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The SandBar

Legal Reporter for the National Sea Grant College Program

Court Restores Ban On Gillnet Fishing Gear in North Atlantic Right Whale Habitat

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Cover page photograph of a North Atlantic right whale, courtesy of the Florida Fish and Wildlife Conservation Commission, taken under NOAA research permit #15488.

Contents page photograph of a sunset over the Puget Sound, courtesy of Robert Seif.

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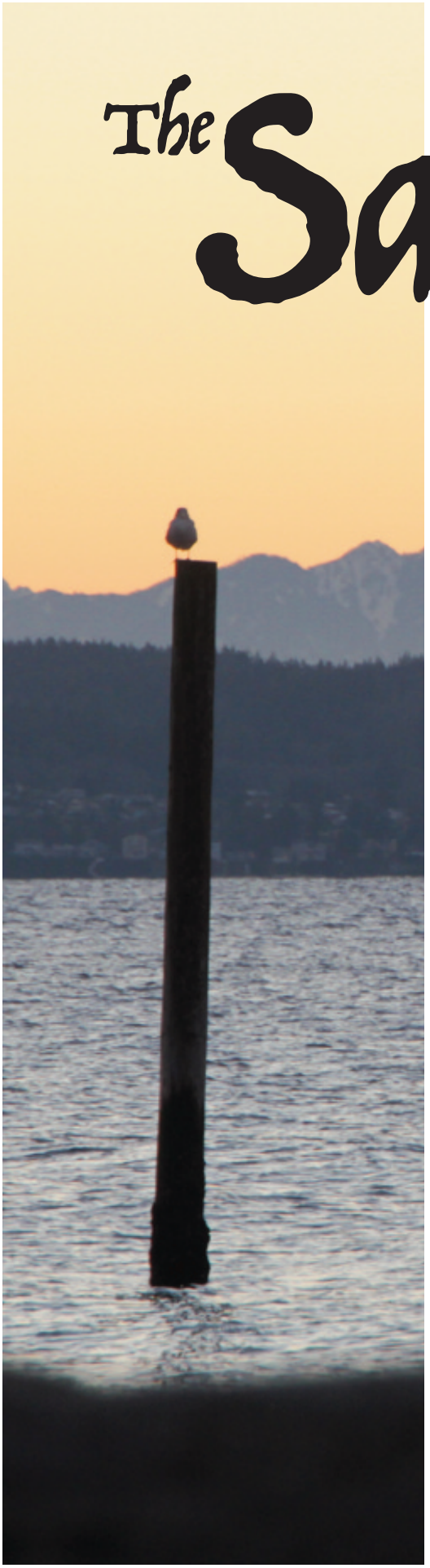

The SandBar

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Court Restores Ban On Gillnet Fishing Gear in North Atlantic Right Whale Habitat

Philip Lott[1]

Photograph of a North Atlantic right whale mother and calf, courtesy of the Florida Fish and Wildlife Conservation Commission.

A federal district court recently restored a ban on gillnet fishing gear in two North Atlantic right whale (*Eubalaena glacialis*) habitats off the coast of New England.[2] The ruling reversed the National Marine Fisheries Service's (NMFS) 2018 Habitat Amendment allowing gillnet fishing gear in the two areas. The court determined that NMFS failed to carry out the necessary consultation to approve the Habitat Amendment.

The North Atlantic Right Whale

In the 1970s, the federal government listed the North Atlantic right whale as endangered under the Endangered Species Act (ESA). Nearly half a century later, the North Atlantic right whale still faces the danger of extinction. Researchers estimate that only about 400 whales are left in the population, and deaths within the species are currently outpacing births.[3] Since 2017, thirty North Atlantic right

whales have died: at least fourteen of those deaths were females, which is a serious blow to the reproductive potential of the North Atlantic right whale.[4] In 2017, NMFS declared the deaths an Unusual Mortality Event (UME) under the Marine Mammal Protection Act.[5]

Major threats to the North Atlantic right whale include entanglement in fishing gear, vessel strikes, and ocean noise. For the threat of entanglement, research suggests that at least "85 percent of right whales have been entangled in fishing gear at least once."[6] Entanglement in fishing gear causes additional stress to the females and is believed to be one of the reasons why females are calving less often.[7] While some entangled whales are able to shed this gear, "other whales may be unable to shed the gear and can carry it for days, months, or even years."[8] In September 2019, the Marine Mammal Commission stated in a letter to NMFS that "entanglement in fishing gear is the leading documented cause of both mortality and serious injury to the North Atlantic right whale.[9]

