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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the September 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-15-03-09).

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THIRD CIRCUIT

New Jersey

***Horan v. Dilbet, Inc.*, 2015 WL 5054856 (D.N.J. Aug. 26, 2015).**

The U.S. District Court for the District of New Jersey denied a restaurant's motion for summary judgment in a case involving a customer's illness due to *Vibrio vulnificus*, a naturally occurring bacteria found in estuaries and sea waters that resides naturally in high numbers in filter feeding shellfish, such as oysters and clams. Although the court held that clams containing *Vibrio* are not a defective product per se under the New Jersey Products Liability Act, the court noted that evidence of negligent health practices at the restaurant precluded summary judgment in the restaurant's favor.

Opinion Here

FOURTH CIRCUIT

***Murray Energy Corp. v. U.S. E.P.A.*, 2015 WL 5062506 (N.D. W. Va. Aug. 26, 2015).**

The U.S. District Court for the Northern District of West Virginia held that a plaintiff's challenges to the newly effective "Clean Water Rule" must be filed in the United States Circuit Courts of Appeals; therefore, it lacked subject matter jurisdiction over the challenge. Specifically, the district court held that because plaintiff's challenge dealt with permitting requirements under the Clean Water Rule, exclusive appellate jurisdiction is required by § 509(b)(1)(E) of the Clean Water Act because the Clean Water Rule amounts to an "other limitation."

Opinion Here

FIFTH CIRCUIT

Ludlow v. BP, P.L.C., 2015 WL 5235010 (5th Cir. Sept. 8, 2015).

The Fifth Circuit Court of Appeals certified a "postspill" class of investors who sued BP P.L.C. for its misrepresentations about the scale of the 2010 Deepwater Horizon oil spill. The court rejected certification for a "prespill" class of investors who sued BP for its additional misrepresentations about the safety issues on the drilling platform before the oil spill. The postspill class damage model was based on a "stock price inflation" theory that BP's stock price was higher than it would have been had they been truthful about the scale of the disaster, and the damages were the difference between the true price and the paid price. The prespill class claimed that risk materialized in the form of the spill and BP's stock price fell as a result. The court held that the postspill investors' model supported certification because it could be applied uniformly across the entire class, while the prespill investors' theory lumped together those who *would* have bought the stock at the heightened risk with those who *would not* have. Therefore, the prespill investors' class damage model did not support certification.

Opinion Here

United States v. CITGO Petroleum Corp., 2015 WL 5201185 (5th Cir. Sept. 4, 2015).

The Fifth Circuit Court of Appeals held that Citgo Petroleum Corp.'s operation of uncovered oil tanks did not constitute an illicit "taking" of migratory birds under the Migratory Bird Treaty Act (MBTA). The court noted that the MBTA's ban on bird takings only applies to intentional takings that directly result in the deaths of migratory birds—not to omissions or incidental, direct, or accidental takings. This decision aligned the Fifth Circuit's view of the MBTA with that of the Eight and Ninth Circuits and reversed the district court's ruling.

Opinion Here

Ensco Offshore Co. v. M/V Satilla, 2015 WL 4720342 (5th Cir. Aug. 10, 2015).

Following a tanker's allission with Ensco Offshore's wrecked drilling rig, Ensco filed a limitation of liability claim. All claims were settled, except for a claim from the owners of the tanker who alleged Ensco was liable under 33 U.S.C. § 409 for failure to mark the wrecked rig. In a per curiam opinion, the U.S. Court of Appeals for the Fifth Circuit agreed with the district court and held that Ensco conducted a full, diligent, and good faith search of its wrecked drilling rig, despite the fact that the company did not search for the submerged wreckage in the area that the tanker allided with the rig.

Opinion Here

Texas

United States v. Lipar, 45 ELR 20164 (S.D. Tex., Aug. 30, 2015).

The U.S. District Court for the Southern District of Texas dismissed the EPA's enforcement action against a developer for filling wetlands in violation of the Clean Water Act (CWA). The court concluded that there was no continuous surface connection between a navigable water of the United States and the wetlands that would establish jurisdiction under the plurality test first set forth in *Rapanos v. United States*. Furthermore, the EPA could not establish jurisdiction under the Kennedy test (also promulgated in *Rapanos*) because the wetlands didn't have a substantial nexus to waters of the United States. Therefore, the developer was not required to seek permits prior to filling in the wetlands in question.

