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The SandBar

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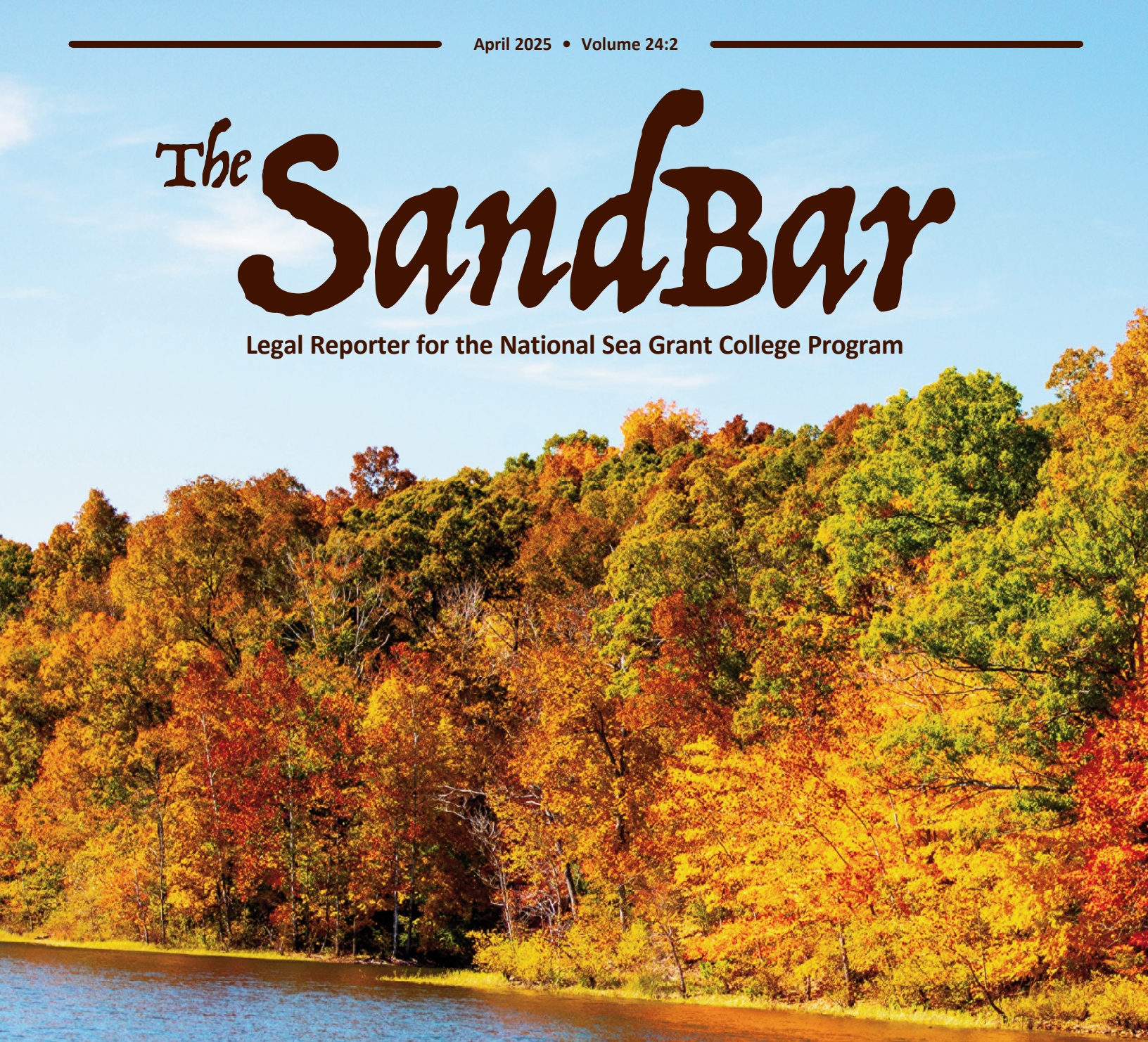

How the CEQ Lost its Rulemaking Authority

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Cover page photograph of Indian Lake in the Hoosier National Forest, courtesy of Steven Higgs.

Contents page photograph of Poaceae, courtesy of Mary Keim.

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How the CEQ Lost its Rulemaking Authority

Siena Fouse[1]

The National Environmental Policy Act (NEPA), the first major environmental protection law enacted by Congress, requires federal agencies to assess the environmental impacts of all "major Federal actions significantly affecting the quality of the human environment."[2] NEPA established the White House Council on Environmental Quality (CEQ) in the Executive Office of the President to oversee Federal agencies' implementation of NEPA.[3] CEQ subsequently developed regulations for the administration of the NEPA process, including environmental assessments, at the direction of an executive order signed by President Carter in 1977.[4]

Nearly fifty years later, in November 2024, the U.S. Court of Appeals for the D.C. Circuit ruled in *Marin Audubon Society v. FAA* that CEQ does not have the authority to issue regulations directing how to implement NEPA.[5] The implications of this decision and the actions that followed raise questions and confusion for federal agencies and private companies relying on the CEQ's guidance to conduct environmental reviews according to NEPA.

