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Testimony regarding Implementation of

the Marine Mammal Protection Act and Endangered Species Act

Committee on Natural Resources

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My name is Paul Weiland, and I am a partner in the Irvine, California office of the law firm Nossaman LLP. I have been an associate and then partner at Nossaman for over 20 years. Prior to my time at Nossaman, I was an attorney in the Law and Policy Section in the Environment and Natural Resources Division of the U.S. Department of Justice.

My testimony is based on my experience working on federal wildlife issues across the nation, including experience and familiarity with the Marine Mammal Protection Act (MMPA) and Endangered Species Act (ESA). My testimony represents my views as an individual and does not necessarily represent the views of my firm, Nossaman, or my clients.

The MMPA and ESA were enacted during the 1970s, a decade that represents the high-water mark for passage of environmental laws by Congress. Both laws reflect a high degree of optimism regarding the nation's ability to accomplish ambitious conservation goals while achieving other societal objectives. In addition, both laws lack specificity and have been subject to limited Congressional reauthorization; consequently, the other branches of government have played outsized roles in their respective trajectories.

In implementing both the MMPA and ESA, the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (USFWS) have frequently drifted from value-neutral assessment of scientific information regarding the status of species and the effects of human activities on them to application of the precautionary principle, when confronted with substantive uncertainties. Like many broad policy principles, the precautionary principle means different things to different people, but two common formulations are: (1) lack scientific certainty should not be a basis for failure to regulate an action that poses a risk of harm to the environment and (2) if there is a risk of harm to the environment due to an action, the action should not proceed. The essence of that principle as applied in the context of the MMPA and ESA is the notion that one should draw all inferences in a manner that tends to underestimate the distribution and abundance of protected species, overestimate the effects of myriad actions on those species, and,

even, over- or under-estimate the effects of measures intended to yield benefits for the species. In shorthand, NMFS and USFWS have often referred to this precautionary approach as giving the benefit of the doubt to the species.

The precautionary principle is engrained in agency culture and reflected in a wide range of agency rules, guidance, and other activities. In *Maine Lobstermen's Association v. National Marine Fisheries Service*, decided in 2023, the United States Court of Appeals for the D.C. Circuit held that applying the principle is a blunt tool that can distort the decision-making process and is, therefore unlawful. The case involved a challenge to a 2021 biological opinion issued by NMFS regarding the effects of several fisheries along the East Coast on species listed under the ESA, including effects of the lobster fishery on the North Atlantic Right Whale. NMFS explained that when analyzing the effects of the lobster fishery on the Right Whale, it resolved uncertainties in favor of the species. The D.C. Circuit rejected that approach, reasoning that the role of NMFS when issuing a biological opinion under section 7 of the ESA is to provide expert assistance by making predictions about the effects of the proposed action on the listed species using the best available scientific information.

Below I discuss three examples of reliance on the precautionary principle to justify agency decision-making under the MMPA and ESA that are, in my view, unlawful.

Right Whale Vessel Speed Rule

One example of reliance on the precautionary principle to justify agency decision-making is the NMFS vessel speed rule. NMFS adopted the vessel speed rule in 2008, imposing a speed limit of 10 knots on most vessels equal to or greater than 65 feet in length across a number of geographic areas along the Eastern Seaboard to reduce the likelihood of death or injury of Right Whales due to vessel collisions. In 2022, NMFS proposed to expand the vessel speed rule to smaller vessels 35 to 65 feet in length and to a more expansive geographic area that includes the coasts of every state on the Eastern Seaboard from Florida to Massachusetts. In January 2025, NMFS withdrew the proposed rule though the 2008 rule remains in effect.

