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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the November 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-12-03-11).

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FOURTH CIRCUIT

South Carolina

***Riverkeeper v. S.C. Dep't of Health & Env'tl Control*, 2012 S.C. LEXIS 219 (S.C. Nov. 2, 2012).**

The South Carolina Supreme Court held that the South Carolina Department of Health and Environmental Control (DHEC) improperly usurped the authority of the Savannah River Maritime Commission when it issued a permit for a Savannah Harbor deepening project. The DHEC had negotiated an agreement with the U.S. Army Corps of Engineers and the Georgia Ports Authority before issuing a Sec. 401 Water Quality Certification for the proposed project. The court analyzed the statute that established the Commission, S.C. Code Ann. § 54-6-10, under the "plain meaning" rule and determined that DHEC infringed on the Commission's authority because the statute stated that the Commission's authority over navigable waters superseded that of DHEC.

<http://m.sccourts.org/opinions/HTMLFiles/SC/27182.pdf> »

Virginia

***Lynnhaven Dunes Condo. Ass'n v. City of Va. Beach*, 2012 Va. LEXIS 194 (Va. Nov. 1, 2012).**

The Virginia Supreme Court recently ruled on a condominium association's objection to a city's attempt to acquire an easement by condemnation. The court held that the evidence was sufficient to support the lower court's ruling that the City of Virginia Beach had proven it had acquired the easements by implied dedication, because the public had access to the beach for over 50 years; the city maintained the easement for over 30 years; and the association did not object. The court also held that the lower court erred in ruling that the association's loss of riparian rights due to sand

placement on the beach following navigational dredging was non-compensable. Although the court noted a previous holding that "a riparian owner's property rights are subordinate to the improvement of navigation," the court noted that in this instance, the loss of the association's riparian rights was sufficiently related to the efforts to regulate and improve navigation because dredged sand could have been placed elsewhere.

<http://www.courts.state.va.us/opinions/opnscvwp/1120086.pdf> »



FIFTH CIRCUIT

***Wynne v. Klein*, 2012 Tex. App. LEXIS 9156 (Tex. App. Austin Oct. 31, 2012).**

In a case alleging that board members of a reclamation district were responsible for a lake being substantially drained over a period of years, a Texas court held that sovereign immunity barred claims against the board members. Government agencies, including officials acting in their official capacities, are protected from suit through sovereign immunity. To maintain that an official's actions meet the ultra vires exception to sovereign immunity "a suit must not complain of a government officer's exercise of discretion but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." In this instance, the court ruled that the activities related to the operation of power plants and the sale of water were permitted by Tex. Const. art. XVI, § 59(a). Further, the board's decisions regarding water flow involved an exercise of discretion. The court ruled that the board's actions were not ultra vires and, therefore, sovereign immunity barred the claims.

<http://www.3rdcoa.courts.state.tx.us/opinions/PDFopinion.asp?OpinionID=21578> »



NINTH CIRCUIT

***Ctr. for Biological Diversity v. United States BLM*, 2012 U.S. App. LEXIS 22016 (9th Cir. 2012).**

The Bureau of Land Management (BLM) and the Fish and Wildlife Service (FWS) authorized a natural gas pipeline from Wyoming to Oregon. Environmental groups and Native American Tribes appeal the authorization, alleging that the "no jeopardy" Biological Opinion (BiOp) issued by the FWS violated the Endangered Species Act (ESA). The Ninth Circuit found the BiOp to be arbitrary and capricious because it did not address the potential impact of significant groundwater withdrawals and the BiOp's "no jeopardy" determination relied on protective measures from a conservation plan not enforceable under the ESA. The BiOp was vacated and remanded to address impacts on groundwater withdrawals on listed fish species and critical habitat, and to categorize and treat the Conservation Action Plan measures as "interrelated actions" or exclude any reliance on their beneficial effects in making a revised jeopardy and adverse modification determination. The BLM's Record of Decision was also vacated and remanded.

<http://www.ca9.uscourts.gov/datastore/opinions/2012/10/22/10-72356.pdf> »

California

***De Gente Unida v. Central Valley Regional Water Quality Control Bd.*, 2012 Cal. App. LEXIS 1158 (Cal. App. 3d Dist. Nov. 6, 2012).**

Environmental groups sought review of a water control board order that prohibited further degradation of groundwater, but did not prohibit the discharge of dairy waste to groundwater. The order required groundwater monitoring wells only when one of the supply wells demonstrated an adverse impact. A California appellate court ruled that the order violated the state's antidegradation policy because the groundwater in the area was of high quality and because the order allowed activities that would result in a release of waste into the groundwater.

***Garland v. Central Valley Regional Water Quality Control Bd.*, 2012 Cal. App. LEXIS 1104 (Cal. App. 3d Dist. Oct. 24, 2012).**

A California appellate court recently upheld a local water board's \$250,000 administrative civil liability order issued against a developer for Clean Water Act permit violations. The board issued the order after concluding that the developer discharged sediment-laden waters into ephemeral drainages adjacent to a construction site. The developer argued there was insufficient evidence that the ephemeral drainages constituted "waters of the United States" under either Justice Scalia's plurality test or Justice Kennedy's significant nexus test in *Rapanos v. United States*, and therefore, there was no jurisdictional basis on which to impose the order against the developer. However, the board also provided an alternative basis for issuing the order, which was that the developer discharged pollutants without a proper permit into non-waters of the United States that eventually connect with a traditional navigable water. The appellate court upheld the order because the board's alternative rationale had jurisdictional support even under the narrowest reading of *Rapanos* and the developer made no attempt to respond to or argue against the board's alternative rationale.

<http://www.courts.ca.gov/opinions/documents/Co67130.pdf> »



ELEVENTH CIRCUIT

***Friends of the Everglades v. U.S. EPA*, 2012 U.S. App. LEXIS 22282 (11th Cir. Oct. 26, 2012).**

The Eleventh Circuit Court of Appeals ruled that it lacked jurisdiction to review an Environmental Protection Agency (EPA) rule exempting the transfer of water from the Everglades Agricultural Area into Lake Okeechobee without a permit under the Clean Water Act (CWA). The EPA argued that the court had original jurisdiction over the matter under 33 U.S.C. § 1369(b)(1), which grants original jurisdiction to the Circuit Court of Appeals for approving "any effluent or other limitation" or "issuing or denying any permit." The court decided that it did not have subject matter jurisdiction because the water-transfer rule is not an "effluent limitation." Further, the rule promulgated by the EPA did not result in the issuance or denial of a permit. The court therefore dismissed the case for lack of subject matter jurisdiction.

<http://www.ca11.uscourts.gov/opinions/ops/200813652.ord.pdf> »

Alabama

***Schramm v. Spottswood*, 2012 Ala. LEXIS 140 (Ala. Oct. 19, 2012).**

A property owner appealed a lower court judgment approving pier construction permits issued to a neighbor by the Alabama Department of Conservation and Natural Resources (DCNR). The permits approved construction that would violate setback requirements. The Alabama Supreme Court ruled that DCNR can issue permits violating setback requirements when enforcement of the requirements would infringe upon the general common-law right held by all riparian property owners to "wharf out" to waters of a reasonable navigational depth. The court also affirmed the trial court's judgment setting the boundaries of the riparian-use area because this issue had already been decided by the trial court and the intermediate appellate court.



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