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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the October 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-24-03-10).

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THIRD CIRCUIT

Lofstad v. Raimondo, No. 24-1420, 2024 WL 4314257 (3d Cir. Sept. 25, 2024).

Several commercial fishers challenged a provision of the Magnuson-Stevens Fisheries Management Act (MSA) that grants veto power to regional Fisheries Management Councils for certain Secretary of Commerce actions. The fishers claimed the veto power violates the Appointments Clause, which requires principal officers to be appointed by the President and confirmed by the Senate. The fishers argued that the councils' veto power made the council members principal officers without proper appointment. The Third Circuit agreed and held that the veto power provision is unconstitutional. As a remedy, the court severed the MSA provisions granting veto power but upheld the councils' advisory role in fishery management proposals.

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FOURTH CIRCUIT

South Carolina

South Carolina v. Haaland, No. 2:23-CV-3651-BHH, 2024 WL 4227082 (D.S.C. Sept. 18, 2024).

South Carolina sued the federal government over limits imposed for the harvest of shellfish, finfish, and other saltwater species in the Cape Romain National Wildlife Refuge. The lawsuit was based on a lease granting South Carolina exclusive authority to harvest these species on lands below the mean high-water mark on Marsh Island and other leased areas. Defenders of Wildlife and the South Carolina Coastal Conservation League intervened, moving to dismiss the case. They argued that the court lacked subject matter jurisdiction due to ripeness issues and that the plaintiffs did not adequately state a claim. The court granted the motion, finding the case was not ripe since South Carolina had not suffered actual harm before the lawsuit was filed.

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FIFTH CIRCUIT

Mississippi

Harrison County, Mississippi v. U.S. Army Corps of Eng'rs, No. 1:24CV21-LG-BWR, 2024 WL 4245422 (S.D. Miss. Sept. 19, 2024).

Local governments and nonprofit groups sued the U.S. Army Corps of Engineers over the operation of the Bonnet Carré Spillway. The plaintiffs claimed that the Marine Mammal Protection Act required the agency to obtain an incidental take authorization prior to opening the spillway due to potential harm to bottlenose dolphins. The U.S. District Court for the Southern District of Mississippi dismissed the case, finding that the plaintiffs failed to demonstrate that Spillway openings consistently increased dolphin strandings. The court concluded that the unpredictability of Spillway openings made it impossible to prove injury-in-fact for standing purposes. Even if injury could be shown, the court found that any potential relief was uncertain, as it depended on decisions made by the National Marine Fisheries Service. Finally, the court denied the plaintiffs' motion to amend their complaint, finding they lacked standing for both their original and alternative claims.

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NINTH CIRCUIT

Coastal Envtl. Rights Found. v. Naples Rest. Grp., LLC, No. 23-55469, 2024 WL 4220690 (9th Cir. Sept. 18, 2024).

An environmental group, Coastal Environmental Rights Foundation, sued a restaurant and its owner over their annual Fourth of July fireworks show, alleging violations of the Clean Water Act (CWA) for setting off fireworks into Alamitos Bay without a permit. The district court found that one firework went off prematurely, but this was insufficient to establish a continuing CWA violation. After the verdict, the Los Angeles Regional Water Quality Control Board issued a National Pollutant Discharge Elimination System (NPDES) permit for public fireworks displays. The restaurant applied for and received this permit. On appeal, the Ninth Circuit ruled the environmental group's requests for injunctive and declaratory relief were moot, as the permit ensured the wrongful behavior would not recur. The Ninth Circuit also ruled the request for civil penalties moot on the same grounds.

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Food and Water Watch v. U.S. Env't Prot. Agency, No. 23-2146, 2024 WL 4371122 (9th Cir. Oct. 2, 2024).

Environmental groups petitioned the Environmental Protection Agency (EPA) to initiate a rulemaking process to revise regulations for concentrated animal feeding operations (CAFOs) that discharge animal waste into waterways. The EPA denied the petition, acknowledging that CAFOs could contribute to unlawful water pollution, but determined that an immediate rulemaking was not the best approach. Instead, it planned to gather information from stakeholders and conduct a study on the efficacy of existing regulations before deciding whether regulatory changes were necessary. The petitioners sought judicial review of this decision, arguing that the EPA's actions were insufficient under the Administrative Procedure Act. However, the Ninth Circuit concluded that the EPA's decision was not arbitrary or capricious because while the EPA declined to open rulemaking at this time, it chose a reasonable approach to further study the issue. Therefore, the court denied the petition.

