Ocean and Coastal Case Alert

~ ~ October 14, 2010 ~ ~

If you are not able to view this properly, please go to http://nsglc.olemiss.edu/casealert.htm

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-10-03-10

FOURTH CIRCUIT

Historic Green Springs, Inc. v. U.S. EPA, 2010 U.S. Dist. LEXIS 103412 (W.D. Va. Sept. 29, 2010).
The United States District Court for the Western District of Virginia dismissed a lawsuit challenging the Environmental Protection Agency's (EPA) failure to object to a National Pollution Discharge Elimination System (NPDES) permit for a wastewater treatment facility. Historic Green Springs, Inc. (HGS) an organization that holds conservation easements on several thousand acres in the Green Springs National Historic Landmark District, filed the claim. HGS alleged that treated sewage was being discharged into a small tributary to the South Anna River, York River, and the Chesapeake Bay in violation of the CWA. The group claimed that the EPA had a non-discretionary duty under the CWA and the National Historic Preservation Act (NHPA) to review the permit. The district court found that the failure to object does not equal approval, and further, the decision whether to object is discretionary, which precludes the NHPA claim.
https://ecf.vawd.uscourts.gov/doc1/19111464124

FIFTH CIRCUIT

Ms Tabea Schiffahrtsgesellschaft Mbh v. Bd. of Comm'rs of the Port of New Orleans, 2010 U.S. Dist. LEXIS 103171 (E.D. La. Sept. 29, 2010).
The United States District Court for the Eastern District of Louisiana ruled that the U.S. Army Corps of Engineers (the Corps) was not liable for negligently failing to maintain the proper depth of water at and around the Napoleon Avenue Wharf after the *MSC Turchia*, a container ship, grounded in the Port of New Orleans on June 2, 2008, causing its bow to swing starboard and allide with the wharf. The plaintiffs sued the Board of Commissioners of the Port of New Orleans (Dock Board), which joined the United States as a third-party defendant. The Dock Board alleged that the Corps was negligent in failing to warn of navigation hazards prior to the grounding of the *Turchia*. The court disagreed, finding that the Corps acted with due care.
https://ecf.laed.uscourts.gov/doc1/08514449047

Mississippi

Bay Point High & Dry, L.L.C. v. New Palace Casino, L.L.C., 2010 Miss. App. LEXIS 549 (Miss. Ct. App. Oct. 5, 2010).
Bay Point High and Dry, L.L.C. filed suit for negligence against New Palace Casino, L.L.C. alleging that New Palace was liable for damages caused to Bay Point's building by one of the casino's barges during Hurricane Katrina. Bay Point alleged that New Palace was liable for negligence in failing to secure or move its barge during Hurricane Katrina, as well as being negligent for not complying with the regulations of the Mississippi Gaming Commission. The trial court granted summary judgment in favor of New Palace. A Mississippi appellate court upheld the ruling. "Bay Point failed to put on significant evidence to show that there was a genuine issue of material fact. New Palace took reasonable steps in mooring its barge in light of the applicable regulations and foreseeable weather conditions of Biloxi Bay. We further find that there is no evidence presenting a genuine issue of material fact whether the failure of New Palace to obtain its PMV status with the Coast Guard for the [barge] proximately caused damage to Bay Point."

http://www.mssc.state.ms.us/Images/HDList/..%5COpinions%5CCO65694.pdf

---

NINTH CIRCUIT

Sackett v. EPA, 2010 U.S. App. LEXIS 19519 (9th Cir. Sept. 17, 2010).
The Ninth Circuit affirmed dismissal of an action seeking injunctive and declaratory relief from an Environmental Protection Agency (EPA) compliance order. The EPA order had directed the plaintiffs to restore a parcel of land that it claimed the plaintiffs had filled without obtaining a permit in violation of the CWA. The U.S. District Court for the District of Idaho dismissed their claims. On appeal, the Ninth Circuit agreed that the CWA precluded pre-enforcement judicial review of administrative compliance orders issued pursuant to 33 U.S.C.S.§ 1319(a)(3), and the preclusion did not violate due process.
http://www.ca9.uscourts.gov/datastore/opinions/2010/09/17/08-35854.pdf

