October 2022 • Volume 21:4

The SandBar

Legal Reporter for the National Sea Grant College Program

20th Anniversary Issue

Our Staff

Editor:
Terra Bowling

Production & Design:
Barry Barnes

Contributors:
Samantha Hamilton
Betsy Randolph
Emma Tompkins

Follow us on Facebook at:
http://www.facebook.com/nsglc

Follow us on Twitter at:
http://www.twitter.com/sglawcenter

The University of Mississippi complies with all applicable laws regarding affirmative action and equal opportunity in all its activities and programs and does not discriminate against anyone protected by law because of age, creed, color, national origin, race, religion, sex, handicap, veteran or other status.

ISSN 1947-3966 NSGLC-22-02-04 *October 2022*
ISSN 1947-3974

The SandBar is a quarterly publication reporting on legal issues affecting the U.S. oceans and coasts. Its goal is to increase awareness and understanding of coastal problems and issues. To subscribe to *The SandBar,* visit: nsglc.olemiss.edu/subscribe. You can also contact: Barry Barnes at bdbarne1@olemiss.edu.

Sea Grant Law Center, Kinard Hall, Wing E, Room 258, University, MS, 38677-1848, phone: (662) 915-7775, or contact us via email at: tmharget@olemiss.edu. We welcome suggestions for topics you would like to see covered in *The SandBar*.

The SandBar is a result of research sponsored in part by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, under award NA180AR4170079, the National Sea Grant Law Center, Mississippi Law Research Institute, and University of Mississippi School of Law. The U.S. Government and the Sea Grant College Program are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon.

The statements, findings, conclusions, and recommendations are those of the author(s) and do not necessarily reflect the views of the National Sea Grant Law Center or the U.S. Department of Commerce.

Recommended citation: Author's Name, *Title of Article*, 21:4 SandBar [Page Number] (2022).

Contents page photograph of wind turbines, courtesy of Daniel Brock.

The SandBar

Contents

National Sea Grant Law Center: 2002-2022

The National Sea Grant Law Center was established in 2002 to "coordinate and enhance Sea Grant's activities in legal scholarship and outreach related to coastal and ocean law issues." For twenty years, the NSGLC at the University of Mississippi School of Law has fulfilled its five major responsibilities, as identified by the National Sea Grant Office:

1) integrating the efforts of ocean and coastal law researchers and users in the Sea Grant network nationwide;
2) conducting research on current ocean, coastal, and Great Lakes law issues;
3) providing outreach and advisory services to the Sea Grant network and coastal constituents;
4) disseminating information and analysis through periodic workshops and conferences as well as publications, and
5) serving as a focal point for Sea Grant's law-related issues and promoting the growth and development of a Sea Grant legal network.

Check out some of the NSGLC's milestones below!

2002

National Sea Grant Law Center established

First Issue of *The SandBar* published

***NSGLC Advisory Service* launched**


The SANDBAR

Supreme Court Rejects Lake Tahoe Landowners' Takings Claim

Supreme Court Upholds Immunity for Ports Authority

The SandBar, Volume 1:1

2005

First edition of the *Ocean and Coastal Case Alert*


-- August 15, 2005 --

Excerpt from the Aug. 15, 2005 *Ocean and Coastal Case Alert*

2008

Sea Grant Law & Policy Journal **relaunched**

Sea Grant Law & Policy Journal, Volume 1:1

2012

NSGLC recompeted and recognized as an "institutional project"

2016

NSGLC Webinar Series **launched**

Sep. 13, 2016 *NSGLC Advisory Service* webinar

2018

First ***NSGLC Blog*** **post published**

Oct. 5, 2018 *NSGLC Blog* post

2019

NSGLC designated as a "coherent area program"

2020

Sea Grant Law Diversity Internship Program **started**

SGLDIP Interns

Proposed National Marine Sanctuary – Hudson Canyon

Emma Tompkins[1]

Dolphins near the Hudson Canyon area, courtesy of Ryan Mandelbaum.

