

October

17
2022

Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the October 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-22-03-10).

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FIRST CIRCUIT

Rhode Island

Champlin's Realty Assocs. v. Coastal Res. Mgmt. Council, No. 2020-168-M.P., 2022 WL 7786926 (R.I. Oct. 14, 2022).

The Rhode Island Supreme Court denied Champlin Marina's proposal to expand its existing Block Island marina on the Great Salt Pond. In 2020, a lower court upheld the Rhode Island Coastal Marine Resources Commission's (CMRC) denial of the application. Champlin's sought review by the Rhode Island Supreme Court. While the Supreme Court appeal was pending, Champlin's and the CRMC entered into mediation and reached a Joint Memorandum of Understanding (MOU) that would allow a scaled-down version of the marina. The parties requested that the Rhode Island Supreme Court incorporate the MOU into a consent order. The Rhode Island Supreme Court remanded to the lower court to consider the "propriety and conclusiveness" of the purported settlement and the validity of the MOU. The lower court judge found that the MOU was a proper exercise of CRMC's authority. The supreme court disagreed, finding that the agency lacked authority to engage in private mediation with Champlin's and settle the case while it was on appeal. The court ultimately affirmed the 2020 decision upholding the denial of the marina expansion.

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FOURTH CIRCUIT

North Carolina

Cape Fear River Watch v. U.S. Army Corps of Eng'rs, No. 7:21-CV-138-FL, 2022 WL 4468268 (E.D.N.C.

Sept. 26, 2022).

Several nonprofit conservation groups sought review of the U.S. Army Corps of Engineers' (Corps) decision to

eliminate seasonal restrictions on dredging in two North Carolina harbors. The Corps proposed to replace the historic dredging window with a risk-based assessment approach, which would allow dredging and bed leveling to occur within the harbors at any time of the year. After a review of the environmental impacts, the Corps published a Finding of No Significant Impact (FONSI) and therefore was not required by the National Environmental Policy Act (NEPA) to prepare a full environmental impact statement (EIS). The plaintiffs argued that the FONSI must be set aside as arbitrary and capricious because it failed to provide a rational explanation and sufficient analysis of multiple NEPA factors, including the impact of the proposed change on endangered or threatened species of sea turtles and sturgeon. The court agreed with the plaintiffs that the evaluation of certain NEPA factors was inadequate, but it determined that a remand of the decision to the defendants with directions to prepare an EIS was not warranted. Instead, the court remanded the decision for further consideration of whether an EIS should be prepared.

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EIGHTH CIRCUIT

Matter of MCEA for Commencement of an Env't Assessment Worksheet, No. A20-1592, 2022 WL 4488498 (Minn. Sept. 28, 2022).

Environmental advocacy groups challenged a county's decision not to prepare an environmental assessment worksheet under the Minnesota Environmental Policy Act for a proposed ditch-improvement project that impacted the upper reach of Limbo Creek. An appellate court agreed that the creek is a "public water" for purposes of environmental review under the Minnesota Environmental Policy Act. On appeal, the Minnesota Supreme Court considered whether the classification of public waters should be based on a statutory definition of "public waters" or the Department of Natural Resources' inventory of "public waters." The Minnesota Supreme Court affirmed the appellate court's finding that the statutory definition controlled and remanded to the county for preparation of a mandatory environmental assessment worksheet.

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NINTH CIRCUIT

San Luis Obispo Coastkeeper v. Santa Maria Valley Water Conservation Dist., 2022 WL 4393596 (9th Cir. 2022).

