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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the April 2014 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-14-03-04).

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FIRST CIRCUIT

Massachusetts

***Massachusetts v. Pritzker*, CIV.A. 13-11301-RGS, 2014 WL 1364907 (D. Mass. Apr. 8, 2014).**

Massachusetts and New Hampshire sued the Secretary of Commerce for promulgating regulations for New England's Multispecies Fisheries in violation of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Regulations 48 and 50 effectively instituted severe cutbacks in catch limits to prevent overfishing and gave the government the opportunity to rebuild stocks that are overfished. The court held that the framework complied with the National Standard of the MSA that provided that "[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry."

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SECOND CIRCUIT

New York

***Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. E.P.A.*, 08-CV-5606 KMK, 2014 WL**

1284544 (S.D.N.Y. Mar. 28, 2014).

Plaintiffs Catskill Mountains Chapter of Trout Unlimited, Inc. challenged the legality of the Environmental Protection Agency's (EPA) water transfer rule. The EPA defined "water transfer" as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." The United States District Court, Southern District of New York held that the water transfer rule was arbitrary and capricious. The court vacated the rule and remanded it to the extent the EPA did not provide a reasoned explanation for its interpretation.

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THIRD CIRCUIT

Pennsylvania

***Citizens for Pennsylvania's Future v. Pittsburgh Water & Sewer Auth.*, CIV.A. 12-943, 2014 WL**

1356134 (W.D. Pa. Apr. 7, 2014).

Citizens for Pennsylvania's Future filed suit against the Pittsburgh Water and Sewer Authority (PWSA) for potential violations of Section 505 of the Clean Water Act (CWA). PWSA was issued a National Pollution Discharge Elimination System Permit, which allowed the PWSA to discharge water into various surrounding rivers as long as they establish an approved stormwater management program to reduce pollution. Plaintiffs alleged that the PWSA failed to enforce local storm water management ordinances against the Buncher Company and, instead, approved the company's faulty storm water management plan. The court determined that failure to enforce local ordinances did not constitute a permit violation under the CWA.

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New Jersey

***Scot Netherlands, Inc. v. State, Dep't of Env'tl. Prot.*, A-5156-11T3, 2014 WL 1343871 (N.J. Super. Ct.**

App. Div. Apr. 7, 2014).

New Jersey corporation Scot Netherlands, Inc. appealed the dismissal of its complaint against New Jersey's Department of Environmental Protection (DEP) for denying their permit applications for activities in freshwater and coastal wetlands. Scot Netherlands argued that the denial was a regulatory taking and that the trial judge's contrary determination was an error. The company purchased property in Atlantic City and could not develop the real estate without the permits. The New Jersey Superior Court held in a per curium opinion that there was no factual or legal error on the part of the trial court and affirmed the trial court's decision to uphold DEP's denial of the permits.

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FIFTH CIRCUIT

Texas

***Contango Operators, Inc. v. United States*, CIV.A. H-11-0532, 2014 WL 1278628 (S.D. Tex. Mar. 26, 2014).**

A dredge owned by Weeks Marine struck a pipeline at the bottom of the Gulf of Mexico causing a rupture. Contango Operators owned the pipeline and sued in response to the rupture. Weeks Marine argued that they should have immunity because they were contracted by the U.S. government to perform duties related to the dredge. The court determined that Weeks Marine failed to establish their sovereign immunity defense because the U.S. government owed a duty of care to Contango, and Weeks Marine was negligent in its actions. Contango received \$2,920,528.80 for insured repair costs, \$534,634.03 for uninsured repair costs, \$78,073.00 for lost hydrocarbons, \$7,981,927.00 for deferred production damages, \$2,351,932.57 for prejudgment interest, and a post-judgment interest rate of 0.14% compounded annually on the sum of these awards.

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NINTH CIRCUIT

California

***Pac. Coast Fed'n of Fishermen's Associations v. Murillo*, CIV. S-2:11-2980-KJM, 2014 WL 1302102 (E.D. Cal. Mar. 28, 2014).**

On a motion for summary judgment, the court had to decide whether the water pollution created by the Grasslands Bypass Project required the defendants to obtain a National Pollutant Discharge Elimination System permit. The government defendants argued that the project fell under an exception within the Clean Water Act (CWA) that does not require a permit for "discharges composed entirely of return flows from irrigated agriculture." The plaintiffs claimed that the project did not fall under the exception and, therefore, violated the CWA. The court determined that the issue as to whether the discharges were entirely return flows was a factual issue that might not fall under the exception.

