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Fourth Circuit CWA Ruling Portends Risks of Overreliance on Major Questions Doctrine

by Jim Wedeking

In Maryland, an annual freshwater fishing license will cost a state resident $20.50. Thanks to the Fourth Circuit, anglers will not have to obtain a Clean Water Act permit as well. In *North Carolina Coastal Fisheries Reform Group v. Capt. Gaston LLC*,[1] the court affirmed the dismissal of a Clean Water Act citizen suit against shrimp trawling companies that fished in Pamlico Sound, a freshwater lagoon west of North Carolina's Outer Banks. The court held that plaintiffs' interpretation of the Clean Water Act would subject the entire commercial fishing industry, as well as recreational fishermen, to the federal law for the first time, conflicting with the Magnuson-Stevens Act and state fisheries regulations and thus violate the Major Questions Doctrine. The court's reliance on that doctrine, however, was arguably unnecessary, given that the three-judge panel could have resolved the dispute on other grounds. *Capt. Gaston* is the first instance of an appellate court undertaking a Major Questions Doctrine analysis where the U.S. Environmental Protection Agency ("EPA") would only establish rules to regulate conduct if the citizen suit succeeded. The availability of alternative grounds, together with the unique lack of actual federal regulatory activity, should give courts some pause when considering *Capt. Gaston* as an inspiration for broad use of the Major Questions Doctrine.

The District Court Dismisses Plaintiffs' Claims

The North Carolina Coastal Fisheries Reform Group, along with several individual plaintiffs who advocate for fisheries reform, filed a Clean Water Act citizen suit alleging that trawl fishing involves two types of unpermitted Clean Water Act discharges.[2] First, they claimed that dragging a trawl net constitutes dredging without a Section 404 permit, as sediment is excavated from the bottom and redeposited back on the sound's floor.[3] Second, the defendants' trawls catch marine species other than shrimp. These unwanted species, which may be live or dead, are known as "bycatch" and are typically thrown back into the water.[4] Throwing bycatch overboard, according to the plaintiffs, constituted the unpermitted discharge of a pollutant (biological material) into a water of the United States from a point source (a vessel) without a National Pollutant Discharge Elimination System permit.[5] What is clear from the complaint is that plaintiffs dislike trawling as a fishing method and, failing to persuade the North Carolina legislature or the state's agencies to issue regulations they find sufficiently restrictive, used the Clean Water Act's citizen suit provision as an alternative tactic.[6]

Defendants moved to dismiss the complaint for failing to state a claim under the Clean Water Act and the district court granted that motion based on several theories, although none were entirely satisfying. The

[1] Case No. 21-2184, Doc. 51 (4th Cir. Aug. 7, 2023) ("Slip Op.").

[2] 560 F. Supp. 3d 979 (E.D.N.C. 2021).

[3] *Id*. at 989; *see also* 33 U.S.C. § 1344 (requiring a Section 404 permit for many dredging activities).

[4] 560 F. Supp. 3d at 988.

[5] *Id*. at 995; *see also* 33 U.S.C. §§ 1311, 1342 1362(12) (collectively, requiring a National Pollutant Discharge Elimination System permit, or state equivalent, to discharge any "pollutant" from a "point source" from a "water of the United States").

[6] 560 F. Supp. 3d at 1002 (noting that plaintiffs "initially su[ed] the North Carolina Division of Marine Fisheries for failing to adequately regulate Defendant Trawling Companies' shrimp trawling operations").

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district court began work in the teeth of a seemingly analogous Fourth Circuit case and an admission that plaintiffs' bycatch claim seemed correct "[i]n its literal sense."[7]

Beginning with the allegation that trawling dredges and re-deposits sediment, the district court faced *United States v. Deaton*, where the Fourth Circuit determined that "sidecasting"—the act of digging up dirt from a wetland and having some of that dirt fall back into the wetland—was the addition of a pollutant to a water of the United States.[8] Thus, in *Deaton*, the defendant violated the Clean Water Act for not obtaining a Section 404 permit for (1) the addition of (2) a pollutant (dredged spoil) (3) to a water of the United States.[9] The district court, however, noted *Deaton*'s rationale that "once that material," dredged spoil, "was excavated from the wetland, its redeposit in that same wetland … *added* a pollutant where none had been before."[10] The district court held that, since the sediment disturbed by trawl nets never leaves the water, there cannot be an "addition" of a pollutant under the Clean Water Act.[11]

