Dangerous Waters? The Future of Irreparable Harm Under NEPA After *Winter v. NRDC*

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Editors' Summary

The debate between Justices Scalia and Breyer during oral argument in Winter v. NRDC *examines whether an NEPA violation constitutes irreparable harm for the purposes of injunctive relief. Whereas Justice Scalia conflated the showing of harm required for standing with the irreparable harm element of injunctive relief, Justice Breyer argued persuasively, as he did in his First Circuit opinions, that the harm from a violation of NEPA is irreparable in itself. Although Justice Breyer's position is both correct and will eventually prevail, given the current makeup of the Court, it may be some time before it becomes law.*

> "[W]hen a decision to which EIS obligations attach is made without the informed environmental consideration that NEPA requires, much of the harm that NEPA seeks to prevent has already taken place."
>
> —*Justice Stephen Breyer*[1]

> "Our cases say that procedural injury alone is not the kind of injury that confers standing; that there has to be some concrete harm."
>
> —*Justice Antonin Scalia*[2]

In a highly publicized case between environmental groups and the U.S. Navy, the U.S. Supreme Court had to decide whether to uphold a preliminary injunction enjoining the Navy from its use of environmentally harmful mid-frequency sonar.[3] In this case, *Winter v. Natural Resources Defense Council*,[4] although the Supreme Court ruled for the Navy, the holding was narrow and limited to the balancing of equities, which favored the interests of the Navy given the lack of evidence of any correlation between naval action and injuries to marine mammals over the 40-year span of training exercises in southern California.[5]

In reaching its decision, the Supreme Court could have considered one of many facets to this case—the balancing of the equities, irreparable harm, and separation of powers—but the Court made its eventual holding based on the balance of the equities: "We do not discount the importance of plaintiffs' ecological, scientific, and recreational interests in marine mammals. Those interests, however, are plainly outweighed by the Navy's need to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines."[6] In addition, the Supreme Court looked at the U.S. Court of Appeals for the Ninth Circuit's finding that a preliminary injunction may be granted "based only on a 'possibility' of irreparable harm," as determined by scientific studies and other evidence, which established a "near certainty" of irreparable harm to the environment.[7] Agreeing with the Navy in dictum, the majority held that the Natural Resources Defense Council (NRDC) had to demonstrate "a *likelihood* of irreparable injury," and that a "possibility" was not sufficient.[8] In particular, even if mid-frequency sonar causes some degree of harm, NRDC failed to show an adverse effect to "*their* scientific, recreational, and ecological interests."[9] Even assuming that NRDC had

1. Winter v. Natural Res. Def. Council, 129 S. Ct. 365, 383, 38 ELR 20279 (2008) (Breyer, J., concurring).
2. Transcript of Oral Argument at 24, *Winter*, 129 S. Ct. 365 (No. 07-1239).
3. In addition, a secondary issue was one of separation of powers, not discussed in this Article.
4. 129 S. Ct. 365.
5. *Id.* at 375.
6. *Id.* at 382.
7. *Id.* at 375.
8. *Id.* (emphasis added).
9. *Id.*

been able to show irreparable harm, the Court explains that "any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors."[10]

Limiting its holding by assuming irreparable harm while focusing on the balancing of the equities, the Supreme Court essentially avoided the question of whether or not a violation of the National Environmental Policy Act (NEPA) of 1969,[11] *in itself*, demonstrates irreparable harm. Although such a characterization of irreparable harm seems novel on the surface, it has precedent in the circuits.[12] And, even though NRDC made the strategic decision not to raise this issue in its own brief, the amicus brief by Defenders of Wildlife, Humane Society of the United States, Center for Biological Diversity, Oceana, Sierra Club, the Wilderness Society, Animal Legal Defense Fund, and Greenpeace, in support of NRDC, focused almost entirely on this issue.[13]

Focusing on this characterization of irreparable harm, the discussion among the Justices during oral argument revealed a potentially vicious fight down the road in regards to what constitutes irreparable harm under NEPA for the purposes of granting an injunction. In particular, on one side was Justice Antonin Scalia, who seemed to confuse the issue of standing with irreparable harm, arguing that direct "concrete harm" was needed in order to receive injunctive relief. However, Justice Scalia incorrectly combined the threshold question of standing to bring a case with the question of whether there is irreparable harm for the purpose of injunctive relief.

On the other side was Justice Stephen Breyer, who remained focused on the issue of irreparable harm without digressing into a discussion of standing. Justice Breyer, in his past position as Judge Breyer on the U.S. Court of Appeals for the First Circuit, presents the "leading edge" in this area of law. His view, which is supported by NEPA itself, is that a violation of NEPA by failure to perform the process and procedures required by the Act constitutes irreparable harm. If eventually adopted by the Supreme Court, his characterization of irreparable harm under NEPA would allow groups seeking environmental protection to more easily bring forth a case seeking an injunction. Once standing is established, given the presumption of irreparable harm resulting from a violation of NEPA, it would be far easier to win an injunction.

This Article examines whether a violation of NEPA constitutes irreparable harm for the purposes of injunctive relief. Section I will lay out the facts and procedural history of *Winter*. Section II will explain and examine the purpose of and procedures required by NEPA. Section III will examine the type of harm required in order for a party to have standing to bring a case under NEPA. Section IV of this Article will examine the basic requirements for injunctive relief. Section V will present the somewhat conflicting, yet consistent, characterizations of irreparable harm for NEPA violations in both the conservative Supreme Court decisions, as well as the more liberal view expressed by then-Judge Breyer on the First Circuit. Section VI will examine the debate that occurred during oral argument: Justice Scalia's apparent confusion of harm for the purposes of standing versus equitable relief, Justice Breyer's focus on his prior First Circuit rulings, and the strategic choice by counsel for NRDC not to correct Justice Scalia's error. Finally, Section VII will conclude that the Breyer approach is both correct and eventual; however, given the current makeup of the Supreme Court, it may be some time before it is recognized as law.

