January 16 2014

Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the January 2014 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-14-03-01).

Forward to a friend

Know someone who might be interested in our monthly newsletter?

Forward this email their way and help spread the word.

THIRD CIRCUIT

Pennsylvania

***Robinson Twp., Washington Cnty. v. Com.*, 2013 WL 6687290 (Pa. Dec. 19, 2013).**

The Pennsylvania Supreme Court recently ruled that several provisions of the 2012 Pennsylvania Oil and Gas Act Amendments ("Act 13"), passed in the wake of increased hydraulic fracturing in the region, are unconstitutional. Act 13 set out a statutory framework for the regulation of oil and gas operations, preempted local regulation of such operations, and gave power of eminent domain to natural gas corporations. The court agreed that certain provisions violated the Environmental Rights Amendment of the Pennsylvania Constitution, Article I, Section 27. Specifically, the court invalidated portions of Act 13 that required municipalities to conform local land use standards to those set out in the Act; preempted all local regulation of oil and gas activities; and waived state location and setback requirements, despite objections from municipalities.

Download PDF

FIRST CIRCUIT

Maine

***Thanks But No Tank v. Dep't of Envtl. Prot.*, 2013 ME 114.**

Thanks but No Tank (TBNT), an environmental group, challenged the Maine Department of Environmental Protection's grant of a permit to a liquefied petroleum gas development company to construct a liquefied petroleum gas terminal at a port. A lower court ruled in favor of the company. TBNT appealed, seeking to vacate the lower court's judgment. The company later voluntarily surrendered the permit citing the local municipality's disapproval of the project. The company and the department sought to dismiss the appeal as moot, while TBNT asked the court to vacate the lower court's decision and to award the organization the costs of the appeal. The court found that TBNT was not entitled to the "extraordinary" equitable remedy of vacating the judgment and that TBNT was not entitled to recover costs, as it was not the prevailing party within the meaning of state law.

Download PDF

***Sleeper v. Loring*, 2013 ME 112.**

Several residents who maintained a right-of-way to a lake shore brought suit, challenging a zoning board's decision to uphold rescission of their permit to maintain a dock and seeking declaratory judgment that they were entitled to build and maintain a dock. A Maine superior court granted defendant lake shore owners summary judgment on one count, and, after a bench trial, found that defendants held fee simple title to the lot, subject to the plaintiffs' right of passage. On appeal, the court overturned the summary judgment claim, finding the deeds in plaintiffs' chains of title ambiguous and holding that the deed in the defendants' chains of title exempted the lot in question from conveyance.

Download PDF

FOURTH CIRCUIT

West Virginia

***Ohio Valley Envtl. Coal., Inc. v. Fola Coal Co.*, LLC, 2013 WL 6709957 (S.D.W. Va. Dec. 19, 2013).**

An environmental group and others brought suit under the citizen suit provisions of the Clean Water Act (CWA) and the Surface Mining Control and Reclamation Act (SMCRA) alleging that a mining company violated these statutes by discharging excessive amounts of selenium into the waters of West Virginia. The company argued that its NPDES permits shield it from liability because selenium was not a pollutant limited under the terms of the permit. The court disagreed, finding the permit shield defense did not protect the company from liability in this instance, as the discharge of selenium violated water quality standards, which are incorporated into the state NPDES permit. The court held that the company was liable for violations of the CWA and SMCRA, but did not rule on the number of violations or grant injunctive relief at this time.

More here

EIGHT CIRCUIT

North Dakota

***Reep v. State*, 2013 ND 253 (2013).**

The North Dakota Supreme Court ruled that a statute governing interests of grantees in shore zones between high and low watermarks on a navigable lake or stream does not convey the state's equal footing interest in minerals under the shore zone to upland landowners. The property owners had brought the action, seeking a declaration regarding ownership of mineral interests under the shore zone of the navigable waters. In a separate action, a well operator sued several upland owners. A state court ruled that North Dakota owned the mineral interests under the land in the shore zone. On appeal, the North Dakota Supreme Court agreed, finding that the anti-gift clause in the North Dakota Constitution prohibits the state from transferring its mineral interest to an upland owner. Further, the statute in question does not convey the state's equal footing interest in minerals under the shore zone.

More here

NINTH CIRCUIT

***Jones v. Nat'l Marine Fisheries Serv.*, 2013 WL 6698065 (9th Cir. Dec. 20, 2013).**

A community association and others brought suit against the U.S. Army Corps of Engineers, challenging an environmental assessment (EA) and finding of no significant impact (FONSI) issued in connection with a chromium mining project near Coos Bay, Oregon. The United States District Court for the District of Oregon granted summary judgment to the Corps. On appeal, the Ninth Circuit agreed that the Corps did not violate either the Clean Water Act (CWA) or the National Environmental Policy Act when issuing a dredge and fill permit for the project. The court found that the Corps properly considered the risks of hexavalent chromium generation and concluded that the risk did not warrant a full Environmental Impact Statement. Further, the Corps properly declined to consider cumulative impacts of future chromium mining, and the Corps' alternative analysis did not violate the CWA.

Download PDF

Washington

***Sierra Club v. BNSF Ry. Co*, 2014 WL 53309 (E.D. Wash. Jan. 2, 2014).**

Several environmental groups filed suit against the BNSF Railway Company (BNSF), alleging that the company violated the Clean Water Act (CWA) by operating rail lines for transporting coal. The plaintiffs alleged that the rail cars release coal dust into U.S. waterways without a permit. The U.S. District Court for the Eastern District of Washington ruled that the environmental groups may proceed with the suit in order to develop the facts to show whether the rail cars meet the statutory definition of a point source discharge and that the carrier illegally introduced pollutants into navigable waters without a permit.

More here

ELEVENTH CIRCUIT

Florida

***Florida Wildlife Fed'n, Inc. v. McCarthy*, 2014 WL 51360 (N.D. Fla. Jan. 7, 2014).**

The United States District Court for the Northern District of Florida granted the Environmental Protection Agency's motion to amend a consent decree to exclude any requirement to adopt numeric downstream-protection criteria or numeric nutrient criteria for South Florida streams or for marine lakes, tidally influenced streams, or conveyances primarily used for water-management purposes with marginal or poor stream habitat components. The consent decree had required the EPA to adopt numeric criteria for Florida's waters unless the state did so first. Florida adopted new nutrient criteria, with non-numeric criteria for some waters. Accordingly, the EPA attempted to change the consent decree. While several environmental groups opposed the modification, the court disagreed and granted the modification. The court noted that the change in state law was a significant change and that the proposed modification is suitably tailored to the changed circumstance.

More here

D.C. CIRCUIT

District of Columbia

***Food & Water Watch v. United States Envtl. Prot. Agency*, 2013 WL 6513826 (D.D.C. Dec. 13, 2013).**

The U.S. District Court for the District of Columbia rejected a lawsuit challenging the Environmental Protection Agency's (EPA) authorization of pollution trading and offsets outlined in its water quality trading program for the Chesapeake Bay. The court held that the environmental groups that filed the suit lacked standing, because they failed to show that they have an actual or imminent injury traceable to the agency's actions and redressable by the court. Further, the court found that the trading and offsets in the 2010 total maximum daily loads (TMDL) plan was not a final agency action.

More here

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