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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the July 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-18-03-07).

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U.S. SUPREME COURT

Florida v. Georgia, 38 S. Ct. 2502 (2018).

In June, the U.S. Supreme Court issued an opinion on an interstate dispute between Florida and Georgia on the apportionment of water from the Apalachicola River Basin, which is formed by the Chattahoochee, Flint, and Apalachicola Rivers. In 2013, Florida sued Georgia for equal apportionment of the Basin waters. The Court agreed to hear the case, appointing a Special Master. The Special Master concluded that Florida failed to demonstrate that its complaint could be redressed through a court decree capping Georgia's water use, since the U.S. Army Corps of Engineers could not be bound by the decree. The Supreme Court disagreed, finding that the Special Master applied too strict a standard for redressability and further evidentiary findings should be conducted to properly apply the doctrine of equitable apportionment. The Court remanded the case for further proceedings with the Special Master.

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FIRST CIRCUIT

City of Taunton, Massachusetts v. United States Envtl. Prot. Agency, 2018 WL 3342108 (1st Cir. July 9, 2018).

The First Circuit upheld an U.S. Environmental Protection Agency (EPA) decision to impose a limit on the amount of nitrogen that the Taunton Wastewater Treatment Plant could discharge into the Taunton Estuary in Massachusetts—having limited such discharge through a National Pollutant Discharge Elimination System (NPDES) permit. When the EPA first issued the permit, the City of Taunton appealed to the Environmental Appeals Board (EAB), arguing against the need for any nitrogen limit as well as the specific limit that the permit imposed. After the EAB denied the City's administrative appeal, the City appealed to the First Circuit, challenging the final agency action on numerous

procedural and substantive grounds. The City made three procedural arguments, including that the EPA: 1) had failed to provide public access to the information used to derive the permit; 2) improperly chose not to address the City's untimely supplemental comments in its response to comments; and 3) improperly limited the City's access to the EPA's back-up documentation supporting the nitrogen limitation. The City also made three substantive arguments, including that the EPA: 1) erred in determining that the Taunton Estuary was nutrient impaired; 2) used improper methodology to determine whether a target nitrogen concentration would ensure unimpaired conditions; and 3) erred in failing to take existing conditions in the Taunton Estuary into account in fashioning the permit's nitrogen limitation. However, the court was not persuaded by any one of these arguments, holding that each of the City's challenges was without merit. Accordingly, the First Circuit affirmed the EAB's initial denial of an administrative hearing.

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FOURTH CIRCUIT

Ohio Valley Environmental Coalition, Inc. v. Pruitt, No. 17-1430 (4th Cir. June 20, 2018).

Several environmental groups sued the U.S. Environmental Protection Agency (EPA) for failing to perform its nondiscretionary duty under the Clean Water Act (CWA) to enact pollutant limits for biologically impaired waters in West Virginia. The CWA directs each state to submit water quality standards for the waters in their state and to develop total maximum daily loads (TMDLs) of pollutants for impaired waters. The West Virginia Legislature directed the state Department of Environmental Protection (DEP) to change its system for evaluating impaired waters. As a result, the DEP stopped submitting TMDLs, and the plaintiffs filed suit alleging that the EPA was required to promulgate TMDLs since the state had not done so. The district court granted summary judgment in favor of the plaintiffs. On appeal, the Fourth Circuit disagreed that West Virginia constructively submitted no TMDLs. The court noted that the constructive submission doctrine states that by a state failing to submit TMDLs for a prolonged period of time, they essentially submit no TMDLs and the EPA has a mandatory duty to issue its own TMDLs. This court and other courts have found that "where a state (1) has produced at least some TMDLs and (2) has a credible plan in place to produce others," the constructive submission doctrine does not apply. Here, West Virginia fulfilled both of these criteria; therefore, the court reversed the district court's grant of summary judgment.

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FIFTH CIRCUIT

Atchafalaya Basinkeeper v. United States Army Corps of Engineers, 2018 WL 3339539 (5th Cir. July 6, 2018).

The Fifth Circuit recently ruled on the U.S. Army Corps of Engineers' (Corps) decision to issue a permit for a pipeline that would run in part through the Atchafalaya Basin of southern Louisiana. Environmental groups claimed that the Corps erred in issuing the permit and sought a preliminary injunction. The district court granted the injunction, finding the Environmental Assessment (EA) inadequate. On appeal, the Fifth Circuit found that the EA was adequate for the permit, since the project did not have a significant environmental impact. Further, there was a rational connection between the pipeline project, the Clean Water Act and National Environmental Policy Act implications, and the decision to issue the construction permit was based on the Finding of No Significant Impact. Finally, the court ruled that EAs were not required to discuss cumulative effects with regard to pre-existing spoil banks. The court remanded for further proceedings.

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Texas

City of Laredo v. Laredo Merchants Ass'n, 2018 WL 3078112 (Tex. June 22, 2018).

The City of Laredo attempted to introduce a local anti-litter ordinance that would prohibit merchants from providing "single use" plastic and paper bags to customers. The Laredo Merchants Association sued the city for declaratory and injunctive relief on the grounds that the Texas Solid Waste Disposal Act preempts the ordinance. The trial court granted summary judgment in favor of the city, but the court of appeals reversed that decision. The city appealed. On appeal, the Texas Supreme Court pointed out that the Texas Constitution states that a city ordinance cannot conflict with state law, so the issue before the court was whether the Act preempted the ordinance and in doing so invalidated the ordinance. The court closely examined the language used in both the Act and the Ordinance, especially the definition of "container." Ultimately, the court found that the city's interpretation was not consistent with a plain read of the Act; therefore, the court affirmed the court of appeals' decision and remanded the case to the trial court for consideration of attorney fees and costs.

