Ocean and Coastal Case Alert

~ ~ November 16, 2011 ~ ~

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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-11-03-11

SECOND CIRCUIT

Cunney v. Bd. of Trs. of Grand View, 2011 U.S. App. LEXIS 21114 (2d Cir. Oct. 19, 2011).
The Second Circuit Court of Appeals reversed a lower court decision dismissing a property owner's lawsuit against a zoning district that denied his request to build a home on his land. The zoning district originally denied the property owner's application because his proposal did not meet height specifications enacted by the district in order to preserve views of the Hudson River. The appellate court found the height requirements unconstitutionally vague because they authorized arbitrary and discriminatory enforcement and provided inadequate notice of the elevation point from which property owners should measure the height of their houses.
https://ecf.ca2.uscourts.gov/cmecf/servlet/TransportRoom?servlet=ShowDoc&dktType=dktPublic&caseId=821&dls_id=00211117795

Connecticut

George v. Inland Wetlands Comm'n, 2011 Conn. Super. LEXIS 2664 (Conn. Super. Ct. Oct. 21, 2011).
The Superior Court of Connecticut dismissed an appeal from a citizen challenging the Inland Wetlands Commission's decision to grant a builder's application to conduct regulated activity as the contract purchaser of land. The citizen challenged the approval of the application because the commission would not reschedule the meeting due to his attorney's absence. However, the court found there was no factual proof to support this allegation and therefore, even though a public hearing was held on the application, the Inland Wetlands Commission was not required by its regulations to make any finding that the proposed activity would be unavoidable and that a feasible and prudent alternative did not exist.

THIRD CIRCUIT

United States v. Donovan, 2011 U.S. App. LEXIS 22026 (3d Cir. Oct. 31, 2011).
The United States Court of Appeals for the Ninth Circuit upheld a district court's entry of summary judgment in favor of the United States and a fine of $250,000 against a landowner for filling wetlands without a permit. The court ruled that the lands in question were wetlands subject to the Clean Water Act under either the plurality test or Justice Kennedy's test in the *U.S. v. Rapanos* decision.
http://www.ca3.uscourts.gov/opinarch/104295p.pdf

Pennsylvania

Am. Farm Bureau Fedn v. United States EPA, 2011 U.S. Dist. LEXIS 118233 (M.D. Pa. Oct. 13, 2011).
A district court ruled that a number of environmental groups and water associations could intervene in a lawsuit challenging the EPA's Total Maximum Daily Load (TMDL) for the Chesapeake Bay and its tributaries. The plaintiffs argued that the TMDL should be vacated because the EPA lacked authority under the CWA to issue the TMDL, the TMDL was arbitrary and capricious, and the agency failed to provide adequate public notice and comment. Because the water associations have an interest in the amount of nutrients and sediment their members are authorized to discharge and the environmental groups have an interest in protecting and restoring the Bay as well as ensuring their individual members' personal use and enjoyment of the Bay, the court found the result of the suit posed a "tangible threat to a legally cognizable interest," which justified the intervention.
https://ecf.pamd.uscourts.gov/doc1/15513513440

FOURTH CIRCUIT

Maryland

Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv., 2011 U.S. Dist. LEXIS 125404 (D. Md. Oct. 31, 2011).
The United States District Court for the District of Maryland ruled that a biological opinion (BiOp) issued by the National Marine Fisheries Service (NMFS) regarding the registration of certain insecticides was not arbitrary and capricious. NMFS' BiOp concluded that three insecticides were likely to jeopardize the continued existence of 27 protected species of salmon and steelhead fish and would destroy or adversely modify critical habitats for 25 of those species. Several pesticide manufacturers, including Dow AgroSciences, filed suit alleging that the BiOp violated the Administrative Procedures Act and the Endangered Species Act. The district court granted summary judgment in favor of NMFS finding that there was a rational connection between the facts and studies considered by the agency and the decision restricting insecticide products sold by plaintiffs.
http://www.mdd.uscourts.gov/Opinions/Opinions/Dow10312011opinion.pdf

