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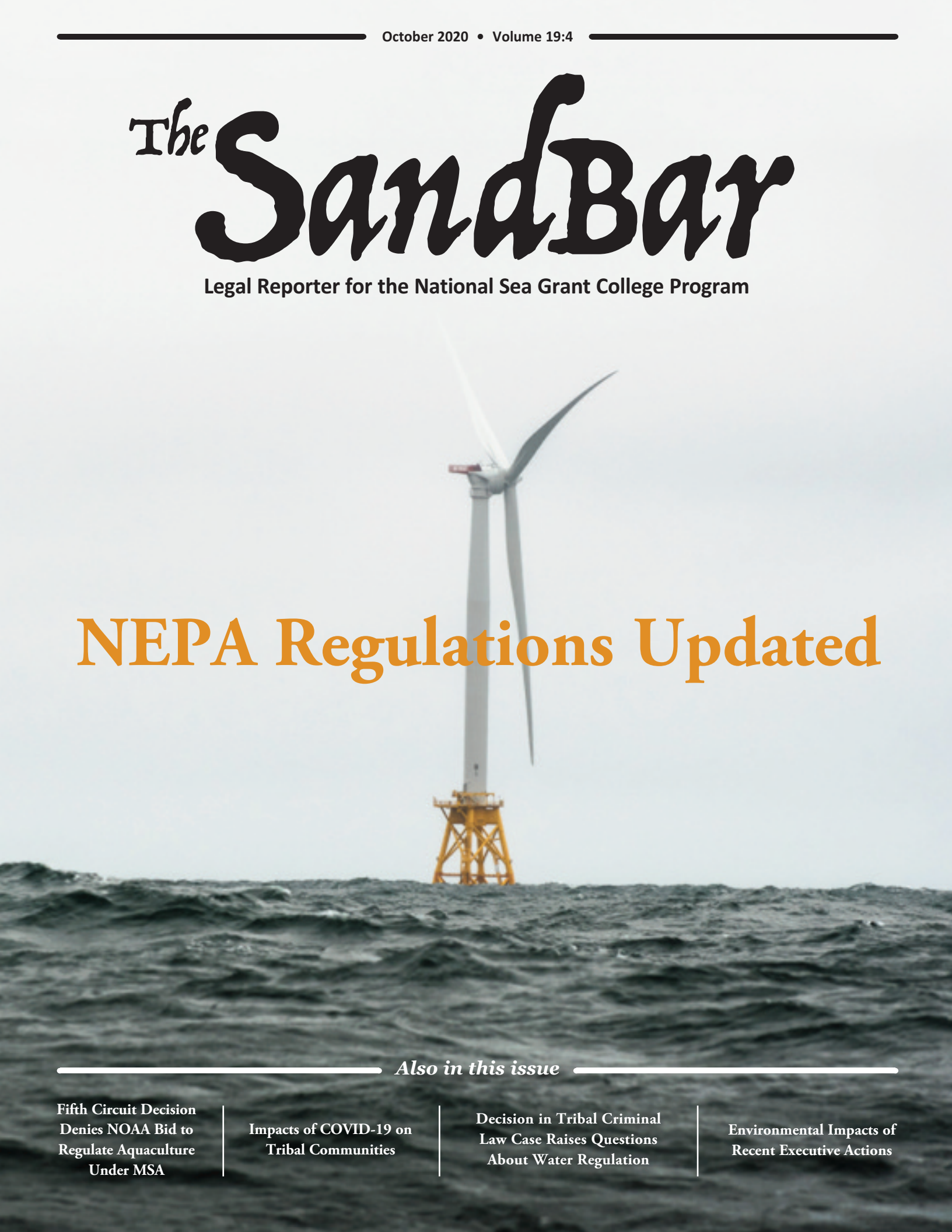

NEPA Regulations Updated

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Cover page photograph of a wind turbine from the Block Island Wind Farm in New Shoreham, Rhode Island, courtesy of Dennis Schroeder.

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Contents

NEPA Regulations Updated

Madeline Doten[1]

Block Island Wind Farm, courtesy of Dennis Schroeder.

On July 15, 2020, the Council on Environmental Quality (CEQ) within the Executive Office of the President issued a final rule updating National Environmental Policy Act (NEPA) regulations. This is the first update to the NEPA regulations in over 40 years. The CEQ made three significant changes to the NEPA regulations. First, the final rule narrows the scope of NEPA review by introducing new NEPA thresholds and establishing a framework for analyzing appropriate level of NEPA review for a federal action. Second, the final rule implements many provisions attempting to modernize NEPA procedures and streamline the environmental review process. Third, the final rule includes several new or revised definitions of terms such as "effects" and "major federal actions" used throughout NEPA and its regulations. This final rule, however, leads to some legal concerns about legal challenges potentially resulting in competing court rulings, wariness from infrastructure companies when implementing the new procedures, and the possibility of the new rule being rolled back after the November presidential election.

