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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the December 2017 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-17-03-12).

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FOURTH CIRCUIT

Maryland

Chesapeake Bay Foundation, Inc. v. K. Hovnanian & Four Seasons at Kent Island, LLC, 2017 WL 5629679 (Md. Ct. Spec. App. Nov. 22, 2017).

A developer proposed a mixed-use adult community known as **Four Seasons** on Kent Island. The Maryland Board of Public Works granted the developer a state tidal wetlands license, which is a requirement for dredging or filling on state-owned tidal wetlands. Several groups and individuals (collectively, plaintiffs) challenged the license in court. A trial court upheld the license, and the plaintiffs appealed on the basis that the Board did not have the information required by law to grant the license. The plaintiffs argued that the developer first had to receive final county approval of complete stormwater management plans before the license could be issued. The court found no statute or regulation requiring final approval nor any evidence that the information presented by the developer was insufficient to grant the license. The plaintiffs also alleged that the Board did not provide sufficient public participation, arguing that there should have been more than one public informational hearing. The court disagreed, noting that the plaintiffs did not present any statute or regulation that would support the requirement for further public hearings.

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SIXTH CIRCUIT

Michigan

Eager v. Peasley, No. 336460, 2017 WL 5907310 (Mich. Ct. App. Nov. 30, 2017).

The Peasleys owned a cottage and rented it out on a short-term basis and advertised its availability on homeaway.com. Neighboring property owners, the Eagers, sued, because the warranty deed on the cottage included a provision stating that the cottage would only be used as a private occupancy and private dwelling. Additionally, the title prohibited commercial uses of the property. The trial court denied the Eagers' request for an injunction. On appeal, the court held that use of the property as a short-term rental did not meet the warranty deed's private occupancy requirement. However, the court found the Peasleys violated the commercial use title restriction, reasoning that the act of renting property short-term is a commercial use even though that activity is also residential in nature. The court remanded the case to the trial court to issue an injunction preventing the Peasleys from using the cottage for short-term rentals.

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Ohio

State v. Gasparac, No. 17CA22, 2017 WL 5713466 (Ohio App. Nov. 20, 2017).

Ronald Gasparac advertised the sale or trade of yellow perch on Craigslist. He then sold 51 pounds of the perch to an undercover Ohio Department of Natural Resources (ODNR) agent three times in violation of state wildlife laws. The value of the yellow perch is set by ODNR at \$20 dollars a fish. Since each transaction was an amount greater than \$1,0000, each offense resulted in a felony of the fifth degree. Gasparac's motion to dismiss the charges was rejected by the trial court. On appeal, Gasparac argued that the valuation of the yellow perch was arbitrary and capricious. The court upheld the trial court's ruling, because valuation of fish for criminal statute purposes is not tied to its commercial value alone. Further, the State of Ohio holds state resources in public trust, and the state must preserve those resources and deter those who harm the state's aesthetic, economic, and recreational interests.

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NINTH CIRCUIT

United States v. Robertson, No. 16-30178, 2017 WL 5662532 (9th Cir. Nov. 27, 2017).

Joseph David Robertson constructed a series of ponds, which released dredge and fill materials into the wetlands and an adjacent tributary of a navigable water of the United States. Robertson was convicted for knowingly discharging dredged or fill material without a permit under the Clean Water Act (CWA). Robertson appealed, arguing that the government did not establish CWA jurisdiction. The government argued that under the significant nexus test, there was CWA jurisdiction, as the area that Robertson discharged dredge and fill materials into was connected to the Jefferson River via tributaries. The Jefferson River is a traditionally navigable water of the United States, so the wetland area had significant nexus to a traditionally navigable water. The court held that this was the proper test to determine CWA jurisdiction.

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United States v. Lummi Nation, No. 15-35661, 2017 WL 5907899 (9th Cir. Dec. 1, 2017).

A treaty gave the Lummi Nation and other tribes the right of taking fish at usual and accustomed grounds and stations or U&A. The definition of a U&A is every fishing location where members of a tribe customarily fished from time to time at and before treaty times. In 2011, the Lower Elwha Tribe sought a ruling on whether waters west of Whidbey Island were included in the Lummi's U&A. After several rulings, the trial court held that these waters were not included in the Lummi's U&A. The Lummi Nation appealed. The Ninth Circuit Court of Appeals held that the waters west of Whidbey Island were included in the Lummi's U&A. The court reasoned that the Lummi Nation likely used the waters as a passage from the San Juan Islands in the north to the present environs of Seattle. The use of these waters was beyond mere trolling, because the Lummi used the area as a fishery. Therefore, the waters west of Whidbey Island, between the Southern part of the San Juan Islands and Admiralty Inlet, are included in the Lummi

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California

City of San Buenaventura v. United Water Conservation District, No. S226036, 2017 WL 6001905 (Cal. Dec. 4, 2017).

