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A WHALE OF A TALE: The Sea of Controversy Surrounding The Marine Mammal Protection Act and the U.S. Navy's Proposed Use of the SURTASS-LFA Sonar System

I. INTRODUCTION

National security is perhaps the most important issue facing the United States today. Since September 11, 2001 our nation has remained on heightened alert. While the Legislature has initiated efforts to maximize homeland security, it is the duty and responsibility of the United States Military to anticipate, strategize, and respond to national security threats.

The Northern District of California is deciding an issue complex in nature and vital in importance for both the safety and security of this country.[1] This issue, the use of the SURTASS-LFA sonar system,[2] has the potential to compromise our nation's very being either by harming the environment in which we live or by hindering the amount of protection shielding our shores from national security threats. The litigation over the use of the sonar system has focused on three of the most important environmental legislative initiatives in U.S. history: The Marine Mammal Protection Act,[3] the National Environmental Protection Act[4] and the Endangered Species Act.[5]

This comment will evaluate the analysis undertaken by the District Court for the Northern District of California and the merits on which its decision to issue an injunction was based. Furthermore, this article will analyze and apply the Marine Mammal Protection Act to the use of the SURTASS-LFA sonar system in order to discuss the inherent flaws of

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1. National Resources Defense Council v. Evans, 232 F. Supp.2d 1003 (N.D. Cal. 2002).
2. *See infra* text accompanying notes 13-23.
3. Marine Mammal Protection Act, 16 U.S.C. § 1361 *et. seq.* (2000).
4. National Environmental Policy Act, 42 U.S.C. § 4321 *et. seq.* (2000).
5. Endangered Species Act, 16 U.S.C. § 1531 *et. seq.* (1988).

the administration of environmental legislation when applied to U.S. Navy policy. Finally, the article will conclude by examining various proposed solutions that address deficiencies in the current environmental legislative landscape, and by providing a recommendation as to how the United States might obtain a necessary and crucial balance between our national security and environmental protection.

II. SUBMARINE WARFARE & THE SURTASS-LFA SONAR SYSTEM

A. *Submarine Warfare*

Traditionally, the United States has achieved unparalleled success in submarine warfare operations by exploiting the high acoustic source levels of enemy submarines with the use of passive sonar.[6] Passive sonar detects sound emitted by a target and provides information regarding the existence and location of enemy submarines.[7] Although the U.S. controlled a monopoly of antisubmarine warfare technology during the Cold War, post-Cold War the United States has struggled to maintain its competitive efforts.[8] Despite any effort, the United States has only been able to sustain a modicum of its past dominance of the sea.[9]

It has been noted that one of the most critical vulnerabilities threatening United States security today is anti-submarine warfare.[10] Over the last thirty years, both the Department of Defense and the Navy have delegated significant portions of their budgets to the maintenance of anti-submarine warfare preparedness.[11] The Navy and the Department of Defense have earmarked these funds as necessary to our defense against national security threats. As of 1992, there was general agreement that the Navy had failed to "develo[p] the capability to locate and interdict hostile submarines in shallow water inside the hundred fathom curve."[12] It was also accepted that there was a critical need for the Navy to address the five-fold threat that faces U.S. antisubmarine forces, a threat that includes: (1) advanced diesel-powered submarines such as the Tango

6. Gordon D. Tyler, Jr., *The Emergence of Low-Frequency Active Acoustics as a Critical Antisubmarine Warfare Technology*, 1 JOHN HOPKINS TECH. DIG. 13 at 145, 146 (1992) [hereinafter Tyler, *Emergence of LFA*].

7. *Id.*

8. *Id.*

9. *Id.*

10. *See* David Larson, *National Security Aspects of the United States Extension of the Territorial Sea to Twelve Nautical Miles*, 2 TERR. SEA. J. 189 (1992).

11. *Id.*

12. Richard A. Worth, *Defending the 100-Fathom Curve*, U.S. NAVAL INST. PROC., 173-76 (Oct. 1987).

and Kilo classes; (2) mines; (3) covert operations; (4) cruise and ballistic missiles; and (5) terrorism.[13] With the geo-political changes experienced in the last ten years these once speculative threats have now become reality.

B. Description of SURTASS-LFA

The United States Navy is required to remain trained and equipped for prompt and sustained combat incident to operations at sea.[14] After recognizing a deficiency in submarine warfare capability, a deficiency that had developed over the previous two decades, the U.S. Navy developed a low frequency, active, surveillance towed array system ("SURTASS-LFA") as a remedy.[15] This system was specifically developed to respond to the concerns facing the U.S. Navy in the early 1990s, specifically, the insufficiency of antisubmarine warfare capabilities.[16]

The SURTASS-LFA is unique because it combines both active and passive sonar components.[17] The active component transmits a low frequency blast of approximately 215 decibels (dB).[18] The sound is emitted from eighteen speakers towed from a specially equipped naval vessel.[19] These acoustic transmitting source elements are called "projectors."[20] The projectors are typically located vertically on the towing vessel and the sound is emitted omni-directionally.[21] The sound transmissions vary in signal type, frequency, and duration.[22] Trained Naval Technicians use sonar propagation models to predict and/or update sound propagation characteristics.[23]

The passive component of the SURTASS-LFA consists of a series of microphones called hydrophones that detect echoes from submerged

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13. *Id.* at 173.
14. 10 U.S.C. § 5062 (1986).
15. Notice of Record of Decision for Surveillance Towed Array Sensor System Low Frequency Active Sonar, 67 Fed. Reg. 48145 (July 23, 2002) [hereinafter, *Decision*].
16. *See* Tyler, *Emergence of LFA, supra* note 6, at 145-47.
17. Brad Knickerbocker, *U.S. Navy Plans for Loud Sonar Raises Fears for Whales*, CHRISTIAN SCIENCE MONITOR, Aug. 20, 2002 [hereinafter, Knickerbocker].
18. Jim Trautman, *Is New Sonar Driving Whales Ashore?*, TORONTO STAR, Aug. 5, 2002.
19. *Whales at issue in Navy Sonar Test*, LOS ANGELES TIMES, July 16, 2002.
20. *Decision, supra* note 15, at 42145.
21. *Id.*
22. Taking of Marine Mammals Incidental to Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active (SURTASS LFA) Sonar, 50 C.F.R. Part 216 (2002) [hereinafter, *Final Rule*]. *See also*, 67 Fed. Reg. 136, 46712 (July 16, 2002) [hereinafter *Final Rule Comments*].
23. *See Final Rule Comments, supra* note 22, at 46713.

objects created by the active system.[24] The low frequency waves travel enormous distances and are far more effective than the exclusive use of passive listening devices.[25]

The use of SURTASS-LFA dramatically increases the range of detection of potential threats at sea.[26] The advantage to using low-frequency blasts as opposed to mid or high frequency blasts is that the sound is able to travel farther.[27] This distance advantage translates into the direct benefit of early detection, giving naval forces more time to assess and respond to potential threats.[28]

The system cost the United States Navy approximately $300 million to produce and is currently employed on only two vessels.[29] The Navy had planned on including the towed system on two additional carriers, however, due to budget constraints; implementation of this plan has been delayed until 2007.[30]

C. The Predicted Use of SURTASS-LFA by the United States Navy

The Chief of Naval Operations ("Chief") has stated that anti-submarine warfare is essential to sea control and maritime dominance.[31] In 1998, the Chief emphasized the importance of anti-submarine warfare in protecting national security.[32] He indicated that the SURTASS-LFA is a primary tool, necessary to prevail in any type of maritime conflict.[33]

The Navy predicts that peacetime SURTASS-LFA deployment would involve approximately 270 days per year at sea for a single vessel.[34] In an average year, there would be a maximum of nine missions, of which six would require the employment of the SURTASS-LFA sonar in active mode and three would utilize the system's passive mode.[35]

The Navy insists that there is an immediate and critical need for SURTASS-LFA.[36] Officials maintain that in order to locate and defend

