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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-11-03-04

THIRD CIRCUIT

Gen. Category Scallop Fishermen v. Sec'y v. U.S. DOC, 2011 U.S. App. LEXIS 5138 (3d Cir. Mar. 16, 2011).
The United States Court of Appeals for the Third Circuit upheld regulations implementing Amendment 11 to the Atlantic Sea Scallop Fishery Management Plan. Former general category scallop permit holders had sued the agencies for promulgating the regulations, alleging violation of the Administrative Procedures Act (APA) and the Magnuson-Stevens Fishery Conservation and Management Act of 1976 (Magnuson-Stevens Act). The amendment reduced the number of vessels eligible to participate in the scallop harvest considerably by replacing an open access general category fishery with a limited access general category. The district court granted summary judgment to the agencies. On appeal, the Third Circuit affirmed. The court ruled that the National Marine Fisheries Service reasonably concluded that the New England Fishery Management Council followed the procedural requirements of the Magnuson-Stevens Act in developing Amendment 11, including holding a sufficient amount of public meetings. Further, the court found sufficient evidence that the amendment complied with National Standard 2 and National Standard 5 of the Magnuson-Stevens Act. Finally, the court ruled that the "control date" recommendation was not subject to the rulemaking provisions of the APA.
http://www.ca3.uscourts.gov/opinarch/102341p.pdf

FIFTH CIRCUIT

Nat'l Pork Producers Council v. U.S. EPA, 2011 U.S. App. LEXIS 5018 (5th Cir. Mar. 15, 2011).
The Fifth Circuit Court of Appeals recently struck down a 2008 EPA rule requiring concentrated animal feeding operations (CAFOs) to obtain Clean Water Act permits if they "propose to discharge." Several farm and poultry operators challenged the rule alleging that certain provisions exceeded the EPA's authority, including the requirement for CAFOs to apply for an NPDES permit, the provision holding a CAFO liable for failing to apply for a permit, and the regulation of a CAFO's land application. The Fifth Circuit ruled that the EPA exceeded its authority in imposing the permit on entities that did not actually discharge, as well as in imposing penalties for failing to apply. The court stated "without a discharge, the EPA has no authority and there can be no duty to apply for a permit." The court upheld the portion of the rule regulating a permitted CAFO's land application.
http://www.ca5.uscourts.gov/opinions/pub/08/08-61093-CV0.wpd.pdf

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NINTH CIRCUIT

San Luis & Delta-Mendota Water Auth. v. Salazar, 2011 U.S. App. LEXIS 6203 (9th Cir. Mar. 25, 2011).
The Ninth Circuit Court of Appeals rejected a Commerce Clause challenge to §§7 and 9 of the Endangered Species Act (ESA). The controversy began when the U.S. Fish and Wildlife Service issued a biological opinion (BiOp) concluding that two federal and state water diversion projects in California's Central Valley were likely to jeopardize the continued existence of the delta smelt and adversely modify its habitat. The BiOp included a "Reasonable and Prudent Alternative" that would lessen the impact on the smelt in compliance with the ESA by reducing water flows at certain times of the year. Several California nut growers filed suit claiming that the application of ESA §§7 and 9 was invalid under the Commerce Clause because the delta smelt is a purely intrastate species and because it has no commercial value. The court disagreed, reasoning that the protection of endangered and threatened species bears a substantial relationship to interstate commerce.
http://www.ca9.uscourts.gov/datastore/opinions/2011/03/25/10-15192.pdf

Pac. Merch. Shipping Ass'n v. Goldstene, 2011 U.S. App. LEXIS 6239 (9th Cir. Mar. 28, 2011).
The United States Court of Appeals for the Ninth Circuit upheld the denial of a plaintiff's motion for summary judgment in a challenge to California's Vessel Fuel Rules. The plaintiff, a maritime shipping association, filed the action contending that the regulations as applied to vessels located more than 3 miles from the California coast were preempted by the Submerged Lands Act. The court disagreed, noting the "'historic presence of state law' in the area of air pollution." The court found that the regulations violated neither the Commerce Clause of the U.S. Constitution nor federal maritime law.
http://www.ca9.uscourts.gov/datastore/opinions/2011/03/28/09-17765.pdf

