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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the September 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-22-03-09).

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SECOND CIRCUIT

Silva v. Farrish, 47 F.4th 78 (2d Cir. 2022).

Three members of the Shinnecock Indian Nation brought suit alleging that the New York State Department of Environmental Conservation (DEC) and several DEC officials violated the tribe's ancestral fishing rights in the Shinnecock Bay by enforcing state fishing regulations, and enforcement amounted to intentional discrimination in violation of federal law. The U.S. District Court for the Eastern District of New York granted summary judgment in favor of the defendants, holding sovereign immunity barred claims against the DEC and DEC officials. On appeal, the U.S. Court of Appeals for the Second Circuit affirmed in part, vacated in part, and remanded the case to the district court. The appellate court held that the district court erred in granting immunity to the DEC officials but not to the DEC itself. The court ruled against the plaintiffs on their discrimination claims, finding DEC officials did not intentionally discriminate against members based on race.

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Town of Southold v. Wheeler, No. 20-3188, 2022 WL 4004004 (2d Cir. Sept. 2, 2022).

The Second Circuit Court of Appeals ruled that the Environmental Protection Agency's (EPA) designation of a waste-disposal site in Long Island Sound was not in violation of the Coastal Zone Management Act because it is consistent with New York's coastal management plan. The court found that the Administrative Procedure Act's arbitrary and capricious standard of review applied and that the agency did not abuse its discretion in making the designation. The court also held that the town was precluded from raising a National Environmental Policy Act claim on appeal.

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FIFTH CIRCUIT

State of Louisiana v. Biden, 45 F.4th 841 (5th Cir. 2022).

The Fifth Circuit vacated and remanded a federal district court's nationwide preliminary injunction enjoining President Biden and various governmental officials from pausing oil and gas leasing on public lands and in offshore waters following the President's issuance of Executive Order 14,008. On March 24, 2021, thirteen states filed a complaint seeking injunctive relief alleging that the Department of Interior violated the Administrative Procedure Act (APA) when implementing lease sale postponements or cancellations. The district court granted the injunction requested by the plaintiffs on June 15, 2021. The state appealed, arguing that the district court's order enjoins the Executive Order itself, which is not subject to judicial review. The states argued that the injunction instead enjoins the "unwritten but conspicuous nationwide lease-sale 'Pause' as final agency action reviewable under the APA." The court found that the district court's order and accompanying memorandum did not define "Pause" with specificity, leading the parties to differ in their interpretation of the Pause's breadth. The Fifth Circuit held that the district court's injunction failed to meet the requirements of Rule 65(d) of the Federal Rules of Civil Procedure because the court was unable to ascertain exactly what conduct was enjoined.

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In re Deepwater Horizon, 21-30573, 2022 WL 4006944 (5th Cir. Sept. 2, 2022).

Loggerhead Holdings, Inc., which owned a scuba diving cruise business, brought suit against BP oil for economic and physical damages resulting from the Deepwater Horizon oil spill, asserting claims under the Oil Pollution Act. BP filed motion for summary judgment, and the district court granted the motion. Loggerhead appealed. On appeal, the Fifth Circuit affirmed in part and reversed in part. The court applied the "substantial-nexus test" established by the U.S. Supreme Court to the Section 2702 (b)(2)(E) claim, which required a "significant causal link" to determine whether the oil damage Loggerhead's vessel *Rorqual* encountered was due to the Deepwater Horizon oil spill. On the claim for economic damages, the court held that the district court erred in granting summary judgment because there is a genuine issue of material fact where a reasonable factfinder could find a causal link between the Deepwater Horizon oil spill and Loggerhead's scuba diving business failure. On the claim for physical damages, the evidence provided by Loggerhead was "so weak or tenuous" that it could not create a genuine dispute of material fact to defeat the motion for summary judgment.

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BG Gulf Coast LNG, L.L.C. v. Sabine-Neches Nav. Dist. of Jefferson County, Texas, 22-40158, 2022 WL 4231804 (5th Cir. Sept. 14, 2022).

Two energy companies, BG Gulf Coast LNG and Phillips 66 Company, sued the Sabine-Neches Navigation District of Jefferson County, Texas, claiming that port fees imposed against waterway users to fund construction improvements exceeded the congressional funding limits according to the Water Resources Development Act (WRDA). The Fifth Circuit affirmed the district court's dismissal for plaintiffs' failure to state plausible claims. The court held that the district can cover more than 25% of the cost with the User Fee proceeds and that the district's actions did not violate the WRDA.

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NINTH CIRCUIT

Metlakatla Indian Cmty. v. Dunleavy, No. 21-35185, 2022 WL 4101799 (9th Cir. Sept. 8, 2022).

