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Ocean and Coastal Case Alert

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

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FIRST CIRCUIT

Maine

Atl. Salmon Fed'n U.S. v. Merimil Ltd. P'ship, No. 1:21-CV-00257-JDL, 2022 WL 558358 (D. Me. Feb. 24, 2022).

Several conservation groups sued the owners/operators of four hydroelectric dams on the Kennebec River, alleging that that the dams resulted in the unlawful take of Atlantic salmon in violation of the Endangered Species Act (ESA). The National Marine Fisheries Service (NMFS) authorized the dam owners/operators to incidentally take Atlantic salmon through dam operations through 2019. The dam owners/operators are now seeking to renew their incidental take authority but have not stopped or altered operations. The plaintiffs sought a preliminary injunction to limit dam operations in the meantime. The U.S. District Court for the District of Maine denied the injunction. The court agreed that there is a likelihood of success on the merits based on both sides' expert witness declarations and dam studies showing actual harm to the Atlantic salmon. However, the court found that the record did not show that the proposed preliminary injunction would reduce the take of salmon to an extent that would prevent likely and irreparable harm to the Gulf of Maine Distinct Population Segment (GOM DPS) as a whole. Moreover, the court reasoned that a preliminary injunction would neither further the public interest nor be equitable.

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FOURTH CIRCUIT

Maryland

Healthy Gulf, et al., v. National Marine Fisheries Service, et al., No. DLB-20-1104, 2022 WL 768181 (D. Md. Mar. 11, 2022).

Two conservation groups challenged a final rule issued by the National Marine Fisheries Service (NMFS) that opened previously restricted areas in the Gulf of Mexico and the Northeast to pelagic longline fishing. The groups claimed that the "Bluefin Bycatch Rule" was not based on the "best scientific information available" as required by the Magnuson-Stevens Fishery Conservation and Management Act (MSA). They also claimed that the rule violated the MSA by failing to prevent overfishing of bluefin tuna. Further, they alleged that the rule violated the National Environmental Policy Act (NEPA) by failing to take a hard look at its environmental impact on spawning bluefin tuna and other non-target species in the Gulf of Mexico and Northeastern United States. The court ruled in favor of NMFS, finding that the agency took a sufficiently hard look at the potential environmental consequences of the rule.

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FIFTH CIRCUIT

Louisiana

Mexican Gulf Fishing Co. v. U.S. Dep't of Com., No. CV 20-2312, 2022 WL 594911 (E.D. La. Feb. 28, 2022).

In 2020, the National Marine Fisheries Service (NMFS) published a Final Rule requiring Gulf of Mexico charter boat owners and operators to submit electronic fishing reports that contain "all fish harvested and discarded, and any other information." "Other information" includes five socio-economic values: the charter fee, fuel price, estimated amount of fuel used, number of paying passengers, and number of crew. The Final Rule also requires them to share GPS information with NMFS and the U.S. Coast Guard for all fishing trips. Several boat owners and operators sued. The plaintiffs argued that they had no notice of NMFS's intention to include the five socio-economic factors and that the inclusion is arbitrary and capricious. The court found that the notice of the proposed rulemaking, comment process, and Final Rule consistently explained the rule would require reporting socio-economic data. The court also concluded that NMFS was not arbitrary and capricious in requiring the reporting of the five socio-economic values. Additionally, the court found that the GPS requirement is necessary and appropriate to aid enforcement of the Magnuson-Stevens Fishery Conservation and Management Act to support conservation and management measures. Further, NMFS provided reasoned responses to comments concerning privacy, necessity, burden, and costs. Moreover, the court concluded that the tracking requirement does not violate the Fourth Amendment of the U.S. Constitution because the fishing industry is heavily regulated, and it is a constitutionally adequate alternative for a search warrant. Accordingly, the court granted the government's motion for summary judgment.

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NINTH CIRCUIT

Friends of Animals v. United States Fish & Wildlife Serv., No. 21-35062, 2022 WL 628565 (9th Cir. Mar. 4, 2022).

A Ninth Circuit panel affirmed dismissal of a challenge to the U.S. Fish and Wildlife Service's (FWS) proposed experiment to conduct lethal removal of barred owls encroaching on the habitat of the northern spotted owl, a threatened species under the Endangered Species Act (ESA). The court agreed that the experiment provided a net conservation benefit as required under the ESA. Further, the FWS reasonably described baseline conditions using resident owl survey data and adequately analyzed critical habitat affected by an Oregon permit. The court concluded that a supplemental environmental impact statement (EIS) was not required under NEPA, and FWS was not required to analyze permits and agreements in a single EIS.

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California

Coastal Act Protectors v. City of Los Angeles, No. B308306, 2022 WL 556904 (Cal. Ct. App. Feb. 24, 2022).

