Is this email not displaying correctly? Try the web version.

January 16 2013

Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the January 2013 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-13-03-01).

Forward to a friend

Know someone who might be interested in our monthly newsletter?

Forward this email their way and help spread the word.

U.S. SUPREME COURT

***L.A. County Flood Control Dist. v. NRDC, Inc., 184 L. Ed. 2d 547* (U.S. 2013).**

The National Resource Defense Council and Santa Monica Baykeeper sued the Los Angeles Flood Control District claiming that its management of stormwater runoff constituted a discharge of a pollutant for which a citizen suit could be filed under §505 of the Clean Water Act (CWA). The groups argued that a discharge occurred when stormwater moved from concrete drainage canals considered to be parts of the Los Angeles and San Gabriel Rivers into unimproved parts of the same rivers. The district court held that this was not a discharge under the CWA, and the Ninth Circuit reversed. The Supreme Court agreed with the district court, finding that water moving from an improved portion of a navigable waterway into an unimproved part of the same river does not constitute a discharge under the CWA.

http://www.supremecourt.gov/opinions/12pdf/11-460_3ea4.pdf »

***Lozman v Riviera Beach*, No. 11-626 (U.S. Jan. 15, 2013).**

The U.S. Supreme Court has ruled that a floating house did not qualify as a vessel for the purposes of admiralty jurisdiction. The case arose from an in rem action filed by the city of Riviera Beach, which sought to remove the floating home from its marina. The city was successful in the lower courts, with the Eleventh Circuit agreeing that the home was a vessel since it was capable of movement over water. The Rules of Construction Act defines a "vessel" as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." The home, however, was not capable of moving on its own—it was towed by a tugboat to its

current location—therefore, the Supreme Court found that in this instance, the floating home did not meet the definition of vessel. The Court held that "a structure does not fall within the scope of [the Construction Act's definition of vessel] unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water."

http://www.supremecourt.gov/opinions/12pdf/11-626_p8k0.pdf »

FOURTH CIRCUIT

***Deerfield Plantation Phase Ii-B Prop. Owners Ass'n v. U.S. Army Corps of Eng'rs*, 2012 U.S. App. LEXIS 26402 (4th Cir. Dec. 26, 2012).**

A homeowners' association in South Carolina appealed the U.S. Army Corps of Engineers' (Corps) decision that it did not have jurisdiction under the Clean Water Act over various bodies of water on a local golf course. The Fourth Circuit Court of Appeals upheld the Corps' decision not to exercise jurisdiction. The Corps' determination that the bodies of water on the golf course were not "waters of the United States" was the product of careful analysis of a variety of factors, including whether they met a permanent waters standard or the nexus standard outlined in *Rapanos*. However, the appellate court upheld the district court's decision to deny the Corps' motion for attorney's fees and costs because the homeowners' association's claim was not frivolous, but rather, was supported by a revised determination by the Corps and expert testimony.

http://www.ca4.uscourts.gov/Opinions/Unpublished/111871.U.pdf »

Maryland

***Waterkeeper Alliance, Inc. v. Hudson*, 2012 U.S. Dist. LEXIS 179962 (D. Md. Dec. 20, 2012).**

Waterkeeper Alliance, a national non-profit seeking to protect water quality, brought suit against a farmer in Eastern Maryland and the company that he sold his chickens to, arguing that litter from the farmer's chicken houses constituted an illegal discharge of a pollutant under the Clean Water Act. The group claimed that chicken litter was either tracked out of the chicken houses on the soles of workers' feet or blown out through the coops' exhaust fans and later ended up in a tributary of the Pocomoke River. However, the court found this possibility unpersuasive and did not hold either the farmer or the chicken company liable.

http://www.mdd.uscourts.gov/Opinions/Opinions/Waterkeeper.pdf »

***Va. Marine Res. Comm'n v. Chicoteague Inn*, 2013 Va. App. LEXIS 9 (Va. Ct. App. Jan. 8, 2013).**

The Virginia Marine Resources Commission (VMRC) became aware that a restaurant had placed a floating platform over state-owned bottomland in order to accommodate overflow seating from its restaurant. The VMRC requested that the Inn move the vessel and apply for the appropriate permits. The Chicoteague Inn objected and requested a hearing with VMRC. The VMRC ordered the portion of the platform over state-owned bottomlands removed. The Inn appealed, arguing that the VMRC did not have jurisdiction to regulate a temporarily docked vessel because the state's action was preempted by federal maritime law. The court agreed with the Inn. On appeal, the Virginia Court of Appeals reversed the decision, finding that federal law granted the VMRC jurisdiction over the vessel. However, the Virginia Court of Appeals granted the Inn a rehearing to determine if the VMRC had the authority to order removal of the vessel. The court found that it did not. "Although a portion of the vessel was temporarily moored over state-owned bottomlands, it was not unlawfully encroaching over the bottomlands such that it violated the rights of the people of the Commonwealth to use the bottomlands. Neither did it interfere with VMRC's management of state-owned bottomlands or fish and shellfish habitats."

