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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the March 2018 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-18-03-03).

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THIRD CIRCUIT

Horan v. Dilbet, Inc., No. 17-2243, 2018 WL 1003370 (3d Cir. Feb. 21, 2018).

A disgruntled patron sued a restaurant under the New Jersey Products Liability Act for allegedly serving her bad clams, which resulted in her contracting vibrio sepsis that necessitated the amputation of her left leg. A federal district court granted summary judgment in favor of the restaurant. On appeal, the patron contended the district court applied an incorrect standard of causation and erroneously excluded her expert witness testimony. The appellate court disagreed, finding that the patron could not show the restaurant increased the risk of the presence of an infectious dose of vibrio in the clams she ate and affirmed the district court's order.

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FIFTH CIRCUIT

Texas

Kleinman v. City of Austin, No. 1:15-CV-497-RP, 2018 WL 1168859 (W.D. Tex. Mar. 6, 2018).

The U.S. District Court for the Western District of Texas ruled that the City of Austin violated the Clean Water Act due to a city park channel eroding and discharging sediment into the Colorado River. The court did not find the evidence justified an injunction but ordered a civil penalty of $25,000 against the city for the violation.

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SIXTH CIRCUIT

Ohio

State ex rel. Food & Water Watch v. State, 2018 WL 915358 (Ohio Jan. 24, 2018).

The Ohio Supreme Court ruled that nonprofit organizations Food and Water Watch and FreshWater Accountability Project lacked standing for a lawsuit seeking to compel the Ohio Department of Natural Resources to promulgate rules relating to the storage, recycling, treatment, processing, and disposal of waste substances associated with oil and gas drilling. The court ruled that the organizations lacked standing, because they failed to demonstrate that their individual members would have standing to sue the department on their own. The court concluded the members' concerns that they were breathing polluted air were speculative and, thus, insufficient to support standing.

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SEVENTH CIRCUIT

Wisconsin

Movrich v. Lobermeier, 905 N.W.2d 807 (Wis. 2018).

The Wisconsin Supreme Court ruled that property owners could not build a public pier on and over a privately owned waterbed abutting their property. The owners asked the court to declare they had a right to build over and onto the manmade waterbed in order to access the navigable water flowing over it. The court concluded that although the public trust doctrine does provide shoreline property owners a right to access the navigable water, it does not allow them to build a pier over a privately owned waterbed to do so.

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NINTH CIRCUIT

California Sea Urchin Comm'n v. Bean, No. 15-56672, 2018 WL 1095085 (9th Cir. Mar. 1, 2018).

Fishing industry groups again lost their challenge to the U.S. Fish and Wildlife Service's (FWS) decision to end a 1987 sea otter translocation program. The program created a reserve population of southern seal otters separate from the main population, which the FWS deemed a failure in 2012. A district court had previously ruled in favor of the FWS, finding its interpretation of the statute allowing for termination to be reasonable. The U.S. Court of Appeals for the Ninth Circuit upheld lower court's ruling.

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Olympic Forest Coal. v. Coast Seafoods Co., No. 16-35957, 2018 WL 1220506 (9th Cir. Mar. 9, 2018).

The Ninth Circuit ruled on a question of whether pipes, ditches, and channels discharging pollutants from non-concentrated aquatic animal production facilities (CAAPF) constitute point sources requiring National Pollutant Discharge Elimination System (NPDES) permits. This appeal stemmed from a district court holding that the discharge points were, in fact, point sources requiring permits. The appellate court first noted that because the term "point source" refers to any discernible, confined, and discrete conveyance from which pollutants are or may be discharged, concentrated animal feeding operations (CAFOs) are point sources along with pipes, ditches, and channels. Considering this, the court held that, as a necessary corollary, pipes, ditches, and channels that discharge pollutants from a non-CAAPF facility must also be point sources requiring NPDES permits. While the court noted that the EPA's current regulations defining CAFOs do not explicitly discuss this point, it makes practical sense. The court reasoned that the fact that a facility is a non-CAAPF does not mean that it does not discharge pollutants through

pipes, ditches, and channels. Therefore, the court held those exit points must be point sources. Otherwise, a non-concentrated facility would be free to pollute at will, exempt from any regulation under the Clean Water Act and NPDES. The court affirmed the district court's previous ruling in favor of Olympic Forest.

