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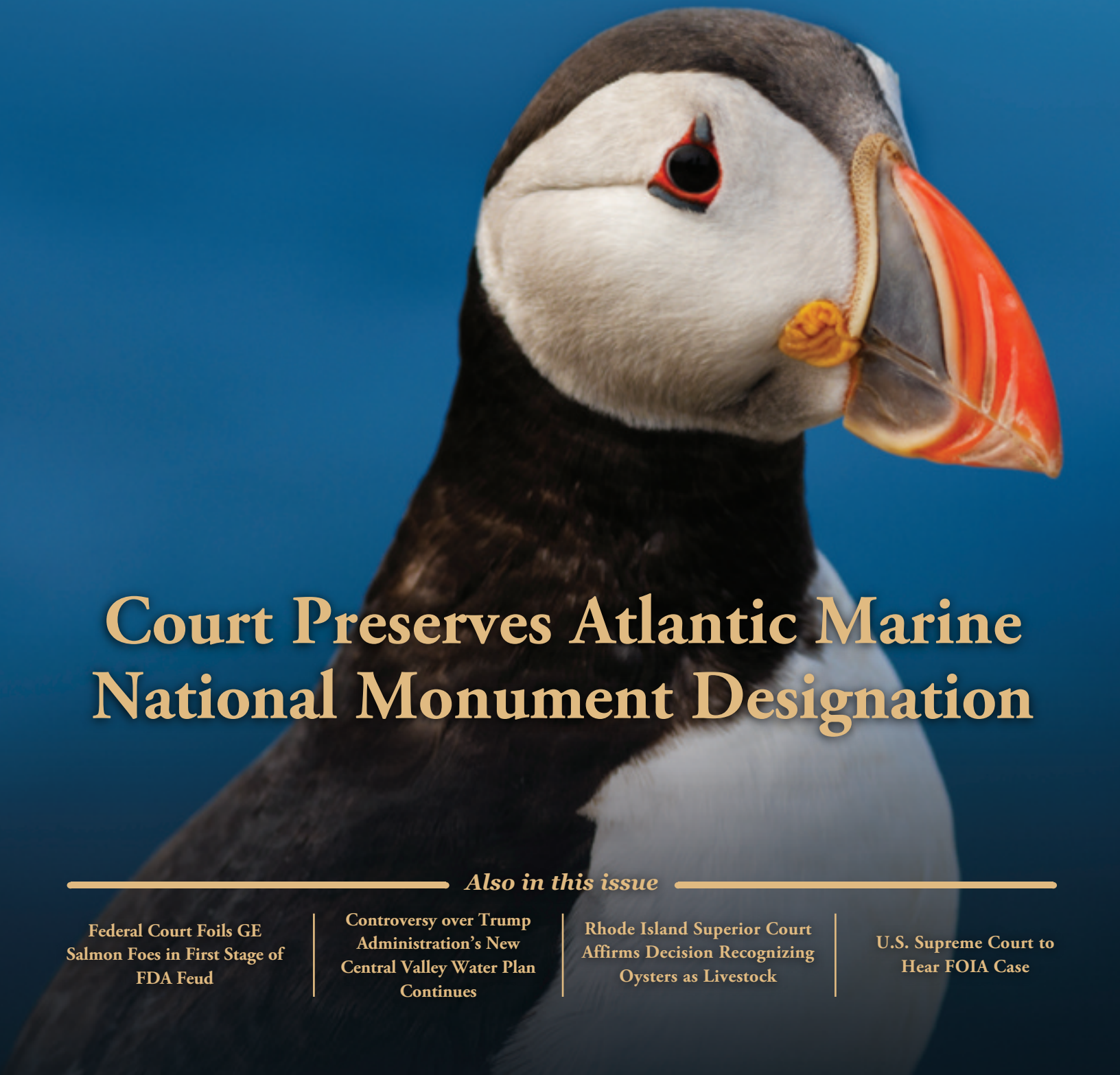

Court Preserves Atlantic Marine National Monument Designation

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Cover page photograph of an Atlantic Puffin, courtesy of Jacob McGinnis.

Contents page photograph of a dolphin, courtesy of Amaury Laporte.

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Court Preserves Atlantic Marine National Monument Designation

Terra Bowling

President Obama designated the Northeast Canyons and Seamounts Marine National Monument under the Antiquities Act in 2016, making it the first marine monument in the Atlantic Ocean. The monument encompasses 4,913 square miles off the coast of New England and features unique geological formations, including three underwater canyons. The monument serves as habitat for more than 54 species of deep-sea corals, endangered whales and sea turtles, and other marine mammals and fish species.

Shortly after the designation, several commercial fishing associations, whose members could no longer fish in the area due to the designation, filed suit. The associations alleged that the President exceeded his statutory authority in designating the monument under the Antiquities Act. A three-judge panel for the U.S. Court of Appeals for the District of Columbia recently upheld a ruling rejecting the challenge.[1]

Designation Under the Antiquities Act

The Antiquities Act grants the President the authority to establish national monuments to protect "...historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government... ."[2] The President may reserve parcels of land as part of the monument; however, the reserved land must be "confined to the smallest area compatible with the proper care and management of the objects to be protected."[3] Presidents have designated many national monuments under the Antiquities Act, including the designation of the Grand Canyon National Monument by President Theodore Roosevelt and the Papahānaumokuākea Marine National Monument by President George W. Bush.[4]

Designation Challenged

In its lawsuit, the commercial fishing associations claimed the President lacked authority to designate the marine monument under the Antiquities Act. The associations alleged that 1) the Antiquities Act did not apply to submerged lands; 2) the Monument was not compatible with the National Marine Sanctuaries Act (NMSA); 3) the Exclusive Economic Zone (EEZ) was not controlled by the federal government and therefore the president was not empowered to designate a monument in the EEZ; and 4) the designated area was not the smallest-area compatible with management. The U.S. District Court for the District of Columbia dismissed the action. On appeal, the D.C. Circuit agreed.

