

# DAMAGE DONE? THE STATUS OF NEPA AFTER *WINTER v. NRDC* AND ANSWERS TO LINGERING QUESTIONS LEFT OPEN BY THE COURT

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## INTRODUCTION

The National Environmental Policy Act (NEPA)<sup>1</sup> is a comprehensive statute that “promotes its sweeping commitment to ‘prevent or eliminate damage to the environment . . .’ by focusing Government and public attention on the environmental effects of proposed agency action.”<sup>2</sup> Since its enactment in 1969, environmental plaintiffs have consistently invoked NEPA to ensure public involvement in federal agency action and to mitigate environmental harms stemming from such action. Thus, the statute is an extremely important tool for environmental organizations and the public alike, and it is critical that NEPA’s congressional mandate not be undermined in a piecemeal fashion by targeted assaults seeking to chip away at the statute’s core purpose and functionality.

In *Winter v. Natural Resources Defense Council*, many such piecemeal attacks were levied at NEPA in a case concerning naval sonar use in southern California and the impacts of that sonar use on marine mammals such as whales and dolphins.<sup>3</sup> Although there were many issues before the Supreme Court in *Winter*, the majority decided the case quite narrowly by holding that a preliminary injunction was improper because “the balance of equities and consideration of the overall public interest” in the case “tip[ped] strongly in favor of the Navy.”<sup>4</sup> Therefore, the majority ultimately viewed *Winter* more as a national security case and less as a substantive environmental case since its analysis focused predominantly on potential hardships to the Navy under the facts. This opinion did, however, cursorily open certain environmental issues under NEPA that were never fully

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† I would like to thank Eric Glitzenstein for allowing me to participate in our firm’s amicus brief to the United States Supreme Court in *Winter v. NRDC*—it is rare for an attorney to have such an important assignment to start one’s career. My goal is for this Article to provide important insight into NEPA so that the statute can continue to serve the critical environmental policy functions envisioned by Congress four decades ago.

1. National Environmental Policy Act, 42 U.S.C. §§ 4321–4370f (2006).

2. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989) (quoting 42 U.S.C. § 4321).

3. *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 370–71 (2008).

4. *Id.* at 378.

resolved before the Court moved on to balance the hardships to the parties.

The first portion of this Article will dissect *Winter*'s discussion of the irreparable harm standard in light of NEPA's history and purpose. The remainder of the Article will focus on three important lingering environmental questions and will examine relevant court decisions and background information to clarify those outstanding questions left open by the Court's opinion.

## I. NEPA'S UNIQUE STATUS

### A. NEPA as Intended by Congress

When it enacted NEPA as "our basic national charter for protection of the environment" in 1969,<sup>5</sup> Congress imposed a "continuing" duty on all federal agencies to consider the environmental impacts of their actions.<sup>6</sup> To satisfy this broad mandate, Congress requires, for each "major Federal action[] significantly affecting the quality of the human environment, a detailed statement" of the project's environmental impacts, and a discussion of reasonable alternative courses of action.<sup>7</sup> Thus, for any project subject to NEPA, agencies must either prepare an Environmental Impact Statement (EIS) or prepare an Environmental Assessment (EA) to determine whether a more detailed EIS is necessary.<sup>8</sup> Although an agency might determine that no significant impact will result from a proposed project, and therefore decide to forego completion of an EIS,<sup>9</sup> the sufficiency of this agency determination can be judicially reviewed if opponents believe that an EIS was warranted under the facts.<sup>10</sup>

The EIS serves as the crux of NEPA's mandate from Congress—"[t]he primary purpose of an environmental impact statement 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."<sup>11</sup> An EIS must "provide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment."<sup>12</sup> Since the primary goal

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5. 40 C.F.R. § 1500.1 (2008).

6. 42 U.S.C. § 4331(a).

7. *Id.* § 4332(C).

8. 40 C.F.R. §§ 1501.3–1501.4.

9. *Id.* § 1501.4.

10. *Id.* § 1500.3.

11. *Id.* § 1502.1 (emphasis added).

12. *Id.*

of NEPA is to ensure informed decision-making, timing of the EIS is critical because “[i]t shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions,”<sup>13</sup> “rather than [to] justify[] decisions already made.”<sup>14</sup> Therefore, an EIS must be completed *before* the start of a project and “[a]gencies shall not commit resources prejudicing selection of alternatives before making a final decision.”<sup>15</sup> Under NEPA, agencies have an affirmative duty to “[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment.”<sup>16</sup> Because agencies must complete an EIS before moving forward with a project, the public is able to meaningfully participate in the NEPA process in the manner envisioned by Congress.<sup>17</sup>

### *B. Judicial Interpretation of NEPA and the Irreparable Harm Standard*

Since its enactment, the Supreme Court has unambiguously interpreted NEPA as a procedural statute.<sup>18</sup> However, despite only mandating

13. *Id.*

14. *Id.* § 1502.2(g).

15. *Id.* § 1502.2(f); *see also id.* § 1500.1(b) (“NEPA procedures must insure that environmental information is available to public officials and citizens *before* decisions are made and before actions are taken.”) (emphasis added); *id.* § 1501.2 (“Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values . . .”).

16. *Id.* § 1500.2(d).

17. *Id.*; *see id.* § 1501.7 (explaining that the agency shall “[i]nvite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds)”).

18. *See Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 376 (2008) (“NEPA imposes only procedural requirements . . .” (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989))); *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 756–57 (2004) (“NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.” (citing *Robertson*, 490 U.S. at 349)); *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 737 (1998) (“NEPA . . . simply guarantees a particular procedure, not a particular result.”); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989) (“NEPA[] reli[es] on procedural mechanisms—as opposed to substantive, result-based standards . . .” (citing *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 100 (1983))); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188 n.34 (1978) (“NEPA essentially imposes a procedural requirement on agencies, requiring them to engage in an extensive *inquiry* as to the effect of federal actions on the environment . . .”); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978) (“NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.” (citing 42 U.S.C. § 4332 (1970); *Aberdeen & Rockfish R.R. Co. v. SCRAP*, 422 U.S. 289, 319 (1975))); *Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976) (“The procedural duty imposed upon agencies by this section is quite precise . . .”); *Aberdeen & Rockfish R.R. Co.*, 422 U.S. at 319 (“NEPA does create a discrete procedural obligation on Government agencies to give written consideration of environmental issues in connection with certain major federal actions and a right of action in adversely affected parties to enforce that obligation.”).

procedural requirements, courts have long recognized that NEPA establishes “significant substantive goals for the Nation” and aims to meet those goals through the statute’s procedural mechanisms, such as the EIS.<sup>19</sup> As environmental legal scholars and practitioners have noted, these substantive goals—the full disclosure of environmental impacts before agencies act and the resulting minimization of environmental degradation—must play an important role in guiding courts as they make case-by-case factual determinations regarding the adequacy of NEPA procedures for a specific federal action.<sup>20</sup>

In the absence of Supreme Court precedent prior to *Winter*, many federal courts accepted the preceding argument that courts rule on the need for the statute’s procedural requirements while being informed by NEPA’s substantive goals. This has been most clearly illustrated in the irreparable harm context with regard to issuances of preliminary injunctions pursuant to NEPA. To obtain a preliminary injunction, a typical remedy sought under NEPA, a plaintiff must establish: (1) likely success on the merits, (2) irreparable harm in the absence of an injunction, (3) that the balance of equities tips in the plaintiff’s favor, and (4) that the injunction is in the public’s interest.<sup>21</sup> Without congressional instruction to preclude this balancing of equities for NEPA claims,<sup>22</sup> courts have utilized this equitable balancing test to determine whether to issue injunctions where governmental action threatens the environment in violation of NEPA’s procedural requirements and substantive goals.

