

Ocean and Coastal Case Alert

~ ~ December 14, 2010 ~ ~

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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. NSGLC-10-03-12

FIRST CIRCUIT

Strahan v. Roughead, 2010 U.S. Dist. LEXIS 123636 (D. Mass. Nov. 22, 2010).

The United States District Court for the District of Massachusetts denied a request for a preliminary injunction against the U.S. Navy regarding its operation of vessels and military training in U.S. coastal waters. The plaintiff alleged that the Navy's failure to consult with the National Marine Fisheries Service (NMFS) regarding the impacts of the operations violates the Endangered Species Act. The court denied the injunction, noting that the preliminary injunction would have a harmful impact on critical Navy operations.

<https://ecf.mad.uscourts.gov/doc1/09514001245>

THIRD CIRCUIT

Delaware

Del. Dep't of Natural Res. & Envtl. Control v. United States Army Corps of Eng'rs, 2010 U.S. Dist. LEXIS 122005 (D. Del. Nov. 16, 2010).

The U.S. District Court for the District of Delaware rejected the state of Delaware's claim that the U.S. Army Corps of Engineers was required to obtain a permit for a dredging project to deepen a channel in the Delaware River from 40 to 45 feet. The plaintiffs claimed that the dredging was an expansion, which required a permit; however, the court found that the project qualified as "maintenance" and therefore no permit was required.

<http://www.ded.uscourts.gov/SLR/Opinions/Nov2010/09-821.pdf>

SEVENTH CIRCUIT

Illinois

Mich. v. United States Army Corps of Eng'rs, 2010 U.S. Dist. LEXIS 127376 (N.D. Ill. Dec. 2, 2010).

The U.S. District Court for the District of Illinois has denied several states' request to issue a preliminary injunction to require the U.S. Army Corps of Engineers to take measures to prevent Asian carp from reaching Lake Michigan through the Chicago Area Waterway System (CAWS). The court found that eDNA evidence and the capture of one live and one dead carp in the CAWS did not verify definitively whether the carp were present in the CAWS and a threat to Lake Michigan. "The Court stresses its recognition that the *potential* harm in a worst case scenario is great. However, Plaintiffs have not presented sufficient evidence to demonstrate either (1) more than a modest likelihood of success on the merits of their substantive claims or (2) that the potential harm is either likely or imminent, such that judicial intervention in the form of a mandatory injunction is warranted at this time."

<https://ecf.ilnd.uscourts.gov/doc1/06718700979>

NINTH CIRCUIT

Humane Soc'y of the United States v. Locke, 2010 U.S. App. LEXIS 24047 (9th Cir. Nov. 23, 2010).

The Ninth Circuit Court of Appeals ruled that the National Marine Fisheries Service (NMFS) did not adequately explain its decision to authorize the killing of California sea lions under the Marine Mammal Protection Act. The agency had authorized Oregon, Idaho, and Washington to kill up to 85 sea lions annually in order to protect salmon populations. The U.S. Court of Appeals for the District of Oregon had ruled that NMFS did not adequately explain the basis of its decision. The appellate court agreed, finding that NMFS did not adequately explain its finding that sea lions are having a significant negative impact on the decline or recovery of listed salmonid populations. The court noted earlier factual findings by NMFS that certain fisheries caused similar or greater salmonid mortality than sea lion predation.

<http://www.ca9.uscourts.gov/datastore/opinions/2010/11/23/08-36038.pdf>

Wild Fish Conservancy v. Salazar, 2010 U.S. App. LEXIS 24890 (9th Cir. Dec. 7, 2010).

The Ninth Circuit Court of Appeals held that the U.S. Fish and Wildlife Service's (FWS) biological opinion (BiOp) regarding the effect of fish hatchery operations on the bull trout did not comply with the Endangered Species Act. The BiOp had concluded that the hatchery operations from 2006 through 2011 were not likely to jeopardize the bull trout, a threatened species. The court found that the FWS failed to articulate a rational connection between facts found and conclusions made, and an incidental take statement was inadequate. The court reversed and remanded the district court's opinion, with instructions to grant injunctive relief until FWS meets its obligations under the ESA.

<http://www.ca9.uscourts.gov/datastore/opinions/2010/12/07/09-35531.pdf>

ELEVENTH CIRCUIT

Florida

Micosukee Tribe v. S. Fla. Water Mgmt. Dist., 2010 Fla. LEXIS 1975 (Fla. Nov. 18, 2010).

The Supreme Court of Florida ruled that the South Florida Water Management District had the authority to issue certificates of participation for the purchase land owned by the United States Sugar Corporation for Everglades restoration purposes. The court found that the bond obligation served the public purpose of conserving and protecting water-related resources, and the authorization complied with the requirements of law. However, the court ruled that the District could not issue certificates for an option to purchase additional property at a later time, since no public purpose had been proven for that land.

<http://www.floridasupremecourt.org/decisions/2010/sc09-1817.pdf>

Payne v. City of Miami, 2010 Fla. App. LEXIS 18682 (Fla. Dist. Ct. App. 3d Dist. Dec. 8, 2010).

A Florida court reversed an agency decision upholding a small scale amendment to the Future Land Use Map of the Miami Comprehensive Neighborhood Plan. The amendment would have allowed for a zoning change of a riverfront area from industrial to residential use, resulting in the replacement of a boatyard and other industrial activities with residential condominiums. The court found that the agency's findings of material fact were not supported by competent, substantial evidence and that the agency incorrectly interpreted the law.

<http://www.3dca.flcourts.org/Opinions/3D06-1799.rh.pdf>

FEDERAL CIRCUIT

CRV Enters. v. United States, 2010 U.S. App. LEXIS 23617 (Fed. Cir. Nov. 17, 2010).

The Federal Circuit Court of Appeals dismissed several riparian owners' claim alleging physical and regulatory takings regarding the Environmental Protection Agency's placement of a log boom as part of a remediation project. The district court dismissed the case. On appeal, the court agreed that the government's action merely restricted their use of the property and did not physically remove any water from a slough and was therefore not a physical taking. In addition, the court found that the regulatory taking claim was also properly dismissed, since the claim ripened and accrued prior to the owners acquiring the property.

<http://www.cafc.uscourts.gov/images/stories/opinions-orders/09-5100.pdf>

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