

# The SandBar

Legal Reporter for the National Sea Grant College Program

## EPA Blocks Pebble Mine Project in Bristol Bay, Alaska—Again

### Also in this issue

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# Our Staff

**Editor:**

Terra Bowling

**Production & Design:**

Barry Barnes

**Contributors:**

Zachary R. Evans  
Samantha Hamilton  
Conner Linkowski  
Emma Tompkins



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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](mailto:tmharget@olemiss.edu). We welcome suggestions for topics you would like to see covered in *THE SANDBAR*.

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Cover page photograph of Sockeye Salmon, courtesy of the Watershed Watch Salmon Society.

Contents page photograph of Humpback Whales, courtesy of Juan F. G.





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# EPA Blocks Pebble Mine Project in Bristol Bay, Alaska—Again

Emma Tompkins<sup>1</sup>



Bristol Bay from Naknek, Alaska, courtesy of Joseph Umnak.

**T**he Environmental Protection Agency (EPA) recently issued a final determination under Section 404(c) of the Clean Water Act (CWA) that effectively blocks Pebble Mine, a copper and gold mining project in Bristol Bay, Alaska. The EPA based its decision on a long history of scientific study and findings that the mine would have substantial adverse effects on the expansive salmon populations that call the Bristol Bay watershed home. Many consider the EPA's exercise of its rarely used "veto authority" under Section 404(c) to block the Pebble Mine to be historic, as this is the fourteenth time in the history of the CWA and just the third time in the past thirty years that the federal agency has done so.<sup>2</sup>

## **Bristol Bay's Pebble Deposit**

The Bristol Bay watershed, located in southwestern Alaska, is home to the greatest sockeye salmon runs on the planet, producing approximately half of the world's sockeye salmon. The watershed also provides the foundation for commercial and sport fisheries for various populations of Pacific salmon and other fishes and supports Alaska natives who depend on the watershed to maintain their subsistence-based lifestyles. In 2019, the total economic value of the Bristol Bay watershed's salmon resources, including subsistence uses, was evaluated at more than \$2.2 billion.<sup>3</sup>

Pebble Limited Partnership (Pebble Limited), a subsidiary of Northern Dynasty Minerals, Ltd., has proposed to build a

large open pit mine at the deposit Pebble Limited calls “one of the greatest stores of mineral wealth ever discovered,”<sup>4</sup> which includes silver, gold, copper, and molybdenum. Company officials argue that the mine could tap into mineral deposits necessary for the transition to cleaner, sustainable forms of energy, which would boost the Alaskan economy without harming the salmon. If constructed, the mine is forecasted to yield 1.3 billion tons of ore over the first two decades of operations.<sup>5</sup>

The timeline of EPA’s regulation of Bristol Bay’s Pebble deposit dates back nearly two decades to the early 2000s, when Northern Dynasty Minerals purchased the mineral rights to begin exploring the deposit. In 2014, under the Obama administration, the EPA completed a final assessment of potential mining impacts on Bristol Bay and proposed a restriction on the usage of the watershed as a disposal site for mining activities because of the potential for “irreversible loss of significant reaches of streams that support salmon and other important species.”<sup>6</sup> In 2019, EPA withdrew that proposed determination under President Trump’s administration. However, also under President Trump’s administration, the U.S. Army Corps of Engineers denied Pebble Partnership’s request for a CWA discharge permit based on the project’s substantial environmental impacts.<sup>7</sup> In October 2021, the U.S. District Court for the District of Alaska granted EPA’s request to reinstate the 2014 proposed determination, resetting the deadlines for EPA to issue a final determination to protect the waters of Bristol Bay.<sup>8</sup>

### The EPA’s Decision

On December 1, 2022, the EPA issued a recommended determination to prohibit and restrict the use of the Bristol Bay watershed for the discharge of mining materials from the Pebble Deposit. The recommendation found that discharges from the mine would result in extraordinary and unprecedented levels of salmon habitat losses and degradation, resulting in unacceptable adverse effects on certain areas within the Bristol Bay watershed.<sup>9</sup> On January 30, 2023, EPA finalized that determination, effectively blocking the Pebble Mine project.<sup>10</sup>

### Litigation Ahead for the Pebble Partnership

On October 28, 2022, the House Committee on Transportation and Infrastructure released a report which concluded that Pebble Mine proponents attempted to deceive regulators by pretending to pursue a smaller mining project while having full intentions of expanding after approval of the initial proposal. The discrepancies were uncovered when investigators from the nonprofit Environmental Investigation Agency posed as potential investors for the Pebble Mine in conversations with chief executives of Pebble Limited and Northern Dynasty Minerals. The Committee found that

although top officials testified in front of Congress that Pebble Partnership had no intentions to expand the mine, Tom Collier, then-CEO of Pebble Partnership, pitched an entirely different plan for expansion to investors.<sup>11</sup>

The company is also facing litigation on an unrelated matter in the U.S. District Court for the Eastern District of New York, where shareholders of Pebble Limited have alleged that the company and individual executives violated federal securities law by providing false or misleading information about the size and scope of the Pebble Mine. On December 18, 2022, the court denied Northern Dynasty Minerals’ motion to dismiss the class action lawsuit.<sup>12</sup> ❌

