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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the June 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-23-03-06).

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U.S. SUPREME COURT

Sackett v. Env't Prot. Agency, 143 S. Ct. 1322 (2023).

In May, the U.S. Supreme Court issued an opinion narrowing federal jurisdiction over wetlands under the Clean Water Act (CWA). Landowners originally brought the suit in 2008 alleging the Environmental Protection Agency (EPA) lacked jurisdiction to issue a CWA compliance order requiring restoration of land the agency claimed was protected wetlands. Following years of litigation, the U.S. Supreme Court held that wetlands must be an indistinguishable part of a body of water that itself constitutes “waters of the United States” under the CWA to be protected under the CWA. The Court did not defer to the EPA’s interpretation of the rule defining “the waters of the United States” to include wetlands adjacent to covered waters if wetlands possessed significant nexus to traditional navigable waters. The Court found that wetlands located on the landowner’s lot did not constitute “waters of the United States.”

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Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023).

The U.S. Supreme Court upheld Proposition 12, a state law prohibiting the sale in California of whole pork products by a seller who knows or should know that the meat came from a breeding pig or their offspring that was “confined in a cruel manner.” The National Pork Producers Council and the American Farm Bureau Federation had filed the lawsuit on behalf of their members, claiming Proposition 12 violated the Commerce Clause of the U.S. Constitution. The Court rejected the arguments made by the organizations, and the case was dismissed.

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FIRST CIRCUIT

Massachusetts

Nantucket Residents Against Turbines v. U.S. Bureau of Ocean Energy Mgmt., No. 1:21-cv-11390-IT, 2023 WL 3510955 (D. Mass. May 17, 2023).

The Nantucket Residents Against Turbines (ACK RATs) brought suit alleging that the Bureau of Ocean Energy Management and the National Marine Fisheries Service's decisions approving a Vineyard Wind Project off of the coast of Martha's Vineyard and Nantucket were in violation of the Endangered Species Act (ESA) and National Environmental Policy Act (NEPA) because they were based on an inadequate environmental assessment and would harm the endangered Northern Atlantic Right Whale population. The U.S. District Court for the District of Massachusetts held that the plaintiffs could not establish standing for their NEPA air quality and emission claims because the plaintiffs only brought forward generalized concerns regarding harm to their health and the environment. The district court granted summary judgement in favor of the defendants, holding that the plaintiffs failed to demonstrate that the agencies violated the ESA or NEPA by issuing an inadequate biological opinion and environmental impact statement for the offshore energy project.

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Man Against Xtinction v. Cosco Container Lines Amerika, Inc., No. 22-cv-10722-DJC, 2023 WL 3457905 (D. Mass. May 15, 2023).

Richard Strahan, who identifies as "Man Against Xtinction," filed a lawsuit alleging that companies that conduct shipping activities in the Massachusetts Bay were shipping large vessels through areas designated as critical habitat of endangered whales. He alleged that the actions of the shipping companies are in violation of the Endangered Species Act (ESA) and constitute a public nuisance. The U.S. District Court for the District of Massachusetts granted the defendant's motion to dismiss, holding that Strahan lacked standing. The district court held that, even assuming Strahan had standing, he failed to state a claim because his ESA complaint did not allege any particular facts of imminent taking of an endangered whale caused by the defendant shipping companies. Finally, the district court declined to exercise supplemental jurisdiction over Strahan's public nuisance claim.

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Seafreeze Shoreside, Inc. v. U.S. Dep't of Interior, No. 1:22-cv-11091-IT, 2023 WL 3660689 (D. Mass. May 25, 2023).

Several fisheries brought suit against the Bureau of Ocean Management and the National Marine Fisheries Services to challenge their approval of the Vineyard Wind Project, claiming it violated the Marine Mammal Protection Act, the Endangered Species Act, the Outer Continental Shelf Lands Act, and the National Environmental Policy Act. The plaintiff fisheries filed a motion for stay to postpone the decision of defendant agencies to approve the Vineyard Wind construction and operation plan until all judgements and appeals are completed. Alternatively, plaintiffs requested a preliminary injunction to revert to the status quo before the construction and operation plan was approved. The U.S. District Court for the District of Massachusetts denied the plaintiff's motion for stay and preliminary injunction. It held that the plaintiffs could not demonstrate a likelihood that they would succeed on the merits and that plaintiffs would not suffer irreparable harm absent a stay. Additionally, the district court held that a stay would substantially injure the Vineyard Wind Project, and that the construction of the offshore energy project is in the public interest due to climate impacts.

