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INSIGHTS

Endangered Species Act Developments: Court Finds Species Do Not Get The "Benefit Of The Doubt" & Agencies Propose Compensatory Mitigation Under ESA Section 7

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Two recent developments may have meaningful impacts on the implementation of Section 7 of the Endangered Species Act (ESA). First, the DC Circuit Court of Appeals issued an opinion in *Maine Lobstermen's Association v. National Marine Fisheries Service* and held that the National Marine Fisheries Service (NMFS) may not give species the benefit of the doubt when relying on partial or incomplete data.**[1]** Second, NMFS and the US Fish and Wildlife Service (USFWS) proposed revisions to the rules implementing Section 7 of the ESA—and, contradicting decades of practice, proposed a compensatory mitigation requirement as a component of the "Reasonable and Prudent Measures" to be implemented as part of an Incidental Take Statement.

NMFS May Not Make Pessimistic Assumptions

In the challenge brought by the Maine Lobstermen's Association, the DC Circuit held that NMFS may not give the "benefit of the doubt" to the endangered species by relying on worst-case scenarios or pessimistic assumptions because the ESA calls for the agency to make an empirical judgement about what is "likely."

The case arose from NMFS' efforts to further protections for the North Atlantic Right Whale (NARW) after studies showed increasing mortality rates. As a result, the NMFS—the Sustainable Fisheries Division—consulted with NMFS—the Protected Resources Division, the latter of which prepared a Biological Opinion (BiOp) for its sister division. In the BiOp, NMFS attempted to define the "reasonably certain" effects of the lobster and crab fisheries on the NARW, when available data was quite limited. NMFS then made assumptions about NARW deaths and the linkages to the lobster and crab fisheries at issue and concluded that the fisheries take about 46 NARW each decade, which would decimate the species in less than 10 years. After the BiOp, NMFS issued a final rule under the Marine Mammal Protection Act implementing the first phase of a framework intended to reduce NARW deaths.

On the merits, the court addressed whether NMFS "must (or even may) indulge in worst-case scenarios and pick 'pessimistic' values in order to give 'benefit of the doubt' to the species.'" The Court held that NMFS may not. The Court described NMFS' consultation role as a limited one, lending expert assistance to the action agency, making predictions about effects, and

issuing an Incidental Take Statement with "Reasonable and Prudent Measures" implemented through "Terms and Conditions" if the action will result in take, but is unlikely to jeopardize a species. The Court faulted NMFS—by over-emphasizing highly speculative harms in the BiOp—for distorting the decision-making process of the action agency. The Court also brushed aside NMFS' claims for deference under *Chevron*, which NMFS claimed was warranted given the silence of the ESA on how the agencies should handle uncertainties in the data. Regarding the legislative history on which NMFS heavily relied and which stated, in part, that "This language continues to give the benefit of the doubt to the species….", the Court found this requirement did not exist in the ESA text and was simply non-binding legislative history. The Court then faulted NMFS for flip-flopping positions as NMFS in a different proceeding several years ago agreed with commenters that nothing in the ESA required it to use a worst-case scenario or make unduly conservative modeling assumptions.

Setting aside NMFS' different positions and the legislative history, the Court read the text of the ESA to reject NMFS' argument that it should "generally select the value that would lead to conclusion of higher, rather than lower, risk to endangered or threatened species." The Court keyed on the "likely" terminology of the statue, which does not pre-suppose or encourage worst-case scenarios, according to the Court. As support, the Court looked to other statutory schemes where Congress intended a cautionary buffer, such as the Clean Air Act. The Court highlighted that such "margins of safety" or presumptions in favor of a species operate as a blunt tool to significantly expand the authority of the agency, with potential significant economic consequences, that Congress did not intend to bestow.

Proposed Revisions to Endangered Species Act Regulations

Three proposed revisions to regulations implementing the ESA have been published for public comment. First, USFWS proposes to go back to its pre-Trump Administration rule that applied the full protections of the Act for endangered species to threatened species, absent a species-specific rule. Second, USFWS and NMFS (together, the Services) jointly proposed two revisions—one to the regulations governing species listing decisions, and the second to regulations implementing Section 7 of the ESA.

Existing regulations in Part 402 of Title 50 set forth procedures governing interagency consultation under Section 7 of the ESA, which requires Federal agencies, in consultation with USFWS and/or NMFS, to ensure that any action carried out by the agencies is not likely to jeopardize the continued existence of endangered or threatened species. The proposed revisions would modify certain Trump Administration changes relevant to the analysis conducted by the Services, such as the definition of "effects of the action" and "environmental baseline."

While all of the proposed changes to the Section 7 regulations are worthy of note and careful analysis, one thing stands out – the brand new addition of a compensatory mitigation requirement as one potential Reasonable and Prudent Measure (RPM) in an Incidental Take Statement. The Services explain that "after considering measures that avoid or reduce incidental take within the action area, the Services may consider for inclusion as RPMs measures that offset any remaining impacts of incidental take that cannot be avoided." This could include "restoring or protecting suitable habitat for the affected species (e.g., via a species conservation bank, conservation easement with endowment, in lieu fee program, restoration program, etc.)." According to the Services, "the measures would need to be

appropriately scaled" and the "scale of the take caused by the action would provide an upper limit on the scale of any offsetting measures."

The Services recognize that this proposal is an about face from their decades-long position that RPMs should reduce the level of take caused by project activities and occur within the "action area" of the activity. The Services explain that they have changed their interpretation of the ESA to allow a compensatory mitigation requirement as a component of RPMs after a "careful review" of the statute and legislative history.

What's Next

The DC Circuit's opinion could have implications for numerous permitting actions. For instance, NMFS is consulting with and preparing BiOps for the Bureau of Ocean Energy Management and its decision-making on whether to approve proposals to construct offshore wind projects. NARW protection remains a focus of NMFS in this context, and the DC Circuit opinion could affect the modeling and assumptions in NMFS' analyses. With respect to the proposed rules, all three should generate substantial public comment. The public comment period closes on August 21, 2023.

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[1] *Maine Lobstermen's Association v. National Marine Fisheries Service*, Case No. 22-5238 (D.C. Cir. June 16, 2023).