### Endnotes

- <sup>1</sup> NSGLC Research Associate; 2023 J.D. Candidate, University of Mississippi School of Law.
- <sup>2</sup> Isabelle Ross, [EPA Stops Alaska’s Pebble Mine with Rarely Used Power](#), ALASKA PUB. MEDIA (Jan. 31, 2023).
- <sup>3</sup> U.S. Env’t Prot. Agency, Region 10, Seattle, WA, Executive Summary, Recommended Determination of the U.S. Environmental Protection Agency Region 10 Pursuant to Section 404(c) of the Clean Water Act, Pebble Deposit Area, Southwest Alaska, ES-1 (Dec. 2022).
- <sup>4</sup> Hal Bernton, [EPA Blocks Alaska Pebble Mine in Salmon-Rich Bristol Bay Region](#), SEATTLE TIMES (Jan. 31, 2023, 6:33 PM).
- <sup>5</sup> *Id.*
- <sup>6</sup> U.S. Env’t Prot. Agency, Region 10, Seattle, WA, Proposed Determination of the U.S. Environmental Protection Agency Region 10 Pursuant to Section 404(c) of the Clean Water Act, Pebble Deposit Area, Southwest Alaska (July 2014).
- <sup>7</sup> [Regulatory Tracker, Bristol Bay and the Pebble Mine](#), HARVARD ENV’T & ENERGY L. PROGRAM, (last visited Feb. 23, 2023).
- <sup>8</sup> Bristol Bay Economic Development Corp., et al., v. Pirzadeh et al., No. 3:19-cv-00265, 2021 U.S. Dist. LEXIS 22359 (D. Alaska Oct. 29, 2021).
- <sup>9</sup> Proposed Determination to Prohibit and Restrict the Use of Certain Waters Within Defined Areas as Disposal Sites; Pebble Deposit Area, Southwest Alaska, 87 Fed. Reg. 32021 (May 26, 2022).
- <sup>10</sup> Final Determination to Prohibit the Specification of and Restrict the Use for Specification of Certain Waters Within Defined Areas as Disposal Sites; Pebble Deposit Area, Southwest Alaska, 88 Fed. Reg. 7441 (Feb. 3, 2023).
- <sup>11</sup> NF Staff, [House Committee Claims “Sham Permitting” by Pebble Mine Backers](#), NATIONAL FISHERMEN (Nov. 1, 2022).
- <sup>12</sup> Darish v. Northern Dynasty Minerals Ltd., No. 20-cv-5917 (ENV), 2021 U.S. Dist. LEXIS 50793 (E.D.N.Y Mar. 17, 2021).

# Court Says Agency's Analysis of Shipping Lane Changes Fails to Protect Marine Wildlife

Zachary R. Evans<sup>1</sup>



Humpback Whale, courtesy of J. Maughn.

**F**ran, a humpback whale, was a welcome and beloved sight for wildlife watchers and researchers in the Monterey Bay, California area. But in August 2022, onlookers witnessed a tragic scene: Fran, deceased, washed ashore on Half Moon Bay's beach.<sup>2</sup> The Marine Mammal Center conducted a necropsy, seeking to determine the cause of death of the celebrated whale who, only a month prior, had been spotted with her new calf. The results confirmed that a ship, traveling at high speed, had severed Fran's spine.

Sadly, Fran's death is not uncommon: vessel strikes are the main human-driven cause of death for large whales.<sup>3</sup> Federal agency scientists estimate close to six humpback whales, eleven blue whales, and seven fin whales are struck by ships every year.<sup>4</sup> Whales species are not the only victims of vessel strikes: leatherback sea turtles and other marine wildlife foraging along California's coasts are also at risk of collision-related fatalities.

In 2017, the National Marine Fisheries Service (NOAA Fisheries) conducted an analysis required by the Endangered

Species Act (ESA) for proposed changes in shipping lane designations. NOAA Fisheries determined that a shift in ship traffic patterns would have no effect on wildlife-vessel collisions and, therefore, did not require plans to minimize harm to or death of marine wildlife. The Center for Biological Diversity and Friends of the Earth, worried that the federal reviewers had failed to acknowledge well-established research in their considerations, sued NOAA Fisheries to challenge the opinion, as well as the U.S. Coast Guard for relying on the opinion.<sup>5</sup> The plaintiffs, in filing requests for motion for summary judgment, alleged that the codification of shipping lanes that vessels use when approaching ports results in a significant number of ship strikes with ESA-protected species.

### Threats to Marine Majesties

California's coastal waters provide important habitat for a number of at-risk whale species and endangered sea turtles. Humpbacks, like Fran, and blue whales are baleen whales: large mammals that use "baleen plates that overlap to form a dense net used to strain millions of small shrimp-like animals."<sup>6</sup> Blue whales—the largest living animals on Earth—follow tiny krill populations up and down the west coast. In addition to providing essential feeding habitat for baleen whales, California's coastal ecosystem also supports leatherback sea turtles. Weighing between 500 and 1,500 pounds, these endangered reptiles eat brown sea nettle found along the coast.

But these magnificent species and their habitats face a multitude of threats from shipping vessels, fishing debris, and climate change. Of the five endangered or threatened distinct population segments of humpback whales located along the West Coast, two are found in the waters governed by the newly proposed shipping lane designations. Endangered leatherback sea turtles are often found just below the surface of ocean waters, which scientists say may make them especially susceptible to vessel strikes in feeding areas. To avoid creating additional human-made threats, the ESA requires federal agencies to look before they leap, ensuring that approval of a government policy change or project does not significantly harm protected wildlife populations.

### Stewards of Marine Wildlife

Enacted in 1973, the federal ESA advances the conservation of at-risk fish, wildlife, and plant species. ESA regulations require federal agencies to consult with either NOAA Fisheries or the U.S. Fish and Wildlife Service (FWS) to confirm proposed government actions are "not likely to jeopardize the continued existence" of endangered or threatened species.<sup>7</sup> While the FWS generally manages species found on land and in freshwater, NOAA Fisheries is tasked with conservation of marine wildlife and anadromous fish,

such as salmon and sturgeon, that migrate between freshwater and oceans.<sup>8</sup> After reviewing a proposed action, such as shipping lanes designations, NOAA Fisheries issues a biological opinion (BiOp) based on "the best scientific and commercial data available."<sup>9</sup> The BiOp details whether the agency action may affect a threatened or endangered species and, if so, to what extent.

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## The plaintiffs, in filing requests for motion for summary judgment, alleged that the codification of shipping lanes that vessels use when approaching ports results in a significant number of ship strikes with ESA-protected species.

