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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the June 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-16-03-06).

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U.S. SUPREME COURT

U.S. Army Corps of Eng'rs v. Hawkes Co., 2016 WL 3041052 (U.S. May 31, 2016).

The U.S. Supreme Court held that landowners may sue the U.S. Army Corps of Engineers to challenge the agency's wetlands determinations. The case arose when three companies sought a Clean Water Act permit to mine peat on their property. The Corps issued an approved jurisdictional determination (JD) finding the property contained "waters of the United States." The companies sought judicial review of the JD under the Administrative Procedure Act (APA). The Corps argued that JDs are not subject to review under the APA because they are not final agency action. The district court agreed and dismissed the case for lack of subject matter jurisdiction. On appeal, the Eighth Circuit reversed, and the U.S. Supreme Court granted certiorari. The Court held that an approved JD is a final agency action, because it is the point at which the agency's decision making process is finalized and legal consequences may flow. Additionally, the Court noted that landowners risking enforcement from performing unpermitted activities or seeking judicial review once an unsatisfactory permit has been received were not adequate alternatives to APA review.

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FIRST CIRCUIT

Maine

Osprey Family Trust v. Town of Owls Head, 2016 WL 3165600 (Sup. Jud. Ct. Me. June 7, 2016).

The Osprey Family Trust sought to replace a dilapidated deckhouse with a larger structure located partly within a town's Shoreland Zoning Ordinance (SZO) setback zone. The Planning Board approved the Trust's plan; however, two town residents appealed the Board's decision, claiming it erred in finding the project conformed with the SZO setback requirements. The Board of Appeals (BOA) found that the Planning Board erred in approving the plan, because the structure was not relocated "to the greatest practical extent" outside the setback zone. The superior court affirmed the BOA's decision. On appeal, the Supreme Judicial Court of Maine declared a new structure's total floor area cannot extend into a setback zone if the original structure could be relocated beyond the setback area.

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FOURTH CIRCUIT

Maryland

Assateague Coastal Trust, Inc. v. Schwalbach, 2016 WL 2956538 (Md. May 23, 2016).

Roy Schwalbach sought a local zoning variance to build a pier across a portion of his property that contains marshlands protected under the state's Critical Area law. After the Board of Zoning Appeals granted the variance, Assateague Coastal Trust sought judicial review, claiming the Board's decision was defective, because 1) denying the variance would not deny Schwalbach "all reasonable and significant use of the entire property," 2) Schwalbach failed to show that no adverse environmental impacts would result from the variance, and 3) the Board did not explicitly find that Schwalbach rebutted the statutory presumption of non-conformity. Both the circuit court and court of special appeals affirmed the Board's decision. On appeal, the appellate court declared an applicant must show that a variance denial would deny the property owner a use of the property that is significant and reasonable and the use cannot be relocated. The court found Schwalbach had submitted sufficient evidence of no adverse environmental impact, and he rebutted the statutory presumption of non-conformity.

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South Carolina

Green v. S.C. Elec. & Gas Co., 2016 WL 3180102 (D.S.C. June 8, 2016);

Benjamin v. S.C. Elec. & Gas Co., 2016 WL 3180100 (D.S.C. June 8, 2016);

Melton v. S.C. Elec. & Gas Co., 2016 WL 3180103 (D.S.C. June 8, 2016).

During a "1,000-year probability" flood in South Carolina, South Carolina Electric & Gas (SCE&G) allegedly opened three floodgates to a dam. Three property owners (plaintiffs) separately brought negligence, inverse condemnation, trespass, and strict liability actions against SCE&G claiming its water management resulted in destruction of their homes. Two plaintiffs brought similar actions against CSX Transportation, Inc. (CSX) for its maintenance and operation of bridge culverts. SCE&G filed a Notice of Removal to federal court in each case, and the plaintiffs filed Motions to Remand. The district court declared it had original jurisdiction over the plaintiffs' negligence claims for several reasons: 1) the plaintiffs "necessarily raised" a federal issue (i.e. SCE&G's duty of care under a Federal Energy Regulatory Commission (FERC) license), 2) the parties disputed whether a duty was owed, 3) the issue was substantial to ensure consistent FERC orders, and 4) resolution in federal court would not disturb federal and state judicial responsibilities. Because the plaintiffs' other claims were a part of the negligence claims controversy, the court declared it had supplemental jurisdiction over the other claims.

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FIFTH CIRCUIT

Louisiana

Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs, 2016 WL 3180643 (E.D. La. June 8, 2016).

For nearly two years, the U.S Army Corps of Engineers (Corps) authorized the filling of wetlands under an expired regional "general permit" and subsequently reissued the permit without public participation and environmental reviews. Atchafalaya Basinkeeper filed suit against the Corps, claiming it had failed to comply with the Clean Water Act and the National Environmental Policy Act. The Corps requested a voluntary remand without vacatur and a temporary stay of all proceedings until June 2017 in order to determine whether a modification or revocation of the permit was in the public's interest. The court granted the voluntary remand and temporary stay, finding the remand was neither arbitrary nor capricious because it serves judicial economy, provides the Corps an opportunity to remedy any mistakes, and the court would have likely remanded the case to the Corps had it found the Corps' initial decision lacked sufficient evidence. However, the court limited the stay to ninety days finding such was a "more appropriate" time frame.

