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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the February 2018 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-18-03-02).

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U.S. SUPREME COURT

Nat'l Ass'n of Manufacturers v. Dep't of Def., 138 S. Ct. 617 (2018).

In January, the U.S. Supreme Court held that challenges to the Waters of the United States Rule (Rule) must be brought in federal district courts. The government argued, unsuccessfully, that a challenge to the Rule should be brought in the federal courts of appeals, because the Rule fell within § 1316(b)(1)(E) of the Clean Water Act. Section 1316(b)(1)(E) provides courts of appeals exclusive jurisdiction to review Environmental Protection Agency actions, including "approving or promulgating any effluent limitation or other limitation[.]" The Court found that because the Rule is a definitional rule that clarifies the scope of the statutory term "waters of the United States," it does not fall within the actions established by § 1316(b)(1)(E).

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FIRST CIRCUIT

Conservation Law Foundation v. Pruitt, 2018 WL 524758 (1st Cir. Jan. 24, 2018).

Two organizations filed two lawsuits against the Environmental Protection Agency (EPA) for failing to perform duties required by the Clean Water Act. The plaintiffs claimed that the EPA failed to notify unpermitted commercial, industrial, and institutional property owners in the Charles River Watershed of their obligation to obtain stormwater discharge permits. Both lawsuits, filed in district courts in Massachusetts and Rhode Island, were dismissed. In a consolidated appeal, the plaintiffs claimed that by helping to develop and approve the Total Maximum Daily Loads (TMDLs) in those states, the EPA determined that individual permits were necessary for the discharges identified in the TMDLs, which triggered the notice requirement. The EPA argued that its approvals of the TMDLs does not result in a requirement for individual permits. The court agreed, noting that the TMDLs did not list specific dischargers, and affirmed dismissal of the case.

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SIXTH CIRCUIT

Michigan

Mays v. Snyder, 2018 WL 559726 (Mich. Ct. App. Jan. 25, 2018).

Flint, Michigan residents filed a class action lawsuit against various Michigan officials for decisions that exposed the citizens to contaminated water. State and city defendants moved for summary judgment, which was denied in part and granted in part. The defendants appealed on multiple grounds. The appellate court found that the plaintiffs were excused from a notice requirement, which allowed them to avoid having their claims dismissed under government immunity. The appellate court also found that the lower court properly found it had jurisdicition over "city officials" because emergency managers acted as an "arm of the state" in making their decisions regarding Flint water. Further, the court found that the facts pled, if proven true, establish a constitutional violation of substantive due process, right to bodily integrity, and inverse condemnation of property. Finally, the court held that the plaintiffs' official capacity claims could proceed.

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SEVENTH CIRCUIT

Indiana

Gunderson v. Indiana, 2018 WL 849890 (Ind. Feb. 14, 2018).

The Indiana Supreme Court ruled that the boundary separating public trust land from privately owned riparian land along the shores of Lake Michigan is the common-law ordinary high water mark. The court held that, absent an authorized legislative conveyance, the state retains exclusive title up to that boundary. The decision affirms a lower court's ruling that the state holds title to the shores of Lake Michigan in trust for the public but reverses the lower court's decision that private property interests overlap with those of the state.

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EIGHTH CIRCUIT

Minnesota

In the Matter of the Amendment of the Sulfate Water Quality Standard Application to Wild Rice and Identification of Wild Rice Waters, OAH 80-9003-34519; Revisor R-4324 (Minn. Office of Admin. Hearings Jan. 10, 2018).

A Minnesota state administrative law judge disapproved proposed changes to the state's water quality sulfate discharge standard aimed at protecting wild rice. The judge ruled that the Minnesota Pollution Control agency did not demonstrate how the proposed changes to the existing 1973 standard would better protect the state's wild rice and thus found the changes were not justified.

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NINTH CIRCUIT

Minnesota

Hawai'i Wildlife Fund v. Cty. of Maui, 2018 WL 650973 (9th Cir. Feb. 1, 2018).

The County of Maui operates underground injection control (UIC) wells located within the primary municipal wastewater treatment plant for Maui. The County injects about 3 to 5 million gallons of treated wastewater per day into the groundwater via the wells. Pollutants from the wastewater injections travelled to the Pacific Ocean. The Hawai'i Wildlife Fund claimed that Maui's activities violated the Clean Water Act (CWA). The district court agreed. On appeal, the court addressed to what extent a point source discharge triggers a requirement for a National Pollutant Discharge Elimination System (NPDES) permit. First, the appellate court held that Maui County discharged pollutants from a single point source: the wells. Secondly, the pollutants in the navigable water were traceable from

the wells, meaning that the pollutant migration is equivalent to a discharge into a navigable water. Third, the pollutant levels that reached the navigable water were not *de minimus*. Additionally, the County claimed that it did not have fair notice that it needed a NDPES permit, because the state maintained that NPDES permits were not required for the wells. However, the state had not yet made that determination and a reasonable person would have understood the County activities to be in violation of the CWA. Therefore, the County was held liable for pollutant discharges from its underground wells.