Several advocacy organizations brought suit against the U.S. Bureau of Reclamation and the Santa Maria Water Conservation District, claiming that the operation of a dam interfered with Southern California steelhead's reproductive migration and that it results in an unlawful take in violation of the Endangered Species Act (ESA). The district court granted summary judgment to the agencies, and the advocacy organizations appealed. The Ninth Circuit reversed the judgment of the district court and held that the relevant statute, Public Law 774, affords the Bureau of Reclamation and the Santa Maria Water District discretion to manage and operate the Twitchell dam for the purpose of preventing the take of Southern California Steelhead. The court held that the agencies have discretion to operate Twitchell Dam for other purposes besides "irrigation, conservation, and flood control," which include adjusting water discharges, to support the migration and reproduction of Southern California Steelhead.

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Save the Bull Trout v. Williams, 49 F.4th 1292 (9th Cir. 2022).

The Ninth Circuit dismissed an action challenging the Fish and Wildlife Service's 2015 Bull Trout Recovery Plan under the Endangered Species Act (ESA). Two of the three plaintiff environmental groups had previously brought suit in the U.S. District Court for the District of Oregon challenging the 2015 Bull Trout Recovery Plan. The court determined that the plaintiffs failed to state a claim for violation of a nondiscretionary duty, precluding the court from exercising jurisdiction under the citizen suit provision of the ESA. Accordingly, the court dismissed the plaintiffs'

claims for lack of jurisdiction but granted the plaintiffs leave to amend. The plaintiffs declined to amend. The plaintiffs initiated a new suit in the U.S. District Court for the District of Montana again challenging the Service's compliance with the ESA in creating the 2015 Bull Trout Recovery Plan and adding Save the Bull Trout as a plaintiff. Finding that the requirements of claim identity and privity were met, the court concluded that plaintiffs' challenge to the 2015 Bull Trout Recovery Plan was precluded because the Oregon district court's opinion was a final judgment on the merit of the claims and dismissed the complaint.

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Hawai'i

Kia'i Wai v. Dep't of Water, No. SCAP-20-0000487, 2022 WL 4396318 (Haw. Sept. 23, 2022).

The Hawaii Supreme Court recently addressed the required scope of environmental review under the Hawai'i Environmental Policy Act (HEPA). Proposing to install a 9,000-foot water transmission line in the Lihu'e area, the Kaua'i County Department of Water prepared a draft environmental assessment (EA) and made an anticipated finding of no significant impact on the area surrounding the proposed water line. After the public comment period, the Department published a final EA, which included a finding of no significant impact. Plaintiffs challenged the final EA in a state Environmental Court, arguing the Department did not comply with the HEPA and its administrative rules. The Environmental Court held the Department misapplied HEPA in completing the final EA by limiting its review to the physical footprint of the project and failing to consider secondary impacts beyond the physical footprint of the project site, as well as failing to properly analyze the cumulative impacts of the project. The court ordered the Department to prepare a new EA that complies with HEPA and its administrative rules by expanding the Department's analysis to beyond the physical footprint of the proposed project.

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ELEVENTH CIRCUIT

Norwegian Cruise Line Holdings Ltd v. State Surgeon Gen., Fla. Dept. of Health, No. 21-12729, 2022 WL 5240425 (11th Cir. Oct. 6, 2022).

The Norwegian Cruise Line brought suit against Florida's Surgeon General claiming that a state statute prohibiting the cruise line from implementing a vaccination policy for vessels departing from Florida violated their rights under the First Amendment, the dormant Commerce Clause, and the Due Process Clause. The district court granted the cruise line's motion for preliminary injunction, and the state appealed. Statutes which target speech based on its communicative content are presumed unconstitutional under the First Amendment and may be justified only if the government can show they are narrowly tailored to serve a compelling state interest. On appeal, the Eleventh Circuit held that the state statute prohibiting businesses from requiring their customers to provide documentation certifying their COVID-19 vaccination or post-infection recovery information in order to receive access and service did not violate the cruise line's First Amendment free speech rights because the statute had rational relationship to the state's substantial interests in protecting its residents from discrimination and privacy concerns related to private medical documentation. The Eleventh Circuit vacated the district court's preliminary injunction against the Florida Surgeon General.

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