

# The **SANDBAR**

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Legal Reporter for the National Sea Grant College Program

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## Georgia Aquarium Loses Bid to **Import Whales**

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*Also,*

Second Circuit Sends EPA Back to Drawing Board on Ballast Water and Lakers

Organic Aquaculture Standards: Navigating Potential USDA Regulations

Sixth Circuit Issues Nationwide Stay of the Clean Water Rule

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Contents page photograph of the Great Falls in Virginia courtesy of Christine Fournier.



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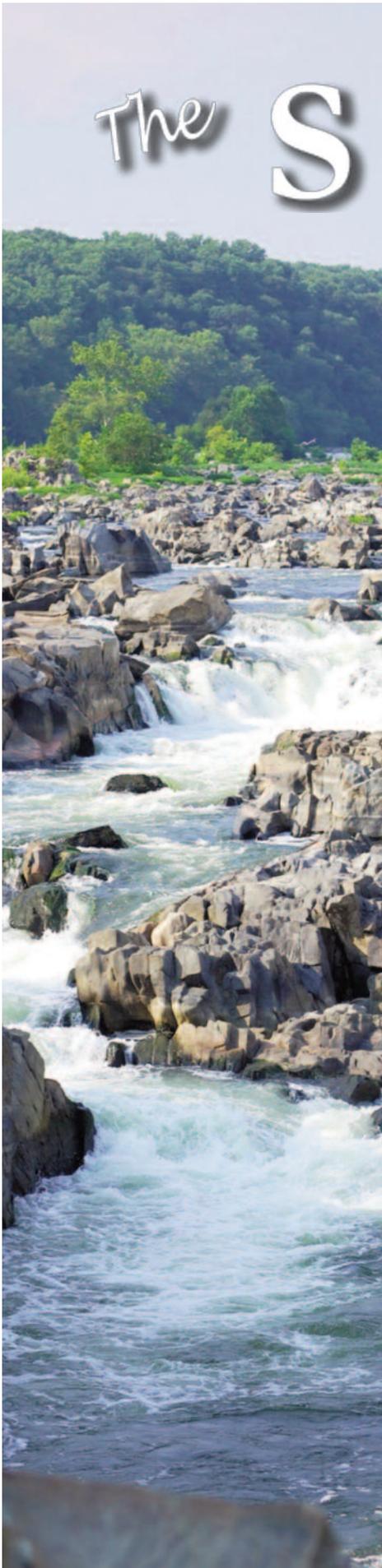


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# GEORGIA AQUARIUM LOSES BID TO IMPORT WHALES

Katie Muldoon<sup>1</sup>

The Georgia Aquarium's beluga whale program has found itself in the media multiple times this past year. In June, the facility lost a female beluga calf only 26 days after its birth.<sup>2</sup> Just months later, her mother Maris passed away.<sup>3</sup> And, in September, the U.S. District Court for the Northern District of Georgia upheld the National Marine Fisheries Service's (NMFS) denial of the Aquarium's application for the importation of almost 20 captured beluga whales from a research facility in Russia.<sup>4</sup>

## Background

Between 2006 and 2011, 18 beluga whales were taken from the Sakhalin Bay in Russia and have been held at the Utrish Marine Mammal Research Station (UMMRS) on the coast of the Black Sea. In June 2012, the Georgia Aquarium submitted an application to import these whales into the United States where they would be redistributed between the Georgia Aquarium, Sea World Orlando, Sea World San Antonio, Sea World San Diego, Mystic Aquarium in Connecticut, and Shedd Aquarium in Illinois for breeding purposes and public display.

NMFS reviewed the application and ultimately denied it due to the Georgia Aquarium's failure to prove that 1) the removal would not result in harm to the species or stock in that region, 2) the removal would not likely result in the taking of "replacement" animals, and 3) none of the animals were nursing at the time they were removed from the wild.

In response to the denial, the Georgia Aquarium filed an administrative appeal with NMFS, pursuant to the Administrative Procedures Act (APA) on the grounds that the agency acted arbitrarily, capriciously, and not in accordance with the law in denying the permit to import the whales. The court upheld NMFS's denial of the permit, noting that the aquarium failed to show its permit request was consistent with the Marine Mammal Protection Act (MMPA).

## Denial of the Aquarium's Application

The MMPA "was enacted to protect marine mammal species and population stocks in the wild that are or may be

"in danger of extinction or depletion as a result of man's activities."<sup>5</sup> The district court noted that the primary purpose of the MMPA is to protect the animals and was not intended to balance the interests of the capture display industry and the marine mammals.<sup>6</sup> It emphasizes that the interests of the marine mammals come first under the statutory scheme, and the interests of the industry are secondary to the protection of the animals.<sup>7</sup>

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***IT EMPHASIZES THAT THE INTERESTS OF THE MARINE MAMMALS COME FIRST UNDER THE STATUTORY SCHEME, AND THE INTERESTS OF THE INDUSTRY ARE SECONDARY TO THE PROTECTION OF THE ANIMALS.***

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The MMPA prohibits the taking and importation of marine mammals, with certain exceptions such as public display. Any party seeking to capture or import marine mammals must submit an application for a permit from NMFS.<sup>8</sup> Permits are available for scientific research, enhancing the survival or recovery of a species or stock, or public display, provided that certain requirements are met. In the case at hand, the Georgia Aquarium's application for a permit failed for several reasons.

First, the court found that the removal of the whales may not comply with the MMPA's purpose of preventing marine mammals species and population stocks from "diminish[ing] beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, [and] below their optimum sustainable population."<sup>9</sup> The Aquarium did not acknowledge the possibility that additional whales in the region may be removed from the wild or killed by sources other than the capture team, such as through private hunting or by accidental deaths. Additional captures or deaths must be considered in calculations of the yearly number of whales that can be removed from the wild in order to maintain a healthy population.



