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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the November 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-19-03-11).

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FIRST CIRCUIT

Maine

Man Against Xtinction v. Comm'r of Maine Dep't of Marine Res., No. 1:19-CV-00406-LEW, 2019 WL 5748317 (D. Me. Nov. 5, 2019).

An environmental advocacy group filed suit claiming Maine regulations requiring the use of vertical buoy ropes for lobster fisheries violated the Endangered Species Act, as the vertical ropes can lead to entanglement of endangered right whales and sea turtles. After filing the claim, the plaintiff sought a Temporary Restraining Order (TRO) and a Preliminary Injunction against the Maine Department of Marine Resources. The court denied the plaintiff's request for emergency relief, noting that a ban on the use of buoy lines in commercial lobster fishing would effectively suspend the existing commercial lobster fishery. Further, the TRO would deprive the agency of the ability to exercise its duties related to lobster fisheries and marine policy.

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SECOND CIRCUIT

Connecticut

Mayer-Wittmann v. Zoning Bd. of Appeals of City of Stamford, 333 Conn. 624 (2019).

Stamford, Connecticut's zoning board granted a landowner's application for variances from setback requirements and height restrictions to reconstruct a beachfront cottage severely damaged by Hurricane Sandy. A neighbor sought review of that decision, and a trial court dismissed the claim. On appeal, the Supreme Court of Connecticut ruled that the variances were justified. The court held that the cottage's status as a legally nonconforming accessory structure did not terminate due to lack of reconstruction within one year of the hurricane. The landowner established the existence of an unusual hardship warranting approval of the application for variances.

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Wozniak v. Town of Colchester, 193 Conn. App. 842 (2019).

Property owners brought suit against the Town of Colchester, seeking a writ of mandamus to compel the town to file a Letter of Map Revision (LOMR) to the Federal Emergency Management Agency (FEMA). The owners alleged an error on the flood map. The property owners claimed that the town's failure to send the letter resulted in an inverse condemnation and negligence. A lower court granted the town's motion for summary judgment. The Connecticut Court of Appeals held that the town had no duty to send an LOMR. The court noted that the property owners were permitted to file an LOMR individually.

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FOURTH CIRCUIT

North Carolina

Intersal, Inc. v. Hamilton, No. 115PA18, 2019 WL 5677496 (N.C. Nov. 1, 2019).

A marine research and recovery corporation, Intersal, Inc., brought suit against the North Carolina Department of Natural and Cultural Resources (DNCR) and a nonprofit over the research and recovery of two shipwrecks, one believed to have belonged to the pirate Blackbeard. Intersal alleged breach of a previous settlement agreement and tortious interference with a contract. A lower court dismissed all of the claims. On appeal, the North Carolina Supreme Court affirmed in part and reversed in part. The court ruled that Intersal failed to state a claim with regard to the nonprofit's tortious interference of a contract; however, the court reinstated a claim against DNCR regarding the violation of media and promotional rights under a previous settlement agreement and a claim for breach of settlement agreement based on DNCR's failure to renew a search permit for one of the shipwrecks. The case was remanded to the lower court.

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NINTH CIRCUIT

Friends of the River v. Nat'l Marine Fisheries Serv., No. 18-15623, 2019 WL 4887136 (9th Cir. Oct. 3, 2019).

Friends of the River (FOR) challenged two opinions issued by the National Marine Fisheries Service (NMFS) in Endangered Species Act consultations with the U.S. Army Corps of Engineers (Corps) regarding certain federally managed properties on the Yuba River. The district court granted summary judgment for NMFS, the Corps, and the Yuba County Water Agency. On appeal, the Ninth Circuit held that NMFS's opinions were arbitrary and capricious for lack of a reasoned explanation for the change in its approach to classification of the properties. The court reversed in part and remanded the case to the district court with instructions to remand to NMFS for reassessment of the two opinions. Furthermore, the court reversed the district court's summary judgment in favor of the Corps on the unauthorized "take" claim but affirmed the rejection of FOR's claim that the agencies were required to reinstate consultation.

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Montana

Ksanka Kupaqa Xa'lcin v. U.S. Fish and Wildlife Serv., CV 19-20-M-DWM, 2019 WL 5078895 (D. Mont. Oct. 10, 2019).