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NINTH CIRCUIT

Ctr. for Biological Diversity v. Exp.-Imp. Bank of the United States, 2018 WL 3149770 (9th Cir. June 28, 2018).

In 2012, environmental organizations sued the Export-Import Bank of the United States (Ex-Im Bank) for violations of the Endangered Species Act, the National Historic Preservation Act, and the Administrative Procedure Act. The environmental organizations alleged that Ex-Im Bank violated these acts by financing two liquid natural gas projects in Australia. Both projects are located within the Great Barrier Reef. The environmental groups claim that Ex-Im Bank did not adequately review the impacts, environmental and otherwise, prior to approving funding for these projects. Ex-Im Bank argued that the matter is now moot, because the loans and projects are complete and one of the loans is completely repaid. The court held that the action was not moot and continued to review the case on the issue of standing. The court found that the environmental groups failed to establish redressability, which is necessary for standing, because Ex-Im Bank played a statistically minor role in financing the two projects. Following a long procedural history, the court affirmed the district court's grant of summary judgment in favor of Ex-Im Bank due to the environmental groups' lack of redressability and standing.

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ELEVENTH CIRCUIT

Aponte v. Royal Caribbean Cruise Lines Ltd., 2018 WL 3083730 (11th Cir. June 21, 2018).

A cruise ship passenger, Freddy Aponte, slipped and fell on a puddle of soap while on board a Royal Caribbean ship. Aponte sued Royal Caribbean for a single count of negligence. The district court granted summary judgment in favor of Royal Caribbean. Aponte appealed. The Eleventh Circuit found that there were genuine issues of material fact and vacated the lower court opinion. First, there was a question of whether Royal Caribbean had actual or constructive notice of the puddle of soap that caused the accident. Second, there was a genuine issue of material fact over whether the puddle of soap was open or obvious to a reasonable person. Since these issues persist and the parties did not agree on the material facts of the case, the court vacated the grant of summary judgment and remanded the case for further proceedings.

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Florida

3630 Inv. Corp. v. Miami-Dade Cty., No. 17-22925-CIV, 2018 WL 3213489 (S.D. Fla. June 29, 2018).

On June 29, a judge in the U.S. District Court for the Southern District of Florida denied a motion made by Miami-Dade County to dismiss a land-use dispute case filed against it by 3630 Investment Corp. and others. The company accused the county of using an improper stormwater drainage system that failed to prevent sediment from entering

the system and depositing into a boat basin on plaintiffs' property, causing the basin floor to become substantially shallower. Plaintiffs argued that this reduction in depth began to interfere with use of the basin, including the type and number of vessels that could be berthed. Miami-Dade County moved to dismiss on standing issues, arguing that plaintiffs had acquired the property decades after the original drainage system was put in and the sediment became permanent. The court found that the plaintiffs had standing because their claims accrued at some point between 2012 and 2014 when the consequences of the sedimentary deposit manifested, during which time 3630 Investment owned the basin bottom. The court also addressed an allegation by the county that it couldn't control the existence of the sediment settlement because of the natural flow of water, thus eliminating its responsibility for the present situation. However, the court ruled that were it not for the county's stormwater drainage system, the deposit may not have occurred, or if it did occur, may have been exacerbated by the drainage system. Considering these rulings and looking at the case in the light most favorable to the plaintiffs, the court then denied the county's motion to dismiss and required it to file an answer to plaintiffs' second amended complaint by early August.

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DC CIRCUIT

Am. Rivers v. Fed. Energy Regulatory Comm'n, 2018 WL 3320870 (D.C. Cir. July 6, 2018).

The D.C. Circuit Court of Appeals granted a petition for review brought by several conservation groups against the Federal Energy Regulatory Commission (FERC). The court rescinded FERC's renewal of a 30-year licensing agreement with Alabama Power for the company to continue operating hydroelectric facilities on the Coosa River. The conservation groups argued that FERC did not meet its duties under the National Environmental Policy Act (NEPA) or Endangered Species Act (ESA); therefore, it issued the new license unlawfully. The court agreed, holding that FERC failed to meet is obligations under the Federal Power Act, including compliance with the other environmental statutes, because Alabama Power's licensing procedures did not support FERC's conclusion to approve relicensure. To determine ESA compliance, FERC relied on a report from the National Fish and Wildlife Service (NFWS), which stated that Alabama Power's operations could cause up to 100% takings of some local animal populations and ignored previous harm from hydroelectric operations in determining a baseline condition. Yet, the report concluded that continued operation was "not likely to jeopardize" endangered species or habitat. The Commission's own report on NEPA compliance issued a Finding of No Significant Impact (FONSI), despite the fact that the FONSI was based on decades old data and did not address the dams' lack of fish passage, failure to maintain a healthy level of dissolved oxygen, or failure to consider cumulative impacts of operation. Noting these contradictions between data and conclusions, the court vacated Alabama Power's renewed license and remanded the decision back to FERC to reconsider the application in a manner consistent with the court's opinion.

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