

The SandBar

Legal Reporter for the National Sea Grant College Program

Loper: The Death Knell for Chevron Deference?



Also in this issue

Court Gives Green Light to
Challenge to Texas Beach
Closures Due to Space Flights

Court Revokes
Florida's CWA § 404
Permitting Program

Anchoring Change: Bar Harbor
Restricts Cruise Ship Visitors
to 1,000 Per Day

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Our Staff

Editor:

Terra Bowling

Production & Design:

Barry Barnes

Contributors:

Amy Kraitchmann, J.D.

Jonathan Scoggins

Katie Shaw

Madison A. Vice

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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. We welcome suggestions for topics you would like to see covered in *THE SANDBAR*.

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CONTENTS

***Loper: The Death Knell for Chevron
Deference?*** 4

**Court Gives Green Light to Challenge
to Texas Beach Closures Due to
Space Flights** 7

**Court Revokes Florida's CWA § 404
Permitting Program** 10

**Anchoring Change: Bar Harbor Restricts
Cruise Ship Visitors to 1,000 Per Day** 12

**Setting Sail for Sustainability:
EPA Agrees to Finalize Ballast Water
Discharge Standards** 14

Loper: The Death Knell for Chevron Deference?

Jonathan Scoggins¹



Fishing boat, courtesy of Pixabay.

On January 17, 2024, the U.S. Supreme Court heard oral arguments in a case involving a fishing industry challenge to a NOAA regulation requiring Atlantic herring boats to have fishery monitors onboard. This regulation was enacted pursuant to the Magnuson Stevens-Fishery Conservation and Management Act (MSA). In their lawsuit,

the fishermen objected to the lower courts' application of *Chevron* deference—a two-part test developed to determine whether a court should defer to an agency's interpretation of a statute. The significance of this case extends beyond its impact on the Atlantic herring industry since overturning *Chevron* deference would have ripple effects far beyond the scope of the MSA.

What is *Chevron* Deference?

In 1984, the U.S. Supreme Court established the *Chevron* doctrine. Subsequent cases have challenged the doctrine over the years, yet its core principles endure.² *Chevron* is a two-part test for judicial review of agency interpretations of federal law. Part one occurs when courts review an agency's construction of a statute; courts must first determine "[W]hether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."³ Part two of the analysis occurs if courts find the statute to be overall ambiguous; in such cases, courts must defer to an agency's reasonable interpretation of that statute. In other words, the *Chevron* doctrine gives judicial deference for administrative actions when statutes are vague. However, the deference does not extend to agency actions that are of "economic and political significance" because Congress may not have intended to convey such authority.⁴

History of *Loper*

This case originates from a regulatory action of the National Marine Fisheries Service (NMFS), which has delegated authority from the Secretary of Commerce to implement fisheries management programs. The New England Fishery Management Council submitted an amendment to NMFS to revise industry-financed monitoring programs within New England fisheries. After a comment period, NMFS approved the Council's amendment and published the Final Rule on February 7, 2020, requiring monitoring on half of Atlantic herring trips.⁵ The issue in *Loper* arose from the requirement that the selected vessels carry an additional person serving as a third-party monitor and bear associated costs, including the monitor's salary.

Four family-owned companies challenged the Final Rule, claiming it jeopardizes a \$4.5 million fishing industry.⁶ These fishermen argued that their livelihoods are at stake because the monitoring programs can cost them \$710 per day and may reduce their yearly returns by up to 20%. In response, NMFS offered various ways to mitigate the adverse economic impacts on herring fishery participants. For instance, vessel owners can apply for exemptions from industry-funded monitoring for voyages targeting less than 50 metric tons of herring. Additionally, midwater trawl vessels can opt for electronic monitoring instead of hiring a private monitor.

At the district court, the herring fishermen alleged that the MSA did not authorize NMFS to create industry-funded monitoring requirements. The district court's analysis was governed by *Chevron* deference. At step one, the district court found that Congress's intent was clear and that the MSA unambiguously authorized industry-funded monitoring of the herring fishery. As a result of that conclusion, the district court upheld the Final Rule. The herring fishermen appealed to the D.C. Circuit.

The D.C. Circuit also applied *Chevron* deference, but disagreed with the district court's analysis. The D.C. Circuit found that the statutory silence within the MSA left unresolved whether the NMFS could require the fishermen to bear the cost of at-sea monitoring; the MSA did not therefore unambiguously authorize industry-funded monitoring. The D.C. Circuit proceeded to step two and determined that the NMFS' interpretation was reasonable after reading various provisions within the MSA. While the D.C. Circuit took a different path, their ultimate conclusion was the same – the Final Rule was valid. Still, the fishermen did not give up; they appealed to the Supreme Court, which granted certiorari.

