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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the January 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-19-03-01).

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SECOND CIRCUIT

Sierra Club v. Con-Strux, LLC, 911 F.3d 85 (2d Cir. 2018).

Sierra Club filed suit alleging that Con-Strux, LLC, a recycling facility operator, engaged in “industrial activity” under the Clean Water Act (CWA) without a permit. The company recycled demolished concrete, asphalt, and other construction products that it then processed and resold on the wholesale market for use by the construction industry. The U.S. District Court for the Eastern District of New York granted summary judgment in favor of Con-Strux. On appeal, the Second Circuit held that the Sierra Club’s claims were sufficient to demonstrate that the company was a recycler facility engaged in industrial activity under the CWA. The court vacated the district court’s ruling and remanded the case for further proceedings.

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THIRD CIRCUIT

New Jersey

Twp. of Long Beach v. Tomasi, No. A-0644-17T4, 2018 WL 6683927 (N.J. Super. Ct. App. Div. Dec. 20, 2018).

The Township of Long Beach condemned a ten-foot-wide strip of land along private property to provide pedestrian public access to the beach. The action was part of a shoreline protection project started by the New Jersey Department of Environmental Protection (NJDEP) and the U.S. Army Corps of Engineers (Corps) following Superstorm Sandy. The Corps’ engineering regulations condition participation in such projects on the “provision of reasonable public access rights-of-way” to the beach. The property owners challenged the town’s actions, and the court ruled in favor of the town. On appeal, the court affirmed, holding that providing public access to obtain federal funds for a shore protection project is a legitimate public purpose and use.

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FOURTH CIRCUIT

Appalachian Voices v. State Water Control Bd., No. 18-1077, 2019 WL 177928 (4th Cir. Jan. 14, 2019).

As part of Clean Water Act § 401 permitting for the Atlantic Coast Pipeline (ACP), the Virginia State Water Control Board (Board) and the Virginia Department of Environmental Quality (DEQ) certified that activities related to construction of the pipeline would not degrade the state's water resources. Environmental groups and their individual members challenged the § 401 certification. The court denied the petition for review, concluding that the certification was not arbitrary and capricious.

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FIFTH CIRCUIT

Mississippi

Gulf Restoration Network v. Oscar Renda Contracting, Inc., No. 1:17CV130-LG-RHW, 2018 WL 6579172 (S.D. Miss. Dec. 13, 2018).

Gulf Restoration Network (GRN), an environmental group, filed a Clean Water Act (CWA) citizen suit alleging that a contractor violated a stormwater discharge permit for a large infrastructure project to replace water, sewer, drainage, and street infrastructure systems damaged by Hurricane Katrina. Both parties filed motions for summary judgment. The court held that the GRN's evidence was insufficient on its own to grant summary judgment. The contractor sought summary judgment on the alleged CWA violations for which GRN could not show prima facie evidence of a violation; however, the court found that the contractor did not establish which violations were not supported. The court denied both summary judgment motions.

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SIXTH CIRCUIT

Guertin v. State, No. 17-1698, 2019 WL 99088 (6th Cir. Jan. 4, 2019).

Flint, Michigan residents brought a § 1983 action against the State of Michigan, the City of Flint, and government officials. The plaintiffs claimed they sustained personal injuries and damages due to drinking and bathing in water supplied to customers without the addition of chemicals to neutralize the water's corrosive nature. The U.S. District Court for the Eastern District of Michigan dismissed the claims in part. The residents appealed the § 1983 claim, alleging that defendants violated their right to bodily integrity under the Substantive Due Process Clause. The Sixth Circuit Court of Appeals held that the residents stated a bodily-integrity substantive due process claim against Flint's former emergency managers and former public works director, as well as Michigan Department of Environmental Quality officials. However, that claim failed with respect to Michigan Department of Health and Human Services employees. The court held that state, city, and related officials were not entitled to qualified immunity from residents' substantive due process claims. Finally, the court held that the city was not an arm of the state and was not entitled to sovereign immunity.

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NINTH CIRCUIT

Sierra Club, Inc. v. United States Fish & Wildlife Serv., No. 17-16560, 2018 WL 6713260 (9th Cir. Dec. 21, 2018).

The Sierra Club made a Freedom of Information Act (FOIA) request to the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) for records generated during the U.S. Environmental Protection Agency's (EPA) rulemaking process concerning cooling water intake structures, including documents generated as part of an ESA § 7 consultation. The Services withheld several records under an FOIA exemption that shields documents subject to the "deliberative process privilege" from disclosure. The Sierra Club brought an action under FOIA. The U.S. District Court for the Northern District of California ruled that 12 of the 16 requested records were not protected by the privilege. On appeal, the Ninth Circuit affirmed the order to produce documents that were not both pre-decisional and deliberative. The order to produce documents that were both pre-decisional and deliberative was reversed. The case was remanded for further proceedings.

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ELEVENTH CIRCUIT

Alabama

State v. Volkswagen AG, No. 1170528, 2018 WL 6583430 (Ala. Dec. 14, 2018).

The State of Alabama filed suit alleging that Volkswagen installed and maintained software in its vehicles that was designed to alter emissions readings. A circuit court judge dismissed the claims after the case was removed to federal court. On appeal, the Alabama Supreme Court ruled that the federal Clean Air Act preempted the state's claims that Volkswagen violated the Alabama Environmental Management Act and the Alabama Air Pollution Control Act. The court noted that allowing states and counties to bring claims regarding the emission control tampering would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

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Florida

Shands v. City of Marathon, No. 3D17-1859, 2019 WL 73650 (Fla. Dist. Ct. App. Jan. 2, 2019).

The Shands brought suit against the City of Marathon for inverse condemnation, alleging that the city's zoning and environmental regulations deprived them of all or substantially all economic use of an island they owned within the boundaries of the city. The city sought summary judgment, and the trial court ultimately ruled in favor of the city. On appeal, the appellate court reversed this decision, finding that genuine issues of material fact precluded summary judgment on the landowners' claim.

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