Background

The environmental movement of the 1960s and 70s sparked a wave of legislation passed by Congress to protect the nation's waterways, air quality, and environment. On January 1, 1970, in response to public concern regarding industrial and urban pollution, President Nixon signed NEPA into law. NEPA established a national policy "to use all practicable means and measures … to create and maintain conditions under which man and nature can exist in productive harmony," and required federal agencies to engage in a review of proposed federal actions and their possible impact on the environment prior to making decisions.[2]

NEPA also created the CEQ to ensure that NEPA obligations are met by federal agencies. The CEQ is tasked with issuing guidance and regulations regarding NEPA procedural requirements. Under CEQ regulations, federal agencies must comply with NEPA procedures by issuing Environmental Impact Statements (EIS) for major federal actions significantly impacting the human environment, preparing Environmental Assessments (EA) to determine whether an EIS is required, or identifying any categorical exclusions (CE) that do not have a significant impact on the environment.[3] Historically, the timeline for federal agencies issuing EISs, EAs, and CEs has been extremely lengthy.

In 2017, President Trump issued Executive Order 13,807. The order called for a "One Federal Decision" policy regarding environmental review, set forth a goal of keeping the environmental review process for major infrastructure projects under two years, and requested that the CEQ consider modernizing its NEPA regulations.[4] The CEQ started the administrative process to update the NEPA regulations in 2018. First, the CEQ issued an Advance Notice of Proposed Rulemaking requesting comments from the public on their potential updates to the NEPA regulations. Nearly two years later, on January 10, 2020, the CEQ issued a Notice of Proposed Rulemaking. After a public comment period resulting in over 1.1 million comments, public hearings, and interagency review, the CEQ published a Final Rule setting forth the updated NEPA regulations on July 15, 2020.[5] The rule became effective September 14, 2020.

NEPA Thresholds and Analytical Framework

The CEQ's final rule adds six new considerations for determining when NEPA should apply to federal agency actions. These considerations are whether: 1) another statute (such as the Clean Water Act) expressly exempts a proposed activity or decision from NEPA; 2) compliance with NEPA would clearly and fundamentally conflict with the requirements of another statute; 3) compliance with NEPA would be inconsistent with congressional intent expressed in another statute; 4) the proposed activity or decision meets the definition of a major federal action generally; 5) the proposed activity or decision does not meet the definition because it is non-discretionary such that the agency lacks authority to consider environmental effects as part of its decision-making process; and 6) the proposed action is an action for which another statute's requirements serve the function of agency compliance with NEPA. In addition to these six new considerations, the final rule also establishes a framework for agencies to follow in order to decide whether an EIS, EA, or CE is applicable to a federal action. Furthermore, the rule establishes a set of factors for analyzing the "significance" of any environmental impacts caused by a federal action.

Modernizing and Streamlining the Process

The CEQ's final rule codifies aspects of the "One Federal Decision" policy set forth in Executive Order 13,807 by requiring federal agencies to evaluate proposed actions under a single EIS and issue a joint Record of Decision. The rule also provides agencies with discretion regarding the timing of NEPA analysis and establishes that federal agencies should focus on assessing only certain environmental impacts of a proposed project rather than all environmental information regarding the project. Additionally, the final rule permits agencies to draw on any source of information that the agency finds to be reliable in the decision-making process, including modern forms of scientific research such as remote sensing and statistical modeling. The final rule also allows for more input from applicants and contractors of proposed projects in the environmental review process, as it allows them to submit information and material toward the preparation of environmental documents, so long as the lead federal agency evaluates the information provided.[6]

Finally, the CEQ's final rule attempts to address public involvement in the environmental review process, update outreach procedures, and increase oversight of public comments. First, the final rule promotes early public involvement with the preparation of EAs and EISs and requires draft and final EISs to include a section outlining all "alternatives, information, and analyses submitted by interested parties in response to the agency's requests for comment."[7] Second, the final rule allows agencies to use opportunities other than public hearings to engage the public in the environmental review process. The rule requires agencies to consider the affected parties' access to electronic media when giving notice of proposed projects and actions. CEQ's rule requires that commenters reference specific pages or sections of draft EISs and, where possible, include data sources and methodologies supporting proposed changes — instead of merely stating the agency made a mistake — in order to assist in informed decision-making by federal agencies.[8] The new regulations also require public comments to be submitted within the comment period, otherwise, they are "considered unexhausted and forfeited."

Block Island Wind Farm, courtesy of Dennis Schroeder.

Definitions

While the final rule contains many changes to definitions, two of the most significant changes are for the definitions of "effects" and "major federal action." In the final rule, the CEQ removed the definition of "cumulative impacts" and refined the definition of effects. In the existing NEPA review process, a cumulative impacts analysis meant that an agency had to consider a project's impact in combination with other past, present, and future actions that affect the environment. Under the new rule, agencies must only consider the "effects" of an action, defined to mean changes to the human environment that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives. The new definition also provides that agencies should generally not consider effects significant if they are remote in time, geographically remote, or the result of a lengthy causal chain. In response to many public comments addressing climate change concerns, the final rule added the term "generally" to ensure that agencies may occasionally consider effects that are remote in time and geographically distant if the effect is reasonably foreseeable and has a close causal relationship to the proposed action.

NEPA requires agencies to prepare a detailed statement on the environmental impact of major federal actions significantly affecting the quality of the environment.[9] The final rule addresses the definition of "major federal action." The new rule defines "major" and "significantly" separately, meaning that any activity that is subject to federal control and responsibility may be subject to review, but activities that have only a minimal federal involvement but a significant environmental impact would not trigger NEPA review. The new regulation also lays out types of projects that are not classified as major federal actions. First, a project is not considered to be a major federal action if the effects of the agency's activities or decisions are located entirely outside of the jurisdiction of the U.S. Second, "activities or decisions that do not result in final agency action under the Administrative Procedure Act" are not classified as major federal actions. Third, federal projects with minimal federal funding or involvement "such that the agency cannot control the outcome of the project" are not considered major federal actions. Finally, this definition also excludes loans, loan guarantees, and other forms of financial assistance "where the Federal agency does not exercise sufficient control and responsibility over the effects of the action."