I. Statement of Facts and Procedural History

Although the Marine Mammal Protection Act (MMPA)[14] generally protects marine mammals from harassment, hunting, capturing, and killing, the Secretary of Defense may exempt the military from actions required under the MMPA if necessary for national defense.[15] As such, the Secretary of Defense granted the Navy an exception to perform training exercises off the coast of southern California.[16] However, in addition to the requirements under the MMPA, under NEPA, the Navy (or any federal agency) must also prepare an environmental impact statement (EIS) when engaging in federal action "significantly affecting the quality of the human environment."[17] Alternatively, absent a showing of significant impact, an agency may also prepare a less demanding environmental assessment (EA).[18] In *Winter*, the Navy only prepared an EA, which concluded that its proposed exercises would have no *significant* impact on the environment.[19] In its EA, the Navy concluded that the potential injury to marine mammals that would occur over the 14 southern California training exercises could be categorized as: "Level A harassment, defined as the potential destruction or loss of biological tissue (*i.e.,* physical injury), and Level B harassment, defined as temporary injury or disruption of behavioral patterns such as migration, feeding, surfacing, and breeding."[20] Of these two levels of harm, "The District Court found (based on the Navy's study of the matter) that the exercises might cause 466 instances of Level A harm and 170,000 instances of Level B harm."[21] In particular, the Navy found that there would be 274 Level A harassments of beaked whales.[22] After a very complicated procedural history,[23] NRDC

10. *Id.* at 376.
11. 42 U.S.C. §§4321-4370f, ELR Stat. NEPA §§2-209.
12. *See generally* Sierra Club v. Marsh, 872 F.2d 497, 19 ELR 20931 (1st Cir. 1989); Massachusetts v. Watt, 716 F.2d 946, 13 ELR 20893 (1st Cir. 1983).
13. *See generally* Brief for Amici Curiae Defenders of Wildlife et al. in Support of Respondents, *Winter*, 129 S. Ct. 365 (No. 07-1239), 2008 WL 4642202.
14. 16 U.S.C. §§1361-1421h, ELR Stat. MMPA §§2-410.
15. *Winter*, 129 S. Ct. at 371.
16. *Id.*
17. *Id.* at 372.
18. *Id.*
19. *See id.*
20. *Id.*
21. *Id.* at 383.
22. *Id.* at 372.
23. Immediately after the Navy produced its EA, NRDC (as well as other environmental groups) sought an injunction against the Navy claiming that the training exercises violated NEPA, the Endangered Species Act (ESA) of 1973, and the Coastal Zone Management Act (CZMA) of 1972. *Id.* at 373. The District Court ruled for NRDC under NEPA and CZMA finding that an injunction was appropriate due to the *possibility* of "irreparable harm" to the environment. *Id.* The Ninth Circuit agreed that a preliminary injunction was appropriate but remanded the case back to the District Court to develop an injunction that would still allow the Navy to conduct a limited form of the

successfully enjoined the Navy. At this point, the Supreme Court finally stepped in and ruled for the Navy, lifting part of the injunction.[24]

II. NEPA

As defined by the statute itself, the general purpose of NEPA is to act as the "basic national charter for protection of the environment."[25] Unlike other laws that seek to protect our environment, such as the Clean Water Act (CWA)[26] and the Alaska National Interest Lands Conservation Act (ANILCA),[27] NEPA is a procedural statute. As such, the teeth of NEPA come in the form of procedures that require that "environmental information is available to public officials and citizens before decisions are made and before actions are taken."[28] Such information "must be of high quality[, as a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA."[29]

However, although the actions required by NEPA are procedural, they are substantive in nature. As NEPA itself states:

> Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.[30]

As the stated purpose of NEPA clearly dictates, it is the process of gathering information—gathering data that can help protect the environment and/or reach better informed decisions—not the paperwork itself, that drives NEPA.

As for the intended policy of NEPA, once again the statute itself clearly states the role of federal agencies. In their execution of the Act, agencies "shall to the fullest extent possible" implement NEPA procedures,[31] encourage "public involvement,"[32] and identify alternatives to the harmful conduct that could "minimize adverse effects of [the proposed] actions upon the quality of the human environment."[33] In doing so, there are two possible procedural branches that a federal agency will be required to undertake.

First, a detailed EIS will be required if there is a finding of "significant impact" to the environment.[34] The goal of an EIS is to serve as "an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government."[35] Second, if there is no finding of "significant impact," an agency may prepare a less-detailed EA.[36] This document should be concise and "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact."[37]