In June, the National Oceanic and Atmospheric Administration (NOAA) began the regulatory process to designate the Hudson Canyon National Marine Sanctuary in an area approximately 100 miles offshore of New York City.[2] The Hudson Canyon is one of the most expansive submarine canyons in the world and the largest along the United States' Atlantic coast. Rivaling the magnitude and depth of the Grand Canyon, the Hudson Canyon extends about 350 miles seaward, reaches depths of 2-2.5 miles, and is up to 7.5 miles wide.

Despite its proximity to one of the world's largest metropolitan centers, the Hudson Canyon provides habitat for a range of endangered, protected, and sensitive species, including the sperm whale, sea turtles, and deep sea, cold-water

coral communities. The robust diversity of the Hudson Canyon supports the local economy by providing productive waters for commercial and recreational fisheries, attracting recreational divers around the shallower areas of the Canyon, and supporting the yearly migration of whales and seabirds that attracts countless whale and birdwatchers. In addition to the environmental and economic features of the Hudson Canyon, the waters surrounding the Canyon hold historical and cultural significance for New York and New Jersey residents. Interestingly, the Hudson Canyon area is home to countless shipwrecks, varying from freighters to military radar platforms, some dating back to the mid-19th Century.[3]

Nomination Process

The National Marine Sanctuaries Act (NMSA) authorizes the Secretary of Commerce to designate and protect national marine sanctuaries of national significance due to their conservation, recreational, ecological, historical, scientific, cultural, archeological, educational, or aesthetic qualities.[4] The Secretary of Commerce delegated the responsibilities of day-to-day management of the protected sanctuaries to NOAA's Office of National Marine Sanctuaries (ONMS). Since the passage of the NMSA, the ONMS has established thirteen national marine sanctuaries and two marine national monuments.[5]

The application process for the designation of national marine sanctuaries allows communities to nominate special marine and Great Lakes areas the community believes would benefit from designation as a national marine sanctuary. According to NOAA, there is no requirement for who may nominate an area for consideration; however, nominations should demonstrate broad support from a variety of stakeholders and interested parties. The rule further establishes evaluation criteria, which are based on designation standards in section 303(b) of the NMSA. If NOAA determines that a nomination complies with the regulations and criteria, NOAA may add the nomination to the "inventory" of sites for the NOAA Administrator to consider for designation as a national marine sanctuary.[6]

NOAA's Consideration of Hudson Canyon Area

In November 2016, the Wildlife Conservation Society submitted a nomination asking NOAA to consider designating the Hudson Canyon area as a national marine sanctuary to conserve its nationally significant ecological and biological resources and to expand upon existing local and state efforts to study, interpret, and promote the area's ecological and biological uniqueness. The nomination was endorsed by a diverse coalition of organizations and individuals at the local and national level including elected officials, businesses, shipping industry representatives, recreational users, conservation organizations, academic groups, tourism companies, and historical societies.[7] Not all public feedback has been positive, however. Hudson Canyon's nomination has faced opposition from fishermen who fear that the designation would result in prohibitions or more restrictions on the Canyon's fisheries.[8] In February 2017, NOAA added the Hudson Canyon to the inventory of successful nominations eligible for designation.

Next Steps

The next steps in the designation process requires NOAA to draft designation documents, including a draft environmental impact statement (EIS), a draft management plan, and a notice of proposed rulemaking to define proposed sanctuary regulations. The public will then have an opportunity to review the drafts and will be allowed to submit comments. After the public comment period, NOAA will prepare and release a final EIS, management plan, and a final rule and regulations, as well as agency responses to public comments.

If designated by NOAA, the Hudson Canyon area would become just the sixteenth national marine sanctuary in the country and the second national marine sanctuary off New York's shorelines.[9] The designation would increase NOAA's leverage in managing and protecting the Canyon's resources and preventing drilling for oil and gas. The Hudson Canyon would serve as a sentinel site to monitor the impacts of climate change on submarine canyons, which are vulnerable to the effects of ocean acidification and oxygen depletion. Based on previous designation processes, it may be at least two to three years before NOAA releases a final decision on the designation.

