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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the February 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-13-03-02).

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FOURTH CIRCUIT

North Carolina

***United States v. House of Raeford Farms, Inc.*, 2013 U.S. Dist. LEXIS 7144 (M.D.N.C. Jan. 17, 2013).**

A district court in North Carolina found a poultry processing plant, House of Raeford Farms, guilty of a Clean Water Act violation for the discharge of untreated wastewater in violation of the state's pretreatment program. Raeford Farms then brought three motions, all of which were denied. The court denied the motion to arrest judgment, finding that this court was the proper authority to hear the case. The court also denied the motion for a new trial because it found the jury instructions accurately and fairly stated the law. Finally, the court denied the motion for acquittal because the government presented sufficient evidence to allow a reasonable juror to find Raeford Farms guilty beyond a reasonable doubt.

***Rose Acre Farms, Inc. v. NC Dept. of Environment & Natural Resources*, No. 12-CVS-10 (N.C. Super. Ct. Jan. 4, 2013).**

Rose Acre Farms, an egg production facility, petitioned a North Carolina court for review of the state environmental agency's requirement that Rose Acre obtain a National Pollutant Discharge Elimination System (NPDES) permit. The agency argued that a permit was necessary, as ammonia and other pollutants enter state waters when the farm's ventilation fans blow feathers and dust away from the bird litter. The farm argued that an NPDES permit was not required due to a stormwater discharge exception. The court held that the state environmental agency has the proper authority to require the farm to obtain a NPDES permit. Further, the stormwater discharge exception did not apply

because the farm's pollutants may reach the water by ventilation fan, and the exception only applies to pollutants that are applied onto land. The court remanded the case back to the Office of Administrative Hearings for an evidentiary hearing to determine the actual validity of the farm's NPDES permit.



NINTH CIRCUIT

Alaska Survival v. Surface Transp. Bd., 2013 U.S. App. LEXIS 1478 (9th Cir. 2013).

Several nonprofit environmental organizations challenged the federal Surface Transportation Board's approval of the construction of a 35-mile railway extension between Port MacKenzie and Wasilla, Alaska. The organizations argued that the agency improperly exempted Alaska Railroad Company from required licensing procedures under the Interstate Commerce Commission Termination Act of 1995 and failed to comply with the procedural requirements of the National Environmental Policy Act (NEPA) and Administrative Procedure Act (APA). The Ninth Circuit found that the agency's decision was not arbitrary and capricious and that the agency did not abuse its discretion or violate any laws in granting the exemption because it presented substantial evidence supporting its decision to do so. Furthermore, the Ninth Circuit found that the agency's Final Environmental Impact Statement complied with NEPA.

Alaska

Alaska Oil & Gas Ass'n v. Salazar, 2013 U.S. Dist. LEXIS 10559 (D. Alaska 2013).

The Alaska Oil and Gas Association brought suit seeking invalidation of the U.S. Fish and Wildlife Service's (FWS) final rule establishing the critical habitat designation for the polar bear. The court found that the final rule failed to comply with the Endangered Species Act's (ESA) procedural requirements and violated the arbitrary and capricious standard of review. For critical habitat designations, ESA requires FWS to demonstrate that an area contains physical or biological features that are essential to the conservation of the species. FWS designated an entire 187,151 square mile area as critical habitat based on only one essential feature that is only present in 1% of that entire designated area. Because the record did not provide evidence of essential features in the entire area, but was merely speculative, the court found that FWS violated the arbitrary and capricious standard of review. Furthermore, the court found that FWS did not comply with ESA's procedural requirements. If a state agency submits comments disagreeing with a proposed final rule that is ultimately issued, the ESA requires FWS to provide those agencies with written justification as to why their comments were not included in the final rule. FWS wrote a response letter to the Governor, not the state agency, and addressed only some of the agency's concerns. The court vacated the final rule and remanded it to FWS to correct the substantive and procedural errors.

California

Drakes Bay Oyster Co. v. Salazar, 2013 U.S. Dist. LEXIS 15056 (N.D. Cal. Feb. 4, 2013).

In November, the U.S. Department of the Interior declined to renew a permit allowing the Drakes Bay Oyster Company to continue operation of its oyster farm near the Point Reyes National Seashore. The company sought to have the decision overturned, arguing that the Department failed to perform its duties under the National Environmental Policy Act. The court found that the court lacked jurisdiction to review the decision and further, the company did not present evidence necessary to obtain injunctive relief.

Washington

Wild Fish Conservancy v. Nat'l Park Serv., 2013 U.S. Dist. LEXIS 18924 (W.D. Wash. Feb. 12, 2013).

Environmental groups brought suit, alleging a Native American Tribe (Tribe) took protected species in violation of § 9 of the Endangered Species Act (ESA). The Tribe operates multiple hatchery programs pursuant to a Hatchery and Genetic Management Plan developed through a collaborative process involving federal agencies. The plaintiffs argued that the Tribe was not operating their hatcheries in accordance with the government regulations. The court found that

the plaintiffs failed to provide the Tribe with written notice of specific violations as required under the ESA. Furthermore, the court found the plaintiffs' arguments meritless in that the Tribes met their burden in showing that future takings will not occur and the Tribe submitted evidence that it was operating the hatcheries in compliance with governmental regulations. The court further found that it was not appropriate to hold an evidentiary hearing or allow the plaintiffs time for discovery. The court therefore granted the Tribe's motion to dismiss the case.



ELEVENTH CIRCUIT

Georgia

***Georgia River Network, et al v. Turner, et al*, No. OSAH-BNR-EPD-ES-1308374-60-Miller (Ga. Admin. Hearings Jan. 14, 2013).**

The U.S. Army Corps of Engineers issued Grady County, Georgia a permit to build a fishing lake and dam. The permit was conditioned upon the county obtaining a variance from the state allowing buffers along state waters. The Environmental Protection Division of the Department of Natural Resources (DNR) issued the buffer variance. Georgia River Network and American Rivers subsequently brought suit, seeking an order invalidating the Director's issuance of the variance, arguing that Georgia's Erosion and Sedimentation Act (Act) requires buffers along wetlands. The court disagreed with the DNR's stance that the Act only required buffers in areas of wretched vegetation. The court agreed with the plaintiffs and reversed the issuance of the variance, holding that the Act requires buffers for all state waters, including wetlands.



FEDERAL CLAIMS

***Westlands Water Dist. v. United States*, 2013 U.S. Claims LEXIS 11 (Fed. Cl. 2013).**

Westlands Water District in California buys and sells water from a government-administered project. The district sued the United States government, arguing that the government's failure to provide it with water drainage facilities and services constituted breach of various contracts. The water district argued that the governmental contracts expressly obligated the government to provide it with drainage facilities and services. The Court of Federal Claims disagreed, finding that no language in the contracts obligated the government to undertake drainage responsibilities. Although the water district presented several governmental representations that they intended to provide drainage, the court stated that only representations that are express undertakings are binding, not mere intentions or explanatory recitals. Finding that the government did not expressly undertake drainage obligations in the contractual language, the court dismissed several of the water district's claims, and others were subsequently dismissed because they were time-barred or the court did not have authority to grant the declaratory relief that the water district requested.



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