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Taking Stock of Oil Drilling’s Wildlife Impact: Center for Biological Diversity v. Salazar

INTRODUCTION

The Chukchi Sea off the North Slope of Alaska is a promising location for oil and gas development. It also provides habitat for polar bears and Pacific walruses, which are protected under the Marine Mammal Protection Act (MMPA). In 2008 the polar bear received additional protection when the U.S. Fish and Wildlife Service (“the Service”) listed it as “threatened” under the Endangered Species Act (ESA), because global warming is causing the sea ice on which it depends to disappear. The Pacific walrus is not listed as threatened or endangered because its population is considerably larger than that of the polar bear.

The MMPA prohibits the “taking” of marine mammals. A “take” is broadly defined to include “harassment,” including any act of “torment” or “annoyance” that “has the potential to injure . . . [or] disturb a marine mammal or marine mammal stock in the wild by disrupting behavioral patterns.” The MMPA does allow several exceptions to the prohibition on takes, including takes for scientific research, commercial fishing, and oil exploration. In Center for Biological Diversity v. Salazar, plaintiffs Center for Biological Diversity and Pacific Environment challenged regulations passed by the Service in response to new proposed oil and gas exploration in the Chukchi Sea. Plaintiffs sought judicial review of regulations that authorize incidental take of polar bears and Pacific walruses resulting from exploratory drilling activities, claiming violations of the MMPA, the ESA, and the National Environmental Policy Act (NEPA). The Ninth Circuit upheld the regulations, finding them to
be in compliance with the controlling federal statutes.\textsuperscript{8}

I. BACKGROUND

The Service’s 2007 proposed regulations authorized incidental nonlethal take of “small numbers” of polar bears and Pacific walruses resulting from drilling activities, as long as the take will have a “negligible impact” on the species.\textsuperscript{9} The regulations defined “small numbers” as “a portion of a marine mammal species or stock whose taking would have a negligible impact on that species or stock.”\textsuperscript{10} A “negligible impact,” in turn, is an impact “not reasonably likely to . . . adversely affect the species or stock through effects on annual rates of recruitment or survival.”\textsuperscript{11} The Service’s proposed regulations cover exploratory drilling, but not commercial production.\textsuperscript{12} Following public comments by the plaintiffs, the Marine Mammal Commission\textsuperscript{13} recommended delaying the final regulations until a more effective monitoring and mitigation strategy could be developed.\textsuperscript{14}

In March 2008, the Service issued an environmental assessment (EA)\textsuperscript{15} for its proposed regulations, according to the requirements of NEPA.\textsuperscript{16} The EA concluded that the incidental take regulations would have no measurable impacts on the physical environment. Two months later, the Service issued a Biological Opinion (BiOp), as required by the ESA, concluding that the incidental take regulations were not likely to jeopardize the continued existence of the polar bear.\textsuperscript{17} The next month, the Service issued its final Chukchi Sea incidental take regulation.\textsuperscript{18} It authorized four seismic survey vessels per year, with three support vessels each, as well as three drill ships, each drilling up to four wells, accompanied by ice breakers, barges, helicopters, and supply ships.\textsuperscript{19} On land, the regulations allowed construction of up to one hundred

\textsuperscript{8} Salazar, 695 F.3d at 898.
\textsuperscript{9} Incidental Take During Specified Activities, 72 Fed. Reg. 30,670, 30,670 (proposed June 1, 2007).
\textsuperscript{10} 50 C.F.R. § 18.27(c) (2012).
\textsuperscript{11} Id.
\textsuperscript{12} 50 C.F.R. § 30.670.
\textsuperscript{13} Salazar, 695 F.3d at 900.
\textsuperscript{14} The Marine Mammal Commission is an independent federal agency created under the MMPA to advise the Service. It is primarily an oversight and advisory body. Federal agencies are not required to adopt its recommendations, but an agency that declines to do so must provide a written explanation to the Commission within 120 days. See About the Marine Mammal Commission, MARINE MAMMAL COMM’N, http://mmc.gov/about/welcome.shtml (last visited Apr. 3, 2013).
\textsuperscript{15} Salazar, 695 F.3d at 900.
\textsuperscript{16} See 40 C.F.R. § 1508.9 (2012).
\textsuperscript{17} 42 U.S.C. §§ 4371–4375 (2006).
\textsuperscript{20} Incidental Take During Specified Activities, 73 Fed. Reg. 33,212, 33,215–16 (June 11, 2008).
miles of roads and four airfield runways.\textsuperscript{20}

These activities were not predicted to disturb polar bear den areas or walrus haulouts on shore.\textsuperscript{21} Additionally, the offshore activities were planned for the open water season (July through November) to avoid disturbing animals residing on winter pack ice.\textsuperscript{22} In July 2008, the Service began issuing letters of authorization to oil companies for exploration, valid for approximately five years through June 11, 2013.\textsuperscript{23} The Center for Biological Diversity ("the Center") promptly filed suit, alleging that the incidental take regulations, BiOp, and EA failed to comply with the MMPA, ESA, and NEPA, respectively.