The issue in *Loper* arose from the requirement that the selected vessels carry an additional person serving as a third-party monitor and bear associated costs, including the monitor's salary.

Supreme Court Arguments

At the Supreme Court, the herring fishermen boldly asked the Court to consider overturning *Chevron*.⁷ Their advocate set forth four reasons in support of this argument. First, there is a longstanding tradition of the judiciary interpreting statutes rather than deferring to the executive branch. Second, *Chevron* contradicts the separation of powers outlined in the Constitution. In other words, *Chevron* unlawfully delegates both the authority of Article III courts and the legislative power of Article I to executive agencies under Article II. Third, *Chevron* violates the Due Process Clause by requiring the courts to favor the government over its citizens. Fourth, *Chevron* endangers the herring fishermen's livelihood because of the cost of the monitoring programs.

In response, the Solicitor General, representing the Secretary of Commerce and NMFS, argued that the Court should not overturn the *Chevron* doctrine and should affirm the D.C. Circuit.⁸ In support of these arguments, the Solicitor focused on the agency's authority under the MSA and weaknesses in the herring fishermen's arguments: First, according to the Solicitor General, the MSA unambiguously grants NMFS the authority to implement the monitoring provision. Although the D.C. Circuit found the statute somewhat ambiguous, it correctly concluded that NMFS' interpretation was reasonable. Second, the compliance costs are consistent with other anticipated expenses within the statutory framework. Third, the industry's argument regarding the extinction of their business lacks practicality because they failed to identify a single fishing trip where they paid for monitoring services. Fourth, the *Chevron* doctrine promotes political accountability, national uniformity, and predictability and recognizes that agencies can contribute to administering complex statutory schemes.



Buoy and trawler net, courtesy of Pixabay.

Why Does All This Matter?

If the Supreme Court decides to overturn the *Chevron* doctrine, it could have consequences beyond the MSA and the Atlantic herring fishing industry. For example, a dramatic change in the landscape of administrative law may occur—power would shift away from executive agencies and be transferred to courts to interpret federal statutes. Moreover, abolishing *Chevron* could also increase the likelihood of courts reversing federal regulations, thereby complicating agencies' efforts to address current and emerging policy challenges. 🦞

Endnotes

¹ NSGLC Research Associate; 2L, University of Mississippi School of Law.

² See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); see also *West Virginia v. EPA*, 597 U.S. 697 (2022).

³ *Chevron*, 467 U.S. at 842-43.

⁴ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000) (this is known as the major questions doctrine).

⁵ NOAA Fisheries, *Atlantic Herring* (last visited Mar. 2, 2024).

⁶ *Loper Bright Enters., Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), cert. granted, 143 S. Ct. 2429 (2023).

⁷ Brief for Petitioners, *Loper Bright Enters., Inc. v. Raimondo*, 143 S. Ct. 2429 (argued Jan. 17, 2024) (No. 22-451).

⁸ Brief for the Respondents in Opposition, *Loper Bright Enters., Inc. v. Raimondo*, 143 S. Ct. 2429 (argued Jan. 17, 2024) (No. 22-451).

Court Gives Green Light to Challenge to Texas Beach Closures Due to Space Flights

Amy Kraitchman, J.D.¹



SpaceX launch tower in Boca Chica, Texas courtesy of Michael Hogan.

In February, the Texas Court of Appeals, 13th District, determined that three non-profit environmental groups had sufficient standing to proceed with their case against Texas state and county officials regarding the operation of SpaceX in Boca Chica, Texas. Under current state law, Texas counties along the Gulf of Mexico are permitted to order closures of public beaches and access points for public health and safety when they are in close proximity to space launch sites on specific launch days. The environmental groups argue that these closures are unconstitutional and impede on their constitutional right to access public beaches in the state.²

Background

Texas is one of the few states in the country with a constitutional right to unrestricted access to and from public beaches. This is because in 2009 over 75% of the state voting public voted in favor of adding the “Open Beaches Amendment” (OBA) to the Texas State Constitution, thus creating a permanent easement for the public to use to access public beaches.³ It also allows the state legislature to “enact [additional] laws to protect the right of the public to access and use a public beach.”⁴

In 2013, the Texas State Legislature, relying in part on the OBA, passed a law that allows county commissioners along the Gulf of Mexico to temporarily close beaches, and beach access points, when they are within close proximity to space launch sites on launch days for public safety.⁵ A couple years later, SpaceX built their launch site (Starbase) along Boca

Chica beach in Cameron County. On October 11, 2021, SaveRGV, a local non-profit, filed a lawsuit against the Texas General Land Office (GLO), the Texas Land Commissioner, and Cameron County—the Texas Attorney General (AG) later filed a motion to intervene and join the defendants—seeking declaratory judgment that this new law was a violation of the OBA, and thus unconstitutional. In May 2022, the Sierra Club and the Carrizo/Comecrudo Tribe of Texas (the Tribe) announced that they were joining SaveRGV (collectively, SaveRGV) in the lawsuit.

