



FEDERAL REGULATORY ROUNDUP

WHAT HAPPENED AT THE END OF THE TRUMP ADMINISTRATION?

National Sea Grant Law Center
Informational Webinar
February 3, 2021



THE UNIVERSITY of
MISSISSIPPI
SCHOOL OF LAW

Webinar Overview

- Background on Federal Regulatory Process
- Status Updates on “Midnight Regulations”
 - Science Transparency Rule
 - Prohibitions under Migratory Bird Treaty Act
 - ESA and Critical Habitat Designations
 - Nationwide Permit Reissuance
- Other Agency Actions to Watch

Who We Are

- One of 34 Sea Grant Programs
- Based at the University of Mississippi School of Law
- Established to provide non-advocacy legal research, outreach, and education services to Sea Grant network.
- Don't forget to follow us on Twitter and Facebook!



<http://nsglc.olemiss.edu>

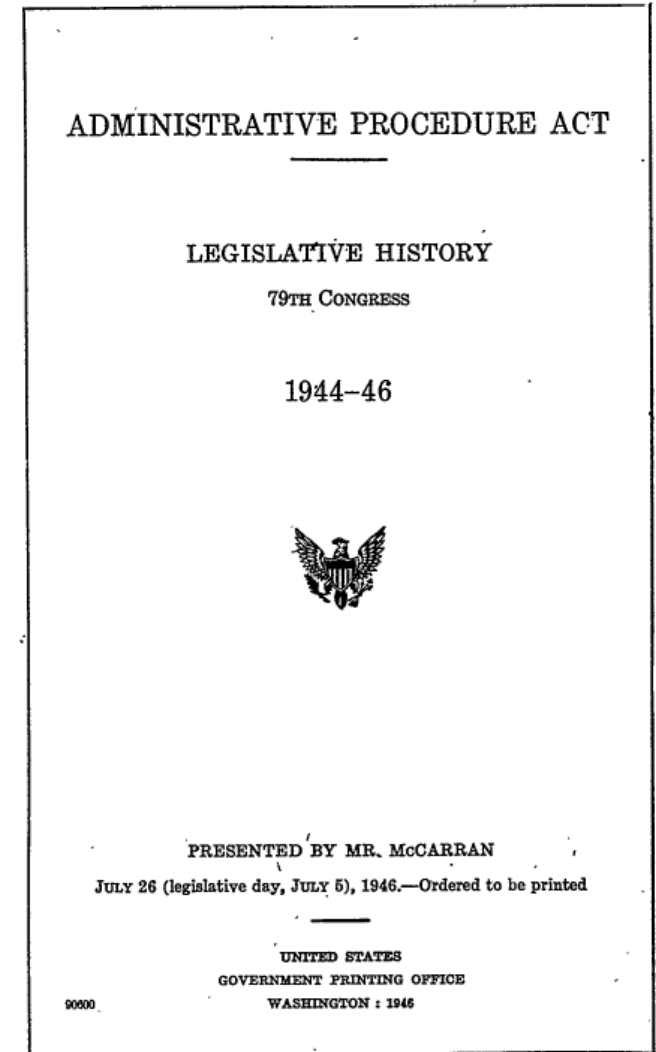
NSGLC Advisory Service