Background

This case began after the Federal Aviation Administration and the National Parks Service issued an Air Tour Management Plan governing tourist flights over four national parks in California. The agencies decided not to prepare an environmental analysis under NEPA after determining their plan would cause minimal environmental impact. CEQ regulations allow an agency to avoid preparing an environmental impact statement or an environmental assessment if the proposed action normally does not have a significant effect on the environment.[6] This "categorical exclusion" regulation was established by the CEQ following President Carter's 1977 executive order.

The agencies considered existing air tours, which were operating under interim authority until the plan's creation, as part of their environmental baseline. Then when assessing the environmental impacts of the flight plan, the agencies determined there would be only minimal impact because the plan would maintain the same number of flights compared to their baseline. Thus, the agencies opted for a categorical exclusion, deciding not to prepare an environmental assessment or environmental impact statement for the flight plan.

Establishing a Proper Baseline Under NEPA

Environmental groups and an area resident brought this action seeking judicial review of the categorical exclusion. They argued that it was improper for the agencies to include existing interim flights in the baseline for their environmental analysis of the flight plan. The D.C. Circuit Court agreed and held that it was arbitrary and capricious for the agencies to treat interim operating authority flights as the status quo for their NEPA analysis.

NEPA established the White House Council on Environmental Quality (CEQ) in the Executive Office of the President to oversee Federal agencies' implementation of NEPA.

The court explained that by including the thousands of air tours conducted under interim operating authority in their baseline, the agencies treated the existing flights as part of the environment without evaluating their impact. The court found that outcome contrary to the agencies' duties under NEPA and the statute requiring the flight plan, which aims to protect the environment by minimizing adverse effects of aircraft overflights.[7]

A Surprising Challenge to the CEQ's Authority

In its analysis, the majority determined that the CEQ does not have the authority to issue regulations on how federal agencies must comply with NEPA. The court labeled the CEQ's authority as advisory, describing how NEPA created the CEQ to review and appraise agencies' compliance with NEPA and make related recommendations to the President. This portion of the opinion came as a surprise considering neither party to

Photo of Coralbean, courtesy of Mary Keim.

the case questioned the CEQ's authority to issue regulations. Because this ruling was not necessary to resolve the case, it may not be legally binding on other courts but may be used as persuasive authority in other cases. The dissent stated there was no cause to reach that issue in this case and when no party raises an issue, the court lacks the benefit of the parties' presentation of briefing and argument on it.

A Remedy Against the Wishes of Both Parties

The court held that because the agencies have not shown "at least a serious possibility" that they will be able to reach the same outcome regarding the categorical exclusion on remand due to a lack of CEQ's authority, they must vacate the flight plan. Chief Judge Srinivasan dissented from the determination to vacate the plan because it put the prevailing party in a worse position and both parties agreed that the plan should not be vacated due to the disruptive consequences it would cause. Additionally, the dissent noted that in similar circumstances, this court has a history of remanding to the agency without vacating a flawed but environmentally protective agency action.

Subsequent History

Following this case, the new presidential administration issued an executive order revoking President Carter's 1977 order and directing the CEQ to rescind its existing NEPA regulations and provide new guidance on implementing NEPA.[8] On February 25, 2025, the CEQ published an interim final rule rescinding all of the CEQ's regulations implementing NEPA from the last five decades.[9] The interim final rule cites this case and a more recent federal district court decision that cited this case to find that CEQ regulations were invalid.[10] The CEQ also issued guidance for agencies to follow, but it leaves unanswered questions about what actions are significant enough to be reviewed, which may result in different approaches to NEPA implementation among the agencies and delays on major infrastructure projects.[11]

Conclusion

This is a time of uncertainty fueled by seismic changes in NEPA implementing regulations, anticipated alteration of NEPA analysis standards by the U.S. Supreme Court due to a pending case, *Seven County Infrastructure Coalition v. Eagle County, Colorado*, as well as significant agency staffing cuts and turnover. The CEQ directed agencies to revise their NEPA regulations but to continue to follow their existing procedures for implementing NEPA in the meantime. Federally funded or permitted projects requiring review under NEPA may require more communication with agency officials responsible for NEPA reviews to keep updated during this period of uncertainty.

Endnotes

1 NSGLC Ocean and Coastal Law Fellow.

2 National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C).

3 42 U.S.C. § 4342.

4 Exec. Order No. 11991, 3 C.F.R. §§ 123–24 (1978).

5 Marin Audubon Soc'y v. FAA, 121 F.4th 902, 908 (D.C. Cir. 2024).

6 40 C.F.R. § 1501.3(c)(1).

7 49 U.S.C. § 40128(b)(1)(B).

8 Exec. Order No. 14154, 90 Fed. Reg. 8353, 8353–8359 (Jan. 20, 2025).

9 Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10610, 10610–10616 (Feb. 25, 2025).