The purpose of the rule, according to NMFS, is to reduce Right Whale mortality. The range of the Right Whale population in the Atlantic Ocean extends from coastal waters in the United States and Canada across the Atlantic to coastal waters of northern Europe though scientists believe the population is concentrated along the Eastern Seaboard of the U.S. and Canada. The species experienced a significant population decline due to whaling in the 19th and 20th centuries, but the population made progress toward recovery over the period 1990-2010. Since 2010, the population has declined from an estimated 470 whales to 370 whales. Vessel strikes and entanglement in fishing gear are believed to be the two leading causes of Right Whale mortality though estimates generated from modeling are freighted with uncertainty.

In its 2022 proposed rule, NMFS reported that between 2008 and 2022 there were 12 Right Whale vessel strikes in U.S. waters. The agency further indicated that 5 of these 12 strikes involved vessels between 35 and 65 feet in length. During that same period, there were more than 5.1 million offshore fishing trips along the Eastern Seaboard by vessels 35 to 65 feet in

length. These data demonstrate that the probability that a vessel between 35 and 65 feet in length operating along the Eastern Seaboard would strike a Right Whale is less than one in a million.

The proposed rule exemplifies one circumstance in which the precautionary principle can result in an absurd outcome, that is, when it leads to regulation of a vast amount of human activity that causes no harm for the purpose of curbing a miniscule amount of human activity that causes harm. An analog would be the imposition of a speed limit on roads within Desert Tortoise habitat across the American Southwest. Even more problematic is the lack of a legitimate legal basis in the MMPA or the ESA for either vessel speed rule. In both rules, NMFS references provisions that grant the agency general rulemaking authority. Section 112(a) provides NMFS with authority to promulgate regulations that are "necessary and appropriate" to carry out the purposes of the MMPA. And section 11(g) provides NMFS authority "to promulgate regulations as may be appropriate to enforce" the ESA. But these sources of authority do not provide the agency with authority to act as a legislative body; they are subject to the major questions doctrine and nondelegation doctrine that are rooted in the separation of powers reflected in the Constitution.

Turning first to the MMPA, that Act does not authorize NMFS to promulgate rules that prohibit conduct that has a very remote probability of causing "take" of marine mammals. In fact, the legislative history of the MMPA and regulations promulgated by NMFS both establish that accidental take is not prohibited under the MMPA. For example, the legislative history of the MMPA includes the statement that "take" under the MMPA "is not intended to mean the killing of a marine mammal by a vessel or its appurtenances as the result of an accident or Act of God." House Conf. Rep. 92-1488. Consistent with this legislative history, NMFS regulations define "take" under the MMPA to extend to "the negligent or intentional operation of an aircraft or vessel." 50 C.F.R. 216.3. A vessel collision with a Right Whale, which has a very low probability of occurring, is *de facto* accidental and, therefore, cannot be prohibited "take." To wit, the prohibition of a million vessel trips that occur without a collision with a Right Whale to prevent a single vessel trip that leads to an accidental collision with a Right Whale is not a legitimate exercise of regulatory authority.

Turning next to the ESA, the Act does not authorize NMFS to promulgate rules that prohibit conduct that has a very remote probability of causing "take" of listed species. Rather, section 9 of the ESA prohibits "take" of endangered species. The means (or "policy instruments") that Congress included in the ESA to implement the "take" prohibition are twofold: the enforcement provisions in section 11 that authorize NMFS as well as citizens to initiate lawsuits to enforce the prohibition and the procedures in section 7 and 10 that provide processes for entities undertaking federal and non-federal actions, respectively, to obtain authorization for "take" incidental to otherwise lawful activity. Those means that Congress included in the ESA do not include regulations to prevent take. The vessel speed rule purports to impose an enforceable requirement on vessel operators under the ESA, even when those operators have not engaged in prohibited take of Right Whales and there is a *de minimis* risk that their conduct could result in prohibited take. Further, compliance with the rule does not immunize the vessel operator from liability for

take in the unlikely event that even operative at the slower speed the vessel collides with a Right Whale.

