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Ocean and Coastal Case Alert

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

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FOURTH CIRCUIT

Maryland

Maryland Dep't of Env't v. Riverkeeper, 2016 WL 929349 (Md. Mar. 11, 2016).

Multiple environmental organizations challenged municipal separate storm sewer system discharge (MS4) permits issued by the Maryland Department of the Environment (MDE) to Anne Arundel County, Baltimore City, Baltimore County, Montgomery County, and Prince George's County. The permits required the local governments to control or treat runoff from twenty percent of their land that is paved or covered by buildings. The plaintiffs argued that the permits were not specific or strict enough and that the public did not have an adequate opportunity to review and comment on the permits. The Maryland Court of Appeals, the state's highest court, ruled that the permits comply with the federal Clean Water Act (CWA), noting that the CWA "contemplates that states shall set controls they deem necessary to reduce the discharge of pollutants into their waters." Further, the court found that the agency offered adequate public review of the permits.

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SIXTH CIRCUIT

In re U.S. Dep't of Def., U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Waters of U.S., 2016

WL 723241 (6th Cir. Feb. 22, 2016).

The U.S. Court of Appeals for the Sixth Circuit denied a motion to dismiss actions challenging the validity of the Environmental Protection Agency's (EPA) and U.S. Army Corps of Engineers' (Corps) final rule clarifying definition of "waters of the United States" as used in the Clean Water Act (CWA). The court found that the final rule was subject to direct circuit court review under the CWA and due process concerns raised by challengers were premature and unfounded.

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NINTH CIRCUIT

Alaska Oil & Gas Ass'n v. Jewell, 2016 WL 766855 (9th Cir. Feb. 29, 2016).

The U.S. Court of Appeals for the Ninth Circuit reversed a lower court ruling that vacated the U.S. Fish and Wildlife Service's (FWS) final rule designating critical habitat for polar bears under the Endangered Species Act (ESA). The State of Alaska, oil and gas trade associations, and Alaska Native corporations and villages challenged the rule, alleging that the FWS's designation was arbitrary and capricious and violated the ESA. The district court agreed. On appeal, the Ninth Circuit found that the FWS's decision was not arbitrary and capricious. Notably, the agency's decision of where to locate each primary constituent element (PCE) was not arbitrary and capricious, as it used scientific data establishing current use by existing polar bears.

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Shell Offshore Inc. v. Greenpeace, Inc., 2016 WL 851824 (9th Cir. Mar. 4, 2016).

Shell Offshore sought an injunction to stop an environmental organization from engaging in direct-action protests designed to hinder the oil company's oil exploration activities. The U.S. District Court for the District of Alaska granted a preliminary injunction and later entered a preliminary order of civil contempt imposing sanctions against the organization for violating the injunction. The environmental organization appealed. The Ninth Circuit dismissed and remanded the case, finding that the appeal was moot because the preliminary injunction expired, and the lower court's order was coercive in nature.

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Washington

Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend Constitution, No. 91551-2, 2016 WL 455957

(Wash. Feb. 4, 2016).

The Washington Supreme Court struck down a proposed local initiative containing provisions relating to zoning changes, water rights, workplace rights, and rights of corporations. County, city residents, and others filed a declaratory judgment action challenging validity of the initiative on the ballot, and a lower court ruled in their favor. The Court of Appeals reversed, finding that the challengers had standing to challenge the initiative, and the initiative was beyond the scope of local legislative authority.

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ELEVENTH CIRCUIT

Alabama

Gulf Restoration Network v. Jewell, 2016 WL 617461 (S.D. Ala. Feb. 16, 2016).

An environmental organization recently challenged plans to use a portion of BP restoration funds provided following the Deepwater Horizon oil spill to partially fund a nearly \$60 million lodge and conference center in Gulf State Park in Alabama. The U.S. District Court for the Southern District of Alabama ruled that the trustees designated pursuant to the Oil Pollution Act to develop a natural resources restoration plan should have considered reasonable alternatives to the proposed project. The court enjoined the trustees' use of early restoration funds for construction of the lodge and conference center, pending further National Environmental Policy Act review.

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DC CIRCUIT

District of Columbia

Mashack v. Jewell, 2016 WL 777914 (D.D.C. Feb. 26, 2016).

A group of boat owners and several of their friends brought suit against the U.S. Department of the Interior challenging the closure of the Buzzard Point Marina, a National Park Service (NPS) facility. The boat owners claimed that the NPS has a statutory obligation to continue to operate the Washington, D.C. site and that the closure would violate the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), the National Park Service Concessions Management Improvement Act of 1998 (Concessions Act), and the Administrative Procedure Act (APA). The court dismissed the claim, noting "plaintiffs have advanced their claims in this case by conflating discrete decisions and events, misstating the significance and scope of particular record documents, and blurring the distinctions between separate statutory and regulatory regimes. When one disentangles the jumble of evolving legal theories that plaintiffs have put before the Court—as one must do to assess the validity of any individual claim—it becomes clear that the Park Service has acted in accordance with the law to date, and that many of the necessary steps have not yet been undertaken and are not yet subject to challenge."

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FEDERAL CLAIMS

Pioneer Reserve, LLC v. United States, 2016 WL 616376 (Fed. Cl. Feb. 16, 2016).

Pioneer Reserve, a wetlands mitigation bank, sued the U.S. Army Corps of Engineers (Corps), alleging breach of

contract. Pioneer Reserve had signed an umbrella mitigation banking instrument (UMBI) with the Corps, establishing how many wetland mitigation credits the company had available for purchase. In 2013, the Corps amended the UMBI by reclassifying portions of Pioneer Reserve's property from wetlands to uplands, thereby reducing the number of wetland mitigation credits available for sale. The Court of Federal Claims held that factual issues remained as to the unilateral modification of the UMBI and to damages suffered from any breach; therefore, it could not grant summary judgment in favor of Pioneer Reserve.

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