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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the August 2016 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-16-03-08).

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FIRST CIRCUIT

Paolino v. JF Realty, LLC, No. 15-1498 (1st Cir. July 18, 2016).

The Rhode Island Department of Environmental Management required JF Realty to install stormwater control measures and obtain a Rhode Island Pollution Discharge Elimination System (RIPDES) permit after a business located on its property allegedly contaminated an adjacent lot. After JF Realty made the changes, Paolino, owner of the adjacent lot, subsequently filed a Clean Water Act citizen suit against JF Realty, alleging it discharged contaminates into U.S. waters without a valid RIPDES permit. The district court ruled in favor of the defendant, finding Paolino did not meet his burden of proof. JF Realty subsequently filed a motion for attorney's fees, and the court ordered Paolino to pay the attorney's fees. On appeal, the U.S. Court of Appeals for the First Circuit affirmed, finding that the district court did not err when it excluded expert witness testimony, ruled in favor of the defendant, and awarded JF Reality's attorney's fees.

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THIRD CIRCUIT

Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Envtl. Prot., No. 15-2122 (3d Cir. Aug. 8, 2016).

The U.S. Court of Appeals for the Third Circuit recently reviewed permitting decisions by the Pennsylvania Department of Environmental Protection (PADEP) and the New Jersey Department of Environmental Protection (NJDEP) for expansion of a portion of a pipeline that connects gas wells in Pennsylvania to the main pipeline. Environmental organizations challenged the agencies' issuance of the permits. The Third Circuit concluded that it had jurisdiction to review the permitting decisions under the Natural Gas Act, and neither agency acted arbitrarily or capriciously in issuing the permits.

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FIFTH CIRCUIT

Thomas v. Chevron USA, No. 15-20490 (5th Cir. Aug. 11, 2016).

While captain of a supply vessel off the Nigerian coast, pirates attacked Wren Thomas's vessel and held him captive for 18 days. Thomas sued Chevron and Edison Chouest Offshore, asserting claims under the Jones Act and for maintenance and cure. Chevron filed a motion to dismiss on the basis that it was not Thomas's employer. The district court denied Thomas's motion to amend his pleadings and remanded the matter for further proceedings. After Thomas moved to amend his complaint to assert claims under general maritime law, the court denied the motion and entered summary judgment in favor of Chevron. On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed the lower court's decision, finding that the plaintiff gave sufficient notice of his intent to amend his complaint and his amended claims would not have been futile.

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Louisiana

Warren v. Shelter Mut. Ins. Co., Nos. 15-838,15-354,15-1113 (La. Ct. App. June 29, 2016).

When a boat's hydraulic steering system failed due to a small oil leak, Derek Hebert was thrown overboard and struck by a boat propeller, causing his death. His parents brought survival and wrongful death claims, alleging that the steering system, manufactured by Teleflex, was defective and Teleflex breached its duty to warn users of the system's dangers. A jury found in favor of Teleflex, but the trial court granted the father's motion for a new trial, finding that a prejudicial error occurred. The second jury found in favor of the father and awarded more than $23 million in damages. On appeal, the court affirmed the lower court's judgments holding 1) manufacturers have a duty to warn consumers of its product's dangers, 2) Teleflex knew of its product's dangers, and 3) Teleflex failed to adequately warn its users because warnings were not placed in obvious locations, such as near the boat's steering wheel and the system's oil tank.

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NINTH CIRCUIT

Nat. Res. Def. Council v. Pritzker, No. 14-16375 (9th Cir. July 15, 2016).

The National Marine Fisheries Service's (NMFS) 2012 Final Rule authorized the incidental take of marine mammals for the Navy's Low Frequency Active (LFA) sonar activities and included a mitigation measure that prohibited sonar at specific decibels in designated "offshore biologically important areas." Environmental groups filed suit under the Administrative Procedure Act, claiming that NMFS acted arbitrarily in promulgating the Final Rule since the mitigation measure did not satisfy the Marine Mammal Protection Act's (MMPA) "least practicable adverse impact" standard. The lower court ruled in favor of NMFS. On appeal, the U.S. Court of Appeals for the Ninth Circuit held that NMFS must achieve both the "least practicable adverse impact" and "negligible impact" standards in order to authorize an incidental take. The court also held that the Final Rule did not establish means of "effecting the least practicable adverse impact on" marine mammal species as required under the MMPA. Additionally, the court held that NMFS did not give adequate protection to ocean areas flagged as biologically important.

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Pac. Dawn LLC v. Pritzker, No. 14-15224 (9th Cir. Aug. 3, 2016).

A fish harvester and fish processor filed suit against the National Marine Fisheries Service (NMFS), alleging that it failed to consider the groups' present participation in the Pacific whiting fishery when instituting a fishery management program that limited their share of total allowable catch. The plaintiffs specifically objected to the agency's selection of a qualifying period ending in 2003 and 2004 for harvesters and fish processors, respectively. The U.S. District Court for the Northern District of California granted NMFS summary judgment. On appeal, the Ninth Circuit found that NMFS properly considered the harvesters' and processors' present participation in the fishery, and their dependence upon the fishery, as required by the Magnuson-Stevens Act. The court concluded that the harvester and processor groups waived their argument that NMFS violated national standards that require the allocation of fishing privileges to be fair and equitable by failing to raise the argument before district court. The appellate court affirmed the district court's decision.