Karuk Tribe of Cal. v. United States Forest Serv., 2011 U.S. App. LEXIS 7058 (9th Cir. Apr. 7, 2011).
The Ninth Circuit affirmed a lower court decision allowing a mining operation to proceed on the basis of a notice of intent (NOI) despite claims by a Native American tribe that the mining would violate § 7 of the Endangered Species Act (ESA). The Karuk Tribe of California claimed that the gold mining activity would affect protected Coho salmon. The court found that the NOI process does not constitute an agency action as defined under the ESA; therefore, an interagency consultation is not required.
http://www.ca9.uscourts.gov/datastore/opinions/2011/04/07/05-16801.pdf

California

Santa Monica Baykeeper v. City of Malibu, 2011 Cal. App. LEXIS 388 (Cal. App. 2d Dist. Apr. 5, 2011).
In a lawsuit challenging a city's adoption of an environmental impact report (EIR) and approval of a park project, a California appellate court affirmed a lower court's denial of a writ of mandate challenging the issuance of the final EIR and approval of the project. The court found that the conclusions in the final EIR regarding the impact of using treated effluent from an adjoining lumber yard project were supported by substantial evidence. Further, the court found that a cumulative groundwater impacts analysis was not necessary because the project did not generate groundwater impacts.
http://www.courtinfo.ca.gov/opinions/documents/B222776.PDF

ELEVENTH CIRCUIT

Odyssey Marine Exploration v. Unidentified, Shipwrecked Vessels, No. 10-14396 (11th Cir. March 31, 2011).
The U.S. Court of Appeals for the Eleventh Circuit held that a contract to engage in deep sea exploration for sunken treasure falls under federal admiralty jurisdiction. The case originated from an alleged oral agreement between Keith Bray, a researcher of sunken sea vessels, and Odyssey Marine Exploration, Inc. (Odyssey), a company that performs deep sea exploration and recovery. Allegedly, the parties agreed to work together to locate a Spanish cargo vessel, the *Merchant Royal*. Bray alleged that Odyssey later indicated that they had no plans to search for the vessel, and, five years after the agreement, the parties executed a contract under which Odyssey paid Bray "in full" for his research file. Shortly thereafter, Odyssey filed an in rem action to perfect its claim to a sunken wreck alleged to be the *Merchant Royal*. Bray intervened in the suit. The in rem action was dismissed upon determination that the wreck was not the *Merchant Royal* and the district court dismissed Bray's action. On appeal, the Eleventh Circuit ruled that the contract was cognizable in admiralty, given its "peculiarly maritime concern."
http://www.ca11.uscourts.gov/opinions/ops/201014396.pdf

DC CIRCUIT

District of Columbia

Ctr. for Biological Diversity v. Salazar, 2011 U.S. Dist. LEXIS 26967 (D.D.C. Mar. 16, 2011).
The U.S. District Court for the D.C. Circuit recently upheld the Fish and Wildlife Service's (FWS) decision to exclude an area containing a sub-population of the Cape Sable seaside sparrow as critical habitat. The FWS had proposed designation of the contested area as critical habitat in its Draft Rule, but chose to exclude the area from the Final Rule due, in part, to the fact that the designation would likely interfere with the Comprehensive Everglades Restoration. The court found that the decision is within the Secretary's discretion, as long as the decision will not result in the extinction of the species.
https://ecf.dcd.uscourts.gov/doc1/04513331055

FEDERAL CIRCUIT

Ark. Game & Fish Comm'n v. United States, 2011 U.S. App. LEXIS 6417 (Fed. Cir. Mar. 30, 2011).
The U.S. Court of Appeals for the Federal Circuit ruled that a decision by the U.S. Army Corps of Engineers to allow deviations from the Clearwater Dam operating plan did not result in a taking. The Arkansas Fish and Game Commission brought the suit, alleging a physical takings claim after the deviations allowed flooding of a state wildlife management area, causing excessive timber mortality. The trial court ruled that the temporary deviations constituted a taking of a flowage easement and awarded the Commission more than $5 million in damages. On appeal, the court ruled that because the deviations from the operating plan at issue were only temporary, they cannot constitute a taking. The court noted that to constitute the taking of a flowage easement, flooding must be a permanent or inevitably recurring condition.
http://www.cafc.uscourts.gov/images/stories/opinions-orders/09-512110-5029.pdf

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