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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the May 2014 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-14-03-05).

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SECOND CIRCUIT

New York

***Borough of Upper Saddle River, N.J. v. Rockland Cnty. Sewer Dist. No. 1*, 2014 WL 1621292 (S.D.N.Y. Apr. 22, 2014).**

Residents and the Borough of Upper Saddle River New Jersey brought suit against the operator of a wastewater treatment plant, asserting continuing violations of the Clean Water Act (CWA), and state law claims for private nuisance, public nuisance, and trespass. The claims stemmed from sewage spills from a Rockland County Sewer District pumping station. The court found that the citizens had standing to bring the CWA claims and the citizen-suit was not precluded by the CWA. The court declined to grant summary judgment on the CWA claims, as well as the nuisance and trespass claims.

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***Gabrielli v. Town of New Paltz*, 116 A.D.3d 1315 (N.Y. App. Div. 2014).**

A New York appellate court upheld a local law enacted to prevent despoliation and destruction of wetlands, waterbodies, and watercourses. A lower court had overturned the law, finding that the town adopted the law in

violation of the State Environmental Quality Review Act (SEQRA). The appellate court disagreed, noting that the planning board met all of the requirements of SEQRA, including taking the requisite hard look before finding that no environmental impact statement was required. Further, the court found that the law was not unconstitutionally vague.

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THIRD CIRCUIT

New Jersey

***New Jersey Transit Corp. v. Mori*, 2014 WL 1773444 (N.J. Super. Ct. App. Div. May 6, 2014).**

A New Jersey appellate court reversed a jury award to a property owner whose land was acquired by the New Jersey Transit Corporation through condemnation. The jury had determined that the area was not wetlands and awarded the property owner $425,000. The appellate court found that only the U.S. Army Corps of Engineers (Corps) could make a wetland determination. Further, the court found the jury should not have considered whether the Corps would have granted the property owner a permit to build on the land.

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FOURTH CIRCUIT

Virginia

***Virginia Marine Res. Comm'n v. Chincoteague Inn*, 2014 WL 1499552 (Va. Apr. 17, 2014).**

The Virginia Supreme Court ruled that the Virginia Marine Resources Commission had jurisdiction to order a restaurant owner to remove a floating platform that was temporarily moored over state-owned subaqueous bottomland, reversing the appellate court. The court determined that the platform was an encroachment, and, therefore, subject to the state statute making it unlawful to encroach upon or over the commonwealth's subaqueous bottomland. The court further ruled that the restaurant's use of a floating platform above the state-owned subaqueous bottomland was not an activity included in the *jus publicum*, or the public's right to use the commonwealth's subaqueous bottomland.

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***Chesapeake Bay Found., Inc. v. Com., ex rel. Virginia State Water Control Bd.*, 2014 WL 1593323 (Va. Ct. App. Apr. 22, 2014).**

A Virginia appellate court upheld a permit issued by the State Water Control Board authorizing a developer to convert 144.6 acres of wetlands to uplands as it develops a mixed-use, master-planned community in the City of Chesapeake. An environmental group and a citizens group claimed that the permit does not minimize or avoid wetland loss. A circuit judge upheld the permit. On appeal, the court affirmed the circuit court's judgment, concluding that there was substantial evidence in the record to support the Board's decision.

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NINTH CIRCUIT

Natural Res. Def. Council v. Jewell, 2014 WL 1465695 (9th Cir. Apr. 16, 2014).

Environmental groups brought suit claiming that the U.S. Bureau of Reclamation violated the Endangered Species Act (ESA) by renewing long-term water service contracts for diversions from the Central Valley Project (CVP). The groups alleged that the agency violated § 7(a)(2) of the ESA by failing to consult the U.S. Fish and Wildlife Service or the National Oceanic and Atmospheric Administration's National Marine Fisheries Service about the effects of the project on the threatened delta smelt. The United States District Court for the Eastern District of California granted the government summary judgment. On appeal, the Ninth Circuit affirmed, finding that the groups lacked standing and that the renewal of the contracts was not a discretionary act under the ESA. On rehearing, however, the Ninth Circuit found that the groups did have standing to bring suit and that the agency's restrictions on discretion in negotiating contract terms did not remove the duty to consult under the ESA.

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California

Duarte Nursery, Inc. v. U.S. Army Corps of Engineers, 2014 WL 1647384 (E.D. Cal. Apr. 23, 2014).

A California nursery owner filed suit, alleging that the U.S. Army Corps of Engineers violated the nursery owner's due process rights when the Corps issued a cease and desist order and a notice of a violation of § 402 of the Clean Water Act (CWA). The Corps claimed that the nursery had violated the CWA by discharging dredged or fill materials into waters of the United States without a permit. The nursery owners alleged that the orders were issued in violation of due process because the agency never held a hearing on the matter. The U.S. District Court for the Eastern District of California denied the government's motion to dismiss the challenge.

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Hawaii

Syngenta Seeds, Inc. v. Cnty. of Kauai, 2014 WL 1631830 (D. Haw. Apr. 23, 2014).

The U.S. District Court for the District of Hawaii granted environmental groups, including Surfrider Foundation, a motion to intervene in a case seeking to invalidate a Kauai County ordinance relating to pesticides and genetically modified organisms. The ordinance requires the mandatory disclosure of the use of "restricted use" pesticides and the possession of genetically modified organisms (GMO) by commercial agricultural entities; requires commercial agricultural entities to establish pesticide buffer zones between crops to which restricted use pesticides are applied and surrounding properties; and requires the County of Kauai to complete an Environmental and Public Health Impact Study. The agricultural company plaintiffs contend that the ordinance is preempted by state and federal law regulating pesticide use and GMO crops, violates state and federal rights to due process and equal protection, and effectuates a taking of the plaintiffs' property.

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