

## LITIGATION ALERT

### UNITED STATES SUPREME COURT TIGHTENS STANDARD FOR PRELIMINARY AND PERMANENT INJUNCTIONS IN FEDERAL COURT, REJECTS THE “SLIDING SCALE” STANDARD

On November 12, 2008, the United States Supreme Court, in *Winter, et al. v. Natural Resources Defense Council, Inc., et al.*, issued a 6-3 decision that tightens the standards for preliminary and permanent injunctions in federal courts. The Court stated that the party seeking an injunction must demonstrate a *probability*, not merely a *possibility*, of irreparable harm in the absence of an injunction, rejecting the “sliding scale” standard used by the Ninth Circuit. The Court also held that, even if plaintiffs had demonstrated a probability of irreparable harm, such injury was outweighed by the public interest in the defendant Navy’s effective training of its sailors. The Court thus vacated the District Court’s grant of a preliminary injunction to the extent it was challenged by the Navy.

#### BACKGROUND

This case revolved around the Navy’s use of mid-frequency active (MFA) sonar during its training exercises in the waters off the coast of Southern California. Plaintiffs sued the Navy, alleging that its use of the MFA sonar causes serious injuries to the marine mammals that inhabit these waters. Plaintiffs alleged that the Navy violated several federal statutes, and they sought declaratory and injunctive relief.

This case has a lengthy and somewhat complicated procedural history. Relevant here, the District Court denied the Navy’s request to vacate the preliminary injunction, which required the Navy to implement six mitigating measures during its training exercise. The Ninth Circuit affirmed, agreeing with the District Court that plaintiffs had established a “possibility” of irreparable injury, and that the balance of hardships and the public interest weighed in favor of plaintiffs. The Navy successfully sought review in the Supreme Court, and the Supreme Court reversed and vacated the injunction.

#### INJUNCTION

The Court began its analysis by reiterating what a plaintiff seeking a preliminary injunction must demonstrate. It stated, in a sentence that will often be quoted, that a plaintiff must show “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” With respect to irreparable injury, the Court reiterated

that “plaintiffs seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction.” The Court expressly rejected the Ninth Circuit’s “possibility” standard as too lenient. The Ninth Circuit’s “possibility” test allows a plaintiff who demonstrates a strong likelihood of prevailing on the merits to obtain a preliminary injunction by showing only a possibility of irreparable harm. In rejecting this standard, the Court reasoned that “[i]ssuing a preliminary injunction based only on the possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” The Court declined to reach the merits of the case, holding that, even if plaintiffs demonstrated a probability of irreparable harm, the public interest in having a combat-ready Navy trumps plaintiffs’ interest in marine mammals.

The Court also noted that the standards for obtaining preliminary and permanent injunctions are identical, except that the former requires a showing of likelihood of success on the merits, whereas the latter requires proof of actual success on the merits.

The Court’s decision will undoubtedly make it more difficult for plaintiffs to obtain preliminary injunction in federal courts. *Winter* did away with the so-called “sliding scale” standard,<sup>1</sup> like the one used by the Ninth Circuit, which allows plaintiffs to offset their weaker showing of the likelihood of success on the merits with a stronger showing of the likelihood of irreparable harm, and vice versa. Post-*Winter*, courts will no longer be at liberty to relax the preliminary injunction standard by balancing the strength of the plaintiff’s showing of the likelihood of irreparable injury and the likelihood of success on the merits. Rather, plaintiffs seeking preliminary injunction will have to demonstrate the “probability” of prevailing on the merits, and the “probability” of irreparable injury without injunctive relief. A mere possibility of either success on the merits or irreparable injury will not suffice.

## CONTACT INFORMATION

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<sup>1</sup> For discussion of the “sliding scale” standard *see generally* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.3 (2d ed. 1995).