Endnotes

1 NSGLC Research Associate; 2023 J.D. Candidate, University of Mississippi School of Law.

2 Notice of Intent to Conduct Scoping and to Prepare a Draft Environmental Impact Statement for the Proposed Hudson Canyon National Marine Sanctuary, 87 Fed. Reg. 34853 (June 8, 2022).

3 *Id.*

4 16 U.S.C. 1431 *et seq.*; 15 C.F.R. § 922.10.

5 *Legislation,* Nat'l Marine Sanctuaries, (last visited Sept. 15, 2022).

6 Re-Establishing the Sanctuary Nomination Process, 79 Fed. Reg. 33851-01 (June 13, 2014).

7 Notice of Intent, *supra* note 2.

8 Dan Radel, *No Fishing in Hudson Canyon? Proposed Marine Sanctuary Could Help Fish, Hurt Fisherman*, Asbury Park Press (June 17, 2022, 9:56 AM).

9 *New York Department of State Applauds NOAA's Proposed National Marine Sanctuary for the Hudson Canyon*, N.Y. State (June 16, 2022).

Court Upholds Industry-Funded At-Sea Monitor Rule

Terra Bowling

In August, a split D.C. Circuit Court of Appeals dismissed a case filed by a group of commercial herring fishing companies objecting to a rule promulgated under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) that establishes industry-funded at-sea monitoring programs in New England.[1] The companies had contended that the MSA did not authorize the National Marine Fisheries Service (NMFS or NOAA Fisheries) to require the industry to pay for at-sea monitoring. The majority opinion found the agency's interpretation of its authority to require the industry-funded monitoring to be reasonable.

At-sea monitors, also known as "fishery observers" are essentially "NOAA Fisheries' eyes and ears on the water," collecting data on onboard catches, as well as interactions with marine mammals and other wildlife.

The Rule

The MSA was enacted to "conserve and manage the fishery resources found off the coasts of the United States," and "promote domestic commercial and recreational fishing under sound conservation and management principles."[2] Pursuant to the MSA, each of the eight Fishery Management Councils must prepare and submit Fishery Management Plans for approval to NMFS. The New England Fishery Management Council (NEFMC) develops the FMP for the Atlantic herring fishery.

In February 2020, NMFS published the final rule amending the FMP to require industry-funded monitoring in the Atlantic herring fishery (monitoring rule).[3] At-sea monitors, also known as "fishery observers" are essentially "NOAA Fisheries' eyes and ears on the water," collecting data on onboard catches, as well as interactions with marine mammals and other wildlife.[4] Pursuant to the monitoring rule, owners of vessels selected by NMFS host and pay the costs of the monitor. The rule allows exceptions for vessels landing less than 50 metric tons of herring. NMFS estimated the industry costs of hosting an at-sea monitor to be $710 per day, and would reduce their earnings by twenty percent.[5]

District Court Ruling

New Jersey commercial fishing companies participating in the Atlantic herring fishery filed suit in the U.S. District Court for the District of Columbia, alleging, among other claims, that NMFS lacked the authority under the MSA to require industry-funded monitoring and that the rulemaking was procedurally flawed.[6] The federal district court granted summary judgment to NMFS. The court also concluded the federal government sufficiently studied the environmental impacts of the rule, as well as other alternatives and mitigation measures. The court granted the defendants' motion for summary judgment, upholding the rule.

