HunterMaclean

MEMORANDUM

To:	MLA Fisheries Committee Members
From:	Justin G. Guthrie
Date:	April 30, 2025
Re:	2025 Spring MLA Meeting – Fisheries Committee – Recent Case Update

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***Daniels v. Exec. Dir. of Fla. Fish & Wildlife Conservation Comm'n*, 127 F.4th 1294 (11th Cir. 2025)**

FACTS: This appeal from the Southern District of Florida concerned the entanglement of federal and state jurisdiction in the commercial fishing industry and the extent to which the Magnuson-Stevens Fishery Conservation and Management Act (the "Act") permitted Florida's regulation of fishing activities in federal waters.

Plaintiff, a Florida-based commercial fisherman, challenged the constitutionality of regulations promulgated by Florida's Fish and Wildlife Conservation Commission, which restricted where and how Florida-registered fishing vessels harvested pompano in federal waters in the Gulf of Mexico. Plaintiff argued that federal law preempted state regulations affecting fishing in federal waters and that Florida's regulations violated the Equal Protection Clause ("EPC") of the Constitution because the regulations only restricted Florida-registered vessels. The Southern District rejected Plaintiff's arguments on summary judgment and concluded that he lacked standing.

On appeal, the Eleventh Circuit found that Plaintiff had standing, but the Southern District was correct in granting summary judgment in favor of Defendant, the Executive Director of Florida's Fish and Wildlife Conservation Commission, on Plaintiff's preemption and EPC claims.

ISSUE: Whether Plaintiff had standing to pursue his EPC and preemption claims against Defendant. Whether state regulations promulgated by Florida's Fish and Wildlife Conservation Commission, which restricted where and how Florida-registered fishing vessels harvested fish in federal waters, violated the EPC of the Constitution or whether such regulations were otherwise preempted by federal law and/or regulation.

HOLDING: Plaintiff has standing to sue Defendant; however, Florida's regulations concerning pompano fishing were neither preempted by federal law nor violative of the EPC of the Constitution.

REASONING: As to standing, the Eleventh Circuit found that Plaintiff alleged injury in fact: he was a commercial fisherman who regularly fished for pompano in federal waters. In so doing, Plaintiff used gill nets; however, Florida's regulatory scheme restricted Plaintiff from using gill nets in the Gulf of Mexico's EEZ to catch pompano. According to the Eleventh Circuit, because Plaintiff could be prosecuted for fishing for pompano with gill nets, he faced a threat of persecution sufficient to constitute injury in fact. With respect to his injury in fact's traceability to challenged conduct that could be redressed by a favorable judicial decision, the Eleventh Circuit found that Plaintiff's injury was directly traceable to the existence of Florida's pompano rules in Florida's Administrative Code, which could be redressed by a judicial decision, satisfying standing's causation requirement.

With respect to preemption, the Eleventh Circuit disagreed with Plaintiff that the Act deprived Florida of any authority to regulate the activity of pompano fishing in federal waters. The Eleventh Circuit analyzed the text, context, and history of the Act to then construe the regulatory scheme and clarify the scope of permissible fishing vessel regulations promulgated by states, like Florida, under the auspice of the Act.

Accordingly, the Eleventh Circuit found that the Act's text, context, and history militated against Plaintiff's preemption argument. Instead, the Eleventh Circuit found that the Act indicated Congressional intent for the states to regulate fishing vessels in ways that would affect fishing. *See id*. at n.9 (distinguishing the Eleventh Circuit's opinion in *Se. Fisheries Ass'n, Inc. v. Chiles*, 979 F.2d 1504 (11th Cir. 1992), and noting that any comments on the Act's preemptive force in *Chiles* was "dicta that went 'beyond the case' and therefore 'ought not to control the judgment in a subsequent suit when the very point is presented for decision.'").

The Eleventh Circuit then endeavored to address the overlap between *fishing regulations* and *fishing vessel regulations*, noting that Congress may have intended to allow states to regulate fishing vessels in ways that affect fishing — the Act plainly proclaims that the United States exercises sovereign and exclusive fishery management authority over fish — and the Eleventh Circuit was bound to read the Act in a way to resolve conflicts. Accordingly, the Eleventh Circuit found that it could read § 1856(a) (the Act's statute concerning state jurisdiction to regulate fishing vessels outside state boundaries) and § 1811(a) in a manner that gives effect to each while preserving the sense and purpose of both statutes.

The Eleventh Circuit explained that § 1811(a) of the Act vested in the United States sovereign rights and fishery management authority over all fish within the EEZ, which — following the definition of "fishery" in § 1802(13) — included the act of fishing for such stocks of fish. "Fishing" encompasses many activities, from harvesting of fish to any operations at sea in support of, or in preparation for, such harvests. 16 U.S.C. § 1802(16). Thus, by the plain language of the statute, "fishing" is not limited to the operation of a fishing vessel in pursuit of fish. Rather, it would include the operation of the fishing vessel, any operations at sea supporting the harvest of fish, and the activities of each individual on a fishing vessel who is involved in catching, taking, or harvesting fish. In short, the Eleventh Circuit concluded that § 1811(a) of the Act vested in the United States authority over everything related to the harvesting of fish in the EEZ, including the individual activities of persons at sea irrespective of whether those persons operate or own a fishing vessel. Comparatively, the Eleventh Circuit noted that § 1856(a) of the Act carved out and conditionally delegated authority to the states over a narrow portion of this all-encompassing authority. This delegated portion concerned only "fishing vessels." 16 U.S.C. § 1802(18). The Eleventh Circuit also noted that, generally, captains, owners, or operators of vessels are held responsible for any state-regulated conduct of the vessel, and that states and municipalities have long been able to regulate vessel conduct and exact penalties.

With the foregoing in mind, the Eleventh Circuit found that § 1856(a) of the Act allowed Florida to regulate "fishing vessels" in a manner that affected fishing activities, and that statute specifically permitted the regulation of the fishing vessel at issue because it was registered under Florida law and there were no fishery management plans or other applicable federal fishing regulations covering pompano in the Gulf of Mexico EEZ.