In the lawsuit, the commercial fishing associations claimed the President lacked authority to designate the marine monument under the Antiquities Act.

The appellate court first addressed whether the Antiquities Act reaches submerged lands. The court noted that the U.S. Supreme Court has "consistently held that the Antiquities Act reaches submerged lands and the waters associated with them."[5] The court cited several cases in which the Supreme Court held the President had authority to designate submerged lands under the Act, including the designation of an underground pool of water near Death Valley that housed a rare species of fish as part of Death Valley National Monument; the Channel Islands National Monument; and the Glacier Bay National Monument.[6] The court dismissed this claim, finding the Supreme Court precedent conclusive.

Next, the court considered whether the NMSA precludes the President from designating a marine monument under the Antiquities Act. The NMSA authorizes the federal government to designate and manage marine sanctuaries in the "United States exclusive economic zone." The exclusive economic zone (EEZ) is the area between 12 and 200 nautical miles off the nation's coasts over which the United States exercises jurisdiction. The monument lies entirely within the EEZ.[7]

The appellate court again agreed with the lower court, finding that the NMSA and the Antiquities Act were compatible, as they addressed different needs. The Antiquities Act limits monuments to the "smallest area compatible" with management and protects objects of "historic or scientific interest." Under the NMSA, the marine sanctuaries may be much larger and address a wide array of values.

Risso's dolphin, courtesy of Robin Agarwal.

The court also summarily dismissed the claim that the federal government lacked sufficient authority to control the EEZ. The court cited domestic and international law granting the U.S. control over the EEZ. The court noted "the federal government exercises unrivaled authority over the EEZ."[7]

Finally, the court rejected the claim that the monument was not the smallest-area compatible with management. The court found the plaintiffs failed to identify which portion of the Monument "lacks the natural resources and ecosystems the President sought to protect."[8]

Conclusion

The D.C. Circuit affirmed the federal district court's dismissal of the challenge. The ruling affirms that U.S. Presidents may use the Antiquities Act to establish marine national monuments. The fishing associations' attorney has indicated that the groups may seek review of the decision "en banc" or before the entire D.C. Circuit court.[9]

Portions of this article appeared on the NSGLC Blog, Terra Bowling, Court Upholds National Monument Designation, NSGLC Blog (Jan. 24, 2020).

Endnotes

1 Massachusetts Lobstermen's Ass'n v. Ross, 945 F.3d 535 (D.C. Cir. 2019).

2 54 U.S.C. § 320301(a).

3 *Id.* § 320301(b).

4 *Massachusetts Lobstermen's Ass'n,* 945 F.3d at 538.

5 *Id.* at 540.

6 *Id.*

7 *Id.* at 543.

8 *Id.* at 544.

9 Kirk Moore, *Fishermen Consider Next Move After Court Upholds Atlantic National Monument*, National Fisherman (Jan. 14, 2020).

Federal Court Foils GE Salmon Foes in First Stage of FDA Feud

Zachary Klein[1]

Genetically modified organisms (GMOs) have increasingly attracted the attention of industry, consumers, and the government. While the ability to alter an organism's genes offers potential for improving the quantity and quality of food sustaining the global population, citizen groups and regulators are closely monitoring the safety of GMOs, including genetically engineered (GE) salmon, for human consumption and the environment. On December 12, 2019, the U.S. District Court for the Northern District of California dealt a blow to a coalition suing the Food and Drug Administration (FDA) over its approval of GE salmon for human consumption.[2] The order indicates that the plain language of the Food, Drug, and Cosmetic Act (FDCA) authorizes the FDA to regulate the creation and propagation of GE animals under certain circumstances, and also explains why the court lacks the jurisdiction to hear two of the plaintiff's specific claims. However, resolution of the case will ultimately turn on procedural issues to be argued during the next stage of litigation.

Background

Genetically engineering an animal requires a scientist to derive a sequence of DNA, known as an rDNA construct, that can encode and represent a certain trait. The rDNA construct is then integrated into an animal's genome, causing the animal to express the sought-after trait and allowing that animal to pass the trait onto its progeny. The FDA began regulating certain rDNA constructs in 2009 on the theory that they are "drugs" under the FDCA. The agency has since approved an rDNA construct that causes rabbits to produce milk capable of treating hemophilia[3] and another that yields chickens whose egg whites contain a protein that treats a rare enzyme disorder.[4] However, the FDA has elsewhere declined to exercise its authority over rDNA constructs without pharmaceutical value, including one that allows for the breeding of fish that glow under certain kinds of light.[5]

AquaBounty Technologies, Inc. (AquaBounty) has created an rDNA construct that allows Atlantic salmon to grow to full size in roughly half the standard time. In November 2015, the FDA approved AquaBounty's application for approval of this rDNA construct as a new drug—the first time the FDA approved the use of an rDNA construct to develop genetically engineered animals destined for the kitchen table.[6] In light of this salmon's unique origins and qualities, some activist groups and media outlets have referred to AquaBounty's salmon as "Frankenfish."[7] Believing the approval to be unlawful, a coalition of environmental and industry groups sued the FDA and its Commissioner, the Secretary of Health and Human Services, and the U.S. Fish and Wildlife Service; AquaBounty intervened as a defendant to protect its interest in the litigation.