As Robert Dreher argues in *NEPA Under Siege*, "NEPA's most significant effect has been to deter federal agencies from bringing forward proposed projects that could not withstand public examination and debate."[38] By requiring that federal agencies use an "'interdisciplinary approach' in decisionmaking affecting the environment," the U.S. Congress has ensured that agencies employ the environmental planners necessary to conduct a fair examination of proposed projects' harm to the environment.[39] The Council on Environmental Quality (CEQ), which regulates NEPA, seems to agree, having concluded in its 25th anniversary report, "NEPA's most

exercise. *Id.* The District Court did so and once again the Navy filed for an appeal to the Ninth Circuit. *Id.* However, after the initial granting of a preliminary injunction, the Navy was not deterred. Instead of relying solely on the courts, the Navy sought relief from the executive branch (then-President Bush). *Id.* The president granted an exemption from the CZMA, claiming that the training exercise was "in the paramount interest of the United States" and "essential to national security." *Id.* In addition, the Council on Environmental Quality (CEQ) authorized the Navy to implement "alternative arrangements" to NEPA compliance in light of "emergency circumstances." *Id.* After these actions by the executive branch, the Navy moved to vacate the injunction, but once again the District Court and the Ninth Circuit rejected its claims. *Id.* at 374. In particular, the Ninth Circuit questioned whether or not the CEQ may interpret "emergency circumstances" so liberally (although politically conservatively). *Id.* In addition, the Ninth Circuit held that an EIS was in fact necessary. *Id.*

24. *Id.* at 382.
25. 40 C.F.R. §1500.1(a) (2009). *See* 42 U.S.C. §4321 (2007).
26. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
27. 16 U.S.C. §§3101-3233 (2007).
28. 40 C.F.R. §1500.1(b).
29. *Id.*
30. 40 C.F.R. §1500.1(c).
31. Calvert Cliffs Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1128, 1 ELR 20346 (D.C. Cir. 1971) ("NEPA requires that an agency must—to the *fullest* extent possible under its other statutory obligations—consider alternatives to its actions which would reduce environmental damage."); 40 C.F.R. §1500.2(a) ("Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations."); 40 C.F.R. §1500.2(b):
    > Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.
32. 40 C.F.R. §1500.2(d) ("Encourage and facilitate public involvement in decisions which affect the quality of the human environment.").
33. 40 C.F.R. §1500.2(e) ("Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.").
34. *See* 40 C.F.R. §1501.4(e). *See also* 40 C.F.R. §1508.13 ("Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared.").
35. 40 C.F.R. §1502.1:
    > It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

    Id.
36. *See* 40 C.F.R. §1501.3.
37. 40 C.F.R. §1508.9(a)(1).
38. Robert Dreher, NEPA Under Siege 6 (2005), *available at* http://www.law.georgetown.edu/gelpi/research_archive/nepa/NEPAUnderSiegeFinal.pdf.
39. *Id.* (NEPA "has required agencies to add biologists, geologists, landscape architects, archeologists, and environmental planners to their staffs. These new employees brought new perspectives and sensitivities to agencies that formerly had relatively narrow, mission-oriented cultures.").

enduring legacy is as a framework for collaboration between federal agencies and those who will bear the environmental, social, and economic impacts of their decisions [as] agencies today are more likely to consider the views of those who live and work in the surrounding community and others during the decisionmaking process."[40]

III. Standing

Before attempting to resolve any question of equitable relief and irreparable harm, a party seeking to contest a NEPA violation must first have standing to bring a suit. The controlling cases as to this threshold question are *Lujan v. National Wildlife Federation*[41] and *Lujan v. Defenders of Wildlife*.[42]

First, in *National Wildlife Federation*, Justice Scalia, writing the majority opinion of the Supreme Court, held that members of the National Wildlife Federation lacked standing to complain of an agency's "land withdrawal review program" (expanded mining on federal land) since the interference of the member's recreational use and aesthetic enjoyment of the land were merely "in the vicinity" of the land affected by agency action.[43] In reaching this holding, Justice Scalia affirmed the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit Court's opinion, which found that there was, "no showing that [complainant's] recreational use and enjoyment extends to the particular 4500 acres" opened up for mining.[44] Preventing recognition of harm "in the vicinity" of proposed agency action thereby limits standing, as members of an environmental group must show that they were directly affected by that action.

Two years later, in *Defenders of Wildlife*, Justice Scalia, again writing for the majority of the Supreme Court, held that members of wildlife conservation and other environmental organizations lacked standing to complain of a new regulation interpreting the Endangered Species Act[45] as only applying to actions within the United States or on the high seas.[46] In doing so, Justice Scalia explained the three-element test for standing:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[47]

Clarifying this injury-in-fact test, Justice Scalia explained that it "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."[48] As such, the majority held that there must be sufficient evidence of a concrete interest, as well as a concrete harm.[49] Justice Scalia also dismissed three theories of standing proposed by the plaintiff: "ecosystem nexus,"[50] "animal nexus,"[51] and "vocational nexus."[52] Such theories were held to be inconsistent with the rejection of plaintiff's "in the vicinity" argument from *National Wildlife Federation*.[53] However, in his concurring opinion, Justice Anthony Kennedy, joined by Justice David Souter, added that although such an argument lacked enough evidence in the present case, there remains a possibility that a plaintiff could demonstrate standing on the theory of an "ecosystem nexus," "animal nexus," or "vocational nexus."[54] In particular, the concurrence cites to *Japan Whaling Assn. v. American Cetacean Society*, which found sufficient "injury in fact" that whale-watching would be "adversely affected by continued whale harvesting."[55]

IV. Injunctive Relief

After there is a finding of standing for the case in controversy, the question then becomes one of remedy. And so, before delving into the interaction of irreparable harm and NEPA, one must first understand when and why a showing of irreparable harm must be made at all. Federal courts have the power to grant whatever sort of equitable remedy is required by the facts of any particular case.[56] In order to achieve the appropriate result, the court must engage in a "balancing of the equities."[57] Essentially, this is a balancing of the benefits and harms to each party of the litigation. In doing this balancing, federal courts engage in a four-pronged test to determine whether or not injunctive relief is appropriate. Federal courts determine:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[58]

