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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the April 2022 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-22-03-04).

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FIRST CIRCUIT

Maine

Maquoit Bay, LLC v. Dep't Marine Res., No. Cum-21-113, 2022 WL 964167 (Me. Mar. 31, 2022).

Maquoit Bay, LLC opposed Mere Point Oyster Company's (MPOC) application for a ten-year aquaculture lease for a site located approximately 1,250 feet from its shorefront property. The Maine Department of Marine Resources (DMR) approved the lease, finding that it would not unreasonably interfere with ingress or egress or with navigation. The company sought review of DMR's decision. The court affirmed the approval, finding that no riparian owners would be affected because no one owned private property within 1,000 feet of the proposed lease. On appeal, the court found that DMR specifically considered how the proposed lease would affect Maquoit Bay's ingress or egress. Moreover, the court also determined that DMR was not required to consider practicable alternatives when making the lease decision. Further, the court determined that the company did not meet its burden of showing that the lease interfered with commercial fishing. Additionally, the court deferred to DMR's designation because it was reasonable. Therefore, the court affirmed the grant of MPOC's lease.

Opinion Here

SECOND CIRCUIT

New York

Mahoney, et al. v. U.S. Dep't of Interior, No. 22-CV-01305-FB-ST, 2022 WL 1093199 (E.D.N.Y. Apr. 12, 2022).

Several Hamptons residents sought a preliminary injunction to halt onshore trenching for the South Fork Wind Farm and South Fork Export Cable Project. The plaintiffs alleged that the onshore digging would disrupt perfluoroalkyl and polyfluoroalkyl substances (PFAS) present in the groundwater, contributing to the existing PFAS pollution in the wells on their properties. The U.S. District Court for the Eastern District of New York denied the motion, finding the plaintiffs failed to show that they would suffer irreparable harm from the digging.

Opinion Here

FIFTH CIRCUIT

Louisiana

Crooks v. State ex rel. Dep't of Nat. Res., No. 2021-633, 2022 WL 794167 (La. App. 3 Cir. Mar. 16, 2022).

Several landowners brought a class action lawsuit against the Louisiana Department of Natural Resources seeking damages for increased flooding across their property in the Catahoula Basin. The trial court awarded the landowners damages, which they sought to compel via writ of mandamus that the court denied based upon Section 10 of Article XII of the Louisiana Constitution and Louisiana Statute 13:5109(B). On appeal, the court determined that the landowners could not enforce the judgment by ordinary means because the state's property cannot be seized and sold to satisfy the judgment. Therefore, the court granted the writ of mandamus. Additionally, the court found that although there was no justifiable excuse for the state's failure to comply with the final judgment, the trial court did not err by denying sanctions for contempt. Further, because Louisiana law authorizes attorney's fees in a class action, and because the landowners were awarded attorney's fees, the court awarded the landowners attorney's fees for work done on the appeal.

Opinion Here

SIXTH CIRCUIT

Barber v. Charter Twp. of Springfield, No. 20-2297, 2022 WL 1077308 (6th Cir. Apr. 11, 2022).

Blanche Barber sought a preliminary injunction to prevent the Town of Springfield and Oakland County Parks and Recreation departments (collectively, Springfield) from removing a dam near her property, asserting that removal constitutes an unconstitutional taking and trespass. Springfield filed a motion for a judgment on the pleadings, which the court granted, finding that it did not have power to hear Barber's claims. Barber then filed a civil rights action under 42 U.S.C. § 1983, alleging that Springfield violated the Fifth Amendment by dismissing her claims. The court concluded that Barber's claims were ripe because Springfield made a final decision to remove the dam, and because under precedent, plaintiffs may sue for injunctive relief before a physical taking happens. The court determined that Barber is likely to suffer an injury as soon as the dam is removed because removal will change the flow of water on Barber's property, making the harm certainly imminent. Further, the court recognized that these harms as unique to her property and sufficiently particularized. Therefore, the court found that Barber faces a risk of future harm that is sufficiently imminent and substantial, thus giving her standing to seek injunctive relief.

Opinion Here

Ohio

State ex rel. Yost v. Rover Pipeline, L.L.C., No. 2020-0091, 2022 WL 802884 (Ohio Mar. 17, 2022).

Pursuant to § 401 of the Clean Water Act (CWA), Rover Pipeline, LLC (Rover) applied for certification with Ohio that any discharge from its pipeline into the state's navigable waters would comply with the CWA. In accordance with § 401, Ohio must act on a certification request within one year of it being submitted. When pollutants from the pipeline were discharged into Ohio's navigable waters, the Ohio Attorney General sued, alleging that Rover violated the CWA. Rover moved to dismiss, which the trial court granted, concluding that Ohio failed to act on its certification request within the CWA's one-year period. The appellate court affirmed, finding that Ohio failed to timely act on the certification request. The state appealed again. The court determined that the one-year period commences when the application is submitted, not when deemed complete. Further, because more than one year passed between Rover filing the application and Ohio approving it, the court found that Ohio waived its right to participate in the certification process but did not waive its rights unrelated to certification. Additionally, the court stated that whether the unlawful discharge allegations in the complaint fall outside the scope of § 401 certification is a legal determination that the trial court must address. Therefore, the court reversed and remanded to trial court to determine whether any allegations are outside the scope of § 401 certification.