Conclusion

The CEQ's final rule will likely lead to legal battles over enforcement and interpretation before any real impact on infrastructure projects is realized. Legal concerns arising under this new rule include competing rules in different district courts, wariness from infrastructure companies themselves, and the uncertainty of the 2020 election.[10] Finally, with the imminent presidential election, the new rule may only be in effect for a short time.[11] If President Trump is not elected for a second term, the new President has the option of rolling back these procedures.

Endnotes

1 2022 J.D. Candidate, Stetson Law. Doten was the 2020 NSGLC Summer Research Associate.

2 42 U.S.C. §§ 4331(a) and 4332(2)(C).

3 40 C.F.R. §§ 1508.4, 1508.9, and 1508.11.

4 Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (Aug. 24, 2017).

5 *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 43,304, 43,304 (July 16, 2020).

6 *Id.* at 43,337.

7 *Id.* at 43,317.

8 *Id.* at 43,333.

9 42 U.S.C. § 4332(2)(C).

10 Ellen M. Gilmer, Stephen Lee & Jennifer A. Dlouhy, *Trump's Environmental Permitting Update to Spark Legal Frenzy*, Bloomberg Law (July 15, 2020).

11 *Id.*

Fifth Circuit Decision Denies NOAA Bid to Regulate Aquaculture Under MSA

Zachary Klein[1]

View of a fish farm, courtesy of Michael Davis-Burchat.

"Is aquaculture fishing?"

This three-word question has sparked a long and contentious debate regarding the scope of the National Oceanic and Atmospheric Administration's authority to manage aquaculture in the United States' offshore waters. The U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) recently considered the question and provided the most significant answer to date in its August 3, 2020 decision in *Gulf Fishermens Association v. National Marine Fisheries Service*.[2] The decision may still be appealed to the U.S. Supreme Court, but it nevertheless represents a monumental development in clarifying the regulatory landscape for aquaculture in offshore waters.

Setting the Stage

Aquaculture—also known as fish farming—is the cultivation of aquatic organisms, such as fish or shellfish, especially when the organisms are cultivated for food.[3] Offshore aquaculture, which is also called open ocean aquaculture or mariculture, refers to aquaculture occurring in marine waters. Under a combination of domestic and international law, the jurisdiction of the United States extends two hundred nautical miles (nm) from the coast. The states have been delegated authority within three nm of US shores, but the waters between 3 nm and 200 nm from the coast, collectively known as the Exclusive Economic Zone (EEZ), and activities which occur within them—including offshore aquaculture—fall under the federal government's purview.[4]

Historically, the only fish in the U.S. EEZ have been wild fish. Wild-harvest fisheries were managed almost exclusively by the states prior to 1976, when Congress passed the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens or MSA).[5] The MSA provides a comprehensive regulatory framework for all commercial and recreational fishing in the U.S. EEZ. Importantly, Magnuson-Stevens defines "fishing" as, "the catching, taking, or harvesting of fish," as well as any other activity which can reasonably be expected to result in a catch, take, or harvest.[6]

The MSA is administered by the National Marine Fisheries Service (NMFS), a division of the National Oceanic and Atmospheric Administration (NOAA). Under the terms of the MSA, eight Regional Fishery Management Councils around the nation are tasked with drafting Fishery Management Plans (FMPs) to prevent overfishing and promote the long-term health of fisheries. NMFS reviews each FMP for consistency with the MSA and, if approved, FMPs become law through a separate rulemaking process involving publication of each FMP in the Federal Register.

The prospect of regulating aquaculture under Magnuson-Stevens was first officially raised by NOAA's Office of General Counsel in 1993. At the time, the agency reasoned that aquaculture falls under the statute's definition of "fishing" because the definition's inclusion of the word "harvesting" "connotes the gathering of the crop" and "adds an additional concept beyond 'catching' or 'taking.'"[7] Sixteen years later, the Gulf of Mexico Fisheries Management Council (the Gulf Council) became the first regional council to capitalize on the General Counsel's interpretation by submitting a plan to regulate and permit aquaculture under the MSA. With jurisdiction covering Texas, Louisiana, Mississippi, Alabama, and Florida, the Gulf Council put forward a "Plan for Regulating Offshore Marine Aquaculture in the Gulf of Mexico" (the Plan) in 2009 that called for five to twenty aquaculture permits to be issued over a ten-year period. NMFS published a proposed Rule to implement the Plan in 2014, and the Rule was finalized two years later.[8]

Concerned about the Plan's commercial and environmental impacts, a coalition of fishing and environmental organizations challenged the Rule in district court after it was finalized in 2016 on the basis that it was not within the Gulf Council's authority to regulate fisheries under Magnuson-Stevens. NMFS argued that it had authority over aquaculture in the EEZ by virtue of the MSA including "harvesting" in the definition of fishing or, alternatively, that the court should defer to the agency's interpretation of the statute in light of its ambiguity.[9] In her 2018 decision, however, Judge Jane Milazzo of the U.S. District Court for the Eastern District of Louisiana disagreed.[10] NMFS's appeal of that decision ushered the case to the Fifth Circuit, which has federal appellate jurisdiction over Texas, Louisiana, and Mississippi.