II. SUMMARY

The District Court for the District of Alaska granted summary judgment to the Service, and plaintiffs appealed. The Ninth Circuit reviews a district court’s grant or denial of summary judgment \textit{de novo}.\textsuperscript{24} Additionally, its review of agency compliance with the environmental statutes must conform to requirements of the Administrative Procedure Act (APA).\textsuperscript{25} To set aside an agency decision under the APA, a court must find the decision to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”\textsuperscript{26} Additionally, the Service’s interpretation of statutes it is charged with administering is entitled to \textit{Chevron} deference.\textsuperscript{27} The Ninth Circuit considered the alleged violations of the MMPA, ESA, and NEPA separately, ultimately finding that the Service’s regulations did not violate any of the statutes. There was considerable overlap between the MMPA and ESA, as each statute protects the polar bear, a marine mammal that is also “threatened.”\textsuperscript{28}

A. MMPA Claims

The Center alleged three violations of the MMPA. First, it claimed that the Service improperly interpreted the statute, by conflating the question of

\textsuperscript{20} Id.
\textsuperscript{21} Ctr. for Biological Diversity v. Salazar, 695 F.3d 893, 900 (9th Cir. 2012).
\textsuperscript{22} Id.
\textsuperscript{23} Id. at 901.
\textsuperscript{24} Humane Soc’y v. Locke, 626 F.3d 1040, 1047 (9th Cir. 2010).
\textsuperscript{25} Id.
\textsuperscript{26} 5 U.S.C. § 706(2)(A).
\textsuperscript{27} See \textit{Chevron}, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–43 (1984). This case provides the two-part test for administrative deference. First, if Congress has spoken directly to the precise question at issue, then the agency charged with applying the law must comply with Congress's clear intent. \textit{Id}. Second, if Congress has not directly addressed the question at issue, or the statute is silent or ambiguous on the issue, a reviewing court should uphold the agency’s interpretation as long as it is a reasonable construction of the statute. \textit{Id}.
whether take affects “small numbers” of mammals with the separate question of whether take will result in a “negligible impact” on the population. MMPA section 101(a)(5)(A) provides for incidental take of “small numbers” of mammals if the Service “finds that the total of such taking . . . will have a negligible impact on [the relevant] species or stock.”

The original 1983 incidental take regulations implementing section 101(a)(5) define “small numbers” as “a portion of marine mammal species or stock whose taking would have a negligible impact on that species or stock.” The Center argued that this definition treated “small numbers” and “negligible impact” as effectively the same thing, when in fact they are two separate requirements. This conflation issue had previously been addressed in Natural Resources Defense Council v. Evans, where the plaintiffs challenged incidental take regulations for whales and other marine life, which relied on the 1983 regulations. Evans ruled that “small numbers” is a separate requirement from “negligible impact,” and that treating them as identical would render the former term “mere surplusage.”

The Ninth Circuit upheld Evans and preserved this distinction between “small numbers” and “negligible impact.” Without it, the Service would be able to define “small numbers” as any amount that would have a “negligible impact” on population, and could therefore authorize the incidental take of large numbers of mammals as long as it had only a negligible impact on the relevant species or stock. This decision, however, was not dispositive to the current case because the 2008 final rule was written differently than the 1983 regulations that Evans struck down. As a result of significant redrafting of the 2008 rule, it does analyze the “small numbers” and “negligible impact” standards separately, under different headings.

