

Turning Tides: The D.C. Circuit Will Not Give the Benefit of the Doubt to Endangered Species

INTRODUCTION

In *Maine Lobstermen’s Association v. National Marine Fisheries Service* (*Maine Lobstermen’s*), the D.C. Circuit restricted the ability of a biological opinion (BiOp) issued under the Endangered Species Act (ESA) to protect endangered species.¹ The Court stated that the National Marine Fisheries Service (NMFS) could not give the North Atlantic right whale (NARW) the “benefit of the doubt” by using “worst-case scenarios or pessimistic assumptions” when creating a BiOp analyzing how lobster and Jonah crab fisheries impacted the NARW.² This prohibition precludes NMFS from issuing BiOps using “predictive models for assessment of jeopardy.”³ This decision counters legislative statements from the 1979 ESA amendments indicating that, due to limited data on impacts to endangered species, agencies must “give the benefit of the doubt to the species.”⁴ In relying on a primarily textualist interpretation of the ESA and preventing NMFS from giving NARWs the benefit of the doubt, the D.C. Circuit limited agency interpretations when data is uncertain and contradicted the ESA’s legislative history.

I. BACKGROUND

A. *The Endangered Species Act*

Enacted in 1973, the ESA puts forth comprehensive legal protections for animals and plants listed as threatened or endangered.⁵ NMFS and U.S. Fish and Wildlife Service (FWS) are the two agencies that determine which species are to be listed.⁶ Section 7 of the ESA requires NMFS and FWS to provide

DOI: <https://doi.org/10.15779/Z387H1DP2M>

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1. See 70 F.4th 582, 595–601 (D.C. Cir. 2023).
2. *Id.* at 586.
3. Emma Green, *The Inefficacy of Statutory Protections for the North Atlantic Right Whale*, 53 ENV’T L. REP. (ELI) 10712, 10722 (2023).
4. H.R. REP. NO. 96–697, at 12 (1979) (Conf. Rep.).
5. See Greer Gaddie, *Protecting Captive Endangered Animals: The Importance of Interpreting the Endangered Species Act Broadly*, 49 TEX. ENV’T L.J. 295, 296 (2019).
6. *Endangered Species: Species Information (Factsheets)*, EPA, <https://www.epa.gov/endangered-species/endangered-species-species-information-factsheets> (last visited Nov. 13, 2024).

consultations to ensure actions “authorized, funded, or carried out” by the federal government are “not likely to jeopardize the continued existence of any endangered species or threatened species” or cause the “destruction or adverse modification” of the species’ habitat.⁷

Section 7’s original language required that agency actions “do not jeopardize” the continued existence of a protected species.⁸ In 1979, this language was revised to state that agencies cannot advance actions “likely to jeopardize” a protected species and must use “the best scientific and commercial data available” to assess jeopardy.⁹ Conference report statements clarified that, due to the “reality of limited data” on how actions impact species, agencies must “give the benefit of the doubt to the species.”¹⁰ Evaluation of how proposed actions might impact species can include the amount or extent of incidental takings the action will likely cause.¹¹

If an action is likely to adversely impact a species, the consulting agency, either NMFS or FWS, analyzes if federal actions violate the ESA and prepares a required BiOp examining the proposed action’s effects.¹² BiOps can be “jeopardy” BiOps or “no-jeopardy” BiOps depending on the level of risk posed to the species.¹³ Jeopardy BiOps are issued when federal actions jeopardize the species or adversely modify its habitat, and they provide “reasonable and prudent alternatives” to amend actions.¹⁴ No-jeopardy BiOps allow proposed actions to proceed and must contain Incidental Take Statements, which “identif[y] and authoriz[e] the level of mortality and serious injury” that actions are predicted to produce.¹⁵

B. *The Marine Mammal Protection Act*

Enacted in 1972, the Marine Mammal Protection Act (MMPA) requires NMFS to establish take-reduction plans to curtail mortality and serious injury for endangered marine mammal species that come into contact with federal fisheries.¹⁶ These plans lead to “promulgated final rules.”¹⁷ Within six months, the final rules seek to reduce species’ mortality and serious injury to below the maximum amount of animals that may be killed while keeping the population of

7. 16 U.S.C. § 1536(a)(2).