40. *Id.* (quoting Council on Envtl. Quality, the National Environmental Policy Act: A Study of Its Effectiveness After Twenty-Five Years 7 (1997)).
41. 497 U.S. 871, 20 ELR 20962 (1990).
42. 504 U.S. 555, 22 ELR 20913 (1992).
43. *See Nat'l Wildlife Fed'n.*, 497 U.S at 885-89.
44. *Id.* at 887 (citing Nat'l Wildlife Fed'n v. Burford, 699 F. Supp. 327, 331, 19 ELR 20341 (D.D.C. 1988) (internal quotation marks omitted)).
45. 16 U.S.C. §§1531-1544 (2007), ELR Stat. ESA §§2-18.
46. *See Defenders of Wildlife*, 504 U.S. at 557-58.
47. *Id.* at 560-61 (internal citations omitted).
48. *Id.* at 563.
49. *Id.*
50. *Id.* at 565 ("proposes that any person who uses any part of a 'contiguous ecosystem' adversely affected by a funded activity has standing even if the activity is located a great distance away.") (emphasis omitted).
51. *Id.* at 566 ("anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing").
52. *Id.* ("anyone with a professional interest in such animals can sue").
53. *Id.* at 565-66.
54. *Id.* at 579 (Kennedy, J., concurring).
55. *Id.* at 579-80 (citing Japan Whaling Ass'n. v. Am. Cetacean Soc'y, 478 U.S. 221, 231 n.4, 16 ELR 20742 (1986)).
56. Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).
57. Yakus v. United States, 321 U.S. 414, 440 (1944).
58. Hilton v. Braunskill, 481 U.S. 770, 776 (1987). *See also* Sarah W. Rubenstein, *Injunctions Under NEPA After* Weinberger v. Romero-Barcelo *and* Amoco Pro-

Although all four prongs must be met, the most important for the purposes of this Article is the second—the required showing of irreparable harm.[59] As the common understanding of the word suggests, "irreparable" means that "the party must show that available legal remedies are unable to redress the harm at issue."[60]

In making its case-by-case determination of whether there has been an adequate showing of irreparable harm, a court shall "look to the language and purpose of the statute violated."[61] If the court can determine that the congressional intent was "to prevent the harm at issue, then the court will hold the harm [to be] irreparable."[62] Likewise, the D.C. Circuit has held that "harm for the purposes of irreparable harm is of course defined in terms of the evil that the particular statute was designed to prevent."[63]

V. Irreparable Harm for NEPA Violations

Even after an environmental group gets its foot in the door by establishing standing to contest a NEPA violation, in order to receive injunctive relief, such a group must satisfy all four prongs of the injunctive relief test. This task is particularly difficult due to the procedural role of NEPA, and those seeking to enforce this statute must be able to demonstrate that the harm from failure to comply with this procedural statute is in itself irreparable.

A. Supreme Court Doctrine

Applying the principles of injunctive relief to NEPA violations, the Supreme Court has taken a relatively conservative approach as to the question of what qualifies as irreparable harm. First, in *Weinberger v. Romero-Barcelo*,[64] the Supreme Court faced the issue of whether a violation of the CWA's permit provisions amounted to irreparable harm on its face. Similarly to the facts in *Winter*, for many years, the Navy had used an island off the coast of Puerto Rico for weapons training.[65] Although all of the training was meant to involve air-to-ground combat, bombings of navigable waters also occurred.[66] Upset by the potential harm to their environment, the residents of Puerto Rico sought an injunction, alleging violation of the CWA by failing to receive a permit from the U.S. Environmental Protection Agency (EPA).[67] But, despite the failure to get a permit, the Court concluded that, under the CWA, "[a]n injunction is not the only means of ensuring compliance. The [CWA] itself, for example, provides for fines and criminal penalties."[68] Given these other means of enforcement, as well as the fact that the purpose of the statute is to protect the nation's waters, "not the permit process,"[69] no injunction was required. However, the Court backed down somewhat by noting that "should it become clear that no permit will be issued and that compliance with the [CWA] will not be forthcoming, the statutory scheme and purpose would require the court to reconsider the balance it has struck."[70] Since it was likely that the Navy would eventually get a permit, the Court found the harm to be far from irreparable.

The second major Supreme Court case on the subject of irreparable harm for NEPA violations was *Amoco v. Village of Gambell*,[71] in which the Supreme Court once again faced the issue of injunctive relief for violation of an environmental statute. Here, the case involved the granting of offshore oil leases in violation of ANILCA, which protects natural resources used for subsistence by native Alaskan people.[72] In doing so, ANILCA has two main components, a procedural requirement requiring an evaluation,[73] and a substantive requirement requiring notice, hearings, and certain determinations.[74] One commentator [commenter?] has noted:

> ANILCA establishes a procedural scheme much like NEPA, in which government agencies must prepare environmental impact statements detailing the potential environmental impacts of proposed projects. Yet ANILCA is not purely procedural. It also requires regulated agencies to take "rea-

duction Co. v. Village of Gambell, 5 Wis. Envtl. L.J. 1, 4-10 (1998).

