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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the July 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-21-03-07).

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U.S. SUPREME COURT

PennEast Pipeline Co. v. New Jersey, No. 19-1039, 2021 U.S. LEXIS 3564 (June 29, 2021).

The United States Supreme Court issued an opinion addressing whether a private company's delegated eminent domain power includes the ability to sue a nonconsenting state to take possession of the land. PennEast brought the suit against New Jersey to obtain rights-of-way along its 116-mile pipeline route from Pennsylvania to New Jersey. A federal district court held that sovereign immunity did not protect New Jersey's argument from suit. On appeal, the Third Circuit ruled in favor of New Jersey and dismissed the case. In a 5-4 decision, the Supreme Court reversed the Third Circuit, holding that the federal government may delegate its power to take state land through eminent domain to private companies. The Court reasoned that there is no requirement that the federal government speak with unmistakable clarity when it delegates an exemption to sovereign immunity. Additionally, the majority found the power of eminent domain inextricably linked to condemnation authority; if a company with eminent domain authority does not also possess the ability to seize land, the federal government would be subject to the will of the states—an unacceptable outcome. The Court remanded the case to the district court to consider the merits of the condemnation suit.

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FIRST CIRCUIT

Penobscot Nation v. Frey, No. 16-1424, 2021 WL 2850139 (1st Cir. July 8, 2021).

In 2012, the Penobscot Nation sued the state of Maine in federal district court, asserting its right to ownership over the "Main Stem" of the Penobscot River under the "Settlement Acts" (the Acts)—a pair of federal and state statutes defining the Nation's Reservation to include "islands" in the Main Stem. The Nation disputed a Maine Attorney General (AG) legal opinion on the scope of the Nation's Reservation. The AG opinion stated that under the Acts, the Nation's exclusive regulatory authority extends only to lands within the Main Stem, not to the water of the River. The Nation asked the court for a declaratory judgment acknowledging that its Reservation includes the water in the Main Stem. The district court refused and instead granted Maine's counterclaim for declaratory judgment consistent with the AG opinion. However, the district court granted the Nation's second request and declared that the Nation's

sustenance fishing rights under the Acts include the right to use the entire Main Stem. On the parties' cross-appeal, the First Circuit Court of Appeals affirmed on the issue of the Nation's limited regulatory jurisdiction but vacated the district court's holding on the sustenance fishing rights issue. The Nation petitioned for rehearing en banc, and the First Circuit granted the petition. En banc, the First Circuit again affirmed the district court's decision regarding the Reservation's boundaries under the Acts relying on the ordinary meaning of the word "island"—land surrounded by water—and declining to apply the Indian-favoring canons of statutory construction. Additionally, the appellate court vacated the Nation's fishing rights claim because the Nation lacked a cognizable injury resulting from the AG opinion and the Nation's claim is not ripe for review.

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THIRD CIRCUIT

New Jersey

In re Waterfront Dev. Individual Permit of Del. River Partners, No. A-0709-19, 2021 WL 2562541 (N.J.

Super. Ct. App. Div. June 23, 2021).

The Delaware Department of Environmental Protection (DEP) issued two coastal development permits to Delaware River Partners, LLC (DRP) to build structures in the Delaware River. DRP built a dock and terminal project under its first permit. The second permit authorized DRP to construct an additional dock that would be used for onloading and offloading liquid cargo. Delaware Riverkeeper challenged the second permit and then appealed to the Superior Court of New Jersey, claiming the DEP's decision to issue the permit was arbitrary and capricious and should be reversed. Riverkeeper argued that the DEP failed to evaluate the dock as an "energy facility" or a "tanker terminal" as required by the DEP regulations and failed to consider the dock's adverse impacts on endangered sturgeon and water quality. The New Jersey appellate court agreed that the DEP was not required to analyze the dock as an "energy facility" because it is not a facility used to produce and store oil and gas. Additionally, the court agreed that the second dock is not a tanker terminal because it simply adds two berths to an already permitted tanker terminal. Thus, the DEP correctly categorized and evaluated the permit pursuant to its regulation governing docks and piers for cargo and passenger movement. The court deferred to the DEP's finding that the dock would present minimal or no threat to any species and also accepted the DEP's water quality impact findings. The court affirmed the DEP's decision to permit DRP's second dock.

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FOURTH CIRCUIT

N. Carolina Dep't of Env't Quality v. Fed. Energy Regul. Comm'n, No. 20-1655, 2021 WL 2763265 (4th Cir.

July 2, 2021).

The North Carolina Department of Environmental Quality (NCDEQ) and PK Ventures, a private company, separately challenged the Federal Energy Regulatory Commission's (FERC) issuance of a license authorizing McMahan Hydroelectric to operate the Bynum Hydroelectric Project on the Haw River in North Carolina. FERC had determined that NCDEQ waived its rights under the Clean Water Act to issue a water quality certification for the Project. The Fourth Circuit granted NCDEQ's petition for review, vacated the license issued by FERC, and remanded with instructions for FERC to re-issue the license to include the water-quality conditions imposed by NCDEQ. The court dismissed PK Ventures' claims that FERC lacked jurisdiction under the Federal Power Act to issue the license to McMahan and that McMahan's § 401 application to NCDEQ was not valid under North Carolina law because McMahan was not the owner of the project.