10 Iowa v. CEQ, No. 24-cv-00089-DMT-CRH (D.N.D. Feb. 3, 2025).

11 Hannah Northey, *Trump Hands off NEPA to Agencies*, E&E News (Feb. 20, 2025).

Chain of Causation: Federal Court Connects Florida's Water Regulations to Manatee Mortalities

Madison Vice[1]

Manatee in the Indian River Lagoon, courtesy of the Florida Fish and Wildlife Conservation Commission.

Florida's Indian River Lagoon, deemed one of the most biologically diverse estuaries in North America, is located between the barrier islands of the state's eastern coast and its mainland.[2] Home to thousands of plant and animal species, the Lagoon becomes a winter ground for much of the federally protected West Indian manatee population as they seek warmer waters.[3] Since 2020, the Indian River Lagoon has experienced what biologists term an "Unusual Mortality Event" (UME), a designation reserved for mass marine mammal die-offs that demand immediate response. In 2021, over 1,100 West Indian Manatees died in Florida, a record number of deaths amounting to 1.7 times the usual five-year average.[4] The sudden and exponential increase in manatee mortalities led state biologists to the conclusion that manatees were dying from prolonged starvation and malnutrition, directly resulting from the loss of thousands of acres of seagrass.

In 2022, environmental organization Bear Warriors United filed a lawsuit against the Florida Department of Environmental Protection (FDEP), alleging that the agency violated the Endangered Species Act (ESA) by causing harm to the manatees as a result of pollution linked to wastewater discharges regulated by the FDEP. In December, a federal district court in Florida ruled in favor of the environmental organization.[5] The court found that the agency may be held accountable for indirect harm to the species under the ESA, despite being in compliance with other laws and regulations.

Manatees in the Indian River Lagoon, courtesy of the Florida Fish and Wildlife Conservation Commission.

Background

The ESA makes it unlawful for any person "to take any [listed] species within the United States."[6] Here, the term "take" is broadly defined to include actions that "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" a protected species.[7] The court noted that in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the U.S. Supreme Court held that even "activities not intended to harm an endangered species, such as habitat modification, may constitute unlawful takings under the ESA unless the Secretary permits them."[8] The central question before the court was whether the manatee deaths were the result of indirect actions by the FDEP.

Causation

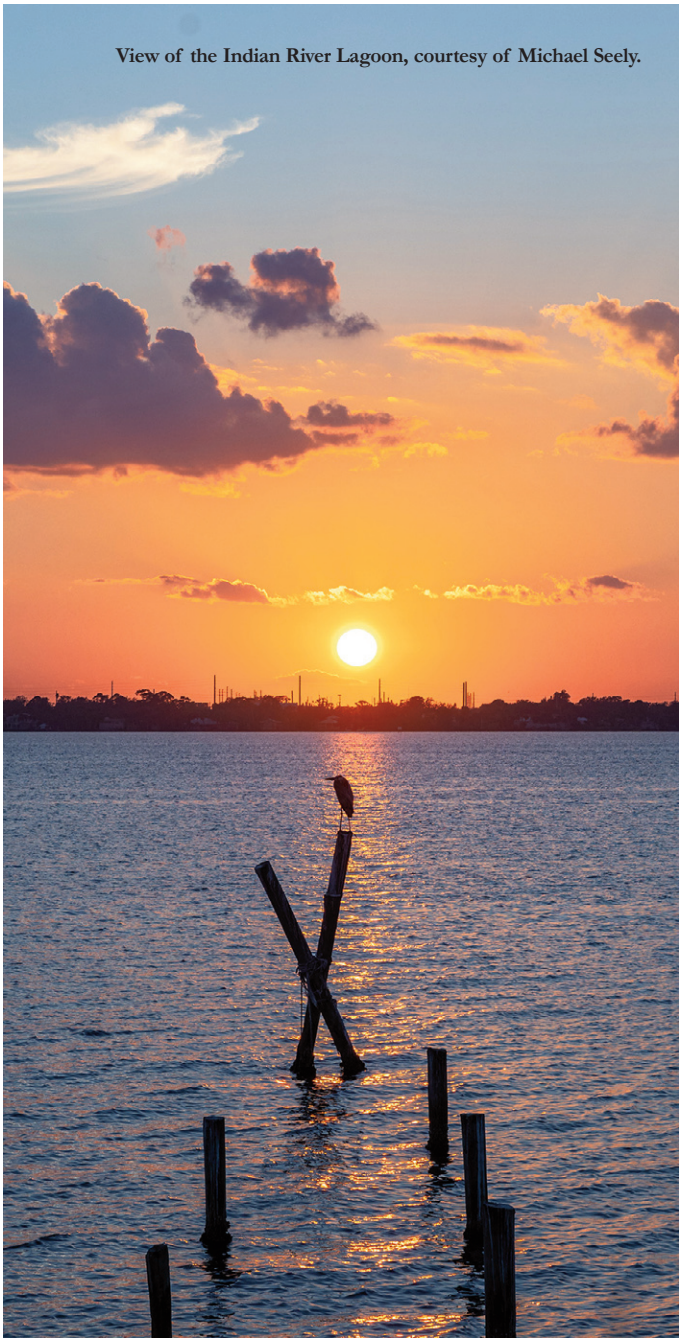
In establishing the causal chain between FDEP's wastewater regulation and the manatee deaths, the environmental organization argued that "(1) FDEP has regulatory authority over the wastewater discharge from wastewater treatment plants …; (2) discharges made pursuant to FDEP regulations have resulted in an excess of nutrients in [Indian River Lagoon]; (3) those nutrients led to the death of seagrasses and promoted harmful algae blooms; and (4) deprived of a primary food source, manatees have starved, grown emaciated, and an unusual number have died."[9] In evaluating the first link in the chain of causation, the court focused on FDEP's regulatory authority, finding undisputed evidence that FDEP exercises broad regulatory control regarding the wastewater discharge into the Indian River Lagoon, including oversight of wastewater treatment plants and, since July 2021, complete administrative control over onsite sewage treatment disposal systems. This authority gives FDEP direct power to regulate the quantity and quality of effluent entering the lagoon ecosystem.

