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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the May 2013 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-13-03-05).

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SECOND CIRCUIT

Connecticut

***Sams v. Dep't of Env'tl. Prot.*, 308 Conn. 359 (2013).**

The Connecticut Supreme Court held that a state Department of Environmental Protection (DEP) hearing officer properly ordered the removal of an entire seawall. The property owners had installed the seawall to mitigate the effects of erosion without seeking approval from the town or DEP. The court ruled that the DEP properly asserted jurisdiction over the seawall; substantial evidence supported the DEP's conclusions that the sea wall was constructed in violation of state law and constituted a nuisance; and, the DEP officer's decision was not an abuse of discretion.

<http://www.jud.ct.gov/external/supapp/Cases/AROCr/CR308/308CR35.pdf>

New York

***Matter of Norse Energy Corp. USA v Town of Dryden*, 2013 N.Y. App. Div. LEXIS 3078**

(N.Y. App. Div. 3d Dep't 2013).

A New York appellate court recently upheld a town's zoning ordinance banning all activity related to the exploration for, and the production or storage of, natural gas and petroleum within the town's borders. The ban was enacted in response to concerns over proposed hydraulic fracturing. The court held that the ordinance was not preempted either expressly or impliedly by the state's Oil, Gas and Solution Mining Law.

http://www.courts.state.ny.us/reporter/3dseries/2013/2013_03145.htm



FOURTH CIRCUIT

***Vill. of Bald Head Island v. United States Army Corps of Eng'rs*, 2013 U.S. App. LEXIS 7470 (4th Cir. Apr. 15, 2013).**

The Fourth Circuit Court of Appeals recently dismissed a complaint seeking to require the U.S. Army Corps of Engineers to fulfill commitments it made to the Village of Bald Head Island and other North Carolina towns. The Village alleged that when implementing a project to widen, deepen, and realign portions of the Cape Fear River navigation channel, the Corps failed to honor commitments to protect the adjacent beaches against the adverse effects of the project and to restore sand to the beaches. The appellate court affirmed the district court's dismissal of the complaint for lack of subject-matter jurisdiction. The court found that the Corps' alleged failure to implement the project in accordance with its commitments was not "final agency action" that was subject to judicial review under the APA and that it lacked admiralty jurisdiction over the complaint's contract claims.

<http://www.ca4.uscourts.gov/opinions/Published/112366.p.pdf>

West Virginia

***Alt v. United States EPA*, 2013 U.S. Dist. LEXIS 65093 (N.D. W. Va. Apr. 22, 2013).**

A federal district court recently dismissed the Environmental Protection Agency's motion to dismiss a claim filed by a poultry farmer. The EPA had ordered the farmer to obtain a National Pollutant Discharge Elimination System permit for ordinary precipitation runoff from the farmyard. The EPA withdrew the order and filed a motion to dismiss the suit. The court found that although the agency withdrew the order, the claim was not moot, as the agency had not changed its position regarding the regulation of farmyard stormwater.



NINTH CIRCUIT

***Resisting Envtl. Destruction v. United States EPA*, 2013 U.S. App. LEXIS 8384 (9th Cir. 2013).**

Several environmental groups sought review of decisions of the Environmental Protection Agency's (EPA) Environmental Appeals Board upholding the agency's grant of two air permits authorizing exploratory drilling operations in the Arctic Ocean. The court denied review, finding that the Clean Air Act was unclear as to whether certain support vessels operating in conjunction with a drillship were required to comply with best available control technology requirements. The court also held that the Board's decisions were permissible, reasonable, and entitled to deference. And, finally, the court ruled that the EPA's exemption of compliance with ambient air standards within a 500-meter radius surrounding the drillship was not plainly erroneous or inconsistent with EPA regulations.

<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/04/23/12-70518.pdf>

California

***Coastside Fishing Club v. California Fish & Game Com.*, 215 Cal. App. 4th 397**

(Cal. App. 4th Dist. 2013).