Opinion Here

EIGHTH CIRCUIT

***North Dakota v. U.S. E.P.A.*, 2015 WL 5060744 (D. N.D. Aug. 27, 2015).**

The U.S. District Court for the District of North Dakota preliminarily enjoined EPA's and the U.S. Army Corps of Engineers' controversial "Clean Water Rule." Thirteen states--Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota and Wyoming--challenged the rule, generally arguing that the rule was promulgated in violation of the Clean Water Act, the Administrative Procedure Act, and the National Environmental Policy Act. The district court ruled that original jurisdiction lies in the district court and not the court of appeals, and that the states are likely to succeed on the merits of their claims. The states also demonstrated that they will face irreparable harm absent a preliminary injunction. The court noted that a balancing of the harms and analysis of the public interest revealed that the risk of harm to the states is great and the burden on the agencies is slight. The district court, therefore, preliminarily enjoined the rule as it applies to the 13 states involved in the case.

Opinion Here

NINTH CIRCUIT

***Klamath-Siskiyou Wildlands Ctr. v. MacWhorter*, 2015 WL 4716812 (9th Cir. Aug. 10, 2015).**

The U.S. Court of Appeals for the Ninth Circuit reversed a district court's dismissal of suit for lack of subject matter jurisdiction. The Ninth Circuit held that the district court had subject matter jurisdiction over a citizen suit to enforce the U.S. Forest Service's obligations under the Endangered Species Act where the plaintiff's pre-suit notice letter gave sufficient information to allow the agency to identify third-party notices of intent to engage in mining operations that might result in a statutory violation.

Opinion Here

***ONRC Action v. U.S. Bureau of Reclamation*, 2015 WL 4978998 (9th Cir. Aug. 21, 2015).**

The U.S. Court of Appeals for the Ninth Circuit held that the U.S. Bureau of Reclamation did not violate the Clean Water Act (CWA) by discharging pollutants into the Klamath River without a permit in connection with its management of an irrigation project along the California-Oregon border. Environmental groups brought a CWA citizen suit against the agency, alleging that pollutants discharged into the river via a drain constituted an unlawful discharge; however, pursuant to the U.S. Supreme Court's decision in *Los Angeles County Flood District v. Natural Resources Defense Council*, no pollutants are "added" to a water body when water is merely transferred between different portions of that water body. Therefore, the court held that a permit was not required and affirmed the lower court's grant of summary judgment in favor of the agency.

Opinion Here

California

***W. Side Irrigation Dist. v. Cal. State Water Res. Control Bd.*, No. 34-2015-80002121 (Super. Ct. Cal. Aug. 3, 2015).**

A California court held that revised "curtailment letters" that the state water board sent to irrigation districts and water appropriators in the Central Valley no longer violated due process; therefore, the court denied the districts' motions for a preliminary injunction. The court previously ruled that the letters, which ordered the districts to stop diverting water from California's rivers and streams, were coercive in nature and went beyond the "informational" purpose the board claimed. The court noted that the revised letters made substantial changes in accordance with constitutional concerns. While the court agreed with the irrigation districts that it would have been more prudent to rescind the original curtailment letters in full and issue a new informational notice, the court noted that it is not its role to dictate how the board should exercise its discretion.

Opinion Here

Oregon

***Bandon Pac., Inc. v. Envtl. Quality Comm'n*, No. 1001950, 2015 WL 5037113 (Or. Ct. App. Aug. 26, 2015).**

An Oregon court reversed an order by the Environmental Quality Commission (EQC) imposing $200,266 in civil penalties against Bandon Pacific for violations of its National Pollutant Discharge Elimination System (NPDES) permit and state laws applicable to disposal of fish waste. The court held that the evidence that Bandon submitted at the administrative hearing was sufficient and that the EQC failed to provide a substantial reason for its conclusion that petitioner's violations were moderate in magnitude. Specifically, the court held that Bandon's evidence was sufficient to justify a penalty reflective of a minor, as opposed to moderate, magnitude violation because Bandon does not have to prove the precise concentration, volume, and toxicity of the discharged wastewater in order to rebut the presumption of moderate magnitude. Rather, Bandon's burden is to demonstrate that a minor magnitude is more probable than the presumed moderate magnitude.

Opinion Here

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