to comply with NEPA's requirements.

For each of these reasons, the Navy's eleventh hour attempt to circumvent this Court's ruling – like the conduct that forms the basis of this lawsuit – is illegal. Accordingly, this Court's conclusion that the Navy is not likely to prevail on the merits cannot be altered by the Executive Branch's latest actions.[8]

B. The Presidential Exemption from the CZMA Does Not Excuse Defendants' NEPA Violations

Nor can the Navy's eleventh hour invocation of a presidential exemption to the CZMA justify the requested stay of this Court's Mitigation Order under NEPA. The Navy's exercise of a presidential exemption to the CZMA does not and cannot act as a general exemption under NEPA. Indeed, the Ninth Circuit, like this Court, has already rejected the Navy's invitation to construe the Secretary of the Navy's invocation of a National Defense Exemption to the MMPA as a *de facto* exemption from NEPA. Congress knows how to create exemptions from its statutes, and while it has done so in other instances, it has declined to do so for NEPA. *See San Luis Obispo,* 449 F.3d at 1035.[9]

[8] Indeed, the Navy's invocation of 1506.11 merely confirms and underscores the Navy's violations of law in this case. Section 1506.11 applies only when "necessary to take an action with significant environmental impact without observing the provisions of these regulations." By invoking this provision, Defendants have necessarily conceded (and has CEQ necessarily found) both that the SOCAL exercises will have a "significant environmental impact" and that, absent further mitigation, the SOCAL exercises would be conducted (under NDE II) "without observing the provisions of these regulations" – *i.e.*, in violation of NEPA.

[9] As noted above, Plaintiffs join in intervenor California Coastal Commission's opposition to the Navy's *ex parte* application and in the

C. The Navy's Eleventh Hour "Exemptions" Do Not Tip the Equities in Favor of the Navy

1. The Court's Mitigation Order Does Not Impose an Undue Burden on the Navy

As the Court correctly concluded in issuing its Mitigation Order and denying the Navy's original request for stay, the measures the Court has ordered would not prevent the Navy from training and certifying its troops. Defendants now challenge only two provisions in the Mitigation Order – the safety zone and surface-ducting requirements – effectively conceding the feasibility of the other provisions, such as the Catalina Basin exclusion and the Mitigation Order's other geographic and monitoring requirements. But the Court has already ruled on the burden posed by these two measures, along with the other elements of its Mitigation Order, finding that there is "no basis for concluding that absent a stay, Defendants will suffer irreparable injury." Navy Ex. 3 at 2. That finding is amply supported by the record.

The Court did not err in finding that the 2200 yard shut-down is practicable. The record shows that the Navy observed a *de facto* 4,000 yard safety zone during the first three exercises conducted under the EA, either shutting down or powering down when marine mammals were sited out to 4,000 yards; and that the marginal effect of the Court's requirement on training hours would have been extremely small.[10] Nothing has changed to alter that conclusion. Indeed, when all of the after-action reports newly furnished by the Navy (see Navy Ex. 16) are considered, they affirm that shut-downs would have occurred on average *only 1-2 additional times* per exercise had the Court's requirement been in place. Not only is this increase far

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Commission's arguments that the presidential exemption provision of the CZMA as it was applied in this case raises serious constitutional issues under *Hayburn's Case*, 2 U.S. (2 Dall.) 409, and its progeny. *See, e.g., Plaut*, 514 U.S. at 213; *Deerfield*, 992 F.2d at 427-30.

[10] Declaration of Josh B. Gordon in Support of Plaintiffs' Opening Brief Regarding Appropriate Mitigation Measures ("Gordon Decl."), Ex. 14 at 10-11; Pl. Opening Mitigation Br. at 20 n.9 (indicating that the additional six events would have affected far less than 1% of all 317 hours of sonar use); Navy Ex. 16, Part 8 (Att. G) at 19 (short duration of shut-down periods).

smaller than what the Navy has misleadingly claimed, but its marginal effect on training hours is extremely low – consisting of a dozen additional shut-downs taken over many hundreds of hours of sonar use over the better part of a year. *Id.* The Court's finding that its safety zone requirement would present only a "minimal imposition" on the Navy (Navy Ex. 6 at 15) is well supported.[11]

Similarly, the evidence indicates that the Court's surface-ducting requirement would not significantly impede certification, as the Navy claims (Navy Ex. 21 at 3, 22). The Navy has argued that powering down during such conditions is impractical because they are difficult to track, but the Court carefully considered and rejected that argument. Navy Ex. 6 at 17; *see also* Pl. Resp. Mitigation Br. at 10; Def. Op. Br. at 27 (stating that, "[i]n order to become proficient in MFA sonar use, Sailors must learn to identify when surface ducting conditions exist"). And contrary to the Navy's broad claims about the impracticability of power-downs, the NDE imposed by the Secretary of Defense in 2006 required the Navy to observe a power-down requirement during certain conditions. Gordon Decl., Ex. 15 at 2. Finally, the Court clarified the surface-ducting measure in its Modified Order, inserting the qualifier "significant" to ensure the proper balance between training and environmental protection. Navy Ex. 4 at 4. Indeed, the record plainly demonstrates that certification *does not even require*