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Proposal reviewers will look at the current status of protected species that may be affected by the action and consider the cumulative effects the action may have. If the action "jeopardize[s] the continued existence" of one of these species, then the opinion will include a "reasonable and prudent alternative."<sup>10</sup> However, if a species is not placed in jeopardy, NOAA Fisheries instead will issue an incidental take statement. This statement allows for the lawful, incidental—but not intentional—killing ("taking") of a number of the protected species, describes the effect of the taking, and establishes measures "necessary or appropriate to minimize such impact."<sup>11</sup>

### The Court's Reasoning

Despite the numerous threats facing marine wildlife, the danger of fast-traveling ships is one that regulations can mitigate. At the heart of the plaintiff's claim in this case was a plea for regulators to conduct rigorous reviews of shipping lane designations to prevent fatal vessel strikes.

The court applied the arbitrary and capricious standard used for reviewing challenged federal agency decisions: if the agency decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance of law," the court "shall" set it aside.<sup>12</sup> In other words, the court will intervene to block implementation of a poorly reasoned or illegal agency decision.

After first affirming that the plaintiffs could bring the case in the first place, the court then assessed if NOAA Fisheries violated the ESA. Specifically, the court focused on the alleged failures to "evaluate the impacts of shipping lane designations on endangered whales and sea turtles" and to develop an incidental take statement.<sup>13</sup> NOAA Fisheries argued that the proposed shipping lane designations would produce no more incidental take than that of a hypothetical no-lane scenario under which ships



Blue Whale, courtesy of Christopher Michel.

had no specific path to follow into port. The court disagreed fervently, writing, “[s]uch a determination defies logic particularly when it is undisputed that the impacted, protected species are harmed by” the proposed shipping lane designations.<sup>14</sup>

Although the court did not decide if new shipping lane designations would jeopardize protected species (a different question under ESA regulations), it concluded that NOAA Fisheries should quantify likely incidental take. The court held that “the absence ... of an incidental take statement renders the biological opinion arbitrary, capricious, an abuse of discretion, and not in accordance with law.”<sup>15</sup> In finding that NOAA Fisheries’ opinion and lack of incidental take statement violated the ESA (and the U.S. Coast Guard relied on the improper opinion), the court found in favor of the plaintiffs and granted their motions for summary judgment to vacate and set aside the unlawful opinion.

### What’s Next?

On February 7, 2023, NOAA Fisheries, the U.S. Coast Guard, and their senior officials filed an appeal with the Ninth Circuit U.S. Court of Appeals.<sup>16</sup> By spring 2023, both the appellants and the appellees (the Center for Biological Diversity and Friends of the Earth) are required to file briefs outlining their arguments.<sup>17</sup> As litigation continues, court watchers and wildlife watchers alike should keep an eye out for the appeals court’s decision. What conditions or facts the appeals court determines should trigger NOAA Fisheries’ issuance of an incidental take statement could have significant impacts on Endangered Species Act litigation in western and Pacific states and territories. ♻️

### Endnotes

- <sup>1</sup> 2024 J.D. Candidate, Albany Law School.
- <sup>2</sup> *Whale Killed by Ship Strike off Half Moon Bay Was Well-Known Humpback Named Fran*, CBS/Bay City News Serv. (Aug. 31, 2022).
- <sup>3</sup> See generally R. Cotton Rockwood et al., *High Mortality of Blue, Humpback and Fin Whales from Modeling of Vessel Collisions on the U.S. West Coast Suggests Population Impacts and Insufficient Protection*, 12 PLoSOne 1-24 (2017).
- <sup>4</sup> *Ctr. for Biological Diversity v. NOAA Fisheries*, No. 4:21-CV-00345-KAW, 2022 WL 17488678, at \*15 (N.D. Cal. Dec. 7, 2022).
- <sup>5</sup> *Ctr. for Biological Diversity v. NOAA Fisheries*, at \*1.
- <sup>6</sup> *Humpback Whale*, Monterey Bay Aquarium, (last visited: Feb. 20, 2023).
- <sup>7</sup> *Ctr. for Biological Diversity v. NOAA Fisheries*, at \*2; *NOAA Fisheries: About Us, NOAA*, (last visited: Feb. 20, 2023).
- <sup>8</sup> *Species*, N. Pac. Anadromous Fish Comm’n; *Understanding Laws and NOAA Fisheries*, NOAA, (last visited: Feb. 20, 2023).
- <sup>9</sup> *Ctr. for Biological Diversity v. NOAA Fisheries*, at \*2.
- <sup>10</sup> *Id.*, at \*3.
- <sup>11</sup> *Id.*, at \*4.
- <sup>12</sup> *Id.*, at \*32.
- <sup>13</sup> *Id.*, at \*35.
- <sup>14</sup> *Id.*, at \*38.
- <sup>15</sup> *Id.*, at \*38-9.
- <sup>16</sup> *Ctr. for Biological Diversity v. NOAA Fisheries*, No. 4:21-CV-00345-KAW, 2022 WL 17488678 (N.D. Cal. 2022), *appeal filed*, No. 23-15166 (9th Cir. 2023).
- <sup>17</sup> *Id.*

# Environmental Groups Claim BiOp Failed to Assess Risk of Oil & Gas in the Gulf

Conner Linkowski<sup>1</sup>

In 2020, Earthjustice filed a lawsuit against NOAA Fisheries challenging a 2020 biological opinion (BiOp) for the oil and gas leasing and development program in federal waters of the Gulf of Mexico. Earthjustice alleges that the BiOp does not account for the population and habitat changes resulting from the Deepwater Horizon oil spill and its impact on species listed under the Endangered Species Act (ESA). The Bryde's whale, an ESA listed species, is currently of particular concern to environmental organizations due to the species' vulnerability to the impacts of oil and gas development and dangerously low population numbers in the Gulf of Mexico.

