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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the May 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-18-03-05).

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SECOND CIRCUIT

New Hampshire

Appeal of Cook, 2018 WL 2074773 (N.H. May 4, 2018).

N. Miles Cook, III requested a permit to reconstruct and extend his dock on the Piscataqua River. The New Hampshire Department of Environmental Services (DES) denied the permit and the Wetland Council upheld the decision. On appeal, Cook argued that he was not required to demonstrate "need" to obtain the permit. The court agreed that the statute did not specifically require a showing of need, but it is a reasonable requirement that allows DES to carry out its functions. Cook claimed that even if need was required, then DES applied the wrong definition. DES maintained that it interprets need according to the context of dock permits in a manner that reflects the at-issue regulations and the common law right to wharf out. However, Cook argued that a court definition of "need" from a similar statute should apply. The court held that absent a clear definition of need in the relevant regulation, Cook's interpretation should apply because of its plain and ordinary meaning. The court remanded the case back to DES to interpret need according to the court's ruling.

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New York

In the Matter of the Application of Riverkeeper v. Seggos, 2018 WL 2123908 (N.Y. App. Div. April 23, 2018).

Environmental groups challenged a concentrated animal feeding operation (CAFO) general permit issued by the New York State Department of Environmental Conservation (DEC). The permit allowed CAFOs to develop comprehensive nutrient management plans by consulting a paid private engineer. The groups alleged that this violated the federal Clean Water Act (CWA) and state law by failing to have a CWA required Nutrient Management Plan, adequate agency review, and public participation. The court agreed and ordered DEC to issue a revised, CWA-compliant CAFO permit.

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FOURTH CIRCUIT

United States v. Oceanic Illsabe Ltd, 2018 WL 2089971 (4th Cir. May 7, 2018).

Oceanic Illsabe and Oceanfleet Shipping, two closely related shipping corporations headquartered in Greece, and two of their engineers were convicted of nine criminal offenses in federal district court. The convictions arose when a vessel the companies operated, *Ocean Hope*, discharged large amounts of oil pollutants into the ocean. The companies appealed the convictions. Oceanfleet claimed that the engineers responsible were only employed by Oceanic. The court found that the engineers were employees of Oceanic and Oceanfleet due to several factors: the paychecks came from both companies, they wore the same uniforms, and the Oceanfleet Manual was provided to the engineers by Oceanfleet. Additionally, the court ruled that the engineers acted on the corporations' behalf in their criminal conduct by ordering crewmembers to violate the law by discharging pollutants, the companies were on notice due to discrepancies in the updates on the Oil Record Book, and the companies knew about the discharge offloads. The court upheld the fines and sentences.

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South Carolina

Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 2018 WL 1833546 (S.C. Apr. 18, 2018).

A developer sought a permit to construct a bulkhead and revetment along the Kiawah River in order to facilitate residential development of the upland property. The South Carolina Department of Health and Environmental Control (DHEC) denied the majority of the permit but granted a 270-foot portion to protect public access. The developer and a coastal conservation group challenged the DHEC's decision. A lower court ruled in favor of the developer, granting a permit for 2,783 feet of bulkhead and revetment but modifying the requested permit. The South Carolina Supreme Court reversed and remanded. On remand, the Administrative Law Court authorized installation of 270 feet of bulkhead with revetment and additional bulkhead spanning 2,513 feet. DHEC and the group appealed again. The South Carolina Supreme Court affirmed the ALC's ruling that 270 feet of bulkhead would allow the public to continue to access public tidelands, but it found that approval of 2,513 feet of bulkhead without revetment was not supported by substantial evidence. The court affirmed as modified.

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EIGHTH CIRCUIT

Sisseton-Wahpeton Oyate of Lake Traverse Reservation v. U.S. Army Corps of Engineers, 2018 WL 1936356 (8th Cir. Apr. 25, 2018).

Merlyn Drake, a real property owner adjacent to Enemy Swim Lake in South Dakota, constructed a farm road. Drake received several permits and exemptions from the U.S. Army Corps of Engineers (Corps) for dredging parts of the lake and surrounding areas. The majority of the lake's shoreline is owned by the Sisseton-Wahpeton Oyate Tribe. The lake has significant and historical value to the Tribe, and the Tribe feared that Drake was not only dredging for a farm road, but also dredging for future development projects. The Tribe claimed that Drake misrepresented his claims to the Corps. In 2010, the Tribe sent a letter to the Corps requesting it to recapture the road project and order Drake to remove the road. The Corps responded that Drake's activities were for agricultural purposes and declined to intervene, because the permits and exemptions were valid. The Tribe claimed that the Corps' decision in the letter was arbitrary and capricious. The court held that the response letter in 2010 was not a final agency action for purposes of a permit, so it did not give rise to a claim. Also, the Tribe is not entitled to equitable tolling, because it did not diligently pursue its rights; therefore, the statute of limitations bars the Tribe's claims regarding the agency decision. Next, the Tribe claimed that the Corps erroneously issued a nationwide-permit for Drake's project, but Drake's project was not a "single and complete project." However, the Corps' interpretation of the project being "single and complete"

was not erroneous.

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Simmons v. Smith, 2018 WL 1998289 (8th Cir. Apr. 30, 2018).

Lee Simmons, a landowner on the banks of the Niobara River, sued the National Park Service (NPS), alleging that the NPS arbitrarily and capriciously established the boundaries of a scenic area of the river, which ran through his property. Simmons argued that NPS could not establish an "outstanding remarkable value" to the valley from "rim to rim." The court noted that the boundaries were selected because it balanced the region's recreational, geologic, fish and wildlife, and paleontological outstanding remarkable values as equitably as possible. The land contained a large viewshed as well as large ponderosa trees that contained bald eagle habitat, and the boundary closely tracked the viewshed and the ponderosa trees. Therefore, the boundary line establishment was not an arbitrary and capricious agency action.

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Minnesota

State v. Klapstein, 2018 WL 1902473 (Minn. Ct. App. Apr. 23, 2018).

Several protesters attempted to shutdown a petroleum pipeline. The protestors were arrested and faced several charges, including felony criminal damage to property, aiding and abetting felony criminal damage to property, gross misdemeanor trespassing, and aiding and abetting gross misdemeanor trespassing. The protestors used a "necessity" defense and testified to the "necessity of their actions in preventing environmental harm caused by the use of fossil fuels, particularly the tar sands oil carried by the pipeline with which they interfered." A lower court issued a pretrial order allowing the protestors to present evidence on the necessity defense at trial. A Minnesota appeals court upheld the ruling.

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FEDERAL CIRCUIT

St. Bernard Parish Gov't v. United States, 887 F.3d 1354 (Fed. Cir. 2018).

St. Bernard Parish and property owners in the parish filed a takings claim against the United States. They claimed that the United States was liable for the flooding of their property during Hurricane Katrina and other hurricanes, due to the construction of the Mississippi River-Gulf Outlet channel and its improper maintenance of that channel. The Federal Circuit Court of Appeals held that the government cannot be held liable for takings due to inaction. Furthermore, the construction of the channel was not the cause of the flooding; therefore, there were no grounds for a takings action.

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