In their initial argument, SaveRGV argued that § 61.132 of the Texas Natural Resource Code, § 61.011(d)(11) of the Texas Natural Resource Code, and § 15.32(d) of the Texas Administrative Code should be found unconstitutional because they violated the Texas Constitution by allowing state and county officials to order beaches and beach access points to be closed to the public for extended periods of time. The GLO, Land Commissioner, and AG all filed pleadings claiming that SaveRGV lacked standing to bring this case. Additionally, the Land Commissioner and AG claimed they were protected from this challenge under sovereign immunity.

On June 30, 2022, the Cameron County 445th District Court granted all 3 motions to dismiss the case finding that: 1) SaveRGV lacked standing; 2) the Land Commissioner and AG were protected under sovereign immunity, and 3) that the OBA does not create a private right of enforcement on its own.⁶ SaveRGV promptly filed an appeal.

Appeal

The appellate court saw things differently and ruled in favor of SaveRGV. The court addressed three main issues when it made its determination: standing, sovereign immunity, and if the OBA has a private right of enforcement. On all three issues, the appellate court sided with SaveRGV.

Standing

In order to bring a lawsuit, a plaintiff must establish that they have standing to bring the case. The burden is on the plaintiff to show that they have standing. To establish standing, the plaintiff must have suffered an “injury-in-fact,” the injury suffered must be traceable to the actions of the defendant, and a favorable outcome must actually remedy the harm suffered.⁷ Additionally, if the plaintiff is an organization bringing a suit on behalf of their members, they must show: 1) that their members would have otherwise had standing to bring a claim; 2) the interest they are seeking to protect relates to the organization’s general purpose; and 3) that the claim or relief sought does not require the participation of individual members.

In this case, the state and county officials argued that there had not been an injury-in-fact, and that even if there was an injury it was only traceable to the actions of the Texas Legislature and the Cameron County Commissioner’s Court. However, the appellate court disagreed. They said that SaveRGV had suffered an injury-in-fact because while the beach closures affected the general public’s access, both Sierra Club and the Tribe had pointed to specific instances of their members being unable to access the beach in their motions to join the case. The OBA states that “the public, individually and collectively,” has free access to public beaches. The court interpreted this to mean that, although the closure of Boca Chica affected everyone’s access, SaveRGV demonstrated an actual injury-in-fact because its members were specifically denied access when the beach was closed for SpaceX activities.

Additionally, the Land Commissioner and GLO argued that the alleged injuries were not traceable to their actions because the injuries were due to the actions of the Texas Legislature and the Cameron County Commissioner’s Court who issued each order to temporarily close Boca Chica Beach. However, the court again sided with SaveRGV in holding that the injury is traceable to the Land Commissioner and GLO’s actions. SaveRGV claimed, and the court agreed, that all injuries are traceable back to the statutes at issue. Although the Cameron County Commissioner’s Court is the one that actually issued each closure order, the ability to issue such orders are permitted by the GLO and Land Commissioner because they are the ones who administer and carry out § 15.32 of the Texas Natural Resource Code, which SaveRGV claims is unconstitutional. Based on this, and the fact that there was an injury-in-fact, the court determined that SaveRGV had sufficiently shown that they did have standing to bring this case.

Sovereign Immunity

In Texas, state employees are protected from liability for negligence under sovereign immunity, however this immunity can be waived. SaveRGV argued that in this case the sovereign immunity should be waived because they claim that the statutes at issue are unconstitutional. The court agreed. Under § 37.006(b), the Texas Uniform Declaratory Judgement Act (UDJA), sovereign immunity is waived when a lawsuit is challenging the constitutionality of a statute or rule. When this occurs, the Texas AG, and any other relevant government employee, must be “served with a copy of the proceeding.” In this case, that means, the Land Commissioner and AG could not claim sovereign immunity to shield themselves from litigation.

The court interpreted this to mean that, although the closure of Boca Chica affected everyone’s access, SaveRGV demonstrated an actual injury-in-fact because its members were specifically denied access when the beach was closed for SpaceX activities.

