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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the July 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-22-03-07).

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U.S. SUPREME COURT

West Va. v. EPA, 142 S. Ct. 2587 (June 30, 2022).

After the D.C. Circuit Court vacated the Affordable Clean Energy (ACE) Rule proposed by the Trump administration, West Virginia and several groups petitioned the U.S. Supreme Court for review of the U.S. Environmental Protection Agency's (EPA) authority to broadly regulate greenhouse gas emissions. The ACE Rule would have replaced the Obama administration's Clean Power Plan (CPP), which aimed to reduce carbon emissions from power plants by shifting toward cleaner sources of energy. The CPP was never implemented due to an unfavorable U.S. Supreme Court ruling that stayed the plan. However, the Court had agreed to hear the challenge to the CPP, and in June, the Court ruled that the Clean Air Act § 111(d) did not grant the EPA authority to regulate greenhouse gas emissions as it had in the CPP. The Court decided the case using the Major Question Doctrine, holding that if the EPA wanted to regulate greenhouse gas emissions at the industry level using a generation shifting approach, it needed clear authorization from Congress and could not rely on the language in § 111(d).

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FIRST CIRCUIT

Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers Loc. Lodge 207 v. Raimondo, No. 21-1873, 2022 WL 2679972 (1st Cir. July 12, 2022).

A union of lobster fishermen filed a lawsuit against the National Marine Fisheries Service (NMFS) alleging that the agency had failed to consider accurate data when regulating the use of fishing equipment. In August 2021, NMFS issued a regulation prohibiting lobster fishing with vertical buoy lines to prevent the deaths of North Atlantic right whales. The plaintiffs contended that NMFS did not consider alternatives and did not adequately justify the

conclusions reached in creating the new regulation. The court held that the agency had not ignored any relevant data and had provided an adequate explanation for not seeking additional data through different methods such as tracking and tagging whales. The court ruled that NMFS's fishing equipment regulation was not arbitrary or capricious. The court vacated the preliminary injunction issued by the U.S. District Court for the District of Maine and remanded the case for further proceedings.

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Massachusetts

Armstrong v. Sec'y of Energy & Env'tl Affairs, SJC-13210 (Me. July 12, 2022).

Pursuant to its responsibilities under the Public Trust Doctrine, the Massachusetts Department of Environmental Protection (DEP) promulgated regulations regarding the location of buildings located within 100 feet of protected tidelands. The regulations allow the state Secretary of Energy and Environmental Affairs to provide substitute specifications for a Municipal Harbor Plan. The Massachusetts Supreme Judicial Court considered whether the override regulation promulgated by the DEP resulted in an improper delegation of the DEP's public trust responsibilities to the Secretary of Energy and Environmental Affairs. The court upheld the lower court's ruling finding the delegation improper. The court remanded the case for further proceedings.

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SEVENTH CIRCUIT

Illinois

Holm v. Kodat, No. 127511, 2022 WL 2165695 (Ill. June 16, 2022).

Illinois Supreme Court recently ruled on the use of a nonnavigable river in Grundy County, Illinois by riparian property owners. Under Illinois common law, a riparian owner of a nonnavigable waterway has a private property interest to the middle of the waterway that includes a right to exclude others from the property. The plaintiffs claimed they had a right to kayak on the waterway through neighboring properties owned by defendants without permission. The plaintiffs based their arguments on the "reasonable use" doctrine and a previous court decision, *Beacham v. Lake Zurich Property Owners Ass'n*. The court noted that the reasonable use doctrine only applies to consumptive or diversionary use of the water, not recreational use. In *Beacham*, the court held that property owners of land abutting a nonnavigable lake had a right to reasonable use of the full lake. The court reasoned that a nonnavigable lake is distinct from a nonnavigable river or stream and declined to extend the application of *Beacham*. The court concluded that the river was nonnavigable and, therefore, the plaintiffs had no public right of access. The Illinois Supreme Court affirmed the judgement of the lower courts.

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EIGHTH CIRCUIT

Iowa

Garrison v. New Fashion Pork LLP, No. 21-0652, 2022 WL 2347783 (Iowa June 30, 2022).

An Iowa property owner appealed a lower court's dismissal of his claims against his neighbors for trespass, nuisance, and drainage issues caused by their confined animal feeding operations (CAFOs). On appeal, the landowner argued that Iowa's right-to-farm statute, which grants farms immunity against nuisance claims, violated the state constitution's unalienable rights clause. The court disagreed. In a 4-3 decision, the court upheld the right-to-farm statute and overturned a 2004 case that had identified limited exceptions to the statute. In its opinion, the court tossed out its three-part test for assessing exceptions because the required fact-based analysis was an outlier compared to other states, led to high litigation costs for CAFOs nuisance claims, and was difficult to implement. The Iowa Supreme Court affirmed that the lower court properly granted the defendants' motion for summary judgment with prejudice.