## Background

Section 7 of the ESA requires a federal agency to consult with the appropriate federal environmental agency to ensure that its actions will not “jeopardize the continued existence” of ESA-listed species or negatively impact critical habitats.<sup>2</sup> After the consultation, the federal environmental agency prepares a BiOp analyzing “the effects of the proposed action to the listed species or critical habitat.”<sup>3</sup> NOAA Fisheries is responsible for producing BiOps concerning the oil and gas industry's impact on wildlife and their habitats in the Gulf of Mexico. Prior to 2020, the most recent BiOp for the oil and gas program was published in 2007.<sup>4</sup> Following the explosion of the Deepwater Horizon oil rig in 2010, which caused over 200 million gallons of oil to spill into the Gulf of Mexico over the course of eighty-seven days, the Department of the Interior (DOI) and NOAA Fisheries recognized that a reevaluation of the oil spill risks discussed in the 2007 BiOp was necessary.<sup>5</sup> The DOI and NMFS then engaged in a consultation that continued for almost eight years without producing a new BiOp.

This delay prompted the Gulf Restoration Network, Sierra Club, and the Center for Biological Diversity to file a lawsuit against NMFS to compel completion of the consultation with the DOI.<sup>6</sup> The parties reached a settlement, resulting in the issuance of a new BiOp in 2020.<sup>7</sup> According to Lisa Belskis, a spokesperson for the NOAA, the 2020 BiOp accounts for the loss of wildlife and habitats caused by the 2010 Deepwater Horizon oil spill in its assessment of oil spill risks.<sup>8</sup> Several environmental organizations, however, disagree.<sup>9</sup>

## 2020 Complaint

The complaint filed in 2020 alleges that the 2020 BiOp fails to address the primary concerns that prompted the DOI and NMFS to reinitiate consultation. Namely, Earthjustice alleges that the 2020 BiOp fails to account for the population and habitat changes resulting from the Deepwater Horizon oil spill in its evaluation of the oil and gas industry's impact on ESA-listed species and habitats.<sup>10</sup> The complaint further alleges that the 2020 BiOp arbitrarily assumes that “an extremely large oil spill will not result from [the] Interior's oil and gas program”—an assumption also made in the 2007 BiOp, which was proven incorrect by the occurrence of the Deepwater Horizon oil spill.<sup>11</sup> Moreover, the complaint notes that the BiOp fails to acknowledge the sublethal harms, the effects of climate change, and the impact on the recovery of species resulting from oil and gas developments in the Gulf of Mexico.

Accordingly, Earthjustice presented three causes of action under the ESA and the Administrative Procedure Act (APA), alleging that the BiOp's analyses, proposed reasonable prudent alternatives, and incidental take statement are arbitrary and capricious.<sup>12</sup> The APA requires a court to “hold unlawful and set aside agency actions, findings, and conclusions found to be . . . arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law[.]”<sup>13</sup> The plaintiffs requested that the 2020 BiOp be vacated and remanded to NMFS “with an order to prepare a sufficiently protective biological opinion within six months.”<sup>14</sup>

In arguing that the analyses in the 2020 BiOp are arbitrary and capricious and contrary to the best available science, Earthjustice points to the ESA's requirements regarding the issuance of BiOps. Under the ESA, NMFS must use the best available scientific information in the formation of a BiOp.<sup>15</sup> The plaintiffs argue that—because NMFS did not account for the population and habitat changes caused by the Deepwater Horizon oil spill, climate change, and sublethal harms resulting from oil and gas development in the Gulf of Mexico—NMFS did not use the best available science in its analyses. Further, the plaintiffs assert that NMFS failed to analyze how future oil and gas development would impact the likelihood of recovery for certain wildlife populations. The plaintiffs also argue that NMFS's conclusions indicating

that further oil and gas development will not adversely affect certain wildlife and habitats are “not based on any rational scientific analyses, nor do they consider all relevant factors or use the best available science.”<sup>16</sup>

The ESA also requires NMFS to propose reasonable and prudent alternatives (RPAs) to mitigate harm to wildlife if it determines that a proposed action—like oil and gas development—is likely to adversely affect a listed species or its habitat.<sup>17</sup> NMFS concluded that oil and gas development would adversely affect Bryde’s whales—a species of whale in the Gulf of Mexico.<sup>18</sup> While the BiOp included an RPA to mitigate harm caused to Bryde’s whales by vessel strikes and vessel noise, the plaintiffs argue that the RPA is arbitrary and capricious. The plaintiffs base their argument on the fact that the BiOp does not contain any RPAs to mitigate the other stressors from oil and gas development that would adversely affect the Bryde’s whale, nor does the BiOp establish that stressors left unaddressed by the RPA would not harm the Bryde’s whale.<sup>19</sup> Further, the plaintiffs argue that NMFS failed to establish that the proposed RPA would adequately mitigate the harm caused to Bryde’s whales by vessel strikes and vessel noise.<sup>20</sup> Thus, the plaintiffs argue that, because the RPA does not present a more comprehensive plan to mitigate harm to Bryde’s whales, the RPA is arbitrary and capricious and therefore violates the ESA and the APA.

Lastly, the plaintiffs argue that the BiOp’s incidental take statement (ITS) is arbitrary and capricious. The ESA requires that NMFS issue “an incidental take statement whenever a proposed federal agency action will not jeopardize a protected species but will result in incidental take of members of the species.”<sup>21</sup> The ITS must “specif[y] the impact, *i.e.*, the amount or extent, of such incidental taking on the species. . . .”<sup>22</sup> The 2020 BiOp states that oil and gas development will result in the incidental take of Bryde’s whales, sperm whales, several species of sea turtles, Gulf sturgeon, whitetip sharks, and giant manta rays.<sup>23</sup> However, the ITS does not include Bryde’s whales and sperm whales. Therefore, the plaintiffs assert that “NMFS did not account for, minimize, require the reporting of, or authorize take of . . . Bryde’s whales or sperm whales in accordance with the ESA.”<sup>24</sup> Accordingly, the plaintiffs argue that NMFS’s inclusion of an inadequate ITS in the BiOp is arbitrary and capricious, violating the ESA and APA.

