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The SandBar

Legal Reporter for the National Sea Grant College Program

The End of Chevron Deference

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Contents page photograph of the Rio Grande River Gorge, courtesy of Beth Wilson.

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The SandBar

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The End of Chevron Deference

Collin Dowson[1]

Fishing vessel, courtesy of Freddy Dendok.

Forty years ago, the U.S. Supreme Court issued a decision which would change the face of administrative law. In *Chevron v. Natural Resources Defense Council*, the Court set out a two-step test to determine when courts should defer to an agency's interpretation of a statute.[2] First, a court will ask whether Congress has spoken to the issue at hand. If Congress has spoken, the issue is resolved, as Congress' directive is binding. If a court concludes that Congress hasn't spoken to the issue at hand, the court must then determine if the interpretation offered by the agency is a reasonable one. This is a relatively low bar for agencies to clear, which has frequently resulted in courts approving the statutory interpretations of agencies. After several years of signaling its wavering support for *Chevron*, the Supreme Court was finally afforded an opportunity to deal a death blow to the doctrine in *Loper Bright Enterprises v. Raimondo*.[3]

Background

In *Loper*, the Court considered a classic *Chevron* question of agency interpretation. For years, the National Marine Fisheries Service (NMFS) had, under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), developed programs where third-party observers would be placed aboard fishing vessels to collect data for conservation and fishery management. The Act provided a few examples of types of vessels who could be made to bear the costs associated with these observers. Examples included foreign vessels, and vessels in the highly lucrative North Pacific Council region. Crucially, the Act did not specify whether Atlantic herring fishing vessels could be made to bear observer costs. However, NMFS chose to interpret this silence as permission and developed a plan where some Atlantic herring fishing vessels would pay for all of the costs

associated with hosting an observer. Several family-run businesses sued, arguing that being forced to pay for observers could cost up to $710 per day, cutting their annual returns by up to twenty percent.

The district court that first heard the case applied the *Chevron* test and found in the first step of its analysis that Congress had spoken to the issue, and that the MSA gave NMFS permission to compel Atlantic herring vessels to bear the cost. The D.C. Circuit reviewed the case, and though it disagreed that the MSA explicitly spoke to the issue, it also sided with NMFS. Reaching the second step of *Chevron* analysis, this court found that although the MSA was ambiguous on the point, the interpretation provided by NMFS was a reasonable one, and they would therefore defer to the agency. The Supreme Court then agreed to hear the case, but limited itself only to the question of whether *Chevron* should be overruled or clarified.[4]

The Majority View

Writing for a 6-3 majority, Chief Justice Roberts outlined the view that the *Chevron* doctrine was an impermissible practice, which could no longer be used by American courts. The crux of the argument was that *Chevron* could not be reconciled with section 706 of the Administrative Procedure Act (APA). The APA was a piece of legislation crafted in 1946 to help temper the "zeal" of administrators in executing legislation, with section 706 stating that courts should be the ones to decide all questions of law which might arise under the act.[5] The majority argued that this phrasing mandated courts to decide for themselves what any murky provisions might mean, necessarily prohibiting them from deferring to agencies. While the majority acknowledged that courts often show "due respect" to the interpretations of the executive branch, this respect could not be allowed to override the judicial function of interpreting the law.[6] The majority argued that it was crucial for courts to seek out not merely a reasonable interpretation of a statute, but the "single, best meaning" of the law's text, and that accepting any other interpretation was therefore impermissible.[7]

The majority then attempted to counter several arguments in support of *Chevron*. One popular argument for the value of Chevron deference is that it places decision-making authority in the hands of agency employees, who are often experts on the topic, such as NMFS employees who are well versed in the nuances of fishery management. The majority claimed that this argument was unpersuasive for two reasons. First, the majority pointed out that, because the government was given a chance to make its case before a court would reach a decision, judges would receive the benefit of the agency's knowledge throughout the course of the trial, and would thus be aware of any expertise-based arguments as to why a particular interpretation was the best option. Additionally, the majority argued that in most cases, the task of interpretation did not turn on an issue of subject matter expertise, but on the rules of legal reasoning and statutory interpretation which are the purview of judges, not agency actors.

One of the largest hurdles for the majority to overcome in striking down *Chevron* was the legal principle of *stare decisis*. This Latin phrase, translated as "to stand by things decided," encourages courts to follow the rulings set by previous courts of equal prestige unless given a compelling reason not to.[8] Since *Chevron* had stood for forty years, and since a great many decisions had been made using its framework, there was a strong presumption against overturning it. The majority responded by pointing out that the *stare decisis* principle is not an "inexorable command" and that other factors weighed in favor of overturning *Chevron*.[9] The majority argued that *Chevron's* central premise was fundamentally incorrect, and that so many alterations had been made to the doctrine over the years that it was unworkable, meaning that no parties could reasonably rely on it to lead to a particular outcome.