8. *Maine Lobstermen’s*, 70 F.4th at 596.

9. *Id.*; 16 U.S.C. § 1536(a)(2).

10. H.R. REP. NO. 96–697, at 12 (1979) (Conf. Rep.).

11. *Cf.* 50 C.F.R. § 402.02 (“*Reasonable and prudent measures* refer to those actions the Director considers necessary or appropriate to minimize the impact of the incidental take on the species.”).

12. 16 U.S.C. § 1536(b); *Ctr. for Biological Diversity v. Raimondo*, 610 F. Supp. 3d 252, 260–61 (D.D.C. 2022).

13. *Maine Lobstermen’s Ass’n, Inc. v. Nat’l Marine Fisheries Serv.*, 626 F. Supp. 3d 46, 53 (D.D.C. 2022).

14. *Id.*

15. *Id.*

16. *Id.*; 16 U.S.C. § 1387(f)(2).

17. *Maine Lobstermen’s*, 626 F. Supp. 3d at 53.

the species stable.¹⁸ The rules aim to reduce mortality and serious injury to “insignificant levels,” near zero, within five years.¹⁹

Under the MMPA, whales experience strandings when they are deceased on a beach or floating in water, or alive on a beach and are “unable to return” to water.²⁰ An “unusual mortality event” (UME) is a stranding that is “unexpected,” entails a “significant die-off” of the marine mammal’s population, and “demands immediate response.”²¹ The Working Group on Marine Mammal Mortality Events, a group of marine mammal health experts, determines if a UME is occurring.²² In response to a UME, the Working Group issues a “detailed contingency plan” to collect data on the threats to the species.²³ This investigation “identif[ies] actions and resources” to guide the UME response and agencies’ responsibilities under MMPA and ESA provisions.²⁴

C. Threats to the North Atlantic Right Whale

One of “the rarest of all marine mammal species,” the NARW is a migratory endangered species that has its critical habitat in the Gulf of Maine and off the New England coast and its calving grounds in southeastern U.S. waters.²⁵ The NARW’s population has been declining due to climate change, vessel strikes, and fishing gear entanglements.²⁶ Fixed-gear fisheries, including Maine’s lobster and Jonah crab fisheries, pose “the greatest cause of human-induced” harm to the NARW.²⁷ Yet, the lobster industry is deeply tied to Maine’s history, provides critical jobs, and generates significant revenue (an estimated \$700 million in 2021).²⁸ From 2011 to 2019, the NARW population dropped from an estimated 481 to 368.²⁹ Warm waters are diminishing the populations of copepod, a plankton species and NARWs’ preferred prey, causing NARWs to shift migratory patterns and face more fishing gear entanglements and vessel strikes.³⁰

18. *Id.*

19. *Id.* at 53–54.

20. *Understanding Marine Wildlife Stranding and Response*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/insight/understanding-marine-wildlife-stranding-and-response> (last visited Apr. 21, 2024).

21. 16 U.S.C. § 1421h(9).

22. *Marine Mammal Unusual Mortality Events*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-unusual-mortality-events> (last visited Mar. 28, 2024).

23. *See* 16 U.S.C. § 1421c(b).

24. *See* U.S. DEP’T OF COM., NOAA, NMFS-OPR-9, NATIONAL CONTINGENCY PLAN FOR RESPONSE TO UNUSUAL MARINE MAMMAL MORTALITY EVENTS 7 (1996).

25. David Beasley, *Judge Rejects Whale Suit Against Navy Sub Training Site*, 33 No. 5 WESTLAW J. ENV’T 1, 1 (2012); *Maine Lobstermen’s*, 70 F.4th at 586.

26. *See Maine Lobstermen’s*, 70 F.4th at 586–87; Green, *supra* note 3, at 10713.

27. *See* Nathaniel Willse et al., *Vertical Line Requirements and North Atlantic Right Whale Entanglement Risk Reduction for the Gulf of Maine American Lobster Fishery*, 14 MARINE & COASTAL FISHERIES 1, 1–2 (2022); Allison K. Briggs, *Maine Lobstermen and the North Atlantic Right Whale: The Ongoing Conflict and the Obvious Solution*, 27 OCEAN & COASTAL L.J. 153, 163 (2022).

28. *See* Green, *supra* note 3, at 10713.