AquaBounty has created an rDNA construct that allows Atlantic salmon to grow to full size in roughly half the standard time.

The lawsuit has been divided into two stages to reflect the plaintiffs' two overarching contentions: 1) the FDA lacks the authority to regulate rDNA constructs as drugs, and 2) the agency has not adequately evaluated the environmental risks posed by GE animals in general, or by AquaBounty's salmon in particular. The court's recent order concluded the first stage of proceedings, so its decision was limited to four claims challenging this exercise of FDA authority. Two of these claims specifically attacked the document in which the FDA first explained its authority to regulate GE animals, and a third claim asserted that the agency generally lacks the statutory authority to regulate GE animals. However, the court deferred adjudication

AquaBounty salmon and non-gmo salmon, courtesy of AquaBounty Technologies.

of the fourth claim—that GE salmon are not environmentally safe, and thus precluded from FDA approval by the FDCA—to the lawsuit's second stage.

Challenges to Guidance Dismissed

The FDA Modernization Act of 1997 authorizes the FDA to issue guidance documents with public participation, subject to the limitation that the guidance does not "create or confer any rights for or on any person."[8] After posting a draft version in the Federal Register, which satisfies the statute's "public participation" requirement, the FDA finalized a guidance document that defines GE animals as "those animals modified by rDNA techniques, including the entire lineage of animals that contain the modification."[9] This guidance document, known as "Guidance 187," concludes that an "rDNA construct in a GE animal that is intended to affect the structure or function of the body of a GE animal" qualifies as a drug under this provision.[10] The FDCA provides multiples definitions of the word "drug," but the FDA derived its authority from the particular phrase "articles (other than food) intended to affect the structure or any function of the body of man or other animals."[11]

In the lawsuit at hand, the court noted that § 704 of the Administrative Procedure Act (APA) limits judicial review to "final agency action for which there is no other adequate remedy in a court."[12] The court here determined that the guidance document effectively concluded the FDA's decisionmaking process regarding rDNA constructs qualifying as "drugs," but nevertheless held that it is not a final rule under the relevant U.S. Supreme Court test because it does not have any direct and appreciable legal consequences. "The announcement of an interpretive rule

doesn't open the courtroom doors to any person who disagrees with the agency's interpretation," the court wrote, before explaining that Guidance 187 did not actually compel the plaintiff to engage in or abstain from any activity.[13] The court consequently determined that the document is not a final agency action for purposes of the APA, meaning that the plaintiffs lacked a proper legal basis for their claims challenging Guidance 187 which, thus, needed to be dismissed for lack of jurisdiction.

FDCA Allows the FDA to Regulate rDNA Constructs

The court next considered that the FDCA defines the word "drug" to mean, among other things, "articles (other than food) intended to affect the structure or any function of the body of man or other animals."[14] Despite the plaintiffs' insistence that the FDA shoehorned an entire regulatory scheme for GE animals into a single unambiguous word, the court confirmed the FDA's argument that AquaBounty's rDNA construct is a drug under the plain language of the statute. Sweeping aside other canons of statutory interpretation that the plaintiffs alleged should control here instead, the court averred that it must follow an explicit legislative definition provided by the FDCA "even if it varies from a term's ordinary meaning."[15] Through a brief summary of the U.S. Supreme Court's historical deference to the FDCA's literal language, the court substantiated its observation that the statute's definition of drug "is broad and dynamic by design, not by linguistic oversight."[16]

Relying on a legal treatise co-authored by late Supreme Court Justice Antonin Scalia,[17] the plaintiffs suggested that a literal interpretation of "articles (other than food) intended to affect the structure or any function of the body of man or other animals" would include bicycles and nail clippers, so the scope of the statutory definition must be reduced in order to avoid this absurd result. However, the court rejected this theory because statutory context demonstrates that bikes and nail clippers are not intended to affect the structure or function of people's bodies in a way that justifies FDA intervention. The court was similarly unpersuaded by the plaintiff's argument that two neighboring definitions for "drug" in the FDCA limit the language in controversy to articles that treat disease in a medical sense, as the Supreme Court has upheld that FDCA provisions may extend beyond the traditional medical context to implement the Act's overriding purpose: protecting public health.[18] The court then refuted the plaintiffs' attempt to limit the FDCA's applicability to GE animals in light of subsequently enacted legislation, finally denying the plaintiffs' argument that the FDA's authority is misplaced here because the agency is attempting to regulate GE animals, rather than the rDNA constructs themselves.

Conclusion

The court ruled in favor of the FDA with respect to the claims challenging Guidance 187 because the document is not final agency action, a finding that required dismissal of these claims for lack of jurisdiction. The court likewise found that the plain language of the FDCA provides the FDA with the authority to approve rDNA constructs for the genetic engineering of animals as long as the constructs qualify for the statute's broad definition of the word "drug." The case is not yet totally decided, however, as the parties still need to argue the more procedure- and environment-oriented issues of the lawsuit's second stage.