But there is no question that throwing live and dead fish into the water is an "addition" and that the Clean Water Act defines a "pollutant" to include "biological matter," meaning that "[i]n its literal sense," plaintiffs met all the required elements of an unpermitted discharge.[12] The district court responded with several explanations as to why it was declining to follow the text's plain meaning:

- Requiring the defendants to obtain a permit was inconsistent with Section 1370 of the Clean Water Act, declaring that the Act shall not affect "any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."[13] Specifically, the Clean Water Act could conflict with state fishery management regulations.[14]
- There is no clear statement that Congress intended "'to authorize an unprecedented intrusion into traditional state authority.'"[15] Requiring a permit for bycatch "would extend the Act into an area of traditional state management and jurisdiction," such as state fishery management regulations.[16]
- The Magnuson-Stevens Act, and its legislative history, indicated that Congress was aware of bycatch and, therefore, did not intend to regulate it under the Clean Water Act or alter existing fishing practices.[17]
- Under the canon of statutory construction *lex specialis*, the more specific Magnuson-Stevens Act should control over the more general Clean Water Act with respect to bycatch regulation.[18]
- Requiring trawlers to obtain Clean Water Act permits would impermissibly "alter the fundamental details of a regulatory scheme," namely, the Magnuson-Stevens Act through "vague or ancillary provisions" of a statute.[19]
- Considering fish to be "biological materials" would lead to "absurd results" as anyone throws a fish or crab back into the water would violate the Clean Water Act.[20]

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[7] 560 F. Supp. 3d 979, 997 (E.D.N.C. 2021).

[8] 209 F.3d 331, 335-36 (4th Cir. 2000).

[9] *Id*. at 335 (citing 33 U.S.C. § 1362(12)(A) and § 1362(6)).

[10] 560 F. Supp. 3d at 996 (quoting *Deaton*, 209 F.3d at 335-36) (emphasis added).

[11] *Id*.

[12] *Id*. at 997.

[13] *Id*. at 998 (quoting 33 U.S.C. § 1370).

[14] *Id*. at 999.

[15] *Id*. (quoting *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality)).

[16] *Id*.

[17] *Id*. (citing a floor speech and sections of the Magnuson-Stevens Fishery Act that post-date the Clean Water Act's enactment).

[18] *Id*. at 1000 (citing *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)).

[19] *Id*. (quoting *Whitman v. Amer. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

[20] *Id*. at 1003 (quoting *Lara-Aguilar v. Sessions*, 889 F.3d 134, 144 (4th Cir. 2018)).

None of these explanations were terribly satisfying. Many of them, such as the invocation of Section 1370, the demand for a clear statement by Congress for "an unprecedented intrusion into traditional state authority," and various interferences with the Magnuson-Stevens Act (which did not seem to apply to Pamlico Sound), require the district court to assume a conflict between fishing regulations and the Clean Water Act that it never explained. Other explanations were not terribly persuasive. For instance, the district believed a ruling for the plaintiffs would intrude "into an area of traditional state management and jurisdiction," but the Clean Water Act routinely applies to such areas, including farming, commercial or industrial construction projects, and home building.[21] Nor is the Clean Water Act's prohibition on discharges of pollutants without a permit some "vague or ancillary provision" as the district court seemed to believe. And the worry that the Clean Water Act's literal application would lead to absurd results is a commonly shared worry that has done little to reign in the Act's reach.[22]

The Fourth Circuit Introduces the Major Questions Doctrine

The Fourth Circuit upheld the district court's dismissal order but provided a much cleaner, more direct opinion that took the fragments of the district court's reasoning and fashioned them into a Major Questions Doctrine holding. Like the district court, the Fourth Circuit begged off "relying on" the Clean Water Act's "literal language" as this must yield to "a background rule or other legal interests" that "contextually inform our understanding of a statute's meaning."[23] Among these "background rule[s]" is the Major Questions Doctrine, where, in "extraordinary cases" when the "history and breadth" of agency actions involve "economic and political significance," courts have "reason to hesitate before concluding that Congress meant to confer such authority."[24] Under the Major Question Doctrine, courts are "more hesitant to recognize new-found powers in old statutes against a backdrop of an agency failing to invoke them previously," the court explained.[25]