The second link addressed whether discharges permitted under FDEP regulations caused excess nutrients in the North Indian River Lagoon. The court cited evidence from the FDEP's own Basin Management Action Plan (BMAP), which provided that the Total Maximum Daily Load exceedances for certain nutrients were above the pollutant load that the Lagoon could tolerate without causing exceedances of State of Florida water quality standards. The court further noted evidence indicating that a major source of excess nutrient levels in the Lagoon was caused by human wastewater and septic tanks.

The third link examined the relationship between these excess nutrients and seagrass death. Here, the court relied heavily on expert testimony that the widely accepted conclusion among researchers that excessive nutrient pollution, or eutrophication, is a primary cause of seagrass ecosystem deterioration. The court rejected FDEP's attempt to attribute seagrass loss primarily to hurricanes and climate change, finding that the agency had misconstrued the expert's testimony stating that while events like hurricanes can temporarily cause seagrass loss, only a hyper-eutrophied system would be unable to recover from such disruptions.

The final link connected seagrass loss to manatee deaths. The court cited documentation from the Florida Fish and Wildlife Conservation Commission that directly attributed manatee starvation to the lack of seagrasses in the Indian River Lagoon. With the Lagoon losing between 50% to 90% of its historical seagrass coverage between 2009 and 2019, the court found sufficient evidence that manatees were deprived of their primary food source, leading to starvation and death.

After establishing these four links, the court emphasized that FDEP could not escape liability merely by demonstrating compliance with Clean Water Act (CWA) standards. The court



View of the Indian River Lagoon, courtesy of Michael Seely.

determined that evaluating liability hinges on assessing whether a risk of an ESA taking exists when FDEP adheres to all relevant laws and regulations, rather than determining if takings could potentially be avoided through regulatory compliance. Additionally, the court pointed out that FDEP had failed to establish regulations specifically designed to prevent manatee takings, and observed that the BMAP made no mention whatsoever of manatees. This rejection of FDEP's primary defense that compliance with CWA standards should shield it from ESA liability was central to the court's reasoning. The court emphasized that the FDEP's actions may still be in violation of the ESA, even if the FDEP has acted in compliance with other federal laws. Additionally, the court also addressed a critical timing issue in the dismissal of FDEP's argument that it could not be held responsible for problems predating its 2021 assumption of septic system regulation, finding that taking control of a regulatory program means assuming responsibility for ongoing violations.

After establishing these key legal principles, the court granted partial summary judgment to the plaintiffs. The court noted that a genuine factual dispute remained regarding whether manatees face ongoing risk under current regulations. A jury trial will proceed on that remaining issue.

Conclusion

As this case proceeds on the question of ongoing risk, it will continue to highlight growing challenges at the intersection of water quality regulation and endangered species protection. For Florida's manatees, the ruling offers hope for stronger protections through enhanced regulatory oversight, but it also underscores the complexity of addressing environmental threats that emerge through multiple causal steps. With seagrass loss affecting coastal waters throughout Florida, similar legal challenges could emerge in other watersheds where endangered species depend on healthy aquatic vegetation. The decision suggests that regulatory agencies should take a more holistic view of environmental protection, considering not just compliance with individual programs but the real-world ecological consequences of regulatory action—and inaction. For now, it stands as a significant precedent establishing that regulatory agencies may not be able to shield themselves from ESA liability simply by following other environmental standards. The health of endangered species populations may demand more aggressive pollution controls than traditional water quality programs required.

Endnotes

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

[2] Fl. Dep't of Env't Prot., Ecology of Indian River Lagoon, (last visited Feb. 18, 2025).

[3] *Id.*

[4] Fl. Fish & Wildlife Conservation Comm'n, 2021 Manatee Mortalities in Florida (2022).

