

Here we go...

Given the current court, this doesn't bode well. This NYT article ends with a short digression about another environmental case that gives the "whether conditions" of the Supreme Court.

Best of luck and Godspeed to NRDC et. al.

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<http://www.nytimes.com/2008/06/24/washington/24scotus.html?ex=1214971200&en=a39d09f80b7409cf&ei=5070&emc=eta1>

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WASHINGTON — The Supreme Court on Monday stepped into a long-running environmental dispute over the impact on whales and other marine mammals of Navy training exercises off Southern California.

The court, warned by the Bush administration that a set of conditions placed on the exercises by the federal appeals court in San Francisco “jeopardizes the Navy’s ability to train sailors and marines for wartime deployment during a time of ongoing hostilities,” agreed to hear the Navy’s appeal during its next term.

The training exercises, which are due to end next January, will continue in the meantime, because the appeals court issued a stay of its own order when it ruled in the case four months ago. That court, the United States Court of Appeals for the Ninth Circuit, ordered the Navy to suspend or minimize its use of sonar when marine mammals are in the vicinity.

The Navy acknowledges that the sonar can cause “behavioral disruptions” and short-term hearing loss in dolphins and whales, but denies that these effects are serious or lasting. But the Natural Resources Defense Council maintains that the high-intensity sonar causes “mass injury,” including hemorrhaging and stranding. The appeals court said the Navy’s own assessment “clearly indicates that at least some substantial harm will likely occur” without the measures designed to mitigate the sonar’s effects.

The justices themselves will not resolve the debate over the extent of the harm. Rather, as presented to the Supreme Court, the case is a dispute over the limits of executive branch authority and the extent to which the courts should defer to military judgments.

In January, as the case was proceeding in the appeals court, President Bush granted the Navy an exemption from one federal environmental law, the Coastal Zone Management Act. Simultaneously, the Council on Environmental Quality, an executive branch agency, declared that “emergency circumstances” warranted granting an exemption from the full effect of another statute, the National Environmental Policy Act.

These actions did not sway the appeals court, which said that “while we are mindful of the importance of protecting national security, courts have often held, in the face of assertions of potential harm to military readiness, that the armed forces must take precautionary measures to comply with the law.”

In the government’s appeal, *Winter v. Natural Resources Defense Council*, No. 07-1239, the administration describes training in the use of sonar to detect submarines as an “essential element” of the exercises, which it says are designed to “train the thousands of military personnel in a strike group to operate as an integrated unit in simultaneous air, surface and undersea warfare.”

The administration's brief says that by imposing conditions on the use of sonar, "the decision poses substantial harm to national security and improperly overrides the collective judgments of the political branches and the nation's top naval officers regarding the overriding public interest in a properly trained Navy."

Under the appeals court's order, the Navy must suspend the use of sonar or reduce it to specified levels when a marine mammal is seen at certain distances. The appeals courts said this requirement would not compromise the Navy's ability to conduct the exercises.

Another appeal before the Supreme Court on Monday also presented a clash between executive power and environmental protection, concerning the fence being built on the Mexican border by the Department of Homeland Security.

But in this instance the government had prevailed in the lower court, and the justices, without comment, declined to hear an appeal filed by Defenders of Wildlife and the Sierra Club. The question was the validity of a federal law that allows the secretary of homeland security to waive any federal, state, or local laws that, in the secretary's "sole discretion," present obstacles to the fence project.

Michael Chertoff, the department's secretary, invoked this authority last year in waiving 20 laws, including the Endangered Species Act, to enable the fence project to proceed through a national conservation area in Arizona.

The lawsuit filed by the environmental groups maintained that the statute violated the separation of powers by delegating to the secretary a form of legislative authority. The lawsuit also challenged the law's unusually truncated judicial review provision, which limits the types of challenges that can be brought in Federal District Court and strips the appeals court of jurisdiction to hear any appeal.

Judge Ellen Segal Huvelle of the Federal District Court here upheld the law, saying that the breadth of the waiver provision did not make it unconstitutional. The case was *Defenders of Wildlife v. Chertoff*, No. 07-1180.