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In NCLA Win, Fifth Circuit Tosses Back NMFS Rule Trying to Track Charter Boats Without a Warrant

Mexican Gulf Fishing Company, et al. v. U.S. Department of Commerce, et al.

Washington, DC (February 23, 2023) – In a landmark win for charter boat fishermen across the Gulf of Mexico, the U.S. Court of Appeals for the Fifth Circuit has [set aside](#) a controversial [Final Rule](#) issued by the National Marine Fisheries Service (NMFS), which required 24-hour GPS tracking of recreational charter boat fishing vessels and reporting of confidential economic data. As Judge Jennifer Walker Elrod wrote, “in promulgating this regulation, the Government committed multiple independent Administrative Procedure Act violations, and very likely violated the Fourth Amendment.” The ruling is major for many reasons, including that the government tried to claim that charter boat fishing is a “closely-regulated industry” to which the Fourth Amendment does not apply.

NCLA represents more than 1,300 federally permitted charter boat owners in the class-action lawsuit, *Mexican Gulf Fishing Company v. U.S. Department of Commerce*. The Final Rule required each charter boat to be “equipped with NMFS-approved hardware and software with a minimum capability of archiving GPS locations.” The Rule would have required charter boats to install onboard an NMFS-approved Vessel Monitoring System (VMS) tracking device—an “anchor bracelet”—that continuously transmits the boat’s GPS location to NMFS, whether the boat is being used for a charter-fishing trip or for something else. Charter boat operators “are responsible for purchasing the VMS units,” which the Final Rule estimated would cost upwards of \$3000 plus a monthly service fee of \$40 to \$75. NCLA argued this 24-hour GPS surveillance was not only unnecessary and unduly burdensome, but also that this requirement violated the Fourth Amendment by searching without probable cause or a warrant, exceeded the authority granted by the Magnuson-Stevens Act (MSA), and was arbitrary and capricious in violation of the Administrative Procedure Act (APA). NCLA also complained that the rule required reporting economic data that had nowhere been specified by the agencies in proposing the rule for comment.

The Fifth Circuit agreed with NCLA’s analysis and held that the GPS-tracking requirement was unlawful for “several independently sufficient reasons.” These include (1) that the “unambiguous language of the Magnuson-Stevens Act does not authorize the regulation;” (2) “the Government failed to respond to public comments expressing concerns of personal privacy violations stemming from GPS surveillance;” (3) “the Government failed to rationally consider the associated costs and benefits;” and (4) the Final Rule cannot withstand APA review because there was improper notice of the data the agency planned to collect. Regarding the contention that the Government failed to address Fourth Amendment concerns in public comments, Judge Elrod emphasized that “the Government fail[ing] to identify this particular concern from the public comments borders on incredible.”

Charter boats operating in the Gulf of Mexico are small businesses. They account for less than one percent of Gulf fishing. NCLA commends the Fifth Circuit for recognizing the financial and privacy costs associated with NMFS’s ill-conceived regulation. The Court also correctly held that the agencies could not state vaguely that they sought “other” socio-economic data and then require purely economic data reporting like the cost of fuel and how much passengers were charged. In highlighting how the Government failed to connect the GPS-tracking requirement with any legitimate conservation purpose, Judge Elrod wrote, “What benefits does the Government point to in response? Next to nothing.”

NCLA released the following statements:

“The rights of all charter boat fishing businesses in the Gulf of Mexico have been vindicated. Just because they have fishing permits does not let Big Brother track them 24 hours a day. The agencies were utterly dismissive of the rights of more than a thousand of these boat owners, but the Fifth Circuit was having none of it.”

— **John J. Vecchione, Senior Litigation Counsel, NCLA**

“Since this rulemaking began, the Government has ignored massive privacy costs that its rule placed on charter fisherman in the Gulf. As the Fifth Circuit held, government agencies are not free to duck hard questions, nor may they avoid considering a rule’s costs and benefits. They tried to do so here and got slapped down hard.”

— **Kara Rollins, Litigation Counsel, NCLA**

For more information visit the case page [here](#) and watch the case video [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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