The Eleventh Circuit was unmoved by Plaintiff's argument that Florida's pompano regulations violated the EPC of the Constitution's 14th Amendment (contending that these regulations discriminatorily imposed fishing restrictions of Florida-registered vessels in federal waters while allowing non-Florida registered vessels to harvest pompano more extensively in federal waters). The Eleventh Circuit noted that Plaintiff failed to identify any dissimilar treatment of persons *within* Florida's jurisdiction. That is, the 14th Amendment concerns a state's treatment of persons

within its jurisdiction. Here, only Florida-registered vessels fell within the state's extraterritorial jurisdiction and were subject to its pompano regulations. *See* § 1856(a)(3)(A) (allowing a state to regulate fishing vessels outside of its territorial boundaries when that vessel is registered under the law of that state). Thus, according to the Eleventh Circuit, when a vessel is registered under Florida law, and operates in federal waters, Florida's pompano regulations applied, conversely, when a vessel was not registered under Florida law, its pompano regulations could not apply. Thus, there could not be any dissimilar treatment of persons within Florida's jurisdiction sufficient to state an EPC claim under the 14th Amendment.

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

FACTS: This appeal from the District of Massachusetts concerned whether the NMFS acted lawfully in issuing a final rule and subsequent emergency rule that seasonally banned vertical buoy lines used in lobster and Jonah crab trap fishing from certain federal waters off of the Massachusetts coast. The NMFS issued these rules with the purpose of reducing the risk of injury or death to North Atlantic right whales, an endangered species that forages in the subject waters from February 1 to April 30.

Plaintiff, the Massachusetts Lobstermen's Association, Inc., persuaded the District of Massachusetts that the NMFS' final rule conflicted with a temporary statutory authorization for lobster and Jonah crab fishing contained in a Rider to the Consolidated Appropriations Act ("CAA") of 2023. On appeal, the First Circuit reversed and remanded.

ISSUE: Whether the Solicitor General was required to authorize prosecution of an appeal by the NMFS before the notice of appeal was actually filed. Whether the NMFS acted lawfully in issuing a final rule seasonally banning vertical buoy lines used in lobster and Jonah crab trap fishing from certain federal waters off of the Massachusetts coast, specifically whether the NMFS' final rule fell within the stated exception to the CAA's Rider.

HOLDING: The Solicitor General is not required to authorize prosecution of an appeal before notice of appeal is filed. The NMFS' appeal was not rendered a legal nullity by the Solicitor General's failure to approve appeal within 60-day deadline for filing notice of appeal. The final rule and emergency rule fell within exception to CAA's Rider.

REASONING: With respect to the procedural issue, the First Circuit joined the Federal Circuit, and the Fifth and Sixth Circuits in finding that 28 C.F.R. § 0.20(b) did not require the Solicitor General to authorize an appeal before the filing of a notice of appeal.

With respect to the merits of the final rule, the First Circuit summarized the history of the right whale's endangered status and the NMFS' actions to combat declining population numbers.

The Government designated the right whale as endangered in 1970, and, since 1972, the right whale has been protected under the Marine Mammal Protection Act (the "MMPA"). For its part, the MMPA makes it unlawful to "take" right whales in U.S. waters or on the high seas, except as authorized by treaty or statute.

The term "take" means to harass, hunt, capture, kill, or attempt to do any of the foregoing.

However, § 118 of the MMPA authorizes "incidental taking" of marine mammals during commercial fishing operations. The First Circuit further summarized that the mechanism for authorization of an incidental taking is to submit a "take reduction plan," designed to assist in the recovery or prevention of a statutorily protected species that interacts with commercial fisheries. This section also provides the NMFS with emergency rule making authority. Take reduction plans are promulgated by the NMFS in consultation with take reduction teams composed of persons with relevant expertise concerning the marine mammals in question or the operation of commercial fisheries. The First Circuit noted that right whales remained highly endangered with a declining population. According to the NMFS, the steep decline in numbers results from human-caused mortality from entanglements with fishing gear and vessel strikes.

In late 2017, the NMFS attempted to address right whale population decline by informing the take reduction team that it was necessary to amend the right whale take reduction plan. Following study and consultation, in 2021 the NMFS imposed new rules on the lobster and Jonah crab fisheries to reduce entanglement risks to right whales, i.e., the 2021 Take Reduction Plan Amendment. The 2021 Take Reduction Plan Amendment expanded the boundaries of an area of federal waters, known as the Massachusetts Restricted Area, which is seasonally closed to vertical buoy lines from February 1 to April 30. At the same time, the Massachusetts Division of Marine Fisheries ("MDMF") independently expanded an area of state waters covered by a similar seasonal closure north to the New Hampshire border. In early 2022, the MDMF notified the NMFS that these two adjustments (expanding the geographic scope of seasonally closed federal and state waters) had inadvertently left a 200-nautical mile area of federal waters, known as the "Wedge," unprotected.

The Wedge is part of the corridor through which right whales enter and exit Cape Cod Bay during migration. According to the First Circuit, surveys had confirmed that lobstermen were using the Wedge during the spring closure period and that right whales were present in the Wedge in significant numbers during that same time. It was disclosed that while some lobstermen fished the Wedge, more used it to "wet store" their gear, including vertical buoy lines, so that such gear could be deployed quickly. The NMFS determined that the significant presence of right whales in the Wedge during the spring closure period, combined with the "high density" of vertical buoy lines observed in the Wedge, substantially increased the risk of entanglements. Thus, on March 2, 2022, the NMFS issued an emergency rule closing the Wedge to vertical buoy lines for the remainder of that spring season, i.e., the NMFS' 2022 emergency rule.

In parallel with the foregoing, interested parties filed two separate lawsuits in the District Court for the District of Columbia, which challenged the NMFS' 2021 Take Reduction Plan Amendment. In the first suit, conservation groups alleged that the 2021 Take Reduction Plan Amendment was inadequate under the MMPA because it would not reduce right whale morality. The District Court for the District of Columbia granted summary judgment to the conservation groups and required the NMFS to finalize a new rule by December 9, 2024.

