Ocean and Coastal Case Alert

~ ~ April 16, 2012 ~ ~

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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. 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 Barry Barnes, bdbarne1@olemiss.edu with *"**Case Alert**"* on the subject line. NSGLC-12-03-01.

This issue of the Ocean and Coastal Case Alert highlights opinions issued since January 15, 2012. The NSGLC apologizes for the interruption in this service in February and March due to staffing turnover.

U.S. SUPREME COURT

PPL Montana, LLC v. Montana, 132 S. Ct. 1215 (Feb. 22, 2012).
The U.S. Supreme Court reversed a state court decision that Montana may charge rent from an electric company that owns dams on the Missouri, Madison, and Clark Fork rivers. An unanimous Supreme Court held that (1) under the equal footing doctrine, Montana did not hold title to riverbeds under segments of river that were nonnavigable at time of statehood; (2) the 17–mile Great Falls reach of the Missouri River, at least from the head of the first waterfall to the foot of the last, was not navigable; (3) present-day recreational use of the Madison River in Montana did not bear on navigability; and (4) reliance by utility and its predecessors upon Montana's long failure to assert title to riverbeds was some evidence to support the conclusion that the river segments were nonnavigable.
http://www.supremecourt.gov/opinions/11pdf/10-218.pdf

Sackett v. EPA, --- S. Ct. --- (Mar. 21, 2012).
The U.S. Supreme Court held that landowners may bring a civil action under the Administrative Procedure Act to challenge the EPA's issuance of an administrative compliance order under Section 309 of the Clean Water Act. The Sacketts had received a compliance order from EPA which stated that their residential lot contained navigable waters and that they had violated the CWA by filling about one-half acre of their property with dirt and rock in preparation for building a house without first obtaining the proper permits. The Sacketts did not believe their property was subject to the CWA and filed suit when EPA denied their request for an administrative hearing. The U.S. Supreme Court held that (1) EPA's compliance order was "final agency action" for which there was no adequate remedy other than Administrative Procedure Act review, and (2) the CWA did not preclude that review.
http://www.supremecourt.gov/opinions/11pdf/10-1062.pdf

SECOND CIRCUIT

Connecticut
Reardon v. Zoning Bd. of Appeals of Town of Darien, 2012 WL 802121(Conn. Super. Ct. Feb.17, 2012).
The Reardons challenged a permit issued by the Darien Zoning Board to their neighbors seeking to build a $1.85 million addition to their waterfront home. The neighbors own the waterfront parcel of land between the Reardon's home and the Long Island Sound, and, according to the Reardons, the addition to the neighbor's home would destroy the view that they have of the Long Island Sound from their property and diminish their property value by almost $1 million. The zoning enforcement officer determined that the neighbor's plans for reconstruction did not pose any adverse impacts and chose not to revoke the building permits. Since

Connecticut law does not recognize this decision as appealable to the Zoning Board of Appeals, the superior court dismissed the Reardon's appeal of the permit decision.

THIRD CIRCUIT

New York

Anschutz Exploration Corp. v. Town of Dryden, 940 N.Y.S.2d 458 (N.Y. Sup. Ct. Feb. 21, 2012).
The N.Y. Supreme Court for Tompkins County upheld a town's zoning amendment that bans hydraulic fracturing within its jurisdiction. Anschutz Exploration Corporation owns gas leases covering approximately 22,200 acres in the Town of Dryden which it acquired prior to the enactment of the zoning amendment. Anschutz argued that the state's Oil, Gas and Solution Mining Law preempted the local zoning amendment. The court concluded that the OGSML did not preempt the zoning amendment because there was no clear express of legislative intent to preempt local zoning control with respect to oil and gas production.

