Public Land & Resources Law Review

Volume 0 *Case Summaries 2010-2011* Article 15

March 2013

Center for Biological Diversity v. Kempthorne

Amanda Anderson

***Center for Biological Diversity v. Kempthorne*, 588 F.3d 701 (9th Cir. 2009).**

Amanda Anderson

ABSTRACT

The Ninth Circuit affirmed the decision to grant summary judgment to the Fish and Wildlife Service, upholding MMPA and NEPA regulations. The court found the Service did not violate MMPA or NEPA in authorizing a period for oil and gas operators to apply to conduct non-lethal takes of polar bears and Pacific walrus. The Service was not required to address the possibility that climate change, in addition to the non-lethal takes, may put additional stress on polar bear populations.

I. INTRODUCTION

In *Center for Biological Diversity v. Kempthorne*,[1] the United States Court of Appeals for the Ninth Circuit affirmed the decision from the United States District Court for the District of Alaska granting summary judgment to the United States Fish and Wildlife Service (Service), upholding Marine Mammal Protection Act (MMPA) and National Environmental Policy Act (NEPA) regulations.[2] The court held the MMPA and NEPA were not violated[3] when the Service authorized a five-year period for oil and gas operators in the Beaufort Sea on the Northern Coast of Alaska to apply for "letters of authorization" (LOA) to conduct non-lethal "takes"[4] of polar bears and Pacific walrus.[5]

II. FACTUAL BACKGROUND

[1] *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701 (9th Cir. 2009).
[2] *Id*. at 706.
[3] *Id*. at 712.
[4] "Take" means "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362(13) (2006).
[5] *Ctr. for Biological Diversity,* 588 F.3d at 705.

In 2006, the Service announced new regulations under the MMPA that authorized a five-year period in which oil and gas operators along the Beaufort Sea could apply for a one-year LOA to conduct non-lethal takes of polar bears and Pacific walrus.[6] Similar regulations had been announced six times since 1993.[7]

Before announcing the 2006 regulations, the Service evaluated the impacts of the oil and gas industry on polar bears and Pacific walrus.[8] The Service found that while industrial oil and gas production may negatively affect polar bears, the impact would be negligible and would likely be consistent with past periods of regulation.[9] The same report found that Pacific walrus are uncommon in the Beaufort Sea, and the impact on them would also be negligible.[10] The Service produced an environmental assessment (EA) but not an environmental impact statement (EIS).[11]

III. PROCEDURAL BACKGROUND

In February 2007, the plaintiffs, Pacific Environment and the Center for Biological Diversity, filed this action against the Service alleging the 2006 regulations violated MMPA and NEPA.[12] The district court granted summary judgment to the Service, concluding that the Service's 2006 MMPA and NEPA regulations were not arbitrary or capricious. The court found that both polar bears and Pacific walrus are potentially susceptible to climate change due to

[6] *Ctr. for Biological Diversity*, 588 F.3d at 705.
[7] *Id.* at 706.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] Here, the Service's environmental assessment was designed to "evaluate the impact of issuing incidental take regulations as opposed to permitting industrial activities in the absence of such regulation." (Internal quotations omitted.) *Id.*
[12] *Id.*

changes in ice pack habitat and available food resources.[13] However, the threat of climate change was not emphasized in the court record.[14] The plaintiffs appealed the decision.

IV. ANALYSIS

The Ninth Circuit Court of Appeals affirmed the district court's decision granting summary judgment to the Service.[15] On appeal, the issues included: (1) Article III[16] standing, (2) ripeness, (3) the definition of "specified activity" under the MMPA, (4) the Service's finding of negligible impact under the MMPA, (5) the Service's finding of no significant impact under NEPA, and (6) the Service's failure to produce an EIS.

The appellants established Article III standing[17] because the alleged injury was geographically specific, imminent, and caused by the Service's NEPA and MMPA regulations.[18] Though the Service did not raise standing in the district court, the "jurisdictional issue of standing can be raised at any time."[19] To demonstrate standing, plaintiffs must "allege an injury in fact to show [there is] a personal stake in the outcome of the controversy."[20] An individual interest in observing a species and its habitat is sufficient to confer standing, while generalized harm to the environment is not.[21] Additionally, an organization can state the interests on behalf of its members.[22] Because the appellants alleged a specific injury on behalf of their individual members, they had standing.[23]

---

[13] *Id.* at 705.
[14] *Id.* at 706.
[15] *Id.* at 712.
[16] U.S. Const. art. III, § 1.
[17] The three elements of standing are: (1) an injury in fact, (2) causation, and (3) it is likely that "the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).
[18] *Ctr. for Biological Diversity*, 588 F.3d at 708.
[19] *Id.* at 707.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.* at 708.