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California

Santa Barbara Channelkeeper v. City of San Buenaventura, 2018 WL 618674 (Cal. Ct. App. Jan. 30, 2018).

The City of San Buenaventura has been diverting water from the Ventura Watershed in Southern California since 1870. Plaintiff Santa Barbara Channelkeeper sued the city and claimed that the diversions were unreasonable because of the impact the diversions have on endangered Southern California steelhead trout during the summer when water levels are low. Under the California Constitution, there is no property right in the unreasonable use of water. The city claimed that their use was reasonable and cross-complained against other entities who also draw water from the Ventura Watershed, claiming that their use was unreasonable. The trial court struck this cross-complaint, but the California Court of Appeal agreed with the city since the plaintiff's complaint alleged unreasonable use based on the water's flow alone. Thus, the court reasoned it cannot disregard other water users. Additionally, the water at issue is a property right, which is the same property right at issue in the complaint and the cross-complaint. Therefore, the complaint and cross-complaint arise from the same transaction. The court reversed the trial court's dismissal of the cross-complaint, remanded the case for further proceedings, and awarded costs of appeal to the city.

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Cent. Coast Forest Ass'n v. Fish & Game Comm'n, 18 Cal. App. 5th 1191 (Cal. Ct. App. 2018).

This decision arose from a series of litigation between timber companies challenging the California Fish and Game Commission's (Commission) rejection of their petition seeking delisting of Coho salmon in certain coastal streams from the registered endangered species list under the California Endangered Species Act (CESA). The California Supreme Court reversed and remanded back to the California Court of Appeal. On remand, the appellate court addressed the definition of range, which it held means the current range, not the historical range of the species. Secondly, the Court of Appeal addressed if a portion of a species could be delisted. The court held that delisting a certain population could only be done if that population is an entirely separate species or subspecies. For these reasons, the appellate court reversed judgment and ruled in favor of the Commission.

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ELEVENTH CIRCUIT

Florida

St. Johns Riverkeeper, Inc. v. U.S. Army Corps of Engineers, 2018 WL 490476 (M.D. Fla. Jan. 19, 2018).

The U.S. District Court for the Middle District of Florida denied St. Johns Riverkeeper's (Riverkeeper) motion for a preliminary injunction to prohibit the U.S. Army Corps of Engineers (Corps) from proceeding with its plan to dredge a portion of the St. John's River. Riverkeeper argued that the Corps had not satisfied its obligations under the National Environmental Policy Act (NEPA) by failing to conduct both an Environmental Impact Statement (EIS) for shortening the dredging plan from 13 miles to 11 miles and a supplemental EIS in the wake of Hurricane Irma. The court, however, denied the motion for failure to show a substantial likelihood of success on the claims. As to the shortening of the dredging claim, the court found that, although there were negotiations to reduce the distance of the project, there was not yet a final agency determination on the reduction, and thus Riverkeeper lacked subject matter jurisdiction to challenge it. As to Hurricane Irma, the court found that it did not present new information for the Corps to consider because the Corps had already considered in its models the dredging's impact on high water levels equal to or higher than those present during the hurricane. The court also found the Corps had taken a hard look at the data from Hurricane Irma and that Riverkeeper failed to present evidence that the Corps' determination that Hurricane Irma did not generate new information was arbitrary and capricious.

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People for Ethical Treatment of Animals, Inc. v. Miami Seaquarium, 2018 WL 985682 (11th Cir. Jan. 19,

People for Ethical Treatment of Animals, Inc. v. Miami Seaquarium, 2018 WL 385682 (11th Cir. Jan. 12, 2018).

The U.S. Court of Appeals for the Eleventh Circuit upheld a district court's ruling that Miami Seaquarium did not commit an unlawful take in violation of § 9 of the Endangered Species Act (ESA) by either harming or harassing its killer whale Lolita. People for the Ethical Treatment of Animals (PETA) sued the Seaquarium alleging it had harmed and harassed Lolita based on thirteen injuries the killer whale sustained while in captivity. In interpreting § 9 of the ESA, the appellate court held that to "harm" or "harass" a captive endangered species means to pose a threat of serious harm greater than mere annoyance or vexation. The court also found none of the thirteen injuries Lolita sustained during her captivity constituted harm or harassment.

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D.C. CIRCUIT

District of Columbia

Double R Ranch Tr. v. Nedd, 2018 WL 466652 (D.D.C. Jan. 18, 2018).

The Federal District Court for the District of Columbia dismissed a suit challenging the suitability determination of a portion of the Rogue River for possible designated protection by Congress under the Wild and Scenic Rivers Act for lack of subject matter jurisdiction. The court based its finding on the suitability determination not being a final agency action and on the plaintiff's failing to allege an injury in fact traceable to the determination. The court explained that the suitability determination is only one step in the process of a potential designation and thus cannot be challenged as a final agency action. The court also explained that the injuries alleged by the plaintiffs were speculative because they are based on Congress designating the river to be protected under the Act, which has not yet and may never occur.

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