In the second suit, the State of Maine and lobster industry associations, including Plaintiff, filed suit alleging that the NMFS' 2021 Take Reduction Plan Amendment was arbitrary and capricious because the NMFS had overestimated the impact of the lobster fishery on right whales by relying upon inappropriate assumptions. The District Court for the District of Columbia upheld the Amendment; however, the D.C. Circuit reversed, holding the biological opinion informing the

NMFS' analysis was inconsistent with the Endangered Species Act's ("ESA") requirements. The D.C. Circuit remanded to the District Court for the District of Columbia without vacating the 2021 Take Reduction Plan Amendment. Following remand, the NMFS reconvened the take reduction team to recommend additional measures to comply with the timetable specified in the remand; however, before the NMFS could propose a new amendment, Congress intervened with the Rider to the CAA, which the District of Massachusetts found prohibited the NMFS from issuing any new regulation under the MMPA or ESA affecting lobster and Jonah crab fishing.

For its part, the Rider, found in § 101 of the CAA, sets forth a temporary authorization for lobster and Jonah crab fishing, but § 101(b) provided an exception to that authorization. The exception provides that the temporary authorization shall not apply to 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 [the CAA], affecting lobster and Jonah crab." (emphasis added).

The District of Massachusetts found the NMFS' 2022 emergency rule concerning the seasonal closure of the Wedge was not "in place" on December 29, 2022, when the Rider became law. The First Circuit disagreed and agreed with the NMFS, which proffered that a better reading of the Rider should yield a conclusion that the NMFS' 2022 emergency rule was "in place" as of that date.

The First Circuit reasoned that the Rider was enacted by Congress to address the balance of interests of the lobster and Jonah crab fisheries with those of the right whale following the District of Columbia litigation. That is, the purpose of the Rider to the CAA was that it was meant to compromise and pause the economic death sentence to the lobster industry that would be occasioned by the implementation of the regulatory actions required by the District of Columbia litigation.

Plaintiff argued that the Rider's statutory term "in place" was synonymous with the colloquial phrase "in effect," and that it, therefore, could not be understood as anything other than a requirement that the emergency Wedge closure to have been in place (or in effect) on December 29, 2022, for the exception described in § 101(b) of the Rider to apply. The First Circuit rejected this argument by noting the 'consequences of reaching a contrary conclusion.'

The First Circuit noted that the NMFS' 2022 emergency rule was the first emergency rule affecting the lobster and Jonah crab fisheries that was issued under the MMPA or the ESA in more than a decade and the only such rule issued in 2022. According to the First Circuit, it was more likely that the drafters of the Rider had the NMFS' 2022 emergency rule in mind when writing that the restrictions imposed by § 101(a) "[did] not apply to an existing emergency rule, or any action taken to extend or make final an emergency rule that is in place on [December 29, 2022] affecting lobster and Jonah crab." The First Circuit further reasoned that, if the NMFS' 2022 emergency rule was not regarded as having been "in place" on December 29, 2022, no other rule could possibly have come within the exception specified in § 101(b), rendering it a nullity *ab initio*, and courts are to avoid interpretations of statutes that have this effect.

***Seafreeze Shoreside, Inc. v. United States Dep't of the Interior*, 123 F.4th 1 (1st Cir. 2024)**

FACTS: This consolidated appeal from the District of Massachusetts concerned the Government's process for approving a plan to construct and operate a large-scale commercial offshore wind energy facility. The facility, which began delivering power to the New England grid in 2024, is located on the Outer Continental Shelf, fourteen miles south of Martha's Vineyard and Nantucket.

Plaintiffs are entities involved in, or associated with, the commercial fishing industry. Defendants are federal departments, agencies, and officials responsible for the plan approval process, as well as the business entity that successfully submitted the proposed plan and is constructing and operating the facility. Plaintiffs sued to obtain declaratory and injunctive relief, asserting thirty-nine claims under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, and several environmental statutes. The District of Massachusetts entered summary judgment for the Defendants on all claims. On appeal, the First Circuit affirmed.

The First Circuit began by identifying the Parties to the Seafreeze Appeal and the Alliance Appeal, which were consolidated for the First Circuit's review.

The Plaintiffs in the Seafreeze Appeal included: Seafreeze Shoreside, Inc., a seafood dealer, the Long Island Commercial Fishing Association, Inc., a trade group representing New York's commercial fishing industry ("LICFA"); XIII Northeast Fishery Sector, Inc., a private organization of commercial fishermen located in the Northeast, and three commercial fishing companies: Heritage Fisheries, Inc.; Nat. W., Inc.; and Old Squaw Fisheries, Inc.

The Defendants in the Seafreeze Appeal included: the Department of the Interior; the Honorable Debra Haaland, in her official capacity as Secretary of the Interior; the BOEM; Liz Klein, in her official capacity as the BOEM's Director; Laura Daniel-David, in her official capacity as the Interior Department's Principal Deputy Assistant Secretary of Land and Minerals Management; the Department of Commerce; the Honorable Gina M. Raimondo, in her official capacity as Secretary of Commerce; the National Oceanic and Atmospheric Association ("NOAA"); the NMFS; Catherine Marzin, in her official capacity as Deputy Director of the NOAA; the Department of Defense; the Honorable Lloyd J. Austin III, in his official capacity as Secretary of Defense; the Corps; Lt. Gen. Scott A. Spellmon, in his official capacity as the Corps' Commander and Chief of Engineers; Col. John A. Atilano, II, in his official capacity as the Corps' District Engineer of the New England District; and Vineyard Wind 1, LLC, which submitted the approved plan and is constructing and operating the facility. Vineyard Wind 1 was not initially sued but intervened as a Defendant.

With respect to the Alliance Appeal, the Plaintiffs included: Responsible Offshore Development Alliance ("Alliance"), a D.C. nonprofit whose membership includes fishing associations, seafood dealers, seafood processors, fishing vessels, and affiliated businesses.

The Defendants in the Alliance appeal included: the Interior Department; Secretary Haaland in her official capacity; the BOEM; Director Klein in her official capacity; the NMFS; Richard W. Spinrad, in his official capacity as the NOAA's Administrator; the Department of the Army; Christine Wormuth, in her official capacity as Secretary of the Army; the Corps; Jamie A. Pinkham, in his official capacity as Acting Assistant Secretary of the Army for Civil Works; and

Vineyard Wind.