Beluga whale courtesy of Mathieu Jarry.

The Aquarium argued that because the animals were already taken from the wild at the time it submitted its application for import, the potentially harmful impacts on the wild stock or environment would have already occurred and the approval of the permit would have no direct effect on the Sakhalin-Amur beluga whale stock.<sup>10</sup> However, the court noted that there is indication in the record that the whales were captured for the purpose of exporting to the Georgia Aquarium specifically; therefore, had the team known the permit would be denied, the 18 whales in question may not have been removed from the wild.

Second, the court found that the importation of the beluga whales would undermine regulations enacted under the MMPA. The regulations stipulate that the take or import of marine mammals may not lead to the capture of more marine mammals to replace those taken.<sup>11</sup> In the past, NMFS has required letters from the exporting facility confirming that there was no intention

to acquire additional or replacement animals after the release of the ones in question. The court noted that because there is an ongoing, legal capture operation in Russia for beluga whales and other marine mammals, no such letter would be feasible. As a result, the Aquarium could not provide assurance that the Russian facility would not replace the 18 whales with other whales after the export to the Georgia Aquarium. NMFS concluded that the Aquarium did not meet the statutory requirement of the MMPA to prove that replacement takings would not occur as a result of the importation.

Third, the MMPA and its regulations prohibit the import for public display of any juvenile marine mammal “nursing at the time of taking.”<sup>12</sup> The court found that the Aquarium failed to prove that none of the captured whales had been nursing or of nursing age at the time of capture. The aquarium offered one set of ages for the 18 beluga whales in its preliminary draft application for the permit, and in its final application

Sunset over Sakhalin Bay in Russia courtesy of Raita Futo.



had increased ages for eight of the whales. The final application, even with the changed ages, still suggests that five of the whales were under the required age of 1.5 years old at the time of capture and that they were not yet independent of their mothers. The altered ages not only create ambiguity but also question the integrity of other data in the application.

### Conclusion

On the entry wall of the Georgia Aquarium is inscribed the quotation, “The oceans deserve our respect and care, but you have to know something before you can care about it.”<sup>13</sup> There is a tension between the need to protect these animals in the wild and the need to make them available to the public in order to raise awareness of the species. Many believe that without facilities such as aquariums, the public would be unaware of the need to protect animals like beluga whales.

Importing these 18 whales may reduce the need for future wild captures if the aquarium breeding cooperative can establish a successful domestic stock. On the other hand, importing these whales will most likely lead to the subsequent capture of at least 18 more. The tensions between ethics and education, short-term effects and long-term goals make this case a difficult issue but also an important dialogue among conservationists and advocates across the spectrum. ♻

### Endnotes

- <sup>1</sup> 2017 J.D. Candidate, University of Mississippi School of Law.
- <sup>2</sup> Peter Holley, *The Georgia Aquarium’s Newborn Beluga Whale Has Died*, WASH. POST, June 6, 2015.
- <sup>3</sup> Faith Karimi, *Maris The Beluga Whale Dies Suddenly at Georgia Aquarium*, CNN, Oct. 23, 2015.
- <sup>4</sup> Ga. Aquarium, Inc. v. Pritzker, 2015 WL 5730661 (N.D. Ga. Sept. 28, 2015).
- <sup>5</sup> *Id.* at \*6, citing 16 U.S.C. § 1361(1).
- <sup>6</sup> *Id.* citing Fed’n of Japan Salmon Fisheries Co-op. Ass’n v. Baldrige, 679 F. Supp. 37, 46 (D.D.C. 1987); Kokechik Fisherman’s Ass’n v. Sec’y of Commerce, 839 F. 2d 795 (D. C. Cir. 1988); Comm. for Humane Legislation, Inc. v. Richardson, 414 F. Supp. 297, 306 (D.D.C.) aff’d, 540 F. 2d 1141, 1148 (D.C. Cir. 1976).
- <sup>7</sup> *Id.*
- <sup>8</sup> *Georgia Aquarium*, 2015 WL 5730661 at \*14.
- <sup>9</sup> 16 U.S.C. § 1361(2).
- <sup>10</sup> *Georgia Aquarium*, 2015 WL 5730661 at \*22.
- <sup>11</sup> 50 C.F.R. § 216.34.
- <sup>12</sup> 16 U.S.C. § 1372(b)(2), 50 C.F.R. § 216.12(c)(2).
- <sup>13</sup> *Georgia Aquarium*, 2015 WL 5730661 at \*1.

# SECOND CIRCUIT SENDS EPA BACK TO DRAWING BOARD ON BALLAST WATER AND LAKERS

John Juricich<sup>1</sup>

**B**allast water has been the bane of Great Lakes advocates since the introduction of zebra mussels into the U.S. via an oceangoing freighter in the early 1980s.<sup>2</sup> While states and the federal government have attempted to regulate ballast water discharges, the issues are complex and litigation has ensued. Environmental groups recently commended the U.S. Court of Appeals for the Second Circuit's ruling in *Natural Resources Defense Council v. EPA*.<sup>3</sup>

In the ruling, the Second Circuit effectively sent the Environmental Protection Agency (EPA) back to the drawing board regarding its Vessel General Permits (VGPs), which are intended to regulate discharge of ballast water from ships. Specifically, the court admonished EPA's ballast water rules as being too weak and noncompliant with the Clean Water Act (CWA). As a result, present permit exemptions for certain ships will no longer be operable, and much stricter regulations on ballast water will likely be imposed. At the heart of this issue lies the catalyst of these regulations and the driving factor of the court's ruling: invasive species.