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24. Knickerbocker, *supra* note 17.
25. Marc Kaufman, *Navy Cleared To Use Sonar Despite Fears of Injuring Whales*, WASHINGTON POST, July 16, 2002 at A.03 [hereinafter Kaufman].
26. *See* Tyler, *Emergence of LFA, supra* note 6, at 153-54.
27. Id. at 153.
28. *Id.*
29. *Sonar OK'd for U.S. Navy*, ASSOCIATED PRESS, July 16, 2002.
30. *Final Rule, supra* note 22, at 46713.
31. *Decision, supra* note 15, at 48145.
32. *Final Rule Comments, supra* note 22, at 46713.
33. *Id.*
34. *Id.*
35. *Id.* Environmentalists only contest the use of the active sonar component which emits the blasts that have the potential of injuring whales. The passive component has been used for the past three decades.
36. *Sonar OK'd for U.S. Navy*, ASSOCIATED PRESS, July 16, 2002.

against potential threats, sailors must train realistically with both active and passive sonar.[37] In executing anti-submarine warfare missions, the survival of U.S. ships and U.S. sailors depends on accurate detection of enemy submarines.[38] The Department of Defense argues that employment of the SURTASS-LFA, which allows Naval Fleet units to detect quieter submarines, will enable the Navy to meet the need for heightened national security.[39]

Of the approximately 500 non-U.S. submarines in the world, 224 are operated by non-allied nations.[40] Russia, Germany, China, Iran and North Korea are among the nations who have acquired the most modern, almost undetectable, submarines.[41] Use of the SURTASS-LFA would allow the U.S. Navy to quickly and accurately detect the presence of such modern submarines.[42] Although there seems to be a compelling national security interest, the use of SURTASS-LFA is not without a cost. The pervasive nature of the sound emission raises several environmental concerns.

D. The Concern: Sound Emissions Empirically Harm Whales

A single sound emission, commonly referred to as a "blast" is comparable to the noise of a twin engine F-15 fighter jet taking off.[43] This level of sound has the potential to seriously damage many types of marine wildlife, but for the time being, the focus of public attention seems to be on whales.[44] There is a great deal of scientific dispute regarding the actual impact of the SURTASS-LFA on whales.[45] However, given the administrative mechanisms of environmental legislation, the matter will ultimately be decided not in a lab, but in a courtroom.

There are several empirical examples demonstrating harm caused by active sonar equipment to marine mammals. One such example occurred in the Bahamas in 2000 while the Navy was still testing the new sonar

37. *Final Rule Comments, supra* note 22, at 46716.
38. *Id.*
39. *Id.* at 46712.
40. *Decision, supra* note 15, at 48146.
41. Laura Linden, *Navy Exempted From Sonar Limits: Military Permit Overrides Marine Protection Act*, SAN MATEO COUNTY TIMES, July 16, 2002 [hereinafter Linden]; Theresa B. Salamone, James L. Noles, *Judge Enjoins Testing of Naval Surveillance Technology*, 18 SUM NAT. RESOURCES & ENV'T 31 at *60 (Summer, 2003).
42. Linden, *supra* note 41.
43. Jim Trautman, *Is New Sonar Driving Whales Ashore?*, TORONTO STAR, Aug. 5, 2002 at A21 [hereinafter Trautman].
44. *Id.*
45. *See* NRDC v. Evans, 272 F. Supp.2d 1033 (ND Cal. 2002).

technology.[46] Originally, the Navy denied any link existed between use of sonar and the stranding of 17 marine mammals.[47] However, in December of 2001, the U.S. Navy and the National Marine Fisheries Service ("NMFS") released a report admitting that active sonar may contribute to whale beachings.[48]

In the Bahamas incident, at least sixteen whales and two dolphins beached themselves.[49] Eight whales died within hours.[50] Scientists conducted autopsies on the whales and found hemorrhaging around the brain and ear bones, injuries consistent with those resulting from exposure to extremely loud noise.[51]

However, the Navy has since distinguished the sonar used in the Bahamas from the SURTASS-LFA, stating they were testing a mid-frequency sonar emission at the time of the incident.[52] The Navy contends that low-frequency sonar is less harmful than mid-level frequency sonar, but environmentalists disagree.[53] A joint report issued by the National Oceanic and Atmospheric Administration and the Navy concluded that the mid-frequency sonar was only one of several factors, including topography and unusually calm seas, contributing to whale deaths.[54]

Similar incidents have occurred worldwide contemporaneous with sonar testing. Twelve Curvier beaked whales beached themselves in Greece during NATO exercises testing the low-frequency sonar system, but the whales decomposed before scientists could investigate the cause of death.[55] Because of the potential for the destruction of marine life, there has been a great deal of litigation in recent years concerning the use of active sonar technology.

III. LITIGATION SURROUNDING THE USE OF SURTASS-LFA

A. The History of Litigation Regarding the LFA Sonar System

There have been a number of lawsuits concerning the use of the SURTASS-LFA system. However, most cases have dealt exclusively

46. Linden, *supra* note 41.
47. *Id.*
48. Kaufman, *supra* note 18, at A3.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. Kaufman, *supra* note 18, at A3.
54. Katherine Seelye, *U.S. Seeks to Limit Conservation Law,* WASH. POST, Aug. 10, 2002 [hereinafter Seelye].
55. *Whales At Issue in Navy Sonar Test,* LA TIMES, July 16, 2002.

with testing of the sonar, not actual deployment of the SURTASS vessel. A review of these cases will outline some of the environmental concerns and how they have been treated up to this point.

1. Ocean Mammal Institute v. Cohen[56]

A coalition of environmental groups including the Ocean Mammal Institute, Earth Island Institute, Greenpeace Foundation, Animal Welfare Institute, and Earthtrust filed for an injunction to halt the testing of SURTASS-LFA.[57] The groups argued that the sonar could substantially harm endangered whale species by impairing hearing and thereby, increasing mortality rates.[58] The U.S. Court of Appeals denied the injunction, holding that the cessation of the testing in Hawaii made the issue moot.[59] The plaintiffs argued that the testing would continue in other areas and asked the court to grant an exception of repeatability to the mootness bar.[60] The court reasoned that the plaintiff's argument was mere speculation.[61]

2. Hawaii County Green Party v. Clinton[62]

Similar to the Ninth Circuit, the District of Hawaii denied a petition for injunction of testing occurring off the coast of Hawaii in August of 1998.[63] The court declared that the issue became moot when the Navy ended testing within the area and therefore the court had no subject matter jurisdiction to review the claim.[64] The court also ruled that the experiments were unlikely to be repeated in the area so the exception to the mootness bar did not apply.[65]

3. Kanoa Inc. v. Clinton[66]

Kanoa Incorporated filed for a temporary restraining order to halt sonar testing on humpback whales under a National Marine Fisheries Service permit.[67] The plaintiff corporation asserted that the experiments

56. Ocean Mammal Institute v. Cohen, 164 F.3d 631, 1998 WL 709560 (9th Cir. 1998).
57. *See id.*
58. *Id.*
59. *Id.* at *1 (1998 WL 709560).
60. *Id.*
61. *Cohen,* 164 F.3d 63 at *1 (1998 WL 709560).
62. Hawaii Green Party v. Clinton, 124 F. Supp. 2d 1173 (D. Haw. 2000).
63. Id.
64. *Id.* at 1179.
65. *Id.* at 1183.
66. Kanoa Inc. v. Clinton, 1 F. Supp. 2d. 1088 (D. Haw. 1998).
67. *Id.* at 1090.

were resulting in a reduction of whale sightings within their viewing areas and therefore they were being harmed by the testing.[68] The District Court held that the corporation lacked standing under the Administrative Procedure Act, NEPA, the MMPA, and the ESA.[69]

B. Pending Litigation: NRDC v. Evans[70]

The National Resources Defense Council, the Humane Society, Cetacean Society International, the League for Coastal Protection, Ocean Futures Society, and Jean-Michel Cousteau have filed suit against the Secretary of the United States Department of Commerce, the National Marine Fisheries Service ("NMFS"), the Assistant Administrator and the Administrator of the National Oceanographic & Atmospheric Administration, the Secretary and Chief of Naval Operations and the United States Navy.[71] The suit challenges the validity of the permitted use of SURTASS-LFA under the Marine Mammal Protection Act, National Environmental Policy Act and the Endangered Species Act.[72]

The suit was filed in the Northern District of California and is being heard by Magistrate LaPorte.[73] Although the actual litigation will be delayed for some time, the court has recently granted a preliminary injunction to the Plaintiffs.[74] The court issued a forty-six page decision on October 31, 2002 holding that the Plaintiffs had shown reasonable probability of prevailing on several issues.[75]

The court then ordered the Plaintiffs and Defendants to agree upon

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68. *Id.*

69. *See id.* at 1092-95.

