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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the September 2019 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-19-03-09).

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THIRD CIRCUIT

Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Envtl. Prot, No. 17-3299, 2019 WL 3822247 (3d Cir. Aug. 15, 2019).

An environmental group challenged the Pennsylvania Department of Environmental Protection's approval for a gas company to use a state general permit to discharge water used to conduct hydrostatic testing. The company had submitted a Notice of Intent to comply with the state general permit for hydrostatic testing. The plaintiffs alleged that the department's approval violated public notice requirements. The court dismissed the challenge, holding that the public notice requirements were met at the time the general permit was issued.

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FIFTH CIRCUIT

Ctr. for Biological Diversity v. U.S. Envtl. Prot. Agency, No. 18-60102, 2019 WL 4126355 (5th Cir. Aug. 30, 2019).

The U.S. Court of Appeals for the Fifth Circuit held that environmental organizations lacked standing to challenge an Environmental Protection Agency permit for oil and gas facilities to discharge into parts of the Gulf of Mexico. The court held that the members of the environmental organization did not meet the requirements for associational standing, because they neither demonstrated injury in fact nor a geographic nexus. The court dismissed the case.

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Clean Water Action v. U.S. Envtl. Prot. Agency, No. 18-60079, 2019 WL 4047518 (5th Cir. Aug. 28, 2019).

Environmental conservation groups challenged the Environmental Protection Agency's (EPA) final order revising compliance dates for new best available technology effluent limitations and pretreatment standards concerning waste streams from steam electric power generating point sources under the Clean Water Act (CWA). The U.S. Court of Appeals for the Fifth Circuit held that the EPA's final order was a permissible revision of a prior order. Further, the court held the EPA did not violate CWA provisions by postponing the compliance date for new technology requirements.

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NINTH CIRCUIT

Washington

Port of Anacortes v. Frontier Indus., Inc., No. 78726-8-I, 2019 WL 3887412 (Wash. Ct. App. Aug. 19, 2019).

A log handling facility caused the accumulation of wood waste at the bottom of the "log pocket," an area where logs are handled in the water, which negatively impacted the marine environment. The Port of Anacortes, as owner of the facility, was found liable for remediation under the Model Toxics Control Act (MTCA). The Port sought indemnification from prior operators. A lower court denied the defendants' motion for summary judgment. On appeal, the court found that wood waste does qualify as designated hazardous substances under the MTCA. Further, genuine issues of material fact as to whether hazardous substances were released at the time defendants were operators of the log handling facility precluded summary judgment.

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ELEVENTH CIRCUIT

Cahaba Riverkeeper v. U.S. Envtl. Prot. Agency, No. 17-11972, 2019 WL 4309089 (11th Cir. Sept. 12, 2019).

Several environmental groups petitioned the Environmental Protection Agency (EPA) to withdraw Alabama's authority to administer the National Pollutant Discharge Elimination System (NPDES) permit program for the state. The EPA declined to initiate withdrawal proceedings, and the groups sought judicial review. The U.S. Court of Appeals for the Eleventh Circuit ruled in favor of the EPA, finding that the agency reasonably interpreted statutory and regulatory text, and its decision was not arbitrary, capricious, nor an abuse of discretion.

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Plott v. NCL Am., LLC, No. 19-10109, 2019 WL 4254697 (11th Cir. Sept. 9, 2019).

After a cruise ship passenger slipped and fell on a puddle inside the ship, she filed suit alleging negligence and failure to warn. A district court granted the cruise company's motion for summary judgment. On appeal, the court found that the district court erred in granting summary judgment, because the passenger established that the cruise line had notice of the dangerous condition and that the condition was not open or obvious. The court also held that the lower court properly excluded certain expert witness opinions.

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Azzia v. Royal Caribbean Cruises, Ltd, No. 18-12644, 2019 WL 4072012 (11th Cir. Aug. 29, 2019).

After a child nearly drowned in a pool on a Royal Caribbean cruise ship, the child's parents filed suit. The parents claimed that the cruise company was guilty of negligence and negligent infliction of emotional distress. A district court granted summary judgment on the emotional distress claim, finding that the plaintiffs were not in the "zone of danger" at the time of the accident. On appeal, the U.S. Court of Appeals for the Eleventh Circuit affirmed. The court

found that the plaintiffs failed to show that they sustained physical impact or were placed in immediate risk of physical harm by the company's allegedly negligent conduct.

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Georgia

Georgia v. Wheeler, No. 2:15-CV-00079, 2019 WL 3949922 (S.D. Ga. Aug. 21, 2019).

Several states challenged a 2015 rule promulgated by the U.S. Army Corps of Engineers and the Environmental Protection Agency defining "waters of the United States" (the "WOTUS Rule") under the Clean Water Act (CWA). A federal district found that the final rule "was not the logical outgrowth the proposed rule" and was partially arbitrary and capricious. The court concluded that the agencies did not correctly apply the significant nexus test for jurisdictional limits established by U.S. Supreme Court Justice Anthony Kennedy in *Rapanos*. Further, the court held that the rule substantially interferes with an area of traditional state authority without Congressional authorization. The court granted summary judgment if favor of the plaintiffs and remanded the WOTUS Rule to the agencies for review.

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DC CIRCUIT

District of Columbia

Friends of Animals v. Ross, No. 16-CV-1540 (DLF), 2019 WL 4016983 (D.D.C. Aug. 26, 2019).

In 2014, the National Marine Fisheries Service (NMFS) concluded that the queen conch found in the Caribbean Sea and the Gulf of Mexico did not warrant listing as an endangered or threatened species under the Endangered Species Act (ESA). Environmental groups filed suit. The court held that NMFS erred in relying on a vacated agency policy in determining that no portion of the queen conch's range was significant. The court vacated the listing decision and remanded to NMFS.

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