One particular type of fishing gear poses a threat to the northern right whale: gillnets. Designed to entangle fish by the gills, a gillnet is a nylon wall of netting that hangs in the water.[10] The walls of netting can stretch for up to two miles long and fifty feet high.[11] A consequence of this type of fishing gear is bycatch: the unintended entanglement of large ocean animals like whales. Several areas off the coast of New England had been closed to the groundfish fishery to prevent the bycatch. In April 2018, NMFS approved the Habitat Amendment, which opened up two of the areas, the Nantucket Lightship Groundfish Closure Area and the Closed Area 1 Groundfish Closure Area, to the groundfish fishery. Because of the threat to the endangered North Atlantic right whale, NMFS immediately met pushback.

Challenging the Amendment

Just a month after NMFS announced the Habitat Amendment, the Conservation Law Foundation (CLF) filed its complaint in the U.S. District Court for the District of Columbia alleging that NMFS's Habitat Amendment violated the ESA and the Magnuson-Stevens Act (MSA) by not engaging in formal consultation prior to enacting the amendment. The ESA provides that "[e]ach Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species."[12] Under the MSA, "the Secretary shall . . . immediately commence a review of the plan or amendment to determine whether it is consistent with . . . any . . . applicable law."[13] After issuing its final Environmental Impact Statement for the Habitat Amendment, the Sustainable Fisheries Division (SFD) of NMFS undertook its own internal review process determining that consultation with the Protected Resources Division (PRD) was not required. Thus, CLF argued that SFD failed to consult with PRD about the Habitat Amendment's effects as required by the ESA and MSA.

The court determined that NMFS's failure to consult with PRD "led not only to a failure to consider the combined and cumulative effects of the various measures of the Habitat Amendment but also to SFD's reliance on individual, outdated biological opinions."[14] The court concluded that it could not excuse NMFS's breach of duty, and NMFS violated the ESA and MSA. The court granted CLF's motion for summary judgment.

Restoring the Ban

To remedy NMFS's violations, the court granted an injunction restoring the ban on gillnet fishing gear in the two areas of North Atlantic right whale habitat. In a press release on CLF's website, its Senior Attorney stated that "[w]e cannot afford to lose even one more of these critically endangered creatures" and the court's ruling "rightfully reverses a dangerous course."[15] Using a passage from Herman Melville's magnum opus *Moby Dick*, Judge Boasberg noted in the opinion just what that dangerous course was: "There is no folly of the beasts of the earth which is not infinitely outdone by the madness of men." Though maybe not madness, NMFS's Habitat Amendment violated the mandates of the ESA and MSA. The restoration of the ban in key habitats of the North Atlantic right whale remedies the violations and could help preserve the species.

Endnotes

1 2021 JD Candidate, University of Mississippi School of Law.

2 Conservation Law Found. v. Ross, CV No. 18-1087 (JEB), 2019 WL 5549814 (D.D.C. Oct. 28, 2019).

3 *North Atlantic Right Whale*, NOAA Fisheries.

4 *North Atlantic Right Whale*, Marine Mammal Commission.

5 Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. § 1421(c).

6 *North Atlantic Right Whale*, NOAA Fisheries, *supra note* 3.

7 *Id.*

8 *West Coast Large Whale Entanglement Response Program*, NOAA Fisheries.

9 Peter O. Thomas, *Comments on Atlantic Large Whale Take Reduction Plan Scoping*, Marine Mammal Commission (Sept. 23, 2019).

10 Elizabeth Brown, *Fishing Gear 101: Gillnets - The Entanglers*, Safina Center (June 6, 2016).

11 Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1536(a)(2).

12 Magnuson-Stevens Act (MSA), § 1854(a)(1)(A).

13 Conservation Law Found. v. Ross, CV No. 18-1087 (JEB), 2019 WL 5549814 (D.D.C. Oct. 28, 2019).

14 Jake O'Neill, *CLF Prevails in Right Whale Lawsuit Against Federal Government*, Conservation Foundation (Oct. 28, 2019).

EPA Takes Action on Regulating Lead: What is the New Proposed Trigger Level?

Catherine Janasie[1]

Photograph of Newark, New Jersey, courtesy of Massmatt Media.

