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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the June 2013 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-13-03-06).

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FIRST CIRCUIT

Curran v. Me. Dep't of Inland Fisheries & Wildlife, 2013 Me. Super. LEXIS 59 (Me. Super. Ct. May 15, 2013).

The Supreme Court of Maine held that the Maine Department of Inland Fisheries and Wildlife's restrictions on a permit to own Koi were not arbitrary and capricious. Despite the Department's classification of Koi as an invasive fish, it granted a permit to Georgette Curran to keep the fish, as long as she complied with certain restrictions. Curran brought suit to have the restrictions lifted, arguing that Koi would not survive long enough in Maine waters to be a nuisance. The court found that the Department's actions were well within the language of the statute regulating carp, from which the Koi are a subspecies.

<http://mainelaw.maine.edu/library/SuperiorCourt/decisions/KENap-12-26.pdf>

New Hampshire

Appeal of Morrissey, 2013 N.H. LEXIS 66 (N.H. June 5, 2013).

The Supreme Court of New Hampshire held that the Department of Environmental Services (DES) failed to consider the total wetlands impact of a proposed project on wetlands. When issuing permits, the DES must consider not only activity that might require a permit, but any activity that may impact the wetlands. As such, the DES should have considered the town's activity in relation to the water level in a pond before requiring the town to apply for a dredge and fill permit. Although the court historically gives deference to agency interpretation of legislation, such deference

is not absolute, particularly if the agency conduct is at plain odds with the language of a statute.

<http://www.courts.state.nh.us/supreme/opinions/2013/2013044morrissey.pdf>



FOURTH CIRCUIT

***Ohio Valley Envtl. Coalition, Inc. v. United States Army Corps of Eng'rs*, 2013 U.S. App. LEXIS 9753 (4th Cir. 2013).**

The Fourth Circuit Court of Appeals upheld the district court's dismissal of claims against the U.S. Army Corps of Engineers for its issuance of a Clean Water Act § 404 permit related to a mountaintop mining removal operation. The Ohio Valley Environmental Coalition brought the suit, alleging that the Corps used corrupted data in its analysis of the mine's impact on the local watershed. The Coalition also claimed that the Corps acted arbitrarily and capriciously by not taking a hard look at expert evidence regarding the impact. Upon examination of the data, the district court held that the data was not corrupted, the mine would not significantly impact the watershed, and that the issuance of a permit was appropriate. The court also held that the Corps correctly determined that an environmental impact statement was not necessary because the environmental impact of the mine's actions lacked significance.

<http://www.ca4.uscourts.gov/opinions/Published/121999.p.pdf>



FIFTH CIRCUIT

***Comer v. Murphy Oil USA*, 2013 U.S. App. LEXIS 9705 (5th Cir. 2013).**

The Fifth Circuit Court of Appeals held that the doctrine of res judicata barred a group of Mississippi Gulf Coast residents and property owners from seeking relief from the effects of global warming. In 2011, the Gulf Coast residents brought suit against numerous energy companies, alleging that the energy companies produced emissions that contributed to global warming, thus intensifying Hurricane Katrina. However, the Gulf Coast residents had previously filed suit against the energy companies in 2005. Under res judicata, a court cannot hear a case if a previously decided case exists that had identical parties, proper jurisdiction, a final judgment based on the case's facts, and the same claim. The Gulf Coast residents responded that the third element of res judicata was not met because the 2005 appeals court dismissed the claims due to an insufficient number of judges available to hear the case. The Fifth Circuit nevertheless held that res judicata was present because the district court's dismissal of the claims was a sufficient final holding based on the facts.

<http://www.ca5.uscourts.gov/opinions/pub/12/12-60291-CVo.wpd.pdf>

***Pelican Island Oysters, Inc. v. Office of Coastal Prot. & Restoration Auth.*, 2013 U.S. App. LEXIS 10123 (5th Cir. May 20, 2013).**

The Fifth Circuit Court of Appeals dismissed an oyster company's appeal in a case claiming that the state, two contractors, and various subcontractors negligently dredged and constructed a project, thereby damaging their oyster leases. They sued in both state and federal courts. The state district court dismissed the claim for lack of subject matter jurisdiction and did not rule on the merits of the case. The Oystermen appealed, believing that the court lawfully had jurisdiction under admiralty law. The appellate court held that while their claim was an admiralty case, they are only allowed to hear admiralty cases if the appeal is on the merits of the case.

<http://www.ca5.uscourts.gov/opinions%5Cunpub%5C12/12-30846.O.wpd.pdf>

Texas

***State v. Crabtree*, 2013 U.S. Dist. LEXIS 77679 (S.D. Tex. May 31, 2013).**

A U.S. district court recently held that the shortened red snapper fishing season along the Gulf of Mexico was unlawful under the Magnuson-Stevens Fishery Conservation and Management Act (MSA). In March, the National Marine Fisheries Service (NMFS) issued an emergency rule altering the 2013 recreational red snapper season in federal waters in the Gulf of Mexico. As a result, the federal seasons varied in length off each of the Gulf states. Texas and Louisiana challenged the emergency rule. The court held that NMFS failed to meet the criteria for emergency rulemaking and that the emergency rule discriminated amongst the states. The court threw out the emergency rule, reinstating the original red snapper season for 2013.