The U.S. Forest Service (USFS) approved the Rock Creek Mine in Montana after consulting with the U.S. Fish and Wildlife Service (USFWS) about potential effects to bull trout and grizzly bear populations protected under the Endangered Species Act. Plaintiffs filed suit against the USFS and the USFWS asking the court to declare decisions about the proposed Rock Creek Mine invalid. RC Resources, owner of the mineral estate for the mine, intervened. The USFWS, the USFS, and RC Resources all filed motions for judgment on the pleadings. Because the court found that plaintiffs had standing and the claims were ripe and cognizable, the district court denied the defendants' motions for judgment on the pleadings.

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ELEVENTH CIRCUIT

Ctr. for Biological Diversity v. U.S. Army Corps of Engineers, No. 18-10541, 2019 WL 5690619 (11th Cir. Nov. 4, 2019).

A fertilizer manufacturer engaging in phosphate mining in Florida sought Clean Water Act permits from the U.S. Army Corps of Engineers (Corps) to expand its mining operation. The Corps conducted a National Environmental Policy Act (NEPA) review evaluating the environmental consequences of the mining and discharging activity. The Corps determined the effects of the production and storage of phosphogypsum waste at the fertilizer plant fell outside of the NEPA review. In November 2016, the Corps issued the fertilizer manufacturer a permit. Subsequently, the Center for Biological Diversity filed suit against the Corps raising claims under NEPA, the Administrative Procedure Act, and the Endangered Species Act (ESA). The district court granted summary judgment for the Corps. On appeal, the Eleventh Circuit affirmed the judgment, holding that the effects of phosphogypsum produced at the plant were too attenuated from the Corps evaluation of the mining discharge. Further, the court found that the Corps complied with NEPA, and its environmental impact statement did not require consultation under the ESA.

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D.C. CIRCUIT

District of Columbia

Conservation Law Found. v. Ross, CV No. 18-1087 (JEB), 2019 WL 5549814 (D.D.C. Oct. 28, 2019).

The Conservation Law Foundation (CLF) challenged a final habitat amendment issued by the National Marine Fisheries Service (NMFS) that amended fishery rules to allow gillnet fishing gear in two large areas of North Atlantic right whale habitat in New England waters. CLF contended that NMFS neglected its Congressional mandate to insure that its actions are not likely to jeopardize the continued existence of any endangered species. The U.S. District Court for the District of Columbia held that NMFS violated both the Endangered Species Act and the Magnuson-Stevens Act, because the habitat amendment may affect the North Atlantic right whale. Further, the court found that the appropriate remedy for this violation was an injunction that would restore the prohibition on gillnet fishing gear in the two areas.

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Ctr. for Biological Diversity v. Ross, No. CV 18-112 (JEB), 2019 WL 5653458 (D.D.C. Oct. 31, 2019).

In 2014, the National Marine Fisheries Service (NMFS) published a biological opinion (BiOp) finding that opening American lobster fisheries in North Atlantic right whale habitat was not likely to jeopardize the endangered whale species. Plaintiffs challenged the BiOp claiming NMFS violated its duties under the Endangered Species Act (ESA). After discovery, plaintiffs filed for summary judgment. NMFS filed a Motion to Stay the case. The court denied NMFS's Motion to Stay, finding that granting the stay may inflict harm on the plaintiffs' interest in protecting the Northern right whale. Further, the court found that the stay would not promote judicial economy and that NMFS failed to show that denying the stay would cause harm to NMFS. NMFS has 14 days to file their opposition to the plaintiffs' Motion for Summary Judgment.

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FEDERAL CIRCUIT

Baley v. United States, No. 2018-1323, 2019 WL 5995861 (Fed. Cir. Nov. 14, 2019).

The U.S. Court of Appeals for the Federal Circuit ruled on a long-running case stemming from the Klamath River Basin Reclamation Project. The Bureau of Reclamation halted water delivery to farms and water districts in 2001 in order to protect several species under the Endangered Species Act and to preserve tribal rights to fish those species. Several plaintiffs filed suit alleging that the action resulted in a taking without compensation and a violation of the

Several plaintiffs filed suit alleging that the action violated its taking market compensation and a violation of the Klamath River Basin Compact. The Federal Circuit ruled that the lower court correctly affirmed the Bureau's actions, as the tribal rights were superior to the state water rights.

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