Although the Supreme Court twice provided guidance about this balancing test in an environmental context in the 1980s, the statutes at issue were quite distinct from NEPA, leading lower courts to distinguish their preliminary injunction analyses in light of NEPA’s unique purpose. In *Weinberger v. Romero-Barcelo*, a plaintiff sought a preliminary injunction

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19. *Vt. Yankee*, 435 U.S. at 558 (citing 42 U.S.C. § 4332 (1970); *Aberdeen & Rockfish R.R. Co.*, 422 U.S. at 319).

20. *E.g.*, Leslye A. Herrmann, *Injunctions for NEPA Violations: Balancing the Equities*, 59 U. CHI. L. REV. 1263, 1265 (1992). NEPA’s substantive “goal should guide courts in determining whether to issue an injunction. Indeed, only an approach that considers NEPA’s goal will preserve NEPA as a meaningful statute.” *Id.*

21. *See Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542, 546 n.12 (1987) (citing, *e.g.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–13 (1982); *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 392 (1981)) (stating the basis for granting preliminary injunctive relief); *Romero-Barcelo*, 456 U.S. at 312 (citing *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)) (explaining when a court of equity should issue an injunction).

22. *See, e.g., Hill*, 437 U.S. at 187–88, 194 (1978) (explaining that courts are precluded from balancing economic and other costs against harm to threatened and endangered species under the Endangered Species Act because Congress stated that such species were of “incalculable” value in its wording of the Act (internal quotation marks omitted)).

against the United States Navy for violation of the Federal Water Pollution Control Act (FWPCA) when the Navy conducted weapons-training operations and discharged ordnance into waters without first obtaining a National Pollutant Discharge Elimination System permit from the Environmental Protection Agency (EPA).<sup>23</sup> The Court held that “[a]n injunction [was] not the only means of ensuring compliance” with the substantive requirements of the FWPCA and thus injunctions should not be presumed based solely on a violation of the FWPCA.<sup>24</sup> Further, the Court explained that an act’s “statutory scheme and purpose” must inform courts of whether and how to apply the balancing test for the grant of preliminary injunctions.<sup>25</sup>

Five years later, the Court revisited the question of preliminary injunctive relief in environmental contexts in *Amoco Production Co. v. Village of Gambell*. In *Gambell*, the plaintiffs sought a preliminary injunction for violation of the Alaska National Interest Lands Conservation Act (ANILCA) when the Department of the Interior granted oil and gas leases to private companies without considering the impacts of those leases on subsistence rights for Alaskan natives.<sup>26</sup> The primary question before the Court was whether the Ninth Circuit correctly held that “[i]rreparable damage [for preliminary injunction purposes] is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action.”<sup>27</sup> The Court reversed the Ninth Circuit’s decision, holding that “the Ninth Circuit erroneously focused on the statutory procedure rather than on the underlying substantive policy the process was designed to effect—preservation of subsistence resources.”<sup>28</sup> By concentrating on ANILCA’s substantive requirements that are the essence of the statute’s scheme and purpose, the Court found that an equitable balancing test was proper, and further found that a presumption of irreparable harm under ANILCA was impermissible because “the environment can be fully protected [under ANILCA] without this presumption.”<sup>29</sup> Despite eliminating any presumption of irreparable harm where an environmental violation exists, the Court noted:

Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of

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23. *Romero-Barcelo*, 456 U.S. at 306–07 (citing *Romero-Barcelo v. Brown*, 478 F. Supp. 646 (P.R. 1979)).

24. *Id.* at 314.

25. *Id.* at 320.

26. *Village of Gambell*, 480 U.S. at 534–35.

27. *Id.* at 541 (quoting *People of Gambell v. Hodel*, 774 F.2d 1414, 1423 (9th Cir. 1985)).

28. *Id.* at 544.

29. *Id.* at 545.

long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.<sup>30</sup>

With only these opinions to rely on, lower courts attempted to decipher the Court's cryptic mandate in other environmental contexts. Since NEPA differs significantly from both the FWPCA and ANILCA—because it contains only procedural requirements, and thus “[a]n injunction is . . . the only means of ensuring compliance” with NEPA<sup>31</sup>—logic dictates the conclusion that courts have less discretion to balance the equities with respect to NEPA violations than with violations of environmental statutes with significant substantive requirements.<sup>32</sup> Further, following the Court's “statutory scheme and purpose” approach,<sup>33</sup> which requires the statute's text to guide the federal judiciary's equitable balancing test, it seems that Congress clearly intended for NEPA to serve as our “national charter for protection of the environment,”<sup>34</sup> a substantive goal that can only be accomplished through compliance with the statute's procedural requirements. Therefore, considering NEPA's unique status as compared to other environmental statutes, courts for more than two decades reasonably took the position that NEPA compels a more relaxed showing of irreparable harm for injunctive relief purposes than do its substantive counterparts such as the FWPCA or ANILCA.

For example, the Fifth Circuit considered the Court's “statutory scheme and purpose” mandate after *Romero-Barcelo* with regard to NEPA and determined that NEPA's unique status required preliminary injunctive relief where a statutory violation existed.<sup>35</sup> In *Gambell*, the Supreme Court foreclosed the presumption of injunctive relief used in the preceding line of

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30. *Id.*

31. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982) (noting that, unlike other environmental statutes such as NEPA, the procedures in the FWPCA are not the main objectives of the Act; therefore “[a]n injunction is not the only means of ensuring compliance” with the FWPCA).

32. *See Herrmann*, *supra* note 20, at 1275–76.

33. *Romero-Barcelo*, 456 U.S. at 320.

34. 40 C.F.R. § 1500.1 (2008).

