Updates
June 22, 2023
DC Court Holds That ESA Section 7 Does Not Give the “Benefit of the Doubt” to Listed Species

The U.S. Court of Appeals for the District of Columbia Circuit issued an opinion on June 16, 2023, speaking to several important issues in administrative law. Confronting a challenge under the Endangered Species Act (ESA), the district court addressed how federal agencies must approach uncertainty under the Administrative Procedure Act's (APA) standards, the continued viability of the *Chevron* doctrine, and how (now-common) dramatic pendulum swings in an agency's interpretation of particular statutes diminish the extent to which reviewing courts will defer to federal agency determinations.

In *Maine Lobstermen's Association v. State of Maine Dep't of Marine Resources*, 2023 WL 4036598 (D.C. Cir. 2023), the court addressed "whether and to what extent the federal lobster fishery is responsible for hampering the [North Atlantic] right whale population." *Id.* at *2. The court held that the National Marine Fisheries Service (NMFS) erred by concluding that it must give the "benefit of the doubt" to an endangered or threatened species by relying upon worst-case scenarios or pessimistic assumptions when determining whether a federal fishery is "likely" to jeopardize that species under the ESA. The court held that not only is this approach not mandatory, it is inconsistent with the statute's requirement to base such determinations on the "best scientific and commercial data available."

NMFS' Biological Opinion and "Phase One" Rule

The controversy before the court concerned NMFS's Biological Opinion regarding the effects on the right whale and lobster and Jonah crab fisheries, and a related rule imposing certain requirements on lobstermen designed to reduce the risk of injury to North Atlantic right whales. Two groups of plaintiffs raised challenges to these actions: conservation groups and groups of lobstermen (including the lead plaintiff, Maine Lobstermen's

Association) joined by Maine's Department of Marine Resources. The Biological Opinion addressed uncertainty regarding right whale deaths by making a series of extremely conservative assumptions. The combined effect of these assumptions, the agency concluded, is that the fishing gear used in lobster and Jonah crab fisheries would kill 46 whales each decade. *Id.* at *3. NMFS also concluded that federal fisheries entangle more than 9% of right whales each year, but based this conclusion on a study that provided the "benefit of the doubt" to the species, as opposed to actual "confirmed entanglements." *Id.* NMFS found that, using these "worst case" assumptions, the fisheries in question would decimate the right whale population within a decade. *Id*. To defend its use of the worst-case assumptions, the agency pointed to a line in a *House Conference Report* for the 1979 amendments to Section 7 of the ESA, which stated that "this language continues to give the benefit of the doubt to the species." *Id.* at *2-3.

NFMS issued the challenged rule—"phase one" of a proposed four-step "Conservation Framework"—soon after the Biological Opinion. The Conservation Framework is NMFS's commitment to reduce right whale entanglements in federal fisheries, in four specific phases, to near zero by 2030. It requires lobstermen to mark their ropes, add weak links or use weak ropes, increase the number of traps they use for each "trawl," and also imposes seasonal fishing restrictions. *Id.* at *4. After extrapolating the combined effect of Conservation Framework and the fisheries' effects on whales over the next five decades, NMFS found that federal fisheries would be unlikely to jeopardize the right whale, despite the agency's pessimistic conclusions regarding the number of whales the fisheries would kill.

Litigation by Industry and Conservation Groups

The lobstermen and conservation groups sued, both groups challenging the Biological Opinion and the phase one rule on different grounds. The district court granted summary judgment in favor of the conservation groups on two claims that the agency did not appeal and summary judgment in favor of the government in the lobstermen's action.[1] Afterward, Congress enacted a law requiring the NMFS to promulgate new rules that take effect by December 31, 2028; the law also provided that the phase one rule "shall be deemed sufficient" to ensure that authorizations of the lobster and Jonah crab fisheries would be "in full compliance" with the Marine Mammal Protection Act (MMPA) and ESA. Citing the statute, the government moved to dismiss the appeals as moot.

Court's Rationale

Writing for a panel that included Trump appointees Gregory G. Katsas and Neomi Rao, Senior Circuit Judge Douglas H. Ginsburg (a Reagan appointee) first concluded that the lobstermen had standing to challenge both the rule and the Biological Opinion. The court concluded that the phase one rule would cost lobstermen between $50 and $90 million over six years and that this concrete "pocketbook" injury gave them a stake in the outcome of the suit. *Id.* at *5. And because the Biological Opinion made the NMFS' no-jeopardy determination contingent on the rule, it too injured the lobstermen by coercing NMFS not to lift the rule.

