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 09-002-06

SECOND CIRCUIT

Reino De Espana v. ABSG Consulting, Inc., 2009 U.S. App. LEXIS 12618 (2d Cir. June 12, 2009).
The U.S. Court of Appeals for the Second Circuit vacated the U.S. District Court for the Southern District of New York's decision regarding the *Prestige* oil spill. The district court had granted summary judgment to the American Bureau of Shipping (ABS), finding that the federal court did not have jurisdiction over the case because an international convention deprived it of jurisdiction. On appeal, and the Second Circuit agreed with Spain's argument that the convention could not divest the U.S. court of jurisdiction, given that the U.S. had not ratified the convention. The district court had denied ABS' counterclaims for indemnity and contribution, finding they were barred by the Foreign Sovereign Immunity Act. The appellate court disagreed and held that the ABS could bring the counterclaims, since they were sufficiently related to the plaintiff's claims.
http://www.ca2.uscourts.gov/decisions/plus

New York

Port of Oswego Auth. v. Grannis, No. 10296-08, 2009 WL 1606015 (N.Y. Sup. Ct. May 21, 2009).
The New York Department of Environmental Conservation (DEC) issued a Clean Water Act § 401 Water Quality Certificate for Commercial Vessel and Large Recreational Vessel General Permit for the discharge of ballast water. Several plaintiffs, including ports and other shipping interests, contested conditions in the permit requiring that ballast water be discharged 50 miles from shore and that ballast water treatment systems be installed by 2012. The plaintiffs argued that the conditions should be struck down, since they were more stringent than the Environmental Protection Agency's general permit. The court noted that certain conditions may be added to the § 401 Certification in order to ensure compliance with the Clean Water Act and with other state law. The court found that the conditions were rationally derived from the authority of the DEC to control ballast water pollution, the permit application process (including public notice and comment) was sufficient, and the DEC took a hard look at the environmental and economic effects of the conditions. Therefore, the plaintiffs' complaint was denied and dismissed.

THIRD CIRCUIT

United States v. Fleet Mgmt., Ltd., No. 08-2600, 2009 WL 1483143 (3d Cir. May 28, 2009).
A district court excluded opinion testimony regarding the discharge of oil-contaminated bilge water and sludge into the ocean. The government appealed the district court's decision, arguing that the reliability factors were misapplied and that alternative explanations were given undue weight. The Third Circuit affirmed the district court's decision.
http://www.ca3.uscourts.gov/opinarch/082600np.pdf

FOURTH CIRCUIT

South Carolina

Young v. S.C. Dep't of Health & Envtl. Control, No. 4555, 2009 WL 1586790 (S.C. Ct. App. June 4, 2009).
A riparian landowner appealed the decision of the South Carolina Ocean and Coastal Resource Management (OCRM) to grant a neighboring landowner a permit to build a private recreational dock. The plaintiff argued that the dock's mechanical boatlift would interfere with his view of Church Creek. He had already unsuccessfully appealed OCRM's decision to the Administrative Law Court and the Coastal Zone Management Appellate Panel. The court upheld the issuance of the permit, since there was no abuse of discretion and the agency had considered cumulative effects.
http://www.judicial.state.sc.us/opinions/displayOpinion.cfm?caseNo=4555

Virginia

United States v. Bedford, No. 2:07cv491, 2009 WL 1491224 (E.D. Va. May 22, 2009).
The United States filed a complaint seeking injunctive relief and civil penalties against Cody Bedford and his company, Bedford Tree Service, Inc., for unauthorized discharge of pollutants into waters of the United States, in violation of the Clean Water Act (CWA). Bedord failed to obtain a CWA § 404 permit for filling wetlands on his property and never made an effort to cooperate with the Virginia Department of Environmental Quality. The court found that Bedford violated the CWA because he (1) controlled, performed, and was responsible for the activities at issue; (2) discharged pollutants; (3) from a point source; (4) into streams or wetlands that qualify as jurisdictional waters of the United States; (5) without a permit or other statutory authorization for such discharge. As a remedy, the court created a deed restriction ensuring preservation of the remaining twenty-four acres of wetlands and entered a judgment in the amount of $90,000.

