

The SAND BAR

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Legal Reporter for the National Sea Grant College Program



Removal of Species from ESA List has Ripple Effect on Humpback Whale Regulations

Also,

Ninth Circuit Rules Salmon Fisheries Management Plan Amendment Contrary to Magnuson-Stevens Act

What is the Status of the Water Crisis in Flint?

To Catch an Aquarium Fish: Court Rules on Environmental Review of Permits

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Cover page photograph of a humpback whale courtesy of Michael Sale.

Contents page photograph of a humpback whale breaching at sunset courtesy of Meandering Mouse Media.





The SANDBAR

CONTENTS

Removal of Species from ESA List has Ripple Effect on Humpback Whale Regulations... 4

Ninth Circuit Rules Salmon Fisheries Management Plan Amendment Contrary to Magnuson-Stevens Act 6

What is the Status of the Water Crisis in Flint? 9

Landowner Wants Last Word in Aquaculture Review 12

To Catch an Aquarium Fish: Court Rules on Environmental Review of Permits 14

REMOVAL OF SPECIES FROM ESA LIST HAS RIPPLE EFFECT ON HUMPBACK WHALE REGULATIONS

Ashley Stilson¹



Photograph of a humpback whale courtesy of Sylke Rohrlach.

The humpback whale's recovery story continues to unfold as a successful environmental tale. For the past forty-seven years, humpback whales were listed as endangered under the Endangered Species Act (ESA) due to intense commercial whaling that significantly depleted their worldwide population.² Through an international ban on harvesting and domestic laws protecting the species, humpback whale numbers have increased to the point where, in September 2016, the National Marine Fisheries Service (NMFS) issued a final determination revising the humpback whale's endangered species status.³

In making its determination, NMFS divided the worldwide humpback whale population into fourteen distinct population segments (DPS) (i.e. discrete populations that are significant to the worldwide population). Only four DPS (Cape Verde Islands/Northwest Africa, Western North Pacific, Central America, and Arabian Sea) are now listed as endangered, one DPS (Mexico) is listed as threatened, and the remaining nine DPS are no longer listed at all! While the removal of the humpback whale's species-wide endangered status is a sign of remarkable success, the various ESA listings among the DPSs created the possibility for protection gaps.

This is because the ESA makes it unlawful for any person to “take” an *endangered* species, leaving threatened and unlisted DPS without their previous protections.⁴

In order to ensure there was no lapse in protection, NMFS simultaneously issued its final determination and new and amended regulations regarding humpback whale protection and approach.⁵ One regulation extends ESA protection for endangered species to threatened humpback whale DPS.⁶ Two additional regulations prohibit approaching both endangered and threatened humpback whales within 100 yards or disrupting their normal behavior or prior activity in Alaska.⁷

NMFS also issued additional regulations under the Marine Mammal Protection Act (MMPA) in order to protect unlisted humpback whale DPS. The MMPA makes it unlawful to “take” any marine mammal in U.S. waters.⁸ NMFS issued regulations that prohibit approaching humpback whales within 100 yards or disrupting their normal behavior or prior activity in both Alaska and Hawaii.⁹

By simultaneously issuing a final determination and new and amended regulations, NMFS ensured there was no lapse in humpback whale protection. These protections will continue to aid the species in their successful recovery. ❧

Endnotes

¹ 2017 J.D. Candidate, Elisabeth Haub School of Law at Pace University.

² Approach Regulations for Humpback Whales in Waters Surrounding the Islands of Hawaii Under the Marine Mammal Protection Act, 81 Fed. Reg. 62,010 (Sept. 8, 2016).

³ Endangered and Threatened Species; Identification of 14 Distinct Population Segments of the Humpback Whale (*Megaptera novaeangliae*) and Revision of Species Wide Listing, 81 Fed. Reg. 62,260 (Sept. 8, 2016).

⁴ 16 U.S.C. §§ 1538(a)(1); 1532(19) (“Take” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct”).

⁵ 81 Fed. Reg. 62,010; 81 Fed. Reg. 62,260; Technical Amendments and Recodification of Alaska Humpback Whale Approach Regulations, 81 Fed. Reg. 62,018 (Sept. 8, 2016).