ISSUE: Whether the District Court erred in granting summary judgment to Defendants on Plaintiffs' APA/Endangered Species Act ("ESA") claims. Whether the District Court erred in granting summary judgment to Defendants on Plaintiffs' APA/National Environmental Protection Act ("NEPA") claims and the Alliance Plaintiffs' APA/Marine Mammal Protection Act ("MMPA") claim. Whether the District Court erred in granting summary judgment to Defendants on the Alliance Plaintiffs' APA/Clean Water Act ("CWA") claims. And whether the District Court erred in granting summary judgment to Defendants on Plaintiffs' APA/Outer Continental Land Shelf Act ("OCSLA") claims.

HOLDING: The alleged injury incurred by a particular Plaintiff, a nonprofit organization of fishing-related businesses, with regard to the Bureau of Ocean Energy Management's ("BOEM") approval of the wind project construction and operations plan was not redressable by that Plaintiff's ESA claim, and thus that Plaintiff lacked Article III standing for such claim. The BOEM's failure to consider alternatives that would have required construction outside lease area was not arbitrary and capricious. The alleged violations of the NEPA or the OCSLA that occurred when the BOEM resumed review of the proposed wind project construction and operations plan was not the cause of any injury suffered by a particular objector Plaintiff, and thus that Plaintiff lacked Article III standing for a claim challenging such conduct of the BOEM. The conclusion of Army Corps of Engineers (the "Corps") that impacts on commercial fisheries, wildlife, and the marine environment did not preclude issuance of a CWA permit for discharge of dredged or fill material was not arbitrary and capricious. Finally, the BOEM's determination that the wind project could be carried out in safe manner, as required by the OCSLA, was not arbitrary and capricious.

REASONING: The First Circuit began its analysis by outlining the issues in the Seafreeze Appeal, which involved claims pursuant to the APA and the OCSLA, the NEPA, and the ESA, and the Alliance Appeal, which involved overlapping claims pursuant to the same statutes as well as the MMPA, the CWA, and the Rivers and Harbors Act. The First Circuit then, after noting the robust procedural and factual history of the Vineyard Wind project, summarized the conclusions of the District Court of Massachusetts, which ultimately denied Plaintiffs' motions for summary judgment while granting Defendants' cross-motions for summary judgment.

In short, the District Court had concluded that: (1) Plaintiffs' ESA claims were non-justiciable under Article III of the Constitution, (2) Plaintiffs were outside of the zone of interests protected by the NEPA, (3) the Alliance Plaintiffs were outside of the zone of interests protected by the MMPA, (4) the Alliance Plaintiffs had failed to identify a genuine issue of material fact as to whether the Corps' issuance of the CWA § 404 permit was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or otherwise not in accordance with law, and (5) Plaintiffs had failed to identify a genuine issue of material fact as to whether the BOEM's approval of the project under the OCSLA was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or otherwise not in accordance with law.

The APA/ESA Claims

Three arguments were advanced by the Seafreeze Plaintiffs and Alliance Plaintiffs on appeal. The first two arguments, advanced by the Seafreeze Plaintiffs, targeted aspects of the September 11,

2020 biological opinion, but not the superseding October 18, 2021 biological opinion. The third, advanced by the Alliance Plaintiffs, argued that the sequence in which Defendants acted resulted in the issuance of a joint Record of Decision ("ROD") and approval of a Construction and Operations Plan ("COP") without there being a valid biological opinion in place. The District Court rejected all three arguments for a lack of standing and, alternatively, mootness.

On appeal, the Seafreeze Plaintiffs also presented one argument challenging the District Court's standing and mootness rulings on their ESA claims. In short, the Seafreeze Plaintiffs argued that the District Court erred in refusing to recognize the LICFA's associational standing to assert, on behalf of a LICFA member, David Aripotch, certain non-economic environmental and aesthetic injuries arising from Vineyard Wind's impact on the wind project area. Aripotch, who was not a party, owns Plaintiff Old Squaw and captains its boat. In the District Court, he submitted a declaration detailing the aesthetic and spiritual pleasures he derived from fishing and photographing right whales and other marine life in the project area. The District Court rejected this argument.

First, the District Court concluded that Aripotch's personal injuries and interests could not be imputed to Old Squaw, the corporation he owned. Second, the District Court refused to allow the LICFA to assert Aripotch's non-economic interests in the project area because the LICFA did not demonstrate that those interests were germane to its purpose of supporting fisheries management. On appeal, the Seafreeze Plaintiffs challenged the District Court's ruling, relying upon the LICFA's articles of incorporation, but the First Circuit was not persuaded. The First Circuit noted that the Seafreeze Plaintiffs did not introduce those articles until after the summary judgment briefing deadline in the District Court, and the District Court declined to allow the supplementation of the record, which the First Circuit found was not reversible error.

The Seafreeze Plaintiffs also attempted to invoke Fed. R. Evid. 201(c)(2) (providing for judicial notice if a party so requests and the court is supplied with necessary information) concerning the articles of incorporation. However, the First Circuit found that, while the District Court may have taken judicial notice of the articles of incorporation, they would not provide grounds for LICFA to represent *Aripotch's* personal interests in the project area.

With respect to the Alliance Plaintiffs' challenge to the District Court's rejection of its ESA claim on justiciability grounds, the First Circuit noted that the Alliance Plaintiffs did not engage with the District Court's standing and mootness rulings, which was itself a reason to reject the appellate challenge in this regard. The First Circuit noted that the District Court had correctly concluded that the Alliance Plaintiffs lacked standing to press its ESA claim because an event occurring after the alleged procedural error (the initial issuance of the ROD and approval of the COP without a valid biological opinion) broke the causal chain between that error and both the BOEM's substantive action (approval of the COP) and the Alliance Plaintiffs' alleged Article III injury (economic harm from the operation of the project). For the same reasons, the District Court concluded that the Alliance Plaintiffs' ESA claim was moot because an event occurring after the alleged procedural error had rendered it immaterial. The First Circuit agreed with this rationale.

