

The SandBar

Legal Reporter for the National Sea Grant College Program

Supreme Court Rules on Wetlands Covered by the Clean Water Act

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Supreme Court Rules on Wetlands Covered by the Clean Water Act

Catherine Janasie¹



Priest Lake in Idaho, courtesy of Joel Mann.

In May, the U.S. Supreme Court decided *Sackett v. Environmental Protection Agency*, a pivotal case in determining the scope of the Clean Water Act (CWA).² In the case, the Court considered what wetlands are subject to the CWA's permitting system. The case involved the Sacketts, who purchased a piece of property in Idaho near Priest Lake. After backfilling in portions of their property, the U.S. Environmental Protection Agency (EPA) issued a compliance order to the Sacketts, claiming that the filled in portions were wetlands covered by the CWA. In doing so, the EPA relied on a long-standing agency interpretation of what wetlands are covered by the CWA. However, the Sacketts challenged that their property contained covered wetlands. Ultimately, the Court agreed with the Sacketts, creating a new test for determining covered wetlands.

The Clean Water Act

The CWA requires that the discharge of a pollutant to navigable waters by a point source requires a permit—either a Section 402 point source permit or a Section 404 dredge and fill permit. The EPA administers the Section 402 program, while the U.S. Army Corps of Engineers (Corps) administers the Section 404 program, with some EPA insight. The geographical scope of the CWA's permit programs hinges on what are “navigable waters.”³ The CWA defines navigable waters as “the waters of the United States,”⁴ often referred to as WOTUS. What waters can be considered WOTUS is constrained by the interstate commerce clause of the U.S. Constitution. While the Supreme Court has previously stated that the CWA extends beyond traditionally navigable waters, what additional waters can be considered WOTUS has been uncertain.

Waters of the United States

The EPA and Corps have interpreted what they believe WOTUS to include through rulemaking. At the time of the Sackett decision, the agencies' January 2023 rule was in place. The January 2023 rule included traditional navigable waters, interstate waters, and the territorial seas, as well as their tributaries and adjacent wetlands as WOTUS.⁵ Since the term adjacent wetlands was included in the CWA in 1977, the agencies have interpreted adjacent to mean "not only wetlands adjoining covered waters but also those wetlands that are separated from covered waters by a man-made dike or barrier, natural river berm, beach dune, or the like."⁶ Thus, the agencies contend that wetlands that are neighboring covered waters can be subject to the CWA's permit requirements.

The Supreme Court first considered the scope of WOTUS in 1985, when the court held that wetlands abutting traditional navigable waters were covered by the CWA.⁷ In 2001, the Court determined that isolated ponds used by migratory birds did not have the requisite connection to interstate commerce, and thus, could not be WOTUS.⁸ In 2006, the Court decided *Rapanos v. United States*, which also considered what wetlands are covered by the CWA, but the decision was a plurality opinion with no controlling rule as to what wetlands can be considered WOTUS.

The January 2023 rule included traditional navigable waters, interstate waters, and the territorial seas, as well as their tributaries and adjacent wetlands as WOTUS.

Rather, two different tests emerged from *Rapanos*. Justice Scalia's test, joined by three others, considers WOTUS to include "only relatively permanent, standing or flowing bodies of water."⁹ In regards to wetlands, Justice Scalia's test considers wetlands to be a WOTUS only if the wetland has "a continuous surface connection to bodies that are [WOTUS] in their own right."¹⁰ Justice Kennedy developed what is known as the significant nexus test to determine whether a wetland should be covered by the CWA. Importantly, the January 2023 WOTUS rule relies on the significant nexus test. The rule stated that an adjacent wetland is covered by the CWA if it has a significant nexus to a traditionally navigable water, and that a wetland that is neighboring a covered water can be considered adjacent. Determining whether the wetland had a significant nexus is a multi-factor test that critics have said is too hard to apply and requires a case-by-case analysis.

The Sackett Property

The Sackett's property contains a wetland that is separated from an unnamed tributary by a road that is 30-feet wide. The tributary then feeds into a creek, which then feeds into Priest Lake, a traditionally navigable water. The issue in the case revolves around whether the wetland can be considered "adjacent." The Sacketts, relying on Justice Scalia's test from *Rapanos*, argued that the wetland was outside the scope of the CWA because the wetland does not have a surface connection to a water covered by the CWA. Relying on the agencies' WOTUS regulation, the EPA determined that the wetland on the Sackett's property was covered by the CWA, finding that the wetland was adjacent because it neighbored covered waters and that the wetland had a significant nexus to covered waters.

