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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the July 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-19-03-07).

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FIRST CIRCUIT

Rhode Island

Rollingwood Acres, Inc. v. Rhode Island Dep't of Env'tl. Mgmt., No. 2015-328-M.P., 2019 WL 2571367 (R.I. June 24, 2019).

A landowner and commercial tenants appealed a hearing officer's refusal to award litigation expenses after they prevailed on state environmental and pollution law claims. The plaintiffs had been involved in a 22-year legal battle with the Department of Environmental Management (DEM) over charges of excessive sediment discharge. The discharge occurred after the state Department of Transportation replaced a DEM-permitted drainage pipe on the plaintiffs' property without the knowledge or consent of the plaintiffs and without obtaining a permit from DEM. The superior court upheld the denial, and the Supreme Court of Rhode Island granted certiorari. The appellate court reversed the trial court's decision and awarded the plaintiffs litigation expenses.

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SECOND CIRCUIT

New York

Aqua Harvesters, Inc., et. al v. New York Dep't of Env'tl. Conservation, No. 17CV1198JMAAKT, 2019 WL 3037866 (E.D.N.Y. July 11, 2019).

Several surfclam fishery permit holders and others involved in the fishery challenged three state laws related to the fishery. The plaintiffs sought a preliminary injunction for the Single Vessel Rule, the 70-Foot Rule, and the Residency Rule. The plaintiffs claimed that the state laws were preempted by federal fishery endorsements and that they violated the Dormant Commerce Clause, the Privileges and Immunities Clause, and the Equal Protection Clause of the U.S. Constitution. The U.S. District Court for the Eastern District of New York denied the injunction, finding that the plaintiffs were unlikely to succeed on their claims.

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NINTH CIRCUIT

California

San Diego Gas & Elec. Co. v. San Diego Reg'l Water Quality Control Bd., No. D073968, 2019 WL 2511244 (Cal. Ct. App. June 18, 2019).

San Diego Gas and Electric Company (SDG&E) filed a petition for a writ of mandate, seeking to vacate a 2012 cleanup and abatement order issued by the San Diego Regional Water Quality Control Board (Regional Board) for waste discharged into San Diego Bay from a now-defunct power plant site. The Regional Board determined that SDG&E had discharged water contaminated with Polychlorinated Biphenyls (PCBs) and other pollutants that contaminated sediment, fish, and shellfish. SDG&E argued that while they had discharged pollutants into the Bay, others had too, and its contribution was not a substantial factor in creating the polluted conditions. The California Court of Appeals held that the Regional Board was not required to apply a substantial factor causation test and affirmed the trial court's denial of SDG&E's petition. The appellate court also conducted an independent review of the administrative record and concluded that substantial evidence supported the Regional Board's finding that by discharging the waste directly attributable to it, SDG&E created or threatened to create a condition of pollution or nuisance.

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Hawaii

Na Kia'i Kai v. Nakatani, No. CV 18-00005 DKW-RLP, 2019 WL 2997774 (D. Haw. July 9, 2019).

Several environmental groups alleged that a century-old drainage ditch system originally built for a sugar mill violated the Clean Water Act (CWA) and the public trust under the Hawaii Constitution by discharging into the Pacific Ocean without a CWA NPDES permit. The defendants argued that the discharges were exempt from the CWA NPDES permitting requirements by the Water Transfer Rule (WTR). The plaintiffs sought summary judgment on both claims, and the state sought summary judgment on the CWA claim and dismissal of the public trust claim. The court granted the plaintiffs' summary judgment motion on the CWA claim, finding that the WTR exemption did not apply to the drainage system, therefore, a NPDES permit is required. The court dismissed the public trust claim, holding that the state was immune from suit under the Eleventh Amendment and principles of sovereign immunity.

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Idaho

Idaho Conservation League v. U.S. Forest Serv., No. 1:18-CV-044-BLW, 2019 WL 2505031 (D. Idaho June 17, 2019).

