June 15 2021

Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the June 2021 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-21-03-06).

Forward to a friend

Know someone who might be interested in our monthly newsletter?

Forward this email their way and help spread the word.

U.S. SUPREME COURT

Guam v. United States, 141 S. Ct. 1608 (2021).

The U.S. Supreme Court ruled that Guam may pursue a Superfund cost recovery claim from the U.S. Navy. The Navy constructed the Ordot Dump on Guam during the 1940s. Both the United States and Guam used the dump to deposit waste. In 2004, the U.S. Environmental Protection Agency (EPA) and Guam entered into a consent decree (Decree) to resolve violations of the Clean Water Act (CWA). The Decree stated that compliance, which included paying civil penalties and taking certain actions at the dump, would constitute full settlement of the civil claims. Guam then sued the United States under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), alleging that the United States' use of the dump exposed it to a cost-recovery action under § 107(a) and a contribution action under § 113(f). The D.C. Circuit rejected Guam's claims and the U.S. Supreme Court agreed to hear the appeal. The Court determined that the opening clause of § 113(f)(3)(B) ties itself to the CERCLA regime; the anchoring provision explained the scope of the contribution actions by specifically referencing CERCLA; and "response action" is a CERCLA-specific term that appears throughout the Act. The Court reasoned that interpreting § 113(f)(3)(B) to authorize a contribution right for environmental liabilities under other laws, like the CWA, would stretch the statute beyond Congress's actual language. Therefore, the Court reversed and remanded the case.

Opinion Here

SECOND CIRCUIT

Connecticut

Conn. v. Exxon Mobil Corp., No. 3:20-cv-1555 (JCH), 2021 WL 2389739 (D. Conn. June 2, 2021).

The State of Connecticut sued Exxon Mobil Corp. (Exxon) under the Connecticut Unfair Trade Practices Act, alleging that Exxon lied to Connecticut customers about the impact of fossil fuels on the climate and that those misrepresentations affected those customers' behavior. Exxon sought to remove the case, arguing that federal law governed the claims, and that Connecticut was seeking to regulate emissions of pollutants through common law tort liability rules. The case was removed to federal court. The federal district court then granted Connecticut's motion to remand the case to the Superior Court of Connecticut. Despite Exxon's arguments that Connecticut was actually targeting climate change harms, the complaint sought restitution under Connecticut law to fund efforts to respond to Exxon's allegedly deceptive and unfair practices.

Opinion Here

New York

Ctr. for Biological Diversity v. U.S. Env't Prot. Agency, No. 20-cv-6572 (JSR), 2021 WL 2217870 (S.D.N.Y. June 2, 2021).

In March 2020, the U.S. Environmental Protection Agency (EPA) announced that it would not enforce discharger violations of certain routine requirements, including sampling, testing, training, and reporting, if noncompliance was caused by COVID-19. Several environmental groups sued, arguing this policy posed the concrete risk of excess pollutants entering the habitats of shortnose sturgeons. The U.S. District Court for the Southern District of New York granted summary judgment for the EPA. The court noted that plaintiffs would suffer injury sufficient to confer standing if excess pollutants actually entered the habitats of the shortnose sturgeons. However, the court found that no reasonable jury could infer that the EPA's policy caused a real risk of excess drainage into sturgeon habitat. Furthermore, the plaintiff did not present evidence demonstrating the policy presented a traceable connection to the alleged harm. The record contained no evidence that permittees who temporarily failed to monitor disobeyed the law by discharging excess pollutants. The court concluded that a reasonable fact finder could not simply presume, without evidence, that monitoring failures caused excess discharges.

Opinion Here

FOURTH CIRCUIT

South Carolina

S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, No. 2019-000074, 2021 WL 2214218 (S.C. June 2, 2021).

