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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the August 2015 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-15-03-08).

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SECOND CIRCUIT

Connecticut

***Tilcon Conn., Inc. v. Comm'r of Envtl. Prot.*, 2015 WL 4429214 (Conn. July 28, 2015).**

The Connecticut Supreme Court held that the Connecticut Water Diversion Policy Act—a permit requirement for any diversion of the water contained within, flowing through, or bordering upon the state—does not authorize the Department of Environmental Protection (DEP), in the context of applications for diversion permits for withdrawals of water, to seek information about, and thereby effectively regulate, the applicant's excavation activities as diversions separate and apart from the withdrawals for which it sought permits or as an effect of the proposed diversions. The court also held that the Act does not allow the DEP to request a wetlands mitigation plan of permittees.

Opinion Here

FOURTH CIRCUIT

North Carolina

***Willie R. Etheridge Seafood Co. v. Pritzker*, 2015 WL 4425659 (E.D.N.C. July 16, 2015).**

Multiple commercial fishing companies and fishermen filed an action challenging Amendment 7 of the National Marine Fisheries Service's (NMFS) Consolidated Atlantic Migratory Species Fishery Management Plan. Amendment 7 seeks to minimize the number of Bluefin Tuna caught as bycatch and dead discards in the pelagic long line fishery while providing a flexible quota system. The plaintiffs alleged that the Amendment violated the Magnuson-Stevens Fishery Conservation and Management Act, the Administrative Procedures Act, the National Environmental Policy Act, the Regulatory Flexibility Act, and due process. NMFS sought dismissal of all claims except for the Magnuson-Stevens Act claim. The court agreed and dismissed those claims for failure to state a claim and lack of subject matter jurisdiction.

Opinion Here

***N.C. Fisheries Ass'n v. Pritzker*, 2015 WL 4488509 (E.D. N.C. July 22, 2015).**

Various environmental groups brought suit against federal and state entities alleging that defendants violated the Endangered Species Act (ESA) by causing the illegal take of endangered Kemp's ridley sea turtles and the unauthorized take of threatened loggerhead, green, and leatherback sea turtles by allowing and authorizing a recreational "hook and line" fishery to operate. The U.S. District Court for the Eastern District of North Carolina granted defendants' motion to dismiss for lack of jurisdiction because the environmental groups lacked standing and failed to state a claim upon which relief could be granted. The environmental groups could not show an injury-in-fact to establish standing, nor did the groups plausibly allege that the defendants played any role in authorizing or allowing recreational "hook and line" fishing in North Carolina waters.

Opinion Here

FIFTH CIRCUIT

***In re Deepwater Horizon*, 2015 WL 4385622 (5th Cir. July 16, 2015).**

In May 2012, BP and related entities reached a settlement with a class of individuals who suffered economic loss and property damage after the *Deepwater Horizon* oil spill. That settlement agreement established a fund and an elaborate multi-tiered claims process. A provision of the agreement governs the scope and timing of the parties' access to information about these claims as they move through the claims process. The district court determined that BP was not entitled to review claim-specific information until an initial decision was made by the settlement program. BP appealed the decision. The appellate court dismissed the appeal for lack of jurisdiction.

Opinion Here

NINTH CIRCUIT

***Chinatown Neighborhood Ass'n v. Harris*, WL 4509284 (9th Cir. July 27, 2015).**

The U.S. Court of Appeals for the Ninth Circuit found California's Shark Fin Law, Cal. Fish & Game Code 2021(b),

which makes it unlawful to possess, sell, offer for sale, trade, or distribute a shark fin in the state, valid and constitutional. Plaintiffs alleged that the law violated the U.S. Constitution's Supremacy Clause by interfering with the national government's authority to manage fishing off the California coast; however, plaintiffs failed to identify any actual conflict between the Magnuson-Stevens Fishery Conservation and Management Act and the Shark Fin Law. The Ninth Circuit also rejected plaintiffs' Commerce Clause argument, concluding that nothing about the extraterritorial reach of the Shark Fin Law renders it invalid. Further, the law does not fix prices in other states, require those states to adopt California standards, or attempt to regulate transactions conducted wholly out of state. Finally, the Ninth Circuit noted that the Shark Fin Law does not interfere with activity that is inherently national or that requires a uniform system of regulation.

Opinion Here

Bldg. Indus. Ass'n of the Bay Area v. U.S. Dep't of Commerce, 2015 WL 4080761 (9th Cir. July 7, 2015).

The U.S. Court of Appeals for the Ninth Circuit affirmed a district court's ruling that the National Marine Fisheries Service's (NMFS) procedures leading to the designation of a critical habitat for a threatened species, the southern distinct population segment of green sturgeon, complied with the Endangered Species Act (ESA) and the Administrative Procedures Act. The Ninth Circuit concluded that, when considering the economic impact of its designation, NMFS complied with § 4(b)(2) of the ESA and was not required to apply the specific balancing-of-the-benefits methodology. The court further held that § 4(b)(2) establishes a discretionary process by which the agency may exclude areas from designation but does not set standards for when areas must be excluded from designation; therefore, an agency's discretionary decision not to exclude an area from designation was not subject to judicial review. The Ninth Circuit also held that National Environmental Policy Act does not apply to critical habitat designations.

Opinion Here

Alaska

State v. Jewell, 2015 WL 4464576 (D. Alaska July 21, 2015).

The U.S. District Court for the District of Alaska denied Alaska's request for a court order directing the Department of Interior (DOI) to review the state's plan for the exploration of oil and gas resources in the Arctic National Wildlife Refuge (ANWR). When Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA) in 1980, it authorized limited-duration exploratory activities on a 1.5 million acre area within ANWR known as the "coastal plain." In 2013, Alaska submitted an exploration plan and special use application to DOI under ANILCA, but DOI denied review. Alaska then argued that the DOI Secretary has an ongoing obligation under ANILCA to evaluate and approve exploration plans submitted for approval; however, the district court agreed with DOI that no such obligation exists. Because the district court held that the statute authorizing or requiring the Secretary to approve additional exploration is ambiguous, the Secretary's interpretation of her statutory authority and obligation to review and approve exploration plans is based on a permissible and reasonable construction of the statute. The district court, therefore, upheld DOI's interpretation and denial of review.

Opinion Here

ELEVENTH CIRCUIT

***Smith v. Royal Caribbean Cruises, Ltd.*, 2015 WL 4546202 (11th Cir. July 29, 2015).**

The U.S. Court of Appeals for the Eleventh Circuit ruled that a cloudy or murky pool on a cruise ship was an open and obvious danger for swimmers, precluding a passenger from obtaining a judgment against the cruise ship for negligence surrounding injuries sustained because of the pool's murkiness. The court found that the cruise ship company could not be held liable for injuries sustained by a passenger while swimming in a murky pool aboard the *Liberty of the Seas* cruise ship, because the passenger noticed the murkiness of the water before even entering the pool and immediately recognized that he could not see while he was swimming underwater. Therefore, the cruise ship did not owe a duty to warn the passenger of the open and obvious dangerous condition.

Opinion Here

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