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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the April 2013 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-13-03-04).

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U.S. SUPREME CIRCUIT

***Decker v. Northwest Envtl. Def. Ctr.*, 2013 U.S. LEXIS 2373 (Mar. 20, 2013).**

Recently, the U.S. Supreme Court ruled that National Pollutant Discharge Elimination System (NPDES) permits are not required for stormwater runoff from logging roads. An environmental group brought the suit, alleging that a logging company violated the Clean Water Act (CWA) by discharging stormwater runoff from its logging roads into two Oregon Rivers without NPDES permits. The Environmental Protection Agency (EPA), which regulates such discharges, had issued regulations exempting certain activities from NPDES requirements and had determined that these types of logging activities were exempt. The Ninth Circuit disagreed with the agency's interpretation of the rule. On certiorari, the U.S. Supreme Court reversed the Ninth Circuit, finding that the EPA reasonably interpreted the rule. Prior to the Supreme Court hearing the case, the EPA amended its regulations clarifying that stormwater discharges from logging roads were exempt from NPDES requirements. The Supreme Court found that the EPA's recent amendment to the Industrial Stormwater Rule did not make this case moot even if the new version will not require permits for the types of discharges at issue here because the company's past discharges will be governed by the older version of the statute.

http://www.supremecourt.gov/opinions/12pdf/11-338_kifl.pdf

FIRST CIRCUIT

Paolino v. JF Realty, LLC, 2013 U.S. App. LEXIS 5142 (1st Cir. Mar. 13, 2013).

Property owners sued adjacent property owners under the Clean Water Act's citizen suit provision for discharging illegal levels of pollutants into navigable waters. The case was dismissed with prejudice by a Rhode Island district court, which found that the plaintiff property owners issued insufficient pre-suit notice to the defendant property owners. On appeal, the First Circuit reversed the dismissal after finding that the notice complied with the requirements of 40 C.F.R. § 135.3(a), because it was at least adequate for the defendants to identify and remedy several of the alleged violations. The notice described in detail the ways in which the defendants' property was discharging pollutants into navigable waters, including a three-page list of dates on which reported measures or observations of hazardous materials on the defendants' property or in its runoff were in excess of amounts allowed by Rhode Island's water quality standards. Further, the notice allowed the defendants to determine each party's responsibility for the individual violations. Therefore, the First Circuit reversed the judgment in part, as to the case's dismissal, and affirmed in part, as to the dismissal of one of the defendants who was not properly served process.

<http://www.ca1.uscourts.gov/pdf/opinions/12-2031P-01A.pdf>



SECOND CIRCUIT

Kenneth D. Paskar & Friends of Laguardia Airport v. United States DOT, 2013 U.S. App. LEXIS 7259 (2d Cir. Apr. 9, 2013).

The United States Court of Appeals for the Second Circuit ruled that a Federal Aviation Administration (FAA) letter regarding the impact of a proposed marine trash-transfer facility on airport operations was not a final order and therefore not reviewable by the court. After the New York City Sanitation Department proposed to build a large waste facility, the Secretary of Transportation tasked the FAA with determining whether the facility would cause flight problems as a large number of birds may be attracted to the waste. The FAA analyzed the construction plans and produced recommendations for the Sanitation Department. This prompted the Secretary of Transportation to write a letter to the Sanitation Department indicating that it should follow the FAA's recommendations. LaGuardia Airport sued alleging that the letter was a final order that would have a negative impact on the airport. The Second Circuit held that the letter was not a final order and dismissed the case for lack of jurisdiction.

http://www.ca2.uscourts.gov/decisions/isysquery/08d998e6-fcad-49ff-b292-d0bc5f8bbdad/1/doc/10-4612_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/08d998e6-fcad-49ff-b292-d0bc5f8bbdad/1/hilite/



FIFTH CIRCUIT

Hornbeck Offshore Servs., L.L.C. v. Salazar, 2013 U.S. App. LEXIS 7183 (5th Cir. Apr. 9, 2013).

After the Deepwater Horizon oil spill, President Obama directed the Department of the Interior (DOI) to halt all oil and gas drilling operation on the Outer Continental Shelf for six months. In response, Hornbeck Offshore Services, a company that owns deepwater exploratory ships, sued the Department of the Interior for violating the Administrative Procedures Act by inadequately explaining the directive. A district court issued an injunction on the directive. The DOI continued to establish the moratorium on oil and gas drilling while it appealed the injunction. As a result, it received a civil contempt fine. On appeal, the Fifth Circuit determined that although the DOI did attempt to avoid the effects of the injunction, it did not violate the court's order and, therefore, was improperly held in civil contempt.