The GLO and the Land Commissioner also claimed it was redundant to have both of them named in the suit and moved to have the Land Commissioner removed. Under Texas state law, a lawsuit that is brought against a government employee is presumed to be a suit against their employer unless the lawsuit alleges that the employee was acting *ultra vires*—meaning that the employee was acting beyond their power or authority.⁸ However, the court disagreed with the GLO and Land Commissioner; the court found that in their suit, SaveRGV was claiming that the Land Commissioner had acted beyond their legal authority by adopting § 61.011(d)(11) and was seeking declaratory judgment stating so. Thus, the court stated that the claim was not prohibited and the Land Commissioner could not be removed from the case.

Private Right to Enforcement

Lastly, the state and county officials argued that §33(d) of the OBA prohibits this lawsuit because it “does not create a private right of enforcement.” The state and country officials claim that based on that section, SaveRGV cannot challenge the constitutionality of any of the statutes or rules that allow for beach closures for space launches. SaveRGV responded by claiming that they are not taking a private action, such as suing SpaceX (a third party), to enforce their right to access the beach but are instead challenging the constitutionality of the statutes. The court, again, agreed and ruled that since SaveRGV brought a declaratory judgment action against the

Starship SN16 at Starbase in Boca Chica Texas,
courtesy of Lars Ploughmann.



state and county officials on the constitutionality of the statutes and not an injunction to enforce their access rights against SpaceX, their suit is not prohibited under § 33(d). The OBA does not prevent SaveRGV from challenging the constitutionality of § 61.132 of the Texas Natural Resource Code, § 61.011(d)(11) of the Texas Natural Resource Code, and § 15.32(d) of the Texas Administrative Code.

Conclusion

The appellate court reversed the trial court's decision to dismiss the case after it determined that SaveRGV, Sierra Club, and the Tribe had sufficiently proven standing to bring their suit. Additionally, the court ruled that the AG and Land Commissioner were not protected by sovereign immunity because of UDJA; nor was the case barred by § 33(d) of OBA. The case was sent back to the trial court to be considered on the merits. The AG, GLO, and Cameron County are expected to appeal this decision to the State Supreme Court.⁹

Endnotes

- ¹ NSGLC Ocean and Coastal Law Fellow.
- ² *SaveRGV v. Texas General Land Office*, No. 13-22-0358-CV, 2024 WL 385656, 2024 Tex. App. LEXIS 815 (Tex. App.-Corpus Christi-Edinburg Feb. 1, 2024).
- ³ Elizabeth Howell, *SpaceX's Starship Work in South Texas Spurs Lawsuit over Boca Chica Beach Access*, Space.com (May 20, 2022).
- ⁴ TEX. CONST. art. I, § 33(C).
- ⁵ Tex. Nat. Res. Code Ann. § 61.132; *see also* Brandon Lingle, *Activists Win Appeal Over SpaceX Beach Closures in Texas*, GOV'T TECH. (Feb. 2, 2024).
- ⁶ Order Granting Defendant Cameron County's Plea to the Jurisdiction, 2021-DCL-05887 (Jun. 30, 2022); Order Granting Texas Attorney General's Plea to the Jurisdiction, 2021-DCL-05887 (Jun. 30, 2022); Order Granting Defendants Texas General Land Office's and George P. Bush, in His Official Capacity as to Texas Land Office Commissioner's, Plea to the Jurisdiction, 2021-DCL-05887 (Jun. 30, 2022).
- ⁷ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).
- ⁸ *SaveRGV*, 2024 WL 385656, 2024 Tex. App. LEXIS 815, at *16 (Tex. App.-Corpus Christi-Edinburg Feb. 1, 2023) (citing *Franka v. Velasquez*, 332 S.W.3d 367, 382 (Tex. 2011)).
- ⁹ Steve Clark, *Appellate Court Sides with Environmentalist over SpaceX Beach Closure Lawsuit*, MYRGV (Feb. 2, 2024).

Court Revokes Florida's CWA § 404 Permitting Program

Madison Vice¹

A federal judge has struck down the State of Florida's authority to issue wetlands permits under the federal Clean Water Act (CWA).² The U.S. District Court for the District of Columbia determined that the Environmental Protection Agency (EPA) and U.S. Fish and Wildlife Service (FWS) violated the Endangered Species Act (ESA) when allowing Florida to take over permitting for dredge-and-fill activities impacting wetlands. The court found that the agencies failed to adequately consider the program's threats to endangered plants and animals, rendering Florida's three-year control of the permitting process unlawful. This decision could delay or complicate numerous real estate, infrastructure, and other development projects requiring wetlands permits across the state, as Florida receives thousands of permit applications each year. In fact, between the date of the program's assumption in 2020 and June 2023, the state received over 8,100 permit applications.³

Background

The CWA, a cornerstone of federal environmental legislation, aims to protect the nation's water resources by regulating the discharge of pollutants into navigable waters. Section 404 of the CWA specifically addresses the discharge of dredged or fill material, granting the U.S. Army Corps of Engineers (Corps) the authority to issue permits for such activities. However, the CWA provides a mechanism for states to assume this permitting authority, subject to approval by the EPA. To obtain approval, a state must demonstrate that its proposed permitting program meets the requirements set forth in the CWA and EPA's implementing regulations.