In this case, EPA has never asserted regulatory authority over either trawl fishing or bycatch and lacks the technical expertise to regulate in this field. In fact, with the unusual situation of a citizen suit, a ruling for the plaintiffs would effectively compel EPA to not only regulate trawl fishing and bycatch despite its long-standing declination, but the reasoning would extend to require EPA regulation of all commercial and recreational fishing, be it in the oceans, rivers, lakes, or streams.[26] Thus, the Fourth Circuit required a clear statement of Congress that EPA was authorized "to regulate bycatch under § 1311 of the Clean Water Act."[27] Plaintiffs' appeals to the definitional terms of the Clean Water Act were not enough as "literal readings of the broad terms in the Clean Water Act's definitional section" do not "supply clear authorization to regulate something under the Act."[28]

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[21] Indeed, the Supreme Court's most recent Clean Water Act case, *Sackett v. EPA*, 143 S. Ct. 1322 (2023), dealt with the Clean Water Act's application to building a single house. Under the district court's view, the Clean Water Act would be ostensibly limited to activities subject only to federal regulation, operating on little more than military bases and nuclear plants.

[22] *See*, *e.g.*, *Rapanos v. United States*, 547 U.S. 716, 727-28 (2006) (plurality) ("But district offices of the Corps have treated, as 'waters of the United States,' such typically dry land features as arroyos, coulees, and washes, as well as other channels that might have little water flow in a given year"); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2004) (three acres of undeveloped desert was a water of the United States); *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003) (roadside ditch eight miles from a navigable water is a "water of the United States"); *United States v. Larkins*, 852 F.2d 189, 193-94 (6th Cir. 1988) (Merritt, J., concurring) ("A farmer's low lying farmland or a homeowner's low lying backyard—adjacent to a small stream or creek but many miles from any navigable waterway—has apparently been converted into government property no longer subject to control or improvement by the owner without government permission. A statute that does not mention 'wetlands' has apparently been read to include simply 'moist land adjacent to a creek.'").

[23] Slip Op. at 6. The Fourth Circuit thus places the Major Questions Doctrine in the same drawer as the Rule of Lenity, the Canon of Constitutional Avoidance, the Presumption Against Implied Repeal, and other theories of statutory interpretation that do not interpret a text as much as they avoid dangerous territory. *Id*. at 6-7.

[24] *Id*. at 7 (quoting *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022).

[25] *Id*. at 8.

[26] *Id*. at 12-15.

[27] *Id*. at 15.

[28] *Id*. at 15-16 (citing *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976) (Clean Water Act's definition of "radioactive materials" subject to regulation was read to exclude nuclear materials regulated under the Atomic Energy Act) and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (seasonal ponds and isolated

Did the Fourth Circuit Need the Major Questions Doctrine?

Although the Fourth Circuit's opinion raised the Major Questions Doctrine, it also provided an alternative rationale that arguably undermined the need for a Major Questions Doctrine analysis. On the issue of bycatch, the court noted that the Clean Water Act requires the "addition" of pollutants. "But bycatch adds nothing to the water that was not already there" and "there is no 'increase' of anything."[29] And, with respect to trawl nets disturbing sediment, the court held that the trawlers are not dredging, as that term is commonly understood, and the sediment is not "dredged spoil," a listed pollutant under the Clean Water Act.[30] Even if the plaintiffs pointed to the rocks and sand disturbed by the nets, these are not discharged or added to the waters but merely disturbed by the trawl nets.[31] The court's relatively simple definitional analyses, tacked on almost as an afterthought, could have resolved the case without raising the Major Questions Doctrine. This is important because, as the Fourth Circuit's opinion illustrates, the Major Questions Doctrine should be used sparingly, almost to the point of avoiding the doctrine if possible.