A Defense of *Chevron*

Leading a three member dissent, Justice Kagan outlined her argument for why the majority's decision was misguided. The dissent pointed out that ambiguities in statutes are unavoidable, given that Congress simply cannot foresee every possible dispute arising from its word choices. And, given that ambiguities are inevitable, the dissent argued that it was vastly preferable for the remaining gaps to be filled in by agencies rather than courts. For one, the dissent pointed out that unlike judges, agencies, via the president, are politically accountable to the people for the decisions they make. For another, the dissent argued the majority was wrong to say that most interpretations turned on issues judges were well-versed in, saying instead that many focused on "scientific or technical subject matter" that judges had no background in.[10]

The dissent also criticized the majority's contention that *Chevron* took from judges their time-honored role as interpreters of the law. The dissent pointed out that the first step of the *Chevron* test, where a judge would determine whether or not a statute spoke to the issue at hand, was precisely where legal interpretation came into play. It was only if, after using all of the tools and knowledge available to them, a judge was unable to decide what the text of a statute meant, that they would then move on to deciding whether or not the supplied agency interpretation should be deferred to. Rather than returning traditionally enjoyed power to judges, the dissent criticized the majority's approach as seizing power for the judicial branch, turning the Supreme Court into "the country's administrative czar."[11]

The dissent also pointed out that if *Chevron* was really as wrong as the majority supposed, Congress had forty years to correct the mistake by issuing legislation declaring

Fishing vessel, courtesy of Ron Ronile.

interpretation to be the sole responsibility of courts. However, Congress had not done so, despite having multiple opportunities to enact such legislation. Additionally, the dissent scorned the majority's *stare decisis* analysis. The majority had made much of the fact that the Supreme Court has declined to use the *Chevron* test since 2016. But the dissent painted this pattern as a deliberate "self-help" technique which the Court's conservative majority has repeatedly used in recent years to do away with precedent it doesn't like, adding that this "overruling-through-enfeeblement" makes a mockery of *stare decisis*.[12]

So, What Happens Now?

The majority concluded its opinion by stating that while the *Chevron* two-step test can no longer be used, none of the cases previously decided using the test, including the original *Chevron* case from which the test spawned, were overturned by the *Loper* decision. This clarification is crucial, given that it is estimated that the *Chevron* test has been used in "more than 18,000 federal-court decisions."[13] However, the dissent warned that the exact reasoning used by the majority in *Loper* could be used by judges "motivated to overrule an old Chevron-based" rule to overturn other regulations, given that they need only come up with a "special justification" for doing so.[14] Even if previously settled disputes remain settled, the decision leaves the fate of regulations which have not previously been challenged highly uncertain. Even more doubt remains concerning regulations yet to be issued. *Loper* seems set to have just as much of a ripple effect on administrative law in the years to come as the *Chevron* rule it overturned.

Endnotes

1 NSGLC Summer Research Associate; 2L Northwestern School of Law.

2 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

3 Loper Bright Enters., Inc. v. Raimondo, 144 S.Ct. 2244 (2024).

4 *Loper Bright Enterprises v. Raimondo*, Cornell Law School Legal Information Institute, (last visited July 19, 2024).

5 *Loper*, 144 S.Ct. at 2261.

6 *Id.* at 2258.

7 *Id.* at 2266.

8 *Stare Decisis*, Cornell Law School Legal Information Institute, (last updated Dec. 2021).

9 *Loper*, 144 S.Ct. at 2270.

10 *Id.* at 2294.

11 *Id.* at 2295.

12 *Id.* at 2308.

13 *Id.* at 2307.

14 *Id.* at 2310.

Ozone in Limbo: U.S. Supreme Court Grants Stay of EPA's Good Neighbor Plan

Cheyanne Sharp[1]

When it is in the upper atmosphere, ozone is beneficial, acting as a barrier against the sun's dangerous radiation.[2] However, ozone can also form closer to the ground and become an infamous air pollutant—smog. When certain compounds commonly found in emissions from cars, refineries, and chemical and power plants chemically combine, the reaction creates this harmful "ground level ozone." Breathing in ozone can lead to respiratory harm in humans, and the pollutants are similarly harmful to plant life.[3] Ozone pollution hurts sensitive vegetation by reducing photosynthesis and halting the plant's growth, ultimately contributing to ecosystem decline through changes in plant abundance, habitat quality, and water and nutrient cycles.[4] These effects are far-reaching, with wind often carrying ozone a long way from its source.[5]

As statutorily authorized by the Clean Air Act (CAA), the U.S. Environmental Protection Agency (EPA) redefined its ozone air quality standards in 2015 to protect against these harmful effects. Every state was required to adjust its regulatory plans accordingly, but the EPA found many of their approaches insufficient to meet the goals of the CAA. Therefore, in 2023, the EPA developed its own mandatory plan of action for the noncompliant states. Several states challenged the final rule in federal courts throughout the country. On June 27, 2024, the U.S. Supreme Court weighed in on the issue, ordering a stay of the rule's enforcement until the ongoing litigation comes to an end.[6]

Background

The states and the federal government both have essential roles in improving air quality under the CAA, with the EPA in charge of setting limits on air pollutant levels in order to protect public health and the states implementing individualized plans to achieve those goals. Once the EPA sets updated air quality standards, each state has three years to develop its own State Implementation Plan (SIP) outlining how they will be met and enforced. Under the CAA's "Good Neighbor Provision," an upwind state's SIP must account for air currents carrying a disproportionate amount of air pollution to downwind states, finding ways to further limit its own emissions to rectify the imbalance. If the EPA finds that a SIP fails to meet these requirements, the agency will step in and issue a Federal Implementation Plan (FIP) for the state to ensure that it will attain compliance by the statutory deadline.