35. *See, e.g.*, *Citizen Advocates for Responsible Expansion, Inc. v. Dole*, 770 F.2d 423, 443 (5th Cir. 1985) (citing *Richland Park Homeowners Ass'n, Inc. v. Pierce*, 671 F.2d 935, 941 (5th Cir. 1982)) (holding that “injunctive relief halting construction and preserving the status quo is the normal and proper remedy for an agency's failure to comply with NEPA”). Although it did not accept a blanket presumption, the Ninth Circuit also adopted a more lenient irreparable harm standard post-*Romero-Barcelo*. *See, e.g.*, *Am. Motorcyclist Ass'n v. Watt*, 714 F.2d 962, 966 (9th Cir. 1983) (“The premise for relaxing the equitable tests in NEPA cases is that irreparable damage may be implied from the failure of responsible authorities to evaluate thoroughly the environmental impact of a proposed federal action.” (citing *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323, 330 (9th Cir. 1975))).

cases.<sup>36</sup> However, short of creating a presumption, many circuits have continued to conduct more lenient irreparable harm analyses under the “statutory scheme and purpose” approach that remained in effect post-*Gambell*. The most thorough post-*Gambell* discussion of irreparable harm under NEPA came from an opinion in the First Circuit by then-Judge Breyer in *Sierra Club v. Marsh*. Clarifying the definition of irreparable harm under NEPA that Judge Breyer elucidated in the 1983 case *Massachusetts v. Watt*,<sup>37</sup> Breyer opined:

We did not (and would not) characterize the harm described as a “procedural” harm, as if it were a harm to *procedure* . . . . 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, the risk of uninformed choice, a risk that arises in part from the practical fact that bureaucratic decisionmakers (when the law permits) are less likely to tear down a nearly completed project than a barely started project. In *Watt* we simply held that the district court should take account of the potentially irreparable nature of this decisionmaking risk to the environment when considering a request for preliminary injunction.<sup>38</sup>

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36. See *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987) (citing *Romero-Barcelo*, 456 U.S. at 311) (“[The Court] reversed, acknowledging at the outset the fundamental principle that an injunction is an equitable remedy that does not issue as of course.”).

37. *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983).

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. . . .

It is appropriate for the courts to recognize this type of injury in a NEPA case, for it reflects the very theory upon which NEPA is based—a theory aimed at presenting governmental decision-makers with relevant environmental data *before* they commit themselves to a course of action. This is not to say that a likely NEPA violation automatically calls for an injunction; the *balance* of harms may point the other way. It is simply to say that a plaintiff seeking an injunction cannot be stopped at the *threshold* by pointing to additional steps between the governmental decision and environmental harm.

*Id.* (citations omitted) (citing *Alaska v. Andrus*, 580 F.2d 465, 485 (D.C. Cir. 1978); *Jones v. D.C. Redevelopment Land Agency*, 499 F.2d 502, 512–13 (D.C. Cir. 1974); *Romero-Barcelo*, 456 U.S. at 314).

38. *Sierra Club v. Marsh*, 872 F.2d 497, 500–01 (1st Cir. 1989) (citations omitted) (citing, *e.g.*,

The First Circuit went on to distinguish NEPA from the statute at issue in *Gambell* on the basis that “NEPA is a *purely* procedural statute in a sense that ANILCA is not” since ANILCA “contains a ‘substantive’ standard.”<sup>39</sup>

Judge Breyer’s opinion in *Marsh*, coupled with similar interpretations of NEPA’s unique “statutory scheme and purpose,” resulted in more lenient irreparable harm analyses in the post-*Gambell* judicial arena. Courts in numerous circuits adopted this relaxed approach to establishing irreparable injury where NEPA violations existed, including the First Circuit,<sup>40</sup> the D.C. Circuit,<sup>41</sup> and the Ninth Circuit,<sup>42</sup> among others. Despite the rationality of the more relaxed irreparable harm standard in light of NEPA’s “statutory scheme and purpose” as a uniquely procedural statute, the Supreme Court in *Winter v. Natural Resources Defense Council* altered this relaxed standard by requiring plaintiffs to establish a likelihood of irreparable harm in any case seeking preliminary injunctive relief.

In *Winter*, the majority opinion authored by Chief Justice Roberts expressly foreclosed the use of an irreparable harm standard mandating less than a likelihood of irreparable injury by stating:

We agree with the Navy that the Ninth Circuit’s “possibility” standard [for establishing irreparable harm] is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction. Issuing a preliminary injunction

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Sierra Club v. Marsh, 701 F. Supp. 886, 907 (D. Me. 1988); N. Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1156–58 (9th Cir. 1988); Wisconsin v. Weinberger, 745 F.2d 412, 426–27 (7th Cir. 1984).

39. *Id.* at 502.

40. *See, e.g., id.* at 500 (“[A] plaintiff seeking an injunction cannot be stopped at the *threshold* by pointing to additional steps between the governmental decision and the environmental harm.”).

41. *See, e.g.,* Natural Res. Def. Council v. Lujan, 768 F. Supp. 870, 890 (D.D.C. 1991) (adopting the liberal standard that “NEPA presumes injury where participation in the NEPA process is denied” (citing Cmty. Nutrition Inst. v. Butz, 420 F. Supp. 751, 757 (D.D.C. 1976))).

42. *See, e.g.,* Natural Res. Def. Council v. Winter, 518 F.3d 658, 696 (9th Cir. 2008) (“Where, as here, plaintiffs demonstrate a likelihood of prevailing on the merits of their claims, injunctive relief is appropriate where there is a ‘possibility of irreparable harm.’” (quoting Natural Res. Def. Council v. Winter, 530 F. Supp. 2d 1110, 1118 (C.D. Cal. 2008) (order granting preliminary injunction), *rev’d*, Winter v. Natural Res. Def. Council, 129 S. Ct. 365 (2008))); Lands Council v. McNair, 494 F.3d 771, 779 (9th Cir. 2007) (“Because Lands Council has demonstrated a strong probability of success on the merits of its NFMA and NEPA claims, ‘it need only show the possibility of irreparable injury if preliminary relief is not granted, and that the balance of hardships tips in its favor.’” (quoting Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1177 (9th Cir. 2006), *abrogated by Winter*, 129 S. Ct. at 365)); Friends of the Earth v. Hall, 693 F. Supp. 904, 913 (W.D. Wash. 1988) (noting that “the risk of bias resulting from the commitment of resources prior to a required thorough environmental review is the type of irreparable harm that results from a NEPA violation” (citing Massachusetts v. Watt, 716 F.2d 946, 953 (1st Cir. 1983))). It is important to note that the Ninth Circuit’s pre-*Winter* “possibility” standard for establishing irreparable injury was not specific to NEPA; the Ninth Circuit used this standard in all preliminary injunction contexts.



based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.<sup>43</sup>

This bright-line standard imposed by the majority in *Winter* now requires all plaintiffs to show that, in addition to a likely violation of the statute, irreparable harm is more likely than not to result in the absence of a preliminary injunction.<sup>44</sup> Although this general proposition by the Court is not specific to NEPA plaintiffs, it has the effect of precluding NEPA plaintiffs from obtaining preliminary injunctive relief where such plaintiffs cannot establish a likelihood of irreparable harm.