## The Problem

A ship takes on and discharges ballast water to compensate for changes in its weight caused by activities such as loading and unloading cargo or consuming fuel or supplies. The amount of water can range from hundreds of gallons to as much as 25 million gallons—enough to fill thirty-eight Olympic-sized swimming pools. More than 21 billion gallons of ballast water are released in the United States annually. When a ship takes on ballast water, it can inadvertently pick up organisms and their eggs and larvae, as well as sediment and pollutants. When the ship discharges ballast water, often in a new place, these organisms and pollutants are ejected into the surrounding waterbody, enabling these organisms to establish new, non-native populations. As a result, ships have become one of the primary ways that invasive species are spread from one waterbody to another.<sup>4</sup>



Zebra mussels attached to a boat propeller courtesy of Towne Post Network Media.

Invasive species cause severe economic and ecological harm, including by destroying native fish species and shellfish industries, triggering algae blooms, and devastating tourism. Zebra mussels are a particularly destructive example. These mussels have wreaked havoc by blocking water intake and outtake at power plants and other industrial facilities, causing nearly \$70 million in damage between 1989 and 1995. One study estimates the damage caused by invasive species collectively at “about \$137 billion a year—more than double the annual economic damage caused by all natural disasters in the United States.”<sup>5</sup>

Ballast water discharge is particularly problematic in the Great Lakes. Vessels that sail exclusively in the Great Lakes, known as “Lakers,” account for over ninety-five percent of ballast water volumes transferred in the Great Lakes. Unfortunately, Lakers are more likely than oceangoing vessels, or “salties,” to spread invasive species because the short duration of their voyages allows organisms to survive in their ballast.

Photo of a ship deballasting courtesy of C. Simkanin.



### **The Response**

Historically, the U.S. Coast Guard regulated ballast water discharges. In 2006, environmental groups sued the EPA to require it to regulate ballast water discharges under the CWA. The U.S. District Court for the Northern District of California found that the EPA's exclusion of ballast water discharges from National Pollutant Discharge Elimination System (NPDES) permitting was a violation of the CWA.<sup>7</sup> Ultimately, the Ninth Circuit upheld the ruling.<sup>8</sup>

In response, the EPA issued a NPDES general permit for the discharge of ballast water by commercial vessels, which set to expire in December 2013. In 2011, the Lake Carriers' Association (LCA), a collection of plaintiffs consisting of commercial ship owners and operators,

challenged the VGP claiming that the EPA's inclusion of state certification requirements was arbitrary and capricious.<sup>9</sup> The U.S. Court of Appeals for the District of Columbia denied the claim, finding that the EPA was not authorized to amend or reject the state conditions.<sup>10</sup> Finally, in April 2013, relying on the existing International Maritime Organization standard, the EPA issued a final NPDES general permit to replace the expiring permit. The new permit requires commercial vessels over 79 feet long entering the Great Lakes to perform one of 27 different types of discharges of ballast water. In addition, the permit contains numeric ballast water discharge limits for vessels with ballast water tanks and also exempted Lakers built before 2009.<sup>11</sup> This is the VGP at issue in the recent challenge by the environmental groups.

## EPA's Errors According to the Court

In response to the VGP, four environmental groups filed suit, alleging that the EPA acted arbitrarily and capriciously in issuing the VGP. The Second Circuit addressed certain aspects of the VGP and, in a unanimous opinion, ruled that technology exists to enforce tougher effluent discharge limitations and the EPA acted arbitrarily and capriciously because it should have used its authority under the CWA to consider onshore facilities for ballast treatment instead of only focusing on control systems aboard ships.<sup>12</sup> The court also held that “EPA’s exemption of the pre–2009 Lakers from the VGP was also arbitrary and capricious due to EPA’s failure to conduct an appropriate and factually-supported cost-benefit analysis.”<sup>13</sup> The court ended its admonishment of the EPA’s ballast water rule by remanding the matter back to the EPA to better justify its approach in the VGP or to draft new VGP ballast water provisions in accordance with its ruling. In the meantime, the court mandated that the current VGP would remain in effect.

A particularly interesting side note in the Second Circuit’s opinion was its extraordinary specificity. Normally, given the high deferential standard to an agency’s decision, a court weighing in on highly complex environmental issues won’t go into great detail in its decision. However, the Second Circuit in this case provided specific instructions on what the EPA did and did not do, and how the EPA should fix it. If anything, the specificity in this court’s decision was atypical, and how that affects further proceedings regarding this issue could be interesting.

## Implications of the Ruling

This ruling is obviously intimating that stricter regulations must be placed on the shipping industry. However, even if the EPA decides not to seek further review of the Second Circuit’s decision, it will be quite some time before a new VGP is drafted. The EPA was already scheduled to begin working on a 2018 VGP in early 2016. As the Second Circuit’s ruling will require extensive analysis and further study, the changes required by this ruling will more than likely be integrated in the research and development process for the 2018 VGP. However, along with the myriad regulations already shaping their day-to-day business, owners and operators of vessels in U.S. waters have another wrinkle on the horizon to keep tabs on as this issue progresses.

