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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the December 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-22-03-12).

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FIFTH CIRCUIT

Texas

TX Commission on Env'tl. Quality v. Save our Springs Alliance, Inc., No. 08-20-00239-CV, 2022 WL 17659907 (Tex. App. Dec. 13, 2022).

The Texas Commission on Environmental Quality (TCEQ) approved an application by the City of Dripping Springs for a Texas Pollution Discharge Elimination System (TPDES) permit to discharge treated wastewater into a hill country creek. An environmental group challenged the agency's decision, alleging that the TPDES permit violated antidegradation rules and failed to sufficiently identify the location of the proposed discharge point. A trial court ruled in favor of the environmental group. On appeal, TCEQ and the city claimed that the administrative record supported that the permit complied with antidegradation rules and that public notice sufficiently identified the location of the proposed discharge point. The appellate court agreed and reversed the trial court's ruling.

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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 17252075 (D. Alaska Nov. 28, 2022).

In June, the U.S. District Court for the District of Alaska vacated Amendment 14 to the Alaska Salmon Fisheries Management Plan (FMP), finding it arbitrary and capricious in violation of the Magnuson-Stevens Act and the Administrative Procedure Act. In November, the court issued a remedy order outlining additional relief for the parties. The court ordered the National Marine Fisheries Service to issue regulations implementing a new FMP amendment consistent with the court's previous orders by May 1, 2024. The agency is also required to issue periodic status reports to the court.

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California

Center for Bio. Diversity, et al. v. NOAA Fisheries, et al., No. 4:21-CV-00345-KAW, 2022 WL 17488678

(N.D. Cal. Dec. 7, 2022).

Two environmental groups challenged the National Marine Fisheries Service's issuance of a 2017 Biological Opinion (BiOp) codifying shipping lanes vessels use to approach ports off the California coast. The groups alleged that the BiOp resulted in significant numbers of ship strikes with species protected under the Endangered Species Act (ESA), including humpback and blue whales and leatherback sea turtles. The plaintiffs and defendants filed motions for summary judgment. The U.S. District Court for the Northern District of California ruled in favor of the environmental groups. The court concluded that the BiOp failed to comply with the ESA, and, therefore, was arbitrary, capricious, an abuse of discretion, and not in accordance with the law.

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Oregon

State v. Bordeaux, 323 Or. App. 60 (2022).

An Oregon fisherman was convicted for unlawfully fishing in the Otter Rock Marine Reserve. On appeal, the fisherman argued that the state failed to sufficiently prove that he landed crab from the marine reserve. The appellate court rejected the fisherman's interpretation of the term "fish for" in the applicable state statute. The fisherman also argued that the lower court failed to apply a "knowing" mental state. The appellate court concluded that the fisherman failed to preserve the mental state issue on appeal. The appellate court affirmed the lower court's opinion.

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Washington

Friends of Grays Harbor, et al. v. Washington, et al., No. 84019-3-I, 2022 WL 17581802 (Wash. Ct. App.

Dec. 12, 2022).

After the Washington Department of Ecology approved the Grays Harbor County Shoreline Master Program (SMP) update, an environmental group sought review with the Shorelines Hearings Board. The group contended that the SMP should have addressed sea level rise and did not meet the minimum requirements for flood hazards, among other issues. The Board disagreed and upheld the SMP approval. On appeal, the Washington Court of Appeals affirmed the Board's ruling. The court found that the appellants did not provide sufficient evidence that the Board either based its order on an erroneous interpretation or application of law or that the order is unsupported by substantial evidence.

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Preserve Responsible Shoreline Mgmt. v. City of Bainbridge, No. 56808-0-II, 2022 WL 17588919 (Wash.

Ct. App. Dec. 13, 2022).

Preserve Responsible Shoreline Management (PRSM) appealed the Growth Management Hearing Board's (Board) order upholding the City of Bainbridge Island's Shoreline Master Program (SMP). PRSM claimed that the Board's approval violated the state Administrative Procedure Act (APA) and that the SMP was unconstitutional. The court found that the Board did not erroneously interpret or apply the law and its decision was not arbitrary or capricious in violation of the APA. Further, the Board's order was supported by substantial evidence. Finally, the court rejected the unconstitutionality claims, finding that PRSM failed to meet its burden for relief. The court affirmed the Board's approval.

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D.C. CIRCUIT

District of Columbia

Ctr. for Biological Diversity v. Raimondo, No. CV 18-112 (JEB), 2022 WL 17039193 (D.D.C. Nov. 17, 2022).

In July, the U.S. District Court for the District of Columbia ruled that the National Marine Fisheries Service's 2021 Biological Opinion (BiOp) and the 2021 Final Rule related to the lobster fishery violated the Endangered Species Act and the Marine Mammal Protection Act by not providing adequate protection for endangered North Atlantic right whales. After receiving supplemental briefing on remedies from both parties, the court remanded the Final Rule to the agency, ordering the agency to develop new gear restrictions by December 2024. The court declined to rule on the 2021 BiOp until after issuance of the Final Rule.

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INTERNATIONAL TRADE

Sea Shepherd New Zealand v. United States, No. 20-00112, 2022 WL 17250150 (Ct. Int'l Trade Nov. 28, 2022).

Sea Shepherd New Zealand filed suit against the United States, claiming that the import of fish and fish products originating from New Zealand fisheries in the Maui dolphin's range should be banned because New Zealand gillnet and trawl fisheries result in the death of Maui dolphins in excess of U.S. standards. The court granted the government's motion to dismiss the claim that the United States unlawfully withheld agency action by failing to ban New Zealand's associated imports. However, the court granted Sea Shepherd's motion for a preliminary injunction for the import of associated fish and fish products, pending resolution on the remaining claims. The court will consider whether the government acted arbitrarily, capriciously, and otherwise not in accordance with law both by denying Sea Shepherd's petition for emergency rulemaking and by granting findings of comparability to New Zealand.

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