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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the January 2016 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-16-03-01).

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FIRST CIRCUIT

Maine

Penobscot Nation v. Mills, No. 1:12-CV-254-GZS, 2015 WL 9165881 (D. Me. Dec. 16, 2015).

The U.S. District Court for the District of Maine denied the Penobscot Indian Nation's claim that its reservation encompassed the entire main stem of the Penobscot River. The court upheld the language of the Maine Indian Claims Settlement Act and the Maine Implementing Act, which "...clearly define the Penobscot Indian Reservation to include the delineated islands of the Main Stem, but do not suggest that any of the waters of the Main Stem fall within the Penobscot Indian Reservation." While the Penobscot Nation will maintain authority over these islands, it will not be allowed to regulate activities in and on the river or any non-tribal discharges into it. The Penobscot Nation will retain traditional sustenance fishing rights in the river.

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THIRD CIRCUIT

New Jersey

Hackensack Riverkeeper, Inc. v. New Jersey Dep't of Envtl. Prot., No. A-1752-12T3, 2015 WL 9281742 (N.J. Super. Ct. App. Div. Dec. 22, 2015).

A New Jersey court invalidated the New Jersey Department of Environmental Protection's (DEP) public trust and public access rules, as well as any other regulation provisions that rely on these rules. Two environmental groups challenged the rules, arguing that DEP improperly assumed management of lands held in public trust, where power to do so is held by the Legislature and has not been delegated to DEP. Further, the appellants argued that DEP's 2012 adoption of new Public Access Rules (the Rules) was not authorized by the Coastal Area Facility Review Act (CAFRA) and "improperly infring[ed] upon powers reserved to the State's municipalities." First, the court held that, despite case law establishing the public's right to access the ocean and certain privately-owned dry sand areas upland of the water, the public trust doctrine does not give DEP the authority to establish rules affecting lands held in public trust. Next, the court found that the Rules were not authorized under any statute. Finally, the Court held that, although provisions of the Municipal Land Use Law (MLUL) allow for Municipal Public Access Plans (MPAPs) without creating a direct conflict, it isn't clear as to just how the provisions of the rules requiring regularly updated MPAPs could practically correspond with these provisions of MLUL. As a result, DEP's Rules were stricken and invalidated.

FIFTH CIRCUIT

Louisiana

Coastal Conservation Ass'n, et al v. U.S. Dep't of Commerce, et al, No. CV 15-1300, 2016 WL 54911 (E.D. La. Jan. 5, 2016).

The U.S. District Court for the Eastern District of Louisiana recently ruled on a challenge to Amendment 40 to the Gulf of Mexico Fishery Management Council's Reef Fish Fishery Management Plan and the related rule setting fishing quotas and seasons for 2015-2017. The amendment is an "attempt to reign in the consistent overages in the recreational sector by providing for increased flexibility in the management of the sector." The Coastal Conservation Association and other groups argued that 1) the Magnuson-Stevens Act (MSA) prohibits the Gulf Council from regulating charter and headboat fishing separately from other recreational fishing; 2) the Gulf Council and the National Marine Fisheries Service (NMFS) failed to adequately "assess, specify, and analyze" the likely economic and social effects of Amendment 40; 3) Amendment 40 makes an unfair and inequitable allocation of fishery resources in violation of National Standard 4; and 4) Amendment 40 makes an improper delegation of the Gulf Council's authority by authorizing the NMFS staff to set final allocation levels. The court found each claim to be without merit, and accordingly, granted defendants' motion for summary judgment.

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NINTH CIRCUIT

Alaska Wilderness League v. Jewell, No. 13-35866, 2015 WL 9466852 (9th Cir. Dec. 29, 2015).

The U.S. Court of Appeals for the Ninth Circuit recently denied a petition for a rehearing en banc regarding decisions made by the Bureau of Safety and Environmental Enforcement (BSEE) in approving Shell Gulf of Mexico, Inc.'s oil spill response plan for offshore drilling in the Beaufort and Chukchi Seas on Alaska's Arctic coast. Environmental groups alleged that BSEE failed to adequately consider the Endangered Species Act (ESA) and prepare an

environmental impact statement pursuant to the National Environmental Policy Act (NEPA) before approving Shell's response plan. Three judges dissented from the court's denial, noting that the majority's interpretation of the 1990 amendments to the Clean Water Act resulted in an improper narrowing of the scope of both the ESA and NEPA. This narrowing would effectively take these Acts "off the table when considering oil spill response plans, which are a required component of offshore drilling proposals." The dissenting judges noted that, "by not correcting the majority's holding through en banc review, [the court has] let stand a decision that misapplies core principles of administrative and environmental law."