This past year, reminiscent of the Flint, Michigan water crisis, news hit of widespread lead contamination in Newark, New Jersey's drinking water. These stories are concerning, as there is no safe amount of exposure to lead, a toxic metal that persists and accumulates in a person's body over time. Fetuses, infants, and young children are the most vulnerable to lead exposure. Even a low dose can damage a child's nervous system, affect growth, impair hearing, and cause learning disabilities.[2] As stories about lead contaminated drinking water arose around the country, the U.S. Environmental Protection Agency (EPA) announced that it would be revising the rule that regulates lead in drinking water, known as the Lead and Copper Rule (LCR). Due to the dangers of lead, many were hoping that the revised rule would lower the lead action level. But when the EPA released its proposed rule in November 2019, the action level remained the same at 15 ppb. However, the new proposed rule contains a "trigger level," set at 10 ppb. This is a new concept within the LCR framework, which leads to the question—what is the purpose of the new proposed trigger level?

The Safe Drinking Water Act

In the United States, drinking water is regulated on the federal level by the Safe Drinking Water Act (SDWA), which aims to ensure the quality of Americans' drinking water.

The SDWA authorizes the EPA to set national standards for drinking water to protect against health effects from exposure to naturally occurring and man-made contaminants.[3] The SDWA regulates public water systems (PWS), which are systems having at least fifteen service connections or serving at least twenty-five people for at least sixty days a year. Drinking water standards may apply differently based on the type and size of the PWS. These systems must ensure that the water they provide meets health standards established in EPA and state regulations.

The Lead and Copper Rule

For each regulated contaminant under the SDWA, the EPA Administrator must adopt "maximum contaminant level goals" or MCLGs that "at the level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety."[4] Through the LCR, EPA has set the MCLG for lead at zero, since there is no safe level of exposure to lead.[5] However, the MCLG is only aspirational and not actionable – meaning PWS cannot be forced to meet the MCLG or penalized for failing to do so.

The SDWA also requires the EPA to establish maximum contaminant levels (MCL) for regulated contaminants. For each regulated contaminant, the PWS has to monitor drinking water to ensure that the MCL is not triggered and take certain steps if and when the MCL is exceeded. The MCL for lead is 15 ppb, which is not a health based standard. Rather, it is technology driven and based on feasibility for the PWSs. Water systems monitor lead levels by sampling household tap water. If these samples show that more than 10% of samples are above the lead action level, certain legal requirements are triggered. A water system, for example, may be required to optimize its corrosion control treatment, engage in public education, or even replace lead service lines under its control.[6]

New Trigger Level

Under the EPA's proposed changes, the action level under the LCR would remain the same- the 90th percentile sample exceeds 15 ppb. However, the proposed rule introduces a new "trigger level," which is when the 90th percentile sample is greater than 10 ppb, but less than 15 ppb. Like the action level, the new trigger level is not a health-based standard. Rather, it is a level proposed by the EPA at which PWSs must take certain actions aimed at reducing lead exposure.

Under the proposed rule, when a PWS has a 90th percentile sample between 10 and 15 ppb, it would be subject to some new requirements. The first proposed change has to do with monitoring frequency. Under the current LCR, a PWS can qualify for reduced monitoring if its samples are consistently below 15 ppb. These systems only have to test for lead on a triennial basis. With the proposed rule, the EPA would require systems with samples between 10 ppb and 15 ppb to sample annually, meaning the reduced monitoring schedule would not be available to these systems.[8]

The proposed rule also has new requirements for corrosion control treatment (CCT) for systems with its 90th percentile sample at the trigger level. CCT focuses on preventing lead in plumbing from leaching into the drinking water supply, since a lot of lead exposure is actually caused by lead leaching out of old plumbing. If a PWS is already using CCT and its samples are at the trigger level, the system needs to follow procedures in the proposed rule for optimizing CCT. The same is true for systems with samples above the action level of 15 ppb. If systems at the trigger level do not already have CCT in place, they must perform a CCT study if its regulating agency requires it. In comparison, systems above the action level would have to install CCT under the proposed rule.[9]

Finally, the proposed rule contains requirements for lead service line replacement (LSLR) for all PSWs that serve more than 10,000 people. Systems that exceed the action level of 15 ppb are required to fully replace 3% of lead service lines each year for two years. Those systems that meet the trigger level have a lesser requirement. They must create a two-year LSLR plan that contains the system's replacement plan.[10]

Looking Forward

The new trigger level is in a proposed rule, which is subject to public comment for sixty days. Once EPA receives all the comments by the January 13, 2020 deadline, the agency will then review the comments and make any necessary changes to the rule. This means there is no firm date for when the new revised LCR will become final, or whether the action level and trigger level will remain as currently written in the proposal. Until then, PWSs are still only subject to the 15 ppb action level.