Despite espousing this sweeping standard, the Court's discussion in *Winter* indicates that NEPA's "statutory scheme and purpose"—although not alone sufficient to merit an injunction—remains an important criterion weighing in favor of a preliminary injunction where a NEPA violation is likely. Without invoking by name the "statutory scheme and purpose" approach, the *Winter* majority implicitly acknowledged this approach by stating:

NEPA imposes only procedural requirements to "ensur[e] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." Part of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures. Here, in contrast, the plaintiffs are seeking to enjoin—or substantially restrict—training exercises that have been taking place in SOCAL for the last 40 years. And the latest series of exercises were not approved until after the defendant took a hard look at environmental consequences . . . .<sup>45</sup>

Thus, the Court factored NEPA's unique scheme and purpose into its preliminary injunction analysis, but it qualified the level of weight accorded to the statutory purpose where the challenged government action "has been going on for [forty] years with no documented episode of harm to a marine

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43. *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 375–76 (2008) (citations omitted) (citing, *e.g.*, *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Granny Goose Foods, Inc. v. Teamsters & Auto Truck Drivers Local No. 70 of Alameda County*, 415 U.S. 423, 441 (1983); *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)).

44. *Id.* at 374.

45. *Id.* at 376 (alteration in original) (citations omitted) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

mammal” and an injunction might jeopardize national security.<sup>46</sup> However, in most other NEPA contexts where harm is much more concrete and national security is not of paramount concern, courts should continue to craft preliminary injunctions with heavy consideration placed on NEPA’s unique statutory scheme and purpose.<sup>47</sup>

Further, it is important to note that although the Court’s bright-line standard set an important precedent for establishing irreparable harm, this standard was not determinative of the outcome in *Winter*. In fact, the majority explicitly gave credence to the irreparable injury alleged by the plaintiffs in the case, stating: “Plaintiffs contend that the Navy’s use of . . . sonar will injure marine mammals or alter their behavioral patterns, impairing plaintiffs’ ability to study and observe the animals,” and “we do not question the seriousness of these interests.”<sup>48</sup> Rather, the Court decided the case very narrowly by “conclud[ing] that the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy.”<sup>49</sup> The Court went further by acknowledging that “military interests do not always trump other considerations, and we have not held that they do. In this case, however, the proper determination of where the public interest lies does not strike us as a close question.”<sup>50</sup>

Based on its narrow holding on equitable balancing grounds, it is clear that the Court perceived *Winter* as a case predominantly about the public’s interest in military preparedness and less about environmental protection under NEPA. This view is reinforced by the sparse reference to NEPA in the majority opinion and the fact that only the bright-line irreparable harm standard discussed above provided answers to the various legal questions

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46. *Id.* at 381.

47. On a related note, Justice Ginsburg’s dissent in *Winter*, which Justice Souter joined, followed a more direct “statutory scheme and purpose” approach than the majority, and observed that:

[C]ourts have evaluated claims for equitable relief on a “sliding scale,” sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high. This Court has never rejected that formulation, and I do not believe it does so today.

Equity’s flexibility is important in the NEPA context. Because an EIS is the tool for *uncovering* environmental harm, environmental plaintiffs may often rely more heavily on their probability of success than the likelihood of harm.

*Winter*, 129 S. Ct. at 392 (Ginsburg, J., dissenting) (citation omitted). Although both the majority and the dissent followed a statutory scheme and purpose approach, they reached different results. The majority’s result—a statutory scheme and purpose approach to preliminary injunctions that accords little weight to NEPA’s purpose only in the narrow context of national security where harm is not sufficiently concrete—prevails as the law of the land, but changes little for the federal judiciary because of the narrow scope of the majority’s qualification under such an approach.

48. *Winter*, 129 S. Ct. 365, 377–78 (2008).

49. *Id.* at 368.

50. *Id.* at 378.

that were before the Court. As a case with a complex procedural history, *Winter* tempted the Court to address numerous issues of contention under NEPA. However, since the majority chose not to reach these issues, the remainder of this Article will provide discussion and analysis of the important NEPA questions left open by the *Winter* Court to help guide judicial reasoning in a post-*Winter* world.

## II. LEVEL OF IMPACT TO ESTABLISH IRREPARABLE INJURY IN A WILDLIFE CONTEXT

The first important question left open in *Winter* is what level of impact is necessary to establish irreparable injury in a wildlife context. In *Winter*, the government argued that the environmental plaintiffs could only establish irreparable harm by proving that the agency action at issue would result in “permanent or long-lasting harm to a species as a whole.”<sup>51</sup> In multiple places in its brief, the government asserted this notion that the plaintiffs’ showing of irreparable harm is dependent on definitive proof of species-level effects.<sup>52</sup> Although the majority opinion recognized that “the Navy asserts that plaintiffs have failed to offer evidence of species-level harm that would adversely affect *their* scientific, recreational, and ecological interests,”<sup>53</sup> the majority never relied on this assertion as a basis for its ruling.

In any event, the government’s assertion is erroneous, considering NEPA’s text and underlying regulations. More importantly, it is a very dangerous contention because it seeks to undermine the statutory purpose of NEPA and other environmental statutes aimed in whole or in part at wildlife protection. In NEPA, Congress expressly provided that, among other things, every EIS must address “the relationship between *local short-term uses* of man’s environment and the maintenance and enhancement of long-term productivity.”<sup>54</sup> Thus, Congress intended for NEPA to include assessments of local uses significantly impacting the environment, which invariably have a greater impact locally than on the environment at large. Further, NEPA’s implementing regulations make clear that an action may

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51. Brief for the Petitioners at 19–20, *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008) (No. 07-1239), [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-1239\\_Petitioner.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-1239_Petitioner.pdf) (last visited on Apr. 20, 2009) [hereinafter Petitioner’s Brief].

52. *Id.* at 19–20; *see id.* at 44 (“Any finding of irreparable injury *to respondents* therefore must rest upon a likelihood of a harm to the species as a whole . . . .”); *id.* at 45 (arguing that “*temporary* harms do not establish that irreparable harm is actually likely to result even to an individual beaked whale, much less to the species as a whole”).

53. *Winter*, 129 S. Ct. at 375.

54. 42 U.S.C. § 4332(C)(iv) (2006) (emphasis added).

be subject to the NEPA review process for its significant local or regional effects; “in the case of a site-specific action, significance would usually depend upon *the effects in the locale rather than in the world as a whole*.”<sup>55</sup> Therefore, NEPA recognizes that localized impacts—including such impacts on wildlife—may be sufficient to establish irreparable injury, thus refuting the government’s assertion in *Winter* that large-scale, species-wide impacts must be shown to establish such harm.