In 2015, the EPA made its air quality standards for ozone more stringent, starting the clock for the states to create new SIPs. A few states failed to submit SIPs altogether, while many others developed plans with no new emission controls in place, providing reasons such as their inability to initiate new cost-effective methods to meet the goals. Throughout 2022, the EPA announced that it would be disapproving of a total of twenty-six SIPs because they did not comply with the Good Neighbor Provision. The agency initiated a public comment period on the disapprovals and also proposed and published a single FIP applying to all of those states. The FIP, specifically targeting ozone-forming nitrogen oxide emissions, prioritized improving downwind air quality in the most cost-effective manner.

The FIP implemented this goal by proposing "a 'uniform level' of cost, and so a uniform package of emissions-reduction tools, for upwind States to adopt" based on the maximum point where the benefits of downwind air quality improvement would still exceed the costs of upwind mitigation strategies.[7] However, according to the Court, the notice and comment period revealed the public's concern that any upwind state's failure to implement the FIP might shift this threshold point, creating disparities in the burdens placed on the regulated states. These anxieties intensified as federal circuit courts began issuing stays of the EPA's SIP denials. Still, the EPA issued the final FIP, amending it with a severability provision which said that the rule would still apply if any states came to be exempt from its reach. Litigation challenging the FIP continued to ensue, resulting in more stays and more states exempt from its requirements.

Photo of air pollution from power plant, courtesy of Lundrim Aliu/World Bank Photos.

Several of the remaining states, including Ohio, West Virginia, and Indiana (the States), along with several industry groups, brought suit against the EPA in the U.S. Court of Appeals for the D.C. Circuit, claiming that the FIP was arbitrary and capricious as applied to them given the rule's inconsistent state of implementation. Like many others before them, the States requested a stay of the FIP's enforcement throughout the course of the litigation. The D.C. Circuit denied their request, and the Supreme Court stepped in to resolve the issue.

The Majority Decision

In deciding whether to grant or deny a request for a stay, federal courts consider "(1) whether the applicant is likely to succeed on the merits, (2) whether it will suffer irreparable injury without a stay, (3) whether the stay will substantially injure the other parties interested in the proceedings, and (4) where the public interest lies."[8] The Court found that the latter three factors weighed fairly equally on either side in this case, with the EPA advocating for health-preserving air quality regulation and the States alleging impairments to their sovereignty, equality, and financial resources. Therefore, the Court's decision rested upon the first factor, requiring an analysis of the States' likely success on the merits of the case.

In a majority decision penned by Justice Gorsuch, the Court held that the States were likely to succeed on the merits, thereby warranting a stay of FIP enforcement. According to the Court, the EPA failed to sufficiently address the concerns raised by public commenters about whether the quantity and identity of FIP-regulated states played a role in the FIP's cost-effective emissions-controls analysis.

The Court also held that the EPA's alternative arguments were without merit. First, the Court explained that the severability provision providing that the rule would remain in effect even if blocked in some states was insufficient to address

the commenters' concerns because expressing "awareness [of the problem] is not itself an explanation."[9] While the provision demonstrated the EPA's intent to apply the FIP swiftly and consistently, it did not provide any support or justification for the mode of analysis behind the FIP's requirements. Next, after reviewing comments to the FIP and the EPA's response to them, the Court found that the EPA had notice of these potential challenges during the public comment period. Therefore, the Court held that 1) the EPA was barred from arguing that the States' objections were not raised with reasonable specificity and 2) the States were not required to submit a motion for reconsideration to the EPA before bringing a judicial action against it. With each of these arguments addressed, the Court granted the States' application for a stay of the FIP's enforcement against them until the resolution of the lawsuit.

The Dissenting Opinion

While the Court ultimately decided to grant the stay requested by the States, it was a close call, with four Supreme Court Justices dissenting from the majority decision and signing on to an opposing opinion written by Justice Barrett. First, the dissent pointed out what it viewed as major flaws in the majority's analysis: the Court 1) de-emphasized the EPA's statutory responsibilities under the CAA; 2) disregarded the possibility that the EPA's SIP disapprovals were warranted and the agency's corrective response was justified; 3) took the commenters' criticisms out of their original context; and 4) failed to point to affirmative evidence that removing state-specific information from the FIP analysis would in fact alter the EPA's emissions limits.

The dissenting Justices stated that the States' claim would likely be impeded by procedural obstacles and a lack of supporting evidence. The dissent stressed that objections to EPA decisions must have been first "raised with reasonable specificity during the period for public comment" to be brought again later as a judicial challenge.[10] However, the dissent argued that the EPA likely did not have sufficient notice of the specific issue challenged in the lawsuit because it was not originally or fully brought up by any public commenter.

