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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the September 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-21-03-09).

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SECOND CIRCUIT

Cangemi v. United States, No. 19-1076, 2021 WL 4057350 (2d Cir. Sept. 7, 2021).

In 1926, a property owner constructed jetties at the Lake Montauk Harbor to stabilize the inlet and provide access to the harbor. In 1942, the owner deeded the jetties to the Town of Montauk, which then granted the federal government an easement to use and develop the jetties as part of the Federal Navigation Project (FNP). Today, the U.S. Army Corps of Engineers (Corps) maintains the jetties pursuant to the FNP; the town does not control or manage them. In 2012, a group of property owners west of the jetties sued Montauk and the United States, alleging that the jetties were a private and public nuisance because of the resulting erosion, and the jetties caused an unauthorized entry and acceleration of waters on their property effecting trespass. The district court dismissed all claims, and the property owners appealed. On appeal, the court found that the Corps was afforded discretion in managing the FNP because no specific action was proscribed. Because the town did not control the jetties, the town was not obligated to remedy the erosion. Moreover, knowledge of the erosion after the transfer of ownership did not give rise to a duty to abate the erosion. Therefore, the property owners' nuisance claims failed. The property owners' trespass claim also failed because creation of the jetties, which disrupted the flow of water, was not an immediate or inevitable consequence of Montauk transferring the jetties to the federal government.

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FOURTH CIRCUIT

S.C. Coastal Conservation League v. U.S. Army Corps. of Eng'rs, No. 2:17-CV-3412, 2021 WL 3931908 (D.S.C. Sept. 2, 2021).

The U.S. District Court for the District of South Carolina recently rejected a challenge to federal permits issued for the construction of I-73, a new interstate highway to Myrtle Beach. In 2017, the South Carolina Coastal Conservation

construction of I-73, a new interstate highway to Myrtle Beach. In 2017, the South Carolina Coastal Conservation League (League) brought suit against the agencies approving the project, including the Environmental Protection Agency and the U.S. Army Corps of Engineers (Corps), alleging violations of the Clean Water Act, the National Environmental Policy Act, and the Administrative Procedure Act. The League alleged that the interstate project would cost billions to construct and unreasonably destroy hundreds of freshwater wetlands. The plaintiffs claimed that the agencies did not adequately analyze the environmental impact of, and other alternatives to, the I-73 plan. The court disagreed, ruling that the agencies reasonably concluded that a Supplemental Environmental Impact Statement was not required. Moreover, the court found that neither the environmentalists' reliance on various reports nor its arguments regarding the Corps' NEPA analysis were sufficient to show that the Corps made a clear error of judgment when it determined that the South Carolina Department of Transportation clearly demonstrated a lack of practicable alternatives. Therefore, the district court granted summary judgment in favor of the agencies.

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FIFTH CIRCUIT

Louisiana

State v. Dep't of Commerce, No. 21-1523, 2021 WL 4125058 (E.D. La. Sept. 9, 2021).

To promote sea turtle conservation, the National Marine Fisheries Service (NMFS) promulgated a rule requiring Turtle Excluder Devices (TEDs) on skimmer trawl vessels greater than forty feet in length operating in inshore waters ("the Final Rule"). Because of the effects of COVID-19, the agency postponed the effective date until August 1, 2021. On August 11, the State of Louisiana sought a preliminary injunction enjoining enforcement, arguing that the effective date was arbitrary and capricious, in violation of the Administrative Procedure Act, because it failed to consider the amount of time necessary for shrimpers to come into compliance. The court found that NMFS did not consider that net makers would need time to hand-make each TED after receiving training. The court also noted that Hurricane Ida exasperated supply chain problems. The court determined that failing to extend the effective date would cause irreparable harm to the economy, predicting a reduction in gross revenues of approximately $2.9 million for the shrimping industry. The court concluded that a brief delay in implementation would allow for compliance and not result in unreasonable risk to sea turtles. Therefore, the court granted the injunction, postponing enforcement in Louisiana inshore waters until February 1, 2022.