The National Sea Grant Law Center will continue to monitor this case closely and share any significant updates on our social media and blog. For more information on the topic, please see FDA Lifts Import Alert on AquAdvantage Salmon on our blog and "Fate of the 'Frankenfish': the USDA's Final National Bioengineered Food Disclosure Standard and its Impact on Aquaculture" in the January 2019 issue of The SandBar .

Endnotes

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

2 Order Granting in Part and Denying in Part Defendants' Motion for Judgment on the Pleadings; Denying Plaintiffs' Motion for Summary Judgment, *Institute for Fisheries Resources v. Hahn*, Case No. 16-cv-01574-VC (N.D. Cal. Dec. 19, 2019).

3 21 C.F.R. § 528.1070.

4 *Id.* § 528.2010.

5 *See* Int'l Center for Technology Assessment v. Thompson, 421 F. Supp. 2d 1, 5 (D.D.C. 2006).

6 21 C.F.R. § 529.1092.

7 *See, e.g.*, Zlati Meyer, *GMO 'Frankenfish' salmon could be in stores as early as next year, as FDA lifts ban*, USA TODAY (Mar. 13, 2019); Veronica Stracqualursi, FDA allows genetically engineered 'Frankenfish' salmon to be imported to US, CNN.

8 Pub. L. No. 105-115, § 405, 111 Stat. 2296, 2368-69 (codified as amended at 21 U.S.C. § 371(h)); 21 U.S.C. § 371(h)(1)(A)).

9 73 Fed. Reg. 54,407 (Sept. 19, 2008); 74 Fed. Reg. 3,057 (Jan. 16, 2009).

10 Order, *supra* n. 2 at 6.

11 21 U.S.C. § 321(g)(1)(C).

12 5 U.S.C. § 704.

13 Order, *supra* n. 2 at 9-10.

14 21 U.S.C. § 321(g)(1)(C).

15 Digital Reality Trust, Inc. v. Somers, 138 S.Ct. 767, 776 (2018).

16 Order, *supra* n. 2 at 13.

17 *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 228-29 (2012).

18 *See US v. Article of Drug…Bacto-Unidisk*, 394 U.S. 784, 798 (1969).

Controversy over Trump Administration's New Central Valley Water Plan Continues

California Questions Whether Listed Fish Species Will be Adequately Protected

Catherine Janasie[1]

Delta smelt, courtesy of USFWS/Peter Johnsen.

In February, President Trump traveled to California to sign a memorandum implementing a new plan for the delivery of water to the state's Central Valley.[2] The water plan is controversial—while it will allow more water to reach Central Valley farmers, it will also impact fish species listed as threatened and endangered under the Endangered Species Act (ESA), because updated water plans will allow for more diversions from the state's Bay-Delta watershed that serves as habitat for these listed species. As a result, California has brought a lawsuit challenging the new water delivery plan.

Central Valley Project

The U.S. Bureau of Reclamation (BOR) operates the Central Valley Project (CVP) in California, which is one of the country's largest water projects covering almost 400 miles and managing about 9 million acre-feet of water, which is the amount of water needed to cover one acre of land with a foot of water. While it serves other purposes, such as generating power, the CVP is intended to primarily protect California's Central Valley from both water shortages and damaging floods. Importantly, the CVP provides water for both domestic water supply for the

Central Valley and urban locales in the San Francisco Bay and Sacramento Areas, as well as for agricultural uses. In fact, about 5 million acre-feet of the CVP's water goes to farms, which is enough water to irrigate one-third of California's agricultural land or about 3 million acres.

CVP water is also important for wildlife habitat. The area encompassing the CVP is home to a multitude of fish species, included species listed under the ESA. These species include the delta smelt, the winter and spring runs of Central Valley chinook salmon, and Central Valley steelhead.[3] Under the Central Valley Project Improvement Act, each year the CVP dedicates about 800,000 acre-feet to habitat, with another 410,000 acre-feet of water going to state and federal government managed wildlife refuges and wetlands.

Central Valley chinook salmon, courtesy of USFWS/Dan Cox.

Updating the Central Valley Plan

In 2018, President Trump issued a memorandum to promote the delivery of water in the West, including the CVP, with the aim of minimizing "unnecessary regulatory burdens and foster[ing] more efficient decision-making."[4] Specifically, the memorandum asked BOR to update the CVP plan. Because changes to the CVP would affect both the environment and listed species, both the ESA and the National Environmental Policy Act (NEPA) are implicated. Thus, BOR would need to compete an updated review under NEPA and work with the National Marine Fisheries Service (NMFS) on updating the Biological Opinions for the listed fish species before an updated water plan could go into effect. The memorandum set 2019 deadlines for the agencies to complete these reviews.

Endangered Species Act

The consultation provisions of Section 7 of the ESA apply to the actions of federal agencies and aim to ensure that any proposed action by the agency would likely not jeopardize or destroy or adversely modify a species' critical habitat. The consultation process itself involves the federal agency proposing the action, known as the "action agency"—here, BOR—to consult with the "expert agency"—NMFS for designated marine species and anadromous fish like salmon—to assess the impact of its proposed action on the listed species or its critical habitat. The expert agency then issues a Biological Opinion (BiOp) finding whether the action will result in jeopardy or adverse modification.