Negligible Impact Determination

A second example of reliance on the precautionary principle to justify agency decision-making is the guidance on negligible impact determinations under the MMPA issued by NMFS in 2020. Section 102 of the MMPA generally prohibits "take" of marine mammals and section 3 defines "take" to include the actual or attempted harassment, hunting, capturing, or killing of marine mammals. However, section 101 of the MMPA includes exceptions to the "take" prohibition. Among these is section 101(a)(5)(E), which provides that NMFS shall allow the incidental taking of ESA listed marine mammals by persons using vessels of the United States and those vessels which have valid federal fishing permits while engaged in commercial fishing if NMFS makes certain determinations. Section 101(a)(5)(E) applies in tandem with section 118 to commercial fishery operations that impact ESA listed marine mammals.

Under section 101(a)(5)(E), NMFS must determine, after notice and an opportunity for public comment, that: (1) incidental mortality and serious injury from commercial fisheries will have a "negligible impact" on the affected marine mammal; (2) a recovery plan has been developed or is being developed for the marine mammal under the ESA; and (3) where required under section 118 of the MMPA, a monitoring plan has been developed and a take reduction plan has been developed or is being developed for such marine mammal. In other words, NMFS is required to make a negligible impact determination in order to authorize take due to commercial fishery operations.

Section 118, meanwhile, imposes additional requirements governing the taking of marine mammals incidental to commercial fishing. For example, under section 118(f)(1), the Secretary must "develop and implement a take reduction plan designed to assist in the recovery or prevent the depletion of each strategic stock which interacts with a commercial fishery." These take reduction plans are developed by take reduction teams and must include information on the number of animals being killed or seriously injured annually, recommended measures to reduce mortality and serious injury, and recommended dates for achieving the plan objectives.

As this very brief description of the regulatory requirements applicable to commercial fishing operations under the MMPA demonstrates, there are layers of requirements applicable to such operations. The requirement that incidental mortality and serious injury from commercial fishery operations will have a "negligible impact" on the affected species or stock is but one of these requirements, but it has outsized importance due to NMFS's interpretation of the specific provision. To begin with, the negligible impact determination guidance is notable because it interprets the term "negligible impact" as applied to commercial fisheries but was not subjected to notice and comment. But more importantly, the guidance establishes a negligible impact threshold for commercial fisheries that is unduly burdensome and, in some instances, unattainable. The formula for that threshold is:

$$NIT_s = N_{min} \times 0.5R_{max} \times 0.013$$

where NIT_s is the negligible impact threshold for a single fishery, N_{min} is the minimum abundance estimate for the species or stock, and R_{max} is the maximum net productivity of the species of stock.

At each step, NMFS builds in an assumption based on the precautionary principle. So, with respect to abundance, rather than use the most likely abundance estimate, NMFS uses the minimum abundance estimate. NMFS then multiplies this minimum abundance estimate by one-half the maximum net productivity rate (where the maximum net productivity rate is the rate that will result in the optimum sustainable population of the species, a term defined in section 3 of the MMPA). Finally, as NMFS acknowledges expressly in the guidance, the agency multiplies the first two variables by 0.013 (or 1.3 percent) to generate a negligible impact threshold for the specific fishery under consideration. By purposely tipping the scale at each step, NMFS compounds its distortion of the decision-making process.

The negligible impact determination guidance has the effect of curtailing or possibly shutting down commercial fisheries. The exercise of such authority, which has vast economic significance, arguably goes beyond the authority delegated to NMFS by Congress. In addition, the exercise of such authority via guidance rather than rulemaking that is subject to notice and comment arguably is an end run around the requirements of the Administrative Procedure Act. Finally, use of the precautionary principle at each step in the process of making negligible impact determinations distorts the decision-making process by inflating the effects of any given commercial fishery on a protected marine mammal and causing needless economic dislocation across multiple commercial fisheries.

