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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the June 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-18-03-06).

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SECOND CIRCUIT

New York

New York v. Pruitt, Nos. 18-CV-1030, -1048 (S.D.N.Y. May 29, 2018).

On May 29th, the U.S. District Court for the Southern District of New York denied defendants' motion to transfer two cases challenging the Trump Administration's delay of the Clean Water Rule to Texas. The two cases in question are mostly identical but filed by different plaintiffs—the first filed by a group of states and the District of Columbia and the second brought by the Natural Resources Defense Council and the National Wildlife Federation. These cases concern several issues related to the new 2015 definition of "Waters of the United States" (WOTUS) under the Clean Water Act. In 2015, the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers jointly promulgated a new WOTUS definition, which was immediately challenged in court. The first of the challenging cases, filed in the District of North Dakota, resulted in an injunction that prohibited implementation of the 2015 definition in thirteen states. In another case, the Sixth Circuit issued a nationwide stay of the 2015 definition—a decision that was struck down by the U.S. Supreme Court in early 2018 because the case should have been brought in district court rather than the court of appeals. Soon after this ruling, the EPA and the Corps jointly promulgated a rule delaying implementation of the 2015 WOTUS definition by two years—known as the "Suspension Rule." However, another lawsuit was pending in the Southern District of Texas that also challenged the new WOTUS definition. In the wake of the Supreme Court's decision, the plaintiffs in that case decided to move for a nationwide injunction against the 2015 definition. Because of this, the governmental and industry defendants in the two nearly identical cases at hand moved to transfer the two cases to the same Texas district—arguing that transfer would be proper as venue would have initially been proper in Texas. However, the court disagreed. The court held that the defendants in both cases did not legally reside in Texas for the purposes of the venue statute, nor did the events leading up to the lawsuit occur in Texas. The court also reasoned that a balancing of factors weighed heavily against transfer and that the defendants did not satisfy any of the other transfer requirements. Accordingly, the court ruled that transfer of either or both cases to Texas would not be appropriate and denied the defendants' motion.

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FOURTH CIRCUIT

North Carolina

Save Our Sound OBX, Inc. v. North Carolina Dept. of Transportation, 2018 WL 2671207 (E.D.N.C. June 4, 2018).

A group of residents challenged a project that would remove a section of highway from the Pea Island Wildlife Refuge, replacing it with a bridge in Pamlico Sound. The plaintiffs alleged that the North Carolina Department of Transportation (NCDOT) approved the bridge without appropriate consideration of environmental consequences under the National Environmental Protection Act, feasible alternatives under the Department of Transportation Act, and effects on historically significant property under the National Historic Preservation Act. The court granted summary judgment in favor of NCDOT. The court found that the agency adequately considered impacts of the construction process, effects on the Refuge, and socio-economic effects. The court also found that the agency did not eliminate beach nourishment options prematurely, nor was the construction unlawfully predetermined by a prior settlement with environmental groups.

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South Carolina

Jowers v. S.C. Dep't of Health & Envtl. Control, 2018 WL 2449220 (S.C. May 30, 2018).

On May 30, the Supreme Court of South Carolina issued a decision refusing to reverse its 2017 ruling upholding a law letting industrial farms siphon large amounts of river water without state permits. The resident plaintiffs in this case, concerned about their riparian rights, filed suit against the South Carolina Department of Health and Environmental Control (DHEC). The plaintiffs challenged certain registration provisions of the South Carolina Surface Water Withdrawal Act (SWWA)—legislation that requires anyone taking more than three million gallons of water per month from state rivers to obtain state permits. Plaintiffs took issue with the SWWA's provisions exempting agriculture—which require that agricultural users simply register their surface water use with the DHEC. After doing so, users are permitted to withdraw surface water up to the registered amount—with those withdrawals not being subject to the reasonableness factors the Act imposes for all other users. The plaintiffs made three primary arguments in this case: 1) that the SWWA's registration system is an unconstitutional taking of their riparian rights; 2) that the SWWA violates due process by depriving plaintiffs of their riparian rights without notice or an opportunity to be heard; and 3) that the SWAA violates the public trust doctrine by disposing of assets the State holds in trust. As to the first and second claims, the court held that plaintiffs had no standing, as the SWAA had not yet deprived plaintiffs of their riparian rights. The court was not convinced by their claim of future injury. As to plaintiffs' public trust claim, the court held that plaintiffs also lacked standing, since they did not allege that any public trust asset had been lost due to surface water withdrawals by agricultural users. Therefore, the court ruled against the plaintiffs, and the SWWA was, again, upheld.

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NINTH CIRCUIT

Mono County v. Walker River Irrigation District, 890 F.3d 1174 (9th Cir. 2018).

Walker River Paiute Tribe and the United States filed suit seeking recognition of the Tribe's additional water rights to the Walker River, which is subject to the Walker River Decree. Mineral County intervened as a plaintiff seeking modification of the final decree. Mineral County requested that the court recognize the county's rights and for the public to have minimum levels of water in Walker Lake. The U.S. District Court for the District of Nevada dismissed the action, but the county appealed. The court ultimately found that the Nevada Supreme Court must answer a question of law. Specifically, "Does the public trust doctrine apply to rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?" Until the Nevada Supreme Court accepts and decides this

question of law, this case is stayed.

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California

United States v. HVI Cat Canyon, Inc., No. CV 11–5097 FMO (SSx), 2018 WL 2325398 (C. D. Cal. May 20, 2018).

The United States filed a complaint against an oil company alleging violations of § 311(b) and § 301(a) of the Clean Water Act (CWA) for twelve oil spills occurring between 2005 and 2010 and sought removal costs of over $2 million under § 1002(a) of the Oil Pollution Act of 1990 (OPA). The United States moved for summary judgment. The court granted in part and denied in part the motion for partial summary judgment. The court found the defendant liable under § 311(b) and § 301(a) of the CWA and under § 1002(a) of the OPA. Subsequently, the court ordered that the defendant to pay the United States approximately 90% of the cleanup costs plus interest.

