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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the November 2015 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-15-03-11).

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FOURTH CIRCUIT

Maryland

***Kelso v. Smiertka*, 2015 WL 6410177 (Md. Ct. Spec. App. Oct. 21, 2015).**

A Maryland appellate court affirmed the Worcester County Shoreline Commission's (Commission) approval of a property owner's application to install a pier extension to their waterfront property. The court considered 1) whether the Commission appropriately considered state law regarding riparian rights, including the question of whether the extension would interfere with the riparian rights of nearby waterfront property owners, and 2) whether the pier would have an adverse impact on navigability and surrounding property values and would commercially benefit the county. After reviewing the evidence and testimony submitted at the initial hearing on the application, the court affirmed the Commission's decision.

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North Carolina

***Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 2015 WL 6157706 (M.D. N.C. Oct. 20, 2015).**

The U.S. District Court for the Middle District of North Carolina denied Duke Energy's motion to dismiss a Clean

Water Act (CWA) citizen suit filed by environmental groups for alleged National Pollutant Discharge Elimination System (NPDES) permit violations. The groups alleged that the company unlawfully discharged pollutants through engineered seeps, non-engineered seeps, an unpermitted pipe, and hydrologically connected groundwater to surface waters of the United States. The groups also alleged that the company violated the terms of its permit by allowing and causing "removed" substances, specifically coal ash waste, to enter waters of the state and the United States. The district court held that it has jurisdiction under the CWA to adjudicate claims where, as alleged here, pollutants travel from a point source to navigable waters through hydrologically connected groundwater serving as a conduit between the point source and the navigable waters. The court also ruled that the environmental groups have standing to move forward on their claim that Duke Energy violated dam safety provisions of its NPDES permit.

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Virginia

307 Campostella, LLC v. Mullane, 2015 WL 6673960 (E.D. Va. Oct. 30, 2015).

The U.S. District Court for the Eastern District of Virginia denied several boating companies' motion to dismiss a claim that alleged the companies introduced "unseaworthy vessels" and an "unlicensed pier/storage facility" to Virginia's Elizabeth River, thus creating overcrowding, obstruction, pollution, and blight and violating the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA). These boats—many 60-70 years old—were meant to be salvaged and sunk as artificial reefs, but, instead, languished by and on the shoreline and banks of the river for several years. The court held that the CWA claims were meritorious and denied the companies' motion to dismiss on these counts. However, the court also found that the plaintiff's RCRA and nuisance allegations were insufficient and granted the plaintiff leave to amend its complaint on both counts. Until the case is resolved, the vessels on the Elizabeth River will continue to obstruct the waterway.

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FIFTH CIRCUIT

Louisiana

Derouen v. Hercules Liftboat Co., LLC, 2015 WL 6159118 (E.D. La. Oct. 20, 2015).

The U.S. District Court for the Eastern District of Louisiana ruled on whether admiralty and maritime jurisdiction applied in a case brought by workers who were injured during a transfer from a lift boat to a crew boat. The plaintiffs were not seamen, but the accident occurred over navigable waters in the Gulf of Mexico, and, thus, the court found that admiralty and maritime jurisdiction applied. The court found that both the lift boat company and the crew boat owner were jointly negligent, and this negligence was the proximate cause of the plaintiffs' injuries and damages. The crew boat captain breached his reasonable duty of care by failing "to properly communicate with his crane operator counterpart...regarding personnel basket transfer procedures and sea conditions unique to the transfer at issue." Furthermore, the crane operator breached his duty of care by failing to communicate regarding personnel basket transfer procedures and by ignoring any visibility issues. The court held the crew boat owner 30% liable for the plaintiffs' injuries, and the lift boat company liable for the remaining 70%.

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Chalos & Co., P.C. v. Marine Managers, Ltd., No. CIV.A. 14-2441, 2015 WL 6442558 (E.D. La. Oct. 23, 2015).

