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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the August 2012 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-12-03-08).

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FIRST CIRCUIT

Upper Blackstone Water Pollution Abatement Dist. v. U.S. Environmental Protection Agency, 2012 U.S. App. LEXIS 16145 (1st Cir. 2012).

The First Circuit recently denied a petition to review a National Pollutant Discharge Elimination System (NPDES) permit containing discharge limits for nitrogen, phosphorous, and aluminum for a sewage treatment plant on the Blackstone River. The water district that operates the treatment plant objected to the effluent limitations as premature and unsupported by the scientific record. The district argued that the agency should have issued the permit after the district completed facility upgrades and a new computer model of the river. The court found no error in the final permit decision, noting that the Clean Water Act requires the EPA to review and reissue permits every five years. Further, even with the facility upgrades, the discharge from the plant would still cause, have the reasonable potential to cause, or contribute to the violation of water quality standards. The court also dismissed arguments that the EPA relied on a flawed record when crafting the permit's limitations. The court concluded that the nitrogen limit the EPA chose was justified by the record and within the zone of reasonableness.

<http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=11-1474P.01A> »

Massachusetts

***Garrity v. Conservation Comm'n of Hingham*, 462 Mass. 779 (2012).**

The Supreme Court of Massachusetts ruled that a property owner could proceed with plans to build a pile-supported pier in front of his house, a pile-held floating dock, and a land-based platform or deck from which the pier would extend. The town conservation commission had originally denied the request based on the town's wetlands bylaw, but the Department of Environmental Protection reversed the decision citing the commission's failure to act within a twenty-one day time period required by the Act. The commission argued that the property owner had waived the twenty-one day deadline for issuance of a decision. The court concluded that an applicant may waive the time period, but certain conditions must be met. "... [A]ny waiver must be voluntary in fact, its duration defined and reasonable in length, and notice of the waiver's duration must be a matter of public record, available to all interested persons."

<http://tinyurl.com/bqz7lrr> »



SECOND CIRCUIT

Connecticut

***Shanahan v. Dep't of Env'tl. Prot.*, 305 Conn. 681 (2012).**

The Connecticut Supreme Court recently affirmed in part and reversed in part a ruling on a Department of Environmental Protection order directing a property owner to remove a seawall that he had constructed on his property along Long Island Sound without obtaining the proper permit. The Connecticut Supreme Court affirmed the portion of the trial court's judgment concluding that substantial evidence showed at least part of the property owner's seawall was constructed waterward of the high tide line and that Conn Gen Stat. 22a-359 was not unconstitutionally vague as applied to the seawall. However, the court ruled that the trial court improperly determined that the department had jurisdiction under section 22a-361 to order removal of the entire seawall, in the absence of a finding by the department that the entire seawall was constructed waterward of the high tide line.

<http://www.jud.ct.gov/external/supapp/Cases/AROCr/CR305/305CR77.pdf> »



NINTH CIRCUIT

***Native Vill. of Eyak v. Blank*, 2012 U.S. App. LEXIS 15771 (9th Cir. July 31, 2012).**

Five Alaskan Native Villages (Villages) sought review of the United States District Court for the District of Alaska's dismissal of their claim alleging that the Secretary of Commerce's regulations failed to account for their non-exclusive aboriginal hunting and fishing rights in the areas of the Outer Continental Shelf (OCS) in the Gulf of Alaska. The court

noted that aboriginal rights can exist without any treaty or Act of Congress. However, the Villages must prove that the right was “actual, exclusive, and continuous use and occupancy ‘for a long time’” of the claimed area. The Ninth Circuit agreed with the district court’s findings that the Villages made irregular use of the OCS, and that such use and occupancy as probably existed was temporary and seasonal. While the villages satisfied the continuous use and occupancy requirement, they had not proven exclusivity.

<http://www.ca9.uscourts.gov/datastore/opinions/2012/08/01/09-35881.pdf> »

Native Vill. of Kivalina IRA Council v. United States EPA, 2012 U.S. App. LEXIS 16613 (9th Cir. Aug. 9, 2012).

The Ninth Circuit denied a petition to review an order of the United States Environmental Protection Agency Environmental Appeals Board (EAB). The EAB had denied review of the Village of Kivalina Council’s challenges to a permit issued by the EPA. The permit authorized a lead and zinc mine operator to discharge wastewater into the Wulik River, which flows into the Chukchi Sea near the Native Village of Kivalina. The court found that the EAB properly concluded that the village council had not satisfied the procedural requirements to obtain review under 40 C.F.R. section 124.19(a) because it did not show why the EPA’s responses to comments were clearly erroneous or otherwise warranted review.

<http://www.ca9.uscourts.gov/datastore/opinions/2012/08/09/11-70776.pdf> »



TENTH CIRCUIT

Oklahoma

Sierra Club, Inc. v. Bostick, 2012 U.S. Dist. LEXIS 109015 (W.D. Okla. Aug. 5, 2012).

The United States District Court for the Western District of Oklahoma recently denied a motion to preliminarily enjoin the construction of segments of the Keystone XL pipeline. In 2011, President Obama denied a request to complete the Keystone XL pipeline. Shortly thereafter, the oil company sought to divide its original intercontinental pipeline into segments and sought verification from regional offices of the U.S. Army Corps of Engineers that its projects would fall within the scope of nationwide permit (NWP) 12, which authorizes the construction, maintenance, repair and removal of utility lines, including pipelines. After each of the regional offices granted the requested verification, several environmental groups filed suit, seeking to enjoin the construction of the pipelines. The groups argued that the Corps’ reissuance of NWP 12 violated the Administrative Procedures Act and that the verifications issued by the Corps regional offices were improper. The court denied the injunction, finding the groups failed to establish a substantial likelihood of success on the merits.

<https://ecf.okwd.uscourts.gov/doc1/14912620106> »



DC Circuit

District of Columbia

***WildEarth Guardians v. Salazar*, 2012 U.S. Dist. LEXIS 105331 (D.D.C. 2012).**

The United States District Court for the District of Columbia rejected a challenge to the United States Bureau of Land Management's decision to authorize the leasing of certain public lands in northeastern Wyoming for coal mining operations. An environmental group argued that the lease violated the National Environmental Policy Act by not considering the impacts of global warming on the aesthetic, recreational, and economic interests in the mining area. The court found an insufficient connection between the coal mining and global warming deprived the group of standing. The court also ruled that the agency's environmental impact statement adequately addressed other impacts from the mining operations.

<https://ecf.dcd.uscourts.gov/doc1/04513950292> »



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