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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the October 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-19-03-10).

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FIRST CIRCUIT

Maine

Almeder v. Town of Kennebunkport, 2019 ME 151 (Oct 3, 2019).

Beachfront property owners along Goose Rocks Beach in Maine sued the Town of Kennebunkport, seeking a declaration that their properties include land to the mean low water mark, subject to public rights in the intertidal zone. The trial court ruled in favor of the town, finding that it has title to the land seaward of the seawall, including the beach and the dry sand above it. On appeal, the appellate court found that the lower court properly interpreted the term "seawall" and correctly concluded that the seawall was the seaward boundary of the properties in question. The Maine Supreme Judicial Court held that the town holds legal title to the land seaward of the seawall in trust for public use.

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THIRD CIRCUIT

Pennsylvania

Berner v. Montour Twp. Zoning Hearing Bd., No. 39 MAP 2018, 2019 WL 4726151 (Pa. Sept. 26, 2019).

The Pennsylvania Supreme Court recently ruled on whether the state Nutrient Management Act (NMA) preempted local regulation of nutrient management by agricultural operations that were not otherwise subject to the NMA's requirements. A trial court affirmed the Montour Township Zoning Hearing Board's grant of a special exception application by local regulation of nutrient management. The Pennsylvania Commonwealth Court reversed that decision. On appeal, the appellant argued that the NMA preempted the Township's attempt to regulate nutrient management. The Pennsylvania Supreme Court held that the NMA preempted 1) local regulation of agricultural operations not subject to the NMA's requirements to the extent that the local regulation is more stringent than, inconsistent with, or in conflict with those requirements, and 2) the adverse impact requirement in the zoning ordinance concerning hog raising and manure management.

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FOURTH CIRCUIT

North Carolina

Nat'l Audubon Soc'y v. U.S. Army Corps of Engineers, No. 7:17-CV-162-FL, 2019 WL 4686337 (E.D.N.C. Sept. 25, 2019).

The National Audubon Society (NAS) sought review of a final agency action by the U.S. Army Corps of Engineers (Corps) that allowed the town of Ocean Isle Beach to construct a rock wall and a beach fillet. The National Audubon Society alleged that the Corps approved the project without proper consideration of environmental consequences. Both NAS and the Corps moved for summary judgment. Because the Corps' determination that the rock wall would cause less environmental harm than the other practicable alternatives was not arbitrary and capricious, the court denied NAS's motion for summary judgment and granted the Corps' motion for summary judgment.

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NINTH CIRCUIT

Pac. Coast Fed'n of Fishermen's Associations v. Glaser, No. 17-17130, 2019 WL 4230097 (9th Cir. Sept. 6, 2019).

The federal government constructed a drainage system to help with irrigation and drainage projects in California's Central Valley. The Pacific Coast Federation of Fisherman's Associations (PCFFA) and others alleged that the defendants violated the Clean Water Act by mishandling the drainage system and allowing it to pollute surrounding waters. The district court entered judgment for the defendants and PCFFA appealed. The court of appeals held that 1) the term "irrigated agriculture" included discharges from all activities related to crop production, 2) the term "entirely" meant "wholly, completely, fully," rather than "majority," 3) fact issues remained to be tried, and 4) the complaint gave fair notice of PCFFA's theories that the drain picked up seepage from non-irrigated land and that the drain discharged pollutants from seepage and sediment within the drain. The appellate court reversed and remanded.

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Rosenblatt v. City of Santa Monica, No. 17-55879, 2019 WL 4867397 (9th Cir. Oct. 3, 2019).

The Ninth Circuit held that Santa Monica's city ordinance banning vacation rentals unless a primary resident remained in the dwelling did not violate the dormant Commerce Clause. The U.S. District Court for the Central District of California dismissed the action. On appeal, the Ninth Circuit held that the ordinance was not a direct regulation of interstate commerce. The ordinance did not violate the dormant Commerce Clause by directly regulating booking and payment transactions that might occur entirely out-of-state. The ordinance did not violate the dormant Commerce Clause by banning wholly extraterritorial communications and advertisements nor did it discriminate against out-of-state interests. Finally, the ordinance did not have effect on interstate commerce that clearly outweighed its local benefits.

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Alaska

Ctr. for Biological Diversity v. Bernhardt, No. 3:18-CV-00064-SLG, 2019 WL 4725124 (D. Alaska Sept. 26, 2019).

The Center for Biological Diversity (CBD) filed a petition with the Secretary of the United States Department of the Interior to list the Pacific walrus as a threatened or endangered animal under the Endangered Species Act (ESA). The CBD subsequently filed a complaint in the district court seeking a declaration that the Secretary violated the ESA by not acting on the petition and to compel the Secretary to make and publish a 90-day finding. Over the course of several years, the parties reached a settlement agreement on different occasions that led to the U.S. Fish and Wildlife Service publishing a 90-day finding, a 12-month finding, a Final Species Status Assessment, and another 12-month finding. After issuance of these findings, CBD initiated an action listing five claims related to violations of the ESA and Administrative Procedure Act. Both CBD and the defendants filed a motion for summary judgment. The court held for defendants on all five claims, dismissed CBD's motion for summary judgment, and granted defendants' motion for summary judgment.

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California

Lindstrom v. California Coastal Comm'n, No. D074132, 2019 WL 4509046 (Cal. Ct. App. Sept. 19, 2019).

Plaintiffs filed a petition for writ of mandate against the California Coastal Commission (CCC) challenging special conditions that were placed on its coastal development permit. The trial court disapproved of certain special conditions while approving other special conditions. CCC appealed, and the plaintiffs cross-appealed. On appeal, the California Court of Appeals concluded that CCC's imposition of the special conditions was within its discretion, except for one overbroad condition requiring removal of the home because of erosion or landslide. Therefore, the court reversed the trial court's judgment and directed the trial court to enter a new judgment ordering CCC to either delete or revise the special condition that was too broad.

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Washington

The Coalition to Protect Puget Sound Habitat v. U.S. Army Corps of Engineers, et al, No. 17-1209RSL, 2019 WL 5103309 (W.D. Wash. Oct. 10, 2019).

In 2017, the U.S. Army Corps of Engineers reissued Nationwide Permit 48 (NWP 48), which covers certain activities related to commercial shellfish aquaculture in waters of the United States. An environmental group alleged that the issuance of NWP 48 violated the Clean Water Act (CWA), the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA). The U.S. District Court for the Western District of Washington held that the agency's conclusion that the permit would have a minimal environmental impact was not supported by the evidence; therefore, the issuance of NWP 48 was arbitrary and capricious and not in accordance with NEPA or the CWA. The court held that NWP 48 is unlawful and set it aside in the state of Washington. The court requested additional briefing from the parties on the issue of whether NWP 48 should be vacated outright, which would invalidate existing activities under the permit, or whether it should be left in place while the agency considers how to remedy deficiencies in the permit.

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