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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the July 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-17-03-07).

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SUPREME COURT

Murr v. Wisconsin, No. 15-214, 2017 WL 2694699 (U.S. June 23, 2017).

The U.S. Supreme Court ruled on whether an ordinance that deprived a landowner of all, or practically all, of the use of one of his lots constituted a regulatory taking of private property. Landowner Joseph Murr is the owner of two parcels of land that are located on the St. Croix River in Wisconsin. The challenged ordinance prevented the use or sale of two adjacent lots as separate building sites unless they each contained at least one acre of land for development and both lots were under common ownership. The Murr parcels did not meet the one-acre requirement, and Murr challenged the lot size requirement. The state moved for summary judgment, and the lower court granted the motion. On appeal, the U.S. Supreme Court affirmed, holding that the minimum lot size regulation was a legitimate exercise of government power, and the two parcels were required to be evaluated as a single parcel when determining whether the regulation was a regulatory taking. The Court determined that the regulations did not amount to a compensable regulatory taking and found that the grant of summary judgment was appropriate.

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FIRST CIRCUIT

Benjamin Riggs, et al. v. Narragansett Electric Company, et al., No. 16-2083, 2017 WL 2928123 (1st Cir. July 10, 2017).

The U.S. Court of Appeals for the First Circuit recently ruled on a district court decision dismissing a challenge to a wind farm near Block Island, Rhode Island. The district court ruled that a three-year statute of limitations barred the case. The Narragansett Electric Company had entered into an agreement with Deepwater Wind Block Island for the project's development. The agreement passed the construction and operation costs on to the Rhode Island taxpayers. The agreement was submitted to the Public Utilities Commission (PUC) and approved in 2010 after the Rhode Island General Assembly amended the definition of "commercial reasonableness." Benjamin Riggs, Laurence Ehrhardt, and the Rhode Island Manufacturers Association (plaintiffs) opposed the Block Island wind farm, alleging that they would be adversely affected by increased electricity rates for up to twenty years. The appellate court affirmed the district court's dismissal, reasoning that the plaintiffs had three years from the PUC's approval date in 2010 to file their claims. The plaintiffs filed their lawsuit in 2015; therefore, the claims were barred and the case was dismissed.

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Massachusetts

Aqua King Fishery, LLC v. Conservation Commission of Provincetown, No. 16-P-1366, 2017 WL 2622694 (Mass. App Ct. June 16, 2017).

The Conservation Commission of Provincetown (Commission) contended that Aqua King Fishery, LLC (Aqua King) failed to obtain a permit for the use of hydraulic dredge fishing gear during commercial sea clam fishing operations. Aqua King sought legal action to reverse the enforcement order issued by the Commission, arguing that the Division of Marine Fisheries controls sea clam operations; therefore, the company should not be subject to municipal regulations set by the Commission. At the lower court, the Commission counterclaimed that Aqua King was in violation of the state Wetlands Protection Act. The lower court granted a partial judgment for the Commission. Both parties appealed. The Commission appealed two issues: the lower court's finding that part of Provincetown's wetlands bylaw was unenforceable and the judge's denial of a maximum fine of $25,000. The reviewing court affirmed all findings of the lower court except for the denial of the $25,000 fine. The reviewing court stated that the lower court could impose the penalty once the Commission determines remediation measures and a timeline for implementation regarding the Wetlands Protection Act violations.

Coady v. Putnam, No. 16 MISC 000004 (AHS), 2017 WL 2693852 (Mass. Land Ct. June 22, 2017).

Janice Coady sued her neighbors, the Brombergs and others, claiming that the reconstruction of a dwelling on their property would impede her view. The Brombergs had obtained the necessary permit from the Wellfleet Zoning Board of Appeals, as well as an exemption from a Wellfleet Zoning Bylaw that set floodplain regulations for the area. Coady appealed the Zoning Board's decision to the Massachusetts Land Court. Coady asserted that the Zoning Board's grant of the special permit was arbitrary and unreasonable. The court determined that the grant of the permit was not unreasonable, because the project proposed to replace one non-conforming structure with another, and this replacement was not more detrimental to the neighborhood than the existing structure. Coady also asserted that the floodplain exemption should not have been granted, because the reconstruction project was in a flood hazard zone, and the bylaw strictly prohibits building in these zones. The court determined that the exemption was appropriate, because the bylaw also states that existing dwellings are exempt from the restriction. The court affirmed the permit and exemption.

Conservation Law Foundation, Inc. v. American Recycled Materials, Inc., No. 16-12451-RGS, 2017 WL 2622737 (D. Mass. June 16, 2017).