The Fifth Circuit's Decision

Like the district court, the Fifth Circuit rejected NFMS's argument that the MSA's definition of fishing is ambiguous enough to confer the agency—and, by extension, the Regional Fishery Management Councils—the authority to regulate aquaculture activities in the EEZ. Although one of the three judges on the panel which heard the case filed a dissenting opinion, the majority opinion affirmed Judge Milazzo's decision on several grounds.

To justify its decision, the majority opinion considered both the statute's text and history. First, the court noted that the original Magnuson-Stevens Act of 1976 did not mention aquaculture or fish farming whatsoever, and the references found in subsequent amendments proved to be "discrete and immaterial provisions" that did not purport to allow NMFS to regulate aquaculture. In the same vein, the court highlighted legislative history dating back to 1948 that demonstrated Congress's familiarity with aquaculture, including references to aquaculture that were included in Magnuson-Stevens by amendment in 1992 and 2007, but did not purport to confer NMFS the authority to regulate aquaculture. Citing the oft-repeated tenet of statutory interpretation that "Congress does not hide elephants in mouseholes,"[11] the court declined to read NMFS's authority to regulate aquaculture into the phrase "harvesting of fish."

The court was likewise unconvinced by NMFS's reliance on the word "harvesting" in the MSA's definition of "fishing" to make its ambiguity argument. Instead, the court found that the word's context makes clear it should be read as synonymous with "catching" and "taking" for purposes of Magnuson-Stevens, rather than as a separate

activity over which NFMS has regulatory authority. Perhaps the final nail in the coffin for the court, however, was the equation of offshore aquaculture facilities to fisheries under NMFS's Final Rule. The court concluded that the MSA not only makes demands of fisheries that cannot apply to aquaculture facilities, such as preventing overfishing, but also fits poorly with aquaculture more broadly. In this respect, the court observed that NMFS admitted this very point during the rulemaking process, as the agency stated during the environmental review process that "[m]any of the principles and concepts that guide wild stock management under the [MSA] are either of little utility or not generally applicable to the management of aquaculture operations."[12] The court concluded its opinion by quoting the district court's reaction to this concession: "[T]his Court does not view the incompatibility of the requirements of the [Magnuson-Stevens Act] with aquaculture operations as an unfortunate happenstance, but rather, as a clear indication that Congress did not intend for the [Act] to grant NMFS the authority to regulate aquaculture."[13]

Nevertheless, one of the Fifth Circuit panel's three judges was persuaded by NMFS's argument and would have upheld the agency's regulation of aquaculture under Magnuson-Stevens. First, the dissent pointed out that offshore aquaculture appeared to fall within the Act's delegation to NMFS of authority over "all fish, and all Continental Shelf fishery resources, within the exclusive economic zone."[14] The dissent also asserted that, even if the Act does not specifically mention aquaculture, it may still apply to fish farming because fishing techniques have incorporated lines, pots, cages, nets, and other types of enclosures since time immemorial.[15] Finally, the dissent suggested that Magnuson-Stevens and its relevant terminology are sufficiently ambiguous for the court to defer to NMFS's interpretation.

What lies ahead

The Fifth Circuit's decision is perhaps the most important to date with respect to the regulation of offshore aquaculture in the U.S. Prospective offshore aquaculture operations must continue to navigate the current non-MSA regulatory framework, which requires such operations to obtain permits from the Environmental Protection Agency and the Army Corps of Engineers. But the status quo may not remain static for long. President Trump's May 2020 Executive Order (EO) on Promoting American Seafood and Competitiveness and Economic Growth promises fewer barriers to aquaculture permitting and, at the EO's direction, NOAA is working diligently to identify Aquaculture Opportunity Areas suitable for operations in the EEZ.[16]

Endnotes

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

2 968 F.3d 454 (2020).

3 *See* Merriam-Webster Dictionary, Aquaculture (last visited Sept. 23, 2020).

4 The jurisdictions of Texas and Florida, however, respectively extend 9 nm into the Gulf of Mexico from the states' shores. Bureau of Ocean Energy Management, "Outer Continental Shelf," U.S. Dept. of the Interior (retrieved Sept. 29, 2020).

5 Holly V. Campbell, *Marine Law and Policy for Scientists and Managers*, 40. Ore. St. Univ. (2019).

6 16 U.S.C. § 1802(16).

7 Memorandum from Jay S. Johnson, NOAA Deputy General Counsel, and Margaret F. Hayes, NOAA Assistant General Counsel for Fisheries, to James W. Brennan, NOAA Acting General Counsel (Feb. 7, 1993). The General Counsel's office would later reexamine the question of regulating aquaculture under the MSA in 2011 and ultimately reaffirmed its conclusion from 1993. *See* Memorandum from Constance Sathre, Office of the General Counsel, to Lois Schiffer, NOAA General Counsel, June 9, 2011.

8 *See* Fisheries of the Caribbean, Gulf, and South Atlantic; Aquaculture, 79 Fed. Reg. 51,424 (Aug. 28, 2014); Fisheries of the Caribbean, Gulf, and South Atlantic; Aquaculture, 81 Fed. Reg. 1,762 (Jan. 13, 2016), *codified at* 50 C.F.R. pts. 600 and 622.

