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Ocean and Coastal Case Alert

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

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FOURTH CIRCUIT

***Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.*, 2013 U.S. App. LEXIS 3650 (4th Cir. 2013).**

Dow AgroSciences, a pesticide manufacturer, brought suit against the National Marine Fisheries Service (NMFS) in a Maryland district court challenging the agency's issuance of a biological opinion (BiOp) as arbitrary and capricious under the Administrative Procedure Act (APA). NMFS issued the BiOp as part of the pesticide reregistration process required under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Endangered Species Act (ESA). The BiOp concluded that the use of certain pesticides would harm certain Pacific salmonids and their habitats, meaning these pesticides could not be reregistered and thus could not be used without substantial restrictions. The district court ruled for NMFS, finding that the BiOp was rationally supported by facts and studies considered by NMFS. The Fourth Circuit reversed that decision, concluding that the BiOp was not the product of reasonable decision making because it failed to explain or support several assumptions critical to its opinion. In making this decision, the court concluded: 1) NMFS failed to justify its model's assumption that juvenile salmonids would be exposed to lethal levels of pesticides for 96 hours; 2) NMFS failed to explain why they used outdated water monitoring data when new data is available; and 3) NMFS failed to explain why it imposed uniformly sized buffers to all water bodies regardless of the economic feasibility of such buffers. The Fourth Circuit concluded that NMFS relied on data, tests, and standards that did not appear to appear logical or obvious and did not explain its reliance on these choices with sufficient clarity so that the court could review them for reasonableness. For that reason, the BiOp was vacated for being arbitrary and capricious, the district court's opinion reversed, and the case remanded to NMFS.
http://www.ca4.uscourts.gov/Opinions/Published/112337.P.pdf

South Carolina

***Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl Control*, 2013 S.C. LEXIS 25 (S.C. Feb. 27, 2013).**

The South Carolina Supreme Court recently ruled in favor of a permit allowing a bulkhead and revetment to be constructed on Kiawah Island. A development group initially sought permission to build a more than 2,500-foot sea wall, and the state Department of Health and Environmental Control (DHEC) permitted only a 270-foot sea wall. An Administrative Law Court (ALC) reversed the decision, stipulating that the development group make changes to its plans. DHEC and an environmental group appealed the decision. In 2011, the state supreme court issued an opinion siding with the DHEC; however, the court agreed to rehear the case. In February, the court ruled that the ALC did not err in refusing to defer to DHEC and that the ALC did have the authority to modify the revetment. The court found that substantial evidence supported the ALC's conclusion that the proposal complied with the Coastal Zone Management Act, the Coastal Zone Management Program, and state law.
http://www.sccourts.org/opinions/HTMLFiles/SC/27065.pdf

FIFTH CIRCUIT

Louisiana

***Belle Co., LLC v. United States Army Corps of Eng'rs*, 2013 U.S. Dist. LEXIS 27546 (M.D. La. Feb. 28, 2013).**

The U.S. District Court for the Middle District of Louisiana recently ruled that a U.S. Army Corps of Engineers' jurisdictional determination finding wetlands subject to the Clean Water Act (CWA) is not a final agency action within the meaning of the Administrative Procedure Act (APA). The plaintiffs had sought a permit to construct a solid waste landfill. After the Corps found that the land in question contained jurisdictional wetlands, the plaintiffs brought suit. Under the APA, a court may only review the decisions of an administrative agency when there has been a "final agency action." The court ruled that in this instance, the Corps' decision did not result in a final agency action, distinguishing the case from a recent U.S. Supreme Court decision, *Sackett v. EPA*.
https://ecf.lamd.uscourts.gov/doc1/08711327423

NINTH CIRCUIT

***Shell Offshore, Inc. v. Greenpeace, Inc.*, 2013 U.S. App. LEXIS 5033 (9th Cir. Mar. 12, 2013).**

The Ninth Circuit Court of Appeals affirmed a district court order granting an oil company a preliminary injunction to stop Greenpeace from interfering with vessels involved in exploratory drilling on the Arctic outer continental shelf (OCS) and from committing various unlawful and tortious acts against those vessels. Greenpeace argued that the action was not justiciable, that the district court lacked subject matter jurisdiction to issue its order, and that the court erred in its application of a previous court case. The court disagreed and ruled in favor of Shell on all issues. In making its decision, the court relied on evidence of past actions Greenpeace activists around the world have taken to "stop Shell" from drilling activities.
http://cdn.ca9.uscourts.gov/datastore/opinions/2013/03/13/1235332.pdf

***Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 2013 U.S. App. LEXIS 3887 (9th Cir. Feb. 25, 2013).**

The Ninth Circuit recently held that the actions of the Sea Shepherd Conservation Society, an organization known for investigating and confronting Japanese whale-hunting ships, did amount to piracy in that their actions were clearly violent acts for private ends. The Institute of Cetacean Research, a group of Japanese whalers, brought the action against Sea Shepherd. The Sea Shepherd had rammed the whaling ships, as well as thrown glass containers of acid, smoke bombs, and flares with hooks at the ships. The whale hunters believed that the Sea Shepherd's acts amounted to piracy, which violated international agreements regulating the conduct on the high seas. They sued under the Alien Tort Statute, 28 U.S.C. §1350, which provides a cause of action for torts committed in violation of the law of nations or a U.S. treaty. The U.S. District Court for the Western District of Washington denied the request for a preliminary injunction. On appeal, the Ninth Circuit disagreed. The court found that a preliminary injunction was warranted, because 1) the researchers were likely to succeed on the merits of their claim under international agreements; 2) repeated dangerous acts could lead to inevitable harm, which would be irreparable; 3) without an injunction, the researchers would continue to be victims of the Sea Shepherd's violent acts; and 4) the researchers' activities were covered by a permit and were therefore consistent with congressional policy on the marine ecosystem. Therefore, the Ninth Circuit remanded and reversed back to the district court.
http://cdn.ca9.uscourts.gov/datastore/general/2013/03/12/12-35266_Order.pdf

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California

***Schmeer v. County of Los Angeles*, 2013 Cal. App. LEXIS 130 (Cal. App. 2d Dist. Feb. 21, 2013).**

A Los Angeles County, California ordinance prohibits retail stores from providing plastic carryout bags to its customers and requires them to charge 10 cents per paper carryout bag. California residents and a plastic bag manufacturer brought suit, claiming that this ordinance violated the California Constitution, which prohibits any new general or special tax imposed by local governments without prior voter approval. The district court and appellate court found that according to California law, charges were only considered "taxes" if they produced revenue for the government. Here, the paper bag charge was paid to and retained by the stores providing them, and the store was required to use those funds for specific purposes. Because no funds were remitted to the county, the court found that the paper bag charges were not "taxes" under the state Constitution. Therefore, the voter approval requirements were inapplicable.
http://www.courts.ca.gov/opinions/documents/B240592.pdf

Oregon

***Humane Soc'y of the United States v. Bryson*, 2013 U.S. Dist. LEXIS 20616 (D. Or. Feb. 15, 2013).**

Several environmental organizations sued the National Marine Fisheries Service (NMFS) over its decision to authorize several states to kill particular California sea lions feeding on salmonids at Bonneville Dam. The salmonids, which are protected as threatened or endangered under the Endangered Species Act, must work their way up to the dam's fish ladders. As the salmonids congregate below the dams, they are easy prey for the sea lions and efforts to deter the sea lions have been ineffective. The court concluded that NMFS did not act arbitrarily or capriciously when authorizing the killing and that the authorizations do not conflict with the Marine Mammal Protection Act's protection of Steller sea lions. The court also found that NMFS complied with the National Environmental Policy Act when it issued a supplemental information report in lieu of supplementing its environmental assessment.
http://media.oregonlive.com/environment_impact/other/DCopinion.pdf

DC CIRCUIT

District of Columbia

***Safari Club Int'l v. Salazar* (In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig. - MDL No. 1993), 2013 U.S. App. LEXIS 4194 (D.C. Cir. 2013).**

The United States Court of Appeals for the District of Columbia recently rejected challenges to the listing of the polar bear as threatened under the Endangered Species Act. The court upheld the listing, finding that the Fish and Wildlife Service's decision was amply supported by data and well within the mainstream on climate science and polar bear biology. Further, the information was supported by a wide variety of scientific experts.
http://www.cadc.uscourts.gov/internet/opinions.nsf/27B0BE9562811E2485257B2100550BFF/$file/11-5219.pdf

FEDERAL CIRCUIT

***Casitas Mun. Water Dist. v. United States*, 2013 U.S. App. LEXIS 4067 (Fed. Cir. Feb. 27, 2013).**

The Federal Circuit Court of Appeals recently affirmed a decision dismissing Casitas Municipal Water District's takings claim against the United States. The water district, located in California, was required by the government to construct a fish ladder to allow endangered steelhead trout to pass its dam. In 2005, the water district brought suit, arguing that the water diversion over the fish ladder caused it to lose water, which resulted in a physical taking of property. In 2008, the Federal Circuit ruled that the diversion could be analyzed under the physical takings test. On remand, the federal claims court held that this claim was not ripe because the water district failed to show any reduction in deliveries of water to the district's customers. On appeal, the Federal Circuit agreed. Furthermore, the court found that any loss in the amount of water to which the district was entitled did not amount to a loss in water property rights because such rights have been limited to "beneficial use" of the water.
http://www.cafc.uscourts.gov/images/stories/opinions-orders/2012-5033.Opinion.2-22-2013.1.pdf

Federal Claims

***Lone Star Indus., Inc. v. United States*, 2013 U.S. Claims LEXIS 124 (Fed. Cl. Feb. 27, 2013).**

The United States Court of Federal Claims ruled that the government's closure of the Mississippi River Gulf Outlet (MRGO) did not result in an unconstitutional taking of property from Lone Star Industries, a deep-draft vessel terminal. The court found that the terminal owner had no compensable property interest in deep-draft access to its property. Further, the terminal owner failed to show that the closure of the outlet was a direct regulation of the property. Ultimately, the court dismissed the suit for failure to state a claim.
http://www.uscfc.uscourts.gov/sites/default/files/WILLIAMS.LONESTAR022713.pdf

National Sea Grant Law Center
256 Kinard Hall, Wing E
University, MS 38677-1848

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