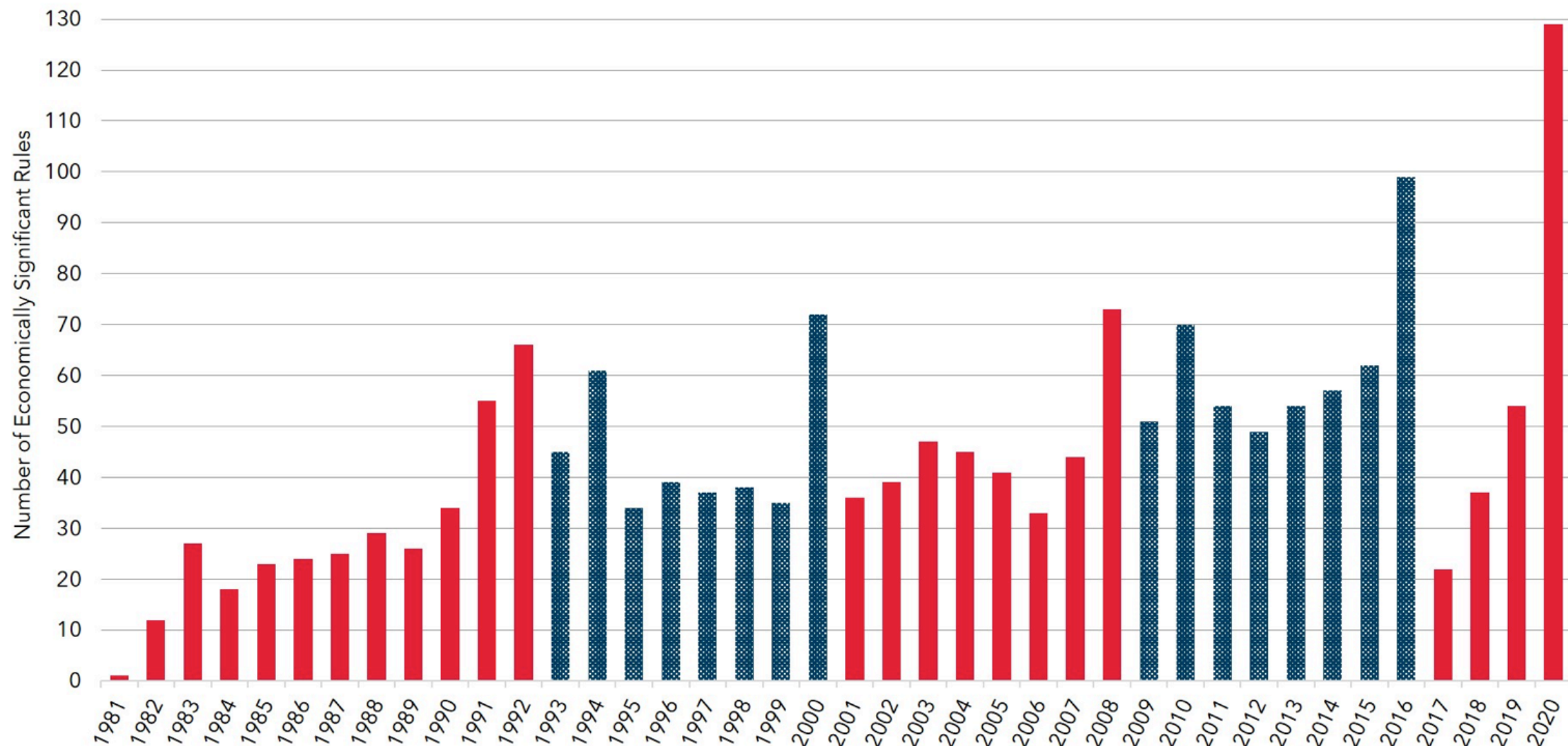
- Legal research service provided free of charge to Sea Grant Programs.
- Research only! Prohibited from providing legal advice.
- To submit a request, email Stephanie Otts at sshowalt@olemiss.edu.

Federal Regulatory Process

- Administrative Procedure Act applies to all agencies within federal government.
 - Prescribes procedures for agency rulemakings.
 - Standards for judicial review of agency action.
- Notices published in Federal Register:
<https://www.federalregister.gov/>



Economically Significant Final Rules Published by Presidential Year



Regulatory
Studies Center

THE GEORGE WASHINGTON UNIVERSITY

Sources: [Office of Information and Regulatory Affairs \(OIRA\)](#)
and [Office of the Federal Register \(OFR\)](#)

Updated: January 26, 2021

Congressional Review Act

Mechanism by which Congress can overturn rules.