Second, plaintiffs claimed that the Service improperly authorized incidental take without quantifying the number of mammals that could be taken. The Service had interpreted “small numbers” to mean small relative to total population size. The court upheld this method because, as Congress had not spoken as to the precise issue of relative versus absolute numbers of

30. 50 C.F.R. § 18.27(c) (2012).
31. Ctr. for Biological Diversity v. Salazar, 695 F.3d 893, 903 (9th Cir. 2012).
33. Id. at 1150.
34. Salazar, 695 F.3d at 903.
35. Id.
37. Id. at 1150. See Incidental Take During Specified Activities, 73 Fed. Reg. at 33,233 (“[O]nly small numbers of Pacific walrus and polar bears are likely to be taken incidental to the described Industry activities relative to the number of walruses and polar bears that are expected to be unaffected by those activities.” (emphasis added)).
affected mammals, the Service is entitled to *Chevron* deference.\textsuperscript{38}

Third, the Center claimed that the Service’s “small numbers” determination was based on false assumptions and bad science.\textsuperscript{39} It argued that by focusing on offshore, open-water exploration, the determination accounted for only a fraction of the oil and gas exploration activities planned for the area. The court approved defendants’ decision, finding that it was rational to focus on open-water exploration because those are the areas where most of the proposed activities would occur, and because the 2008 rule dealt with land-based disturbances separately.\textsuperscript{40}

\section*{B. Endangered Species Act Claims}

The Center brought two claims under the ESA, which was implicated because the polar bear has both ESA and MMPA protections.\textsuperscript{41} It first challenged the Service’s contention that an incidental take statement (ITS) was not required.\textsuperscript{42} Although the defendants submitted an ITS, they claimed that it was not required because the Service had exempted any activity consistent with MMPA requirements from ESA section 9 coverage.\textsuperscript{43} The plaintiffs argued that the section 9 exemption was irrelevant to the Service’s separate obligations under section 7 to prepare both a BiOp and an ITS. In a small victory for the Center, the Ninth Circuit agreed.\textsuperscript{44} This helps to clarify the Service’s ESA responsibilities moving forward, specifically that an exemption from section 9 take liability does not remove its duty to prepare an ITS.

The Center next attacked the ITS itself. As with the MMPA, it argued that the ITS included in the Service’s BiOp failed to comply with the ESA because it did not provide a numerical limit on the amount of take, or an adequate substitute measure.\textsuperscript{45} Whereas the MMPA does not require quantification of incidental take in absolute terms,\textsuperscript{46} the ESA’s legislative history shows a stronger preference for numerical take estimates.\textsuperscript{47} Still, in the Ninth Circuit, the Service need not provide a precise estimate if it can show that it was not practically possible to do so.\textsuperscript{48} Here, the Ninth Circuit ruled that the ITS,

\begin{footnotesize}
\begin{enumerate}
\item *Salazar*, 695 F.3d at 902.
\item Id. at 908.
\item An ITS specifies the impact of an incidental taking on a species and specifies reasonable and prudent measures to minimize the impact. 16 U.S.C. § 1536(b)(4)(C)(i)–(iv) (2006).
\item *Salazar*, 695 F.3d at 910–11.
\item Id.
\item Id. at 911.
\item Id.
\item See *Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1250 (9th Cir. 2001).
\end{enumerate}
\end{footnotesize}
supplemented by the BiOp, sufficiently explained why a numerical measure of take was “impracticable.” 49

As a general rule, the ESA is also less restrictive on agency action than the MMPA. The ESA’s definition of “take” is less expansive than the MMPA’s: it requires a “likelihood of injury to [a listed species] . . . [so] as to significantly disrupt normal behavioral patterns,” 50 whereas the MMPA requires only that harassment have the “potential to injure . . . [or] disturb a marine mammal . . . by causing disruption of behavioral patterns.” 51 Also, the incidental take requirements for the MMPA are more restrictive than for the ESA. For instance, under the MMPA, the Service must show that a specified activity will have at most a “negligible impact” on the relevant stock of polar bears, whereas the ESA standard is whether the agency action will “jeopardize the continued existence” of the species as a whole. 52 Certain agency actions between the two standards could therefore satisfy the ESA yet violate the MMPA.

The court used the interplay between the ESA and MMPA to decide that the Service had fulfilled its duties under the ESA. Most importantly, it concluded that because the MMPA is more restrictive than the ESA, as long as incidental take does not violate the MMPA incidental take regulations, there is no need to reinitiate consultation under the ESA. 53

C. NEPA Portion

Plaintiffs also challenged the 2008 Chukchi Sea regulations under NEPA. 54 Specifically, they claimed that the Service’s EA failed to consider a reasonable range of alternatives, and that it failed to address the potential impacts of a large oil spill. 55 Although the EA only considered two possible scenarios, the incidental take regulations and a no-action alternative, the court found this sufficient. 56 As to the possibility of an oil spill, the court acknowledged that although the long-term likelihood of a large oil spill in the Chukchi Sea is between 33 and 51 percent, the Service’s EA did not need to consider the total range of development and production. 57 Rather, it need only consider the preliminary exploration activities over a period of 5 years. 58 For this reason, the court found the EA’s discussion of “small operational spills” to be appropriate.