The first reason for avoidance is that both the district court and the Fourth Circuit admit that it is an anti-textual doctrine.[32] Given that a court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous,"[33] reading relatively unambiguous statutes to *not* mean what they say undermines trust in the judiciary. Indeed, the district court opinion and, to a lesser extent, the Fourth Circuit opinion read like they were written to avoid a particular result, not interpret a statute in a neutral manner.

The second reason is that the Fourth Circuit names a surprisingly long list of "non-exhaustive" "hallmarks" where a statutory interpretation may present a Major Question and, thus, require an arguably anti-textual approach: (1) "the question must have significant political and economic consequences," (2) an expansive construction of a statute carrying an extraordinary grant of regulatory authority, (3) when a statute's "structure indicates that Congress did not mean to regulate the issue in the way claimed," (4) when an interpretation would conflict with an existing regulatory scheme, (5) when agencies claim "new-found powers in old statutes," (6) "when the asserted power raises federalism concerns," and (7) "when the asserted authority falls outside the agency's traditional expertise."[34] Further, many of these scenarios are vague, making consistent application from court to court less likely.[35] Due to its anti-textual nature and use in vacating highly controversial regulations, one would think courts should view the Major Questions Doctrine as something of a nuclear option: a potentially disruptive gambit for use only when an executive agency has

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wetlands fell within definition of "waters of the United States" but regulation was beyond agency's authority).

[29] *Id*. at 18, n. 14 (citing *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001)). This rationale, however, may be in tension with *Deaton* which held that once natural materials (dirt and vegetation) are removed from a wetland, it becomes a pollutant (dredged spoil) and that "once that material was excavated … its redeposit in … *added* a pollutant where none had been before." 209 F.3d at 335-36.

[30] Slip Op. at 19-20. The plaintiffs' claims regarding dredging received inconsistent attention from both the district court and the Fourth Circuit. It is not entirely clear whether the Fourth Circuit rejected the plaintiffs' claims about dredging based on the Major Questions Doctrine or solely on the grounds that disturbing sediment is not dredging.

[31] *Id*. at 21. There are also regulatory exemptions for dredging permits, excluding "incidental addition, including redeposit, of dredge material association with any activity that does not have or would not have the effect of destroying or degrading an area of waters," an exemption for incidental fallback, and an exemption for activities with an "inconsequential … effect on the area." 33 C.F.R. § 323.2(c), (d), (d)(5). These exemptions were raised in briefing before both courts but apparently made little impression.

[32] Slip Op. at 17-18 ("under the major-questions doctrine, it does not follow that the Clean Water Act *clearly* regulates returning bycatch to the ocean simply because bycatch falls within the literal definition of 'biological materials'").

[33] *BedRoc Limited, LLC v. United States*, 541 U.S. 176, 183 (2004).

[34] Slip Op. at 7-9.

[35] For instance, where the Fourth Circuit found that regulation of commercial fisheries "would have significant political and economic consequences," *id*. at 13, another court may disagree. Even if there was record evidence of an industry's revenue, employment, contribution to gross domestic product, importance to foreign trade, etc., there is no way for a court to establish objective criteria as to what is significant and what is not. A court may simply go with its gut, meaning that if a judge is unfamiliar with an industry (such as genetic counseling or eyebrow threading) or disfavors an industry (*e.g.*, tattooing and body piercing, gunsmithing, pawn shops), new or unusually intrusive regulation of those industries is less likely to have "significant political and economic consequences" than if the regulation was directed at a more commonly known or favored industry.

gone horribly off the rails by torturing common statutory language to reach uncommon interpretations.[36]

In this case, it was never clear whether the Major Questions Doctrine was necessary. By its own terms, the Major Questions Doctrine requires more than a statutory interpretation that would regulate common but previously unregulated acts. Indeed, an early Clean Water Act case saw a district court hold that U.S. Navy aerial bombing training in Vieques, Puerto Rico involved "accidental bombings of the navigable waters" which, strictly speaking, involved the discharge of a pollutant (bombs) from a point source (aircraft) into navigable waters.[37] The question there was not whether a literal reading of the Clean Water Act required the U.S. Navy to obtain discharge permits in order to train; the Navy's obligation to do so was never even questioned. The only issue was whether the district court had the equitable discretion to allow the Navy to continue training while it obtained its Clean Water Act permits.[38] The Clean Water Act's regulation of U.S. Navy training was both significant and surprising, given the importance of the training to national security and the unlikelihood that Congress had bombing runs in mind when passing the Clean Water Act, but it apparently created no conflict with national defense priorities.