⁶ 50 C.F.R. § 223.213.

⁷ Id. §§ 223.214; 224.03(b).

⁸ 16 U.S.C. §§ 1372(a)(2)(A); 1362(13) (A taking occurs when a marine mammal is or there is an attempt to harass, hunt, capture, or kill any marine mammal); 50 C.F.R. § 216.3 (A taking of a marine mammal can also result from negligent or intentional aircraft or vessel operation or any other negligent or intentional act which disturbs a marine mammal).

⁹ 50 C.F.R. §§ 216.18; § 216.19 (In Hawaii, using an aircraft to approach humpback whales within 1,000 feet is also prohibited).



Photograph of a diving humpback whale's tail courtesy of Peter de Ruiter.

NINTH CIRCUIT RULES SALMON FISHERIES MANAGEMENT PLAN AMENDMENT CONTRARY TO MAGNUSON-STEVENSON ACT

Nathan Morgan¹



Photo of Cook Inlet in Alaska courtesy of Robbie Shade.

Since becoming a United States territory, and continuing throughout statehood, Alaska has been known for and shaped by its salmon fisheries.² Today, in light of diminished salmonid populations nationally, Alaska holds a unique position. Alaska is the only region along the Pacific Coast that hosts the five salmonid species together in abundance.³ One area in particular, Cook Inlet, located in the central Gulf of Alaska, contributes significantly to Alaska's salmon fishing legacy.⁴ While the federal government has assumed management over most of the Alaskan salmonid fisheries, it has exempted Cook Inlet from federal management, leaving it to state control.

In a recent case, two commercial salmon fishing groups challenged the National Marine Fisheries Service's (NMFS) decision to exempt three historic net fishing areas, including Cook Inlet, from the Fisheries Management Plan (FMP) for salmon, leaving only the state to regulate the fishery. The Ninth Circuit ruled that NMFS cannot exempt a fishery from an FMP if it requires conservation and management under the Magnuson-Stevens Fisheries Conservation and Management Act (Magnuson-Stevens Act).⁵ NMFS, however, may delegate management authority to a state if it does so explicitly through the FMP.⁶

Regulatory Background

Federal fisheries management in the North Pacific Ocean began in response to international agreement in 1953.⁷ Congress enacted the North Pacific Fisheries Act of 1954 (1954 Act) establishing federal regulatory authority over Alaskan waters up to twelve nautical miles from shore. The 1954 Act excluded three fishing areas, including Cook Inlet, from regulation, leaving those areas to Alaskan control, which historically allowed net fishing.

The Magnuson-Stevens Act, enacted in 1976, aspires to prevent and eliminate overfishing through the development and implementation of FMPs. The Act provides NMFS with the authority to regulate marine fisheries in federal waters out to 200 nautical miles from shore.⁸ It grants states management authority over waters within three nautical miles from shore. When developing FMPs, the regional fisheries management council for a given jurisdiction must balance conservation and economic interests based on the best available scientific information to determine the optimum sustainable yield for a given fishery.⁹

In its development of the Salmon FMP, the North Pacific Fisheries Management Council reapplied the exceptions for salmon fishing allowed in the 1954 Act. It split Alaskan fisheries into East and West Areas, with Cook Inlet in the West. The Council prohibited commercial salmon fishing in all areas except Cook Inlet and two other historic net fishing areas, which were again left to state management. When the Council later amended the Salmon FMP, it reiterated that although commercial salmon fishing was prohibited in the West Area, the historic net fishing areas, including Cook Inlet were “conducted and managed by the State of Alaska as nearshore fisheries,” although they did extend into federal waters.¹⁰ Congress repealed the 1954 Act in 1992 following the negotiation of another new international convention, leaving the Council without statutory support to exempt the historic net fishing areas from the FMP.¹¹

Salmon FMP Amendment 12

The North Pacific Fisheries Management Council reviewed the Salmon FMP in 2010. In 2011, realizing that the Salmon FMP “does not explicitly defer management” of these areas to Alaska, the Council proposed Amendment 12 to remove these areas from the Salmon FMP and thereby from federal jurisdiction. When NMFS solicited public comments on Amendment 12, United Cook Inlet Drift Association and Cook Inlet Fishermen’s Fund (collectively “United Cook”) commented against it.¹²