9 *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

10 Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv., 341 F. Supp. 3d 632, 640 (E.D. La. 2018). To learn more about the decision, please see Amanda Nichols, "Federal Court Vacates Gulf of Mexico Aquaculture Regulations," Nat'l Sea Grant L. Ctr (Oct. 18, 2018).

11 Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001).

12 81 Fed. Reg. at 1,762.

13 341 F. Supp at 640.

14 16 U.S.C. § 1811(a).

15 Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv., 968 F.3d 454, 469 (Aug. 3, 2020) (Higginson, S., dissenting).

16 Executive Order 13,921, *Promoting American Seafood and Competitiveness and Economic Growth* (May 7, 2020), 85 Fed. Reg. 28,471. See also NOAA Fisheries, "NOAA Announces Regions for First Two Aquaculture Opportunity Areas under Executive Order on Seafood," Nat'l Oceanic and Atmospheric Admin. (Aug. 20, 2020).

Impacts of COVID-19 on Tribal Communities

Mikayla Mangle[1]

View of the Vermilion Cliffs National Monument, courtesy of Don Graham.

Tribal communities have been disproportionately harmed by the outbreak of COVID-19. This summer, the Navajo Nation had the highest infection rate of COVID-19 in the country, surpassing New York.[2] In New Mexico, although Native people make up only one-tenth of the population, they had more than 55% of Covid-19 cases.[3] Below is a look at why tribal communities are more vulnerable to COVID-19 exposure, the impact of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) on tribal communities, and the various steps tribes are taking to combat COVID-19 in their own communities.

Tribal Community's Vulnerability to COVID-19 Exposure

One reason Native Americans have a higher susceptibility to contracting COVID-19, particularly on reservations, is that tribal communities are more likely to lack infrastructure necessary to protect against COVID-19. For example, Native American households are 19 times more likely as white households to lack indoor plumbing.[4] This means that Native Americans without indoor plumbing have decreased access to clean water for important preventative measures like hand washing. In addition, traveling to obtain water from wells may lead to decreased social distancing. The expense of adding the needed infrastructure is immense. For example, the Indian Health Service estimates it would cost $200 million to provide basic water and sanitation access to the Navajo Nation alone.[5]

A combination of preexisting health care issues and a lack of certain amenities are also critical factors that make tribal communities more vulnerable to COVID-19. Native Americans living on reservations are eight times more likely to live in overcrowded homes due to housing shortages.[6] This overcrowding can lead to a higher risk of COVID-19 exposure. Furthermore, the Indian Health Service within the U.S. Department of Health and Human Services (the principle federal health care provider for Native American people) has been underfunded since well before COVID-19. For example, pre-COVID-19, the Indian Health Service was already understaffed by 25%.[7] This has led to many tribes not getting the health supplies that they need to help combat COVID-19. Additionally, 35% of Native Americans living on reservations lack broadband internet, which has prevented COVID-19 related information from getting to some communities and may have led to fewer precautions being taken.[8]

CARES Act

The CARES Act, an economic relief package of $2 trillion to protect American citizens and businesses from the public health and economic impacts of COVID-19, was passed by Congress and signed into law on March 27, 2020. Within the $2 trillion, $8 billion was set aside for tribal governments. However, there have been disputes and confusion regarding the allocation of the funds to tribal communities. This confusion has led to litigation between the U.S. Department of the Treasury and tribes and a delay in allocating funds to tribes.

A group of federally recognized tribes brought suit against the U.S. Secretary of Treasury, Steven Mnuchin, regarding the allocation of the CARES Act funds set aside for tribes. Mnuchin determined that Alaska Native Corporations (ANC) were eligible to receive Title V funds (Title V within the CARES Act appropriates $150 billion for fiscal year 2020 for, "payments to states, tribal governments, and units of local government").[9] Multiple tribes then brought suit, arguing that ANCs do not meet the CARES Act definition of tribal government, which is "the recognized governing body of an Indian Tribe," and therefore should not be eligible for Title V funds. Ultimately, the U.S. District Court for the District of Columbia agreed and enjoined the Secretary of the Treasury from making Title V payments to ANCs.

While the tribes had success in their litigation, disputes continue over how to determine a tribe's population in order to allocate CARES Act funds. The Treasury Department has been using population data from the Department of Housing and Urban Development to determine the funding amount to each tribe.[10] However, this data is based solely off race and only looks at how many people within a certain area identify as American Indian or Alaskan Native. Ultimately, this single race data reduces the total population of all tribes because many tribes have multi-race populations. This single race formula has led to some tribes being recorded as having a population count as zero and, therefore, receiving only the minimum amount of funds of $100,000.[11]

Tribes Combating COVID-19

Even with extremely limited resources and the significant infrastructure challenges on reservations, tribal communities have taken major steps to limit COVID-19 exposure in their communities. For example, the Navajo Nation has established 80 contact tracers.[12] Contact tracers track all the people that COVID-19-positive patients may have infected. The Havasupai Tribe, the only tribe to still live within the Grand Canyon, declared a state of emergency in March and restricted all travel in and out of the Grand Canyon.[13] However, while many tribes have taken precautions to keep their community safe, these precautions have not always been well respected by the state and federal government. For example, the re-opening of national parks, particularly the Grand Canyon, has proved to be potentially harmful to tribes within the area. The Navajo Nation gave citations to various travelers coming through the Navajo Nation to the Grand Canyon because neither the federal nor state government informed travelers of the Navajo Nation's shelter in place order (meaning no one is allowed to come onto the Navajo reservation).