In 2018, President Trump issued a memorandum to promote the delivery of water in the West, including the CVP, with the aim of minimizing "unnecessary regulatory burdens and foster[ing] more efficient decision-making."

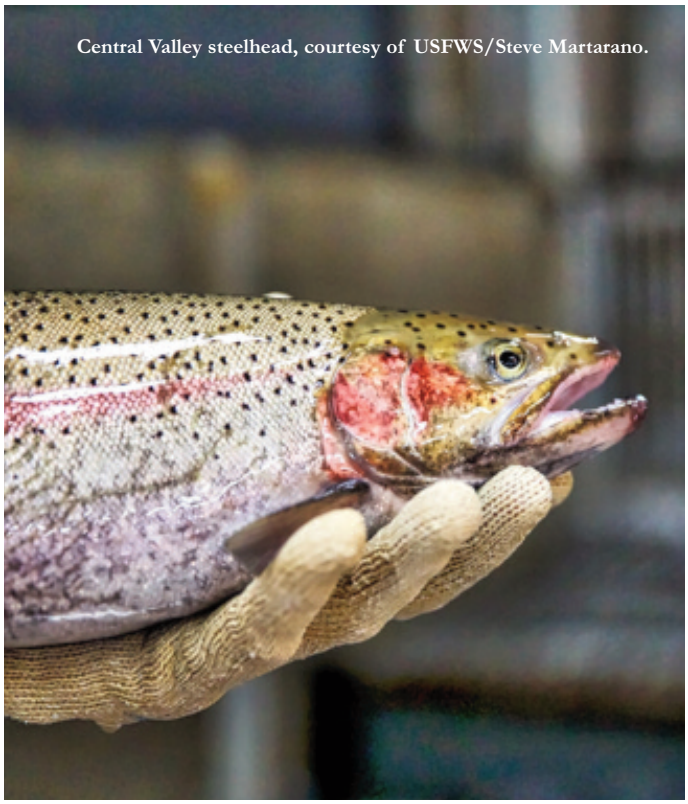
NMFS released its updated BiOps in October 2019 for multiple listed species that would be impacted by the updated plan, including salmon and steelhead.[5] Ultimately, NMFS found that the updated plan would not result in jeopardy or adverse modification to any of the listed species. But the new BiOps were controversial, as there were reports that NMFS scientists initially found that increased water diversions from California's Bay-Delta watershed under the new CVP plan would endanger the listed fish species and result in jeopardy.[6] However, these scientists were then replaced with a new review team that ultimately issued the no jeopardy or adverse modification finding.

National Environmental Policy Act

NEPA requires all federal agencies to consider the environmental impacts of their major actions that could significantly affect the environment. The BOR released its final Environmental Impact Statement (EIS) under NEPA this past December, but the Record of Decision making both the EIS and the BiOps effective was not signed until February 18, 2020 – the day before President Trump traveled to California and issued his memorandum.

NEPA requires agencies to consider alternatives to their proposed action, and BOR considered several different modifications to its proposed new water plan "to maximize water supply deliveries and optimize marketable power generation…and to augment operational flexibility

by addressing the status of listed species."[7] BOR has stated that its chosen option "best balances the need to provide a safe and reliable water supply to farms, families and communities, and protects species with flow measures, habitat restoration, improved temperature management strategies, performance measures and strong oversight by independent panels."[8]



Central Valley steelhead, courtesy of USFWS/Steve Martarano.

California Lawsuit

The day after President Trump issued his memorandum, California filed a lawsuit challenging the agencies' BiOps and EIS due to the effect the updated CVP plan will have on the state's natural resources, including the ESA listed fish species. The complaint states that the no jeopardy finding violates the ESA, because the updated CVP plan will "actually significantly *reduce* protections for the listed species and their designated critical habitat, thereby increasing the likelihood of their extinction."[9] Thus, California argues, the BiOps are arbitrary and capricious under the Administrative Procedure Act (APA).

California also claims the EIS violates NEPA and the APA. The complaint alleges that BOR did not allow for adequate public comment, minimized evidence from scientific experts, and failed to evaluate all reasonable alternatives. This, California argues, makes the EIS arbitrary and capricious under the APA. As a result, California is asking the court to declare both the BiOps and the EIS unlawful and to set aside both documents.

Conclusion

President Trump's February memorandum means that BOR can now implement the revised CVP plan. But the President's memo went a step further than the new plan, as it directs the agencies "to build upon the success of the Plan and ROD by supplementing the resulting operations, consistent with applicable law, to make deliveries of water more reliable and bountiful."[10] Secretary of the Interior Bernhardt released a statement almost immediately saying that the ESA and NEPA analyses were both lawful and based on the best available science.[11] Meanwhile, other organizations have joined California and also filed lawsuits challenging the new CVP plan.[12] For now, it seems, the saga over delivering water to the Central Valley and protecting listed species will continue.

Portions of this article appeared on the NSGLC Blog, Catherine Janasie, Controversy over the Trump Administration's new Central Valley Water Plan Continues-California Questions Whether Fish Species Will be Adequately Protected, NSGLC Blog (Feb. 26, 2020).

