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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the September 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-13-03-09).

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FIRST CIRCUIT

***Conservation Law Found., Inc. v. Jackson*, CA 11-11657-MLW, 2013 WL 4574581 (D. Mass. Aug. 23, 2013).**

The United States District Court of Massachusetts denied the Environmental Protection Agency's (EPA) motion to dismiss a portion of a lawsuit alleging that the EPA violated the Clean Water Act and associated regulations in a manner that contributed to pollution in waters around Cape Cod. The court found that the Conservation Law Foundation and Buzzards Bay Coalition had standing to bring the suit on behalf of their members. While the district court granted dismissal of several claims, the court denied dismissal of a claim that the EPA's mandatory annual reviews of how Massachusetts administers its State Revolving Fund money has been arbitrary, capricious, and contrary to law.

<http://pacer.mad.uscourts.gov/dc/cgi-bin/recentops.pl?filename=wolf/pdf/8%2022%2013%20memorandum%20and%20order.pdf>

SECOND CIRCUIT

***Ne. Research, LLC v. One Shipwrecked Vessel*, 11-1644-CV, 2013 WL 4753732 (2d Cir. Sept. 5, 2013)**

The Second Circuit upheld a district court ruling finding that the State of New York had title to an intact shipwreck of an early nineteenth century wooden schooner found in Lake Erie. After Northeast Research discovered the sunken vessel, it filed an in rem action in federal court asserting title under admiralty law as the finder and salvor of the shipwreck. New York intervened, claiming title to the wreck under state law and the Abandoned Shipwreck Act (ASA). The ASA vests certain abandoned shipwrecks in the state where they rest. Northeast Research claimed that the wreck was not abandoned but a ship that participated in the War of 1812. The district court agreed with New York and awarded title to the state. On appeal, the Second Court upheld the opinion, finding that the ship met the proof for abandonment under the ASA.

http://www.ca2.uscourts.gov/decisions/isysquery/30a98fee-5eaf-44ae-8943-80930eb9f421/1/doc/11-1644_opn.pdf



FOURTH CIRCUIT

***Angelex Ltd. v. United States*, 723 F.3d 500 (4th Cir. 2013).**

The Fourth Circuit reversed and remanded a district court order that altered a bond set by the U.S. Coast Guard for the release of a detained ship and restricted penalties the government could pursue for the ship's violation of pollution prevention statutes. The Coast Guard had detained the vessel, an ocean-going bulk cargo carrier, for discharging bilge water overboard and maintaining an incomplete or falsified Oil Record Book in violation of MARPOL and the Act to Prevent Pollution from Ships. After the Coast Guard set a \$2.5 million bond, the vessel and its owner filed an emergency petition, seeking immediate release of the vessel or alteration of the bond terms. The United States District Court for the Eastern District of Virginia issued the order in favor of the vessel. On appeal, the Fourth Circuit found that the district court lacked jurisdiction to review the order because the Coast Guard's actions were discretionary agency decisions, subject to review only if the agency exceeded its statutory authority.

<http://www.ca4.uscourts.gov/opinions/Published/131610.p.pdf>

***Town of Nags Head v. Toloczko*, 12-1537, 2013 WL 4517074 (4th Cir. Aug. 27, 2013).**

In an effort by the town of Nags Head, North Carolina to regulate properties that encroach onto public trust lands, the town sought to require owners of a beachfront property damaged by a tropical storm to raze their cottage. When the owners refused to comply, the town brought suit in state court. The suit was removed to federal court, and the owners filed multiple counterclaims. Ultimately, the United States District Court for the Eastern District of North Carolina abstained from a decision invoking the "Buford doctrine of abstention," which requires abstention in areas that have "the danger of federal interference with unsettled, important policy matters reserved to the states." On appeal, the Fourth Circuit reversed the district court's decision to abstain and remanded the case.

<http://www.ca4.uscourts.gov/Opinions/Published/121537.P.pdf>



NINTH CIRCUIT

***California Sportfishing Prot. Alliance v. Chico Scrap Metal, Inc.*, 11-16959, 2013 WL 3779974 (9th Cir. July 22, 2013).**

The United States Court of Appeals for the Ninth Circuit reversed a lower court's dismissal of a citizen suit brought by a conservationist organization under the Clean Water Act (CWA) against operators of three scrap metal recycling facilities. The organization claimed that the companies violated the National Pollutant Discharge Elimination System (NPDES) permit governing industrial storm water discharges. The United States District Court for the Eastern

District of California dismissed the case, finding the action barred by a CWA provision prohibiting citizen suits when a state has diligently prosecuted an action to require compliance with a standard, limitation, or order. The Ninth Circuit disagreed, finding the suit was not barred by the provision because documents showed that the state had never sought enforcement of the permit. The Ninth Circuit also rejected the defendants' argument that the suit was barred by a CWA provision barring citizen suit when a state has diligently prosecuted action under a state law that is comparable to the CWA. The court found that penalties assessed by the state under state law were not "comparable" to the CWA.

