~ ~ January 15, 2010 ~ ~

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The National Sea Grant Law Center is pleased to offer the ***Ocean and Coastal Case Alert***. The ***Case Alert*** is a monthly listserv highlighting recent court decisions impacting ocean and coastal resource management. Each Case Alert will briefly summarize the cases. Please feel free to pass it on to anyone who may be interested. If you are a first-time reader and would like to subscribe, send an email to waurene@olemiss.edu with *"**Case Alert**"* on the subject line. MASGC 10-002-01

SECOND CIRCUIT

Vermont

In re Entergy Nuclear Vt. Yankee Discharge Permit 3-1199, 2009 VT 124 (Vt. 2009).
An energy company sought a permit amendment under the National Pollutant Discharge Elimination System (NPDES) of the Clean Water Act (CWA). The trial court granted the permit, but imposed monitoring and temperature conditions. On appeal, the Vermont Supreme Court held that the trial court erred in imposing additional conditions, since the conditions were not justified by its findings.
http://info.libraries.vermont.gov/supct/current/op2008-295.html

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FOURTH CIRCUIT

AES Sparrows Point LNG, LLC v. Wilson, 2009 U.S. App. LEXIS 28191 (4th Cir. Dec. 22, 2009).
The Fourth Circuit denied a petition for review of Maryland's denial of a request for water quality certification for an LNG terminal and pipeline. The Maryland Department of the Environment denied the request, stating that, among other deficiencies, the application did not show that the project would be carried out in compliance with state water quality standards. The appellate court found that the LNG company failed to establish any basis to disturb the Corps' determination that Maryland had not waived its right to grant or deny the certification request. Further, the court denied AES's petition for review, agreeing that the dredging required to accommodate the LNG tankers would create areas where dissolved oxygen levels would fail to meet Maryland water quality standards.
http://pacer.ca4.uscourts.gov/opinion.pdf/091539.P.pdf

SIXTH CIRCUIT

United States v. Lexington-Fayette Urban County Gov't, 2010 U.S. App. LEXIS 278 (6th Cir. Jan. 7, 2010).
A U.S. district court refused to approve a settlement between the U.S. and Kentucky governments and the Lexington-Fayette Urban County government. The settlement was for a Clean Water Act (CWA) civil enforcement action for violations involving the county's sanitary and storm sewer systems. The district court found that the settlement amount of $425,000 would be better directed toward alleviating the conditions that violated the CWA (compliance was estimated to be between $250 to $300 million). The Sixth Circuit rejected the court's ruling and remanded the case to the district court, noting that "If Congress thought a violator's money would be better spent [for remediation], Congress would hardly have provided for civil penalties."
http://www.ca6.uscourts.gov/opinions.pdf/09a0434p-06.pdf

EIGHTH CIRCUIT

Serv. Oil v. U.S. EPA, 2009 U.S. App. LEXIS 28384 (8th Cir. Dec. 28, 2009).
The Environmental Protection Agency (EPA) imposed a substantial penalty on Service Oil, Inc. for not timely obtaining a storm water discharge permit. Service Oil filed a petition to review the penalties. The court granted the petition, finding that the penalty assessment was an expansion of EPA's remedial power not authorized by the governing law, because the EPA based the amount of the penalty on the company's failure to comply with the EPA's permit application regulations, not on unlawful discharges.
http://www.ca8.uscourts.gov/opndir/09/12/082819P.pdf

NINTH CIRCUIT

California

Reddell v. California Coastal Commission, 2009 Cal. App. LEXIS 2090 (Cal. App. 2d Dist. Dec. 1, 2009).
A California appellate court rejected a developer's claim against the California Coastal Commission. The Commission had denied the developer's application for a coastal development permit for residential and commercial development on bluffs above Morro Bay, citing the fact that the project was inconsistent with the city's local coastal plan policies for bluff development, visual resources, parking, visitor-serving priorities, and community character. The developer, Dan Reddell, filed a writ of administrative and ordinary mandate and a complaint for damages and equitable relief against the Commission. The trial court denied the petition and dismissed the complaint. The appellate court agreed, finding that the substantial evidence supported the Commission's decision and that the Commission had no duty to approve a revised project. The appellate court also concluded that the trial court did not err in dismissing the plaintiff's claims for violation of due process and equal protection. Finally, the court concluded that Reddell's claim for damages for a regulatory taking of property was not ripe.
http://www.courtinfo.ca.gov/opinions/documents/B206428.PDF

People v. Maikhio, 2010 Cal. App. LEXIS 2 (Cal. App. 4th Dist. Jan. 5, 2010).
In a prosecution for two misdemeanor fishing offenses, possession of a California spiny lobster during closed season and failure to exhibit his catch on demand, a California appellate court affirmed a trial court's grant of a motion to suppress evidence. The court agreed that the Department of Fish and Game warden did not have either the statutory or constitutional authority to stop defendant's vehicle. The court found that the warden did not have reasonable suspicion that the defendant had illegally caught a lobster, even though the warden observed him catch something using the hand-lining method, because the warden could not see what defendant caught and the method could lawfully be used for fish.
http://www.courtinfo.ca.gov/opinions/documents/D055068.PDF

Hawaii

Maunalua Bay Beach Ohana 28 v. State, 2009 Haw. App. LEXIS 807 (Haw. Ct. App. Dec. 30, 2009).
In 2005, several oceanfront property owners challenged Hawaii's Act 73, alleging that it resulted in an unconstitutional taking of their right to accretion. The trial court agreed. On appeal, however, the Hawaii appellate court found that the property owners have no vested right to future accretions in oceanfront land and, therefore, Act 73 does not amount to an uncompensated taking.

http://www.state.hi.us/jud/opinions/ica/2009/ica28175.pdf

ELEVENTH CIRCUIT

Florida

Odyssey Marine Exploration, Inc. v. Shipwrecked Vessel, 2009 U.S. Dist. LEXIS 119086 (M.D. Fla. Dec. 22, 2009).
In a case regarding a shipwrecked Spanish naval vessel, the court ruled that Odyssey Marine Exploration, a shipwreck recovery company, was not entitled to possessory rights and ownership over items it recovered. The court held that the court lacked subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C.S. § 1602 et seq. It is likely that the case will be appealed to the U.S. Court of Appeals for the Eleventh Circuit.
https://ecf.flmd.uscourts.gov/doc1/04717665837

Johnson v. Gulf County, 2009 Fla. App. LEXIS 19943 (Fla. Dist. Ct. App. 1st Dist. Dec. 22, 2009).
Fred M. Johnson filed suit alleging that development of wetlands near his property would violate the comprehensive plan of Gulf County, Fla., that the county wrongfully refused to enforce its comprehensive plan and its regulations, and that the property owner filling the wetlands, William Rish, Jr., wrongfully filled wetlands without first obtaining a permit. The trial court found that the wetlands in question were non-jurisdictional and ruled in favor of Gulf County. The appellate court reversed the ruling and ordered a remand, holding: the trial court erred in ruling that the wetlands were non-jurisdictional; the developer was required to obtain a development order or permit before clearing and filling; and a subdivision ordinance did not allow the creation of three lots from one without a development plan.
http://opinions.1dca.org/written/opinions2009/12-22-2009/08-6189.pdf

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MASGC 10-002-01

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