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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the January 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-18-03-01).

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FIRST CIRCUIT

Maine

Portland Pipe Line Corp., et al. v. City of South Portland, 2017 WL 6757556 (D. Me. Dec. 29, 2017).

In December, the U.S. District Court for the District of Maine ruled on a challenge to a local ordinance prohibiting shipments of crude oil from the City of South Portland's waterfront. A pipeline operator claimed that the city's ordinance was preempted under several federal and state laws and violated the Commerce Clause of the U.S. Constitution, due process and equal protection, and the city's comprehensive plan. The court granted the motion for most of the claims but denied summary judgment for the Commerce Clause issues. The court noted, "The [City] Council's primary purpose and intent in enacting the Ordinance, as well as its primary practical effect, will have to be resolved by a fact finder."

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FIFTH CIRCUIT

Larry Doiron Inc., et al. v. Specialty Rental Tools & Supply LLP et al., 2018 WL 316862 (5th Cir. Jan. 8, 2018).

The U.S. Court of Appeals for the Fifth Circuit adopted a new test to determine whether contracts related to oil and gas drilling in navigable waters are governed by maritime law. The court replaced a six-factor test focusing on the nature of the work performed with a two-step test that considers whether a vessel will perform a substantial role in completion of the contract. The case overturns prior Fifth Circuit precedent.

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EIGHTH CIRCUIT

Nebraska

Cappel v. State Dep't of Nat. Res., 298 Neb. 445 (2017).

The Nebraska Supreme Court upheld the dismissal of a suit related to the Nebraska Department of Natural Resource's regulation of surface water permits. Farmers claimed that the agency's regulation prevented them from using the surface waters of a river and its tributaries to irrigate their crops, resulting in inverse condemnation and a violation of their due process rights. The lower court found that the state was not protected by sovereign immunity but dismissed the complaint. On appeal, the Nebraska Supreme Court ruled that the state did have sovereign immunity, and the lower court erred in failing to find that it lacked subject matter jurisdiction over the farmers' claims under 42 U.S.C. §1983, due process, and restitution. The court remanded to the lower court, instructing it to dismiss claims barred by sovereign immunity for lack of subject matter jurisdiction.

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NINTH CIRCUIT

Turtle Island Restoration Network v. U.S. Dep't of Commerce 2017 WL 6598627 (9th Cir. Dec. 27, 2017).

Environmental groups challenged a decision of the National Marine Fisheries Service (NMFS) to allow a Hawai'i-based swordfish fishery to increase its fishing efforts, alleging that the increase would result in unintentional deaths of endangered sea turtles. The group also opposed the U.S. Fish and Wildlife Service's (FWS) issuance of a "special purpose" permit to NMFS that authorized the fishery's incidental take of migratory birds. The groups claimed that the agencies' actions resulted in violations of the Endangered Species Act and the Migratory Bird Treaty Act. The U.S. District Court for the District of Hawai'i entered summary judgment in favor of the agencies. On appeal, the Ninth Circuit ruled that NMFS's Biological Opinion finding that increased fishing efforts would result in no jeopardy for loggerhead sea turtles was arbitrary and capricious. The court, however, held that NMFS' no jeopardy finding for leatherback sea turtles was supported by the scientific record. The court also held that the FWS's issuance of a special purpose permit to NMFS was arbitrary and capricious.

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Animal Legal Def. Fund v. Wasden, No. 15-35960, 2018 WL 280905 (9th Cir. Jan. 4, 2018).

An animal rights advocacy organization brought suit against the Governor and Attorney General of Idaho, challenging a statute that criminalized interference with agricultural production facilities. The organization claimed that the statute violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and is preempted by federal law. The U.S. District Court for the District of Idaho entered summary judgment in favor of the organization and permanently enjoined enforcement of the statute. On appeal, the Ninth Circuit held that the statute violated the First Amendment by criminalizing entry into an agricultural production facility by misrepresentation and by prohibiting a person from entering a private agricultural production facility and making audio or video recordings of the agricultural facility's operations without express consent from the facility owner. The court upheld other portions of the statute, including prohibitions on obtaining records or employment by misrepresentation with the intent to cause economic or other injury to an agriculture production facility's operations, property, or personnel. The court found that the law did not violate the Equal Protection Clause.

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California

Cent. Coast Forest Ass'n v. Fish & Game Comm'n, No. C060569, 2018 WL 300188 (Cal. Ct. App. Jan. 5, 2018).

Timber company owners petitioned the California Fish and Game Commission (Commission) to delist coho salmon

south of San Francisco from the list of endangered species in California. The Commission added coho salmon to the list of endangered species in 1995 pursuant to a petition from the Santa Cruz County Fish and Game Advisory Commission. A trial court agreed with the companies and delisted the coho salmon in the Santa Cruz mountains. On appeal, the court reversed the delisting, since evidence showing no threat to the salmon was rebutted with definitive scientific evidence to the contrary.

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D.C. CIRCUIT

District of Columbia

Kimberly-Clark Corp. v. D.C., 2017 WL 6558500 (D.D.C. Dec. 22, 2017).

The District of Columbia (D.C.) recently enacted a law that limits when a manufacturer can market wipes as "flushable." The D.C. legislation includes a three-part standard for "flushability." If a company's wipes fail that test, it must clearly and conspicuously label that the product "should not be flushed." A manufacturer of "flushable wipes" moved for a preliminary injunction to prevent enforcement of the law. The U.S. District Court of the District of Columbia granted the injunction, agreeing that the law likely violates the plaintiff's First Amendment rights. The court noted that D.C. is still in the process of promulgating regulations to implement the legislation; therefore, the court will reassess whether the injunction remains appropriate after those regulations become final.

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FEDERAL CIRCUIT

Banks v. United States, 2017 WL 6626638 (Fed. Cir. Dec. 29, 2017).

Property owners and the U.S. Army Corps of Engineers (Corps) appealed the U.S. Court of Federal Claims' ruling on the alleged physical taking of certain parts of shoreline on Lake Michigan owned by thirty-seven property owners. In 2014, a court ruled that jetties constructed by the Corps resulted in erosion of the plaintiffs' property and a taking. The property owners appealed the court's assessment of damage awards. The appellate court agreed that the Federal Claims court's findings were erroneous and remanded the case back to the court.

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