Endnotes

1 Senior Research Counsel, National Sea Grant Law Center.

2 Presidential Memorandum on Developing and Delivering More Water Supplies in California (Feb. 19, 2020).

3 Complaint at 9, California Natural Resources Agency v. Ross, No. 3:20-cv-01299 (N.D. Cal. Feb. 20, 2020).

4 Presidential Memorandum on Promoting the Reliable Supply and Delivery of Water in the West (Oct. 19, 2018).

5 NOAA Fisheries, Biological Opinion for the Reinitiation of Consultation on the Long-Term Operation of the Central Valley Project and State Water Project (2019).

6 *See* Bettina Boxall, *Salmon Study May Foil Trump's Plan to Boost Water Deliveries to Central Valley Farms*, Los Angeles Times, July 18, 2019.

7 Press Release, U.S. Department of the Interior, WTAS: Trump Administration Optimizes Water Delivery and Increases Species Protection in California's Central Valley (Feb. 20, 2020).

8 *Id.*

9 Complaint, *supra* note 3, at 2.

10 Presidential Memorandum, *supra* note 2.

11 Press Release, U.S. Department of the Interior, Secretary Bernhardt's Statement on California's Lawsuit Against the Central Valley Project (Feb. 20, 2020).

12 *See* Press Release, Natural Resources Defense Council, NRDC's 100th Suit Against the Trump Administration Seeks to Protect California Salmon and Endangered Species (Dec. 3, 2019).

Rhode Island Superior Court Affirms Decision Recognizing Oysters as Livestock

Philip Lott[1]

Oysters, courtesy of Paul Asman and Jill Lenoble.

Potter Pond in South Kingstown, Rhode Island is one of a handful of the "most treasured resources in the state."[2] The salt pond is a coastal lagoon "with shallow water that [is] separated from the ocean by a barrier, creating a protected environment that is popular for many activities."[3] Among those activities is shellfish aquaculture. The Rhode Island Superior Court recently found that oyster-farming support activities are permitted in South Kingstown's R-80 zone near Potter Pond, holding that oysters are considered livestock within the meaning of the Town of South Kingstown's Use Code.[4]

Farming Oysters in Potter Pond

Perry Raso, founder of the Matunuck Oyster Bar and Farm and an appellee in this litigation, began farming oysters in Potter Pond in 2002. In 2016, the South Kingstown Zoning Board of Review (Zoning Board) sent Raso a notice of violation for his oyster-farming support activities on a property located in an R-80 zone. An R-80 Zone is "a rural residential low density district in which intensive development should not occur."[5] The notice of violation stated that Raso was improperly using the dock area of the property to support his aquaculture business in violation of Use Code 51.3 and another area of the property for employee parking in violation of Use Code 64.1. Use Code 51.3 states that "Wholesale Trade of Seafood Products (including land based aquaculture support services)" is not allowed in the R-80 zone.[6] Use Code 64.1 prohibits a parking lot in an R-80 zone. After receiving the notice, Raso appealed.

At the Zoning Board's public hearing, Raso offered his position that oyster farming is permitted under Use Code 02, which allows livestock farms in R-80 zones.[7] Raso's experts both opined that oyster farming was a form of agriculture and that farmed shellfish were livestock.

Building on that premise, they argued that Raso's oyster-farming support activities were protected under Rhode Island's Right to Farm Act and were thus permitted in the R-80 zone under the livestock classification of Use Code 02.[8] The Zoning Board then heard from the zoning official and the appellants—the Krekorians and the Howlands—who were neighbors of the Raso property concerned about the traffic, noise, and unpleasant appearance of the activities occurring on the property.

At the Zoning Board's public hearing, Raso offered his position that oyster farming is permitted under Use Code 02, which allows livestock farms in R-80 zones.

When the hearing concluded, the Zoning Board received supplemental memoranda from Raso, the Krekorians, and the Howlands, and its own counsel. After consideration, the Zoning Board voted four-to-one to grant Raso's appeal and reverse the zoning official's notice of violation. The Zoning Board found that oysters were a type of livestock, and therefore, the oyster-farming support activities were permitted on the property. Moreover, the Zoning Board determined that parking for employees for the oyster-farming business was allowed as a permitted accessory use.

Appealing to the Rhode Island Superior Court

The Krekorians and the Howlands appealed, arguing that the Zoning Board erroneously applied Use Code 02, rather than Use Code 51.3.[9] The Krekorians and the Howlands contended that the town council intended to prohibit aquaculture support activities when it enacted Use Code 51.3. Additionally, citing Use Code 64.1, they challenged the Zoning Board's determination that parking for employees on the property was allowed as permitted accessory use.[10] The Rhode Island Superior Court reviewed the Zoning Board's decision using the traditional "substantial evidence" standard applicable to administrative agency actions. Following this standard of review, the Rhode Island Superior Court judge "may not 'substitute [his or her] judgment for that of the zoning board if [he or she] can conscientiously find that the board's decision was supported by substantial evidence in the whole record.'"[11]

Laying the foundation for its analysis, the court reiterated that the Zoning Board has wide discretion when construing an ordinance where terms are not adequately defined. The term "livestock" is not defined in Use Code 02. The court concluded that the Zoning Board's decision was not clearly erroneous or unauthorized.

