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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the April 2021 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-21-03-04).

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U.S. SUPREME COURT

Florida v. Georgia, No. 142, 2021 WL 1215718 (U.S. Apr. 1, 2021).

The State of Florida sued the State of Georgia seeking an equitable apportionment of water from interstate rivers in the Apalachicola-Chattahoochee-Flint River Basin. Florida claimed that Georgia's overconsumption of the water from interstate rivers caused low flows in the Apalachicola River, seriously harming Florida's oyster fisheries and river ecosystem. A Special Master appointed by the U.S. Supreme Court recommended the Court deny Florida relief. After conducting an independent review of the record, the Court agreed with the Special Master's recommendations. The Court held that Florida was unable to prove by clear and convincing evidence that the collapse of its oyster fisheries was caused by Georgia's overconsumption. Furthermore, the Court held that Florida failed to prove that Georgia's overconsumption harmed river wildlife and plants by disconnecting tributaries, swamps, and sloughs from the Apalachicola River, thereby drying out important habitats for river species. The Court overruled Florida's exceptions to the Special Master's Report and dismissed the case.

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FOURTH CIRCUIT

Nat'l Audubon Soc'y v. United States Army Corps of Engineers, No. 19-2151, 2021 WL 1152922 (4th Cir.

Mar. 26, 2021).

The National Audubon Society brought suit against the U.S. Army Corps of Engineers (Corps) and the Town of Ocean Isle Beach under the National Environmental Policy Act (NEPA) and the Clean Water Act (CWA). The suit challenged the Corps' issuance of a permit to the Town to construct a "terminal groin"—a jetty extending seaward perpendicular to the shoreline—to stop chronic erosion of its beaches. The U.S. District Court for the Eastern District of North Carolina granted summary judgment to the Corps and the town. On appeal, the Fourth Circuit affirmed the district court's judgment. The court found that in issuing an Environmental Impact Statement and granting the CWA permit, the Corps collected a broad range of data and analyzed the data to make judgments based on its own special expertise while considering the various standards imposed by NEPA and CWA. Moreover, the court concluded that the Corps provided a reasonable explanation of its decision, including a rational connection between the facts found and the decisions made.

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FIFTH CIRCUIT

Louisiana

Melerine v. Tom's Marine & Salvage, LLC, No. 2020-00571, 2021 WL 1115357 (La. Mar. 24, 2021).

In 2016, a tugboat pushing a barge through the coastal waters of St. Bernard Parish entered into Christmas Lake, which contains several oyster leases. Down to one engine due to mechanical problems, the captain tried to navigate the tugboat out but was ultimately forced to turn around, entering oyster lease grounds held by Marty Melerine. The tugboat crossed the middle of Melerine's 140-acre lease until the tugboat grounded and stopped. The captain tried to extricate the tugboat for about 45 minutes; however, he ultimately had to wait for high tide the next day to move the boat. Melerine sued the tugboat captain's employer, Tom's Marine & Salvage, LLC, and its insurer, seeking damages caused by the grounding. The jury found for the plaintiffs, and the judgment was affirmed on appeal. The Louisiana Supreme Court granted review. The court held that the trial court erred in denying the motion *in limini* seeking to exclude evidence related to the Oyster Lease Damage Evaluation Board. Further, the court held that the trial court erred in admitting an oyster biologist's testimony because the expert opinions were beyond his area of expertise and unsupported by reliable methodology. Therefore, the Louisiana Supreme Court reversed the judgment of the court of appeals, the judgment on the jury verdict was vacated, and the matter was remanded to the trial court for a new trial.

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NINTH CIRCUIT

League of Conservation Voters, et al., v. Biden, et al., No. 19-35460, 2021 WL 1392149 (9th Cir. Apr. 13, 2021).

The U.S. Court of Appeals for the Ninth Circuit held that a lawsuit challenging President Trump's Executive Order 13,795 (EO 13,795) is moot. In 2019, the U.S. District Court for the District of Alaska held that President Trump had overstepped his authority in rescinding withdrawals of areas of the Outer Continental Shelf (OCS) in the Chukchi Sea, Beaufort Sea, and Atlantic Ocean from exploration and development activities. Federal defendants and intervenors appealed. In January 2021, President Biden issued Executive Order No. 13,990 reinstating the OCS withdrawals and revoking EO 13,795. The Ninth Circuit held that any ruling of the court would be moot, as EO 13,795 was no longer in effect and the relevant areas of the OCS were withdrawn from exploration and development activities. The court remanded with instructions to dismiss the case without prejudice.

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California

Felkay v. City of Santa Barbara, No. 2D CIV. B304964, 2021 WL 1034275 (Cal. Ct. App. Mar. 18, 2021).

In 2006, Thomas Felkay purchased an oceanfront residential lot in Santa Barbara for \$850,000. The city planning commission subsequently rejected Felkay's proposal to build a single-family residence on the lot, finding it would be in violation of the city's Local Coastal Plan Policy 8.2, which prohibits development on a bluff face. The trial court found there had been a government taking and afforded the city the opportunity to either rescind the decision denying the permit or proceed to a jury trial on the amount of damages as just compensation for the permanent taking of the property. The city chose the second option, and after a damages trial, a jury found the city was liable to the trustee for the fair market value of \$2.4 million and for attorney and expert fees of \$1,007,397. The city appealed, claiming the inverse condemnation claim was not ripe because Felkay did not submit a revised application after the city denied his permit application. The California appellate court held that property owners are not required to submit more than one proposal to the permitting authority when the permit denial makes clear that no development of the property would be allowed under any circumstance. The Court of Appeals affirmed the trial court's judgment.

