

January

15
2015

Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the January 2015 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-15-03-01).

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FIRST CIRCUIT

Massachusetts

***Coon v. McCabe*, 2014 WL 7466543 (Mass. Land Ct. Dec. 31, 2014).**

The Massachusetts Land Court ruled on the public's right to beach access on a portion of Rexhame Beach in Marshfield, Massachusetts. The dispute, which began in 1998, involves a group of property owners in a subdivision that claimed certain dunes, access roads and beach as their own. Town residents maintained their right to use the beach and a right of access over subdivision roads. The court had to determine who owned the beach and the right of the public to access the beach over two subdivision roadways. After examining evidence including land grants dating back to the 1640s, the court ultimately found that the town possessed title to the beach including a portion of the upland area. The court did rule that all except one of the subdivision's five streets are not open to public use.

No opinion available

FOURTH CIRCUIT

North Carolina

***N. Carolina Env'tl. Justice Network v. Taylor*, 2014 WL 7384970 (E.D.N.C. Dec. 29, 2014).**

An environmental group filed a citizen suit claiming that two livestock farms illegally dumped swine waste onto the lands and waters in violation of the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA). The defendants argued that suits brought under the citizen suit provisions of CWA and RCRA were not entitled to a jury on the issue of liability for civil penalties. The court disagreed and ruled that the group was entitled to a jury trial. The court found that "[b]ecause the relief sought is the same in both a citizen suit and a direct enforcement suit, either party has the right to demand and receive a jury determination of liability for civil penalties."

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FIFTH CIRCUIT

***In re Deepwater Horizon*, 2015 WL 151806 (5th Cir. Jan. 9, 2015).**

In a narrow 7-6 vote, the U.S. Court of Appeals for the Fifth Circuit denied a motion to rehear *en banc* a decision issued last year that held BP and Anadarko strictly liable for fines under Clean Water Act (CWA) § 311. The dissenting judges stated that "[t]he panel opinion's 'controlled confinement' test does not follow from the text of the CWA. Compounding this, the panel's supplementary opinion conflicts with the panel opinion. These problems, coupled with the exceptional importance of the underlying issue, necessitated a rehearing."

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NINTH CIRCUIT

***Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 2014 WL 7235539 (9th Cir. Dec. 19, 2014).**

The U.S. Court of Appeals for the Ninth Circuit held Paul Watson and the Sea Shepherd Conservation Society (Sea Shepherd) in contempt for violating an injunction prohibiting the group from physically attacking or coming within 500 yards of certain whaling and fueling vessels on the open sea. After the court issued the injunction last year, Sea Shepherd transferred control over its campaign, designed to thwart whaling activities in the Southern Ocean, to foreign Sea Shepherd entities. These foreign entities repeatedly committed acts against the plaintiffs' whaling ships that would have violated the injunction if performed by Sea Shepherd. The court ruled that the defendants violated the court's injunction by using this strategy.

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***San Luis & Delta-Mendota Water Auth. v. Locke*, No. 12-15144, 2014 WL 7240003 (9th Cir. Dec. 22, 2014).**

Several suits challenged the National Marine Fisheries Service's (NMFS) issuance of a Biological Opinion (BiOp)

related to the effects of two California water projects on certain threatened and endangered fish species. After the actions were consolidated, the U.S. District Court for the Eastern District of California granted summary judgment, invalidating portions of the BiOp. On appeal, the Ninth Circuit upheld the BiOp. The court ruled that NMFS acted within its discretion in using a non-scaled data model to set river flows. Further, NMFS did not act arbitrarily or capriciously in finding that the continued operations of the projects were likely to jeopardize viability and essential habitat of species. And, finally, the court found that the BiOp was not in violation of the Administrative Procedure Act in making various recommendations and requirements in the BiOp.

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TENTH CIRCUIT

Colorado

Rags Over the Arkansas River, Inc. v. Bureau of Land Mgmt., 2015 WL 59471 (D. Colo. Jan. 2, 2015).

The U.S. District Court for the District of Colorado upheld the Bureau of Land Management's (BLM) approval of artist Christo's temporary art installation over the Arkansas River in Colorado. The installation, called "Over the River," would involve fabric panels covering a six mile stretch of the river. Environmental groups had filed suit against the BLM and the Department of the Interior, alleging that the BLM's approval violated the National Environmental Policy Act (NEPA) and the Federal Land Policy and Management Act (FLPMA). The court found that the agency's decision did not violate NEPA because BLM took the requisite hard look at the impacts of the project on the bighorn sheep population and traffic flow through and around the project. The court also found that the BLM's decision did not violate FLPMA because the agency applied the correct legal standing when approving the project, its findings under FLPMA were not arbitrary and capricious, and that it gave the appropriate scrutiny to the portions of the project affecting Arkansas Canyonlands Area of Critical Environmental Concern.

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D.C. CIRCUIT

District of Columbia

Oceana, Inc. v. Pritzker, 2014 WL 7174875 (D.D.C. Dec. 17, 2014).

The U.S. District Court for the District of Columbia rejected a challenge to a Biological Opinion (BiOp) issued by the National Marine Fisheries Service (NMFS) related to the impacts of the operation of the Atlantic Sea Scallop Fishery on the Northwest Atlantic population segment of loggerhead sea turtles. The BiOp had concluded that the operations of the fishery would not jeopardize the existence of the sea turtles. The court rejected the environmental group's contentions that the agency's determinations in the BiOp were arbitrary and capricious. The court did, however, remand a portion of the BiOp relating to the Incidental Take Statement to NMFS.

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