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Texas

Conservation Force v. Delta Air Lines, Inc., 2016 WL 3166279 (N.D. Tex. June 6, 2016).

Following the death of Cecil the Lion, Delta Air Lines announced it would no longer transport "Big Five" animal trophies. Multiple safari clubs jointly filed suit against Delta claiming the new policy 1) discriminated against safari clubs by refusing to transport Big Five trophies in violation of federal common law, 2) was a tortious interference with business relations, and 3) violated the Federal Aviation Act (FAA), which prohibits unreasonable discrimination. Delta moved to dismiss all claims for failure to state claims upon which relief can be granted. The court granted Delta's motions declaring a common carrier is allowed to discriminate as to what it carries, the Airline Deregulation Act preempts tortious interference claims based on "airline services," and the FAA lacked an expressed or implied private right of action.

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NINTH CIRCUIT

Protect Our Communities Found., et al. v. Jewell, 2016 WL 3165630 (9th Cir. June 7, 2016).

The BLM granted Tule Wind, LLC a right-of-way to construct and operate a wind energy facility on federal lands. A nonprofit brought suit in federal court, alleging the project's Environmental Impact Statement (EIS) failed to comply with National Environmental Policy Act (NEPA) requirements and the right-of-way harms birds in violation of the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act (Eagle Act). The parties cross-

motioned for summary judgment, and the district court granted BLM's motion, finding the final EIS conformed to NEPA requirements, and BLM was not responsible for ensuring MBTA and Eagle Act permits were obtained prior to granting the right-of-way. On appeal, the circuit court declared 1) BLM acted within its discretion, 2) the EIS incorporated numerous mitigation measures, and 3) BLM took a "hard look" at avian, inaudible noise, stray voltage, and greenhouse-gas emission impacts. Furthermore, the court declared neither the MBTA nor the Eagle Act imposed secondary liability on agencies acting in their "purely regulatory capacity" that did not proximately cause the "taking" of a bird and the BLM's regulatory role is "too far removed" from either Act to be held liable under the Administrative Procedure Act.

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California

Jones v. U.S. Dep't of the Navy, 2016 WL 3033859 (S.D. Cal. May 27, 2016).

Two navy members were forever lost at sea after a wave washed their helicopter overboard during a ship maneuvering operation. The families of the deceased brought negligence and strict product liability actions against the Navy, the ship's designers and manufacturer, and Prudential Insurance Company claiming 1) the Navy negligently maneuvered the ship, 2) the designers designed a ship known to "unreasonably and unnecessarily endanger...aircrew," 3) the manufacturer should have known of the design defect and failed to warn, and 4) Prudential failed to notify a spouse of her husband's decline of life insurance coverage. The court dismissed the plaintiffs' first and fourth causes of action with prejudice, finding, respectively, the Feres doctrine precluded such action and the plaintiffs failed to state a claim upon which relief can be granted. The court dismissed the plaintiffs' second and third causes of action without prejudice finding they were preempted by the Death on the High Seas Act.

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Washington

Pac. Coast Shellfish Growers Ass'n v. U.S. Army Corps of Eng'rs, 2016 WL 3000259 (W.D. Wash. May 25, 2016).

The U.S. Army Corps of Engineers (Corps) denied a shellfish growers association a Freedom of Information Act (FOIA) request regarding a draft Programmatic Biological Assessment (PBA). After the Corps failed to act on the group's administrative appeal, the association filed suit seeking to compel disclosure. The court granted the Corps' motion for summary judgment, finding the PBA fell under FOIA's Deliberative Process Privilege. The court noted that the PBA was prepared to advise the federal agencies in preparing a programmatic biological opinion and is "open to discretionary decision making." The Corps did not waive its privilege by releasing an earlier draft PBA.

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D.C. CIRCUIT

District of Columbia

Flaherty v. Pritzker, No. 11-0660 (D.D.C. June 14, 2016).

In 2013, the National Marine Fishery Service (NMFS) issued the final rule for the Atlantic Herring Fishery

Specifications for the 2013-2015 Fishing Years (Fishery Specifications). Fishermen and the Ocean River Institute (plaintiffs) brought Magnuson-Stevens Fishery Conservation and Management Act (MSA), National Environmental Policy Act (NEPA), and Administrative Procedure Act (APA) claims alleging 1) the Fishery Specifications did not prevent overfishing in violation of MSA, 2) NMFS failed to consider reasonable alternatives as required by NEPA, and 3) NMFS acted arbitrarily and capriciously in failing to consider a control rule consistent with a Remedial Order. The court declared that while having an overfishing limit equal to the actual biological catch limit "does provide some cause for concern," it is permitted. Additionally, the court determined NMFS satisfied its NEPA obligations by considering three control rule alternatives.

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National Sea Grant Law Center
256 Kinard Hall, Wing E
University, MS 38677-1848