Ctr. for Biological Diversity v. U.S. DOI, 2010 U.S. App. LEXIS 19767 (9th Cir. Sept. 23, 2010).
The Ninth Circuit ruled that the Bureau of Land Management's approval of a land exchange in a company's mining plan of operations (MPO) violated the National Environmental Policy Act (NEPA) and the Federal Land Policy and Management Act (FLMA) The court found that in the BLM's Final Environmental Impact Statement prepared pursuant to NEPA, the BLM assumed without analysis that the MPO process would impose no constraints on, and would have no effect on, the manner in which the company would conduct new mining operations on exchanged land. The court also held that the BLM's approval of the proposed land exchange was a violation of FLPMA and similarly arbitrary and capricious. The court reversed the decision of the district court and remanded for further proceedings consistent with the court's opinion.
http://www.ca9.uscourts.gov/datastore/opinions/2010/09/23/07-16423.pdf

---

California

Sonoma County Water Coalition v. Sonoma County Water Agency, 2010 Cal. App. LEXIS 1745 (Cal. App. 1st Dist. Oct. 8, 2010).
A California appellate court ruled that the Sonoma County Water Agency did not abuse its discretion in preparing an urban water management plan. Several citizen organizations and one individual had challenged the adequacy the plan. The trial court ruled in favor of the plaintiffs, finding that the plan was not supported by substantial evidence and failed to comply with statutory requirements, including the failure to provide the required degree of specificity and to address certain environmental impacts. On appeal, the court ruled that the trial court failed to give deference to the expertise and discretion of the Agency. Further, "the Plan was clear as to its assumptions, which were based on existing conditions and anticipated completion of projects already in progress, which were equally clear as to their limitations, and for which the Agency had factual support. The Plan was not deficient for failing to assert a level of certainty in its anticipated water supply that could not be justified, or for failing to plan an alternative supply which would necessarily be at least equally uncertain. It did not mislead. The Agency was not required to plan

based on alternative hypothetical scenarios its experts considered unlikely to occur, rather than focusing its resources on those circumstances it reasonably anticipated. It was not required to consider all possible eventualities."
http://www.courtinfo.ca.gov/opinions/documents/A124556.PDF

Washington

Puget Sound Harvesters Ass'n v. Dep't of Fish & Wildlife, 2010 Wash. App. LEXIS 2209 (Wash. Ct. App. Sept. 28, 2010).
A Washington appellate court affirmed a trial court's finding that the Washington Department of Fish and Wildlife's rules setting the 2008 fall chum salmon fishing schedule in South Puget Sound areas 10 and 11 were arbitrary and capricious. The court held that the Department erred in allocating time on the water between gillnetters and purse seiners without determining the likely effect of this allocation on fish harvest for the two gear groups.
http://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinionTextOnly&filename=394359MAJ&printOnly=y

---

ELEVENTH CIRCUIT

Miccosukee Tribe of Indians of Fla. v. United States Army Corps of Eng'rs, 2010 U.S. App. LEXIS 19240 (11th Cir. Sept. 15, 2010).
The Eleventh Circuit affirmed dismissal of the Miccosukee Tribe of Indians' challenge to a federal government plan to replace the ground-level Tamiami Trail with a bridge to increase the flow of water into Everglades National Park. The Eleventh Circuit agreed that the district court lacked subject matter jurisdiction to hear the case. The court noted that the Omnibus Appropriations Act 2009 partially repealed the environmental laws that plaintiff was invoking, which included the National Environmental Policy Act of 1969 (NEPA), the Federal Advisory Committee Act (FACA), and the Endangered Species Act (ESA).
http://www.ca11.uscourts.gov/opinions/ops/200914194.pdf

NSGLC-10-03-10