Conclusion

COVID-19 has been especially harmful to tribal communities. The lack of funding and lack of certain infrastructure and basic amenities has resulted in many tribal communities being more vulnerable to contracting the virus. While steps are being taken by the federal, state, and tribal governments to combat this harm, there still is a lack of communication and understanding between the entities leading to confusion and more outbreaks of cases in and near tribal communities.

Endnotes

1 2022 J.D. Candidate, Tulane Law School. Mangle was the 2020 Sea Grant Legal Diversity Intern at the National Sea Grant Law Center.

2 Sahir Doshi *et. al*, *The COVID-19 Response in Indian Country*, Center for American Progress (June 18, 2020).

3 *Id.*

4 Anagha Srikanth, *How the Coronavirus Threatens Native American Communities*, The Hill: Changing America (Mar. 19, 2020).

5 *Id.*

6 Doshi, *supra* note 2.

7 *Id.*

8 *Id.*

9 *Confederated Tribes of Chehalis Reservation v. Mnuchin*, No. 20-cv-01002(APM), 2020 U.S. Dist. WL 1984297 (D.D.C. Apr. 27, 2020).

10 Randall K.Q. Akee *et. al*, *Directing the U.S. Treasury Dep't Round 1 Allocations of CARES Act COVID-19 Relief Funding for Tribal Gov't*, Harv. Project on American Indian Econ. Dev. Native Nations Inst. (2020).

11 *Id.*

12 Laurel Morales, *Navajo Nation Sees High Rate of COVID-19 and Contact Tracing is a Challenge*, NPR (Apr. 24, 2020).

13 *NRDems Forum: Not So Grand Opening: Examining Local Perspectives on the Department of the Interior's Plan to Reopen National Parks During the Coronavirus Pandemic: Before the Subcomm. on National Parks, Forests, and Public Lands of Natural Resources Comm*, 116th Cong. (2020) (statement of Carletta Tilousi, Councilwoman, Havasupai Tribe).

Decision in Tribal Criminal Law Case Raises Questions About Water Regulation

Olivia Deans[1]

In July 2020, the U.S. Supreme Court issued a 5-4 decision overturning the State of Oklahoma's conviction of a Native American defendant on the basis that the crimes were committed in Indian country.[2] While the ramifications of the *McGirt* decision are still unfolding, the case seems to declare almost all of eastern Oklahoma as Muscogee (Creek) Nation (MCN) reservation land, including the populous city of Tulsa. Following this decision, approximately 1.8 million people are likely living within tribal reservation land. Thousands of state-court convictions may also be overturned. Both the majority and dissenting opinions noted the possible far-reaching effects of recognizing the historic MCN reservation boundaries. One notable outcome potentially arising after this case is the jurisdictional changes to water use, regulation, and pollution control.

McGirt v. Oklahoma

The *McGirt v. Oklahoma* case entered the Supreme Court docket after a member of the Seminole Nation, Jimcy McGirt, was convicted of three sexual offense crimes by the Oklahoma state court. McGirt argued his case belonged in federal court, not state court, in accordance with the Major Crimes Act (MCA). The MCA establishes exclusive federal jurisdiction over certain crimes committed by an Indian that take place within Indian country.[3] Therefore, if the crimes took place on the MCN reservation, and the MCN reservation was established Indian country, then the state court would not have jurisdiction over McGirt, and the convictions would be invalid. The Supreme Court agreed with McGirt. The Court held that the alleged crimes took place within Indian country, and therefore, the Oklahoma state court did not have jurisdiction to prosecute McGirt.

State courts generally do not have jurisdiction over Indians in Indian country.[4] Indian country is defined in statutes and generally refers to the reservation area set aside by Congress. Only Congress has the authority to disestablish a reservation. Once a reservation is disestablished, then a state may have jurisdiction over crimes committed by Indians. To disestablish a reservation, Congress must "clearly" and "explicitly" state its intent to disestablish a reservation and surrender the tribal interests.[5] To determine whether state jurisdiction applies, a court will analyze: 1) whether a reservation has been established; 2) how the statutory language defines Indian country and how it applies to the reservation; and 3) whether the reservation has been disestablished. Under the disestablishment analysis, a court analyzes whether any subsequent statutes or acts of Congress disestablish the reservation. If there is ambiguity, a court may look to the surrounding circumstances to clarify the intent of Congress. For disestablishment of a reservation, Congress's intent must be clear.

In this case, the State of Oklahoma argued the MCA did not apply because the MCN reservation had been disestablished, or alternatively not created in the first place. Specifically, Oklahoma alleged that Congress disestablished the MCN reservation during the allotment era. The allotment era refers to the time when Congress divided the reservation area into privatized land lots that were no longer tribal, communal property but freely alienable and transferable to non-Indian land owners. Additionally, Oklahoma argued that historical acts of Congress disestablished the reservation when they infringed on Indian self-government practices, such as abolishing the MCN tribal courts and requiring presidential approval of tribal ordinances. Oklahoma also warned of potential public policy implications.