[11] Over the eight SOCAL exercises covered by the Navy's after-action reports (Navy Ex. 16), operators temporarily secured their sonar 27 times. Had the Court's ruling been in place, they would have had to shut-down an additional 12 times, or 1-2 additional times per major exercise. Navy Ex. 16, Part 3 (Att. B) at 4, Part 4 (Att. C) at 3-6, 7-8, Part 5 (Att. D) at 3, Part 6 (Att. E) at 3-5, Part 7 (Att. F) at 10-11, Part 8 (Att. G) at 5-6, 19. Moreover, even in many of these 'additional' instances the Navy powered-down its sonar. *Id.* The Navy attempts to obscure the implications of its own data by claiming – as it did on its original motion for stay – that the prescribed shut-down zone would result in a "five-fold (500%) increase in the average number of shutdowns per exercise." Navy Ex. 21 at 16. But this misleading assertion fails to account for the Navy's actual past practice of shutting down sonar in the majority of cases when species were observed beyond 200 yards. Ex. 16 (*e.g.*, shut-downs at 3100, 4000, and 6000 yards during COMPTUEX 07-1). The Navy is left to speculate that ships were "likely" to have shut down their sonar beyond 200 yards only during non-critical points of its exercises (Ex. 21 at 18-19); but this claim, too, is belied by its after-action reports. The Navy's reports make no distinction among shut-down events in evaluating potential impacts on training, noting instead the potential loss of detection opportunities even during exercises when virtually all shut-downs occurred beyond 200 yards. *E.g.*, Navy Ex. 16, Part 4 (Att. C) at 14, Part 5 (Att. D) at 11.

training during such "significant" conditions, since ships were certified despite the complete absence of these conditions in each of the SOCAL exercises since July 2006 for which they were reported. Navy Ex. 16, Part 3 (Att. B) at 5, 11 (JTFEX 06-4), Part 4 (Att. C) at 10, 15 (COMPTUEX 06-4), Part 5 (Att. D) at 7, 12 (JTFEX 07-1), Part 6 (Att. E) at 8, 13 (COMPUTEX 07-1). In short, the Court's Mitigation Order poses no undue burden to the Navy.

2. The Navy's Repeated Insistence That National Security Concerns Tip the Equities Against Injunctive Relief Should Again Be Rejected

The Navy again argues that this Court must defer to the assessments of the Executive Branch in matters of national security – this time as expressed through new declarations and recent "waivers" – and conclude that the balance of harms and equities favor a stay. Navy Ex. 21 at 14, 26. Again, this argument fails.

Deference to the Executive does not equate to an abdication of judicial review, and courts have a duty to independently assess claims and weigh them against competing interests, even in the sphere of national security. *See, e.g., Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998) (even in the context of national security, "deference is not equivalent to acquiescence"); *Coldiron v. U.S. Dep't of Justice*, 310 F.Supp.2d 44, 53 (D.D.C. 2004) ("[A] court must [] defer to agency claims of harm to national security. On the other hand…the court is not to be a wet blanket. No matter how much a court defers to an agency, its review is not vacuous.") (internal quotes and citations omitted); *Dubbs v. CIA*, 769 F.Supp. 1113, 1116 n.3 (N.D. Cal. 1990) (traditional deference owed to the Executive in matters of national security "does not require the Judiciary to abdicate *its* authority under Article III.") (emphasis in original). Contrary to the Navy's repeated suggestions, deference is not a blank check to violate the law. *See Duncan v. Kahanamoku*, 327 U.S. 304, 322-23, 66 S.Ct. 606, 90 L.Ed. 688 (1946) ("The military should always be kept in subjection to the laws of the country to which it belongs, and he is no friend to the

Republic who advocates the contrary. The established principle of every free people is that the law shall alone govern; and to it the military must always yield.") (internal quotations and citations omitted); *San Luis Obispo*, 449 F.3d at 1035 ("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.").[12]

This Court spent months reviewing the evidence and crafting relief that balances two competing, and highly significant, public interests: protection of the environment and military readiness. Such balancing is, indeed, the specialized role of courts sitting in equity. *See Hecht Co. v. Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754 (1944) (courts' equitable power is "the instrument for nice adjustment and reconciliation between" competing interests).