Los Angeles adopted an ordinance requiring the registration of short-term rentals. Over a year later, Coastal Act

Protectors (CAP) sued to enjoin the ordinance, alleging that it constituted a development as defined by California Coastal Act of 1976 and thus the city must obtain a coastal development permit (CDP) approving the ordinance prior to implementation. The trial court found that the ninety-day statute of limitations applied, and CAP's petition was time barred. On appeal, CAP argued that a three-year statute of limitations should apply instead. The ninety-day statute of limitations applies to actions challenging several types of city-planning and zoning decisions, including ordinances. The three-year statute of limitations applies to actions for a liability created by statute. On appeal, the court reasoned that even if the city was required to obtain a CDP prior to implementing the ordinance, that duty existed at the time of adoption. Therefore, the court found CAP's petition was an action to attack or void the city's decision to adopt a zoning ordinance without first obtaining a CDP. Accordingly, the court determined that the ninety-day statute of limitations applied. Because CAP filed its petition to void the ordinance over a year after adoption, the court concluded that CAP's petition was untimely.

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Hawaii

Hueter v. Haaland, No. CV 21-00344 JMS-KJM, 2022 WL 479794 (D. Haw. Feb. 16, 2022).

Several Alega Village, American Samoa residents sued unnamed private fisherman for illegally fishing in the Alega Marine and Wildlife Sanctuary Reserve (Alega Reserve), a privately-owned marine protected area within the waters of Alega Village, and numerous U.S. and American Samoa government officials for failing to enforce environmental laws against the fishermen in violation of the residents' due process rights. The residents claimed that the fishermen violated the Endangered Species Act (ESA) by harming endangered sea turtles within the Alega Reserve, the National Marine Sanctuaries Act (NMSA) by damaging the Alega Reserve itself, and the Marine Protection, Research, and Sanctuaries Act (MPRSA) by discharging oil from their boats in the reserve. The residents also sought to compel the governments to enforce such laws against the fishermen. The court granted the government's motion to dismiss and removed the federal defendants from the case. The American Samoa government officials also moved to dismiss, which the court held in abeyance until the court determines whether the unnamed fishermen are sufficiently identified, and whether there is cognizable federal claim against the fishermen.

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Carmichael v. Bd. of Land & Nat. Res., No. SCWC-16-0000071, 2022 WL 620248 (Haw. Mar. 3, 2022).

Individuals and a non-profit organization filed a complaint for declaratory and injunctive relief against the Hawaii Board of Land and Natural Resources (BLNR), alleging its renewal of revocable water rights permits in the Ko'olau Forest Reserve and Hanawi Natural Area Reserve without an environmental assessment violated the Hawaii Environmental Policy Act (HEPA). A state circuit court granted summary judgment. The court ruled that the renewal was not a HEPA action requiring environmental assessment, but found that the revocable permits were invalid because the agency exceeded its authority in granting them under HRS 171-55. On appeal, the Hawaii Supreme Court vacated the lower court's decision. The court found that the permits were not authorized under HRS 171-55. Further, the grant of revocable permits is an environmental action subject to environmental review under HEPA. The case was remanded to the circuit court.

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Keep the North Shore Country v. Bd. Of Land and Nat. Res., No. SCAP-19-0000449, 2022 WL 522648 (Haw. Feb. 22, 2022).

An environmental organization sought review of the Hawaii Board of Land and Natural Resources' approval of a habitat conservation plan and incidental take license for Hawaiian hoary bats for a wind turbine project. The plaintiff alleged procedural irregularities and noncompliance with the state endangered species statute. The Hawaii Supreme Court upheld a lower court's affirmation of the approval. The court found substantial evidence supported the conclusion that the plan would minimize and mitigate impacts of take to the extent practicable, as well as the conclusion that plan would increase likelihood that bats would survive and recover. Further, the exclusion of data from an established wind farm on take quantity was not clearly erroneous. The inconsistency in data allowed the Board to rely on its expertise in factoring wind turbine height and blade length in cumulative impacts analysis. Finally, the court held that a Board member could participate in both Board and Committee proceedings.

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ELEVENTH CIRCUIT

Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC, No. 21-10676, 2022 WL 620284 (11th Cir. Mar. 3, 2022).

The U.S. Army Corps of Engineers (Corps) authorized Sea Island Acquisitions, LLC (Sea Island) to fill a wetland to construct a commercial building. However, Sea Island filled the wetland near its hotel but never constructed a building. Several groups sued, alleging that Sea Island did not comply with permitting procedures and that it intentionally and maliciously mislead the Corps because it filled the wetland for the purpose of landscaping, not constructing a commercial building. The trial court dismissed the action, finding that the plaintiffs did not suffer an injury-in-fact and thus did not have standing to sue. On appeal, the environmentalists argued that they suffered an aesthetic injury to their interest in the wetlands, giving them standing to sue. The court determined that because one of the members of the non-profit groups gained aesthetic pleasure from viewing the wetlands and regularly recreated in the area, the environmentalist was sufficiently deprived in their aesthetic interest as to suffer an injury-in-fact. Therefore, the court found that the plaintiffs had standing to bring the suit and remanded for further proceedings.

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