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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the February 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-16-03-02).

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SECOND CIRCUIT

Friends of Animals v. Clay, 2016 WL 305359 (2d Cir. Jan. 26, 2016).

The U.S. Court of Appeals for the Second Circuit upheld the U.S. Fish and Wildlife Service's (FWS) issuance of a depredation permit to the Port Authority of New York and New Jersey, which authorized the emergency take of migratory birds that threaten to interfere with aircraft at John F. Kennedy International Airport. An animal rights group filed the suit against FWS, alleging that the agency did not have the authority to issue a permit that allowed non-species-specific emergency-take provisions. The U.S. District Court for the Eastern District of New York granted summary judgment in favor of the agency. On appeal, the Second Circuit agreed that regulations enacted under the Migratory Bird Treaty Act clearly authorize the FWS to issue such permits.

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THIRD CIRCUIT

U.S. ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC, 2016 WL 386087 (3d Cir. Feb. 2, 2016).

The U.S. Court of Appeals for the Third Circuit recently reversed a district court's dismissal of an action brought by a

law firm alleging that owners of fishing vessels violated the False Claims Act (FCA) by certifying that fishing vessels were controlled by U.S. citizens and commanded by U.S. captains in order to obtain licenses for Korean nationals to fish under the South Pacific Tuna Treaty (SPTT). The U.S. District Court for the District of Delaware granted the owners' motion to dismiss, finding that the law firm was not an "original source" of certain information underlying the action, a requirement of the FCA. On appeal, the court found that the law firm was an original source, as it possessed knowledge of the alleged fraud that was independent of publicly disclosed allegations or transactions. Further, the firm's independent knowledge of the alleged fraud materially added to publicly disclosed information.

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FOURTH CIRCUIT

Maryland

Litz v. Maryland Dep't of Env't, 2016 WL 280947 (Md. Jan. 22, 2016).

The Maryland Court of Appeals ruled that a property owner could bring a Fifth Amendment takings claim based on a governmental entity's failure to act. Gail Litz brought an action against the Maryland Department of the Environment, the town of Goldsboro, and Caroline County alleging that because the entities failed to enforce a consent agreement that required cleanup of septic pollution on her property, she lost business on her lakefront campground, which resulted in the loss of her property through foreclosure. A lower court granted defendants' motions to dismiss. On appeal, the court ruled "... that an inverse condemnation claim is pleaded adequately where a plaintiff alleges a taking caused by a governmental entity's or entities' failure to act, in the face of an affirmative duty to act." Litz may now proceed with her claim in circuit court.

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Lagna v. People's Counsel ex rel. Baltimore Cty., 2016 WL 327029 (Md. Ct. Spec. App. Jan. 27, 2016).

The Court of Special Appeals of Maryland affirmed a lower court's denial of a property owner's bid to establish the right to use his property for a nonconforming use as a "private boat club." Following hearings, both the Baltimore County Office of Administrative Hearings and the Baltimore County Board of Appeals had denied his request. On appeal from the circuit court, the court agreed that the Board's decision not to allow the nonconforming use was supported by the record.

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NINTH CIRCUIT

California

Sud v. Costco Wholesale Corp., 2016 WL 192569 (N.D. Cal. Jan. 15, 2016).

The U.S. District Court for the Northern District of California dismissed a lawsuit against Costco that alleged shrimp sold by the stores did not comply with the supplier code of conduct on human rights advertised on the company's website. The plaintiff claimed that she was harmed by purchasing farmed shrimp from Thailand that was "derived from a supply chain that depends upon documented slavery, human trafficking and other illegal labor abuses." Using

its membership tracking system, Costco produced receipts showing that the shrimp purchased by the plaintiff and her mother were from Vietnam and Indonesia, not Thailand. The court granted the company's motion to dismiss the complaint for lack of standing, with leave to amend.

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Pac. Shores Prop. Owners Ass'n v. Dep't of Fish & Wildlife, 2016 WL 234482 (Cal. Ct. App. Jan. 20, 2016).

A California appellate court ruled that the state Department of Fish and Wildlife's (DFW) reduction of flood control for certain property was an inverse condemnation by physical taking. Property owners in an undeveloped subdivision along a lagoon's shore suffer flood damage when the lagoon rises above a certain level. After DFW assumed control of the flood control process from a local agency and decided to provide less protection than previously afforded, the owners filed an inverse condemnation action against DFW and the California Coastal Commission. A lower court found DFW and the Commission liable for a physical taking and awarded damages, but concluded the owners' claim for a regulatory taking was barred, awarded owners attorney fees, and denied owners any precondemnation damages. On appeal, the court affirmed, but reversed the judgment finding the Commission liable.

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Washington

Snohomish Cty. v. Pollution Control Hearings Bd., 2016 WL 225256 (Wash. Ct. App. Jan. 19, 2016).

Several counties and a building industry association appealed a review board's order upholding a Washington Department of Ecology permit condition requiring counties to apply new stormwater regulations to certain property development applications. The appellants claimed that the conditions conflicted with the vested rights doctrine. The doctrine requires that a land use application generally must be contemplated under the zoning or other land use control ordinances in effect at the time the application was submitted. The appellate court noted that the permit's required stormwater regulations are "land use control ordinances" under the vested rights statutes and enforcement of the conditions would violate the statutory vested rights of developers who submit applications before July 1, 2015 but do not begin construction until after June 30, 2020. The court also noted that the Clean Water Act did not preempt the state's vested rights statutes.

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ELEVENTH CIRCUIT

Alabama

Regions Bank v. BP P.L.C., 2016 WL 360700 (Ala. Jan. 29, 2016).

Regions Bank brought a trespass action against BP, alleging damages related to the *Deepwater Horizon* oil spill. BP argued that the bank's claims were covered by the 2012 multidistrict litigation settlement agreement for economic and property damages. A lower court agreed and dismissed the action, finding that because the bank did not opt out of the class its claims were discharged. On appeal, Regions argued, and the court agreed, that the bank was not a member of the class settlement agreement since the agreement clearly excluded commercial banks as class members.

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FEDERAL CLAIMS

Alford v. United States, 2016 WL 465489 (Fed. Cl. Feb. 8, 2016).

Mississippi property owners filed a claim alleging that the U.S. Army Corps of Engineers effected a Fifth Amendment taking of their property by diverting flood waters from the Mississippi River onto their property. The owners also argued that the diversion violated the takings clause of the Mississippi Constitution and constituted a nuisance or trespass under Mississippi common law. The court granted the defendant's motion to dismiss the state law claims, noting that the Federal Claims court did not have jurisdiction over those claims.

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