

**DECISIONS OF THE  
U.S. SUPREME COURT  
IN ENVIRONMENTAL  
CASES  
DURING THE 2008  
TERM**

**May 26, 2009**

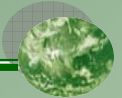
**Lori Potter  
Kaplan Kirsch & Rockwell LLP  
lpotter@kaplankirsch.com**



**KAPLAN KIRSCH ROCKWELL**

# Cases addressed:

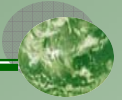
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- Winter v. Natural Resources Defense Council, 555 U.S. \_\_\_\_, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)
- Summers v. Earth Island Institute, 555 U.S. \_\_\_\_, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009)

**Winter v. Natural Resources Defense Council,**  
**555 U.S. \_\_\_\_, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)**

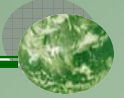
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- **16<sup>th</sup> NEPA case to come before Court**
- **16<sup>th</sup> reversal of a lower court judgment for plaintiff on a NEPA cause of action!**

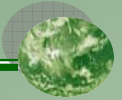
# Writing on the wall:

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**First line of opinion: “To be prepared for war is one of the most effectual means of preserving peace.” -- George Washington**

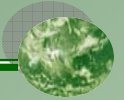
# Facts of Winter:



- Navy did EA on proposed sonar testing in CA
- NRDC sued, district court issued PI
- 9<sup>th</sup> Cir. agreed PI needed, but remanded for injunction to be narrowed
- District court revised PI to allow sonar tests with six mitigation measures
- Navy sought Executive Branch exemptions
- 9<sup>th</sup> Cir. affirmed PI; cert granted

# Holding:

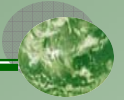
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- Reversed (5-4) the injunction conditions appealed by the Navy on grounds that (i) plaintiff had shown only “possibility,” not “likelihood,” of irreparable harm, and (ii) district court failed to defer to military judgments about the Navy’s interests and to properly balance the equities
- Substantial injunctive relief remains in place
- Signaled several areas of likely future litigation...

# Issues for another day:

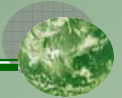
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1. **What constitutes irreparable injury in the context of harm to a species**
2. **Availability of injunctive relief based on NEPA violations**

**Summers v. Earth Island Institute, 555 U.S. \_\_\_\_\_,  
129 S.Ct. 1142, 173 L.Ed.2d 1 (2009)**

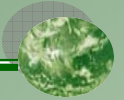
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- **In the lower courts, a case about the validity of Forest Service appeal regulations**
- **In the Supreme Court, a case about standing – no defense of the regs**
- **Standing cases have a track record similar to NEPA cases before the Supreme Court**

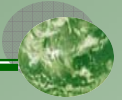
# Writing on the wall:

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**First line of opinion: “Respondents are a group of organizations dedicated to protecting the environment.” -- Justice Antonin Scalia**

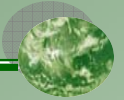
# Facts of Summers:



- 1992 enactment of Appeals Reform Act
- 2003 rule-making exempted certain salvage timber sales and fire-rehab projects from NEPA, notice and comment, and administrative appeal
- 2003 Burnt Ridge timber sale (238 acres)
- Earth Island challenged 2003 rule facially and as applied to Burnt Ridge timber sale
- Forest Service withdrew Burnt Ridge sale; parties settled the as-applied claim
- District court held regulations invalid, issued nationwide injunction against use of regulations
- 9<sup>th</sup> Cir. affirmed; cert granted

# Holding:

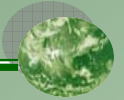
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- Reversed (5-4); injunction vacated
- No standing to facially challenge the regulations in the absence of as-applied, site-specific demonstration of injury to the plaintiff's interests
- Undisputed deprivation of the procedural right to notice and comment does not create Article III standing without a showing of injury to plaintiff's concrete interests in a place or resource

# Issues for another day:

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1. When -- if ever -- can regulations be challenged facially?
2. Under what circumstances can either industry or environmental groups obtain nationwide injunctions of invalid rules?