Endnotes

1 Senior Research Counsel, National Sea Grant Law Center.

2 *Basic Information about Lead in Drinking Water*, U.S. Envtl. Prot. Agency.

3 42 U.S.C. § 300g-1.

4 *Id.* § 300g-1(E)(4)(A).

5 *Basic Information about Lead in Drinking Water*, *supra* note 2.

6 40 C.F.R. § 141.86(c) and (d).

7 National Primary Drinking Water Regulations: Proposed Lead and Copper Rule Revisions, 84 Fed. Reg. 61,684 (proposed Nov. 13, 2019) (to be codified at 40 C.F.R. pts. 141 and 142).

8 *Id.* at 61,687.

9 *Id.* at 61,687-88.

10 *Id.* at 61,688.

Shell-Shocked in Seattle:

Court Sets Aside Federal Aquaculture Permit Scheme in Washington

Zachary Klein[1]

Photograph of a sunset over the Puget Sound, courtesy of Michael Li.

Although it is no secret that the Clean Water Act (CWA) provides the federal regulatory framework for discharge of pollution in the United States' waterways, even those who have a passing familiarity with the statute are often surprised to discover how much oversight and permitting authority it vests with the U.S. Army Corps of Engineers (Corps). In 2017, the Corps reissued Nationwide Permit 48 (NWP 48), allowing discharges, structures, and activities related to commercial shellfish aquaculture in the waters of the United States. The decision immediately prompted legal challenges across the country, but the federal District Court of Western Washington became the first judicial body to weigh in on the controversy on October 10, 2019, when it set aside NWP 48 in the State of Washington. Proceedings are not finished, however, as parties and onlookers alike eagerly await Judge Lasnik's decision regarding whether NWP 48 will be vacated in Washington or remain in place while the Corps takes further action.

Background

The CWA authorizes the Corps to issue permits for the discharge of material into navigable waters of the United States.[2] Rather than imposing a burdensome process of individual, project-based application and permitting, the CWA allows the Corps to issue five-year general permits on a statewide, regional, or nationwide basis for activities that the Corps determines to be similar and causing minimal adverse effects on the environment when performed separately or cumulatively.[3] The Corps made such a finding prior to reissuing NWP 48 in 2017.[4]

The CWA's "minimal adverse effects" finding is not the only procedural requirement that the Corps must consider before issuing a general permit. The National Environmental Policy Act (NEPA) requires all federal agencies to analyze the environmental impact of their proposals and actions by conducting an environmental assessment (EA).[5] If an agency cannot say that a proposal would "not have a significant effect on the human environment" after conducting an EA, the agency must prepare a more thorough environmental impact statement (EIS).[6] In addition to the determination that the activities permitted by NWP 48 would result in no more than minimal individual and cumulative adverse effects for purposes of the CWA, the Corps' 2016 EA for NWP 48 concluded that the general permit would not have a significant impact on the human environment and, thus, that an EIS was unnecessary.[7]

The Coalition to Protect Puget Sound Habitat and the Center for Food Safety separately filed suit to have these conclusions invalidated under the Administrative Procedure Act (APA) as being arbitrary, capricious, and unsupported by the record. Even when affording the Corps' decisions the high deference to which they are entitled,[8] the court ultimately agreed with the plaintiffs, finding inadequate evidence in the Corps' EA for a reasonable mind to accept the Corps conclusions regarding NWP 48's environmental impacts.[9]

Effects Analysis: Cherry-Picked Statements from the Literature

The Corps' EA for NWP 48 explicitly acknowledged that commercial shellfish aquaculture activities can induce adverse environmental impacts, but nevertheless concluded that the impacts arising from NWP 48 would be no more than minimal 1) when considered on a landscape rather than a site-by-site scale, 2) because the relevant ecosystems are resilient, and 3) because the impacts are "relatively mild" in comparison "to the disturbances and degradation caused by coastal development, pollution, and other human activities in coastal areas."[10] The court flatly rejected all three lines of reasoning.