The Ninth Circuit reversed the district court's dismissal of the Metlakatlan Indian Community's suit for failure to state a claim against Alaskan officials who asserted the Community was subject to Alaska's limited entry statute for commercial fishing in state waters. Congress passed the 1891 Act recognizing the Community and establishing the Annette Islands Reserve as its reservation. The Community claimed that the Act granted traditional fishing rights in off-reservation waters, and that they were therefore not subject to Alaska's limited entry program. Alaska argued that the Community's rights should be distinguished from the rights of other tribes because the Community's reservation was created by law, rather than executive order. The Ninth Circuit disagreed, holding that the type of legal

instrument used to establish a reservation makes no difference to the court's inquiry into a tribe's attendant resource rights. The court applied the Indian canon of construction, which required it to construe the 1891 Act liberally in favor of the Community and to infer rights that supported the purpose of the reservation. The court discussed in detail the Community's rich history throughout the Alaskan territory and the purpose of the Act, and ultimately held that the Community enjoys an implied right to non-exclusive off-reservation fishing for personal consumption and ceremonial purposes, as well as commercial purposes, under the Act. The Ninth Circuit stated that any regulation by Alaska of off-reservation fishing by the Community must be consistent with Congress' intent in the 1891 Act to provide the Metlakatlangs rights that would satisfy the future as well as the present needs of the Community.

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ELEVENTH CIRCUIT

Florida

Rood v. Town of Ft. Myers Beach, Fla., No. 2:20-CV-981-SPC-KCD, 2022 WL 3544398 (M.D. Fla. Aug. 18, 2022).

The U.S. District Court for the Middle District of Florida granted Fort Myers Beach's motion for summary judgment in a lawsuit involving the its denial of an application for special exemption to build a dune walkover from a resident's property to the town's beach. After the denial of the application, the resident filed suit against the town for failure to accommodate pursuant to the Americans with Disabilities Act (ADA). The court applied the failure-to-accommodate test generally used for residential zoning disability cases to the claim. The test requires the plaintiff to show that he requested a reasonable accommodation, and that the accommodation was necessary. The court found it relevant that during the zoning proceedings the plaintiff supported his argument for the exemption with the town's zoning, permitting, and statutory requirements, never offering evidence of his disability or desire for an ADA accommodation. The court held that the plaintiff's claim failed because he never directly requested an ADA accommodation or offered enough information to put the town on notice of his disability and desired accommodation. Further, the court held that even if the plaintiff requested an accommodation, the ADA did not require the dune walkover because it was not a reasonable or necessary accommodation and would have fundamentally altered the nature of the town's environmentally critical zoning scheme.

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D.C. CIRCUIT

Gulf Restoration Network v. Haaland, No. 20-5179, 2022 WL 3722429 (D.C. Cir. Aug. 30, 2022).

The U.S. Court of Appeals for the District of Columbia upheld two 2018 offshore oil and gas lease sales in the Gulf of Mexico. Several environmental organizations filed suit claiming that the Bureau of Ocean Energy Management's lease sales were based on arbitrary environmental assessments in violation of the National Environmental Policy Act. The U.S. District Court for the District of Columbia ruled in favor of the federal agencies. On appeal, the court held that BOEM adequately considered a no-action alternative and was not required to consider potential changes to the Bureau of Safety and Environmental Enforcement's (BSEE) safety rules. However, the court found that the agency acted arbitrarily when it declined to address a Government Accountability Office (GAO) report criticizing BSEE enforcement of existing safety and environmental regulations. The court affirmed the summary judgment in part and reversed the summary judgment in part and remanded the case for further consideration of the GAO report.

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District of Columbia

Maine Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., 21-2509 (D.D.C., Sept. 9, 2022).

The U.S. District Court for the District of Columbia ruled on a challenge to the National Marine Fisheries Service's

(NMFS) 2021 Biological Opinion (BiOp) and Final Rule addressing North Atlantic right whale population conservation and restrictions on lobster fishing. The State of Maine and lobstering association claimed that NMFS's estimates of the current and future right whale population were inaccurate. The court granted summary judgment in favor of NMFS, finding that the agency provided a reasonable explanation for its estimates.

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Center for Biological Diversity, et al. v. Nat'l Marine Fisheries Serv., et al., 2022 WL 4235013 (D.D.C. Sept. 14, 2022).

Several environmental organizations filed suit challenging the National Marine Fisheries Service's (NMFS) 2019 Rule requiring certain types of shrimp trawlers to use a turtle excluder device (TED). The groups claimed that the rule and accompanying Environmental Impact Statement (EIS) violated the Endangered Species Act, the Administrative Procedure Act (APA), and the National Environmental Policy Act (NEPA). The U.S. District Court for the District of Columbia granted summary judgment in favor of the federal agency, holding that the promulgation of the 2019 Rule and EIS in compliance with both NEPA and the APA.

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