Ocean and Coastal Case Alert

~ ~ June 15, 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-10-03-06

FIRST CIRCUIT

Massachusetts

Roche v. Dir. of the Div. of Marine Fisheries, 2010 Mass. App. LEXIS 622 (Mass. App. Ct. May 18, 2010).

The Appeals Court of Massachusetts upheld a regulation promulgated by the state Division of Marine Fisheries that was intended to close a loophole between state and federal fishing permit programs. The loophole had allowed several fishermen who held both state and federal permits to delay renewing their federal permits in order to fish beyond the limits imposed under either permitting scheme. Two commercial fishermen filed suit, claiming that the regulation was unconstitutional, and illegal, arbitrary, and capricious under state law. The court held that 1) the state law is not preempted by the Magnuson-Stevens Act, since the Act does not expressly or impliedly preempt state regulation; 2) the regulation does not violate the dormant Commerce Clause by impinging on foreign commerce; 3) the law does not violate the Equal Protection clause because it is rationally related to a legitimate state interest; 4) and, the department did not exceed its statutory authority or act arbitrarily or capriciously in promulgating the regulation.

http://www.massreports.com/opinionarchive/default.aspx

THIRD CIRCUIT

Pennsylvania

Delaware Ave., LLC v. Dep't of Conservation & Natural Res., 2010 Pa. Commw. LEXIS 276 (Pa. Commw. Ct. June 10, 2010).

A Pennsylvania court held that the state, not an adjacent property owner, owned a ten-acre tract of previously submerged land along a navigable river. The land was created during a dredging project in the Delaware River. The adjacent property owner filed an action to quiet title. The court found that since the land was created by a dredging project, rather than formed gradually over time, the doctrine of accretion did not apply.

http://www.courts.state.pa.us/OpPosting/Cwealth/out/2393CD09_6-10-10.pdf

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FIFTH CIRCUIT

Comer v. Murphy Oil USA, 2010 U.S. App. LEXIS 11019 (5th Cir. May 28, 2010).

A panel of the United States Court of Appeals for the Fifth Circuit has dismissed a climate change nuisance case. A three-judge panel of the Fifth Circuit had ruled that landowners along the Gulf Coast had standing to sue for damages related to Hurricane Katrina. The defendants, several oil and energy companies, requested a hearing *en banc*, a hearing with all sixteen sitting judges in the Fifth Circuit. Seven of the judges recused themselves and nine voted to hear the case *en banc*. The grant of rehearing *en banc* vacated the panel opinion. Of nine judges, six had voted to hear the case, but after another judge recused herself, the court determined that the court lacked the necessary quorum to hear the case as required under 28 U.S.C.S. § 46. The dismissed the case, which effectively reinstates the district court's original decision holding that the plaintiffs did not have standing to pursue their claims.

http://www.ca5.uscourts.gov/opinions/pub/07/07-60756-CV2.wpd.pdf

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NINTH CIRCUIT

Butte Envtl. Council v. United States Army Corps of Eng'Rs, 2010 U.S. App. LEXIS 11024 (9th Cir. June 1, 2010).

The U.S. Court of Appeals for the Ninth Circuit affirmed a lower court opinion upholding the decision by the U.S. Fish and Wildlife Service (FWS) and the U.S. Environmental Protection Agency (EPA) to approve the construction of a business park on protected wetlands. Butte Environmental Council, a nonprofit environmental organization, filed suit against the city of Redding, the Corps and the FWS in federal district court. The group claimed that the Corps' decision to issue a permit for the project and the FWS' biological

opinion finding that the project would not adversely modify the critical habitat for endangered and threatened species were arbitrary and capricious under the Clean Water Act (CWA) and the Endangered Species Act (ESA). The district court granted summary judgment in favor of the agencies and the City. The appellate court agreed that neither the Corps' approval nor the FWS's biological opinion were arbitrary and capricious.
http://www.ca9.uscourts.gov/datastore/opinions/2010/06/01/09-15363.pdf

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Alaska

State v. Alaska Riverways, Inc., 2010 Alas. LEXIS 54 (Alaska May 21, 2010).

