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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the January 2023 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-23-03-01).

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FIFTH CIRCUIT

Port of Corpus Christi Auth. of Nueces Cnty., Tex. v. Port of Corpus Christi L.P., No. 22-40124, 2023 WL 116726 (5th Cir. Jan. 6, 2023).

The Port of Corpus Christi Authority of Nueces County, Texas (Port Authority) sued the Port of Corpus Christi, L.P. for trespass under Texas common law, alleging that dredging operations conducted pursuant to a permit issued by the U.S. Army Corps of Engineers resulted in sand, clay, large stones, and dredge pipe being placed onto the Port Authority's submerged land. The Port of Corpus Christi removed the case to federal court, claiming that federal jurisdiction was proper based on 1) Federal Officer Removal Jurisdiction, 2) Federal Question Jurisdiction, and 3) Admiralty/Maritime Jurisdiction. The Port Authority filed a motion to remand the case to state court, which the district court granted. The Port of Corpus Christi appealed this decision. The Fifth Circuit held that the Port of Corpus Christi did not satisfy the requirements of Federal Officer Removal Jurisdiction because it was not assisting or carrying out the duties of a federal officer. Further, the court held that Federal Question Jurisdiction was not proper because the Port Authority's complaint alleged trespass under Texas common law and did not implicate any federal laws. Finally, because the Port of Corpus Christi did not sufficiently brief the issue of Admiralty/Maritime Jurisdiction, the court disregarded this argument. Accordingly, the Fifth Circuit affirmed the district court's decision to remand the case to state court.

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Shrimpers and Fishermen of the RGV v. United States Army Corps of Eng'rs, No. 21-60889, 2023 WL 108558 (5th Cir. Jan. 5, 2023).

Several groups, including the Shrimpers and Fishermen of the RGV, challenged the issuance of a Clean Water Act (CWA) permit by the U.S. Army Corps of Engineers (Corps). The permit allowed developers to build a natural gas pipeline system and liquified natural gas export facility in south Texas. A portion of the development would be built on wetland terrain, which is regulated by the CWA. The plaintiffs argued that the Corps violated the CWA by 1) failing to show that the plan for the project was the least environmentally damaging practicable alternative (LEDPA) and 2)

determining that compensatory mitigation was not necessary given the wetland impacts. The court rejected the plaintiffs' arguments because the Corps sufficiently explained its reasons for rejecting the alternative plans presented by the plaintiffs concerning the LEDPA. The court was further swayed by the Corps' determination that the pipeline construction impacts on the wetlands would be temporary and did not necessitate compensatory mitigation, the court rejected the plaintiffs' arguments. Accordingly, the Fifth Circuit denied the petition for review.

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SIXTH CIRCUIT

Ohio

TWISM Enters., L.L.C. v. State Bd. of Registration for Pro. Eng'rs & Surveyors, No. 2022-Ohio-4677

(Ohio Dec. 29, 2022).

The Ohio Supreme Court concluded that its courts are not required to defer to an agency's interpretation of the law. The Ohio State Board of Registration for Professional Engineers and Surveyors (Board) denied TWISM Enterprises, L.L.C. (TWISM) a certificate of authorization to provide engineering services. TWISM appealed the denial in the Court of Common Pleas, which afforded no deference to the Board's interpretation of the administrative code. The Board appealed this decision. The appellate court reversed the lower court's decision, finding that the administrative code provision was ambiguous and thus, the Board's interpretation was entitled to deference. TWISM appealed to the Ohio Supreme Court, which took this case as an opportunity to clarify the law regarding judicial deference to statutory interpretations by administrative agencies. The court concluded that the judiciary is not required to defer to an agency's interpretation of the law. The court found that TWISM's employment of an independent contractor to complete the company's engineering work satisfied the fulltime manager requirement. Accordingly, the Ohio Supreme Court reversed the appellate court decision and remanded the case to the Board for further proceedings.

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EIGHTH CIRCUIT

Minnesota

Clean Water & Air Legacy, LLC v. Tofte Wastewater Treatment Ass'n, No. CV 22-386 (JRT/LIB), 2023

WL 35902 (D. Minn. Jan. 4, 2023).

