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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the September 2020 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-20-03-09).

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FIRST CIRCUIT

New Hampshire

Conservation Law Found., Inc. v. New Hampshire Fish & Game Dep't, No. 18-CV-996-PB, 2020 WL 5102830 (D.N.H. Aug. 27, 2020).

An environmental organization brought suit against the New Hampshire Fish and Game Department (NHFG) alleging that the Powder Mill State Fish Hatchery discharged pollutants into the Merrymeeting River in violation of the facility's National Pollutant Discharge Elimination System (NPDES) permit. The U.S. District Court for the District of New Hampshire separated the claims into "Outfall Discharge" claims, those based on current and anticipated releases of phosphorus and other pollutants directly from the facility's two outfalls, and "Sediment Discharge" claims, those related to past releases of phosphorus by the facility that have settled into sediments at the bottom of and continue to leach into the river. The parties filed cross-motions for summary judgment. The court granted NHFG'S motion with respect to the Sediment Discharge claims. The court granted the plaintiff's summary judgment on two of the Outfall Discharge claims. Under the court's order, the facility has ninety days to implement a system to stop Outfall Discharges that violate limits in its 2011 NPDES permit.

Opinion Unavailable

Rhode Island

Relentless, Inc. v. U.S. Dep't of Commerce, No. CV 20-108 WES, 2020 WL 5016923 (D.R.I. Aug. 25, 2020).

Several commercial fishing businesses sought a permanent injunction from the U.S. District Court for the District of Rhode Island to prohibit the government from enforcing a rule requiring Atlantic herring fisherman to pay for independent monitors aboard their vessels. The defendants petitioned the court to transfer the case to the U.S. District Court for the District of Columbia so that it could be consolidated with *Loper Bright Enterprises v. Department of Commerce*, C.A. No. 20-466 (D.D.C.). The court disagreed with the defendant's arguments for transferring the case. The court reasoned the *Loper* case was not factually or legally identical, and the plaintiffs could

be inconvenienced from a change in venue. Therefore, the court denied the defendant's motion to transfer the case.

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SECOND CIRCUIT

New York

Poly-Pak Industries, Inc. v. New York, No. 902673 (N.Y. Sup. Ct. August 20, 2020).

A plastics company and a convenience store owners association sued the State of New York, challenging the constitutionality a state plastic bag ban and state Department of Environmental Conservation regulations enacted pursuant to the ban. A New York court upheld the ban but struck down the portion of the regulations setting the minimum thickness for plastic reusable bags at 10 mils. The judge ruled that the regulation allowing reusable plastic bags was outside the authority granted by the statute.

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NINTH CIRCUIT

California

Kouball v. Seaworld Parks & Entertainment, No. 20-CV-870-CAB-BGS, 2020 WL 5408918 (S.D. Cal. Sept. 9, 2020).

An annual pass holder at SeaWorld in San Diego sought to file a class action suit to recover pass fees for the amount of time that SeaWorld closed the park due to the Covid-19 pandemic. The plaintiff claimed 1) violation of California's Consumers Legal Remedies Act (CLRA); 2) violation of California's Unfair Competition Law (UCL); 3) violation of California's False Advertising Law (FAL); 4) breach of contract; 5) unjust enrichment; and 6) money had and received. The U.S. District Court for the Southern District of California dismissed the CLRA, unjust enrichment, and money had and received claims with prejudice. The court dismissed the remaining claims without prejudice, ruling that the plaintiff could submit an amended complaint for the UCL, FAL, and breach of contract claims by September 23, 2020.

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Oceana, Inc. v. Ross, No. 19-CV-03809-LHK, 2020 WL 5232566 (N.D. Cal. Sept. 2, 2020).

On May 31, 2019, the National Marine Fisheries Service published a final catch limit rule for the central anchovy subpopulation. An environmental organization challenged the agency's final catch limit rule. The plaintiff argued the rule was unlawful under the Magnuson-Stevens Fishery Conservation and Management Act because the rule was not based on the best scientific information available, did not prevent overfishing, and did not account for the needs of anchovy predators. The federal district court agreed with the plaintiff that the rule did not meet the requirements for using the best available scientific information available, and the rule did not prevent overfishing. The court did not reach the merits of whether the catch limit rule needed to account for the needs of anchovy predators. Therefore, the court vacated the 2019 catch limit rule and remanded to the agency.

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Protecting Our Water & Envtl. Res. v. Cty. of Stanislaus, No. S251709, 2020 WL 5049384 (Cal. Aug. 27, 2020).

Environmental organizations sued Stanislaus County, California to stop the county's practice of categorically classifying nonvariance well construction permits as ministerial projects, which are exempt from California Environmental Quality Act (CEQA) review. The plaintiffs argued that the issuance of the permits is a discretionary

decision that requires review under CEQA. A lower court ruled in favor of the county and an appellate court subsequently reversed. On appeal, the California Supreme Court reversed the appellate court's ruling that all permit issuances under the county's code were discretionary; however, the court held that the county's practice of blanket ministerial categorization violated CEQA.

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D.C. CIRCUIT

District of Columbia

Ctr. for Biological Diversity v. Bernhardt, No. 1:20-CV-00529 (TNM), 2020 WL 4903844 (D.D.C. Aug. 20, 2020).

An environmental group sued to require the U.S. Fish and Wildlife Service (FWS) to create a new recovery plan for the endangered Houston toad under the Endangered Species Act (ESA). The FWS sought to dismiss the complaint, arguing that its 1984 recovery plan for the toad was exempt from ESA recovery plan requirements enacted in 1988. The court denied the motion, finding that the 1984 plan was not exempt and that it lacked basic components for a recovery plan under current ESA requirements.

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Ctr. For Biological Diversity v. Ross, No. CV 18-112 (JEB), 2020 WL 4816458 (D.D.C. Aug. 19, 2020).

The Endangered Species Act requires the National Marine Fisheries Service (NMFS) to complete a Biological Opinion (BiOp) evaluating the impact of the American Lobster fishery on the right whale. In 2014, the agency issued a BiOp that the federal district court found to be unlawful. NMFS proposed issuing an updated BiOp in May 2021. Environmental organizations petitioned the court to require NMFS to complete the BiOp by January 31, 2021, and prohibit lobster fishing in the Southern New England Restricted Area until the BiOp is issued. The court disagreed with the plaintiffs and found that public interest and a balance of harms weighed in favor of a May 31, 2021 deadline without a prohibition on lobster fishing in the area.

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FEDERAL CIRCUIT

Taylor Energy Co. LLC v. United States, No. 2019-1983, 2020 WL 5240652 (Fed. Cir. Sept. 3, 2020).

The operator of three oil and gas leases covering areas on the Outer Continental Shelf brought suit against the United States, asserting claims involving Louisiana state law, including breach of trust agreement providing financial security for operator's federally mandated decommissioning work on oil and gas wells, request for dissolution of trust account based on impossibility of performance, request for reformation or rescission based on mutual error, and breach of the duty of good faith and fair dealing. The Court of Federal Claims granted the government's motion to dismiss. On appeal, the U.S. Court of Appeals for the Federal Circuit recently ruled that Outer Continental Shelf Lands Act regulations, not state law, governed the oil and gas lease operator's breach of contract claim.

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