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October 16 2015

Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the October 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-15-03-10).

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SECOND CIRCUIT

***Nat. Res. Def. Council v. U.S. E.P.A.*, Nos. 13-1745(L), 13-2393(CON), 13-2757(CON), 2015 WL 57803093 (2d Cir. Oct. 5, 2015).**

The U.S. Court of Appeals for the Second Circuit recently remanded portions of the Environmental Protection Agency's (EPA) Vessel General Permit (VGP) that regulates discharge of ballast water from ships. The Second Circuit concluded that the EPA acted arbitrarily and capriciously in issuing portions of the 2013 VGP. Therefore, the Second Circuit remanded the permit to review (1) EPA's decision to set the technology-based effluent limits (TBELs) at the International Maritime Organization standard, (2) EPA's failure to consider onshore treatment for ballast water discharge, (3) EPA's decision to exempt pre-2009 Lakers, or ships who stay within Great Lakes waters, from the TBELs in the 2013 VGP permit, (4) EPA's narrative standard for water quality-based effluent limits (WQBELs), and (5) the monitoring and reporting requirements established by EPA for WQBELs. However, the Second Circuit denied the petition for review with respect to TBELs for viruses and protists and the monitoring and reporting requirements established by EPA for TBELs.

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FIFTH CIRCUIT

Louisiana

***Basinkeeper v. Bostick*, 2015 WL 5664960 (E.D. La. Sept. 23, 2015).**

The U.S. District Court for the Eastern District of Louisiana recently denied a motion for reconsideration of a permit issued by the U.S. Army Corps of Engineers (Corps) for construction of a ring levee and access road required by an oil well located in the Atchafalaya Basin. Plaintiffs Atchafalaya Basinkeeper and Louisiana Crawfish Producers Association initially filed the suit alleging that the Corps exceeded its authority in granting the permit in violation of both the Clean Water Act (CWA) and the National Environmental Policy Act (NEPA). In June, the district court upheld the permit. In considering a motion for reconsideration filed by the plaintiffs in August, the court found that the plaintiffs' reasons for seeking reconsideration were based on arguments and evidence previously heard, and, furthermore, that there was no evidence that the Corps misled the court by misrepresenting or withholding any evidence. Accordingly, the court dismissed the motion.

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SIXTH CIRCUIT

***In re E.P.A.*, 2015 WL 5893814 (6th Cir. Oct. 9. 2015).**

The U.S. Court of Appeals for the Sixth Circuit recently granted a motion for a nationwide stay of the Clean Water Rule promulgated earlier this year by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers to clarify what waters have a "significant nexus" to navigable waters and are subject to federal authority. The court noted that the states that filed the motion had a substantial possibility of success with their claims if the court establishes that it does, in fact, have subject matter jurisdiction. The court decided to issue the stay because it was concerned about the impact that such a rule would have on the general public, if implemented. The Sixth Circuit reasoned that, although the stay would cause a reversion back to the old rule, it would restore uniformity of regulation and allow the court time to clarify whether the rule is consistent with U.S. Supreme Court precedent.

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NINTH CIRCUIT

***Marilley v. Bonham*, 2015 WL 5472732 (9th Cir. Sept. 18, 2015).**

The Ninth Circuit recently ruled on the constitutionality of California's imposition of commercial fishing fees for nonresidents. The court struck down the fees, reasoning that the significantly higher fees required of nonresidents directly burden commercial fishing by nonresidents—a protected privilege. The court found that these fees are not closely related to the advancement of a substantial state interest, and, therefore, violate the Privileges and Immunities Clause of the U.S. Constitution. California alleged that the fees were justified because they help fund state

conservation efforts and enforcement expenses, but the state failed to show how the differential nonresident fee is related to a resident's share of these expenditures, and, therefore, the court rejected this argument.

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Alaska

Alaska Commercial Fishermen's Mem'l in Juneau v. City & Borough of Juneau, 2015 WL 5655710 (Alaska Sept. 25, 2015).

A nonprofit organization constructed a commercial fishermen's memorial on the Juneau waterfront and held yearly ceremonies at the memorial. The City and Borough of Juneau made plans to build a large dock on the same stretch of waterfront and requested the State of Alaska transfer state-owned submerged lands for berthing cruise ships. The organization filed suit for a temporary restraining order to prevent construction of the dock before the land was transferred. The superior court denied the organization's requests, and granted the city's motion to dismiss the organization's claims. The Alaska Supreme Court affirmed the superior court's decision because the organization failed to prove that a trespass had occurred or was likely to occur, and agreed that the transfer of the submerged lands was in the best interest of the state.

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Cook Inlet Fisherman's Fund v. State, Dep't of Fish & Game, No. S-15595, 2015 WL 5655814 (Alaska Sept. 25, 2015).

