THE ENDANGERED SPECIES ACT AND THE PRECAUTIONARY PRINCIPLE: THE D.C. CIRCUIT'S *MAINE LOBSTERMEN'S* DECISION HAS LEGS

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In a recent decision, the U.S. Court of Appeals for the D.C. Circuit held that the language and statutory history of section 7 of the Endangered Species Act (ESA), requiring an agency to rely upon the "best scientific and commercial data available," prevents the National Marine Fisheries Service (NMFS) from making speculative, worst-case assumptions about whether a fishery is "not likely" to jeopardize a protected whale species' survival. *Maine Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 70 F.4th 582, 599–600 (D.C. Cir. 2023). More broadly, the court also rejected the argument that in cases where an agency must make a decision or issue a permit based on an activity's alleged environmental or biological impacts, the agency (and a reviewing court) must apply a non-statutory "precautionary principle" in favor of a protected species. Instead, the court found that the precautionary principle—a presumption that activities with uncertain impacts will cause harm to species and should not be allowed—is generally improper absent an express statutory basis. The time to petition for rehearing has now passed, and the decision is a binding precedent likely to be invoked in many administrative and judicial contexts.

The opinion is perhaps the most forceful judicial take-down of the precautionary principle to date, providing a comprehensive and authoritatively sourced refutation of its use in agency decision-making. Based on a review of the current field for environmental and natural resources law, there are three contexts in which the decision is likely to be cited either for its narrow holding about section 7's "best available data" standard,[1] or its broader holding rejecting the precautionary principle as an interpretive overlay for courts' review of agency decision making. The case has relevance to one threatened lawsuit again the U.S. Fish and Wildlife Service (Service) and two rulemakings underway before federal agencies. Because challenges to agency rulemakings may be and often are brought in the D.C. Circuit, the opinion would be controlling authority in any such litigation.

First, a brief review of the holding is in order. In *Maine Lobstermen*, lobstermen and other commercial fishing groups challenged NMFS's biological opinion (BiOp) concerning the effects of the lobster and Jonah crab fisheries on the endangered North Atlantic Right Whale, and a related rule imposing certain requirements to reduce the risk of injury and death to whales that become entangled in fishing gear. In the BiOp, NMFS cited the declining numbers of whales. Lacking reliable numbers of confirmed deaths by entanglement, NMFS made pessimistic assumptions about how many whales are killed each year and how many of the deaths can be attributed to fishing gear used in federal fisheries. The agency acknowledged using "worst case scenario" metrics that "very likely overestimate the likelihood of a declining population." Based on those assumptions, it concluded that the rule's measures were necessary to avoid jeopardy to the whales from the fisheries' activities. After holding that the BiOp was contrary to law under the Administrative Procedure Act (APA), the court reversed the district court's award of

[1] Although the decision addressed the "best scientific and commercial data available" standard in the context of ESA § 7, 16 U.S.C. § 1536(a)(2), the standard also appears in multiple places in the ESA: it is the sole basis for listing decisions under section 4, 16 U.S.C. § 1533(b)(1)(A), and a factor in delisting decisions, § 1533(c), decisions to designate critical habitat, § 1533(b)(2), and import and export decisions, 16 U.S.C. § 1537a(c)(2).

summary judgment to the government and directed entry of judgment in favor of the fishermen and vacatur of the BiOp.

The opinion can be interpreted at two levels. At a narrow level, the court found that the text and legislative history of the ESA did not support—let alone compel—NMFS's interpretation of section 7 to require pessimistic assumptions about a proposed action's effects on protected species. NMFS had cited a sentence in a 1979 House Conference report for section 7 to support its position that the ESA required it to give the "benefit of the doubt" to a species in the face of uncertainty. NMFS also cited case law interpreting the APA's standard of review to require courts to be especially deferential when an agency makes predictions "at the frontiers of science." Rejecting these arguments, the court emphasized that, after the Supreme Court's decision in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), Congress amended section 7. The amendments replaced the statute's original wording, which flatly prohibited agency actions that jeopardize a protected species,[2] with a requirement that any action be "not likely to jeopardize" the species based on "the best scientific and commercial data *available*." The court found the change in the statute's text compelling and the legislative history cited by NMFS irrelevant because "legislative history is not the law." The amendment to the statute's language confirmed that "Congress did not want economic activity stopped in its tracks whenever complete data was lacking." Therefore, the "best scientific and commercial data available" standard requires an agency to "strive to resolve or characterize the uncertainty through accepted scientific techniques"; if it cannot, it must find that the action is "not likely" to jeopardize the species' survival.

At a broader level, and marshalling significant scholarship in support of its conclusion, the court rejected the basis for a presumption in favor of a protected species in agency decision making—the so-called precautionary principle. Noting that Congress can (and does) instruct agencies to apply a precautionary principle when it intends that result, the court recognized and catalogued the costs of applying the principle. The opinion explains that the principle "can multiply an agency's power over the economy" by allowing the agency "'to regulate or veto activities' even if it cannot be shown that those activities are likely to produce significant harms." And a presumption against activities or projects with uncertain impacts could have broad applicability because uncertainty, far from being unusual in agency decision making, "is endemic in the field of health and safety regulation." The presumption, the court reasoned, distorts, rather than improves analysis by preventing the agency from considering an action's advantages in addition to its disadvantages, and "invites the unnecessary economic dislocation wrought by worst-case thinking." Moreover, the presumption ignores that worst-case scenarios exist for any outcome. The fisheries rule, for instance, could have devastating impacts on industry by causing fishery closures. Finally, the court noted that humans are not "the only casualties of worst-case thinking" because a "presumption in favor of one protected species may jeopardize another." This point can easily be extrapolated to apply to renewable energy projects, where impacts to species must often be balanced against a project's mitigating effects on climate, which carries its own species impacts.

