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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the April 2016 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-16-03-04).

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U.S. SUPREME COURT

Sturgeon v. Frost, 2016 WL 1092415 (U.S. Mar. 22, 2016).

The U.S. Supreme Court recently ruled on the National Park Service's jurisdiction over lands within conservation units in Alaska. The case began when a hunter, John Sturgeon, used a hovercraft on the Nation River, a navigable river on nonfederal land within a conservation system unit. Park Rangers prohibited Sturgeon from using the hovercraft, citing National Park Service (NPS) regulations. Sturgeon alleged that the hovercraft ban did not apply to his activities on the river, as the Nation River is owned by the state and not subject to these regulations. Sturgeon argued that the Alaska National Interest Lands Conservation Act (ANILCA) prohibits the enforcement of NPS regulations on state or native corporation lands situated within federal conservation system units. More specifically, § 103(c) of ANILCA states that no State, Native Corporation, or private lands, "shall be subject to the regulations applicable solely to public lands within such units." The Ninth Circuit reasoned that the federal hovercraft ban does not apply "solely" within the units in Alaska and was enforceable against Sturgeon's activity. The Supreme Court, however, agreed with Sturgeon's interpretation of this section, and reversed the Ninth Circuit's ruling and remanded the case to the Ninth Circuit.

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DC CIRCUIT

Nat'l Wildlife Fed'n v. U.S. Army Corps of Engineers, 2016 WL 1048767 (D.D.C. Mar. 14, 2016).

The National Wildlife Federation and several other conservation groups filed suit against the U.S. Army Corps of Engineers (Corps), alleging that its decision to reissue a nationwide permit authorizing the discharge of dredged and fill material to construct bank stabilization projects violated the Administrative Procedure Act, the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), and the Endangered Species Act. The U.S. District Court for the District of Columbia dismissed the case, finding the groups lacked standing to bring the lawsuit. The court held that the groups could not show that they were "directly affected" by the agency action. Further, these groups failed to establish an imminent injury under NEPA or CWA, or that the alleged injury to their members would be rectified by a favorable decision. Accordingly, the court granted the Corps' cross-motion for summary judgment and dismissed the action for lack of standing.

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FIFTH CIRCUIT

Mississippi

K.R. Borries v. Grand Casino of Mississippi, Inc. Biloxi, 2016 WL 1272960 (Miss. Mar. 31, 2016).

During Hurricane Katrina, Grand Casino's gambling barges broke loose from their moorings and collided with Schooner Pier. Following this incident, one of the affected property owners, Borries Construction, filed suit against Grand Casino. Following the circuit court's granting of summary judgment, Borries appealed, alleging "Grand Casino breached its duty of care to Borries by negligently mooring its casino and failing to take precautions to prevent foreseeable harm to nearby property owners." The Mississippi Supreme Court found that there was a "battle of the experts" as to whether Grand Casino breached its duty to take these precautions. Borries's expert stated that Grand Casino's mooring system was not adequate to withstand Hurricane Katrina; and, because of prior storm history, Hurricane Katrina's storm surge was foreseeable. Grand Casino's expert stated that Grand Casino complied with Gaming Commission mooring requirements. The court found that, because a genuine dispute of material fact existed regarding Grand Casino's duty, the circuit court improperly granted summary judgment in favor of Grand Casino. Accordingly, the judgment of the lower court was reversed, and the case was remanded for further proceedings.

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FOURTH CIRCUIT

North Carolina

Willie R. Etheridge Seafood Co. v. Pritzker, 2016 WL 1126014 (E.D.N.C. Mar. 21, 2016).

The U.S. District Court for the District of North Carolina recently ruled on an Amendment to the 2006 Consolidated Highly Migratory Species (HMS) Fishery Management Plan (FMP). In recent years, the International Commission for