50. 50 C.F.R. § 17.3 (2012) (emphasis added).
52. Salazar, 695 F.3d at 913.
53. Id.
54. Id. at 915.
55. Id.
56. Id. at 916.
57. Id. at 917.
58. Id.
III. IMPLICATIONS

Though the Ninth Circuit affirmed summary judgment for defendants, the plaintiffs achieved several small victories. Importantly, the court upheld Evans, which required the Service to keep separate the requirement that incidental take impact only “small numbers” of animals from the requirement that it have a “negligible impact” on the population. In doing so, the court made the Evans rule mandatory authority in the Ninth Circuit. The two separate requirements may soon impact Service regulations affecting other species in other states. As the court noted, the separate requirements’ combined effect provides greater species protection than the sole requirement of “negligible impact,” which by itself could allow take of large numbers of animals as long as it did not significantly affect the total population.

The court ruled that an ITS was required under the ESA, despite overlap with the MMPA. It was forced on two occasions to decide “close question[s]” about this ESA ITS. It decided to allow information from the Service’s BiOp to supplement its relatively sparse ITS, which was “not very illuminating regarding the feasibility of providing a specific numerical estimate of take under the ESA.” Also, the court relied on the overlap between the MMPA and ESA to fulfill the requirement that the ITS specify “the impact, i.e., the amount or extent,” of the incidental take. Rather than giving a customary numerical estimate, the Service had merely referred to the “small numbers” determination in the 2008 final rule, claiming it “articulate[d] the anticipated amount of take with respect to effect on the population.” Normally, the court noted, the ITS as submitted “would not serve as an adequate surrogate because it does not specify a clear standard for determining when the anticipated level of take would be exceeded.” The Service thus seems to have narrowly cleared its ESA requirements. In the future it may have to provide more descriptive language about adverse effects on protected animal populations, particularly in cases where there is not overlap with other statutes such as the MMPA.

In January 2013, the Department of the Interior, which manages the Service, opened an urgent review of Arctic drilling operations after a series of accidents. This new assessment could halt or diminish Shell’s plans to open the Beaufort and Chukchi Seas to oil exploration. In addition, the Coast

60. See Salazar, 695 F.3d at 903–04.
61. See id. at 913–14.
62. See id. at 912.
64. Salazar, 695 F.3d at 913.
65. Id.
67. Id.
Guard announced plans to conduct a comprehensive marine casualty investigation of the December 31, 2012 grounding of one of Shell’s drilling rigs, the Kulluk. The Coast Guard cited Shell’s other Arctic drilling rig, the Noble Discoverer, for more than a dozen violations involving safety systems and pollution equipment. Following this series of accidents and violations, Shell announced on February 27, 2013 that it will not return to the Arctic for the rest of the year.

These recent problems may force a reevaluation of the Service’s species monitoring and mitigation strategies, which the court broadly endorsed in this case. If exploratory drilling in the Arctic proves more dangerous than had been expected, future plaintiffs in similar suits may convince courts to take a more critical view of the requirements at issue here, including a numerical estimate of take in the ITS. Plaintiffs would be well-advised to suggest an alternative “surrogate” measure of take, in place of numerical estimates, since in the court’s eyes their failure to do so gave credence to the Service’s decision not to give a numerical estimate. With undeniably urgent safety problems plaguing current Arctic exploratory drilling, courts in the future may be less deferential to EAs that claim that the chance of a large oil spill from exploratory activities is “very low.”

CONCLUSION

The plaintiffs brought suit against the U.S. Fish and Wildlife Service, alleging that authorization for incidental take of polar bears and Pacific walruses resulting from oil and gas exploration activities in the Chukchi Sea violated the MMPA, ESA, and NEPA. The Ninth Circuit affirmed summary judgment for the Service, finding that it fulfilled its requirements under the relevant federal environmental statutes. Principally, the Ninth Circuit found that the Service’s interpretation of the MMPA “small numbers” requirement was entitled to Chevron deference, and its ESA incidental take statement reasonably relied on the small numbers and negligible impact findings of the MMPA incidental take regulation and sufficiently explained why it could not practically express a numerical estimate of take.

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68. Id.

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