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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the July 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-16-03-07).

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SECOND CIRCUIT

Connecticut

Indian Spring Land Co. v. Inland Wetlands, No. 19591 (Conn. July 5, 2016).

Indian Spring Land Company sought a permit from the Connecticut Inland Wetlands and Watercourses Agency to conduct forest management work and construct a gravel road across a small wetland area on its property. After finding the operations were permitted, the agency issued the company a permit that required a removable steel bridge over the wetland area. The company appealed the agency's decision, alleging its road construction activities were directly related to its farming operations and thus permitted "as of right" under the Inland Wetlands and Watercourses Act (Act). The lower court found the company was not exempt from the agency's oversight because the Act provided the agency with jurisdiction over all types of road construction. On appeal, the Supreme Court ruled that the agency could not attach special conditions to the permit, as the Act's plain language excludes road construction directly related to farming operations from regulatory oversight.

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FIFTH CIRCUIT

Texas

Chambers-Liberty Counties Navigation Dist. v. State, No. 03-15-00744-CV (Tex. App. July 8, 2016).

Texas conveyed over 23,000 acres of submerged land to the state's Chambers-Liberty Counties Navigation District (District). The District subsequently leased a portion of the land and granted oyster cultivation and harvesting rights to Sustainable Texas Oyster Resource Management LLC (STORM). The state sued the District, alleging the lease exceeded the District's statutory authority and sought declaratory relief that the lease was void. The state also sought restitution for the value of each oyster STORM possessed. The lower court denied the District's sovereign immunity jurisdictional plea and motion to dismiss. On appeal, the court held that the State legislature expressly waived the District's immunity and authorized retrospective relief for unlawful oyster possession. The court declared that the district's commissioners acted outside their authority, thus voiding the lease.

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SIXTH CIRCUIT

Kentucky

Harrison Silvergrove Prop., LLC v. Campbell Cty. & Mun. Bd. of Adjustments, No. 2014-CA-000619-MR (Ky. Ct. App. July 8, 2016).

C & B, a marine transport company, sought a conditional use permit to build a "dockage facility" on its River Recreation/Conservation zoned property. The Campbell County and Municipal Board of Adjustment (Board) denied C & B's permit application, finding C & B's proposed facility was for heavy industrial, rather than recreational use. C & B appealed the Board's decision, alleging it was arbitrary. The circuit court found the Board's decision was not arbitrary because 1) it did not exceed its statutory authority when interpreting "dockage facility" to be limited to"recreational" facilities, 2) it did not violate C & B's procedural due process rights, and 3) the substantial evidence supported the permit denial. The appellate court affirmed the circuit court's findings and declared that the Board is vested with limited interpretive authority and correctly interpreted "dockage facility" within the ordinance's framework.

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SEVENTH CIRCUIT

Illinois

Hampton v. Metro. Water Reclamation Dist. of Greater Chi., No. 119861 (Ill. July 8, 2016).

During a heavy rainfall, the Metropolitan Water Reclamation District of Greater Chicago closed several floodgates and diverted stormwater into nearby creeks, allegedly causing several waterways to overflow and damage adjacent properties. The property owners brought suit, alleging the temporary flooding constituted a compensable taking under Illinois law. The trial court certified the takings claim, and the appellate court held that a temporary flooding was not a compensable taking under Illinois state law. On review, the Illinois Supreme Court considered whether federal case law, which held that temporary flooding may constitute a taking, overruled conflicting state law. The

court found 1) federal cases are relevant to Illinois law because the federal and Illinois Constitutions use "taking" synonymously, 2) the federal and state cases are not in conflict, because neither impose a strict takings rule regarding temporary flooding, and 3) the Illinois Takings Clause is broader than its federal counterpart, providing a damaged property remedy. The court reversed the appellate court's decision and remanded the case to the circuit court to consider the merits of the argument in light of this ruling.

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EIGHTH CIRCUIT

Iowa

Estate of McFarlin v. State, No. 14-1180 (Iowa June 17, 2016).

While boating on a state-owned lake, Foote drove his boat between two buoys marked "Dredge Pipe" and hit the pipe, causing the boat's propeller to flip into the boat and kill a young boy. The boy's mother brought a wrongful death action against the State of Iowa, alleging that the state failed to adequately mark the pipe. The district court granted the state's summary judgment motion, finding that the public-duty doctrine, which protects government agencies and employees from suit when they are acting in a capacity benefitting the general public, barred her claim. The appellate court affirmed, and the Iowa Supreme Court granted further review. The court declared Iowa laws empowering the state Department of Natural Resources to regulate lake use neither expressly nor implicitly created a private right to sue. Additionally, the court held that the public-duty doctrine barred the mother's claim, because boaters are members of the general public and are not subject to the "specialized group" exception.

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NINTH CIRCUIT

United States v. Washington, No. 13-35474 (9th Cir. June 27, 2016).

In the mid-1800s, the State of Washington guaranteed numerous Pacific Northwest Indian tribes off-reservation fishing access in exchange for relinquishing portions of their lands to the state. Pursuant to a previous court decision that held the agreement also guaranteed tribes an adequate amount of fish to sustain a "moderate living," twenty-one Indian tribes requested the court to determine whether the state violated the agreement by building and maintaining culverts. The tribes alleged that the culverts prevented salmon from traveling to their spawning ground and significantly decreased their population over time. The district court issued an injunction ordering the state to correct the culverts after finding the culverts impeded or blocked salmon access to almost five million square meters of suitable salmon habitat with the potential to produce "several hundred thousand…salmon…each year." On appeal, the court affirmed the district court's holding and declared building and maintaining culverts violates the state's obligations under the agreement.

