

June

17
2014

Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the June 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-14-03-06).

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SECOND CIRCUIT

***Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 2014 U.S. App. LEXIS 9265 (2d Cir. May 19, 2014).**

After a fistfight on a floating dock, one of the injured parties brought suit against Captain's Cove, the owner of the marina that owned the dock. Captain's Cove filed a third party complaint against the boat owners, Tandon and Doohan, whose guests were involved in the fight. The boat owners sought to limit their tort liability under the Limitation of Liability Act. For the extension of admiralty jurisdiction, Tandon needed to show both that the injury occurred on navigable water and had a connection with maritime activity. The court did not address whether the dock satisfied the location test because it found the dismissal was proper based on the maritime connection test alone. The court found that the fight had no effect on maritime commerce and did not satisfy the maritime connection test. Therefore, the court affirmed the district court's dismissal for lack of admiralty jurisdiction.

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THIRD CIRCUIT

New Jersey

***Pinelands Pres. Alliance v. State of New Jersey Dep't of Env'tl. Prot.*, 2014 N.J. Super. LEXIS 77 (App. Div. June 3, 2014).**

Environmental groups brought a challenge to a permit issued by the New Jersey Department of Environmental Protection (DEP) to a developer under New Jersey's Coastal Area Facility Review Act. The permit impacted an area that constituted endangered or threatened species habitat as it was home to the northern pine snake. DEP allowed the developer to mitigate any possible adverse effects to the habitat through off-site measures. The environmental groups challenged this mitigation measure. The New Jersey Superior Court ruled there was nothing in the state code which prohibited off-site mitigation. Nonetheless, the court reversed the issuance of the permit and remanded to DEP for additional consideration. The court held that DEP must determine if the area is mapped as endangered or threatened wildlife species habitat on the Department's Landscape Maps of Habitat for Endangered, Threatened or Other Priority Species and must apply the proper impervious cover limits.

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FOURTH CIRCUIT

Maryland

***Robinson v. Md. Dep't of the Env't*, 2014 U.S. Dist. LEXIS 67544 (D. Md. May 16, 2014).**

Plaintiffs brought a challenge to the siting of the Horseshoe Casino on property adjacent to the Middle Branch of the Patapsco River and protected open space and wildlife areas. Environmental Site Assessments showed soil contamination and water contamination at levels above Maryland's legal cleanup standards. The assessments also showed that the contaminated water was discharging into the Middle Branch of the Patapsco. The Maryland Department of the Environment directed the city to develop a remediation plan for the site. Plaintiffs alleged this plan was inadequate and brought Clean Water Act, Civil Rights Act, Fourteenth Amendment, and numerous other claims. Defendants filed a motion to dismiss. The court ruled that all of plaintiffs' claims were lacking and granted defendants' motion to dismiss.

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North Carolina

***Cape Fear River Watch v. Duke Energy Progress*, 2014 U.S. Dist. LEXIS 78033 (E.D. N.C. June 9, 2014).**

Conservation groups brought Clean Water Act claims against an energy company based on alleged unauthorized surface discharges into Sutton Lake. The energy company operated a lakeside facility, which included two coal ash settling lagoons which discharged into Sutton Lake. The North Carolina Department of Environmental and Natural Resources had issued one National Pollution Discharge Elimination System (NPDES) permit that did not address certain discharges by the company. The court granted the energy company's motion to dismiss for one claim, but denied the motion as to all other claims.

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FIFTH CIRCUIT

***United States v. B.P. Exploration & Prod. Inc. (In re Deepwater Horizon)*, 2014 U.S. App. LEXIS 10425 (5th Cir. June 4, 2014).**

British Petroleum Exploration & Production, Inc. and Anadarko Petroleum Corporation appealed a judgment against them regarding their civil liability under the Clean Water Act (CWA) for discharges from an oil well. The court made three distinct holdings. First, the cement failure at the well constituted a "discharge" under the CWA because the failure allowed oil to flow from an area of confinement into navigable waters. Second, the oil companies, as owners of the well, were subject to civil liability as expressly stated in the CWA. Third, civil penalty liability under the CWA cannot shift from appellants to the drilling vessel's owner or operator. The court found that the fault of a third party does not shift liability from the well owner. Accordingly, the court affirmed the grant of partial summary judgment.

