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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the October 2016 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-16-03-10).

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FIRST CIRCUIT

Boston Redevelopment Auth. v. Nat'l Park Serv., No. 15-2270, (1st Cir. Sept. 23, 2016).

The First Circuit recently upheld the National Park Service's (NPS) decision to deny the Boston Redevelopment Authority (BRA) permission to commercially develop an open-air pavilion located on a wharf in Boston Harbor. After the NPS refused permission, the BRA filed suit against NPS under the Land and Water Conservation Fund Act. The district court granted summary judgment in favor of NPS. On appeal, the First Circuit agreed. The court found that the NPS acted neither arbitrarily nor capriciously in denying the permit. As a result, the pavilion will remain open for recreational use.

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SECOND CIRCUIT

New York

Sierra Club v. Martens, No. 100524/15, 2016 WL 5719815 (N.Y. Sup. Ct. Sept. 29, 2016).

A New York court recently denied several nonprofits' challenge to an initial permit allowing a thermoelectric power

plant on the Lower East Side of Manhattan to continue making water withdrawals from the East River. The nonprofits objected to the "once through" intake process used by the plant, suggesting that a "closed cycle" system that recycled water would result in less harm to local aquatic life. The court upheld the New York's Department of Environmental Conservation permit, finding that the petition must be dismissed as untimely, without merit, and under the doctrine of laches.

Raritan Baykeeper, Inc. v. Martens, No. 12441/122014-03622, 2016 WL 5107934 (N.Y. App. Div. Sept. 21, 2016).

A New York appellate court recently ruled on the New York State Department of Environmental Conservation's denial of area residents' and environmental groups' request for full party status and for an adjudicatory hearing with respect to a marine transfer station (MTS). At the MTS, waste would be unloaded from collection vehicles and packed into containers and then conveyed by barges to other facilities. The residents and groups requested the hearing on issues related to public health, safety, and welfare, and to the environment. The request was denied on the grounds that the petitioners did not meet the required burden of proof to show that the issues were substantive and significant. The court found that the denial was not arbitrary and capricious.

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THIRD CIRCUIT

Pennsylvania

Robinson Twp. v. Commonwealth, No. 104 MAP 2014, 2016 WL 5597310 (Pa. Sept. 28, 2016).

The Pennsylvania Supreme Court found sections of "Act 13," a Pennsylvania law that regulates oil and gas operations in the Marcellus Shale, unconstitutional. The court ruled that the provision restricting health care professionals' access to information concerning chemicals used in the fracking process was a special law, benefitting one particular industry, and thus prohibited by the Pennsylvania Constitution. Further, a provision requiring the Department of Environmental Protection to notify only public, not private, drinking water facilities in the event of fracking-related chemical spills was also an unconstitutional special law. Finally, the provision that authorized the taking of real property for the storage of natural or manufactured gas violated the public use requirement, resulting in an unconstitutional taking.

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NINTH CIRCUIT

United Cook Inlet Drift Ass'n. v. NMFS, No. 14-35928 (9th Cir. 2016).

A Ninth Circuit panel recently held that the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires the National Marine Fisheries Service (NMFS) to include Cook Inlet in its salmon fishery management plan. The suit arose when two groups of commercial fishermen challenged Amendment 12, which removed three historic net fishing areas from the management plan. The U.S. District Court for the District of

Alaska ruled in favor of NMFS. On appeal, the Ninth Circuit panel concluded that although the Magnuson-Stevens Act allows delegation of management to a state, it must do so through a fishery management plan and not merely remove an area from the plan in reliance of state management.

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California

People v. Davis, No. C080545, 2016 WL 5390153 (Cal. Ct. App. Sept. 27, 2016).

A California appellate court recently considered whether a California man could be prosecuted and convicted of petty theft of water diverted for use in his marijuana field. The defendant was convicted after law enforcement discovered he was using water from a train tunnel to fill a tank that then pumped water to his field. On appeal, the defendant argued that the diverted water was nuisance groundwater over which the state had only a regulatory interest. The court agreed that the conviction for simple larceny could not stand, as the state did not have a possessory interest in the water.

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Hawaii

Kilakila 'O Haleakala v. Bd. of Land & Nat. Res., No. SCWC-13-0003065, 2016 WL 5848921 (Haw. Oct. 6, 2016).

The Hawaii Supreme Court upheld a permit allowing the construction of the Advanced Technology Solar Telescope (ATST) in an area set aside for astronomical observatories on the island of Maui near the summit of Haleakala, a site of great cultural and spiritual significance for native Hawaiians. Kilakila ‘O Haleakala (Kilakila), an organization dedicated to protecting the sacredness of the summit, contested the permit issued by the Board of Land and Natural Resources (BLNR). Two lower courts affirmed BLNR’s decision to grant the permit. The Hawaii Supreme Court also affirmed. The court ruled that the permit approval process was not procedurally flawed and that BLNR correctly determined that the ATST met the applicable permit criteria and was consistent with the purposes of the conservation district.

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ELEVENTH CIRCUIT

Alabama

Breland v. City of Fairhope, No. 1131057, 2016 WL 5582405 (Ala. Sept. 30, 2016).

The Alabama Supreme Court ruled in favor of a property owner who brought suit against the city of Fairhope over development restrictions on his property. The property owner, Charles Breland, received permits from the U.S. Army Corps of Engineers and the Alabama Department of Environmental Management to fill wetlands on his property. Breland claimed that the city adopted ordinances regulating the fill of wetlands that prevented his project from moving forward. A lower court granted summary judgment in favor of the city. The lower court found that the claim was filed more than two years after the city’s initial action, making it outside the two-year statute of limitations. The state supreme court reversed. The court noted that Breland’s complaint was filed within two years of the city’s subsequent actions, bringing the claim within the two-year statute of limitations. The case was remanded to the

circuit court.

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