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EIGHTH CIRCUIT

Minnesota

In the Matter of Enbridge Line 3 Replacement Project, 2021 WL 3853422 (Minn. App. Aug. 30, 2021).

The Minnesota Court of Appeals rejected a challenge to the Minnesota Pollution Control Agency's (MPCA) decision to issue a Clean Water Act § 401 certification for "Line 3," a 340-mile crude oil pipeline that stretches from Alberta, Canada to the Wisconsin coast on Lake Michigan. The plaintiffs claimed that MPCA failed to consider alternative routes for the pipeline, improperly determined that the project would comply with state water quality and wetlands standards, improperly limited the scope of its authority under § 401 to discharges and construction impacts, and improperly shifted the burden of proof to the challengers. The court concluded that the certification was not affected by legal error and was supported by substantial evidence in the record.

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NINTH CIRCUIT

Sackett v. U.S. Env't Prot. Agency, 2021 WL 3611779 (9th Cir. Aug. 16, 2021).

The Ninth Circuit recently granted summary judgment in favor of the Environmental Protection Agency (EPA) after landowners brought suit for declaratory and injunctive relief under the Clean Water Act (CWA), claiming that their residential lot near a lake did not contain wetlands subject to the CWA. In 2004, the plaintiffs purchased a soggy residential lot near Idaho's Priest Lake, where plaintiffs planned to build a home. Shortly after they began placing sand and gravel fill on the lot, the owners received an administrative compliance order from the EPA stating the property contained wetlands subject to the CWA, and they were required to remove the fill and restore the property to its natural state. The landowners brought suit against the EPA in 2008, challenging the agency's jurisdiction over the property. Subsequently, the EPA withdrew its compliance order. In the present case, the Ninth Circuit found the EPA's withdrawal of the compliance order did not moot the case, and substantial evidence supported the EPA's conclusion that the lot contained wetlands. Moreover, the court applied the significant nexus analysis to determine if the property was covered by the CWA and found substantial evidence supporting the EPA's conclusion that wetlands shared a significant nexus with the lake. Therefore, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the EPA.

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California

Earth Island Inst. v. Regan, No. 20-CV-00670-WHO, 2021 WL 3487120 (N.D. Cal. Aug. 9, 2021).

The U.S. District Court for the Northern District of California recently held that the Environmental Protection Agency (EPA) violated the Clean Water Act (CWA) and the Administrative Procedure Act (APA) by failing to issue a final rule to the National Contingency Plan (NCP) regarding the removal of chemicals following an oil spill. Following the BP Deepwater Horizon Oil Spill in 2010, the EPA began reevaluating the role of dispersants in oil spill response. In 2011, the EPA's Office of Inspector General issued a report finding that the EPA had not updated the NCP since 1994 to include up-to-date testing procedures for dispersant efficacy at the time of the spill. Earth Island filed suit in 2020, alleging that the EPA failed to incorporate scientific developments to assure that the NCP is effective and can minimize damage. The plaintiffs also claimed that while the EPA submitted a portion of the final rule in 2021, it had been six years since the public comment period on the Proposed Rule closed and the agency failed to issue a final rule on the other two components of the Proposed Rule. The court agreed that the EPA failed to perform its nondiscretionary duty to issue a final rule to update the NCP as required by the CWA. The district court also found the EPA's delay unreasonable and thus, a violation of the APA. While the court granted summary judgment in favor of the plaintiffs, it nevertheless adopted the EPA's proposed deadline of May 31, 2023 to take final action on the Proposed Rule.

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Oregon

N.W. Envtl. Defense Ctr. v. U.S. Army Corps Of Eng'rs, No. 3:18-CV-00437-HZ, 2021 WL 3924046 (D. Or. Sept. 1, 2021).