29. *Ctr. for Biological Diversity*, 610 F. Supp. 3d at 262.

30. *Maine Lobstermen’s*, 70 F.4th at 587.

Tracing entanglements and strikes relies on several methods, including human detection, veterinary evaluation, and official public reporting.³¹ Deceased NARWs can “lose buoyancy and sink” without being accounted for.³² Thus, it is difficult to record and trace NARW entanglements and strikes.³³

II. CASE HISTORY

A. 2021 NMFS NARW BiOp

In 2017, the Working Group on Marine Mammal Mortality Events declared a UME for the NARW under the MMPA after fishing gear entanglements and vessel strikes killed seventeen NARWs in U.S. and Canadian waters.³⁴ The same year, a study was published detailing the population decline of the NARW.³⁵ In response, NMFS took action under the ESA and MMPA and initiated a “formal consultation” for the federal fisheries that might jeopardize NARWs.³⁶

In 2021, NMFS concluded its formal consultation of Maine’s lobster and Jonah crab federal fisheries with a BiOp.³⁷ NMFS began by detailing the “reasonably certain” harmful effects the fisheries had on the NARW.³⁸ Because of the limited data on the NARW, it used inferences and NARW “scarring analysis” to estimate that the fisheries killed forty-six NARWs each decade and entangled over 9 percent of the estimated 368 NARWs each year.³⁹ NMFS explained these predictions gave “the benefit of the doubt” to the NARW and provided a species-protective estimate of total entanglements.⁴⁰ While preparing the BiOp, NMFS also created an associated Conservation Framework (“Framework”), which consisted of a four-part plan to reduce NARW killings to almost zero by 2030.⁴¹ Although NMFS concluded that the fisheries killed unsustainable levels of NARWs and a Framework was necessary, NMFS issued a no-jeopardy BiOp stating that the lobster and Jonah crab federal fisheries were not likely to jeopardize NARWs.⁴² To reach this conclusion, NMFS used projections that assumed the fisheries would follow the Framework, requiring the fisheries to implement the Framework to continue operating.⁴³ After issuing the BiOp, NMFS promulgated the Final Rule, which required lobster fishers to “mark their ropes, add weak links or use weak ropes, and increase the number of

31. See Richard M. Pace et al., *Cryptic Mortality of North Atlantic Right Whales*, 3 CONSERVATION SCI. & PRAC. 1, 2 (2021).

32. *Maine Lobstermen’s*, 70 F.4th at 589.

33. See *id.* at 588–89.

34. *Id.* at 587.

35. *Id.*

36. *Id.* at 588.

37. *Id.*

38. *Id.*

39. *Id.* at 589–90.

40. *Id.*

41. *Ctr. for Biological Diversity*, 610 F. Supp. 3d at 263.

42. *Maine Lobstermen’s*, 70 F.4th at 590.

43. See *id.*

traps” used for every trawl, and also imposed seasonal fishing restrictions.⁴⁴ This Final Rule implemented the Framework’s first phase and amended the NARW take-reduction plan under the MMPA.⁴⁵

B. The D.C. District Court Cases and the Consolidated Appropriations Act

The Maine Lobstermen’s Association (“Lobstermen”) filed suit against NMFS under the ESA contesting the BiOp, Framework, and Final Rule. The Lobstermen asserted that NMFS “overstate[d] the risks lobstering pose[d]” to the NARW and that the Final Rule overregulated the fisheries.⁴⁶ The Lobstermen pointed out that only two NARW deaths from U.S. fisheries were documented from 2010 to 2018.⁴⁷ The Lobstermen sought remand without vacatur so that NMFS could rewrite the BiOp, Framework, and Final Rule.⁴⁸ NMFS argued that its BiOp, Framework, and Final Rule were valid, as it utilized the best available commercial and scientific data in its analyses and “reasonably explained its scientific conclusions.”⁴⁹

Applying the arbitrary and capricious standard of review, which is deferential to the agency, the D.C. District Court held that the BiOp survived.⁵⁰ The court stated that NMFS “reasonably explained” its inferences and utilized “what it rationally assessed was the best available data.”⁵¹ The court expressed that it would not override NMFS’s expert judgment, as NMFS had provided “peer-reviewed” analyses and determined “mortal entanglements is quintessentially murky water.”⁵² The Lobstermen appealed.

