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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the September 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-17-03-09).

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FIRST CIRCUIT

Rhode Island

Emhart Indus., Inc. v. New England Container Co., Inc., 2017 WL 3535003 (D.R.I. Aug. 17, 2017).

Litigation over Dioxin and other hazardous waste pollution at the Centredale Manor Restoration Project Superfund Site in North Providence, Rhode Island has been ongoing for nearly a decade. The litigation has focused on which parties were responsible and what remedies should be ordered. The case at hand tasked the court with determining two remaining issues at the close of the Phase II trial. The first issue was whether the Environmental Protection Agency's (EPA's) remedy-selection process was arbitrary, capricious, or otherwise not in accordance with the law. The U.S. District Court for the District of Rhode Island found that several actions by the EPA were arbitrary, capricious, or otherwise not in accordance with the law, violating the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). First, the EPA had no grounds to label Source Area groundwater as a potential source of drinking water. Second, the EPA improperly assumed there were no largemouth bass in Allendale Pond. Third, the EPA's use of fourteen grams as the reasonable maximum consumption rate for anglers fishing at the site was arbitrary. The court rejected arguments by Emhart First that the EPA not identifying a specific confined disposal facility violated the law. The court also rejected that the amount of excavation ordered by the EPA was arbitrary, capricious, or outside the law. The EPA based its excavation decision in the remedial plan on data collected but is committed to perform more testing to refine the plan. The court indicated that part of the plan is contingent on the further testing. Therefore, Emhart does not have to pay fines for noncompliance, since part of the EPA's plan violated CERCLA.

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SECOND CIRCUIT

Constitution Pipeline Co., LLC v. New York State Dep't of Envtl. Conservation, 2017 WL 3568086 (2d Cir. Aug. 18, 2017).

The New York State Department of Environmental Conservation (NYSDEC) denied Constitution Pipeline's application for a certificate under § 401 of the Clean Water Act. The denial's basis was that Constitution Pipeline did not provide enough information regarding stream crossings and water impact. Constitution Pipeline claimed that NYSDEC exceeded the § 401 time limit for the state's review of the application; therefore, NYSDEC should be ordered to notify the U.S. Army Corps of Engineers (Corps) that the state waived its right on the application, so the Corps can issue a permit to Constitution under § 404 of the CWA. Alternatively, the company argued that NYSDEC's denial was arbitrary, capricious, and beyond its legal authority, so NYSDEC should be ordered to grant the § 401 permit. The court pointed out that Constitution Pipeline asked for the information for years, and nothing can prove that NYSDEC claimed it had all the information necessary. Furthermore, the company's claim is that NYSDEC waived the state's right by failure to act. However, only the federal appellate circuit has jurisdiction over those claims; therefore, that claim was dismissed. As to the second argument, the court held that the company's failure to provide more information about alternative routes or stream crossings led to NYSDEC being authorized to make a decision evaluating environmental impacts of the pipeline in light of state water quality standards. The information withheld was significant, so NYSDEC's denial of the application was not arbitrary, capricious, or beyond its legal authority.

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THIRD CIRCUIT

Delaware Riverkeeper Network v. United States Army Corps of Engineers, 2017 WL 3611780 (3d Cir. Aug. 23, 2017).

The Delaware Riverkeeper Network, an environmental group, petitioned for a review of the U.S. Army Corps of Engineers' (Corps) approval of Tennessee Gas Pipeline Co.'s interstate pipeline project through Pennsylvania. The plaintiffs argued that the Corps' rejection of a compression alternative was arbitrary and capricious, which violated the Clean Water Act. The Corps claimed that a compression alternative would have disturbed less land, but its impact on that land would be more permanent. Since the alternative would have had greater impact, the Third Circuit ruled that the decision was not arbitrary or capricious. Riverkeeper also argued that the Corps failed to perform a water-dependency analysis. The court found that though no explicit water-dependency finding was made, the failure to do so was harmless because the Corps properly examined other alternatives.

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New Jersey

Borough of Avalon v. U.S. Army Corps of Engineers, 2017 WL 3917138 (D.N.J. Sept. 7, 2017).

The U.S. Army Corps of Engineers (Corps) prepared to perform the second phase of a beach renourishment project in the Borough of Avalon. The U.S. Fish and Wildlife Service (FWS) advised the Corps that the Coastal Barrier Resources Act (CBRA) did not block the project, reasoning that the CBRA prohibited either the use of materials for Coastal Barrier Resources Systems or federal funds. The Borough claimed that this interpretation of CBRA was arbitrary and

capricious. However, the State of New Jersey and the Corps agreed to use state funds for the project after the suit was filed. Additionally, the Corps granted a bid for periodic beach renourishment. The U.S. District Court for the District of New Jersey held that those actions made the issues moot. The acceptance of the bid to perform the project also removed any injury to the plaintiff; therefore, the Borough lacked standing. Furthermore, the suit was not over a final agency action, so the court did not have jurisdiction over these issues. Therefore, the case was dismissed.