### What’s Next

The parties to this lawsuit have now been litigating this case for over two years, but a resolution could be coming soon, as the parties were sent to mediation for settlement discussions in January 2023.<sup>25</sup> A senior attorney at Earthjustice, Chris Eaton, while unsure of what will result from the mediation, “expects it will involve discussing potential interim mitigation or protective measures for Rice’s whales.”<sup>26</sup>

This lawsuit highlights the concerns that environmental organizations have about the accuracy of the data that federal agencies distribute and the impacts that may result. More accurate information regarding the impact of oil and gas development in the Gulf of Mexico may help facilitate better preventive measures and response plans. However, whether or not the analyses, RPA, and ITS in NMFS’s 2020 BiOp were truly arbitrary and capricious in violation of the ESA and APA is yet to be determined. ❧

### Endnotes

- <sup>1</sup> NSGLC Research Associate; 2024 J.D. Candidate, University of Mississippi School of Law.
- <sup>2</sup> U.S. FISH & WILDLIFE SERVICE, [ESA SECTION 7 CONSULTATION](#).
- <sup>3</sup> *Id.*
- <sup>4</sup> Complaint for Declaratory & Injunctive Relief at 2, [Sierra Club v. Nat’l Marine Fisheries Serv.](#), Civ. No. PX-20-3060 (D. Md. Oct. 21, 2020).
- <sup>5</sup> *Id.* at 2-3.
- <sup>6</sup> [Gulf Restoration Network v. Nat’l Marine Fisheries Serv.](#), No. 8:18-CV-1504-T-27AEP, 2020 WL 836516, at \*1 (M.D. Fla. Feb. 20, 2020).
- <sup>7</sup> *Id.* at \*1-3.
- <sup>8</sup> Alejandra Martinez, [Environmentalists Push for Tougher Oil and Gas Restrictions to Protect Rare Whale in Gulf of Mexico](#), *The Texas Tribune* (Jan. 17, 2023, 5:00 AM).
- <sup>9</sup> *Complaint, supra* note 4, at 3.
- <sup>10</sup> *Id.*
- <sup>11</sup> *Id.*
- <sup>12</sup> *Id.* at 33-37.
- <sup>13</sup> 5 U.S.C. § 706(2)(a).
- <sup>14</sup> *Complaint, supra* note 4, at 39.
- <sup>15</sup> 16 U.S.C. § 1536(a)(2).
- <sup>16</sup> *Complaint, supra* note 4, at 36.
- <sup>17</sup> 16 U.S.C. § 1536(b)(3).
- <sup>18</sup> *Complaint, supra* note 4, at 36.
- <sup>19</sup> *Id.* at 37.
- <sup>20</sup> *Id.*
- <sup>21</sup> *Id.*; 16 U.S.C. 1536(b)(4).
- <sup>22</sup> 50 C.F.R. 402.14(i)(1)(i).
- <sup>23</sup> *Complaint, supra* note 4, at 38.
- <sup>24</sup> *Id.*
- <sup>25</sup> Letter Order, [Sierra Club v. National Marine Fisheries Service](#), Civ. No. DLB-20-3060 (D. Md. Jan. 6, 2023).
- <sup>26</sup> Martinez, *supra* note 8.

# Commercial Fisherman Feel the Sting Following Loss on Red Grouper Catch Limits

Emma Tompkins<sup>1</sup>



In June 2022, the National Marine Fisheries Service (NMFS) issued the final rule for Amendment 53 (A53) to the Fishery Management Plan (FMP) for reef fish resources in the Gulf of Mexico. A53 specified new overfishing limits and reallocated catch limits for red grouper among commercial and recreational fisherman. Commercial fishing groups sued NMFS, alleging that A53 effectively increases the risk of red grouper overfishing and unfairly disfavors

commercial fishermen, as the amendment increased catch limits for recreational fishermen while decreasing commercial catch limits.<sup>2</sup> However, the U.S. District Court for the District of Columbia disagreed, finding that the administrative record does not support the commercial fishermen's claims. According to the district court judge, "The continued availability of red grouper is affected by the number and the characteristics of the fish that die, not by the identity of those who catch them."<sup>3</sup>

## **Magnuson-Stevens Fishery Conservation and Management Act**

The groups brought suit under the framework established by the Magnuson-Stevens Fishery Conservation and Management Act (MSA).<sup>4</sup> The MSA is the primary law that governs marine fisheries management in U.S. federal waters. The MSA aims to foster the long-term biological and economic sustainability of marine fisheries by preventing overfishing, rebuilding overfished stocks, and protecting habitat that fish need to spawn, feed, and grow to maturity.<sup>5</sup>

The MSA established eight Regional Fishery Management Councils, which develop FMPs for fisheries under their jurisdiction that need conservation and management. NMFS uses the Council's recommendations and the notice-and-comment rulemaking process to generate final regulations in accordance with ten national standards identified in the MSA. One of the Councils' most important functions is to recommend to NMFS "annual catch limits" for fisheries under their purview. The catch limit process is based on a Council's assessment of a fishery's stock. A Council's scientific committee reviews the results of a stock assessment and recommends values for inputs that are used to create annual catch limits. The Council reviews the scientific committee's recommendations and produces its own recommendations to be incorporated into an FMP.

### **Red Grouper Management Efforts**

A53 altered an FMP that has governed reef fishing in the Gulf of Mexico since 1984.<sup>6</sup> The original FMP for reef fish resources in the Gulf did not limit the volume of red grouper that could be caught; however, later data collection efforts raised concerns about the long-term viability of the red grouper stock. In 1990, NMFS amended the FMP to include allowable catch limits for both the recreational and commercial fishing sectors to address the overfishing concerns. NMFS based these catch limits on the Service's estimates of the historical percentages of the red grouper catch harvested by each sector during the previous eight years.<sup>7</sup> Accordingly, NMFS's commercial and recreational catch-estimation methods are crucial to the Service's red grouper management efforts.

