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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the January 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-17-03-01).

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FIRST CIRCUIT

Block Island Fishing, Inc. v. Rogers, 844 F.3d 358 (1st Cir. 2016).

The U.S. Court of Appeals for the First Circuit ruled on an action brought by a ship owner seeking declaratory relief as to the amount of maintenance and cure owed to an employee for injuries he sustained while working aboard the ship and for the recovery of alleged overpayment of maintenance benefits. The employee filed a counterclaim asserting negligence under the Jones Act, unseaworthiness, continuing maintenance and cure, negligent or intentional failure to provide maintenance and cure, and lost wages. The U.S. District Court for the District of Massachusetts granted in part and denied in part the motion for summary judgment. On appeal, the court held that the district court erred by replacing the owner's proposed date on which its maintenance and cure obligations ended with its own date and that the owner could offset overpayments against the employee's damages award.

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SECOND CIRCUIT

Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA (Catskill III), No. 14–1823, 14–1909, 14–

1991, 14–1997, 14–2003 (2nd Cir. Jan. 18, 2017).

The U.S. Court of Appeals for the Second Circuit reinstated the Water Transfers Rule (40 C.F.R. § 122.3), which was established by the U.S. Environmental Protection Agency (EPA) under the Clean Water Act (CWA) to allow government agencies to perform water transfers between bodies of water without a National Pollutant Discharge Elimination System permit. A district court had previously struck down the rule. The appellate court found that the EPA's rule was entitled to deference under *Chevron v. NRDC*, 467 US 837 (1984). One judge dissented, arguing that Congress did not intend to exclude these types of transfers from the CWA and their exclusion is incompatible with the goals of the CWA.

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FOURTH CIRCUIT

Ohio Valley Envtl. Coal. v. Fola Coal Co., LLC, 2017 WL 35726 (4th Cir. Jan. 4, 2017).

The U.S. Court of Appeals for the Fourth Circuit ruled that a National Pollution Discharge Elimination System (NPDES) permit did not shield Fola Coal Company from liability for its unlawful discharges into a waterway. Environmental groups filed the citizen suit against the company, alleging violation of the Clean Water Act and seeking injunctive relief. Following a bench trial, the U.S. District Court for the Southern District of West Virginia determined that permanent injunctive relief was warranted. On appeal, the Fourth Circuit held that the NPDES permit did not shield the company from liability for unlawful discharges, because the company did not comply with the conditions of its NPDES permit.

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FIFTH CIRCUIT

Coastal Conservation Ass'n v. United States Dep't of Commerce, 2017 WL 187703 (5th Cir. Jan. 17, 2017).

The Coastal Conservation Association brought an action alleging that Amendment 40 to the Reef Fish Fishery Management Plan (FMP) violated the Magnuson-Stevens Fishery Conservation Act (MSA). The amendment established a federal charter component and private angling component within the recreational sector for Gulf of Mexico red snapper, allocated the red snapper recreational quota between the two components, and established separate red snapper season closure provisions for the two components. The U.S. District Court for the Eastern District of Louisiana dismissed the action. On appeal, the Fifth Circuit held that the amendment did not violate the provision of the MSA requiring the fishery management council to establish separate quotas for recreational fishing and commercial fishing. Further, the agency complied with requirements of the National Standards for FMPs. Finally, the decision to base allocations between federal charter and private angling components on the average of two sets of catch data, one covering 2006-2013, and one covering 1986-2013, was not arbitrary and capricious.

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In re Deepwater Horizon, 2017 WL 74274 (5th Cir. Jan. 6, 2017).

Following the establishment of a settlement program to compensate numerous groups for economic losses caused by the *Deepwater Horizon* disaster, a special master appointed by the court determined that a commercial fishing

claimant had filed a fraudulent claim. Upon this finding, the special master moved for an order that would require the lender, which had loaned an "advance" to the claimant and had been partially repaid by him, to make restitution, on the theory that the lender had been unjustly enriched. The U.S. District Court for the Eastern District of Louisiana granted the motion, relying on an exception to the rule that bona fide third-party payees are not liable in restitution. On appeal, the court held that the exception to the rule regarding third-party payees only applied to attorneys; therefore, the lender was not liable for restitution.