[5] Bear Warriors United, Inc. v. Hamilton, No. 6:22-CV-2048-CEM-LHP, 2024 WL 5279337 (M.D. Fla. Dec. 18, 2024).

[6] 16 U.S.C. § 1538.

[7] 16 U.S.C. § 1532(19).

[8] *Bear Warriors United, Inc.*, 2024 WL 5279337.

[9] *Id.*

Hook, Line, and Sinker: U.S. to Enforce Seafood Import Ban to Protect Marine Mammals

Katie Shaw[1]

Photo of dolphins, courtesy of Deidre Woollard.

The U.S. is set to enforce a long-delayed ban on seafood imports linked to marine mammal bycatch starting in 2026. This decision follows a legal agreement between conservation groups and U.S. authorities, ensuring that the ban, initially mandated under the Marine Mammal Protection Act (MMPA), will be enforced. The U.S. is the world's largest seafood importer, bringing in over $21 billion worth of seafood annually—about 15% of the global market—with approximately 70-85% of its seafood coming from more than 130 countries.[2]

The ban prohibits the import of seafood from countries that fail to meet U.S. standards for minimizing the incidental capture of marine mammals, otherwise known as bycatch, in commercial fishing operations. Bycatch is one of the greatest threats to marine mammals. Each year, over 650,000 whales, dolphins, and other iconic marine mammals are killed or seriously injured after becoming trapped in fishing gear meant for other species.[3] Many of these animals drown, suffer fatal injuries, or are discarded after dying on board fishing vessels. Those who manage to escape may suffer serious injuries such as cuts, broken bones, and amputations. The decision to enforce the ban comes after decades of weak implementation of existing regulations and repeated delays in enforcement.

Delayed Enforcement of the MMPA's Seafood Import Provisions

This ban traces its origins back to the MMPA, which includes a provision that prohibits the import of seafood from countries

that failed to meet U.S. standards for preventing marine mammal bycatch.[4] However, enforcement of this provision remained weak for decades. In March 2008, the Center for Biological Diversity (CBD), along with Turtle Island Restoration Network, petitioned the government to ban imports of swordfish and swordfish products from countries that failed to provide reasonable proof of their fishing technology's impact on marine mammals.[5] The petition sought the enforcement of the MMPA's import provisions.

In response, in 2016, the National Oceanic and Atmospheric Administration (NOAA) took steps to address this by introducing a final rule to implement the MMPA's import restrictions by the following year.[6] The final rule initially allowed a one-time only initial five-year exemption period to allow countries and fisheries to change their regulations as necessary. This exemption period has actually been extended a couple times since then.[7] The National Marine Fisheries Service issued an interim final rule in 2020 to extend the exemption period in light of the disruptions caused by COVID-19. Another final rule was initiated in 2022 in order to extend the exemption period by another year in response to comments received during the 2020 rulemaking. These delays eventually led to legal action by conservation groups demanding enforcement.

In August 2024, the CBD, Animal Welfare Institute, and the Natural Resources Defense Council filed a lawsuit in the U.S. Court of International Trade, seeking a court order to enforce the seafood import ban.[8] The lawsuit claimed that the U.S. government had been neglecting its duty under the MMPA, allowing foreign fisheries to continue operations that result in the deaths of marine mammals without consequence. Conservation groups asserted that it was long past time for the government to stop delaying implementation and to take action against countries whose fishing practices cause excessive harm to marine mammals.[9]

The Settlement Agreement

Following the lawsuit, a legal agreement was reached that sets January 1, 2026, as the official date for the ban to take effect.[10] Under this agreement, foreign fisheries and nations seeking to export seafood to the U.S. must now provide reasonable proof that they meet the same standards for preventing marine mammal bycatch as U.S. fisheries. This marks a turning point in efforts to ensure that seafood entering national markets is sourced in compliance with regulations aimed at protecting marine mammals. As part of the agreement, the government is obligated to report on its efforts to conservation groups. In return, the conservation groups agreed not to initiate further litigation until after full performance or encourage others to do so on their behalf.

The ban's upcoming implementation has been widely supported by conservationists, particularly given the scale of U.S. seafood imports, which amounted to $25.5 billion in 2023 with major seafood suppliers from Canada, Chile, India, Indonesia, and Vietnam in that order. Sarah Uhlemann, the international program director at the CBD, stated, "I'm relieved other nations will finally be pressured to prevent whales and dolphins from getting caught in fishing nets."[11] As the deadline nears, the success of this ban could shape the future of the international seafood trade.

Conclusion

The enforcement of this seafood import ban represents a significant milestone in marine conservation and global fisheries regulation. After decades of delays and negotiations, the U.S. is finally taking decisive action to reduce the devastating impact of bycatch on marine mammals. By requiring foreign fisheries to meet the same standards as domestic ones, the ban not only protects vulnerable creatures but also levels the playing field for responsible fisheries worldwide. However, challenges remain. Ensuring compliance among exporting nations, monitoring enforcement efforts, and addressing potential trade disputes will be critical in determining the ban's success. As 2026 approaches, all eyes will be on the U.S. and its seafood trade partners.