SIXTH CIRCUIT

Michigan

Michigan Sullivan v. Tillman, No. 285195, 2009 WL 1564555 (Mich. Ct. App. June 2, 2009).
A landowner, William Sullivan, challenged another landowner's construction of a pier extending into Big Crooked Lake. A trial court ruled in favor of Sullivan, finding that he had riparian rights while the other landowner had only easement, not riparian, rights in the beach or walk areas. A Michigan appellate court agreed, finding that the strip of beach separating Sullivan's property from the water was deemed an easement for all lot owners rather than dedicated land for lot owners in fee simple. Since Sullivan's property was riparian and the defendant's was not, the court affirmed the judgment of the trial court.

http://coa.courts.mi.gov/documents/OPINIONS/FINAL/COA/20090602_C285195_25_285195.OPN.PDF

NINTH CIRCUIT

California

Center for Biological Diversity v. U.S. Fish & Wildlife Serv., No. C 08-01278, 2009 WL 1610019 (N.D. Cal. June 8, 2009).
Several environmental groups brought suit under the Endangered Species Act, the National Forest Management Act, and the Administrative Procedures Act, alleging that four revised forest management plans should have contained incidental take statements. During formal consultation, the Fish and Wildlife Service and the National Marine Fisheries Service prepared biological opinions for 43 species of fish and one species of sea lion. Each of the biological opinions indicated that an incidental take statement would be provided as appropriate at the time that site-specific projects were undertaken. The court held that a programmatic plan can result in incidental take even though specific projects have not yet begun and that plaintiffs did have standing to sue. Therefore, the court found that the agencies had violated the Administrative Procedures Act and granted the plaintiffs' motion for summary judgment.
https://ecf.cand.uscourts.gov/doc1/03515704735

ELEVENTH CIRCUIT

Friends of Everglades v. S. Fla. Water Mgmt. Dist., No. 07-23829, 2009 WL 1545551 (11th Cir. June 4, 2009).
The Eleventh Circuit Court of Appeals upheld an Environmental Protection Agency (EPA) rule that exempts water transfers between navigable waters without a Clean Water Act (CWA) permit. The case began when several organizations filed an action seeking an injunction to force the South Florida Water Management District to get a permit under the National Pollution Discharge Elimination System (NPDES) program of the CWA before pumping polluted canal water into Lake Okeechobee. The Eleventh Circuit determined that language in the CWA regarding "any addition of any pollutant to navigable waters from any point source" was ambiguous. Thus, the EPA regulation, which accepted the unitary waters theory that transferring pollutants between navigable waters was not "addition to navigable waters," was a reasonable construction of that ambiguous language and was thus entitled to deference. Therefore, the court ruled, the water district did not require a NPDES permit and had not violated the CWA.
http://www.ca11.uscourts.gov/opinions/ops/200713829.pdf

Florida

Conrad v. Young, No. 4D07-2441, 2009 WL 1456720 (Fla. Dist. Ct. App. May 27, 2009).
In a dispute over a piece of beachfront property, plaintiffs sought declaratory and injunctive relief to prevent the defendants from obstructing beach access, contending that the property was subject to a public easement. The defendant countered that (1) she now owned the property through adverse possession, and (2) the doctrine of laches prevented the plaintiffs' suit. (Laches bars relief to a claimant who has unreasonably delayed asserting a claim, thereby prejudicing the other party.) The court held that the defendant did not own the property, because there had not been seven years of continuous, adverse possession of the property because plaintiffs had used the property on numerous occasions to access the water. The court further held that the doctrine of laches did not apply. The court upheld an injunction preventing the defendant and her successors in title from obstructing the use of the easement and an order for the defendant to remove the existing obstructions.
http://www.4dca.org/opinions/May2009/05-27-09/4D07-2441.op.pdf

DC CIRCUIT

Oceana, Inc. v. Guitterez, No. 08-00318, 2009 WL 1491516 (D.C. Cir. May 28, 2009).
In 2008, the National Marine Fisheries Service (NMFS) adopted a rule implementing bycatch reporting measures for the Northeast Region. Oceana, an environmental protection organization, filed suit under the Administrative Procedures Act. Oceana filed a motion to compel NMFS to add documents to the administrative record that NMFS contends are deliberative or covered by the attorney-client privilege. The court held that the first set of documents was pre-decisional and thus were properly excluded from the administrative record. The court further held that the second set of documents involved confidential communications for the purpose of securing legal advice and therefore should not be included in the administrative record. Noting the presumption that administrative records are complete and the plaintiff failure to demonstrate "unusual circumstances" required to justify supplementation of the administrative record, the court denied the motion.
https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2008cv0318-22

MASGC 09-002-06

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