In August 2020, Florida submitted an application to the EPA, seeking to assume § 404 permitting authority. This move represented a shift in the management of Florida's wetlands and waterways, as the state aimed to streamline the permitting process and assert greater control over its environmental resources. As part of the application review process, the EPA consulted with the FWS as mandated by § 7 of the ESA. The ESA requires federal agencies to ensure that their actions, including the approval of state permitting programs, do not jeopardize the continued existence of threatened or endangered species or adversely modify their critical habitat. The FWS, as one of the expert agencies responsible for administering

the ESA, prepared a biological opinion (BiOp) to assess the potential impacts of Florida's assumption of § 404 permitting authority on listed species and their habitats.

The BiOp, a crucial document in the consultation process, is intended to provide a comprehensive analysis of the effects of the proposed action on protected species, based on the best available scientific data. In this case, the FWS opted for a programmatic approach, issuing a BiOp that broadly addressed the potential impacts of Florida's assumption of permitting authority rather than conducting species-specific assessments. The FWS also issued an incidental take statement (ITS), which anticipated that some level of incidental "take" of listed species, meaning to "harass, harm, pursue, hunt, shoot, wound, trap, kill, capture, or collect," might occur as a result of the state's permitting activities.⁴

The EPA, relying on the BiOp and ITS, approved Florida's application to assume § 404 permitting authority in December 2020. This decision made Florida only the third state, after Michigan and New Jersey, to successfully obtain this authority. However, several environmental organizations, including the Center for Biological Diversity, Defenders of Wildlife, and the Sierra Club, challenged the approval, citing the potential impacts on threatened and endangered species and the adequacy of the consultation process.

ESA Claim

Evaluating whether the defendants violated the ESA, the court examined three key issues: the BiOp, the ITS, and the EPA's reliance on these documents. Regarding the FWS's programmatic BiOp, the court found that the agency failed to conduct the required species-specific analysis when assessing the potential impacts of Florida's permitting program on threatened and endangered species. The ESA and its implementing regulations mandate that the FWS provide a detailed evaluation of how the proposed action may affect each listed species and their critical habitat. However, the court determined that the BiOp lacked this necessary level of specificity, instead relying on a more generalized, "guild-level" analysis that grouped species based on broad ecological similarities.⁵ The court held that this approach did not satisfy the ESA's requirements, rendering the BiOp inadequate.

The court also found fault with the FWS's programmatic ITS, which is designed to anticipate and authorize a certain level of incidental take of listed species resulting from the proposed action. The ESA requires the FWS to specify the amount or extent of anticipated take, either numerically or through the use of a surrogate measure. In this case, the court held that the ITS failed to meet this standard, as it did not set any numerical take limits or provide a clear surrogate for determining when the anticipated level of take would be exceeded. The absence of these essential elements, the court concluded, rendered the ITS invalid under the ESA.

Finally, the court addressed the EPA's reliance on the flawed BiOp and ITS in approving Florida's assumption of § 404 permitting authority. The court emphasized that the EPA, as the action agency, had an independent duty to ensure that its decision would not jeopardize the continued existence of listed species. By relying on the FWS's legally deficient BiOp and ITS, the EPA failed to fulfill this obligation, violating the ESA. The court also found that the EPA violated the ESA by determining that its approval would have no effect on listed species under the jurisdiction of the National Marine Fisheries Service (NMFS) without properly considering potential impacts beyond the immediate permit areas. These findings led the court to conclude that both the FWS and the EPA had violated the ESA in the process of approving Florida's assumption of § 404 permitting authority.

APA Claim

Under the APA, courts have the authority to “hold unlawful and set aside” agency actions that are found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.⁶ In this case, the court determined that the deficiencies in the BiOp and ITS, as well as the EPA's reliance on these documents, warranted vacatur – a remedy that essentially nullifies the agency's decision. The court's decision to vacate the BiOp and ITS was based on its finding that the flaws in these documents were substantial and not merely procedural. The FWS's failure to conduct species-specific analyses and to set clear take limits, the court reasoned, went to the heart of the ESA's requirements and could not be easily remedied through further explanation or minor adjustments. By vacating these documents, the court effectively sent the matter back to the FWS to redo its analysis in compliance with the ESA.

