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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the June 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-17-03-06).

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FIRST CIRCUIT

Maine

Maine Council of the Atlantic Salmon Federation v. National Marine Fisheries Service, No. 16-2155, 2017 WL 2456812 (1st Cir. June 7, 2012).

The Maine Council of the Atlantic Salmon Federation (Council) sued the National Marine Fisheries Service (NMFS) for an alleged violation of the Administrative Procedure Act (APA). The Council contended that NMFS's biological opinions (BiOps) evaluating modifications of licenses to operate four hydropower dams on the Kennebec River in Maine failed to consider the impacts on endangered fish species. The Federal Energy Regulatory Commission (FERC) granted the license modifications while the case was pending. The U.S. District Court for the District of Maine dismissed the case, citing a lack of subject matter jurisdiction. The appellate court affirmed. The court agreed that one of the BiOps had expired and the review of the other BiOps by the lower court was precluded by the Federal Power Act, which requires that appeals of FERC orders go directly to a federal court of appeals. The appellants have filed a claim challenging the FERC orders in the U.S. Court of Appeals for the District of Columbia.

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SECOND CIRCUIT

New York

In re Methyl Tertiary Butyl Ether Prod. Liab. Litig., No. 15-3934-CV, 2017 WL 2507724 (2d Cir. June 12, 2017).

In 2003, the Orange County Water District (District) filed a complaint in a California state court alleging that various oil companies were responsible for contaminating groundwater due to the use of a gasoline additive known as methyl tertiary butyl ether (MTBE). Several claims from the multidistrict litigation were removed from state to federal court and transferred to a New York federal district court. The District stated that MTBE leached from underground storage tanks and threatened over 400 sites in the district. BP and Shell oil companies moved for summary judgment. The lower court granted the motion, reasoning that the claims were the same ones brought by the Orange County District Attorney (OCDA) against the companies in 1999, which were settled in 2002 and 2005 and were therefore barred from litigation. On appeal, the Second Circuit reviewed the decision to grant summary judgment based on the close relationship of the OCDA and the District. The appellate court determined that the district court's finding that OCDA and the District's relationship to one another barred the District's claims was incorrect. The appellate court remanded the case to the lower court for further proceedings regarding the claims against BP and Shell.

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FOURTH CIRCUIT

North Carolina

Kings Harbor Homeowners Assoc., Inc. v. Goldman, No. COA16-1189, 2017 WL 2436960 (N.C. Ct. App. June 6, 2017).

Roy Goldman and his wife (the Goldmans) appealed a trial court's decision finding that the couple could not prevent access to a pier built on their property and adjacent to a public walkway easement. Pursuant to the North Carolina Coastal Area Management Act (CAMA), the developer of the Kings Harbor neighborhood obtained a permit from the North Carolina Department of Environmental and Natural Resources to build a pier on lot 37. The Goldmans inherited lots 37 and 38 from Mrs. Goldman's mother, and they claimed she held valid title to the pier. The Goldmans tried to assert their exclusive ownership of the pier by leaving the walkway easement open for use but restricting access to the pier with chains, signs, and a locked wooden gate. The Kings Harbor Homeowners Association brought an action to stop the Goldmans from interfering with the residents' use of the pier. After the trial court ruled in favor of Kings Harbor, the Goldmans appealed. The North Carolina Court of Appeals ruled in favor of the Goldmans holding that the developer conveyed all property rights of lot 37 to Mrs. Goldman's mother, including the pier, when she purchased it in 2011. The developer's conveyance of the walkway easement did not include the pier. Thus, the appellate court reversed and remanded the trial court's decision.

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FIFTH CIRCUIT

In Re: Settoon Towing, L.L.C. v. Marquette Transportation Company, No. 16-30459, 2017 WL 2486018 (5th Cir. June 9, 2017).

