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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the May 2020 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-20-03-05).

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U.S. SUPREME COURT

Cty. of Maui, Hawaii v. Hawaii Wildlife Fund, No. 18-260, 2020 WL 1941966 (U.S. Apr. 23, 2020).

In a 6-3 opinion, the U.S. Supreme Court held that the federal Clean Water Act (CWA) requires the federal government to regulate some groundwater pollutants that discharge into navigable waters. Environmental groups filed the suit over discharges from a wastewater treatment plant operated by Maui County, Hawaii. The plaintiffs claimed that the discharges violated the CWA because the pollutants were discharged into groundwater that later released into a navigable water. The County argued that discharges are regulated by the CWA only when pollutants are directly discharged into navigable waters. The federal district court ruled in favor of the environmental groups, and the Ninth Circuit affirmed. The appellate court held that when the pollutants are “fairly traceable” to the point source and are more than minimal amounts, the CWA applies. The Supreme Court rejected the “fairly traceable” test. The Court found that the groundwater discharges would fall under the CWA permitting requirements based on a “functional equivalent” standard. Essentially, an “addition” will be regulated under the CWA when directly deposited from a point source or “when the discharge reaches the same result through roughly similar means.”

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FIRST CIRCUIT

Maine

Man Against Xtinction v. Comm'r of Maine Dep't of Marine Res., No. 1:19-CV-00406-LEW, 2020 WL 2114924 (D. Me. May 4, 2020).

The U.S. District Court for the District of Maine denied in part and granted in part a motion to dismiss a plaintiff's claims that the National Marine Fisheries Service acted arbitrarily, capriciously, or not in accordance with the law concerning its regulation of vertical buoy lines and gill nets. The plaintiff had alleged that the fishing gear violates the Endangered Species Act (ESA) due to the threat that it poses to right whales. The court found that the plaintiff could continue with ESA Section 7 and Section 9 claims, but it denied the defendant's motion to consolidate a hearing on the Preliminary Injunction Motion, since the plaintiff had withdrawn that motion.

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Wyman v. United States Surgical Corp., No. 1:18-CV-00095-JAW, 2020 WL 1952815 (D. Me. Apr. 22, 2020).

A lobster and crab fisherman brought claims based on damage he and his business allegedly suffered as a result of shellfish contamination caused by the presence of mercury in the Penobscot River. The successor to the corporation that made the disposal sought summary judgment on the permanent and continuing nuisance and permanent and continuing strict liability causes of action, arguing that they are barred by the applicable six-year statute of limitations. The Court granted summary judgment on most of the claims; however, it denied summary judgment on the continuing nuisance claim and the common law continuing strict liability claim. The court concluded that there is a genuine dispute over whether the alleged nuisance caused by the dumping of mercury is readily abatable.

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Massachusetts

Strahan v. Sec'y, Massachusetts Exec. Office of Energy & Env'tl. Affairs, No. 19-CV-10639-IT, 2020 WL 2079302 (D. Mass. Apr. 30, 2020).

The U.S. District Court for the District of Massachusetts held that the Massachusetts Executive Office of Energy and Environmental Affairs must obtain an incidental take permit before issuing licenses that allow fishermen to deploy vertical buoy ropes (VBRs) in Massachusetts coastal waters. The plaintiff had alleged that the VBRs violate the Endangered Species Act (ESA) due to the threat that they pose to right whales. The court agreed that the VBRs would likely cause further harm to the endangered species. The judge did not immediately enjoin the use of VBRs but noted that the plaintiff may renew the motion for a preliminary injunction if the state agency fails to obtain an incidental take permit within 90 days.

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THIRD CIRCUIT

Pennsylvania

Delaware Riverkeeper Network v. Sunoco Pipeline L.P., No. CV 18-2447, 2020 WL 1888954 (E.D. Pa. Apr. 16, 2020).

Environmental groups claimed that Sunoco Pipeline violated the Clean Water Act by failing to obtain a National Pollutant Discharge Elimination System (NPDES) permit for its stormwater discharges after construction of a natural gas pipeline in Pennsylvania. The U.S. District Court for the Eastern District of Pennsylvania dismissed the suit. The court found the stormwater runoff did not require a NPDES permit, and there was no evidence that the construction violated water quality standards.

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NINTH CIRCUIT

Ctr. for Biological Diversity v. Esper, No. 18-16836, 2020 WL 21821753 (9th Cir. May 6, 2020).

Environmental groups challenged the construction and operation of an aircraft base in Okinawa, Japan, as well as the potential adverse effects of the construction on the endangered Okinawa dugong, a distant relative to the manatee. The Ninth Circuit panel affirmed the district court's grant of summary judgment to the Department of Defense. The panel ruled that the Department took into account the effects of its proposed action on foreign property as required under Section 402 of the National Historic Preservation Act. The panel also held that the Department's finding of "no adverse impact" was not arbitrary and capricious in violation of the Administrative Procedure Act.

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Alaska

Bristol Bay Econ. Dev. Corp. v. Hladick, No. 3:19-CV-00265-SLG, 2020 WL 1905290 (D. Alaska Apr. 17, 2020).

In 2014, the Environmental Protection Agency (EPA) proposed action to prevent the U.S. Army Corps of Engineers

from issuing a permit to allow mining operations in Alaska's Bristol Bay region. The EPA withdrew its proposed action in August 2019. Several groups filed suit. The U.S. District Court for the District of Alaska held that agency's action was an enforcement action and unreviewable under the Administrative Procedure Act.

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D.C. CIRCUIT

District of Columbia

Gulf Restoration Network v. Bernhardt, No. CV 18-1674 (RBW), 2020 WL 1930470 (D.D.C. Apr. 21, 2020).

Environmental groups challenged the Bureau of Ocean Energy Management's (BOEM) decision to hold oil and gas lease sales in the Gulf of Mexico. The U.S. District Court for the District of Columbia granted summary judgment to BOEM. The court held that BOEM did not act arbitrarily and capriciously during its environmental review process. The court denied the plaintiffs' motion for summary judgment and granted the federal defendants' cross-motions for summary judgment.

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COURT OF INTERNATIONAL TRADE

Nat. Res. Def. Council v. United States, Ct. Int'l Trade, No. 18-00055, 2020 WL 1933960 (Ct. Int'l Trade Apr. 22, 2020).

Environmental organizations filed a lawsuit in the Court of International Trade, seeking to protect the vaquita, an endangered porpoise, from the impacts of gillnet fishing. The suit alleged that the Marine Mammal Protection Act required the U.S. government to ban imports of seafood from foreign fisheries whose fishing practices result in incidental killing of a marine mammal in excess of U.S. standards. In March, the National Marine Fisheries Service placed an embargo on the import of Mexican seafood imports caught with gillnets. In light of the agency's decision, the plaintiffs dropped the lawsuit.

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