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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the March 2017 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-17-03-03).

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FOURTH CIRCUIT

West Virginia

Ohio Valley Environmental Coalition, Inc. v. McCarthy, No. 3:15-0271, 2017 WL 600102 (S.D.W. Va. Feb. 14, 2017).

Environmental groups sued the Environmental Protection Agency (EPA) over the agency's alleged failure to disapprove West Virginia's actual or constructive submissions of "no biological impairment" total maximum daily loads (TMDLs) for certain waterbodies, as well as for failure to develop TMDLs for these waterbodies. The groups also claimed that the EPA violated the Administrative Procedure Act (APA) by approving TMDLs issued by the West Virginia Department of Environmental Protection (WVDEP) for six watersheds, which lacked TMDLs for ionic toxicity TMDLs. A federal district court held that WVDEP violated the Clean Water Act by constructively failing to submit TMDLs for biologically impaired bodies of water. Consequently, the EPA had a duty to approve or disapprove of the submission of no TMDLs. Because the court found the plaintiffs had a valid claim under the CWA, the court denied the plaintiffs' APA claims. An APA claim cannot be sustained in addition to a CWA claim.

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NINTH CIRCUIT

Casorio v. Princess Cruise Lines, Ltd., No. 15-56239, 2017 WL 631702 (9th Cir. Feb. 16, 2017).

James Casorio fell off a cruise ship while disembarking at St. Maarten, eventually dying from the resulting injuries. His wife, Mary Casorio, filed an action against Princess Cruise Lines, claiming that the ship breached its duty of care to her husband. The district court dismissed the action. On appeal, Casorio claimed that the cruise ship should have provided medical air evacuation for her husband. The Ninth Circuit affirmed the lower court's decision, finding that Princess Cruise Lines properly placed James Casorio in the care of the local hospital; therefore, the conduct did not fall below the duty of care reasonably owed in the circumstances.

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San Luis & Delta–Mendota Water Auth. v. Haugrud, No. 14-17493, 2017 WL 677537 (9th Cir. Feb. 21, 2017).

In 2013, the Bureau of Reclamation (BOR) released Trinity River water from Lewiston Dam. The amount released exceeded the amount agreed upon, but it helped prevent a mass die off of migrating salmon in the rivers below the dam. A water authority and water district brought suit, alleging violations of the Endangered Species Act (ESA), the National Environmental Protection Act (NEPA), the Reclamation Act, and the Central Valley Project Improvement Act (CVPIA). The BOR argued that it had authority to release the water under the Act of August 12, 1955 (1955 Act), which included broad language authorizing BOR to adopt appropriate measures to ensure the preservation and propagation of fish and wildlife. The district court held that the 1955 Act did not give BOR power to perform the water release. The court dismissed the ESA claim due to lack of standing and ruled in favor of the BOR regarding the NEPA, CVPIA, and Reclamation Act claims. On appeal, the Ninth Circuit found that the BOR was within its rights to release the water under the 1955 Act. The court found that the language was constructed in such a way to give the BOR authority to ensure the continuation of the salmon down river. The appellate court affirmed in part and reversed in part, resulting in a dismissal of all claims.

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Oregon

Alliance for the Wild Rockies v. U.S. Army Corps of Eng'rs, No. 3:16-CV-01407-HZ, 2017 WL 722576 (D. Or. Feb. 22, 2017).

The Alliance for the Wild Rockies brought an action in federal district court claiming that twenty-three dams maintained and operated by the U.S. Army Corps of Engineers, the U.S. Bureau of Reclamation, and the Bonneville Power Administration threatened critical habitats of the threatened bull trout, violating the Endangered Species Act (ESA). The defendants argued that the issue was moot, because the relevant agencies already initiated consultation as required by the ESA for all of the challenged dams. The U.S. District Court for the District of Oregon granted the defendants' motion to dismiss. The court found that it lacked jurisdiction, because the matter was not a live case or controversy.

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Washington

Puget Soundkeeper All. v. Dep't of Ecology, No. 48267-3-II, 2017 WL 702504 (Wash. Ct. App. Feb. 22, 2017).

A Washington appellate court affirmed in part and reversed in part a Washington Pollution Control Hearings Board's (Board) decision permitting wastewater and stormwater discharges into the Lower Duwamish Waterway. The Puget Soundkeeper Alliance had challenged two permit provisions that required testing for polychlorinated biphenyls (PCBs) and limited copper and zinc levels in untreated stormwater discharges based on benchmarks. The court

affirmed some of the PCB testing methods and reversed the Board's rulings on others. The court remanded the decision to the Washington Department of Ecology for revision.

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ELEVENTH CIRCUIT

High Point, LLLP v. National Park Service, No. 15-11825, 2017 WL 908200 (11th Cir. Mar. 8, 2017).