A barge owned by Settoon Towing collided with another barge owned by Marquette Transportation Company on the Mississippi River, causing an oil spill that closed part of the river for two days. The Coast Guard charged Settoon with the cleanup and remediation expenses, holding them strictly liable for the damage. Settoon brought suit, seeking contribution from Marquette for the cost of cleanup. The lower court found both barge owners were negligent. Marquette Transportation was found to be 65% at fault for the collision, while Settoon Towing was 35% at fault. Marquette appealed to the U.S. Court of Appeals for the Fifth Circuit, claiming that the Oil Pollution Act (OPA) does not permit contribution actions for purely economic damages. The Fifth Circuit affirmed the lower court's decision, holding that Settoon may recover damages under OPA, including purely economic losses from Marquette because they are jointly liable. The appellate court reasoned that the plain meaning of the language in OPA reflected the intention of the legislature to include contribution claims under OPA. Therefore, the appellate court affirmed the lower court's opinion.

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Borcik v. Crosby Tugs, L.L.C., No. 15-30435, 2017 WL 2374115 (5th Cir. June 1, 2017).

Deckhand Eric Borcik filed a whistleblower suit against his employer, Crosby Tugs, LLC, claiming that he was fired in retaliation for reporting environmental violations. The U.S. District Court for the Eastern District of Louisiana ruled that Borcik did not act in "good faith" when he reported environmental violations. After the lower court's decision, Borcik appealed, claiming that the jury was improperly instructed as to the meaning of "good faith." The appellate court certified the question to the Louisiana Supreme Court to define the phrase "good faith." The Louisiana Supreme Court defined "good faith" to "[mean] an employee is acting with an honest belief that a violation of an environmental law, rule, or regulation occurred." Basing its decision on the definition provided by the Louisiana Supreme Court, the appellate court found that the lower court made an error by providing the jury with instructions that "good faith" required *more* than an honest belief that a violation occurred. The Fifth Circuit sent the case back to the lower court to rule in accordance with its opinion.

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Louisiana

In re Louisiana Dep't of Env'tl. Quality Permitting Decision: Water Quality Certification, No. 2016 CA 1181, 2017 WL 2392524 (La. Ct. App. June 2, 2017).

Southern Aggregates applied for a Clean Water Act § 404 permit from the U.S. Army Corps of Engineers (Corps) to excavate wetlands, discharge fill material, and perform construction in Livingston Parish, Louisiana. In October 2015, the Louisiana Department of Environmental Quality (LDEQ) issued its opinion that water quality standards would not be violated by the construction. In December 2015, Save Our Hills and others (Save our Hills) filed a complaint, alleging that LDEQ did not conduct a cost/benefit analysis, which is required for proposed projects, and did not respond to public comments. The district court judge ruled that the court did not have jurisdiction and dismissed the case. On appeal, the court granted Southern Aggregates' motion to dismiss, because the appeal was moot since Southern Aggregates had already commenced the excavation when it was granted its § 404 permit.

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Sweet Lake Land v. Oleum Operating Co., L.C., 2016-429 (La. App. 3 Cir. May 31, 2017).

Sweet Lake Land and Oil Company sued prior lessees BP, Oleum Operating Company, and ASKM for alleged environmental damage done to its property by lessees during oil mining. Sweet Lake alleged that original lessee BP created pits filled with water that were high in oil, barium, arsenic, and benzene and failed to seal the pits properly. Following BP's operation, subsequent operators signed leases that entailed a duty to restore surface areas once a well

was abandoned. At trial, Sweet Lake alleged that lessees Oleum and ASKM did not abide by the cleanup terms of their respective leases. At trial, Sweet Lake sought money damages against all three companies, but the jury found only BP responsible for the damage done to the land. ASKM and Oleum were not found in breach of their leases. The trial court ordered BP to submit a remediation plan but declined to award money damages against them. On appeal, Sweet Lake asserted that Oleum and ASKM breached lease obligations. The court of appeal reversed, finding that Oleum and ASKM had express obligations to restore sites and failed to do so.



NINTH CIRCUIT

California

Coastal Env'tl. Rights Found. v. CA Reg'l Water Quality Control Bd., No. D070171, 2017 WL 1833124 (Cal. Ct. App. May 8, 2017).