70. *National Resources Defense Council ("NRDC") v. Evans*, 232 F. Supp. 2d 1003 (N.D. Cal 2002).

71. *Id.*

72. *Id.* at 1013. The Court addressed the use of SURTASS-LFA under all three of these statutory provisions.

73. *Evans*, 232 F. Supp. 2d 1003 at 1012.

74. See *id.* at 1055.

75. *Id. at 1012*. The Court addressed the use of SURTASS-LFA under all three of these statutory provisions. The Court concluded that the Plaintiffs had valid claims under the MMPA, ESA and NEPA that would justify the issuance of a preliminary injunction. This article, however, will only address the issues contended under the MMPA because they are most illustrative of the problems of environmental legislation as applied to the U.S. Navy's use of SURTASS-LFA. The analysis of this article can be directly applied to any of these statutes. The ESA is the only act with a special provision regarding national security and it provides that in a time of war the Secretary of Defense can excuse the military from the provisions of the act. Endangered Species Act,16 U.S.C. § 1536. However, this provision has never been used and is considered to be moot. *See* Paul C. Kiamos, *National Security and Wildlife Protection: Maintaining an Effective Balance,* 8 ENVTL. LAW. 457, 499 (2002). Secondly, even if the Executive does exclude the Navy from the ESA, it would still be acting in violation of MMPA and NEPA. MMPA has the strictest requirements (not subject to wartime exception) and therefore this article focuses on the MMPA.

the conditions of an injunction that would comply with statutory mandates (such as the MMPA) and restrict the Navy's use of SURTASS-LFA, while allowing the Navy some room to test and train.[76] The injunction agreement narrows the use of SURTASS-LFA from the permitted 14 million square miles to 1 million square miles.[77]

IV. CASE STUDY: NRDC V. EVANS & THE APPLICATION OF THE MARINE MAMMAL PROTECTION ACT

A. *Statutory Background*

The Marine Mammal Protection Act ("MMPA") explicitly prohibits any person or vessel subject to the jurisdiction of the United States from "taking" marine mammals on the high seas. [78] The MMPA was enacted in 1972 as Congress reacted to growing public concern regarding the threatened extinction of many underwater mammals.[79]

Under the MMPA the term "take" is broadly defined as, "to harass, hunt, capture or kill any marine mammal."[80] The term "harass" is further defined to include acts of "torment" or "annoyance" that have the

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76. NRDC v. Evans, 232 F. Supp. 2d 1003, 1054-55 (N.D. Cal. Oct. 31, 2002). Magistrate LaPorte states,

> Balancing the harms and weighing the public interest, the Court concludes that a preliminary injunction should issue, but that it should not impose a complete ban on peacetime use of LFA Sonar. Rather, the preliminary injunction should be carefully tailored to reduce the risk to marine mammals and endangered species by restricting sonar's use in additional areas that are particularly rich in marine life, while still allowing the Navy to use this technology for testing and training in a variety of oceanic conditions." The injunction is temporary until the time litigation is complete.

77. *Navy to Limit Sonar Testing Thought to Hurt Sea Mammals*, ASSOCIATED PRESS (San Francisco), Nov. 16, 2002.

78. Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1372(a)(1) (2000).

79. This national concern was sparked by a couple of distinct events. Primarily, the widespread media coverage of the slaughter of harp seal pubs in Canada led to public outrage. Also, fear that certain whale species were close to extinction due to human activities lead to public concern. Finally, the incidental killing of dolphins by U.S. tuna vessels concerned Congress. *See* LaVonne R. Dye, *The Marine Mammal Protection Act: Maintaining the Commitment to Marine Mammal Conservation*, 43 CASE W. RES. L. REV. 1411, 1414 n.11. The author provides,

> Recent history indicates that man's impact upon the marine mammals has ranged from what may be identified as malign neglect to virtual genocide. These animals, including whales, porpoises, seals, sea otters, polar bears, manatees, and others have only rarely benefited from out interest: they have been shot, blown up, clubbed to death, run down by boats, poisoned, and exposed to a multitude of other indignities, all in the interest of profit or recreation, with little or no consideration of the potential impact of these activities on the animal populations involved.

80. 16 U.S.C. § 1362(13) (2000).

"potential to injure" a marine mammal or marine mammal stock in the wild or have the "potential to disturb" them "by causing disruption of behavior patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding or sheltering."[81] Harassment that has the potential to physically injure a marine mammal is qualified as "Level A" harassment.[82] Harassment that will merely disturb a marine mammal's behavioral pattern is known at "Level B" harassment.[83] The qualification of harassment as Level A or Level B is important because of the differing standards of authorization required for each Level and because these differing standards often lead to an incidental taking.

The MMPA gives the regulating Secretary the power to authorize "incidental takes" for activities resulting in the unintentional takings of a "small number" of marine mammals as long as the result would have no more than a "negligible impact" on the species as a whole.[84] Before approving such an "incidental take" the Secretary must evaluate the requested activity and conclude that the taking is small, and the result, negligible.[85]

There are several exceptions to the MMPA that allow two distinct types of authorization to be issued depending on the level of contemplated injury. The first exception, incidental harassment authorization, can be issued when an act only has the incidental potential to disturb a marine mammal.[86] The second exception, letters of authorization, can be applied to activities that may cause serious injury or mortality to a marine mammal.[87] These exceptions are also differentiated by their respective procedural requirements to obtain authorization.

To obtain an incidental take authorization, a detailed summary of the proposed action must be included in a letter to the Assistant Administrator for Fisheries at the National Oceanic and Atmospheric Administration.[88] The Administrator must review the description of the activity and publish a notice in the Federal Registrar as well as provide

81. *Id.* at § 1362(18); 50 C.F.R. § 216.3 (defining "Level A" and "Level B" harassment).

82. *Id.*

83. *Id.*

84. MMPA § 109(a), 16 U.S.C. § 101(a)(5)(A)(i), 16 U.S.C. § 1371(a)(5)(A)(i). In order to authorize incidental takes, the regulating Secretary must find a negligible impact on the affected species or stock, and no fixed adverse impact on species or stock subsistence. *Id.* Further, in regulating incidental takes, the regulating Secretary prescribes necessary regulations that detail methods of taking, monitoring, and reporting requirements for proposed activities in which serious injury or mortality is anticipated. *Id.* at § 101(a)(5)(A)(ii), 16 U.S.C. § 1371(a)(5)(A)(ii).

85. *Id.*

86. 50 C.F.R. §§ 216.105(b), 106 (2001).

87. *Id.*

88. 50 C.F.R. § 216.04 (2001).

for thirty days of public comment.[89] At the conclusion of the thirty-day period the Administrator, based on the best scientific evidence available, must evaluate the request and determine the extent of the proposed taking.[90]

After examining all relevant data, the Administrator chooses one of three findings of impact. The Administrator can determine that the activity will have (1) a negligible impact; (2) no immitigable adverse impact; or (3) more than negligible impact.[91] If the Administrator finds that the proposed action will have either a negligible impact or no immitigable adverse impact, then the findings will be subject to public comment before further consideration.[92] If the Administrator determines that the proposed action will have more than a negligible impact, then a negative finding along with the underlying basis for denial is published in the Federal Registrar.[93]

When serious death or injury is a possible result of a proposed activity (a.k.a. Level B harassment), the administrator is responsible for promulgating regulations.[94] These regulations must include: (1) permissible methods of taking pursuant to such activity, and other means of affecting the least practicable adverse impact on such species or stock and its habitat, and (2) requirements pertaining to the monitoring and reporting of such taking.[95]

In addition to following the regulations, the individual or group proposing the action must obtain a letter of authorization.[96] The letter of authorization is only granted if the Director concludes that the proposed

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89. *Id.* at § 216.104(b)(2).
90. *Id.* at § 216.104(c).
91. *Id.* at § 216.104(c) to (d).
92. *Id.* at § 216.104(c).
93. 50 C.F.R. § 216.104(d) (2001).
94. *Id.* § 216.105(b) to (c) (2001) states:

> (b) For allowed activities that may result in incidental takings of small numbers of marine mammals by harassment, serious injury, death or combination thereof, specific regulations shall be established for each allowed activity that set forth:
>
> > (1) permissible methods of taking; (2) means of effecting the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses; and (3) requirements for monitoring and reporting, including requirements for independent peer review of proposed monitoring plans where proposed activity may affect the availability of a species or stock for taking or subsistence uses.
>
> (c) Regulations will be established based upon the best available information. As new information is developed, through monitoring, reporting, or research, the regulations may be modified, in whole or in part, after notice and opportunity for public review.