The U.S. District Court for the Eastern District of Louisiana granted in part a motion for summary judgment against owners of a bulk cargo vessel. Chalos, a law firm for the vessel's chief engineer, filed a breach of contract action against the vessel owners after they failed to pay an agreed-upon retainer fee in exchange for Chalos' fee for litigating a case that accused the defendants of illegally "discharge[ing] oily waste into the ocean." Chalos was initially hired to individually represent Matthaïos Fafalios, the chief engineer on the defendants' vessel, who instructed the ship's crewmembers on how to bypass the vessel's "Oily Water Separator." The defendants claimed that the retainer agreement should be rescinded because their reason for hiring counsel on Fafalios's behalf was based on their belief that Fafalios was innocent of any intentional wrongdoing, and that Chalos knew or should have known this. In response, Chalos alleged that no one told them nor did they have reason to believe that the defendants were agreeing to pay for Fafalios' representation because they believed he was factually innocent. The court ruled that the defendants did not have a reasonable basis to believe that Fafalios was innocent. Instead, "the objective evidence should have caused [the] defendants to conduct further investigation," and poor judgment cannot excuse the defendants' contractual obligations. Accordingly, the court found the retainer agreement to be enforceable and ordered the defendants to pay Chalos its full amount of attorneys' fees and expenses incurred. However, the court also ordered Chalos to file a new motion for damages addressing the appropriate legal standard and whether its fee request satisfies it, before any fees would be awarded.

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Mississippi

Ward Gulfport Properties, L.P. v. Mississippi State Highway Comm'n, 2015 WL 6388832 (Miss. Oct. 22, 2015).

In 2012, a federal court revoked a permit issued by the Mississippi State Highway Commission (Commission) that proposed to fill wetlands in the roadbed of a limited-access road and pledged 1,300 acres of property as wetlands. The property owners filed suit alleging that missed business opportunities as a result of the permit issuance resulted in a taking. The trial court granted summary judgment in favor of the Commission. On appeal, the Mississippi Supreme Court ruled that the owners' claims were not barred by either res judicata or collateral estoppel. Further, summary judgment by the lower court was inappropriate, as there were genuine issues of material fact as to whether seeking the permit constituted a categorical taking or a partial regulatory taking.

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NINTH CIRCUIT

California

California Sportfishing Prot. Alliance v. United States Bureau of Reclamation, 2015 WL 6167521 (E.D. Cal. Oct. 20, 2015).

The U.S. District Court for the Eastern District of California ruled on several Temporary Urgency Change Petitions (TUCP) issued to the San Francisco and San Joaquin water authorities. These TUCPs granted temporary exceptions to water quality regulations in these areas in light of a statewide drought. The California Sportfishing Protection Alliance and other organizations challenged the issuance of these TUCPs, claiming that they did not remove requirements for

either the permittees or the U.S. Bureau of Reclamation from complying with federal water quality standards. The court concluded that the decision was not reviewable under the Administrative Procedure Act because "no 'agency action,' let alone any 'final' agency action [had] been alleged in [the] case." Although the plaintiffs argued that the "final agency action" requirement did not apply, the court found that none of the pertinent exceptions were applicable, and, therefore, granted the motion to dismiss for lack of jurisdiction.

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Washington

***Fairweather Fish, Inc. v. Pritzker*, 2015 WL 6160133 (W.D. Wash. Oct. 20, 2015).**

The U.S. District Court for the Western District of Washington granted summary judgment in favor of the National Oceanic and Atmospheric Administration (NOAA) and the National Marine Fisheries Service (NMFS) in a suit challenging a final rule promulgated by the agencies. Advocacy organizations claimed that the rule—barring hired masters from harvesting certain quantities of fish after a certain date unless that quantity is consolidated with "blocked" or apportioned quantities of that fish—violated the Magnuson-Stevens Act and the Halibut Act. The district court rejected these arguments and granted summary judgment in favor of NOAA and NMFS, because the standards of the acts do not apply to the rule promulgated.

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***Quinault Indian Nation v. Imperium Terminal Servs., LLC*, 2015 WL 6437694 (Wash. Ct. App. Oct. 20, 2015).**

A Washington appellate court ruled on the issuance of a substantial shoreline development permit (SSDP) that would allow owners of storage facilities for methanol to expand their operations. The Washington Department of Ecology (DOE) and the city had issued mitigated determinations of nonsignificance (MDNS) and the SSDPs. In response, the Quinault Indian tribe and citizens groups appealed to the Shoreline Hearings Board, and the Board invalidated the MDNS and remanded the permits. Post-hearing, both parties appealed to the Washington Court of Appeals for discretionary review. The Quinault Indian tribe appealed on the grounds that 1) RCW 88.40.025 requires that permit applicants demonstrate financial responsibility at the State Environmental Policy threshold determination phase and before permitting, and 2) the Ocean Resources Management Act applies to terminal development projects. The court rejected both arguments and upheld the Board's ruling.

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