Supreme Court Opinion

Sackett was a unanimous 9-0 opinion reversing the Ninth Circuit opinion that upheld the EPA's determination, with three separate concurrences.¹¹ However, all nine justices only agreed on two points. First, all the justices agreed that the Sackett's property was not covered by the CWA, as there was not the requisite connection to a truly navigable water. Second, the justices agreed that the significant nexus test articulated by Justice Kennedy in *Rapanos* was not the correct test for determining what wetlands are covered by the CWA.

The majority opinion adopted Justice Scalia's test from *Rapanos*.¹² In doing so, the majority found that the surface connection test was easier to apply for landowners, which the majority found important considering the burdens the CWA permitting system places on landowners, including the risk of criminal penalties. Further, the Court emphasized the states' traditional role in regulating land use. In order to keep this balance between federal and state power, the majority refused to defer to the EPA's and Corps's regulations interpreting what wetlands should be covered.¹³

Justice Kavanaugh's concurrence, joined by Justices Sotomayor, Kagan, and Jackson, disagreed with the continuous surface connection requirement of the majority test, arguing that the majority misinterpreted the term adjacent wetlands and conflated adjoining with adjacent.¹⁴ Justice Kavanaugh also argued that the continuous surface connection test was not as clear cut as the majority states.¹⁵ Further, he relied on the longstanding agency interpretation of what wetlands should be covered by the CWA, noting that the interpretation has stood since 1977, through both Republican and Democratic administrations.¹⁶

Justice Kagan's concurrence, joined by Justices Sotomayor and Jackson, argued that the majority's interpretation of what wetlands are covered by the CWA is too narrow. Justice Kagan relied on the EPA and Corps regulations and would include wetlands separated from covered waters "by only a dike, berm, dune, or similar barrier."¹⁷



Priest Lake in Idaho, courtesy of Eric Prado.

Looking Ahead

In response to *Sackett*, the EPA and U.S. Army Corps of Engineers have already released a revised rule to conform to the Supreme Court decision.¹⁸ Future courts will also have to apply the new WOTUS test to upcoming CWA cases. Finally, states do have the option to enact laws, regulations, or policies to provide protections for more waters than those covered under the new Supreme Court test. Each of these moving pieces will determine what waters are covered by the CWA in the future. 🍷

Endnotes

¹ Senior Research Counsel, National Sea Grant Law Center.

² [598 U.S. 651 \(2023\)](#).

³ 33 U.S.C. § 1362(7).

⁴ *Id.*

⁵ [Revised Definition of Waters of the United States](#), 88 Fed. Reg. 3004 (Jan. 18, 2023).

⁶ [Sackett](#), 598 U.S. at 720.

⁷ *United States v. Riverside Bayview*, 474 U.S. 121 (1985).

⁸ *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001).

⁹ 547 U.S. 715, 732-39 (2006).

¹⁰ *Id.* at 742.

¹¹ *Sackett*, 598 U.S. 651.

¹² *Id.* at 678-79.

¹³ *Id.* at 679.

¹⁴ *Id.* at 718-720.

¹⁵ *Id.* at 727-28.

¹⁶ *Id.* at 720-22.

¹⁷ *Id.* at 714.

¹⁸ [Revised Definition of “Waters of the United States”](#); Conforming, 88 Fed. Reg. 61,964 (Sept. 8, 2023).

Fourth Circuit Says Shrimp Bycatch is Not a Pollutant

Terra Bowling



Shrimper in North Carolina, courtesy of Gerry Dincher.

In Pamlico Sound, a coastal estuary off the coast of North Carolina, commercial shrimpers drag trawl nets along the floor of the ocean to harvest shrimp. The nets stir up sediment, and, in addition to shrimp, they retain “bycatch,” or other unwanted fish and marine organisms, that the shrimpers throw overboard. A conservation group, Fisheries Reform

Group, filed suit under the Clean Water Act’s (CWA) citizen suit provision, claiming that the shrimp trawlers were violating the CWA by throwing bycatch overboard and by disturbing sediment with their trawl nets.

In August, the Fourth Circuit ruled in favor of the shrimp trawlers.¹ A ruling against the shrimp trawlers would

have had far-reaching impacts on the regulation of fisheries and fishers who regularly toss bycatch overboard. The case also marks the first time a federal court has expressly invoked the “major questions doctrine” to limit the jurisdictional scope of the CWA.