The APA/NEPA and APA/MMPA Claims

The First Circuit next considered both sets of Plaintiffs' challenges to the District Court's grant of

summary judgment to Defendants on Plaintiffs' joint APA/NEPA claims and the Alliance Plaintiffs' APA/MMPA claim. The First Circuit considered these challenges together because the District Court dismissed both sets of claims for being outside the zones of interest of the environmental statutes that Plaintiffs invoked.

With respect to the APA/NEPA claims, the District Court held that Plaintiffs did not put forth competent evidence as to an environmental harm that would impact their commercial fishing. With respect to the Alliance Plaintiffs' APA/MMPA claim, the District Court held that the Alliance Plaintiffs had not established a cognizable interest in right whales or any other marine mammal. On appeal, the First Circuit outlined the zone of interest test and affirmed the District Court's zone of interest ruling as to the Alliance Plaintiffs' APA/MMPA claim. The First Circuit, however, disagreed with the District Court's zone of interest ruling as to Plaintiffs' APA/NEPA claims.

The First Circuit found that, while the District Court was correct in rejecting much of Plaintiffs' evidence of environmental injury, the ROD itself acknowledged that the discharge of fill material associated with the project would have a major adverse impact on shellfish and fish in the project area, and Plaintiffs had plausibly linked the adverse impacts to the expected adverse economic effects of the project on commercial fishing interests, satisfying the zone of interests test. Despite this, however, the First Circuit affirmed the District Court's dismissal of these claims.

The First Circuit reasoned that the Seafreeze Plaintiffs' arguments on appeal rested on an underlying assertion that the BOEM was improperly motivated to reach decisions so that Vineyard Wind could timely honor its contractual commitments. The First Circuit found this premise to be misguided, but, apart from that, the First Circuit found that the Seafreeze Plaintiffs' APA/NEPA arguments failed to establish that the BOEM engaged in arbitrary or capricious decision making.

The APA/CWA Claims

The First Circuit next considered the challenge to the District Court's grant of summary judgment to Defendants on the Alliance Plaintiffs' APA/CWA claims. The Alliance Plaintiffs argued that the Corps' decision to issue a CWA § 404 permit for the discharge of dredged or fill material arbitrarily and capriciously failed to properly account for the effect of the project on commercial fisheries, wildlife, and the marine environment. The Alliance Plaintiffs further argued that the Corps issued the permit under the mistaken belief that the impacts of the project on commercial fisheries, wildlife, and the marine environment would be minor. In support of this argument, the Alliance Plaintiffs pointed to several statements in the Final Environmental Impact Statement ("FEIS") which, according to the First Circuit, if read in isolation, appeared to project more-than-minor impacts from the project on commercial fisheries, commercial shipping, recreational vessel businesses, mollusks, fish, and crustaceans. But the First Circuit noted that the Alliance Plaintiffs' brief omitted context that qualified the statements in a manner that supported the Corps' conclusion. Overall, after extensive analysis, the FEIS concluded that the project would have a moderate impact on fish and other aquatic organisms. Therefore, according to the First Circuit, the record did not support a conclusion that the Corps acted arbitrarily or capriciously in issuing the CWA § 404 permit.

The APA/OCSLA Claims

Finally, the First Circuit considered the challenges to the District Court's grant of summary judgment to Defendants on Plaintiffs' APA/OCSLA claims. Plaintiffs' principal argument was that the District Court misunderstood the OCSLA's core statutory provision governing the approval of offshore wind projects, 43 U.S.C. § 1337(p)(4), in holding that the BOEM had not acted arbitrarily or capriciously in approving the COP. Plaintiffs also argued that the District Court impermissibly discounted their evidence of safety concerns, environmental harms, and the effect on commercial fishing that the project would cause.

The First Circuit found that Plaintiffs' principal argument was based upon mischaracterizations of the District Court's reading of the OCSLA § 1337(p)(4). The First Circuit found that the District Court only held that the BOEM must have "discretion" in considering whether each statutory criterion was satisfied, and that the BOEM must "balance" the statutory mandate to develop energy projects on the Outer Continental Shelf with the twelve statutory criteria for which it must provide. Plaintiffs did not contest either of these points; thus, the First Circuit found that Plaintiffs failed to provide the First Circuit with any basis to conclude that the District Court's award of summary judgment to Defendants was infected by a misreading of OCSLA § 1337(p)(4).

***Unkechaug Indian Nation v. Seggos*, 126 F.4th 822 (2d Cir. 2025)**

FACTS: This appeal from the District Court for the Eastern District of New York concerned the Unkechaug Indian Nation, a sovereign Native American tribe recognized under New York state law (the "Nation"), which challenged regulations enforced by the New York State Department of Environmental Conservation (the "DEC") that prohibited the harvesting of American glass eels.

The Nation sought declaratory and injunctive relief to prevent the DEC from enforcing New York's fishing regulations, including those barring the harvesting of glass eels, against the Nation's members in the Nation's "customary fishing waters." The Eastern District granted summary judgment to Defendants holding that the Andros Order — a 1676 agreement between the Royal Governor of New York and the Nation that allowed the Nation to "freely whale or fish for or with Christians, or by themselves, and dispose of their effects as they thinke [sic] good according to law and Custome [sic] of the Government" — was not a federal law that preempted New York's fishing regulations. On appeal, the Second Circuit affirmed.

ISSUE: Whether the 11th Amendment to the Constitution barred the Nation's claims against the DEC. Whether the Andros Order, a 1676 agreement between the Royal Governor of New York and the Nation, is a federal law that could preempt New York's fishing regulations.

HOLDING: The 11th Amendment barred the Nation's claims against the DEC, but the *Ex parte Young* exception to sovereign immunity applied to the claims for declaratory and injunctive relief asserted against the Commissioner of the DEC in his official capacity. However, the Andros Order was (and is) not federal law binding on the United States because it was entered before the Confederal period, on behalf of the British Crown, and had not been ratified by the United States. Because the Andros Order is not federal law, it did not preempt New York state's fishing regulations, including those prohibiting the harvesting of American glass eels in New York's

territorial waters.

