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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the May 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-17-03-05).

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FIRST CIRCUIT

Massachusetts

Squam Partners, LLC v. Conservation Commission of Nantucket, 91 Mass. App. Ct. 1118 (2017).

Squam Partners appealed the Conservation Commission of Nantucket's decision to deny a permit to construct an elevated walkway through a vegetated wetland. The Commission denied the permit on the grounds that the walkway would have a negative impact on area wildlife and scenic views of the wetland area. Squam argued that this finding was not supported by substantial evidence; however, the Commission obtained a report discussing the impact the walkway would have on wildlife. The district court was satisfied that the Commission had enough evidence to find that Squam's walkway would have an adverse impact. The Massachusetts Court of Appeals affirmed the district court's judgment.

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Rhode Island

Kilmartin v. Barbuto, 2017 WL 1751392 (R.I. May 2, 2017).

When beachfront landowners began restricting access to two miles of beach in Misquamicut, the State of Rhode Island filed suit. The state claimed that in 1909, the owners of the property dedicated the disputed property to the public through the recordation of Plat and Indenture. The state sought to enjoin the current landowners from

restricting the public's access to the beach. The trial court agreed with the current property owners, finding that the 1909 Plat and Indenture did not reveal the original landowners' manifest intent to dedicate an easement over the beach area. Furthermore, extrinsic evidence showed there was no intent to dedicate public beach access. The state appealed. The appellate court noted that in 1909, the owners knew how to execute a public dedication, because they did so properly with nine rights of way. Additionally, extrinsic evidence of the original deeds to the land showed that reserved beach rights remained with pre-existing covenants with third parties, not the public. The court agreed that the facts did not support a finding that the disputed area was meant for public access; therefore, the trial court's judgment was affirmed.

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FIFTH CIRCUIT

Louisiana

Borcik v. Crosby Tugs, LLC, 2017 WL 1716226 (La. May 3, 2017).

An employed deckhand sued his employer Crosby Tugs, LLC for retaliatory termination. The employee claimed that the captain of his boat violated the Louisiana Environmental Quality Act (LEQA). Borcik informed the Chief Administrative Officer of Crosby Tugs about his concerns, and later he was fired. Borcik sued his employer, claiming it violated the whistleblower provision of the LEQA. The federal district court informed the jury that the statute required the employee to act in good faith and to reasonably believe that the activity, policy, or practice of the boat captain violated LEQA. In addition, the employee also could not have any intent to seek an unfair advantage or to harm another party in making his report of the environmental violation. The jury found Borcik did not make his report in good faith, and judgment was entered in favor of Crosby Tugs. Borcik appealed, and the Fifth Circuit certified the question to the Louisiana Supreme Court to define "good faith." Crosby Tugs claimed that good faith meant that the plaintiff had no intent to seek an unfair advantage or to harm another party in making his report of the environmental violation. The Louisiana Supreme Court held that good faith should be defined broadly to uphold the purpose of LEQA. The court reasoned that Crosby Tug's definition would make it nearly impossible for an employee to invoke the statute because an employee could be seen as having an "intent to harm" in nearly every case.

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Mississippi

Mississippi Dep't of Wildlife, Fisheries, & Parks v. Webb, 2017 WL 1396686 (Miss. Ct. App. Apr. 18, 2017).

In 2009, two Mississippi Department of Wildlife, Fisheries, and Parks (MDWFP) conservation officers stopped Donald Bernius for speeding in a boat on the Tchoutacabouffa River. During the stop, the officers asked Bernius to move his boat to the straightaway because they were in a blind spot to other boaters. Bernius agreed but then veered away and fled. Bernius collided with Christopher Webb's boat, which killed Christopher and injured Shane Webb. The Webbs sued MDWFP under the Mississippi Tort Claims Act (MTCA) and claimed that the officers acted with reckless disregard for the safety of others when they failed to detain Bernius and control his movement to a safer location. The Harrison County Circuit Court concluded that the officers' instructions to Bernius to move to the straightaway violated Mississippi boating laws and the MDWFP's standard operation procedures (SOPs). Therefore, the circuit court agreed that the officers acted with reckless disregard for public safety. The MDWFP appealed and claimed that the evidence did not support the conclusion that the officers showed "reckless disregard." The appellate court held that no SOP prohibited the officers from requesting a boater to move to a safer location, and an SOP violation alone cannot determine if there was "reckless disregard." Due to the concern for officer safety, it was within the officers' discretion to ask Bernius to move to a safer location. The appellate court reversed the Harrison County Circuit Court's

decision.

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NINTH CIRCUIT

Wildlife Fish Conservancy v. Nat'l Park Serv., 2017 WL 1381128 (9th Cir. Apr. 18, 2017).

The National Marine Fisheries Service (NMFS) approved the use of hatcheries operated by the State of Washington and the Lower Elwha Klallam Tribe to restore the Elwha River fish populations after a dam removal project. The Wildlife Fish Conservancy and others claimed that the approvals violated the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). The plaintiffs also claimed that the Tribe's hatchery operation was a taking of threatened fish in violation of the ESA. The district court partially vacated one of NMFS's decisions but otherwise entered judgment against the plaintiffs. The Ninth Circuit held that the district court correctly concluded that NMFS's decision to prepare an Environmental Assessment (EA) instead of an Environmental Impact Statement (EIS) was not arbitrary or capricious, because an EIS is not required simply because some uncertainty exists about an effect. The appellate court also found that NMFS did not improperly segment consultation among its Biological Opinions. These two opinions responded to two different requests: to reinitiate consultation on the dam removal project and a request by the state and Tribe to approve the hatchery programs. Additionally, any claim against the Tribe for taking was barred for lack of notice. The appellate court affirmed the district court's decision.

