July 16 2014

Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the July 2014 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-14-03-07).

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THIRD CIRCUIT

New Jersey

***In re Flood Hazard Area Verification Approval*, 2014 N.J. Super. Unpub. LEXIS 1499 (App. Div. June 20, 2014).**

Citizen groups challenged the approval of Freshwater Wetlands Protection Act (FWPA) and Flood Hazard Area Control Act (FHACA) permits issued by the New Jersey Department of Environmental Protection (DEP). The groups made three arguments claiming the permits for the proposed residential development did not comply with the statutes: 1) the property owner failed to comply with a previous deed restriction; 2) the DEP did not hold a public hearing prior to permit issuance; and 3) the DEP entered into a procedurally improper settlement with the property owner. The court held that the permit issued pursuant to the FHACA was properly supported by the record but vacated the permits issued under the FWPA. It ruled that a public hearing, which must address the requested conservation deed restriction alterations, is required.

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FOURTH CIRCUIT

North Carolina

***Cape Hatteras Access Pres. Alliance v. Jewell*, 2014 U.S. Dist. LEXIS 84596 (E.D.N.C. 2014).**

After complaints by conservation groups, the National Park Service (NPS) promulgated a regulation that limited off road vehicle (ORV) access within the Cape Hatteras National Seashore. Pro-ORV group Cape Hatteras Access Preservation Alliance (CHAPA) then brought suit contesting the regulations. CHAPA stated six claims against the regulation: one based in the seashore's Enabling Act and five based in the National Environmental Policy Act (NEPA). After cross motions for summary judgment, the U.S. District Court for the Eastern District of North Carolina ruled against CHAPA. The court ruled that Congress gave clear priority to natural resource protection in the NPS's enabling act, and therefore, NPS is able to restrict access to ensure that protection. Also, the court ruled the draft and final environmental impact statements were sufficient as to all of CHAPA's NEPA claims.

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FIFTH CIRCUIT

***Aransas Project v. Shaw*, 2014 U.S. App. LEXIS 12356 (5th Cir. June 30, 2014).**

The U.S. Court of Appeals for the Fifth Circuit reversed a district court's grant of a preliminary injunction against the Texas Commission of Environmental Quality (TCEQ). The injunction was granted after environmental groups charged that TCEQ's permitting of water withdrawal from the San Antonio and Guadalupe rivers constituted a take of endangered whooping cranes. The groups argued the permitting reduced the quantity of water reaching the delta; the lower water quantity meant fewer blue crabs and wolfberries, food staples for the cranes, could be sustained within the delta region; and, the lack of those food sources caused the deaths of 23 whooping cranes from emaciation. The Fifth Circuit ruled that there was no proximate cause between the permitting and the deaths of the cranes. The court noted that the take must be foreseeable and not merely accidental. In this instance, the court held the deaths were too remote to affix ESA liability.

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***United States v. Rainey*, 2014 U.S. App. LEXIS 12222 (5th Cir. June 27, 2014).**

In this criminal prosecution stemming from BP's response to the Deepwater Horizon explosion and spill, the U.S. Court of Appeals for the Fifth Circuit answered whether BP's former vice president David Rainey could be prosecuted for obstruction of a congressional subcommittee. The charges stemmed from Rainey's report to the House Subcommittee on Energy and Environment that the best estimate for the amount of oil escaping from the well was 5,000 barrels of oil per day (BOPD), with a worst case scenario number of 60,000 BOPD. This report was made after his own research and the research of BP experts estimated it to be much higher, up to 146,000 BOPD. A grand jury indicted Rainey on one count of obstruction of Congress under 18 U.S.C. § 1505. The district court granted Rainey's motion to dismiss the charge on the grounds that the subcommittee was not covered under § 1505's language. The statute allows prosecution for obstructing any inquiry by "any committee of either House." The Fifth Circuit ruled that Congressional subcommittees are included within "any committee of either House." Accordingly, it vacated the

district court's grant of dismissal.