The difficulty with both the district court and the Fourth Circuit opinions is that both courts presumed that a conflict between the Clean Water Act and fisheries regulations made a non-textual interpretation necessary. For instance, the district court would not adopt "an interpretation of the Clean Water Act to ban all bycatch discard from a fishing vessel" as this "would be in tension with the Magnuson-Stevens Act's specific directive to Regional Fishery Management Councils to prepare plans for fisheries conversation that only minimize bycatch and bycatch mortality."[39] It even assumed (incorrectly) that EPA could not create a less onerous general permit for bycatch.[40] The Fourth Circuit believed that "[i]f we sided with Fisheries, the immediate consequence would be to simply ban the shrimpers from throwing their bycatch into Pamlico Sound."[41] Both courts were wrong on this account.

The courts forgot that the Clean Water Act does not "ban" discharges; it bans discharges without a permit.[42] An EPA permitting scheme for trawling and bycatch *could* create a conflict with state and federal fisheries regulations, but a conflict is not inevitable. The question of a potential conflict must be viewed from two time periods, the short term and the long term. In the short term, if the plaintiffs prevailed on the merits, the district court would not be required to ban any commercial fishing activities as it, and the Fourth

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[36] *See*, *e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (Food & Drug Administration interpreted "drug" to include cigarettes and smokeless tobacco even though the Food, Drug, and Cosmetic Act charges the administration with ensuring that regulated drugs are safe and effective); *Nat'l Fed'n of Independent Business v. OSHA*, 142 S. Ct. 661 (2022) (Occupational Safety & Health Administration imposed a COVID-19 vaccine mandate on an estimated 84 million Americans as an "occupational safety or health standard"); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (EPA interpreted "best system of emission reduction" to effectively dictate a shift from fossil-fuel electricity generation to wind and solar generation while enacting a carbon cap-and-trade program that Congress considered but refused to pass).

[37] *Weinberger v. Romerco-Barcelo*, 456 U.S. 305, 307-08 (1982).

[38] *Id*. at 309-11. In fact, the district court noted that "[i]t would be a strained construction of unambiguous language for the Court to interpret that the release or firing of ordnance from aircraft into the navigable waters of Vieques is not ' … any addition of any pollutant … from any point sources …', particularly in view of the broad rather than narrow interpretation given to this type of statute" and required a discharge permit even though EPA "does not appear to have any regulation which provides for the issuance of a … permit under circumstances such as herein presented" and there was no evidence of "any measurable deleterious effects on the environment, or on the quality of the surrounding waters." *Barcelo v. Brown*, 478 F. Supp. 664, 646 (D. P.R. 1979) (quoting *United States v. Standard Oil Co.*, 384 U.S. 224 (1966)).

[39] 560 F. Supp. 3d at 1002; *see also id*. at 1000 (asserting that federal fisheries statutes should not be "'controlled or nullified'" by the Clean Water Act); *id*. at 1002 (plaintiffs' "interpretation of the Clean Water Act" would "ban all bycatch discard from a fishing vessel").

[40] *Id*. EPA and delegated state programs likely have the authority to issue general permits for bycatch. *See generally*, 40 C.F.R. § 122.28 (EPA standards for general NPDES permits); *id*. § 123.25(a)(11) (incorporating requirements of § 122.28 into state permitting programs).

[41] Slip Op. at 12, n. 8; *see also id*. at 10 (the existence of a "distinct regulatory scheme" for fisheries management "suggests that we should expect clear authorization from Congress before finding that it was effectively displaced by the Clean Water Act").

[42] *See* 33 U.S.C. § 1311(a).

Circuit, believed.[43] The Supreme Court held in *Weinberger v. Romero-Barcelo* that courts are not obligated to deliver whatever relief plaintiffs demand.[44] Courts retain full equitable power to fashion an appropriate remedy, including an order allowing the defendants to continue shrimp trawling until they obtain a Clean Water Act permit. The district court that originally heard the U.S. Navy bombing case *refused* to prohibit "further military activities in Vieques until such time as there is compliance with all such [Clean Water Act] violations."[45] Therefore, the short-term prospect of banning trawl fishing or throwing back bycatch did not need to be a factor in the courts' analyses.

