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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the June issue of Ocean and Coastal Case Alert. The Case Alert is a monthly newsletter highlighting recent court decisions impacting ocean and coastal resource management. (NSGLC-12-03-04).

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Fifth Circuit

***Gulf Restoration Network, Inc. v. Salazar*, 2012 U.S. App. LEXIS 10892 (5th Cir. May 30, 2012).**

A group of non-profit organizations petitioned for judicial review of Department of the Interior (DOI) plan approvals under the Outer Continental Shelf Lands Act (OCSLA) and National Environmental Policy Act (NEPA). Petitioners argued that the DOI failed to consider the Deepwater Horizon disaster in approving further deepwater drilling and inadequately reviewed the plans under NEPA, because it incorrectly applied categorical exclusions (from the NEPA environmental assessments or impact statement requirements) to those plans, which should not have been so excluded because they involved drilling in relatively untested deep water, areas of high biological sensitivity, areas of high seismic risk or seismicity, or areas of hazardous natural bottom conditions. The Fifth Circuit dismissed four of the petitions for judicial review as moot, and dismissed the remaining petitions for judicial review because of petitioners' failure to participate in the

administrative proceedings related to the DOI's approval of the plans as required by 43 U.S.C.S. § 1349(c)(3).
http://www.ca5.uscourts.gov/opinions/pub/10/10-60411-CV0.wpd.pdf »

Sixth Circuit

Michigan

***Dep't of Envtl. Quality v. Worth Twp.*, 2012 Mich. LEXIS 630 (Mich. May 17, 2012).**

The Michigan Supreme Court held that under the state's Natural Resources and Environmental Protection Act (NREPA), a municipality can be held responsible for, and required to prevent, a discharge of raw sewage that originates within its borders, even when the raw sewage is discharged by a private party and not directly discharged by the municipality itself. The case arose after the state's environmental department filed suit against a township for the contamination of surface waters within and surrounding its borders, including Lake Huron and several of its tributaries. It sought an injunction to compel the township to prevent the discharge of raw sewage into the waters of the state. The township argued that neither the courts nor the state agency has the authority to hold a township liable for the discharge of raw sewage from private residences into state waters. But the NREPA creates a presumption that a municipality is in violation of NREPA when a discharge originates within its boundaries, irrespective of who actually caused the discharge. In addition, a township is within the NREPA's definition of municipality. Accordingly, a township can be held responsible as a municipality under the statute.
http://courts.michigan.gov/supremecourt/Clerk/11-12-Term-Opinions/141810.pdf »

Eighth Circuit

North Dakota

***Brigham Oil & Gas, L.P. v. N.D. Bd. of Univ. & Sch. Lands*, 2012 U.S. Dist. LEXIS 77575 (D.N.D. June 5, 2012).**

Both the State of North Dakota and numerous riparian landowners along the Missouri River contended that they own the mineral rights in and under the "shore zone," and each issued oil and gas leases concerning the same property. The "shore zone" is the area between the ordinary high

water mark and the ordinary low water mark of navigable rivers. The parties to this lawsuit sought to determine whether the State of North Dakota or the riparian landowners have title to the "shore zone" minerals. The District Court for the Northwestern Division of North Dakota remanded the case to the North Dakota state courts to decide the important state law issues presented.
https://ecf.ndd.uscourts.gov/doc1/1371540101 »

Ninth Circuit

***Native Village of Point Hope v. Salazar*, 2012 U.S. App. LEXIS 10760 (9th Cir. May 25, 2012).**

The Ninth Circuit denied environmental and Alaska Native groups' expedited petitions challenging the Bureau of Ocean Energy Management's (BOEM's) approval of an oil company's exploration plan to drill in the Beaufort Sea. Petitioners claimed that the oil company's exploration plan did not meet the OCSLA's informational standards and regulations, as it failed to reference an approved oil spill response plan, and did not adequately describe the company's well-capping stack and containment system. The court found that the record supported both BOEM's decision that the company's exploration plan complied with the Outer Continental Shelf Land Act's (OCSLA's) requirements, and its conclusion that well-capping technology is now feasible in the Arctic.
http://www.ca9.uscourts.gov/datastore/opinions/2012/06/06/11-72891.pdf »

***Karuk Tribe of Cal. v. United States Forest Serv.*, 2012 U.S. App. LEXIS 11145 (9th Cir. June 1, 2012).**

The Karuk Tribe of California challenged the U.S. Forest Service's (FS) approval of a Notice of Intent (NOI) to conduct mining activities in a coho salmon critical habitat. The Ninth Circuit found in favor of the Tribe, reversing the district court's denial of summary judgment on the Tribe's Endangered Species Act (ESA) claim. The court found that the FS violated the ESA by not consulting with the appropriate wildlife agencies before approving NOIs to conduct mining activities in the coho salmon critical habitat. The FS affirmatively authorized private mining activities when it approved the NOIs. Those approvals were final agency action, not merely advisory. Because the Tribe alleged a procedural violation, as opposed to a substantive violation, it did not have to prove a listed species was in fact injured. By definition, mining activities requiring a NOI "might cause" disturbance of a habitat. The FS did not dispute that the mining activities approved "may affect" critical habitat of coho salmon; it thus had a duty to consult with the relevant wildlife agencies before approving the

NOIs.
http://www.ca9.uscourts.gov/datastore/opinions/2012/06/01/05-16801.pdf »