FIFTH CIRCUIT

In re Katrina Canal Breaches Litigation, ---F.3d --- (5th Circuit Mar. 2, 2012).
The Fifth Circuit upheld the U.S. District Court for the Eastern District of Louisiana's ruling granting the federal government immunity from liability for damages caused by the breaching of levees built pursuant to a flood control program, but not for damages caused by the breaching of levees built as part of a navigational project. It also affirmed the lower court's ruling granting the government immunity from liability for damages caused because of discretionary decisions that are susceptible to a public policy analysis. The plaintiffs suffered damage to their properties when water breached several levees in and around New Orleans during Hurricane Katrina. The government argued for immunity under language in the Flood Control Act of 1928 and the Discretionary Function Exception of the Federal Tort Claims Act.
www.ca5.uscourts.gov/opinions/pub/10/10-30249-CV0.wpd.pdf

Mississippi

Comer v. Murphy Oil USA, Inc., 2012 WL 933670 (S.D. Miss. Mar. 22, 2012).
The U.S. District Court for the Southern District of Mississippi dismissed a lawsuit filed by coastal property owners alleging that various coal and oil companies were responsible for emitting global warming gases that caused the damaging weather patterns responsible for Hurricane Katrina and the storm's coastal flooding. The court dismissed the case with prejudice, thereby precluding the plaintiffs from refilling the case at a later date, holding that the underlying issues of climate change are political questions that should be regulated by the legislative branch rather than by the courts. Since no legislative or administrative regulations presently govern carbon dioxide emissions, the court indicated that plaintiffs must wait until such regulations are issued prior to suing companies over increased carbon dioxide emissions.

NINTH CIRCUIT

Turtle Island Restoration Network v. U.S. Dept. of State, 2012 WL 516060 (9th Cir. Feb. 17, 2012).
Turtle Island Restoration Network filed suit against the U.S. Department of State for its alleged failure to satisfy consultation and environmental assessment obligations under the National Environmental Policy Act and Endangered Species Act in conducting annual certifications of countries exempted from general ban on shrimp imports. The Ninth Circuit affirmed the lower court's dismissal of the lawsuit based on res judicata, because Turtle Island's current challenge arose from the "same transactional nucleus of facts" litigated in the group's previous litigation of the certification regulations. The Ninth Circuit noted, however, that the legal question of whether NEPA and the ESA apply to the annual certifications has yet to be litigated on the merits and another plaintiff would be free to bring such a challenge.
www.ca9.uscourts.gov/datastore/opinions/2012/02/17/10-17059.pdf

Turtle Island Restoration Network v. U.S. Dept. of State, 2012 WL 834073 (9th Cir. Mar. 14, 2012).
Several non-profit environmental groups filed a lawsuit challenging the National Marine Fisheries Service's implementation of an amendment to the Pacific Fishery Management Council's Fishery Management Plan for Pelagic Fisheries. This amendment sets the annual allowable interactions between the longline fishery and

loggerhead and leatherback sea turtles. Turtle Island and the National Marine Fisheries Service had negotiated a settlement and the district court entered a consent decree over the objection of an intervening party, the Hawaii Longline Association. The Ninth Circuit determined that the Magnuson-Stevens Act did not prohibit the NMFS from settling the litigation by entering into a consent decree.
http://www.ca9.uscourts.gov/datastore/opinions/2012/03/14/11-15783.pdf

California

South Yuba River Citizens League and Friends of the River v. National Marine Fisheries Service, 2012 WL 371544 (E.D. Cal. Feb. 3, 2012).

The South Yuba River Citizens League challenged a Biological Opinion that the NMFS issued concerning two dams that the U.S. Army Corps of Engineers operates on the South Yuba River. The original Biological Opinion concluded that the dams, when fully operational, would pose no jeopardy to threatened species of fish whose habitat was located predominantly in the South Yuba River. In 2010, the district court found this Biological Opinion to be arbitrary and capricious and remanded the matter to the NMFS for additional consideration. In the interim period between the remand and NMFS's deadline for issuing a new Biological Opinion, plaintiffs requested a remedial plan be instituted that required the placement of woody debris in the river to supplement spawning habitat for the threatened steelhead fish; however, because the plaintiffs could not show that irreparable injury would occur if these remedial measures were not taken, the district court denied the plaintiffs' request.

ELEVENTH CIRCUIT

Florida

Florida Wildlife Federation, Inc. v. Jackson, 2012 WL 537529 (N.D. Fla. Feb. 18, 2012).