59. The Supreme Court has highlighted the importance of this prong, finding that "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." Beacon Theaters v. Westover, 359 U.S. 500, 506-07 (1959).
60. Rubenstein, *supra* note 58, at 5.
61. *Id. See also* Weinberger v. Romero-Barcelo, 456 U.S. 305, 320, 12 ELR 20538 (1982); Native Village of Quinhagak v. United States, 35 F.3d 388, 394-95, 25 ELR 20291 (9th Cir. 1994).
62. Rubenstein, *supra* note 58, at 5.
63. *Id.* (quoting Nat'l Wildlife Fed'n v. Burford, 835 F.2d 305, 337, 18 ELR 20382 (D.C. Cir. 1987) (Williams, J., concurring)).
64. 456 U.S. 305, 12 ELR 20538 (1982).
65. *Id.* at 307.
66. *Id.*
67. *Id.* at 308.
68. *Id.* at 314 (citing 33 U.S.C. §1319(c) and (d)).
69. *Id.* ("As Congress explained, the objective of the FWPCA is to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters'" (quoting 33 U.S.C. §1251(a)).
70. *Id.* at 320.
71. 480 U.S. 531, 17 ELR 20574 (1987).
72. *Id.* at 534.
73. 16 U.S.C. §3120(a) (2007).
    > In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes.

    Id.
74. 16 U.S.C. §3120(a).
    > No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency-(1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 3115 of this title; (2) gives notice of, and holds, a hearing in the vicinity of the area involved; and (3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

    Id.

> sonable steps . . . to minimize adverse impacts upon subsistence uses and resources."[75]

Once again, the Supreme Court found that the lower courts "erroneously focused on the statutory procedure rather than on the underlying substantive policy the process was designed to effect—preservation of subsistence resources."[76]

B. The "Leading Edge" in the Circuits

During his time on the First Circuit, then-Judge Breyer clarified the rules from *Weinberger* and *Village of Gambell*. First, in *Massachusetts v. Watt*,[move signal here] Judge Breyer decided whether a preliminary injunction was appropriate to prevent the auctioning of rights to drill for oil in a fishing area off the coast of New England.[77] Upholding the preliminary injunction, Judge Breyer found that NEPA requires a supplement to an EIS before the auctioning of oil leases, if there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[78] Here, there was a 97% reduction in the amount of oil estimated in the region.[79] Such a reduction, the court found, most likely would result in drastically different environmental consequences.[80] Even though this reduction meant that the environmental harm would be lessened, the court still demanded an updated report.[81] Relying on traditional views of irreparable harm, the government argued that regardless of the NEPA violation, there was no irreparable injury here. It is at this point that Judge Breyer made his key finding:

> The government's argument, however, ignores an important feature of NEPA. NEPA is not designed to prevent all possible harm to the environment; it foresees that decisionmakers may choose to inflict such harm, for perfectly good reasons. Rather, NEPA is designed to influence the decisionmaking process; its aim is to make government officials notice environmental considerations and take them into account. Thus, when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered.[82]

Distinguishing NEPA from the CWA, which the Court in *Weinberger* described as focusing on the "integrity of the Nation's Waters, not the permit process," Judge Breyer found that NEPA does just the opposite by focusing on the permit process itself.[83] As such, "it is appropriate for the courts to recognize this type of injury in a NEPA case."[84]

As Judge Breyer was quick to point out, every NEPA violation does not, by itself, require an injunction.[85] In order to prevail, a traditional balancing of the equities must take place.[86] Instead, the novelty and benefit of recognizing this sort of harm is that it prevents plaintiffs from being "stopped at the *threshold*" when seeking to enjoin actions in violation of NEPA.[87]

Several years later, in *Sierra Club v. Marsh*,[signal here] Judge Breyer harmonized his prior decision in *Massachusetts* with the Supreme Court's ruling in *Village of Gambell*, concluding that the Supreme Court did not overrule *Watt*.[88] *Sierra Club* involved the building of a new dry cargo terminal in Maine on Sears Island. Due to the need to dredge the channel, clear the island, and build a causeway, the First Circuit had held that the Federal Highway Administration (FHwA) was required to prepare an EIS under NEPA.[89] Although the FHwA prepared an EIS, Sierra Club sought an injunction, arguing that the final EIS "did not adequately evaluate the environmental effects of choosing the Sears Island site, nor did it adequately explore other alternatives . . . less harmful to the environment."[90] At trial, the district court had held that *Village of Gambell* "severely undercut" the holding in *Watt*,[91] and that *Village of Gambell* "appear[ed] to preclude preliminary injunctive relief predicated on a likely NEPA violation unaccompanied by a showing of irreparable environmental injury."[92] In addition, the lower court held that "irreparable environmental injury" meant physical harm to the environment that one could not repair at a later date.[93] The First Circuit rejected this view. And in doing so, Judge Breyer added a few words of caution:

> We did not (and would not) characterize the harm described as a "procedural" harm, as if it were a harm to *procedure* (as the district court apparently considered it). Rather, the harm at stake is a harm to the *environment,* but the harm consists of the added *risk* to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment. NEPA's object is to minimize that risk.[94]

Judge Breyer was also quick to point out that since the holding in *Watt*, many other courts have agreed that the harm to decisionmaking can be irreparable.[95]

