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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the April 2023 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-23-03-04).

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FIRST CIRCUIT

Relentless, Inc. v. U.S Dep't of Com., No. 21-1886, 2023 WL 2534593 (1st Cir. 2023).

The owners of two fishing vessels that harvest herring (collectively, "Relentless") challenged the National Marine Fisheries Service's (NMFS) authority to promulgate a final rule under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) that requires fishing vessels to carry monitors on board in certain circumstances. The final rule also requires vessel owners to pay for monitors in certain instances by contracting with private entities. The U.S. District Court for the District of Rhode Island ruled in favor of the government, concluding that the final rule is a permissible exercise of NMFS's authority and is otherwise lawful. Relentless appealed. On appeal, Relentless argued that the final rule violated the MSA, the Administrative Procedure Act (APA), the Regulatory Flexibility Act (RFA), and the Commerce Clause of the U.S. Constitution. The court found that because Congress expressly authorized NMFS to require vessels to carry monitors, and because NMFS's interpretation of that authority does not depend on its payment of the costs, the final rule is authorized by the MSA. Further, the rule does not violate MSA's National Standards. The court also found that because NMFS had a rational basis for adopting the rule, the rule is not arbitrary and capricious in violation of the APA. The court concluded that the rule does not violate the RFA because NMFS considered and responded to comments and evaluated the impact of its action on small businesses. Lastly, because Relentless is not being forced to participate in the market, the rule does not violate the Commerce Clause. Accordingly, the First Circuit Court of Appeals affirmed the district court's ruling.

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Massachusetts

United States v. Patriot Marine, LLC, No. 21-CV-10243-AK, 2023 WL 2814550 (D. Mass. Apr. 6, 2023).

Following an oil spill off the coast of Woods Hole, Massachusetts in January 2018, the Commonwealth of Massachusetts and the United States brought separate suits under the Oil Pollution Act (OPA) and the Massachusetts Oil and Hazardous Material Release Prevention and Response Act. The court combined the complaints and, in 2022, granted declaratory judgment for the United States and Massachusetts. The court found Patriot Marine to be the

responsible party liable for removal costs under the OPA and state law. The United States moved for summary judgment on the issue of whether Patriot Marine could limit its liability under the OPA. The court granted the United States' motion for partial summary judgment, agreeing that the issue had already been litigated by a hearing officer, and Patriot Marine would not qualify to limit its liability pursuant to the OPA because it failed to report the incident.

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FOURTH CIRCUIT

South Carolina

Braden's Folly, LLC v. City of Folly Beach, No. 2022-000020, 2023 WL 2778717 (S.C. Apr. 5, 2023).

The property owner of two small, contiguous, developed coastal lots brought suit for a regulatory taking against the City of Folly Beach, South Carolina. The city had amended an ordinance to require certain contiguous properties under common ownership, including the owner's property, to be merged into a single, larger property. The owner alleged that the ordinance interfered with its investment-backed expectation. The lower court granted the property owner's motion for summary judgment, and the city appealed. The South Carolina Supreme Court reversed. The court conducted the U.S. Supreme Court's *Penn Central* test for evaluating whether a regulatory taking has occurred, which considers: 1) the economic impact of the regulation on the claimant; 2) the extent to which the regulation has interfered with distinct investment-backed expectations; and 3) the character of the governmental action. The court held that the economic impact of ordinance weighed heavily in favor of finding that ordinance did not amount to regulatory taking; the extent to which ordinance interfered with owner's investment-backed expectations did not weigh in favor of either party; and the character of the ordinance weighed in favor of finding that ordinance did not amount to regulatory taking. The court therefore concluded that the ordinance did not result in a taking of the plaintiff's property under the *Penn Central* test.

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Virginia

Center for Biological Diversity v. U.S. Maritime Admin. et al., No. 4:21-CV-00132, 2023 WL 2746028 (E.D. Va. Mar. 31, 2023).

To relieve landside congestion along coastal corridors, Congress enacted the U.S. Marine Highway Program authorizing the U.S. Department of Transportation (DOT) to provide grants to projects that develop, expand, or promote marine highway transportation. The Center for Biological Diversity brought a citizen suit alleging that the agency's failure to engage in consultation for the U.S. Marine Highway Program as a whole, as well as the James River Container Expansion Project, which encompasses a critical habitat of the endangered Atlantic sturgeon species, violated the Endangered Species Act (ESA). Section 7 of the ESA requires federal agencies to engage in consultation with either the U.S. Fish and Wildlife Service or the National Marine Fisheries Service when any project or action they authorize, fund, or carry out may affect a listed species or designated critical habitat. The court determined that although consultation for the entire Marine Highway Program is not required under the ESA, the agency is nevertheless required to engage in § 7 consultation of individual projects. Accordingly, the court found that the agency's failure to conduct a consultation of the James River Container Expansion Project to be arbitrary and capricious in violation of the ESA.

