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Ocean and Coastal Case Alert

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

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U.S. SUPREME COURT

U.S. Fish and Wildlife Serv. v. Sierra Club, Inc., No. 19-547, 2021 WL 816352 (U.S. Mar. 4, 2021).

The U.S. Supreme Court held that documents related to the Environmental Protection Agency's (EPA) 2011 Cooling Water Intake Structures Rule are exempt from Freedom of Information Act (FOIA) requests. As required by the Endangered Species Act, the EPA consulted with the U. S. Fish and Wildlife Service and National Marine Fisheries Service (Services) before issuing the rule. After continued discussions with the Services, the EPA sent a revised proposed rule in March 2014 that differed significantly from the 2013 version. Satisfied that the revised rule was unlikely to harm any protected species, the Services issued biological opinions (BiOps). The EPA issued its final rule that same day. The Sierra Club, an environmental organization, submitted requests under FOIA for records related to the Services' consultations with the EPA. The Services invoked the deliberative process privilege to prevent disclosure of the draft BiOps analyzing the EPA's 2013 proposed rule. The Sierra Club sued to obtain the withheld documents and the Ninth Circuit held that the draft BiOps were not privileged because the draft opinions represented the Services' final opinion regarding the EPA's 2013 proposed rule. However, the Supreme Court reversed and held that the deliberative process privilege protected the draft BiOps from disclosure because they reflect a preliminary view—not a final decision—about the EPA's proposed 2013 rule.

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THIRD CIRCUIT

New Jersey

Giordano v. Solvay Specialty Polymers USA LLC, 2021 WL 754044 (D.N.J. Feb. 26, 2021).

Two New Jersey residents filed suit against several manufacturing companies, alleging that the intentional manufacturing, use, discharge, and/or disposal of poly- and perfluoroalkyl substances caused the contamination of

their private water supply. The plaintiffs are seeking compensatory and punitive damages, including medical monitoring and costs, arising from the intentional, knowing, reckless, and negligent acts and omissions of several manufacturing companies. The companies moved to dismiss, arguing various pleading deficiencies. The U.S. District Court for the District of New Jersey denied the motion, holding that the plaintiffs had sufficiently pled all claims.

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FOURTH CIRCUIT

Mountain Valley Pipeline, LLC v. N. Carolina Dep't of Env't Quality, No. 20-1971, 2021 WL 922110 (4th Cir. Mar. 11, 2021).

Mountain Valley Pipeline, LLC (MVP) sought to build a natural gas pipeline running through North Carolina and its rivers, streams, and wetlands. The state's Department of Environmental Quality (DEQ) denied MVP's Clean Water Act (CWA) Section 401 certification for the project. MVP petitioned the Fourth Circuit for relief. The court found that DEQ's denial was consistent with the state's water quality standards. Additionally, the court stated that DEQ did not exceed its statutory authority and that its decision was consistent with the CWA. However, the court nevertheless held that DEQ's denial was arbitrary and capricious because it did not adequately explain its decision in light of the administrative record. As a result, the Fourth Circuit vacated the denial and remanded to DEQ for additional explanation.

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NINTH CIRCUIT

United States v. Lucero, No. 19-10074, 2021 WL 821948 (9th Cir. Mar. 4, 2021).

In 2014, James Lucero allowed construction companies to dump debris and materials at an area near the San Francisco Bay that contained wetlands and a tributary subject to the Clean Water Act (CWA). He was subsequently convicted on three counts of discharging pollutants into navigable waters in violation of the CWA. On appeal, Lucero argued that the jury instructions used to convict him erroneously explained the CWA's knowledge element. He also claimed that the definition of "waters of the United States" is unconstitutionally vague and that the 2020 regulatory definition of "waters of the United States" should apply retroactively to his case. The Ninth Circuit rejected the latter two claims; however, the court agreed with Lucero on the knowledge element claim. The court stated that the knowledge requirement imposed by the CWA only compels the government to prove that a defendant "knowingly" discharged a substance "into water" and not "into waters of the United States." The court reversed the conviction and remanded for a new trial.

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United States v. State Water Res. Control Bd., 2021 WL 716991 (9th Cir. Feb. 24, 2021).

