October 15 2021

Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the October 2021 issue of *Ocean and Coastal Case Alert*.

The Case Alert is a monthly newsletter highlighting recent court decisions impacting ocean and coastal resource management. (NSGLC-21-03-10).

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FIRST CIRCUIT

Relentless Inc. v. U.S. Dep't of Com., No. CV 20-108 WES, 2021 WL 4256067 (D.R.I. Sept. 20, 2021).

Several New England commercial herring fishers filed suit over a rule promulgated under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) requiring them to pay for at-sea monitors. The suit's allegations included that the rule violated the MSA, and the Commerce Clause of the U.S. Constitution. The U.S. District Court for the District of Rhode Island concluded that the monitoring rule is authorized by § 1853 of the MSA. Section 1853(b)(8) authorizes observers in FMPs. Further, § 1853(a) states that FMPs must include "conservation and management measures" that are "necessary and appropriate" to "prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery." At-sea monitors collect data to ensure that the conservation measures put in place are followed and help prevent overfishing. Next, the court considered the plaintiffs' argument that the monitoring rule violated the Commerce Clause by requiring them to participate in the market for at-sea monitors. The court was not persuaded by this argument, noting that the plaintiffs are voluntarily in the commercial herring fishing market and free to pursue commercial fishing in a manner that would put them beyond the scope of the monitoring rule. The court granted the defendants' motion for summary judgment.

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THIRD CIRCUIT

New Jersey

United States ex rel. Rafi Khatchikian and Ivan Torres v. Port Imperial Ferry Corp., No. CV2162388KMAME, 2021 WL 4705008 (D.N.J. Oct. 7, 2021).

Port Imperial Ferry Corporation, d/b/a New York Waterway, operates a fleet of commercial ferries and multiple boat maintenance facilities in New York and New Jersey. Two former employees brought suit against New York Waterway under the Clean Water Act (CWA), claiming the company and other defendants dumped raw sewage, boat fuel, oil, and other materials into the Hudson River and other waterways. The plaintiffs also alleged that the defendants falsely certified compliance with environmental regulations to obtain government grants and terminated an employee in retaliation for whistleblowing. The defendants filed a motion to dismiss. The court partially granted the motion. The

court dismissed claims that the company falsely certified environmental compliance, finding that the claims lacked sufficient detail to survive a motion to dismiss. The court also dismissed the claims of retaliation under the False Claims Act, noting that the defendants did not have notice of protected conduct; therefore they cannot have retaliated based on that conduct. The court denied the motion to dismiss the CWA violation claim and ordered further discovery regarding whether the plaintiffs met the pre-suit notice requirement under the CWA.

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FOURTH CIRCUIT

North Carolina

North Carolina v. Raimondo, No. 2:20-CV-59-FL, 2021 WL 4270098 (E.D. N.C. Sept. 20, 2021).

The State of North Carolina sought judicial review of the National Oceanic and Atmospheric Association's approval, despite the state's objection, of a seismic survey to be conducted by WesternGeo in the Atlantic Ocean along the North Carolina coastline. North Carolina argued that the decision violated the Coastal Management Zone Act and Administrative Procedure Act because the proposed seismic survey would adversely affect several uses and resources of the state's coastline, including fishing, tourism, research, and endangered species. The defendants argued that the state did not have standing in the case. The court disagreed, finding that the NOAA decision caused injury to the state in its unique position. However, between the time of the approval and the judicial review of the decision, WesternGeo decided not to conduct the seismic survey. The court concluded that, because the seismic survey was no longer proceeding forward, the decision and its judicial review were now moot. The court dismissed the action.

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N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, No. 4:20-CV-151-FL, 2021 WL 4254856 (E.D. N.C. Sept. 17, 2021).

North Carolina Coastal Fisheries Reform Group (NCCFRG) and several individuals sued several corporate owner-operator shrimp trawlers (trawlers), alleging that they violated the Clean Water Act (CWA) and Public Trust Doctrine (PTD) by discharging pollutants and dredged materials into navigable waters without a permit. The court had to determine whether the alleged casting of bycatch back into the coastal waters and alleged resuspension of sediments incidental to shrimp trawling constitute a discharge of pollutants into navigable waters under the CWA. The court concluded that the plaintiffs failed to state a CWA claim. The court found that, even accepting the resuspension of sediment as a pollutant, the complaint failed to draw a reasonable inference that the pollutant is discharged *into* navigable waters. The court also found that fishery management in state coastal waters, including bycatch and discard, is a state concern and not controlled by the CWA's general prohibition of unpermitted discharge. The court noted that the Magnuson-Stevens Act recognizes that some bycatch discard will be needed for regulatory reasons. Additionally, the court determined that, because the NCCFRG only set forth statements without evidence, it could not reasonably infer that the trawlers engage or have engaged in discharge of dredged materials requiring a permit under the CWA. Further, the court concluded that the NCCFRG could not bring suit for violations of the PTD because they were not the Attorney General or acting on the state's behalf. Lastly, the court would not grant NCCFRG leave to amend its complaint because doing so would be futile, i.e., clearly insufficient and frivolous on its face, because it could not withstand a motion to dismiss.