Background

The CWA prohibits the “discharge” of any “pollutant” without a permit.² Under the CWA, “pollutant” includes both “biological materials” and “dredged spoil.”³ The plaintiffs argued that throwing the bycatch overboard and disturbing the sediment on the ocean floor resulted in an unpermitted discharge of a pollutant without a permit. The U.S. District Court for the Eastern District of North Carolina dismissed the suit for failure to state a claim, ruling that the CWA does not regulate bycatch and that disturbing sediment with trawl nets does not violate the Act. Fisheries Reform Group appealed the decision.

According to the appellate court, the case at hand required application of the major questions doctrine because granting the EPA authority to regulate bycatch under the CWA would have “significant political and economic consequences.”

Major Questions

On appeal, the Fourth Circuit first considered whether the case required application of the “major questions doctrine.” The major questions doctrine is a background principle of law recently outlined by the U.S. Supreme Court in *West Virginia v. EPA*. “This background rule requires clear congressional authorization for agency action in ‘extraordinary cases’ when the ‘history and breadth’ and ‘economic and political significance’ of the action at issue gives us ‘reason to hesitate before concluding that Congress’ meant to confer such authority’ to act on the agency.”⁴

According to the appellate court, the case at hand required application of the major questions doctrine because granting the EPA authority to regulate bycatch under the CWA would have “significant political and economic consequences.” The court noted that Congress has established a regulatory scheme for the regulation of bycatch through the Magnuson Stevens Fishery Conservation and Management Act and states have authority to regulate in state waters. “Interpreting the Act to require the EPA to regulate bycatch would give it power over ‘a significant portion of the American economy.’ Almost every commercial or recreational fishermen in America would be subject to the EPA’s new regulatory

control. Anyone who fishes from a boat using live bait, or by chumming, or who — after catching a fish — releases it back into the ocean, would violate the Clean Water Act unless they first obtained a Clean Water Act permit alongside their ordinary fishing permits.”⁵

As part of the major questions doctrine analysis, the court looked at whether there was clear congressional intent to regulate the return of bycatch to the ocean under the CWA. The court noted that despite a “plausible textual basis” for the plaintiff’s interpretation, it fell “short of the clear congressional authorization needed when the major-questions doctrine applies.”⁶ Therefore, the return of bycatch to the ocean was not a discharge of a “pollutant” that would require compliance with the CWA.

Next, the court looked at whether sediment from the ocean floor temporarily suspended in the water due to the trawl nets is the discharge of a pollutant requiring a CWA discharge permit. The court noted that, to succeed on this argument, the plaintiffs would have to show: the disturbed sediment is a pollutant; that pollutant was added to the water; and that the addition came from a point source. The court found that the sediment did not qualify as a pollutant because it was not “dredged spoil,” as it had never been dredged. Further, even if sediment from the lagoon floor was a pollutant, the trawlers did not “discharge” it because it had never been removed from the ocean. Therefore, the shrimpers’ actions do not require a CWA permit.

Conclusion

The Fourth Circuit affirmed the lower court’s opinion, putting this case to rest. If the court had ruled otherwise, it could have drastically changed how fisheries are regulated. The use of the doctrine in this case indicates that courts will continue to closely scrutinize whether agency actions are in line with congressional intent. ♡

Endnotes

¹ *N. Carolina Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291 (4th Cir. 2023).

² 33 U.S.C. § 1311(a).

³ 33 U.S.C. § 1362(6).

⁴ *Id.* (quoting *W. Virginia v. Env’t Prot. Agency*, 597 U.S., 142 S. Ct. 2587, 2608 (2022), quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)).

⁵ *N. Carolina Coastal Fisheries Reform Grp.*, 76 F.4th at 299; quoting *West Virginia*, 142 S. Ct. at 2608. See *Brown & Williamson*, 529 U.S. at 159, 120 S.Ct. 1291.

⁶ *N. Carolina Coastal Fisheries Reform Grp.*, 76 F.4th at 302.

Agencies Look to Provide Green Sea Turtles Shell-ter

Lourdes Carreras-Ortiz¹

Green sea turtle, courtesy of Matt Kieffer.



Following a lawsuit filed by several environmental groups, the National Marine Fisheries Service (NOAA Fisheries) and the U.S. Fish and Wildlife Service (FWS) issued proposed rules concerning the designation of critical habitat for six green sea turtle distinct population segments (DPSs). The designation would cover approximately 8,850 acres of beaches and nearly 428,000 square miles of U.S. waters. The public comment period on the proposed rule closed in October 2023 and further agency action is expected next year.

