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## Natural Resources Defense Council, Inc. v. Pritzker

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*Natural Resources Defense Council, Inc. v. Pritzker*, No. 14-16375,  
\_\_\_F.3d\_\_\_, 2016 WL 3854207 (9<sup>th</sup> Cir. July 15, 2016)

**Caitlin Buzzas**

In *Natural Resources Defense Council, Inc. v. Pritzker*, the Ninth Circuit dealt with the conflict of science in making legal and policy decisions. NMFS was held to a stringent mitigation standard to protect marine mammals against the Navy’s use of LFA sonar for military operations. In this decision the court held that agencies are required to apply the least practicable adverse impact on marine mammals in these types of operations and agencies must listen to their own experts when making these decisions.

I. INTRODUCTION

In *Natural Resources Defense Council, Inc. v. Pritzker*, the Natural Resources Defense Council, the Humane Society of the United States, the Cetacean Society International, the Ocean Futures Society, Jean-Michel Cousteau, and Michael Stocker (collectively “Plaintiffs”) challenged and sought an injunction against the National Marine Fisheries Service’s (“NMFS”) Final Rule authorizing the incidental take of marine mammals in connection with the Navy’s peacetime use of low-frequency sonar system (“LFA”) for training, testing, and routine operations.<sup>1</sup> The Plaintiffs contended that NMFS’s mitigation measures did not satisfy the Marine Mammal Protection Act’s (“MMPA”) least practicable adverse impact standard.<sup>2</sup> The United States District Court for the Northern District of California granted summary judgment in favor of NMFS on the issue of compliance with the MMPA,<sup>3</sup> holding that although NMFS has the discretion to choose mitigation measures, the least practicable adverse impact is a “stringent standard” that NMFS is required to adopt.<sup>4</sup> The United States Court of Appeals for the Ninth Circuit agreed with the district court’s principles but reversed and remanded the ruling, disagreeing with its procedure and holding NMFS’s Final Rule did not satisfy the least practicable adverse impact standard.<sup>5</sup>

II. FACTUAL AND PROCEDURAL BACKGROUND

Congress enacted the MMPA due to concern that “marine mammal species and population stocks were in danger of extinction or

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1. *Natural Resources Defense Council, Inc. v. Pritzker*, No. 14-16375, \_\_\_F.3d\_\_\_, 2016 WL 3854207 (9<sup>th</sup> Cir. July 15, 2016).

2. *Id.* at \*1.

3. *Id.* at \*2.

4. *Id.*

5. *Id.*

depletion due to human activity.”<sup>6</sup> The MMPA prohibits harassing, hunting, capturing, or killing marine mammals—activities that collectively are known as a “take.” The MMPA authorizes exceptions to this broad prohibition, which allow NMFS to take “small numbers” of marine mammals for specified activities for up to five years.<sup>7</sup> An authorized incidental take must meet two requirements.<sup>8</sup> First, NMFS must find the total take will have a “negligible impact.”<sup>9</sup> Second, NMFS must impose regulations that set forth “permissible methods of taking” as well as “other means” of achieving the least practicable adverse impact on species stock and habitat.<sup>10</sup> The least practicable adverse impact standard applies both to “permissible methods of taking” for such activity and to “other means” of reducing incidental take.<sup>11</sup>

The U.S. Navy uses LFA sonar for peacetime operations, and determined it is the most effective way to detect potentially hostile foreign submarines.<sup>12</sup> LFA sonar can harm a variety of marine mammal species, particularly “low-frequency hearing specialists” such as whales, seals, and walruses.<sup>13</sup> The MMPA classifies LFA sonar into two categories.<sup>14</sup> “Level A harassment” are sound pulses of 180 dB or greater that directly injure or are likely to injure marine mammals,<sup>15</sup> and “Level B harassment” are sound pulses below 180 dB that indirectly interfere with normal behavioral patterns of marine mammals.<sup>16</sup>

Most recently, NMFS issued a final rule authorizing incidental take of marine mammals by LFA sonar in 2012 (“Final Rule”).<sup>17</sup> The Final Rule includes three mitigation measures to minimize the impact of the Navy’s incidental take.<sup>18</sup> The first requires the Navy to shut down or delay LFA sonar use if it detects a nearby marine mammal.<sup>19</sup> The second prohibits the Navy from creating LFA sonar pulses of 180 dB or greater within “costal exclusion zones” which extend 22 km off of any coastline.<sup>20</sup> The third prohibits the Navy from creating LFA sonar pulses of 180 dB or greater within a kilometer of designated “offshore biologically important areas” (“OBIAs”).<sup>21</sup> OBIAs are protected marine

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6. *Id.*

7. *Id.*

8. *Id.* (citing 16 U.S.C. § 1371(a)(5)(A)(i)(I) (2012)).