95. *Id.*
96. *Id.* at § 216.106(a)-(b). A letter of authorization may only be issued to a U.S. citizen.

activity will not exceed the maximum allowable takings under the applicable regulations.[97] The letter must indicate the effective time period of the permission as well as provide for any specific conditions that pertain to the specified activity.[98] Authorization is limited to a period of not more than five consecutive years.[99] Violation of the terms and conditions of the letter of authorization will result in the holder of the letter, as well as anyone claiming to act under its authority, being subject to MMPA penalties.[100]

B. Disputed Issues

Environmental groups have challenged the use of the SURTASS LFA system as violative of the MMPA in five ways.[101] The District Court for the Northern District of California has recently ruled on the apparent validity of each of the five ways.[102] The first challenge leveled against the secretary in the promulgation of the MMPA by the National Resources Defense Council ("NRDC") is that the Final Rule is not limited to a specific geographical region.[103] The second challenge to the MMPA is that the Final Rule uses an improper definition of "small numbers" as provided by 50 CFR 216.03.[104] The third challenge, the NMFS used an invalid definition of "Level B. Harassment."[105] The forth challenge, that the impact of the proposed SURTASS usage will result in more than a "negligible impact."[106] And finally, that the mitigation and monitoring requirements included in the Final Rule are insufficient.[107]

To evaluate these five claims, the court must look to other statutes besides the MMPA, statutes that do not create any private right of action.[108] Actions brought by citizens challenging procedures under the MMPA must be brought under the APA, and are reviewed based on the "arbitrary and capricious" standard.[109] The Court has ruled on the apparent validity of each of the five claims. Following is a summary of

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97. *Id.*
98. 50 C.F.R. 216.106(a)-(b) (2001).
99. *Id.* at § 216.106(c).
100. 50 C.F.R. § 216.106(g).
101. *See* NRDC v. Evans, 232 F. Supp. 2d 1003 (N.D. Cal. 2002).
102. *Id.* However, this is not a final ruling, merely an issuance of an injunction until the time that litigation ceases or the time when the permit expires, whichever is sooner.
103. *See id.*
104. *Id.* at 1023.
105. *Id.* At 1017.
106. *Evans,* 232 F. Supp. 2d at 1032.
107. *Id.* at 1033.
108. Hawaii County Green Party v. Clinton, 124 F. Supp. 2d 1173, 1190 (D. Haw 2000) (*citing* Didrickson v. U.S. Dep't of Interior, 982 F.2d 1332, 1338 (9th Cir. 1992)).
109. *Id.* at 21. *See also*, 50 CFR § 216.180 (2001).

the court's analysis:

1. Final Rule—limited specific geographical region

The Final Rule allows for the taking of various mammals in fifteen different biomes, which are divided in numerous provinces and subprovinces.[110] The NRDC has argued that the provinces identified by the NMFS are too large to meet the "specific geographical region" standard commanded by the MMPA.[111]

In order for review of the NMFS' interpretation of the MMPA in promulgating the regulation that allows use of the SURTASS-LFA, a court must consider the NFMS' construction in light *Chevron,* the most current Supreme Court president establishing the test for administrative agency action.[112] The first inquiry required under *Chevron* is whether the statute unambiguously expresses the intent of Congress.[113] If the intent of Congress is clear the agency, as well as the courts, are required to give effect to the specific intent of Congress.[114] If, however, the intent is not clear, then the inquiry must focus on whether the agency's interpretation is based on a permissible construction of the statute.[115] Unfortunately, the language, "specified geographic region," in isolation does not provide incite to the specific intent of Congress.

The NMFS believes that the designation of biomes is most appropriate under the MMPA for determining "specific geographic area[s]" because, "biome[s] [are] the most likely geographic region to contain the majority of a specific marine mammal stock, especially those that are migratory."[116] The NMFS further explains that "these provinces and biomes effectively delineate the area wherein discrete population units reside thereby allowing NMFS to analyze impacts from SURTASS/LFA sonar on a species and/or stock basis."[117]

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110. *Id.* at 23.
111. *Id.* at 8.
112. *Id.* at 9.
113. Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L.Ed.2 694 (1984).
114. *Id.* at 843.
115. *Id.* at 843.
116. *Evans*, 232 F. Supp. 2d at 1020-21 (responding to the argument that the designation of biomes, done by Longhurst, was designed for plankton and was therefore inapplicable to whales.

> While admittedly, the Longhurst schematic was designed for plankton, it is the best scientific data available for designating specified geographic regions because no biogeographic concept has been designed for marine mammals and, in general, the distribution of marine organisms at higher trophic levels resembles the general geographic patterns of primary productivity, with the larges aggregations concentrated in coastal areas and zones of upswelling.

117. *Id.* at 1023. The Court recognized that the use of SURTASS-LFA is not world-

The Northern District of California held that because the NRDC did not present any evidence to prove that an alternative biogeographical scheme could be readily applied for the "specific location" of marine mammals, the definition used by the NMFS was not arbitrary and capricious.[118] Because the NRDC was unable to formulate a competing standard, the judge determined that NFMS' accusation did not warrant the issuance of an injunction.[119]

This issue, the designation of "specific location," reflects a prevailing problem of environmental legislation that often leads to time consuming and costly litigation. The terms of the MMPA, like most environmental statutes, are necessarily vague because most environmental concepts are difficult to apply uniformly to each situation that arises with respect to authorized takings. Given this vagueness, it is arguable that the language of the MMPA gives the NMFS room to remain flexible. Under this reasoning, when considering the determination of "specific location," it is fitting to conclude that the court showed the appropriate deference to the acting agency.

2. "Small Numbers" Controversy

The NRDC also claims that a regulation issued by the NMFS more than twenty years ago, a regulation containing a definition of "small numbers," violates the MMPA.[120] If this regulation was indeed promulgated in violation of the Act, then the use of the NMFS definition in the Final Rule permitting SURTASS-LFA use is likewise invalid.

The regulation defines "small numbers" as "a portion of a marine mammal species or stock whose taking would have a negligible impact on that species or stock."[121] The MMPA specifically authorizes the Secretary to establish regulations "as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species

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wide, but rather, "the total area that would be available for SURTASS-LFA sonar to operate includes about 70-75 percent of the world's oceans." *See also* 50 CFR § 216.180 (2001).

118. *Evans,* 232 F. Supp. 2d at 1023. The Court stated,

> Plaintiffs have not presented any evidence, however, disputing NMFS' conclusion that no alternative biogeographical scheme currently exists for marine mammals that can be readily applied here. Thus, plaintiffs have not shown a likelihood of success on their claim that NMFS acted in an arbitrary and capricious manner in choosing the specified geographical regions identified in the Final Rule.

119. *Id.*

120. *Id.*

121. General Regulations Governing Small Takes of Marine Mammals Incidental to Specified Activities, Definitions, 50 C.F.R. § 216.03. "Small numbers means a portion of a marine mammal species or stock whose taking would have a negligible impact on that species or stock."

and population stocks and will be consistent with the purposes and policies set forth in section 1361."[122] The NRDC contends that by defining "small numbers" using the term "negligible impact," the NMFS has combined two separate protective standards in an impermissible way.[123] They argue, because Section 1371(a)(5)(A) of the MMPA permits the authorization of incidental takings of "small numbers of marine mammals of a species or population" *only if* the Secretary finds that the total taking will have a "negligible impact," there are two separate requirements.[124] The NRDC contends that these two terms are mutually exclusive and that to treat them together reduces the statutes words to mere surplusage.[125]

The court has thus far agreed with the position of the NRDC and has determined that the plaintiffs have a reasonable chance of prevailing on this issue at trial. This argument is one basis for the court's issuance of a temporary injunction pending the resolution of the litigation.