Lawsuit & Settlement

NOAA Fisheries and FWS share responsibility for implementing the Endangered Species Act (ESA). NOAA Fisheries' jurisdiction extends to sea turtles that forage in waters of the United States, while FWS has jurisdiction over turtles that nest on land within the United States. The green sea turtles as a species was originally listed under the ESA as threatened in 1978. Following a species status review in 2016, the agencies issued a final rule listing eleven green sea turtle DPSs—three as endangered and eight as threatened.

Under the ESA, once a species is listed, the agencies must make a critical habitat designation “to the maximum extent prudent and determinable.”²² The agencies are directed to designate critical habitat at the time of listing, but that deadline may be extended up to one year if critical habitat is not determinable at the time. Critical habitat may include specific areas within and outside the geographical area occupied by the species that contain physical or biological features essential to conservation. When the agencies failed to meet the critical habitat designation deadlines, the Center for Biological Diversity, Sea Turtle Oversight Protection, and Turtle Island Restoration Network filed suit against NOAA Fisheries and FWS in 2020 to compel the designation of critical habitat for six of the DPSs. Later that year, the parties entered into a stipulated settlement agreement that the agencies would submit a proposed critical habitat determination for the six DPSs at issue in the complaint on or before June 30, 2023.³

When the agencies failed to meet the critical habitat designation deadlines, the Center for Biological Diversity, Sea Turtle Oversight Protection, and Turtle Island Restoration Network filed suit against NOAA Fisheries and FWS in 2020 to compel the designation of critical habitat for six of the DPSs.

Proposed Rule

NOAA Fisheries’ jurisdiction extends to six DPSs of the listed green sea turtles: the North Atlantic, South Atlantic, East Pacific, and Central North Pacific DPSs and the Central South Pacific and Central West Pacific DPS.⁴ The first four are classified as threatened, while the last two are classified as endangered. The proposed rule from NOAA Fisheries covers a range of coastlines in California, Texas, North Carolina, Florida, Puerto Rico, Hawai’I, U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of Northern Mariana Islands. As part of the rule, NOAA Fisheries is also demarking certain Sargassum habitat that falls within U.S. jurisdiction.

FWS has jurisdiction over the remaining five green sea turtles DPSs. The Eastern Pacific DPS does not seem to nest within soil of the states and is therefore excluded from its jurisdiction. As indicated in the proposed rule in the Federal Register, close to nine thousand acres are proposed across

101 units among states, territories, the commonwealths and two USFWS-managed areas (Midway Islands and Palmyra Atoll).⁵ More detailed information on the precise locations and coastlines forming part of these designations can be found in the Federal Register.⁶

Conclusion

Following the publication of the proposed rules from NOAA Fisheries and FWS in the Federal Register on July 19, 2023, the agencies held public informational meetings and public hearings in August. Apart from attending these meetings, the public could also submit comments on the proposed rules via mail and electronically until October 17. The agencies must take into consideration all substantial comments when drafting the final rule for critical habitat designation.

If all goes well, the green sea turtles will benefit from increased protection for its critical habitat, hopefully increasing their numbers as the years go by. Green sea turtles are one of the largest species of turtle, capable of weighing up to five hundred pounds and measuring up to five feet long.⁷ Sea turtles are said to have been around since the time of the dinosaurs and are estimated to live until around 80 years old.⁸ The varieties mentioned here can be found to swim and live in every ocean except the Arctic, meaning their habitat spans to over 80 countries.⁹ Unfortunately, human poaching and loss of hatching beaches have been the main causes for the decrease in numbers of green sea turtles.¹⁰ That’s why protecting their nesting sites is so crucial to the species’ continued existence. 🐢

Endnotes

¹ Ocean and Coastal Law Fellow for the National Sea Grant Law Center.

² 16 U.S.C. 1533(a)(3)(A).

³ *Stipulated Settlement Agreement and Order*, Center for Biological Diversity et al v. Bernhardt et al, Docket No. 1:20-cv-00036 (D.D.C. August 20, 2020).

⁴ The Federal Register, [Endangered and Threatened Wildlife and Plants: Proposed Rule To Designate Marine Critical Habitat for Six Distinct Population Segments of Green Sea Turtles](#) (Jul. 19, 2023).

⁵ The Federal Register, [Endangered and Threatened Wildlife and Plants: Designation of Critical Habitat for Green Sea Turtle](#) (Jul. 19, 2023).

