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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the June 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-15-03-06).

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SECOND CIRCUIT

New York

***Lord & Taylor LLC v. Zim Integrated Shipping Servs., Ltd.*, 2015 WL 3630443 (S.D.N.Y. June 8, 2015).**

A New York judge ruled that a shipping container terminal was not liable for damage sustained to two shipping containers containing 211 boxes of sweaters during Hurricane Sandy. Department store chain Lord & Taylor had sued for damages, alleging a loss of property of over $200,000. The judge ruled that the damage resulted from an act of God and the shipping company had no reasonable or practical way to protect the containers and was therefore not liable for the damage.

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FOURTH CIRCUIT

Maryland

***Bd. of Pub. Works v. K. Hovnanian's Four Seasons at Kent Island, LLC*, 2015 WL 3479263 (Md. June 3, 2015).**

A developer sought a writ of mandamus to require the Maryland Board of Public Works to vote on an application for a state wetlands license for construction of a waterfront housing project. The circuit court granted the motion and ordered the Board to vote on the application. The appellate court vacated the lower court's judgment, finding that the developer is required to await a final decision before filing suit to challenge the procedures of the Board.

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EIGHTH CIRCUIT

***McClung v. Paul*, 2015 WL 3540610 (8th Cir. June 8, 2015).**

John and Kim McClung obtained a permit from the U.S. Army Corps of Engineers to maintain a boat dock and stone steps on the public land between their property and Greers Ferry Lake. Contrary to permit conditions, the homeowners sprayed herbicide and mowed the shoreline. The Corps revoked the permit. The McClungs brought an action against the Corps, seeking review under the Administrative Procedure Act. The U.S. District Court for the Eastern District of Arkansas ruled in favor of the Corps. On appeal, the Eighth Circuit held that the district court did not abuse its discretion in denying the homeowners' request to supplement the record and finding that revocation of the permit was not arbitrary and capricious. The court also held that the homeowners did not have a property interest in their permit; therefore, the lack of notice did not violate the couple's due process rights.

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NINTH CIRCUIT

***Alaska Wilderness League v. Jewell*, 2015 WL 3620115 (9th Cir. June 11, 2015).**

The U.S. Court of Appeals for the Ninth Circuit rejected a claim that the Bureau of Safety and Environmental Enforcement's (BSEE) approval of Shell's oil spill response plans (OSRPs) for leases in the Beaufort and Chukchi seas was arbitrary and capricious. On appeal, the Ninth Circuit rejected the claim that BSEE's approval of the OSRPs was arbitrary and capricious simply because Shell predicted an impossibly high recovery rate of 90-95%. The court also found that an Endangered Species Act consultation was not necessary prior to approval of the OSRPs; BSEE's interpretation of the Oil Pollution Act was entitled to *Chevron* deference; and, BSEE was not required to prepare a Environmental Impact Statement before approving the OSRPs.

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Alaska

***Aulukestai v. State Dep't of Natural Res.*, 2015 WL 3452438 (Alaska May 29, 2015).**

A tribe and several individuals challenged the Alaska Department of Natural Resource's issuance of land and water use permits allowing mineral exploration of state lands adjacent to the Bristol Bay watershed. The lower court ruled

in favor of DNR. On appeal, the Alaska Supreme Court ruled that "intensive mineral exploration on state land," which included drilling, dynamite blasting, and use of stream water, resulted in the disposal of an interest in state land for which prior public notice was required by the state constitution. In a separate action related to the case (*Alaska Conservation Found. v. Pebble Ltd. P'ship*, 2015 WL 3452471 (Alaska May 29, 2015)), the court ruled that the mining company must pay attorney fees for the plaintiffs.

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California

Siskiyou Cnty. Farm Bureau v. Dep't of Fish & Wildlife, 2015 WL 3507075 (Cal. Ct. App. June 4, 2015).

Siskiyou County Farm Bureau filed a complaint for declaratory relief against the California Department of Fish and Wildlife, seeking to prohibit the Department from bringing an enforcement action for the Farm Bureau's failure to notify the Department of plans to divert water. The plaintiffs alleged that the statute requiring notification for a substantial diversion was ambiguous. The lower court agreed. On appeal, the court reversed the decision, finding that the statute was not ambiguous in that taking water out of its natural flow for agricultural purposes was a diversion of water under the statute.

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Washington

United States v. Washington, 2015 WL 3451316 (W.D. Wash. May 29, 2015).

The Squaxin Island Tribe filed suit against a commercial shellfish farmer, claiming it should have been notified prior to the shellfish farmer beginning operations on certain leased tidelands. The tribe sought an equitable remedy for the lost opportunity to harvest its treaty share of non-native Manila clam. The court agreed that the shellfish farmer violated notice requirements and harvest plans for two of its leases. After hearing further evidence, the court will determine the amount of clams the tribe is entitled to in the future.

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D.C. CIRCUIT

Nat'l Ass'n of Home Builders v. U.S. Fish & Wildlife Serv., 2015 WL 3371707 (D.C. Cir. May 26, 2015).

The U.S. District Court for the District of Columbia ruled that four associations lacked standing to bring a suit challenging consent decrees requiring the U.S. Fish and Wildlife Service (FWS) to determine whether 251 species should be listed as endangered or threatened under the Endangered Species Act. The U.S. District Court for the District of Columbia had previously dismissed the complaint. On appeal, the D.C. Circuit ruled that the associations had no procedural right to comment at the warranted-but-precluded stage of listing species; therefore, the associations "must show actual or imminent, concrete and particularized injury-in-fact; causation, such that the injury is fairly traceable to the challenged conduct; and redressability." The court found that the associations failed to make these showings, and therefore lacked standing to bring the suit.

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