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75. Rubenstein, *supra* note 58, at 9 (quoting 16 U.S.C. §3120(a) (1996)).
76. *Village of Gambell*, 480 U.S. at 544.
77. Rubenstein, *supra* note 58, at 9 (quoting 16 U.S.C. §3120(a) (1996)).
78. Massachusetts v. Watt, 716 F.2d 946, 947, 13 ELR 20893 (1st Cir. 1983).
79. *Id.* at 948 (quoting 40 C.F.R. §1502.9(c)). *See* 42 U.S.C. §4332(C) (2007).
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. Sierra Club v. Marsh, 872 F.2d 497, 498, 19 ELR 20931 (1st Cir. 1989) (Sears Island is "a 940-acre, uninhabited, undeveloped piece of land directly opposite Mack Point.").
89. *Id.* (referring to Sierra Club v. Marsh, 769 F.2d 868, 15 ELR 20911 (1st Cir.1985)).
90. *Id.*
91. Sierra Club v. Marsh, 701 F. Supp. 886, 895, 19, 20699 (D. Me.1988).
92. *Id.* at 897.
93. *Id.* at 898.
94. *Sierra Club*, 872 F.2d at 500 (internal quotations omitted).
95. *See* N. Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1156-58, 18 ELR 20865 (9th Cir. 1988); Wisconsin v. Weinberger, 745 F.2d 412, 426-27, 14 ELR 20744 (7th Cir. 1984); *id.* at 432-33 (Cudahy, J., concurring in part and dissenting in part); City of Davis v. Coleman, 521 F.2d 661, 671, 5 ELR 20633 (9th Cir. 1975); Friends of the Earth v. Hall, 693 F. Supp. 904, 913, 949, 19

Distinguishing *Village of Gambell*, Judge Breyer identified two distinct purposes of ANILCA. As mentioned in the previous subsection, there is a "subsistence evaluation" required by the statute, which mirrors the preparation of an EA or EIS under NEPA,[96] as well as a requirement that the federal agency give notice, hold a hearing, and make certain other determinations.[97] However, unlike NEPA, which is a "*purely* procedural statute,"[98] ANILCA contains other substantive standards as well.[99] In particular, a federal agency could not fulfill the procedural requirements under the statute, but then still undertake an action "in spite of its non-minimal adverse impacts on subsistence uses; yet the agency head could do an exactly comparable thing under NEPA."[100] As such, "a court, *under ANILCA but not under NEPA,* may require the decisionmaker to choose a new action; and this fact may make the ANILCA failure '*reparable* harm.'"[101] In conclusion, Judge Breyer held that "the harm at stake in a NEPA violation *is* a harm to the *environment,* not merely to a legalistic 'procedure,' nor, for that matter, merely to psychological well-being."[102]

VI. Oral Argument

As a preview of the future of determining irreparable harm under NEPA, the discussion between the Justices and counsel during oral argument revealed two separate and contradictory views of precedent. On the one hand, Justice Scalia reasoned that the Supreme Court's prior rulings entirely preempt the recognition of procedural harm as irreparable. However, in making this claim, Justice Scalia seemed to incorrectly apply the standard for standing from the two *Lujan* cases, instead of the *Weinberger* and *Village of Gambell* line of cases (as well as *Massachusetts* and *Sierra Club*). By contrast, Justice Breyer correctly pointed to those rulings for the proposition that irreparable harm occurs whenever proposed action violates the substantive purpose of a statute, whether that purpose is purely procedural or not. In order to elucidate these two conflicting views, this section follows the discussion during oral argument, highlighting Justice Scalia's apparent confusion between standing and injunctive relief, Justice Breyer's references to his two First Circuit cases, as well as the strategic choice by counsel for NRDC not to correct Justice Scalia's error.

A. Justice Scalia's Confusion

Justice Kennedy initiated the discussion of irreparable injury by asking Solicitor General Gregory G. Garre the following: "Let's assume an EIS is required; let's assume it hasn't been prepared; let's assume the government project is going to proceed. [Do y]ou still have to show irreparable harm before you can get the injunction?"[103] After Solicitor General Garre answered in the affirmative, Justice Kennedy followed up by asking if he had authority from the circuits that bolstered his point.[104] Hearing that Solicitor General Garre was starting to stumble with his words, Justice Scalia interjected:

> Well, yes, you do [have authority], but it may not be in the circuits. Our cases say that procedural injury alone is not the kind of injury that confers standing; that there has to be some concrete harm . . . . And—and the only injury that—that follows from the mere failure to file an EIS is—is a procedural injury that affects the entire population.[105]

It is at this point that Justice Scalia seemed to confuse standing with injunctive relief. By invoking the doctrine of standing, the requirement of "concrete harm," and thus the rules from the two *Lujan* cases, Justice Scalia applied the wrong rule. Although he could have referred to the more conservative view of a NEPA violation under *Weinberger* and *Village of Gambell*, which would have furthered the different argument against the granting of injunctive relief, by referring to the standing doctrine, Scalia simply applied the wrong test.

Although the rules for standing provide a useful gatekeeper function, once there has been a finding of standing for the case in controversy through a showing of direct harm, the question becomes one of remedy. It is at this point that the NEPA procedural harm may be enough to satisfy the irreparable harm requirement for injunctive relief. In order to elucidate why this confusion matters for this case, it is important to look back at the specific harm that occurred to marine mammals, in particular the 466 instances of Level A Harm (including 274 Level A harassments of beaked whales), as well as the 170,000 instances of Level B harm.

Properly applying the rules for standing and irreparable harm, the following seems to be the correct result. Plaintiffs may establish direct "concrete harm" by demonstrating any "injury in fact," not just harm that is irreparable. And so, the 170,000 instances of Level B harm, many of which would impact whale watchers, would seem to qualify as direct harm, even though it is not species-wide or irreparable.[106] Only after a plaintiff gets his foot in the door by establishing standing, must the plaintiff prove irreparable harm for purposes of injunctive relief. It is at this point that the injury to the beaked whales, which do not live at the surface and are rarely

ELR 20298 (W.D. Wash. 1988); Stand Together Against Neighborhood Decay, Inc. v. Bd. of Estimate of the City of New York, 690 F. Supp. 1192, 1196 (E.D.N.Y.1988); Save Our Dunes v. Pegues, 642 F. Supp. 393, 404, 17 ELR 20092 (M.D. Ala.1985), *rev'd on other grounds,* 834 F.2d 984, 18 ELR 20438 (11th Cir. 1987).