REASONING: The Second Circuit began by noting the American glass eel and related conservation efforts. Glass eels are miniature juvenile American eels and a lucrative trade for glass eels has emerged due to the demand for glass eels to serve as seed stock for aquaculture facilities in Asia. This increasing demand, combined with the relative ease of harvesting glass eels, has caused market prices for glass eels to soar and for over-harvesting and poaching to occur. In an effort to preserve the glass eel population, New York implemented various regulatory measures through federally-mandated Fishery Management Plans. Accordingly, New York law prohibited the harvesting of juvenile American eels under nine inches long. However, New York did not regulate fishing by members of the Nation in the Nation's own reservation waters.

The Second Circuit then recounted the genesis of this lawsuit, noting that in March 2014, DEC officers encountered fishermen, including members of the Nation, harvesting glass eels *outside* of the Nation's reservation waters. The fishermen were issued criminal summons for harvesting glass eels in violation of New York law, and the DEC seized the fishing equipment and over seven pounds of glass eels. From 2014 until 2016, the Nation attempted to export several shipments of glass eels to Asia, and some of those shipments were intercepted and seized, prompting litigation from the Nation seeking declaratory and injunctive relief.

Before reaching the merits of the appeal itself, the Second Circuit addressed Defendants' 11th Amendment defense — Defendants argued that the 11th Amendment barred the Nation's action because the DEC is a state entity not subject to suit, and the *Ex parte Young* exception to sovereign immunity did not apply to the claims against the DEC's Commissioner because the Nation's claims functionally sought to divest New York state from its sovereign control over public lands. The Second Circuit found that the DEC is a state entity, and that the 11th Amendment barred the Nation's claims against the DEC, but the Second Circuit agreed with the Eastern District's conclusion that the *Ex parte Young* exception to 11th Amendment immunity applied to claims against the DEC's Commissioner in his official capacity.

According to the Second Circuit, in determining whether the *Ex parte Young* exception applied, a court need only inquire into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. Applying this inquiry, the Second Circuit found that the allegations in the Nation's complaint satisfied the requirements of *Ex parte Young*. The Nation alleged the (1) the ongoing enforcement of New York fishing regulations violated its federally-guaranteed rights, and (2) the requested relief would prospectively end the alleged violations. Thus, the Second Circuit found that the *Ex parte Young* exception to sovereign immunity applied to the Nation's claims asserted against the DEC's Commissioner in his official capacity.

With respect to the Andros Order, the Nation argued that the Andros Order was a valid treaty binding on the United States because of the adoption of Article VI of the Constitution. Two clauses of Article VI were relevant to the Second Circuit's analysis — the Debts and Engagements Clause and the Supremacy Clause.

The Nation first argued that the Andros Order was binding on the United States through the Debts and Engagements Clause of Article VI, which states: "All Debts contracted, and Engagements

entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation." U.S. Const. art. VI, cl. 1. According to the Second Circuit, however, in making this argument the Nation conflated "Engagements" made *during* the Confederal period — that is after the American Revolution, when the Articles of Confederation were in effect, formally binding the American States together prior to the adoption of the Constitution — and those entered *before* the Confederal period. Because it was undisputed that the Andros Order was not made during the Confederal period, the Second Circuit had no trouble concluding that the Andros Order did not bind the United States.

With respect to the Supremacy Clause, the Nation argued that the Andros Order was a valid treaty of the United States that overrode New York's state regulations under Article VI. The Supremacy Clause of Article VI, provides, in relevant part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .. " U.S. Const. art. VI, cl. 2. The plain language of the Supremacy Clause thus contemplates two types of treaties that are, or will be, "the supreme Law of the Land": (1) treaties that were entered under the authority of the United States *before* the ratification of the Constitution, i.e., those entered *during* the Confederal period, and (2) future treaties made by the United States *after* the ratification of the Constitution.

According to the Second Circuit, because the Andros Order was entered in 1676, more than 100 years before the adoption of either the Articles of Confederation or the Constitution, the Andros Order did not fall within the Supremacy Clause's contemplation of future treaties. The question before the Second Circuit then became whether the Andros Order could be an enforceable treaty made before the ratification of the Constitution.

According to the Second Circuit, the drafters' placement of the commas around the phrase ". . ., or which shall be made, . . ." made it very clear that the phrase "under the Authority of the United States" modified "all Treaties made," as well as "all Treaties . . . which shall be made." That is, according to the Second Circuit's reading, the only pre-existing treaties that were "the supreme Law of the Land" under the Supremacy Clause were those made "under the Authority of the United States," not those made *before* the United States existed. Because the Andros Order was executed before the creation of the United States, at a time when the British Crown held "in its utmost extent" the power to make treaties with the Native Americans, the Andros Order plainly could not have been made under the "Authority of the United States," which did not technically exist in 1676.

***Prutehi Litekyan: Save Ritidian v. United States Dep't of Airforce*, 128 F.4th 1089 (9th Cir. 2025)**

FACTS: This appeal from the District Court of Guam concerned a challenge by Plaintiff, the Prutehi Litekyan: Save Ritidian, a nonprofit organization dedicated to protecting natural and cultural resources in Guam, to the Air Force's decision to engage in the disposal of munitions at Tarague Beach, located on the northern tip of Guam. Plaintiff contended that the Air Force failed to comply with its environmental review obligations under the National Environmental Policy Act ("NEPA"), the Air Force responded by invoking another federal statute, the Resource

Conservation and Recovery Act ("RCRA"), which governed hazardous waste disposal, in part, through a permitting process.

For its part, Tarague Beach is a multifaceted site for wildlife and people of Guam, serving as a nesting habitat for the green sea turtle and a resting spot for migratory seabirds. Tarague Beach also sits above Guam's sole aquifer, which provides more than 80% of Guam's population with drinking water. Just offshore, fishermen regularly harvest food for their families. Tarague Beach is also the area where the United States Air Force has, for years, disposed of unexploded ordnance (tear gas, ammunition, propellants, and explosive materials), some of which dates back to WW2. The Air Force elected to dispose of such munitions through Open Burning/Open Detonation ("OB/OD") operations, which entail burning the munitions in the open air or blowing them up.