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FIFTH CIRCUIT

Louisiana

Acadian Gas Pipeline Sys. v. Nunley, 2011 La. App. LEXIS 1269 (La.App. 2 Cir. Nov. 2, 2011).
A Louisiana appellate court upheld a servitude across private property, allowing a developer to build a natural gas pipeline. The court found that the builder satisfied the baseline requirement for expropriation by a private entity under La. Const. art. 1, § 4(B)(4) and La. Rev. Stat. Ann. §§ 19:2(5), 30:554(A)(2). In upholding the servitude, the court cited evidence showing a public necessity to provide a steady flow of natural gas in light of growing demand, hurricane threats, and huge resources in the Haynesville Shale.
http://www.lacoa2.org/Opinions%20PDF/46648ca.pdf

NINTH CIRCUIT

California

Cal. Sportfishing Prot. Alliance v. Shamrock Materials, Inc., 2011 U.S. Dist. LEXIS 126833 (N.D. Cal. Nov. 2, 2011).
A district court rejected a sand and gravel company's argument that because it was a distribution facility rather than an industrial facility, it was not subject to the court's jurisdiction for an alleged Clean Water Act (CWA) violation. Both environmental and citizen groups had brought a CWA action against the company for discharging stormwater associated with industrial activity into a river without a NPDES permit. The court stated that the CWA does not plainly and unambiguously require that facilities under its jurisdiction be classified as a specific type of facility.
https://ecf.cand.uscourts.gov/cgi-bin/WrtOpRpt.pl?119139031745377-L_134_0-1

ELEVENTH CIRCUIT

Florida

St. Johns River Water Mgmt. Dist. v. Koontz, 2011 Fla. LEXIS 2617 (Fla. Nov. 3, 2011).
The Supreme Court of Florida held that the denial of a landowner's application for a permit to develop his commercial property did not result in a taking. The court found "… that under the takings clauses of the United States and Florida Constitutions, the *Nollan*/*Dolan* rule with regard to 'essential nexus' and 'rough proportionality' is applicable only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought, thereby rendering the owner's interest in the real property subject to the dedication imposed." In this instance, the exaction sought was not an interest in real property and the permit was never approved. The court reversed the lower court's decision requiring the district to compensate the property owner for a temporary taking of his land.
http://www.floridasupremecourt.org/decisions/2011/sc09-713.pdf

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D.C. CIRCUIT

Town of Barnstable v. FAA, 2011 U.S. App. LEXIS 22025 (D.C. Cir. Oct. 28, 2011).
The U.S. Court of Appeals for the District of Columbia overturned the Federal Aviation Administration's (FAA) no hazard determinations for 130 wind turbines, which were part of the Cape Wind project in the Nantucket Sound. The court ruled that the FAA's determinations were arbitrary and capricious because they departed from the agency's own internal guidelines. Further, the FAA "failed to supply any apparent analysis of the record evidence concerning the proposed wind farm's potentially adverse effects on [visual flight rules] operations."

http://www.cadc.uscourts.gov/internet/opinions.nsf/4804795E91B8FA5F85257937004EDC66/$file/10-1276-1338470.pdf

District of Columbia

In re Polar Bear Endangered Species Act Listing& § 4(d) Rule Litig., 2011 U.S. Dist. LEXIS 119476 (D.D.C. Oct. 17, 2011).

The United States District Court for the District of Columbia issued an additional ruling regarding the agency's Special Rule on polar bears. The court rejected environmental groups' challenge claiming that the rule violated the Endangered Species Act by not addressing greenhouse gas emissions as the underlying cause of the rise in Arctic temperatures which led to the species' diminishing sea ice habitat. However, the court ruled that the U. S. Fish and Wildlife Service failed to conduct the appropriate environmental reviews under the National Environmental Policy Act (NEPA) prior to implementing mechanisms to protect the polar bear. As a result, the court vacated the agency's final rule determining measures required to conserve the polar bear species and reinstated a similar interim rule while the agency conducts a proper environmental review.
https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2008mc0764-283

In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig., 2011 U.S. Dist. LEXIS 119455 (D.D.C. Oct. 17, 2011).

In another opinion from the U.S. District Court for the District of Columbia on the Fish and Wildlife Service's Special Rule on polar bears, the court ruled that because the FWS properly concluded that the polar bear was a depleted species under the Marine Mammal Protection Act (MMPA) as of the effective date of a final rule listing it as threatened under the ESA, the MMPA mandated that sport-hunted polar bear trophies were no longer eligible for import as a result of the species' depleted status. Further, the FWS did not err by administratively closing import permit applications for such trophies that were pending at the time the rule was issued.
https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2008mc0764-281

NSGLC-11-03-11