In addition, the pertinent case law has consistently held that localized impacts to wildlife are sufficient to establish both injury in fact for standing purposes and irreparable injury for injunctive relief purposes. In *Lujan v. Defenders of Wildlife*, the Supreme Court stated: “Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest” for establishing injury.<sup>56</sup> Naturally, an individual’s “‘cognizable interest’ . . . in ‘us[ing] or observ[ing] an animal species’”<sup>57</sup> may be gravely impaired by adverse impacts to local wildlife “‘use[d] or observe[d]” by that individual regardless of whether the “‘species as a whole’ will be driven to extinction by the action under review.”<sup>58</sup>

Numerous federal court decisions reinforce the notion that localized impacts to wildlife are sufficient to establish irreparable injury. The most notable case is *Anderson v. Evans* in the Ninth Circuit, which provided detailed discussion of these issues where significant localized impacts to gray whales were expected despite the lack of anticipated species-wide impacts.<sup>59</sup> In *Anderson*, the Court opined:

Our reasoning in this regard is as follows: The government agrees that a relatively small group of whales comes into the area of the Tribe’s hunt each summer, and that about sixty percent of them are returning whales (although, again, not necessarily whales returning annually). Even if the eastern Pacific gray whales overall or the smaller . . . group of whales are not significantly impacted by the Makah Tribe’s whaling, the

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55. 40 C.F.R. § 1508.27(a) (2008) (emphasis added).

56. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992). Explaining that irreparable injury can be shown on the basis of threatened harm to a single member of a species, the Court stated: “It is clear that the person who observes or works with a *particular animal* threatened by a federal decision *is facing perceptible harm*, since the very subject of his interest will no longer exist.” *Id.* at 566 (emphasis added).

57. Brief for Defenders of Wildlife et al. as Amici Curiae Supporting Respondents at 27, *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008) (No. 07-1239), [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-1239\\_RespondentAmCu8ConservationOrgs.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-1239_RespondentAmCu8ConservationOrgs.pdf) (alteration in original) (quoting *Lujan*, 504 U.S. at 562).

58. *Id.* at 28.

59. *Anderson v. Evans*, 314 F.3d 1006, 1018–19 (9th Cir. 2002).

summer whale population in the *local* Washington area may be significantly affected. Such local effects are a basis for a finding that there will be a significant impact from the Tribe's hunts. Thus, if there are substantial questions about the impact on the number of whales who frequent the Strait of Juan de Fuca and the northern Washington Coast, an EIS must be prepared.

The crucial question, therefore, is whether the hunting, striking, and taking of whales from this smaller group could *significantly affect the environment in the local area*. . . . There is at least a substantial question whether killing five whales from this group either annually or every two years, which the quota would allow, could have a significant impact on the environment.

. . . .

In short, the record establishes that there are "substantial questions" as to the significance of the effect on the *local* area. Despite the commendable care with which the EA addresses other questions, the EA simply *does not adequately address the highly uncertain impact of the Tribe's whaling on the local whale population and the local ecosystem*. This major analytical lapse is, we conclude, a sufficient basis for holding that the agencies' finding of no significant impact cannot survive the level of scrutiny applicable in this case.

And because the EA simply does not adequately address the local impact of the Tribe's hunt, an EIS is required.<sup>60</sup>

Other courts have also supported this approach. For example, a D.C. district court had a similar issue before it when environmental plaintiffs complained that "even if the predicted impacts of the proposed take of 525 swans on the 3,600 strong swan population of the entire state of Maryland are likely to be minimal, the impacts may be substantially greater on the local level."<sup>61</sup> Weighing this issue, the court held that "the *impact of a proposed action on a local population of a species, even where all parties acknowledge that the action will have little or no effect on broader populations*, is 'a basis for a finding that there will be a significant impact' and setting aside a FONSI [Finding of No Significant Impact]."<sup>62</sup> On that basis, the court concluded that there was a "compelling showing of irreparable harm" sufficient to warrant injunctive relief.<sup>63</sup> This approach—finding localized impacts to wildlife sufficient to establish irreparable

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60. *Id.* at 1019, 1021 (second and fourth emphases added) (citation and footnote omitted).

61. *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 232 (D.D.C. 2003) (citing *Anderson*, 314 F.3d at 1019–20).

62. *Id.* at 234 (emphasis added) (quoting *Anderson*, 314 F.3d at 1018–21).

63. *Id.* at 237.

harm—has been echoed in other wildlife cases brought under NEPA and other federal environmental statutes.<sup>64</sup>

Based on the foregoing, it is clear that the government's contention in *Winter*—that a plaintiff can only show irreparable harm by proving definitive and long-lasting harm to an entire species—was merely an attempt to obfuscate the issue. Although the Court did not address the merits of this question in *Winter*, both NEPA and legal precedent applying it and other statutes aimed at wildlife protection resoundingly rebut the argument and provide clear guidance for courts. In a wildlife context,

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64. See, e.g., *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1256–58 (10th Cir. 2003). In this case, the Fish and Wildlife Service anticipated that a golf course development would result in “the loss of three bald eagle nests and twelve juvenile bald eagles during the construction period,” but the Service and other defendants argued that irreparable harm could only be shown by proof of “irretrievabl[e] damage to the entire species.” *Id.* at 1256. In rejecting that argument, the court stated: “Plaintiffs contend that a proponent of a preliminary injunction under these circumstances, seeking to prevent harm to members of a threatened or endangered species, need not show harm to the species as a whole. We agree.” *Id.* at 1257 (footnote omitted). Also looking at these issues in the ESA context in *National Wildlife Federation v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1512 n.8 (9th Cir. 1994), the Ninth Circuit acknowledged “that a threat of extinction to the species is [not] required before an injunction may issue under the ESA” because “[t]his would be contrary to the spirit of the statute, whose goal of preserving threatened and endangered species can also be achieved through incremental steps.” *Id.* In another case, *Sierra Club v. Norton*, 207 F. Supp. 2d 1310 (S.D. Ala. 2002), the court stated:

The threatened harm, destruction of optimal habitat of an endangered species, is clearly irreparable. The portions of the dune ecosystem on which construction is begun will *no longer be available to support the local ABM population*. That loss of habitat will have an effect on the beach mouse population, *including loss of individual members of the species*.

*Id.* at 1340 (emphases added). Similar logic was employed in *Fund for Animals v. Clark*, 27 F. Supp. 2d 8 (D.D.C. 1998), in which the court found:

[T]he combination of the injury suffered by plaintiffs due to federal defendants' procedural failure to comply with NEPA and the aesthetic injury the individual plaintiffs would suffer from seeing or contemplating the bison being killed in an organized hunt [despite the lack of species-level impacts] leads the court to conclude that the plaintiffs have carried their burden of demonstrating the presence of an irreparable harm should the court not grant injunctive relief.

*Id.* at 14. In *Sierra Club v. Martin*, 71 F. Supp. 2d 1268 (N.D. Ga. 1996), the district court phrased the matter:

The question of irreparable injury does not focus on the significance of the injury, but rather whether the injury, irrespective of its gravity, is *irreparable*—that is, whether there is any adequate remedy at law for the injury in question. . . .

In the instant case, the logging will destroy certain sensitive plants and animals located in the timber project areas, as well as suitable habitats for these and other similar sensitive and endangered species in the two Forests. No monetary award can recompense this injury; thus, there is no adequate remedy at law for these injuries.