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Hawaii

United States v. Triple Dragon LLC, 83 Fed. Reg. 25494 (June 1, 2018);

United States v. Capt. Millions III, LLC, 83 Fed. Reg. 25494, 25495 (June 1, 2018).

On June 1, 2018, the U.S. Department of Justice published notices of proposed Consent Decrees under the Clean Water Act (CWA) for two lawsuits: *United States of America v. Triple Dragon LLC et al. and United States of America v. Capt. Millions III, LLC et al.* The complaints alleged the defendants violated § 311 of the CWA and the Coast Guard's pollution control regulation by discharging oily bilge waste from a commercial longline fishing vessel while fishing off Hawaii. The proposed Consent Decrees required corrective measures, as well as civil penalties. The publication of the notices in the Federal Register initiated the thirty-day comment period. Following the conclusion of the comment period, the Consent Decrees are binding on all parties.

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Opinion Here (v. Capt. Millions III, LLC)

Washington

Pope Resources, LP v. Washington State Department of Natural Resource, 418 P.3d 90 (Wash. 2018).

Pope Resources, as tenants, sued the Washington State Department of Natural Resources (DNR), as landlord, for contribution of cleanup costs of Port Gamble Bay. Port Gamble Bay was contaminated by the operation of a sawmill owned and operated by Pope Resources. Pope Resources sought contribution from the DNR, arguing that the DNR constitutes an owner/operator under Washington's Model Toxics Control Act (MTCA). The Supreme Court of Washington reversed the appellate court and held that the DNR is not an owner/operator as defined by the MTCA, but rather, serves solely as the state's management agent. Furthermore, the court disagreed with the appeals court and found that the DNR's role as management agent is distinct from any operational control; therefore, the DNR is not an operator under the MTCA. Subsequently, the court granted summary judgment in favor of the DNR.

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DC CIRCUIT

District of Columbia

Public Employees for Environmental Responsibility v. Pruitt, No. 17-652 (D.D.C. June 1, 2018).

On May 29th, the D.C. federal district court granted summary judgment in favor of Public Employees for Environmental Responsibility (PEER) in its Freedom of Information Act (FOIA) lawsuit against the Environmental Protection Agency (EPA). PEER initially filed its FOIA request seeking documents that EPA Administrator Scott Pruitt relied on when stating in a March 2017 appearance on the CNBC television program "Squawk Box" that carbon

dioxide created by human activity is not a primary contributor to global warming and that there is tremendous disagreement about the impact of human activity on the world's climate. Specifically, PEER sought EPA documents supporting Pruitt's conclusion that human activity is not the primary driver of climate change—documents the EPA performed no search for and, consequently, did not produce. EPA, however, moved for summary judgment, arguing that PEER's overbroad and unduly burdensome FOIA request was an impermissible attempt to compel it and its Administrator to answer questions and take a position on the climate change debate. However, the court disagreed and noted that the EPA had failed to demonstrate a viable legal basis for its refusal to conduct any document search whatsoever in response to PEER's straightforward FOIA request. Accordingly, the court denied the EPA's motion for summary judgment and directed it to conduct and complete a relevant records search, to disclose promptly to PEER any responsive, non-exempt records, and to produce to PEER an explanation for any documents withheld in full or in part.

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National Parks Conservation Ass'n v. Semonite, Nos. 17-CV-01361, -01574 (D.D.C. May 24, 2018).

On May 24th, a federal district court denied two summary judgment claims filed by preservation groups against the U.S. Army Corps of Engineers. The groups brought claims under the National Environmental Policy Act (NEPA), § 404 of the Clean Water Act (CWA), and the National Historic Preservation Act (NHPA). These claims all concerned the U.S. Army Corps of Engineers' approval of a 17-mile transmission line across the James River near historic Jamestown, Virginia—a project the plaintiffs argued should not have been approved. As to the Corps' actions under NEPA and the CWA, plaintiffs made three main categories of arguments: 1) that the Corps erred in deciding to issue a "finding of no significant impact" (FONSI) determination and not an environmental impact statement (EIS); 2) that the Corps failed to adequately analyze less impactful feasible alternatives to the approved project; and 3) that the Corps failed to provide the opportunity for public comment or meaningful involvement in the NEPA process. The court disagreed with these arguments and held that the Corps took the statutorily required "hard look" at the project and properly determined that no EIS was required. The court also ruled that the Corps properly addressed any mitigation concerns and was not required to circulate a draft environmental assessment and FONSI for public review. Additionally, the court concluded that the only reasonable alternative to the project also required crossing the James River and would, in fact, cause a greater overall impact. Finally, the court ruled that plaintiffs' claims under the NHPA were not convincing. Accordingly, the court denied plaintiffs' motions for summary judgment and dismissed the case entirely.

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FEDERAL CLAIMS

In re Upstream Addicks and Barker Flood-Control Reservoirs, No. 17-9001L, 2018 WL 2354924 (Fed. Cl. May 24, 2018).

Following Hurricane Harvey in August 2017, a large number of upstream property owners sued the United States alleging uncompensated takings under the Fifth Amendment of the U.S. Constitution. Due to the large number of similar complaints relating to the Addicks and Barker dams, these upstream property owners were grouped together for multi-district litigation. The United States moved to dismiss the Master Complaint made by the plaintiffs. The United States argued a lack of jurisdiction and contended that the Master Complaint failed to state a claim upon which relief could be granted. Due to the nature of takings cases, the court deferred the government's motion to dismiss until trial.

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