The Air Force moved to dismiss Plaintiff's Complaint and the District Court held that Plaintiff lacked standing to challenge the Air Force's permit application because its injury was not fairly traceable to the Air Force's conduct; the Air Force had not engaged in final agency action under the Administrative Procedure Act ("APA"), and Plaintiff's challenge was therefore not ripe; and even if the District Court had subject matter jurisdiction over the case, Plaintiff failed to state a claim because RCRA's permitting process made NEPA review "redundant" and a "waste of resources." On appeal, the Ninth Circuit reversed each holding and remanded.

ISSUE: Whether Plaintiff had standing to challenge the Air Force's decision to move forward with OB/OD operations without conducting NEPA review. Whether the Air Force's decision to apply for a RCRA permit and the details of its planned activities on Tarague Beach, described in the permit application, reflected the Air Force's final agency action under the APA that was ripe for judicial review. Whether the RCRA's permitting process makes the environmental review mandated by NEPA and superfluous.

HOLDING: Plaintiff had standing to challenge the Air Force's decision to move forward with OB/OD operations without conducting NEPA review. Had the Air Force taken the requisite "hard look" at the environmental impacts of OB/OD and appropriately engaged the public before committing to its plan for disposal, the agency might have chosen a different place or method for handling the waste munitions. That possibility made the injury fairly traceable to the Air Force's actions and was enough to establish Article III standing for a procedural injury under NEPA. The Air Force's decision to apply for a RCRA permit and the details of its planned activities on Tarague Beach, described in the permit application, reflected the Air Force's commitment to a particular location for and method of waste munitions disposal, and so was the endpoint in its decision-making process. That commitment also determined the agency's legal obligations. The Air Force thus engaged in final agency action that was ripe for judicial review under the APA. The RCRA's permitting process is dissimilar from the environmental review mandated by NEPA and so does not make the latter superfluous. Nor do the processes outlined in RCRA suggest that Congress did not intend NEPA to apply to the decision making of operational agencies (as opposed to agencies charged with assuring environmental compliance). The NEPA, therefore, applied to the Air Force's decision to conduct OB/OD operations at Tarague Beach, and Plaintiff stated a claim against the Air Force by alleging noncompliance with the NEPA.

REASONING: The Ninth Circuit began by reviewing the interplay between the NEPA and the RCRA.

On the one hand, the NEPA is a statute designed to, in relevant part, "encourage productive and enjoyable harmony between man and his environment [and] to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. Primarily a procedural statute, the NEPA achieves its "sweeping policy goals . . . through a set of 'action-forcing' procedures that require that agencies take a '"hard look" at [the] environmental consequences' " of their actions, and "provide for broad dissemination of relevant environmental information." (citations omitted). The NEPA "does not mandate particular results; it simply prescribes the necessary process" for assessing the environmental impact of agency action. (citations omitted). T

The Ninth Circuit noted that one of the NEPA's requirements is that a federal agency prepare a "detailed statement" before engaging in "major" federal action affecting the quality of the human environment, i.e., an Environmental Impact Statements ("EIS"). In some instances, a federal agency may not know, before preparing an EIS, whether the environmental impacts of its action will be significant, or it may have reason to believe the action is not likely to have such effects. In such instances, the federal agency is required to conduct an Environmental Assessment ("EA") that describes, among other things, "the purpose and need for the proposed action," alternatives to that action, and the "environmental impacts of the proposed action and alternatives."

On the other hand, the RCRA is a substantive environmental statute that "empowers [the U.S. Environmental Protection Agency (EPA)] to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and waste management procedures" set forth in the statute. RCRA governs facilities that "treat[ ], stor[e], [or] dispos[e]" of hazardous waste and authorizes EPA to set performance standards for such facilities by regulation. 42 U.S.C. § 6924(a) (1996). To handle hazardous waste, a facility must apply for and obtain a RCRA permit.

The Ninth Circuit then summarized the Air Force's relationship with Andersen Air Force Base in northern Guam and the adjacent Tarague Beach, where the Air Force erected an Explosive Ordnance Disposal ("EOD") range to dispose of unserviceable ordnance and munitions. The Air Force uses two methods to destroy hazardous munitions — OB and OD. OB entails placing munitions in a burn kettle, along with wood, diesel fuel, and an ignition device. OD entails placing munitions, an explosive charge, and igniter into a pit.

The Air Force first received a RCRA permit to conduct OB/OD operations on Tarague Beach in 1982 from the Guam EPA. Every three years since then, it applied for a new permit. The Guam EPA granted each permit since it was authorized to do so. While OD operations occurred under each permit, no OB operations have taken place since at least the early 2000s. More recently, the Guam EPA had issued the Air Force's recent RCRA permit in 2018, which was set to expire in September 2021, as that expiration date approached, the Air Force had to decide whether it would continue OD operations (and possibly restart OB operations) on Tarague Beach or find another way to manage hazardous waste munitions. The Air Force applied for permit renewal in May 2021, reflecting the intent to conduct OB/OD operations from 2021 to 2024, however the Air Force did not submit either an EIS or EA or invoke any exclusion. While review of its application was pending, the Guam EPA permitted the Air Force to continue to operate the EOD facility under the terms of its prior 2018 permit.

In January 2022, Plaintiff sued the Air Force, alleging that it violated NEPA by submitting a RCRA

permit renewal application without preparing an EIS or EA. At the District Court level, Plaintiff identified several ways in which members' interests would be harmed by the Air Force's proposed OB/OD operations. Among the forms of relief, Plaintiff sought a declaratory judgment that the Air Force had violated NEPA and to grant injunctive relief compelling the Air Force to withdraw their pending RCRA permit and enjoin the continued OB/OD operations and resubmission of any RCRA application as long as the Air Force did not comply with the NEPA's requirements. The District Court granted the Air Force's Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

With respect to standing, the Ninth Circuit found that Plaintiff's injury was fairly traceable to the Air Force's decision to carry out OB/OD operations (as detailed in its 2021 RCRA permit application) without first conducting an EA or EIS. According to the complaint, the Air Force did not carry out the detailed and complete environmental review that the NEPA required. If it had, its decision-making process could have been influenced "by the environmental considerations that the NEPA requires an agency to study," and could have resulted in a different decision, including a decision not to carry out OB/OD operations on Tarague Beach in the following three years or to do so differently. Accordingly, the Ninth Circuit found Plaintiff's injury was thus fairly traceable to the Air Force's noncompliance with the NEPA.