The Zoning Board relied upon testimony and affidavits from Raso's experts concluding that oysters were within the meaning of livestock. The experts' conclusion was that Raso's oyster farming "conform[ed] to every definition of agriculture, and since the crops of the shellfish farmer are animals and not plants, they must be considered livestock."[12] Also, one of the experts pointed out that Raso's property was "not being used for wholesale sales or sorting of final product before sale so that the activities prohibited under Use Code 51.3 were not applicable to this type of use."[13] The Zoning Board determined the experts to be credible, and the experts' conclusions went unrebutted. Therefore, the Rhode Island Superior Court affirmed the Zoning Board's interpretation that oysters were considered livestock within the meaning of the Use Code.

Furthermore, the court affirmed the Zoning Board's decision allowing parking for employees as permitted accessory use. The court stated that "[s]ince parking arrangements for employees of the aquaculture farm are located on the same premises as and related to the primary principal use, the parking lot qualifies as an accessory use under the Ordinance."[14] Perry Raso walked away free to continue his oyster-farming support activities, and, with its ruling, the Rhode Island Superior Court established a new and valuable precedent for aquaculture farmers in the state.

Endnotes

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

2 Leigh Vincola, *Aquaculture and Recreation Vie for Salt Pond Use*, ECORI NEWS (Apr. 22, 2016).

3 *Id.*

4 Krekorian v. Zoning Bd. of Review of S. Kingstown, No. WC-2016-0464, 2019 R.I. Super. LEXIS 136, at *1 (R.I. Super. Dec. 26, 2019).

5 *Id.*

6 Schedule of Use Regulations Table, Pt. III, Appx. A, Art. III, § 301, Use Code 51.3 (South Kingstown, R.I.).

7 *Id.* at Use Code 02.

8 *Id.*; R.I. Gen. Laws § 2-23-1.

9 *Id.* at Use Codes 02 & 51.3.

10 *Id.* at Use Code 64.1.

11 Lloyd v. Zoning Board of Review for City of Newport, 62 A.3d 1078, 1083 (R.I. 2013) (citing Apostolou v. Genovesi, 388 A.2d 821, 825 (R.I. 1978)).

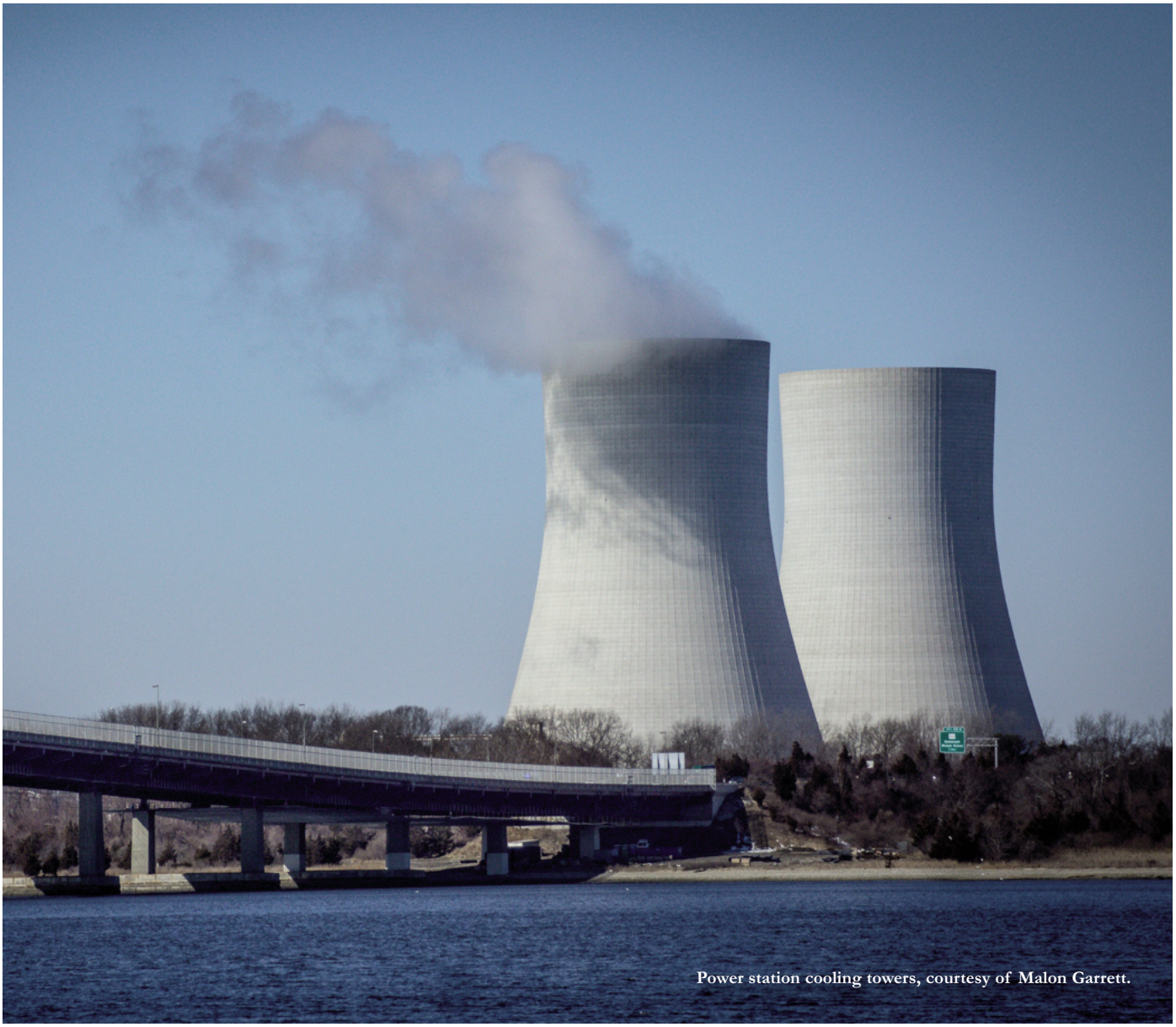
12 *Krekorian,* 2019 R.I. Super. LEXIS 136, at *5–6.