9. *Id.* (citing 16 U.S.C. § 1371(a)(5)(A)(i)(II)(aa)).

10. *Id.*

11. *Id.*

12. *Id.* at \*3.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at \*3.

17. *Id.* at \*4; *see* Taking and Importing Marine Mammals: Taking Marine Mammals Incidental to U.S. Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active Sonar, 77 Fed. Reg. 50290 (Aug. 20, 2012).

18. *Id.* at \*4.

19. *Id.*

20. *Id.*

21. *Id.*

areas that provide marine mammals with relatively low-noise environments.<sup>22</sup>

For the Final Rule, NMFS flagged 73 candidate OBIAAs by consulting, amongst other measures, a 2010 White Paper written by four senior NMFS “subject matter experts.”<sup>23</sup> The White Paper cautioned that identifying OBIAAs based only on known data would be difficult as data-poor regions did not equate to regions with no population or biological importance of marine mammals and habitat.<sup>24</sup> However, neither the White Paper nor NMFS’s subject matter experts were involved in drafting the Final Rule, and NMFS used significantly different criteria than recommended in the White Paper.<sup>25</sup> As a result, NMFS cut several areas that the subject matter experts nominated for protection, stating its reason for cutting so many potential OBIAAs was lack of sufficient data.<sup>26</sup>

The Plaintiffs asserted the three mitigation measures were not sufficient to meet the MMPA’s required “least practicable adverse impact” on marine mammals.<sup>27</sup> While, the Plaintiffs did not challenge the shutdown protocol or costal exclusion zone, they stated that, taken as a whole, these measures were inadequate to make up for the deficiencies in the designation of OBIAAs.<sup>28</sup> The district court found that NMFS complied with the MMPA and granted summary judgement.<sup>29</sup> The Ninth Circuit reversed and remanded the ruling, stating that NMFS’s Final Rule did not satisfy the least practicable adverse impact statement.<sup>30</sup>

### III. ANALYSIS

The Ninth Circuit reviewed the Final Rule under both the MMPA and the Administrative Procedure Act (“APA”).<sup>31</sup> First, it analyzed the Final Rule’s mitigation measures to see if it achieved the “stringent standard” required by the MMPA of the “least practicable adverse impact” on marine mammals.<sup>32</sup> Second, it looked specifically at the Final Rule’s OBIA designation under the APA, which states that a court will only set aside a final agency action if it is found to be “arbitrary and capricious.”<sup>33</sup>

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22. *Id.*

23. *Id.* at \*8 (The 2010 White Paper was entitled *Identifying Areas of Biological Importance to Cetaceans in Data-Poor Regions* (see 77 Fed. Reg. at 50300)).

24. *Id.* at \*8.

25. *Id.*

26. *Id.* at \*9.

27. *Id.* at \*7.

28. *Id.*

29. *Id.* at \*2.

30. *Id.*

31. *Id.* at \*9.

32. *Id.* at \*5.

33. *Id.* at \*5, 9.

A. *Least Practicable Adverse Impact*

NMFS argued there were several reasons why it was not required to comply with the stringent standard of ensuring the “least practicable adverse impact” on marine mammals.<sup>34</sup> First, it contended that once a “negligible impact” finding is concluded, then it “must allow the activity” and the only mitigation measures needed are ones that allow the activity to go forward.<sup>35</sup> The Ninth Circuit looked to the statutory text and found that mitigation to achieve the “least practicable adverse impact” is an independent threshold issue, not a secondary follow up requirement, which is central to whether NMFS can authorize an incidental take.<sup>36</sup> Additionally, the Ninth Circuit determined Congress’s mandate that “NMFS must find negligible impact ‘and’ set forth regulations to minimize adverse impact in order to authorize incidental take makes the independent nature of these requirements clear.”<sup>37</sup>

Next, NMFS contended that the mitigation requirement was unnecessary because the agency “cannot mitigate adverse population-level impacts to any degree less than zero.”<sup>38</sup> The Ninth Circuit found this argument was based on a “misreading of the agency’s own implementing regulations.”<sup>39</sup> NMFS incorrectly applied the “negligible impact” definition of the MMPA. Read properly, the MMPA states that even if the threat to population levels are not significant, the agency still must adopt mitigation measures aimed at protecting marine mammals to the greatest extent practicable in light of military readiness needs.<sup>40</sup>

