Ocean and Coastal Case Alert

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The National Sea Grant Law Center is pleased to offer the ***Ocean and Coastal Case Alert***. The ***Case Alert*** is a monthly listserv highlighting recent court decisions impacting ocean and coastal resource management. Each Case Alert will briefly summarize the cases. Please feel free to pass it on to anyone who may be interested. If you are a first-time reader and would like to subscribe, send an email to waurene@olemiss.edu with "***Case Alert***" on the subject line. MASGC 09-002-04

U.S. SUPREME COURT

Entergy Corp. v. Riverkeeper, Inc., 2009 U.S. LEXIS 2498 (U.S. Apr. 1, 2009).
The United States Supreme Court has upheld cooling water intake structure regulations promulgated by the Environmental Protection Agency (EPA) under 33 U.S.C.S. 1326(b) of the Clean Water Act (CWA). In promulgating the regulations, the EPA weighed the costs and benefits of requiring closed-cycle cooling systems at existing power plants and determined that it was not cost effective to require the closed-cycle systems. Environmental groups and several states challenged the regulations, claiming that the EPA should not have used the cost-benefit analysis in promulgating the regulations, since § 316(b) of the CWA requires the use of "the best technology available for minimizing adverse environmental impact." The Supreme Court found that the CWA did not preclude the EPA from considering costs and benefits in establishing national performance standards and providing for variances from the standards.
http://www.supremecourtus.gov/opinions/08pdf/07-588.pdf

FIRST CIRCUIT

Maine

State v. Weeks, 2009 ME 33 (Me. Mar. 24, 2009).
Maine's "v-notch" program provides that when an egg-bearing female lobster is caught, it must be marked with a v-shaped notch in the right rear middle flipper and released. It is a violation of state law to "take, transport, sell or possess" a lobster showing a v-notch, or one that has been "mutilated in a manner that could hide or obliterate that mark." A Maine lobsterman was convicted of possessing four lobsters with v-notches. The fisherman argued that because the lobsters bore evidence of regeneration, he was not in violation of the law because based on Bureau of Marine Patrol policy, it is not a violation of the statute to possess a lobster with a mutilated right center flipper that has subsequently regenerated. The court upheld the conviction in light of evidence that the lobsters' right center flippers had been mutilated in a manner that would hide or obliterate a v-notch.
http://www.courts.state.me.us/court_info/opinions/2009%20documents/09me33we.pdf

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FOURTH CIRCUIT

Columbia Venture LLC v. S.C. Wildlife Fed'n, 2009 U.S. App. LEXIS 6932 (4th Cir. Apr. 3, 2009).
The Fourth Circuit Court of Appeals upheld FEMA's base flood elevation determination for Richland County, South Carolina, which had been challenged by a development company, Columbia Venture. The United States District Court for the District of South Carolina had vacated the determinations, finding that FEMA failed to timely publish notice of the decision in the Federal Register in violation of 42 U.S.C.S. § 4104(a). The Fourth Circuit held that the failure to timely publish did not nullify FEMA's determination, unless the plaintiff could prove that any deficiency was prejudicial. The court found that Columbia Venture did not suffer prejudice, because it was heavily involved in the administrative process, received notice of each development, had sufficient opportunity to be heard, and submitted its challenges to FEMA's determinations. The court dismissed the district court's order.

South Carolina

Brownlee v. S.C. Dep't of Health & Envtl. Control, 2009 S.C. LEXIS 71 (Mar. 30, 2009).
The South Carolina Department of Health and Environmental Control (DHEC) denied several landowners permits to extend their docks across a river. The landowners contested the decision, citing a state regulation that prohibited bridging *navigable* creeks. The landowners argued that a neighbor's dock near the mouth of the tributary rendered the water unnavigable. An administrative law judge (ALJ) reversed DHEC's decision and ordered the agency to issue the permits. The South Carolina Coastal Zone Management Appellate Panel reinstated DHEC's ruling, which was then affirmed by a trial court. The trial court's decision was reversed by the South Carolina Court of Appeals. The South Carolina Supreme Court reversed. The court found that the fact that the mouth of the tributary had a man-made impediment did not render the entire tributary nonnavigable for purposes of S.C. Code Ann. § 49-1-10 and, therefore, DHEC properly denied the permits to the landowners.
http://pacer.ca4.uscourts.gov/opinion.pdf/052398.P.pdf

FIFTH CIRCUIT

Arctic Slope Reg'l Corp. v. Affiliated FM Ins. Co., 2009 U.S. App. LEXIS 6900 (5th Cir. Apr. 2, 2009).
In September 2005, Hurricane Rita's storm surge flooded Omega Natchiq Inc.'s office and construction yard in Iberia Parish, Louisiana. The company's insurer, Affiliated FM, denied coverage for the company's storm surge losses. Although the insurance policy's flood provision included protection from storm surge damage, it contained an exclusion for low-lying flood-prone areas. Omega claimed that the loss fell within a provision defining coverage for wind/hail damage, or, in the alternative, that the policy was ambiguous and should be construed in the company's favor. The Fifth Circuit found that the wind/hail exception did not apply, and there was no ambiguity when the policy was read as a whole.