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Pennsylvania

Commonwealth v. Karash, 2017 WL 3587046 (Pa. Aug. 21, 2017).

Frederick Karash appealed his sentence after he was found guilty of not having the required safety equipment on his boat. The court addressed a case of first impression in Pennsylvania for whether the stop of a boat without reasonable suspicion or probable cause on a Pennsylvania waterway violated the Fourth Amendment. The Pennsylvania Supreme Court held there is a strong government interest in keeping the waterways safe and suspicionless searches are a way to maintain that safety. However, the court still maintained that there was an interest in supporting the constitutional framework. The Commonwealth failed to demonstrate that it is unable to set up an inspection system, such as that it does for roadway checkpoints. Therefore, since Karash's boat was stopped without reasonable suspicion or probable cause, then the search violated the Fourth Amendment. Karash's sentence was reversed.

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NINTH CIRCUIT

Oceana, Inc. v. Nat'l Marine Fisheries Serv., 2017 WL 3722843 (9th Cir. Aug. 29, 2017).

Oceana and Greenpeace filed suit challenging the National Marine Fisheries Service (NMFS) 2014 biological opinion and final environmental impact statement that assessed the effect of proposed fishing regulations on the western district population of Steller sea lions. The district court granted summary judgment for NMFS. The U.S. Court of Appeals for the Ninth Circuit affirmed the summary judgment ruling for NMFS. The court found that NMFS used the best data available to determine that the regulation was not likely to jeopardize the species' existence. Mere debate in the scientific community about the issue is not enough to violate that standard. Therefore, the court held that NMFS did not violate the Endangered Species Act or the Administrative Procedure Act in its assessments.

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California

Surfrider Found. v. Martins Beach 1, LLC, 221 Cal. Rptr. 3d 382 (Ct. App. 2017).

Surfrider, a non-profit dedicated to preserving recreational public beach access, sued California coastal landowners for closing public access to the beach. The landowners permanently closed a gate, posted no-access signs, and painted over a billboard that advertised the access to the beach. Surfrider claimed these actions were "development" under the Coastal Act, which requires a Coastal Development Permit (CDP). The Superior Court of San Mateo County ruled in favor of Surfrider. A California appellate court agreed that "development" took place, because the totality of the landowners' conduct caused a significant decrease in access to the beach, so the CDP permit was required. The landowners argued that they could trace the land back to a Mexican land grant before statehood; therefore, their

private property rights have priority over public access rights. The court held that the landowners had to first litigate that issue with the Coastal Commission to exhaust administrative remedies. Finally, the landowners argued that the CDP requirement was an unconstitutional taking. The court held that this issue was not yet ripe for review, because

the economic impact to the landowners still had to be determined. Furthermore, the trial court's grant of a temporary injunction to allow beach access is not an unconstitutional taking, because it is temporary until a CDP decision is made. Therefore, the judgment for Surfrider was affirmed.

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Hawaii

Gold Coast Neighborhood Ass'n v. State, 2017 WL 3668851 (Haw. Aug. 25, 2017).

The Gold Coast Neighborhood Association sought a declaration that the State of Hawaii was responsible for maintaining a seawall. The state paid for and made repairs to the seawall over the past 65 years. However, the state denied any duty to maintain and keep the seawall in safe condition. The Hawaii Supreme Court held that the state acquired an easement over the seawall by implied dedication. The court held that for a seawall to be surrendered to the state, the seawall must be subject to a previously existing express easement to the state. Additionally, that easement must unambiguously open the seawall up as pathway for public travel. These requirements were not met; therefore, the seawall was impliedly dedicated but not surrendered to the state under state statute, meaning that the state did not own the seawall. The dissent argued that private property rights in ways or trails may not be impliedly dedicated or surrendered to the state without the state's formal approval. Therefore, the state had no responsibilities or rights in the seawall.

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Umberger v. Dep't of Land & Nat. Res., 2017 WL 3887456 (Haw. Sept. 6, 2017).

