

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. NSGLC-11-03-12

FOURTH CIRCUIT

South Carolina

Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env'tl. Control, 2011 S.C. LEXIS 368 (S.C. Nov. 21, 2011).

The Supreme Court of South Carolina reversed and remanded an administrative law judge's ruling that permitted a property owner to construct erosion control devices in a critical zone. The Department of Health and Environmental Control had approved construction of an erosion control device for 270 feet, but denied the owner's permit to construct an erosion control device over a remaining portion of the property. After a contested case hearing, the administrative law judge amended the permit to allow the owner to construct the bulkhead/revetment over the entire area he had requested. The state supreme court reversed the judgment, finding that the judge failed to give the deference due an agency's interpretation of the Coastal Zone Management Act and applicable regulations. Further, the court ruled that the judge exceeded his authority in rewriting a permit. The case was remanded for reconsideration.

<http://www.sccourts.org/opinions/displayOpinion.cfm?caseNo=27065>

SIXTH CIRCUIT

Tennessee

United States v. Roberts, 2011 U.S. Dist. LEXIS 133411 (M.D. Tenn. Nov. 17, 2011).

In a case arising from an alleged violation of the Clean Water Act from the construction of an earthen dam, a court granted the defendants' motion to bar the government's wildlife and fisheries biologist from testifying. The court granted the motion finding that the expert could not provide a study or personal knowledge supporting his hypothesis that every impoundment on a tributary reduces ecological biodiversity in all downstream waters.

<https://ecf.tnmd.uscourts.gov/doc1/16911791403>

NINTH CIRCUIT

Rock Creek Alliance v. U.S. Fish & Wildlife Serv., 2011 U.S. App. LEXIS 22887 (9th Cir. Nov. 16, 2011).

The Ninth Circuit affirmed a lower court decision finding that an action filed under § 7 of the Endangered Species Act (ESA) was properly dismissed. Environmental groups had filed the suit alleging that because a proposed silver mine could impact the bull trout and the grizzly bear, two species listed as threatened under the ESA, the Forest Service should have engaged in formal consultations with the U.S. Fish and Wildlife Service (FWS) before approving the mine. The appellate court ruled that the FWS's determination that a proposed silver mine would result in no adverse modification to bull trout critical habitat and would result in no jeopardy to grizzly bears was not arbitrary, capricious, or in violation of the ESA.

<http://www.ca9.uscourts.gov/datastore/opinions/2011/11/16/10-35596.pdf>

California

Quantification Settlement Agreement Cases, 2011 Cal. App. LEXIS 1530 (Cal. App. 3d Dist. Dec. 7, 2011).

A California appeals court reversed a lower court decision invalidating a settlement agreement addressing intra-state water rights over water from the Colorado River. The settlement, between the state of California and several irrigation agencies, included a Joint Powers Agreement allocating mitigation costs. Under the agreement, the state was contractually obligated to pay excess mitigation costs. The lower court determined that the Joint Powers Agreement violated a portion of the state constitution that stipulates that money may only be withdrawn from the state treasury through a legislative appropriation. On appeal, the court found that the agreement did not violate the California constitution, because an appropriation would be required for any party to enforce the obligation.

<http://www.saccourt.ca.gov/coordinated-cases/qs/qs.aspx>

D.C. CIRCUIT

Nat'l Ass'n of Home Builders v. EPA, 2011 U.S. App. LEXIS 24430 (D.C. Cir. Dec. 9, 2011).

The National Association of Home Builders challenged the Environmental Protection Agency and the U.S. Army Corps of Engineers' determination that two reaches of the Santa Cruz River in southern Arizona constituted "traditional navigable waters" under the Clean Water Act (CWA). A federal district court dismissed the action, ruling that the CWA precluded a pre-enforcement challenge to the determination. On appeal, the United States Court of Appeals for the District of Columbia ruled that the association lacked standing to challenge the determination. The court noted that the NAHB did not demonstrate an injury in fact to either itself or on behalf of its members that was traceable to the determination—a requirement to establish standing.

[http://www.cadc.uscourts.gov/internet/opinions.nsf/05B153905CD0FB4185257961005BCADF/\\$file/10-5341-1346791.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/05B153905CD0FB4185257961005BCADF/$file/10-5341-1346791.pdf)

Sierra Club v. Van Antwerp, 2011 U.S. App. LEXIS 23736 (D.C. Cir. Nov. 29, 2011).

The United States District Court for the District of Columbia reversed and remanded a portion of a lower court decision regarding the U.S. Army Corps of Engineers' decision to allow the discharge of fill material into wetlands outside Tampa, Florida. The environmental groups brought suit challenging the permit, alleging that it violated the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), and the Endangered Species Act (ESA). The federal district court agreed that the Corps did not meet its obligations under NEPA and the CWA, but rejected the ESA claims. On appeal, the D.C. Circuit Court reversed the district court's decision regarding the CWA and NEPA, but affirmed the ESA decision except for its findings that the Corps' analysis of the indigo snake (a listed species) was inadequate. The court ruled that the Corps failed to consider how the project would adversely affect the indigo snake through "fragmentation" of its habitat and remanded for further explanation by the Corps.

[http://www.cadc.uscourts.gov/internet/opinions.nsf/C603AEFC1966C85F852579570053BA42/\\$file/10-5284-1344344.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/C603AEFC1966C85F852579570053BA42/$file/10-5284-1344344.pdf)

District of Columbia

Alaska v. Lubchenko, 2011 U.S. Dist. LEXIS 133840 (D.D.C. Nov. 21, 2011)

The United States District Court for the District of Columbia held that the National Marine Fisheries Service's decision to grant a petition to list the Cook Inlet beluga whale as an endangered species under the Endangered Species Act was rational and was supported by the administrative record. The State of Alaska had sued to have the agency's determination overturned. The court denied the state's request for summary judgment, finding that the whale easily qualified as endangered under NMFS' definition of an unacceptably high risk of extinction for large whales. The court noted that the number of beluga wells in Cook Inlet likely exceeded 1,300 thirty years ago but now hovers around 350.

<https://ecf.dcd.uscourts.gov/doc1/04513640591>

COURT OF FEDERAL CLAIMS

Casitas Mun. Water Dist. v. United States, 2011 U.S. Claims LEXIS 2289 (Fed. Cl. Dec. 5, 2011).

In a Fifth Amendment takings case, a water district alleged that operating restrictions placed on its water project pursuant to the Endangered Species Act resulted in a taking. In 2009, the United States Court of Federal Claims ruled that the restrictions did result in a regulatory taking. On appeal, the Court of Appeals for the Federal Circuit held that the agency's actions should be analyzed as a physical taking. On remand, the Federal Claims court held that the only compensable water right that may be acquired under California law is the right of beneficial use. The court found that the plaintiff's takings claim was not yet ripe because the government's action had not yet interfered with its beneficial use of water.

<http://www.uscfc.uscourts.gov/sites/default/files/WIESE.CASITAS120511.pdf>

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