The Court accepts the idea that Congress purposefully neglected to define "small numbers" because the term is incapable of being expressed within numerical limits.[126] The NMFS has responded that they agree the term "small numbers" can not be expressed as a written number. The NMFS claims that despite this fact, defining "small numbers" as they have in construing the Act places an upper limit on the term, and when applied, the definition properly and effectively implements Congressional intent.[127]

The rationale of the NMFS is further clarified by an examination of the definition of "negligible impact." Negligible impact is defined as "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects of annual rates of recruitment or survival."[128]

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122. *Id.*

123. 16 U.S.C. § 1373 (1990), providing, in pertinent part,

The Congress finds that—

> (1) certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities;
> (2) such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population.

124. *See* 16 U.S.C. 1361(a)(5)(A) (1990) (allows for Secretary to authorize the incidental take of "small numbers" of marine mammals of a species or population. Stating, if the Secretary finds "that the total of such taking during each five-year period concerned will have a negligible impact on such species or stock.")

125. *Evans*, 232 F. Supp. 2d at 1026.

126. *Id.* at 1025 (*citing* H.R. Rep. No. 97-228 (1981)).

127. *See* 67 Fed. Reg. 46764 (2002).

128. General Regulations Governing Small Takes of Marine Mammals Incidental to

This definition narrows the scope of the activities that might be considered exempt from the statute, thereby fulfilling the intent of Congress.[129] The stated rationale of the NMFS is that when faced with two similar terms of regulation, one will inherently emerge as stronger than the other.[130] By including the most stringent definition in the weaker standards, more protection for marine mammals is created under the Act.

The court interprets the default provision of the MMPA, "no permit may be issued for the taking of any marine mammal," to mean that Congress intended for any harm to any marine animal to be forbidden. However, this interpretation of legislative intent necessarily fails because it conflicts with the direct statutory language that allows incidental take permits to be issued.[131]

The regulation defining small numbers, as mentioned above, is more than twenty years old. If the Court were to declare it invalid, there would be dramatic consequences. First, every permit issued by the NMFS using this definition could be contested. Second, it would force the NMFS to come up with a new definition of "small numbers." This redefining could be described as a nearly impossible task. Congress has been unable quantify it, the NMFS has done its best to define it, albeit through an over-inclusive definition of "negligible impact," and the court offers no suggestion for a more appropriate definition. Third, although it is true that the NMFS construct of "small numbers" might not be perfect, it is certainly a reasonable construction and there has been no specific indication as to why the definition might be either arbitrary or capricious.

The fact that a challenge to a twenty-year old NMFS generic regulation can justify an injunction of military training, despite the Navy's full procedural compliance in requesting specific authorization for the use of SURTASS-LFA, demonstrates an inherent flaw in the administration of the MMPA.[132] There is no mechanism to weigh the legitimacy of national security concerns in the decision making process, against the issuance of a preliminary injunction on statutory grounds, while still seeking to avoid the cost and time of litigation.

Specified Activities 50 C.F.R. § 216.103 (2002).

129. *See* text accompanying notes 78-85.

130. *Evans*, 232 F. Supp.2d at 1025-1026.

131. *See* MMPA, 16 U.S.C. § 1371(a)(5)(A).

132. This "process" included: conducting scientific studies to assess potential harm to marine animals; preparing a detailed summary of the proposed action and submitting it to the Secretary; responding to public comment; develop biome areas sufficient to meet the "specified geographic area" criteria; etc.

3. Final Rule's Definition of "Harassment"

There has been a great deal of litigation over the NMFS regulations determining what constitutes "harassment" under the MMPA.[133] As mentioned previously, the MMPA divides harassment into two categories.[134] NRDC argues that the NMFS improperly defined "harassment" in the Final Rule in two respects. First, they pointed out that the Final Rule would require that there be an actual disruption of behavioral patterns, rather than merely a potential for disruption as the statute states.[135] Second, the Final Rule requires that the disruption must be "significant" to constitute a violation of the rule, whereas the statute contains no such limitation.[136] Thus, the Final Rule allows more disruption to Marine Mammals than the MMPA allows.

The court agrees that the NMFS definition of "harassment" is both arbitrary and capricious, but determined that the erroneous definition did not cause any particularized harm, nor the requisite "irreparable injury."[137] Therefore, the judge refused to impose a temporary injunction on the use of the SURTASS-LFA on this ground.

The court's methodology in deciding this issue raises another

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133. Before the NMFS issued the regulation defining "harassment," courts took different views concerning what actually constituted harassment under the Act. *See* United States v. Hayashi, 5 F.3d 1278, 1279 (9th Cir. 1993) (holding "reasonable actions . . . not resulting in severe sustained disruption of the mammal's normal routine . . . [of] eating fish or bait off of a fishing line are not rendered criminal by the [MMPA] or its regulations"). The *Hayashi* Court used the "familiar principle of statutory construction that words grouped in a list should be given related meaning" to determine that the plaintiff's action (shooting near porpoises) did not constitute harassment. *Id. But see* Strong v. United States, 5 F.3d 905 (5th Cir. 1993) (holding that the feeding of marine mammals by tourists constituted harassment under the MMPA. Id. at 906-07). *See also,* Tepley v. National Oceanic & Atmospheric Admin., 908 F. Supp. 708 (N.D. Cal. 1995) (distinguishing chasing whales from causing them to flee while holding that swimming near whales did not constitute harassment).

134. Despite the formulation of a statutory definition of "harassment" the issue has still been widely contested in NMFS regulations. The definition is so vague that it promotes widely varying interpretations by regional offices of the NMFS. *See* Paul C. Kiamos, *National Security and Wildlife Protection: Maintaining an Effective Balance,* 8 ENVTL. LAW 457, 473 (2002).

135. *See Evans* 232 F. Supp. 2d at 1028. The Final Rule Provides that "for Level B incidental harassment takings, NMFS will determine whether takings by harassment are occurring based on whether there is a significant behavioral change in a biologically important activity, such as feeding, breeding, migration or sheltering." 67 Fed Reg. 46721-22.

136. *Evans* 232 F. Supp. 2d at 1028. The statute only requires a disruption, not a significant disruption. *See* 16 U.S.C. § 1362(18)(A). The Final Rule also provides that "for small take authorizations (as opposed to intentional takings), a Level B harassment taking occurs if the marine mammal has a significant behavioral response in a biologically important behavior or activity." 67 Fed. Reg. 46740.

137. *Id.* at 1028.

interesting issue; that is, why the court seems so eager to allow a definition of harassment that swallows the intent of the MMPA? The definition of harassment has been widely contested but the court fails to address case precedent. Instead, the court ignores the definition of the NMFS, determined arbitrary and capricious, because the harassment does not cause irreparable harm. However, the entire lawsuit is based on the premise that the Final Rule is invalid because it allows the U.S. Navy to unlawfully harass marine mammals. The definition of "harassment" should be a crucial element in the resolution of this suit. In its application, the Final Rule gives the Navy more flexibility than the direct language of the MMPA permits.

4. Negligible Impact

The NMFS is only permitted to issue "small take permits" if it can first find that the taking authorized will have only a "negligible impact" on marine mammals.[138] The court's decision provides little analysis regarding what exactly the NRDC argued; regardless, the Court ultimately holds that the plaintiffs raised a serious issue on the merits regarding "negligible impact" and ruled that on this basis, an injunction should be granted.[139] The Court reasoned that under the Final Rule the Navy retains discretion to operate in zones of the ocean that are rich in biological life and nothing specifically prohibits the Navy from operating SURTASS-LFA during mating or migration seasons.[140] The Court adds that, "while the mitigation measures adopted will help reduce harm to marine mammals and are very commendable as far as they go, the evidence shows, as explained below, that the planned mitigation is not likely to be as effective as defendants contend."[141]

The decision on the merits of the "negligible impact" claim ignores the weight of scientific evidence that shows no significant harm to marine mammal species.[142] The Court displayed the necessary deference to the NMFS when ruling that the scientific basis for an 180dB threshold was not arbitrary or capricious under the NEPA.[143] It is difficult to reconcile the fact that the court both recognizes the validity of the scientific evidence for the purposes of NEPA analysis, and then bases the MMPA analysis on mere speculation.