96. 16 U.S.C. §3120(a) (2007).
97. *Id.*
98. *Sierra Club,* 872 F.2d at 502.
99. *Id.*
100. *Id.*
101. *Id.* at 503.
102. *Id.* at 504. Likewise, Judge Breyer admonishes the District Court which "refer[ed] to 'harm to the NEPA process' and 'harm to the environment' as though they were separate categories; but they are not." *Id.* at 505.
103. Transcript of Oral Argument, *supra* note 2, at 24.
104. *Id.* ("Do you have authority for that in the—are the circuits unanimous on that point?").
105. *Id.* at 24-25.
106. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 579-80, 22 ELR 20913 (1992) (citing Japan Whaling Ass'n. v. Am. Cetacean Soc'y , 478 U.S. 221, 231 n.4, 16 ELR 20742 (1986)).

seen by whale watchers,[107] becomes important. Although this injury does not qualify as direct harm, it satisfies the irreparable harm requirement for injunctive relief. Thus, if the balancing of the equities had tipped in favor of NRDC, and Justice Scalia had confused standing and injunctive relief, as he did during oral argument, he would have reached the incorrect result.

B. Justice Breyer's Response

Immediately after the exchange between Solicitor General Garre and Justice Scalia, Justice Breyer jumped into the discussion.[108] Applying the reasoning from *Massachusetts* and *Sierra Club*, Justice Breyer pointed to the purpose behind NEPA:

> [L]ook, you have an EIS for the reason that the agency itself, once it reads it, might decide to do something else. That's the whole point of an EIS. So if the agency goes ahead with the action before reading the EIS, it becomes committed to that course of action, and the chances that the EIS will lead it to back up are the same as the chances that any big agency will back up once it's committed to a course, namely a lot lower. And that I always thought was the whole harm that the EIS is there to stop.[109]

In other words, the purpose of an EIS—the purpose of NEPA—is to make the most informed decision possible. Although the Navy expressed the belief that an EA was enough,[110] NEPA seemed to require that the Navy produce an EIS. Therefore, injunctive relief was appropriate.

C. Counsel for NRDC

During NRDC's oral argument, NRDC's counsel brought the discussion back to Justice Kennedy's initial question as to what the circuits have said about irreparable harm.[111] Describing them as the "leading edge" in the circuits, counsel refers to then-Judge Breyer's two decisions in the First Circuit, *Massachusetts* and *Sierra Club*, in which Judge Breyer explains that, although NEPA is a procedural statute, it has the substantive purpose of "informed decisionmaking."[112]

However, once again, Justice Scalia confused standing with injunctive relief:

> That's unfortunately contrary to what our opinions have said, which was quite clearly that procedural . . . procedural injury is not the kind of injury that gives rise to Article III standing. . . . The whole country can complain about the failure to issue an EIS. That is not the kind of injury that gives standing.[113]

In the mind of Justice Scalia, NRDC's argument holds no water because he is applying the incorrect tests. It is at this point that counsel for NRDC apparently made the decision not to challenge Justice Scalia's confusion of standing and irreparable harm because, most likely, (1) counsel did not expect the Court in its present makeup to adopt the Breyer line of cases, and (2) counsel assumed that the Court would assume irreparable harm and focus on the balancing of equities, as the Court eventually would. Therefore, NRDC's counsel would not want to lead Justice Scalia down the dangerous road of attempting to create a majority for the proposition that the First Circuit standard of irreparable harm is incorrect. As long as Justice Scalia confuses standing with irreparable harm, he cannot overturn the decisions in *Massachusetts* and *Sierra Club*.

D. Justice Breyer's Concurrence

Finally, even though the majority of the Court did not address whether all violations of NEPA automatically give rise to substantive irreparable harm, Justice Breyer raised this issue in his concurring opinion.[114] Echoing his statements during oral argument, Justice Breyer explained that the "very point of NEPA's insistence upon the writing of an EIS is to force an agency 'carefully' to 'consider . . . detailed information concerning significant environmental impacts,' while 'giv[ing] the public the assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process.'"[115] For the purpose of NEPA is "to assure that when Government officials consider taking action that may affect the environment, they do so fully aware of the relevant environmental considerations."[116] This is a purpose that is echoed throughout *Massachusetts*, *Sierra Club*, and NEPA itself. As such, Justice Breyer points to the requirement of an EIS—a requirement "not [to] force them to make any particular decision, but it does lead them to take environmental considerations into account when they decide whether, or how, to act."[117] And so, if a decision is made without the federal agency fulfilling its EIS obligations, "much of the harm that NEPA seeks to prevent has already taken place."[118] It is