Conservation Law Fund (CLF) sued American Recycled Materials (ARM) in the U.S. District Court for the District of Massachusetts alleging that ARM violated the Clean Water Act (CWA) by discharging pollutants into Bogastow Brook without the necessary permits. CLF and ARM disagreed about the type of work conducted by ARM. CLF asserted that ARM conducts activities that are categorized as industrial and require permits for industrial discharges. ARM contends that its activities fall under Standard Industrial Classification (SIC) code 5032, which governs brick, stone, and related construction materials, and not into the industrial category that requires a permit. The court granted ARM's motion to dismiss, because CLF did not allege facts that plausibly suggest that ARM's facility discharges pollutants into Bogastow Brook. Under the CWA, to show a violation has occurred, CLF must prove that ARM discharged a pollutant into navigable waters from a point source without a permit. The facts alleged were not sufficient for the court to draw a reasonable inference that ARM is liable for the alleged misconduct.

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EIGHTH CIRCUIT

Minnesota

West McDonald Lake Ass'n v. Minn. Dep't of Nat. Res., No. A16-1469, 2017 WL 2625563 (Minn. Ct. App. June 19, 2017).

The West McDonald Lake Association appealed the decision of the Minnesota Department of Natural Resources (DNR) to grant a public waters work permit that would lower the elevation of a strip of land that is located between two lakes. West McDonald Lake opposed the planned reduction in the elevation between the two lakes, citing violations of the Clean Water Act if the polluted waters of the neighboring lake would reach and negatively impact West McDonald Lake. The appellate court invalidated the public waters work permit, finding the DNR violated state regulations by not obtaining a National Pollutant Discharge Elimination System (NPDES) permit, which is required since the federal water transfer exemption does not apply to Minnesota waters. The court ruled that the proposed project requires further assessment by the DNR regarding the additional pollutant discharge in West McDonald Lake and still has the possibility to continue after further analysis.

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NINTH CIRCUIT

California

Lynch v. Cal. Coastal Comm'n, No. S221980, 2017 WL 2871762 (Cal. July 6, 2017).

Barbara Lynch and other homeowners applied for a permit to build a new sea wall in Encinitas after winter storms damaged their properties and a beach access stairway. The California Coastal Commission (Commission) granted the permit, provided the homeowners met specific conditions. The homeowners filed a petition challenging two conditions: the permit would expire in 20 years and reconstruction of the lower portion of the stairway was prohibited. Before the two challenges were resolved, the homeowners satisfied all other permit conditions and went forward with the reconstruction. The Commission then moved for judgment on the challenged conditions contending that the homeowners waived their permit objections by obtaining the permit and continuing with the project. The

trial court denied the Commission's motion and ruled in favor of the homeowners. The appellate court reversed, ruling that the conditions were valid. On appeal, the California Supreme Court ruled that the homeowners forfeited their right to object to permit conditions, because they went forward with construction before a determination was made regarding their objections. Existing law requires homeowners who seek to invalidate the permit conditions to do so before proceeding with a project, as it puts the Commission on notice that its decision is being questioned and allows them to mitigate potential damages. Additionally, the court reasoned that the homeowners received the benefits of the permit by constructing the new sea wall and could not now complain of the permit's burdens. Therefore, the judge affirmed the appellate court's ruling.

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Oceana, Inc. v. Pritzker, No. 16-cv-06784-LHK (SVK), 2017 WL 2670733 (N.D. Cal. June 21, 2017).

Oceana challenged a final rule that set annual catch limits on northern anchovy. Oceana brought suit in the U.S. District Court in the Northern District of California seeking to compel the National Marine Fisheries Service (NMFS) to provide three additional categories of materials to its administrative record filed with the court. Oceana alleged violations of the Administrative Procedure Act and the Magnuson-Stevens Fishery Conservation Management Act. NMFS opposed the motion to add the additional documents to the administrative record, because they claimed that they did not consider the documents when developing the northern anchovy rule. The court held that existing law required two of the three requested categories to be included in the administrative record. However, the defendants could withhold said information if it was privileged. The court ruled that if the defendants asserted that the material was privileged they must also provide a privilege log no later than July 14, 2017. Even if not asserting privileged information, all the materials must be submitted by July 14, 2017.

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Washington

Chelan Basin Conservancy v. GBI Holding Co., et al., No. 93381-2, 2017 WL 2876140 (Wash. July 6, 2017).

Chelan Basin Conservancy (Conservancy) filed suit against GBI Holding Company (GBI) in Washington state court seeking the removal of six acres of fill material that elevated the property above Lake Chelan. The Conservancy claimed that the fill material affected the public right to use water in the navigable waterway, which violated the public trust doctrine and a 1969 state court decision, *Wilbour v. Gallagher*, which specifically protected the right of navigation under the public trust doctrine. Following the *Wilbour* decision, the Washington state legislature enacted a savings clause to protect improvements made prior to the *Wilbour* decision from public trust challenges. At the trial court level, GBI moved for summary judgment and argued that the savings clause barred the claim for removal of the fill material, as it was in placed eight years prior to the *Wilbour* decision. The trial court held that the savings clause did not apply and ordered the removal of the fill. GBI appealed, and the court of appeals reversed the order, holding that the savings clause did apply and the bar on public trust claims was enforceable. The Conservancy petitioned the Washington Supreme Court for review, and the court agreed that the savings clause did apply, but chose not rule on whether the savings clause violated the public trust doctrine and remanded the case back to the trial court.