138. MMPA, 16 U.S.C. 1371(a)(5)(A), (D) (2000).
139. *Evans*, 232 F. Supp. 2d at 1022.
140. *See id.* at 1022-23.
141. *Id.* at 1023.
142. *See id.* at 1014-15.
143. *See id.* at 1017.

5. Mitigation and Monitoring

The Final Rule requires mitigation and monitoring in three different respects. The Navy is required to: (1) use a high frequency active sonar system to monitor for marine mammals within two kilometers of the LFA source and suspend operation during the period they are detected in the zone; (2) visually monitor marine mammals and endangered sea turtles from the deck of the source ship; and (3) use passive acoustic monitoring.[144] The court held that the plaintiffs had a reasonable chance of prevailing on this issue at trial as well and speculated that the mitigation and monitoring requirements of the Final Rule are deficient. Again, the court gives no analysis of exactly how the mitigation efforts might be deficient. This kind of judgment demonstrates the lack of predictability inherent in the current statutory framework. There is little or no guidance for the Navy to formulate a plan that avoids this problem in the future; that is, the issuance of an injunction preventing military training while litigation is pending.

C. *Resulting Agreement*

Magistrate LaPorte ordered the parties to meet and confer to craft a preliminary injunction consistent with the opinion issued on October 21, 2002.[145] As a result, the Navy and the NRDC reached an agreement for a permanent injunction.[146] The agreement limits the Navy's authorization to conduct testing of the SURTASS-LFA across fourteen million square miles of the ocean to one million square miles of ocean in the Pacific Mariana Islands.[147]

V. FLAWS IN THE ADMNINSTRATION OF ENVIRONMENTAL LEGISLATION AS APPLIED TO U.S. NAVY TRAINING EXCERCISES

A. *Injunctive Relief Is Inappropriate for Military Training*

There are two basic reasons why injunctive relief is inappropriate for military training. Primarily, the threshold as to what kind of

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144. *See* Requirements for Monitoring, 50 C.F.R. 216.185 (2002) (providing, "If a marine mammal is detected within the 180 dB SURTASS-LFA mitigation zone, SURTASS-LFA will be immediately delayed or suspended."

145. *Evans*, 232 F. Supp. 2d at 1055.

146. Marc Kaufman, *Navy Agrees to Injunction Limiting Sonar Use; Hill Exemption Still Sought; Group Says Whales Threatened*, WASHINGTON POST, October 14, 2003.

147. Theresa B. Salamone, James L. Noles, *Judge Enjoins Testing of Naval Surveillance Technology*, 18 SUM. NAT. RESOURCES & ENV'T 31 at *60 (Summer, 2003).

challenges could warrant a complete cessation of military training exercises is too low. The NRDC case, for example, lists one reason for the issuance of an injunction as being the fact that the Final Rule uses an improper definition of "small numbers" constructed by the NMFS twenty years ago. This injunction was issued despite full statutory compliance by the Navy, and will result in the impedance of important and necessary training exercises until the cessation of the pending litigation.

The second reason that the issuance of injunctive relief is inappropriate where such relief might interfere with military training is that a court's decision to impose such relief relies too heavily on the wildcard of judicial discretion. Such discretion should not impede one of the more important obligations of our military, its training and maintenance. The current legislative framework leaves a court responsible for striking a balance between national security and environmental protection while faced with strict legislation tailored with little room to consider all pertinent concerns.[148]

> When our vital ranges are not available for training because they are encumbered by encroachments, our state of readiness is at risk. This is complicated by the fact that the encroachment issues are complex, varied, and involve multiple federal, state, and local agencies, the Congress, the non-governmental organizations, and the public. In dealing with its effects, we have borne a significant increase in administrative and human costs (time away from home, flight hour costs, travel expenses, etc.) to achieve an acceptable level of readiness. In some instances, we have been unable to achieve the desired level.[149]

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148. An example of how judicial review can limit the amount of factors the Court can consider is the Supreme Court's Treatment of the ESA in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). The *TVA* Court stopped construction of a million-dollar damn in order to preserve an endangered species. The Court reasoned that the plain intent of Congress in enacting the statute was to halt and reverse the trend toward species extinction, "whatever the cost." *Id.* at 184. Considering how this would impact issues of readiness the Court stated,

> Furthermore, it is clear Congress foresaw that § 7 [of the ESA] would, on occasion, require agencies to alter ongoing projects in order to fulfill the goals of the Act. Congressman Dingell's discussion of Air Force practice bombing, for instance, obviously pinpoints a particular activity—intimately related to the national defense—which a major federal department would be obligated to alter in deference to the strictures of § 7.

Id. at 186-87. This decision, if construed narrowly, removes all equitable discretion from courts to deny an injunction for the purposes of national security.

149. Encroachment Issues Having a Potentially Adverse Impact on Military Readiness: Hearing Before the Subcomm. on Readiness and Management Support of the Senate Armed Services Committee, 107th Cong. (2001) (statement of Vice Admiral James F. Amerault, Deputy Chief of Naval Operations, Fleet Readiness and Logistics), available at http://www.senate.gov/~armed_services/statemnt/2001/010320ja.pdf. (last

It is important that Congress recognize that injunctive relief as applied to the Department of Defense is undesirable, inefficient, and outright dangerous when national security interests are implicated. As the quote above exemplifies, United States national security is jeopardized when training exercises are encroached by pending environmental litigation.

The statutory framework and judicial precedent narrows the "correct" decision to be one that in some cases is blatantly unreasonable. The result is that courts are left to either apply the law or blatantly ignore it.[150] This is detrimental to both the U.S. Navy and environmental groups because it leaves them with no predictability. In cases where the court decides in favor of environmentalists, our national security might very well be in jeopardy. Furthermore, for the court to ignore the black letter law, frustrates the democratic process and compromises the validity of the entire act.

B. The Existing Legislative Framework Does Not Provide the Necessary Flexibility for Appropriate Remedy

Adjudication of third-party civil suits against the military, rules out any possibility for long-term compromise. It is impossible to strike a balance in a situation where there is necessarily a winner and a loser. There is little to no flexibility in many environmental statutes to look to for help with this dilemma. A judge is not authorized to make a compromise in a final order when she rules on whether the Navy or the NMFS is violating a statute. They make a determination and the contemplated activity is either valid or not.

C. The Status Quo Holds the U.S. Navy to Unreasonable Standards and Inefficient Procedures—The Result: The U.S. Navy is Falling Behind

The U.S. Navy has found itself in a two-tier regulating system. Not only must the Navy comply with all current legislation to the degree that the NMFS requires, spending time and money to meet those standards, but often they do this only to be later faced with a further challenge by

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visited Jan. 10, 2002).

150. In a post-*TVA* decision, the D.C. Circuit refused to issue a preliminary injunction against the U.S. Navy for reasons of national security. *Water Keeper Alliance v. United States Dept. of Defense*, 271 F.3d 21 (D.C. Cir. 2001). The D.C. Court explained away the *TVA* decision by stating, "we do not think that they [addressing other precedent including *TVA*] can blindly compel our decision in this case because the harm asserted by the Navy implicates national security and therefore deserves greater weight than . . . economic harm. . . ." *Id.* at 34.

suing third parties. Such a challenge is often followed by even more expense, more time spent, and more uncertainty.

The SURTASS-LFA litigation is an example of how inefficient and unreasonable the current administration of the MMPA is as applied to training exercises. The Navy has invested years and millions of dollars in order to attain the adequate levels of data to convince the NMFS to issue a permit. They hired outside experts, four of whom were even nominated by the NRDC, to conduct studies on the effect on whales.[151] These independent experts concluded that the use of the SURTASS-LFA would not have any more than a "negligible impact" on marine life. In the meantime, foreign counterparts have not only developed, but are training with the SURTASS-LFA in the world's oceans. Both the Russian and the French navies already employ the LFA system.[152]

To exercise a non-negotiable "hard stance" is simply not rational while our Nation's environmental initiatives are circumvented each and every day by both our international enemies and allies. Further, U.S. prevention of the international use of potentially environmentally damaging technologies is simply unrealistic. While U.S. environmental laws are circumvented daily by other countries such as Russia and France, who are operating active sonar in our oceans, it is patently unreasonable for our Navy to be spending time in courtrooms.[153] Our Nation's credibility as a military leader is critical and training is a necessary element in maintaining that status.

