Ocean and Coastal Case Alert

~ ~ May 16, 2012 ~ ~

If you are not able to view this properly, please go to http://nsglc.olemiss.edu/casealert.htm

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. 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 Barry Barnes, bdbarne1@olemiss.edu with ***"Case Alert"*** on the subject line. NSGLC-12-03-03.

FIFTH CIRCUIT

Louisiana

Louisiana Environmental Action Network v. City of Baton Rouge, 2012 WL 1301164 (5th Cir. Apr. 17, 2012).

The Fifth Circuit reversed and remanded a district court's decision dismissing the Louisiana Environmental Action Network's (LEAN) Clean Water Act citizen suit against the City of Baton Rouge for unlawfully discharging wastewater into the Mississippi River. The Louisiana Department of Environmental Quality had issued discharge permits under the CWA to three wastewater treatment facilities owned and operated by the City of Baton Rouge. All three permits contained a standard condition, known as the Eighty-Five Percent Rule, which required the city to reduce the amount of biochemical oxygen and total suspended solids present in the discharged wastewater by 85% from the amounts present in the sewage entering into the plant. According to LEAN, the City was not in compliance with this permit condition. The City filed a motion to dismiss, claiming the lawsuit was barred by the CWA's "diligent prosecution" provision because the city was subject to a 2002 consent decree between the City and the U.S. government and the State of Louisiana that required compliance by 2015. The CWA bars a citizen suit if the EPA or the State is already diligently prosecuting a civil or criminal action in court. The Fifth Circuit remanded the case to the district court to determine whether the suit was barred by the diligent prosecution provision due to the existence of the 2002 consent decree.
www.ca5.uscourts.gov/opinions/pub/11/11-30549-CV0.wpd.pdf

NINTH CIRCUIT

California

Friends of the River v. U.S. Army Corps of Eng'rs, 2012 WL 1552623 (E.D. Cal. Apr. 27, 2012).

The District Court for the Eastern District of California recently denied the Army Corps of Engineers' motion to dismiss the plaintiffs' challenge to the Corps' Engineer Technical Letter. The challenged policy required clear cutting trees and shrubbery along 1600 miles of levees located in California alone and prohibited all vegetation except grasses within a 15 feet wide zone on either side of any levee. According to the plaintiffs, the Corps' new vegetation management practices constitute final agency actions, major federal actions, and agency rulemaking that require compliance with the National Environmental Policy Act, the Endangered Species Act, and the Administrative Procedure Act's notice and comment requirements. The district court determined that the plaintiffs sufficiently alleged that the Corps' regulations violated the procedural requirements of these Acts and, accordingly, denied the Corps' motion to dismiss the lawsuit.

Hawaii

Kahea v. Nat'l Marine Fisheries Serv., Slip Copy, 2012 WL 1537442 (D.Hawai'i Apr. 27 2012).

Kahea challenged a one-year fishing permit issued to Kona Blue Water Farms by the National Marine Fisheries Service. The permit authorized Kona Blue to "stock, culture and harvest" almaco jack fish using "CuPod gear," a mesh cage continuously towed behind a vessel, in federal waters off the coast of the Big Island. Kahea alleged the permit was improper because Kona Blue is engaged in aquaculture, not fishing, and therefore not properly permitted under the Magnuson-Stevens Act. The MSA defines "fishing" to include "the catching, taking, and harvesting of fish." NMFS argued that the permit was proper because aquaculture involves "harvesting" a crop. The district court deferred to NMFS interpretation of the MSA, finding that the agency's interpretation of "harvesting" was not irrational or contrary to the plain meaning of the statute.

Washington

Proie v. Nat'l Marine Fisheries Service, 2012 WL 1536756 (W.D. Wash. May 1, 2012).

The plaintiffs challenged a November 2005 decision by the National Marine Fisheries Service excluding captive members of the Southern Resident Killer Whale population from the endangered species list. According to the plaintiffs, SRKW in captivity are subject to harm or harassment, and the exclusion of these whales from the protections of the ESA renders the captive populations more vulnerable than the whales still found in their natural habitat. Essentially, the plaintiffs contended that the NMFS' decision to exclude these whales from the protections offered by the ESA amounted to a failure to protect these endangered animals as required under the Act. Since the plaintiffs failed to provide NMFS with the required 60-day notice of their intention to sue under the ESA, the district court dismissed the plaintiffs' claims without addressing the merits of their allegations.

State of Washington, Department of Ecology v. City of Spokane Valley, --- P.3d ----, 2012 WL 1564296 (Wash.App. Div. 3 May 3, 2012).

A Washington appellate court held that a developer of residential waterfront lots must seek a permit under the Shoreline Management Act of 1971 to construct docks appurtenant to homes intended for resale. The City of Spokane Valley had exempted the developer from the Shoreline Management Act's permit requirements because the planned docks were intended for the private, noncommercial use of the future homeowners. The Washington State Department of Ecology appealed the City's letter of exemption, arguing that the developer

intended to install the docks to increase the value of the lots for resale. The court agreed that the exemption was inapplicable in this case because the docks would not be built for the applicant's (the developer's) private use.
http://caselaw.findlaw.com/wa-court-of-appeals/1600351.html

ELEVENTH CIRCUIT

Alabama
Defenders of Wildlife v. Bureau of Ocean Energy Management, Regulation, and Enforcement, 2012 WL 1640676 (S.D. Ala. May 8, 2012).
The District Court for the Southern District of Alabama held that the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE) did not violate the National Environmental Policy Act, the Endangered Species Act, or the Administrative Procedure Act in completing Lease Sale 213 following the Deepwater Horizon oil spill in April 2010. Defenders of Wildlife argued that BOEMRE was required, under both the ESA and NEPA, to prepare a supplemental Environmental Impact Statement (EIS) before accepting bids. The court found that the plaintiff failed to meet its burden of showing that BOEMRE's determination to proceed without a supplemental EIS was arbitrary, capricious, or an abuse of discretion.

NSGLC-12-03-03

To subscribe to the email version, send an email to Case Alert Subscription with ***Subscribe Alert*** in the subject line.

To view archives of the Case Alert go to: Case Alert Archives