⁶ *Id.*

⁷ Natural Habitat Adventures, [13 Fascinating Facts About Green Sea Turtles](#) (Oct. 14, 2022).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

Court Dismisses Challenges to Vineyard Wind Energy Project

Alexa Sinha¹

The rolling waters of the Atlantic Ocean south of Martha's Vineyard and Nantucket are home to many species, including the critically endangered North American Right Whale, and boasts a thriving fishing industry. It could also soon be home to Vineyard Wind, a 62-turbine offshore wind energy operation, as the project recently survived three legal challenges.²

In May, the U.S. District Court for the District of Massachusetts granted the government's motion to dismiss a case filed by several local groups arguing that offshore wind construction and operations will negatively impact the marine species and industries that frequent the area leased for wind operation.³ Later that month, in a separate action filed by members of the fishing industry, the court declined to halt construction of the project and ultimately dismissed the case this fall.⁴ The court also dismissed a lawsuit in August filed by a resident alleging the project violated federal law.⁵

Vineyard Wind Project & Timeline

Offshore wind energy is key to reaching the Biden Administration's target of net zero emissions by 2050.⁶ President Biden plans to meet this goal by deploying 30 gigawatts of offshore wind by 2030, enough to power 10 million homes.⁷ Vineyard Wind is one of several companies stepping up to meet the demand.

The Vineyard Wind 1 project is estimated to generate 800 megawatts of electricity annually to power over 400,000 homes in New England once fully operational.⁸ The project will be located in a federal wind energy area on the Outer Continental Shelf around 15 miles south of Martha's Vineyard and Nantucket. With 62 wind turbines, it will be the first commercial-scale offshore wind operation in the United States. Each turbine, placed one nautical mile apart, will reach 260 meters (853 feet) high, taller than the tallest building in New England.

Vineyard Wind was met with resistance, however. Though there is currently no evidence that noise from wind turbines themselves cause mortality of whales, many fear that the increased traffic and construction in their habitats will negatively impact already endangered whales, especially since human activity like vessel strikes pose life-threatening risks to whales.⁹

Offshore wind operations will increase boat traffic in crucial habitats to lay cable, deploy turbines, and conduct maintenance. Additionally, commercial fishers fear that they will be cut off from sections of their fishing grounds: over 742,000 acres of ocean south of Nantucket and Martha's Vineyard has already been leased to nine offshore wind companies for prospective operations.¹⁰

In March of 2021, the Bureau of Ocean Energy Management (BOEM) released its final Environmental Impact Statement (EIS) for the proposed Vineyard Wind project.¹¹ Two months later, the Secretary of Interior and the Secretary of Commerce approved the Vineyard Wind Project Construction and Operation Plan.¹² Shortly after the approval of the project, several local groups, including commercial fishers, trade associations, and Nantucket residents filed suit against BOEM and the National Marine Fisheries Service (NOAA Fisheries), alleging that their approval of the project was in violation of several congressional acts, including the Endangered Species Act (ESA), National Environmental Policy Act (NEPA), Marine Mammal Protection Act, and the Outer Continental Shelf Lands Act.

Nantucket Residents Against Turbines v. U.S. Bureau of Ocean Energy Management

The Nantucket Residents Against Turbines ("ACK RATs") and its founding member, Vallorie Oliver, sued the BOEM and NOAA Fisheries, alleging that their decision to approve the Vineyard Wind Project off of the coast of Martha's Vineyard and Nantucket was in violation of the ESA and NEPA.¹³ The ACK RATs, whose primary mission is to protect Nantucket's pristine environment and the North Atlantic Right Whale, claimed that the government agency's approval was based on an inadequate environmental assessment, and that the completion of the Vineyard Wind Project would harm the endangered Northern Atlantic Right Whale population.¹⁴

After Vineyard Wind was awarded an offshore lease, it submitted to BOEM a proposed Construction Operations Plan (COP). BOEM then sent a request to NOAA Fisheries to prepare a biological opinion (BiOp) required by the ESA. The initial 2020 BiOp found that the proposed wind farm "may adversely affect but is not likely to jeopardize the continued existence" of the North Atlantic Right Whales.¹⁵ In 2021 BOEM requested a new BiOp which, like the 2020 version,



concluded that the proposed wind farm would likely not jeopardize the Right Whales. Shortly thereafter, BOEM issued its final approval of Vineyard Wind's COP.