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Louisiana

***Bd. of Comm'rs of the Southeast La. Flood Prot. Authority-East v. Tenn. Gas Pipeline Co., LLC*, 2014 U.S. Dist. LEXIS 87791 (E.D. La. June 27, 2014).**

The Board of Commissioners of the Southeast Louisiana Flood Protection Authority—East (Authority) filed suit in the Parish of Orleans for injunctive relief and damages against 92 oil and gas companies. The Authority claimed the companies were liable for actions that made south Louisiana vulnerable to storm damage. The companies removed to federal court, and the Authority filed this motion to remand to the Civil District Court for the Parish of Orleans. The District Court for the Eastern District of Louisiana denied the motion. It ruled that the Authority's state law claims raised a federal issue and federal question jurisdiction was proper. It also found that entertaining the issue in federal court would not upset the balance of federal and state jurisdictional responsibilities.

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Texas

***Porretto v. Tex. Gen. Land Office*, 2014 Tex. LEXIS 560 (Tex. July 3, 2014).**

The Porretto family claimed ownership of seventeen tracts of land between the Galveston Seawall and the Gulf of Mexico. Some of the property was inland of the mean higher high tide line (MHHT) and some was seaward of the MHHT. In Texas, the MHHT is the boundary between private lands and state owned lands. After the Texas General Land Office allowed renourishment and recreational leases on the Porretto beach seaward of the MHHT, the Porrettos filed this lawsuit asserting a taking of private property under the Texas Constitution. The court held that the Porrettos were not entitled to compensation. It found the Porrettos did not hold ownership interest in the lands seaward of the MHHT. The state leased and renourished its own lands. Also, even though the MHHT moved seaward, the ownership of the shoreline did not change with the avulsive renourishment projects. Accordingly, the court ruled that the Porrettos did not experience a taking of any of the beach landward of the original MHHT.

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SIXTH CIRCUIT

Michigan

***Waisanen v. Superior Twp.*, 2014 Mich. App. LEXIS 1211, 2014 WL 2871387 (Mich. Ct. App. June 24, 2014).**

John Waisanen purchased property abutting a Lake Superior access area in 1971. In 1981, he built an addition onto his home and a breakwall, both of which, unbeknownst to him, encroached onto the beach access area. In 2008, after a survey of his property, Waisanen brought suit to adversely possess the land onto which his addition and breakwall encroached. The first issue on appeal was whether a counter claim by the municipal corporation defendant barred Waisanen's adverse possession claim under MCL 600.5821(2), which bars such claims in actions brought by municipal corporations. The court held that the counter claim was not an action brought by a municipal corporation, and so Waisanen's adverse possession claim was allowed. The second issue was whether occasional use of the disputed lake access area by the public was enough to disrupt Waisanen's continuous possession. The court held that

it was not. Accordingly, as Waisanen met all the adverse possession requirements, the court quieted title in Waisanen's favor.

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NINTH CIRCUIT

California

***Light v. State Water Resources Control Bd.*, 2014 Cal. App. LEXIS 523 (Cal. App. 1st Dist. June 16, 2014).**

A California appellate court held that the State Water Resources Control Board (Board) had the power to reduce, through reasonable use requirements, the amount of water withdrawn from the Russian River system for frost protection. After many young salmon were found fatally stranded along the banks of the Russian River due to abrupt declines in water levels, the Board passed a regulation requiring water users to form local governing bodies to regulate withdrawals. The waters users claimed that the Board did not have the authority to limit water use by riparian and early appropriation users. The court held that although the Board has no authority to require permits for water withdrawals by riparians and early appropriators, there is no reason why it cannot prevent those groups from using water unreasonably.

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***Lookout Point Alliance v. City of Newport Beach*, 2014 Cal. App. Unpub. LEXIS 4214 (Cal. App. 4th Dist. June 16, 2014).**

The Guidas family owned two small, adjoining lots within Newport Beach and the California coastal zone. The family sought permits to demolish the two small houses that stood on the lots, merge the two lots into one, and build one larger house on the remaining lot. Lookout Point Alliance and the Juaneño Band of Mission Indians, Acjachemen Nation (collectively, LPO) challenged the City of Newport Beach's approval of the lot merger application. LPO contended Newport Beach failed to comply with the California Environmental Quality Act (CEQA) and the city's Coastal Land Use Plan adopted under the California Coastal Act. The city found the merger exempt from the CEQA's Environmental Impact Report (EIR) requirement for projects having a significant effect on the environment. The court upheld the exemption. It ruled that the city council made all findings required by CEQA and the city's merger ordinance. It also held that appellants failed to provide any legal analysis or site any authority as to how the lot merger violated the Coastal Act. The appellate court affirmed the grant of approval to merge the lots.

