By Richard Lazarus

When a Loss Is Almost a Victory

At first glance, the Supreme Court's recent ruling in *Winter v. NRDC* would seem to contain no surprises. After almost 40 years, the refrain is certainly familiar. First, environmentalists prevail in the lower courts in a National Environmental Policy Act case, and then the Supreme Court reverses. Winter is the 16th time this has happened out of 16 NEPA cases heard by the High Court on plenary review.

The only obvious immediate difference is that the environmentalists in *Winter* actually received some votes! Two justices (Stephen Breyer and John Paul Stevens) dissented in part and two justices (Ruth Bader Ginsburg and David Souter) dissented entirely. The last time the environmentalists received any votes in a NEPA case subject to plenary review was their 1976 loss in *Kleppe v. Sierra Club.*

Winter, however, underscores that not all Supreme Court losses are the same and sometimes significant victories may be embedded in an opinion that otherwise has all the formal trappings of a loss. The case is also a reminder of how an opinion author may deftly use language that, in the longer term, may prove far more significant than any of the actual rulings of the Court.

As soon as the Court granted review in *Winter*, the bottom-line result was obvious: a quick reversal. For this reason, NRDC's true challenge was to achieve what Supreme Court advocates describe as a "soft landing," a ruling with minimal precedential effect. In many, but not all respects, NRDC achieved just that.

First, NRDC embraced the unorthodox tactic of virtually abandoning any pretense of defending the lower courts' ruling on the first question presented by the solicitor general: whether the Council on Environmental Quality had validly invoked its "emergency" regulation to allow the Navy to comply with NEPA based on "alternative arrangements" determined by CEQ. The lower courts had ruled that CEQ had not, because the term "emergency" applies only when the federal agency's circumstances are unanticipated and unforeseen rather than, as in *Winter,* the product of the Navy's own inadequate compliance efforts. But instead of defending the lower courts' reasoning, NRDC challenged CEQ's statutory and constitutional authority to excuse the Navy, thereby raising a legal issue not ruled on by the courts below and therefore also not one that the Supreme Court was likely to address.

The Court, moreover, responded to NRDC's tactic not by ruling against the organization on the first issue, but instead by skipping it altogether and reversing instead on a narrow fact-bound basis: the failure of the lower courts to give adequate deference to the beliefs of Navy commanders and the president that two of the preliminary injunction conditions would unduly undermine the Navy's ability to train. The Court's maneuver is intriguing. Based on questions posed by the justices at oral argument, including the chief justice, NRDC may have raised enough doubts about the legitimacy of CEQ's emergency authority to prompt the Court to avoid the first question.

Second, the Court declined to address some of the solicitor general's broader arguments. For instance, the Court did not rule on the SG's claim that environmentalists could not demonstrate irreparable injury — either as required for a preliminary injunction or for Article III standing — absent a far greater showing of species injury: the SG had argued that respondents "have no legally cognizable interest in individual members of a species" and "any finding of irreparable injury . . . must rest upon likelihood of a harm to the species as a whole." Such a ruling could have dramatically limited the ability of environmental groups to maintain standing and obtain injunctive relief in many future wildlife and marine mammal cases.

Finally, the Court repeatedly emphasized that the Navy had appealed only two of many injunction conditions that the district court had imposed on its sonar. The Court's ruling, accordingly, left in place much of the relief obtained by NRDC. In that respect, NRDC was very much a winner. Based on NEPA's procedural requirements, the group achieved significant modification of the Navy's use of active sonar in its recent exercises and likely in future exercises as well.

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Environmentalists should nonetheless be wary of too much celebration. The chief justice's opinion for the Court contains language that government lawyers will most likely invoke to argue against injunctions based on NEPA violations in future cases. Rather than embrace the view of some lower courts and many academics that a NEPA violation, by its nature, should normally warrant injunctive relief, the majority twice intimates that NEPA's procedural character in fact cuts the other way, at least where the governmental action is not "new" and its impacts not "completely unknown."

In short, there is some silver lining in *Winter* for environmentalists, but there is also reason for concern.

Richard Lazarus is on the law faculty of Georgetown University. He can be reached at lazarusr@law.georgetown.edu.