The South Carolina Coastal Conservation League (League) appealed an administrative law court's (ALC) approval of a permit to construct an erosion control device (steel wall) within the critical area along the Kiawah River shoreline. The League argued that the ALC should have explicitly addressed the policies specific to the critical area permits because the steel wall, which is to be constructed upland, will ultimately encroach upon the critical area because of erosion. The court held that the ALC erred in upholding the permits and certifications. First, because there was no evidence to support the finding that the steel wall will not have an impact on the critical area, the ALC erred in accepting Department of Health and Environmental Control's (DHEC) narrow, formulaic interpretation of whether a permit that impacts a critical area warrants a more stringent review. The court also agreed that the ALC erred in bootstrapping the protection of Beachwalk Park to its public benefit analysis for the rest of the steel wall. The DHEC must consider the extent to which development could affect existing public access to beaches, tidal and submerged lands, navigable waters, and other recreational coastal resources. The portion that would protect Beachwalk Park represented approximately 10% of the entire wall and no public benefit was identified for the remaining 90%. Finally, the ALC erred in solely relying on the economic benefit of the overall project. Because tax revenue and increased employment opportunities are not sufficient justifications for eliminating the critical area, the ALC erred in determining the public will benefit from the wall based on purely economic reasons. The court reversed the ALC's approval of the project.

Opinion Here

SIXTH CIRCUIT

Michigan

Lakeshore Grp. v. Dep't of Env't Quality, No. 159524, 2021 WL 2022837 (Mich. May 20, 2021).

In 2014, the Michigan Department of Environment, Great Lakes, and Energy (EGLE) granted Dune Ridge permits for a residential and marina development project in a protected dune area along the shore of Lake Michigan. Neighboring landowners, Charles Zolper and Jane Underwood, sought an administrative hearing challenging the permits. Michigan's Sand Dunes Protection and Management Act (SDPMA) allows "aggrieved owners immediately adjacent to the proposed use" to request a formal hearing contesting permits and, if requested properly, the EGLE "shall" conduct a hearing. When Zolper and Underwood requested a hearing, they each owned property immediately adjacent to Dune Ridge's property. However, before the hearing took place, Dune Ridge conveyed slivers of its property immediately adjacent to the petitioners' respective properties, creating a buffer between Dune Ridge's property and petitioners'. The administrative law judge (ALJ) dismissed Underwood and Zolper as parties, reasoning they had lost standing when Dune Ridge conveyed portions of its land. The circuit court reversed the ALJ's order, and the court of appeals subsequently reversed the circuit court's ruling. On appeal, the Michigan Supreme Court found that Dune

appeals subsequently reversed the circuit court's ruling. On appeal, the Michigan Supreme Court found that Duke Ridge could not unilaterally act to revoke a petitioner's right to a hearing by conveying land that effectively creates a protective buffer. The SDPMA only requires that a petitioner be immediately adjacent to the project when they request a hearing; there is no basis to require that petitioner maintain this status throughout the proceedings. The court remanded for a contested hearing.

Opinion Here

EIGHTH CIRCUIT

Minnesota

In re Enbridge Energy, Ltd. P'ship, Nos. A20-1071, A20-1072, A20-1074, A20-1075, A20-1077, 2021 WL 2407855 (Minn. Ct. App. June 14, 2021).

Following several appeals from tribes and environmental organizations, the Minnesota Court of Appeals reviewed the Minnesota Public Utilities Commission's (Commission) decision granting Enbridge Energy a need certification allowing it to replace the existing Line 3 oil pipeline. The Commission regulates the construction of new pipelines in Minnesota and must balance the need with the environmental and tribal impacts. Pursuant to a consent decree with the federal government, Enbridge was required to replace the existing Line 3 if it obtained state permission because the existing pipeline was deteriorating. Because the revised Final Environmental Impact Statement (FEIS) addressed the impact of a potential oil spill, the court found the revised FEIS was reasonably adequate. The court affirmed the Commission's decision because substantial evidence supported it and because the Commission reasonably selected a route for the replacement pipeline based upon respect for tribal sovereignty while minimizing environmental impacts.

Opinion Here

NINTH CIRCUIT

Ctr. for Biological Diversity v. Haaland, No. 19-35981, 2021 WL 2232487 (9th Cir. June 3, 2021).