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Alaska Wilderness League v. Jewell, No. 15-35559, 2015 WL 9584808 (9th Cir. Dec. 31, 2015).

The U.S. Court of Appeals for the Ninth Circuit dismissed the Alaska Wilderness League's claims challenging an incidental take regulation under the Marine Mammal Protection Act of 1972 (MMPA) that "authorizes the 'take' of polar bears and Pacific walruses incidental to oil and gas exploration activity in a 240,000-square-kilometer area of the Chukchi Sea, off the north coast of Alaska." The court noted that in the time since the appeal was filed, recent changes in circumstances "rendered remote and speculative the possibility that any oil and gas exploration activity [would] occur in or near the [region] in the less than three years before the Regulation expires." Therefore, the League's appeal is rendered moot.

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Alaska

Lieutenant Governor of State v. Alaska Fisheries Conservation All., Inc., No. S-15662, 2015 WL 9587544 (Alaska Dec. 31, 2015).

Previously, the Lieutenant Governor of Alaska refused to certify a proposed ballot initiative that would ban commercial net set fishing in nonsubsistance areas, reasoning that the initiative would effect a "constitutionally prohibited appropriation of public assets." The superior court, however, issued an order requiring the Lieutenant Governor to certify the initiative, noting that net setters were not a distinct commercial user group, and that the legislature and Board of Fisheries should retain discretion to allocate the salmon stock to other commercial fisheries. On December 31, the Supreme Court of Alaska issued its appellate decision regarding the matter. Contrary to the superior court's holding, the Supreme Court found that net setters constitute "a distinct commercial user group that deserves recognition in the context of the constitutional prohibition on appropriations." Furthermore, the Court found that the proposed ballot initiative would take salmon away from these net setters and prohibit the legislative Board of Fisheries from allocating any salmon to them. Accordingly, the Supreme Court reversed the superior court's order compelling the Lieutenant Governor's certification.

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Hawaii

Conservation Council for Hawaii v. Nat'l Marine Fisheries Serv., No. CV 14-00528 LEK-RLP, 2015 WL 9459899 (D. Haw. Dec. 23, 2015).

The U.S. District Court for the district of Hawaii ruled on a challenge to the limits on the fishing and catching of bigeye tuna in the Western and Central Pacific Ocean (WCPO). Several environmental groups contested the "Quota Shifting Rule" established by the National Marine Fisheries Service (NMFS). The court first concluded that the Quota

Shifting Rule's interpretation of conservation and management measure (CMM) 2013-01 regarding catch allocation was not arbitrary and capricious. Next, the court concluded that "the Quota Shifting Rule's interpretation of the relevant CMM as allowing [specified fishing agreements]" was, in fact, reasonable. Finally, the court rejected all of plaintiffs' allegations that NMFS failed to properly consider the effects of the Quota Shifting Rule. Accordingly, the court granted the plaintiffs' motion for summary judgment as to the preliminary issues of standing and justiciability, but denied the motion on the merits of each of the plaintiffs' claims against the Quota Shifting Rule.

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DC CIRCUIT

Anglers Conservation Network v. Pritzker, No. 14-5304, 2016 WL 43602 (D.C. Cir. Jan. 5, 2016).

The U.S. District Court for the District of Columbia dismissed a claim that the Mid-Atlantic Fishery Council should have amended the mackerel, squid, and butterfish fishery management plan (FMP) to include river herring and shad. In dismissing the case, the court noted that there was no basis for judicial review of the Mid-Atlantic Fishery Council's decision not to add these "bycatch" fish to the FMP and subject them to "science-based annual catch limits and accountability measures."

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Friends of Animals v. Ashe, No. 14-5172, 2015 WL 9286948 (D.C. Cir. Dec. 22, 2015).

The U.S. Court of Appeals for the District of Columbia dismissed an action brought by Friends of Animals against the Director of the U.S. Fish and Wildlife Service (FWS) and the Secretary of the Department of the Interior (DOI). Specifically, the group alleged that FWS failed to make timely determinations on citizen petitions to list 39 species as either endangered or threatened under the Endangered Species Act (ESA). Under the ESA, "the Service must make an initial determination on the petition within 90 days, to the maximum extent practicable." Then, if FWS determines that a species may warrant listing, it must make a final determination within 12 months of the petition's initial filing (with no exceptions). Because the FWS failed to make any determinations on these citizen petitions within 12 months, Friends of Animals filed suit. However, the lower court found that the plaintiff failed to give 60 days notice to FWS before filing suit, which is required under the ESA. On appeal, the D.C. Circuit agreed and dismissed the action for failure to give adequate notice.

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