Furthermore, beyond the procedural bar, the dissent felt that the States were unlikely to succeed on the merits. Based on their review of the administrative record, it seemed that the cost-effective solutions in the FIP were determined based on nationwide industry data—not state-specific capabilities as suggested by the majority. The dissent also explained that the severability provision was justified by the EPA's statutory duty to protect the public health through air quality standards, along with a need to assure the public that the rule would be reliably implemented. Finding so many potential obstacles to the States' claim, the dissent would have denied the stay.

Implications

The Supreme Court's decision means that the States' case will now be remanded to the D.C. Circuit for evaluation on the merits, but the FIP will not be enforced against the States in the meantime. The opinion came in a wave of Supreme Court rulings limiting the authority of federal agencies, in line with its June 2024 decision to overturn *Chevron* deference.[11]

Opponents of the stay, like dissenting Justice Barrett, express concern that "the Court's injunction leaves large swaths of upwind States free to keep contributing significantly to their downwind neighbors' ozone problems for the next several years."[12] Furthermore, as pointed out by EPA spokesman Timothy Carroll, the dangerous and costly effects of ozone pollution will continue to disproportionately harm children, older adults, communities of color, low-income families, and other disadvantaged people.[13] In contrast, many proponents favor the Supreme Court's stay as a step toward halting inconveniences and costs to the industries regulated by the FIP.[14]

Endnotes

1 NSGLC Summer Research Associate; 2L, Stetson University College of Law.

2 *Ground-level Ozone Basics*, Env't Prot. Agency (May 14, 2024).

3 *Health Effects of Ozone Pollution*, Env't Prot. Agency (Apr. 9, 2024); *Ecosystem Effects of Ozone Pollution*, Env't Prot. Agency (Nov. 1, 2023).

4 *Ecosystem Effects of Ozone Pollution*, *supra* note 3.

5 *Ground-level Ozone Basics*, *supra* note 2.

6 Ohio v. Env't Prot. Agency, No. 23A349, 2024 WL 3187768 (U.S. June 27, 2024).

7 *Id.* at *4 (quoting Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard, 87 Fed. Reg. 20036, 20076 (Apr. 6, 2022) (to be codified at 40 C.F.R. pts. 52, 75, 78, 97)).

8 *Id.* at *6.

9 *Id.* at *8.

10 *Id.* at *13 (Barrett, J., dissenting) (quoting 42 U.S.C. § 7607(d)(7)(B) (2024))..

11 *See also* Loper Bright Enters. v. Raimondo, No. 22-1219, 2024 WL 3208360 (U.S. June 28, 2024).

12 Ohio, 2024 WL 3187768, at *21 (Barrett, J., dissenting).

13 Matthew Daly, *What it Means for the Supreme Court to Block Enforcement of the EPA's 'Good Neighbor' Pollution Rule*, The Associated Press (June 27, 2024, 3:19 PM).

14 *Id.*

Conflict on the Rio Grande: the Battle Over Water Distribution in the American Southwest

Collin Dowson[1]

View of the Rio Grande River, courtesy of Kirk Kittell.

For more than a century the Rio Grande—a river which snakes through Colorado, New Mexico, and Texas, before continuing south into Mexico—has been the focus of a number of important negotiations. Arguably the most important of these agreements has been the Rio Grande Compact, signed in 1938 by all the states who touch the river. Under this Compact, Colorado agreed to deliver a set amount of water each year to New Mexico, who in turn would deliver a set amount of water to the Elephant Butte Reservoir.[2] This reservoir, which is more than 100 miles north of the Texas border, was chosen because of the key role it plays in multiple pre-existing agreements, including a 1906 treaty between the U.S. and Mexico, and a series of deals collectively called the "Downstream Contracts," under which the U.S. releases water from Elephant Butte for the use of communities in New Mexico and Texas.[3]

2018 Opinion

In 2018, Texas sued New Mexico, alleging that increased groundwater pumping in the area between Elephant Butte and the Texas border was causing Texas to receive less water than it was entitled to under the Compact. As a dispute between states, the conflict represents one of the few issues over which the Supreme Court has original jurisdiction, meaning that the court was the first to hear the case, with no need for an appeal from a lower court. The court appointed a Special Master to oversee the proceedings. A Special Master is an official who is appointed by a court to perform some court-like functions, such as hearing arguments and overseeing the opening phases of a trial, before providing recommendations on how the court should rule. Out of concern for the effect New Mexico's pumping might have on the Downstream Contracts and its treaty with Mexico,

the U.S. asked for permission to intervene in the litigation, wanting to make largely the same claims as Texas.

The Special Master recommended that the Court deny New Mexico's motion to dismiss the complaint brought by Texas. The Master also recommended that the Court dismiss in part the complaint filed by the U.S., arguing that the Compact does not give the U.S. the power to enforce its terms. After these recommendations were issued, both the U.S. and Colorado filed exceptions.

In 2018, the Supreme Court unanimously ruled that the U.S. would be permitted to join the litigation. The court granted this permission because it found that the U.S. had "distinctively federal interests" which could only be defended through U.S. participation.[4] Namely, the federal government has a legal responsibility to deliver water under both the Downstream Contracts and the treaty with Mexico.

