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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the June 2024 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-24-03-06).

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THIRD CIRCUIT

New Jersey

In re Reauthorization of the Freshwater Wetlands Gen. Permit #1, Nos. A-2758-21, A-2804-21, 2024 N.J. Super. Unpub. LEXIS 1102 (Super. Ct. App. Div. June 7, 2024).

New Jersey residents challenged the state's use of a Confined Disposal Facility (CDF), which "piggybacked" on permits acquired by the previous operator. The claimants observed that this CDF had grown and experienced increased use since its initial authorization, causing environmental harm. The court had previously remanded this case, asking the state to justify its decision to rely upon the old permits, noting other, more suitable ones were available. On appeal, the court invalidated the original permit, ruling the state's continued use marked a significant deviation from the permitting criteria, which New Jersey had misinterpreted on remand.

[Opinion Here](#)

FOURTH CIRCUIT

Maryland

Eliza Wille et al., v. Gina Raimondo, et al., No. CV 22-0689-BAH, 2024 WL 2832599 (D. Md. June 3, 2024).

After the National Marine Fisheries Service (NMFS) issued a rule to limit human interaction with spinner dolphins in Hawaii, some residents argued that the rule was unconstitutional under the Appointments Clause. The claimants argued that the rule's author was not qualified to issue this regulation because he was not a presidentially appointed and Senate-confirmed "Officer of the United States." Instead, the author was Samuel Rauch, the NMFS Deputy Assistant Administrator for Regulatory Programs. The defendants filed a motion for summary judgment. The court granted the motion, finding that Rauch's principal, Dr. Spinrad, the NOAA Administrator, was appointed correctly, resolving concerns about the principal-agent relationship and any alleged impropriety.

[Opinion Here](#)

FIFTH CIRCUIT

Plaquemines Parish v. BP America Prod. Co., 2024 WL 2746246 (5th Cir. 2024).

A number of oil companies were sued by Louisiana parishes in more than forty separate cases for the environmental harm caused by their production of crude oil. The oil companies appealed multiple decisions by district court judges to have the cases remanded to state court. The oil companies argued that the cases should be decided in federal court by virtue of the federal officer removal statute. This statute allows companies to remove a case to federal court if a sufficient connection can be shown between the conduct of the defendant and a federal officer. Here, the oil companies claimed that their actions were the result of refining contracts made with the federal government to produce aviation fuel during World War II. The court agreed that the companies had “acted under” a federal officer by performing as was required by their contracts. However, the court found that the conduct at issue, the methods which the oil companies used to expand production of crude oil in WWII, had an insufficient connection to the contracts, and thus to the federal officers in question. The contracts involved did not mention the production of crude oil, meaning that the companies could have fulfilled their contractual obligations in many ways which did not involve the production methods now alleged to have caused environmental harm. Therefore, the court concluded that the connection between federal officers and the conduct in question was insufficient for the case to be removed to federal court and affirmed the decisions to keep the cases in state courts.

[Opinion Here](#)

Alabama

F Fam. S., LLC v. Prop. Owners Ass'n of Ono Island, Inc., No. SC-2023-0341, 2024 WL 2228594 (Ala. May 17, 2024).

The purported owner of a lot in a canal-fronting residential subdivision on Ono Island, Alabama filed suit in state court against the subdivision’s property owners association (POA) after the POA issued a stop work order regarding a boat shelter that the plaintiff was building on an intertidal mound within the lot. The plaintiff asserted claims of contractual interference and negligence, while the POA counterclaimed that the tax sale underlying the plaintiff’s property rights was invalid and the construction project violated the subdivision’s restrictive covenants. The trial court held that the POA owned the island because the tax sale was invalid and enjoined the plaintiff from building because the island was burdened by covenants that prohibited such activity. The plaintiff appealed to the Alabama Supreme Court. First, the court reversed the lower court’s decision to void the tax sale underlying the plaintiff’s ownership because the suit was brought after the twenty-year period within which the sale’s validity could be challenged. On the other hand, the court affirmed that the island was a unit of the subdivision and at least impliedly burdened by its covenants. The intertidal mounds were intentionally developed as an integral part of Ono Island’s canal system and the POA consistently managed them to ensure canal access and ecosystem health for the benefit of all property owners within the subdivision. Regardless of their plat designations, the islands were historically managed according to the covenants and the covenants were referenced in the deeds to all subdivision property, so the plaintiff had at least constructive notice of their applicability.

[Opinion Here](#)



NINTH CIRCUIT

Nat. Res. Def. Council v. Haaland, No. 21-15163, 2024 WL 2340796 (9th Cir. May 23, 2024).

The Natural Resources Defense Council and other environmental interest groups (collectively, “NRDC”) filed suit against the U.S. Bureau of Reclamation (BOR) and the U.S. Fish and Wildlife Service (FWS), claiming that the agencies violated the Administrative Procedure Act (APA) and Endangered Species Act (ESA) due to insufficient consultation for the renewal of government water supply contracts. NRDC alleged that 1) BOR and FWS failed to engage in adequate consultation on the potential effects that renewing the contracts might have on the ESA-protected delta smelt and 2) that BOR was legally obligated to reinstate its consultation with the National Marine Fisheries Service (NMFS) about the contracts’ potential effects on Chinook salmon. After a tumultuous, nearly twenty-year procedural history, the plaintiffs appealed the district court’s dismissal of three of their claims for relief, but the circuit court affirmed the decision. First, after finding that the issue was not moot, the court held that FWS did not violate the APA by failing to conduct an adequate consultation on the contract renewals’ effects on delta smelt and its habitat. Embedded within this conclusion, the court also held that, in providing consultation that the contract renewals would not harm the species, FWS 1) appropriately relied on its 2008 biological opinion to inform its decision, 2) utilized the best available science, 3) properly accounted for changes in environmental conditions, and 4) sufficiently considered the full scope of the renewals’ effects despite modeling limitations. Next, the court held that, since FWS’s consultation was adequate, BOR did not violate its duties under the ESA by relying on the consultation. Finally, the court held that BOR did not unlawfully fail to reinstate consultation with NMFS regarding the effects of

the contract renewals on Chinook salmon because BOR did not have sufficient discretion to take measures that would benefit the species.