The ACK RATs argued that the 2021 BiOp was flawed because it failed to engage with the “best scientific and commercial data available,” pointing to five studies that the BiOp did not address. Therefore, ACK RATs claimed that NOAA Fisheries and BOEM acted arbitrary and capriciously in violation of the ESA in approving the Vineyard Wind Project. The ACK RATs also claimed that the agencies did not adequately consider risks like vessel strikes, operational noise, or increased stress of Right Whales. After determining that the ACK RATs have sufficient standing, the court granted summary judgment in favor of BOEM and NOAA Fisheries because the agencies have deference in determining what constitutes the best available data and adequately identified and studied the risks involved with the project.

Seafreeze Shoreside, Inc. v. U.S. Department of Interior

Several fisheries representatives, including a group of commercial fishermen and a D.C. based nonprofit, joined suit claiming that Vineyard Wind would economically ruin the fishers that fish in the proposed project area.¹⁶ The plaintiffs filed a motion for stay to postpone the decision of BOEM and NOAA Fisheries to approve the Vineyard Wind COP until all judgments and appeals are completed. Alternatively, the plaintiffs requested a preliminary injunction to revert to the status quo before the COP was approved. The court again ruled in favor of the agencies and denied the motion for stay and preliminary injunction. It held that the plaintiffs could not demonstrate a likelihood that they would succeed on the merits, or that they would suffer irreparable harm absent a stay. Additionally, the court held that a stay would substantially injure the Vineyard Wind Project, and that the construction of an offshore wind energy project is in the public interest because of the impending climate crisis.

In October 2023, the court denied the plaintiffs’ motions for summary judgment, finding the agencies did not act arbitrarily, capriciously, or otherwise unlawfully in issuing the permits and authorizations.¹⁷

Melone v. Coit

In this challenge to Vineyard Wind, Thomas Melone, a Nantucket resident and solar power company owner, filed suit to stop the Vineyard Wind Project.¹⁸ He alleged that NOAA Fisheries violated the Marine Mammal Protection Act (MMPA) and the Administrative Procedure Act (APA) in issuing an Incidental Harassment Authorization (IHA) for the Vineyard Wind Project. Both sides moved for summary judgment. NOAA Fisheries and Vineyard Wind asserted that the plaintiff lacked standing and that they were entitled to summary judgment due to compliance with the MMPA. The resident claimed that he had standing as a result of his environmental interest in right whales and is entitled to summary judgment and vacatur of the IHA because NOAA Fisheries acted arbitrarily and capriciously in issuing the IHA. The U.S. District Court for the District of Massachusetts found that the plaintiff had standing but failed to show that the agency acted arbitrarily, capriciously, or otherwise unlawfully in issuing the IHA.

Looking Forward

Despite litigants’ previous success in ending the proposed Cape Wind Project after a decade of litigation, the U.S. District Court for the District of Massachusetts has so far ruled in favor of the continuance of Vineyard Wind.¹⁹ Construction of Vineyard Wind is now underway, though both the “ACK RATs” and the fisheries group are filing an appeal in their cases. There is one more case pending in front of the U.S. District Court for the District of Massachusetts. The Responsible Offshore Development Alliance has sued the U.S. Department of the Interior, BOEM, and NOAA Fisheries, among other federal agencies.²⁰ Additionally, eight other wind operators have leased federal waters nearby and are preparing for the same strenuous environmental review process that Vineyard Wind completed. However, based on the court’s rulings, future residents and visitors of Martha’s Vineyard and Nantucket will most likely see glittering white turbines milling in the Atlantic distance. ❧

Endnotes

- ¹ NSGLC Summer Research Associate; 2L at Tulane University School of Law.
- ² *Project Overview*, VINEYARD WIND.
- ³ *Nantucket Residents Against Turbines v. U.S. Bureau of Ocean Energy Mgmt.*, No. 1:21-cv-11390-IT, 2023 WL 3510955 (D. Mass. May 17, 2023).
- ⁴ *Seafreeze Shoreside, Inc. v. U.S. Dep’t Interior*, No. 1:22-cv-11091-IT,