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Glacier Fish Company LLC v. Pritzker, No. 15-35103 (9th Cir. Aug. 10, 2016).

In December 2013, NMFS published a final rule and final regulations that required members of a catcher-processor co-op to pay a percentage of the revenue earned by each vessel as a fee to NMFS. Glacier Fish Company, a co-op member, challenged the requirement. A Ninth Circuit panel held that the agency had the authority to require Glacier to pay the fee, but the agency's calculation of the amount of the 2014 cost recovery fee was inconsistent with its own regulations. The court reversed the district court's summary judgment of the case to the extent it upheld NMFS's fee calculation. The panel remanded to the agency to re-determine that fee in accordance with its regulations.

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California

Prop. Reserve, Inc., v. Super. Ct. of San Joaquin Cty., No. S217738 (Cal. July 21, 2016).

The California Department of Water Resources (Department) sought to conduct environmental and geological testing on more than 150 privately owned properties under consideration for acquisition for the construction of a drinking water transport tunnel. The Department sought court orders granting it the authority to enter the properties and conduct such testing activities under the state eminent domain law's pre-condemnation entry and testing provisions.

The lower court denied the Department's geological request, finding it could only gain such authority through a condemnation action. The appellate court found that the pre-condemnation entry and testing provisions did not satisfy the state's takings clause, and both the environmental and geological testing constituted a taking or damaging of property. On appeal, the California Supreme Court held the pre-condemnation entry and testing provisions would not violate the state's taking clause if the provisions' procedures are reformed to allow property owners to obtain a jury damages determination.

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Washington

Puget Soundkeeper All. v. United States Envtl. Prot. Agency, No. 2:16-CV-00293-BJR (W.D. Wash. Aug. 3, 2016).

In 2015, the U.S. Environmental Protection Agency (EPA) found that Washington set its fish consumption rate too low and proposed a new fish consumption rate for use in calculating Washington's water quality standards. Under the Clean Water Act (CWA), the EPA had ninety days to promulgate revised water quality standards for Washington after the agency issued its proposed standards. After EPA missed the deadline, several environmental groups brought suit. The groups filed a motion for summary judgment, seeking an injunction that ordered the EPA to comply with the CWA and promulgate revised water quality standards within thirty days of the court order. The EPA also moved for summary judgment, agreeing that an injunction should be entered but requesting a longer timeframe. The court ultimately ordered EPA to promulgate revised water quality standards for Washington State by September 15, 2016, or, in the alternative, by November 15, 2016, if the state submits its own water quality standards by September 15.

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ELEVENTH CIRCUIT

Tundidor v. Miami-Dade Cty., No. 15-12597 (11th Cir. Aug. 3, 2016).

A boat passenger was injured when he struck his head on a water pipe after passing under a canal bridge. The passenger brought a personal injury action under federal admiralty jurisdiction against Miami-Dade County. The U.S. District Court for the Southern District of Florida dismissed the case for lack of jurisdiction. On appeal, the U.S. Court of Appeals for the Eleventh Circuit held that federal admiralty jurisdiction was not proper in this case, as the canal was obstructed by a water control structure, which prevented vessels from using the canal for interstate commerce, as required for federal admiralty jurisdiction.

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D.C. CIRCUIT

Earthreports, Inc. v. Fed. Energy Regulatory Comm'n, No. 15-1127 (D.C. Cir. July 15, 2016).

The Federal Energy Regulatory Commission (FERC) authorized the conversion of the Cove Point liquefied natural gas

(LNG) facility from an import maritime terminal to a mixed-use import and export terminal. Several environmental organizations brought suit claiming that FERC did not satisfy its obligations under the National Environmental Policy Act (NEPA), because it failed to take a hard look at several possible environmental impacts from the conversion project. On appeal, the U.S. Court of Appeals for the D.C. Circuit the court held that NEPA did not require FERC to consider the indirect effects of increased natural gas exports, including climate change impacts. Further, the court found that FERC adequately addressed ballast water, the North Atlantic right whale, and public safety concerns.

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Mingo Logan Coal Co. v. Envtl. Prot. Agency, No. 14-5305 (D.C. Cir. July 19, 2016).

Four years after the U.S. Army Corps of Engineers issued Mingo Logan Coal Company (Mingo) a Clean Water Act (CWA) permit to dispose of excess soil from its mountain top mining operations into nearby valleys containing waterways, the U.S. Environmental Protection Agency (EPA) withdrew the permit, finding the project would result in "'unacceptable adverse effects' to the environment." Mingo challenged the EPA's determination alleging 1) EPA lacked statutory authority under the CWA to revoke the permit, and 2) the EPA's Final Determination to revoke the permit was arbitrary and capricious in violation of the Administrative Procedure Act (APA). After the circuit court found that the EPA had statutory authority to revoke the permit, it remanded the APA claim to the district court. The district court held the EPA's Final Determination complied with the APA, because the effects on valley and downstream wildlife supported the EPA's decision. On appeal, the court affirmed and concluded that the EPA did not violate the APA, because it considered relevant factors and adequately explained its decision.

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