The Alaska Supreme Court ruled that although the state may charge rent for commercial docks on navigable waters, a fee based on passenger head counts violates federal law. Alaska Riverways, a paddleboat tour operator, constructed a system of floating docks adjacent to its riverside property in 1980. Though the state of Alaska owns the riverbed below the ordinary high water mark, Alaska Riverways and the state never entered into a lease agreement. In 2006, DNR proposed a twenty-five year lease to the company for $1,000 per year or $.25 per paying passenger, whichever is greater. Alaska Riverways contested the per-passenger fee. A lower court ruled that Alaska Riverways had a common law wharfage privilege, since the docks were built prior to state law abolishing riparian owners' common law right to wharf out over state-owned riverbed. The appellate court disagreed, finding that the common-law right "should yield to the public interest in earning revenue from the exclusive use of state land by a riparian owner." The court ruled, however, that the per-passenger fee violates federal law prohibiting states from levying a tax for the use of navigable waters.
http://courts.alaska.gov/ops/sp-6479.pdf

California

Huverserian v. Catalina Scuba Luv, Inc., 2010 Cal. App. LEXIS 750 (Cal. App. 2d Dist. May 26, 2010).

After a diver died following a scuba diving trip, his family filed a wrongful death action against the equipment rental company. The company argued that exculpatory language in the rental contract provided a full defense to the action and sought summary judgment. The trial court granted the motion. On appeal, the court reversed the decision, finding that the exculpatory language did not provide a defense in this instance, because it was expressly limited to boat dives or multiple day rentals. The court noted that "the relevant language is not a mere caption, but was an integral part of the exculpatory paragraph, emphasized in boldface and underlined."
http://www.courtinfo.ca.gov/opinions/documents/B212823.PDF

TWC Storage, LLC v. State Water Resources Control Bd., 2010 Cal. App. LEXIS 801 (Cal. App. 6th Dist. June 3, 2010).

After the Regional Water Quality Control Board for the San Francisco Bay Region imposed a $25,000 fine against a company for a chemical spill on its property that infiltrated the groundwater, the company filed suit arguing that the board abused its discretion in imposing the fine. A lower court denied the petition. On appeal, the court affirmed the denial, concluding that the board properly applied the relevant statutes and that because the company permitted the discharge into the groundwater it was strictly liable. The court also rejected the company's argument that it was deprived of due process at the administrative hearing before the board.
http://www.courtinfo.ca.gov/opinions/documents/H033228.PDF

Washington

Catchpole v. Wagner, 2010 U.S. Dist. LEXIS 53729 (W.D. Wash. June 1, 2010).

A property owner filed a Clean Water Act (CWA) citizen suit against his neighbor for grading an easement area containing wetlands. The United States District Court for the Western District of Washington dismissed the suit, noting that harm sought to be addressed in a citizen's suit must lie in the present or the future and not in the past. The court found that the only time the easement was graded was in 2006 and the neighbor has no future plans to perform grading or other similar work in the easement area without first obtaining a permit.
https://ecf.wawd.uscourts.gov/doc1/19713702501

ELEVENTH CIRCUIT

Florida

Nassau County v. Titcomb, 2010 Fla. App. LEXIS 7662 (Fla. Dist. Ct. App. 1st Dist. June 3, 2010).

After several residents challenged an ordinance approving densities requested in a planned development of an island, a district court ruled in favor of the residents and quashed the development order. The county appealed the decision. While the court agreed that the residents had standing to challenge the ordinance, it overturned the district court's order with regard to the ordinance. The court found that the ordinance should be reinstated since the plan permitted redefining land use designation on advice from a water management district. Since the district had reclassified part of the island, the ordinance complied with the density requirements of the island's Comprehensive Plan.
http://opinions.1dca.org/written/opinions2010/06-03-2010/09-1008.pdf

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