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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the May 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-22-03-05).

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FIRST CIRCUIT

Blackstone Headwaters Coal., Inc. v. Gallo Builders, Inc., No. 19-2095, 2022 WL 1261510 (1st Cir. Apr. 28, 2022).

In 2013, the Massachusetts Department of Environmental Protection issued a unilateral administrative order to a Worchester development site, alleging that it had violated Massachusetts law by allowing discharge to runoff into the Blackstone River. This resulted in a settlement. Nearly three years later, Blackstone Headwaters Coalition (Blackstone), an environmental nonprofit, sued the developers under the Clean Water Act (CWA) citizen suit provision. Blackstone asserted that the developers failed to obtain an Environmental Protection Agency (EPA) permit and thus violated its general construction permit. The district court granted summary judgment on the defendants' claim that 33 U.S.C. 1319(g)(6)(A) precludes a citizen suit that seeks to apply a "civil penalty" for a CWA violation. On appeal, Blackstone argued that the exclusion does not apply to a citizen suit that seeks declaratory or injunctive relief. The First Circuit agreed and held that the limitation in § 1319(g)(6)(A) bars only a citizen suit that seeks to apply a civil penalty and not a citizen suit for declaratory and prospective injunctive relief to redress an ongoing violation.

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THIRD CIRCUIT

Delaware

Delmarsh, LLC v. Env't Appeals Bd., No. 248, 2021, 2022 WL 1463720 (Del. May 10, 2022).

The Delaware Department of Natural Resources and Environmental Control (DNREC) denied a property owner's request to designate lots as non-wetlands. The property owner appealed to the state's Environmental Appeals Board (EAB), which affirmed DNREC's denial. The property owner sought review and the superior court affirmed the denial.

On appeal, the Delaware Supreme Court also affirmed. The court found that DNREC's photographic evidence was properly admitted; the lots were properly designated as wetlands; and, a taking did not occur.

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NINTH CIRCUIT

Safari Club Int'l v. Haaland, 31 F.4th 1157 (9th Cir. 2022).

The state of Alaska and Safari Club each sued U.S. Department of the Interior Secretary Haaland, alleging that the U.S. Fish and Wildlife Service (FWS) violated the Alaska National Interest Lands Conservation Act (ANILCA), the National Wildlife Refuge System Improvement Act of 1997, the Administrative Procedure Act, and the National Environmental Policy Act (NEPA) by enacting the Kenai Rule, which limits certain hunting practices approved by the state in the Kenai National Wildlife Refuge. Alaska and Safari Club argued that the state, not the federal government, has the authority to regulate hunting on federal lands. The court reasoned that the federal government has control over federal lands. The court determined that ANILCA preserves federal authority over public lands in Alaska. Therefore, the court concluded that FWS may restrict state-authorized hunting in the refuge to conserve wildlife. Moreover, the court concluded that the Kenai Rule was not arbitrary and capricious because FWS rationally established reasons for the rule. The court affirmed the grant of summary judgment in favor of the FWS on all claims.

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San Francisco Herring Ass'n v. U.S. Dep't of the Interior, No. 20-17412, 2022 WL 1464461 (9th Cir. May 10, 2022).

An association representing herring fishermen brought a lawsuit challenging the National Park Service's (NPS) authority to prohibit commercial herring fishing under the Golden Gate National Recreation Area (GGNRA) Act in the GGNRA. The U.S. District Court for the Northern District of California granted NPS's motion for summary judgment. A Ninth Circuit panel affirmed, holding that NPS had statutory authority to enforce its generally applicable commercial fishing prohibition in the GGNRA. The court found that the language and context of the GGNRA Act did not support the plaintiffs' argument that the NPS must acquire a formal property interest in the navigable waters of the GGNRA from the State of California to regulate those waters.

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TENTH CIRCUIT

Allen v. Env't Restoration, LLC, No. 19-2197, 2022 WL 1310904 (10th Cir. May 3, 2022).

While excavating an inactive gold mine in southwestern Colorado, a blowout caused at least three million gallons of contaminated water to release into Cement Creek, which flows into New Mexico. The U.S. Environmental Protection Agency (EPA) took responsibility for the spill. Several plaintiffs sued the EPA and the mine owners in New Mexico and Utah under the Clean Water Act (CWA). The court consolidated the cases into multidistrict litigation centralized in New Mexico. Then, an individual livestock farmer sued for negligence, negligence per se, and gross negligence. The court consolidated the cases into the multidistrict litigation. The mine owners moved to dismiss the farmer's claims, arguing that he failed to file within Colorado's two-year statute of limitations. The court found that the farmer filed within New Mexico's three-year statute of limitations, which the court found applied to the claims, and denied the motion. The court certified the question for interlocutory appeal. On appeal, the court determined that the CWA compels the district court to apply Colorado's statute of limitations to state law claims preserved under the CWA. Therefore, the court reversed and remanded for further proceedings.