Shortly before the Lobstermen filed suit, conservation groups also filed suit against NMFS, arguing that the BiOp and the Final Rule did not comply with the ESA and MMPA.⁵³ They asserted that the BiOp and its Incidental Take Statement did not comply with the MMPA’s requirement of “negligible impact” from fisheries.⁵⁴ Further, they contended that the Final Rule was “insufficiently whale protective” and failed to “reduce” NARW mortality and serious injury.⁵⁵ The D.C. District Court held that the BiOp and Final Rule were invalid and ordered additional briefing as to potential remedies.⁵⁶ After supplemental

44. *Id.*

45. *Id.*

46. *Maine Lobstermen’s*, 626 F. Supp. 3d at 52.

47. *Id.* at 59.

48. *Id.* at 55.

49. *Id.* at 55, 57–69.

50. *Id.* at 52.

51. *Id.*

52. *Id.* at 60.

53. *Ctr. for Biological Diversity*, 610 F. Supp. 3d at 258.

54. *Id.*

55. *Maine Lobstermen’s*, 626 F. Supp. 3d at 54.

56. *Ctr. for Biological Diversity*, 610 F. Supp. 3d at 280.

briefings, the D.C. District Court remanded the BiOp and Final Rule but “[held] the vacatur decision in abeyance.”⁵⁷

After these cases, Congress passed the Consolidated Appropriations Act, a \$1.7 trillion omnibus spending bill providing federal agency funding for 2023.⁵⁸ Maine lawmakers inserted a provision in the Act stating the Final Rule was “sufficient to ensure . . . the American lobster and Jonah crab fisheries are in full compliance with the [MMPA] and the [ESA]” until December 31, 2028.⁵⁹ This resulted in the vacatur of the orders in the conservation groups’ case.⁶⁰

C. *The 2023 D.C. Circuit Court Case*

On appeal, the D.C. Circuit Court held that the Lobstermen had standing to challenge the BiOp and Final Rule, given the BiOp had a “coercive effect” on the Lobstermen and the Final Rule would cost between \$50-90 million over six years to implement.⁶¹ The court found that the Consolidated Appropriations Act only set a “temporary ceiling . . . for compliance” and that the Final Rule was not definitively “necessary.”⁶² The court directed the district court to vacate the BiOp, rejecting NMFS’s *Chevron* argument that the ESA’s silence on handling data uncertainties gave it discretion to use species-protective estimates.⁶³ The court remanded the Final Rule, allowing NMFS to explain how the Rule did not rely upon the BiOp’s “validity.”⁶⁴

Assessing the BiOp, the court first looked to the ESA’s text and history.⁶⁵ The court emphasized that the ESA requires agencies to “ensure an action is ‘not likely to jeopardize the continued existence of’ a protected species.”⁶⁶ The court focused on the word “likely” and reasoned it should have its “ordinary . . . common meaning” of “probable.”⁶⁷ The court noted the agency must avoid actions that are “more likely than not” to cause jeopardy—“[n]o more, and no less.”⁶⁸ The court also focused on the language that the agency must utilize “the best scientific and commercial data available,” spotlighting that this ensures the ESA is not administered “on the basis of speculation” and refrains from

57. *Ctr. for Biological Diversity v. Raimondo*, Civil Action No. 18-112 (JEB), 2022 WL 17039193, at *2 (D.D.C. Nov. 17, 2022).

58. *See* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459 (2022).

59. *See* Maxine Joselow, *To protect lobstermen, spending bill may speed whales’ extinction, activists say*, WASH. POST (Dec. 20, 2022), <https://www.washingtonpost.com/climate-environment/2022/12/20/right-whales-maine-spending-bill/>; *Maine Lobstermen’s*, 70 F.4th at 592.

60. *Ctr. for Biological Diversity v. Raimondo*, Civil Action No. 18-112 (JEB), 2024 WL 324103, at *11 (D.D.C. Jan. 29, 2024).

61. *Maine Lobstermen’s*, 70 F.4th at 592-93.

62. *Id.* at 593-94.

63. *Id.* at 597-601.

64. *Id.* at 601.

65. *Id.* at 595.

66. *Id.* (quoting 16 U.S.C. §1536(a)(2)).