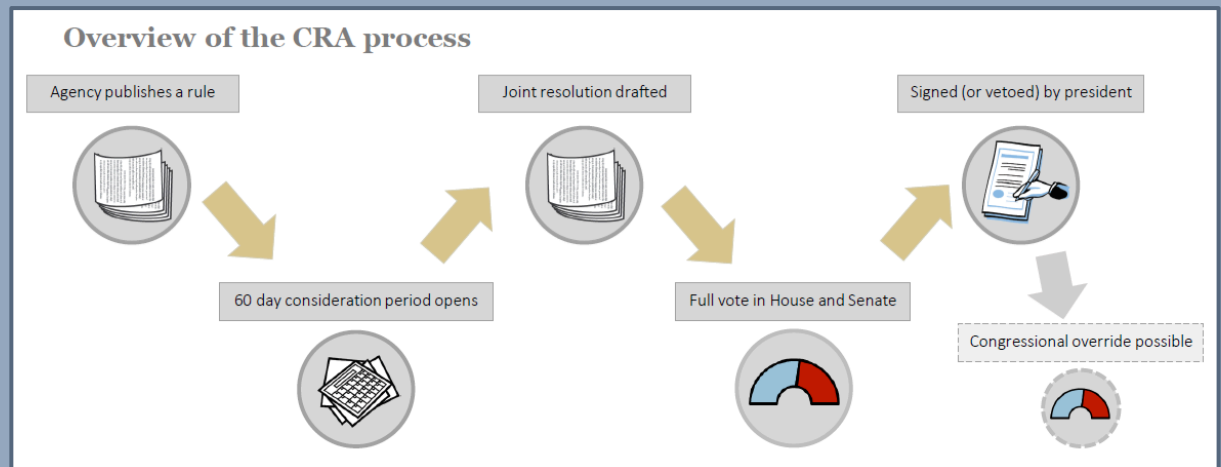
- Requires Joint Resolution (JR) passed by simple majority of both chambers and President's signature. Congress can override veto ($\frac{2}{3}$ of both chambers).
- Once JR is enacted, rule cannot take effect and the agency may never re-issue it or issue a rule in "substantially the same form."

Window = 60 days Congress has been in session

- All regulatory actions since August 21 can be overturned by 117th Congress.
- More than 1,400 eligible but only 10-20 likely to be seriously considered.

History

- Enacted in 1996, successfully used only once prior to 2017.
- Used in 2017 to overturn 16 Obama-era regulations (including guidance!).



Range of Possibilities

Final Rules



- No action taken - rule becomes effective
- Effective date delayed/ comment period opened
- Repealed by Biden Administration through notice and comment rulemaking.
- Repealed through CRA.
- Upheld/Vacated by Court.

Proposed Rules

- No action - no final rule issued.
- New comment period opened.
- Final rule published by Biden administration (ability to make major changes constrained by APA).

“Science Transparency” Rule - EPA

- Proposed Rule: April 30, 2018
- Final Rule: January 6, 2021
- Effective: January 6, 2021

	Docket ID EPA-HQ-OA-2018-0259
	Comments Received 993,464

- For the purpose of setting forth how the EPA will “consider the availability of dose-response data underlying pivotal science used in its significant regulatory actions and influential scientific information.”

Environmental Defense Fund v. EPA

- Environmental groups filed suit on 1/11/21.
- Court granted EDF motion for summary judgment on 1/27.
 - Found that the rule was substantive, not procedural.
 - EPA didn't have good cause to make the rule effective immediately.
 - Ordered rule to become effective 30 days after publication - 2/5.
- EPA filed motion requesting vacatur and remand to agency - 1/31/21.
- Court granted motion on 2/1/21.

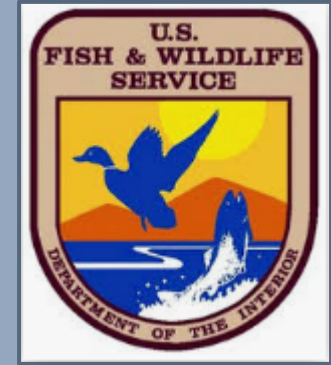
Migratory Bird Treaty Act Rule

Migratory Bird Treaty Act (16 U.S.C. 703): unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, or kill migratory birds, or attempt to engage in any of those actions.

- Strict liability but prosecutorial discretion

New Regulation - 50 CFR 10.14

- Final Rule published January 7, 2021; Effective Feb. 8, 2021
- 16 U.S.C. 703 prohibitions “*apply only to actions directed at migratory birds, their nests, or their eggs*”
 - Intentional actions only- incidental taking or killing not prohibited.
 - “Reading the MBTA to capture incidental takings could potentially transform average Americans into criminals.”
 - Need notice of liability



2020-2021 Federal Duck Stamp Credit: USFWS

MBTA Rule Legal Challenge



State of New York et al v. U.S.
Department of the Interior et al, Docket
No. 1:21-cv-00452 (S.D.N.Y. Jan 19,
2021)

- NY, CA, CT, IL, MA, MD, MN, NJ, NM, OR, PA, and WA
- Seeking a declaration that MBTA rule is unlawful and asking the Court to vacate it.

ESA “Habitat” Definition

- Proposed Rule: August 5, 2020
- Final Rule: December 16, 2020 (85 Fed. Reg. 81,411)
- Effective: January 15, 2021

“For the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species.”