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Cal. Sea Urchin Comm'n v. Bean, No. 14-55580 (9th Cir. July 12, 2016).

As a part of the species recovery plan for the California sea otter, the U.S. Fish and Wildlife Service (FWS) promulgated the California sea otter translocation program Final Rule in 1987. The program established an experimental otter population near San Nicolas Island and exempted fishermen from the Endangered Species Act and Marine Mammal Protection Act take prohibitions within the "management zone." However, the program was unsuccessful, and the FWS terminated it in 2012. The California Sea Urchin Commission brought Administrative Procedure Act claims alleging that the FWS violated its statutory authority by terminating the translocation program. The lower court held that the complaint was untimely because it challenged the 1987 Final Rule. On appeal, the court held the commission timely challenge the FWS 2012 Final Rule terminating the translocation program because it was filed within six years of the 2012 Final Rule's promulgation.

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California

Duarte Nursery, Inc. v. U.S. Army Corps of Eng'rs, No. 2:13-cv-02095-KJM-AC (E.D. Cal. June 10, 2016).

After Duarte Nursery tilled its newly purchased property, the U.S. Army Corps of Engineers (Corps) issued a cease and desist letter to Duarte, claiming that the nursery's activities violated the Clean Water Act (CWA) by discharging dredged material into seasonal wetlands located on the property. Duarte brought constitutional claims against the Corps, alleging it violated the nursery's due process right and right against retaliatory prosecution. The Corps counterclaimed, alleging Duarte violated the CWA. The court held Duarte violated the CWA because the tilling equipment moved and redeposited soil within the wetlands area of the property that have a "significant nexus" to Coyote Creek, and the new tilling activity did not fall within the CWA's farming exemption. Additionally, the court declared the Corps' cease and desist letter did not deprive Duarte of a property interest and the Corps' sovereign immunity barred Duarte's retaliation claim.

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TENTH CIRCUIT

Wyoming

Wyoming v. U.S. Dep't of the Interior, No. 2:15-CV-043-SWS (D. Wyo. June 21, 2016).

In March 2015, the Bureau of Land Management (BLM) published its final rule regulating hydraulic fracturing (fracking) on federal and Indian lands (Rule). Industry members and the States of Wyoming and Colorado sought judicial review of the Rule under the Administrative Procedure Act, alleging the Rule is arbitrary, not in accordance with law, in excess of the BLM's statutory jurisdiction and authority, and contrary to the federal trust obligations to Indian tribes. The court held that the BLM lacked Congressional authority to promulgate the Rule because 1) neither the Federal Land Policy and Management Act nor the Mineral Leasing Act grants the BLM specific authority to regulate fracking, 2) Congress vested the Environmental Protection Agency (EPA) through the Safe Drinking Water Act with the authority and duty to regulate fracking, and 3) Congress explicitly removed the EPA's regulatory authority over non-diesel fracking in the Energy Policy Act of 2005.

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ELEVENTH CIRCUIT

Frasca v. NCL (Bahamas) Ltd., No. 1:12-cv-20662-JG (11th Cir. June 30, 2016).

While aboard a cruise ship operated by NCL (Bahamas) Ltd. (NCL), Thomas Frasca slipped and fell on the ship's wet deck, detaching his right hamstring. Frasca brought negligence claims against NCL, alleging it failed to maintain the deck and warn of its slippery condition. The district court granted NCL's summary judgment motion, finding NCL did not have a duty to warn of the deck's "open and obvious" condition, and Frasca failed to produce evidence that NCL had prior notice of the deck's dangerous condition. The court also entered summary judgment for NCL on Frasca's negligent maintenance claim, finding it was not adequately pled. On appeal, the court reversed both summary judgment motions, finding Frasca raised genuine issues of material fact concerning the deck's "open and obvious" condition and NCL's prior notice of the deck's slippery condition. A report suggested the deck was unreasonably slippery when wet and NCL's safety video warns of the deck's dangerous condition. The court also held that Frasca adequately pled his negligence maintenance claim.

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D.C. CIRCUIT

Pub. Emp. for Envtl. Responsibility v. Hopper, No. 14-5301 (D.C. Cir. July 5, 2016).

The Cape Wind Energy Project is a proposed offshore wind farm located in Nantucket Sound. Public Employees for Environmental Responsibility and others (Plaintiffs) brought Administrative Procedure Act claims alleging, among others, that 1) the Bureau of Ocean Energy Management (BOEM) violated the National Environmental Policy Act (NEPA) by relying on inadequate geological surveys when creating the Project's environmental impact statement (EIS), and 2) the U.S. Fish and Wildlife Service (FWS) violated the Endangered Species Act (ESA) by issuing an incidental take permit that did not incorporate the best available scientific data or specify a particular mitigation measure. While the district court did not specifically address the Plaintiff's NEPA claim, the court held the FWS did not violate the ESA because a previous court order only required the FWS to clarify that it independently evaluated the final incidental take permit. On appeal, the court vacated the EIS, declaring that the BOEM was required to consider the lease's "predictable consequences" at the time it issued the EIS. Additionally, the court vacated the incidental take permit, finding the FWS reopened the administrative record and was required to consider the Plaintiff's mitigation measure.

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