> Our forward-deployed naval forces are strategically positioned in key regions of the world that are vital to our nation's trade, communications, and political interests. Mobile, flexible, and sustainable these naval forces operate unencumbered by sovereignty issues. It is precisely because of their credible combat capability that we play a key role in maintaining worldwide economic, political and

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151. *See* Kiamos, *supra note* 74, at 488, stating,

> Although the Navy has engaged reputable marine mammal scientists nominated by the National Resource Defense Council to act as independent advisors and has implemented substantial mitigation in the deployment plan, the deployment of LFA Sonar still remains uncertain because of the likelihood of litigation.

152. *Kiamos, supra note* 74, at 485.

153. Further, it would seem that up to this point, the irreparable harm on marine life speculated by the use of SURTASS-LFA remains a speculation. With other countries utilizing the sonar, there have been no mass whale strandings. As opposed to some types of environmental damage, such effects that have been speculated as a result of SURTASS usage can not go unnoticed by the public and more importantly, the media. At this point the speculated fears remain speculated fears. This provides further support that the United States Navy should not be sacrificing necessary training activities in the status quo. If the premise of the *NRDC v. Evans* suit is correct and operation of the SURTASS-LFA inflicts irreparable harm on certain species, than it will be done regardless of whether the U.S. is allowed to employ the system or not.

> military stability. Our naval forces are lethal war fighting instruments immediately available to our joint-combined warfare commanders when needed because they are trained and ready for combat. Training and readiness form the solid foundation of our credible combat capability, and no amount of technology, hardware, personnel or leadership can achieve this readiness without access to quality training ranges in the United States to prepare our Sailors and Marines for the rigors of combat.[154]

A more important concern than the international circumvention of U.S. environmental initiative with respect to use of SURTASS-LFA, is the threat of the U.S. Navy falling behind in military technology and losing the ability to detect a new class of submarines. This new class consists of technologically-advanced submarines that are virtually undetectable using our current sonar techniques.[155] Countries such as Russia, France and China already possess these submarines and are willing to use them should a conflict arise.[156]

For example, China has new-generation nuclear submarines coated with a new type of sonar-absorbing material and equipped with 16 Ju-Lang ballistic missiles with a reported effective range of 4,320 nautical miles.[157] In May of 2002, China ordered eight more Russian Kilo Class submarines to be armed with Club-S surface-to-surface missiles from Russia.[158] These missiles are slated for delivery in the next five years.[159] All of this upgrading is speculated to be the result of conflict preparation for potential conflict with Taiwan and possibly the U.S.[160]

The emergence of low-frequency active acoustics has been

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154. *See* Encroachment Issues Having a Potentially Adverse Impact on Military Readiness: Hearing Before the Subcomm. on Readiness and Management Support of the Senate Armed Services Committee, 107th Cong. (2001) (Statement of Vice Admiral James F. Amerault, Deputy Chief of Naval Operations, Fleet Readiness and Logistics), available at http://www.senate.gov/~armed_services/statemnt/2001/010320ja.pdf. (last visited, January 10, 2002).

155. Current techniques are passive and thereby less effective. *See id.* at 147. The SURTASS system combines the traditional passive sonar (which consists of microphones that pick up approaching noise) with an active component (which sends out a low-frequency that serves as a long-range echo-producer). *Id.*

156. These are the countries that we know have these submarines, however, the extent of their world-wide production/usage is unknown. *See* text accompanying notes 153-62.

157. Samuel Loring Morrison, *China Develops Threatening Naval Force Against Taiwan*, 19 NAVY NEWS WEEK 37 (September 16, 2002).

158. *Id.*

159. *Id.*

160. *Id.* ("China is developing larger surface ships, ballistic missile submarines, nuclear-powered attack submarines and conventional submarines, so it will be able to blockade Taiwan and deter any involvement of the U.S. Pacific Fleet in the Taiwan Strait by the end of this decade. For this purpose the development of SSBN's has been given priority, to build up a nuclear deterrence.")

described as "critical" to submarine warfare technology.[161] It is important that we maintain credibility as well as be equipped, trained and ready to use that new technology. Training is a necessary component of U.S. Military efforts in sustaining its level of operation against ever-changing threats and potential combat scenarios presented today's world theatre.

For the reasons given above, the administration of the MMPA as applied to third party suits against the U.S. Navy is inefficient and unreasonable.

VI. PROPOSED SOLUTIONS

The decisions and operational training of the armed forces should not be left subject to the adjudicative decision of one individual judge in Northern California. In today's climate where it appears that war is continually on the horizon it can hardly be argued that any one individual should have the power to decide if the speculated deaths to Marine wildlife outweigh the training needs of the U.S. Navy, even if only to issue a temporary injunction. There have been several ideas contemplated in solving this conflict.

A. *Voluntary Alternative Dispute Resolution*

One such suggestion is to move these processes out of the traditional adjudicative system into some form of voluntary alternative dispute resolution ("ADR").[162] This would provide for additional flexibility and an opportunity to come to an agreement as opposed to the declaration of a winner or loser as adjudication demands.[163] ADR would also allow the additional benefit of having these matters decided by a person with highly specialized expertise (both in knowledge and experience) who can truly appreciate the consequences of his/her actions in this field.[164] Finally, the use of ADR would decrease the cost and time that is presently spent by both the Navy and environmental groups in litigation.[165]

161. *See* Tyler, *supra* note 6, at 146.

162. *See* Eric Montvalo, *Operational Encroachment: Woodpeckers and Their Congressmen*, 20 TEMP. EVTL. L. & TECH. J. 219 (suggesting alternative dispute resolution as a solution to environmental encroachment on U.S. Military Activity).

163. *Id.* at 248.

164. *Id.*

165. Stephen B. Goldberg et. al., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES, at 8 (3rd ed. 1999).

> The following is a list of justifications for alternative dispute resolution (ADR): 1) to lower court caseloads and expenses; 2) to reduce the parties' expenses and time; 3) to provide speedy settlement of those disputes that were disruptive of

However, there are several practical flaws that would make voluntary ADR unlikely under the MMPA. First, there is no room in the current statutory provisions that allow such a deviation from normal adjudication. Second, most forms of alternative dispute resolution necessitate a willingness to participate in order to actually reach an agreement.[166] Third, there is no evidence that the private third party litigants would be open to such negotiation. Many environmental groups believe that citizens' suits are necessary for effective administration of the MMPA and cannot be foregone.[167] Also, the ability to still go to court and potentially win a temporary injunction ceasing military training for the amount of time it takes to proceed through litigation is a substantial environmental victory that could impede verified national security concerns.[168]

> the community or the lives of the parties' families; 4) to improve public satisfaction with the justice system; 5) to encourage resolutions that were suited to the parties' needs; 6) to increase voluntary compliance with resolutions; 7) to restore the influence of neighborhood and community values and the cohesiveness of communities; 8) to provide accessible forums to people with disputes, and; 9) to teach the public to try more effective processes than violence or litigation for settling disputes.

Id.

166. *Id.* at 496-98.

> 1. Environmental mediation ought to begin with some conflict assessment that leads to the selection of a manageable number of stakeholder representatives, procedural ground-rules, and the selection of a neutral party acceptable to stakeholders. . . .
>
> 3. Environmental mediation must take place "in the sunshine." That is, environmental mediation cannot be conducted in secret.
>
> 4. The product of almost all environmental negotiations is rarely a legally binding agreement.
>
> 5. The result of environmental mediation in a particular case does not set a precedent.
>
> 6. Technical and scientific issues need to be dealt with as part of environmental mediation.
>
> 7. Almost any multi-party, multi-issue environmental dispute can be mediated as long as question of fundamental rights do not need to be decided.

167. Sierra Club, Hawaii Chapter, Testimony before the Senate Committee on Health & Environment and Water, Land & Hawaiian affairs, SB 443 (February 11, 1997), available at http://www.hi.sierraclub.org/action/1997/97-01-31-t-sb0443.html (last visited Jan. 19, 2002).

