

August

15  
2019

# Ocean and Coastal Case Alert

**The National Sea Grant Law Center** is pleased to offer the August 2019 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-19-03-08).

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## FIRST CIRCUIT

### Rhode Island

***Rhode Island v. Chevron Corp.***, No. CV 18-395 WES, 2019 WL 3282007 (D.R.I. July 22, 2019).

The State of Rhode Island filed suit in state court against several energy companies, seeking damages for climate change impacts to its coastal infrastructure and natural resources. The court granted the energy companies' motion to remove the case to federal district court. The state filed a motion to remand the case to state court. The federal district court granted the state's motion, finding no federal jurisdiction under the statutes and doctrines relied upon by the defendants.

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## THIRD CIRCUIT

### Pennsylvania

***Marcellus Shale Coal. v. Dep't of Env'tl. Prot.***, No. 573 M.D. 2016, 2019 WL 3268820 (Pa. Commw. Ct. July 22, 2019).

A natural gas industry organization brought suit against the Pennsylvania Department of Environmental Protection (DEP) and Environmental Quality Board (EQB) challenging regulations involving unconventional well operations for hydraulic fracturing. After preliminary injunctive relief was granted, then partially reversed and remanded, the organization applied for summary relief on claims related to several public resource regulations. The court granted summary relief in part and denied it in part. DEP and EQB cross-applied for summary relief. The court held that DEP lacked statutory authority to require well operators to enter onto private land to inspect and monitor others' wells absent threats of pollution. The court struck down the requirement to restore well areas to approximate original conditions within nine months after completion of drilling. The remaining challenged regulations were upheld.

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## FOURTH CIRCUIT

***Defs. of Wildlife v. United States Dep't of the Interior***, No. 18-2090, 2019 WL 3366598 (4th Cir. July 26, 2019).

Several environmental organizations sought review of the U.S. Fish and Wildlife Service's (FWS) biological opinion (BiOp) and incidental take statement (ITS) related to the proposed Atlantic Coast Pipeline, which will move natural gas from West Virginia to Virginia and North Carolina. The BiOp concluded that the pipeline would not jeopardize the rusty patched bumblebee, clubshell, Indiana bat, or the Madison cave isopod. The court found that the FWS's conclusion that the pipeline would not jeopardize the rusty patched bumble bee and the clubshell was arbitrary and capricious. Further, the ITS was inadequate for the Indiana bat and arbitrary for the Madison Cave isopod.

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### Maryland

***Maryland Dep't of Env't v. Cty. Commissioners of Carroll Cty.***, No. 5, Sept. Term, 2018, 2019 WL 3561897 (Md. Aug. 6, 2019).

Carroll and Frederick counties filed separate actions seeking review of their municipal separate storm sewer system permits—Phase I MS4s—issued by the Maryland Department of the Environment. The counties challenged the scope of the permits, the level of effort required of each County, the classification of the Counties, and the absence or inclusion of certain terms in the permits. The court held that the Department did not exceed its authority in issuing the permits. Further, the Department did not act arbitrarily or capriciously in including the contested terms in the permits. As a matter of first impression, the court held that the counties did not qualify for Phase II MS4 permits, which have less stringent pollutant controls.

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## NINTH CIRCUIT

### Oregon

***Kramer v. City of Lake Oswego***, 365 Or. 422 (2019).

Several individuals who lived outside of Lake Oswego brought suit seeking public access to the city lake for recreation purposes. The city by resolution prohibits water access through its waterfront parks and only allows city residents to access the lake through a swim park. The Oregon Supreme Court held that neither the public use doctrine nor the public trust doctrine grant the plaintiffs the right to lake access through the swim park. Further, the public use doctrine did not grant plaintiffs water access through the waterfront parks. However, the court noted that a genuine issue of material fact existed as to whether the city's waterfront resolution violated the public trust doctrine. The court found that neither the waterfront resolution nor the residents-only swim park policy violated the state's Equal Privileges and Immunities clause.

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***E. Oregon Mining Ass'n v. Dep't of Env'tl. Quality***, 365 Or. 313 (2019).

Suction dredge miners associations challenged a National Pollutant Discharge Elimination System (NPDES) permit for small suction dredge mining discharges issued by the Oregon Department of Environmental Quality under authority delegated by the U.S. Environmental Protection Agency (EPA). The plaintiffs claimed that the U.S. Army Corps of Engineers (Corps) should regulate the small suction dredge mining discharges under the dredge and fill permit program, because the suction dredge discharge contained dredged material. The Oregon Supreme Court disagreed. The court found that material discharged as a result of suction dredge mining constitutes a "pollutant" under the Clean Water Act (CWA), and the Corps and the EPA reasonably interpreted the CWA to conclude that these discharges should be regulated under the NPDES permit program.

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## ELEVENTH CIRCUIT

## Florida

***Gulf Restoration Network, et al., v. Nat'l. Marine Fisheries Serv.***, No. 1:18-cv-01504-JDW, stipulated settlement agreement (M.D. Fla. July 19, 2019).

Environmental groups reached a settlement with the National Marine Fisheries Service (NMFS) in a suit alleging that the agency unreasonably delayed completing consultation and issuing a biological opinion (BiOp) on federally authorized oil and gas operations. Although NMFS reinitiated consultation in 2013 following the *Deepwater Horizon* oil spill, it had not completed the process. Under the settlement agreement, the agency must develop a new BiOp by November 5, 2019 and pay the plaintiffs more than \$25,000 in legal fees.

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## D.C. CIRCUIT

### District of Columbia

***Anacostia Riverkeeper, Inc., et al., v. Wheeler***, 2019 WL 3803639 (D.D.C. Aug. 12, 2019).

Environmental groups challenged the “total maximum daily loads” (TMDLs) for *E. coli* bacteria in the Anacostia and Potomac Rivers in the District of Columbia. The plaintiffs claimed that the U.S. Environmental Protection Agency (EPA) violated the Clean Water Act (CWA) when it approved these TMDLs. The court held that the EPA did violate the CWA by approving TMDLs that did not establish daily maximum discharge limits. The court vacated the TMDLs; however, the TMDLs will be in effect until the new standards are in place.

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***Am. Tunaboat Ass'n v. Ross***, No. 1:19-CV-01011 (TNM), 2019 WL 3458641 (D.D.C. July 31, 2019).

The American Tunaboat Association challenged the National Marine Fisheries Service’s (NMFS) decision denying the group “applicant” status in review of the management plan for the U.S. purse seine fishery in the Western and Central Pacific Ocean. The Association claimed the denial was arbitrary and capricious. Both parties moved for summary judgment. The court denied the Association’s motion and granted NMFS’s motion, finding the agency’s denial decision reasonable. The group may still have a role in the review process during rulemaking through public comment.

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