Similarly, the court vacated the EPA's approval of Florida's assumption of § 404 permitting authority, citing the agency's reliance on the legally deficient BiOp and ITS. The court emphasized that the EPA had an independent duty to ensure that its actions would not jeopardize listed species, and that by relying on the flawed FWS documents, the EPA had failed to fulfill this obligation. The vacatur of the EPA approval meant that the agency would need to reconsider its decision in light of the ESA violations identified by the court.

Conclusion

The court's decision and choice of remedy in *Center for Biological Diversity v. Regan* highlights the importance of species-specific analysis in assessing the potential impacts of agency actions on protected wildlife. This ruling underscored the importance of strict adherence to the ESA's procedural and substantive requirements in the context of federal agency actions, emphasizing that federal agencies cannot rely on generalized or programmatic assessments when evaluating the potential impacts of their actions on threatened and endangered species. Instead, agencies must carefully consider the specific effects on each listed species and their critical habitat, using the best available scientific data. This requirement ensures that agencies make informed decisions and that the ESA's protective goals are met.

The court's decision also has implications for future state efforts to assume permitting authority under the Clean Water Act. States seeking to take on this responsibility must be prepared to navigate the complex interplay between state and federal environmental laws, particularly the ESA. The ruling emphasized the importance for states to work closely with federal agencies to ensure that their proposed permitting programs are compatible with the ESA's requirements and that the necessary species-specific analyses are conducted.

Ultimately, *Center for Biological Diversity v. Regan* demonstrates the ongoing challenge of balancing environmental protection and state-federal cooperation in the management of our nation's natural resources. While the court's ruling may be seen as a setback for state assumption of permitting authority, it also serves as a reminder of the paramount importance of the ESA in safeguarding biodiversity. As states and federal agencies continue to work together to protect the environment, they must do so in a manner that gives full effect to the ESA's mandate and ensures the conservation of threatened and endangered species. ♻️

Endnotes

¹ NSGLC Research Associate; 2L, University of Mississippi School of Law.

² *Ctr. for Biological Diversity v. Regan*, No. 21-119 (D.D.C. Feb. 15, 2024).

³ Fla. Dep't. of Environmental Protection, *State 404 Program Annual Report* (2023).

⁴ *Id.*

⁵ *Id.*

⁶ 5 U.S.C. § 706(2).

Anchoring Change: Bar Harbor Restricts Cruise Ship Visitors to 1,000 Per Day

Katie Shaw¹

Bar Harbor, Maine, is a bustling tourist destination renowned for its scenic coastal beauty. The town serves as a gateway to Acadia National Park, a national asset often hailed as the Crown Jewel of the North Atlantic Coast. Over the past fifteen years, Bar Harbor has seen a consistent rise in tourism, primarily fueled by its connection to Acadia National Park. In 2021 alone, Acadia drew in approximately four million visitors, many of whom also explored downtown Bar Harbor during their trip.² Despite its seasonal flood of visitors, Bar Harbor maintains a community of around 5,500 residents year-round, a population mirroring that of a large cruise ship.

Despite its seasonal flood of visitors, Bar Harbor maintains a community of around 5,500 residents year-round, a population mirroring that of a large cruise ship.

The area has recently witnessed an influx of larger cruise ships anchoring nearby. Bar Harbor is a Class A port of entry for foreign-flagged vessels reentering the United States. While Maine boasts two other Class A ports of entry, neither provides the proximity to Acadia National Park that Bar Harbor offers. Traveling from either port would consume a significant portion of the day, leading cruise lines to favor Bar Harbor over other ports in the state. The town reported that over 270,000 cruise passengers visited the port in 2019.³

Two years ago, Bar Harbor voters approved an ordinance that limits the number of cruise ship passengers who can disembark to 1,000 per day. The initiative sparked a lawsuit by local business owners, who claimed the ordinance violated the Maine and U.S. constitutions; however, a federal district court judge ruled that the residents of Bar Harbor have the lawful ability to limit the number of passengers disembarking cruise ships.

Bar Harbor's Efforts to Control Cruise Ship Tourism

Residents emphasized the strain on Bar Harbor's downtown caused by the large influx of passengers, leading to congestion in public spaces and diminishing their quality of life. During a special town meeting on November 8, 2022, Bar Harbor officials passed an initiative with a majority vote establishing a 1,000-passengers-per-day cap.⁴ This ordinance calls for a minimum of a \$100 fine for unauthorized disembarkation to be enforced against visitors.⁵ The Harbor Master would be required to develop rules for cruise ship reservation systems, track disembarkations, and report any violations.