Another interesting side note on this issue, and something to keep a watch on moving forward, is Senator Marco Rubio’s bill (S. 373) that would make the Coast

Guard the lead agency on ballast water regulation. If the bill passes, it could possibly gut the Second Circuit’s decision.<sup>14</sup> In any event, this ruling as it stands now is making waves in the shipping industry. ♻

## Endnotes

- <sup>1</sup> 2016 J.D. Candidate, University of Mississippi School of Law.
- <sup>2</sup> “From that humble start, the invaders colonized the Great Lakes and spread across the country on towed boats.” Jim Robbins, *A Western Showdown*, N.Y. TIMES, Sept. 8, 2015, at D6.
- <sup>3</sup> *Natural Res. Def. Council v. U.S. E.P.A.*, 2015 WL 5780393 (2d Cir. Oct. 5, 2015).
- <sup>4</sup> *Id.* at \*1; *see also* *Nw. Env’tl. Advocates v. U.S. EPA*, 537 F.3d 1006, 1012-13 (9th Cir. 2008) (“All told, more than 10,000 marine species each day hitch rides around the globe in the ballast water of cargo ships.”).
- <sup>5</sup> *Nw. Env’tl. Advocates*, 537 F.3d at 1013.
- <sup>6</sup> *Id.* (quoting *Nw. Env’tl. Advocates v. U.S. EPA*, 2006 WL 2669042, at \*4 (N.D. Cal. Sept. 18, 2006)).
- <sup>7</sup> *Nw. Env’tl. Advocates v. U.S. EPA*, 2006 WL 2669042.
- <sup>8</sup> *Nw. Env’tl. Advocates*, 537 F.3d at 1006.
- <sup>9</sup> *Lake Carriers’ Ass’n v. U.S. EPA*, 652 F.3d 1 (D.C. Cir. 2011).
- <sup>10</sup> *Id.*
- <sup>11</sup> Final National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges Incidental to the Normal Operation of a Vessel, 78 Fed. Reg. 21,938 (Apr. 12, 2013).
- <sup>12</sup> *Natural Res. Def. Council*, at \*11-14. The National Wildlife Federation (NWF) and the National Resources Defense Council contended that mid-ocean ballast water flushing and new onboard treatment systems are insufficient protections against aquatic hitchhikers like the invasive zebra mussel. The NWF wants to see ships pipe ballast water into waterfront treatment facilities in port cities rather than dumping the pollutant into the water.
- <sup>13</sup> *Id.* at \*16.
- <sup>14</sup> Rebecca Williams, *Federal appeals court orders EPA to rewrite ballast rules for ships*, MICHIGAN RADIO (Oct. 8, 2015). Noah Hall, an expert on water law and professor at Wayne State University, stated that this legislation “would in effect exempt these vessels—both lakers and salties—from regulation by the EPA under the Clean Water Act,” and “would more or less gut [the Second Circuit’s decision] and it would take this entire form of pollution, take it out of the Clean Water Act regulatory scheme . . . .” *Id.*

# ORGANIC AQUACULTURE STANDARDS: NAVIGATING POTENTIAL USDA REGULATIONS

Alexandra Chase<sup>1</sup>

The sale and consumption of seafood is increasing annually, as well as the demand for organic food sources. Currently, there are no federal standards for organic aquaculture. Consumers, together with the aquaculture industry, have requested federal guidelines. Recommendations presently under review by the U.S. Department of Agriculture (USDA) will control the production, sale, and marketing of organic seafood and aquatic plants in the United States. These regulations would help ensure consistent products and methods, as well as advance domestic competition in global organic aquaculture markets.

## What is Aquaculture?

Aquaculture is the cultivation and rearing of aquatic plants and animals and a multibillion-dollar global industry. The term encompasses diverse groups of aquatic animals and plants, including edible finfish and shellfish, baitfish, sportsfish, and ornamental fish and plants. Regulation of the aquaculture industry is often complex and nuanced, in part because of the diverse nature, quantity, and type of animals and plants involved. The methods of farming can vary: for instance, shellfish (such as oysters, mussels, and clams) and fish (such as salmon) are raised in bays or the open ocean, while catfish, crawfish, shrimp, and tilapia are farmed in reservoirs, and trout in raceways.

Edible aquatic animals and plants are the cornerstone of the aquaculture industry, and half of all seafood consumed in the world is a product of aquaculture. The fastest growing sector of food production is farmed fish products, which are anticipated to further expand into the market share as global population and demand increases. Consumers in the United States alone spent over \$91 billion dollars in 2014 on fishery foodstuffs, which reflects a \$5 billion dollar increase over three years.<sup>2</sup>

## Organic Aquaculture

Aquaculture commerce is expanding and producers are hoping to further their stake in consumable fishery products by targeting the organic market. Organic food

and beverage sales are a \$35 billion dollar business.<sup>3</sup> In the United States, the organic industry continues to capture a larger percentage of total food market sales each year. Federal organic aquaculture certification would yield greater profits for domestic producers and create a unique market share that is presently unavailable to commercial fishing operations, as wild caught fish products do not qualify for organic accreditation.

## Organic Aquaculture Standards

Abroad, international organic aquaculture standards are utilized by private foreign industry. These organic standards vary by country, aquatic species, and certifying agent. Aside from food safety concerns, there is no national oversight of organic aquaculture that is imported, sold, and consumed in the United States.

In 2001, the domestic aquaculture industry started making requests for the development of federal regulations as a way to compete with international companies. An Aquaculture Working Group (AWG) was appointed in 2005 by the Secretary of Agriculture to advise the National Organic Standards Board (NOSB) in drafting recommendations to be sent to the USDA.<sup>4</sup> Members of the AWG are from trade groups, universities, fishery producers and suppliers, and environmental organizations.

Between 2007-2009 the NOSB gave the USDA five recommendations for the standards, production, and certification of organic aquaculture. In May 2012, the deputy administrator of the National Organic Program (NOP), Miles McEvoy, advised the NOSB that his office was working on producing an organic aquaculture standard rule that would be available in two years. There was supposition that a notice of proposed rulemaking would be available in early to late summer of 2015; however, to date, no standards have been released.

## Benefits and Critiques for Federal Standards

The only organic aquaculture products sold or marketed in the United States are produced internationally. Domestic regulation would enable national producers to fully compete in the organic seafood industry.