the Conservation of Atlantic Tunas (ICCAT) made changes that decreased the percentage of underharvest that could be carried forward each year and decreased the total allowable bluefin catch for contracting parties. This, coupled with increased bluefin landings, resulted in extremely early closures of some fishing seasons in the following years. The National Marine Fisheries Services (NMFS) attempted to combat these problems through the creation of Amendment 7. Eighteen Pelagic Longline Fishery fishermen or fishing companies operating out of North Carolina, New York, and Florida alleged that Amendment 7 threatened the economic viability of their businesses by imposing onerous monitoring requirements and bycatch quotas. The plaintiffs further alleged that the Amendment's Individual Bluefin Quota (IBQ) program gave preferential treatment to two groups, was neither fair nor equitable, and disenfranchised longtime fishermen who had borne the largest brunt of conservation efforts. The court ultimately held that the plaintiffs failed to make the requisite demonstration that NMFS did not properly "balance competing conservation and economic interests" when adopting Amendment 7. The court found that NMFS's actions were neither arbitrary nor capricious in adopting the amendment and its implementing regulations. Accordingly, the court granted the motion for summary judgment in the defendants' favor.

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South Carolina

Livingston v. United States, 2016 WL 1274013 (D.S.C. Mar. 31, 2016).

The U.S. District Court for the District of South Carolina ruled on whether a tour operator could pass unpermitted through national wildlife refuge waters with her nature tour business, Nature Adventure Outfitters (NAO). The plaintiffs, two tour group operators, alleged that employees of the Cape Romain National Wildlife Refuge restricted their access in order to extend a competitive advantage to close friends who operated a competing tour company. The plaintiffs alleged a violation of Due Process under the 5th Amendment and a violation of the South Carolina Unfair Trade Practices Act. The plaintiffs also requested a writ of mandamus allowing for free navigation of refuge waters. In response to the plaintiff's motion for summary judgment, the court held that, "because defendants' regulatory authority extends to activities that affect federal property, it is at least possible that defendants' regulation of plaintiffs' tours was valid." Accordingly, the plaintiffs' motion for summary judgment was denied. The defendants filed a motion to dismiss, alleging protection under the defense of qualified immunity. The court held that defendants would be entitled to qualified immunity under both an "exceeded regulatory authority" theory and an "improper motive" theory and, thus, granted the defendants' motion to dismiss.

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NINTH CIRCUIT

Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Dep't of Interior, 2016 WL 1179953 (9th Cir. Mar. 28, 2016).

The U.S. Court of Appeals for the Ninth Circuit affirmed in part and reversed in part a lower court decision dismissing a fishermen group's National Environmental Policy Act (NEPA) claims against the U.S. Bureau of Reclamation in connection with its approval of eight interim two-year contracts for delivery of water from the Central Valley Project to California water districts. In approving the contracts, the Bureau issued an Environmental Assessment (EA) and a Finding of No Significant Impact rather than preparing a more detailed Environmental Impact Statement under NEPA. The Ninth Circuit agreed with the lower court that the EA's "no action" alternative complied with NEPA even though it assumed continued interim contract renewal, and also that other aspects of the Bureau's action complied

with NEPA. But the Bureau's decision not to give full and meaningful consideration to the alternative of a reduction in maximum interim contract water quantities—or adequately explain why it eliminated the reduction in water alternative from detailed study—was an abuse of discretion. Therefore, the Ninth Circuit remanded the lower court's decision with instructions to direct the Bureau to consider such alternatives in any future EA for an interim contract renewal.

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San Diego Navy Broadway Complex Coal. v. U.S. Dep't of Defense, 2016 WL 1237404 (9th Cir. Mar. 30, 2016).

The U.S. Court of Appeals for the Ninth Circuit held that the government complied with the National Environmental Policy Act (NEPA) when it issued a Finding of No Significant Impact in connection with the redevelopment of a fifteen-acre waterfront site owned by the U.S. Navy in downtown San Diego. Civic groups argued that the government should have prepared a supplemental Environmental Impact Statement (EIS) on the potential for terrorist attacks at the redeveloped site under the Ninth Circuit's ruling in *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016 (9th Cir. 2006), which requires the government to address the environmental consequences of a possible terrorist attack at the site. The government met that requirement in this case when it considered the relevant factors in its "hard look" at potential terrorism. In addition, the government did not abuse its discretion in determining that there was no significant impact from the possible environmental effects of potential terrorism at the site. Therefore, a supplemental EIS was not required.

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Alaska

Alaska Oil & Gas Ass'n v. Nat'l Marine Fisheries Serv., 2016 WL 1125744 (D. Alaska Mar. 17, 2016).