High Point, LLLP owned property on Cumberland Island, Georgia's largest barrier island, and built Brick-Kiln Dock for the use of its shareholders, descendants of Coca-Cola magnate Asa Candler. Later, High Point executed property to the United States, and the deed reserved the right of the High Point shareholders to use the dock for the rest of their lives. Later, Congress designated parts of the dock area as wilderness and potential wilderness subject to the Wilderness Act. The dock later became unusable as a deep-water dock, so High Point asked the National Park Service (NPS) for permission to move the dock. The agency refused. High Point sued the NPS and both parties filed cross-motions for summary judgment. The federal district court granted NPS's motion and denied High Point's motion. On appeal, the Eleventh Circuit held that the deed only reserved present use of the dock and not deep-water access in general. Additionally, because deep-water access was not guaranteed, it was not an existing private right exception to the Wilderness Act. Also, the agency properly denied High Point's request to extend the marshland portion of the dock without altering the part that was designated as wilderness since NPS had the authority to regulate the marshlands.

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Florida

Florida Wildlife Fed'n v. McCarthy, No. 8:14-CV-3204-T-23JSS, 2017 WL 625720 (M.D. Fla. Feb. 15, 2017).

The Florida Department of Environmental Protection updated Florida's list of impaired waters under § 303(d) of the Clean Water Act (CWA), and the Environmental Protection Agency (EPA) issued a "decision document," which partially approved the list. Environmental groups claimed that the EPA's decision document failed to evaluate Florida's antidegradation requirements. The U.S. District Court for the Middle District of Florida ruled that EPA's findings in the decision document were reasonable for several reasons: 1) demanding the EPA to review individual permit decisions would improperly expand the EPA's role; 2) it was reasonably based on state policy; 3) the plaintiffs could not cite to specific evidence that overlooked or contradicted the EPA's conclusions; and 4) the study plaintiffs cited to relied on data past the "cut off" date. The district court found that the EPA's actions were not arbitrary and capricious, because they examined the relevant data and articulated a satisfactory explanation for its actions. The plaintiffs also claimed that the EPA erroneously denied their rule-making petition to revise Florida's antidegradation policy. The district court denied the plaintiffs' motion for summary judgment and granted the defendants' motion for summary judgment.

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DC CIRCUIT

Gov't of Province of Manitoba v. Zinke, No. 16-5203, 2017 WL 836092 (D.C. Cir. Mar. 3, 2017).

North Dakota filed a motion to modify an injunction governing the Northwest Area Water Supply Project (NAWS). NAWS is a project by North Dakota and the Bureau of Reclamation (BOR) to build a pipeline to provide drinking water. The Province of Manitoba challenged the sufficiency of BOR's environmental assessment pursuant to the National Environmental Policy Act (NEPA) that found no significant impact, because it did not guarantee that the water would be adequately treated. The federal district court granted a partial injunction that permitted North Dakota to move forward, as long as it did not impact BOR's NEPA process. When North Dakota sought permission to begin the paper design of the proposed water treatment plant, the district court denied the request pursuant to the injunction. North Dakota appealed, asking for the terms of the injunction to be modified. The court found two changed circumstances that justified the modification. First, the issuance of the FEIS (Final Environmental Impact Study) and ROD (Record of Decision) constituted a significant change that temporarily eliminated the court's concerns about North Dakota's ability to influence the BOR's NEPA decisions. Second, the proposed modification benefits the public interest, because it allows the state to attempt to reduce the risk of exposure to arsenic from the project, while causing no harm to the NEPA process. Therefore, the appellate court remanded to the district court with instructions to modify the injunction.

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District of Columbia

Fisheries Survival Fund v. Jewell, No. 16-cv-2409-TSC (D.C. Dist. Ct. Feb. 15, 2017).

The Bureau of Ocean Energy Management (BOEM) planned to lease a large nautical area off the coast of New York to Statoil Wind US, LLC for the development of a wind energy facility. The plaintiffs, nine commercial fishing organizations and businesses, claimed that BOEM failed to properly comply with the National Environmental Policy Act (NEPA) and the Outer Continental Shelf Lands Act (OCSLA) prior to the lease, because the environmental impact of construction was not properly assessed. The plaintiffs sought a preliminary injunction to temporarily halt BOEM from proceeding with the final sale of the lease, claiming they would be irreparably harmed by construction of the wind facility. The U.S. District Court for the District of Columbia denied the motion. The court held that since actual construction of the wind facility was years away and may not even occur at all, the plaintiffs failed to show they would suffer irreparable harm due to the lease sale.

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National Sea Grant Law Center
256 Kinard Hall, Wing E
University, MS 38677-1848



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