

JUN 24 2008

IN THE SUPREME COURT OF THE UNITED STATES

No. 07-1239

DONALD C. WINTER, SECRETARY OF THE NAVY,
ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNOPPOSED MOTION TO CALENDAR ORAL ARGUMENT IN OCTOBER 2008

The Acting Solicitor General, on behalf of the Secretary of the Navy and the other federal petitioners, respectfully moves, pursuant to Supreme Court Rule 21, to calendar oral argument during the Court's October 6-15, 2008, argument session. An October 2008 argument date would maximize the Court's flexibility to issue a disposition on the merits of the important questions presented before anticipated events could complicate the disposition of this case or require supplemental briefing. The briefing schedule under the Court's rules (and set forth below) would provide respondents with the full 30-day briefing period to prepare their merits brief and complete briefing at least seven days before oral argument.

STATEMENT

As the petition explains, the Navy scheduled a series of up to 14 strike group training exercises involving the use of mid-frequency active (MFA) sonar in the Southern California Operating Area (SOCAL) from February 2007 through January 2009. Pet. 2, 6. The last exercises in this series presently are expected to be completed within November and December 2008.¹ In addition, as the petition explains, the Navy plans to complete in January 2009 a comprehensive Environmental Impact Statement (EIS) process that will evaluate all future SOCAL activities, including but not limited to training exercises such as those discussed above. Ibid.

The Navy's Environmental Assessment (EA) at issue in this case determined that the National Environmental Policy Act (NEPA) did not require an EIS for the exercises that were anticipated through January 2009. Pet. 7. After the district court disagreed with the Navy's determination and entered a preliminary injunction imposing restrictions that present an unacceptable risk to essential military training necessary to ensure the readiness of the Nation's armed forces, the Council on Environmental Quality (CEQ) determined that "emergency circumstances" warranted alternative arrangements

¹ Like most if not all planned military exercises, the timing and logistical components of these exercises are subject to change based on operational considerations. The government intends to make available to the Court under appropriate security measures a classified update regarding the remaining schedule or any modifications thereto in connection with its brief for petitioners.

for NEPA compliance under 40 C.F.R. 1506.11 until the Navy completes its SOCAL EIS process or January 23, 2009, whichever is earlier. .Pet. 11; App. 240a, 248a.

The questions presented on which this Court granted certiorari are whether CEQ permissibly construed its own regulation in finding "emergency circumstances" and whether the preliminary injunction is inconsistent with established equitable principles limiting discretionary equitable relief. Pet. I.

ARGUMENT

1. An October 2008 oral argument for this case is warranted to provide the Court with the opportunity to issue its decision on the merits before that decision might be complicated by events anticipated in late 2008 and early 2009. The anticipated completion of the last training exercises covered by CEQ's alternative arrangements (in November and December 2008) and the SOCAL EIS process (in January 2009) could raise questions concerning Article III mootness.² By calendaring oral argument in October 2008, however, this Court would maximize its flexibility to

² At the same time, for example, the propriety of CEQ's finding of "emergency circumstances" and the appropriateness of preliminary injunctive relief involve questions that may be capable of repetition, yet evading review. In the present case, like other cases arising in "emergency" circumstances, the time-limited nature of the action often can preclude full litigation even through the preliminary-injunction stage of a case. And, in the context of environmental lawsuits such as this, the government and respondent NRDC repeatedly litigate the propriety of preliminary injunctive relief that would restrict government action.

issue its decision before any such complications would arise. In addition, given the importance of the questions presented and the national security interests in permitting the Navy to conduct necessary training exercises, the public would benefit from a prompt disposition in this case.

Accordingly, the government hereby requests that the case be calendared for oral argument during the October session (October 6-15). To accommodate that request, the Court might consider, for instance, scheduling oral argument for October 8 and rescheduling one of the cases currently scheduled for argument that day in which the government is a party (e.g., Nugusie v. Mukasey, No. 07-499, or Summers v. Earth Island Institute, No. 07-463). Summers involves the government's challenge to an injunction affirmed by the Ninth Circuit in environmental litigation and, for that reason, the Court may find it appropriate to calendar oral argument both in the present case and Summers on October 8. The Court's current calendar would then permit Nugusie to be set for oral argument on the afternoon of October 14, 2008 (no argument is presently scheduled for that time) or moved to different argument session.

2. Respondents have stated that they do not oppose the following briefing schedule, which the government has proposed to facilitate an October argument:

August 7, 2008	Brief for petitioners
August 14, 2008	Amici briefs supporting petitioners
September 8, 2008	Brief for respondents
September 15, 2008	Amici briefs supporting respondents
October 3, 2008 or seven days before oral argument, whichever is earlier	Reply brief

The above schedule is in accordance with this Court's rules, would provide respondents with a full 30-day period in which to file their brief, and would complete merits briefing at least seven days before oral argument.

3. Counsel for respondents have authorized us to represent that they do not oppose the relief requested in this motion.

CONCLUSION

For the reasons stated, petitioners respectfully request that the Court calendar oral argument during the Court's October 2008 argument session.

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Counsel of Record

JUNE 2008