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Louisiana

Atchafalaya Basinkeeper v. U.S. Army Corps of Engineers, 2016 WL 7476173 (E.D. La. Dec. 29, 2016).

The Atchafalaya Basinkeeper, the Louisiana Crawfish Producers' Association-West, and the Gulf Restoration Network challenged the U.S. Army Corps of Engineers' (Corps) reissuance of the expired New Orleans District General Permit 13, alleging that the Corps failed to comply with the Clean Water Act and the National Environmental Policy Act in re-issuing the permit. The Corps filed a motion for the continuation of a temporary stay, and the court denied the motion, finding that it was not warranted. Further, the court found that the plaintiffs demonstrated that they could be harmed by a continuation of the temporary stay.

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SIXTH CIRCUIT

Concerned Pastors for Soc. Action v. Khouri, 844 F.3d 546 (6th Cir. 2016).

An advocacy group filed an action claiming that city, state, and local officials violated regulations under the Safe Drinking Water Act (SDWA) in handling Flint, Michigan's water treatment and distribution system, which resulted in lead leaching into drinking water. The U.S. District Court for the Eastern District of Michigan granted the plaintiffs' motion for a preliminary injunction requiring defendants to provide city residents with safe drinking water at the point of use and denied the state officials' motion to stay the preliminary injunction. On appeal, the appellate court held that the officials did not show a likelihood of success on their claim that the injunction was overbroad and lacked evidentiary support. Further, the officials would not suffer irreparable harm absent a stay, while a stay would substantially injure city residents. Finally, the court concluded that the public interest supported denial of the stay.

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NINTH CIRCUIT

Marilley v. Bonham, 844 F.3d 841 (9th Cir. 2016).

Nonresident commercial fishermen brought a class action claiming that the Director of the California Department of Fish and Game violated the Privileges and Immunities Clause and Equal Protection Clause by imposing statutorily mandated higher fees for nonresident commercial fishermen than for resident commercial fishermen for fishing licenses, vessel registrations, Dungeness crab permits, and herring gill net permits. The U.S. District Court for the Northern District of California granted the plaintiffs summary judgment. The Director appealed, and the Ninth Circuit affirmed the decision. In a rehearing, the Ninth Circuit reversed the grant of summary judgment, finding that

the differences in the fees violated neither the Privileges and Immunities Clause nor the Equal Protection Clause.

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Washington

Snohomish Cty. v. Pollution Control Hearings Bd., 2016 WL 7495874 (Wash. Dec. 29, 2016).

Municipal storm water permittees appealed portions of a municipal storm water permit issued pursuant to the National Pollutant Discharge Elimination System (NPDES) permitting program. The permit required permittees, as owners or operators of large and medium municipal separate storm sewer systems, to apply new stormwater regulations to completed development applications. The permittees argued that this violated the vested rights doctrine. The Pollution Control Hearings Board (Board) held that the vested rights doctrine did not apply. An appellate court reversed the Board's decision, finding that the vested rights doctrine excused compliance with storm water regulations, because the regulations were land use control ordinances. The Washington Supreme Court reversed and reinstated the Board's order.

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Quinault Indian Nation v. Imperium Terminal Services, LLC, 2017 WL 121545 (Wash. Jan. 12, 2017).

The Washington Supreme Court reversed an appellate court's decision finding that the Ocean Resources Management Act (ORMA) does not apply to two projects to expand oil terminals on the shores of Grays Harbor. The state supreme court found that this interpretation improperly restricts ORMA, which was enacted to broadly protect against the environmental dangers of oil and other fossil fuels. The court reversed and remanded for further review under ORMA's provisions.

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FEDERAL CLAIMS

Klamath Irrigation v. United States, No. 1-591L, 2016 WL 7385039 (Fed. Cl. Dec. 21, 2016).

Landowners and irrigation districts sued the United States, claiming that the Bureau of Reclamation effected a Fifth Amendment taking of their water rights by refusing to release water to irrigation canals in order to preserve the habitat of three species of fish protected under Endangered Species Act. The plaintiffs argued that the claims should be analyzed as physical takings, and the government cross-moved arguing that the claims should be analyzed as regulatory takings. The court held that the claims required analysis under the physical takings framework and will proceed to analyze the claims accordingly.

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