The court also concluded that the challenge was not mooted by recent congressional action. Because the recent legislation held only that the phase one rule would be *sufficient* to comply with the ESA and MMPA—not that it would be *necessary* to do so—the statute did not resolve the issues before the court. *Id.* at *6. The court then

rejected several arguments asserted in the government's motion to dismiss as relevant only to the merits, not to dismissal, noting that many were not raised in the NMFS's opening brief and thus were forfeited. *Id.* at *7.

Turning to the merits, the court found that the text and legislative history of the ESA did not justify NMFS's interpretation of Section 7 to require pessimistic assumptions about effects to protected species. The court emphasized that after *TVA v. Hill*, 437 U.S. 153, 172 (1978). Congress amended the statute by replacing its flat prohibition on jeopardizing a protected species with a requirement that the action be "not likely to jeopardize" the species based on "the best scientific and commercial data *available*." Based on this, the court concluded that "Congress did not want economic activity stopped in its tracks whenever complete data was lacking," *id.* at *9. NMFS's role in the decision-making process is to "form a scientific judgment," not to "distort" the process by overemphasizing speculative harms whenever available data is lacking. *Id.*

The court also held that the district court erred by effectively affording *Chevron* deference to the agency's interpretation of statutory silence to adopt conservative, species-protective assumptions in the face of such silence. Citing *Loper Bright Enterprises, Inc. v. Raimondo*, a case currently pending in the U.S. Supreme Court, the panel disparaged the view that statutory silence provides an agency with discretion. *Id.* The court found that it could not uphold the Biological Opinion on that basis because the agency had not justified its interpretation as a matter of policy but rather had erroneously claimed that its position was required by the ESA's legislative history. The court also found that deference to the agency's views was not warranted because it had "oscillated between one view and its opposite" by departing from views it expressed in a 2019 rulemaking, while "display[ing] no awareness of its own flip flop." *Id.* at *10.

Finally, the court found the Biological Opinion contrary to law because it was inconsistent with the statute's insistence on "likely" outcomes and using the best "available" data. The court noted that "the use of the term 'available' would be meaningless if the agency could rely on pessimistic, speculative assumptions." *Id.* at *11. The court discussed the shortcomings of the so-called "precautionary principle" urged by the conservation groups: it reasoned that presumptively giving the benefit of the doubt to a particular species in the face of uncertainty could have damaging repercussions on the economy because uncertainty "is endemic in the field of health and safety regulation." *Id.* Such a presumption, the court found, "invites the unnecessary economic dislocation wrought by worst-case thinking" and can even work hardships on other protected species. *Id.* And the presumption would be all the more unreasonable because Congress tasked NMFS, in its capacity as the consulting agency, "to serve as a scientific consultant and permitting authority, not with making policy." *Id.* at *12.

The court rejected the agency's harmless error argument, finding that the flawed legal conclusion irreparably compromised its decision-making. *Id.* The court directed the district court to vacate the Biological Opinion as applied to the lobster and Jonah crab fisheries. The court left the phase one rule in place, concluding that NMFS might be able to justify it on remand. The court also noted that leaving the rule in place would secure the effect of the appropriations act by immunizing NMFS and the lobstermen from liability under the MMPA and ESA, thereby preventing the closure of the fishery. *Id.* at *13.

Takeaways

The decision stands as a warning that courts may show greater skepticism to agency interpretations that reflect policy rather than empirical judgments (at least where they are not acknowledged as such). The decision demonstrates that courts no longer reflexively defer to agency interpretations at "the frontiers of science," where

data is unavailable. The court's citation to NMFS' changed position between administrations as a factor weighing against deference is also noteworthy given the dramatic reversals recently seen in agency interpretations not only in the ESA context but under other environmental statutes like the Clean Air Act (CAA) and Clean Water Act (CWA). The opinion will no doubt be cited by many litigants challenging decisions in which agencies, operating in the face of uncertain data, rely on conservative assumptions to achieve what they perceive to be statutory goals.

Endnote

[1]The government did not appeal the claims on which the conservation groups prevailed, including one claim that the phase one rule was not restrictive enough under the MMPA.

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