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Olympic Stewardship Foundation, et al. v. State of Washington Environmental and Land Use Hearings Office, et al., No. 47641-0-II, 2017 WL 2645454 (Wash. Ct. App. June 20, 2017).

Olympic Stewardship Foundation (OSF) and others appeal a decision by the Western Washington Growth Management Hearings Board (Board) that upheld the 2014 Shoreline Master Program (Program) for Jefferson County, Washington. The program establishes policies and regulations regarding the planning and development for

shoreline uses. Each county within the state of Washington is required by law to develop such a plan. The Department of Ecology (DOE) must approve the Program before it becomes a state shoreline regulation. OSF and others appealed the Board's decision, stating that the Board erred when it upheld the 2014 Program. The court ruled that the Program complied with the Growth Management Act, the Shoreline Management Act of 1971, and all DOE guidelines. Therefore, the appellate court affirmed the Board's final decision and order.

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TENTH CIRCUIT

Kansas

Petrowsky v. NextEra Energy Resources, LLC, No. 17-1043-EFM-KGG, 2017 WL 2666361 (D. Kan. June 21, 2017).

Edwin Petrowsky brought suit under the Endangered Species Act (ESA) seeking to enjoin the implementation of wind towers by NextEra (NextEra) Energy Resources in the Aransas-Wood Buffalo migratory flyway. Petrowsky stated that the wind towers are dangerous to whooping crane bird populations that fly through the area for several months every year during their migration. NextEra moved to dismiss the case for lack of subject matter jurisdiction, because the ESA requires that Petrowsky notify each subsidiary of NextEra before filing with the court, which Petrowsky did not do. Additionally, NextEra argued that it does not operate or own the wind farms in the Aransas-Wood Buffalo flyway, so therefore, it is not the proper defendant. The U.S. District Court for the District of Kansas court granted NextEra's motion to dismiss, because Petrowsky did not comply with the ESA's notice requirement and the subsidiaries are the proper defendants.

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ELEVENTH CIRCUIT

Alabama

Coosa Riverkeeper, Inc. v. Oxford Water Works and Sewer Board, No. 2:16-cv-01737-JEO, 2017 WL 2619087 (N.D. Ala. June 16, 2017).

Coosa Riverkeeper (Riverkeeper) sued Oxford Water Works and Sewer Board (Board) in the U.S. District Court in the Northern District of Alabama for violating the Clean Water Act (CWA). Riverkeeper alleged that a wastewater treatment plant, which the board oversees, was illegally discharging pollutants into the Choccolocco Creek. Riverkeeper claimed three violations of the CWA occurred: 1) the Board discharged amounts of e. coli and chlorine that exceeded the limits in its National Pollution Discharge Elimination System (NPDES) permit; 2) the Board failed to report its permit violations; and 3) the plant is discharging formaldehyde without a permit. The Board moved to dismiss, because the State of Alabama was already prosecuting an action in state court for the Board's alleged violations of its NPDES permit. The Board also asserted that the formaldehyde claims should be barred, because Riverkeeper cannot show the discharges are likely to occur again in the future. The court determined that the appropriate standard for the prosecution claim was to assume that factual allegations in the complaint are true and give the Riverkeeper the benefit of all reasonable factual inferences when ruling on the motion to dismiss. Applying this standard, the court reasoned that the motion to dismiss should be granted in part because the issue was being prosecuted in state court and denied in part, as to the formaldehyde claims.

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Florida

Florida Wildlife Federation Inc. v. U.S. Army Corps of Eng'rs, No. 14-13392, 2017 WL 2622333 (11th Cir. June 19, 2017).

Florida Wildlife Federation and other environmental organizations brought suit against the U.S. Army Corps of Engineers (Corps), alleging that the Corps violated the Clean Water Act (CWA) and Florida law when it made decisions about the release of water from locks in Florida's cross-state water channel. The Corps moved to dismiss the action, stating that it was immune from suit under the doctrine of sovereign immunity. Two state agencies also listed as defendants, a water management district and the Florida Department of Environmental Protection, also moved to dismiss asserting sovereign immunity. The environmental organizations voluntarily dismissed the state agencies from the action. The agencies then intervened and moved to dismiss the claims against all defendants in the lawsuit, because the agencies were necessary parties and the court could not move forward without them, but since they had sovereign immunity they could not be brought into court. The district agreed and dismissed the case. The environmental organizations appealed. The Eleventh Circuit Court of Appeals affirmed the lower court's dismissal, ruling that the water district was a required party to the lawsuit and reasoned that the case had to be dismissed because the water district was not involved.

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