Ocean and Coastal Case Alert

~ ~ September 16, 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-10-03-09

FIRST CIRCUIT

Massachusetts

Blair v. Dep't of Conservation & Rec., 2010 Mass. LEXIS 598 (Mass. Aug. 26, 2010).
A Massachusetts court ruled that the denial of a lakefront property owner's application for a variance did not result in a regulatory taking under the state constitution. The property owners modified their property, which was within a 200-foot buffer zone from the lake, removing trees to add a lawn and extend their beach area. After the Department of Conservation and Recreation instituted enforcement proceedings for the violation of Massachusetts laws, the owners agreed to remove portions of the beach and the retaining wall and replant trees. After they completed the work, their subsequent application for a variance was denied. The court found that although the denial might lower the owners' property value, there was no regulatory taking under the Massachusetts constitution and no compensation was required since the owners retained the right to use their land and only a portion of their land abutting the public watershed was regulated.
http://tinyurl.com/27aocbs

Alliance to Protect Nantucket Sound v. Energy Facilities Siting Bd., 2010 Mass. LEXIS 601 (Mass. Aug. 31, 2010).
The Massachusetts Supreme Judicial Court has upheld the state Energy Facilities Siting Board (EFSB) ruling authorizing construction of transmission lines that would connect Cape Wind's proposed offshore wind farm to the regional electric power grid. The court found that the electric company satisfied the requirements in Mass. Gen. Laws ch. 164, §§ 69O, 69L(A)(4). The court agreed with the EFSB's findings that "Cape Wind satisfied the requirements set forth in § 69O by showing that the transmission project was (1) needed; (2) compatible with considerations of environmental protection, public health, and safety; (3) in conformance with State and local laws, except for limited aspects of the Cape Cod Act and the RPP, exemption from which was reasonable and consistent with the siting board's statutory mandate to provide a reliable energy supply with a minimum impact on the environment at the lowest possible cost; and (4) required to serve the public interest and convenience." The court also agreed with EFSB's findings that the project complied with § 69L(A)(4) "by making a good faith effort to obtain the authorizations included in the certificate: the DRI approval, four local permits Cape Wind could not obtain without DRI approval, and four State authorizations, three of which Cape Wind had already received."
http://tinyurl.com/25r8a64

SECOND CIRCUIT

Murphy v. EAPWJP, LLC, 123 Conn. App. 316 (Conn. App. Ct. 2010).
A Connecticut appellate court upheld a decision finding that adjoining landowners had acquired a prescriptive easement over a portion of land that gave them beach access. The landowners had accessed the beach for many years over a wooden boardwalk that they had maintained. In addition, the plaintiffs and others had maintained mooring poles on the owner's land. The owners of the property, EAPWJP, removed the boardwalk and told the adjoining landowners that they could no longer access the beach via EAPWJP's property. The adjoining landowners sought a prescriptive easement over the land and for the maintenance of the mooring poles. EAPWJP agreed with the lower court's assessment that the prescriptive use was open, notorious, and under a claim of right for more than a fifteen year period. However, EAPWJP argued that the wooden walkway negatively impacted tidal wetlands and, because the wooden walkway had been constructed and maintained without obtaining the necessary permits, it could not have formed the basis for the acquisition of a prescriptive easement. Although the court agreed that the walkway had not been authorized by the Department, it ruled that that does not negate the rights of the plaintiffs to cross *the land* owned by EAPWJP, since the prescriptive easement is not limited by, or dependent on, the wooden walkway that was built on the land. Finally, the court held that EAPWJP failed to prove that the mooring poles were a public nuisance.
http://www.jud.ct.gov/external/supapp/Cases/AROap/AP123/123AP456.pdf

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FOURTH CIRCUIT

United States v. Said, No. 2:10cr57 (E.D. Va., August 17, 2010).
A U.S. district court dismissed piracy charges against six Somali nationals who had fired on the *USS Ashland* in the Gulf of Aden. The court found that because the men did not rob the ship or its crew, their acts did not constitute piracy under U.S. law. The court reasoned that due process prevented the court from applying a new definition of piracy referencing the current law of nations. Although the piracy charges were dismissed, other charges against the men, including attack to plunder a vessel, acts of violence against persons on a vessel, assault with a dangerous weapon on federal officers and employees, conspiracy involving firearms during a crime of violence, and use of a firearm during a crime of violence, were undisturbed by the court's ruling.
http://ia360702.us.archive.org/1/items/gov.uscourts.vaed.253001/gov.uscourts.vaed.253001.94.0.pdf