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Mississippi

***Inst. of Marine Mammal Studies v. Nat'l Marine Fisheries Serv.*, 2014 U.S. Dist. LEXIS 70454 (S.D. Miss. May 22, 2014).**

The Institute for Marine Mammal Studies (IMMS), a non-profit organization that provides public education and research on marine mammals held a permit from the National Marine Fisheries Service (NMFS), which allowed IMMS to obtain up to eight sea lions from the network stranding organizations. Stranding organizations rescue and rehabilitate stranded marine mammals and, if possible, release those animals back into the wild. These organizations are administered by NMFS. IMMS filed suit against NMFS, alleging that the agency was forcing IMMS to apply to take wild sea lions and was closing other methods of procuring sea lions, like the stranding network. IMMS claimed these agency actions were arbitrary and capricious. IMMS also claimed that by forcing it to take wild animals NMFS violated the Marine Mammal Protection Act's purpose of preserving the ocean populations of marine mammals. The court held that IMMS' permit was an impermissible delegation of discretion to IMMS and remanded to NMFS for permit reconsideration.

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***Christmas v. Exxon Mobil Corp*, 2014 Miss. LEXIS 244 (Miss. May 15, 2014).**

The Supreme Court of Mississippi granted summary judgment in favor of Exxon Mobil in a private nuisance suit. Exxon Mobile owns a waste-water facility which acts as habitat for many alligators. Roving gators were seen many times on an adjacent parcel owned by the property owners, and they claimed the presence of these alligators constituted a nuisance. The court ruled that the alligators existed in a wild state, so Exxon could not be held liable for the presence of animals. Alligators that are not the possessions of defendants could not constitute a private nuisance, so the court reinstated the circuit court's grant of summary judgment for the defendant.

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NINTH CIRCUIT

California

Cal. Coastal Comm'n v. United States Dep't of the Navy, 2014 U.S. Dist. LEXIS 72756 (S.D. Cal. May 28, 2014).

The California Coastal Commission (CCC) moved for summary judgment on its claim that the U.S. Navy's failure to conduct a supplemental consistency determination was arbitrary and capricious under the Administrative Procedure Act. The Navy planned to renovate federally owned buildings in downtown San Diego. In 1990, the CCC approved a consistency determination, which stated the renovation plan was consistent with the California Coastal Act, as required under § 307 of the Coastal Zone Management Act (CZMA). The CCC's claim resulted from its belief that the renovation plan underwent modifications between 1990 and 2006, and thus a new consistency determination was needed. The court found that the 2006 plan was not substantially different from the 1990 plan. Accordingly, it ruled that a supplemental consistency determination was not warranted under the CZMA, denied the CCC's motion for summary judgment, and granted summary judgment for the Navy.

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Sierra Club v. County of Fresno, 2014 Cal. App. LEXIS 459 (Cal. App. 5th Dist. May 27, 2014).

Appellants objected to the County of Fresno's approval of a plan to construct a retirement community. Appellants argued that the Environmental Impact Report (EIR) for the project did not meet the requirements of the California Environmental Quality Act (CEQA), and the project was inconsistent with the county's general land use plan. Two deficiencies within the EIR were alleged: failure to discuss treated effluent from wastewater facilities and failure to discuss air quality impacts. The court found that the EIR's discussion of effluent was sufficient but found the EIS deficient as to its air quality impact assessment. The court ordered that a revised EIR be prepared. On the land use claim, the court ruled that the project was not inconsistent with the county land use plan.