Scale of impacts evaluation and impacts of other human activity. The court chided the Corps for focusing only on cumulative impacts in the EA for NWP 48, thus falling short of the regulatory requirement to consider potential effects of individual disposal sites that would be authorized by the general permit.[11] Similarly, the court noted and rejected the EA's repeated assertion that commercial shellfish aquaculture is a minor subset of the human activity affecting coastal habitats. "Noting that a particular environmental resource is degraded," the court wrote, "is not an excuse or justification for further degradation."[12] On remand, the court instructed the Corps to analyze the individual and cumulative impacts against the environmental baseline, rather than against all degradation that has already occurred.

The court also took umbrage with the Corps' failure to consider the environmental impacts of pesticides used in shellfish aquaculture, an intentional omission that the Corps justified on the basis that the pesticides are regulated by a different federal entity.

The court also took umbrage with the Corps' failure to consider the environmental impacts of pesticides used in shellfish aquaculture, an intentional omission that the Corps justified on the basis that the pesticides are regulated by a different federal entity.[13] The court reminded the Corps that the agency's impacts analysis should be guided by the foreseeability of an action being taken, rather than who undertakes that action or has the authority to regulate it.[14] The Corps will need to assess the potential uses and environmental impacts of pesticides in commercial shellfish aquaculture in order to comply with the CWA and NEPA on remand.

Resilient ecosystems. Relying heavily on a U.S. Department of Agriculture (USDA) report from 2015, the Corps' EA concluded that the impacts of activities authorized by NWP 48 would be minimal because the consequent disturbances would be temporary, and the affected ecosystems have previously demonstrated their ability to recover from the specific temporary disturbances in question. However, the USDA report on which the Corps relied was concerned only with the effects of intertidal oyster aquaculture on the seagrass *Zostera marina*, and the court found that this report could not support the broad conclusions for which it was provided by the Corps. The court found that the USDA report did not touch upon the impact that many activities authorized by NWP 48 would have on seagrass, let alone on other aquatic resources.[15] The court concluded that the USDA report's relatively narrow scope and findings were insufficient for a reasonable mind to support the conclusion

Photograph of Zostera marina at the Padilla Bay Reserve, courtesy of Suzanne Shull.

that entire ecosystems are resilient to the disturbances permitted under NWP 48 or that those impacts of commercial shellfish aquaculture will be individually or cumulatively minimal.[16]

Improper reliance on the regulatory framework

The court also criticized the Corps' invocation of the surrounding regulatory framework as justification that the individual and cumulative environmental effects of activities permitted under NWP 48 would be minimal. For example, the Corps claimed that the conditions imposed on all nationwide permits—such as those requiring permittees to use non-toxic materials—would ensure that the individual and cumulative impacts of commercial shellfish aquaculture activities are minimal. However, as the court observed, these general conditions relate to only some of the environmental resources that the Corps acknowledges are impacted and, additionally, reflect glaring regulatory gaps even for resources to which they are applicable. The general condition concerning spawning areas, for example, prohibits the most destructive activities but leaves unregulated many others that could significantly impact those areas.[17] While the court acknowledged that the general permit terms and conditions can relate to and support a finding of minimal impacts, they are too broad to be the primary factors on which an agency relies when evaluating the impacts of permitted activities.

Conversely, regional directors of the Corps have discretionary authority to modify, suspend, and even revoke nationwide permits within a particular region or class of water so they may safeguard against permits sanctioning activities with more than minimal environmental impacts in a particular area to unique local idiosyncrasies.[18] Where this authority is exercised, an EA must evaluate proposed activities' impacts in light of any regional conditions imposed. The court sympathized with the Corps' seemingly "impossible" task of conducting a nationwide analysis for NWP 48 given the diversity of environments and activities implicated by the general permit, but nevertheless held that delegating responsibility for analysis and permitting to district engineers under this scheme amounted to an unlawful reliance on post-issuance procedures to make pre-issuance minimal impact determinations.[19]

Conclusion

The court granted the plaintiffs' motion for summary judgment, finding that the Corps failed to adequately consider the impacts of commercial shellfish aquaculture activities authorized by NWP 48, the Corps' claims of minimal individual and cumulative impacts were not substantially supported by the record, and the Corps' EA failed to satisfy NEPA requirements. The court's order held

Photograph of the Dosewallips River in Brinnon, WA, courtesy of Gregory Smith.

unlawful and set aside NWP 48 in Washington, but the court must still decide whether NWP 48 should be vacated outright as applied in the state—and thus invalidate all operations currently authorized by the general permit—or NWP 48 should be left in place while the agency performs an adequate impact analysis and environmental assessment.

