July 15 2015

Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the July 2015 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-15-03-07).

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U.S. SUPREME CIRCUIT

***Michigan v. E.P.A.*, 2015 WL 2473453 (U.S. June 29, 2015).**

In a 5-4 decision, the U.S. Supreme Court ruled that the Environmental Protection Agency (EPA) improperly excluded cost considerations from its decision to regulate hazardous air pollutants from power plants. The Court noted that when an agency interprets a statute, it must faithfully interpret the language. In this instance, the Court found that § 112 of the Clean Air Act (CAA) required the EPA to include cost considerations in its decision about regulation of power plants; therefore, the EPA unreasonably interpreted the CAA.

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THIRD CIRCUIT

***Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 2015 WL 4069224 (3d Cir. July 6, 2015).**

The U.S. Court of Appeals for the Third Circuit upheld the Environmental Protection Agency's (EPA) authority to order pollution reductions for Maryland and other states that drain into the Chesapeake Bay. The EPA set a "total maximum daily load" (TMDL) of nutrients and sediments washing into the Chesapeake Bay from six bay states and

the District of Columbia and set a deadline of 2025 for the states to adopt measures needed to reduce all sources of pollution or face possible federal sanctions. The American Farm Bureau Federation, the National Association of Home Builders, and other groups sued in 2011 to block the plan, claiming that the EPA overstepped its authority in promulgating the Chesapeake Bay TMDLs. The Third Circuit agreed with the EPA and its supporters, because the EPA's interpretation of its authority under the Clean Water Act was not unreasonable.

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FOURTH CIRCUIT

***S.C. Coastal Conservation League v. U.S. Army Corps of Eng'rs*, 2015 WL 3757640 (4th Cir. June 17, 2015).**

The South Carolina Coastal Conservation League sued various parties under the Administrative Procedure Act, the Clean Water Act, the National Environmental Policy Act, and the Endangered Species Act to protect 485 acres of freshwater wetlands from degradation and to stop conversion of the wetlands from freshwater to saltwater. The U.S. Court of Appeals for the Fourth Circuit affirmed the lower court's holding and held that the League's claim was moot. Specifically, because the water at issue now contains more saline than the water the League seeks to prevent from entering it, the court ruled that it could not provide meaningful relief.

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West Virginia

***Ohio Valley Envtl. Coal. v. McCarthy*, 2015 WL 3824255 (S.D.W. Va. June 19, 2015).**

Environmental groups filed a petition requesting that the Environmental Protection Agency (EPA) evaluate West Virginia's failure to administer and enforce the National Pollutant Discharge Elimination System (NPDES) and to withdraw the delegation of the program from the West Virginia Department of Environmental Protection. More than six years after filing the petition, the environmental groups filed an action alleging that the EPA failed to perform its nondiscretionary duty to respond to its petition under the Clean Water Act (CWA) and that the EPA's failure to timely respond also violated the Administrative Procedure Act. EPA's motion to dismiss was granted in part by the district court because the EPA's failure to timely respond under the CWA is a discretionary duty; however, the district court also granted a stay so that the plaintiff environmental groups can properly file their compliant under the Administrative Procedure Act directly with the court of appeals.

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NINTH CIRCUIT

***Bear Valley Mut. Water Co. v. Jewell*, 2015 WL 3894308 (9th Cir. June 25, 2015).**

The Ninth Circuit upheld a 2010 U.S. Fish and Wildlife Service (FWS) rule designating a critical habitat for the threatened Santa Ana sucker, a small freshwater fish native to several California rivers and streams. Several municipalities and water districts filed suit against the FWS, arguing that it failed to cooperate with state and local

agencies on water resource issues in violation of the Endangered Species Act (ESA), that the critical habitat designation for the sucker was arbitrary and capricious, and that it failed to prepare an Environmental Impact Statement (EIS) in violation of the National Environmental Policy Act (NEPA). The Ninth Circuit affirmed the lower court's decision and upheld the rule because this particular section of the ESA does not create an independent cause of action, and the 2010 rule fully addresses the impact on conservation plans and local partnerships, and it explains the changed circumstances requiring designation and articulates the reasons why the benefits of inclusion outweigh the benefits of exclusion. Further, because the NEPA does not apply to the designation of critical habitats, the FWS did not violate the ESA by failing to prepare an EIS.

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***Alaska Eskimo Whaling Comm'n v. U.S. E.P.A.*, 2015 WL 3938162 (9th Cir. June 29, 2015).**

The Alaska Eskimo Whaling Commission petitioned for review of the Beaufort Permit issued by the Environmental Protection Agency (EPA) under the National Pollutant Discharge Elimination System (NPDES) provisions of the Clean Water Act, which authorizes discharges by oil and gas exploration facilities into the Beaufort Sea. The Ninth Circuit Court of Appeals remanded back to the EPA for a determination of whether the discharge of non-contact cooling water (alone or in combination with other authorized discharges) into the Beaufort Sea will cause unreasonable degradation of the marine environment because of the effect of such discharge on bowhead whales. The Ninth Circuit denied the petition in all other respects because the EPA's issuance of the Beaufort Permit is otherwise supported by the record, does not reflect a failure to consider an important aspect of the problem, and is not otherwise arbitrary or capricious.

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Hawaii

***Haw. Wildlife Fund v. Cty. of Maui*, 2015 WL 3903918 (D. Haw. June 25, 2015).**

The County of Maui was found liable under the Clean Water Act (CWA) for its effluent discharges in operation of the Lahaina Wastewater Reclamation Facility. The County then sought summary judgment with respect to potential penalties, arguing that a court cannot assess statutory penalties against the County because the County lacked fair notice that a National Pollutant Discharge Elimination System permit was required. The U.S. District Court for the District of Hawaii ruled that the County could not demonstrate that it lacked fair notice and was therefore not entitled to a judgment as a matter of law.

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ELEVENTH CIRCUIT

Georgia

***Turner v. Ga. River Network*, 2015 WL 3658823 (Ga. June 15, 2015).**

In 2010, Grady County received federal approval to construct a 960-acre fishing lake. The project also entailed building a large dam and flooding wetlands and nine miles of streams to create the lake. To proceed with the project, Grady County was required to apply for a buffer variance through the Environmental Protection Division in order to disturb the stream waters that would be affected by the project. Georgia River Network and American Rivers

challenged the variance, arguing that Grady County's application was deficient because it failed to address buffers for the wetlands that would also be affected by the project. The Environmental Protection Division granted the variance and opined that wetlands did not require buffers because they generally lack wrested vegetation and were therefore not subject to a variance request. The Supreme Court of Georgia agreed with the Environmental Protection Division and held that GA. CODE ANN. § 12-7-6(b)(15)(A) does not provide for the requirement of establishing a buffer for state waters, including wetlands, adjacent to banks without wrested vegetation.

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