July 22 2024

Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the July 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-24-03-07).

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U.S. SUPREME COURT

Texas v. New Mexico, No. 141, Orig., 2024 WL 3074422 (U.S. June 21, 2024).

The State of Texas sued the States of New Mexico and Colorado, alleging that New Mexico's excessive groundwater pumping was depleting Texas' apportionment of water from the Rio Grande in violation of the Rio Grande Compact. The Court allowed the United States to intervene in 2018. Here, Texas and New Mexico sought approval of a proposed consent decree that would have introduced a new procedure for allocating each state's share of the Rio Grande's waters, disposing of the dispute and each party's claims. The U.S. objected to this proposal and filed an exception to a Special Master's report recommending approval of the solution. The Court sustained the exception and denied the states' motion to enter the consent decree. First, the Court held that the U.S. had valid claims under the Compact because 1) the U.S. had duties involving the allocation of the Rio Grande's water under both the federal Rio Grande Project and Downstream Contracts, 2) the U.S. played an integral role in the Compact's operation, and 3) New Mexico's conduct could interfere with U.S. obligations under a water allocation treaty with Mexico. The Court held that the consent decree would impermissibly dispose of the U.S.'s claims, noting that it would allow the challenged pumping to continue rather than addressing the U.S.'s prayer for injunctive relief. The Court ultimately prohibited the consent decree because it would get rid of the U.S.'s viable Compact claims without its consent. A dissenting opinion endorsed by four Justices instead emphasized that the consent decree should have been approved because it would have been consistent with 1) the goals and existing implementation of the Compact, 2) precedent of dismissing remaining claims without prejudice after the resolution of an interstate dispute, 3) traditional deference to state water law by Congress, and 4) efficiency.

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Loper Bright Enters. v. Raimondo, No. 22-1219, 2024 WL 3208360 (U.S. June 28, 2024).

The U.S. Supreme Court overruled *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, holding that, under the Administrative Procedure Act (APA), courts may not defer to an agency's interpretation of an ambiguous law—they must now employ their independent judicial judgment to determine whether an agency has acted within its

statutory authority. The Supreme Court decision encompassed two lawsuits initiated by fishermen in the Atlantic herring fishery industry, each arguing that the National Marine Fisheries Service (NMFS) exceeded its authority under the Magnuson-Stevens Fishery Conservation and Management Act by mandating that the fishermen pay for fishery management observers on their own vessels in certain circumstances. After the presiding circuit courts deferred to NMFS's agency expertise and decided in favor of the government, the Supreme Court granted *certiorari* to determine whether *Chevron* should be overruled – the Court did not consider the fishery management issues. Six Justices agreed that it should. The majority emphasized that courts have historically been deferential to an agency's findings of *fact*, but the Constitution gives the courts full authority over the final interpretation of the *law*. The majority also focused on the language of the APA itself, noting that it explicitly makes reviewing courts responsible for deciding *all* relevant questions of law when presented with challenged agency actions. In the majority's view, courts are best suited to decide statutory ambiguities.

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FOURTH CIRCUIT

Ctr. for Env't Health v. Regan, 103 F.4th 1027 (4th Cir. 2024).

Four North Carolina citizen groups petitioned the U.S. Environmental Protection Agency (EPA) to require testing of pollutants in their community, and then challenged the EPA's final decision in federal court. Pursuant to the Toxic Substances Control Act (TSCA), the petitioners requested that the EPA promulgate a rule or order requiring chemical manufacturers and processors to conduct testing on fifty-four per- and poly-fluoroalkyl substances (PFAS). The EPA granted the petition, instituting its own National PFAS Testing Strategy to test the effects of the more than 6,500 known PFAS varieties through a categorical and tiered process. The petitioners were unhappy with the process and challenged the decision at the district court, arguing that the EPA's "grant" of their petition was effectively a denial. The district court disagreed and granted the EPA's motion to dismiss for lack of jurisdiction. On appeal, the circuit court affirmed that decision, holding that the EPA's decision was indeed a "grant" in fact and, therefore, not open to judicial review. Even though the National PFAS Testing Strategy would not directly test for all fifty-four PFAS and did not include all of the exact testing procedures suggested in the petition, the EPA's chosen approach was justified by efficiency and under authority granted to the agency by TSCA. One circuit judge concurred in part and dissented in part, finding that the exclusion of fifteen PFAS from the EPA's National PFAS Testing Strategy rendered its decision a partial denial subject to judicial review.

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North Carolina

White v. U.S. Env't Prot. Agency, No. 2:24-CV-00013-BO, 2024 WL 3049581 (E.D.N.C. June 18, 2024).