13 *Id.* at *5.

14 *Id.* at *16.

U.S. Supreme Court to Hear FOIA Case

Terra Bowling



Power station cooling towers, courtesy of Malon Garrett.

The U.S. Supreme Court has agreed to hear a case regarding a Freedom of Information Act (FOIA) request for records generated during the U.S. Environmental Protection Agency's (EPA) rulemaking process for cooling water intake structures.[1] The Sierra Club made an FOIA request to the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) for records related to the agencies' Endangered Species Act (ESA) consultation. The agencies withheld several documents, citing a "deliberative process privilege" under FOIA. The Ninth Circuit ruled that the privilege did not shield most of the requested documents from disclosure.[2]

The Rulemaking

Cooling water intake structures draw water from waterbodies to cool industrial facilities, power plants, and other manufacturing and processing complexes. The structures can have a detrimental effect on aquatic life, as they pull fish, shellfish, and eggs into the cooling systems, generate heat or release chemicals into the water, or trap larger species against intake screens. As required by the Clean Water Act, the EPA regulates the design and operation of these structures to lessen these adverse impacts. Pursuant to § 7 of the ESA, the EPA is required to consult with FWS and NMFS on any actions, including rulemaking, which may affect a species protected under the ESA.

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In 2011, the EPA proposed new rules for cooling water intake structures. The EPA initiated § 7 consultation with NMFS and FWS on the rulemaking. In 2013, the agencies prepared draft opinions finding that rule as currently written would jeopardize ESA-protected species and negatively impact their designated critical habitats. The agencies submitted portions of their opinions to the EPA. The EPA completed its draft final rule in March 2014 and submitted it to the agencies for review. Following further discussions with the EPA, the agencies issued a joint final "no jeopardy" biological opinion in May 2014. The EPA subsequently issued the regulation.

FOIA Request

The Sierra Club submitted FOIA requests to FWS and NMFS related to their ESA consultations in August 2014. The agencies disclosed some records but withheld others under the FOIA's deliberative process privilege. The Sierra Club filed suit in 2015, alleging that the agencies improperly withheld the documents.

FOIA was enacted to allow access to federal agency records. There are nine FOIA exemptions and three law enforcement record exclusions that may shield agency records from public disclosure. FOIA Exemption 5, which incorporates the common law "deliberative process privilege," protects "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency… ."[3]

The U.S. District Court for the Northern District of California ruled that 12 of the 16 requested records were not protected by the privilege. On appeal, the Ninth Circuit ruled that the deliberative process privilege did not shield most of the requested documents from disclosure. The court affirmed the order to produce documents that were not both pre-decisional and deliberative, but it reversed the order for documents that did not meet that standard.[4] The agencies sought Supreme Court review.

Cert

The agencies claim that the lower courts erred in finding the consultation documents were not protected by the deliberative process privilege. The petition for *writ of certiorari* states, "The Ninth Circuit's decision implicates the core purpose of the deliberative process privilege, which is "to enhance 'the quality of agency decisions' by protecting open and frank discussion among those who make them within the Government.'"[5] The brief argues that the consultation "was plainly deliberative, and the agencies' preliminary drafts preceding their final decisions are entitled to protection."[6]

On March 2, 2020, the Supreme Court granted the agencies' petition. The Court will decide "[w]hether Exemption 5 of the Freedom of Information Act, by incorporating the deliberative process privilege, protects against compelled disclosure of a federal agency's draft documents that were prepared as part of a formal interagency consultation process under Section 7 of the Endangered Species Act of 1973 and that concerned a proposed agency action that was later modified in the consultation process."[7] The parties must now submit their briefs on the merits of the case.

Endnotes

1 U.S. Fish & Wildlife Serv. v. Sierra Club, Inc., No. 19-547, 2020 WL 981803 (U.S. Mar. 2, 2020).

2 Sierra Club, Inc. v. U.S. Fish & Wildlife Serv., 925 F.3d 1000, 1006 (9th Cir. 2019).

3 5 U.S.C. § 552(b)(5).

4 *Sierra Club, Inc. v. U.S. Fish & Wildlife Serv.*, 925 F.3d at 1006.

5 Petition for a Writ of Certiorari, U.S. Fish and Wildlife Serv. V. Sierra Club, U.S., No. 19-547, *quoting* Department of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 9 (2001) (*quoting* Sears, 421 U.S. at 151).

6 *Id.*

7 *U.S. Fish and Wildlife Service v. Sierra Club*, SCOTUSblog.com.

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Littoral Events

2020 Association of State Floodplain Managers Annual Conference

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For more information, visit: https://asfpmconference.org

American Fisheries Society 150th Annual Meeting

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Columbus, OH

For more information, visit: https://afsannualmeeting.fisheries.org

2020 Summit: The National Coastal & Estuarine Conference

October 4-8, 2020
Honolulu, HI

For more information, visit: https://estuaries.org/summit