Endnotes

[1] Ocean and Coastal Law Fellow, National Sea Grant Law Center.

[2] 33 U.S.C. § 1344(a).

[3] *See* 33 U.S.C. § 1344(e).

[4] *See* NWP003034-35.

[5] *See* 40 C.F.R. § 1508.9; O'Reilly v. U.S. Army Corps of Engr's, 477 F.3d 225, 228 (5th Cir. 2007).

[6] 40 C.F.R. §§ 1508.9; 1508.11; and 1508.13.

[7] Decision Document NWP003034-3116 (Dec. 21, 2016), NWP003106-07.

[8] *See* Ctr. For Biological Diversity v. Zinke, 900 F.3d 1053, 1067 (9th Cir. 2018).

[9] *See* San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 601 (9th Cir. 2014).

[10] NWP003040 and NWP003044.

[11] Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Eng'rs, 2019 WL 5103309 (W.D. Wash. Oct. 10, 2019); see 40 C.F.R. § 230.11(e).

[12] *Id.* at 15.

[13] *See id.* at 16; NWP003077.

[14] *See* 40 C.F.R. § 1508.7.

[15] *Coal. to Protect Puget Sound Habitat*, 2019 WL 5103309 at *11.

[16] *Id.* at 13-14.

[17] *Id.* at 17.

[18] *See* 33 C.F.R. §§ 330.4(e) and 330.5.

[19] *Coal. to Protect Puget Sound Habitat*, 2019 WL 5103309 at *19.

City's Short-Term Rental Ordinance Here to Stay

Terra Bowling

Photograph of a beach in Santa Monica, California, courtesy of Pedro Szekely.

Santa Monica, a popular tourist destination in Southern California, has approximately 90,000 permanent residents.[1] On weekends and holidays, however, the city may see up to 500,000 visitors. To accommodate the influx of tourists, the town has hotels, as well as short-term rentals offered by residents on sites like AirBnB and HomeAway.

Like many other coastal towns, Santa Monica has struggled to balance property owners' desire to offer short-term rentals with the need to preserve neighborhoods and maintain affordable housing for permanent residents. To address the issue, the Santa Monica City Council passed an ordinance regulating the rentals in 2015. Shortly thereafter, residents and companies filed separate suits challenging the ordinance. One Santa Monica resident alleged the ordinance violated the dormant Commerce Clause of the U.S. Constitution.[2] In another suit, rental sites claimed the ordinance violated the First Amendment and other laws.[3] In 2019, the U.S. Court of Appeals for the Ninth Circuit ruled on both complaints.

The Ordinance

In passing the ordinance, the Santa Monica City Council reasoned that the short term rentals "negatively impacted the quality and character of its neighborhoods by 'bringing commercial activity and removing residential housing stock from the market' at a time when California is already suffering from severe housing shortages."[4] The ordinance, as amended in 2017, allows licensed property owners to "home share," but prohibits rentals for 30 consecutive days or less.[5] Home sharing is defined as "[a]n activity whereby the residents host visitors in their homes, for compensation, for periods of thirty consecutive days or less, while at least one of the dwelling unit's primary residents lives on-site, in the dwelling unit, throughout the visitors' stay."[6]

The ordinance also requires rental platforms to collect and pay appropriate taxes for bookings. The platforms must disclose listing and rental bookings to the city regularly. Additionally, the rental sites may not book properties not listed on the city register.

CDA and First Amendment

Homeaway.com and Airbnb filed separate suits alleging that the Santa Monica city ordinance was preempted by the federal Communications Decency Act (CDA) and infringed upon their First Amendment rights. The U.S. District Court for the Central District of California consolidated both actions, denied the plaintiffs' motion for preliminary injunction, and dismissed the complaints. The plaintiffs appealed.

On appeal, the Ninth Circuit held that the CDA did not preempt the ordinance. The CDA provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[7] Essentially, it grants internet companies immunity from liability for posting third-party content. The rental companies argued that the CDA expressly preempts the Santa Monica ordinance, because it requires them "to monitor the content of a third-party listing and compare it against the City's short-term rental registry before allowing any booking to proceed."[8] The court rejected this, finding that the ordinance merely requires the companies to ensure the rental properties are registered with the city. The court also rejected the contention that the ordinance required them to remove non-compliant properties from their sites. The ordinance did not expressly mandate this.