United Cook raised concerns regarding commercial catch decline of 51% for sockeye salmon since 1981. They attributed the decline to Alaska’s failure to meet its own management goals. In June 2012, following the notice and comment period, NMFS issued a final Environmental Assessment (EA). The EA explained that Alaska was the “appropriate authority for managing Alaska salmon fisheries” based on its expertise, infrastructure, and current management scheme.¹³ The EA further suggested that Alaska’s management structure was actually more effective at combating and preventing overfishing than the federal government’s. NMFS concluded that state regulation would not have a significant impact on the environment since it maintained the same management of the fisheries currently in place. NMFS then adopted the Amendment and implemented it in December 2012.

United Cook’s Challenge

United Cook brought two claims against NMFS following the approval of Amendment 12. First, United Cook asserted that Amendment 12 was contrary to the Magnuson-Stevens Act’s requirement to prepare an FMP “for each fishery under its authority that requires conservation and management.”¹⁴ They further alleged that Amendment 12 was “arbitrary[,] capricious and contrary to the National Environmental Policy Act.”¹⁵ The U.S. District Court for the District of Alaska allowed the State of Alaska to enter the case, joining NMFS as a defendant. The district court entered summary judgment for NMFS, which United Cook appealed.

On appeal, NMFS argued that the statute only requires an FMP for fisheries that require conservation and management at the federal level and not those fisheries delegated to the states. Further, NMFS suggested that Alaska’s regulation is effective, making conservation efforts at the federal level unnecessary. While the district court deferred to NMFS’ expertise, the Ninth Circuit re-applied the *Chevron* two-step analysis to determine whether the agency’s action was arbitrary. In this instance, the Ninth Circuit only needed to consider the first step of *Chevron*, in which a court must determine whether Congress directly spoke to the precise issue in dispute. If Congress did, the congressional language overrides an alternative agency interpretation.¹⁶ The Magnuson-Stevens Act states that a Fisheries Management Council must “for each fishery under its authority that requires conservation and management, prepare and submit to the Secretary (A) a fishery management plan...”¹⁷ The Ninth Circuit noted that if it were to read such language as NMFS suggests – that a council shall only develop an FMP for fisheries which require “*federal* conservation and management”¹⁸ – it would be adding language to the statute.

Photo of a bear catching a salmon in Valdez, Alaska courtesy of the Alaska Region U.S. Fish & Wildlife Service.



NMFS argued that since the statute allows states to regulate fishing vessels registered in their jurisdiction where no FMP exists, the provision acts as a means of “deferral.” NMFS claimed it may defer fishery regulation to the state, making an FMP unnecessary. The Ninth Circuit reached the opposite conclusion, finding the “deferral” provision a restriction on NMFS’s ability to defer to state management. Under the language of the 1996 amendment to the Magnuson-Stevens Act, a state may only regulate fishing vessels registered in its jurisdiction if 1) there is no FMP, or 2) the state law is consistent with the FMP. However, NMFS may only delegate fishery regulation of a fishery requiring conservation and management to a state if it does so explicitly in an FMP.¹⁹ Since NMFS attempted to exclude Cook Inlet from the Salmon FMP, rather than delegating management of those areas *through* the FMP, Amendment 12 was contrary to the Magnuson-Stevens Act.

Conclusion

The Ninth Circuit concluded that the Magnuson-Stevens Act language is clear as to Congress’s intent – NMFS, through its fisheries management councils, may only delegate regulation of a fishery requiring conservation and management if done expressly in an FMP. As the Ninth Circuit emphasized, this maintains the spirit of the Magnuson-Stevens Act, which manages fisheries for the nation as a whole, rather than an individual state’s interest.²⁰ Given this statutory framework, and the North Pacific Fisheries Management Council’s unanimous vote on Amendment 12, Alaska may likely be delegated management authority of the historic net fishing areas within the context of the Salmon FMP. ♻