A coalition of Bar Harbor businesses, eager to maintain their commercial ties with cruise lines and their passengers, contested the local community's push to reduce cruise ship visits. Major cruise companies, like Carnival, Royal Caribbean, and Norwegian, hold Bar Harbor—and, as such, Acadia National Park—as a premier destination in their itineraries. These companies operate foreign-flagged ships and consider Bar Harbor their most convenient and desirable port of entry from foreign waters.

However, despite the local business' efforts to argue that the ordinance violates the Maine and U.S. constitutions, the federal district court ruled that the town can legally impose this daily cap.⁶ The ordinance is a lawful exercise of the Home Authority rule under the Maine Constitution, which allows municipalities to enact local ordinances on matters not explicitly prohibited by state or federal law. Furthermore, the court found that the ordinance did not violate the Due Process Clause, Supremacy Clause, or Commerce Clause of the U.S. Constitution.

The Bar Harbor Town Council has already made plans to implement the daily cap for the upcoming season, with the first cruise ship anticipated in May. Cruise ships that secured reservations to port prior to the vote in 2022 will enjoy unrestricted access, with no limitations on passenger disembarkation. However, any ship that made a reservation to port in 2024 after the vote will be subject to the daily passenger caps.

View of a cruise ship in Bar Harbor, Maine,
courtesy of Domenico Covertini.



Starting the 2025 season, nearly all cruise ships will have to adhere to the passenger limit. The regulations required by the town ordinance are currently in development. The Harbor Master will establish a reservation system for cruise ships transporting passengers to the town, along with mechanisms to accurately track disembarked individuals.

Conclusion

Some local businesses have voiced strong criticism regarding reduced cruise ship passenger visits and the subsequent district court decision.⁷ For many establishments, cruise ship passengers represent a significant portion of their customer base, and a decrease in their numbers could have financial consequences. While the decision to limit the cruise ship visitors may face opposition from some stakeholders, the ruling by the federal district court provides legal validation for Bar Harbor residents who voted for the amendment. The Bar Harbor Town Council stated that enforcement will proceed without delay regardless of any appeals against the court's decision.⁸ Moving forward, Bar Harbor's commitment to enforcing the ordinance signals a concerted effort to balance tourism growth with preserving residents' quality of life. ♻️

Endnotes

- ¹ NSGLC Research Associate; 2L, University of Mississippi School of Law.
- ² *Acadia National Park: Visitation Statistics*, NATIONAL PARKS, (last visited Mar. 24, 2024).
- ³ Town of Bar Harbor, *2019 Annual Report* (June 30, 2020).
- ⁴ Town of Bar Harbor, *Special Meeting Official Results* (Nov. 8, 2022).
- ⁵ BAR HARBOR CODE Ch. 125, art. VIII, § 125-77.
- ⁶ *Ass'n to Preserve & Protect Local Livelihoods v. Town of Bar Harbor*, No. 1:22-cv-00416-LEW (D. Me. 2024).
- ⁷ Carrie Jones, *UPDATE: Council Will Hold Special Meeting Wednesday About Cruise Ship Limits Next Steps*, Bar Harbor Story (Mar. 5, 2024).
- ⁸ Bar Harbor Town Council, *Town Council Statement on Cruise Ship Ordinance Enforcement*, BAR HARBOR (Mar. 6, 2024).

Setting Sail for Sustainability: EPA Agrees to Finalize Ballast Water Discharge Standards

Katie Shaw¹



Zebra mussels, courtesy of Alexander Hardy.

Cargo vessels are responsible for discharging 52 billion gallons of ballast water annually in U.S. waters.² When dumped, this water may carry various pollutants, including aquatic invasive species, oil, grease, toxic chemicals, and pathogens, all with severe consequences to the environment and public health. Once invasive species are introduced to new waters, they can reproduce and spread rapidly, devastating fisheries and causing damage to coastal

and inland waters. For example, the rapid spread of zebra mussels has caused billions of dollars in damages in United States waters over the course of two decades. Inadequate regulation of water pollution from vessels not only jeopardizes marine ecosystems but also poses risks to public health.

In 2018, Congress amended the Clean Water Act (CWA) with the Vessel Incidental Discharge Act (VIDA).⁴ This legislation mandated the Environmental Protection Agency (EPA)

to develop updated discharge standards by December 4, 2020. In 2023, the agency faced legal action for its delay in finalizing these standards. Recently, the EPA entered a consent decree with environmental groups that requires the agency to finalize its federal performance standards for vessel discharges by fall 2024.