The court also affirmed the lower court's conclusion that the ordinance did not implicate First Amendment rights, as the conduct regulated by the ordinance did not have a "significant expressive element." The court noted that the ordinance is clearly a regulation aimed at booking transactions and neither the ordinance's effect nor intent is to regulate speech. Further, the ordinance did not have "the effect of 'singling out those engaged in expressive activity.'"[9] The court noted that the incidental impacts on free speech raised minimal concerns and did not trigger First Amendment scrutiny.

Dormant Commerce Clause

In the second case, Santa Monica resident Arlene Rosenblatt brought a class action suit challenging the ordinance on behalf of herself and other similarly situated residents. Prior to the enactment of the ordinance, Rosenblatt rented her Santa Monica home on Airbnb when she and her husband travelled. Rosenblatt claimed that the ordinance violated the Dormant Commerce clause by directly and indirectly burdening interstate commerce.

The Commerce Clause of the U.S. Constitution grants Congress the authority to regulate interstate commerce. The *dormant* Commerce Clause prevents states from unjustifiably discriminating against or burdening interstate commerce. The U.S. District Court for the Central District of California dismissed the action.

On appeal, the Ninth Circuit agreed that Santa Monica's ordinance did not violate the dormant Commerce Clause. The court first had to decide whether the ordinance directly regulated interstate commerce. The court found that the ordinance "penalizes only conduct in Santa Monica, regardless of whether the visitors are in-state or out-of-state."[10] The court also concluded that the ordinance does not directly regulate out-of-state booking and payment transactions, as the ordinance applies equally to in-state and out-of-state bookings.

Next, the court looked at whether the ordinance discriminated against out-of-state interests. The court noted that laws or regulations that discriminate through purpose or effect may violate the dormant Commerce Clause, while those that have a nondiscriminatory, incidental effect may not. The court found that the ordinance did not discriminate against out-of-state residents by denying them access to Santa Monica's residential neighborhoods—the law applied equally to people nationwide, including city residents. The court also dismissed the argument that the ordinance's support of local hotels discriminated against interstate commerce. The court agreed with the lower court's assessment of the argument as "illogical." Finally, the court dismissed the argument that the ordinance is discriminatory because it contains a residency requirement for home sharing.

The court found that the ordinance did not discriminate against out-of-state residents by denying them access to Santa Monica's residential neighborhoods—the law applied equally to people nationwide, including city residents.

Although the court determined that the ordinance did not directly regulate or burden interstate commerce, the court next looked at whether the ordinance unduly burdened interstate commerce through its incidental effects. *Under* the "Pike test" established by the U.S. Supreme Court, an ordinance that regulates evenhandedly and only has incidental effects on interstate commerce may be upheld if it "effectuate[s] a legitimate local public interest" unless the burden imposed is "clearly excessive in relation to the putative local benefits."[11] The court ruled that Rosenblatt did not show that the alleged burden on interstate commerce clearly outweighed its local benefits. The court reasoned, "Land use regulations are inherently local. They are not a significant burden on interstate commerce merely because they disappoint would-be visitors from out of state."[12]

Photograph of tourists in Santa Monica, California, courtesy of La Citta Vita Photography.

Conclusion

In both of these cases, the Ninth Circuit upheld Santa Monica's ordinance regulating short-term rentals. On December 10th, Airbnb reached an agreement with the City of Santa Monica.[13] Under the agreement, Airbnb must include a city license number on each listing and pay $2 to the city for every night booked, which will go toward providing affordable housing. Airbnb is also required to remove illegal listings upon notification by the city. Additionally, listings are restricted to no more than two per residence.

Although the Santa Monica ordinance is in place for now, many similar cases are ongoing across the country. So far, the lawsuits have had mixed results. Airbnb challenged San Francisco's ordinance, which prohibited the companies from collecting fees from rentals that were not registered with the city.[14] The suit resulted in the company agreeing to comply with an amended ordinance under which hosts would register with rental companies rather than with the city, and the companies would regularly supply the city with information on its listings. In New York, a federal district court ruled in favor of Airbnb and Homeaway in their suit over a New York City ordinance requiring the companies to report renter data to the city. In that case, the court found that the ordinance requiring the companies to turn over extensive information about the hosts likely violated the Fourth Amendment.[15] It appears that local governments and the rental platforms will continue negotiating to find a balance between allowing short-term rentals and protecting local interests.

Endnotes

1 HomeAway.com, Inc. v. City of Santa Monica, 918 F.3d 676, 679 (2019).

2 Rosenblatt v. City of Santa Monica, 940 F.3d 439 (2019).

3 *Homeaway.com, Inc.*, 918 F.3d 676.