- 2023 WL 3660689 (D. Mass. May 25, 2023); *Seafreeze Shoreside, Inc., et al., v. U.S. Dep’t of Interior*, et al., No. 1:22-CV-11091-IT, 2023 WL 6691015 (D. Mass. Oct. 12, 2023).
- ⁵ *Melone v. Coit*, No. 1:21-CV-11171-IT, 2023 WL 5002764 (D. Mass. Aug. 4, 2023).
- ⁶ *EACT SHEET: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies*, THE WHITE HOUSE (April 22, 2021).
- ⁷ *EACT SHEET: Biden Administration Launches New Federal-State Offshore Wind Partnership to Grow American-Made Clean Energy*, THE WHITE HOUSE (June 23, 2022).
- ⁸ *Vineyard Wind*, *supra* note 2.
- ⁹ *Addressing Misinformation on Offshore Wind Farms and Recent Whale Mortalities*, U.S. DEP’T ENERGY (April 28, 2023).
- ¹⁰ Bureau of Ocean Energy Management, *Massachusetts Leases OCS-A 0500 (Bay State Wind) and OCS-A 0501 (Vineyard Wind)*, U.S. DEP’T INTERIOR; *Offshore Wind Work Group*, TOWN & COUNTY OF NANTUCKET MASSACHUSETTS.
- ¹¹ U.S. DEP’T INTERIOR & BUREAU OF OCEAN ENERGY MGMT., VINEYARD WIND 1 OFFSHORE WIND ENERGY PROJECT FINAL ENVIRONMENTAL IMPACT STATEMENT VOLUME I (2021).
- ¹² *Biden-Harris Administration Approves First Major Offshore Wind Project in U.S. Waters*, U.S. DEP’T INTERIOR (May 11, 2021).
- ¹³ *Nantucket Residents Against Turbines*, No. 1:21-cv-11390-IT, 2023 WL 3510955.
- ¹⁴ *Whales and Turbines Don’t Mix*, ACK FOR WHALES; *Nantucket Residents Against Turbines*, No. 1:21-cv-11390-IT, 2023 WL 3510955, at *1.
- ¹⁵ *Nantucket Residents Against Turbines*, No. 1:21-cv-11390-IT, 2023 WL 3510955 at *3.
- ¹⁶ *Seafreeze Shoreside, Inc.*, No. 1:22-cv-11091-IT, 2023 WL 3660689; *Seafreeze Shoreside Inc. v. U.S. Dep’t Interior*, No. 21-cv-3276 (CRC), 22-cv-237 (CRC), 2022 WL 3906934 (D.D.C. June 27, 2022).
- ¹⁷ *Seafreeze Shoreside, Inc.*, No. 1:22-cv-11091-IT, 2023 WL 6691015.
- ¹⁸ *Melone*, No. 1:21-CV-11171-IT, 2023 WL 5002764.
- ¹⁹ Benjamin Storrow, *Solar Executive with Ocean Views Sues Vineyard Wind*, ClimateWire (July 20, 2021).
- ²⁰ *Responsible Offshore Development Alliance v. Haaland*, No. 1:2022cv11172 (D. Mass. Filed July 20, 2022).

Fishpass Project in Michigan Gets the Go-Ahead

Terra Bowling

Grand Traverse Bay, courtesy of Andrew McFarlane.



A dam modification project with research elements in Traverse City, Michigan may proceed after the Michigan Supreme Court declined to hear an appeal of the case in August.¹ The project features an experimental “Fishpass” component that will allow desirable fish to pass upstream while blocking undesirable species, like the invasive sea lamprey. The project was derailed in 2021 by a lawsuit alleging the project required a city-wide vote before it could proceed.²

Background

The project involves modifications to the Union Street Dam, an approximately 250-foot-long dam constructed in 1867 and updated in the 1950s and 60s. In 1987, a “fish ladder” was added to the dam to allow some fish to proceed upstream. Over the years, the dam has been used to control the level of the adjacent lake, provide a barrier to the passage of invasive species upriver, and to prevent flooding.

The city initiated the current project to upgrade the dam and to find an improved method for allowing some fish to swim upstream while restricting others. The project will increase the size of the dam, but it will also increase the space available for public use and provide more amenities. Following construction, the research elements of the Fishpass Project will last for 10 years, at which time the city may opt out of the experimental research.

Litigation

Days before the dam modification project was planned to commence in 2021, a resident filed suit alleging that the project violated Traverse City ordinances that require a city-wide vote prior to the sale or disposition of parks property. The city argued that the ordinances did not apply because the dam was not a “legally dedicated city park” and the project did not result in a disposition of city property. The trial court agreed with the plaintiff that the property did not have to be a dedicated park for the voting requirement to apply. Further, the court found that a vote was required because the research elements of the Fishpass Project resulted in a disposition of property due to a change of use to “research,” which is not a valid park purpose. The court granted the plaintiff summary judgment, halting the project.