Endnotes

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

2 Press Release, *Lawsuit Seeks to Protect Marine Mammals From Foreign Fishing Gear, Enforce Seafood Import Bans*, CBD (Aug. 8, 2024).

3 Press Release, *U.S. Government Agrees to Halt Seafood Imports Tied to Deadly Bycatch of Whales, Dolphins, Other Marine Mammals*, CBD (Jan. 16, 2025).

4 16 U.S.C. § 1371(a)(2).

5 Final Fish and Fish Product Import Rule, 81 Fed. Reg. 54390 (Aug. 15, 2016).

6 *Id.*

7 Modification of Deadlines Under the Final Fish and Fish Product Import Rule, 88 Fed. Reg. 80193 (Nov. 17, 2023).

8 Nat. Res. Def. Council, Inc. v. Raimondo, No. 1:24-cv-00148-N/A, (Ct. Intl. Trade, Aug. 8, 2024).

9 CBD, *supra* note 2.

10 Nat. Res. Def. Council, Inc. v. Raimondo, No. 1:24-cv-00148-GSK, (Ct. Intl. Trade, Jan. 16, 2025).

11 CBD, *supra* note 3.

First Circuit Upholds Protection of Right Whales' Habitat

Jonathan Scoggins[1]

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

Just beyond the shores of Massachusetts, a vast stretch of federal waters spanning 200 miles –dubbed "the Wedge"— serves as a natural highway for right whales during their spring migration. To protect this endangered species, the National Marine Fisheries Service (NMFS) enacted a regulation prohibiting vertical buoy lines in the Wedge annually from February 1 to April 30. The primary aim of the prohibition on buoy lines was to prevent whale entanglements.

On February 9, 2024, the Massachusetts Lobstermen's Association, Inc. (the "Association") filed a lawsuit, arguing that the regulation conflicted with a rider in the Consolidated Appropriations Act of 2023, which temporarily authorized lobster and crab fishing. The Association prevailed at the trial level, arguing that the rider superseded the regulation. On appeal, the First Circuit upheld the regulation, finding an exception within the same rider to the fishing authorization, thereby

reversing the trial court's decision. Put simply, the First Circuit's decision in *Mass. Lobstermen's Ass'n v. Menashes* upholds regulatory protections for right whales, which the agency asserts are helping ensure their safety during spring migration for years to come.[2]

The Struggle for Survival: Threats to the North Atlantic Right Whale

The North Atlantic right whale (*Eubalaena glacialis*) is a baleen species that is among the most endangered large whales on the planet.[3] The right whale can live for up to seventy years, growing to 52 feet in length and weighing up to 140,000 pounds—smaller in length than a semi-truck but much heavier. The name "right whale" comes from its reputation as the "right" whale to hunt because it floats after being killed. During the 1890s, whalers drove right whales to the edge of extinction. The repercussions of whaling are still felt today, as right whales never fully recovered to their pre-whaling population levels, with an estimated 356 remaining in the wild.

Notably, human interactions continue to be the greatest threat to the species, with entanglement in fishing gear and vessel strikes being the primary contributors to their mortality. Fishing gear poses a significant danger to right whales, as it can cut into their bodies, causing severe injuries, infections, and potentially death. Moreover, NOAA Fisheries estimates that at least 85% of right whales have been caught in fishing gear at least once. Tangled whales can tow the gear for vast distances, ranging from tens to hundreds of miles—sometimes for months or even years—before they are either freed, shed the gear, or die from their injuries. Similarly, vessel strikes are a significant threat to right whales because their habitat and migration routes often overlap with shipping lanes. Collisions with vessels of almost any size can injure or kill a right whale, causing broken bones, massive internal injuries, or cuts from propellers.

Balancing Conservation and Commercial Fishing: NMFS's Authority

In 1970, the federal government declared the right whales to be an endangered species. In 1972, Congress enacted the Marine Mammal Protection Act (MMPA), which made it unlawful to "take" right whales. The MMPA defines "take" as harassing, hunting, capturing, killing, or attempting any of these actions.[4] The act allows for "incidental taking" to occur during commercial fishing operations.[5] The primary mechanism for authorizing "incidental taking" while advancing MMPA conservation goals is a "take-reduction plan," designed to support the recovery or prevent the depletion of protected species interacting with commercial fisheries.[6]

The goal of a take-reduction plan is to reduce marine mammal mortality and injury due to incidental takings from commercial fishing operations within six months of

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

implementation. Phrased differently, take-reduction plans seek to strike a balance between permitting a certain number of right whales to be unintentionally killed by commercial fisheries and preventing further accidental deaths to ensure a sustainable population. NMFS develops take-reduction plans and has emergency rulemaking authority under the MMPA when commercial fishing activities significantly impact right whales through incidental takings. NMFS is also authorized to extend the duration of emergency rules or amend take-reduction plans when adverse impacts persist.