67. *Id.* (quoting *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 433-34 (2019); *Likely*, BLACK’S LAW DICTIONARY (5th ed. 1979)).

68. *Id.* (quoting *Alaska Oil & Gas Ass’n v. Pritzker*, 840 F.3d 671, 684 (9th Cir. 2016)).

“needless economic dislocation.”⁶⁹ The court stated that because data regarding fisheries’ impacts on the NARW was uncertain, NMFS could not “distort[] the decisionmaking process by overemphasizing” speculative harms.⁷⁰ The court held that the ESA’s history did not mandate a worst case analysis.⁷¹ Rather, the change in language from “do not” to “is not likely” to jeopardize revealed Congress did not want to empower the ESA to “paralyze government, or force industry ‘to spend billions to save one more fish.’”⁷²

The court also took issue with NMFS’s *Chevron* argument that the ESA’s silence on what to do with uncertain data gave it discretion to release a precautionary BiOp.⁷³ First, the court stated that NMFS’s *Chevron* argument did not align with the agency proceeding—NMFS had never argued it was protecting the NARW for reasons of “policy.”⁷⁴ Rather, the court found that NMFS had incorrectly believed the ESA’s legislative history “had ordained . . . a precautionary principle in favor of the species.”⁷⁵ The court affirmed that an agency interpretation was not owed deference when the agency mistakenly “believe[d] that interpretation [was] compelled by Congress.”⁷⁶ Secondly, the court declined to apply *Chevron* deference because NMFS had been “arbitrary and capricious” and inconsistent in its stance on the silence—NMFS had publicly “oscillated” between the view that NMFS should give the benefit of the doubt to species and the view that NMFS should not use “worst-case scenario” assumptions.⁷⁷ Lastly and most importantly, the court held that even if NMFS had properly asserted its deference argument, the ESA did not permit NMFS to use “worst case-scenario” or “pessimistic” predictions.⁷⁸ The court held that Congress would be clear if it wanted NMFS to use a “precautionary principle” as a presumption in favor of the species that would allow NMFS to “err on the side of caution” when faced with uncertain data.⁷⁹ The court concluded that NMFS was not authorized by the ESA to make presumptions in favor of the NARW and “pick whales over people.”⁸⁰

69. *Id.* (quoting 16 U.S.C. §1536(a)(2); *Bennett v. Spear*, 520 U.S. 154, 176–77 (1997)).

70. *Id.* at 596.

71. *Id.*

72. *Id.* (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 233 (2009) (Breyer, J., concurring in part and dissenting in part)).

73. *Id.* at 596–97.

74. *Id.* at 597.

75. *Id.* at 597–98.

76. *Id.* (quoting *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006)).

77. *Id.* at 598.

78. *Id.* at 599.

79. *Id.*

80. *Id.* at 600.

III. ANALYSIS

A. *This Textualist Approach Counters Legislative History and Defies Precedent*

In deciding that the BiOp was invalid, the court utilized a textualist approach that runs contrary to the ESA's legislative history and its aim to precautionarily protect endangered species. The court primarily focused on two textual provisions in Section 7: that the action "is not likely to jeopardize" a listed species and that the agency must use "the best scientific and commercial data available."⁸¹ The court interpreted these terms in complete isolation, holding that unless NMFS definitively showed that the fisheries were "more likely than not" to cause the predicted harms to the NARW, the BiOp was invalid.⁸² However, this language in Section 7 must be analyzed in conjunction with the legislative history of the ESA.

Before 1979, Section 7 required that agencies "do not jeopardize" protected species; the language was revised to state that agencies cannot advance actions that are "likely to jeopardize the continued existence" of protected species.⁸³ Statements in the House Conference Report for the 1979 ESA amendments clarify that the amendment simply brought the language of the ESA "into conformity with existing agency practice and judicial decisions."⁸⁴ The statements further explain that BiOps must be based on the "best evidence that is available or can be developed" during the consultation.⁸⁵ The statements express that an agency that prepares a BiOp without utilizing the "best evidence," but instead relies on "inadequate knowledge or information," must then "make a reasonable effort to develop that information" and risks noncompliance with Section 7.⁸⁶ Although the new language provides less stringent protections for potentially impacted species, the legislative statements declared that Section 7 "continues to give the benefit of the doubt to the species" and does not "lessen" agency "obligation[s]" under the ESA.⁸⁷