The appellants' claims were ripe[24] for review because the issues were primarily legal, did not require additional fact finding, and the Service's 2006 regulation was final.[25] Ripeness, like standing, was not raised in district court but can be plead at any time.[26] Whether an agency's action is arbitrary and capricious is a legal question, so the appellants did not need to challenge a specific LOA.[27] Because the 2006 regulations last for only five years and there is an inherent delay in litigation, the court articulated that the appellants could be disadvantaged if review was denied.[28]

"Oil and gas exploration, development, and production activities,"[29] as defined in the 2006 regulations, were narrowly enough defined to qualify as a "specified activity" under the MMPA.[30] Appellants argued that the activities listed in the regulations were not "substantially similar" and were too broad to qualify as one "specified activity."[31] The legislative history of the MMPA equates "specified activity" to activities that are "narrowly identified so that the anticipated effects will be substantially similar."[32] The Service defined "specified activity" in the same way, and the definition was not arbitrary or capricious.[33] The Service defined all oil and gas activity in the Beaufort Sea to be substantially similar with negligible impact.[34] Appellants did not show that the oil and gas activities listed in the 2006 regulation needed to be classified by more than one "specified activity" because there were dissimilar impacts.[35]

---

[24] A claim is ripe "if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *U.S. West Commun. v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999).
[25] *Ctr. for Biological Diversity*, 588 F.3d at 708.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 709.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] 1981 U.S.C.C.A.N. 1458, 1469.
[33] *Ctr. for Biological Diversity*, 588 F.3d at 709.
[34] *Id.*
[35] *Id.*

The Service's finding of negligible impact under MMPA was not arbitrary and capricious because the Service made scientific predictions within the scope of its expertise.[36] The court concluded that the relationship between industrial oil and gas activities and the weakened fitness of polar bears due to climate change was speculative.[37] To find a "negligible impact," the Service must analyze the effects that are "reasonably expected" or "reasonably likely," but the Service is not required to analyze effects that are unproven or speculative.[38] Since the relationship between weakened physical fitness of polar bears and industrial activities was speculative, it did not matter if the Service analyzed the effects.[39] Failure to analyze the effects of the oil and gas development and polar bear weakness due to climate change was unimportant under MMPA, and the Service did not act arbitrarily or capriciously when it found negligible impact for the 2006 regulations.[40]

The court held the Service's finding of no significant impact was not arbitrary and capricious under NEPA because the Service's EA did acknowledge climate change and the oil and gas industry's effect on polar bear populations.[41] NEPA requires agencies to supply convincing reasons to explain why the impacts of a project are insignificant if the agency issues a finding of no significant impact.[42] Here, the court agreed with the district court and determined that climate change generally threatens polar bear populations.[43] The authorization of non-lethal takes while generalized climate change threats exist was not likely to have significant impacts on

[36] *Id.* at 711.
[37] *Id.*
[38] 50 C.F.R. § 18.27(c) (2010).
[39] *Ctr. for Biological Diversity*, 588 F.3d at 710.
[40] *Id.* at 711.
[41] *Id.*
[42] *Id.*
[43] *Id.*

polar bear populations.[44] The Service addressed climate change and oil and gas production considerations in the EA and considered the consequences of its actions.[45]

The court held that the Service did not commit clear error under NEPA in deciding not to produce an EIS even though there was some uncertainty in predicting the impacts of the 2006 regulations.[46] An EIS is required under NEPA when the effects of a project are "highly uncertain or involve unique or unknown risks."[47] For regulations to be enforceable, an EIS must be produced when the effects of a project are "highly" uncertain, not when there is only some uncertainty.[48] The court determined there was some uncertainty in authorizing the 2006 regulations for non-lethal takes, but that uncertainty did not meet the statutory level of "highly uncertain" because the Service made predictions based on past data.[49] The Service made predictions within the scope of its expertise and did not act arbitrarily in deciding not to produce an EIS.[50]

V. CONCLUSION

Center for Biological Diversity v. Kempthorne highlights the interplay between scientific uncertainty and agency decision-making. The Service addressed climate change and non-lethal takes in the EA, but the topics were not addressed together because the effects were unclear. The court allowed the Service to strategically ignore the possibility that additional stress may be placed on polar bear populations by the combination of climate change and non-lethal takes. However, in the future, the court may revisit the relationships between wildlife and climate

[44] *Id.* at 712.
[45] *Id.*
[46] *Id.*
[47] 40 C.F.R. § 1508.27(b)(5) (2010).
[48] *Ctr. for Biological Diversity*, 588 F.3d at 712.
[49] *Id.*
[50] *Id.*

change. Additional changes in climate may require the Service to more specifically address the effects of non-lethal takes by oil and gas activities on threatened or endangered species.