The U.S. District Court for the Northern District of Florida recently upheld EPA's rule setting numeric criteria for Florida, except with respect to (1) the stream criteria and (2) the default downstream-protection criteria for unimpaired lakes. In 2009, the EPA made a determination that numeric criteria for nutrient pollution would be necessary to meet the requirements of the Clean Water Act. Because the state of Florida failed to adopt numeric criteria, the court found EPA's decision to issue the criteria was lawful. The district court remanded the stream criteria and default downstream-protection criteria for unimpaired lakes because the EPA identified criteria that would identify any increases in nutrient levels, as opposed to harmful increases in nutrients, but failed to provide a scientific rationale for that distinction.

Georgia

Georgia River Networks v. U.S. Army Corps of Engineers, 2012 WL 930325 (S.D. Ga. Mar. 9, 2012).

The U.S. District Court for the Southern District of Georgia approved the U.S. Army Corps of Engineers' decision to allow the construction of a 960-acre fishing lake in Grady County. Though opponents to the project alleged that the lake would adversely impact water quality in the Ochlocknee River watershed and destroy valuable wetland areas, the Corps argued that it considered all potential alternatives to permitting the proposed fishing lake as part of its environmental assessment. The court determined that the agency had taken the requisite hard look at the potential impacts that the project could have and reasonably concluded that granting the permit would not have significant effects on water quality, wetland habitats, and local wildlife populations.

Coastal Marshlands Protection Committee v. Altamaha Riverkeeper, Inc., 2012 WL 934514 (Ga. Ct. App. Mar. 21, 2012).

The Coastal Marshlands Protection Committee issued a permit for the construction and maintenance of a community dock over marshlands located along the South Newport River. Altamaha Riverkeeper and two property owners appealed the permit decision to an administrative law judge who affirmed the Committee's decision to issue the dock permit based upon the evidence submitted by the parties. Altamaha Riverkeeper petitioned for judicial review in the Fulton County Superior Court, and the judge determined that, though the ALJ's factual determinations were supported by information in the record, the ALJ's refusal to reconsider the Committee's granting of the permit was not supported by sufficient evidence. The Court of Appeals disagreed and held that the ALJ made an independent review of the evidence and that the judge, on review, sufficiently determined that the dock would serve the public interest.
http://caselaw.findlaw.com/ga-court-of-appeals/1598649.html

D.C. CIRCUIT

Noble Energy, Inc. v. Salazar, 671 F. 3d 1241 (D.C. Cir. Mar. 2, 2012).
Noble Energy filed suit challenging an order of the Minerals Management Service that directed it to permanently plug and abandon an undeveloped exploratory offshore oil well. In 2001, a California district court ruled that lease suspensions had to comply with the Coastal Zone Management Act. Noble's most recent lease suspension, issued in 1999, was revoked since it had not been assessed for consistency with the state's coastal management plan. In 2008, the Federal Circuit affirmed a finding of the Federal Court of Claims that the application of the CZMA to suspension requests constituted a material breach of the companies' lease agreements. Noble was awarded $1.2 million in restitution and discharged from all obligations arising from their lease. The current fight began in 2009 when the MMS ordered Noble to decommission the well. Noble challenged the order, arguing the MMS materially breached its lease agreement by applying the Coastal Zone Management Act to suspension requests. The Department of Interior maintained that, even if it had breached the terms of the lease, Noble had not been relieved from complying with its independent and statutory obligation to plug the lease when ordered to do so. The D.C. Circuit sent the case back to the district court with orders to remand the case to the Secretary of Interior to provide an opportunity for MMS's successor to determine whether the Department's plug and abandon regulations apply in Noble's case.
http://law.justia.com/cases/federal/appellate-courts/cadc/11-5114/11-5114-2012-03-02.html

District of Columbia
Flaherty v. Bryson, 2012 WL 752323 (D.D.C. Mar. 8, 2012).
The U.S. District Court for the District of Columbia recently considered challenges to the latest amendments of the Atlantic Herring Fishery Management Plan. The Fishery Management Plan for Atlantic herring was updated to include annual catch limits on the amount of fish caught and accountability measures to ensure compliance with the limits; however, this plan did not include catch limits or accountability measures for several species of river herring. The plaintiffs successfully argued that the National Marine Fisheries Service violated the Magnuson-Stevens Act by failing to include catch limits for the river herring; additionally, the plaintiffs demonstrated that NMFS violated NEPA by failing to consider the environmental impacts of reasonable alternatives to the amendment.

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