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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the April 2017 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-17-03-04).

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FIRST CIRCUIT

Massachusetts

Conservation Law Found., Inc. v. United States Envtl. Prot. Agency, 2017 WL 1115155 (D. Mass. Mar. 24, 2017).

The Conservation Law Foundation and Charles River Watershed Association brought a citizen suit under the Clean Water Act (CWA) against the U.S. Environmental Protection Agency (EPA). The plaintiffs claimed that the stormwater discharges along the river required National Pollutant Discharge Elimination Systems (NPDES) permits. The plaintiffs argued that the EPA's approval of the Charles River Total Maximum Daily Loads (TMDLs) resulted in an implicit determination under its Residual Designation Authority (RDA) that permits were required; therefore, a nondiscretionary duty to require stormwater dischargers to apply for permits attached. The EPA argued that TMDLs alone do not create enforceable obligations. The court granted EPA's motion to dismiss for lack of subject matter jurisdiction, because the agency's interpretation was reasonable.

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SECOND CIRCUIT

New York

City Club of N.Y. v. United States Army Corps of Engineers, 2017 WL 1102667 (S.D.N.Y. Mar. 23, 2017).

The U.S. District Court for the Southern District of New York recently ruled on a challenge to a permit issued by the U.S. Army Corps of Engineers for the construction of a park and performing arts center on a pier in the Hudson River. In conducting an Environmental Assessment for the permit, the Corps found that the project was "water dependent" and that the project alternatives were not practicable. The plaintiffs sued the agency alleging violation of the Clean Water Act (CWA) and the Administrative Procedure Act (APA). The plaintiffs argued that due to the pier's location in the Hudson River Park Estuarine Sanctuary, it would be in a "special aquatic site" as defined by 40 C.F.R. § 230.40(a). The court noted that for projects located in a "special aquatic site," the Corps must define the project's basic purpose and determine whether that purpose is water dependent. If it is not water dependent, the Corps must presume that practicable alternatives are available in less sensitive areas. The court found that the language of the Hudson River Park Act, which established the Sanctuary, clearly and unambiguously established that area as a "special aquatic site." The court found that the project was improperly deemed water dependent, and the Corps failed to apply the required presumptions. Therefore, the court granted the plaintiffs' motion for summary judgment, vacated the permit, and remanded the decision to the Corps for proceedings consistent with this opinion.

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THIRD CIRCUIT

Pennsylvania

Wayne Land & Mineral Grp., LLC v. Delaware River Basin Comm'n, 2017 WL 1100565 (M.D. Pa. Mar. 23, 2017).

Wayne Land & Mineral Group filed a complaint against the Delaware River Basin Commission, claiming that the Commission lacked authority under the Delaware River Basin Compact to review and approve a natural gas well pad, a gas well, and related facilities and activities on its property in the Delaware River Basin. The Commission filed a motion to dismiss for lack of subject matter jurisdiction due to the plaintiff's complaint not being ripe for adjudication and lack of standing. The court determined that the group had standing and the complaint was ripe; however, the court held the group's complaint failed to state a claim for relief and must be dismissed. The complaint stated that the group's activities were not a "project" under the Compact. The Compact defines project to include any activity for the utilization of water resources. Because the group planned to utilize the water resources, the complaint was dismissed. The group must now submit an application to the Commission to determine if the proposed activities have a substantial effect on the water resources of the Basin.

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NINTH CIRCUIT

California

San Francisco Herring Ass'n v. United States DOI, 2017 WL 1040780 (9th Cir. Mar. 17, 2017).

The San Francisco Herring Association challenged the U.S. Department of the Interior's (DOI) enforcement of a rule that prohibits commercial fishing in the Golden Gate National Recreation Area. A federal district court granted summary judgment in favor of the DOI. On appeal, the U.S. Court of Appeals for the Ninth Circuit dismissed, finding

that it lacked jurisdiction to hear the case. The court noted that the Administrative Procedure Act provides jurisdiction only for "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." The court found that the DOI's patrol of the area did not result in a final agency action.

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Hawaii

Territory of American Samoa v. Nat'l Marine Fisheries Services, 2017 WL 1073348 (D. Haw. Mar. 20, 2017).

The Territory of American Samoa brought suit against the National Marine Fisheries Service over a rule that would reduce the size of the Large Vessel Prohibited Area for the Pacific Island Pelagic Fisheries. Among other claims, American Samoa argued that the rule violates the deeds of cession of American Samoa, which constitutes a violation of the Magnuson-Stevens Fishery Conservation and Management Act. The U.S. District Court for the District of Hawaii agreed and granted the territory's motion for summary judgment on this claim. The court dismissed the remaining claims as moot.

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Oregon

Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 2017 WL 1135610 (D. Or. Mar. 27, 2017).