However, the Supreme Court majority was not persuaded by the state of Oklahoma. With a powerful reference by Justice Gorsuch to the Trail of Tears and recognition of Oklahoma's historical overstep in Indian country, the Supreme Court found no clear evidence of Congress disestablishing the MCN reservation. The Court analyzed subsequent statutes applying to the reservation and found no ambiguity in whether Congress intended to disestablish the reservation. Specifically, the Court noted that extrinsic events and historical treatment were not compelling of Congress's intent when the statutes in question did not create ambiguity. Therefore, the Court noted it must "hold the government to its word" and declare the MCN reservation to remain Indian country.[6] The dissent, written by Chief Justice Roberts, took a different approach than the majority for analyzing the subsequent statutes and surrounding circumstances. Under this view, disestablishment is determined by examining all statues and surrounding circumstances, such as the state's subsequent understanding of reservation status. This analysis would include recognition of the 19 million acres of land no longer controlled by state jurisdiction and "decades of past convictions," that could be invalid.[7]

Water Law Implications

While *McGirt* narrowly held that the MCA applied to the locale in question, both the majority and dissent suggested that there

could be civil jurisdictional issues arising in the wake of the decision. Water jurisdiction, governing both use and pollution control, may be impacted by the *McGirt* case. It is unclear how broad future courts will apply the *McGirt* holding. However, the outcome of this case could affect pollution control under the Clean Water Act (CWA), water use under the *Winters* Doctrine, and strengthen other tribal reservation claims to jurisdictional oversight of water resources.

The CWA is the major water pollution control mechanism for most waters within the state of Oklahoma. Generally, states have delegated authority to implement water pollution control plans for the state. However, the CWA also allows for approved tribes to be granted "Treatment as States" (TAS) status and gain authority to implement water pollution control plans for the reservation territory.[8] This would also allow the MCN to set stricter water pollution standards than federal standards or the state of Oklahoma's standards. Currently, the MCN does not have TAS status to oversee a CWA control program, and Oklahoma oversees the water control program. However, after the *McGirt* declaration of reservation status, the MCN may seek to gain TAS status and be responsible for managing water pollution within the reservation. Additionally, with TAS status, the MCN could seek additional funding to help manage waters within the reservation boundaries.[9]

Recently, the Oklahoma governor petitioned the Environmental Protection Agency (EPA) to grant the State of Oklahoma authority to oversee environmental pollution control in Indian country.[10] EPA granted Oklahoma this oversight authority under Safe, Accountable, Flexible, Efficient, Transportation, Equity Act (SAFETEA).[11] A provision in SAFETEA states that if Oklahoma requests to administer these programs in Indian Country, the EPA must grant it. However, SAFETEA does not prohibit tribes from seeking TAS status. Tribes may still exercise water pollution control under the CWA, but SAFETEA requires the tribe to also enter into a cooperative agreement with Oklahoma before gaining TAS status.[12] It will be up to the MCN to raise the TAS water control option and it may elect to continue pollution control under the Oklahoma plan.

Additionally, the *McGirt* decision could impact water use under the *Winters* Doctrine.[13] Generally, water rights and water usage are determined by state law and depend on the state's water allocation system.[14] However, after the 1908 Supreme Court decision *Winters v. United States*, water rights are reserved at the time the land was federally set aside for the tribal reservation.[15] Subsequent court decisions established that tribes are generally entitled to enough water to suit the needs on the reservation. Unlike some state prior appropriation systems, under the *Winters* Doctrine, water use is not lost if not used. It may take subsequent litigation or cooperative agreements to determine how the *Winters* Doctrine will be applied after the Court determined the MCN Reservation included a significantly larger portion of land than initially recognized by Oklahoma. For example, under the *Winters* Doctrine, the MCN reservation area may require a significantly larger portion of appropriated water to sustain the recognized reservation area. It is also unclear whether the MCN could create a water regulation system different than the current Oklahoma hybrid system. SAFETEA does not grant Oklahoma the authority to regulate water allocation. Like other civil matters in eastern Oklahoma, time will tell how broad the *McGirt* decision is applied.

Conclusion

The Supreme Court emphasized the importance that reservation boundaries and rights not be lightly disestablished. In the wake of the decision, the State of Oklahoma and the Creek, Cherokee, Chickasaw, Choctaw, and Seminole Nations have released joint statements committing to ensuring justice in regards to McGirt's case and working cooperatively to navigate the acknowledged jurisdictional boundaries.[16] The *McGirt* case certainly raises many water use and regulation questions. This case narrowly applies to the MCN reservation, but the decision strengthens tribal nations' claims across the United States. Water use, pollution control, and jurisdiction may change in response to strengthened tribal reservation boundaries and claims of sovereignty.

Endnotes

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

2 McGirt v. Oklahoma, 140 S.Ct. 2452 (2020).

3 This article uses the terms Indian and Indian country as statutory terms that convey legal rights. *See* 18 U.S.C. § 1153(a).

4 Negonsott v. Samuels, 113 S.Ct. 1119, 1121 (1993).

5 *McGirt*, 140 S.Ct. at 2462-63.

6 *Id.* at 2459.

7 *Id.* at 2482.

8 33 U.S.C. § 1377(e).

9 33 U.S.C. § 1377(f).

10 Letter from Envtl. Prot. Agency Adm'r Andrew Wheeler to Governor Kevin Stitt (Oct. 1, 2020).

11 Safe, Accountable, Flexible, Efficient, Transportation, Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1144, 1937 (2005).

12 *Id.*

13 Winters v. United States, 28 S.Ct. 207 (1908).

14 Generally, states operate a riparian or prior appropriation water allocation system. Oklahoma uses a hybrid of these two approaches.

15 *Winters*, 28 S.Ct. at 212.