168. *Navy to Limit Sonar Testing Thought to Hurt Sea Mammals*, ASSOCIATED PRESS (San Francisco), Nov. 16, 2002.

B. *The Armed Forces Marine Mammal Protection Act*[169]

The Chief of Naval Operations has proposed an amendment to the MMPA entitled, "Armed Forces Marine Mammal Protection Act" with the goal of protecting marine mammals while maintaining naval readiness within the MMPA's permitting regime.[170] The amendment proposes that 16 U.S.C. § 1983 be reconstructed to allow taking of marine mammals during military training and exercises at sea as long as they are "limited to the lowest practicable levels consistent with national security requirements."[171] Additionally, the Amendment would provide that upon request of the Secretary of Defense, the President may, for purposes of national security, exempt any armed forces operation from application of the MMPA.[172] This amendment would eliminate the need to obtain permits for training exercises under the MMPA.[173]

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169. Since this article was written, the 108th Congress has passed the "National Defense Authorization Act for Fiscal Year 2004" which incorporates this proposed amendment to the Marine Mammal Protection Act. *See* Military Readiness and Marine Mammal Protection, P.L. 108-136, § 319. This Amendment to the MMPA allows the Secretary of Defense, after conferring with the Secretary of Commerce or the Secretary of the Interior, or both, as appropriate, to exempt any action undertaken by the Department of Defense that is necessary for national defense. This amendment does not define or specify what is meant or required by the term "confe[r]." It gives no indication if either the Secretary of Commerce or the Secretary of the Interior must grant permission for exemption, or if they merely need to be told. Likewise, it does not specify what facts would justify the determination that an exemption is necessary for "national defense." The Amendment does, however, limit the exemption to a time period of less than two years. The amendment does not address third party civil lawsuits and does not forbid the granting of preliminary injunctions to military activity. However, the amendment does create room for a balancing test of national security concerns and environmental protection. It remains to be seen if this amendment will result in the circumvention of U.S. environmental initiatives or if it will strike the necessary balance between national security and environmental protection that this article endorses.

170. *See Kiamos, supra note* 74, at 491-92.

171. *Id.* at 492, stating,

> The draft essentially proposes that 16 U.S.C. § 1383 be amended by adding a new subsection (c), Marine Mammal Protection Procedures for the Armed Forces, "to ensure that the armed forces have the necessary flexibility to meet their obligation to protect national security while operating in the marine environment." In striking this balance, the armed forces must conduct operations in the marine environment utilizing reasonable and practicable measures to limit the incidental taking of marine mammals.

172. *Id.* at 492.

> Proposed subsection (c) also intends for the incidental kill, serious injury, or harassment of marine mammals during the course of military activity training and exercises at sea to be limited to the lowest practicable levels consistent with national security requirements. Additionally, proposed subsection (c) provides that, upon request of the Secretary of Defense, the President may, for purpose of national security, exempt any armed forces operation from application of the MMPA.

173. *Id.*

Although the goal of the Armed Forces Marine Mammal Protection Act is noble through its recognition that both marine mammals and our borders need protection, the implementation of this amendment leaves the U.S. Navy with too much power and little incentive to protect those species. Under the proposed amendment there is no judicial or political remedy for third party administration of the MMPA. This amendment would be a dramatic shift in power over the status quo and would likely be met with contempt and even disgust by environmentalists.

VII. THE COMPROMISE: A WORKABLE, MUTUALLY ADVANTAGEOUS SOLUTION

A. The Proposal

The MMPA should be amended to include specific provisions pertaining to the U.S. Navy (and all branches of armed forces) and contain the following elements:

1. United States Armed Forces are subject to the requirements of the MMPA.

2. Permits can be issued for the incidental takings of marine mammals following the completion of all requisite steps provided in the Marine Mammal Protection Act and approval of the NMFS.

3. Any and all third party suits brought against the U.S. Navy (or other branch of the armed forces) concerning the MMPA must be submitted to mandatory and legally binding arbitration.

4. Upon the request of the Secretary of Defense, the President may, for purposes of national security, exempt any armed forces operation from application of the MMPA.

B. Solvency

A carefully crafted amendment to the MMPA incorporating the above-mentioned characteristics would strike the necessary balance between environmental protection and national security. Such an amendment would allow the necessary exception to the Act in those cases where the Secretary of Defense and the President of the United States decide that a legitimate national security threat exists. At the same time, however, such an amendment maintains the structure of environmental law without the inefficiencies resulting in the status-quo when third parties contest incidental takes under the MMPA.

The exception provision of the Amendment would allow our country's military leaders to decide when a situation exists that would warrant an exception to the MMPA. This provision would gain the

benefit sought by the Armed Forces Marine Mammal Protection Act that the Chief of the Navy is proposing, however, it would not grant the Navy a blank check with respect to training activities. The Navy would still need to apply for permits and satisfy all the requisite steps before conducting training activities. This provision would assure that the current state of environmental consciousness and scientific research will continue with regard to all training activities. By mandating compliance with the MMPA, unless the President determines there is a legitimate national security threat deeming exception to the MMPA necessary, the public has a political remedy if the exception is abused.

Mandatory arbitration is beneficial to both the U.S. Navy and environmental advocates. The arbitration provision assures that environmental groups would also be able to seek a judicial remedy if the NMFS acts in an arbitrary or capricious manner when issuing a permit. However, the process of arbitration would be more efficient than traditional adjudication in at least 4 ways: (1) arbitrators will be selected based on their expertise in the areas of national security and environmental protection, therefore, decisions will not be made by a judge who is trying to learn/interpret/and issue a ruling on matter complex with military and environmental information; (2) arbitration is less costly, thereby aiding both the U.S. Navy and environmental groups;[174] (3) arbitration is much faster than traditional adjudication, assuring that issues will be decided quickly instead of remaining in the wings of judicial court-clog; (4) arbitrators are free to come up with creative remedies, allowing for permanent compromise (as opposed to temporary injunctions) which are flexible and can more effectively balance the competing interests of national security and environmental protection.[175]

This proposal strikes the ultimate balance between U.S. National Security interests and environmental concerns. It allows the Navy to continue essential training activities unhindered by the strict constraints of the MMPA. If a conflict arises after the Navy has gone through the rigorous process of obtaining an incidental take permit, it can now be handled in a more efficient and reasonable manner.

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174. Thomas E. Carbonneau, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION at 2 (3rd ed., 2002) (explaining the application to Business Transactions):

> The designated arbitrators ordinarily have considerable experience in the relevant business sector. Their commercial expertise allows them to reach accommodative determinations that reflect a consensus in the trade. By choosing to arbitrate, therefore, business parties avoid inexpert judges who may be prone to impose legalistic solutions upon commercial problems.

175. *See id.* at 21 (explaining, "the basic rule of U.S. arbitration law is that arbitrators, as a matter of law, possess the remedial authority necessary for them to do justice in the given case. . . Arbitral tribunals can issue orders for provisional relief.").

As applied to *NRDC v. Evans*, the proposed amendment would not only save time and money, but it would guarantee a long-term compromise, unrestricted by the current state of the law. An arbitral tribunal, equipped with specific knowledge and expertise in environmental protection and national security, has the ability to construct a judicially enforceable, permanent compromise, assuring increased satisfaction by the U.S. Navy and environmental groups. If, in the interim, a serious situation develops where the use of the SURTASS-LFA is critical to national security, the proposed amendment would allow the Secretary of Defense and the President to permit exception to the MMPA. This gives the statutes added flexibility and a narrow, but necessary, loophole for national security needs.

VIII. FINAL THOUGHTS

Issues concerning national security and environmental protection are intrinsically connected: environmental protective statutes have no enforcement mechanism without political autonomy, and; alternatively, there is no purpose of national security if a habitable geographic region in which we can exercise our freedoms no longer exists.

The power struggle between the Navy and various environmental groups is a direct result of the way that environmental statutes, such as the MMPA, are structured. The *NRDC v. Evans* case illustrates the inefficiencies of the MMPA as applied to the U.S. Navy in an all too realistic way.

The proposed solution, an amendment to the MMPA requires the Navy to comply with the Act and submit claims of third parties to arbitration, would be a necessary first step to establishing a balance of two equally important issues.

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