First, the Court found that the Compact was inextricably tied with the Downstream Contracts. The Compact's stated purpose is to ensure the "equitable apportionment of the waters of the Rio Grande." However, the Court argued that this goal was only able to be met due to the Downstream Contracts, which ensured that water was distributed equitably to downstream communities. Likewise, the U.S. could not fulfill its obligations under the Downstream Contracts without deliveries of water being made to the Reservoir per the terms of the Compact. The Court held that this mutual reliance made the U.S. a sort of agent to the Compact, who therefore had an interest in seeing that its terms were met. The Court also found it relevant that New Mexico had conceded that the U.S. played an integral role in the Compact's operation.

Next, the Court held that a violation of the Compact could jeopardize the U.S.' ability to satisfy its treaty obligations to Mexico. If New Mexico did not make appropriate deliveries of water to the Reservoir, it could directly impair the ability of the U.S. to deliver water from that Reservoir to Mexico. Finally, the Court noted the importance of the fact that the U.S. was bringing its claims in an existing action brought by Texas, seeking substantially the same relief as Texas, and intervening without the state's objection.

Because it found a number of factors to indicate that the case concerned distinctively federal interests, the Court held that the U.S. should be permitted to continue to pursue its Compact claims. The U.S.' exception to the Special Master's recommendation was sustained, and the case was remanded to the Special Master for further proceedings.

Consent Decree

Following the 2018 decision, proceedings continued for several more years until, in 2024, New Mexico and Texas were able to negotiate a consent decree. A consent decree is a type of settlement agreement which parties take to a court for approval, giving it the same force as a judicial decree. Under the Consent Decree, New Mexico would be allowed to continue its increased pumping, but the water due to Texas would be measured further south, at a point near El Paso, helping to ensure that Texas would receive the correct amount of water. The U.S. objected to the Consent Decree, arguing that if the Court granted it, the U.S. would be prevented from being able to defend its interests to provide water under Downstream Contracts and the treaty with Mexico. In a split decision, the Court again sided with the U.S.

Writing for a slim majority, Justice Jackson broke the question into two distinct parts: whether the U.S. still had valid claims under the Compact, and whether approving the Decree would dismiss any such claims without the U.S.' consent. First, because the Court had found that the U.S. had claims under the Compact as a result of its distinctively federal interests in 2018, and because the nature of the claims being brought had not changed, the majority concluded that the U.S. necessarily still had claims under the Compact in 2024. Next, the majority concluded that the Decree's approval would dismiss those claims, noting comments made by both the Special Master and by the states themselves indicating that the Decree's use would fully resolve all Compact claims by every party. The opinion also pointed out that the Decree took for granted that New Mexico was permitted to do the very thing that the U.S. was claiming was a violation of the Compact. The majority argued that this would have the effect of cutting the U.S. off from a remedy to which it argued it was entitled.

Justice Gorsuch delivered the dissent, joined by three other Justices, outlining their view that the Court should have accepted the Special Master's recommendations to approve the Decree. The dissent stated that it was improper to force the states to continue litigating when they had reached an agreement. The dissent also claimed that the U.S. had essentially hijacked the litigation to serve its own interests.

Conclusion

With the Consent Decree denied, the case now returns to litigation. Proceedings will continue under the supervision of the Special Master until the parties can reach a settlement which can be agreed upon by all, or until the time comes for the Court to hear the dispute as a whole on the merits.

Endnotes

[1] NSGLC Summer Research Associate; 2L Northwestern School of Law. This article is adapted from a post on the NSGLC blog.

[2] Texas v. New Mexico, 583 U.S. 407, 410 (2018).

[3] *Id.* at 411.

[4] *Id.* at 413.

Federal Court Strikes Down BiOp on Oil and Gas Development in the Gulf

Katie Shaw[1]

In August, a federal district court in Maryland invalidated the National Marine Fisheries Service's (NMFS) biological opinion (BiOp) assessing the impacts of oil and gas extraction on protected wildlife in the Gulf of Mexico.[2] The court found that the BiOp significantly underestimated risks posed to endangered species, particularly the Rice's whale, including vessel strikes and noise pollution. This ruling creates uncertainty for the oil and gas industry, which now faces potential permitting disruptions as NMFS works to develop a new BiOp that accurately assesses these risks.

The Gulf of Mexico: Oil Hub and a Critical Ecosystem

Offshore oil and gas production in the Gulf of Mexico is a critical component of the U.S. energy sector, with the western and central regions, including Texas, Louisiana, Mississippi, and Alabama being major petroleum-producing areas. In fact, oil production in the Gulf accounts for 15% of the nation's crude oil production.[3] The Bureau of Ocean Energy Management (BOEM) regulates the oil and gas industry in the Gulf, overseeing federal leases for geophysical exploration and development. While the Gulf is home to this major economic benefit, it is also home to many protected species, including the Rice's whale, an endangered marine mammal found only in the Gulf of Mexico with fewer than 100 individuals remaining.[4] In addition, the Gulf hosts Kemp's ridley sea turtles, the most endangered sea turtle species globally, and the Gulf sturgeon, which depends on the region's freshwater and estuarine habitats for spawning.[5]

Under the Endangered Species Act (ESA), federal agencies must ensure that any federal action, such as oil and gas activities, will not jeopardize the continued existence of endangered species or result in harmful habitat modification.[6] If a federal action may impact a protected marine species, NMFS is responsible for issuing a BiOp that assesses the risks. The BiOp may also assist with developing mitigation measures to minimize harm to protected species.