Appeal

On appeal, the fishermen renewed their challenge to NMFS' authority to enact the rule. The U.S. Court of Appeals for the D.C. Circuit completed a *Chevron* analysis, a two-step test developed by the U.S. Supreme Court, to determine whether NMFS reasonably interpreted its authority under the MSA. Under the first step of the analysis, the court looked at whether Congress has spoken clearly on the issue. In this instance, the court noted that the language of the MSA does not explicitly say

Photo courtesy of NOAA Fisheries.

whether the agency can require the industry to pay for at-sea monitors. The court therefore moved on to the second step of the Chevron analysis to determine whether the agency's rulemaking was based on a reasonable interpretation of the law. The court noted that Section 1853(b)(8) of the MSA specifically states that the agency may require at-sea monitors. Two other provisions, Sections 1853(a)(1)(A) and (b)(14), grant the agency authority to implement "necessary and appropriate" measures to meet the MSA's conservation and management goals. The court found the agency's interpretation of these statutes to allow it to require industry-funding monitoring to be reasonable.

The court also addressed the fishermen's claims that the monitoring rule, even if statutorily authorized, was arbitrary and capricious. The plaintiffs alleged that the agency should have considered the economic cost of the rule. Reviewing the record, the court found the agency properly considered the cost and made efforts to address it by providing exceptions for smaller vessels. The court also held that NMFS followed the proper procedures in promulgating the rule and its delay in issuing the rule was harmless.

Conclusion

The court granted the agency's motion for summary judgment, affirming the rule. In a dissenting opinion, one judge argued that the MSA's silence on the issue of industry-funded at sea monitors meant that the agency lacked authority to require them. The judge concluded the dissent by noting the hardship of the rule on the fishermen.

Endnotes

1 Loper Bright Enter., Inc. v. Raimondo, No. 21-5166, 2022 WL 3330362 (D.C. Cir. Aug. 12, 2022).

2 16 U.S.C. § 1801(b)(1), (b)(3).

3 Industry-Funded Monitoring Final Rule, 85 Fed. Reg. 7,414 (Feb. 7, 2020).

4 *Fisheries Observers,* NOAA Fisheries.

5 85 Fed. Reg. at 7,418.

6 Loper Bright Enter., Inc. v. Raimondo, 544 F. Supp. 3d 82, 95 (D.D.C. 2021).

Seasonal Closures of Lobster Fisheries: The Wrong Way to Protect the Right Whale?

Samantha Hamilton[1]

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

The National Marine Fisheries Service (NMFS) has come under attack from all sides for its 2021 Biological Opinion (BiOp) and Final Rule addressing North Atlantic right whale population conservation, in particular for its new restrictions on lobster fishing to achieve those conservation goals. Since promulgating the BiOp in May 2021 and the Final Rule in August 2021, both lobster industry and conservation groups have filed suits against NMFS challenging the actions and their impacts. Lobster industry actors say that the restrictions on gear usage and seasonal restrictions on vertical buoy lines are arbitrary and capricious and point to a severe potential impact on the local economy. Conservation groups believe the BiOp violates federal regulations aimed at protecting endangered species and the Final Rule fails to adequately safeguard the severely endangered right whale population. These competing arguments and recent court decisions have left the legitimacy of the agency's decisions, as well as the fate of the North Atlantic right whale, unclear.

Government Action

The North Atlantic right whale (*Eubalaena glacialis*), so named because it was the "right" whale to hunt, has been driven nearly to extinction. They number between 360 and 370, and their population continues to decline.[2] Although the whaling industry is no longer a threat to their survival, right whales still face extinction due to boat strikes and entanglement in trap lines–including trap lines placed within federally regulated fisheries.[3]

To combat the right whale's declining population, the Atlantic Large Whale Take Reduction Team and NOAA developed the Atlantic Large Whale Take Reduction Plan in 1997 under the Marine Mammal Protection Act (MMPA).[4] The plan has been amended periodically since 1997 to better address the needs of the whales, most recently with the publication of the August 2021 Final Rule, following publication of the May 2021 BiOp.[5]

The BiOp included an "Incidental Take Statement" (ITS) which authorizes the number of anticipated future killings or injuries of right whales ("takes"), based on how many such takes the species can afford while sustaining its population.[6] Under the ESA and MMPA, the ITS may not authorize a number of takes unless the impact would be "negligible" on the species.