SIXTH CIRCUIT

Michigan

Anglers of the Ausable, Inc. v. Dep't of Envtl. Quality, 2009 Mich. App. LEXIS 723 (Mich. Ct. App. Mar. 31, 2009).
A Michigan appellate court found that a lower court properly enjoined an energy company from treating polluted water and discharging it into a water system. The Michigan Department of Environmental Quality (DEQ) had issued the company a permit and certificate of coverage authorizing the action. When nearby residents filed suit alleging a violation of the Michigan Environmental Protection Act (MEPA), the lower court enjoined the energy company from discharging the treated water. The DEQ and the energy company appealed. Although the appellate court found that the circuit court should have dismissed the action due to lack of jurisdiction, the court found that the court properly enjoined the discharge of treated water, because the rate of discharge would pollute or impair natural resources in violation of MEPA.
http://coa.courts.mi.gov/documents/OPINIONS/FINAL/COA/20090331_C279301_64_279301.OPN.PDF

NINTH CIRCUIT

Trout Unlimited v. Lohn, 2009 U.S. App. LEXIS 5353 (9th Cir. Mar. 16, 2009).
In 2005, the National Marine Fisheries Service (NMFS) issued a final Hatchery Listing Policy which allowed of the agency to consider the number of hatchery-reared salmon when making Endangered Species Act (ESA) listing determinations for wild salmon. Environmental groups contested the decision. The United States District Court for the District of Washington held that the decision, which resulted in downlisting a population of steelhead from endangered to threatened, violated the ESA. On appeal, the court overturned the finding that the policy violated the ESA. The Ninth Circuit found that the Hatchery Listing Policy was consistent with both the plain language of the ESA and with the statutory goal of preserving natural populations. The appellate court affirmed the district court's conclusion that NMFS's denial of petitions to split natural and hatchery fish into separate evolutionarily significant units (ESU) was not arbitrary or capricious. The court dismissed an intervenor's arguments that NMFS impermissibly distinguished between hatchery-reared and naturally-spawned salmon.
http://www.ca9.uscourts.gov/datastore/opinions/2009/03/16/0735623.pdf

Hawaii

Sierra Club v. DOT, 202 P.3d 1226 (Haw. 2009).
After a Hawaii court issued a permanent injunction prohibiting the operation of an inter-island boat ferry, "Superferry," the state legislature adopted special legislation allowing the Superferry to operate between Oahu, Maui, and Kauai pending completion of its environmental impact statement (EIS). The Hawaii Supreme court found that the legislation was unconstitutional because it created a class that was limited to the Superferry vessel company. The court also awarded attorney's fees to the plaintiffs, Sierra Club and other environmental groups.
http://www.state.hi.us/jud/opinions/sct/2009/29035.pdf

Cape Flattery v. Titan Mar. LLC, 2009 U.S. Dist. LEXIS 22320 (D. Haw. Mar. 19, 2009).
After a vessel that ran aground on a coral reef was rescued by a salvage company, the U.S. government informed the vessel owner that it could be liable for the more than $15 million in damage to the coral reef incurred during the salvage. The owner sued the salvage company seeking indemnity or contribution under the Oil Pollution Act of 1990 (OPA). The salvage company argued that the dispute arose under an arbitration agreement and sought to compel arbitration. The United States District Court for the District of Hawaii ruled that the owner was not required to submit the claim to arbitration, finding that the damage did not "arise under" the agreement. Furthermore, the salvage company had an independent duty under federal and state law to prevent damage to the reef.
https://ecf.hid.uscourts.gov/doc1/0611801947

FEDERAL CIRCUIT

Palmyra Pac. Seafoods, L.L.C. v. United States, 2009 U.S. App. LEXIS 7447 (Fed. Cir. Apr. 9, 2009).
The Secretary of the Interior signed an order designating tidal lands, submerged lands, and waters out to a twelve-nautical mile distance surrounding the island of Palmyra as a National Wildlife Refuge. Commercial fishing licensees were precluded from fishing within the refuge. The licensees filed an action asserting a regulatory taking against the United States. The United States Court of Federal Claims dismissed the complaint. The court held that because the fishing licensees did not have a cognizable Fifth Amendment property interest, no taking occurred. The licensees appealed, and the Court of Appeals for the Federal Circuit affirmed the judgment. The court reasoned that an adverse effect on the value of the licensees' contract did not result in a compensable taking.
http://www.cafc.uscourts.gov/opinions/08-5058.pdf

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