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ELEVENTH CIRCUIT

Florida

***Florida Panthers v. Collier County*, 2014 U.S. Dist. LEXIS 82273 (M.D. Fla. June 17, 2014).**

Two endangered species and two conservation groups brought a claim of Endangered Species Act (ESA) violations against Collier County Florida. The Collier County land use plan labeled property as sending lands or receiving lands.

Sending lands were of high environmental value. On sending lands, housing density is limited to one home per forty acres, and non-agricultural commercial activities are restricted to protect habitat. Receiving lands do not have such restrictions. The Husseys, owners of the HHH Ranch, brought a claim alleging that Collier County improperly designated the ranch as sending lands. That claim is under appeal. This claim stemmed from Collier County authorizing a settlement agreement with the Husseys, which changed the designation of the HHH Ranch from sending lands to receiving lands. The change would allow the Husseys to clear land within an area of documented habitat for the two endangered species, the Florida Panther and the Red-cockaded Woodpecker. The county moved to dismiss for lack of subject matter jurisdiction. The court granted the motion, because the settlement agreement claims hinged on a pending appeal on the Husseys' earlier designation claim.

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***Fish v. Wakulla Fishermen's Ass'n*, 2014 Fla. App. LEXIS 10400 (Fla. Dist. Ct. App. 1st Dist. July 7, 2014).**

Several Florida regulations, enacted pursuant to a Florida constitutional amendment to limit the use of gill or entangling nets, were challenged by fishermen. The trial court acknowledged that prior cases had reviewed and upheld the regulations. Even so, the trial court held the regulations were unfair and prohibited enforcement under the regulations. The appellate court reversed based on res judicata. It ruled that the trial court was bound by the prior precedent of the jurisdiction, regardless of whether or not the trial court agrees with those decisions. Also, the court found that the fishermen did not present evidence to support application of the manifest injustice exception to res judicata.

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D.C. CIRCUIT

District of Columbia

***Permapost Prods. v. McHugh*, 2014 U.S. Dist. LEXIS 91611, 2014 WL 3056506 (D.D.C. July 7, 2014).**

An assemblage of wood and forest products manufacturers challenged the approval of two regional conditions to Clean Water Act (CWA) nationwide permits and the issuance of operating procedures for activities. One of the challenged conditions would prohibit nationwide permittees from using wood products treated with harmful wood preservatives in contact with waters or wetlands within the state of Oregon. The other condition would prohibit nationwide permittees from using products treated with creosote and pentachlorophenol in certain waters in Alaska. The manufactures claimed that these conditions were issued in violation of the Administrative Procedure Act (APA), the Endangered Species Act (ESA), and the Regulatory Flexibility Act (RFA). The government agencies motioned to dismiss for lack of standing. The court held the manufacturers lacked prudential standing for their CWA-based APA and RFA claims, because the manufacturers' economic interests are not protected under the CWA. However, economic interests fall within the zone of interests protected under the ESA, so the manufacturers' ESA claims satisfied procedural standing requirements. Accordingly the court dismissed all but the ESA claims.

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FEDERAL CIRCUIT

U.S. Court of Federal Claims

***Kingman Reef Atoll Dev. v. United States*, 2014 U.S. Claims LEXIS 597 (Fed. Cl. June 30, 2014).**

This litigation stemmed from an alleged taking that occurred when the Secretary of Interior established the Kingman Reef National Wildlife Refuge. Kingman Reef Atoll Development, L.L.C. (KRAD) and Kingman Reef Atoll Investments, L.L.C. (KRAI) sought $54,500,000 in compensation for the alleged taking of development and use rights. After cross motions for summary judgment, the court denied KRAD and KRAI's motion with prejudice and granted the government's motion for summary judgment in its entirety. It held that KRAD and KRAI could not establish a property interest in Kingman reef through a quiet title suit or through adverse possession by a predecessor in interest. Because no interest in the property was established, no compensable taking occurred upon the designation of the Kingman Reef National Wildlife Refuge.

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