The 2021 Final Rule, which relied on the findings in the BiOp, requires lobster gear be changed to use weaker ropes and introduces seasonal closures in the Gulf of Maine from October to January and south of Nantucket from February to April to protect migrating whales.[7] The purpose of the seasonal closure is "to guard against the possibility that the large proliferation of lobster trap lines customarily placed in the [Gulf of Maine] Restricted Area would cause the death of one or more of the few, severely endangered North Atlantic right whales that the Agency estimated could travel in that area during those months."[8] However, such closures would severely impact the local economy and lobster fishing industry. In the past several months, three court rulings have attempted to strike a balance between the interests of protecting the right whale and protecting the lobster fishing industry, with representatives from both sides objecting to the agency's actions.

Recent Rulings

A lobstering union and others filed suit in federal district court arguing that the closure was an overstep by NMFS, which relied on a peer-reviewed model designed to identify danger zones for right whales such as the Restricted Area, rather than data from right whale tracking.[9] In a win for the union, the U.S. District Court for the District of Maine issued a preliminary injunction for the seasonal closure. However, in November 2021, the First Circuit stayed the injunction, reinstating the ban.[10] And, while there are serious stakes on both sides, Congress has placed its thumb on the scale for the whales.

The 2021 Final Rule, which relied on the findings in the BiOp, requires lobster gear be changed to use weaker ropes and introduces seasonal closures in the Gulf of Maine from October to January and south of Nantucket from February to April to protect migrating whales.

In October 2022, the court issued an opinion on the merits of the stay. The First Circuit decided against the lobster industry, upholding the seasonal closure. The court found that NMFS had met their burden of proof and did not overstep their authority in implementing a seasonal closure based on the data modeling and other evidence they relied upon.

This does not mean, however, that the right whale is out of danger; nor does it mean that those on the other side of many of these lawsuits, the conservation groups, are pleased with the measures. In July, the U.S. District Court for the District of Columbia ruled on a suit filed by the Center for Biological Diversity (CBD) and other environmental groups (collectively, CBD). CBD argued that the Final Rule and BiOp violated the ESA, the MMPA, and the Administrative Procedure Act (APA), and did not go far enough to protect the right whale, which will be severely impacted by even a single death due to the severity of their population depletion.[11]

The district court agreed with CBD, finding that the ITS within the BiOp permitted incidental takes of right whales that were not authorized under the MMPA because they would have more than a "negligible" impact on the right whale population.[12] Additionally, the court found that the Final Rule, which amended the Atlantic Large Whale Take Reduction Plan based on the BiOp, violated the same laws because the Plan would not cut incidental right whale takes to the authorized number from the ITS, which is 0, within the six months provided by statute.[13] The court ordered the parties to brief it with potential remedies in line with the ruling, so that the court may select an alternative that balances the impact on the lobster industry with the congressional mandate to protect endangered species.[14]

In September, the U.S. District Court for the District of Columbia ruled on yet another suit challenging the BiOp and new regulations.[15] In this case, the plaintiffs—Maine and Massachusetts Lobstermen's Associations, the state of Maine, and a lobstering union—claimed that the agency's estimates of the current and future right whale population were inaccurate, and therefore the BiOp arbitrarily and

capriciously over-regulates the industry. The court ruled in favor of NMFS, finding that the agency provided a reasonable explanation for its estimates, all that is required of them under the APA. The groups have filed an appeal.

Conclusion

While it is clear that these decisions are not a win for the lobster industry, they may not be a win for the right whale either. The Final Rule does not eliminate right whale takes, and their population is expected to continue declining. While the BiOp and Final Rule have been invalidated by the U.S. District Court for the District of Columbia for not being procedurally sufficient, the court did not provide a remedy. Instead, the court ordered NMFS to revisit the plan and find other measures to balance the competing interests in these cases. Thus, with the seasonal closure meant to take effect in October, it is unknown what measures will actually be taken to protect the right whale–and with such a diminished population, they may not have time to waste.