The long-term question of a potential conflict is much trickier. Although plaintiffs demanded that the district court impose reductions on bycatch, in the long term it would be the permitting authority that determines what conditions to impose on fishing practices. But the Major Questions Doctrine reaches an unusual question in this case: in assessing whether the Clean Water Act would create a conflict with other regulations or authorities, how does a court evaluate EPA regulations that do not currently exist? In all other Major Question Doctrine cases, agencies have not only exerted the authority to regulate but had finalized complex regulations involving billions of dollars in compliance costs or significant intrusions into peoples' lives.[46] This case, however, is a Clean Water Act citizen suit where "EPA has never sought the authority to regulate bycatch" and "[i]ndeed, the EPA does not even seek it now. Instead, Fisheries tries to foist this authority on it."[47] In such a situation, if a court insists on implementing a Major Questions Doctrine analysis, is it bound to do its best to make two potentially competing regulatory schemes co-exist? And, if it must, then should it assume that future regulations will involve a light touch or a heavy one?

It is certainly possible for EPA to impose a minimal regulatory burden that avoids conflicts with federal or state fisheries regulations, such as by issuing a general permit requiring compliance with pre-existing regulations on bycatch.[48] However, EPA would always have the power to do more. Even if EPA initially imposed light conditions on a general permit, it may change course in the future and impose significant or conflicting requirements. In fact, one may find the notion that EPA would defer to state or federal fisheries agencies, year after year, administration after administration, implausible. It may require commercial fishermen to obtain individual permits—a lengthy and costly process subject to litigation—impose limits on bycatch, ban fishing methods, or create whatever other conditions it chose.

It is not clear what the answer should be or, otherwise, whether the Major Questions Doctrine even has a place in citizen suits where no agency regulations are available for analysis. It is clear, however, that an overuse of the Major Questions Doctrine—where it is applied to cases that can be resolved on other grounds or where its application is arguably based on what individual judges find to be "significant" regulation or not—can damage its legitimacy. This is especially true for judges that, in all other contexts, would deride the use of non-textual devices, such as legislative history, to "interpret" a statute in a manner contrary to its plain meaning. Should the Major Questions Doctrine become an overused and eventually discredited fad, courts will lose a valuable tool for those instances where agencies use unorthodox interpretations to regulate far beyond what anyone ever intended.

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[43] The plaintiffs requested an injunction prohibiting the defendants from shrimp trawling "by either eliminating the destruction of non-target species or reducing that destruction to *de minimis* levels" and an order to "regulate and decrease the levels of bycatch destroyed by Defendant Trawling Companies." Complaint, Case No. 20-cv-00151, Doc. 1 (Aug. 4, 2020) at 16-17.

[44] 456 U.S. 305 (1982).

[45] *Barcelo*, 478 F. Supp. at 705.

[46] *See*, *e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (EPA would dictate electricity generation, requiring a shift from fossil fuels to wind and solar production); *Nat'l Fed'n of Independent Business v. OSHA*, 142 S. Ct. 661 (2022) (OSHA COVID-19 vaccine mandate); *Texas v. EPA*, Case No. 22-1031 (D.C. Cir.) (challengers argue EPA is improperly using fuel economy standards to end the sale of conventional vehicles and mandate electric vehicles).

[47] Slip Op. at 12 (footnote omitted). This point is further illustrated plaintiffs raising at oral argument the possibility of EPA creating a general permit for bycatch discharges—a remedy far less stringent than what they demanded—but were not well versed enough to discuss EPA's legal authority at that time. *Id*. at 14, n. 11. This is not a problem when an agency has already presented proposed and final rules, responded to public comments, and has briefed the questions of its own authority itself.

[48] There are obvious downsides to even this minimalist approach. By incorporating compliance with fisheries regulations into a Clean Water Act permit, citizen plaintiffs could file suits to enforce alleged violations of those fisheries regulations, including violations of the Magnuson-Stevenson Act—something Congress likely never anticipated under either statute.