BiOps for Oil and Gas Activities

In 2007, NMFS issued a BiOp concluding that proposed oil and gas activities in the Gulf would not jeopardize ESA-protected species or their habitats, primarily because the risk of a significant oil spill was deemed low.[7] However, the 2010 *Deepwater Horizon* oil spill disaster, which released millions of barrels of oil into the Gulf, contradicted NMFS's assessment. The spill killed or severely injured over 100,000 individuals of species listed under the ESA, including an estimated 20% population loss of the Rice's whale.[8]

In response to the oil spill, BOEM reinitiated formal consultations with NMFS to assess the impact of its federally authorized oil and gas leases on endangered species in light of the spill. In March 2020, NMFS published a new BiOp assessing the impact of all federal oil and gas activities in the Gulf under existing and new leases through 2029. This BiOp concluded that the Rice's whale would be the only ESA-protected species impacted by the proposed activities and outlined a plan to mitigate the threat.[9] The agency also issued an Incidental Take Statement (ITS), specifying the permissible amounts of incidental takes resulting from BOEM's oversight of federal oil and gas leases that affects several ESA-listed species. As a result, Earthjustice challenged the 2020 BiOp on behalf of multiple environmental groups, including the Sierra Club and Turtle Island Restoration Network.

Lawsuit

The environmental groups argued that the 2020 BiOp violated both the Administrative Procedure Act (APA) and the ESA by underestimating the risks of oil spills, failing to adequately protect the Rice's whale and other endangered species, and failing to account for catastrophic oil spills, such as the 2010 *Deepwater Horizon* incident.[10] During litigation, BOEM continued consultations with NMFS on the 2020 BiOp to assess the impact of its oil and gas licensing activities and sought a stay and voluntary remand in order to mitigate the oil and gas industry's impacts. BOEM also attempted to address environmental

The environmental groups argued that the 2020 BiOp violated both the APA and the ESA by underestimating the risks of oil spills, failing to adequately protect the Rice's whale and other endangered species, and failing to account for catastrophic oil spills, such as the 2010 *Deepwater Horizon* incident.

concerns by enhancing protections for the Rice's whale and blocking oil drilling in certain areas of the Gulf.[11]

The federal district court in Maryland determined that NMFS's 2020 BiOp significantly underestimated the risks and potential harm oil spills could pose to protected species. According to the court, the BiOp inaccurately stated that the populations of these species, including the Rice's whale, remained as large as before the *Deepwater Horizon* oil spill, despite NMFS's own findings indicating that the spill had substantially reduced their numbers. The court also found the mitigation plan proposed by NMFS inadequate, as it only addressed two of the five major threats to the Rice's whale without explaining why these two were prioritized or how the proposed measures would effectively mitigate these threats. Ultimately, the court found the BiOp unlawful and must be vacated. The current BiOp will remain in effect until December 20, 2024, and NMFS will be tasked with developing a new BiOp.[12] BOEM can legally proceed with oil and gas lease sales and permitting until December 20th. However, after that date, a new BiOp must be issued for BOEM to continue moving forward with such activities.

Environmental and Industry Perspectives

Joanie Steinhaus, Ocean Program Director for Turtle Island Restoration Network, welcomed the court's decision. "Simply put, this BiOp would have condemned the Gulf of Mexico Rice's whales to extinction."[13] Steinhaus added, "The court did the right thing in telling the agency to do better. The recovery of these whales and other species is possible as long as we improve the conditions, and the responsibility lies in our collective actions."

In contrast, industry representatives expressed disappointment over the ruling. The American Petroleum Institute, EnerGeo Alliance, and the National Ocean Industries Association released a statement stating, "We are deeply disappointed in the order yesterday, including the decision to vacate the current BiOp even as the agencies are currently working to revise it."[14] They further warned that failing to promptly issue a revised opinion could have serious consequences for the Gulf of Mexico states and the U.S. economy, potentially disrupting oil production and impacting hundreds of thousands of energy workers in the region.

Conclusion

The federal court's decision to vacate NMFS's BiOp marks a critical moment in the ongoing debate between environmental conservation and energy development in the Gulf of Mexico. As NMFS revises its assessment, the stakes are high for both endangered species and the energy industry that relies on the Gulf for a significant portion of U.S. oil production. All eyes are now on NMFS to craft a solution that effectively protects endangered species without undermining the region's economic engine.

Endnotes

1 NSGLC Research Associate; 3L, University of Mississippi School of Law.

2 Sierra Club v. NMFS, No. DLB-20-3060, 2024 WL 3860211 (D. Md. Aug. 19, 2024).

3 Press release, *Trades Respond to Gulf of Mexico Biological Opinion Court Order*, NOIA (Aug. 20, 2024).

4 *Sierra Club*, 2024 WL 3860211, at *15.

5 Padre Island National Seashore Texas: Kemp's ridley sea turtles, NPS (Mar. 27, 2024); Gulf Sturgeon, FFWCC (last visited Sept. 6, 2024).

6 16 U.S.C. § 1536(a)(2).