A California appellate court held that in adopting regulations that created marine protected areas and marine managed areas in the North Central Coast Study Region, the California Fish and Game Commission acted within its

statutory authority under Pub. Resources Code, § 36725(a). A fishing club had challenged the creation of the areas, arguing that the State Interagency coordinating Committee was required to review the regulations. The court disagreed, finding that prior committee review of the regulations was not required by state law.

www.courts.ca.gov/opinions/documents/Do61121.DOC

Ctr. for Biological Diversity v. EPA, 2013 U.S. Dist. LEXIS 57436 (N.D. Cal. Apr. 22, 2013).

The United States District Court for the Northern District of California dismissed with leave to amend a complaint filed by several environmental groups alleging that the Environmental Protection Agency (EPA) violated the Endangered Species Act (ESA) by failing to undertake required consultations regarding the effects of 382 registered pesticides on endangered or threatened species. The court granted a motion to intervene to several producers of the pesticides. The court found that the plaintiffs failed to properly plead a specific cause of action under the ESA. The court noted that if the plaintiffs file an amended complaint, they must address the EPA's registration actions under § 16 of the Federal Insecticide, Fungicide, and Rodenticide Act.

<https://ecf.cand.uscourts.gov/doc1/035110475826>

Hawaii

Kauai Springs v. Planning Comm'n of Kauai, 2013 Haw. App. LEXIS 249 (Haw. Ct. App. Apr. 30, 2013).

A Hawaii appellate court held that the Kauai Planning Commission had public trust obligations to review a water company's use of water prior to issuing permits. The court found that the Commission's public trust obligations required "the Planning Commission make appropriate assessments and require reasonable measures to protect the water resources at issue in this case..." The court noted that "... although Kauai Springs' use of the water is not illegal or improper per se, that Kauai Springs carries the burden to justify the use of the water in light of the purposes protected by the public trust."

http://www.courts.state.hi.us/docs/opin_ord/ica/2013/April/ica29440ada.pdf

Washington

Puget Sound Crab Ass'n v. State, 2013 Wash. App. LEXIS 944 (Wash. Ct. App. Apr. 23, 2013).

A Washington appellate court upheld the Washington Department of Fish and Wildlife's new Puget Sound Dungeness crab management policy, C-3609, and its accompanying Recreational Season rule, Wash. Admin. Code § 220-56-330. An association of commercial crab harvesters challenged the policy and rule, which had added an additional day a week to the recreational season. The court held that the department did not violate its statutory duties, because it had to allocate a finite resource and it owed a duty to both recreational and commercial harvesters.

<http://www.courts.wa.gov/index.cfm?fa=controller.managefiles&filePath=Opinions&fileName=D2%2042718-4-II%20%20Published%20Opinion.pdf>



D.C. CIRCUIT

Mingo Logan Coal Co. v. United States EPA, 2013 U.S. App. LEXIS 8121 (D.C. Cir. 2013).

The United States Court of Appeals for the District of Columbia rejected a mining company's challenge to the Environmental Protection Agency's invalidation of a permit that was issued years earlier by the U.S. Army Corps of Engineers. The EPA withdrew the specification of streams for the disposal of mountaintop mining waste in the

company's discharge permit. The court held that 33 U.S.C.S. § 1344(c) clearly and unambiguously gave the EPA the power to act after the permit had been issued.

[http://www.cadc.uscourts.gov/internet/opinions.nsf/DBEEA1719A916CDC85257B56005246C4/\\$file/12-5150-1432105.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/DBEEA1719A916CDC85257B56005246C4/$file/12-5150-1432105.pdf)

District of Columbia

Alaska Cmty. Action on Toxics v. United States EPA, 2013 U.S. Dist. LEXIS 64678

(D.D.C. May 7, 2013).

The United States District Court for the District of Columbia dismissed a suit filed by several environmental groups over the Environmental Protection Agency's list of dispersants that may be used following an oil spill. Specifically, the groups challenged the EPA's failure to identify the waters or quantities in which the dispersants could be used. The court found that the claims were barred by a statute of limitations in 28 U.S.C. § 2401(a), which bars complaints filed more than six years after a right of action accrues. In this instance, the court found that the final agency action took place in 1984 when the EPA issued its decision not to specify the waters or quantities in which listed products could be used.

http://www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1_12-cv-01299/pdf/USCOURTS-dcd-1_12-cv-01299-0.pdf



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