In 2012, the National Marine Fisheries Service issued a final decision listing the Arctic subspecies of the ringed seal as "threatened" under the Endangered Species Act. The Alaska Oil & Gas Association challenged this listing alleging that the listing was "based primarily upon speculation as to what circumstances may or may not exist 80 to 100 years from now." The court agreed that the listing was arbitrary and capricious, and thus, invalid. The court reasoned that there was no discernable, quantified threat of extinction within the reasonably foreseeable future and that 1) the proposed protective regulations for threatened subspecies of the ringed seal were not necessary or advisable for the present conservation of the seal; and 2) the existing protections under the Marine Mammal Protection Act made it unlikely that the proposed protective regulation would provide appreciable conservation benefits. Accordingly, the final rule was vacated to the extent that it affected the Arctic ringed seal.

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Oregon

Bohmker v. State, 2016 WL 1248729 (D. Ore. Mar. 25, 2016).

The U.S. District Court for the District of Oregon dismissed a lawsuit brought by individual miners and various mining groups, associations, and businesses challenging an Oregon law that temporarily bans instream motorized mining to protect water quality and fish habitat. The law temporarily prohibits instream mining that uses any form of motorized equipment within certain limited areas, including the beds or banks of state waters containing essential indigenous anadromous salmonid habitat. The plaintiffs sought declaratory relief to prevent the enforcement of the

law, which they claimed was preempted by the Mining Act of 1872. The court disagreed, finding the law is a reasonable environmental regulation that seeks to prevent pollution of the state's waterways. Further, as decided by the U.S. Supreme Court in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), federal mining laws and environmental regulations do not preempt this type of state law. Because the law at issue in this case is an environmental regulation, and not a land use law, the Mining Act of 1872 does not preempt it. Therefore, the district court granted Oregon's motion for summary judgment against the mining groups.

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ELEVENTH CIRCUIT

F.E.B. Corp. v. United States, 2016 WL 1179951 (11th Cir. Mar. 28, 2016).

A corporation filed suit against the United States, seeking to quiet title to a spoil island in the Gulf of Mexico. The court found that the case was framed by the intersection of two federal statutes: the Quiet Title Act (QTA) and the Submerged Lands Act (SLA). As to the QTA, the court noted that the Act has a twelve-year statute of limitations "which is triggered when the plaintiff's QTA action first accrues." The court found that, because the plaintiff's predecessor in interest had actual knowledge of the United States' claim to the real property at issue in 1951, the QTA claim expired in 1963. The owner alleged that, even if the QTA's statute of limitations period was triggered in 1951, the period did not expire due to the intervening passage of the SLA that offset the United States' 1951 assertion of ownership. The court noted that the SLA excludes from its coverage "all lands filled in, built up, or otherwise reclaimed by the United States for its own use." The court reasoned that because the spoil island was built up by Navy contractors to store fill from nearby dredging operations, it was excluded from the SLA. Accordingly, the district court's initial dismissal of the case for lack of subject matter jurisdiction was affirmed. The court noted, however, that the dismissal "[did] not quiet title to the property in the United States," and that the title dispute would remain unresolved.

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Florida

Martins v. Royal Caribbean Cruises Ltd., 2016 WL 1254067 (S.D. Fla. Mar. 29, 2016).

After seventeen-year old Briana Martins died aboard one of Royal Caribbean's cruise liners, her family filed suit. The family alleged that her death was caused by the ingestion of bacteria-ridden food aboard the *Explorer of the Seas*, resulting in the contraction of Salmonella that the medical staff negligently failed to treat. The court denied in part and granted in part Royal Caribbean's motion to dismiss. The court dismissed the defendant's claim that the Death on the High Seas Act (DOHSA) preempted any other claims, such as negligent infliction of emotional distress. Further, the court found that plaintiffs alleged sufficient facts to support their negligent infliction of emotional distress claims, because they each entered into the requisite "zone of danger" by coming into physical contact with Briana herself or her bodily fluids during the course of her Salmonella (which is transmittable through person-to-person contact). The court dismissed, however, plaintiffs' allegations that, under Florida's Wrongful Death Act and the Bahamian Fatal Accidents Law, the defendant's negligent hiring, retention, and training of shipboard medical staff caused Briana's death. Finally, the court held that plaintiffs' complaint as a whole should not be dismissed as a "shotgun pleading" in violation of the Federal Rules of Civil Procedure.

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