In 2011, the U.S. Fish and Wildlife Service (FWS) issued a decision that the Pacific walrus qualified as an endangered or threatened species under the ESA, but the listing was precluded due to a need to prioritize the most urgent listing actions. The 2011 decision, citing several supporting studies, found that the loss of sea-ice habitat and subsistence hunting threatened the Pacific walrus and existing regulatory mechanisms were inadequate. In 2017, the FWS completed a final species status assessment (Assessment) that concluded the Pacific walrus was impacted by but adapting to sea-ice loss, and other stressors were declining. The FWS concluded that the Pacific walrus no longer qualified as a threatened species. In 2018, the Center for Biological Diversity (Center) challenged the FWS's 2017 decision. The district court granted summary judgment to the FWS, and the Center appealed. Because the FWS did not sufficiently explain why it changed its prior position, the court reversed the summary judgment and remanded the case with directions for the FWS to provide a sufficient explanation for the new position.

Opinion Here

Alaska

Cook Inletkeeper v. Raimondo, No. 3:19-cv-00238-SLG, 2021 WL 2169476 (D. Alaska May 27, 2021).

The U.S. District Court for the District of Alaska considered the appropriate remedy for its March decision concluding that the National Marine Fisheries Service (NMFS) violated several federal laws in its review of Hilcorp Alaska, LLC's oil and gas activities in Alaska. At issue was NMFS' Incidental Take Regulations (ITR), Biological Opinion (BiOp), and Environmental Assessment resulting in a Finding of No Significant Impact (FONSI). The court held that each action failed to provide a reasoned explanation or identify adequate support in the record for NMFS' determination that tug noise from Hilcorp's activities would not take beluga whales. Typically, vacatur is the appropriate remedy for violations under the Administrative Procedure Act. However, a court may choose to remand an agency action without vacatur if equity requires. The district court found NMFS' error particularly troublesome, as Hilcorp planned to operate tugs through the Cook Inlet beluga whale's critical habitat. Nevertheless, the court reasoned complete vacatur was not warranted because NMFS' errors, while serious, were limited in scope, affecting only a discrete set of tug operations. The district court remanded the ITR, BiOp, and FONSI without vacatur with respect to Hilcorp's production drilling in 2021. However, the district court vacated the actions with respect to Hilcorp's use of tugs for all exploratory activities and production activities after 2021. Finally, the court did not vacate the actions with respect to Hilcorp's planned maintenance and decommissioning activities because prohibiting pipeline maintenance would increase the risk of an oil or gas leak in Cook Inlet.

Opinion Here

Opinion Here

Washington

Protect Zangle Cove v. Wash. Dep't of Fish & Wildlife, No. 52906-8-II, 2021 WL 2327081 (Wash. Ct. App. June 8, 2021).

In 2015, the Washington Department of Fish and Wildlife (DFW) promulgated a rule exempting installation of aquaculture facilities, such as floating rafts, platforms, or artificial structures used to harvest shellfish, from Washington's Hydraulic Code permitting requirements. Protect Zangle Cove and others filed suit against DFW alleging that DFW's rule exceeds its statutory authority under Washington's Aquatic Act and Hydraulic Code. The suit also named Pacific Northwest Aquaculture (PNA) as a defendant, alleging that that PNA should be subject to Hydraulic Code permitting requirements for its planned geoduck farm. The trial court dismissed Protect Zangle Cove's claims. It found that the plain and unambiguous language of the Aquatic Act removes DFW's regulatory authority over any aquaculture activities, including any that could be subject to the Hydraulic Code. On appeal, the Washington Court of Appeals affirmed. However, it held that the Aquatic Act does not wholly restrict the DFW's rulemaking authority over all aquaculture related processes, such as construction of a boat ramp or bulkhead by an aquatic farmer. Therefore, DFW's rule exempting aquaculture from Hydraulic Code permitting requirements is a valid exercise of DFW's statutory authority.

Opinion Here

National Sea Grant Law Center
256 Kinard Hall, Wing E
University, MS 38677-1848