

February

15  
2017

# Ocean and Coastal Case Alert

**The National Sea Grant Law Center** is pleased to offer the February 2017 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-17-03-02).

## Forward to a friend

Know someone who might be interested in our monthly newsletter?

Forward this email their way and help spread the word.

---

## FIFTH CIRCUIT

***Gulf Coast Rod. v. U.S. Army Corps of Engineers***, No. 16-40181, 2017 WL 243340 (5th Cir. Jan. 19, 2017).

The U.S. Court of Appeals for the Fifth Circuit affirmed a district court's judgment that the issuance of a § 404 Clean Water Act permit to close Rollover Pass, a man-made pass that connects East Bay with the Gulf of Mexico, was not arbitrary or capricious. The appellants, a recreational organization and a civic group, claimed that the U.S. Army Corps of Engineers (Corps) failed to properly consider the cumulative impacts of the closure and any alternatives to closing the pass in its Environmental Assessment (EA). The appellate court held that the Corps provided reasoned justification for choosing its model of studying cumulative impacts on salinity levels. Furthermore, the Corps adequately considered alternatives to closing the pass. The appellate court found that the National Environmental Policy Act did not require the Corps to consider all alternatives in an EA.

[Opinion Here](#)

---

## Louisiana

***Louisiana Dept. of Natural Resources ex rel. Coastal Protection and Restoration Authority v.***

***FEMA***, No. 16-00586-BAJ-EWD, 2017 WL 434048 (M.D. La. Jan. 31, 2017).

The Louisiana Department of Resources (LDNR) submitted a public assistance request to FEMA for money to restore the pre-Katrina/Rita stabilization features of the coastal barrier resource systems (CBRS) damaged by those

hurricanes. FEMA denied the request because the islands and headlands did not constitute a system under the applicable regulations. The plaintiffs appealed through arbitration. The plaintiffs filed Freedom of Information Act (FOIA) requests for documents about how FEMA treated other CBRS. These requests were delayed, and the arbitration panel refused to consider the documents once they were produced. The arbitration panel ruled for FEMA, so LDNR requested a federal district court to vacate the arbitration ruling. The court held that LDNR failed to identify what it might have shown the panel that would have changed FEMA's conclusion about the nature of the CBRS. Also, LDNR failed to assert why those documents were material evidence that had to be considered for fair arbitration. The district court declined to vacate the arbitration ruling.

[Opinion Here](#)



## EIGHTH CIRCUIT

### Minnesota

***Ariola v. City of Stillwater***, No. A16-0750, 2017 WL 279573 (Minn. Ct. App. Jan. 23, 2017).

James Ariola filed a wrongful death action against Stillwater, Minnesota after his son died from a rare disease caused by an amoeba present in a lake managed by the city. The district court dismissed the action. On appeal, the court affirmed the district court's dismissal of the complaint, basing its decision on statutory recreational-use immunity. The court found that there was no evidence that the city had actual knowledge of an artificial condition likely to cause death or serious bodily harm. The appellate court did rule that the district court erred in taxing costs and disbursements against Ariola.

[Opinion Here](#)

***Hawkes Co. v. United States Army Corps of Engineers***, No. CV 13-107 ADM/TNL, 2017 WL 359170 (D.

Minn. Jan. 24, 2017).

In 2013, a peat mining company sought review of a Revised Jurisdictional Determination (JD) in which the U.S. Army Corps of Engineers (Corps) determined that it had Clean Water Act jurisdiction of over 150 acres of wetlands in Minnesota. The U.S. District Court for the District of Minnesota ruled that the JD was not final and therefore not subject to judicial review. The Eight Circuit reversed. Last May, the U.S. Supreme Court agreed, holding that landowners could appeal the JD. The case was remanded to the U.S. District Court for the District of Minnesota for further review. The district court set aside the Revised JD as arbitrary and capricious and enjoined the Corps from asserting jurisdiction over the wetlands.