Ballast Water Regulation

Under the CWA, any unauthorized discharge of pollutants into U.S. waters is strictly prohibited.⁵ For years, ballast water enjoyed exemption from CWA regulation, partly due to the Coast Guard's jurisdiction over ballast water management under the National Invasive Species Act of 1996. However, in 2008, the Ninth Circuit Court of Appeals ruled that the EPA had overstepped its bounds in granting this exemption, necessitating regulation of ballast water discharges under the CWA.⁶

Subsequently, the EPA shared regulatory authority over ballast water discharges with the Coast Guard and certain states. The EPA issued the Vessel General Permit (VGP) in 2013, effective until December 18, 2020, which set nationwide discharge standards for commercial vessels over 79 feet long.³ Under VIDA, the EPA is primarily responsible for establishing discharge standards, while the Coast Guard ensures compliance with these standards concerning vessel equipment and management practices. VIDA extended the validity of the 2013 VGP provisions until new regulations are finalized.

In 2020, the EPA issued its proposed rule pursuant to VIDA outlining national standards for marine pollution control devices in commercial vessels operating in U.S. waters. The proposed rule details specific discharge standards for twenty different vessel equipment and systems, alongside general standards applicable to all vessel discharges.⁷ These standards are technology-based, including numeric effluent limits and best management practices, differentiating between vessel types and sizes, and maintaining a level of stringency similar to the 2013 VGP. Additionally, the proposed rule outlines procedures for states to seek different discharge requirements, including no-discharge zones for incidental discharges. Despite the congressional mandate to finalize regulations by December 4, 2020, the EPA did not meet the statutory deadline nor did the agency take any action to finalize the proposed regulations.

In January 2023, the EPA announced its intent to issue a supplemental notice to the initial proposed rule.⁸ The Center for Biological Diversity and Friends of the Earth initiated legal action under the CWA to compel the EPA to finalize federal performance standards for vessel discharges. In September, environmental groups and the EPA entered settlement discussions and negotiated the consent decree. According to the agreement, the EPA must finalize national standards to prevent ships from discharging pollutants into the ocean by September 23, 2024.⁹

Conclusion

Vessel pollution severely threatens marine ecosystems and public health, calling for more stringent regulations. The EPA's delay in establishing adequate standards prompted legal action from environmental groups and subsequent settlement discussions. With the consent decree, the EPA is now obligated to finalize national standards by September 2024. While the consent decree represents a significant step in the fight for cleaner waters, it is only the first step.

Continued vigilance and advocacy will be necessary to ensure the effective implementation and enforcement of these standards. The oceans program director at the Center for Biological Diversity, Miyoko Sakashita, expressed satisfaction with the agreement, "I'm glad the EPA will take action after years of delay, and I hope the agency finally cracks down on ships that dump water with pathogens and invasive species."¹⁰ Establishing stricter standards for vessel pollution will not only yield benefits for human health but also contribute to the preservation of marine ecosystems and the protection of vulnerable aquatic species. ♻️

Endnotes

¹ NSGLC Research Associate; 2L, University of Mississippi School of Law.

² Complaint at 8, Center for Biological Diversity v. Regan, No. 3:23-cv-535 (N.D. Cal. 2023).

³ ENVIRONMENTAL PROTECTION AGENCY, FINAL 2013 VGP (2013).

⁴ 33 U.S.C. § 1322(p)(4)(A)(i).

⁵ *Id.* § 1311.

⁶ *Nw. Envtl. Advocates v. U.S. EPA*, 537 F.3d 1006, 1010 (9th Cir. 2008).

⁷ Vessel Incidental Discharge National Standards of Performance, 40 C.F.R. § 139 (2020).

⁸ This notice was published in October 2023 and includes data on the type of approval of ballast water management systems received from the Coast Guard, including options for ballast tanks, hulls and niche areas, and greywater systems that the EPA was considering for the final rule. Supplemental Notice of Proposed Rulemaking to the Vessel Incidental Discharge National Standards of Performance, 40 C.F.R. § 139 (2023).

⁹ Consent Decree, Center for Biological Diversity v. Regan, No. 4:23-cv-00535-DMR (N.D. Cal. 2023).

¹⁰ *EPA Agrees to Issue Standards for Protecting U.S. Waters From Ship Pollution, Invasive Species*, CENTER FOR BIOLOGICAL DIVERSITY (Sept. 8, 2023).

The University of Mississippi

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



Littoral Events

Capitol Hill Ocean Week 2024

*June 4-6, 2024
Washington, D.C.*

For more information, visit: <https://preconvirtual.com/chow-2024>

Association of State Floodplain Managers Conference

*June 23-27, 2024
Salt Lake City, UT*

For more information, visit: <https://www.floods.org/conference/2024-asfpm-conference>

National Coastal Conference 2024

*August 26-29, 2024
Galveston, Texas*

For more information, visit: <https://asbpa.org/2024-asbpa-national-coastal-conference>