Photo of a catfish courtesy of Selbe Lynn.

Organic aquatic animal products sell for 75-100% more than wild caught or traditional aquaculture cultivated foods. New organic standards would allow domestic producers to more fully engage in the aquaculture market by increasing access and the opportunity to expand existing seafood supplies. The proposed regulations would require imported and domestically cultivated organic aquaculture to meet federal standards that consumers could rely upon. Additionally, the United States has organic agreements with the European Union (EU) and Canada, which allows products labeled as organic to be sold and marketed between trade partners. Unlike the EU and Canada, the United States does not have organic aquaculture standards and is thus unable to fully participate in these trade arrangements.

In the fall of 2002, the USDA implemented the National Organic Standards for agricultural products.<sup>5</sup> Under this regulation, a USDA accredited agent must certify that the agricultural products that are marketed or labeled as organic meet USDA standards. USDA certified organic food must be produced under methods that protect biodiversity and natural resources and must be cultivated with only approved substances. Pursuant to this, genetically modified organisms (GMOs) are prohibited in organic food, meaning produce cannot be grown with GMO seeds and livestock cannot consume GMOs. There is concern that the proposed organic aquaculture regulations are insufficient because the standards are less demanding than current organic rules, potential problems exist with the monitoring and enforcement of the recommended standards, and environmental impacts inherent in the aquaculture industry are adverse to organic ethos.

Feed issues are at the forefront of critiques that the proposed aquaculture standards are less strict than organic agriculture rules. Regulators face difficulty in addressing the dietary needs of both carnivorous and vegetarian fish with presently available food products. Many predatory species, such as trout and salmon, are fed

fishmeal comprised of ground-up wild fish. Since wild species cannot be organic, critics argue that predatory fish have not consumed an organic diet. Additionally, using wild fish as feed contributes to unsustainable fishing practices and undermines the spirit of organic food. Proponents of wild caught feed argue that using organic fish as feed fish creates a higher environmental impact than wild caught and is prohibitively expensive.<sup>6</sup> Feed concerns also exist in shellfish production, as algae and ocean particles are not in an organic closed system.

Opponents of the proposed regulations argue that USDA agents lack the staff and funding to adequately and timely monitor and enforce existing seafood regulations. There is concern that organic standard testing would be subordinated with little to no supervision or verification of organic aquaculture practices, especially in operations located internationally.

The nature of water also complicates the organic aquaculture discussion as pollutants move freely through water, and there are concerns that farmed species could contaminate, infect, or alter native species. Environmentalists argue that restricting the movement of migratory species like salmon is in opposition to the foundational philosophy of the organic movement and what consumers believe they are purchasing.

## Conclusion

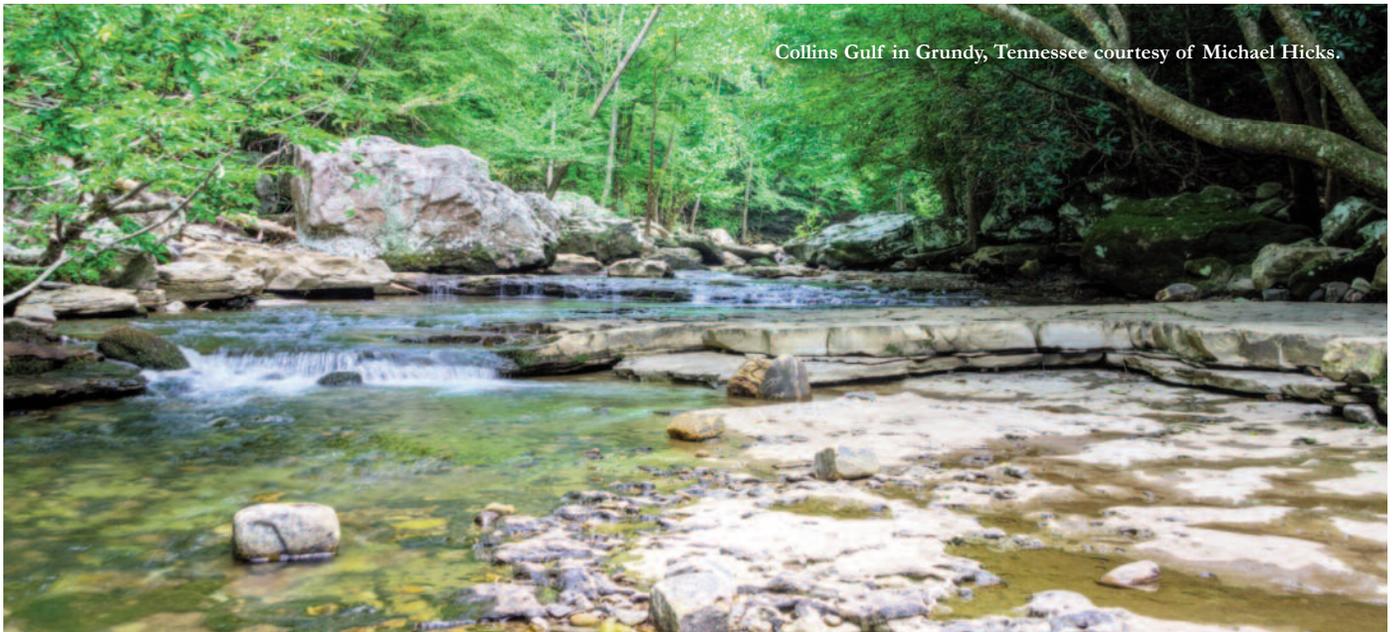
While the regulatory issues associated with developing comprehensive organic aquaculture standards are diverse and dynamic, such regulation would address existing industry needs and market share. Numerous federal agencies have expended effort to develop workable organic aquaculture regulations, and the publication of these standards is likely. The question becomes the level of implementation, monitoring, and industry and consumer buy-in. ♻