[Opinion Here](#)

Soundkeeper v. Port of Tacoma, No. 21-35881, 2023 WL 11807235 (9th Cir. June 10, 2024).

Puget Soundkeeper Alliance alleged the Port of Tacoma (Port) and terminal operators violated the Clean Water Act by not adequately controlling stormwater discharge from a large marine cargo terminal on Puget Sound. The environmental group argued that the Port and operators should be liable for stormwater discharges from the entire footprint of the facility, including an area known as the “Wharf.” The Port and the terminal operators contended that they are required to employ stormwater controls only at portions of the Terminal conducting industrial activities listed in 40 C.F.R. § 122.26(b)(14)(viii) and no such activities occur at the Wharf. A federal district court granted summary judgment for the plaintiffs finding that the Industrial Stormwater General Permits (ISGPs) issued by the state agency did not extend coverage to the Wharf, as the Wharf did not conduct the industrial activities specified in the permits. On appeal, the Ninth Circuit reversed and vacated in part. The court affirmed the grant of summary judgment to the Port as to all discharges not involving the Wharf. However, the court vacated the district court’s decision regarding the 2020 ISGP, which was subject to an ongoing state-court challenge and remanded the case for further consideration.

[Opinion Here](#)

Alaska

Metlakatla Indian Cmty. v. Dunleavy, 2024 WL 2881687 (D. Alaska 2024).

The Metlakatla Indian Community (Community) sued Alaska, claiming that the state’s limited entry commercial fishing program interfered with their right to use the waters they had fished since time immemorial. The Community rested its claim on the 1891 Act, which established its reservation on the Annette Islands. During a prior appeal, the Ninth Circuit held that the 1891 Act reserved implied fishing rights in the waters surrounding the reservation, which the Community had traditionally enjoyed access to. Further, the Ninth Circuit held that Alaska’s limited entry program, as currently administered, is inconsistent with the rights enjoyed by the community, and must therefore be made consistent. Alaska attempted to argue that the case was a matter of aboriginal rights, whose existence are difficult to prove, and which are often barred from trial by previous legislation. Pointing to the Ninth Circuit’s opinion, the district court concluded that the case did not concern aboriginal rights, but a reserved right of the Community, which would not face the same barriers or be barred by prior legislation. It remains to be decided which components of Alaska’s program must be altered to make it consistent with the rights of the Community. It is also yet to be determined whether the Community’s reserved right extends to several specific zones in Alaskan waters which are of concern to both parties.

[Opinion Here](#)

Hawaii

Wai Ola All. v. U.S. Dep’t of the Navy, No. CV 22-00272 LEK-RT, 2024 WL 2214557 (D. Haw. May 14, 2024).

The Wai Ola Alliance and others filed suit against the U.S. Department of the Navy and other related governmental entities alleging that the Navy was violating the Resource Conservation and Recovery Act by persistently releasing toxic pollutants from the Red Hill Bulk Fuel Storage Facility into O’ahu, Hawaii’s groundwater aquifer and navigable waters, endangering both human and environmental health and violating the Clean Water Act. The Navy moved to dismiss the case, or in the alternative, to stay proceedings, as it was already complying with orders from the state’s Department of Health and the U.S. Environmental Protection Agency that set requirements for defueling and monitoring the facility. The district court stayed the case regarding the matters that have been, or are being, addressed by the prior administrative orders because reviewing or undermining those plans would have been inefficient. However, the court denied the Navy’s motion as applied to the remainder of the citizen suit, since the suit would address issues that were neglected by the orders, further strong federal interests, and would not intrude on the state’s efforts or domain.

[Opinion Here](#)



D.C. CIRCUIT

District of Columbia

Comm. for a Constructive Tomorrow v. United States Dep’t of the Interior, 2024 WL 2699895 (D.D.C.)

2024).

Committee for a Constructive Tomorrow (CFACT) requested a preliminary injunction to halt construction of an offshore wind project because of its potential to harm the North Atlantic right whale, an endangered species. CFACT argued that the Biological Opinion provided by the National Marine Fisheries Service, which was used to approve the project, was inadequate, because it failed to consider the cumulative impact on the whale species of all of the wind turbine projects currently approved or planned in the Atlantic seaboard. The request for an injunction was denied because CFACT failed to establish that they would suffer an irreparable injury if an injunction were not granted. The court stated that because of the measures which were already being taken to prevent harm to the whales during construction, the threat to the species was only theoretical, not actual or certain, making an injunction inappropriate. The court also highlighted the fact that CFACT had not requested the injunction until just before in-water construction was to begin, which the court argued indicated a lack of true urgency on the part of the organization.

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