The U.S. District Court for the District of Oregon recently issued a final opinion and order directing the U.S. Army Corps of Engineers (Corps) to take significant remedial measures at multiple dams in Oregon to protect threatened Upper Willamette River Chinook salmon and steelheads (collectively "salmonoids"). The court provided detailed requirements for the Corps to undertake with respect to the Willamette Valley Project (WVP), a network of thirteen federally owned dams and related facilities in the Willamette River Basin. In 2020, the court found that the Corps was violating the Endangered Species Act (ESA) as it was jeopardizing the survival and recovery of salmonoids while operating the WVP. Further, the court found that the Corps' and the National Marine Fisheries Service's (NMFS) repeated delay in implementing measures required for fish passage at various dams in the WVP under the ESA and a 2008 biological opinion (BiOp) to be a substantial procedural violation of the ESA for the Corps and the Administrative Procedure Act for NMFS. In the present matter, the environmentalist plaintiffs sought injunctive relief to remedy the Corps' and NMFS' substantive and procedural ESA violations. The court primarily supported the plaintiff's proposed remedial measures, finding that the Corps' failure to provide adequate fish passage and mitigate water quality issues was causing substantial, irreparable harm to the salmonids. Pursuant to the court's order, the Corps must make every effort to comply with the various water quality standards governing the WVP and lower elevation of reservoirs at several dams. Moreover, the Corps must prioritize flow and spill over hydropower production. The court also is requiring the formation of an expert panel to draft implementation details of each of the

production. The court also is requiring the formation of an expert panel to draft implementation details of each of the requirements under the order to ensure timeliness and expertise in meeting the ends that the court determined equity demands. The court granted in part and denied in part the plaintiffs' Motion for Injunctive Relief.

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ELEVENTH CIRCUIT

Florida

Gammons v. Royal Caribbean Cruises Ltd., No. 20-22240-CIV, 2021 WL 4059408 (S.D. Fla. Sept. 7, 2021).

While on a ziplining excursion in St. Lucia, a cruise passenger injured his leg when his foot got caught below the platform. The passenger booked the excursion through the cruise line, Royal Caribbean. The passenger sued Royal Caribbean for negligent failure to warn, alleging that the cruise company knew or should have known of the risk of harm because it participated in the approval process for the excursion. The court reasoned that because the passenger could not show that there was no assistance provided, safety briefing, or other unreasonably dangerous circumstances when Royal Caribbean did the approval or the inspection, the allegations were insufficient to provide notice, an essential element of the claim. The passenger also sued the two St. Lucia-based companies that operated the excursion ("excursion companies"), alleging that they were negligent. Because the excursion companies are St. Lucian corporations without offices in Florida, the court dismissed the claims for lack of jurisdiction. The passenger asserted a third claim against Royal Caribbean and the excursion companies based on their joint venture. The contract expressly contradicted the passenger's joint venture claim; therefore, the court dismissed the claim with prejudice.

Mai Lis Bahr v. NCL (Bahamas), Ltd., No. 19-CV-22973-BLOOM, 2021 WL 4034575 (S.D. Fla. Sept. 9, 2021).

A passenger slipped and fell walking down the allegedly wet and slippery gangway while exiting the cruise ship at the port. The passenger sued the cruise line, alleging that it breached the duty of care by failing to maintain slip resistance material and warn of the slippery conditions. Prior to the trip, the passenger was aware that rain was forecasted and dressed for rain. Prior to passenger disembarkation, the cruise line placed warning signs that stated, "Caution, wet floor," at the top and bottom of the gangway. The cruise line asserted that it uses the warnings signs regardless of the weather to elicit heightened awareness as passengers disembark. The passenger and the cruise line agreed that environmental factors could have played a role in the passenger's fall. The cruise line moved for summary judgment. The court determined the hazard the signs warned against was connected to the precise hazard that allegedly caused the passenger to fall. Therefore, the court denied summary judgment, finding a genuine dispute of material fact as to whether the cruise line had notice of the condition.

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