~ ~ August 17, 2010 ~ ~

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The National Sea Grant Law Center is pleased to offer the ***Ocean and Coastal Case Alert***. The ***Case Alert*** is a monthly listserv highlighting recent court decisions impacting ocean and coastal resource management. Each Case Alert will briefly summarize the cases. Please feel free to pass it on to anyone who may be interested. If you are a first-time reader and would like to subscribe, send an email to waurene@olemiss.edu with *"**Case Alert**"* on the subject line. NSGLC-10-03-08

THIRD CIRCUIT

Delaware

United States v. Donovan, 2010 U.S. Dist. LEXIS 75144 (D. Del. July 23, 2010).
In the late 1980s and early 1990s, David Donavan filled in a portion of his nearly four acre property near Smyrna, Delaware without a permit. In 2006, the United States District Court for the District of Delaware granted summary judgment in favor of the United States, ordering Donovan to restore .771 acres of wetlands and to pay a civil penalty of $256,000. Donovan appealed to the Third Circuit, which automatically remanded in light of the Supreme Court's ruling regarding Clean Water Act jurisdiction in *Rapanos v. United States*. The district court ruled that under both the plurality and concurring standards set forth in *Rapanos,* the Donovan wetlands are "waters of the United States," and therefore fall within the jurisdiction of the CWA.
https://ecf.ded.uscourts.gov/doc1/04311168668

FOURTH CIRCUIT

N.C. ex rel. Cooper v. TVA, 2010 U.S. App. LEXIS 15286 (4th Cir. July 26, 2010).
The Fourth Circuit Court of Appeals has reversed an injunction requiring installation of emissions controls at four electricity generating plants in Alabama and Tennessee. The United States District Court for the Western District of North Carolina had granted the injunction, finding that the plants constituted a public nuisance under North Carolina law. The Fourth Circuit reversed the case, holding that public nuisance standards could not bypass the Clean Air Act's regulatory scheme. According to the court, "If allowed to stand, the injunction would encourage courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air. The result would be a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." The court also held that the injunction improperly applied home state law extraterritorially.
http://pacer.ca4.uscourts.gov/opinion.pdf/091623.P.pdf

FIFTH CIRCUIT

ConocoPhillips Co v. United States EPA, 2010 U.S. App. LEXIS 15229 (5th Cir. July 23, 2010).
The Fifth Circuit granted a joint motion by the Environmental Protection Agency (EPA) and several environmental organizations to remand a portion of a final rule regulating the use of cooling water intake structures for existing and new offshore oil and gas extraction facilities. The environmental organizations and oil and gas companies had challenged the EPA's Phase III rule; however, the case was stayed pending review of Phase II standards by the U.S. Supreme Court. The Supreme Court upheld the Phase II rule. The EPA and environmental groups then sought voluntary remand of the existing facilities portion of the Phase III rule. The court ruled that it was reasonable to reevaluate the Phase III rule's existing facilities decision in combination with the EPA's new Phase II proposal. The court affirmed the portion of the rule regulating new facilities.
http://www.ca5.uscourts.gov/opinions/pub/06/06-60662-CV0.wpd.pdf

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Danos Marine, Inc. v. Certain Primary Prot. & Indem. Underwriters, 2010 U.S. App. LEXIS 15515 (5th Cir. July 28, 2010)
After Danos Marine's liftboat was capsized by Hurricane Katrina, the company sought to recover costs of wreck removal under a protection and indemnity insurance policy. The insurance company denied coverage, citing the lack of a removal order from the government. The Fifth Circuit ruled that coverage was improperly denied because under the Wreck Act, a vessel owner is obligated to remove the wreck of its vessel from navigable waters and failure to remove the wreck would likely expose the owner to liability.
http://www.ca5.uscourts.gov/opinions/pub/09/09-30378-CV0.wpd.pdf

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NINTH CIRCUIT

Home Builders Ass'n of N. Cal. v. United States Fish & Wildlife Serv., 2010 U.S. App. LEXIS 16439 (9th Cir. Aug. 9, 2010).
The Ninth Circuit Court of Appeals upheld the Fish and Wildlife Service's (FWS) designation of about 850,000 acres of land as critical habitat for 15 endangered or threatened vernal pool species. Several industry groups had challenged the designation, arguing that it went too far. The court upheld the district court's rejection of the challenge, finding that FWS followed technical procedural directives of the ESA, in particular, 16 U.S.C. §§ 1532 and 1533, in making the designation.
https://ecf.ca9.uscourts.gov/cmecf/servlet/TransportRoom?servlet=ShowDoc&dls_id=009122203299

Alaska

Native Vill. of Point Hope v. Salazar, 2010 U.S. Dist. LEXIS 74086 (D. Alaska July 21, 2010).

A federal district judge halted the development of oil and gas wells on leases in the Arctic's Chukchi Sea. The Native Village of Point Hope, the city of Point Hope, and the Inupiat Community of the Arctic Slope, along with several environmental groups challenged the lease sale, as well as the Final Environmental Impact Statement (FEIS) for the sale, claiming that it violated the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the Administrative Procedures Act (APA). The judge found that "although much of the Agency's extensive investigation was appropriate, the Agency has failed to comply with NEPA in certain circumstances" and granted the plaintiffs an injunction. On August 2nd, following a motion filed by Shell, the federal judge clarified that the injunction does not prevent seismic studies that had already been approved or were pending approval by the federal government.
https://ecf.akd.uscourts.gov/doc1/0231716988

DC CIRCUIT

Theodore Roosevelt Conservation P'ship v. Salazar, 2010 U.S. App. LEXIS 15257 (D.C. Cir. July 23, 2010).
The D.C. Circuit Court of Appeals upheld the Bureau of Land Management's (BLM) Record of Decision (ROD), environmental impact statement (EIS), and drilling permits for a natural gas field. Several environmental groups had sued the BLM, arguing that the ROD, EIS, and permits violated the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act (FLMPA), and the Administrative Procedure Act. The district court granted summary judgment in favor of the BLM. On appeal, the D.C. Circuit upheld the decision, finding that although BLM's projects exceeded projections described in the draft EIS for the Regional Management Plan, the agency did not violate NEPA or FLMPA because the projection was only an analytical baseline for evaluating environmental impacts, not a point past which further exploration and development was prohibited.
http://bit.ly/9RThLnc

District of Columbia

Gulf Restoration Network, Inc. v. Nat'l Marine Fisheries Serv., 2010 U.S. Dist. LEXIS 81897 (D.D.C. Aug. 12, 2010).
The United States District Court for the District of Columbia ruled that three environmental groups lacked standing to challenge offshore aquaculture plans in the Gulf of Mexico. The Gulf of Mexico Fishery Management Council had approved the aquaculture plan last January. When the National Marine Fisheries Service (NMFS) did not act on the plan within 30 days, it was automatically approved. The environmental groups claimed that NMFS's inaction violated the Magnuson-Stevens Act and the Administrative Procedures Act. The court found that because no aquaculture operations had been permitted or taken place, "no injury has occurred and the matter is unfit for judicial review."
https://ecf.dcd.uscourts.gov/doc1/04513086169

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