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NINTH CIRCUIT

Northwest Envtl. Def. Ctr. v. Brown, 2010 U.S. App. LEXIS 17129 (9th Cir. Aug. 17, 2010).
The Ninth Circuit ruled that logging companies violated the Clean Water Act (CWA) by not obtaining discharge permits for stormwater

runoff from logging roads. The companies argued that the runoff was exempt from the definition of a point source discharge, or alternatively that discharges from logging operations were exempt. The court found that the runoff, which was collected by and then discharged from the companies' system of ditches, culverts, and channels, was a point source discharge, since the runoff was channeled and controlled through a discernible, confined, and discrete conveyance in the companies' system of ditches, culverts, and channels, and the runoff was then discharged into protected waters. In addition, the runoff was from roads dedicated to the industrial activity of logging and the logging operations were within the broad definition of industrial activity and was therefore not exempt from the permitting process.
http://www.ca9.uscourts.gov/datastore/opinions/2010/08/17/07-35266.pdf

Modesto Irrigation Dist. v. Gutierrez, 2010 U.S. App. LEXIS 17583 (9th Cir. Aug. 20, 2010).
Several irrigation districts in California's Central Valley challenged the National Marine Fisheries Service's (NMFS) decision to list steelhead as a threatened species under the Endangered Species Act (ESA). The irrigation districts challenged the listing of steelhead as a distinct species, separate from rainbow trout. The court ruled that the definition of "species" in the ESA did not require NMFS to place the interbreeding fish in the same "distinct population segment." The court also found that NMFS provided an adequate rationale for the change in policy.
http://www.ca9.uscourts.gov/opinions/view_subpage.php?pk_id=0000010756

N. Cal. River Watch v. Wilcox, 2010 U.S. App. LEXIS 17759 (9th Cir. Aug. 25, 2010).
The Ninth Circuit held that privately-owned wetlands adjacent to navigable waters of the United States do not qualify as "areas under Federal jurisdiction" for purposes of § 9 of the Endangered Species Act (ESA). The case arose when an environmental organization and an individual sued developers and three California Department of Fish and Game employees, claiming that the defendants violated § 9 of the ESA by digging up and removing an endangered plant species, Sebastopol meadowfoam. Section 9 prohibits the "take" of endangered species from "areas under Federal jurisdiction." The plaintiffs claimed that because the plants grew in wetlands subject to the jurisdiction of the U.S. Army Corps of Engineers, § 9 prohibited the take of the plants. The court was not convinced by the argument. "Although we agree that the term 'areas under Federal jurisdiction' is ambiguous, we are not convinced that the U.S. Fish and Wildlife Service ("FWS"), the agency with rule making authority, has interpreted the term. Nonetheless, for the reasons set forth in this opinion, we hold that 'areas under Federal jurisdiction' does not include the privately-owned land at issue here."
http://www.ca9.uscourts.gov/datastore/opinions/2010/08/25/08-15780.pdf

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California

Am. Trucking Ass'ns v. City of Los Angeles, 2010 U.S. Dist. LEXIS 88134 (C.D. Cal. Aug. 26, 2010).
A U.S. district court upheld the Los Angeles Harbor Board of Commissioners adoption of a "Clean Air Action Plan" requiring motor carriers accessing the Port of Los Angeles to comply with a number of requirements designed to reduce emissions. A trucking association challenged the Plan, claiming that it was preempted by the Federal Aviation Administration Authorization Act (FAAA Act). The court found that although several of the provisions in the concession agreement implementing the plan fall under the FAAA Act, all of the provisions fall within the market participant exception to the FAAA Act. The court also held that the provisions do not constitute an undue burden on interstate commerce.
https://ecf.cacd.uscourts.gov/doc1/031110778606

Washington

Pac. Topsoils, Inc. v. Dep't of Ecology, 2010 Wash. App. LEXIS 1927 (Wash. Ct. App. Aug. 24, 2010).
A Washington court held that the Washington Water Pollution Control Act's application to wetlands was not unconstitutionally vague. Pacific Topsoils, Inc. had challenged the Act and the state Department of Ecology's authority to regulate wetlands after the Department had assessed fines against the company for filling wetlands without proper permits. The court affirmed the Washington Pollution Control Hearings Board decision upholding the DOE fines.
http://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=396912MAJ

DC CIRCUIT

District of Columbia

Cape Hatteras Access Pres. Alliance v. United States DOI, 2010 U.S. Dist. LEXIS 84515 (D.D.C. Aug. 17, 2010).
A U.S. district court upheld the U.S. Fish and Wildlife Service's designation of critical winter habitat for the piping plover, a threatened species of shorebirds. The designation, which set aside more than 2,000 acres of land in North Carolina, including parts of the Cape Hatteras National Seashore, was challenged by the Cape Hatteras Access Preservation Association, a coalition with interest in off-road vehicle operation for both recreational and commercial purposes. The court found that the FWS "properly designated and evaluated the special management considerations for each primary constituent element as required by the ESA. Further, the Service properly considered economic and other impacts as required by the ESA. Finally, after taking a 'hard look' at the potential environmental consequences, the Service correctly determined that an EIS was not required pursuant to NEPA."
https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2009cv0236-43

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