## Endnotes

- <sup>1</sup> Ocean and Coastal Law Fellow at the National Sea Grant Law Center, University of Mississippi School of Law.
- <sup>2</sup> Nat'l Marine Fisheries Serv., Fisheries of the U.S., 2014 (NOAA 2015). EUGENE H. BUCK & HAROLD F. UPTON, CONG. RESEARCH SERV., R41613, FISHERY, AQUACULTURE AND MARINE MAMMAL ISSUES IN THE 112<sup>th</sup> CONGRESS (2012).
- <sup>3</sup> *All Things Considered*, National Public Radio (Mar. 11, 2015).
- <sup>4</sup> Nat'l Organic Program: Organic Aquaculture Standards, Fed. Reg. Unified Agenda 0581-AD34 (2014).
- <sup>5</sup> National Organic Program, 7 C.F.R. pt. 205.
- <sup>6</sup> The higher environmental impact is caused by the energy needs associated with cultivating organic fish verses the lower environmental impact of catching fish already in existence.

# SIXTH CIRCUIT ISSUES NATIONWIDE STAY OF THE CLEAN WATER RULE

Amanda Nichols<sup>1</sup>



Collins Gulf in Grundy, Tennessee courtesy of Michael Hicks.

Earlier this year, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) promulgated the Clean Water Rule to clarify what waters have a “significant nexus” to navigable waters and are, thus, subject to federal authority under the Clean Water Act (CWA).<sup>2</sup> Recently, the U.S. Court of Appeals for the Sixth Circuit considered the validity of the rule in four consolidated actions that represented eighteen states (the States).<sup>3</sup> In October, the court granted a motion for a nationwide stay of the Clean Water Rule pending the court’s determination of whether it has subject matter jurisdiction to review the rule.

## Background

The Clean Water Rule introduces bright-line boundaries to, according to the EPA, make identifying waters protected under the CWA easier to understand, more predictable, and consistent with the law and peer reviewed science, while simultaneously protecting streams and wetlands.<sup>4</sup> This rule is intended to address

rulings by the Supreme Court in 2001 and 2006 that created uncertainty about the appropriate scope of waters protected under the CWA. The structure of the rule is based on a 2013 “Connectivity Report” conducted by the EPA that reviewed and synthesized the peer-reviewed scientific data on the connectivity or isolation of streams and wetlands to large bodies of water. The Clean Water Rule relies on the report’s data to focus federal jurisdiction on those streams and wetlands that have the greatest impact on downstream water quality.

In filing suit against the Corps and the EPA, the States argued that the definitional changes within the Clean Water Rule were an impermissible expansion of the agencies’ regulatory authority and dramatically altered the existing system of federal-state collaboration on water quality issues. The States further argued that the federal agencies adopted the rule through a process that was improper under the rulemaking requirements of the Administrative Procedure Act (APA).

## The States' First Allegation

In response to the States' allegation that the rule impermissibly expands federal jurisdiction, the court decided that the rule's treatment of tributaries, "adjacent waters," and waters having a "significant nexus" to navigable waters is at odds with the U.S. Supreme Court holding in *Rapanos v. United States*.<sup>6</sup> *Rapanos* was a "plurality" decision, meaning that there was no majority vote. Since that time, the circuits have been split on whether to follow Justice Scalia's opinion or Justice Kennedy's concurrent opinion. Justice Kennedy's opinion postulated that wetlands that have a "significant nexus" with a traditionally navigable water fall under the protection of the CWA. He noted that this requirement would be satisfied if a wetland were found to have a significant effect on the water quality of any nearby, navigable waters.

In the present case, the Sixth Circuit noted that it was unclear how the new rule's distance limitations would be harmonious with Justice Kennedy's instruction. For instance, under the new rule, wetlands located more than 4,000 feet from a water under CWA jurisdiction would be classified *non-jurisdictional*. The rule also imposes several numeric distance limitations within the definition of "adjacent waters." According to the court, these distance limitations would subvert Justice Kennedy's "significant nexus" analysis in favor of strict, objective determinations that are ultimately at odds with *Rapanos*.

## The States' Second Allegation

The court then looked to the States' allegations of improper rulemaking measures taken under the APA. On this point, the court found that the agencies failed to include the proposed distance limitations in their definitions of "adjacent waters" and "significant nexus" when they published the proposed rule for public comment. Under the proposed rule, the jurisdictional classification of wetlands would be subject to case-by-case determinations. However, the final rule established the 4,000 feet jurisdictional determination after the public comment period had ended. As a result, the court held that the final rule could not be considered a "logical outgrowth" of the proposed rule as required by the APA.<sup>7</sup> The court also noted that the rule lacked any scientific support for its proposed distance limitations, and was, therefore, impermissibly "arbitrary and capricious" under the APA.

## Issuance of the Stay

After the court noted the likelihood of success on the merits of the States' two allegations, it turned to the question of whether to issue a stay on the rule. The

court noted that there was no "compelling showing that any of the petitioning states would suffer immediate, irreparable harm" if a stay was not issued, but also reasoned that there was "no indication that the integrity of the nation's waters [would] suffer imminent injury" if the new rule was not immediately implemented and enforced.<sup>8</sup> In reconciling this conflict, the court noted that its immediate concern was the burden and impact on the public in general.

The court ultimately held that the best way to protect the general public would be to preserve the pre-Rule "status quo" of federal-state collaboration by issuing a stay on the rule. This stay would allow for a more in-depth determination of the appropriateness of the proposed rule and would restore uniformity of regulation under the "familiar...pre-Rule regime," pending judicial review.<sup>9</sup> It reasoned that, although the stay would cause a reversion back to the old rule, it would restore uniformity of regulation and allow the court time to clarify whether the rule is consistent with U.S. Supreme Court precedent.