Endnotes

- ¹ 2017 J.D. Candidate, Vermont Law School.
- ² Katie Sechrist and Joe Rutz, *The History of Upper Cook Inlet Salmon Fisheries: A Century of Salmon*, ALASKA FISH AND WILDLIFE NEWS (January 2014).
- ³ John Sisk, *Chapter 9: The Southeastern Alaska Salmon Industry: Historical Overview and Current Status*, A CONSERVATION ASSESSMENT AND RESOURCE SYNTHESIS FOR THE COASTAL FORESTS AND MOUNTAINS ECOREGION IN THE TONGASS NATIONAL FOREST AND SOUTHEAST ALASKA (March 2007).
- ⁴ Alaska Department of Fish and Game, [COMMERCIAL FISHERIES OVERVIEW: COOK INLET MANAGEMENT AREA](#).
- ⁵ *United Cook Inlet Drift Ass’n v. National Marine Fisheries Service*, 837 F.3d 1055, 1065 (2016).
- ⁶ *Id.*
- ⁷ *Id.* at 1057.
- ⁸ NOAA Fisheries, [MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT](#) (last visited Dec. 1, 2016); 16 U.S.C. § 1801.
- ⁹ *Id.*
- ¹⁰ *United Cook Inlet Drift Ass’n*, 837 F.3d at 1059.
- ¹¹ *Id.*
- ¹² *Id.* at 1060-1061.
- ¹³ *Id.* at 1061.
- ¹⁴ *Id.*
- ¹⁵ *Id.*
- ¹⁶ *Id.* at 1061-1062 (*citing* *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)).
- ¹⁷ *Id.* at 1062 (*citing* 16 U.S.C. 1852(h)(1)).
- ¹⁸ *Id.* at 1061.
- ¹⁹ *Id.* at 1062-1063.
- ²⁰ *Id.* at 1063 (comparing the Magnuson-Stevens Act language, which classifies fisheries management as nationally important, to the Alaskan Constitution, which requires management of natural resources to the maximum benefit of the state).

WHAT IS THE STATUS OF THE WATER CRISIS IN FLINT?

Catherine M. Janasie¹

Photo of Flint, Michigan courtesy of Ken Lund.



It has been over a year since the crisis with Flint, Michigan's water supply became national news. The saga began when the city switched to using water from the Flint River instead of continuing to buy water from Detroit in April 2014. Flint residents immediately began complaining about the quality of the water in their homes. However, despite growing evidence, it took until October 2015 for the state of Michigan to confirm that there was a problem with the amount of lead in Flint's drinking water. Multiple lawsuits were filed challenging the

state and city's actions leading to the crisis. Over a year later, initial rulings are starting to come in those cases, but unfiltered tap water in Flint is still unsafe to drink.

Litigation Update

Once it became apparent that there were unsafe levels of lead in Flint's drinking water supply, numerous lawsuits were filed challenging the government's actions concerning the city's water supply. A couple of notable initial decisions in these cases are described below.



Timing Issues

Federal and state law often require plaintiffs to file their lawsuits within a certain period of time from their injury. In Michigan, since the government is ordinarily immune from claims against it, the state requires claimants to give the government notice of their suit within six months of “the event giving rise to the cause of action.”² When the harm caused is an injury from an accident or some other clearly identifiable incident, the date of the injury is easy to determine. However, when the claims arise over consequences from using contaminated water like what happened in Flint, the precise date of the injury is more difficult to ascertain.

An initial issue that a Michigan court recently had to wrestle with is when the six-month notice period began. The defendants in the case argued that the notice period either began in June 2013 when the city decided to switch to Flint River water or in April 2014 when Flint residents first received Flint River water in their homes.³ The plaintiffs in this suit filed their claims in January 2016, much more than six months after either of the dates proposed by the defendants. The defendants argued that the plaintiffs’ complaint therefore must be dismissed. The court, however, decided to rule against the defendants on this point.