*Id.* at 1327 (second emphasis added) (citation omitted) (citing *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990)).

significant localized impacts to wildlife may be the basis for establishing irreparable injury, even where no threat exists to the species as a whole.<sup>65</sup>

### III. ENVIRONMENTAL IMPACT STATEMENT VERSUS ENVIRONMENTAL ASSESSMENT

The second significant question left open in *Winter* is what effect a lengthy and detailed EA has on an agency's obligation to prepare an EIS under NEPA. In *Winter*, the government argued that its detailed, 293-page EA negated the need for an EIS because the "central purpose of NEPA . . . was fully served" by the government's EA "to a degree rarely matched even in the most comprehensive *EIS*."<sup>66</sup> Contrary to the government's assertion, the mere preparation of a lengthy EA does not eliminate either the legal need for, or the practical value of, an EIS. Although the majority opinion cursorily noted that the "defendant took a 'hard look at environmental consequences,' as evidenced by the issuance of a detailed, 293-page EA,"<sup>67</sup> the Court never embraced the government's position that a lengthy EA supersedes the need for an EIS. Federal courts have consistently rejected similar arguments because the core legal functions of the EA and the EIS differ substantially. In fact, courts have found that, in many cases, a long and detailed EA actually necessitates the need for preparation of an EIS.

NEPA's implementing regulations provide that an EA is a "concise" document that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]."<sup>68</sup> An EIS, on the other hand, is a "detailed written statement" that must include, among other things, all environmental impacts, unavoidable impacts, and alternatives to the

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65. In the first post-*Winter* case addressing irreparable harm in a wildlife context, the court conducted a thorough analysis of *Winter*'s effect on preliminary injunctions and ultimately "accept[ed] the principle that the *death of a single animal* could constitute a violation of the ESA that would call for the full exercise of a court's injunctive authority." *Animal Welfare Inst. v. Martin*, 588 F. Supp. 2d 70, 106 (D. Me. 2008). Much like the Navy in *Winter*, the *Martin* defendant argued that "a finding of irreparable harm requires a showing that the species as a whole will be harmed," *id.* at 102 (quoting Response in Opposition Re: Motion for Preliminary Injunction Filed By Maine Department of Inland Fisheries and Wildlife Commissioner at 18), but the court expressly rejected this contention by recognizing that a violation of the ESA with respect to a single animal could serve as a basis for irreparable harm, and by holding that such a violation with respect to one lynx in that case warranted partial injunctive relief, *id.* at 110.

66. Petitioner's Brief, *supra* note 51, at 49.

67. *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 376 (2008) (citation omitted) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)) (indicating that although the majority did not accept the government's argument that a lengthy EA obviates the need for an EIS, the majority did consider the length and complexity of the Navy's 293-page EA as one factor in finding that the Navy complied with NEPA's hard-look standard under the facts of the case).

68. 40 C.F.R. § 1508.9 (2008).

proposed action.<sup>69</sup> Moreover, EISs are subject to far more stringent requirements for public participation than EAs, including such duties as requiring agencies to provide notice of draft, final, or supplemental EISs; inviting public comment on all EISs; and responding to all comments to EISs.<sup>70</sup> Thus, an argument that a lengthy EA negates the need for an EIS completely disregards the separate functions of the two documents and, if accepted by a court, would seriously undermine NEPA and limit public participation in the EIS process.

The entity responsible for promulgating NEPA regulations, the Council on Environmental Quality (CEQ), has instructed:

Agencies should avoid preparing lengthy EAs except in unusual cases, where a proposal is so complex that a concise document cannot meet the goals of [CEQ regulations] *and* where it is extremely difficult to determine whether the proposal could have significant environmental effects. *In most cases, however, a lengthy EA indicates that an EIS is needed.*<sup>71</sup>

The courts have adopted the CEQ's line of reasoning because common sense dictates the conclusion that unusually long and detailed EAs necessarily involve complex and uncertain issues related to environmental impacts. The most elaborate discussion of this issue again comes from then-Judge Breyer of the First Circuit dealing with a 350-page EA.<sup>72</sup> Judge Breyer stated:

The very length and detail of these documents have posed something of a dilemma to the agencies, the parties, and the reviewing courts. On the one hand, one is tempted to argue that the very complexity of the documents shows that an EIS is needed. The [EAs] are far longer than the CEQ recommends . . . . In addition, the [EAs] reflect considerable disagreement among federal agencies over the documents' findings. . . . To announce that these documents—despite their length and complexity—demonstrate no need for an EIS is rather like the mathematics teacher who, after filling three blackboards with equations, announces to the class, “You see, it is obvious.”

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69. 42 U.S.C. § 4332(C) (2006); 40 C.F.R. § 1508.11.

70. *E.g.*, 40 C.F.R. § 1503.1 (providing that the agency undertaking the EIS must obtain public comments on the draft before submitting the final proposal); *id.* § 1503.4 (explaining that in response to a public comment, the agency preparing the EIS must modify the proposed action or explain why the comments do not apply).

71. Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,037 (Mar. 23, 1981) (second emphasis added).

72. *Sierra Club v. Marsh*, 769 F.2d 868, 874 (1st Cir. 1985).



On the other hand, one tends to recognize, as the appellees point out, that the lengthy documents reflect a thorough consideration of potential impact on the environment. Since these documents, at least arguably, already amount to an EIS in all but name, what is the practical point of requiring additional preparation of another document? . . .

After considering . . . these arguments, we conclude that we should accept neither. We should not give conclusive weight, one way or the other, to the simple *facts* of EA length, complexity, and controversy. These facts do not by themselves show that the EAs' conclusion—"no significant impact"—is correct, nor do they show it is incorrect. At most they show the *practical* wisdom of CEQ's advice: the agencies would have saved time in the long run had they devoted their considerable effort to the production of an EIS, instead of the production of documents seeking to prove that an EIS is not needed. . . .

Moreover, under NEPA and its implementing regulations, we cannot accept the [EAs] as a *substitute* for an EIS—despite the time, effort, and analysis that went into their production—because an EA and an EIS serve very different purposes. An EA aims simply to identify (and assess the "significance" of) potential impacts on the environment; it does not balance different kinds of positive and negative environmental effects, one against the other; nor does it weigh negative environmental impacts against a project's other objectives, such as, for example, economic development. This latter balancing job belongs to the officials who decide whether to approve the project; and (where there are "significant effects") those officials should make the decision in light of an EIS. An EIS helps them make their decision by describing and evaluating the project's likely effects on the environment. The purpose of an EA is simply to help the agencies decide if an EIS is needed.