The Idaho Conservation League (ICL) filed a suit against the U.S. Forest Service, alleging that it violated the Endangered Species Act (ESA) by failing to follow through with formal consultation under ESA § 7 regarding protection of listed anadromous fish species. The Forest Service had initially identified that fish were being harmed by agricultural irrigation ditches diverting water from the Salmon River in the Sawtooth National Recreation Area and undertook ESA § 7 consultation for the environmental impacts of all the diversions together, due to the cumulative and interrelated nature of the impacts from the many diversions. However, when the Forest Service submitted its ESA § 7 biological assessment information to the National Marine Fisheries Service (NMFS), NMFS found the information insufficient and listed additional information about each individual diversion the Forest Service needed to provide. The Forest Service never followed through with the consultation. In response to ICL's motion for summary judgment, the Forest Service moved for dismissal, claiming that agency inaction does not trigger the ESA consultation requirement. The district court granted summary judgment on count one of ICL's motion and required the Forest Service to engage in formal ESA consultation.

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Washington

Idaho Ctr. for Env'tl. Law & Policy v. Dep't of Ecology, No. 51439-7-II, 2019 WL 2610769 (Wash. Ct. App. June 26, 2019).

Environmental groups filed a suit to challenge the validity of a 2015 Department of Ecology (Ecology) administrative rule that establishes minimum instream flows for the Spokane River. Ecology's primary basis for promulgating the rule was to protect and preserve fish habitat. The plaintiffs argued that the rule exceeds Ecology's statutory authority

and is arbitrary and capricious, because the rule's prescribed flow rate did not consider other relevant factors, including the flow required for recreational rafting. The Washington Court of Appeals held that the rule is not reasonably consistent with the Water Resources Act's direction to meaningfully consider a range of instream values and to consider how an instream flow that protects one value might impact the others, and therefore exceeds Ecology's rulemaking authority. The court also held that the rule was adopted without regard to the attending facts and circumstances and is therefore arbitrary and capricious.

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Wild Fish Conservancy v. Cooke Aquaculture Pac., LLC, No. C17-1708-JCC, 2019 WL 2616640 (W.D. Wash. June 26, 2019).

Following the 2017 collapse of one of Cooke Aquaculture Pacific LLC's Atlantic salmon net-pen facilities in Deepwater Bay off of Cypress Island, Washington, the Wild Fish Conservancy filed a Clean Water Act (CWA) lawsuit against Cooke. The plaintiff sought a declaratory judgment that Cooke has violated and continues to violate their NPDES permits and the CWA, injunctions against Cooke to stop the alleged violations and remediate environmental harm, and the maximum civil penalties authorized by the CWA. Cooke filed a motion for partial summary judgment, a motion to amend its answer, and a motion to seal information regarding Cooke's business operations. The court granted summary judgment in part and denied it in part. The court stated that the Conservancy may proceed with its CWA § 301(a) claim for the release of non-native Atlantic salmon and its NPDES claims to the degree that the violations were occurring at the time the suit was filed. The court granted the defendant's leave to amend and the motion to seal.

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FEDERAL CIRCUIT

Missouri

Welty v. United States, 926 F.3d 1319 (Fed. Cir. 2019).

After the USDA approved construction of a levee on adjacent property downstream from a landowners' farm, the landowners filed suit against the United States claiming that their property had been taken without just compensation. The landowners alleged that their neighbor's drainage ditch and levee system had caused unnatural flooding and permanently rendered their land unfit for agricultural production, and since the USDA had approved the plans for the levee and provided financial incentives for their neighbors to enter into a conservation plan, the damage to their land constituted an unconstitutional taking. The circuit court found that the landowners had not presented facts to show that the flooding was a direct and intended result of the government's actions, nor had the landowners presented facts plausibly suggesting that the USDA had compelled their neighbor to construct or maintain a levee. The court also found that USDA's financial incentives for participating in the Conservation Reserve Program are insufficient to show that the neighbor's construction and maintenance of his levee was the result of government coercion. The circuit court affirmed the Court of Federal Claims' dismissal of the suit for failure to state a claim.

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