The court relied on a previous Michigan court decision, *Rusha v. Department of Corrections*.⁴ In that case, the Michigan Court of Appeals acknowledged that there can be an exception to a time limit in a case when applying the time limit would be “so harsh and unreasonable in the consequences that it ‘effectively divest[s]’ a plaintiff ‘of access to the courts intended by the grant of the substantive right.’”⁵ The judge noted that the Flint crisis presented similar unique circumstances. Although Flint switched water sources back in April 2014, state officials continued to discredit reports that there were issues with the water and assert the water was safe to drink well into 2015. It was not until October 2015 that the Governor acknowledged that Flint water had dangerous lead levels and ordered the city to reconnect to Detroit water.⁶ Thus, the court reasoned that the plaintiffs’ cause of action was not readily apparent when the city switched water sources, and the types of injuries the plaintiffs are alleging “likely became manifest so gradually as to have been well established before becoming apparent to plaintiffs...”⁷ Finally, the court found that summary judgment was inappropriate because there were still issues of material fact as to which plaintiffs complied with the notice requirements.⁸



Water Delivery

Because unfiltered tap water in Flint still is not in compliance with the Safe Drinking Water Act (SDWA), a federal court recently ordered operators of the Flint water system to ensure the city's residents have access to safe drinking water. The court order had two parts. The court noted that the first priority was to properly install and monitor water filters. Then, for those houses without "properly installed and maintained water filters," the water system must provide home-delivery of bottled water.⁹ The Michigan Attorney General immediately filed a motion in response to try to stay the order. The state's arguments were based on the premise that the order required water delivery to 100% of Flint residents, making it cost prohibitive for the state. In fact, the state argued that in-home delivery of bottled water would cost around \$10 million a month.¹⁰ Further, the state argued that there were not current SDWA violations in Flint, and thus, the order was not needed.

In rejecting the motion to stay, the court noted that the state's premise that the order requires door-to-door delivery to all Flint residents was false, since home delivery is only required for homes without installed and monitored water filters. The court also rejected the notion that Flint was not violating the SDWA, stating that SDWA violations continue in the city and "that unfiltered tap water in Flint is not safe to drink at this time."¹¹ In denying the state's motion, the court noted that "Flint residents continue to suffer irreparable harm from a lack of reliable access to safe drinking water. This is more than a mere inconvenience; hunting for water has become a dominant activity in some resident's lives, causing anxiety, stress, and financial hardship."¹²

Conclusion

The cases brought in response to the Flint water crisis will continue to go through these initial motions and orders. In addition, the city is still waiting for Congressional

aid to help the city address its water problems. In December, Congress passed a water resources bill that includes aid to Flint.¹³ Finally, after the drinking water crisis in Flint, there has been criticism of the procedures for ensuring the safety of drinking water under the U.S. Environmental Protection Agency's (EPA) Lead and Copper Rule. While the Agency released its plans for revision to the rule in October, the rule has not been updated and it is unclear how a change in administration might affect the EPA's plans. ❧

Endnotes

¹ Research Counsel, National Sea Grant Law Center.

² MICH. COMP. LAWS § 600.6431(3).

³ [Opinion and Order at 8-9](#), *Mays v. Snyder*, No. 16-000017-MM (Mich. Ct. Cl. Oct. 26, 2016).

⁴ *Rusha v. Dept. of Corrections*, 307 Mich. App. 300 (2014).

⁵ *Mays*, at 9 (*quoting* *Rusha v. Dept. of Corrections* 307 Mich. App. 300 (2014)).

⁶ *Id.* at 6.

⁷ *Id.* at 10-11.

⁸ *Id.* at 13.

⁹ [Opinion and Order Denying Motion to Stay Preliminary Injunction, Concerned Pastors for Social Action v. Khouri](#), No. 16-10277 (E.D. Mich. Dec. 2, 2016).

¹⁰ Tresa Baldas, [Michigan to 6th Circuit: Don't Make Us Deliver Bottled Water to Flint](#), DETROIT FREE PRESS, Dec. 5, 2016.

¹¹ Order, 6. - *Supra* note 3.

¹² *Id.* at 8.

¹³ Melissa Nann Burke, *Senate Passes Bills Containing Aid for Flint*, THE DETROIT NEWS, Dec. 9, 2016.

LANDOWNER WANTS LAST WORD IN AQUACULTURE REVIEW

Alexandra Chase¹



Mud fiddler crabs courtesy of Neil DeMaster.