<http://www.ca5.uscourts.gov/opinions/pub/11/11-30936-CV1.wpd.pdf>

Texas

***Aransas Project v. Shaw*, 2013 U.S. Dist. LEXIS 33258 (S.D. Tex. Mar. 11, 2013).**

The Texas Commission on Environmental Quality (TCEQ) is responsible for issuing permits to manage the flow of freshwater into San Antonio Bay. In 2008-2009, local experts noticed that endangered whooping cranes that migrated to the bay refrained from feeding their young. That year, 23 whooping cranes died. The experts concluded that TCEQ mismanaged the flow of freshwater into the bay, killing much of the whooping crane food supply. Concerned, local businesses and citizens formed The Aransas Project (TAP) and sued TCEQ for the "taking" of endangered whooping cranes in violation of the Endangered Species Act. The primary issue at trial was whether TAP had "standing" to sue and resulted in a slew of expert testimony over whether the increased salt content of the bay ultimately caused the whooping crane deaths. The U.S. District Court decided that the salt content was responsible for the deaths and issued an injunction preventing TCEQ from granting permits until they take further precautions to ensure that whooping cranes will not be harmed.



EIGHTH CIRCUIT

***Iowa League of Cities v. EPA*, 2013 U.S. App. LEXIS 5933 (8th Cir. Mar. 25, 2013).**

The Iowa League of Cities (ILC) sued the Environmental Protection Agency (EPA), claiming two letters sent by the EPA to U.S. Senator Charles Grassley regarding wastewater municipal treatment facilities resulted in new regulatory requirements. The group argued that these letters were in contradiction with written EPA policies concerning "mixing zones" and "blending" regulation. ILC argued that the EPA lacked the statutory authority to promulgate rules in this fashion and had violated the APA by not adhering to notice, comment, and publication requirements. The court agreed with ILC and vacated the mixing zone and blending rules back to the EPA to undergo proper rulemaking procedures.

<http://www.ca8.uscourts.gov/opndir/13/03/113412P.pdf>



NINTH CIRCUIT

California

***Ctr. for Biological Diversity & Sierra Club v. BLM*, 2013 U.S. Dist. LEXIS 52432 (N.D. Cal. Mar. 31, 2013).**

The Center for Biological Diversity and the Sierra Club sued the United States Bureau of Land Management (BLM) for selling land in California to oil companies without first considering the environmental impact of hydraulic fracturing. The groups alleged that the agency should have prepared an environmental impact statement prior to selling the land. The Northern District of California ruled in favor of the environmental groups. The court held that the absence of an evaluation of the impact on fracking and reliance on outdated environmental reviews constituted a violation of the National Environmental Policy Act.



DC CIRCUIT

District of Columbia

***Sierra Club v. United States Fish & Wildlife Serv.*, 2013 U.S. Dist. LEXIS 37349 (D.D.C. Mar. 19, 2013).**

The Sierra Club sued the United States Fish and Wildlife Service (FWS) for its definition of the endangered leatherback sea turtle's critical habitat area. FWS revised the sea turtle's critical habitat area to include the coastline of Puerto Rico. The Sierra Club filed a petition to broaden the habitat area to include "the beaches and nearby waters of the Northeast Ecological Corridor of Puerto Rico." After reviewing the Sierra Club's petition, the FWS decided to take 12 months to formulate a new definition. Sierra Club argued that the decision to delay was "arbitrary and capricious" and that the delay was in violation of the Administrative Procedures Act. The court found that the delay was within the agency's discretion and that the decision to delay was unreviewable.

https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2011cv0993-36



FEDERAL CIRCUIT

***Century Exploration New Orleans, LLC v. United States*, 2013 U.S. Claims LEXIS 202 (Fed. Cl. Mar. 21, 2013).**

The Department of the Interior leases areas of the Outer Continental Shelf to private companies for exploration, in particular for oil and natural gas. After the Deepwater Horizon Oil Spill, the government amended many of its regulations concerning private oil drilling companies. Private companies sued the government, claiming that the government breached their lease agreement by creating new arbitrary and capricious regulations that negatively impacted their businesses. The Court of Federal Claims determined that it was within the government's power to alter its regulations in the event of a catastrophic oil spill, despite any perceived limits in the lease agreement. The court held that the lease agreement was not breached, and, even if it had been breached, the government would be able to invoke sovereign immunity.

<http://www.uscfc.uscourts.gov/sites/default/files/BUSH.CENTURY032113.pdf>



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