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Oregon

Hayes Oyster Co. v. Oregon Dep't of Envt'l Quality, 2017 WL 1381659 (D. Or. Apr. 17, 2017).

The Oregon Department of Environmental Quality (DEQ) has a duty to establish Total Maximum Daily Loads (TMDLs) for bacteria. The DEQ established a TMDL for the Tillamook Watershed in 2001. Hayes Oyster Company claimed that the waste load allocations for the National Pollutant Discharge Elimination System (NPDES) were not reasonably calculated to obtain compliance with the water quality standard for all shellfish growing in Tillamook Bay. Hayes Oyster Company sued the Oregon Department of Environmental Quality (DEQ) and the DEQ's interim director for public nuisance and unjust takings under the U.S. and Oregon constitutions. The DEQ moved to dismiss the complaint. The court held that the plaintiff's Fifth Amendment Takings Claim was not ripe, because it did not seek remedies in state court first. Furthermore, the plaintiff argued that the DEQ waived its 11th Amendment sovereign immunity; however, 11th Amendment immunity waivers cannot be implied, and the plaintiff failed to show that the DEQ explicitly waived immunity. The court noted that ultimately the federal court is not the proper place to challenge state TMDL decisions; therefore, the court granted the defendant's motion to dismiss for lack of subject matter jurisdiction.

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ELEVENTH CIRCUIT

Florida

Suncoast Waterkeeper v. City of Gulfport, 2017 WL 1632984 (M.D. Fla. May 1, 2017).

Suncoast Waterkeeper and other plaintiffs sued the City of Gulfport, Florida, alleging that raw and treated sewage from its wastewater collection system repeatedly spilled into the Gulf of Mexico in violation of the Clean Water Act (CWA). The City motioned for eight sworn declarations by the plaintiffs in another similar case be taken as true under judicial notice. The court held that the facts in the statements were not undisputed, not generally known, and furthermore, not central to the plaintiffs' claims, so judicial notice would be improper. Additionally, the City motioned to dismiss the case for lack of standing. The City argued that Our Children's Earth Foundation's (OCEF) claims should be dismissed with prejudice, because none of its individual members were named in the complaint. The court held that OCEF sufficiently pled that its members have been, are being, and will be injured by the alleged CWA violation, but OCEF must ultimately prove that at least one of its members was injured by the alleged violation. The City also motioned to dismiss Suncoast Waterkeeper and Ecological Rights Foundation (ERF) complaints with prejudice because they failed to allege an injury that is fairly traceable to the city's conduct. The court held that the injury pled was sufficient, because the complaint showed that Suncoast Waterkeeper and ERF's members enjoyed the waterways and that injury interfered with their use of the waterway. The court denied the city's motions for to dismiss the case for lack of standing.

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DC CIRCUIT

District of Columbia

Ctr. for Biological Diversity v. Zinke, 2017 WL 1755947 (D.D.C. May 4, 2017).

After the *Deepwater Horizon* explosion, an independent executive commission and the Council on Environmental Quality (CEQ) initiated a review of the procedures that the Department of the Interior (DOI) uses for subjecting offshore oil and gas exploration and development projects to the requirements of the National Environmental Policy Act (NEPA). Both recommended major revisions to the DOI's NEPA procedures. The DOI's NEPA review is ongoing, so the Center for Biological Diversity (CBD) sued to compel the DOI to complete its NEPA review and announce whether revisions are necessary. The court held that although the statute established that an agency has an ongoing obligation to review its own NEPA procedures and make changes as necessary, the regulation does not require the agency to complete its review and make a determination. CBD argued that DOI's review of the procedures created a duty for it to complete the review in reasonable time. The court held that this would only be true if the DOI were under a legislative directive to review the NEPA policies, not an executive one. Furthermore, even if the DOI completed its review, there is no obligation for the agency to announce its decision on whether to revise them. Rather, the agency only must publish if it decides to change an enforceable regulation. The U.S. District Court for the District of Columbia granted the DOI's motion to dismiss and dismissed the CDB's complaint.

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FEDERAL CLAIMS

Prakhin v. United States, 2017 WL 1548551 (Fed. Cl. Apr. 28, 2017).

In 1995, Yuriy Prakhin purchased two waterfront lots in Brooklyn in the Sea Gate Community, which is a gated community on the Southern side of Coney Island. In the early 1990s, the U.S. Army Corps of Engineers (Corps) launched a project to restore sand on Coney Island beaches. When the initial stage was completed in 1995, a significant amount of sand accrued in the Sea Gate community, particularly near Gravesend Bay where Prakhin's

property is located. In 2004, the Corps issued a Limited Reevaluation Report for the Sea Gate Project. In 2013, after Hurricane Sandy, the Corps received the funds it needed to complete the project, and it was completed in 2016. In 2014, Prakhin sued the Corps, claiming that the Coney Island project caused sand to accumulate on his property, which resulted in a permanent physical taking under the Takings Clause of the Fifth Amendment. The government motioned to dismiss, claiming that the complaint was barred by a six-year statute of limitations and that the plaintiff failed to present specific evidence to demonstrate that the Corps promised to remove the sand from his property. The plaintiff argued that the complaint was not barred by the statute of limitations, because the Corps repeatedly promised to remove the sand. The court held that the running of the statute of limitations on the takings claim was delayed until the date that Corps completed replenishment project in 2016. The court denied the motion to dismiss.

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