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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the July 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-12-03-07).

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Third Circuit

***State Dep't of Natural Res. & Env'tl. Control v. U.S. Army Corps of Eng'rs*, 2012 U.S. App. LEXIS 13555 (3d Cir. July 3, 2012).**

Recently, the Third Circuit Court of Appeals ruled on a decades-long project to deepen the shipping channel of the Delaware River by five feet. In 1992, Congress authorized the project and appropriated \$195 million to fund a significant portion of the project's overall cost. It continued to support the effort with regular appropriations for the next twenty years. In 2009, New Jersey and Delaware filed suit to enjoin the U.S. Army Corps of Engineers from dredging the channel, alleging violations of the National Environmental Policy Act, the Clean Water Act and the Coastal Zone Management Act. The Corps argued that the deepening project would enable river ports to be economically competitive and at the same time, comply with statutes that protect the environment. The Third Circuit agreed, holding that the project will not violate any environmental statutes and clearing the path for the implementation phase of the project.

<http://www.ca3.uscourts.gov/opinarch/111283p.pdf> »

Fourth Circuit

***Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581 (4th Cir. 2012).**

The Fourth Circuit Court of Appeals recently ordered the U.S. Army Corps of Engineers to prepare an Environmental Impact Statement (EIS) to analyze the environmental consequences of a mooring facility and boat ramp to be built near the Back Bay National Wildlife Refuge in Virginia Beach, Virginia. An environmental group challenged the Corps' permit approval, alleging that it violated the National Environmental Policy Act's procedural requirements; four federal agencies also objected to the project. The facility would have generated sixty-four additional boat slips, thereby creating more traffic in the wildlife area. The Corps reached a finding of no significant impact (FONSI), which eliminated the need for an EIS, based on the creation of a no-wake zone (NWZ) in the impacted area. However, the Corps acknowledged potential deleterious consequences if watercraft were allowed to freely motor about the refuge. Furthermore, the NWZ was to be unmarked, undisclosed to the public and entirely unenforced. Because the incorrect assumption of an effective NWZ was intertwined with the conclusion that no EIS was required, the Fourth Circuit invalidated the resultant FONSI for being arbitrary and capricious, reasoning that agencies should err in favor of the preparation of an EIS when the possibility exists of a significant impact on the environment.

<http://www.ca4.uscourts.gov/opinions/Published/111184.p.pdf> »



Fifth Circuit

Texas

***Angela Bonser-Lain, et al. v. Texas Commission on Envntl. Quality*, Court, Case No. D-1-GN-11-002194 (July 9, 2012).**

A Texas trial court judge issued a letter ruling stating that the public trust doctrine "includes all natural resources of the state" and is not solely applicable to water, contrary to the arguments made by the Texas Commission on Environmental Quality. The judge did, however, find the Commission's refusal to exercise authority to regulate greenhouse gases under the Texas Clean Air Act was a reasonable exercise of discretion based on the fact that the recent D.C. Circuit Court decision in *Coalition for Reasonable Regulation, Inc. v EPA* will likely be appealed to the U.S. Supreme Court.



Ninth Circuit

***Samson v. City of Bainbridge Island*, 2012 U.S. App. LEXIS 12170 (9th Cir. June 15, 2012).**

Shoreline property owners in Washington sought damages for the time during which City of Bainbridge Island ordinances prevented them from building piers or docks on their property, asserting the moratorium violated their substantive and procedural due process rights under the Fourteenth Amendment. The Ninth Circuit Court of Appeals affirmed the decision that the moratorium did not infringe the owners' due process rights. The court found that protecting wildlife and preserving development are legitimate government interests and there was no evidence that the city was acting maliciously, therefore there was no violation of the owners' substantive due process rights. Furthermore, the ordinances generally applied to all shoreline owners, thus not violating procedural due process rights.

<http://www.ca9.uscourts.gov/datastore/opinions/2012/06/15/10-35352.pdf> »

***Pac. Rivers Council v. U.S. Forest Serv.*, 2012 U.S. App. LEXIS 12553 (9th Cir. June 20, 2012).**

The Ninth Circuit Court of Appeals found that the U.S. Forest Service failed to take the requisite hard look at the environmental consequences for fish in the 2004 Sierra Madres Forest Management Plan's Environmental Impact Statement. Given that the 2001 EIS included a detailed, species-by-species, impact analysis, and given that the 2004 EIS completely omitted such analysis and failed to provide any explanation for that approach, the court concluded that the Service had failed to adequately analyze the plan's impact on fish, in violation of the National Environmental Policy Act.