The City of San Buenaventura challenged the United Water Conservation District for charges to the city related to groundwater conservation activities. First, the city claimed that the pumping charges violated a law that forbids fees or charges assessed upon property or a person incident to property ownership without it meeting an exception. The city argued that the pumping fees were property-related fees and charges. The court reasoned that the critical question here is whether the groundwater charge qualifies as a charge for a property-related purpose. The court held that while water is indispensable to most property uses, it is not the sole purpose for water-related fees and charges. The District conserves and replenishes groundwater that flows through an interconnected series of water basins, none of which correspond to land parcels. The water is conserved and maintained for public use, not just for private landowners. The California Supreme Court remanded the case to the trial court to determine whether the fees had a reasonable relationship to the benefits of its conservation activities.

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Monterey Coastkeeper v. Monterey County Water Resources Agency, No. H042623, 2017 WL 6016435 (Cal. Ct. App. Dec. 5, 2017).

Monterey Coastkeeper claimed that the Monterey County Water Resources Agency violated the Porter-Cologne Water Quality Act by not reporting agricultural waste discharges in a drain and ditch system to the regional water quality control board. The trial court granted Monterey Coastkeeper a writ of mandate requiring the Water Resources Agency to prepare and file a report with the regional board for its activities relating to the discharge. The Water Resources Agency appealed, because Monterey Coastkeeper failed to exhaust administrative remedies. The appellate court agreed and held that Monterey Coastkeeper was entitled to file a petition for review of the Regional Board's failure to act in protecting the water with the State Water Board. Therefore, Monterey Coastkeeper failed to exhaust its administrative remedies. As a result, the California Court of Appeals reversed the writ of mandate.

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Idaho

State v. Hudson, No. 44418, 2017 WL 5992043 (Idaho, Dec. 4, 2017).

Phillip Hudson, a littoral property owner, discharged fill material at the lakebed of Priest Lake. The district court found that Hudson violated the Idaho Lake Protection Act (LPA) by placing fill in the bed of the lake without a permit. The district court held that the State of Idaho had jurisdiction of Priest Lake up to an elevation of 2,437.64 feet and that Hudson's fill was within that elevation. Hudson appealed by disputing the location of the Ordinary High Water Mark (OHWM). Hudson claimed that the location of the OHWM was an issue of material fact, which made summary judgment by the trial court improper. Hudson claimed that the OHWM was at 2,435.64 feet when Idaho became a state and that his fill was placed within 2,435.64 and 2,437.64 feet. Therefore, there was an issue of fact as to whether or not he encroached upland of the high water mark, since the location of the high water mark was in dispute. The state argued that whether the 2,437.64 feet was the OHWM or the artificial high water mark did not matter, because the state has authority under the LPA to regulate encroachments below either watermark. Therefore, even if Hudson's fill was below the artificial high water mark, he still needed to obtain a permit to fill that area.

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DISTRICT OF COLUMBIA

District of Columbia

Standing Rock Sioux Tribe v. Dakota Access, No. 16-1534, 2017 WL 6001726 (D.D.C. Dec. 4, 2017).

This case arises from a series of litigation involving the Sioux Standing Rock Tribe (Tribe) and the Dakota Access Pipeline. Previously, the court held that oil could continue to flow in the pipeline while the U.S. Army Corps of Engineers (Corps) conducted further environmental analyses. In the case at hand, the Tribe requested a series of interim measures to monitor ongoing operation of the oil pipeline during the remand period. The Dakota Access Pipeline and Corps opposed these measures, arguing that the Tribe did not demonstrate a need for injunctive relief and the proposed measures are unnecessary. However, in the prior case, the court found that it had the authority to impose interim remedies. The court also held that the Tribes' requested relief was not injunctive relief. Instead, these measures are mainly a way to provide the court with relevant information, preserve the status quo of the parties during the period, and to provide the court, the Tribes, and the public with transparency regarding the pipeline's operations. Therefore, the interim measures were granted during the remand period.

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