7 *Sierra Club*, 2024 WL 3860211, at *2.

8 Press release, *Lawsuit Spurs Agreement to Better Protect Endangered Rice's Whale From Offshore Drilling*, Sierra Club (Aug. 24, 2023).

9 *Sierra Club*, 2024 WL 3860211, at *2-3.

10 *Id.* at *3.

11 *See* Stipulated Agreement to Stay Proceedings, Sierra Club v. NMFS, No. 8:20-cv-03060-DLB (D. Md. July, 21, 2023), ECF 147.

12 *Sierra Club*, 2024 WL 3860211, at *40.

13 Press Release, *Court Orders Government to Protect Rare Gulf Whales, Sea Turtles, and Imperiled Marine Species from Damaging Effects of Offshore Drilling, Earthjustice* (Aug. 20, 2024).

14 NOIA, *supra* note 3.

Pipeline Peril: Line 5 Litigation Continues

Jonathan Scoggins[1]

Stretching 645 miles from Wisconsin through Michigan to Sarnia, Ontario, Line 5 is a pipeline established in 1953 that transports light crude oil and natural gas liquids.[2] The pipeline has a total capacity of 540,000 barrels per day. The pipeline currently delivers up to 14,000 barrels per day of crude oil produced in Michigan, a significant portion of which is refined locally into gasoline, diesel, and other essential products. In 2018, Line 5 supplied 65% of the Upper Peninsula's propane needs and 55% of Michigan's overall propane demand. That same year, Enbridge, the company that owns Line 5, paid approximately $60 million in property and sales-and-use taxes in Michigan.

Over the past several years, Line 5 has faced lawsuits from environmental organizations, Tribes, and the State of Michigan due to concerns about the project's potential to impact the Great Lakes. Federal courts recently issued rulings in two separate Line 5 lawsuits. In June, the Sixth Circuit Court of Appeals remanded to state court a case filed by Michigan's Attorney General Dana Nessel seeking to shut down the portions of Line 5 that cross the Straits of Mackinac.[3] In July, a federal district court rejected the State of Michigan's motion to dismiss a case filed by Enbridge. Both rulings set the stage for an intense clash between Michigan officials and Enbridge over the future of Line 5.

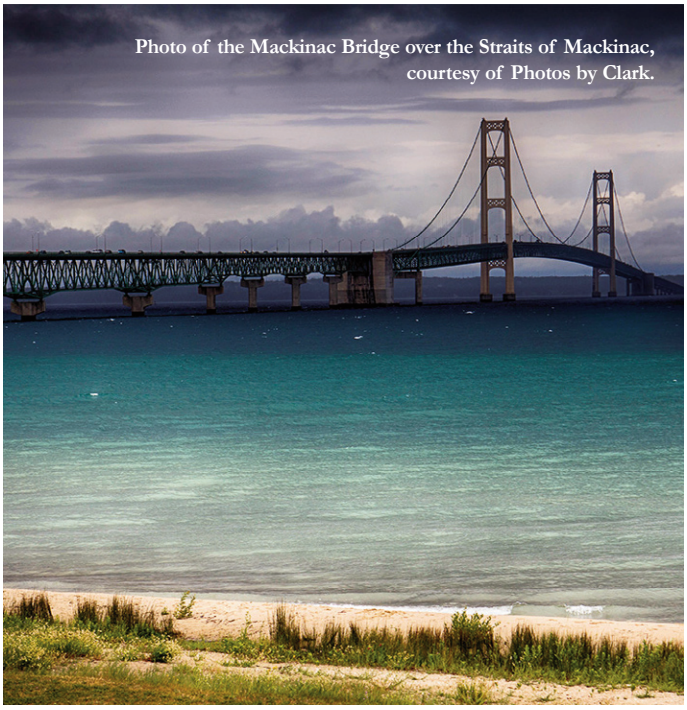

Photo of the Mackinac Bridge over the Straits of Mackinac, courtesy of Photos by Clark.

The Push to Close Line 5

According to the National Wildlife Federation (NWF), Line 5 has experienced twenty-nine spills totaling at least 1.13 million gallons of oil since 1968.[4] Among these incidents, one of the largest occurred in 1999, when 222,600 gallons of oil and natural gas liquids leaked due to the pipeline resting on a rock for years. This spill forced the evacuation of 500 people after responders ignited a vapor cloud, resulting in a fire that lasted thirty-six hours. The NWF attributes these spills to various issues, including construction errors and manufacturing defects like stress cracking along the pipeline's seams.

In June 2019, the Attorney General filed a lawsuit that includes three causes of action: first, that the 1953 easement for the pipelines violates the public trust doctrine and is thus invalid; second, that Enbridge's management of the pipelines constitutes a common law public nuisance; and third, that Enbridge's continued use of the pipelines breaches the Michigan Environmental Protection Act by harming natural resources.[5] These legal arguments are driven by concerns about the risks associated with Line 5. The state seeks to shut down the pipeline to prevent potential harm from an oil spill in the Great Lakes. The dual pipelines are exposed in open water on state-owned bottomlands at the Straits of Mackinac, an area with busy shipping lanes, making them vulnerable to anchor strikes. The state argues that Enbridge's continued operation of the pipelines poses an extraordinary threat to public rights, as the risk of anchor strikes could lead to a catastrophic oil spill at the Straits.