4 *Id.* at 679.

5 Santa Monica Mun. Code §§ 6.20.010-6.20.100.

6 *Id.* at § 6.20.010.

7 47 U.S.C. § 230(c)(1).

8 *Homeaway.com, Inc.*, 918 F.3d at 682.

9 *Id.* at 685-86.

10 *Rosenblatt*, 940 F.3d at 445.

11 Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

12 *Rosenblatt*, 940 F.3d at 452.

13 Maura Dolan, *Santa Monica and Airbnb Settle Case After Appeals Court Rules for City*, Los Angeles Times (Dec. 10, 2019).

14 Airbnb, Inc. v. City & County of San Francisco, 217 F.Supp.3d 1066 (N.D. Cal. 2016).

15 Airbnb, Inc. v. City of New York, 373 F. Supp. 3d 467 (S.D.N.Y. 2019).

2019 Legislative Update

Summaries by the Congressional Research Service, a nonpartisan division of the Library of Congress

116 Public Law 8 – Pesticide Registration Improvement Extension Act of 2018 (S. 483)
Revises requirements for pesticide registration applications and their corresponding maintenance fees and registration service fees.

116 Public Law 9 – John D. Dingell, Jr. Conservation, Management, and Recreation Act (S. 47)
Sets forth provisions regarding various programs, projects, activities, and studies for the management and conservation of natural resources on federal lands. Specifically, it addresses: land conveyances, exchanges, acquisitions, withdrawals, and transfers; national parks, monuments, memorials, wilderness areas, wild and scenic rivers, historic and heritage sites, and other conservation and recreation areas; wildlife conservation; helium extraction; small miner waivers of claim maintenance fees; wildland fire operations; the release of certain federal reversionary land interests; boundary adjustments; the Denali National Park and Preserve natural gas pipeline; fees for medical services in units of the National Park System; funding for the Land and Water Conservation Fund; recreational activities on federal or nonfederal lands; a national volcano early warning and monitoring system; federal reclamation projects; and search-and recovery-missions. In addition, the bill reauthorizes the Historically Black Colleges and Universities Historic Preservation Program and the National Cooperative Geologic Mapping Program.

116 Public Law 62 – Alaska Remote Generator Reliability and Protection Act (S. 163)
Directs the Environmental Protection Agency (EPA) to revise certain regulations regarding particulate matter emissions standards for nonemergency stationary diesel engines in remote areas of Alaska. The EPA must report on methods for assisting remote areas of Alaska in meeting specified energy needs.

116 Public Law 63 – A bill to permit States to transfer certain funds from the clean water revolving fund of a State to the drinking water revolving fund of the State in certain circumstances, and for other purposes. (S. 1689)
Allows—for one year—a state to transfer amounts from its clean water state revolving fund to its drinking water state revolving fund in order to address a threat to public health as a result of heightened exposure to lead in drinking water. Specifically, a state may transfer no more than 5% of the cumulative amount of the federal grant dollars awarded for its clean water state revolving fund to its drinking water state revolving fund.

116 Public Law 92 — Safe Drinking Water Assistance Act of 2019 (S. 1251)
Aims to improve and coordinate interagency Federal actions and provide assistance to States for responding to public health challenges posed by emerging contaminants, and for other purposes. Incorporated into National Defense Authorization Act for Fiscal Year 2020. (S. 1790)

S. Res. 290 – A resolution celebrating 50 years of environmental progress in the Cuyahoga River Valley and Lake Erie.

S. Res. 293 – A resolution designating September 25, 2019 as "National Lobster Day".

S. Res. 305 – A resolution designating the week of September 14-21, 2019 as "National Estuaries Week."

S. Res. 422 – A resolution recognizing November 15, 2019, as America Recycles Day and expressing the sense of the Senate that recycling promotes a healthy economy and responsible environmental stewardship.

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Littoral Events

Gulf of Mexico Oil Spill & Ecosystem Science Conference

February 3-6, 2020
Tampa, FL

For more information, visit: http://bit.ly/gomoses2020

2020 Social Coast Forum

February 3-6, 2020
Charleston, SC

For more information, visit: http://bit.ly/socialcoast2020

Aquaculture America 2020

February 9-12, 2020
Honolulu, HI

For more information, visit: https://www.was.org/Meeting/pdf/AA2020RegBro.pdf