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Alaska

Cook Inletkeeper v. Raimondo, No. 3:19-CV-00238-SLG, 2021 WL 1214496 (D. Alaska Mar. 30, 2021).

Cook Inletkeeper and the Center for Biological Diversity challenged the incidental take regulations promulgated by the National Marine Fisheries Service (NMFS) authorizing Hilcorp Alaska LLC to conduct oil and gas exploration production activities in the Cook Inlet. The U.S. District Court for the District of Alaska granted the plaintiffs' motion for summary judgment in part and denied in part. The court upheld NMFS's mitigation and monitoring measures for seismic surveying under the Marine Mammal Protection Act. However, the court found NMFS's determination that the noise from Hilcorp's tugs towing the drill rig would not cause any take by harassment of Cook Inlet beluga whales to be arbitrary and capricious. The court noted that the agency relied on this erroneous determination when it issued the Incidental Take Regulations, Biological Opinion, and the Environmental Assessment. The court denied Alaska's cross motion for summary judgment. The court granted the federal defendants' request for supplemental briefing on the appropriate remedy.

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D.C. CIRCUIT

Hawkins v. Haaland, No. 20-5074, 2021 WL 1044979 (D.C. Cir. Mar. 19, 2021).

Ranchers in the Upper Klamath Basin region in Oregon sued Bureau of Indian Affairs officials and the Department of Interior, seeking declaratory and injunctive relief to prevent enforcement of the Native American Tribes' reserved water rights that interfered with irrigation of their lands. The district court dismissed the action for lack of standing under Article III of the U.S. Constitution. The ranchers appealed, challenging a Protocol Agreement executed by the United States and the Tribes. Specifically, the ranchers argued that the federal government, as trustee of those water rights, unlawfully delegated its authority to the Tribes and that absent such delegation, the Tribes would be unable to secure state implementation of their water rights. The D.C. Circuit Court of Appeals affirmed the judgment of the district court, finding no concurrence requirement imposed by federal law or Oregon law on the Tribes' water rights, whether by the Klamath Treaty or the federal government's trust relationship. The court concluded that the Protocol did not delegate federal authority to the Tribes, but rather recognized the Tribes' preexisting authority to control their water rights under the treaty with the United States. The court emphasized that federal law governs the substance and scope of the Tribes' rights. Ultimately finding the ranchers failed to establish the causation or redressability necessary for standing under Article III, the court affirmed the judgment of the district court dismissing the ranchers' complaint for lack of standing.

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District of Columbia

Flaherty v. Raimondo, No. CV 11-660 (TJK), 2021 WL 1166736 (D.D.C. Mar. 26, 2021).

In 2011, Plaintiffs Flaherty, Hastbacka, and the Ocean River Institute brought action against the Secretary of Commerce, the National Oceanic and Atmospheric Administration, and the National Marine Fisheries Service (NMFS), challenging the government's management and conservation of four species of fish—blueback herring, alewives, American shad, and hickory shad. In particular, the plaintiffs alleged the government failed to include the four fish species as part of the Atlantic herring fishery, and therefore violated the Magnuson-Stevens Act, the Administrative Procedure Act, and the National Environmental Policy Act (NEPA). Following a long course of litigation, only two challenges remained before the court, both of which related to Amendment 5 to the Atlantic herring fishery management plan. Despite various challenges by the defendants, the district court found that the plaintiffs demonstrated all three requirements of standing. Concerning the merits of the case, however, the court found NMFS's approval of Amendment 5 was not arbitrary and capricious. Plaintiffs claimed the defendants violated NEPA because the Amendment 5 Environmental Impact Statement (EIS) failed to take a "hard look" at the definition of the Atlantic herring fishery and consider all reasonable alternatives to address river herring bycatch. The district court disagreed, as an EIS need only consider a limited range of alternatives to the relevant action, defined by the agency's objectives. The court held that because NMFS considered three alternatives, it fulfilled its duty to consider a reasonable range of alternatives under NEPA. Therefore, the district court granted the defendants' motion for summary judgment.

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Oceana, Inc., v. Raimondo, No. 17-CV-829 (CRC), 2021 WL 1198165 (D.D.C. Mar. 30, 2021).

Oceana, Inc. brought suit challenging a 2016 regulation issued by the National Marine Fisheries Service (NMFS) to curtail overfishing of the dusky shark, a migratory predator fish that inhabits coastal waters from Nova Scotia to Brazil. The regulation at issue targets collateral “bycatch” of dusky sharks by boats and establishes a series of accountability measures designed to reduce the number of sharks that are mistakenly caught in order to decrease the likelihood that those caught will perish as a result. In 2019, the court granted partial summary judgment in Oceana’s favor. Oceana renewed its challenge and both parties moved for summary judgment. Finding that NMFS offered a reasoned justification of the regulation, the court deferred to NMFS’s scientific expertise and granted summary judgment in its favor. In particular, the court found that NMFS rationally justified its treatment of the data on remand, as well as its findings regarding bycatch and the expected mortality reductions from Amendment 5(b). Further, the court held that NMFS did not act arbitrarily nor did it act inconsistently in complying with the court’s instruction that it explain its treatment of recreational data on remand. Lastly, the court stood by its prior conclusions regarding Oceana’s National Environmental Policy Act arguments and rejected them. Therefore, the district court denied Oceana’s motion for summary judgment and granted NMFS’s cross motion for summary judgment.

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National Sea Grant Law Center
256 Kinard Hall, Wing E
University, MS 38677-1848



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