107. Winter v. Natural Res. Def. Council, 129 S. Ct. 365, 372, 39 ELR 20279 (2008).
108. *See* Transcript of Oral Argument, *supra* note 2, at 25.
109. *Id.*
110. *See id.* ("Clearly, the purpose of the requirements under NEPA are to ensure that the agency has—is making an informed decision, and here I don't think there is any question that the Navy was after its 293-page assessment."). However, even if the EA were sufficient as General Garre suggests: "[I]t was not made available for public comment as a draft, as NEPA requires for actions significantly affecting the environment." Brief for the Respondents, *supra* note 13, *Winter*, 129 S. Ct. 365 (No. 07-1239). *See also* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, 19 ELR 20743 (1989) (finding that the central purpose of NEPA is "guarantee[ing] that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."). As the NRDC's brief to the Supreme Court argues: "The mere heft of a document cannot substitute for analytical soundness and public disclosure." Brief for the Respondents, *supra* note 13, at 44 (citing Anderson v. Evans, 314 F.3d 1006, 1023 (9th Cir. 2002)).
111. Transcript of Oral Argument, *supra* note 2, at 52.
112. *Id.* at 52-53.
113. *Id.* at 53.
114. Justice John Paul Stevens also joined this opinion.
115. *Winter*, 129 S. Ct. at 382-83 (Breyer, J., concurring) (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, 19 ELR 20743 (1989)).
116. *Id.* at 383.
117. *Id.*
118. Here, the harm could come from an unknown source. As Justice Breyer notes: In this case, for example, the *absence* of an injunction means that the Navy will proceed with its exercises in the absence of the fuller consideration of environmental effects that an EIS is intended to bring.

this harm that would be irreparable. Even though NEPA is a procedural statute, its purpose—its substance—is informed decisionmaking.

VII. Conclusion

Although, in his concurrence, Justice Breyer confronted whether a NEPA violation itself constitutes irreparable harm, it is likely that Justice Breyer did not want to push this point in too much detail. Given his strong beliefs about the purpose of NEPA, and the use of equitable remedies to achieve that purpose, if he were too open about the irreparable harm issue in his opinion, he would risk a backlash from the rest of the Court. This is most likely confirmed by the strategic decision of NRDC's counsel not to correct the confusion of Justice Scalia, as well as the decision to have this more novel approach to irreparable harm argued in its amicus brief, instead of its own. In doing so, NRDC reminded Justice Breyer of his prior decisions, without drawing too much attention from the rest of the Court. Justice Breyer, as any rational observer of the Court, probably looked around the bench and saw that given the current makeup of the Court, there was no way that his view would win the day.

Interestingly, the most reasoned position during oral argument might have been that of Justice John Paul Stevens. Although Justice Kennedy was the first Justice to ask about the question of irreparable harm explicitly, it was really Justice Stevens who sparked the discussion by asking:

> If this were not a Navy case with all of the implications of the Navy, but an ordinary case in which it was demonstrated that an EIS had to be filed, would it not be normal—normal action to enjoin the—the government action until the EIS was filed? Because the—the very fact that you need an EIS is—is because you don't know what environmental consequences may ensue. That's the purpose of the EIS. So isn't it the normal practice to enjoin government action until the EIS is filed when it is clear there is a duty to file?[119]

Justice Stevens recognized that this case involved national security and military preparedness, and thus was hardly the case on which to take a stand.[120] Although his question should be answered in the affirmative—that is to say that the purpose of an EIS, the purpose of NEPA, is to ensure informed decisionmaking—he was certainly correct that this case, with "all of the implications of the Navy," was not the one in which the Court should accept, or even reject, the recognition of irreparable harm in violations of NEPA. However, that is not to say that the interests of the Navy will always trump those of environmental organizations, but merely that here, with no evidence of any correlation between naval action and injuries to marine mammals over a 40-year span of training exercises in southern California,[121] the balance of equities tipped in favor of the Navy. Without this deficiency of evidence, which, most likely, is largely due to the fact that documentation of such injuries only began recently, the narrow holding of this case suggests that if a later case came along and one could show a correlation of harm, the environmental interest could prevail.

The absence of an injunction thereby threatens to cause the very environmental harm that a full preaction EIS might have led the Navy to avoid (say, by adopting the two additional mitigation measures that the NRDC proposes). Consequently, if the exercises are to continue, conditions designed to mitigate interim environmental harm may well be appropriate.

Id.

119. Transcript of Oral Argument, *supra* note 2, at 23.

120. In fact, during oral argument, Chief Justice John G. Roberts Jr. seemed overwhelmingly concerned with the interests of the Navy, finding the balance of the equities to fall heavily in favor of the Navy:

> My question, though, is that at no point that did the district judge undertake a balancing of the equities, putting on the one side the potential for harm to marine mammals that she found—and that's your point about the record—and putting on the other side the potential that a North Korean diesel electric submarine will get within range of Pearl Harbor undetected. Now, I think that's a pretty clear balance.

Id. at 48. As a result, his majority opinion reads in quite the same way. *Winter*, 129 S. Ct. at 370 (the majority opinion begins by quoting George Washington in his first Annual Address to Congress: "To be prepared for war is one of the most effectual means of preserving peace." 1 A Compilation of the Messages and Papers of the Presidents: 1789-1897, at 57 (James D. Richardson ed., 1897)).

121. *Winter*, 129 S. Ct. at 375. However, there has been documented correlation between sonar use and injury to marine mammals in areas other than southern California. *See id.* at 383-84 ("scientific studies have found a connection between [the beaching of marine mammals] and the Navy's use of sonar, and the "Navy has even acknowledged one stranding where 'U.S. Navy mid-frequency sonar has been identified as the most plausible contributory source to the stranding event.'") (internal citations omitted). *See also* Brief for the Respondents, *supra* note 13, at 3-4 ("For example, in the Bahamas, sightings of one beaked whale population fell to zero following a sonar-related stranding in 2000 and had not returned to prestranding levels five years later.").