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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the August 2020 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-20-03-08).

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SECOND CIRCUIT

Power Authority v. M/V Ellen S. Bouchard, No. 19-1140cv, 2020 WL 4355268 (2nd Cir. July 30, 2020).

In 2014, a barge towed by tugboat M/V Ellen S. Bouchard dropped anchor, rupturing a submarine cable owned and operated by the plaintiff. The rupture caused thousands of gallons of oil to spill into Long Island Sound. The plaintiff brought suit pursuant to the federal oil pollution act (OPA) and the New York Oil Spill Law. The federal district court dismissed the claim, holding that a submarine cable did not meet the OPA's statutory definition of a "facility" because the cable was not used for any purposes within the definition. The Second Circuit disagreed, finding that the submarine cable met the OPA's definition, since the submarine cable is a structure or equipment that has capability of transferring oil and it was used to do so. The Second Circuit vacated the district court's order and remanded the case.

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New York

Natural Resources Defense Council, Inc. v. U.S. Dept of the Interior, No. 18-CV-4596 (VEC), 2020 WL 4605235 (S.D.N.Y. Aug. 11, 2020).

The Migratory Bird Treaty Act of 1918 (MBTA) prohibits the killing, capturing, selling, trading, and transport of protected migratory bird species without agency authorization. Environmental interest groups and various states filed suit to vacate a memorandum and ensuing rules issued by the Department of Interior (DOI) interpreting "takings" and "killings" under the MBTA. The DOI interpreted the MBTA to only apply to intentional, not accidental, killings—an interpretation contrary to long-standing agency policy. The U.S. District Court for the Southern District of New York agreed that the DOI's interpretation of the MBTA should be set aside. The judge found that the DOI's interpretation was contrary to the MBTA's purpose to protect migratory bird populations.

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Rosado v. Wheeler, No. 117CV04843ERKRLM, 2020 WL 4042941 (E.D.N.Y. July 17, 2020).

In 2016, the Environmental Protection Agency (EPA) designated the Eastern Long Island Sound Site as an open-water dredge disposal site. Subsequently, New York's Secretary of State brought suit against the EPA, alleging that the agency did not follow the decision-making processes set out in the Marine Protection, Research, and Safety Act (MPRSA) and the Coastal Zone Management Act (CZMA). The U.S. District Court for the Eastern District of New York disagreed and determined that the EPA used substantial evidence and followed its obligations under the MPRSA and CZMA by considering the laws' evaluation factors when choosing the dredge disposal site. Therefore, the court granted the defendants' cross-motion for summary judgment and denied plaintiffs' motion for summary judgment.

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FIFTH CIRCUIT

Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv., No. 19-30006, 2020 WL 4433100 (5th Cir. Aug. 3, 2020).

Several organizations challenged the National Marine Fisheries Service's (NMFS) regulations regarding offshore aquaculture in the federal waters of the Gulf of Mexico. The plaintiffs alleged that the adoption of the regulations violated the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Endangered Species Act, the National Environmental Policy Act, and the Administrative Procedure Act. The U.S. District Court for the Eastern District of Louisiana granted the plaintiffs summary judgment. On appeal, the Fifth Circuit affirmed, holding that the MSA did not authorize the regulation of aquaculture; therefore, NMFS exceeded its statutory authority in implementing the regulations. The court noted that Congress alone could expand the MSA to include aquaculture.

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Shrimpers and Fishermen of the RGV v. Tex. Comm'n on Envtl. Quality, No. 19-60558, 2020 WL 4376883 (5th Cir. July 31, 2020).

The Texas Commission on Environmental Quality (TCEQ) granted certain air permits to Rio Grande LNG for the construction of a natural gas liquefaction facility, export terminal, and pipeline near Brownsville, Texas. The plaintiffs, Shrimpers and Fishermen of the RGV, asked the Fifth Circuit to vacate TCEQ's decision and order either a contested case hearing or the denial of the permits to Rio Grande LNG. The petitioners argued that TCEQ erred in granting air quality permits to Rio Grande LNG and that petitioners were "affected persons" entitled to a contested case. To show they were "affected persons" petitioners gave examples of several fishermen who live or work near Rio Grande LNG's proposed facility who would suffer from the possible elevated air emissions caused by the proposed facility. The Fifth Circuit dismissed the case, finding that the petitioners lacked standing to seek judicial review. The court stated that the petitioners had shown no injury in fact and they provided no evidence of actual or imminent harm.

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Houston Aquarium, Inc. v. Occupational Safety and Health Review Comm'n, No. 19-60245, 2020 WL 3989632 (5th Cir. July 15, 2020).

The U.S. Court of Appeals for the Fifth Circuit ruled that the Houston Aquarium's diving operations to clean and feed animals within the aquarium's tanks falls within the "scientific diving" exemption to the Occupational Safety and Health Administration (OSHA) Commercial Diving Operations (CDO) standards. An OSHA employee had alleged that the dives were not for scientific purposes, so the aquarium should comply with the CDO standards. An OSHA Commission agreed that the dives were not scientific, and ruled that the CDO standards applied. On appeal, the Fifth Circuit disagreed. The court determined that feeding and cleaning dives are a component of the Aquarium's scientific research because they are necessary for the animals' survival, and the dives allow the divers to assess and study the marine animals. Thus, the court held that these diving operations fall under the "scientific diving" exemption to CDO standards.