Endnotes

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

[2] Ctr. for Biological Diversity v. Raimondo, No. 18-112 (JEB), 2022 WL 2643535 (D.D.C. July 8, 2022).

[3] Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers Local Lodge 207 v. Raimondo, No. 21-1873 at 5 (1st Cir. July 12, 2022).

[4] NOAA Fisheries, Atlantic Large Whale Take Reduction Plan NOAA (2022).

[5] 86 Fed. Reg. 51970 (Sept. 17, 2021).

[6] Ctr. for Biological Diversity, Civil Action 18-112 at 1 (JEB) (D.D.C. July 8, 2022).

[7] Press Release, Center for Biological Diversity, Feds Issue Final Rule to Reduce North Atlantic Right Whale Entanglements in Fishing Gear (Aug. 31, 2021).

[8] Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers Local Lodge 207 v. Raimondo, No. 21-1873 at 2 (1st Cir. July 12, 2022).

[9] *Id.* at 5.

[10] *Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers Loc. Lodge 207 v. Raimondo*, 18 F.4th 38, 40 (1st Cir. 2021).

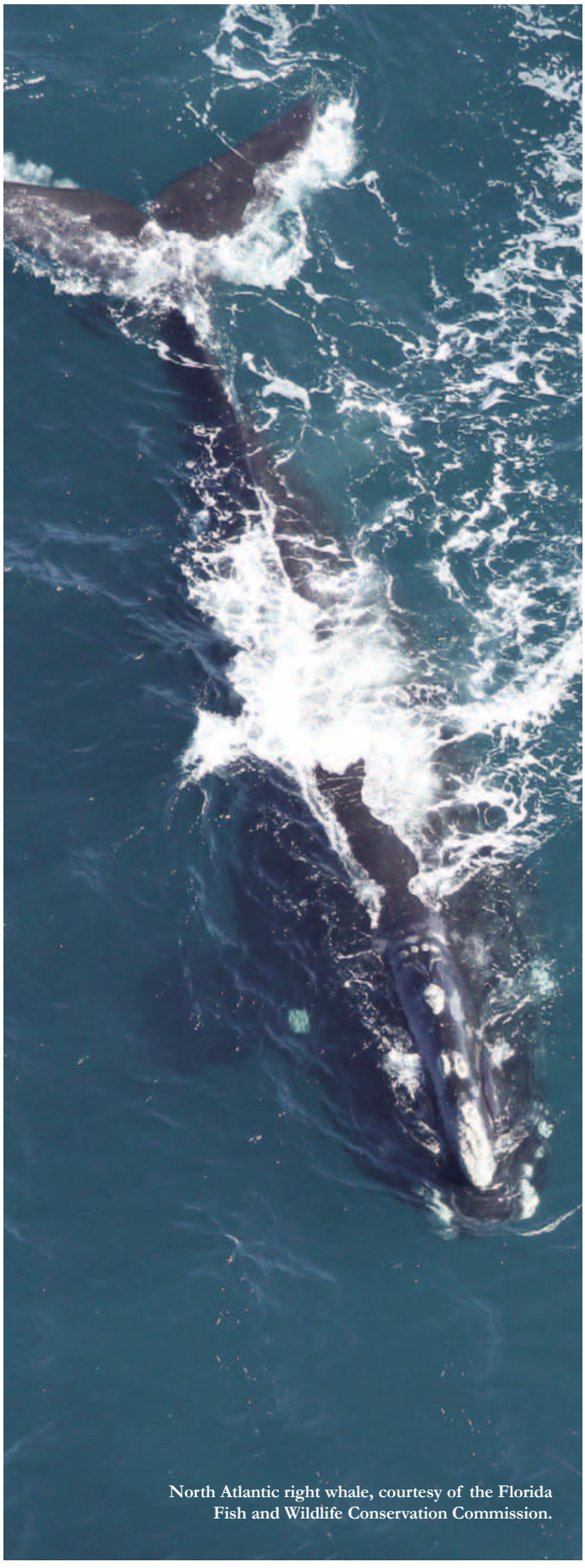
[11] *Ctr. for Biological Diversity v. Raimondo,* Civil Action 18-112 (JEB) (D.D.C. July 8, 2022).