With respect to final agency action, the Ninth Circuit found that the APA's definition of "[a]gency action" included "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). The Ninth Circuit found the Air Force and the Department of Defense are federal administrative agencies subject to the APA. The Ninth Circuit further found that, because the Air Force had made a decision to conduct OB/OD operations in the future at Tarague Beach according to specified protocols, as evidenced by the content of its RCRA permit renewal application, the Ninth Circuit found the Air Force's decision to conduct OB/OD operations according to its RCRA permit renewal application constituted agency action.

For agency action to be final, the Ninth Circuit explained that two conditions had to be satisfied. First, the action must mark the consummation of the agency's decision-making process. Second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow. The Ninth Circuit found both conditions were satisfied.

While the Air Force argued that requesting action by another agency (through an application for a permit) is of tentative or interlocutory nature because it depends upon another agency's action to approve such a permit, the Ninth Circuit noted that the Air Force misidentified that agency action that Plaintiff contested. That is, Plaintiff did not contend that the Guam EPA's eventual permitting decision under the RCRA was the final agency action, Plaintiff instead challenged the Air Force's decision to engage in OB/OD operations over the next three years under particular protocols outlined by its application, the latter of which the Ninth Circuit agreed represented the consummation of the Air Force's decision-making process. Furthermore, the Ninth Circuit dispensed with the Air Force's argument that its decision to continue OB/OD operations was a continuation of the status quo and reflected ongoing agency operations not subject of review. The Ninth Circuit disagreed, noting that the Air Force was required to apply for a new RCRA permit very three years, and each time, the Air Force had to assess whether OB/OD operations made sense based on existing conditions. Thus, the RCRA permit regime distinguished the Air Force's

decision in this matter from other kinds of 'routine implementation decisions' that the Ninth Circuit had previously found did not constitute final agency action.

The second condition indicating final agency action requires that the agency action be one by which rights or obligations have been determined or from which legal consequences will flow. The Ninth Circuit found that the Air Force's decision imposed a legal obligation upon the Guam EPA, and, whether the Guam EPA issued a permit to the Air Force or denied it, legal consequences would flow therefrom. Thus, the Ninth Circuit concluded that the Air Force took final agency action when it decided to proceed with the OB/OD operations at Tarague Beach and submitted its RCRA permit application.

With respect to ripeness, the Ninth Circuit noted that, as the final agency action analysis made clear, Plaintiff's claim was ready for adjudication, and it was jurisdictionally and prudentially ripe. All three factors — (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented — weighed in favor of ripeness.

Moving to the Fed. R. Civ. P. 12(b)(6) grounds, the Ninth Circuit analyzed whether the NEPA's environmental review process was "redundant" with the RCRA's permitting process. The Ninth Circuit found that the schemes were dissimilar enough and noted that only in rare instances had the Ninth Circuit found that substantial overlap between the NEPA and another statute justified exemption from the NEPA's environmental review process.

While the Ninth Circuit found some overlap between the NEPA's procedural requirements and the Guam EPA's RCRA permitting process, they were critically different in several respects. For instance, the timing of each statute's prescribed environmental review was (and is) entirely distinct, reflecting the fundamentally different purposes of the two statutes. Most notably, under the NEPA, agencies must prepare an EIS or EA and engage with the public *before* reaching a final decision to undertake a particular activity that may have significant environmental impact.

The Ninth Circuit's review of a RCRA application, by contrast, noted that an applicant's settled decision to handle hazardous waste in a particular fashion and to seek permission, here from the Guam EPA, to so proceed. Given that role, an environmental agency's application review under the RCRA did not impose "'action-forcing' procedures" requiring a "'hard look' at environmental consequences" and "provid[ing] for broad dissemination of relevant environmental information" before a waste-handling facility adopts the plan memorialized in its application. Thus, the Ninth Circuit found that the RCRA was not so similar to the NEPA as to render NEPA review redundant, nor was the RCRA so different from the NEPA to suggest that Congress did not intend for agencies to comply with both statutes.

Executive Order 14276 – Restoring American Seafood Competitiveness

Federal Register :: Restoring American Seafood Competitiveness

On April 17, 2025, President Trump issued Executive Order 14276 (the "Order"), which is a modification and amplification of a prior Executive Order that President Trump issued during his first term, Executive Order 13921.

According to the White House, the Order was issued to restore American seafood competitiveness. More specifically, the Order's aim is to strengthen the U.S. fishing industry by reducing regulatory burdens, combating unfair foreign trade practices, and enhancing domestic seafood production and exports. The Order purports to do this by:

- Directing the Secretary of Commerce to immediately consider suspending, revising, or rescinding regulations that overly burden America's commercial fishing, aquaculture, and fish processing industries.

- Directing the National Marine Fisheries Service ("NMFS") to:

    - incorporate better, cheaper, more reliable technologies and cooperative research programs into fishery assessments;

    - expand exempted fishing permit programs to promote fishing opportunities nationwide; and

    - modernize data collection and analytical practices to improve the responsiveness of fisheries management to real-time ocean conditions.

The Order establishes an "America First Seafood Strategy" to boost U.S. seafood production, sales, and exports, ensuring long-term industry growth and global competitiveness.

The Order also mandates the development of a seafood trade strategy to address unfair competition, low environmental and labor standards, and illegally sourced seafood from abroad, while expanding access to foreign markets for American seafood products. It also tasks the administration with improving the Seafood Import Monitoring Program ("SIMP") to better detect high-risk shipments from countries that violate international laws.

In addition, the Order mandates a review of all existing marine national monuments to assess the prospect of opening them to commercial fishing.