***Kaahumanu v. Hawaii*, 2012 U.S. App. LEXIS 11391 (9th Cir. June 6, 2012).**

Plaintiffs alleged that Hawai'i Department of Land and Natural Resources permit requirements for commercial weddings on public beaches in Hawai'i unduly burdened their right to organize and participate in weddings on unencumbered state beaches, in violation of the First Amendment, due process and equal protection. The Ninth Circuit upheld the DLNR regulations and guidelines all respects, except the provisions that violate the First Amendment, which give to the Chairperson of the Board of DLNR the authority to revoke an already issued permit "at anytime and for any reason in [his or her] sole and absolute discretion," and giving to DLNR the authority to add terms and conditions to an already issued permit such "as it deems necessary or appropriate.
http://www.ca9.uscourts.gov/datastore/opinions/2012/06/06/10-15645.pdf »

***United States v. 32.42 Acres*, 2012 U.S. App. LEXIS 12066 (9th Cir. June 14, 2012).**

The Ninth Circuit held that the United States can extinguish California's public trust rights when exercising its federal power of eminent domain. At issue are about 32.42 acres of land in San Diego, which the United States has leased on behalf of the Navy since 1949. In 2005, the United States initiated the condemnation action and took a fee simple interest in the property under its powers to "provide for the common Defense," to "provide and maintain a Navy," and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." The Lands Commission contended that the public trust is an aspect of state sovereignty that the federal government is without power to extinguish and that California's interest in its public trust rights is as important as the United States' interest in its power of eminent domain. The Ninth Circuit disagreed, however, and concluded that neither the equal-footing doctrine nor the public trust doctrine prevents the federal government from taking that interest in the land unencumbered.
http://www.ca9.uscourts.gov/datastore/opinions/2012/06/14/10-56568.pdf »

Alaska

***Shell Offshore Inc. v. Greenpeace, Inc.*, 2012 U.S. Dist. LEXIS 74387 (D. Alaska May 29, 2012).**

The District Court for the District of Alaska granted additional preliminary injunctive relief to Shell, precluding Greenpeace, and those acting in concert with it, from coming within designated distances of certain ships that Shell intends to use this summer for exploratory Arctic drilling operations. The scope of injunctive relief was expanded from the U.S. twelve-mile territorial waters to include Shell's

operations in the U.S. Exclusive Economic Zone. The court cited Shell's viable claims of private nuisance, trespass and trespass to chattels, threatened future conversion, and interference with maritime navigation.

https://ecf.akd.uscourts.gov/doc1/02311048176 »

Oregon

***Noble v. Dep't of Fish & Wildlife*, 2012 Ore. App. LEXIS 704**

(Or. Ct. App. May 31, 2012).

The Court of Appeals of Oregon affirmed an order of Oregon Department of Fish and Wildlife (ODFW) approving fishways on two downstream dams on an unnamed stream that ultimately flows into Beaver Creek, a tributary of the Willamette River. Historically, migratory fish including cutthroat trout, have been present in the stream. The plaintiffs, owners of property on the stream, argued that the ODFW incorrectly calculated the amount of water flowing into the system, which led it to erroneously determine that the fishways were adequate to allow migratory fish to pass. The court found that the ODFW's interpretation of streamflow to include only the water that flows over the top of the dam and through the fishway was plausible and consistent with its own administrative rules. Because ODFW was authorized to promulgate rules, and ODFW plausibly construed those rules to require fish passage when water was flowing over the top of a channel-spanning fishway, the court found that the property owners' argument to the contrary lacked merit.

http://courts.oregon.gov/Publications/A140936.pdf »

Washington

***United States v. City of Renton*, 2012 U.S. Dist. LEXIS 73261**

(W.D. Wash. May 25, 2012).

The District Court of the Western District of Washington held that the CWA's unambiguous waiver of sovereign immunity applies to stormwater management fees. In 2011, in response to federal agencies that had ceased paying stormwater program charges, Congress passed the "stormwater amendment" to clarify federal responsibility to pay stormwater program charges. Two cities in Washington filed suit to collect stormwater management fees imposed prior to the January 4, 2011 effective date of the amendment. The United States argued that the stormwater fees are taxes, not service charges, and that it has not waived its immunity to those taxes prior to January 4, 2011. In addition, the stormwater amendment was a clarification, rather than an amendment, of the United States' waiver of immunity and responsibility to pay reasonable service charges. Even if the stormwater management fees are characterized as taxes, the amendment indicates that Congress waived immunity to such taxes even prior to the amendment. Nevertheless, the cities have not demonstrated that the fees assessed prior to January 4, 2011, are reasonable service charges within the meaning of

CWA. Accordingly, the court denied summary judgment on this issue.
https://ecf.wawd.uscourts.gov/doc1/19714744194 »

DC Circuit

***Ill. Commer. Fishing Ass'n v. Salazar*, 2012 U.S. Dist. LEXIS 80883 (D.D.C. June 12, 2012).**

The pallid sturgeon is an endangered fish species that inhabits the Missouri and Mississippi river basins. It closely resembles the shovelnose sturgeon, a more common fish that is not at risk of becoming endangered. In 2010, the U.S. Fish and Wildlife Service issued a rule under the "similarity of appearance" provisions of the Endangered Species Act, requiring the shovelnose sturgeon to be treated as a "threatened" species in the geographic range where it coexists with the pallid sturgeon. Commercial fishermen are accordingly prohibited from harming or killing shovelnose sturgeon in those areas. Plaintiffs filed suit seeking to set aside the rule. Because the rule complies with the requirements of the Endangered Species Act and is adequately supported by the administrative record, the district court granted defendants' summary judgment motion and denied plaintiff's.
https://ecf.dcd.uscourts.gov/doc1/04513893177 »

Sea Grant Law Center

National Sea Grant Law Center
256 Kinard Hall, Wing E
University, MS 38677-1848