<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/07/22/11-16959.pdf>

***Alaska v. Lubchenco*, 723 F.3d 1043 (9th Cir. 2013).**

The Ninth Circuit upheld the National Marine Fisheries Service's (NMFS) determination to limit commercial fishing in waters inhabited by a subpopulation of endangered Steller sea lions. The state of Alaska and representatives of the fishing industry had brought the action, alleging that NMFS's determination was a violation of the Endangered Species Act (ESA). The Ninth Circuit ruled: 1) NMFS's reliance on subregional declines in population was not arbitrary or capricious; 2) NMFS properly considered whether continued fishing could prevent sea lions from reaching goals related to delisting; 3) NMFS's reasonable and prudent alternative analysis was not undermined by plaintiffs' criticisms; 4) NMFS's finding that removal of sea lion prey was an indirect effect of the fishery was not arbitrary or capricious; and, 5) the district court's decision to not require a Record of Decision was appropriate, because it would be premature.

<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/07/23/12-35201.pdf>

***Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles*, 10-56017, 2013 WL 4017155 (9th Cir. Aug. 8, 2013).**

Two environmental organizations brought suit against Los Angeles County and the Los Angeles County Flood Control District, alleging that they were discharging urban stormwater runoff into navigable waters in violation of the Clean Water Act (CWA). The United States District Court for the Central District of California ruled in favor of the defendants, finding that the organizations did not prove that any individual defendant had discharged pollutants in violation of the CWA. The Ninth Circuit affirmed and the plaintiffs sought review in the U.S. Supreme Court. The Supreme Court reversed and remanded the case to the Ninth Circuit. On remand, the appellate court held that pollution exceedances detected at monitoring stations of Los Angeles County and Los Angeles County Flood Control District were sufficient to establish defendants' liability for violations of their National Pollutant Discharge Elimination System (NPDES) permit.

<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/08/08/10-56017.pdf>

***Alaska Wilderness League v. U.S. E.P.A.*, 12-71506, 2013 WL 4105626 (9th Cir. Aug. 15, 2013).**

The Ninth Circuit upheld the dismissal of a challenge to a Clean Air Act (CAA) permit for a drill vessel's pollutant emitting activities in Alaska's Beaufort Sea. The court held that the Environmental Protection Agency (EPA) reasonably interpreted an ambiguous CAA provision to find that the applicant was not required to analyze its drill vessel's potential impact on standards used to maintain air quality before obtaining an oil exploration permit. Further, the EPA permissibly granted a 500-meter exemption to the vessel from ambient air standards.

<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/08/15/12-71506.pdf>

***Chinatown Neighborhood Ass'n v. Brown*, 13-15188, 2013 WL 4517073 (9th Cir. Aug. 27, 2013).**

The Chinatown Neighborhood Association and Asian Americans for Political Advancement appealed a district court's denial of a preliminary injunction against the enforcement of California's Shark Fin Law, which makes it unlawful to possess, sell, offer for sale, trade, or distribute a shark fin in California. In an unpublished opinion, the Ninth Circuit

upheld the denial. The court found that the district court properly analyzed the preliminary injunction application and did not abuse its discretion in determining that Chinatown failed to prove a likelihood of irreparable harm and a likelihood of success on its Equal Protection Clause, dormant Commerce Clause, or its Supremacy Clause claims.

<http://cdn.ca9.uscourts.gov/datastore/memoranda/2013/08/27/13-15188.pdf>

Drakes Bay Oyster Co. v. Jewell, 13-15227, 2013 WL 4712736 (9th Cir. Sept. 3, 2013).

In a case that "pits an oyster farm, oyster lovers and well-known 'foodies' against environmentalists aligned with the federal government" the Ninth Circuit ruled that a permit for commercial oyster farming in a national seashore would expire in accordance with its terms. The owners of the oyster company had sought to have the permit extended by the Secretary of the Interior pursuant to a Congressional enactment that would have allowed a special use permit for the oyster farm. When the Secretary chose not to issue an extension, the owner of the farm sought a preliminary injunction arguing that the decision violated the National Environmental Policy Act (NEPA) and federal regulations. The Ninth Circuit held that the court lacked jurisdiction to review the Secretary's discretionary decision; the oyster company was not likely to succeed in proving the Secretary violated NEPA or its regulations; and the company failed to raise a serious question about the Secretary's decision because it did not show that the balance of equities weighed in its favor.

<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/09/03/13-15227.pdf>

Wild Fish Conservancy v. Jewell, 10-35303, 2013 WL 4826466 (9th Cir. Sept. 11, 2013).

The Ninth Circuit upheld a district court's dismissal of an action alleging that the U.S. Fish and Wildlife Service, the Leavenworth National Fish Hatchery, and others violated the Administrative Procedure Act and the Reclamation Act based on violations of Washington's Water Code and fishways law. Specifically, the Wild Fish Conservancy alleged that the United States improperly diverted water from a tributary of the Wenatchee River. The court found that the environmental organization lacked standing to bring the claim and that its claim failed to challenge a final agency action.

<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/09/11/10-35303.pdf>



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