Although Asia remains the main producer of aquaculture products, U.S. operations are increasing to capture a share of the growing aquaculture market. Both the number and geographical size of domestic operations have increased in the last decade. Aquaculture producers are frequently requesting leases for both water columns and the submerged lands and choosing to rear a diverse variety of aquatic species. Conflicts between shellfish producers and local shoreline landowners and community members have increased as aquaculture operations have grown in number, size, and intensity of use. This was evident in a recent Maryland case in which a landowner opposed a planned shellfish cultivation site.¹

Maryland Aquaculture Leases

In Maryland, the state's Department of Natural Resources (DNR) administers submerged land and water column leases for shellfish cultivation. Upon receiving a lease application, the DNR conducts a review of the application and the proposed site to determine if the lease complies with relevant statutory requirements.² In instances where the proposed lease satisfies the statutory guidelines, but is located in an area that has not been preapproved, the area must be staked and the DNR must advertise the proposed lease to the public. Individuals opposed to the lease can then submit a petition of protest and request a contested case hearing with the Office of Administrative Hearings (OAH).

Once the lease application is determined to meet all statutory guidelines and either no protest is filed or any filed protests are resolved by a final dismissal, the DNR must issue the lease. The DNR can attach conditions to the lease or deny a lease “for reasonable cause” under the police powers, where the proposed lease would harm “the public health, safety, or welfare.”³



Contested Lease

In the summer of 2012, Robert Lumpkins applied to the DNR for an aquaculture lease in St. George's Creek, St. Mary's County, Maryland. The proposed lease was for 5.7 acres of submerged land and the corresponding water column. The DNR found that the proposed lease met statutory requirements and consequently advertised the proposed lease on its website and in a local publication before issuing final approval. Carl Kirk, along with twelve other community members, submitted petitions of protest against Lumpkins's lease application. The proposed lease site is located in front of Kirk's shoreline property and he was concerned that the aquaculture activities would harm his property values, infringe on his navigational rights, and interfere with his ability to lease the site for his own aquaculture project.

In December 2013, the DNR hosted a public information session regarding the proposed lease. On January 17, 2014, the DNR facilitated a conversation between Lumpkins and individuals with concerns about the proposed lease. The lease opponents agreed to drop their opposition in exchange for certain concessions by Lumpkins. He agreed to reduce the land and water column lease area by nearly 34% and 66% respectively, and limit the maximum height of oysters he would plant on the bottom of the lease area.

Kirk was unable to attend the informal mediation and requested the minutes. Unfortunately, the DNR could not comply with the request because no meeting minutes existed. In early April 2014, the DNR facilitated

an informal mediation between Kirk and Lumpkins, who were unable to reach a resolution on the proposed lease. The DNR then forwarded Kirk's petition to the OAH and requested that the complaint be dismissed, arguing that the proposed lease met all statutory requirements and that OAH should dismiss Kirk's petition without a hearing as there was no dispute as to the material facts of whether the proposed lease met the statutory criteria.

Kirk conceded that the proposed lease met the statutory guidelines. Kirk argued, however, that by not providing him with minutes from the January 17th meeting, the DNR violated the Open Meetings Act. The Maryland Open Meetings Act requires that the public have access to the time and location of public body meetings and that minutes be taken and adopted. An Open Meetings Act violation is resolved by either filing a complaint with the Open Meetings Compliance Board or suing the public body. Kirk had filed a complaint with the Open Meeting Compliance Board; however, the Board dismissed Kirk's complaint, finding that the mediation was not a public body meeting.

OAH dismissed the court case without a hearing, holding that the Open Meetings Act was not germane to whether the lease had been properly approved. Kirk then petitioned for judicial review in the Prince George County Circuit Court, which affirmed the OAH holding. Kirk then appealed to the Court of Special Appeals of Maryland, who also affirmed the circuit court's ruling. In an unpublished opinion, the appellate court held that the DNR is not required to facilitate mediation meetings for oyster leases and that even if the Open Meetings Act did apply to the mediation, a lack of minutes would not affect the merits of Lumpkins's lease application.