The Executive Branch "waivers" (insofar as they bear on the equities, as opposed to the merits) merely confirm once again what the Navy has stated throughout this litigation: that it is the position of the Executive Branch that national defense interests weigh against the Court's imposition of mitigation measures. But that position was well-known long before the Executive's latest actions. Indeed, as discussed above, the Navy has repeatedly made this very same argument throughout this case based on the Secretary of Defense's National Defense Exemption to the MMPA. Despite this, both the Ninth Circuit and this Court concluded that the balance of harms and the public interest militate in favor of a tailored injunction such as the Court has issued here. The Ninth Circuit held:

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[12] The Navy's cases do not suggest otherwise. In *Gilligan v. Morgan*, 413 U.S. 1, 11-12, 93 S.Ct. 2440, 37 L. Ed.2d 407 (1973), the Court expressly limits its holding to cases not involving "specific unlawful conduct" of the military (but rather the wholesale critique of military management attempted by plaintiffs there), emphasizing that "there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied." *Id.* at 12 n.16 (internal quotations and citations omitted). *See also Nat'l Audubon Soc. v. Navy*, 422 F.3d 174, 204 (4th Cir. 2005) (striking only those portions of injunction that were not necessary to prevent harm to the environment).

> Plaintiffs have also shown that the balance of hardships tips in their favor if a properly tailored injunction is issued providing that the Navy's operations may proceed if conducted under circumstances that provide satisfactory safeguards for the protection of the environment. Moreover, the public interest would be advanced by an injunction that required adequate mitigation measures.

NRDC v. Winter, 508 F.3d at 886.[13]

In short, just as the Navy's new "waivers" cannot cure the Navy's violations of law, so too they neither identify nor create any new interests that this Court and the Ninth Circuit have not already taken into account in their prior decisions balancing the equities and the public interest in a tailored injunction. This Court has consistently held that there is a "near certainty" of irreparable harm to Plaintiffs, the public, and the environment if these exercises go forward without effective mitigation. In fact, CEQ's mitigation measures are *virtually identical* to those that this Court previously held "woefully inadequate and ineffectual." If a stay is granted or the injunction vacated, the Navy's violations of law will likely go unremedied and such irreparable harm to the environment will result.

The Navy's appeal to the equities now is particularly unavailing given that, as explained above, it has been on notice since at least July of 2006, seven months before its improper EA was released, that its conduct of major MFA sonar training exercises without additional mitigation measures was unlawful. As one court in this district observed fourteen years ago in enjoining a naval weapons testing program,

[13] This is not the first time that courts have held in the face of assertions of potential harm to military readiness that the Navy must take precautionary measures in order to comply with the law during its training exercises. *See* Supp. Gordon Decl. Ex. 3 (RIMPAC 2006 TRO); *NRDC v. Evans*, 279 F.Supp.2d 1129 (N.D. Cal. 2003) ("A tailored injunction reconciles the very compelling interests on both sides of this case, by enabling the Navy to continue to train with and test LFA sonar as it needs to do, while taking some additional measures to better protect against harm to marine life."); *NRDC v. Navy*, 857 F.Supp. 734, 741 n.13 (C.D. Cal. 1994) (enjoining Navy from weapons testing, holding that "[w]hile the Navy has shown that substantial costs in terms of money and defense preparedness will result from an injunction, the Court believes…the balance of harms…favor the plaintiffs") (vacated by consent decree); *cf. Foundation of Econ. Trends v. Weinberger*, 610 F.Supp. 829, 844 (D.D.C. 1985) ("Balancing the environmental considerations of NEPA against these defense concerns this ruling is narrowly tailored to take those matters into account.") (citation omitted); *McVeigh v. Cohen*, 996 F.Supp. 59, 61 (D.D.C. 1998) (recognizing the importance of deference in military affairs, but upholding remedial order because "deference to the military does not deprive courts of their authority to grant equitable relief").

any hardship that the Navy might suffer "is likely the direct result of the failure to comply with [federal environmental laws]" and its "refusal or inability to recognize [that failure] at an earlier date." *NRDC v. Navy*, 857 F.Supp. at 741 n.13. The Navy's own recalcitrance cannot justify a stay or vacation of the injunction. *See, e.g., Adler v. Fed. Republic of Nig.*, 219 F.3d 869, 876-77 (9th Cir. 2000) ("The unclean hands doctrine closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief.").

This Court's narrowly tailored injunction – which was issued in accordance with the Ninth Circuit's specific directive and its holdings regarding the balance of harms and public interest in this case – allows the Navy's training to go forward while adding needed protections for marine life. It therefore remains both necessary and appropriate to remedy the Navy's violations of law.

IV. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court deny Defendants' *Ex Parte* Application.

Dated: January 22, 2008

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