The Hawaii Department of Land and Natural Resources authorized commercial and recreational aquarium collecting permits under Hawaii state statute and the state's Department of Land and Natural Resources administrative rules. The plaintiffs argued that these permits required Hawaii Environmental Policy Act (HEPA) review, and so the permits were invalid. First, the court held that aquarium collecting is an "action" under HEPA under the plain meaning of "action." Secondly, the action falls under one of the relevant statute's land use or administrative acts. The court ruled this action applies, because the action occurs in marine waters and submerged lands owned by the state, and "aquarium collecting" is a use of the land. The court held that the commercial aquarium collecting permits, which allowed unlimited extraction of fish for aquarium collecting, could not be determined as having "minimal or no impact on the environment." Therefore, no HEPA exception applies to commercial aquarium collecting. However, since recreational aquarium collecting had limits, then it does fall under the HEPA exception, so recreational permits do not require HEPA review. Therefore, the commercial aquarium collecting permits are invalid and must undergo HEPA review in the future.

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TENTH CIRCUIT

Western Watersheds v. Michael, No. 16-8083 (10th Cir. Sept. 7, 2017).

Plaintiffs amended a complaint in response to Wyoming's revisions of 2015 trespass statutes, which imposed heightened penalties against "resource data collectors" who trespassed on open lands. In 2016, the legislature amended the statutes to prohibit individuals from trespassing on private lands to collect "resource data" or to gain access to adjacent lands to collect "resource data." The plaintiffs amended their complaint and re-raised their free speech and equal protection arguments to challenge the amended statutes. The district court held that the revised versions of the statutes did not implicate free speech because the statutes dealt with private property. The U.S. Court of Appeals for the Tenth Circuit held that just because one aspect of the statute dealt with private property, that did

not shield the statute from constitutional scrutiny. Additionally, the court held that collecting “resource data” is a protected free speech activity because the creation and dissipation of information is protected. The court pointed out that this does not mean that individuals have unlimited rights to gather information. Rather, extra penalties cannot be imposed on those who trespass to specifically engage in the protected activity. The court declined to address what level of scrutiny should be applied.

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D.C. CIRCUIT

District of Columbia

Oceana, Inc. v. Ross, 2017 WL 3669610 (D.D.C. Aug. 24, 2017).

The National Marine Fisheries Service (NMFS) is tasked with establishing methodologies for collecting and reporting data on fish that are caught, but then discarded. Oceana, Inc., a non-profit organization focused on protecting oceans, claimed that the Northeast region of the NMFS’s adopted bycatch methodology or its SBRM (Standardized Bycatch Reporting Methodology) violated the law. Oceana claimed the 2015 SBRM failed to require NMFS to allocate sufficient funding to achieve the coefficient variation (CV) standard. Congress did not put any statutory restrictions on funding for the SBRM, NMFS has not made funding the basis for departing from standardized methodology, and its established funding trigger was not impermissibly vague. Therefore, the U.S. District Court for the District of Columbia rejected Oceana’s argument that NMFS failed to allocate sufficient funding. Additionally, Oceana argued that NMFS failed to reconsider electronic monitoring and observer bias. The court held that NMFS adequately considered these issues and the subsequent rejection of the use of electronic monitoring and the accounting for observer bias was reasonable. Furthermore, Oceana argued that NMFS ignored indirect and cumulative environmental impacts in its environmental assessment. However, the court held that NMFS cannot foresee those impacts; therefore, the environmental assessment is adequate. Furthermore, NMFS clearly stated the reasoning for choosing a 30% CV, and Oceana failed to address why that amount was inadequate. Therefore, the court rejected Oceana’s argument that NMFS did not adequately justify the 30% CV standard. The court dismissed Oceana’s motion for summary judgment and granted the NMFS’s motion for summary judgment.

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Alfa International Seafood v. Ross, 2017 WL 3726984 (D.D.C. Aug. 28, 2017).

The Seafood Import Monitoring Program is a federal regulation to prevent illegal, unreported, and unregulated (IUU) fishing and seafood fraud. A group of seafood importers, processors, and harvesters claimed that the U.S. Department of Commerce violated federal law by creating the rule and wanted it invalidated. They argued that the department did not have authority to promulgate the rule, the rule was arbitrary and capricious, and the department failed to properly complete a Regulatory Flexibility Analysis (RFA). First, the U.S. District Court for the District of Columbia found that the Secretary of Commerce ratified the rule, so the rule is valid under constitutional authority. Second, the court found that Congress intended for the Department to regulate seafood fraud. Third, the court found that the Department established a sufficient link between the rule and combatting IUU fishing and seafood fraud; therefore, the rule is not arbitrary or capricious. Fourth, the court held that the Department properly completed an RFA, because the Department properly determined compliance costs, and it made a good faith effort to consider alternatives. Therefore, the court upheld the Seafood Import Monitoring Program.

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