In the first opinion (PDF) of its new term, the Supreme Court ruled in favor of the continued use of sonar by the U.S. Navy in submarine-detection exercises off the coast of Southern California. Judging by the media reaction, this was dire, dire news for the Greenpeace set. (“Navy Trumps Whales,” read Thursday’s headline in the San Francisco Chronicle.) In truth, nobody in the environmental community welcomed the decision—and it certainly wasn’t a great day to be a whale—but the decision itself is neither surprising nor sweeping.

The Natural Resources Defense Council has been fighting the Navy’s sonar program in a series of cases for more than 10 years. In 2006, it sued under the Coastal Zone Management Act, the Marine Mammal Protection Act, and the National Environmental Policy Act to stop training exercises off Southern California. Earlier this year, that lawsuit produced an injunction against the use of midfrequency active sonar, pending completion of an adequate environmental impact statement. The Navy challenged only two of several conditions imposed by the district court: a requirement that it shut down active sonar when a marine mammal was detected within 1.25 miles and another that it power sonar down when water conditions would allow sound to travel farther than normal. This week, seven Supreme Court justices agreed with the Navy that those conditions were improperly imposed.
Before the case reached the Supreme Court, the Coastal Zone and Marine Mammal claims had fallen away—because the executive branch can and did provide exemptions from those laws. At that point, there was no reason to think that the justices would rule in favor of the whales: Over nearly 40 years, the court has heard some 16 cases related to the National Environmental Policy Act and ruled against environmental interests in every one. This latest case, with its national security overtones, must have tempted some of the justices to cut back on NEPA in sweeping ways. After all, the Navy was asking for permission to ignore the law altogether whenever it could get the White House to declare an emergency.
The good news is that the environment dodged that bullet. Chief Justice Roberts, writing for the majority, kept his opinion narrow and grounded it in well-established law. Rather than authorize emergency exemptions, the decision focused only on the remedy for violating the act. According to the decision, the plaintiffs in these cases—environmental-advocacy groups, for the most part—must show that the potential harm to the environment outweighs the defendant’s and the public interest in proceeding with the action. In other words, was sonar sufficiently important to the Navy (and thus the public) that the harm to the whales was justified? That has long been the legal test; Thursday’s decision simply made it a bit more difficult for environmental plaintiffs to get injunctive relief in the 9th Circuit (which had been the most generous among the federal courts). The change is not dramatic.

Roberts argued, unsurprisingly, that the public interest in effective military training outweighed the environmental case against deep-sea noise pollution. He noted that “military interests do not always trump other considerations.” But the Navy had submitted declarations from high-ranking officials explaining in some detail why active sonar submarine-detection training is critical to national security and why compliance with the challenged conditions would interfere with that training. Perhaps those declarations were false or exaggerated. The environmental plaintiffs certainly disagreed with them. But courts are ill-equipped to second-guess the military’s considered views on national security—and the trial court had done so almost cavalierly, simply stating that the public interest would not suffer if the Navy’s sonar use was limited “during a subset of their regular activities in one part of one state for a limited period.” Even Justices Breyer and Stevens, consistent friends of the environment, concluded that the lower courts hadn’t given much thought to how the Navy could train effectively under the sonar restrictions they imposed.
This decision by no means grants the Navy carte blanche to run whatever training exercises it wants. In response to this and other lawsuits, the Navy has acknowledged its obligation to prepare environmental impact statements for sonar exercises—not only off California but in Hawaii and on the East Coast, too. For the Southern California exercises, the admirals must still honor the 12-mile coastal buffer zone demanded by the lower court. And they must comply with a second set of conditions imposed by the Defense Department when the Navy was given its two-year exemption from the Marine Mammal Protection Act. Those include the use of trained marine mammal lookouts, operation of active sonar at the lowest practicable power level, and powering down further when marine mammals are within half a mile. Even Joel Reynolds, the NRDC lawyer in charge of the sonar litigation, sees “significant progress” in the Navy’s attitude and behavior.

So the Supreme Court’s “kill the whales” decision was neither surprising nor earth-shattering. That said, it still offers reason for whales, dolphins, toads, and other critters to be discouraged. Georgetown law professor Richard Lazarus has been arguing for years (since long before Roberts joined the court) that the justices don’t understand the special challenges of
environmental law. The chief justice’s opinion in this case shows that Lazarus is still right. A majority of the court not only doesn’t understand environmental problems, it doesn’t care to understand them.

If the lower court was cavalier about the national-security interest, Roberts was equally so about the environmental interests at stake. He acknowledged the bland possibility of unspecified harm to an unknown number of marine mammals but not the detailed evidence of strandings, ear injuries, the bends, and “profound behavioral changes” that had motivated the lower courts’ conclusions.

At his confirmation hearings, Roberts drew fire from environmentalists for an opinion he wrote as a judge on the D.C. Circuit, questioning whether the Commerce Clause of the U.S. Constitution could be read to allow protection of “a hapless toad that, for reasons of its own, lives its entire life in California.” As he pointed out at the time, Roberts had only sought additional review of that question, and his legal interpretation was within the mainstream. The same can be said of his opinion in the Navy sonar case. Then as now, he reveals a flippant lack of concern for the environment that does not bode well for future cases.

Several other significant environmental cases are on the court’s docket this term. It must decide the extent to which the Forest Service is subject to citizen oversight, whether the EPA can use cost-benefit analysis to limit regulations on cooling water intakes, and whether the Corps of Engineers
can allow a mining company to dump thousands of tons of tailings in a lake. While the decision in the Navy sonar case is not as bad for the environment as it might seem, its overtones give ample cause for worry.