The city appealed. In 2022, a state appellate court disagreed and overturned the lower court decision. The court found the project would not result in a “meaningful deviation” in the park usage that would require a vote. The court noted that although the project contains many research elements, research on fish passage through the dam had occurred as early as 1987 when the city installed a fish ladder. Further, “engaging in environmental research concerning the habitat of species found in the area has a natural connection to the Property’s purpose and use as a park.”³ The resident once again appealed.

In August, the Michigan Supreme Court declined to hear the appeal. According to news reports, construction on the Fishpass project will begin immediately, however officials are worried the original estimated costs of the \$22 million project may have increased over the past two years.⁴ The project is projected to be completed by 2024. 🐟

Endnotes

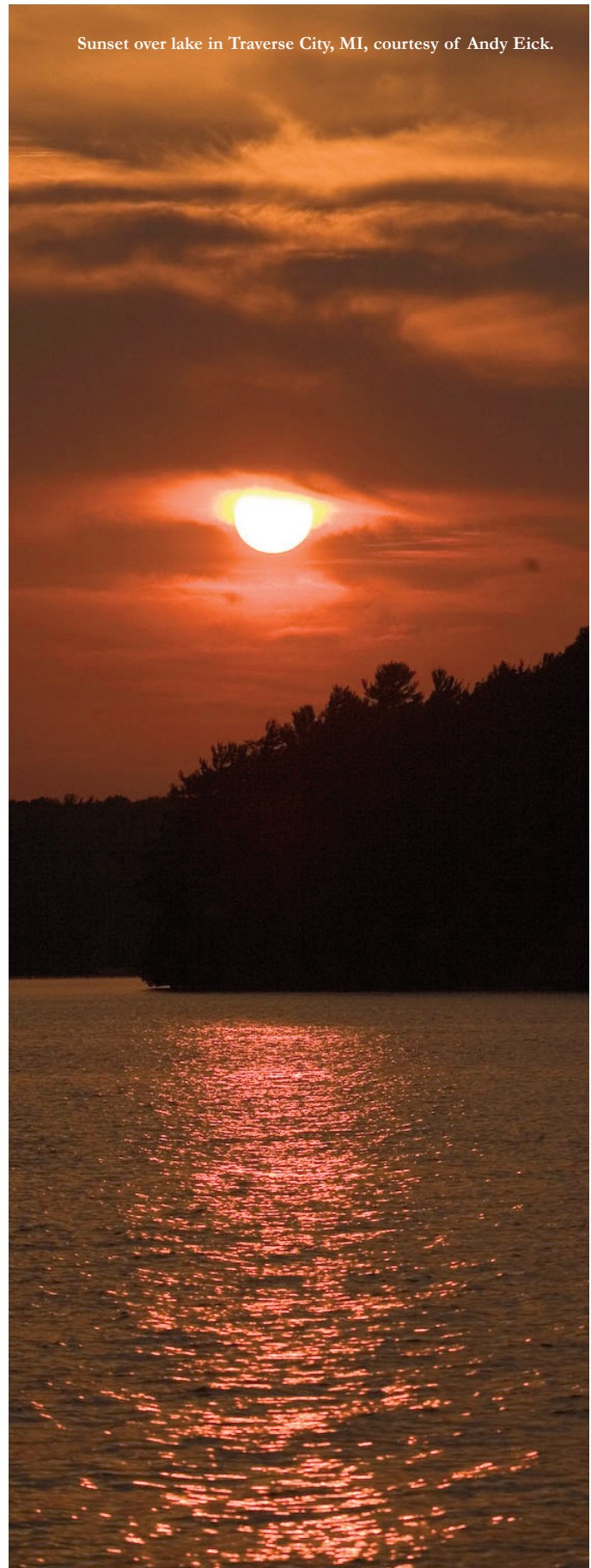
¹ Buckhalter v. City of Traverse City, No. 165058, 2023 WL 5419705 (Mich. Aug. 22, 2023).

² Buckhalter v. City of Traverse City, No. 357216, 2022 WL 12071718 (Mich. Ct. App. Oct. 20, 2022).

³ *Buckhalter*, 2022 WL 12071718 at *4.

⁴ Jordan Travis, “[Supreme Court Rejects Fishpass Appeal](#),” TRAVERSE CITY RECORD EAGLE (Aug. 23, 2023).

Sunset over lake in Traverse City, MI, courtesy of Andy Eick.



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San Antonio, TX*

For more information, visit: <https://www.was.org/meeting/code/AA2024>

Gulf of Mexico Conference

*February 19-22, 2024
Tampa, FL*

For more information, visit: <https://gulfofmexicoalliance.org/announcements/alliance-meetings/gomcon2024>