Bone Cave Harvestman Listing

A third example of reliance on the precautionary principle to justify agency decision-making is the continued listing of the Bone Cave Harvestman by USFWS as an endangered species under the ESA. The Bone Cave Harvestman is a pale, orange, eyeless harvestman that is evolutionarily adapted to spending its entire life in subterranean cave and crevices in the Balcones Canyonlands in portions of Travis and Williamon Counties, Texas. Very little is known about the species despite the fact that it has been listed for more than 35 years. For example, scientists do not understand its reproductive habits, its life span, or the size of the species' historical and contemporary populations. Further, there exists no data or analyses providing any indication whether the populations of the species are growing or in decline or whether the species' range has expanded or contracted over time other than data regarding simple presence or absence in known caves.

USFWS first listed the Bone Cave Harvestman in 1988 under the name Bee Creek Cave Harvestman. At the time of the listing, the only known occurrences of the species were in five or six caves. In deciding to list the species on an expedited basis, USFWS described urban, industrial, and highway expansion in the area of the recorded occurrences as a threat to the species. In 1993, USFWS recognized the Bone Cave Harvestman as a separate species and published a final rule listing it as such.

In the years after its initial listing, occurrences of the species doubled from 6 to 12 then doubled again from 12 to 24, then doubled again from 24 to 48, then doubled again from 48 to 96, and then doubled again from 96 to 192. The number of known occurrences now exceeds 225 caves and crevices. Common sense dictates that the species, once though to be rare, is routinely detected within the cave habitat available to it. Further, while little is known about the species and its population dynamics, conservation biology suggests that each occurrence detected does not only represent the single individual identified but rather is representative of a population in that discrete cave or crevice, or cluster of caves and crevices. In other words, hundreds of individual detections does not amount to hundreds of individuals as it might for a species such as the Grizzly Bear; instead, it amounts to many dozens or perhaps even hundreds of populations within a meta-population.

At the same time, the primary threat to the species identified by USFWS – development in the region – has continued apace with the growth in number of species occurrences since the time of listing. Concrete evidence to support the hypothetical threat posed by development to the continued existence of the Bone Cave Harvestman remains elusive. For example, the species continues to persist in: Inner Space Caverns, a large commercial cave located under Interstate 35 which receives 100,000 visitors annually; in 25 caves located in a golf and retirement community; and in a cave feared by USFWS in 1988 to no longer exist due to a roadway extension, and in several caves located under a large state highway.

On the other hand, at least half of all known occupied caves are protected from land development and managed consistently with conserving the species, many of which were preserved pursuant to local government-sponsored habitat conservation plans approved by USFWS. The plan implemented by the City of Austin and Travis County requires those entities to preserve 19 caves—86 percent of the species' total known localities within Travis County at the time USFWS approved that plan. At least 16 of the 19 caves have been preserved to date. Just north, in Williamson County, the County and the Williamson County Conservation Foundation committed to preserving and managing approximately 700 acres of land benefitting the Bone Cave Harvestman. That plan was based on the USFWS's recovery plan in effect as of the date that plan was approved. Under the Williamson County plan, approximately 943 acres of land have been preserved and new localities of the species have been documented.

The continued listing of the Bone Cave Harvestman, which was presumed endangered at the time of listing because of the small number of known occurrences of the species, is evidence of cognitive bias at USFWS. The agency continues to invoke the same narratives to justify its listing now that were communicated at the time of the initial listing in 1988. And the agency has put on blinders to the substantial body of evidence that countermands that narrative. This conduct is not decision-making on the basis of the best available scientific information; it is based on the precautionary principle. As such, it is unlawful.

Conclusion

NMFS and USFWS face substantial challenges as they implement the MMPA and ESA, including imperfect information regarding the status, threats to, and conservation needs of

protected species and politicization of agency decisions from both sides of the aisle. But that is not grounds for giving the agencies a pass when their actions have real world consequences for both wildlife and society. Instead, given the stakes, NMFS and USFWS should be held to account to make decisions on the basis of the best available scientific information without bias and mindful of the impacts of their decisions on every-day Americans and America's wildlife.