

September

14
2018

Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the September 2018 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-18-03-09).

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FIRST CIRCUIT

Massachusetts

Miramar Park Ass'n, Inc. v. Town of Dennis, 2018 WL 4138916 (Mass. Aug. 30, 2018).

The Supreme Judicial Court of Massachusetts ruled on whether a town's dredging and beach nourishment projects violated state environmental regulations by requiring that materials dredged from the mouth of a tidal river be deposited on a publicly owned beach, rather than on an adjacent, privately owned beach. Several homeowners and a homeowners' association brought the action, alleging that the town's actions violated a regulation designed to protect beaches that are downdrift from jetties from the loss of sediments. A lower court ruled in favor of the plaintiffs. On appeal, the court held that the town's extension of the jetty did not create an obligation to periodically dredge the mouth of the river and to deposit the spoils onto the private beach. The dredging project applied to "land under ocean," and did not trigger the regulation governing the repair and extension of a jetty.

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THIRD CIRCUIT

Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Env'tl. Prot., 2018 WL 4201626 (3d Cir. Sept. 4, 2018).

The U.S. Court of Appeals for the Third Circuit held that the Pennsylvania Department of Environmental Protection's (PADEP) water quality certification under the Clean Water Act (CWA) for expansion of a natural-gas distribution network was not arbitrary, capricious, or otherwise not in accordance with law. The court held that the order was a final agency decision, and due process did not require that organizations have an opportunity to present evidence before the Pennsylvania Environmental Hearing Board. Further, PADEP satisfied CWA's public notice requirement.

Finally, PADEP did not violate its obligation under the Pennsylvania constitution to safeguard the state's natural resources.

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Twp. of Bordentown, New Jersey v. Fed. Energy Regulatory Comm'n, 2018 WL 4212061 (3d Cir. Sept. 5, 2018).

Several towns and an environmental group brought suit to prevent the expansion of interstate natural gas pipeline facilities, claiming the Federal Energy Regulatory Commission (FERC) and the New Jersey Department of Environmental Protection (NJDEP) violated state and federal laws in approving the project. The court ruled that the challenges to FERC's orders lacked merit, as no activities resulting in a discharge could follow from FERC's issuance of a certificate of public convenience and necessity. However, the court ruled that NJDEP incorrectly denied the plaintiffs' request for a hearing.

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FOURTH CIRCUIT

S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959 (D.S.C. 2018).

Environmental groups brought an action against the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers, alleging that a rule suspending the 2015 Clean Water Rule (WOTUS Rule) violated the Administrative Procedure Act. The court found that the agencies did not allow a "meaningful opportunity" to comment by refusing to allow public comment on the merits of the WOTUS Rule and 1980s regulation. The court enjoined the suspension, finding that suspension of a rule requires the same substantive requirements of notice and comment as the promulgation of that rule.

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NINTH CIRCUIT

Ctr. for Biological Diversity v. Zinke, 2018 WL 3945543 (9th Cir. Aug. 17, 2018).

Environmental groups and others challenged the U.S. Fish and Wildlife Service's (FWS) decision not to list arctic grayling, a cold water fish in the Salmonidae family, as an endangered or threatened species under the Endangered Species Act. The U.S. District Court for the District of Montana entered summary judgment in favor of FWS. In 2014, the FWS promulgated its "Final Policy on Interpretation of the Phrase 'Significant Portion of Its Range' in the Endangered Species Act's Definitions of 'Endangered Species' and 'Threatened Species.'" The U.S. Court of Appeals for the Ninth Circuit ruled that the term "range," as interpreted by FWS, was reasonable. Further, the FWS did not act arbitrarily and capriciously by not including certain scientific data. However, the court held that the FWS's failure to rely on best scientific and commercial data in some instances was arbitrary and capricious. The court affirmed in part and reversed in part.

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Bohmker v. Oregon, 2018 WL 4344338 (9th Cir. Sept. 12, 2018).

Several plaintiffs challenged an Oregon state law prohibiting the use of motorized mining equipment in waters designated as essential salmon habitat. The plaintiffs claimed that federal law preempted the extension of state land use plans onto unpatented mining claims on federal lands. The federal district court disagreed and ruled in favor of the state. On appeal, the U.S. Court of Appeals for the Ninth Circuit found that the law was not preempted, as it constitutes an environmental regulation, not a state land use planning law.

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California

Envtl. Law Found. v. State Water Res. Control Bd., 2018 WL 4103188 (Cal. Ct. App. Aug. 29, 2018).

Environmental organizations challenged the California State Water Resources Board's authority to regulate extractions of groundwater that affected public trust uses of Scott River, a tributary of the Klamath River. A California appellate court held that the public trust doctrine applied to the extraction of groundwater to the extent that the extraction adversely affects the river. The court also found that the state's Sustainable Groundwater Management Act did not replace common law or abrogate the state's public trust duty.

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ELEVENTH CIRCUIT

Alabama

Portersville Bay Oyster Co., LLC v. Blankenship, 2018 WL 4124504 (Ala. Aug. 29, 2018).

Oyster farmers brought an inverse-condemnation claim against the Commissioner of the Alabama Department of Conservation and Natural Resources (DCNR) and two companies over the construction of a breakwater and marsh intended to protect Mobile Bay. The farmers claimed that the DCNR's authorization of the construction caused sediment and silt to kill the oysters being farmed in the farmers' shellfish aquaculture easement. A lower court dismissed the complaint against the Commissioner. On appeal, the Alabama Supreme Court ruled that the dismissal was made in error and remanded the case.

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D.C. CIRCUIT

District of Columbia

Oceana, Inc. v. Ross, 2018 WL 3956444 (D.D.C. Aug. 17, 2018).

An environmental group challenged the National Marine Fisheries Service's (NMFS) revised biological opinion (BiOp) regarding the impact of the Atlantic Sea Scallop Fishery on the Northwest Atlantic population segment of loggerhead sea turtles. The U.S. District Court for the District of Columbia held that NMFS did not fail to consider or otherwise disregard the best available science in developing the revised BiOp. However, the court found that NMFS contradicted the revised Incidental Take Statement (ITS) included in the BiOp. The court remanded the revised ITS to the NMFS, asking the agency to provide a reasonable explanation for the discrepancy.

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