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SIXTH CIRCUIT

Michigan

Mays v. Governor of Michigan, No. 157335, 2020 WL 4360845 (Mich. July 29, 2020).

After the City of Flint switched its water source to the Flint River, residents became ill and the EPA later found the water to be highly contaminated. Residents of Flint brought suit against city and state officials on claims of inverse-condemnation and violation of bodily integrity. The defendants argued that the plaintiff's claims should be dismissed because they failed to meet the statutory requirement for notice and allege sufficient facts to establish their claims. The claims court denied the defendants' motion for summary judgment, and the appellate court affirmed. The Supreme Court of Michigan affirmed, finding the plaintiff's allegations were sufficient to prove the plaintiff's claims. The court also held that the plaintiffs did not fail to give proper statutory notice because it is not possible to know when the harm to plaintiffs actually occurred from the contaminated water.

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SEVENTH CIRCUIT

Wisconsin

Jackson v. Childs, No. 2019AP606, 2020 WL 4188130 (Wis. Ct. App. July 21, 2020).

In 2000, the Jacksons learned from a surveyor that a 2.20-acre parcel of land that they believed to be their property actually belonged to their neighbors, the Childs. After more than 10 years of negotiations between the Childs and Jacksons, Mr. Childs passed away before resolving the dispute. The Jacksons then filed a lawsuit seeking quiet title of the disputed parcel, and the court ruled that the Jacksons had acquired title through adverse possession. On appeal, the Wisconsin Court of Appeals affirmed. The court found that Mrs. Childs failed to demonstrate that the adverse possession elements were not met.

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EIGHTH CIRCUIT

Minnesota

White Bear Lake Restoration Ass'n, ex rel. State v. Minnesota Department of Natural Resources, No. A18-0750, 2020 WL 3980718 (Minn. July 15, 2020).

After Minnesota's White Bear Lake reached extremely low water levels in 2013, White Bear Lake Restoration Association and White Bear Lake Homeowner's Association brought suit against the Minnesota Department of Natural Resources (DNR) for alleging mismanagement of its groundwater-appropriation permitting process. The plaintiffs claimed that the Department's mismanagement lead to pollution and impairment of the lake in violation of the Minnesota Environmental Rights Act (MERA) and the common-law public trust doctrine. The Minnesota Supreme Court held that the plaintiffs sufficiently alleged that the DNR's conduct—issuing outsized permits and failing to review cumulative or overall impacts of the permits—adversely affected the environment under MERA, and the DNR's actions were not shielded from liability by MERA's no-action clause. The court, however, declined to extend the public trust doctrine in this case, as the plaintiffs did not allege that the DNR violated its duty to protect public use from private interruption and encroachment. One judge concurred in part and dissented in part, agreeing with the majority that the public trust doctrine did not apply, but disagreeing that the DNR's conduct fell under the regulation of MERA. The case was remanded back to the appellate court for further proceedings.

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NINTH CIRCUIT

The Coal. to Protect Puget v. Taylor Shellfish Co., No. 20-35546, D.C. No. 2:16-cv-00950-RSL (9th Cir. Jul. 22, 2020).

The Ninth Circuit rejected two shellfish groups' efforts to stay a Washington federal judge's order that partially vacated a nationwide Clean Water Act permit for commercial shellfish aquaculture (Nationwide Permit 48) in the state of Washington. The shellfish groups argued that the federal district court judge ignored scientific evidence that supports the U.S. Army Corps of Engineers' (Corps) determination that the permit would result in minimal environmental impacts. In his decision to partially vacate the nationwide permit, the judge stated that the Corps presented insufficient evidence to support a conclusion that the permit's impact on certain species would be minimal. The Ninth Circuit ultimately declined to overturn the district court decision to partially vacate the nationwide permit.

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ELEVENTH CIRCUIT

Tesoriero v. Carnival Corporation, No. 18-11638 (11th Cir. July 14, 2020).

A cruise ship passenger brought suit against Carnival Cruise Lines (Carnival) after a chair in the ship's cabin collapsed when she sat on it, causing her to develop a painful arm condition. The federal district court granted summary judgment in favor of Carnival. On appeal, the plaintiff claimed Carnival had notice the chair was dangerous, res ipsa loquitor applies if no notice is found, and Carnival spoliated evidence when it discarded the chair. The Eleventh Circuit upheld the district court's decision, holding that the plaintiff did not show that Carnival had actual notice that the chair was dangerous, that res ipsa loquitor did not apply because it does not eliminate the notice requirement in maritime law, and that Carnival did not act in bad faith when it got rid of the chair, which showed Carnival did not spoliate evidence.

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