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SEVENTH CIRCUIT

Wisconsin

Class Wisconsin Inc. v. Wisconsin Dept of Nat. Res. 2021 WL 50 (July 9, 2021)

An environmental advocacy organization and a lake management district sought review of the Wisconsin Department of Natural Resources' (DNR) approval of applications for eight high capacity groundwater wells. Under state law, the applications did not require a formal environmental review; however, the plaintiffs argued that the DNR had both a public trust duty and the express statutory authority to consider the environmental impact of all proposed high capacity wells. The DNR claimed that Wis. Stat. Ann. § 227.10 limited the power of DNR to consider only actions “explicitly required or explicitly permitted by statute or by a rule.” The circuit court held that the DNR erred in determining it could not consider the environmental impacts of the wells. On appeal, the Wisconsin Court of Appeals certified the appeal to the Wisconsin Supreme Court. The Wisconsin Supreme Court agreed that the DNR has the authority and discretion to consider the environmental effects of the wells. The court concluded that DNR erroneously interpreted Wis. Stat. Ann. § 227.10 and remanded the case to the circuit court with instructions to remand the applications to DNR.

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EIGHTH CIRCUIT

Iowa

Iowa Citizens for Cmty. Improvement v. State, No. 19-1644, 2021 WL 2483412 (Iowa June 18, 2021).

Two social justice organizations sued the State of Iowa and state officials, asserting that the state's voluntary agricultural nonpoint source pollution control policy violates the public trust doctrine. The plaintiffs sought two remedies. First, they requested a declaratory judgment that the Iowa state government violated the public trust doctrine by failing to protect the public's use of navigable state waters. Second, the groups asked the court for an injunction compelling the legislature to implement a mandatory agricultural pollution regulatory scheme instead of its current voluntary policy. The state moved to dismiss the plaintiffs' petition for lack of standing. The district court denied the state's motion. On appeal, the Iowa Supreme Court reversed in a 4-3 decision. The majority determined the plaintiffs lacked standing because any declaration from the court would not be certain to redress the plaintiffs' alleged injury. Additionally, the court denied the plaintiffs' request for injunctive relief. The majority acknowledged the pervasive environmental problem of agricultural nonpoint source pollution but explained that regulating agricultural water pollution necessarily involves balancing stakeholder interests, which is a legislative function. As a result, the court held that the plaintiffs' claims are nonjusticiable because the court could not provide meaningful relief without violating the separation of powers. Accordingly, the majority reversed and remanded the case back to the district court with directions to dismiss for lack of standing.

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NINTH CIRCUIT

Trout Unlimited v. Pirzadeh, No. 20-35504, 2021 WL 2460989 (9th Cir. June 17, 2021).

In 2014, the EPA issued a proposed determination that restricted mining in the Bristol Bay watershed. In 2019, the EPA withdrew the proposed determination, reasoning that the previous restrictions were based on mining applications that have since been updated with enhanced mitigation plans and the EPA now feels comfortable allowing some mining. Trout Unlimited brought suit in the U.S. District Court for the District of Alaska, challenging the EPA's withdrawal of its previous mining restrictions. The district court dismissed the case reasoning that the court could not review the EPA's decision because the decision was committed to agency discretion. In other words, the court could not find meaningful standards governing the agency decision necessary for judicial review. On appeal, the Ninth Circuit found that while the Clean Water Act does not provide meaningful standards, the EPA regulations do. The pertinent regulation states that the EPA may withdraw a proposed determination because the project *would likely* have an unacceptable adverse effect. The majority interpreted the regulation to mean that the EPA may withdraw a proposed determination only if an unacceptable adverse effect is *unlikely*, despite the dissent's critique describing the majority's interpretation as a “twisted inversion” defying formal logic. As a result, the majority found that the EPA's decision is reviewable and remanded the case to the district court for further proceedings.

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ELEVENTH CIRCUIT

Florida

Florida v. Becerra, No. 21-cv-839, 2021 WL 2514138 (M.D. Fla. June 18, 2021).

Florida challenged the Center for Disease Control and Prevention (CDC)'s "conditional sailing order," which gradually re-opens cruise ship operations that were closed due to COVID-19. Florida claimed the order is an unlawful agency action and sought a preliminary injunction. In response to the CDC's argument that Florida lacks standing to challenge the order, the district court determined that Florida has standing because the alleged injury to Florida's protected economic and proprietary interests is directly connected to the conditional sailing order. The district court then addressed Florida's substantive claims by analyzing the CDC's authority under the Public Health Service Act (PHSA). The CDC defended its order, asserting that the PHSA grants broad discretion in the agency to prevent the spread of disease between states and countries. The court disagreed. Relying on rules of statutory interpretation, the court construed the CDC's scope of authority narrowly and determined the conditional sailing order's extensive mandates exceeded the scope of the agency's authority. Additionally, the court decided that the CDC violated the Administrative Procedure Act by using the good cause exception to forego the notice and comment process when it issued the order. According to the court, as the pandemic is no longer "new," it does not constitute an acute health threat warranting use of the good cause exception. The court also deemed the order arbitrary and capricious because it globally dismissed state and local health measures as inadequate without a reasoned finding. Finally, Florida established that without a preliminary injunction it would likely face substantial irreparable injury to its economy, despite some cruise ships setting sail in phases. As a result, the court found Florida's injury outweighed the prospective injury to the public health and issued a preliminary injunction.

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D.C. CIRCUIT

Jam v. Int'l Fin. Corp., No. 20-7092, 2021 WL 2799936 (D.C. Cir. July 6, 2021).

Indian fishermen and farmers brought suit against the World Bank International Finance Corporation over a \$450 million loan issued for the construction of a coal-fired power plant in India. The plaintiffs argued the bank negligently lent funds to a power-generation project in India, which damaged their environment, health, and livelihoods. The U.S. District Court for the District of Columbia dismissed the case for lack of subject matter jurisdiction, since the injurious activity occurred in India. On appeal, the D.C. Circuit affirmed the dismissal on those grounds.

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



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