[Opinion Here](#)



## NINTH CIRCUIT

***Center for Biological Diversity v. EPA***, No. 14-16977 (9th Cir. Feb. 2, 2017).

The U.S. Court of Appeals for the Ninth Circuit affirmed in part and reversed in part the district court's dismissal of the Center for Biological Diversity's (CBD) claims that the EPA violated the Endangered Species Act (ESA) for its registration of certain active pesticide ingredients and pesticide products without consulting the National Marine Fisheries Service and the U.S. Fish and Wildlife Service. The appellate court affirmed the district court's dismissal of

claims pertaining to the initial issuance of Registration Eligibility Decisions (RED) regarding the active ingredients and pesticide products. The appellate court also affirmed the district court's finding that pesticide product reregistration was an affirmative agency action. However, the appellate court reversed the district court's holding that those claims were barred by the collateral attack doctrine, because RED is only one part of multiple steps for reregistration, which is distinct from the claims involving the initial registration.

[Opinion Here](#)

---

## California

***Tribe v. United States Bureau of Reclamation***, No. 16-cv-06863-WHO, 2017 WL 512845 (N.D. Ca. Feb. 8, 2017).

The U.S. District Court for the Northern District of California addressed two parallel motions in cases brought by the Hoopa Valley tribe and the Yurok tribe. The plaintiffs in those cases claimed that the Klamath River Project negatively impacted endangered salmon by increasing the incidence of disease in the fish caused by worms. The district court denied the Hoopa Valley tribe's claim that the National Marine Fisheries Service (NMFS) violated the Endangered Species Act by unlawfully taking a listed species. The NMFS does not participate in the river project, so it cannot be responsible for the taking. The district court granted the plaintiffs summary judgment, because the federal defendants delayed two years before reinitiating formal consultation after it was required in 2014. Additionally, the Yurok Tribe sought injunctive relief, which was granted. The court ordered that until the consultation, the Bureau must require winter-spring flushing flows to dislodge the worms that carry the disease infecting the salmon and emergency dilution flows if the infection rate exceeds a threshold rate. The defendants also must submit a report to the court regarding the mitigation measures for the water flow in accordance with the best available science.

[Opinion Here](#)

---

***Natural Resources Defense Council v. McCarthy***, No. 16-cv-02184-JST, 2017 WL 491147 (N.D. Ca. Feb. 7, 2017).

A water quality plan for the San Francisco Bay and San Joaquin Delta Estuary (Bay-Delta Plan) implemented standards set by the State Water Resources Control Board (SWRCB) and was approved by the EPA. The SWRCB approved a temporary urgency change petition (TUCP) filed by the California Department of Water Resources and the Federal Bureau of Reclamation to amend requirements of the Bay-Delta Plan in response to a drought. The plaintiffs, which included various environmental groups, sought declaratory and injunctive relief from a federal district court. The plaintiffs claimed that the EPA failed to comply with its non-discretionary duty under the Clean Water Act (CWA) to review and take appropriate action regarding water quality standards. The defendants filed for dismissal, arguing that the claims were moot and the plaintiffs did not adequately plead that the EPA had a discretionary duty to review the revisions to the water quality. The district court held the claims were not moot, because the SWRCB process is too short to allow litigation before it ceases and these amendments will likely be used again in the course of the drought. Additionally, the court ruled that the EPA had a duty to review the revisions to the water quality standards, since TUCP approval was technically a revision of water quality standards. The motion to dismiss was denied.

[Opinion Here](#)

---



## ELEVENTH CIRCUIT

### Florida

***City of Sunny Isles Beach v. Cavalry Corp.***, No. 3D15-1420, 2017 WL 361945 (Fla. Dist. Ct. App. Jan. 25, 2017).

Using eminent domain, the City of Sunny Isles, Florida took a portion of a canal to build a bridge. After a jury verdict determining what the City owed the landowner, the city filed a motion for a new trial. On appeal, the city claimed that the trial court abused its discretion by admitting conceptual site plans as evidence for the highest and best use of the property as a private docking facility. The appellate court disagreed and upheld this valuation methodology, because the testimony was based on the actual value of the property at the time of the taking if sold for its highest and best use.

[Opinion Here](#)



National Sea Grant Law Center  
256 Kinard Hall, Wing E  
University, MS 38677-1848

You're receiving this newsletter because you've subscribed to the *Ocean and Coastal Case Alert*.

To view our archive, go to [Case Alert Archive](#).

First time reader? [Subscribe now](#).

Not interested anymore? [Unsubscribe instantly](#).