Ignoring this explicit legislative intent, the court refused to acknowledge the importance of resolving data uncertainties in favor of endangered species. Also, the House Conference Report explains that "courts have given substantial weight" to BiOps created under the ESA, and the language amendments "would not alter this state of the law."⁸⁸ In only looking to Section 7's plain language and assessing the language amendments in isolation, the D.C. Circuit diminished

81. *See id.* at 596 (quoting Act of Dec. 28, 1979, Pub. L. No. 96-159, 93 Stat. 1225, 1226).

82. *See id.* at 595 (quoting *Alaska Oil & Gas Ass'n*, 840 F.3d at 684).

83. *Id.* at 596.

84. H.R. REP. NO. 96-697, at 12 (1979) (Conf. Rep.).

85. *Id.* at 10.

86. *See id.* at 12.

87. *See id.*; *see generally* Christopher H.M. Carter, *A Dual Track for Incidental Takings: Reexamining Sections 7 and 10 of the Endangered Species Act*, 19 B.C. ENV'T AFFS. L. REV. 135 (1991) (discussing Section 7 amendments).

88. H.R. REP. NO. 96-697, at 12 (1979) (Conf. Rep.).

the power of BiOps to precautionarily protect endangered species. This decision enabled the court to determine the fate of a species, rather than scientists and agency experts who conducted thorough, peer-reviewed investigations into the likely outcomes of the federal fishery operations. This dangerous exercise of the court's power over agency experts is particularly concerning, given that climate change is advancing and "considerable uncertainty surrounds" the impacts of climate change on "the present and future status" of protected species.⁸⁹ Here, "warming [] waters from climate change" are modifying copepod "location and availability," which has ultimately contributed to NARWs altering their migratory patterns and being driven into the path of the fisheries.⁹⁰ Any assessment of the NARW's future will necessarily entail some degree of uncertainty, and now a BiOp accounting for these uncertainties will not stand.

Further, the court failed to follow precedential D.C. District Court decisions regarding agency actions under the ESA. For instance, in *Defenders of Wildlife v. Babbitt*, the court stated that as long as the agency has "considered the relevant factors and articulated a rational connection" between the data and the agency's decision, special "deference to an agency's scientific and technical expertise" directs that the agency's actions be upheld.⁹¹ Here, NMFS used a precautionary, peer-reviewed approach to address uncertainties and propose conservation actions as it thought most effective in protecting the NARW.⁹² The decision in *Maine Lobstermen's* empowers courts to vacate a BiOp prepared by an agency with the best expertise.

B. The Future of the NARW

After *Maine Lobstermen's*, NARWs receive little protection from the lobster and Jonah crab federal fisheries. As climate change intensifies, NARWs will continue to lose feeding grounds and migrate into unprotected waters.⁹³ With a "scarcity of breeding females" and increasing rates of entanglements and strikes, the species faces the real possibility of extinction.⁹⁴ This decision will likely adversely impact the assessment of other actions that may harm NARWs, especially when modifying the action entails "economic dislocation."⁹⁵ For

89. See Daniel Kim et. al., *Judicial Review of Scientific Uncertainty in Climate Change Lawsuits: Deferential and Nondeferential Evaluation of Agency Factual and Policy Determinations*, 46 HARV. ENV'T L. REV. 367, 372, 388 (2022).

90. See Briggs, *supra* note 27, at 168; *North Atlantic Right Whale*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale/overview> (last visited Nov. 24, 2024).

91. See 958 F. Supp. 670, 678–79 (D.D.C. 1997) (quoting *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983)). *But c.f.* *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 228 (D.D.C. 2005) (holding that the ESA does not require NMFS to create BiOps using precautionary estimates that would be entirely "lacking" in scientific "support").

92. See *Maine Lobstermen's*, 626 F. Supp. 3d at 58–60.

93. See Green, *supra* note 3, at 10713.

94. See Ali Sullivan, *DC Judge Won't Halt Toss of Lobster Fishing Rule*, LAW360 (Oct. 31, 2023), <https://www-law360-com.libproxy.berkeley.edu/articles/1738542/dc-judge-won-t-halt-toss-of-lobster-fishing-rule>.