## Conclusion

With the recent issuance of the stay, both critics and supporters of the rule have made their opinions known. Critics celebrate the win over what would be a "...devastating blow to private property rights and...an unlawful power grab by the EPA."<sup>10</sup> Alternatively, supporters of the rule lament the stay of a rule that "...is key to ensuring clean drinking water for one-in-three Americans and protecting essential buffers against flooding."<sup>11</sup> ❧

## Endnotes

<sup>1</sup> 2016 J.D. Candidate at the University of Mississippi School of Law.

<sup>2</sup> *In re E.P.A.*, 803 F.3d 804 (6th Cir. 2015).

<sup>3</sup> These states include: Ohio, Michigan, Tennessee, Oklahoma, Texas, Louisiana, Mississippi, Georgia, West Virginia, Alabama, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, and Wisconsin.

<sup>4</sup> *In re E.P.A.*, 803 F.3d at 805.

<sup>5</sup> *See generally*, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), *Rapanos v. U.S.*, 547 U.S. 715 (2006).

<sup>6</sup> *See generally*, *Rapanos*, 547 U.S. 715.

<sup>7</sup> *In re E.P.A.* at 807.

<sup>8</sup> *Id.* at 808.

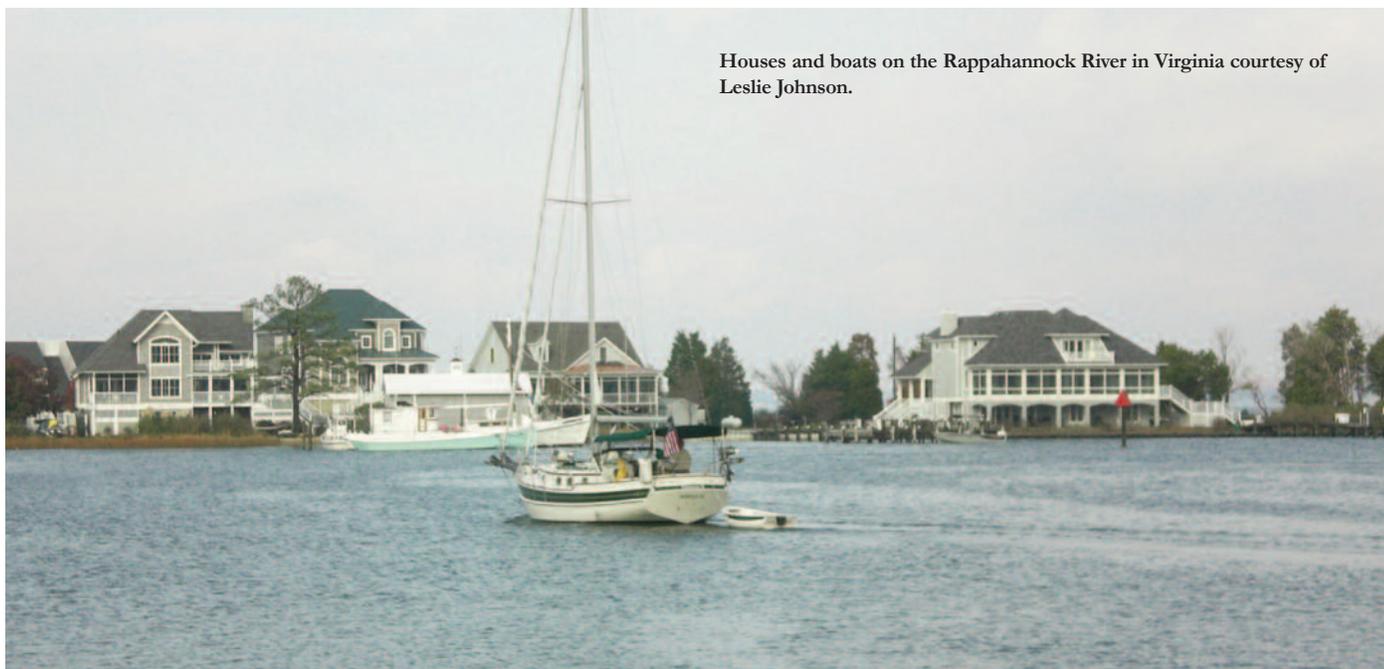
<sup>9</sup> *Id.*

<sup>10</sup> Brent Kendall & Amy Harder, *U.S. Appeals Court Blocks EPA Water Rule Nationwide*, *THE WALL STREET JOURNAL* (Oct. 9. 2015, 4:34 PM).

<sup>11</sup> *Id.*

# VIRGINIA OYSTER FARMERS CHALLENGE LOCAL ORDINANCES

Terra Bowling



Houses and boats on the Rappahannock River in Virginia courtesy of Leslie Johnson.

**W**ith the growing local food movement, the oyster aquaculture industry in Virginia is on the upswing. In fact, state agencies actively encourage oyster farming and gardening as an effort to improve water quality and biodiversity along the coast. Unfortunately, oyster farming isn't as easy as throwing a few cages in the water. The practice requires compliance with a variety of local, state, and federal regulations. In the past few years, two Virginia oyster farmers have challenged local zoning ordinances that require special use permits for oyster aquaculture operations.