To treat an EA as if it were an EIS would confuse these different roles, to the point where neither the agency nor those outside it could be certain that the government fully recognized and took proper account of environmental effects in making a decision with a likely significant impact on the environment. For one thing, those outside the agency have less opportunity to comment on an EA than on an EIS. For another thing, those inside the agency might pay less attention to environmental effects when described in an EA than when described in an EIS. At the same time, if we assume that the [EAs] at issue here offer nearly as thorough an analysis as would an EIS, the agencies will

not find it difficult to comply with the additional procedural EIS requirements that NEPA imposes.<sup>73</sup>

Other courts have followed this line of thought, reasoning that an EA cannot substitute for an EIS because of the explicit difference in the core purposes of the two documents.<sup>74</sup>

Based on the foregoing, the government's contention in *Winter* that its detailed, 293-page EA negated the need for an EIS is simply unfounded in light of the CEQ's instruction and court decisions addressing this issue. Because of the critical distinctions between an EA and an EIS, both in purpose and in substance, an EA cannot substitute for an EIS. In addition, where an EA is unusually long and complex, an EIS will almost invariably be required.

73. *Id.* at 874–75 (citations omitted) (citing, e.g., *Quinonez-Lopez v. Coco Lagoon Dev. Corp.*, 733 F.2d 1, 3 (1st Cir. 1984); *Silva v. Lynn*, 482 F.2d 1282, 1285–86 (1st Cir. 1973); *Massachusetts v. Watt*, 716 F.2d 946, 951 (1st Cir. 1983)).

74. *See, e.g., Anderson v. Evans*, 371 F.3d 475, 494 (9th Cir. 2004).

There is no doubt that the government put much effort into preparing the lengthy environmental assessment now before us. While a notable attribute of the creatures we discuss in this opinion, [gray whales,] girth is not a measure of the analytical soundness of an environmental assessment. No matter how thorough, an EA can never substitute for preparation of an EIS, if the proposed action could significantly affect the environment.

We stress in this regard that an EIS serves different purposes from an EA. An EA simply assesses whether there will be a significant impact on the environment. An EIS weighs any significant negative impacts of the proposed action against the positive objectives of the project. Preparation of an EIS thus ensures that decision-makers know that there is a risk of significant environmental impact and take that impact into consideration. As such, an EIS is more likely to attract the time and attention of both policymakers and the public.

In addition, there is generally a longer time period for the public to comment on an EIS as opposed to an EA, and public hearings are often held. Furthermore, preparation of an EIS could allow additional study of a key scientific issue . . . .

*Id.* (citations omitted) (citing *Sierra Club v. Marsh*, 769 F.2d 868, 874–76 (1st Cir. 1985)); *see also Senville v. Peters*, 327 F. Supp. 2d 335, 369 (D. Vt. 2004). “Unless a document has been publicly circulated and available for public comment, it does not satisfy NEPA’s EIS requirements. . . . An EA is no substitute for an EIS; for one thing the public has less opportunity to comment on an EA than an EIS.” *Id.* (citations omitted) (citing *Massachusetts v. Watt*, 716 F.2d 946, 951 (1st Cir. 1983); *Marsh*, 769 F.2d at 875); *P.R. Conservation Found. v. Larson*, 797 F. Supp. 1074, 1080 (D.P.R. 1992) (“Even assuming arguendo that the new project is a continuation of [an earlier] reconstruction project; we cannot accept the [EA] [prepared in 1982] as a substitute for an EIS, despite the time, effort, and analysis that went into [its] production, because an EA and an EIS serve very different purposes.”) (alterations after the first in original) (citation omitted) (quoting *Marsh*, 769 F.2d at 875); *Md.-Nat’l Capital Park & Planning Comm’n v. U.S. Postal Serv.*, 487 F.2d 1029, 1040 (D.C. Cir. 1973).

We have already made it clear that in cases involving genuine issues as to health, and environmental resources, there is a relatively low threshold for impact statements, and that an agency that relies on an “assessment” to dispense with an impact statement may well run risks not warranted by any countervailing benefits.

*Id.*

IV. EMERGENCY EXCEPTION BY CEQ  
VACATING A JUDICIAL DETERMINATION

The third major question left open in *Winter* is whether, after failing to comply with NEPA and having that unlawful action enjoined by an Article III court, an agency can approach the CEQ and have it vacate the injunction under the guise of “emergency circumstances.” In *Winter*, the government “sought relief from the Executive Branch” via the CEQ because it was displeased with the district court’s injunction.<sup>75</sup> After having the CEQ invoke “emergency circumstances” under NEPA, the government immediately filed a motion for vacatur alleging that the CEQ’s action “eliminated the injunction’s legal foundation.”<sup>76</sup>

Setting aside the numerous separation of powers issues raised by the government’s argument, this legal inquiry decidedly turns on whether a genuine emergency exists. NEPA’s implementing regulations provide:

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.<sup>77</sup>

Although this provision has been invoked occasionally by the CEQ since NEPA’s enactment, *it has never been used by an agency to circumvent an unfavorable court decision*, likely because an executive agency is not authorized to overturn, modify, or amend factual or legal determinations made by Article III courts.

In the instances where the CEQ has taken action under the emergency circumstances provision prior to *Winter*, unforeseeable and exigent facts have always triggered the need for invoking the provision. For example, in a case the government relied on in *Winter*, *Miccosukee Tribe of Indians of Florida v. United States*, “to reduce water levels in [an endangered] [s]parrow’s western nesting habitat in order to increase the probability of successful breeding for that year,” the CEQ allowed the Corps of Engineers

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75. *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 373 (2008).

76. *Id.* at 388 (Ginsburg, J., dissenting).

77. 40 CFR § 1506.11 (2008).

to “deviate[] from its [own test] operations.”<sup>78</sup> Coinciding with its determination of emergency circumstances, the CEQ required the Corps to satisfy alternative arrangements under NEPA, including the preparation of an EA on the Corps’s interim plan and the preparation of a “full [EIS] for a new, longer term plan . . . that would replace” the interim plan.<sup>79</sup> There, the situation was urgent and called for swift action by the CEQ to ensure successful breeding of the sparrow—a goal that the alternative arrangements presumably achieved while still requiring the Corps to fulfill its NEPA obligations on the long-term plan. Similarly, in *Valley Citizens for a Safe Environment v. Vest*, on which the government also relied in *Winter*, the CEQ found emergency circumstances where “the developing situation in the Middle East constituted an emergency” sufficient to warrant twenty-four-hour nighttime flights from a domestic air force base to the Middle East to deliver personnel and supplies.<sup>80</sup> There, an EIS had been previously completed and the emergency circumstances in the Middle East did not permit time to supplement the EIS prior to engaging in nighttime flights.<sup>81</sup> The common bond between these two cases, and other cases where the CEQ found emergency circumstances,<sup>82</sup> is that exigent and unforeseeable facts precluded timely NEPA review because of the urgency at issue.

In stark contrast to *Miccosukee Tribe* and *Valley Citizens*, the Navy in *Winter* understood from very early on that it would need to complete its NEPA obligations, which included preparing an EIS, *before* it could begin its routine training exercises in Southern California.<sup>83</sup> During preparation of

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78. *Miccosukee Tribe of Indians of Fla. v. United States*, 509 F. Supp. 2d 1288, 1290 (S.D. Fla. 2007).