[12] *Id.* at 20.

[13] *Id.*

[14] *Id.*

[15] Maine Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., 21-2509 (D.D.C., Sept. 9, 2022).



North Atlantic right whale, courtesy of the Florida Fish and Wildlife Conservation Commission.

No Clean Power Plan:
Supreme Court Defines Scope of EPA Authority in *West Virginia v. EPA*

Betsy Randolph[1]

On June 30th, the U.S. Supreme Court issued a 6-3 decision in *West Virginia v. EPA* ruling that the Clean Air Act (CAA) § 111(d) did not authorize the Environmental Protection Agency (EPA) to implement a generation shifting approach directing power plants to use clean energy sources over time.[2] The question before the Court was whether the EPA had congressional authority under the CAA to issue rules that reshape the nation's power sector of the economy. The Court ultimately held that the EPA lacks the authority to regulate greenhouse gas emissions using the generation shifting approach.

Background

In August 2015, the Obama administration announced the Clean Power Plan (CPP).[3] The CPP was designed to reduce carbon emissions from power plants because at the time they were the nation's largest source of carbon output. The CPP was the first attempt at national standards that would regulate carbon pollution from power plants. The CPP created a generation shifting approach to greenhouse gas emission that would gradually shift the energy sector away from fossil fuels and towards cleaner energy sources over a span of fifteen years. The CPP directed power plants to begin transitioning towards cleaner sources of energy—such as wind and solar—and reducing carbon pollution to less than 32% of the 2005 levels by 2030.

The EPA was set to implement the Clean Power Plan under the CAA § 111(d), which authorizes the EPA to set goals for emissions and allows states and tribes to decide how they will meet those goals.[4] In 2016, the U.S. Supreme Court prohibited the implementation of the plan; however, due to market changes the power industry was already shifting towards cleaner energy and met the EPA's emissions reduction goal in 2019.

The Trump administration tried to pass the Affordable Clean Energy (ACE) Rule, which would have reduced limitations on gas plant emissions and standards for coal plants. The rules proposed by the Trump administration were all struck down in federal court and the Biden administration began to discuss a new rule for the Clean Air Act.[5] The D.C. Circuit Court invalidated the ACE Rule and the repeal of the CPP in 2021 and remanded back to the EPA. The case was then appealed to the Supreme Court.[6]

The CPP directed power plants to begin transitioning towards cleaner sources of energy—such as wind and solar—and reducing carbon pollution to less than 32% of the 2005 levels by 2030.

Clean Air Act

The CAA establishes that the EPA is responsible for creating regulations that protect and improve the nation's air quality. The CAA creates multiple air pollution control schemes, the New Source Performance Standards program found in the CAA § 111 was the program at issue in *West Virginia v. EPA*. Under the New Source Performance Standards program, the EPA first determines the best system of emissions reduction (BSER) and then calculates the appropriate emission reductions based on the BSER. The EPA then promulgates rules that set emission reduction requirements for new, modified, and some existing sources. The EPA had not used § 111 frequently prior to 2015 when the EPA issued formal regulations for new and existing sources of carbon dioxide pollution in the CPP.[7]

Photo of a power plant, courtesy of Mark Dumont.

Majority Opinion

The majority opinion, written by Chief Justice Roberts, began by addressing the question of mootness since the case addressed whether the EPA had the authority to enforce the CPP and the Biden administration already stated they would not enforce the CPP.[8] The Court held that since it was not absolutely clear that the CPP would never be enforced, the question was not moot. The Court held that a case could not be moot because the EPA had voluntarily halted the enforcement of the CPP since the EPA could decide to enforce the CPP in the future if the case was not heard. Additionally, the Court noted that the government defended the legality of the generation shifting approach which further demonstrated that the question about the extent of the EPA's regulatory authority was not moot.