The Ninth Circuit concluded that NMFS is required to establish regulations to achieve the “least practicable adverse impact” before it can authorize an incidental take, and that the agency’s finding of negligible impact on populations did not satisfy this standard for mitigation.<sup>41</sup> The Ninth Circuit also held the Final Rule failed to meet the requirements of this standard because it did not offer consideration of the fact that “practicable” mitigation measures must balance the impact of LFA on marine mammals with the legitimate needs of military operations.<sup>42</sup>

B. *OBIA*s

NMFS raised two arguments for why it did not adopt the number of OBIA<sub>s</sub> recommended by the subject matter experts. First, it argued the final designation of OBIA<sub>s</sub> was not arbitrary and capricious, as the Plaintiffs asserted, because the Final Rule considered and explained its

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34. *Id.* at \*5.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at \*6.

40. *Id.*

41. *Id.*

42. *Id.*

decision not to adopt the White Paper's recommendations, which is all that is required under the APA.<sup>43</sup> Second, NMFS reasoned that OBIAAs are but one component of a "suite" of mitigation measures.<sup>44</sup>

In rebutting NMFS's arguments the Ninth Circuit held that NMFS's decisions must be evaluated under both the APA, as well as the MMPA's "least practicable adverse impact" requirement.<sup>45</sup> Under the MMPA, NMFS failed to adopt measures to meet the "stringent standard" required for three reasons.<sup>46</sup> First, NMFS did not evaluate why it chose an option that risked overlooking biologically important areas.<sup>47</sup> Second, NMFS offered no explanation why it chose to forgo protections that would have reduced impacts on marine mammals.<sup>48</sup> Third, NMFS made no mention of military practicability in the actual rule.<sup>49</sup>

Regarding NMFS's first argument, the Ninth Circuit held the Final Rule was in "direct conflict with the conclusion of its own experts," which under the APA is arbitrary and capricious.<sup>50</sup> NMFS stated the White Paper's criteria for designating OBIAAs was different than what it used, but offered no explanation as to why NMFS's criteria was equally or more capable of meeting the statutory standard. The Ninth Circuit held NMFS's approach was a policy choice and not a scientific decision. Therefore, it did not meet the stringent standard that mitigation measures result in the "least practicable adverse impact" on marine mammals under the MMPA and was arbitrary and capricious under the APA.<sup>51</sup>

NMFS's second argument was that OBIAAs are but one component of a "suite" of mitigation measures.<sup>52</sup> However, the other two mitigation measures applied regardless of whether an area is considered potentially biologically important or not.<sup>53</sup> Therefore, the only heightened protection possible under the agency's plan was an OBIA designation.<sup>54</sup> Because shutdown zones around LFA sonar are not large enough to protect marine mammals from Level B effects, OBIAAs are one of only two mitigation measures capable of reducing this level of harassment.<sup>55</sup> As a result, the Ninth Circuit determined the record does not show the other mitigation measures are able to achieve the least practicable adverse impact without OBIAAs.<sup>56</sup>

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43. *Id.* at \*9.  
44. *Id.* at \*11.  
45. *Id.* at \*9.  
46. *Id.* at \*9, 10.  
47. *Id.* at \*10.  
48. *Id.*  
49. *Id.*  
50. *Id.* at \*11.  
51. *Id.*  
52. *Id.*  
53. *Id.*  
54. *Id.*  
55. *Id.* at \*12.  
56. *Id.*

## IV. CONCLUSION

In *Natural Resources Defense Council, Inc. v. Pritzker*, the Ninth Circuit held the MMPA requires NMFS to achieve the least practicable adverse impact standard *in addition to* finding a negligible impact in order to authorize an incidental take of marine mammal species, stock, and habitat.<sup>57</sup> Further, by not giving adequate protection to the OBIA's determined important by its own experts, NMFS made a policy instead of a scientific decision which was arbitrary and capricious. The Ninth Circuit in this decision determined that agencies should be held to a high scientific standard in making their decisions. Agencies are required to achieve the least practicable adverse impact standard when protecting from incidental take and are required to listen to the advice of their own experts in making these decisions. This decision is a step forward in setting standards around scientific uncertainty when making policy and legal decisions. This case will be remanded back to the district court which will further decide how to apply this standard, both procedurally and substantively, to agency decisions.

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57. *Id.* at \*13.