79. *Id.* at 1291.

80. *Valley Citizens for a Safe Env’t v. Vest*, 1991 WL 330963, at \*1–2 (D. Mass. May 30, 1991).

81. *Id.*

82. *See Nat’l Audubon Soc’y v. Hester*, 801 F.2d 405, 408 & n.3 (D.C. Cir. 1986). In *Hester*, the CEQ found emergency circumstances where the Fish and Wildlife Service proposed to take the remaining six wild California condors out of the wild for survival of the species. *Id.* at 405. The court noted that “the Council on Environmental Quality had certified that, *due to the urgent nature of the Wildlife Service’s concerns with condor mortality*, immediate recording of the agency’s reasons why it now preferred another of the alternative courses of action discussed in the Environmental Assessment was not required by NEPA.” *Id.* at 405 n.3 (emphasis added). In another case, *South Carolina ex rel. Campbell v. O’Leary*, 865 F. Supp. 300, 303 (D.S.C. 1994), *overruled by South Carolina ex rel. Campbell v. O’Leary*, 64 F.3d 892, 894 (4th Cir. 1995), the court acknowledged that the CEQ found emergency circumstances surrounding the urgent import of spent nuclear-fuel rods in furtherance of the nation’s nonproliferation policy. *Id.*; *see also Crosby v. Young*, 512 F. Supp. 1363, 1365, 1384–85 (E.D. Mich. 1981) (finding emergency circumstances warranting alternative arrangements because of the time and complexity of certain federal loans that could only be secured with NEPA compliance, under which arrangements the “CEQ authorized an environmental analysis on an accelerated schedule [and authorized] . . . HUD . . . [to] releas[e] the Section 108 loan guarantee before the final EIS was prepared”).

83. *See, e.g., Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 374 (2008) (“[T]he Navy has

its EA and during the early stages of litigation, the Navy never approached the CEQ to invoke the “emergency circumstances” provision of NEPA because no emergency existed to justify “alternative arrangements” for a routine training exercise of this kind. Rather than comply with NEPA’s requirements, the Navy stubbornly refused initially to prepare an EIS and went forward with its training exercises despite the serious questions raised about environmental impacts in the Navy’s EA for the project.<sup>84</sup> Not only was the district court’s subsequent injunction not an “emergency” by any stretch of the imagination considering the Navy’s failure to complete an EIS, it was something that the Navy should have foreseen in light of its own internal decisions to ignore NEPA’s mandate during the preliminary stages of the project.<sup>85</sup> By running to the CEQ after the district court’s injunction to invoke “emergency circumstances,” the Navy “took an extraordinary course” forcing the CEQ into a “hasty decision” because of the Navy’s own self-created emergency.<sup>86</sup> Significantly differing from the cases cited above where agencies sought to invoke “emergency circumstances” by the CEQ well before any court order and on the basis of genuine urgency, the government in *Winter* waited until after the district court issued its injunction to invoke the provision, contending that the injunction itself was the emergency circumstance.<sup>87</sup> In such a situation, the CEQ’s emergency determination has no validity because a “rapid, self-serving resort to an office in the White House” is an improper way to address this sort of self-imposed emergency.<sup>88</sup>

Although the CEQ arguably has authority to determine the existence of emergency circumstances and to create alternative NEPA arrangements under 40 C.F.R. § 1506.11 where genuine emergencies exist,<sup>89</sup> such

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been on notice of its obligation to comply with NEPA from the moment it first planned the SOCAL training exercises.”).

84. *Id.* at 387 (Ginsburg, J., dissenting) (“If the Navy had completed the EIS before taking action, as NEPA instructs, the parties and the public could have benefited from the environmental analysis—and the Navy’s training could have proceeded without interruption.”).

85. *Id.*

86. *Id.* at 389, 391.

87. Petitioner’s Brief, *supra* note 51, at 23 (explaining that the Navy asserted that “emergency circumstances” exist because of “the significant risk that the Navy would be unable to effectively prepare strike groups essential to national security under the district court’s January 2008 injunction”).

88. *Winter*, 129 S. Ct. at 391 (Ginsburg, J., dissenting).

89. See Transcript of Oral Argument at 12–14, *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/07-1239.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-1239.pdf). During oral argument, Justice Souter pressed the government on this issue indicating his opinion that the CEQ does not have statutory authority from Congress to make rules dispensing with NEPA’s statutory procedural requirements such as the preparation of the EIS. To this effect, Justice Souter repeatedly asked questions and made comments such as: “Where was the statutory authority suspending the obligation to provide an EIS?”, *id.* at 12; “Where in the statute does it say that the

determinations by the CEQ have no authority to override an order by an Article III court. As a dissenting Seventh Circuit judge once remarked: “The deliberate and flagrant disregard of a federal court order by an executive arm of the Government challenges the very separation of powers upon which our system of government is based.”<sup>90</sup> Therefore, the answer to this question is that the CEQ, as part of the executive branch, cannot vacate an injunction under the guise of “emergency circumstances.”

#### CONCLUSION

In *Winter*, the Court made clear that the irreparable harm standard in any lawsuit seeking a preliminary injunction requires a showing of a likelihood of irreparable harm.<sup>91</sup> Additionally, *Winter* implicitly acknowledged that federal courts should consider the “statutory scheme and purpose” of NEPA in an injunction analysis,<sup>92</sup> in spite of the fact that the statute’s unique purpose is likely not dispositive in a case with facts similar to those in *Winter* where paramount national security interests tip the balance of equities strongly in favor of the government.<sup>93</sup>

With regard to the other three questions, however, there is currently no guiding answer from the Supreme Court. Despite the lack of guidance, there is very strong authority from the lower courts, statutes, and regulations that compels certain conclusions to each question. In short, (1) localized impacts to wildlife may serve as the basis for establishing irreparable harm, (2) a lengthy and detailed EA does not negate the need for an EIS and in fact indicates that an EIS should be prepared, and (3) the CEQ cannot override an injunction by an Article III court under NEPA’s emergency circumstances provision. When these answers are accepted and followed by courts in uniformity, NEPA will have weathered three fierce storms only to emerge stronger and still capable of serving as “our basic national charter for protection of the environment.”<sup>94</sup>

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Council on Environmental Quality can dispense with this requirement?”, *id.* at 12–13; “[W]hat’s the statutory authority for them to engage in rulemaking authority that dispenses with the government’s obligation to comply with an EIS requirement?”, *id.* at 14; and “I want to know what the statutory authority is for that. I don’t see it in NEPA.”, *id.* at 13.

90. *Schrader v. Selective Serv. Sys. Loc. Bd. No. 76 of Wis.*, 470 F.2d 73, 78 (7th Cir. 1972) (Eschbach, J., dissenting).

91. *Winter*, 129 S. Ct. at 375.

92. *See id.* at 374 (noting that the Navy had an obligation to comply with NEPA).

93. *Id.* at 378.

94. 40 C.F.R. § 1500.1 (2008).