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United States v. Korotkiy, No. 23-2443, 2024 WL 4456818 (9th Cir. Oct. 10, 2024).

The chief engineer of a foreign-flagged ship was convicted in federal district court for violating a Coast Guard regulation that requires shipmasters to maintain a record of bilge-water operations in an oil record book while in U.S. waters. The plaintiff claimed that "maintain" did not mean to accurately maintain records and that the regulation only applied to ship masters, not chief engineers. On appeal, the Ninth Circuit held that the regulation imposes a duty to maintain a reasonably complete and accurate record. The court affirmed the lower court's decision finding there was sufficient evidence to support chief engineer's conviction. The court also found the fact that the chief engineer was not a shipmaster did not preclude his prosecution.

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Alaska

State of Alaska v. Nat. Marine Fisheries Serv., No. 3:23-cv-00032-SLG, 2024 WL 4298114 (D. Alaska Sept. 26, 2024).

The State of Alaska filed a lawsuit challenging the National Marine Fisheries Service's (NMFS) April 2022 final rules that designated over 160 million acres of water surrounding Alaska as critical habitat for the Beringia distinct population segment of the bearded seal and the Arctic ringed seal. The state argued that NMFS's designation, encompassing nearly all U.S.-occupied areas of these species, violated the Endangered Species Act by failing to specify areas essential for conservation and not adequately considering economic and national security impacts as well as foreign conservation efforts. NMFS maintained that the dynamic nature of sea ice justified a broad designation, but the U.S. District Court of Alaska concluded that NMFS did not adequately explain why the entire designated area was indispensable to the species' conservation and failed to consider foreign conservation efforts or the possibility of excluding certain areas. Therefore, the court vacated NMFS's critical habitat designations and remanded the matter for further review.

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Washington

Don't Cage Our Oceans v. U.S. Army Corps of Eng'rs, No. C22-1627-KKE, 2024 WL 4349548 (W.D. Wash. Sept. 30, 2024).

Environmental groups filed suit against the U.S. Army Corps of Engineers in November 2022, challenging the issuance of Nationwide Permit (NWP) 56, which authorized structures for finfish aquaculture. The U.S. District Court for the Western District of Washington found that the Corps' issuance of NWP 56 did not comply with the procedural requirements under the Rivers and Harbors Act and the National Environmental Policy Act. The court held that the Corps' environmental assessment (EA) was inadequate because the EA itself acknowledged environmental impacts from aquaculture activities but failed to fully account for them in its analysis. The court determined that since the Corps authorizes the installation of aquaculture structures, it cannot distance itself from the impacts of the activities facilitated by those structures. However, the court also ruled that the Corps did not exceed its authority in issuing NWP 56 and denied the request to vacate NWP 56 on this basis. Further, the court could not determine the appropriate remedy for the permit's deficiencies due to lack of information in the record. The court finally ordered the parties to discuss the next steps for determining a remedy and submit their recommendations by October 2024.

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D.C. CIRCUIT

District of Columbia

Nat'l Wildlife Fed'n v. Lohr, No. 19-cv-2416 (TSC), 2024 WL 4443687 (D.D.C. Oct. 8, 2024).

The National Wildlife Federation (NWF) challenged a 2020 final rule issued by the Natural Resource Conservation Service (NRCS) concerning pre-1996 wetland certifications, alleging violations of the Administrative Procedure Act (APA). The U.S. District Court for the District of Columbia granted NWF's motion for summary judgment, finding that NRCS violated the APA by changing its policy without a reasoned explanation. The court vacated the rule and remanded the case to NRCS. The defendants requested the court to remand the case without vacatur. The district court concluded that NRCS would not suffer manifest injustice from vacatur because 1) NRCS's policy change was seriously deficient; 2) there was a lack of evidence that vacating the rule would cause substantial disruption to the agency; 3) remanding without vacatur could pose serious environmental risks by allowing further wetland drainage; and 4) NRCS had the opportunity to contest vacatur earlier in litigation but chose not to. Therefore, the district court denied NRCS's motion to remand without vacatur.

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