## **Bavuso**

In 2010, Anthony Bavuso began operating an oyster farming business on his property, which is located on the waterfront in York County in a residential district zoned Resource Conservation (RC).<sup>1</sup> In November 2011, the York County Zoning Administrator notified Bavuso that to continue aquaculture operations on his property, he

must obtain a special use permit (SUP). The Administrator cited the county zoning code that only allows one principal use and an accessory use. Any accessory use requires a SUP. Bavuso filed a challenge in the York County Board of Zoning/Subdivision Appeals (Board). The Board ruled that Bavuso must have a SUP to live and operate a business on his property.

In September 2012, Bavuso appealed the decision in York County Circuit Court. The court overturned the Board's decision, ruling that aquaculture is a form of agriculture, a use permitted in the RC zone without any additional land use permits.<sup>2</sup> In January 2014, the Virginia Supreme Court reversed the circuit court's judgment and ruled that living on the property and operating an aquaculture business are competing principal uses, which is not permitted in an RC zone.<sup>3</sup> Ultimately, the court ruled that Bavuso could continue his oyster aquaculture operations as an accessory use, as long as he obtains a SUP.

This July, the York County Circuit Court ruled on a separate case stemming from the Board's decision requiring the SUP.<sup>4</sup> In this action, Bavuso argued that county zoning ordinances violated both state zoning laws and the Virginia Right to Farm Act. Section 15.2-2288 of the Virginia Code states that a local zoning ordinance may not require a SUP for production agriculture in an area zoned as an "agricultural district or classification." The county argued that the state zoning law did not apply, because the county has no area zoned as agricultural district or classification, as required by § 15.2-2288. The court disagreed because "district or classification" is not defined by the statute; therefore, the phrase "must refer to any 'district or classification' that allows agriculture as a 'by-right use' or a 'primary permitted use.'"<sup>5</sup>

The court noted that Virginia's Right to Farm Act exists to protect agricultural interests where non-agricultural activities are undertaken near existing agricultural operations. The Act provides that "... no locality shall adopt any ordinance that requires that a special exception or special use permit be obtained for any production agriculture or silviculture activity in an area that is zoned as an agricultural district or classification..."<sup>6</sup> The court concluded that because the local ordinances conflict with state statutes, they are void.

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**THE COURT NOTED THAT VIRGINIA'S RIGHT TO FARM ACT EXISTS TO PROTECT AGRICULTURAL INTERESTS WHERE NON-AGRICULTURAL ACTIVITIES ARE UNDERTAKEN NEAR EXISTING AGRICULTURAL OPERATIONS.**

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### Garrett

In a separate suit, another York County oyster farmer, Greg Garrett, contested York County's SUP requirement for oyster operations. In 2009, Garrett began raising oysters at his waterfront property, which is zoned Rural Residential (RR), a designation that permits crop and livestock farming. The York County Zoning Administrator informed Garrett that his oyster farming operation was an unauthorized use of land, as aquaculture was not permitted in an RR district. The York County Board of Zoning Appeals upheld that decision.

On appeal, Garrett argued that his business was not aquaculture as defined by the code, because he didn't grow oysters in a controlled environment. He argued that because livestock agriculture is a permitted use in the RR zone, his operations should not require a SUP. In October 2012, the York County Circuit Court ruled in favor of Garrett.<sup>7</sup>

The Board appealed to the Virginia Supreme Court. The Board argued that oysters are not livestock; therefore, the business is not crop or livestock farming. In January 2014, the court issued a decision.<sup>8</sup> The court concluded that oysters are invertebrates and therefore not animals under the county code. Because Garrett's oyster farming is not livestock farming, it is not a permitted use. The court concluded that Garrett may continue with his aquaculture operations only with a SUP.

### Legislation

Following the Virginia Supreme Court decision in 2014, the Virginia legislature approved a bill that amended § 15.2-2288 to reduce local government control of aquaculture. As noted above, this section stipulates that "A zoning ordinance shall not require that a special exception or special use permit be obtained for any production agriculture or silviculture activity in an area that is zoned as an agricultural district or classification." The amendment essentially added aquaculture products to the definition of agriculture.<sup>9</sup> The amendment played a role in the outcome of the July 2015 Bavuso decision. There, the circuit court noted "... the legislature, by amending § 15.2-2288 to include this definition, made it clear that 'aquaculture' was a practice for which no SUP could be required."<sup>10</sup>

The amended law did not clear the way for Garrett and Bavuso, though. The county rezoned Bavuso's property to R33, a designation that does not allow agriculture.<sup>11</sup> And, in August 2014, on his third try at obtaining a SUP from the county, Garrett rescinded his application, citing a desire to move on from the conflict.<sup>12</sup> ☹

### Endnotes

- <sup>1</sup> Bavuso v. Carter, 2014 WL 3510293 (Va. Jan. 3, 2014).
- <sup>2</sup> Bavuso v. Carter, 85 Va. Cir. 336 (2012).
- <sup>3</sup> Bavuso, 2014 WL 3510293.
- <sup>4</sup> Bavuso, et. al v. York County Board of Supervisors, et. al, No. 14-60139 (Va. Cir. July 14, 2015).
- <sup>5</sup> *Id.* at 3.
- <sup>6</sup> VA. CODE ANN. § 3.2-301.
- <sup>7</sup> Garrett, 85 Va. Cir. 447.
- <sup>8</sup> Carter v. Garrett, No. 130144 (Va. Cir. Jan. 3, 2014).
- <sup>9</sup> VA. LEGIS. 435 (2014), 2014 Virginia Laws Ch. 435 (H.B. 1089).
- <sup>10</sup> Bavuso, No. 14-60139 at 3.
- <sup>11</sup> Johanna Somers, *York County Hears Another Lawsuit*, DAILY PRESS, March 12, 2015.
- <sup>12</sup> Ali Rockett, *Garrett Drops Application for Permit to Farm Oysters in York*, DAILY PRESS, Aug. 8, 2014.



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