The United States brought an action in state and federal court against the California State Water Resources Control Board (Board) and its chair for declaratory and injunctive relief. The United States alleged state law claims for violations of the California Environmental Quality Act (CEQA) regarding the Board's water quality control plan for an estuary and asserted a federal discrimination claim. The federal district court granted a stay of the state law claims. On appeal, the Ninth Circuit Court of Appeals held that the United States' actions did not constitute the type of forum shopping necessary to justify a stay because the United States filed its state and federal suits on the same day and informed both courts of the other suit. As a result, the district court abused its discretion by granting a stay. The appellate court reversed and remanded.

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California

Earth Island Inst. v. Crystal Geyser Water Co., 2021 WL 684961 (N.D. Cal. Feb. 23, 2021).

An environmental group filed an action in state court against several food, beverage, and consumer goods companies in the San Mateo Superior Court seeking compensatory and equitable relief associated with alleged injuries sustained as a result of plastic pollution in California coasts and waterways. The group claimed that the plastic pollution was created by the defendants' products, which the companies disseminated in the California marketplace without sufficient warning of known dangers. The group also claimed that by putting the recycling symbol on their products, the companies misinformed consumers about what happens to those products once they are deposited in a recycling bin. The defendants removed the action to federal district court, asserting several bases for federal jurisdiction. The plaintiffs filed a motion to remand the action to state court. The U.S. District Court for the Northern District of California granted the motion because the defendants were unable to demonstrate their burden of establishing jurisdiction.

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ELEVENTH CIRCUIT

Florida

5F, LLC v. Hawthorne, 2021 WL 745361 (Fla. Dist. Ct. App. Feb. 26, 2021).

After a company acquired a portion of state-owned submerged lands adjacent to residential upland waterfront property, it asked the upland owners to pay for the right to construct docks over the submerged land. The upland residents received permits from the Florida Department of Environmental Protection and the county to construct a dock extending over the company's submerged land to the point of navigability. When the residents commenced construction of their dock, the company filed an action for trespass and permanent injunctive relief. The trial court granted the residents' motion for summary judgment. The Florida District Court of Appeals for the Second District affirmed the decision because the residents had a common law right under Florida law to wharf out and construct a dock out to navigable waters without the submerged landowner's consent.

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D.C. CIRCUIT

District of Columbia

Burke v. Coggins, 2021 WL 638796 (D.D.C. Feb. 18, 2021).

A group of California fishermen sued the Secretary of Commerce and the National Marine Fisheries Service (NMFS) challenging a rule that will close the swordfish fishery if the fishermen inadvertently kill or injure too many marine mammals or turtles. NMFS agreed with the fishermen that the rule was invalid and should be vacated. NMFS stated that the rule conflicted with the governing statute because it imposes significant short-term economic effects with only minor conservation benefits. However, Oceana intervened to preserve the rule by raising procedural and substantive challenges to NMFS's determination that the rule violated the law. The U.S. District Court for the District of Columbia granted the fishermen's motion for summary judgment because the determination that the rule conflicted with the governing statute was supported in the administrative record.

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FEDERAL CIRCUIT

Taylor Energy Co., LLC v. Dep't of the Interior, 2021 WL 865359 (Fed. Cir. Mar. 9, 2021).

In 2004, Hurricane Ivan destroyed Taylor Energy's offshore oil and gas operations in the Gulf of Mexico, causing oil leakage. Taylor and the Department of the Interior (Interior) entered into agreements addressing how Taylor would fund a trust account to decommission the sites and how Interior would disburse payments. In December 2018, Taylor filed this action against Interior in federal district court seeking judicial review of the Interior Board of Land Appeals' (IBLA) October 2018 final decision regarding Taylor's requests to retain insurance proceeds in lieu of offsetting them and the disbursement of trust account funds for rig downtime costs. The district court transferred the case to the Court of Federal Claims. Interior appealed the transfer in the Federal Circuit Court of Appeals. The court held that the Claims Court had no jurisdiction because judicial review of an IBLA decision may only proceed in district court. The court remanded to the district court for further proceedings.

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