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FIFTH CIRCUIT

Harrison County, Mississippi v. U.S. Army Corps of Eng'rs, No. 21-60897, 2023 WL 2644024 (5th Cir. Mar. 27, 2023).

A group of Mississippi municipalities and associations concerned by the increased usage of the Bonnet Carré Spillway

sued the U.S. Army Corps of Engineers for the agency's refusal to prepare a supplemental Environmental Impact Statement (EIS) for the comprehensive flood program encompassing the Spillway. Pursuant to the Administrative Procedure Act (APA) § 706(1), the plaintiffs sought to compel the Corps' preparation of a supplemental EIS as required by the National Environmental Policy Act (NEPA). The Fifth Circuit held that the district court did not err in granting summary judgment to the Corps dismissing plaintiffs' NEPA claims because the Corp was not obligated to prepare a supplemental EIS for the spillway so long as the Corps operated the spillway in accordance with its longstanding plan under the Mississippi River and Tributaries Project. Further, because the Corps had no duty to prepare the supplemental EIS sought by the plaintiffs, plaintiffs did not possess a claim under the APA for unlawful agency inaction, and the Corps was immune from the plaintiffs' suit claiming otherwise.

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Texas

Texas v. U.S. Env't Prot. Agency, No. 3:23-cv-17, 2023 WL 2574591 (S.D. Tex. Mar. 19, 2023).

Texas, Idaho, and eighteen national trade associations (Associations) sought a preliminarily injunction of the federal rule revising the definition of "waters of the United States" under the Clean Water Act (CWA). The new rule would codify a significant-nexus test and impose jurisdiction on all "interstate waters, regardless of their navigability." Texas and Idaho asked the court to enjoin the rule within their borders, while the associations asked the court for a nationwide injunction. The U.S. District Court of the Southern District of Texas primarily focused on two factors to determine whether the court should grant the preliminary injunction: 1) whether there was a "substantial likelihood of success on the merits" and 2) whether there was a "substantial threat of irreparable injury" if the injunction was not granted. The court found because the rule's codification of a significant nexus test and its categorical imposition of jurisdiction on interstate waters were unlikely to withstand judicial review, the claim was likely to succeed on the merits. The court also reasoned that because the states showed that their compliance with a rule unlikely to withstand judicial scrutiny would cause them to expend unrecoverable resources—monetary and otherwise—the states satisfied the irreparable harm factor. The associations, however, failed to prove that the rule would cause them irreparable harm—disqualifying them from relief through preliminary injunction. The court also assessed whether granting the preliminary injunction was in the public interest. Because prior case law provided that "expend[ing] valuable resources and time operationalizing a rule that may not survive judicial review" is against the public interest, the court weighed the public interest factor in the states' favor. Accordingly, the court granted the states' request enjoin the rule within their borders and denied the associations' request for a nationwide injunction.

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SIXTH CIRCUIT

Kentucky

Kentucky v. Envtl. Protection Agency, No. 3:23-CV-00007, 2023 WL 2733383 (E.D. Ky. Mar. 31, 2023).

The Commonwealth of Kentucky, along with various business groups, challenged the promulgation of the federal rule redefining "waters of the United States." The plaintiffs sought to preliminarily enjoin the agencies from enforcing the rule. The court denied the plaintiffs' motions without prejudice, holding that because the rule has not yet been enforced and the plaintiffs failed to prove impending injuries, the plaintiffs' claims are not ripe for judicial review. Accordingly, having found that no standing exists, the court dismissed the plaintiffs' action for lack of jurisdiction *sua sponte*.

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NINTH CIRCUIT

California

Center for Biological Diversity v. Raimondo, No. 3:22-CV-00117, 2023 WL 2530993 (N.D. Cal. Mar. 14,

2023).

The Center for Biological Diversity sued the National Marine Fisheries Service (NMFS) under the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA) concerning commercial fishing operations in the sablefish pot fishery spanning Washington, Oregon, and California. According to the plaintiffs, local endangered and threatened populations of humpback whales easily become entangled in the fishing gear used by commercial fishermen in the sablefish pot fishery, resulting in injury to the whales and occasionally death. The group challenged NMFS's issuance of a permit that authorized the incidental taking of ESA-protected humpback whales in the pot fishery as unlawful pursuant to the MMPA and ESA because NMFS failed to ensure that a take reduction plan for the whales was being developed. NMFS argued that it was not required to develop a take reduction plan for the whales because it lacked the funding to do so, citing § 1387(f)(1) of the MMPA which allows the agency to "set priorities for developing take reduction plans and not develop a reduction plan at all if there is insufficient funds." Relying on principles of statutory interpretation, the court determined that the plain language of § 1387 directs that NMFS "*shall* develop and implement a take reduction plan" for strategic stocks in commercial fisheries that involve occasional incidental injury or death to marine mammals; therefore, NMFS was required by statute to develop a take reduction plan for the incidental taking of humpback whales in the sablefish pot fishery.

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