16 *State, Muscogee (Creek), Cherokee, Chickasaw, Choctaw, and Seminole Nations Release Joint Statement in Response to SCOTUS Decision in McGirt Case*, Mike Hunter Oklahoma Attorney General (Jul. 9, 2020).

Environmental Impacts of Recent Executive Actions

Madeline Doten[1]

View of bamboo coral from the Mytilus Seamount, courtesy of the NOAA OKEANOS Explorer Program.

The year 2020 has brought about a multitude of executive actions relating to the COVID-19 pandemic, environmental protection, and almost every policy area in between. President Trump has issued several executive orders and presidential proclamations impacting natural resources and the marine environment. This article provides a general overview of Proclamation 10,049, Executive Orders 13,921 and 13,927, and the impacts of these actions.

Proclamation 10,049

On June 5, President Trump signed a proclamation that opened the Northeastern Canyons and Seamounts Marine National Monument to commercial fishing. In 2016, President Obama had designated this 4,913 square mile area located 130 miles off the coast of Cape Cod, Massachusetts as the first marine national monument in the Atlantic Ocean using his authority under the Antiquities Act. President Trump removed some of the provisions within President Obama's proclamation that prohibited commercial fishing, with hopes that reopening the monument will boost the economy and create more jobs in the fishing industry.

President Trump cited his authority to issue this proclamation to the "Constitution and laws of the United States, including section 320301 of title 54, United States Code."[2] While the Antiquities Act gives the president the authority to establish national monuments, it is silent on whether a president may abolish or alter a national monument. Some environmental organizations have already filed suit against

the Trump administration for this proclamation, claiming that the alteration of a national monument may only be done by Congress and, therefore, the President overstepped his authority with this proclamation.

The impacts of this proclamation are likely minimal. It is unknown how many commercial fishermen will actually make the 130-mile trek out to the monument's boundaries to fish. Additionally, the proclamation also discusses how this reopening for commercial fishing will not become a free-for-all, as the commercial fishing industry will still be regulated by a host of legislation such as the Endangered Species Act (ESA) and the Magnuson-Stevens Fishery Conservation and Management Act. Moreover, on June 17, the New England Fishery Management Council —the council in charge of managing Northeast Canyons and Seamounts Marine National Monument—also announced plans to expand fishing restrictions within the monument's borders. The Council's Omnibus Deep-Sea Coral Amendment will restrict all fishing, except deep-sea red crab pots, between canyons 600 meters and deeper out to the monument's 200-mile limit.

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Executive Order 13,921

On May 7, President Trump issued Executive Order 13,921 aiming to increase domestic seafood production by streamlining the aquaculture permitting process, reducing regulatory barriers for aquaculture projects, and expanding regulations for illegal, unreported, and unregulated fishing.[3] The order outlines a host of requests to achieve its goals of revitalizing the American seafood industry, including establishing the National Oceanic and Atmospheric Administration (NOAA) as the lead agency for environmental review of aquaculture projects, instructing the U.S. Army Corps of Engineers (USACE) to develop three nationwide permits for aquaculture activities, and requesting Regional Fishery Management Councils to issue a list of "recommended actions to reduce burdens on domestic fishing and to increase production within sustainable fisheries."[4] Some of the order's objectives may have a significant impact on the U.S. aquaculture industry and the marine environment if fully implemented, such as the order's request that NOAA identify two offshore aquaculture sites every year for the next five years and its goal of reducing burdens (i.e. permitting processes and regulations) on the fishing industry. The impacts of this Executive Order will not be known for some time as many of the changes would require additional rulemaking from the agencies. For example, on September 15, the USACE published a Notice of Proposed Rulemaking to reissue existing Nationwide Permits (NWPs) under the Clean Water Act (CWA) and Rivers and Harbors Act and propose five new NWPs, including two expressly required by the Executive Order for seaweed and finfish. Once finalized, these agency actions are likely to be subject to court challenges that could potentially delay implementation further.

Executive Order 13,927

On June 4, President Trump issued Executive Order 13,927 directing federal agencies to fast-track infrastructure projects by bypassing the review process set in place by multiple environmental laws.[5] The order was issued in hopes that a slew of large infrastructure projects, such as highway and pipeline projects, would stimulate the economy and create jobs, mitigating the economic downturn caused by the COVID-19 pandemic. The order gives agencies 30 days to provide a report of all expedited projects, and requests that all relevant federal agencies utilize all relevant emergency protocols in order to expedite work on authorized infrastructure, energy, environmental, and natural resource projects on federal lands. It specifically mentions the emergency protocols set in place for the National Environmental Policy Act (NEPA), the ESA, and the CWA.

Nevertheless, the impacts of Executive Order 13,927 are likely minimal. President Trump defines the national emergency prompting the issuance of the executive order as the COVID-19 outbreak in the United States. This type of national emergency likely does not fall under the type of emergencies defined in NEPA, ESA, and CWA emergency protocols. Furthermore, if these provisions are used to loosen environmental review requirements, there will likely be legal battles over whether federal agencies properly did so.

Endnotes

1 2022 JD Candidate, Stetson University College of Law. Doten was the 2020 Summer Research Associate for the National Sea Grant Law Center.

2 Proclamation No. 10,049, 85 Fed. Reg. 35,793 (June 4, 2020).

3 Exec. Order No. 13,921, 85 Fed. Reg. 28,471 (May 7, 2020).

4 *Id.*

5 Exec. Order No. 13,927, 85 Fed. Reg. 35,165 (June 4, 2020).

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