<http://www.ca9.uscourts.gov/datastore/opinions/2012/06/20/08-17565.pdf> »

***Snoqualmie Valley Pres. Alliance v. U.S. Army Corps of Eng'rs*, 2012 U.S. App. LEXIS 13013 (9th Cir. June 26, 2012).**

In a challenge to the issuance of nationwide discharge permits for a dam upgrade project, the Ninth Circuit Court of Appeals affirmed a district court decision finding in favor of the U.S. Army Corps of Engineers and Puget Sound Energy (PSE). PSE operates a hydroelectric power plant at the Snoqualmie Falls in Washington, and planned to lower the dam to mitigate upstream flooding problems. Because the dam upgrade involved discharging fill material into United States waters, which is prohibited under the Clean Water Act without a permit, PSE applied for a series of nationwide discharge permits (NWP) from the Corps. The Corps verified that it could issue the NWPs because the project had minimal impacts and complied with all of the NWP conditions. The court rejected property owners' challenge to the issuance of the permits, finding no evidence that the project would exacerbate flooding problems below the falls.

<http://www.ca9.uscourts.gov/datastore/opinions/2012/06/26/11-35459.pdf> »

California

***Outfitter Properties, LLC v. Wildlife Conservation Bd.*, 2012 Cal. App. LEXIS 743 (Cal. App. 3d Dist. June 26, 2012).**

The Wildlife Conservation Board paid \$9.8 million to the Bureau of Reclamation from the California Habitat Conservation Fund for the Battle Creek Salmon and Steelhead Restoration Project. Plaintiffs argued that the California Fish & Game Code limits fund expenditures for projects relating to the acquisition, restoration, or enhancement of riparian habitat and aquatic habitat for the spawning and rearing of anadromous salmonids and trout to no more than \$6 million over a 24-month period. The California Court of Appeal held, however, that the provision does not impose a strict \$6 million expenditure limit; instead, the provision only limits the board's discretion to make such expenditures. In addition, the board's expenditure did not violate the statutory \$2 million limit on allocations to state agencies because it was paid to the Bureau of Reclamation, a federal agency.

<http://www.courts.ca.gov/opinions/documents/CO65100.pdf> »

Washington

***Yakima County v. E. Wash. Growth Mgmt. Hearings Bd.*, 2012 Wash. App. LEXIS 1418**

(Wash. Ct. App. June 14, 2012).

Yakima County and Yakima County Farm Bureau sought review of the state's Growth Management Board's decision concluding that stream buffers and a Yakima County ephemeral stream ordinance violated the state's Growth Management Act. The Board concluded that the County's decision not to designate certain ephemeral streams as "critical areas" failed to comply with the GMA, that the County's standard stream buffers were not supported by best available science, that the County's standard wetland buffers were in range of the best available science, and that the allowed minimum adjustments to the stream and wetland buffers failed to comply with the GMA. The Washington Court of Appeals found that the Board failed to defer to the County's justification for refusing to designate ephemeral streams as critical areas. However, the court found that the Board correctly decided the stream buffer issue.

<http://www.courts.wa.gov/opinions/pdf/297632.opn.doc.pdf> »



DC Circuit

***Coalition for Responsible Regulation v. EPA*, 2012 U.S. App. LEXIS 12980**

(D.C. Cir. June 26, 2012).

A unanimous panel of the D.C. Circuit Court of Appeals upheld the EPA's developing programs for regulating emissions of greenhouse gases, ruling against a coalition of industry and state parties challenging EPA's authority to regulate. The court cited *Massachusetts v. EPA* as its basis for finding that EPA's construction of the Clean Air Act is unambiguously correct, and that the agency was neither arbitrary nor capricious when it issued rules determining that greenhouse gases may reasonably be anticipated to endanger public health or welfare, and addressing greenhouse gas emissions from cars, light trucks and stationary sources.

[http://www.cadc.uscourts.gov/internet/opinions.nsf/52AC9DC9471D374685257A290052ACF6/\\$file/09-1322-1380690.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/52AC9DC9471D374685257A290052ACF6/$file/09-1322-1380690.pdf) »



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