To Kill a Bearded Seal: Should the NMFS be able to preemptively list a species as threatened under the ESA?

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On October 26, 2017, a 450-pound bearded seal made national news for "lounging" on the runway at the Utqiagvik airport in Alaska, requiring removal by sled. While caribou, musk ox, and even polar bears have made previous appearances on the runway, it was a first for the bearded seal.

By the year 2100, however, the currently healthy bearded seal population may no longer pose a foreseeable threat of obstruction to runways; research conducted by the National Marine Fisheries Service (NMFS) suggests that projected increase of global average temperatures and rising sea levels could significantly decrease the sea ice home to the mustachioed species, compromising the seals' survival and reproduction rates. According to the NMFS, should climate change occur as predicted, the bearded seal population would be forced to relocate to suboptimal ice-covered locations, a major behavioral change that could "compromise the ability of bearded seals, particularly pups, to escape predators, as this is a highly developed response on ice versus land."

On July 21, 2017, the state of Alaska and the Alaska Oil and Gas Association led a petition for review to the Supreme Court of the United States, arguing that the Secretary of Commerce, acting through the NMFS, had abused her discretion in listing the bearded seal as a threatened species under the Endangered Species Act (ESA). Petitioners contend that the NMFS may not list a species as threatened when it is not presently endangered and faces only speculative negative ramifications as a result of climate change.

The ESA was enacted to protect both "endangered species" and "threatened species" and defines a "threatened species" as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Petitioners argue that the Secretary of Commerce’s abuse of discretion lies in depending on mere speculations of long-term effects of climate change on a currently healthy species’ as a basis for listing the bearded seal as threatened.

In determining a species to be endangered or threatened, the ESA requires that the species in question must face at least one of the following: "(1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or
The main focus of the petitioners’ argument lies in the statutory interpretation of the words “likely” and “foreseeable” as they pertain to the first factor, as the species is arguably not presently threatened “within the meaning” of the ESA. The petitioners further claim that the long-term predictive judgments based upon available climate modeling technology are too “substantially uncertain” to determine such a large time span reliably, pointing out that even the NMFS admitted to the uncertainty of its predictions.

In its reversal of the circuit court’s judgment, the Ninth Circuit Court of Appeals commented on both the adequacy of the data used in the NMFS’s determination as well as the statutory interpretations of “likely” and “foreseeable.” Case law allows that an event may be deemed foreseeable so long as the decision is based upon reliable data as to the “threats to the species, how the species is affected by those threats, and how the relevant threats operate over time.” The Ninth Circuit noted that the ESA requires only that the NMFS make its determination “solely on the basis of the best scientific and commercial data available . . . after conducting a review of the status of the species,” and that the majority of peer reviewers agreed that the “best scientific and commercial data available” was used.

Further, the court agreed with the NMFS that the word “likely” should be read within the ESA as having its common meaning rather than as requiring actual calculations to determine the magnitude of a threat to a particular species. The Ninth Circuit held that the ESA does not require a “projected extinction date” or “extinction threshold” to determine whether a species is “more likely than not” to face substantial threat as evidence of likelihood of extinction.

Aside from the issue of statutory interpretation, petitioners claim that the consequences of listing the bearded seal will result in “serious impacts” upon Alaskan communities subject to subsequent ESA regulation and “recovery plans.” Regulation may result in the state of Alaska losing control over local land and waters to federal conservatorship and the implementation of a state income and/or sales tax, neither of which Alaska currently has.

Further, the protection of the bearded seal population may negatively impact the Alaska Native groups, who hunt the bearded seals “to support their subsistence lifestyle and cultural traditions,” as regulation may allow federal oversight of their activity.

By petitioning, the state of Alaska and the Alaska Oil and Gas Association have asked the Supreme Court to quantitatively define “likely” and “foreseeable” as they appear in the ESA. Clearer definitions may aid in striking a balance between serving the predicted needs of a species almost a century in advance and the current needs of local communities; however, questioning the accuracy of scientifically provided probability will undoubtedly hinder future attempted listings under the ESA due to the increasing need for further substantiation. While it is unclear whether or not the Supreme Court of the United States will actually grant a writ of certiorari for this case, the question of how “likely” is “likely enough” will remain a sticking point in determining future threat to a species.


[3] Id.


[6] Id.

[7] The initial case was brought against former U.S. Secretary of Commerce, Penny Pritzker. Alaska Oil & Gas Ass’n v. Pritzker, 840 F.3d 671 (9th Cir. 2016). Her successor is Wilbur Ross.

[8] Brief for the Petitioner at 2, Alaska Oil & Gas Ass’n v. Pritzker, 840 F.3d 671 (9th Cir. 2016) (No. 17-133).
16 U.S.C. § 1531 et seq.

Brief for Petitioner, supra note 7, at 1.

16 U.S.C. § 1532(6) (defining “endangered species” as “any species which is in danger of extinction throughout all or a significant portion of its range”).


Brief for Petitioner, supra note 7, at 17.


Brief for Petitioner, supra note 7, at 1.

Brief for Petitioner, supra note 7, at 11, 12.

Safari Club Int’l v. Salazar (In re Polar Bear Litig., 709 F.3d 1, 15 (2013) (“The term “foreseeable” is not defined by statute or regulation... [T]he timeframe over which the best available scientific data allows us to reliably assess the effect of threats on the species is the critical component for determining the foreseeable future.”)

Alaska Oil & Gas Ass’n v. Pritzker, 840 F.3d 671, 682 (9th Cir. 2016) (citing Office of the Solicitor of the U.S. Dep’t of the Interior, Memorandum on the Meaning of “Foreseeable Future” in Section 3(20) of the Endangered Species Act [**25], No. M-37021 (Jan. 16, 2009)).

Id. at 680 (citing 16 U.S.C. § 1533).

Id. at 684 (internal citations omitted) (“[M]ost dictionaries define “likely” to mean that an event, fact, or outcome is probable.”).

Id. at 684.

Brief for Petitioner, supra note 7, at 20. As per 16 U.S.C. §1533(f), the Secretary “shall develop and implement plans... for the conservation and survival of endangered species and threatened species listed.”

Petitioners point out that the State is heavily dependent upon oil and gas revenues, which would no doubt be affected by federal conservatorship. Id.

Id. at 21.

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