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Hawaii

Hawai'i Wildlife Fund v. County of Maui, 2014 U.S. Dist. LEXIS 74256 (D. Haw. May 30, 2014).

Environmental groups filed suit, claiming that the County of Maui violated the Clean Water Act (CWA) by discharging wastewater at four injection wells without a National Pollutant Discharge Elimination System (NPDES) permit. The groups claimed that wastewater seeps into the ocean on Maui's west shore. The county conceded that the effluent was migrating to the ocean, but sought a stay or dismissal of the action until the Hawaii Department of Health and the Environmental Protection Agency were given an opportunity to determine if a NPDES permit was needed. The court held defendant was liable for CWA violations, as the wastewater was significantly affecting the chemical, physical, and biological integrity of the ocean waters, and granted plaintiffs' motion for partial summary judgment.

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Alaska

Kunaknana v. United States Army Corps of Eng'rs, 2014 U.S. Dist. LEXIS 71860 (D. Alaska May 27, 2014).

Plaintiffs, Sam Kunaknana, the Center for Biological Diversity (CBD), and others challenged the U.S. Army Corps of Engineers (Corps) issuance of a permit to fill wetlands within the Delta where the Colville River meets the Beaufort Sea. Plaintiffs claim the issuance violated the National Environmental Policy Act (NEPA) and § 404 of the Clean Water Act (CWA). The court dismissed CBD's claims due to lack of standing, because CBD's members were not planning to use the area covered by the permit. CBD argued that future use of the Arctic Ocean or the North Slope

coastal ecosystem satisfied the actual or imminent injury requirement because those areas would be affected by the fill. The court rejected that argument, stating that a concrete plan to visit the project area was needed. It did find the Kunaknana plaintiffs to have standing and granted summary judgment as to one of their NEPA claims. The court found that the Corps failed to provide a reasoned explanation why a Supplemental Environmental Impact Statement was unnecessary. The court will not rule on the CWA claims until the other NEPA claims are resolved.

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ELEVENTH CIRCUIT

Alabama

***Black Warrior Riverkeeper v. United States Army Corps of Eng'rs*, 2014 U.S. Dist. LEXIS 69562, 44 ELR 20120 (N.D. Ala. 2014).**

Plaintiffs challenged the 2012 reissuance of Nationwide Permit (NWP) 21 under the Clean Water Act (CWA). The permit allows surface coal mining operations to discharge dredge and fill material into waters of the U.S if those operations meet certain requirements. Under the 2012 version of NWP 21, the requirement for operations that were permitted under previous general permits are different than the requirement for operation that were not previously permitted. Plaintiffs alleged allowing different requirements violated the CWA and the National Environmental Policy Act (NEPA). The Alabama Coal Association, which intervened in the suit, motioned for dismissal due to lack of subject matter jurisdiction and for summary judgment. The court denied the motion for dismissal but granted the motion for summary judgment. After conducting a balancing of equities, the court ruled that plaintiffs' claims were barred by the doctrine of laches, which is an unreasonable delay in bringing a claim. Moreover, it stated that had laches not applied, summary judgment for defendants would have still been appropriate.

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D.C. CIRCUIT

***Detroit Int'l Bridge Co. v. Gov't of Can*, 2014 U.S. Dist. LEXIS 73530 (D.D.C. May 30, 2014).**

A bridge owner sought Coast Guard approval to construct a second bridge while the first, main bridge was under maintenance. The Coast Guard refused to issue a navigational permit for the second bridge because plaintiffs failed to acquire local air rights easements. This action ensued. The bridge owner claimed that the Coast Guard's refusal was an arbitrary and capricious agency action. The plaintiff sought a preliminary injunction in order to preserve the economic "race" between their second bridge and a government owned bridge that was already approved. The court found plaintiffs' economic contentions unduly speculative and insufficient to warrant injunctive relief. The court also ruled that the Coast Guard did not act arbitrarily by requiring air rights easements before issuing the navigational permits.

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