Photo Credit: Glen Johnson

Mandatory Exclusion Rule

- Proposed: September 8, 2020
- Final: December 18, 2020 (85 Fed Reg. 82,376)
- Effective: January 19, 2021
- FWS must consider exclusion when presented with “credible information regarding the existence of a meaningful economic or other relevant impact” that would result from designation of that area.
- The FWS must give weight to the expert or firsthand information, unless there is “material evidence that rebuts that information.”



Challenges to 2020 ESA Rules

- Separate lawsuits of the rules filed in Hawaii federal district court on January 14, 2021.
 - Conservation Council for Hawaii v. Bernhardt, CIVIL NO. 1:21-CV-00040 (D. Haw. Jan. 14, 2021).
 - Center for Biological Diversity v. Bernhardt, CIVIL NO. 1:21-CV-00041 (D. Haw. Jan. 14, 2021).
- Both rules under review by the Biden administration.

Nationwide Permits

Final Rule: January 13, 2021

Effective: March 15, 2021

- 60 days instead of usual 30 days
- Authorizes:
 - Structures under RHA Section 10
 - Dredge and fill under CWA Section 404



3 of note: NWP 48 (shellfish), NWP 55 (seaweed), NWP 56 (finfish)

Change of terminology from “aquaculture” to “mariculture”

- Only authorizing operations in coastal waters.
- Mariculture occurs in marine and estuarine open-water environments.
- Aquaculture can occur in a much broader area.

Modified NWP 48 - Shellfish Mariculture

2017 NWP 48 limited the area of impacted submerged aquatic vegetation in project areas that have not been used for commercial shellfish aquaculture activities in the past 100 years to 1/2 acre

- 2021 NWP 48: limitation is removed.
- Instead: pre-construction notification (PCN) requirement for new and existing commercial shellfish aquaculture activities that will directly impact >1/2 acre of submerged aquatic vegetation



Photo by Catherine Janasle

NWP Lawsuit:

Coalition to Protect Puget Sound Habitat v. U.S. Army Corps of Engineers

U.S. West. Dist. WA ruling:

- Agency's conclusion that NWP 48 would have a minimal environmental impact was not supported by the evidence and was arbitrary and capricious
- NWP 48 not in accordance with NEPA or the CWA

2021 NWP 48 Response:

- Updated the NWP 48 Decision Document - further discussion of impacts on submerged aquatic vegetation, benthic communities, birds, fish, and other species
- "NWP would authorize only those commercial shellfish mariculture activities that have no more than minimal individual and cumulative adverse environmental effects."

Lawsuit is still ongoing! *Coalition Protect Puget Sound v. Taylor Shellfish Company, Inc.*

- Want almost 900 vacated Washington permits reinstated. Arguing 2021 NWP 48 has not mooted the case.
- 9th Circuit heard oral arguments yesterday- 2/2/2021

New NWP 55 - Seaweed Mariculture

Only authorizes structures, not operational aspects seaweed mariculture

Pre-construction notification (PCN) requirement

- Map with location/dimensions, species, water depths

Provides for multi-trophic mariculture

Does not:

- Authorize activities under Section 404 of the CWA
- Allow cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody

To the maximum extent practicable, permittees must remove authorized seaweed or multi-trophic structures from navigable waters once no longer in use



Anoushka Concepcion, aquaculture extension specialist at Connecticut Sea Grant, examines kelp grown in Long Island Sound. Photo: Tessa Getchis / Connecticut Sea Grant

New NWP 56 - Finfish Mariculture

Only authorizes structures, not operational aspects finfish mariculture

- In response to public comments, distinguishes installing finfish aquaculture structures and regulating finfish aquaculture activities by EPA, FDA, etc