Conclusion

The Maryland DNR is likely not subject to the Open Meeting Act requirements when facilitating informal mediations. The DNR lease process is based on specific state guidelines. Efforts to successfully challenge an aquaculture lease application must be made on the merits: whether the proposed lease complies with the appropriate statutory requirements. ♡

Endnotes

¹ See *Kirk v. Md. Dep't of Nat. Res.*, No. 0399 (Md. Ct. Spec. App. Aug. 5, 2016).

² The DNR works in conjunction with the Maryland Department of the Environment, other state agencies, and the U.S. Army Corps of Engineers to ensure that statutory guidelines are met.

³ M.D. Nat. Res. Code § 4-11A-09(d)(4)(2013). *Kirk*, No. 0399, at 3.

TO CATCH AN AQUARIUM FISH: COURT RULES ON ENVIRONMENTAL REVIEW OF PERMITS

Terra Bowling

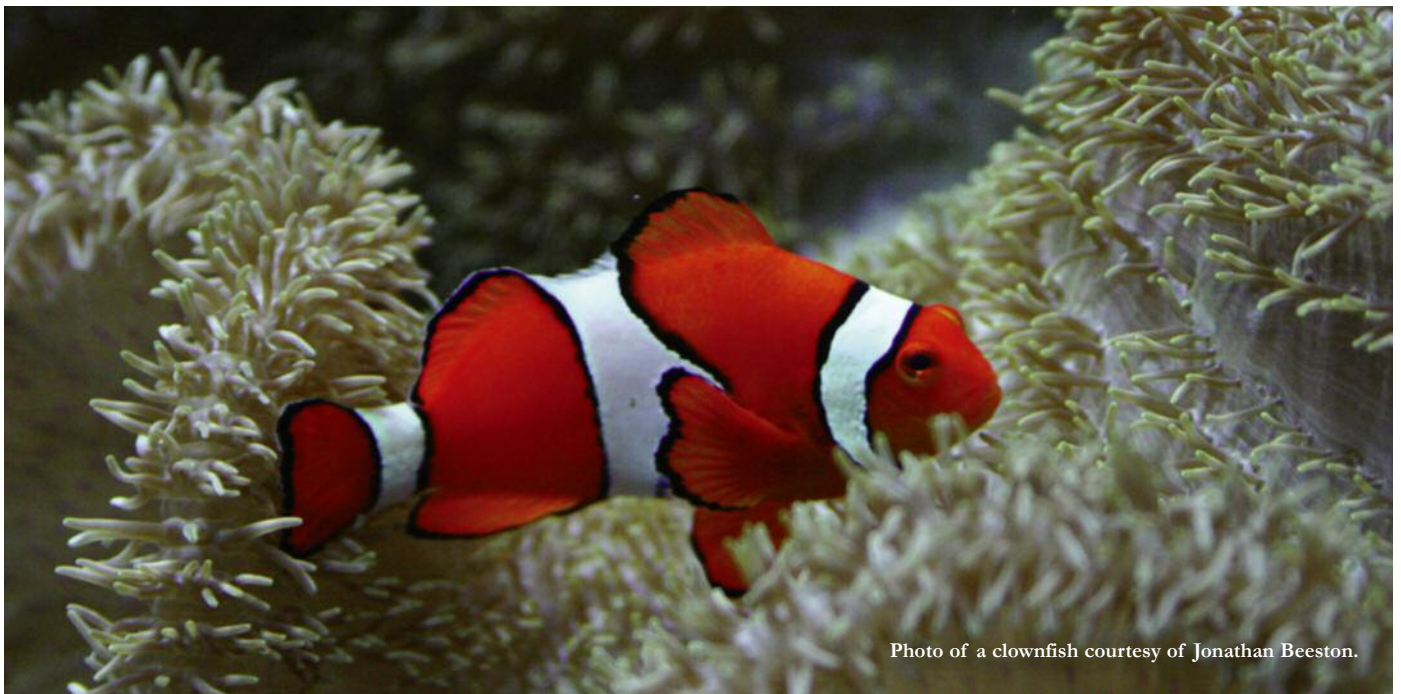


Photo of a clownfish courtesy of Jonathan Beeston.