http://www.courts.state.va.us/opinions/opncavwp/0086121.pdf »

FIFTH CIRCUIT

***Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co*, 2013 U.S. App. LEXIS 545 (5th Cir. Jan. 9, 2013).**

Following the BP Deepwater Horizon oil spill, individuals and the Center for Biological Diversity (plaintiffs) sued the owner and operator of the drilling platform for violations of the Clean Water Act, Comprehensive Environmental Response, Compensation, and Liability Act, and the Emergency Planning and Community Right-to Know Act (EPCRA). The district court granted all of the defendants' motions to dismiss. While the Fifth Circuit affirmed most of the district court's rulings, it allowed the plaintiffs to sue under EPCRA, because the defendants did not actively and effectively report violations concerning the release of hazardous materials. The court found that the required EPCRA information was too difficult to find in the volumes of information on government websites following the spill.

http://www.ca5.uscourts.gov/opinions/pub/12/12-30136-CV0.wpd.pdf »

NINTH CIRCUIT

***Resisting Envtl. Destruction on Indigenous Lands v. United States EPA*, 2012 U.S. App. LEXIS 26358 (9th Cir. 2012).**

Environmental groups appealed the EPA's decision to issue permits for exploratory drilling operations in the Arctic Ocean. The groups argued that the support vessels for drilling ships qualified as Outer Continental Shelf (OCS) sources under 40 C.R.F. §52 and were required to have the appropriate technology and distance regulations to maintain air quality. The Ninth Circuit Court of Appeals upheld the EPA's issuance of the drilling permits, because Congress did not intend to regulate support vessels as OCS sources. The court reasoned that because support vessels are mobile vessels, they did not qualify as OCS sources and were, therefore, not subject to the additional regulations.

http://cdn.ca9.uscourts.gov/datastore/opinions/2012/12/26/12-70518.pdf »

California

***Central Coast Forest Ass'n v. Fish & Game Comm.*, 211 Cal. App. 4th 1433 (Cal. App. 3d Dist. 2012).**

Timber companies sought to remove coho salmon living in streams south of San Francisco, where the timber companies were working, from the California endangered species list. The Fish and Game Commission (Commission) denied this request on two separate occasions, and the court reviewed this decision twice, deferring to the Commission on both occasions. The defendants argued that coho salmon do not naturally live south of San Francisco and therefore should not be protected in these waters. However, the California Court of Appeals held that petitioning for the delisting of a particular species from the endangered species list was not a permissible way to challenge a final administrative decision. Therefore, the appellate court reversed the trial court's ruling, finding that the lower court should not have reviewed the Commission's decision.

www.courts.ca.gov/opinions/documents/C060569.doc »

***Chinatown Neighborhood Ass'n v. Brown*, 2013 U.S. Dist. LEXIS (N.D. Cal. Jan. 2, 2013)**

The Chinatown Neighborhood Association in California requested a preliminary injunction against the enforcement

of a law that makes it illegal to cut the fins from a shark (Shark Fin Law). The association claimed that the Shark Fin Law violated the Equal Protection Clause, the Commerce Clause, and the Supremacy Clause. The group argued that the law discriminated against Chinese-Americans. The district court denied the association's motion because there was not overwhelming evidence that the law violated any of the cited constitutional provisions. The court determined that the disparate impact of the law on the Chinese population was not sufficient evidence to establish an Equal Protection violation. Additionally, the court cited precedent that established that the Commerce Clause does not prevent states from passing for local economic protection. Finally, the court held that the Supremacy Clause claim failed because federal law did not preempt the Shark Fin Law.

https://ecf.cand.uscourts.gov/doc1/035110102400 »

FEDERAL CIRCUIT

***Lost Tree Vill. Corp. v. United States*, 2013 U.S. App. LEXIS 690 (Fed. Cir. Jan. 10, 2013).**

A corporation claimed that the U.S. Army Corps of Engineers' denial of an application to fill wetlands on a portion of its land, "Plat 57", diminished the value of the land and constituted a takings claim under the Fifth Amendment. The corporation had purchased an entire peninsula in Florida and had developed the property, except for on Plat 57. The corporation argued that the rejection of the permit resulted in a total taking, as the property would have no value. The U.S. Court of Federal Claims rejected the claim, finding that the plot must be considered as part of the entire development and therefore, the rejection did not result in a total taking. On appeal, the U.S. Court of Appeals for the Federal Circuit reversed and remanded the court's decision. The appellate court reasoned that common ownership and near proximity of land does not constitute a single parcel of land in terms of takings clause analysis. On remand, the appellate court directed the trial court to consider the loss in economic value for only the undeveloped plot of land.

http://www.cafc.uscourts.gov/images/stories/opinions-orders/12-5008.pdf »

Sea Grant Law Center

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

You're receiving this newsletter because you've subscribed to the *Ocean and Coastal Case Alert*.

To view our archive, go to Case Alert Archive.
First time reader? Subscribe now.
Not interested anymore? Unsubscribe instantly.