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Ocean and Coastal Case Alert

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

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FIRST CIRCUIT

Hootstein v. Amherst-Pelham Reg'l Sch. Comm., No. CV 17-30146-MGM, 2019 WL 538312 (D. Mass. Feb. 11, 2019).

The U.S. District Court for the District of Massachusetts issued an order granting in part and denying in part a motion to dismiss a case regarding lead-contaminated water at Amherst schools. A student's grandfather brought the action against the school committee on behalf of himself, his grandson, and others who might have been affected by the school committee's response to lead-contaminated water at its schools. The complaint first alleged a 42 U.S.C. §1983 (§1983) claim that the committee's response violated the plaintiffs' Fourteenth Amendment due process rights. The plaintiffs also claimed violation of Article 97 of the Amendments to the Massachusetts's constitution. The court first held that the plaintiff could pursue his claim based only on his alleged exposure to lead contaminated waters. The court stated that §1983 was not preempted by the Safe Drinking Water Act; however the plaintiff can only pursue his §1983 claim based on the bodily integrity theory. Finally, the court dismissed the plaintiff's claims regarding the alleged violations of Article 97 of the Amendments to the Massachusetts's constitution.

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FOURTH CIRCUIT

Norfolk S. Ry. v. City of Roanoke, 916 F.3d 315 (4th Cir. 2019).

The U.S. Court of Appeals for the Fourth Circuit upheld a district court's order granting summary judgment for the City of Roanoke, Virginia in a lawsuit alleging discriminatory taxation in violation of the Railroad Revitalization and Regulatory Reform Act of 1976 (Act). The Fourth Circuit reviewed whether Roanoke's stormwater management charge is a fee or a tax. The distinction matters because, under the Act, only taxes are subject to challenge. In making

its decision, the Fourth Circuit relied on a three-part framework established under *San Juan Cellular Telephone Company v. Public Service Commission*. The framework included: "(1) what entity imposes the charge; (2) what population is subject to the charge; and (3) what purposes are served by the use of the monies obtained by the charge." Ultimately, the Fourth Circuit held that the city's stormwater management charge is a fee and not a tax.

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FIFTH CIRCUIT

Louisiana

Gulf Restoration Network v. EPA, No. 18-1632 Section: “S” (5) (E.D. La. Feb. 25, 2019).

Several environmental groups challenged the U.S. Environmental Protection Agency’s (EPA) approval of drastically lowered dissolved oxygen criteria for thirty-one Louisiana rivers, streams, creeks, bays, and bayous. The EPA filed a motion for voluntary remand without vacatur. The environmental groups filed a motion for partial summary judgment. Both parties agreed that remand is expected; however, the parties disagreed as to whether remand should be voluntary as requested by the EPA or subsequent to a finding that the EPA violated the Endangered Species Act (ESA) as requested by the plaintiffs. In addition, the parties disagreed as to whether the remand should be with or without vacatur. The EPA acknowledged its violation of the ESA and that remand at the agency level is necessary. The court stated, “in essence, the EPA has consented to a partial vacatur.” This agreement between parties made the court’s decision much easier. Ultimately, the court stated, since the EPA “acknowledged that they failed to follow the requirements of the [ESA], the Court finds that defendants have raised substantial and legitimate concerns in support of remand.” Further, with agreement between the two parties, the court stated that vacatur was appropriate. The only issue that was not affected by the vacatur was a dissolved oxygen standard related to one Louisiana Pollutant Discharge Elimination System permit.

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NINTH CIRCUIT

California

Fudge v. City of Laguna Beach, No. G055711, 2019 WL 580389 (Cal. Ct. App. Feb. 13, 2019).

A California appellate court upheld a lower court’s dismissal of a claim brought by a resident of the City of Laguna Beach fighting the city’s decision on a Coastal Development Permit (CDP). The plaintiff challenged the city’s decision two ways: 1) by appealing to the California Coastal Commission (Commission); and 2) by filing a suit in state superior court. The Commission accepted the appeal for review, and, as a result, the state superior court dismissed the action. However, once the Commission issues its decision, the plaintiff may then challenge the Commission’s decision in state superior court.

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Washington

Puget Soundkeeper All. v. Total Terminals Int’l, LLC, No. C18-0540RSL, 2019 WL 1013458 (W.D. Wash.

Mar. 4, 2019).

Puget Soundkeeper (Soundkeeper) sued the Port of Seattle (Port) and its tenant under the citizen suit provisions of the Clean Water Act for stormwater discharges from a marine cargo terminal. Soundkeeper alleged that the discharges exceeded the limits imposed by the Industrial Stormwater General Permit (ISGP) that covers the facility. The Port filed a motion to dismiss. The court did not dismiss the case, finding that although the Port is not the permittee, it can be held liable if it violated the ISGP through its acts or omissions.

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Am. Waterways Operators v. Dep’t of Ecology, No. 51547-4-II, 2019 WL 1033902 (Wash. Ct. App. Mar. 5, 2019).

Washington State Department of Ecology (Department) sought to engage in rulemaking to prohibit marine vessel sewage discharge into the Puget Sound. The Department first had to apply to the U.S. Environmental Protection Agency for permission to regulate this discharge and supply a “Certificate of Need” that explained why Puget Sound required protections greater than the federal standard. In response, American Waterways Operators (Operators) appealed only the “Certificate of Need” to the Pollution Control Hearings Board (Board). The Department moved to dismiss the Operators’ appeal stating that the Board did not have jurisdiction. The Board granted the motion to dismiss, holding that the “petition and its Certificate of Need was a discretionary act over which the superior court, not the Board, has jurisdiction.” The Operators appealed the Board’s dismissal to the state superior court, which reversed the dismissal. On appeal, a Washington appellate court found that the Board did not have jurisdiction to

near the appeal, because the Certificate of Need was a prerequisite to rulemaking and not subject to adjudication by the Board.

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DISTRICT OF COLUMBIA

Nat'l Parks Conservation Ass'n v. Semonite, No. 18-5179, 2019 WL 983691 (D.C. Cir. Mar. 1, 2019).

The District of Columbia Court of Appeals recently ruled on a U.S. Army Corps of Engineers' (Corps) permit allowing overhead electrical transmission towers across the historic James River. The Corps granted the permit without preparing an environmental impact statement (EIS). Several nonprofit organizations brought suit alleging the project violated the National Environmental Policy Act, the National Historic Preservation Act, and the Clean Water Act. The court held that the agency's decision not to prepare an EIS was arbitrary and capricious. The court found that the Corps should have issued an EIS due to the degree to which the project affected the human environment, the impacts on the unique geographic and historic district, and the adverse impacts on historically significant sites and a national historic landmark.

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District of Columbia

Oceana, Inc. v. Ross, No. 17-CV-829 (CRC), 2019 WL 1117198 (D.D.C. Mar. 11, 2019).

Oceana brought suit claiming that the National Marine Fisheries Service's (NMFS) Amendment 5b of the highly migratory species fishery management plan under the Magnuson-Stevens Act (MSA) failed to protect the dusky shark. Oceana claimed that NMFS did not adequately establish management measures to constrain the number of sharks accidentally caught, ignored available evidence about prevalence of accidental bycatch of sharks, and failed to look at a reasonable range of alternatives for achieving NMFS' goal for reducing mortality. The U.S. District Court for the District of Columbia granted summary judgment in favor of Oceana. The court found that NMFS ignored available evidence of bycatch and failed to establish appropriate management measures for bycatch.

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