The Road to Litigation: Timeline of Wedge Closure

In early 2022, NMFS discovered that the waters off the coast of Massachusetts known as the "Wedge" were unprotected. This gap in protection arose following an expansion of state protected areas by the Massachusetts Division of Marine Fisheries and a separate federal expansion of the Massachusetts Restricted Area (MRA). The MRA expansion resulted from a 2021 Take-Reduction Plan, which prohibited vertical buoy lines used in lobster and Jonah crab trap fishing from February 1 to April 30.

The Wedge is a crucial corridor that allows right whales to enter and exit Cape Cod Bay during their spring migration. However, fishermen primarily use the Wedge as a "wet store" for their gear, keeping vertical buoy lines ready for quick deployment in other waters once the fishing season opens on May 1. In March 2022, NMFS enacted an emergency rule to close the Wedge to vertical buoy lines for the remainder of the spring season. This decision was made in response to a high concentration of right whales and buoy lines in the area, aiming to prevent entanglements and reduce whale mortality.

In response to the emergency rule, Congress passed a rider—an additional provision added to a larger bill or piece of legislation—effective December 29, 2022. The rider granted temporary authorization for lobster and Jonah crab fishing (§ 101(a)) and included an exception to that authorization for "an existing emergency rule, or any action taken to extend or make final an emergency rule that is in place on the date of enactment of this Act, affecting lobster and Jonah crab." (§ 101(b)).

Subsequently, NMFS announced it would extend the 2022 emergency rule, keeping the Wedge closed to vertical buoy lines from February 1 to April 30, 2023.[7] NMFS clarified that, although the rider potentially allowed fishing under certain conditions, the extension was allowed because the 2022 emergency rule was already in place when the rider was enacted on December 29, 2022. In September 2023, NMFS suggested making the 2022 emergency rule final.[8] In February 2024, NMFS issued the regulation by amending the 2021 Take-Reduction Plan, thereby incorporating the Wedge into the MRA, permanently restricting vertical buoy lines in the region.[9] The Association responded by filing a lawsuit against NMFS in federal court on February 9, 2024.[10]

Appellate Review: The Rationale Upholding the Regulation

The Association filed a lawsuit against NMFS under the MMPA and the Consolidated Appropriations Act (CAA) of 2023. The Association's main argument was that NMFS's regulation conflicted with the temporary authorizations for the American lobster and Jonah crab fisheries in § 101(a) of the CAA rider and did not meet the exception outlined in § 101(b). The trial court ruled that the regulation was void and unenforceable because the emergency rule was not preventing lobster or Jonah crab fishing in the Wedge on December 29, 2022—the day the rider went into effect. The court's rationale was that since the emergency rule was no longer in effect, lobster and Jonah crab fishing was permitted, and the exception under § 101(b) therefore could not apply. NMFS appealed.

The Association then moved to dismiss NMFS's appeal because, although the appeal was filed on time, the U.S. Solicitor General did not authorize it until after the deadline had passed. In a matter of first impression, the First Circuit ruled that the Solicitor General was not required to authorize an appeal before NMFS filed a notice of appeal. The First Circuit also determined that NMFS's notice of appeal was timely, even though it was not approved within the filing deadline. The First Circuit, on appeal, determined that § 101(b) did not require an actual Wedge closure be "in place" on the enactment date. Instead, the rider only required that an "existing emergency rule" be in effect. Because the 2022 emergency rule was in effect on December 29, 2022, the First Circuit held that the regulation was lawful under the exception outlined in §101(b) of the rider.

Endnotes

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

2 *Mass. Lobstermen's Ass'n v. Menashes*, 127 F.4th 398 (1st Cir. 2025).

3 NOAA Fisheries, *North Atlantic Right Whale*, (last visited Feb. 12, 2025).

4 16 U.S.C. § 1362(13).

5 16 U.S.C. § 1387(a).

6 16 U.S.C. § 1387(f)(1).

7 88 Fed. Reg. 7362 (Feb. 3, 2023) (extension of emergency rule).

8 88 Fed. Reg. 63,917 (Sept. 18, 2023) (proposal finalizing emergency rule).

9 89 Fed. Reg. 8333 (Feb. 7, 2024) (to be codified at 50 C.F.R. pt. 229) (issuance of regulation).

10 Notably, two other lawsuits were filed earlier concerning the 2021 Take-Reduction Plan Amendment, but they are omitted from this article to prevent confusion.

Florida Courts Clash with Local Governments' Rights of Nature Enforcement Efforts

Katie Shaw[1]

Photo of Florida greeneyes in Titusville, FL courtesy of Mary Keim.

Should nature have the same legal rights as people? If so, who should have the power to enforce those rights? In recent years, local governments have taken steps to hold polluters accountable through "rights of nature" ordinances, granting natural entities the ability to sue for environmental harm. At the heart of the rights of nature movement is the idea of extending legal rights to natural elements, enabling individuals or organizations to take legal action to protect them against polluters.

