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Supreme Court Rules in Navy Sonar Case
Safeguards for Hawai'i's whales will continue, for now

Honolulu, HI -- A Supreme Court ruling today regarding harm to whales and other marine mammals caused by the US Navy's use of mid-frequency active sonar off the California coast will have no immediate affect on a similar Earthjustice effort to protect whales in Hawai'i. The high court struck down two of six mitigation measures imposed by a California federal district court intended to protect whales and dolphins from the harmful affects of mid-frequency sonar during Navy training exercises. The Navy uses the sonar to detect diesel-electric submarines. The Court's ruling is narrowly tailored to the specifics of the California case and affects only certain provisions of the district court's injunction. A preliminary injunction issued by federal district judge David A. Ezra in Hawai'i earlier this year forcing the Navy to take protective steps in the use of sonar there has successfully provided protection for whales, and likely will continue to do so notwithstanding the Supreme Court's decision.

The US Navy blasts the sonar at extremely loud volumes underwater. This has been closely associated with the deaths of marine mammals, and in particular, beaked whales, at locations throughout the world. These animals use sound waves to locate food, detect food and predators, and communicate with others of their species. Exposure to extremely loud sonar appears to cause deep-diving beaked whales in particular to ascend too rapidly, resulting in a condition similar to the "bends" that has been fatal.

There have been many cases of whales washing ashore dead in areas where US Navy sonar exercises have been conducted, and both the National Marine Fisheries Service and the Navy have acknowledged that mid-frequency sonar can contribute to these incidents, such as one in 2000 when at least 16 whales died in

the Bahamas. A beaked whale washed up and died on a Moloka'i beach during Navy sonar exercises in July 2008, and the government found sonar to be a "plausible, if not likely" contributor to the embayment of some 200 melon-headed whales near Kaua'i during 2004 exercises, after which a juvenile whale died. The Navy acknowledged that the California exercises could cause permanent injury to some 500 beaked whales and temporary deafness to at least 8,000 whales. In spite of this, the Supreme Court ruled that the California district court judge didn't adequately support her conclusion that the likely harm to the whales and dolphins justified two of the restrictions the court had imposed to protect them.

The two provisions of the California court's preliminary injunction the high court struck down were one requiring sonar to be shut down if a marine mammal were sited within 2,200 yards during sonar transmission, and another requiring the Navy to reduce the sonar level during an oceanographic condition known as surface ducting, when sound travels farther under water

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without attenuating, placing marine mammals at greater risk. The Navy did not appeal any of the other mitigation measures the district court ordered, and those have been left in place.

While the Supreme Court's decision will have no immediate effect on the Hawai'i injunction, that injunction includes the same surface ducting provision the Supreme Court struck down. However, unlike the injunction the high court considered, Judge Ezra did not order a 2,200 yard shutdown in case a whale is spotted, but instead ordered a graduated power-down, in which the sound must be reduced as the animal gets closer, and finally shut down at 500 yards. This likely will survive any challenge by the Navy, which itself volunteered a very similar power-down with somewhat smaller distances. In criticizing the California court's provision, the Supreme Court specifically noted that, unlike the Hawai'i provision, "The District Court's injunction does not include a graduated power-down, instead requiring a total shutdown of MFA sonar if a marine mammal is detected within 2,200 yards of a sonar-emitting vessel."

The Supreme Court did not rule there can never be an injunction against the Navy. It said, "Of course, military interests do not always trump other considerations, and we have not held that they do." In fact, since the Supreme Court did not strike down several other aspects of the California injunction, those, along

with other provisions of Judge Ezra's injunction in Hawai'i— including a 12 mile coastal exclusion zone, gradual ramping-up of sonar levels, and monitoring requirements—will continue to provide enhanced protection for whales while allowing the Navy to train.

Other modern navies use the same sonar but in ways less harmful to whales and dolphins.

"It's very clear that mid-frequency harms and kills whales. It's also apparent the Navy—like other modern navies—can effectively train while providing more protection than the Navy has been willing to employ. We expect that as these cases work their way through the courts, the science and the law will force the Navy to take a more responsible and balanced approach," said Earthjustice attorney Paul Achitoff.

Earthjustice is representing the Ocean Mammal Institute, the Animal Welfare Institute, KAHEA: The Hawaiian-Environmental Alliance, the Center for Biological Diversity, and the Surfrider Foundation's Kaua'i Chapter in the Hawai'i case.

See and hear what the Navy sonar sounds like and what impact it has on whales and dolphins.

http://www.youtube.com/watch?v=O9gDk29Y_YY

Earthjustice is the nation's leading non-profit environmental law firm. The Mid-Pacific Office opened in Honolulu in 1988 and represents environmental, Native Hawaiian, and community organizations. Earthjustice is the only non-profit environmental law firm in Hawai'i and the Mid-Pacific and does not charge clients for its services.