

March

14  
2023

# Ocean and Coastal Case Alert

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

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## THIRD CIRCUIT

### Pennsylvania

***Clean Air Council v. Dep't of Env't Prot.***, No. 73 MAP 2021, 74 MAP 2021, 2023 WL 2145657 (Pa. 2023).

Environmental groups appealed the Department of Environmental Protection's (DEP) decision to grant Sunoco Pipeline permits for construction of pipelines. Following litigation, the Environmental Hearing Board (EHB) denied the parties' applications under the Clean Streams Law (CSL) for attorney's fees and costs incurred during the appeal. The CSL allows the EHB to order parties to pay attorney's fees and costs as reasonable. The EHB based its denial of the parties' applications for attorney's fees and costs on the fact that no bad faith was shown by the opposing party. The Pennsylvania Supreme Court determined that this was an error because an exclusionary bad-faith requirement is inconsistent with the CLS's remedial intent. While the court determined that the EHB had correctly denied the plaintiffs' applications for attorney's fees and costs, the court decided to vacate and remand the case for further Board proceedings because the EHB should not have applied a bad-faith requirement in its assessment of whether a party should be awarded attorney's fees and costs.

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## FOURTH CIRCUIT

***No Mid-Currituck Bridge-Concerned Citizens v. North Carolina Dep't of Transp.***, No. 22-1103, 2023 WL 2172205 (4th Cir. 2023).

In 2019, the North Carolina Department of Transportation and the Federal Highway Administration (agencies) approved a plan to construct a bridge over North Carolina's Currituck Sound that would connect the Northern Outer Banks with the state's mainland. Concerned groups filed suit, asserting that the agencies violated the National

Environmental Policy Act (NEPA) by approving the project because the agencies did not issue an additional Environmental Impact Statement (EIS) and the “no-build” alternative to the construction plan used traffic and development projections that improperly assumed the bridge would be built. The district court granted summary judgment in favor of the agencies. The plaintiffs appealed, asserting the same arguments. The agencies are required to publish an EIS when “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impact” arise. Because the agencies had already issued an EIS for the project years earlier, and because the agencies sufficiently considered new information pertaining to traffic forecasts, expected growth, and sea-level rise projections, the Fourth Circuit concluded that the agencies’ decision to not prepare an additional EIS was not arbitrary or capricious. Further, the agencies no-build alternative considered both the lower level of development and traffic projections that would occur without the bridge, showing that the agencies did not mislead the public with this alternative in violation of NEPA. Accordingly, the Fourth Circuit affirmed the district court’s judgment.

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## FIFTH CIRCUIT

***Mexican Gulf Fishing Co. v. U.S Dep’t of Com.***, No. 22-30105, 2023 WL 2182268 (5th Cir. 2023).

Several charter fishing companies that operate in the Gulf of Mexico filed a class action complaint challenging the promulgation of a final rule requiring charter boat owners to install vessel monitoring systems (VMS) that would record and transmit GPS-location information. The final rule also required charter boat owners to report information about fishing yields and certain economic information related to charter trips. The companies sought an injunction to prevent the final rule from going into effect. However, the district court denied that motion and granted summary judgment in favor of the government. On appeal, the companies’ challenge was primarily focused on the GPS-tracking requirement, alleging that it violated the Fourth Amendment, exceeded the authority granted by the Magnuson-Stevens Fishery Conservation and Management Act (MSA), and violated the Administrative Procedure Act (APA) by being arbitrary and capricious. While the Fifth Circuit did not reach the constitutionality question, the court concluded that the MSA does not authorize the government to promulgate a GPS-tracking requirement because VMS devices are not “equipment” furthering the regulatory goals of the MSA nor are they “necessary and appropriate” to further those goals. Further, the court held that the rule was arbitrary and capricious in violation of the APA because the government did not 1) address Fourth Amendment issues during the rule’s consideration, 2) rationally consider the associated costs and benefits, nor 3) provide fair notice that it would require the reporting of certain economic information with the final rule. The Fifth Circuit reversed the district court’s judgment and set the final rule aside.