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ELEVENTH CIRCUIT

Glob. Marine Expl., Inc. v. Republic of France, No. 20-14728, 2022 WL 1499799 (11th Cir. May 12, 2022).

The Eleventh Circuit recently ruled on a case between Global Marine Exploration, Inc. (GME), a shipwreck salvage company, and the French government. After discovering several shipwrecks off Cape Canaveral, Florida, GME contracted with the State of Florida to conduct salvage activities. GME filed an in rem action over the wreck; however, a federal district court concluded that the identity of the shipwreck was La Trinité, a ship captained by Jean Ribault in the 16th Century, and that the wreck was sovereign property of France. GME then filed suit against France. France moved for dismissal, arguing that the Foreign Sovereign Immunities Act (FSIA), which limits suits on foreign countries in U.S. courts, precluded the suit. The federal district court disagreed with GME's argument that a "commercial activity" exception allowing a suit under the FSIA applied. GME appealed the district court's dismissal. The Eleventh Circuit agreed with GME that the exception applies because GME's action is "based upon" France's commercial activity in the United States. The court reversed the district court's dismissal and remanded the case to the district court.

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Florida

Owen v. Carnival Corp., No. 18-25372-CIV-ALTONAGA, 2022 WL 1404602 (S.D. Fla. May 4, 2022).

Susan Owen, a Mississippi citizen, boarded Carnival's Breeze and sailed from Galveston, Texas to ports in the Gulf of Mexico and the Caribbean. During her voyage, Owen developed an eye condition, causing her to visit the ship's doctor, who prescribed her medication. Owen's condition worsened, resulting in permanent impairment, so she filed suit in Florida, alleging negligence, joint venture, vicarious liability, agency, and assumption of risk. The doctor filed a motion to dismiss for lack of personal jurisdiction. None of the treatment occurred in Florida, in Florida-waters, or in consultation with any Florida-based Carnival personnel. The doctor is a Colombian national who resides in the United Kingdom and works as an independent contractor for Carnival. Owen argued that personal jurisdiction should be imputed on the doctor because of Carnival's contacts with Florida. The court determined that whether a joint venture exists is a case-specific question, that Owen failed to produce sufficient evidence to establish that a joint venture exists, and that jurisdiction should be conferred on the doctor. Moreover, the court concluded that a typical employer/independent contract relationship existed, not a joint venture. Therefore, the court granted the motion to dismiss.

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INTERNATIONAL TRADE

District of Columbia

NTSF Seafoods Joint Stock Co. v. United States, Nos. 20-00104, 20-00105, 2022 WL 1375140 (Ct. Int'l Trade Apr. 25, 2022).

NTSF Seafoods Joint Stock (NTSF), a Vietnamese fish producer, sued the U.S. Department of Commerce (Commerce), arguing that a 2003 antidumping order that imposed duties on frozen fish imported from Vietnam to compensate for it being sold at less than normal value was excessive. Catfish Farmers of America (CFA) also sued, arguing that the order was not harsh enough, challenging the use of India market for economic comparison and recommending Indonesia as a comparable market. In response, Commerce conducted an administrative review, during which it found NTSF did not fully cooperate and thus Commerce supplemented the record with partial facts and used India and the highest farming factor values as supported by substantial evidence as a permitted substitute. NTSF argued that Commerce erred in the calculations. The court found that Commerce did not abuse its discretion because NTSF did not seek to correct the error in the preliminary determination and retained the error by including the values in its recommended equation for the final determination, and because NTSF did not allege the calculation

as erroneous until the review was over. The court denied NTSF's motion for judgment on the agency record and granted judgment in favor of Commerce and CFA. The court also concluded, despite the CFA's challenges, that the use of India as a significant producer of comparable merchandise was supported by substantial evidence but remanded to determine whether Indonesia is also economically comparable to Vietnam and whether the Indian factors are the best available as compared to the Indonesian data to supplement the record. Therefore, the court granted in part and remanded in part CFA's motion for judgment on the record.

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