September 15 2016

Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the September 2016 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-16-03-09).

Forward to a friend

Know someone who might be interested in our monthly newsletter?

Forward this email their way and help spread the word.

SECOND CIRCUIT

Vermont

Agency of Nat. Res. v. McGee, 2016 VT 90 (Vt. Aug. 19, 2016).

The Vermont Agency of Natural Resources (ANR) issued a citation and imposed a $10,000 penalty on landowners who placed unpermitted fill in a wetland on their property. A lower court upheld the citation, concluding that the land was not exempt from wetland regulation, but reduced the penalty. On appeal, the Vermont Supreme Court found that the property at issue had not been used to grow food or crops since 1990 and, therefore, did not meet the farming exemption in the wetlands regulations. Since the landowners did not appeal the amount of the penalty, the court did not address that issue.

Opinion Here

FOURTH CIRCUIT

Medford v. Cruz, 2016 WL 4439992 (Md. Ct. Spec. App. Aug. 23, 2016).

A Maryland appellate court recently ruled on an adverse possession claim between adjoining property owners in a

waterfront community in Pasadena, Maryland. The property owners, Vicky Medford and Brigitte Cruz, disputed Cruz's right to access their jointly owned pier via a portion of disputed property. The lower court dismissed Medford's adverse possession claim and found that Cruz had legal and equitable title to the disputed area. The appellate court reversed, concluding that Medford established title to the disputed area through adverse possession. The court stipulated that Medford's ownership of the area is subject to Cruz's right to have reasonable access to the pier.

Opinion Here

FIFTH CIRCUIT

Louisiana State v. United States Army Corps of Engineers, 2016 WL 4446067 (5th Cir. Aug. 23, 2016).

Following Hurricane Katrina, the U.S. Army Corps of Engineers (Corps) developed a cost-sharing formula with the state of Louisiana to pay for the closure of the Mississippi River-Gulf Outlet. Louisiana contested this decision and also challenged the Corps' ecosystem restoration plan with respect to the closure. A federal district court ruled in favor of Louisiana, finding that the Corps was required to cover the costs of the closure and the ecosystem restoration pursuant to the Water Resources Development Act of 2007 (WRDA), as well as an appropriations bill passed following Hurricane Katrina. On appeal, the Fifth Circuit ruled that the Corps' cost-sharing plan for the closure was a permissible construction of the WRDA and appropriations bill. The court dismissed the state's challenge to the ecosystem restoration plan, as the Corps had not completed its plan for that portion of the project.

Opinion Here

NINTH CIRCUIT

California

People v. Rinehart, 206 Cal. Rptr. 3d 571 (Cal. 2016).

The California Supreme Court ruled that neither the federal Mining Law of 1872 nor the Surface Resources and Multiple Use Act of 1955 preempted a state moratorium on suction dredge mining. The complaint arose when a miner was charged with using vacuum and suction dredge equipment to mine for gold without a permit and for possessing such equipment within 100 yards of waters closed to the use of that equipment. After a misdemeanor conviction, the miner appealed. The appellate court reversed, concluding that federal mining law preempted state law that unduly burdens mining on federal land. The California Supreme Court reversed the appellate court, finding that although certain federal laws protected miners' real property interests, they do not give the miners immunity from a state exercising its police powers.

Opinion Here

Dep't of Fin. v. Comm'n on State Mandates, 2016 WL 4506106 (Cal. Aug. 29, 2016).

California's Regional Water Quality Control Board issued a National Pollutant Discharge Elimination System (NPDES) permit authorizing Los Angeles County, the Los Angeles Flood Control District, and 84 cities to operate storm drain systems. Several of the local governments requested reimbursement for the cost of satisfying conditions required by the permit. The Commission on State Mandates agreed that because the conditions were mandated by the

state, the operators were entitled to reimbursement. The appellate court reversed, concluding that the permit conditions were federally mandated and therefore not reimbursable. The California Supreme Court reversed, holding that because the permit conditions were imposed as a result of the state's discretionary action, they were not federally mandated and were reimbursable.

Opinion Here

Hawaii

Rene Umberger, et. al v. Hawai'i, 2016 WL 4555838 (Haw. Ct. App. Aug. 31, 2016).

Three nonprofit organizations and several residents sought to compel the Hawaii Department of Land and Natural Resources (DLNR) to require the holders of permits that allow the take of aquarium fish to comply with the environmental assessment procedures set forth in the Hawai'i Environmental Policy Act (HEPA). The lower court entered summary judgment in favor of the state, finding that aquarium collection did not trigger the environmental assessment process. The appellate court affirmed, agreeing that the take of fish for aquarium purposes did not qualify as an "action" requiring an environmental assessment under HEPA.

Opinion Here

Oregon

Audubon Society of Portland, et al., v. U.S. Army Corps of Engineers, et al., 2016 WL 4577009 (D. Or. Aug. 31, 2016).

Several environmental organizations challenged the double-crested cormorant management plan, final environmental impact statement (EIS), and associated permits authorizing the "take," or killing, of the species in the Columbia River estuary. The cormorants prey on salmon and steelhead listed as endangered or threatened under the Endangered Species Act. In developing the plan, the U.S Army Corps of Engineers and U.S. Fish and Wildlife Service concluded that the take of the birds would benefit the listed species. While the court found that the agencies should have considered other reasonable alternatives to the take of the cormorants, the federal district court upheld the plan, EIS, and permits. The court noted that although the agencies' failure to consider the alternatives was a "significant procedural error," scientific evidence showed that vacating the decision would negatively impact the listed species and "when considering effects on endangered and threatened species, the 'benefit of the doubt' must go to the endangered species."

Opinion Here

Washington

Spokane Cty. v. Sierra Club, 2016 WL 4366951 (Wash. Ct. App. Aug. 16, 2016).

Environmental organizations appealed the National Pollution Discharge Elimination System (NPDES) permit issued by the Washington Department of Ecology (Ecology) to Spokane County for the Spokane Regional Water Reclamation Facility. The group alleged that Ecology did not take the appropriate steps to guarantee the discharge from the facility did not contain unsafe Polychlorinated Biphenyls (PCB) levels. The Pollution Control Hearing Board (PCHB) concluded that portions of the NPDES Permit were invalid and remanded to Ecology. The county and Ecology appealed the PCHB's conclusions, and the superior court affirmed the PCHB. On appeal, a Washington appellate court affirmed in part and reversed in part. The court found that the PCHB properly decided that Ecology should have conducted a reasonable potential analysis. The court also concluded that the PCHB acted contrary to the law by

performing its own reasonable potential analysis and determining the facility had a reasonable potential to cause or contribute to a violation of water quality standards for PCB levels in the Spokane River. The case was remanded for further consideration.

Opinion Here

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