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## NINTH CIRCUIT

### California

***Spencer v. City of Palos Verdes Ests.***, No. B309225, 2023 WL 2237502 (Cal. Ct. App. Feb. 27, 2023).

Cory Spencer, other non-local surfers, and a nonprofit organization (collectively, “Spencer”) experienced harassment from a local surf group when trying to access Lunada Bay, a premier surf spot located in and owned by the City of Palos Verdes Estates. Spencer brought suit against the city, alleging violations of the California Coastal Act (CCA). The trial court entered judgment on the pleadings in favor of the city. On appeal, Spencer alleged that the city violated the CCA by 1) maintaining an unpermitted structure built by the local surf group on its property and 2) conspiring with the local surf group to harass non-locals. Under the CCA, a Coastal Development Permit (CDP) is required for all “development” purposes, defined by the CCA as including “a change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration . . . of any structure. . . .” Spencer alleged that both the structure built on the city’s property by the local surf group and the harassment by the local surf group constituted “developments” under the CCA. The appellate court held that Spencer sufficiently alleged a cause of action that the city, as the landowner, violated the CCA with regard to the structure because the city allowed construction on its

property without a CDP and did not take action to remove the structure despite its ability to do so. The court also concluded that the local surf group's harassment constituted "development" because it affected access to water. Therefore, Spencer sufficiently alleged that the city conspired with the local surf group to harass non-locals and restrict their access to the surf spot in violation of the CCA. The appellate court reversed the trial court's judgment.

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***Gescheidt v. Haaland***, No. 21-CV-04734-HSG, 2023 WL 2250268 (N.D. Cal. Feb. 27, 2023).

Following the decline of the tule elk population in the Tomales Point area of Point Reyes National Seashore due to drought conditions, an advocacy group filed suit. The group alleged that the National Park Service (NPS) violated the Administrative Procedure Act (APA) by failing to update the 1980 General Management Plan for Tomales Point in a timely manner. Both the group and the NPS filed motions for summary judgment. The U.S. District Court for the Northern District of California granted NPS's motion for summary judgment and denied the advocacy group's motion for summary judgment. The court found that the agency did not have a nondiscretionary duty to act on the plan within a certain timeframe and therefore the court could not compel the action under the APA.

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***Los Angeles Waterkeeper v. State Water Res. Control Bd.***, No. B309148, 2023 WL 2237785 (Cal. Ct. App. Feb. 27, 2023).

An environmental group filed petitions for writs of mandate against the State Water Resources Control Board (State Board) and the Los Angeles Regional Water Quality Control Board (Regional Board). The group claimed that the boards violated a duty under the California Constitution and state law by permitting four publicly owned treatment works (POTWs) to discharge treated wastewater without evaluating whether the quantities discharged were reasonable or whether treated wastewater could be recycled or otherwise put to better use, and that the Regional Board issued permits without making findings required under the California Environmental Quality Act. A lower court ruled in favor of the organization with regard to the claims against the State Board and issued writs of mandate. The court dismissed the claims against the Regional Board, finding it had no duty to evaluate the reasonableness of the POTWs' discharges when issuing the permits. On appeal, the court agreed with the lower court's assessment of the Regional Board's duty; however, the court reversed the decision with regard to the State Board. The court concluded that the organization failed to allege that the State Board acted in derogation of duty and thus failed to state a claim.

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***White v. U.S. Army Corps of Eng'rs, et al.***, No. 22-CV-06143-JSC, 2023 WL 2347379 (N.D. Cal. Mar. 3, 2023).

A plaintiff filed suit against the U.S. Army Corps of Engineers, alleging that the agency's operation of a dam resulted in unlawful "taking" of protected salmon species in violation of the Endangered Species Act. The Corps moved to dismiss, arguing that the claims are "prudentially moot" because the agency reinstated the consultation process with the National Marine Fisheries Service. In the alternative, the agency requested a stay pending completion of the consultation. The court denied the Corps' motion, finding a live controversy remained, and a stay was not warranted.

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## D.C. CIRCUIT

### District of Columbia

***Save Long Beach Island et al., v. U.S. Dep't of the Interior et al.***, No. 22-CV-55 (DLF), 2023 WL 2424608 (D.D.C. Mar. 9, 2023).

The U.S. District Court for the District of Columbia dismissed a suit filed by New York and New Jersey residents related to an offshore wind project. The plaintiffs alleged that the U.S. Bureau of Ocean Energy Management (BOEM) violated the Administrative Procedure Act by issuing a memorandum designating certain areas in the New York Bight as "Wind Energy Areas." The residents alleged that BOEM violated the National Environmental Policy Act by failing to conduct an environmental assessment (EA) prior to issuing memorandum and violated the ESA by failing to

consult the National Marine Fisheries Service (NMFS). The court granted the defendants' motion to dismiss, finding an EA was unnecessary at this point because the memorandum did not authorize developers to install turbines. The court granted the plaintiffs' leave to amend their complaint within 30 days. If the plaintiffs do not file an amended complaint, the court will dismiss the suit in full without prejudice.

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