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FIFTH CIRCUIT

Texas

W. Gulf Marine, Ltd. v. Tex. Gen. Land Office, No. 14-19-00708-CV, 2021 WL 4472502 (Tex. App. Sept. 30, 2021).

West Gulf Marine (WGM) owns two lots on the bay side of Galveston Island, both of which have eroded over time and are now partially submerged by water. The Texas General Land Office (GLO) claimed title of submerged portions of the lots for the State of Texas (the State). WGM sued GLO for trespass to resolve the title dispute as to the submerged lands. The trial court concluded that the state owns the submerged lands and dismissed the case with prejudice for lack of jurisdiction. WGM appealed, arguing that it had title to the submerged lands and, therefore, the court had jurisdiction. The court determined that when the Republic of Texas (the Republic) declared its independence from Mexico in 1836, the Republic did not divest itself of title of submerged lands and they remained public lands owned

Mexico in 1836, the Republic did not divest itself of title of submerged lands and they remained public lands owned by the state. The court also determined the joint resolution and act authorizing the sale of the lots that WGM now owns lacked plain and positive language indicating the Republic's intent to transfer title of any the submerged lands. Moreover, WGM never presented any extrinsic evidence indicating such. Therefore, the court, affirming the trial court's decision, concluded that the state, not WGM, owned the submerged lands, and thus, the court did not have jurisdiction.

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NINTH CIRCUIT

Upper Missouri Waterkeeper v. U.S. Env't Prot. Agency, No. 19-35898, 2021 WL 4568069 (9th Cir. Oct. 6, 2021).

An environmental organization challenged the U.S. Environmental Protection Agency's (EPA) approval of the Montana Department of Environmental Quality's variance from Montana's base water quality standards for nitrogen and phosphorous nutrient pollutant discharges under the Clean Water Act (CWA). The Ninth Circuit found the EPA was permitted to consider compliance costs in deciding whether to grant a variance from Montana's approved water quality standards. The court held that EPA reasonably interpreted the section of the CWA governing review of states' water quality standards and variance requests. The court also found that EPA's regulation governing variances did not require compliance with the highest attainable condition at the outset of the variance's term. Finally, the EPA's regulation governing variances did not require compliance with base water quality standards by the end of the variance's term.

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Inland Empire Waterkeeper v. Corona Clay Co., Nos. 20-55420, 20-55678, 2021 WL 4258829 (9th Cir. Sept. 30, 2021).

Two affiliated nonprofit groups brought a Clean Water Act (CWA) citizen suit against Corona Clay Company, asserting the recreational and aesthetic injuries of three members. A National Pollutant Discharge Elimination System (NPDES) permit is required when discharge from a point source flows directly into waters of the United States, or when there is functional equivalent of a direct discharge. The plaintiffs raised one discharge violation claim, specifically that Corona illegally discharged pollutants into waters of the United States outside the terms of its NPDES permit, and two procedural violation claims, namely that Corona violated its NPDES permit by failing to monitor that discharge and report violations. Corona admitted that its stormwater discharge flows indirectly into Temescal Creek, a tributary of the Santa Ana River that flows into the Pacific Ocean. The court held that if the required jurisdictional discharge has occurred, a CWA citizen suit could be premised on ongoing or reasonably anticipated monitoring or reporting violations. Therefore, the court vacated the trial court's judgment and remanded the case for further proceedings in accord with the court's interpretation of the intervening U.S. Supreme Court opinion *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020). The court reasoned that to meet the jurisdictional requirement established in *County of Maui*, the trial court must determine whether Corona's indirect discharges are the functional equivalent of a direct discharge into waters of the United States, or whether a jurisdictional discharge can otherwise be established.

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Food & Water Watch v. EPA, No. 20-71554, 2021 WL 4203496 (9th Cir. Sept. 16, 2021).

Concentrated Animal Feeding Operations (CAFOs) produce animal manure, which can lead to the discharge of pollution into waterways via both ground- and surface water. The Clean Water Act (CWA) prohibits the discharge of pollutants into water of the United States unless authorized by a National Pollutant Discharge Elimination System (NPDES) permit. Two environmental groups challenged the U.S. Environmental Protection Agency's (EPA) issuance of a general NPDES Permit for CAFOs in Idaho, arguing that its issuance was arbitrary, capricious, and in violation of law because it failed to include a sufficient monitoring provision to ensure compliance with its effluent limitations. The CAFO general permit prohibits discharges from production areas and dry weather discharges from land-application areas. The court noted that without requirements to monitor waste containment structures for underground discharges or runoff from irrigated CAFO fields, there is no way to ensure compliance with the permit's zero-discharge requirements. Therefore, the court vacated the CAFO general permit and held that the EPA's issuance of the permit was arbitrary, capricious, and in violation of law.

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Washington

Fish Northwest v. Thom, No. C21-570 TSZ, 2021 WL 4744768 (W.D. Wash. Oct. 12, 2021).

A nonprofit group sued several federal agencies, including the National Marine Fisheries Service (NMFS), the Bureau of Indian Affairs (BIA), the U.S. Fish and Wildlife Service (USFWS), and the U.S. Department of the Interior (DOI), and their administrators alleging the agencies violated the Endangered Species Act (ESA) in managing Puget Sound salmon. The agencies filed a motion to dismiss the claims. The court granted the motion to dismiss with leave to amend several claims, including the claim that NMFS violated Section 7(a)(2) by failing to ensure "no jeopardy" of listed species and claims related to the 2021 Biological Opinion (BiOp) and Incidental Take Statement. The court dismissed with prejudice the claims related to a 2020 BiOp, against BIA for engaging in § 7 ESA consultation, and that NMFS and USFWS failed to consult on agency actions in 2020. The court dismissed the claim alleging failure to enforce the without prejudice.

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