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California

N. California Water Ass'n v. State Water Res. Control Bd., No. C075866, 2018 WL 1127892 (Cal. Ct. App. Mar. 2, 2018).

The Farm Bureau Federation, water associations, and individual fee payers challenged new annual fees for holders of water rights permits and licenses imposed by the California Resource Control Board. The California Court of Appeals for the Third District held that the board properly allocated the fees, the allocation of the fees did not violate the supremacy clause of the U.S. Constitution, and the fee regulations did not operate in an arbitrary manner.

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Washington

Nw. Envtl. Advocates v. U.S. Dep't of Commerce, et al., No. C16-1866-JCC, 2018 WL 1182245 (W.D. Wash. Mar. 7, 2018).

The U.S. District Court for the Western District of Washington denied a motion to intervene made by two parties seeking to join several federal agency defendants and Washington state in an environmental lawsuit filed by a non-profit organization. Northwestern Environmental Advocates (NEA) brought the Administrative Procedure Act (APA) lawsuit alleging its members had been harmed by federal agency action or inaction under the Clean Water Act (CWA) and Coastal Zone Act Reauthorization Amendments (CZARA). Additionally, NEA brought an Endangered Species Act citizen suit alleging the defendant agencies had unlawfully failed to consult on the EPA's approvals and funding of Washington's Nonpoint Source Pollution Management Programs. The proposed intervenors claimed they had the ability to intervene either as of right or permissively under Rule 24 of the Federal Rules of Civil Procedure because, should NEA prevail, the farms and ranchers the proposed intervenors represent would be directly and negatively affected. The court first determined that the proposed intervenors had not met their burden of demonstrating they could intervene as of right. Second, the court noted that: 1) the existing parties to the lawsuit would adequately represent the interests of the proposed intervenors; 2) that they had failed to plead protectable interests; and 3) that further intervention would be likely to cause an undue delay in the litigation. Because a grant of permissive intervention rests in the sole discretion of the court, it denied this motion as well.

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ELEVENTH CIRCUIT

Georgia

Barrow v. Dunn, No. A17A1385, 2018 WL 1061468 (Ga. Ct. App. Feb. 27, 2018).

On February 27, the Georgia Court of Appeals ruled on an appeal filed by Craig Barrow, III challenging a superior court's judgment validating a wastewater treatment facility permit issued to the City of Guyton by Georgia's Department of Natural Resources, Environmental Protection Division (EPD). The permitted wastewater treatment facility was meant to collect wastewater from Guyton's sewer system, treat the water, and then utilize it in field irrigation. Barrow originally appealed the permit to an administrative law judge (ALJ), alleging that the treated surface water and groundwater traveling from the site would pollute and degrade waters on his property and harm the wetlands and various animal life there—contrary to Georgia's antidegredation rule. The ALJ issued its final decision affirming the EPD's permit issuance, and a superior court later affirmed that decision. In this appeal, Barrow alleged that the relevant part of the state's antidegredation rule was unambiguous, that both lower courts' interpretations of that rule contradicted its plain language, and that EPD's cited guidelines provided no authority to avoid the clear mandates of that rule. The appellate court agreed with Barrow, and ruled that the ALJ erred as a matter of law in interpreting the antidegredation rule. The court reasoned that the plain language of the rule did not

limit its application to point source discharges, as the ALJ had interpreted. Because of this incorrect interpretation, and because the treatment facility constituted a nonpoint source, the court held the ALJ's ruling was clearly erroneous. Furthermore, the appellate court held the EPD and city could not make an alternative, evidentiary argument that no antidegredation analysis was required because such an argument had not been initially ruled on by the ALJ. Because of the ALJ's clearly erroneous interpretation, the superior court's judgment affirming the decision was reversed, and the case was remanded for further proceedings.

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