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THIRD CIRCUIT

Pennsylvania

United States v. Pozsgai, No. 88-6545, 2023 WL 3611527 (E.D. Penn. May 23, 2023).

In 1988, the U.S. Department of Justice, on behalf of the U.S. Army Corps of Engineers (Corps) and the

Environmental Protection Agency, filed both a criminal and civil action against the Pozsgais' for filling in the protected wetlands on their property without a permit in violation of the Clean Water Act. As a result, John Pozsgai was sentenced to three-year imprisonment, five-year probation, and a \$200,000 fine, which was later reduced. Additionally, the Pozsgais were permanently enjoined from further filling in the wetland without a permit and ordered to implement a restoration plan submitted by the Corps. In 2023, after little mandated restoration had taken place, the United States requested the court to nullify its previous orders and replace them with a consent decree providing that Britton Industries, a mulching company, will purchase the property and facilitate restoration of the site. The U.S. District Court of the Eastern District of Pennsylvania granted the consent decree, holding that it was fair and reasonable, especially after thirty-five years of litigation.

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SIXTH CIRCUIT

United States v. Michigan, 68 F.4th 1021 (6th Cir. 2023).

The Coalition to Protect Michigan Resources (Coalition) moved to intervene as the United States, Michigan, and five federally recognized tribes were finalizing a new decree determining who manages the Great Lakes fisheries. The Coalition alleged that Michigan intends to abandon key provisions of the previous decree, including promoting biological conservation, allocating fishery resources between sovereigns, and establishing fishing zones. The U.S. District Court for the Western District of Michigan denied the Coalition's motion to intervene, holding that the motion was untimely. The U.S. Court of Appeals for the Sixth Circuit affirmed, holding that the three-year delay between the negotiations and the motion weighed against timeliness.

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NINTH CIRCUIT

California

L.A. Waterkeeper v. State Water Res. Control Bd., Cal. Rptr. 3d, 2023 WL 3774587 (Cal. Ct. App. 2 Dist.

June 2, 2023).

The Los Angeles Waterkeeper filed petitions for writs of mandate against the Regional Water Quality and State Water Resources Control Boards after they renewed permits to allow four publicly owned treatment works (POTWs) to discharge millions of gallons of treated wastewater into the Los Angeles River and Pacific Ocean daily rather than recycle the water for reuse. The Waterkeeper also alleged that the Regional Board issued the permits without making environmental impact reports (EIR) required under the California Environmental Quality Act. The trial court held that the State Board had not met its constitutional and statutory duty to prevent the waste of water and, therefore, granted the writs of mandate against it. The trial court granted the Regional Board's demurrer, holding that its responsibility was to manage water quality only, not water use. In its original opinion, the California Court of Appeal of the Second District affirmed the trial court's judgement in favor of the Regional Board and reversed the writs of mandate against the State Board. In its second opinion, the appellate court reaffirmed its original holdings. It also clarified that the Regional Board is only responsible for creating and implementing water quality control plans, not waste or unreasonable use, so its permitting authority only extends to ensuring that POTWs safely discharge treated wastewater. Additionally, it explained that since § 21002 of the Water Code merely stated a policy to be carried out through the EIR process, which the permits in the case are exempt from, the Regional Board was not required to comply with that provision.

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COURT OF INTERNATIONAL TRADE

Ctr. for Biological Diversity, et al. v. Haaland, No. 22-00339, 2023 WL 3994447 (Ct. Int'l Trade June 14, 2023).

Three environmental groups filed suit to compel the Department of the Interior to respond to its petition regarding the “take” and “trade” of endangered totoaba in Mexico, which threatens the endangered vaquita porpoise. The groups claimed that the take and trade of the species diminishes the effectiveness of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), a treaty that protects endangered wildlife from international trade. On May 18th, the Secretary of the Interior certified to the President that “nationals of Mexico are engaging in taking and trade of the totoaba fish ... and the related incidental take of vaquita ... that diminishes the effectiveness of [CITES].” Under the Pelly Amendment, the President has sixty days to inform Congress of any conservation actions taken or reasons why action is not taken. Following the Secretary’s certification, the parties agreed to dismiss the case with prejudice.

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