However, NMFS's red grouper catch-estimation methods for commercial and recreational fishermen vary greatly. In 2010, NMFS implemented individual fishing quotas (IFQ) as a fishery conservation management tool in a further effort to address red grouper overfishing concerns. Under the IFQ program, NMFS sets a maximum, or total allowable catch, and allocates the privilege to harvest a certain portion of the catch in the form of quota to commercial fishermen. Compliance with the IFQ program is monitored through strict landing and transaction regulations, which require commercial fishermen to complete a landing transaction report for each daily harvest.

Because commercial fishermen are subject to strict monitoring under the IFQ program, measures of the commercial sector's red grouper catch are very precise.

On the other hand, estimating catch for the recreational sector is an "imprecise science at best."<sup>8</sup> When NMFS first allocated allowable recreational catch, it used data collected from Coastal Household Telephone Surveys (CHTS) and dockside surveys of fishing vessels to calculate recreational catch estimates. In 2013, NMFS debuted a new catch-estimation method which utilized mail surveys, called Fishing Effort Surveys (FES), in an attempt to improve estimations of recreational catch.

This change in estimation method is directly related to the plaintiffs' challenges. When NMFS deployed the FES method, it found that its catch estimates were, on average, several times larger than the previous methods used by the Regional Councils. This was unsurprising to some extent, because FES was developed to correct the undercount of recreational fishing efforts related to the poor quality of previous data measurements. However, the larger estimates also posed a problem: NMFS needed consistent recreational fishing data, because it uses these historical estimates of recreational catch to set annual catch limits. To solve this problem, NMFS developed a "calibration" method. Essentially, this method converted the earlier, less accurate estimates of recreational catch to an equivalent estimate that would have been produced under the FES method. Importantly, FES is a method used for estimating only recreational catch, not commercial catch. Therefore, figures related to commercial catch, which is tracked through the IFQ program instead of estimated, do not require the calibration model. The result is that annual catch limits, when expressed in FES units, state a higher value for the recreational catch limit, but the same value for the commercial catch limits.<sup>9</sup>

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**The original FMP for reef fish resources in the Gulf did not limit the volume of red grouper that could be caught; however, later data collection efforts raised concerns about the long-term viability of the red grouper stock.**

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### **Amendment 53 to the Reef Fish Fishery Management Plan of the Gulf of Mexico**

A53, among other objectives, sought to complete the transition from previous recreational catch estimation efforts such as CHTS and dockside surveys to the FES method. A53 altered the annual catch limits based on the results of the 2019 stock assessment, and, for the first time, set the recreational sector's limit explicitly in FES units. The amendment increases the recreational sector's allocation

of the catch limit from 24% to 40.7% and decreases the commercial sector's allocation from 76% to 59.3%.<sup>10</sup>

A.P. Bell Fish Company, the Southern Offshore Fishing Association, and the Gulf of Mexico Reef Fish Shareholders' Alliance sought to vacate A53. Ultimately, the commercial fishing groups believe that A53's allocation goes against the MSA's goals of preventing red grouper overfishing and disfavors commercial fishermen by significantly reducing the groups' annual catch limits. The commercial fishing groups' challenges to A53 fall under four broad categories. First, they contend NMFS failed to satisfy the national standards under MSA in implementing A53. Second, they allege NMFS disregarded other MSA requirements when enacting A53. Third, they bring miscellaneous claims not tied to any specific MSA provisions alleging that some of NMFS's actions, findings, and conclusions are improper under the arbitrary and capricious standard. Fourth, they maintain NMFS did not adequately weigh alternatives as required by the National Environmental Policy Act (NEPA).<sup>11</sup>

### Standard of Review

Each of the MSA's national standards directs the Secretary to ensure that a management plan comports with "a specific and essential policy objective."<sup>12</sup> One of NMFS's critical roles is to strike the appropriate balance among any competing goals that may arise under the national standards. In previous cases, the district court held that NMFS's decisions must receive "a high degree of deference" because it implicates the agency's technical experience.<sup>13</sup> Thus, courts must ensure NMFS weighs the requirements of the national standards and engages in reasoned decision-making that is well supported in the administrative record.

### Court Rules on Challenges to A53

When considering the commercial fishing groups' first challenge, the court stated that an action that results in a direct distribution of fishing privileges is an allocation that must comply with the national standards; therefore, because A53 distributes fishing privileges, it must, among other things, be "reasonably calculated to promote conservation."<sup>14</sup> The court held that A53 is reasonably calculated to promote conservation because it reduces the total catch limit for red grouper to a level that the relevant scientific committee determined would preserve the stock.

As to the groups' general claims under the arbitrary and capricious standard, the court explained that its review of these claims is limited to ensuring that NMFS "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made."<sup>15</sup> The court held that in the five instances identified by the commercial fishing groups challenge, NMFS met this standard.

The commercial fishing groups' final set of claims arises under NEPA, which requires agencies to assess the environmental consequences of major federal actions by following certain procedures during the decision-making process. First, the groups assert that NMFS did not truly weigh all available alternatives when it adopted A53. Second, the groups argue that the range of alternatives NMFS considered was unreasonable. The court held that groups' challenges were meritless.

