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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the November 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-17-03-11).

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FOURTH CIRCUIT

South Carolina

Preservation Society of Charleston v. South Carolina Dep't of Health, No. 2017-UP-403, 2017 WL 4838490 (S.C. Ct. App. Oct. 18, 2017).

Several citizen groups, including the Preservation Society of Charleston, challenged permits for a proposed cruise ship terminal expansion in downtown Charleston. The Administrative Law Court found that the groups lacked standing to challenge the permits, refused to vacate certain state Department of Health authorizations and expand discovery, and sanctioned the citizen groups for requesting a remand to the Department of Health for a final conference review on the issue. On appeal, the South Carolina Court of Appeals held that the plaintiffs lacked associational standing, because the harms claimed by the plaintiffs — pollution, traffic increases, and a negative impact on the historical integrity of Charleston — were general harms to the public as a whole. The court also ruled that claims purporting the new terminal would harm property value and businesses were not supported by evidence. Further, the court held that the plaintiffs lacked standing under the public importance exception, and the groups did not have standing to bring the claim of one member who alleged that smoke emitted from the existing terminal physically harmed her. Since the plaintiff associations lacked standing, the court declined to address the motion to vacate the Department of Health authorizations. The appellate court also held that the Administrative Law court did not abuse its discretion in its prior decisions.

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FIFTH CIRCUIT

Louisiana

Vekic v. Popich, 2017 WL 4737160 (La. Oct. 18, 2017).

Vekic, a former sublessee of three oyster leases, brought action against his former sublessors seeking proceeds from a class action settlement. In 2009, Vekic contracted to sublease the properties and agreed to pay rent to the defendants. This rent was then credited toward a $90,000 purchase price, giving Vekic the option to buy after having paid fully. After the *Deepwater Horizon* explosion in 2010 damaged the oyster leases, Vekic paid the remaining balance of the purchase price, exercised his purchase option, and joined the class action suit against BP. At the same time, the Popich family joined the class action, also looking to recover for damage done to the recently sold leases. The defendants were awarded ample compensation, while Vekic received nothing. In response, he filed suit seeking a judgment he was entitled to the proceedings. The court here noted that, although the agreement was labeled a "sublease," it was essentially a transfer of an interest in the oyster leases with a guaranteed payment by Mr. Vekic of $90,000 to the Popich family. Therefore, the court held that, because Mr. Vekic essentially assumed responsibility for the leases a year before the spill, he should be entitled to the *Deepwater Horizon* settlement money, not the Popich family.

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Borcik v. Crosby Tugs, LLC, No. 13-06212, 2017 WL 5157534 (E.D. La. Nov. 7, 2017).

In 2013, Eric Borcik sued his employer, Crosby Tugs, under the Louisiana Environmental Quality Act (LEQA) and the Louisiana Environmental Whistleblower Act (LEWA), claiming that Crosby Tugs fired him for reporting that his captain instructed him multiple times to illegally dump waste oil into navigable waters. One of the factors to establish a LEWA claim is that the plaintiff must act in good faith when reporting possible environmental law violations. Crosby Tugs claimed that Borcik reported the violations to harm his employer, which did not constitute good faith. The trial judge agreed and instructed the jury to rule against Borcik if they found that he sought to harm another party or gain an unfair advantage from his report. The jury concluded that Borcik did not act in good faith under that definition. On appeal, Borcik argued that this jury instruction was erroneous. The U.S. Court of Appeals for the Fifth Circuit certified the question to the Louisiana Supreme Court. The Louisiana Supreme Court held that under LEQA and LEWA, an employer's desire to harm an employer is irrelevant. "Good faith" means that the employee honestly believed the employer violated environmental law. The Fifth Circuit then remanded back to the U.S. District Court for the Eastern District Court for Louisiana for further proceedings consistent with the definition. The district court granted Borcick's motion to send the matter back to a jury with the proper jury instruction.

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SEVENTH CIRCUIT

Michigan

Michigan Dep't of Envtl. Quality v. City of Flint, No. 17-12107, 2017 WL 4641897 (E.D. Mich. Oct. 17, 2017).

Following the Flint water crisis, the U.S. Environmental Protection Agency (EPA) issued an enforcement order, a settlement similar to a consent judgment, mandating replacement of water infrastructure. The city and other entities

made an agreement that would fulfill the EPA's enforcement order; however, the city did not sign the agreement, vote to approve the agreement, or offer any alternatives. The Michigan Department of Environmental Quality (MDEQ) sued the city, seeking a mandatory injunction requiring the city to sign the agreement. The court found that the injunction was necessary, due to evidence of imminent injury from the city's inaction in addressing Flint's water system. The court reasoned that the public relied on safe tap water every day, the health hazards from a failed water system could not be remedied by available legal remedies, and the public would not be disserved by the injunction providing them with safe water. However, the court noted that the injunction must be narrowly tailored and allowed the city to choose a long-term water source that complied with the EPA Order by October 23, 2017.

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NINTH CIRCUIT

Idaho

Western Watersheds Project v. U.S. Forest Service, et al, No. 1:15-CV-00218-REB, 2017 WL 4927660 (D. Idaho Oct. 31, 2017).