Cook Inlet Fisherman's Fund (CIFF) recently brought suit against the Alaska Department of Fish and Game (DFG) after the Commissioner used emergency authority to limit and later close the set-net fishery in effort to protect king salmon. The DFG argued that it acted to preserve Kenai River king salmon population, while also keeping the strong sockeye run in check. The department argued that the set netters' incidental harvest of the king salmon posed a greater risk to the king run than did drift netters' substantially smaller incidental harvest. The CIFF sought approval of the Board of Fisheries' salmon management plans, as wells as a permanent injunction directing the DFG to follow those plans. The court denied both requests and granted summary judgment to the DFG. The Alaska Supreme Court affirmed, finding DFG did not abuse its power, and the fishermen's demand for injunctive relief lacked necessary specificity.

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California

California Sea Urchin Commission v. Bean, No. 2:14-cv-08499-JFW-CW (C.D. Cal. Sept. 18, 2015).

The U.S. District Court for the Central District of California recently upheld the U.S. Fish and Wildlife Service's decision to terminate their southern sea otter translocation program. The Congressionally created program, which relocated southern sea otters found in the "management zone" of California's coast to Nicholas Island, halted its efforts in 1991 and suspended operations in 1993. The cessation of the program was attributed to unexpectedly high levels of otter deaths coupled with disappearances of translocated otters and slow growth of the new colony. The program was officially terminated in 2012, and several commercial fishing groups filed suit alleging that they would be injured from reduced shellfish stocks due to the otters' consumption. However, the court ruled that these fishing groups lacked standing and their claims lacked merit. Accordingly, the court held that FWS had full authority to commence and halt the program at their discretion under the authorizing statute.

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Washington

***Puget Soundkeeper Alliance v. Ranier Petroleum Corp.*, 2015 WL 5794274 (W.D. Wash. Oct. 4, 2015).**

The court for the western district of Washington recently ruled on a motion for summary judgment made by Puget Soundkeeper Alliance (Soundkeeper) against Rainer Petroleum Corporation (Ranier). Soundkeeper alleged that Ranier violated the Clean Water Act (CWA), as well as certain terms of its NPDES general permit, by exceeding its benchmarks for zinc and copper in stormwater discharge at its Seattle facility, failing to submit annual reports for 2013 and 2014, failing to properly monitor several discharges, failing to conduct monthly compliance inspections, and through several deficiencies in its Stormwater Pollution Prevention Plan (SWPPP). The court found that Ranier did, in fact, violate several parts of its NPDES permit due to the aforementioned failures and granted partial summary judgment. The court also noted that Ranier had violated their general permit for each day its SWPPP exhibited these deficiencies. However, the court was prevented from issuing full summary judgment in this instance, because a question of fact existed as to two quarters that Ranier failed to conduct quarterly discharge sampling. The court did note, however, that each quarter that Ranier failed to conduct these samples properly would constitute a separate violation.

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ELEVENTH CIRCUIT

Georgia

***Georgia Aquarium, Inc. v. Pritzker*, 2015 WL 5730661 (N.D. Ga., Sept. 28, 2015).**

The Georgia Aquarium recently appealed the denial of a permit under the Marine Mammal Protection Act (MMPA) that would allow it to import eighteen beluga whales from Russia to its facility. The 18 whales were captured from the Sakhalin Bay of the Sea of Okhotsk and are currently being kept at a Russian marine mammal research facility. The National Marine Fisheries Service (NMFS) denied the permit on the grounds that there were too many unknowns regarding the possible negative impacts of the removal of these whales from the wild. On appeal, NMFS argued that the Aquarium failed to demonstrate that any taking or importation of marine mammals would be consistent with the MMPA. The court found that, despite the Aquarium's claim that the denial of the permit was arbitrary and capricious, NMFS's actions were consistent with the purposes and requirements of the MMPA.

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D.C. CIRCUIT

***Sierra Club v. U.S. Army Corps of Engineers*, 2015 WL 5692095 (D.C. Cir. Sept. 29, 2015).**

The U.S. Court of Appeals for the D.C. Circuit recently upheld the dismissal of an environmental group's National Environmental Policy Act (NEPA) and Clean Water Act (CWA) claims against the U.S. government regarding a 593-

mile oil pipeline running from Illinois to Oklahoma on both public and private lands. The court held that the government was not required to conduct a NEPA analysis of the entirety of the pipeline—only an analysis of the foreseeable direct and indirect effects of its regulatory actions is required. The court found that the government's authorizations were limited to discrete geographic segments of the pipeline making up less than 5% of its overall length. Accordingly, the scope of the government's NEPA analysis of the pipeline was proper.

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