The Coastal Environmental Rights Foundation (CERF) sued the California Regional Water Quality Control Board (Board), alleging that the Board improperly issued a National Pollutant Discharge Elimination System (NPDES) permit for public fireworks displays over surface waters in the San Diego region. The lower court found that the permit was appropriate. CERF appealed, arguing 1) that the court gave too much weight to the Board's decision; 2) that the fireworks permit violates water quality monitoring required by the Clean Water Act (CWA); and 3) that the permit violates the State's 2009 Ocean Plan concerning discharges in areas of special biological significance. The appellate court affirmed the lower court's decision, stating that the grant of the NPDES general fireworks permit was appropriate. It held that the evidence in the record supported the Board's decision to grant the permit, and existing law dictates that if the evidence is substantial, the decision must stand. Additionally, the court of appeals determined that the permit does not violate federal law concerning water quality monitoring because visual monitoring, which is allowed under the CWA, is being conducted. Finally, the permit does not violate the State's 2009 Ocean Plan because public fireworks displays are a "limited-term activity" under the Plan.

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Orange County Water District v. Alcoa Global Fasteners, Inc. et al., No. D070771, 2017 WL 2376596 (Cal. Ct. App. June 1, 2017).

An investigation by the Orange County Water District (District) identified current and former operators of various industrial sites for volatile organic compound (VOC) groundwater contamination in the North Basin area. To address the issue, the District implemented the North Basin Groundwater Protection Plan to the tune of \$200 million. The District filed suit to have the operators cover the cost of past and future expenditures related to the plan. The damages were predicated under the Carpenter-Presley-Tanner Hazardous Substances Account Act (HSAA). The trial court concluded that the plan was not a necessary measure and that the operators were not responsible for the groundwater contamination. The District appealed, alleging evidentiary issues. The appeal ultimately failed, with the court of appeal finding that the District had failed to satisfy all essential HSAA elements against any one defendant.

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Washington

Columbia Riverkeeper v. Port of Vancouver USA, No. 92455-4, 2017 WL 2483271 (Wash. June 8, 2017).

Columbia Riverkeeper and others sued the Port of Vancouver (Port), claiming that the Port violated the Open Public

Meetings Act (OPMA) when it conducted five executive sessions regarding a property to be leased and used for a large rail terminal. The trial court agreed with the Port's interpretation that the "minimum price" exception, which allows governmental entities to hold closed executive sessions, applied and granted partial summary judgment in favor of the Port. Columbia Riverkeeper appealed the decision to the Washington Supreme Court. Riverkeeper argued that the OPMA exception allows for discussing numbers alone. The reviewing court agreed, basing its reasoning on the plain meaning of the language of the statute, which expressly states that discussions in executive sessions are to focus on the minimum value to sell or lease the property. The reviewing court reversed the grant of summary judgment for the Port for all five meetings and sent the case back to the lower court for further proceedings consistent with the interpretation of the OPMA exception.

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DC CIRCUIT

District of Columbia

Delaware Riverkeeper Network v. Fed'l Energy Regulatory Comm'n, No.16-1092, 2017 WL 2231097

(D.C. Cir. May, 23, 2017).

The Federal Energy Regulatory Commission (FERC) issued a certificate to Transcontinental Gas Pipe Line Company, LLC (Pipe Line Company) that allowed for the expansion of a natural gas pipeline project that runs from Texas to New York City. The affected area falls in two counties in Pennsylvania and parts of New Jersey. This type of certificate is required under the Natural Gas Act (NGA) for any pipeline company that is involved in the interstate transportation of natural gas. The Delaware Riverkeeper Network (Delaware Riverkeeper) and others filed suit alleging that by issuing the certificate, FERC violated the Clean Water Act (CWA) and the National Environmental Policy Act (NEPA). The court found that no violations existed. FERC followed the necessary guidelines and issued an Environmental Assessment after conducting a review, as required under NEPA. FERC issued a Finding of No Significant Impact for the proposed expansion plan, but it did require the Pipeline Company to obtain all authorizations before FERC would approve construction. The court determined that this conditional approval was not in violation of the CWA, because it clearly stated that the Pipe Line Company was required to obtain the required § 401 certification from Pennsylvania. Delaware Riverkeeper also alleged that FERC misclassified areas of wetlands within the project's location, and the court determined that this claim was without merit; therefore, FERC's actions did not violate CWA. Furthermore, the court determined that FERC adequately provided Delaware Riverkeeper with information about projected gas flow velocities and adequately responded to the Delaware Riverkeeper's evidence that the project's proposed gas flow was potentially unsafe.

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