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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the November 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-18-03-11).

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THIRD CIRCUIT

Pennsylvania

Protect PT v. Penn Twp. Zoning Hearing Bd. & Apex Energy (PA), LLC, 2018 WL 5831186 (Pa. Commw. Ct. Nov. 8, 2018).

A Pennsylvania court affirmed a lower court ruling that wastewater produced by a company's hydraulic fracturing is not "toxic" and therefore permitted to be stored in large quantities. The complaint stemmed from the Penn Township Zoning Hearing Board's grant of four special exception applications filed by Apex Energy for its oil and gas operations. An environmental group claimed that the activities would 1) violate a town zoning ordinance related to the storage of toxic-produced water; 2) violate the citizens' environmental rights; and 3) create a high probability of an adverse, abnormal or detrimental effect to the public health, safety, and welfare. A trial court affirmed the board's decisions. The appellate court affirmed, finding no error in the Board's decision to grant the special exceptions.

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FIFTH CIRCUIT

Louisiana

Carline Fisheries v. Vector Disease Control, 2018 WL 5261225 (W.D. La. Oct. 22, 2018).

The U.S. District Court for the Western District of Louisiana denied a motion for summary judgment in a case regarding the impact of pesticides on crawfish aquaculture farms. Several aquaculturists filed suit against a company that aerially sprayed insecticide to control local mosquito population, alleging the company had failed to follow Environmental Protection Agency label directions and negligently sprayed the insecticide over their crawfish ponds. The company filed for summary judgment alleging that the plaintiffs could not establish their negligence claim.

Because the company could not meet its burden of proving either of its claims, the court denied its motion for summary judgment, thus allowing the lawsuit to proceed. For more information, please see the NSGLC blog, [Pesticide Sprayer's Motion for Summary Judgment Fails in Lawsuit Filed by Crawfish Aquaculturists](#).

Mississippi

Harris v. State, 2018 WL 5839607 (Miss. Nov. 8, 2018).

Abutting landowners brought an action against the State of Mississippi, a city, and a county to confirm title to waterfront properties. A trial court granted partial summary judgment in favor of the landowners on the issue of tideland boundaries, confirmed the landowners' title, and ruled that the government parties failed to prove adverse possession or public prescriptive easement. On appeal, the Mississippi Supreme Court reversed and remanded. Following a trial, the lower court held that Mississippi held title to the sand beach in front of landowners' properties as public-trust tidelands and granted easements to the county and city. The landowners appealed. The Mississippi Supreme Court held that the beach was public-trust tidelands; the trial court acted within its discretion in relying on lay witness testimony that the beach was man-made; the expert report did not establish that beach was natural rather than man-made; and the pumping of sand along the shoreline did not constitute an uncompensated taking.

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NINTH CIRCUIT

Hawaii

Matter of Contested Case Hearing Re Conservation Dist. Use Application HA-3568, 2018 WL 5623442

(Haw. Oct. 30, 2018), as corrected (Nov. 5, 2018).

The Hawaii Supreme Court held that the development of a telescope observatory near a sacred mountain summit did not violate public trust principles or the state constitution. The state Board of Land and Natural Resources granted a university's application for the development of the observatory. Native Hawaiian cultural practitioners appealed the decision, and a trial court affirmed. Upon transfer to the Hawaii Supreme Court, the court vacated and remanded the Board's decision. On remand, the Board again granted the application. On appeal, the Hawaii Supreme Court found that the Board fulfilled its constitutional requirement to protect Native Hawaiian traditional and customary rights and that the project did not violate public trust principles or a provision of the Hawaii State Constitution requiring public natural resources to be held in trust by the State for the benefit of the people. Further, the project would not have a substantial adverse impact to existing natural resources within the surrounding area, community, or region under a statute prohibiting a proposed land use if it would cause such impact.

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Washington

Columbia Riverkeeper v. Pruitt, 2018 WL 5024027 (W.D. Wash. Oct. 17, 2018).

In a suit regarding the management of the Columbia and lower Snake Rivers, environmental groups claimed that the Environmental Protection Agency (EPA) violated the Clean Water Act (CWA) by failing to issue a Total Maximum Daily Load (TMDL). The court granted the plaintiffs summary judgment. The court found that the state submitted a constructive submission of "no TMDL," and the EPA failed to undertake its mandatory duty to approve or deny the TMDL submission.

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TENTH CIRCUIT

Audubon Soc'y of Greater Denver v. U.S. Army Corps of Engineers, 2018 WL 5782609 (10th Cir. Nov. 5,

2018).

The Tenth Circuit Court of Appeals held that the U.S. Army Corps of Engineers (Corps) did not act arbitrarily or capriciously in not further analyzing an alternative of imposing enhanced water conservation measures for a project to store more water in a reservoir. An environmental organization filed the action under the Administrative Procedure Act (APA), alleging that the Corps failed to comply with the National Environmental Policy Act (NEPA) and the Clean Water Act (CWA). The U.S. District Court for the District of Colorado denied the petition. On appeal, the Tenth Circuit held that the Corps did not act arbitrarily or capriciously when it decided not to further analyze 1) the alternative of imposing enhanced water conservation measures; 2) the alternative of upstream gravel pits; or 3) the

alternative of requiring water providers to purchase storage capacity at another reservoir. The court held that the Corps' interpretation of a regulation prohibiting the discharge of dredged or fill material if there was a practicable alternative was not plainly erroneous and the Corps did not improperly segment the project. Finally, the Corps did not act arbitrarily or capriciously when it approved recreation relocation and environmental mitigation plans.

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Wyoming

Western Watersheds Project, et. al v. Michael, et. al, 22018 WL 5318261 (D. Wyo. Oct. 29, 2018).

Advocacy organizations challenged Wyoming statutes that impose criminal and civil penalties for data collection on private land or when private land is crossed to reach public land without landowner permission. Plaintiffs argued that the statutes violated the Free Speech and Petition Clauses of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and were preempted by federal law. The district court held that plaintiffs had stated plausible free speech, petition, and equal protection claims, but failed to state a preemption claim. Wyoming amended the two statutes in 2016. Plaintiffs challenged the 2016 statutes, re-alleging free speech and equal protection claims. The district court granted the defendants' motion to dismiss. Upon review, the Tenth Circuit reversed, concluding that plaintiffs' collection of resource data constitutes the protected creation of speech. The Tenth Circuit remanded to the district court to determine the appropriate level of scrutiny and whether the statutes survive review. The district court found the statutes to be unconstitutional.

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DISTRICT OF COLUMBIA

Angelex, Ltd. v. United States, 2018 WL 5725428 (D.C. Cir. Nov. 2, 2018).

The U.S Court of Appeals, District of Columbia Circuit held that the detention of a vessel pending resolution of a criminal case against the vessel owner was authorized by the Act to Prevent Pollution from Ships. The vessel owner sought compensation for losses incurred as result of the U.S. Coast Guard's alleged unreasonable detention of its vessel during the criminal prosecution of the owner and vessel's International Safety Management (ISM) manager for unlawful disposal of oily bilge waste at sea. The U.S. District Court for the District of Columbia granted summary judgment in favor of government. On appeal, the court held that the detention of the vessel pending the resolution of the criminal case against the vessel owner and ISM manager was authorized; therefore, the owner was not entitled to compensation for that detention. Further, the Coast Guard's demand of \$2.5 million bond for the release of vessel was reasonable.

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