Indigenous communities, including the Anishinaabe people, view Line 5 as a violation of their treaty-protected rights and a threat to their way of life due to the risk of oil spills.[6] The Straits of Mackinac are considered sacred by

these communities and have historically been a vital source of fish and wildlife for local businesses and tribal members. Both commercial and subsistence fishing and hunting are crucial for the economic survival of many tribal members. Consequently, more than sixty Tribal Nations have united to file an amicus brief in support of the lawsuit.

On November 13, 2020, Governor Whitmer issued a notice to terminate the 1953 easement and demanded the shutdown of Line 5, while also filing a state court action that paralleled Attorney General Nessel's lawsuit. In response, Enbridge removed the case to federal court on November 24, 2020, arguing that the district court had federal-question jurisdiction under 28 U.S.C. § 1331. Enbridge contended that federal issues were at stake due to significant questions about federal authority in foreign affairs and preemption under the Pipeline Safety Act and the Submerged Lands Act. Subsequently, the Governor sought to remand the case to state court, arguing that the district court lacked jurisdiction over her state law claims. On November 16, 2021, the district court denied the Governor's motion to remand, ruling that it had jurisdiction because the claims required interpreting federal law. As a result, the Governor voluntarily withdrew her case.

A Ruling in the State's Lawsuit

Enbridge successfully removed the Attorney General's case to federal court on December 15, 2021. Enbridge cited 28 U.S.C. § 1446(b)(3), which allows a defendant to move a case to federal court within thirty days of receiving an order determining that the case is removable. In response, the state filed a motion to remand the case to state court, contending that Enbridge's removal was untimely and that the district court lacked subject-matter jurisdiction. The district court denied the state's motion to remand, in a decision similar to its ruling in the Governor's case. The court found that, despite the timing issues, equitable principles supported Enbridge's removal. Additionally, the court concluded that the state was estopped from challenging subject-matter jurisdiction due to the previous jurisdictional ruling in the Governor's case.

On appeal, the Sixth Circuit declined to review whether the district court had subject-matter jurisdiction because it determined that Enbridge's removal was untimely and no equitable exceptions to the statute's removal deadline applied. The Sixth Circuit found that Enbridge did not comply with the initial 30-day removal deadline from the date of service of the complaint, as required by federal statute.[7] For Enbridge's removal to be timely, it needed to file its notice of removal by August 12, 2019. In other words, Enbridge missed its removal deadline by over two years. The Sixth Circuit ruled that no equitable exclusions apply because Enbridge was aware that the lawsuit was removable from the start of litigation, as evidenced by Enbridge's timely removal to federal court in the Governor's case.

Enbridge Lawsuit

Enbridge filed a lawsuit against the Governor and the Department of Natural Resources in federal court on November 24, 2020 contending that Michigan's state officials were violating federal law by halting the operation of a pipeline.[8] In response, Michigan's Governor and the Director argued that the court should dismiss Enbridge's complaint on the grounds of sovereign immunity. Under the Eleventh Amendment, the doctrine of sovereign immunity protects states and state officials sued in their official capacities from lawsuits. However, there are three exceptions to this immunity: 1) when the state has waived immunity by allowing the suit; 2) when Congress has expressly abrogated the states' sovereign immunity; and 3) the *Ex Parte Young* exception, which allows a federal court to issue prospective injunctive and declaratory relief by compelling a state official to comply with federal law.

Enbridge argued that the Governor and the Director were not entitled to sovereign immunity under the *Ex Parte Young* exception. On July 5, 2024, the district court ruled in Enbridge's favor, determining that Michigan's Governor and the Director were not protected by sovereign immunity and dismissed the defendants' motion to dismiss. However, whether Enbridge will receive permanent declaratory and injunctive relief will be determined at a later time.

Conclusion

The litigation over the operation of Line 5 will continue for the near future. The Attorney General's case will now go to state court. Enbridge's case against the Governor will continue to unfold in federal district court, which will decide whether federal law bars state officials from enforcing the shut down of Line 5.

Endnotes

1 NSGLC Research Associate; 3L, University of Mississippi School of Law.

2 *The Straits of Mackinac Crossing and Line 5*, Enbridge (Sep. 2019).

3 Nessel ex rel. Mich. v. Enbridge Energy, LP, 104 F.4th 958 (6th Cir. 2024).

4 Garret Ellison, *Enbridge Line 5 has Spilled At Least 1.1M gallons in Past 50 Years*, MLIVE (Apr. 26, 2017).

5 Compl. for Declaratory and Injunctive Relief, at 2, *Nessel ex rel. Mich. v. Enbridge Energy, LP*, 104 F.4th 958 (6th Cir. 2024) (No. No. 23-1671).

6 *Enbridge's Line 5 Pipeline (Bay Mills Indian Community)*, NATIVE AM. RTS. FUND (last visited Sep. 3, 2024).

7 28 U.S.C. § 1446(b)(1).

8 Enbridge Energy, LP, v. Whitmer, 1:20-CV-01141 (W.D. Mich. filed Nov. 24, 2020).

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