The Court decided the major issue of the case under the Major Question Doctrine, which provides that where an agency is attempting to assert authority over an area that has great economic or political significance, the agency requires clear congressional authorization. The Major Questions Doctrine was relevant because the CPP was an attempt to regulate the entire energy sector by directing power plants to begin shifting from coal and fossil fuels toward cleaner energy sources such as solar and wind. The Court ruled that § 111(d) authorizes the EPA to establish emission guidelines for existing pollution sources but does not permit them to regulate the energy sector as broadly as they did in the CPP. The Court compared the CPP generation shifting approach to a cap-and-trade scheme for regulating carbon dioxide emissions and noted that Congress had repeatedly declined to amend the CAA to include a cap-and-trade system. The Court directed the EPA to create a new rule within a narrower interpretation of the language "best system of emissions reduction" used in the CAA.

Photo of a wind turbine, courtesy of Modes Rodríguez.

Concurring and Dissenting Opinions

Justices Gorsuch, joined by Justice Alito, wrote a concurring opinion advocating for stricter limitations on Congress's power to delegate regulatory authority to federal agencies.[9] The concurrence stressed the importance of the Major Questions Doctrine for safeguarding representative democracy and not shifting power into the hands of non-elected officials.

Justice Kagan submitted the dissenting opinion joined by Breyer and Sotomayor.[10] The dissent emphasized the need for the EPA to be able to address climate change. Kagan then expressed concerns about the Major Question Doctrine and highlighted the need for Congress to make broader delegations so that agencies can address ongoing and changing problems such as climate change.

Conclusion

The EPA is still able to issue regulations for emissions reductions that require changes that can be made on-site to existing power plants. Additionally, Congress could pass new legislation giving the EPA authority to implement a plan similar to the Clean Power Plan that takes a broader approach to emissions reduction. The ruling issued by the Court was the first formal use of the Major Question Doctrine and will likely have significant implications for the future of federal regulatory law.[11] After the ruling was issued, the Biden administration issued a statement reaffirming their commitment to addressing climate change and protecting public health.[12]

Endnotes

1 2024 J.D. Candidate at Lewis & Clark Law School; 2022 NSGLC Summer Research Associate.

2 West Virginia v. EPA, 142 S. Ct. 2587 (2022).

3 Environmental Protection Agency, *Fact Sheet: Overview of the Clean Power Plan* (last updated May 9, 2017).

4 Clean Air Act, 42 U.S.C. §§ 7401-7617.

5 Exec. Order No. 13990, 86 Fed. Reg. 14,7037 (Jan. 20, 2021).

6 American Lung Association v. Environmental Protection Agency, 985 F.3d 914 (D.C. Cir. 2021).

7 *West Virginia v. EPA*, 142 S. Ct. at 2589.

8 *Id.*

9 *Id.* at 2616 (Gorsuch, J. concurring).

10 *Id.* at 2626 (Kagan, J. dissenting).

11 *Key Takeaways from U.S. Supreme Court Decision in West Virginia v. EPA,* National Law Review *(July 2, 2022).*

12 Presidential Statement on Supreme Court Ruling on West Virginia v. EPA, 2022 Daily Comp. Pres. Doc. 202200577 (Jun. 30, 2022).

The University of Mississippi
THE SANDBAR
Sea Grant Law Center
Kinard Hall, Wing E, Room 258
University, MS 38677-1848

Littoral Events

Coastal & Estuarine Research Federation Biennial Conference

November 12-16, 2022
Portland, OR

For more information, visit: https://conference.cerf.science

2022 Coastal & Estuarine Summit

December 4-8, 2022
New Orleans, LA

For more information, visit: https://raesummit2022.estuaries.org

Bays and Bayous Symposium 2023

January 24-25, 2023
Mobile, AL

For more information, visit: https://bbs22.baysandbayous.com