Photo: Kathlyn Tenga-González

Pre-construction notification (PCN) requirement

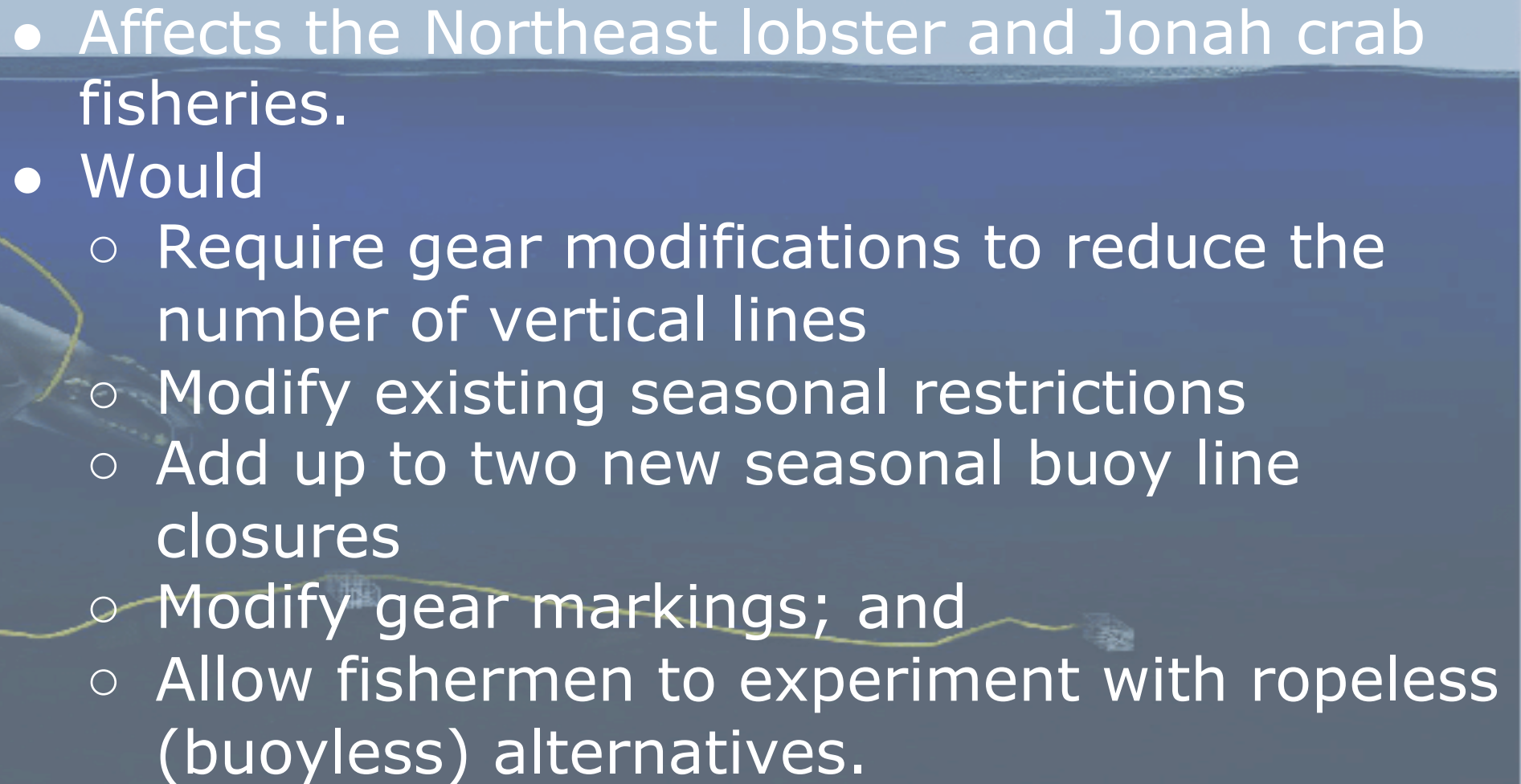
- Map with location/dimensions, species, water depths

Provides for multi-trophic mariculture

Bars cultivation of nonindigenous species unless that species previously has been cultivated in the waterbody

To the maximum extent practicable, permittees must remove authorized finfish structures from navigable waters once no longer in use

Take Reduction Plan for Atlantic Right Whales - NOAA

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- An illustration of an Atlantic Right Whale swimming in the ocean. A yellow rope is entangled around its head and body. The rope extends from a red buoy on the surface, loops around the whale, and then extends to a fishing net on the bottom. The background is a gradient of blue representing the ocean.
- Affects the Northeast lobster and Jonah crab fisheries.
 - Would
 - Require gear modifications to reduce the number of vertical lines
 - Modify existing seasonal restrictions
 - Add up to two new seasonal buoy line closures
 - Modify gear markings; and
 - Allow fishermen to experiment with ropeless (buoyless) alternatives.

Other Rulemakings to Watch

- Updated NEPA Implementing Regulations (CEQ)
 - Final Rule: July 16, 2020
 - Multiple lawsuits have been filed to challenge the new regulations
 - Flagged by Biden Administration for review
- Water of the United States Rule (EPA)
 - Final Rule: April 22, 2020
 - Lawsuits abound!
 - Biden Administration is filing motions in court to pause litigation to give agency a chance to rewrite.