### Conclusion

The court ultimately denied the commercial fishing groups' motion for summary judgment and granted the government's motion for summary judgment. The court maintained that A53 is reasonably calculated to promote conservation and held that it cannot conclude that the amendment structurally disfavored commercial fishermen. Accordingly, A53 will continue to govern the red grouper resources in the Gulf of Mexico over the strenuous objections of commercial fishing groups like the plaintiffs and other affected fishermen throughout the region. ✎

### Endnotes

- <sup>1</sup> NSGLC Research Associate; 2023 J.D. Candidate, University of Mississippi School of Law.
- <sup>2</sup> *A.P. Bell Fish Co., Inc. v. Raimondo*, No. CV 22-1260 (TJK), 2023 WL 122270 (D.D.C. Jan. 6, 2023).
- <sup>3</sup> *Id.* at \*13.
- <sup>4</sup> Magnuson-Stevens Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331, 331-61 (codified as amended at 16 U.S.C. § 1801 et seq.).
- <sup>5</sup> *Laws & Policies*, NOAA FISHERIES, (last visited Feb. 3, 2022).
- <sup>6</sup> Reef Fish Fishery of the Gulf of Mexico, 49 Fed. Reg. 39548, 39548-58 (Oct. 9, 1984).
- <sup>7</sup> See Amendment Number 1 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico, 55 Fed. Reg. 2078, 2078-79 (Jan. 22, 1990).
- <sup>8</sup> *A.P. Bell Fish Co. Inc.*, 2023 WL 122270, at \*2.
- <sup>9</sup> *Id.* at \*12-16.
- <sup>10</sup> Amendment 53 to the Reef Fishery of the Gulf of Mexico Fishery Management Plan, 87 Fed. Reg. 25573, 25574 (May 2, 2022) (to be codified at 50 C.F.R. pt. 622).
- <sup>11</sup> *A.P. Bell Fish Co., Inc.*, 2023 WL 122270 at \*9.
- <sup>12</sup> *C&W Fish Co. v. Fox, Jr.*, 931 F.2d 1556, 1562 (D.C. Cir. 1991).
- <sup>13</sup> *Nat. Res. Def. Council v. Nat'l Marine Fisheries Serv.*, 71 F. Supp. 3d 35, 64 (D.D.C. 2014).
- <sup>14</sup> 50 C.F.R. § 600.325(c)(1); 16 U.S.C. § 1851(a)(5).
- <sup>15</sup> *A.P. Bell Fish Co., Inc.*, 2023 WL 122270 at \*17.

# Corps Must Consult with NMFS on Bonnet Carré Spillway Openings

Samantha Hamilton<sup>1</sup>

In January, a federal district court in Mississippi ruled that the U.S. Army Corps of Engineers (the Corps) violated the Magnuson-Stevens Fishery Conservation and Management Act (MSA) by failing to consult with the National Marine Fisheries Service (NMFS) before opening the Bonnet Carré Spillway repeatedly between 2018-2020.<sup>2</sup> The court ordered the Corps to consult with NMFS by September 30th, 2023, regarding lessening harms of future Spillway openings.

## Opening the Spillway

The Bonnet Carré Spillway was constructed by the Corps in the 1930s as a response to catastrophic flooding of the Mississippi River in 1927. The Spillway diverts water from the Mississippi River near New Orleans into Lake Pontchartrain, which eventually flows into Lake Borgne and the Mississippi Sound. Historically, the Corps would open the Bonnet Carré when the Mississippi River has a flow of 1.25 million cubic feet per second (cfs.) in New Orleans.<sup>3</sup> The Spillway was opened just 8 times in its first 70 years of operation, compared to seven openings in the past 12 years, four of which occurred between 2018 and 2020.<sup>4</sup> 2019 marked the first year where the Bonnet Carré was opened in consecutive years, as well as the first year in which it was opened twice.<sup>5</sup> The Spillway was open for 123 days, allowing for the equivalent of 15 million Olympic swimming pools of freshwater to pass into Lake Pontchartrain.<sup>6</sup>

Opening the Bonnet Carré Spillway has vast ecological and economic impacts on the surrounding area, where the seafood and tourism industries are the lifeblood of the community. The freshwater diverted from the Mississippi River into Lake Pontchartrain enters the Mississippi Sound, decreasing the salinity of the Sound and significantly affecting marine species, who may die or relocate to suitable waters. Additionally, the pollution and nutrients in the freshwater can feed algal blooms in the sound, as happened in 2019. The Mississippi Department of Environmental Quality closed the waters adjacent to the Biloxi shoreline for the entire summer of 2019 due to algae blooms, causing the beaches to be deserted.

“The Mississippi seafood industry creates nearly 5,000 jobs and contributes around \$250 million to the state’s economy.”<sup>7</sup> However, due to the environmental impacts of repeated natural disasters, including Hurricane Katrina, the BP Horizon Oil Spill, and the Bonnet Carré Spillway openings, the once robust

Mississippi seafood industry is in danger. Ryan Bradley, the executive director of Mississippi Commercial Fisheries United, stated, “[t]here is a lot of uncertainty in this industry right . . . We had over 2,000 shrimp boats 12 years ago; now, we have less than 200. It’s such a volatile business now, that commercial fishermen are encouraging their children not to go into the business.”<sup>8</sup> The decreased salinity, increased nutrient concentrations, and added pollution from the diverted water have decimated seafood populations and led to an “unraveling” of the way of life many commercial fishermen have enjoyed for generations.<sup>9</sup> Additionally, Mayor Andrew Gilich of Biloxi attributed the Spillway’s opening to decreased sales tax revenues in the Sound because the algae blooms forced officials to close the beaches.<sup>10</sup>

## Legal Challenges

These repeated openings of the Bonnet Carré Spillway have not gone unchallenged. The State of Mississippi filed suit against the Corps in 2021 alleging that the Corps violated the National Environmental Policy Act (NEPA) by opening the Spillway repeatedly without conducting an environmental impact statement (EIS) regarding the impact of the more frequent and lengthier openings.<sup>11</sup> The Corps filed a motion to dismiss, relying on a 1976 EIS conducted for the Mississippi River & Tributaries Project (MR&T), under which the Bonnet Carré Spillway was constructed, which mentioned the decreased salinity resulting from Spillway openings. Plaintiffs argued this EIS was insufficient and that a supplemental EIS was required for the increased frequency of the Spillway openings in recent years. In 2021, the district court dismissed the lawsuit, ruling that the court lacked authority to compel the Corps to complete an updated environmental impact study on the harms associated with the more frequent openings. The court found that the increased frequency of openings was not a major federal action, without which the court had no authority to order a supplemental EIS and thus lacked jurisdiction.