Western Watersheds Project (WWP) filed suit to challenge the U.S. Forest Service's (USFS) policies regarding grazing practices and permits in the Salmon-Challis National Forest, seeking to stop grazing in the listed areas because of its negative impact to native fish habitat. Plaintiffs, defendants, and intervenors (multiple cattle ranchers) then each filed motions for summary judgment. WWP alleged USFS violated federal law by failing to comply with required stream habitat conservation strategies. However, the court agreed with the USFS and intervenors that the grazing permits and associated operating instructions were lawful and proper. The court reasoned that, despite WWP's evidence and argument that the nearby streams failed to meet target quality goals for riparian habitat, the court must defer to USFS's scientific judgments regarding stream quality. Furthermore, the court noted there was no persuasive evidence of a demonstrated relationship between grazing and poor stream quality that would have required USFS to act. The court, therefore, held USFS did not violate any law by issuing the grazing permits and operating instructions, and granted summary judgment in favor of the defendants and intervenors—dismissing the case.

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Washington

Schwent v. United States, No. C16-5708 BHS, 2017 WL 4700318 (W.D. Wash. Oct. 19, 2017).

In 2013, the Schwents bought property adjacent to the Willets' property. The United States, through the Department of Agriculture, held conservation easement over parts of the Willet property that contained a beaver colony with numerous beaver dams. When a field on the Schwents' property flooded, the Schwents sued the Willets and the United States, claiming that the excess water from the beaver dams was a nuisance, trespass by nuisance, and violated the easement agreement. The government was dismissed from the suit, because the claims exceeded the $10,000 jurisdictional cap. The Schwents amended the complaint to sue the government as a necessary party, because it held the easements. The district court held that this claim amounted to a Fifth Amendment takings claim, and neither injunctive nor declaratory relief is available in a takings claim against the United States. Therefore, the United States' motion to dismiss was granted. The court held that the Schwents may file against the government in Federal Claims Court to obtain a remedy for a takings claim. The Willets' motion to dismiss was also granted without prejudice, because those claims fell under state law.

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ELEVENTH CIRCUIT

Florida

City of Treasure Island v. Tahitian Treasure Island, LLC, No. 2D14-5406, 2017 WL 4847650 (Fla. Dist. Ct. App. Oct. 27, 2017).

The owners of three beachfront hotels in the City of Treasure Island sued the city, claiming that the city's authorization of driving and parking on the beach for city events violated state law. The trial court granted summary judgment to the hotel owners. A further judgment then forbade the city from hosting or allowing vehicular parking and driving on the beach. On appeal, the city argued that its use of the sandy beach did not constitute "vehicular traffic," which is banned on coastal beaches by state statute. The Florida District Court of Appeals held that under the plain meaning of the statute, vehicular traffic meant traffic that would be on a public street or highway. The appellate court found that the city's use of the beach fit that definition, because people used the beach to get from the road to parking spaces. The court noted that the state statute's purpose to avoid harm to the dunes is clear, and the definition of "vehicular traffic" should not be narrowed. However, the appellate court held that the injunction granted by the lower court was overbroad, because the categorical ban on vehicular driving and parking reached activities that may be legal. Further, the trial court was overbroad in striking down a city ordinance allowing vehicles on the beach for functions related to city events. The case was remanded to the lower court.

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DISTRICT OF COLUMBIA

District of Columbia

American Great Lakes Ports Association v. Zukunft, No. 16-1019, 2017 WL 5128999 (D.D.C. Nov. 3, 2017).

The U.S. Coast Guard sets and reviews the base rates that foreign vessels must pay to American maritime pilots to navigate the Great Lakes. In 2016, the Coast Guard instituted a new rule that would revise the methodology used to calculate the base pilotage rates. The American Great Lakes Port Association claimed that the new methodology and 2016 shipping rates were arbitrary and capricious. The court found that the Coast Guard's determination of how many pilots were needed based the season's peak to be reasonable, as peak times could occur at any point of the season, and this number of pilots was necessary to ensure pilots received recommended rest times for safety purposes. The court also found that the Coast Guard's reliance of the Canadian Great Lakes Pilotage Association data to set target compensation was reasonable, because the work done by those pilots was analogous the work done by American pilots. The court found that the Coast Guard's decision to add 10% to the benchmark compensation to account for the benefits Canadian pilots received that American pilots did not to be arbitrary, because the Coast Guard failed to explain how it arrived at a 10% benchmark adjustment. The court also held that the Coast Guard failed to consider vessel "weighting factors" into compensation calculations. The court granted summary judgment in part to both parties and ordered further briefing before a remedy is issued.

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FEDERAL CLAIMS

Sacramento Grazing Ass'n, Inc. v. United States, No. 04-786 L, 2017 WL 5029063 (Fed. Cl. Nov. 3, 2017).

On November 3, the U.S. Court of Federal Claims issued an opinion that brought a long-fought legal battle over stock water and grazing rights to a close. The Sacramento Grazing Association (SGA) initially brought suit against the federal government in 2004 after allegedly having portions of its cattle grazing allotment taken without just compensation. To protect endangered plant species, the U.S. Forest Service had erected multiple "exclosures" within Lincoln National Forest in New Mexico, eventually cutting SGA off from its most reliable and valuable water rights and forcing it to reduce its number of grazing cattle. In 2010, the court issued a summary judgment finding that the Association did, in fact, have ownership of stock water rights in the allotment—having acquired its grazing permit in 1989. This most recent opinion held that the Forest Service had unconstitutionally taken the beneficial use of those water rights, and that SGA was entitled to just compensation under the Fifth Amendment. Furthermore, the court held that the statute of limitations did not bar the court from adjudicating SGA's takings claim. The court then decided to reconvene at a later date to determine the exact amount of just compensation, pending a renewed effort by both parties to ascertain whether alternative water sources could be made available to SGA.

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