Robert White, an owner of waterfront properties in North Carolina, brought suit against the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (collectively, "the agencies") in federal court under the Administrative Procedure Act, challenging the agencies' interpretation of wetlands protected by the Clean Water Act (CWA). In *Sackett v. Environmental Protection Agency*, the U.S. Supreme Court set out a test for determining when wetlands can be considered part of the waters of the United States (WOTUS) under the CWA. Here, White challenged an amended rule promulgated by the agencies which revised the definition of WOTUS according to *Sackett*, arguing that it did not sufficiently conform to the Supreme Court's test. White moved to preliminary enjoin the agencies from enforcing the new rule against him and his properties. After deciding that the case was ripe for judicial review, the first factor the court considered to determine whether a preliminary injunction was warranted was whether White was likely to succeed on the merits of his case. The court answered this factor in the negative because the agencies' definition was sufficiently analogous to that in *Sackett*, it did not raise concerns about due process or federalism, and it represented a constitutional delegation of authority from Congress to the agencies. The failure of this first factor alone was enough for the court to deny White's motion for preliminary injunctive relief.

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SIXTH CIRCUIT

Nessel ex rel. Mich. v. Enbridge Energy, LP, 104 F.4th 958 (6th Cir. 2024).

Michigan's Attorney General sued Enbridge Energy, seeking to shut down the company's Line 5 Pipeline. The Line 5 Pipeline, which is one portion of a network of pipelines that transport petroleum to refineries in the U.S. Midwest and Canada, runs beneath the Straits of Mackinac between Michigan's Lower and Upper peninsulas. The Attorney General filed the case in state court, seeking injunctive relief and alleging that Enbridge's pipeline operation has violated Michigan's public-trust doctrine, common-law public nuisance doctrine, and the state's Environmental Protection Act. Enbridge removed the case to federal court in 2021, two years after receiving notice of the suit, even though federal statutes allow only thirty days for timely removal. Enbridge argued that it did not have notice that the lawsuit was removable until 2021 when a nearly identical lawsuit filed against it by Michigan's Governor was deemed removable. The Attorney General moved to remand the case to state court, but the district court denied the motion, excusing Enbridge's untimely removal based on equitable principles. The circuit court reversed this decision on interlocutory appeal, holding that Enbridge had good-faith grounds to remove the case more than thirty days before it decided to do so and that there could be no equitable exceptions to mandatory removal time limitations. The case will return to and continue in Michigan state court.

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Bruneau v. Mich. Dep't of Env't, 104 F.4th 972 (6th Cir. 2024).

Eight landowners sued two Michigan counties, alleging that they endured takings under the federal and state constitutions when the Edenville Dam failed, flooding and ruining their basements, first floors, and possessions. The landowners argued that the counties initiated these takings by petitioning for the dam's task force to keep the lake's water levels where they had previously been for over nine decades. The district court granted the counties' motion for summary judgment, which the circuit court affirmed. The circuit court held that the counties' petition did not constitute a taking under federal law because their only intentions were to maintain historic water levels in the lake—not to cause permanent flooding of the landowners' properties. Nor did the counties' action qualify as a taking under state law because the conduct was not a substantial cause of the flooding; investigations after the collapse revealed that its only two causes were a loss of soil strength combined with heavy rains.

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NINTH CIRCUIT

Hawaii

In re Surface Water Use Permit Applications, Integration of Appurtenant Rts. & Amends. to the Interim Instream Flow Standards, No. SCOT-21-0000581, 2024 WL 3062952 (Haw. June 20, 2024).

Several entities initiated a direct agency appeal in the Supreme Court of Hawai'i, challenging an amended Decision and Order (D&O II) released by the state's Commission on Water Resource Management in 2021 regarding the management of surface waters from Nā Wai 'Ehā, or "the four great Waters of Maui." The D&O II amended the minimum interim instream flow standards (IIFS) required to protect beneficial uses of the surface waters and granted surface water use permits to various applicants. On appeal, a community group and a state agency—both advocates for Native Hawaiians and their interests—argued that the Commission failed to comply with its constitutional and statutory requirements to restore stream flows to the extent practicable in order to protect public trust uses. The court agreed, holding that 1) the Commission failed to justify its decision to not restore additional stream flows beyond the status quo, especially given new evidence of Hawaii's last sugar plantation shutting down, and 2) that the D&O II lacked the required clarity on whether the Commission incorporated downstream water rights and uses into the IIFS. The court also held that the Commission did not sufficiently explain the D&O II's potential impacts on traditional and customary Native Hawaiian water-related rights or the feasibility of protecting them, nor did the Commission provide

transparent and comprehensible calculations for its IIFS determinations. The court dismissed the claims of three appellants who conducted operations requiring irrigation out of deference to the Commission's decision. On the other hand, an organization conducting diversified agricultural operations succeeded on its argument that the process by which the Commission arrived at its water allocation was not reasonably clear. In response to the final company's appeal, the court held that the D&O II unlawfully delegated the Commission's authority to allocate water during water shortages to permit-holders. For these reasons, the court vacated the D&O II and remanded the issue to the Commission for revision.