95. See *Maine Lobstermen's*, 70 F.4th at 599; Green, *supra* note 3, at 10724.

example, NMFS is partnering with the Bureau of Ocean Energy Management to advance offshore wind projects in the Atlantic.⁹⁶ NMFS must prepare BiOps to determine if these projects will harm the NARW or its habitat.⁹⁷ This evaluation of threats to the NARW will likely face challenges in using “predictive models for assessment of jeopardy” or “worst-case scenario” predictions.⁹⁸ Further, other species listed as endangered or threatened under the ESA may be affected by this decision.⁹⁹

C. *Broader Limitations on the Power of Agency Interpretations When Data is Uncertain*

Broadly, the decision in *Maine Lobstermen’s* likely limits agencies’ powers when data is uncertain. Agencies striving to achieve perceived statutory goals will struggle to produce acceptable assessments in the D.C. Circuit when faced with predictive data models. In rejecting NMFS’s *Chevron* argument that statutory silence gave it discretion to issue a precautionary BiOp, the D.C. Circuit revealed its disfavor for legislative history “supply[ing] duties . . . not found in the enacted law.”¹⁰⁰ This indicates that precautionary principles not explicitly stated in statute will face pressure in the current D.C. Circuit. Parties litigating other environmental statutes like the Clean Air Act and Clean Water Act might face challenges in advancing environmental protections.¹⁰¹ This decision exemplifies a scenario where the court purely looked to statutory text and declined to defer to the agency’s scientific expertise and interpretation of ambiguities.

96. See U.S. DEP’T OF COM., BOEM AND NOAA FISHERIES NORTH ATLANTIC RIGHT WHALE AND OFFSHORE WIND STRATEGY 1 (2024).

97. See *id.* at 6.

98. See Green, *supra* note 3, at 10722; *Maine Lobstermen’s*, 70 F.4th at 595; see also Tyler S. Johnson & Ann D. Navaro, *Endangered Species Act Developments: Court Finds Species Do Not Get The “Benefit Of The Doubt” & Agencies Propose Compensatory Mitigation Under ESA Section 7*, BRACEWELL ENERGY LEGAL BLOG (June 23, 2023), <https://www.bracewell.com/resources/endangered-species-act-developments-court-finds-species-do-not-get-benefit-doubt-agencies/> (discussing how NMFS may be impacted in the “modeling and assumptions” it may use in reducing harm to the NARW).

99. See, e.g., Brief of Plaintiffs-Appellees at *41–42, *Louisiana v. Haaland*, 86 F.4th 663 (5th Cir. 2023) (No. 23-30666) (citing to *Maine Lobstermen’s* to argue that the Bureau of Ocean Energy Management impermissibly used a precautionary principle to protect the Rice’s whale); David Filippi, *The Continuing Impact of the Endangered Species Act on Water Rights and Water Use*, in *The Foundation for Natural Resources and Energy Law Annual Institute: Proceedings of the Sixty-Ninth Annual Natural Resources and Energy Law Institute*, *10-1, *10-5, n. 9 (2023) (stating that, as a result of *Maine Lobstermen’s*, biological opinions “involving water allocations to benefit listed species and their habitats will undoubtedly be scrutinized by water users to ensure” that NMFS or FWS is not using “worst-case scenarios” or “pessimistic assumptions”).

100. See *Maine Lobstermen’s*, 70 F.4th at 598.

101. See Green, *supra* note 3, at 10724–25 (discussing the current trend towards curtailing agency authority and the likelihood of environmental statutes being incorrectly “strict[ly] interpret[ed]” without regard to legislative history).

CONCLUSION

The D.C. Circuit's textualist approach to the ESA and refusal to give the benefit of the doubt to the endangered NARW limits the scope of agency interpretations when data is uncertain and goes against stated legislative intent. In a time when climate change is intensifying and its future is uncertain, this decision poses a serious threat to protecting endangered and threatened species and promoting sustainable ecosystems.¹⁰² Working with uncertain data, NMFS and FWS will face challenges in producing BiOps deemed acceptable by the D.C. Circuit.

Sophie Allan

102. See Kim et al., *supra* note 89, at 371–73.

We welcome responses to this In Brief. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.