In a contradictory 2022 ruling, however, the same court found the Corps had violated the ESA in choosing to open the Bonnet Carré Spillway because the Corps classified its decisions to open the Spillway as emergencies.<sup>12</sup> The court found that “[t]he Spillway was specifically designed and constructed to release freshwater from the Mississippi River into other waterways. Under the Corp’s theory, any opening of the spillway qualifies as an emergency. But Spillway openings are

expected, and the Corps . . . has in fact planned for[] these openings to occur.”<sup>13</sup> Thus, the court found that the Corps’ use of emergency consultation procedures was arbitrary and capricious, and that an after-the-fact analysis of the effects of opening the Spillway on endangered species and their critical habitats did not satisfy the ESA. While the court did not enjoin future Spillway openings, it did mandate an ESA consultation of the effects of Spillway openings, a decision which has been appealed.

In the most recent complaint, a coalition of Mississippi counties, towns, and organizations filed a lawsuit in the same court alleging both NEPA and MSA violations.<sup>14</sup> In January, the court dismissed the NEPA claims against the Corps on the same grounds as the previously dismissed suit but allowed the coalition to proceed with their MSA claims. In the lawsuit, the plaintiffs argued that opening the Spillway and the impacts of doing so amounted to a violation of the MSA, legislation first passed in 1976 that, among other things, manages the nation’s fisheries.<sup>15</sup> The MSA provides, “[e]ach Federal agency shall consult with the Secretary [of Commerce] with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat identified under this chapter.”<sup>16</sup>

The plaintiffs claimed that the Corps needed to consult the Secretary of Commerce in making decisions to continue construction and operation of the Mississippi River and Tributaries Project, to issue the Water Control Plans and other documents governing the operation of the Bonnet Carré Spillway, and specifically deciding to open the Bonnet Carré Spillway for extended periods of time. The court agreed with the plaintiffs, finding that the Corps did violate the MSA in failing to consult NMFS, an agency within the National Oceanic and Atmospheric Administration under the Department of Commerce, as required by the Act. The court ordered the Corps to consult with NMFS by September 30th, 2023 regarding the impacts opening the Spillway would have on the Essential Fish Habitat in the Gulf of Mexico.

Following the order compelling the Corps to consult with NMFS, the Mississippi state legislature issued a concurrent resolution:

*expressing the support of the Mississippi Legislature for the completion of a new Environmental Impact Statement (EIS) to assess the potential impact of federal actions significantly affecting the quality of the human environment regarding openings of the Bonnet Carré Spillway, including consideration of alternative means of flood control and management on the Mississippi River which could lessen or mitigate adverse impacts . . . from operation of the Bonnet Carré Spillway and other elements of the Mississippi River and Tributaries Project; and acknowledging the environmental impacts of the recent operation of the said Bonnet Carré Spillway in decimation of oyster harvests and other essential fish habitat, the Mississippi Coast tourism industry and consequently the tax bases of local and state governments; and for related purposes.*<sup>17</sup>

## Conclusion

Although this ruling means that the Corps is officially required to consult with NMFS on the impacts of opening the Bonnet Carré Spillway, the ruling does not extend beyond that. Mississippi officials are hopeful that this victory will not be limited to a simple consultation with fishery experts, however. For now, those impacted by the Spillway’s opening can at least take comfort in knowing that the Sound, and the industries it supports, is safe from impacts of the Bonnet Carré Spillway until at least after the Corps finishes their consult with NMFS.<sup>18</sup> 🐟

## Endnotes

- <sup>1</sup> Law Fellow, National Sea Grant Law Center.
- <sup>2</sup> *Harrison Cty. v. U.S. Army Corps of Engineers*, No. 1:19CV986-LG-RPM (S.D. Miss. Jan. 18, 2023).
- <sup>3</sup> Frank McCormack, *Judge Orders Corps to Consult on Future Operation of Bonnet Carré Spillway*, THE WATERWAYS JOURNAL (2023).
- <sup>4</sup> Alex Rozier, *A Flood of Catastrophe: How a Warming Climate and the Bonnet Carré Spillway Threaten the Survival of Coast Fishermen*, MISSISSIPPI TODAY (2020), (last visited Feb. 27, 2023).
- <sup>5</sup> *Id.*
- <sup>6</sup> *Id.*
- <sup>7</sup> Sid Salter, *More Rough Waters Ahead for MS Ocean Economy*, THE DAILY LEADER (2023), (last visited Feb. 28, 2023).
- <sup>8</sup> *Id.*
- <sup>9</sup> Flora Dedeaux, *Court Rules Army Corps of Engineers Violated Law, DAMAGED MARINE LIFE IN MISS. SOUND*, WLOX.COM (2023), (last visited Feb. 28, 2023).
- <sup>10</sup> *Id.*
- <sup>11</sup> *Watson v. U.S. Army Corps of Engineers*, No. 1:19-CV00989 (S.D. Miss. Sept. 14, 2021).
- <sup>12</sup> *Defs. of Wildlife v. United States Army Corps of Engineers*, No. 1:20CV142-LG-RPM, 2022 WL 18456141, at \*7 (S.D. Miss. Nov. 22, 2022).
- <sup>13</sup> *Id.*
- <sup>14</sup> *Harrison Cnty.* No. 1:19CV986-LG-RPM.
- <sup>15</sup> McCormack, *supra* note 3.
- <sup>16</sup> *Harrison Cnty.* No. 1:19CV986-LG-RPM. at \*2 (internal citations omitted).
- <sup>17</sup> S. Con. Res. 550, 2023 Gen. Assemb. Reg. Sess. (Miss. 2023).
- <sup>18</sup> Michael Lacy, *Long Road Still Lies Ahead for Mississippi Sound Coalition in Bonnet Carré Spillway Fight*, WLOX.COM (2023), (last visited Feb. 27, 2023).



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Sea Grant Law Center  
Kinard Hall, Wing E, Room 258  
University, MS 38677-1848



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# Littoral Events

## **Association of State Floodplain Managers Annual Conference**

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For more information, visit: <https://www.floods.org/conference/registration>

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