Clean Water and Air Legacy, LLC (CWAL) brought suit asserting the Tofte Wastewater Treatment Association, doing business as Bluefin Bay, discharged sewage and other substances in violation of its wastewater treatment permit, harming a public park along Lake Superior. CWAL asserted claims under the Clean Water Act (CWA), public nuisance, private nuisance, and negligence. Bluefin Bay moved to dismiss the claims or requested summary judgment in the alternative. The U.S. District Court for the District of Minnesota found that CWAL alleged sufficient facts to proceed with the CWA and negligence claims. However, the court agreed to dismiss the public nuisance and private nuisance claims. The court denied the motion for summary judgment because issues of material fact remain for the CWA and negligence claims.

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NINTH CIRCUIT

Sauk-Suiattle Indian Tribe v. City of Seattle, No. 22-35000, 2022 WL 17999429 (9th Cir. Dec. 30, 2022).

The Sauk-Suiattle Indian Tribe (Tribe) sued the City of Seattle (Seattle) for violations of state and federal law

resulting from Seattle's operation of the Gorge Dam without fish passage facilities. After Seattle removed the case to federal court, the Tribe filed a motion to remand the case to state court, which the district court denied. The district court determined that it had jurisdiction because the Tribe's complaint raised substantial federal questions, and the district court subsequently granted Seattle's motion to dismiss the complaint for lack of subject matter jurisdiction. The Tribe appealed. The Ninth Circuit determined that the Tribe's complaint raised substantial federal questions because it would have required a court to interpret the Congressional Acts and apply the Constitution's Supremacy Clause to determine whether Seattle was violating the Congressional Acts by operating the Gorge Dam without fishways. Additionally, the court concluded that the United States has a strong interest in the regulation of projects licensed by the Federal Energy Regulatory Commission (FERC). Finally, the Federal Power Act gives federal courts of appeals exclusive jurisdiction over all objections to FERC orders made by parties to FERC proceedings based on federal and state law. Accordingly, the Ninth Circuit affirmed the district court's denial of the Tribe's remand motion and dismissal of the Tribe's complaint.

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D.C. CIRCUIT

Waterkeepers Chesapeake v. FERC, No. 21-1139, 2022 WL 17814480 (D.C. Cir. Dec. 20, 2022).

After certifying that the Conowingo Dam on the Susquehanna River in Maryland would comply with the Clean Water Act's (CWA) water quality standards in 2018, Maryland attempted to withdraw its certification and waive its authority to certify. The Federal Energy Regulatory Commission (FERC) then treated Maryland's attempted waiver as giving FERC the authority to license the Conowingo Dam. Several environmental groups petitioned for a rehearing regarding the granting of the license, arguing that Maryland did not have the authority to waive its 2018 certification; therefore, FERC did not have the authority to grant the license under the CWA. After the rehearing, FERC determined that Maryland had waived its authority to issue a water quality certification. The environmental groups petitioned for review. The CWA gives FERC the authority to issue licenses only when a state grants certification or waives its authority to do so through refusal or failure to act. Because Maryland acted both by issuing its 2018 certification and subsequently attempting to waive its authority to certify, its actions did not constitute a waiver under the CWA. Accordingly, the appellate court vacated the Conowingo Dam license and remanded the case to FERC for further proceedings.

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A.P. Bell Fish Company, Inc. v. Raimondo, No. CV 22-1260 (TJK), 2023 WL 122270 (D.D.C. Jan. 6, 2023).

Commercial fishermen and a trade association challenged the National Marine Fisheries Service's implementation of Amendment 53 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico. The amendment reduced the allocation of red grouper for the commercial sector while increasing it for the recreational sector. The plaintiffs sought to have the amendment vacated, alleging that the agency based the allocation on bad data, applied those data arbitrarily, disregarded pro-conservation mandates and other legal requirements, and committed itself to a new policy without weighing suitable alternatives. The U.S. District Court for the District of Columbia granted summary judgment to the defendants, finding the administrative record does not support those claims.

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COURT OF INTERNATIONAL TRADE

Sea Shepherd New Zealand v. United States, No. 20-00112, 2023 WL 129368 (Ct. Int'l Trade Jan. 9, 2023).

In November 2022, the Court of International Trade issued a preliminary injunction ordering the immediate ban on imports into the United States of fish and fish products deriving from nine fish species caught in New Zealand's West Coast North Island inshore trawl and set net fisheries, unless affirmatively identified as having been caught with a gear type other than gillnets or trawls. The Government of New Zealand petitioned the court to modify the

preliminary injunction to allow New Zealand a grace period to implement a “traceability system.” The court denied the request, noting the government did not make a requisite showing of “changed circumstances” that would allow a modification of the preliminary injunction.

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