Each year, thousands of exotic fish are purchased through the aquarium trade. Many of these fish originate from warm, tropical waters, such as those in the Philippines, Indonesia, and Hawaii. While many enjoy the beauty these fish bring to their homes, schools, or businesses, the capture of these fish for the aquarium trade can be controversial, as some worry about impacts of collection on the species and their habitats.

In a recent case, individuals and environmental groups sued the state of Hawaii over its issuance of aquarium trade permits. The plaintiffs sought to compel the state to require environmental studies prior to issuing collection permits.¹ A Hawaii appeals court ruled that no Environmental Assessment (EA) is required to issue permits for the take of aquarium fish.

Background

Experts estimate that there are approximately 1,800 tropical fish species in the aquarium trade.² The laws and regulations pertaining to the capture of the species depend on where the fish are caught. In Hawaii, the Department of Land and Natural Resources (DLNR) has the authority to issue and renew aquarium collection permits.

Several individuals and nonprofit organizations filed suit against DLNR claiming that the state violated the Hawaii Environmental Policy Act (HEPA) by approving permits without requiring EAs. HEPA establishes necessary environmental review procedures, including consultation, information gathering, and public review and comment, for certain agency actions. HEPA defines “action” as “any program or project to be initiated by an agency or applicant.”³ HEPA requires EAs for actions



Photo of a yellow tang courtesy of Oregon State University.

that meet the following requirements: 1) the action must be initiated by either a government agency or a private party who needs government approval; 2) the action must fall within at least one of nine categories listed in HEPA; and 3) the action must not be exempt under the Act.

The circuit court found that aquarium collection under an aquarium fish permit issued by DLNR is not an “applicant action” under HEPA.⁴ The court reasoned that the “action” of “aquarium collection” is neither a program nor a project that requires government review. The court noted examples of specifically identifiable programs or projects, such as the Hawaii Superferry, that do require this type of review. The court granted summary judgment in favor of the state.

Is It an Action?

On appeal, the environmental groups alleged that HEPA required an EA, because DLNR’s issuance of the permit is a discretionary action that requires approval under HEPA. They also argued that the action fell within one of the nine categories requiring approval: the use of state land. The court noted that it would decide whether HEPA requires an EA from DLNR prior to permit issuance and would

not consider whether the state’s aquatic resources are adequately managed or require more oversight or regulation.

First, the appellate court noted that “[T]he alleged ‘action’ at issue here is the ‘taking of marine or freshwater nongame fish and other aquatic life for aquarium purposes.’”⁵ The court agreed that the collection is not an action under HEPA. “It would be unprecedented to apply HEPA to require individual Hawai’i citizens to undertake the EA process for such an activity. Hawai’i courts have not construed “any program or project” to mean each and every government-regulated activity.”⁶ The court listed examples of other DLNR-issued permits, such as baitfish licenses and hunting permits, which do not require an EA. The court noted that there was no reason to require HEPA environmental review for aquarium collection permits and not for other similar DLNR permits.

THE CIRCUIT COURT FOUND THAT AQUARIUM COLLECTION UNDER AN AQUARIUM FISH PERMIT ISSUED BY DLNR IS NOT AN “APPLICANT ACTION” UNDER HEPA.

Conclusion

Ultimately, the court agreed with the lower court that aquarium collection under a DLNR permit is not an “applicant action” under HEPA. For that reason, the court affirmed the lower court’s grant of summary judgment in favor of DLNR. At this point, it appears as though stricter state laws and regulations would be necessary to impact the aquarium collection process in Hawaii. 🐟

Endnotes

¹ *Umberger v. Dep’t of Land & Nat. Res.*, 138 Haw. 508, 513 (Ct. App. 2016), *as corrected* (Sept. 1, 2016).

² Jane J. Lee, *Do You Know Where Your Aquarium Fish Come From?*, NATIONAL GEOGRAPHIC (July 18, 2014).

³ HAW. REV. STAT. § 343-2.

⁴ *Umberger, et. al v. Hawaii*, Civil No. 12-1-2625-10 JHC (1st Cir. Haw. June 24, 2013).

⁵ *Umberger*, 138 Haw. at 513.

⁶ *Id.* at 516.



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Los Angeles, CA

For more information, visit: <http://bit.ly/35thwater>

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