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NINTH CIRCUIT

Alaska

United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv., No. 3:21-CV-00247-JMK, 2022 WL 2222879 (D. Alaska June 21, 2022).

The U.S. District Court of Alaska consolidated two challenges to a National Marine Fisheries Service (NMFS) rule that would have closed a large portion of Cook Inlet's waters, a highly productive salmon fishery in Alaska, to commercial fishing. The United Cook Inlet Drift Association (UCIDA) argued that the rule was arbitrary and capricious under the Administrative Procedure Act in barring commercial fishing and permitting recreational fishing, inconsistent with controlling interpretations of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), and violated the National Environmental Policy Act (NEPA) and Administrative Procedure Act. A second group of fishermen alternatively claimed the rule conflicted with constitutional clauses. The court accepted UCIDA's arguments, with the exception of the NEPA claim, and thereby granted one of their motions for summary judgment in full and another in part. The court found the agency's decision to exclude the recreational salmon fishery from the rule was arbitrary and capricious. The court also held that the rule did not comply with MSA National Standards 1, 2, 4, and 8. The second group of fishermen's motion for summary judgment was denied for lack of standing. The final NMFS rule was vacated, with the matter remanded to the agency.

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California

Ctr. for Biological Diversity v. Haaland, No. 19-CV-05206-JST, 2022 WL 2444455 (N.D. Cal. July 5, 2022).

After the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) issued new regulations for implementation of the Endangered Species Act (ESA), the Center for Biological Diversity filed a lawsuit claiming the rules violated the ESA, Administrative Procedure Act (APA), and the National Environmental Policy Act (NEPA). One rule modified how the Services add, remove, and reclassify endangered or threatened species and critical habitat designation. Another rule eliminated the FWS's policy of automatically extending "take" protections to threatened species. A third rule changed the interagency consultation process. The CBD requested that the rules be remanded to the agencies and set aside. The court held this was appropriate because the agencies were unlikely to adopt the same rules again since, after the administration change, FWS and NMFS had stated they intended to revise the regulations. The court granted FWS and NMFS request that the case be remanded for new rules to be promulgated.

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D.C. CIRCUIT

Sierra Club v. FERC, 38 F.4th 220, 2022 WL 2310616 (D.C. Cir. June 28, 2022).

The Federal Energy Regulation Commission (FERC) issued a Certificate Order authorizing Mountain Valley, LLC to construct a new pipeline from Virginia to North Carolina. The Sierra Club filed suit in response, challenging the Certificate Order on the grounds that FERC acted unlawfully when treating Mountain Valley, which had existing pipelines, as a new market entry and that FERC's environmental review under the National Environmental Policy Act (NEPA) was inadequate. The court held that FERC's treatment of Mountain Valley as a new market entry was appropriate because Mountain Valley did not have any operational pipelines at the time. The court then held that the Environmental Impact Statement was adequate because FERC discussed mitigation measures to reduce the impact of the pipeline and included a sufficient discussion of the cumulative impacts of the project. The court ultimately rejected the Sierra Club's petition for review.

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District of Columbia

Ctr. for Biological Diversity v. Raimondo, No. CV 18-112 (JEB), 2022 WL 2643535 (D.D.C. July 8, 2022).

The Center for Biological Diversity (CBD) filed suit against the National Marine Fisheries Service (NMFS) for violating the Endangered Species Act (ESA), Marine Mammal Protection Act (MMPA) and Administrative Procedure Act (APA) when preparing the Atlantic Large Whale Reduction Plan. CBD claimed that NMFS violated the MMPA by not issuing a negligible impact finding and by not reducing right whale mortality and injury below the potential biological removal level. CBD also claimed that NMFS violated the ESA by allowing unpermitted takes of the right whale, not considering the full effects of the new plan, and failing to issue an incidental-take statement. The case was originally brought in 2014 and after finding the documents inadequate the court remanded to NMFS and stayed the proceedings while the new assessments were prepared. The court ruled that NMFS had impermissibly failed to issue a negligible impact finding under the MMPA and failed to find that there would be a reduction in takes of right whales rather than just setting the take limit to zero. Additionally, the court ruled that NMFS had failed to establish that the 2021 Final Rule and the 2021 Biological Opinion would reduce takes of right whales in the appropriate timeframe. The court remanded the case back to NMFS to submit additional documents to remedy the existing errors.

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