<https://ecf.txsd.uscourts.gov/doc1/179118712780>



NINTH CIRCUIT

***Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 2013 U.S. App. LEXIS 10717**

(9th Cir. 2013)

The Ninth Circuit Court of Appeals reversed the district court's order dismissing the Institution of Cetacean Research's (the Institute) request for a preliminary injunction and claims of piracy made against the Sea Shepherd Conservation Society. The court held that the district court's interpretation of "private ends" and "violence" under the United Nations Convention on the Law of the Sea (UNCLOS) was erroneous. Relying on an analysis of piracy law history, the court held that private ends were not limited only to fiduciary ends. The appellate court also found that the district court misinterpreted the definition of violence as conduct harming people, because UNCLOS states that harmful conduct towards inanimate objects constitutes violence as well. Since the Sea Shepherd endangered the Institute's ability to navigate when it launched projectiles and threatened to ram into the Institute's vessel, the Ninth Circuit held that a preliminary injunction was appropriate because an irreparable harm was present based on the UNCLOS definition of violence.

<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/05/24/12-35266.pdf>

California

***North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors*, 216 Cal. App. 4th 614**

(Cal. App. 1st Dist. May 21, 2013).

The California Court of Appeals reversed the trial court's judgment against the Marin Municipal Water District regarding a seawater desalination plant. After the Marin Municipal Water District created an environmental impact report (EIR) regarding the plant, the North Coast Rivers Alliance filed a complaint stating that the plant's construction would negatively impact the aesthetic quality of the surrounding area. An agency issuing an EIR must consider the physical impacts a project will impose on the environment, including aesthetic issues. The court found that agencies must have substantial evidence to conclude whether aesthetic issues will be significantly impacted. The court held that substantial evidence was present in the EIR.

<http://www.courts.ca.gov/opinions/documents/A133821.PDF>

Hawaii

***Detting v. United States*, 2013 U.S. Dist. LEXIS 77187 (D. Haw. May 31, 2013).**

The United States District Court for the District of Hawaii dismissed the claims of two fishermen who claimed that the

National Oceanic Atmospheric Administration (NOAA) violated their fishing rights by not permitting them to fish in two marine national monuments located near Hawaii. The court also dismissed the fishermen's claim alleging that NOAA failed to compensate them for lost earnings due to the prohibition. Further, the court dismissed the fishermen's claim for intentional infliction of emotional distress because they did not exhaust all administrative remedies before bringing their claim. Prior to filing a complaint, their interactions with NOAA only sought relief for economic damages.

<https://ecf.hid.uscourts.gov/doc1/06111844638>



ELEVENTH CIRCUIT

***Miccosukee Tribe of Indians of Fla. v. United States*, 2013 U.S. App. LEXIS 9756 (11th Cir. 2013).**

The Eleventh Circuit Court of Appeals upheld a district court's dismissal of the Miccosukee Tribe's complaint against the U.S. Army Corps of Engineers regarding the Corps' operation of a floodgate bordering the Miccosukee's land in the Everglades. The Corps closed the floodgate to allow the endangered Cape Sable seaside sparrow's critical habitat to recover after a wildfire. The Miccosukee experienced increased, damaging floods on their leased lands as a result. They brought suit seeking damages for the flooding, arguing that it breached the terms of their lease agreement with the Corps. However, the court dismissed their claims due to a lack of sufficient evidence in the record; while the Corps could not flood their land with impunity, the court needed additional information to evaluate the merits of the Tribe's claims.

<http://www.ca11.uscourts.gov/opinions/ops/201014271.pdf>



D.C. CIRCUIT

***Nat'l Wildlife Fedn v. United States EPA*, 2013 U.S. Dist. LEXIS 69886 (D.D.C. 2013).**

The U.S. District Court for the District of Columbia held that the National Wildlife Federation's (NWF) claim against the U.S. Environmental Protection Agency (EPA) challenging a statute governing certain discharge permits lacked legal standing. The NWF challenged a statute that barred the EPA from increasing the stringency of their vessel general permits regulating ballast water discharge. The NWF claimed that the statute violated the Clean Water Act, and the group sought relief under the Administrative Procedures Act. The EPA responded that NWF's complaint should be dismissed because it was untimely, lacked subject matter jurisdiction, and should have been brought in the court of appeals. The court held that the EPA's actions did not have legal consequences, but only practical consequences in a legal context. The EPA neither acted against the statute's language nor did it act outside its jurisdiction.

<https://ecf.dcd.uscourts.gov/doc1/04514321518>

***Midcoast Fisherman's Ass'n v. Blank*, 2013 U.S. Dist. LEXIS 80796 (D.D.C. June 10, 2013).**

The U.S. District Court for the District of Columbia dismissed a case regarding the National Marine Fisheries Service (NMFS) permission of mid-water trawl vessels. NMFS had banned fishing gear capable of catching groundfish in the early 1990s but relaxed the ban in 1998 and 2006 to allow mid-water trawl vessels. The Midcoast Fisherman's Association (the Association) petitioned for emergency and permanent rulemaking to exclude mid-water trawl vessels, claiming that allowing such a method violated statutory bycatch limits. NMFS rejected the petition. A lower court claimed that such a rejection was an abuse of power. On appeal, the court held that while it may order the agency to reconsider its denial, it cannot outright overturn an agency decision. After the Association filed their claim,

NMFS also created a new regulation ordering groundwater fishermen to ensure that their bycatch is minimal with increased monitoring and sampling. Because of the new regulation, NMFS responded that the Association's claims against them were moot. The court also agreed that the case was moot because the Association had the opportunity to participate in notice and comment for the new regulation and because the Association lacked a legal relief applicable to their claim.

<https://ecf.dcd.uscourts.gov/doc1/04514315420>



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