This concept challenges the traditional view of ecosystems as mere resources for human use, instead recognizing them as entities with the fundamental right to exist, flow, and be protected. However, these efforts have faced strong legal opposition, with courts striking down such ordinances based on state preemption laws prohibiting local governments from recognizing legal rights for natural elements. Recently, legal battles in Titusville and Orange County, Florida have tested these restrictions, setting the stage for the ongoing debate of environmental rights.

The Fight for Rights of Nature

The idea of "rights of nature" first emerged in 1972 when law professor Christopher Stone published his groundbreaking article, "Should Trees Have Standing?–Towards Legal Rights for Natural Objects."[2] Stone's work laid the foundation for the movement, which began to gain traction over the years. In 2006, Tamaqua Borough, Pennsylvania, became the first place in the world to legally recognize the rights of nature in an ordinance banning the dumping of toxic sewage sludge. Notably, Ecuador became the first country to enshrine the rights of nature in its national constitution in 2008.[3]

More recently, in 2019, Toledo, Ohio, residents adopted the Lake Erie Bill of Rights, granting Lake Erie the right to exist, flow, and be free from pollution.[4] This initiative was a direct response to a public health crisis in 2014, when toxic algae blooms contaminated the city's drinking water, leaving 500,000 residents without clean water for nearly three days.[5] The law was passed as part of a grassroots movement led by Toledoans for Safe Water, who initiated a petition to amend the city's charter in order to protect Lake Erie. However, in February 2020, a federal district court struck down the Lake Erie Bill of Rights, ruling that it was unconstitutionally vague and exceeded the authority of municipal governments.[6] The court's decision set a precedent that would later influence Florida lawmakers who moved to prevent similar local "rights of nature" initiatives.

Florida's Restrictions on Local Rights of Nature Ordinances

In 2020, the Florida Legislature passed the Clean Waters Act, which included Section 403.412(9)(a), a provision that explicitly prohibited local governments from granting legal rights to any part of the natural environment, such as plants, animals, bodies of water, or other natural elements.[7] Despite this, residents in Titusville, Florida, attempted to pass a ballot measure in 2022 that would grant locals the right to sue over water pollution.

The initiative, which was overwhelmingly approved by voters, sought to establish a city-wide right to clean water and empower residents to take legal action against polluters on behalf of water bodies. However, city officials quickly requested a court ruling on whether the amendment was preempted by state law.[8] Initially, a lower court ruled in favor of the voters, ordering the city to incorporate it into the charter. On appeal, the Fifth District Court of Appeal struck it down, citing Section 403.412(9)(a).[9] The court ruled that while the amendment did not explicitly grant rights to water bodies, it implicitly did so by allowing residents to sue on behalf of natural resources.[10] The court also stated that it recognized the overwhelming support of the charter amendment by Titusville residents, but the legislature, in drafting Section 403.412(9)(a), had not authorized the types of rights provided for in the charter amendment.[11] Ultimately, because state law bars local governments from recognizing rights for natural elements, the amendment was deemed preempted and invalid.

A similar legal battle unfolded in Orange County, Florida, where voters passed an ordinance granting local water bodies the right to exist, flow, and be protected from pollution.[12] In April 2021, a lawsuit was filed on behalf of a group of freshwater ecosystems in Orange County, including Lake Mary Jane, Lake Hart, and Wilde Cypress Branch, in state court over a proposed commercial development that would destroy hundreds of acres of wetlands. However, the court ruled that the ordinance was invalid as it was explicitly preempted by Section 403.412(9)(a).[13]

Conclusion

In recent years, the Rights of Nature movement has gained momentum, but the legal battles in Titusville and Orange County show the ongoing tensions between state and local governments over environmental protections. As local communities push for stronger safeguards, questions remain about how to reconcile these efforts with restrictive state laws. These legal challenges will shape how the concept of nature's rights may be used in future efforts to protect our planet's most vulnerable ecosystems.

Endnotes

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

2 Rights of Nature: Timeline, CELDF (last visited Mar. 5, 2025).

3 *Id.*

4 *Id.*

5 Nicole Pallotta, *Federal Judge Strikes Down 'Lake Erie Bill of Rights*, ALDF (May 4, 2020).

6 Drewes Farms P'ship v. Ohio, 441 F. Supp. 3d 551 (N.D. Ohio 2020).

7 Fla. Stat. § 403.412(9)(a) (2020).

8 City of Titusville v. Speak Up Titusville, Inc., No. 5D2023-3739, 2024 WL 5219853 (Fla. App. 5 Dist. 2024).

9 *Id.* at *4.

10 *Id.* at *3.

11 *Id.*

12 Wilde Cypress Branch v. Hamilton, No. 6D23-1412, 386 So. 3d 1020 (Fla. App. 6 Dist. 2024).

13 *Id.* at 1021.

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