Because uncertainty is pervasive in the regulatory context, the court's opinion is certain to resonate across the current landscape of natural resources law. It could reasonably be cited in

[2] The text previously provided that such actions must "not jeopardize" the species. 16 U.S.C. § 1536 (1976).

connection with at least one threatened lawsuit involving a renewable energy project, and two proposed rulemakings (one by the Service and another by the Bureau of Land Management (BLM)).

First, a geothermal company (Ormat Nevada Inc.) recently provided notice to the Service of its intent to sue the Service for violating the ESA by listing the Dixie Valley Toad as endangered,[3] "despite evidence that the species is not currently in danger of extinction."[4] The Service based its listing decision on the predicted future effects of the company's geothermal project on the toad. Ormat claims that, rather than considering the "best available scientific and commercial information" about its proposed geothermal project, the Service "at every turn and without substantiation assumed the worst-case scenario." The notice of intent to sue states that "[t]he Service cannot take every unknown about a species and assume, without a rational basis, that the unknowns would all contribute to the species' extinction."[5] If the company sues, (particularly if it files in the District of Columbia district court), it is likely to cite *Maine Lobstermen's* for the proposition that the ESA's language requires empirically based judgments, not doomsday scenarios. The agency may have grounds to dispute the company's characterization when it responds. But based on the company's notice of intent, the Service's analysis rested on assumptions like the ones it acknowledged in *Maine Lobstermen's* were based on "worst case scenario" metrics that "very likely overestimate[d]" the likelihood of adverse impacts to" the species.

Second, the decision and its reasoning are relevant to a now-pending, proposed ESA rulemaking. The Service has proposed restoring, under section 4(d) of the ESA,[6] "blanket" rules for animals and plants that automatically extend ESA protections for endangered species to species that are threatened (i.e., likely to become endangered within the foreseeable future), unless the threatened species is protected under a species-specific rule.[7] The Service rescinded the blanket rules in 2019 and revised the section 4(d) regulations to allow only for species-specific rules. The Service now proposes to reinstate the blanket rule options for threatened plant and animal species while maintaining its discretion to issue species-specific rules. One of its rationales for the proposed rule is that the Service often lacks "a complete understanding of the species' decline and taking a precautionary approach to applying protections would proactively address potentially unknown threats."[8] This rationale would seem to run headlong into *Maine Lobstermen's* conclusion that an agency cannot use a presumption in favor of species when it lacks the information it needs to make a science-based determination. The comment period for the proposed rule closed August 21 and several commenters, including San Luis & Delta-Mendota Water Authority, did cite to the case.

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[3] 87 Fed. Reg. 73,971, 73,986 (Dec. 2, 2022).

[4] March 22, 2023 letter from Jessica Woelfel to Secretary Haaland, available at https://www.latimes.com/environment/newsletter/2023-03-23/renewable-energy-company-threatens-to-sue-biden-over-endangered-toad-boiling-point

[5] *Id.* at 4; *see also id*. at 8 ("[T]he Service simply assumes catastrophe.")

[6] Section 4(d) allows the Secretary to issue regulations that are "necessary and advisable to provide for the conservation of any threatened species."

[7] Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 88 Fed. Reg. 40,742 (proposed June 22, 2023).

[8] *Id.* at 40,744.

A third context in which stakeholders might invoke the precedent is the BLM's proposed Conservation and Landscape Health rule.[9] The proposed rule seeks to elevate "conservation" as a use that is on par with other uses specifically enumerated in the Federal Land Management and Policy Act's (FLPMA) definition of "multiple use," 43 U.S.C. § 1702(c), and to authorize conservation leases. Critics, including the National Mining Association, assert that the rule would supplant the standards FLPMA prescribes for withdrawals of public lands. Although this rulemaking would interpret FLPMA, not the ESA, its rationale also relies on the precautionary principle. The preamble to the rule states that it "would require the authorized officer to consider a precautionary approach for resource use when the impact on ecosystem resilience is unknown or cannot be quantified and provide justification for decisions that may impair ecosystem resilience." Under the rationale of *Maine Lobstermen's*, this approach is invalid absent an express statutory basis: "when the Congress wants an agency to apply a precautionary principle, it says so."[10] Although the comment period for the rule closed before the *Maine Lobstermen's* decision issued, the precedent should be considered by the agency as highly relevant.

The *Maine Lobstermen's* precedent, should it survive, is likely to be invoked in these three contexts, and many more to come. The decision, like the lobstermen's quarry, has legs.

[9] Conservation and Landscape Health, 88 Fed. Reg. 19,583 (proposed Apr. 3, 2023).

[10] 70 F.4th at 599 (citing as example language in Clean Air Act requiring "an adequate margin of safety" when the EPA sets air quality standards. 42 U.S.C. § 7409(b)(1)).