Other Agency Actions of Interest

Environmental Protection Agency

Approval of Florida's Request to Implement Section 404 Program

- December 17, 2020
- Florida was first state in 25 years to apply and receive approval. Only two other states have received authority to run program (MI and NJ)

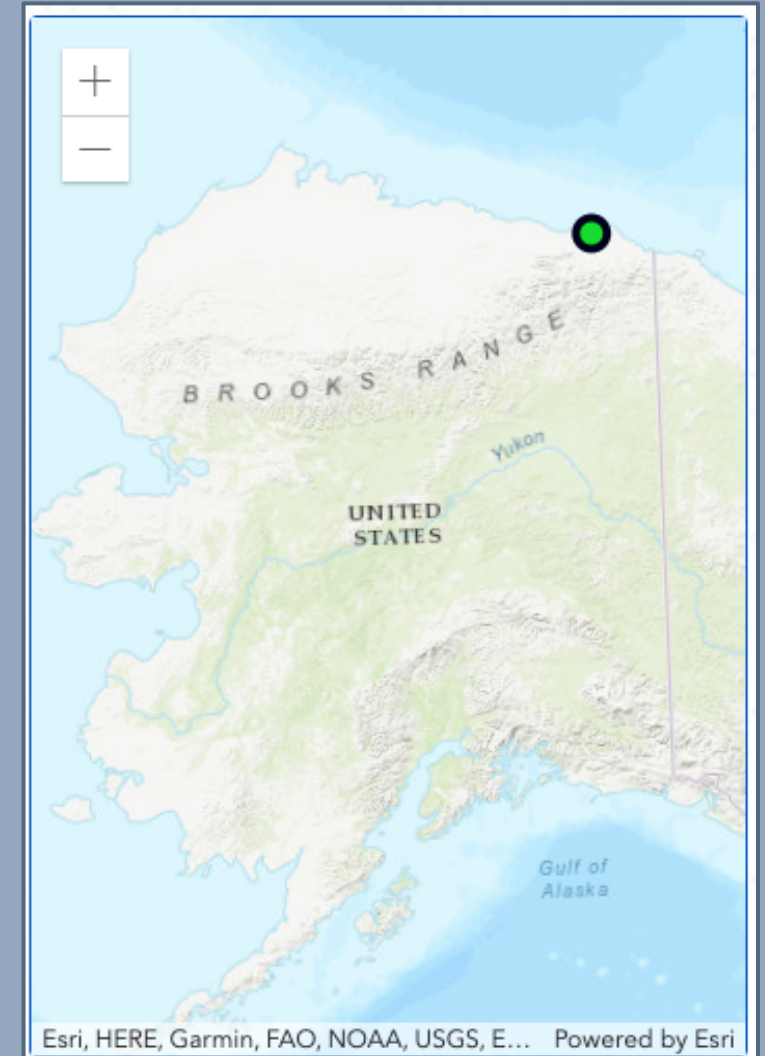
Maui County Wastewater Guidance

- Published December 10, 2020
- Comments were due by January 11, 2021
- Draft memorandum to provide guidance on applying the U.S. Supreme Court's decision in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020).

NOAA

Proposed Authorization for Incidental Take of Polar Bears

- Proposed authorization for seismic survey project to incidentally harass polar bears in ANWR
- Published December 8, 2020, 85 FR 79082
- Comments were due January 7, 2021
- Final authorization has not been issued.



Department of Interior



Offshore Wind Project Development

- The Solicitor issued an opinion letter describing how the agency will interpret “interference with reasonable uses” for offshore wind development
- December 14, 2020
- Agency will err on the side of less interference and will prevent any unreasonable interference

U.S. Department of Agriculture

- MOU on Animal Biotechnology (FDA and USDA)
 - Signed: January 19, 2021.
 - Shifts responsibility for animals concerning regulation of certain animals developed using genetic engineering for agricultural purposes, including food, from FDA to USDA.



AquaBounty Technologies

- CFAP Payments Temporarily Halted on January 27, 2021 due to Biden Administration regulatory freeze.
 - Rule announcing eligible commodities, updated payment calculations, and reopening application was finalized on 1/19.
 - Producers may continue to submit applications during review period.

Coming Up Next! - Executive Orders



Join us on March 3rd as we wade through the flurry of executive actions by President Biden!

Questions?

Please type your question into the Chat window.

Contact Us

sshowalt@olemiss.edu