Opinion Here

NINTH CIRCUIT

Friends of Alaska Nat'l Wildlife Refuges v. Haaland, No. 20-35721, 2022 WL 793023 (9th Cir. Mar. 16, 2022).

In 2009, Congress approved a land exchange with King Cove Corporation, whereby the United States would transfer a portion of the Izembek National Wildlife Refuge (Refuge) to construct a road between the communities of King Cove and Cold Bay to be used primarily for health and safety purposes. The authorization mandated that the approval expired in seven years unless a permit had been issued. In 2013, Interior Secretary Jewell denied the exchange, determining that construction of a road through the Refuge would lead to significant degradation of ecological resources that would not be offset by the protection of other lands. Although the 2009 authorization had expired, in 2018, Interior Secretary Zinke approved the exchange, relying on the Alaska National Interest Lands Conservation Act (ANILCA), which allows the Secretary to exchange lands with Alaska Native village corporations. Several environmental groups challenged the approval; the district court vacated the exchange, finding it to be arbitrary and capricious under the Administrative Procedure (APA). In 2019, Secretary Bernhardt reconsidered and approved the exchange. The same environmental groups again challenged the exchange, which the district court again vacated, finding that it did not advance ANILCA's purpose. On appeal, the court found that because one of ANILCA's purposes is to address the economic and social needs of Alaskans, Secretary Bernhardt properly considered those needs in approving the exchange. Moreover, the court determined that because Secretary Bernhardt made new assessments of the facts that changed policy priorities, there were valid justifications offered for his actions, and accordingly, he did not violate the APA by deviating from prior policy. Further, the court concluded that the exchange did not authorize a road and thus was not subject to ANILCA's special procedures for transportation systems. Therefore, the court reversed and remanded.

Opinion Here

Alaska

Strong v. State, No. A-13269, 2022 WL 983433 (Alaska Ct. App. Apr. 1, 2022).

Clinton and Tuie Strong were cited for fishing in closed waters as their gillnet was outside the boundary line of the Ugashik fishing district. The Strongs asserted a necessity defense, explaining that they were fishing in legal waters until they cut the engine and drifted into closed waters while attempting to repair the hydraulic system in their fishing boat. The trial court convicted them of fishing in closed waters. On appeal, the court determined the potential damage to property and destruction of salmon resulting from a hydraulic spill constituted a "significant evil," and thus the Strongs acted to avoid a significant evil, establishing the first prong of the necessity defense. Further, the court concluded that the lower court should have determined whether the Strongs' violation meaningfully impacted the ecological goals of fishing regulations under these particular circumstances. Therefore, the court remanded the case for reconsideration of the harms reasonably foreseeable from the Strongs' behavior and a determination of whether they proved the necessity defense.

Opinion Here

D.C. CIRCUIT

District of Columbia

Nat. Res. Def. Council, Inc. v. Coit, No. 20-CV-1150 (CRC), 2022 WL 971288 (D.D.C. Mar. 31, 2022).

In 2013, several conservation groups petitioned the National Marine Fisheries Service (NMFS) to list two species of river herring, the alewife and blueback herring, as threatened under the Endangered Species Act (ESA). After thorough analysis, NMFS declined to list the species. The conservationists claimed the decision was arbitrary and capricious under the Administrative Procedure Act. The court vacated the decision and remanded to the agency for further analysis. In 2019, NMFS again determined that a threatened or endangered listing was not warranted. On appeal, the court determined that NMFS provided adequate explanation for the foreseeable future timeframes. The court partially granted NMFS's motion for summary judgment and remanded for further explanation as to why NMFS found the Southern New England blueback herring population to not be a distinct population segment and did not assess the population under NMFS's significant portion of its range policy.

Opinion Here

Ctr. for Biological Diversity v. Regan, No. 1:21-cv-00119 (RDM), 2022 WL 971067 (D.D.C Mar. 30, 2022).

Several environmental groups sued the Environmental Protection Agency (EPA), arguing that the EPA's decision to give immediate effect to its approval of Florida's Clean Water Act (CWA) § 404 program and its failure to codify Florida's § 404 program violated the Administrative Procedure Act (APA). Florida intervened and moved to dismiss

for lack of standing, which the court denied. However, the court found that the environmentalists did not have standing to challenge the EPA's asserted violation of the APA based on their inability to seek reconsideration of the agency's decision. Moreover, the court concluded that it requires further briefing to determine whether the environmentalists' claim challenging the immediacy of the program is redressable. Additionally, the court determined that if the failure to codify rendered the action void, then the unlawful operation of Florida's § 404 program would inflict cognizable harms on the environmentalists. Therefore, the court found that the environmental groups had standing to bring their claim regarding the EPA's failure to codify and assessed the merits. Accordingly, the court concluded that the merits failed because the EPA published the rule in the Federal Register pursuant to the APA.

Opinion Here

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