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***Chinatown Neighborhood Ass'n v. Harris*, 12-CV-03759-WHO, 2014 WL 1245047 (N.D. Cal. Mar. 25, 2014).**

Under California's "Shark Fin Law," it is illegal in the state "for any person to possess, sell, or offer for sale, trade, or distribute a shark fin." Plaintiffs Chinatown Neighborhood Association challenged the law alleging that it discriminated against Chinese Californians because shark fin is commonly used in traditional Chinese dishes. They also argued that the law is unconstitutional under the Equal Protection Clause, violates the Commerce Clause, and is preempted by the Magnuson-Stevens Fishery Conservation and Management Act (MSA). The court held that the plaintiffs failed to state a claim because the law did not violate constitutional rights and was not preempted by the MSA. It then granted summary judgment in favor of the defendant and dismissed the case with prejudice.

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***Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 169 Cal. Rptr. 3d 413 (Cal. Ct. App. 2014).**

California's Department of Fish and Wildlife appealed a judgment made in favor of the Center for Biological Diversity (CBD) concerning the certification of an environmental impact report and issuance of two incidental take permits for

the stickleback fish. The CBD argued that the proposed mitigation efforts constituted a taking in violation of Section 86 of the state's Fish and Game Code. The court of appeals reversed the trial court's decision in favor of the government. The court of appeals acknowledged that whether the mitigation efforts violated the Fish and Game Code was a "close question" but reasoned that there was substantial evidence that minimal risk of death to the stickleback would occur.

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D.C. CIRCUIT

***Oceana v. Bureau of Ocean Energy Mgmt.*, CV 12-0981 (RC), 2014 WL 1281996 (D.D.C. Mar. 31, 2014).**

Two years after the Deepwater Horizon oil spill, the Bureau of Ocean Energy Management (BOEM) approved two lease sales for drilling rights on the outer continental shelf in the area where the spill occurred. BOEM issued the leases stating that no newly discovered information altered any chance of adverse environmental impact and any effect would be small. Various environmental organizations filed suit against BOEM and the National Marine Fisheries Services (NMFS). The organizations argued that BOEM's decision to issue the lease was arbitrary and capricious because they failed to consider the environmental impact of drilling and its impact on endangered species in violation of both the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). Additionally, the organizations argued that NMFS violated the Administrative Procedures Act (APA) by unreasonably delaying the Biological Opinion necessary to assess the impact. The United States District Court, District of Columbia held that BOEM and NMFS did not violate NEPA, the ESA, or the APA because they considered all newly obtained statistical and scientific information relevant to the sale.

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***Guindon v. Pritzker*, CV 13-00988(BJR), 2014 WL 1274076 (D.D.C. Mar. 26, 2014).**

Commercial fishermen brought a lawsuit against the National Marine Fisheries Service (NMFS) for establishing regulations that set quotas and fishing season lengths for recreational fishing of the red snapper fishery in the Gulf of Mexico. Plaintiffs claim that NMFS violated Section 407(d) of the Magnuson-Stevens Fisheries Conservation and Management Act (MSA) by approving a 28-day season based on a "flawed projection model," without adequate accountability measures, and by reopening the season in the fall when the recreational quota had already been reached and exceeded. The United States District Court, District of Columbia held that the regulations were arbitrary and capricious and violated the MSA.

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***Conservation Law Found. v. Pritzker*, CV 13-821 (JEB), 2014 WL 1338596 (D.D.C. Apr. 4, 2014).**

Plaintiff Conservation Law Foundation sued the National Marine Fisheries Service for promulgating Framework 50, which is a suite of measures that made adjustments to New England's Multispecies Fishery Management Plan. The plaintiffs argued that Framework 50 set catch limits for Maine Cod that exceeded the expert recommendation of the Scientific and Statistical Committee, and therefore violated their authority under the Magnuson-Stevens Fishery Conservation and Management Act (MSA). The district court held that Framework 50 violated the MSA since the statute's plain language states that annual catch limits may not exceed the fishing level recommendations of the Scientific and Statistical Committee.

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Conservation Law Found. v. Pritzker, CV 13-820 (JEB), 2014 WL 1338284 (D.D.C. Apr. 4, 2014).

The Conservation Law Foundation (CLF) also challenged the National Marine Fisheries Service's (NMFS) promulgation of Framework 48. Among the regulations that Framework 48 established was a regulation that allows local fishermen to apply for permission to enter areas that had previously been closed to commercial fishing. CLF claimed that Framework 48 violated the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and the National Environmental Policy Act (NEPA) and threatened the Northeast's ecosystems. The district court granted defendant's motion for summary judgment holding that NMFS's promulgation of the framework was sufficient under the MSA and that CLF's NEPA claim was not yet ripe for review.

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