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Locke Lord QuickStudy: A Precautionary Tale: D.C. Circuit ?Strikes Down Precautionary Principle Under the ?Endangered ?Species Act ?

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On June 16, 2023, a three-judge panel of the U.S. Court of Appeals for the District of Columbia ruled unanimously that the National Marine Fisheries Service ("NMFS"), when faced with insufficient data, cannot rely on worst-case scenarios or pessimistic assumptions when developing a Biological Opinion ("BiOp") analyzing the risk posed by an agency action. *Maine Lobstermen's Assn. v. Nat'l Marine Fisheries Serv.*, 70 F.4th 582 (D.C. Cir. 2023). The court further held that NMFS's position that it must give the "benefit of the doubt" to species listed under the Endangered Species Act ("ESA") was not entitled to deference under *Chevron*.

The decision is extremely important for a couple of reasons. First, and most significantly, it eviscerates the precautionary principle that NMFS and the U.S. Fish and Wildlife Service ("USFWS", and collectively with NMFS, the "Services") have long relied upon to justify policies and decisions favoring a listed species. Second, it establishes that the Services' practice of relying upon worst-case assumptions in the absence of conclusive data (which is usually the case when dealing with endangered species) is inconsistent with the authority granted to it in the ESA. This decision should significantly constrain the analyses that the Services may undertake in future BiOps and could lead to challenges of other previously issued BiOps. But while the significance of the decision should not be understated, in practice it may not be quite the hammer that some have suggested, as the opinion does leave room for the Services to continue to be conservative in their BiOps, as long as they provide a reasoned justification based on the data that is available to them. Absent a successful appeal, the likelihood of which would seem to be slim, we expect that is exactly the approach that the Services will take going forward.

The Jeopardy Standard for Section 7 Consultations

Section 7 of the ESA requires federal agencies to consult with NMFS or USFWS, as applicable, to "insure that any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of" any endangered or threatened wildlife species. NMFS is required to develop a BiOp determining whether incidental take associated with the agency action will result in jeopardy to the species, and in the case of marine mammals, specifying the measures required to comply with the take provisions of the Marine Mammal Protection Act. In developing the BiOp, NMFS is required to rely on the best available scientific and commercial data.

In response to a series of North Atlantic right whale deaths occurring in 2017, NMFS began an internal

consultation under Section 7 of the ESA to determine the impact of certain fisheries on the whale's population. NMFS's Sustainable Fisheries Division consulted its Protected Species Division to develop a BiOp, which concluded that the fisheries killed an unsustainable number of right whales despite admittedly limited data (but declining to find that the fisheries jeopardize the right whale). In its BiOp, NMFS stated that "uncertainty is resolved in favor of the species" and that it generally "select[s] the value that would lead to conclusions of higher, rather than lower, risk to the endangered species." In support of this approach, NMFS pointed to legislative history from the 1979 ESA Amendments that required it to "give the benefit of the doubt to the species."

Simultaneously with issuance of the BiOp, NMFS prepared a "Conservation Framework" which set out a four-phase plan to reduce North Atlantic right whale entanglements in fishing gear to zero by 2030. NMFS also enacted a final rule implementing phase one of the Conservation Framework (the "phase one rule"). In the Conservation Framework, NMFS acknowledged that its "model outputs very likely overestimate the likelihood of a declining population." Both the BiOp and the phase one rule were challenged by the Maine Lobstermen's Association and environmental groups. In its decision, the D.C. Circuit vacated the BiOp's application to certain fisheries and remanded the phase one rule to NMFS without vacatur.

Throwing Precaution to the Wind

In rendering its decision, the court held that contrary to NMFS's assertion, Section 7 of the ESA does not require NMFS to make a substantive presumption in favor of the species. Unlike other environmental statutes such as the Clean Air Act, the text of the ESA does not contain language requiring the application of the precautionary principle when making decisions. The court scolded NMFS for its reliance on the ESA's legislative history as requiring application of the precautionary principle. "As any high school Civics student should know," the court explained, "legislators vote on and the president signs bills, not their legislative history. Legislative history therefore cannot bind the executive branch and compel a presumption in favor of the species not required by statute." Instead, the court looked to the text of the statute itself and observed that the ESA stipulates that an action agency must ensure that its action does not "likely" jeopardize the continued existence of a protected species. To interpret this requirement the court looked to the ordinary meaning of "likely," finding it to mean "probable" or "more likely than not." The court then explained that NMFS's role as the consulting agency is to form a scientific judgment that relies on the best available scientific data to determine if it is likely that jeopardy will result from the proposed action, rather than engaging in a worst-case analysis. By relying on worst-case modeling that was by NMFS's own admission "very likely" wrong, the court found that NMFS's BiOp was arbitrary and capricious and not consistent with the requirements of the ESA.

No Indifference on Deference

In reaching its decision, the court declined to give deference to NMFS's interpretation of the ESA, tating that because NMFS's legal reasoning was incorrect, its (mis)conception of the law did not merit deference.

NMFS argued that its application of the precautionary principle was also justified because of the ESA's silence with respect to data uncertainties. However, the court pointed out that NMFS's current position on the precautionary principle was contrary to the stance it had taken as recently as 2019. Although agencies are "free to change their existing policies," the court noted, they must "provide a reasoned explanation for the change." NMFS did not provide a reasoned explanation for its change in policy, and indeed "displayed no awareness of its

own flip flop." Accordingly, the court determined that NMFS's interpretation of the statute was not entitled to deference under *Chevron*.

ESA in Jeopardy?

The court's decision has significant implications both for the protections provided by the ESA and for projects that may have an effect on ESA-listed species. The court was clear that the Services can no longer rely on the precautionary principle to justify overly conservative assumptions when developing their BiOps. This is welcome news for project proponents, as the benefit of the doubt will shift from the species to the project. As the court decreed, "if [based on the available data] the agency cannot reject the null hypothesis (no jeopardy) as unlikely, then [it must] grant a license."

As significant as this shift may be, we do not expect the Services to simply concede and change their ways. The reality is that the Services are staffed largely by biologists, not bureaucrats, and they are likely to continue looking for ways to justify favoring protected species over projects. And they may not have to look hard to do so, as the opinion itself provides the roadmap. Despite its admonitions regarding the waning of *Chevron* deference, the court acknowledged that the Services are entitled to deference when they make "a scientifically defensible decision without resort to a presumption in favor of the species." In this case NMFS admitted its predictions were overly conservative and very likely wrong. In future BiOps, the Services may be similarly conservative but far more opaque, resting their conclusions on whatever data is available even if that data may not be as adequate as they claim. While such a BiOp would still be subject to challenge, the Services will receive far more deference to their interpretation of the science than the statute.

Whether and how far the Services go in that direction will bear close scrutiny in the months and years to come. But it is clear that the ground rules have changed, and the D.C. Circuit has provided the regulated community and federal agencies that must consult with the Services under section 7 with a powerful new tool to help ensure an even-handed evaluation of their proposed actions.

For further information or to discuss how this decision may impact your projects, please contact the authors.

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