Environmental groups and others sought an injunction to require federal dam managers on the Columbia and Snake Rivers to provide spring spill beginning in 2017 in order to protect salmonids under the Endangered Species Act (ESA). The plaintiffs also moved for an injunction requiring the operators to operate the juvenile bypass and a related tag detection system. The plaintiffs also moved under the National Environmental Procedure Act (NEPA) for an injunction to prevent the U.S. Army Corps of Engineers from using any more funds on two planned projects at Ice Harbor Dam and any new projects at any of the lower Snake River dams that would cost more than a million dollars. The U.S. District Court for the District of Oregon found that the Corps and Bureau of Reclamation improperly relied on the now-invalidated 2014 Biological Opinion to determine their 2014 Records of Decision, a violation of the ESA. The court held that it was too late to require tag detection for 2017 but ordered that it should begin in 2018 and continue every year of the remand period. On the NEPA claim, the court held that it couldn't evaluate the harms or public interest of future projects. Therefore, the court denied the requested NEPA injunction but required that the dam operators disclose sufficient information to the plaintiffs. If the plaintiffs believe that the project is unnecessary, then they may file a new motion with the court to enjoin the project.

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Coos Waterkeeper v. Port of Coos Bay Oregon, 284 Or. App. 620 (2017).

In 2007, the Oregon International Port of Coos Bay began applying with the Oregon Department of State Lands (DSL) for a permit to dredge part of Coos Bay to create a new multipurpose slip and marine terminal, as well as an access channel to connect Coos Bay to that slip. DSL issued a permit allowing the Port to dredge material from Coos Bay and to excavate the access channel, placing dredge soil in a small non-tidal wetland and the undertaking of mitigation measures. Environmental groups challenged the permit. The Director of DSL issued a final order, which approved the permit. The plaintiffs sought judicial review of the order. The plaintiffs argued that the director erred in concluding that DSL was not required to consider the effects of operating the marine terminal when it evaluated and approved the Port's application for the fill/removal permit. The plaintiffs also argued that the director erred in concluding that DSL's authority to regulate fill/removal activities in "waters of the state" did not extend to the upland portions of the proposed construction involving removal of the berm. The Oregon Court of Appeals determined that the text, context,

and legislative history of the relevant state law did not define project as the effects of post-construction operations. Rather, it refers to the removal or fill activity. The court also held that removing the berm is part of the dredging process that the permit authorizes. Therefore, the court affirmed the final order.

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DC CIRCUIT

United States Ass'n of Reptile Keepers, Inc. v. Zinke, 2017 WL 1291311 (D.C. Cir. Apr. 7, 2017).

The Lacey Act bans "any shipment" of injurious species "between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States." In 2012, the U.S. Fish and Wildlife Service (FWS) interpreted the shipment clause to ban transport of injurious species, not only between the listed jurisdictions, but also between the 49 continental states. The United States Association of Reptile Keepers (ARK) challenged the rule, arguing that the statute's language of "between" mandates that only shipments between the listed jurisdictions are barred, such as between Hawaii and the continental United States. The district court concluded that the shipment clause does not bar shipments between the 49 continental states. The district court granted a preliminary injunction and FWS appealed. The U.S. Court of Appeals for the District of Columbia Circuit held that the government lacked authority to prohibit shipments of injurious species between the continental United States. The court read the shipment clause to have clear meaning and reasoned that if Congress intended to bar shipments within the continental United States, then Congress could have barred shipments between any state, similar to other legislation. Therefore, the district court's judgment was affirmed.

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District of Columbia

Nat. Res. Def. Council, Inc. v. Rauch, 2017 WL 1155688 (D.D.C. Mar. 25, 2017).

In 2010, the Natural Resources Defense Council (NRDC) petitioned the National Marine Fisheries Service (NMFS) to list blueback herring as threatened under the Endangered Species Act (ESA). After review, NMFS found that the listing was not warranted. The NRDC filed suit, challenging the Listing Decision based on all three of its conclusions: 1) that the Mid-Atlantic Region is not a significant portion of the blueback herring's range; 2) the herring are not threatened throughout their entire range; and 3) the stock complex of blueback herring is not a distinct population segment. The U.S. District Court for the District of Columbia found that the first conclusion was erroneous, because it depended on a premise that the coastwide population trend was stable, and lack of statistical information cannot be used to prove the population was stable. The court found that NMFS also improperly assumed that the Mid-Atlantic blueback herring population and the coastwide population did not overlap. The conclusion that the herring were not threatened throughout their entire range was also set aside because of the improper inference of population stability. Additionally, in concluding that the stock complex of blueback herring was not a distinct population segment, NMFS failed to address a necessary prong: whether any blueback herring stock persists in an ecological setting that is unusual or unique among blueback herring. Therefore, all three conclusions were set aside, and NMFS must perform a proper analysis to readdress the conclusions.

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