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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the August 2018 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-18-03-08).

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SECOND CIRCUIT

Cooling Water Intake Structure Coal. v. U.S. Envtl. Prot. Agency, 2018 WL 3520398 (2d Cir. July 23, 2018).

The U.S. Court of Appeals for the Second Circuit recently upheld an Environmental Protection Agency (EPA) final rule with requirements for cooling water intake structures at existing regulated facilities. The court found that EPA acted within its authority when establishing the rule. The court also rejected a challenge to a biological opinion jointly issued by the Fish and Wildlife Service and the National Marine Fisheries Service that was part of a formal Endangered Species Act (ESA) consultation on the final rule. The court found that the Incidental Take Statement complied with relevant provisions of the ESA and the Marine Mammal Protection Act.

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FOURTH CIRCUIT

Sierra Club v. State Water Control Bd., 2018 WL 3635962 (4th Cir. Aug. 1, 2018).

Environmental groups, individuals, and other entities sought review of the Virginia Department of Environmental Quality's Clean Water Act § 401 certification with regard to the construction of the Mountain Valley Pipeline, a 303-mile natural gas pipeline spanning from West Virginia to Virginia. The Fourth Circuit first ruled that the plaintiffs had standing to bring their claims. The court also found the state had sufficient basis to find reasonable assurance that construction activities for the pipeline would not degrade the state's water quality. Finally, the court held that the state did not act arbitrarily and capriciously in deciding to analyze impacts from activities covered by a nationwide permit separately from impacts from upland activities related to the pipeline's construction.

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Sierra Club v. U.S. Dep't of the Interior, 2018 WL 3717067 (4th Cir. Aug. 6, 2018).

Several environmental organizations filed petitions challenging agency approvals of a portion of the Atlantic Coast Pipeline. The groups sought review of an incidental take statement (ITS) issued by the U.S. Fish and Wildlife Service authorizing the take of five listed species, as well as a right of way issued by the National Park Service (NPS) allowing the pipeline to pass under the Blue Ridge Parkway, a unit of the national park system. The Fourth Circuit agreed and vacated the ITS and the right of way. The court held that the ITS's vague and unenforceable take limits were arbitrary and capricious in violation of the Endangered Species Act. The court found that the NPS failed to show that the construction of the pipeline would be consistent with the purposes of the national park system.

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NINTH CIRCUIT

Alaska

Mallott v. Stand for Salmon, 2018 WL 3751013 (Alaska Aug. 8, 2018).

The Alaska Lieutenant Governor declined to certify a proposed ballot initiative that would establish a permitting requirement for activities that could harm the habitat of fish that migrate to the sea. The initiative sponsors filed suit, and a lower court approved the initiative, disagreeing with the Lieutenant Governor's claim that the initiative effected an appropriation of state assets in violation of the Alaska Constitution. On appeal, the Alaska Supreme Court concluded that the initiative would effect an unconstitutional appropriation, as it infringes on the Alaska Department of Fish and Game's discretion over allocation decisions, which was delegated by the legislature. The court concluded that the problematic sections of the initiative should be removed and the remainder of the initiative should be placed on the ballot.

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California

California Water Impact Network v. Cty. of San Luis Obispo, 236 Cal. Rptr. 3d 53 (Ct. App. 2018).

San Luis Obispo County issues well permits without conducting a review under the California Environmental Quality Act (CEQA). The California Water Impact Network sought a writ to compel the County to perform CEQA review when issuing the permits. The trial court ruled that CEQA did not apply. On appeal, the appellate court determined that under Chapter 8.40 of the San Luis Obispo County Code, the county was required to issue well permits when certain standards were met. Thus, issuance of the permits was a ministerial action exempt from review under CEQA.

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Oregon

Coos Waterkeeper v. Port of Coos Bay Oregon, 363 Or. 354 (2018).

Several environmental groups challenged a permit granted by the Department of State Lands (DSL) for the construction of a deep-water marine terminal in Coos Bay. The permit allowed the Port of Coos Bay to dredge 1.75 million cubic yards of material. The appellate court upheld the permit. The Oregon Supreme Court affirmed, finding that DSL was not required to consider the effects of the marine terminal's presence or of the completed terminal when evaluating an application to dredge and construct a marine terminal.

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Washington

Wild Fish Conservancy v. U.S. Envtl. Prot. Agency, 2018 WL 3742203 (W.D. Wash. Aug. 7, 2018).

An advocacy organization alleged that the Environmental Protection Agency and the National Marine Fisheries Service violated § 7 of the Endangered Species Act in reviewing Washington's revisions to sediment-related water quality standards adopted under the Clean Water Act. The plaintiffs alleged that the standards would allow commercial salmon farms to negatively impact threatened salmonid species in Puget Sound. The salmon farm intervened in the case. The federal agencies and the salmon farm moved to dismiss the complaints. The court denied

both motions.

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ELEVENTH CIRCUIT

Krug v. Celebrity Cruises, 2018 WL 3860473 (11th Cir. August 14, 2018).

A cruise ship passenger slipped and fell while playing a music trivia game aboard a Celebrity Cruise ship. She filed suit, alleging the cruise ship was negligent for creating an unreasonably dangerous condition and failing to warn passengers. The district court granted summary judgment in favor of Celebrity Cruises. On appeal, the Eleventh Circuit affirmed. The court agreed that the ship had no duty to warn of open and obvious dangers. Further, the plaintiff failed to show that the ship had notice of the allegedly dangerous condition or that the ship violated industry standards in operating the game.

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