

Ocean and Coastal Case Alert

~ ~ October 14, 2011 ~ ~

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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-11-03-10

FIRST CIRCUIT

Massachusetts

Zoning Bd. of Appeals v. Hous. Appeals Comm., 80 Mass. App. Ct. 406 (Mass. App. Ct. 2011).

The Appeals Court of Massachusetts affirmed a decision allowing a developer to receive a comprehensive permit under Mass. Gen. Laws Ann. Ch. 40B, §§ 20-23. The original zoning board was concerned that the indefiniteness of the developer's plan would not allow the board to determine whether the plans complied with regulations concerning the remediation of the contamination, wetland preservation, and storm water management. Because the developer proposed to make all modifications to comply with state regulations and the need for affordable housing in the area was great, the court affirmed the grant of the permit.

<http://tinyurl.com/3ccfv86>

THIRD CIRCUIT

Raritan Baykeeper v. NL Indus., 2011 U.S. App. LEXIS 20021 (3d Cir. Oct. 3, 2011)

The Third Circuit Court of Appeals cited the First and Seventh Circuits' applications of abstention in reversing a dismissal of a complaint under the Resource Conservation and Recovery and Clean Water Acts. The court held that abstention should only be utilized in conjunction with the primary jurisdiction and the Buford doctrines in select cases, such as ones with exceptional state involvement, which was not present in the case before the court.

<http://www.ca3.uscourts.gov/opinarch/102591p.pdf>

New Jersey

J.J. White, Inc. v. New Jersey Dep't of Env'tl. Prot., 2011 N.J. Super. Unpub. LEXIS 2477 (App.Div. Sept. 29, 2011).

The Superior Court of New Jersey affirmed a decision denying a company the application of an exemption to the permitting requirements under the Freshwater Wetlands Protection Act (FWPA). The FWPA has a permit exception for activities that are part of a normal ongoing farming operation. The court found that the company's cessation of farming activities in 1993 negated any application of the exception as it relates to the company's current project of restoring and modernizing bogs.

<http://lawlibrary.rutgers.edu/courts/appellate/a2125-09.opn.html>

FOURTH CIRCUIT

Maryland

Patuxent Riverkeeper v. Md. Dep't of the Env't, 2011 Md. LEXIS 628 (Md. Sept. 30, 2011)

A Maryland appellate court ruled that an environmental organization had adequate standing to bring a suit requesting review of the issuance of a construction permit that posed a risk to a member's aesthetic, recreational, and economic interests in a river near the construction. The group properly demonstrated both their interests in the river and a sufficient connection between the issuance of the permit and possible threats to those interests. The court reversed the lower court's decision and remanded the case for further proceedings.

<http://mdcourts.gov/opinions/coa/2011/139a10.pdf>

NINTH CIRCUIT

Samuels v. Holland Am. Line-USA, Inc., 2011 U.S. App. LEXIS 18304 (9th Cir. Sept. 2, 2011).

The Ninth Circuit Court of Appeals affirmed a lower court ruling dismissing a tort claim against the Holland American Line of cruise ships. A passenger sued the company after he was seriously injured by a violent wave, claiming that the cruise line staff should have warned him of the dangers of swimming at a particular beach. The court found that the cruise line had no duty to inform or warn passengers of the condition of the ocean near one of its programmed stops because the line had no actual or constructive notice of the dangerous ocean conditions.

<http://www.ca9.uscourts.gov/datastore/opinions/2011/09/02/10-35933.pdf>

United States v. King, 2011 U.S. App. LEXIS 20020 (9th Cir. Oct. 3, 2011).

Despite lack of proof that certain fluids would have an adverse affect on drinking water, a defendant's conviction for injecting fluids into deep wells without a permit was affirmed. The court found that the government only had to prove that the defendant willfully violated provisions of the Safe Drinking Water Act. The United States Court of Appeals for the Ninth Circuit affirmed the lower court's decision that the government met its burden of proof.

<http://www.ca9.uscourts.gov/datastore/opinions/2011/10/03/09-30442.pdf>

California

Consol. Salmonid Cases v. Locke, 2011 U.S. Dist. LEXIS 109012 (E.D. Cal. Sept. 20, 2011).

Although the United States District Court for the Eastern District of California found the jeopardy described by a biological opinion (BiOp) valid, the court found the BiOp and its reasonable and prudent alternatives (RPA) unlawful. The case involved various challenges to a June 2009 BiOp issued by the National Marine Fisheries Service (NMFS) on the effects of continued operation of the Central Valley

Project and State Water Project in California on five listed fish species. The opinion and its proposed alternatives were found unlawful because NMFS could not justify the imposition of its RPA actions by showing that the measures and restrictions were essential to avoid the aforementioned jeopardy.

<https://ecf.caed.uscourts.gov/doc1/03315352010>

DeCicco v. California Coastal Commission, 2011 Cal. App. LEXIS 1257 (Cal. App. 2d Dist. Oct. 3, 2011)

Despite the fact that a county's decision regarding the "principal permitted use" of a coastal development is not appealable to the state coastal commission, a California appellate court held that when a California development project also involves the approval of a subdivision, the California Coastal Commission has appellate jurisdiction.

<http://www.courtinfo.ca.gov/opinions/documents/B228009.PDF>

Hawaii

Malama Makua v. Gates, 2011 U.S. Dist. LEXIS 113373 (D. Haw. Sept. 30, 2011)

The United States District Court for the District of Hawaii found that the United States Army breached an agreement in which it vowed to conduct a marine resource survey as part of its military training with live ammunition at the Makua Military Reservation in West Oahu. As part of the 2007 agreement, the Army pledged to test several species to assess the environmental impact that training was having on the local ecosystems. The court found that the Army's failure to test several marine species that are commonly eaten by local residents constituted a breach in the agreement.

<https://ecf.hid.uscourts.gov/doc1/06111425715>

D.C. CIRCUIT

District of Columbia

Martha's Vineyard/Dukes County Fishermen's Ass'n v. Locke, 2011 U.S. Dist. LEXIS 105002 (D.D.C. Sept. 15, 2011).

The United States District Court for the District of Columbia dismissed a fishermen association's challenges because their suit was time-barred. Since the suit involved the fishery management plans regarding the Atlantic herring, squid, mackerel, and butterfish fisheries, it was subject to the Magnuson-Stevens Fishery Conservation and Management Act. The court found that the challenges were filed outside of the 30-day limitations period required under the Act.

<https://ecf.dcd.uscourts.gov/doc1/04513556049>

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