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California

Oceana, Inc. v. Raimondo, No. 21-CV-05407-VKD, 2024 WL 3236723 (N.D. Cal. June 28, 2024).

Oceana, Inc., a nonprofit advocating for ocean conservation, brought suit against the National Marine Fisheries Service (NMFS) in the U.S. District Court for the Northern District of California. In June 2021, NMFS approved an amendment to the Pacific Fishery Management Council's fishery management plan that outlined an approach to restore Pacific sardine populations after the species was overfished. In June 2023, NMFS also published corresponding annual specifications for Pacific sardine fishing, laying out catch limits and management measures. Oceana challenged these final decisions, alleging that they violated both the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and the National Environmental Policy Act (NEPA). After both parties filed cross-motions for summary judgment, the district court partially granted and denied each party's motion. The court held that NMFS had violated the MSA by 1) failing to set catch limits that would rebuild the Pacific sardine population in the statutory timeframe, and 2) failing to show a reliance on only the best available science to accurately set overfishing limits. The court rejected Oceana's arguments that 1) NMFS failed to rationally explain or use the best available science in setting its rebuilding target for Pacific sardine populations, and 2) NMFS was required to engage in consultation about the decisions' effects on essential fish habits. Regarding Oceana's NEPA claims, the court held that NMFS's environmental assessment, which accompanied the amendment, was unlawful because 1) it relied on inconsistent assumptions, and 2) NMFS failed to take a hard look at the amendment's impact on the endangered humpback whale. Although the court had analyzed the merits of the case, it declined to issue a final judgment resolving the case until further proceedings were held to determine an appropriate remedy.

Oceana, Inc. v. Raimondo, No. 21-CV-05407-VKD, 2024 WL 3228094 (N.D. Cal. June 28, 2024).

Oceana, Inc. sued the Secretary of Commerce, the National Oceanic and Atmospheric Administration, and the National Marine Fisheries Service (NMFS), alleging that NMFS's approved plan for restoring Pacific sardine populations violated the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and the National Environmental Policy Act (NEPA). Upon cross-motions for summary judgment, the district court held that various aspects of the plan were unlawful. The court vacate the portions of NMFS's challenged amendment that were previously found to be unlawful, along with the entire corresponding NEPA environmental assessment, because 1) doing so was the standard remedy in such cases, 2) the defects in the amendment constituted serious, substantive errors, and 3) vacatur of the rule would not result in any environmental harm or disruptive consequences. Next, the court adopted Oceana's proposed deadline for a revised Pacific sardine population rebuilding plan—June 1, 2025—because there was no evidence suggesting that it would be an unreasonable amount of time for NMFS to prepare a compliant plan, conduct a new environmental assessment, and engage in public comment, especially given that NMFS would be able to build off the intact portions of the preexisting plan. However, the court declined Oceana's request to order NMFS to adopt new methods for setting catch limits and other criteria, as doing so would represent the court unnecessarily dictating the expert agency's means of compliance. Finally, to avoid the potential harmful consequences of a gap in NMFS regulation between the expiration of old annual specifications and the implementation of new ones, the court also directed NMFS to promulgate interim specifications by July 1, 2024, that were no less restrictive than the previous ones.

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D.C. CIRCUIT

Ctr. for Biological Diversity v. Nat'l Marine Fisheries Serv., No. 22-5295, 2024 WL 3083338 (D.C. Cir. June 21, 2024).

Three environmental groups challenged a 2019 rule by the National Marine Fisheries Service (NFMS) requiring shrimpers using skimmer trawls on forty-foot or longer vessels to use turtle excluder devices on their nets. The groups argued that the final rule violated both the Administrative Procedure Act (APA) and the National Environmental Policy Act (NEPA). The district court granted summary judgment to NMFS, and the circuit court affirmed that decision here. The circuit court held that—despite the groups' contentions—the final rule was not arbitrary and capricious; NMFS sufficiently explained its final decision and the associated changes. The court emphasized that the agency was free to modify its proposed rule, and, in this case, the change reflected a reasoned policy choice made in response to commenters' concerns about the rule's economic burden on the fishing industry. The court also held that the final rule was a logical outgrowth of the 2016 proposed rule because the proposal revealed the range of NMFS's considerations and priorities, and then the final rule fell within the scope of options laid out in the proposed rule. Finally, in response to the groups' argument that the final rule violated NEPA by listing the benefits to protected sea turtles as a whole, rather than to each individual species, the court held that the argument was either procedurally forfeited or otherwise without merit.

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Sea Grant LAW CENTER

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