The National Sea Grant Law Center is pleased to offer the January ***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 and provide a link to the opinion. 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, just send an email to waurene@olemiss.edu with "*Case Alert*" on the subject line. MASGC 06-003-04

~ ~ April 18, 2006 ~ ~

FIRST CIRCUIT

Maine

Natural Res. Council of Me. v. Int'l Paper Co., 2006 U.S. Dist. LEXIS 13749 (D. Me. March 28, 2006).

International Paper filed a motion to dismiss a citizen suit filed by the Natural Resources Defense Council under the Clean Water Act, 33 U.S.C.S. § 1365(a)(1), which alleged that the company was discharging pollutants without a valid permit, that the Environmental Protection Agency (EPA) could not extend a permit beyond a period of five years, and that the company failed to timely file a renewal application. International Paper operates a paper mill along a river and discharges pollutants into the river under the terms of an EPA permit. The company timely applied for a renewal of the permit, which EPA renewed several years later. The EPA subsequently notified the company that it was withdrawing the renewal permit and that the company was to be subject to the terms of the original permit. A year later, the EPA transferred responsibility for issuing permits to the state. International Paper now operates under a permit from the state. The district court granted the company's motion to dismiss, holding that the company had continuously operated with a permit because its EPA-issued permit continued in force until the state issued its permit.

Massachusetts

Dominion Energy Brayton Point v. Johnson, 2006 U.S. App. LEXIS 8205 (1st Cir. March 30, 2006).

Dominion Energy appealed a decision of the United States District Court for the District of Massachusetts, which dismissed its suit against the EPA for lack of subject matter jurisdiction. Dominion alleged that the EPA improperly failed to grant the owner's request for a formal evidentiary hearing after issuing a proposed final National Pollution Discharge Elimination System (NPDES) permit. Dominion had applied for renewal of its NPDES permit and a thermal variance authorization. The EPA issued a proposed final permit, in which it rejected the requested thermal variance and Dominion sought review before the Environmental Appeals Board and asked for an evidentiary hearing. The Board accepted the petition for review but declined to convene an evidentiary hearing, based on its rule that an evidentiary hearing was not required under § 403(a) or § 316(a) of the Clean Water Act (CWA), 33 U.S.C.S. §§ 1342(a), 1326(a). Dominion filed suit t o compel the Board to hold an evidentiary hearing. The district court dismissed the suit, holding that the suit constituted a direct challenge to the EPA's hearing rule and, thus, came within the exclusive jurisdiction of the circuit court under 33 U.S.C.S. § 1369(b)(1)(E). In affirming the district court's decision, the court held that the EPA's conclusion that an evidentiary hearing was not required was a reasonable interpretation of 33 U.S.C.S. § 1342(a) and § 1326(a) and entitled to deference.

Frontier Fishing Corp. v. Evans, 2006 U.S. Dist. LEXIS 16243 (D. Mass. March 31, 2006).

Frontier Fishing challenged NOAA's assessment of a fine and permit sanction for allegedly fishing in a Restricted Gear Area contrary to regulations promulgated under the Magnuson-Stevens Fisheries Conservation and Management Act. Frontier Fishing argued that the vessel speed and track indicated by the radar positions and presented by NOAA did not fit the common practice of a bottom trawler in tow and could not have been carried out by the *F/V Settler* if she was trawling; and that it would have been impossible for the *F/V Settler* to move from the radar target's position to where it was observed by Commander Diaz. The district court agreed and found that the Secretary's Findings and Order rested upon a factual premise that was not tenable and had to be set aside.

Rhode Island

Duckworth v. United States, 2006 U.S. Dist. LEXIS 13859 (D. R.I. March 22, 2006).

Gregory N. Duckworth and his corporation, *F/V Reaper*, Inc. were fined $50,000 by NOAA for unlawfully catching and possessing monkfish in federal waters without a federal permit. Duckworth sought review of the imposed civil penalty. The Rhode Island District Court upheld the findings of the Administrative Law Judge that the $50,000 assessment reasonably reflected the gravity, nature, and circumstances of the violation. The ALJ emphasized Duckworth's experience as a fisherman, his ineffective attempts to wiggle out of being caught red-handed, and the deterrent effect of the penalty. g of the application violated statutory and regulatory provisions and exceeded the authority granted to the CRMC, and was arbitrary and capricious. The court also found that the CRMC's decision was affected by error of law and was characterized by an abuse of discretion. The court reversed the CRMC's decision.

THIRD CIRCUIT

New Jersey

In re Stormwater Mgmt. Rules, 2006 N.J. Super. LEXIS 107 (N.J. Super. Ct. App. Div. April 12, 2006).

A builders association filed suit challenging N.J. Admin. Code § 7:8-5.5(h), which was enacted by the New Jersey Department of Environmental Protection (DEP) to implement the New Jersey Stormwater Management Act and requires 300-foot buffer zones on each side of Category One waters and their tributaries. The association argued that the regulation falls outside the scope of the DEP's statutorily delegated authority. The New Jersey Superior Court disagreed and held that the DEP acted within the scope of its delegated authority to deal with water quality and quantity, stormwater management, and non-point sources of pollution.

FOURTH CIRCUIT

Maryland

Potomac Riverkeeper, Inc. v. EPA, 2006 U.S. Dist. LEXIS 14837 (D. Md. March 31, 2006).

Potomac Riverkeeper alleged that EPA failed to comply with its statutory mandates to oversee the timely development of Total Maximum Daily Loads (TMDLs) by the State of Maryland in violation of the Clean Water Act. The plaintiff was challenging the pace of Maryland's TMDL program and the priority accorded to specific waterways by that program. The court held that the Potomac Riverkeeper failed to prove the EPA's decision not to intervene in Maryland's TMDL program was invalid.

FIFTH CIRCUIT

Louisiana

Taira Lynn Marine Ltd. No. 5, LLC v. Jays Seafood, 2006 U.S. App. LEXIS 7307 (5th Cir. March 23, 2006).

Appellants challenged the decision entered by the United States District Court for the Western District of Louisiana that denied appellants' motions for partial summary judgment to dismiss the claims filed by claimants, 14 businesses and business owners, who sought to recover their economic losses as a result of a maritime allision. The primary issue on appeal was whether the claimants, who suffered no physical damage to a proprietary interest, could recover for their economic losses as a result of a maritime allision. Appellants argued that the district court erred in denying their motions for partial summary judgment because certain claimants did not suffer physical damage to a proprietary interest. The appellate court determined that it was error for the court to deny appellants' motions for partial summary judgment. The claimants had not alleged that they incurred costs in acting to contain the gaseous cargo; therefore none of t he claimants was entitled to recover under the Comprehensive Environmental Response, Compensation, and Liability Act. The court also found that the claimants had not raised an issue of fact as to whether their economic losses were due to damage to property resulting from the discharge of gas, and they could not recover under the Oil Pollution Act.

NINTH CIRCUIT

Hawaii

MacDonald v. Kahikolu Ltd., 2006 U.S. App. LEXIS 7901 (9th Cir. March 31, 2006).

MacDonald challenged the decision entered by the United States District Court for the District of Hawaii in favor of MacDonald's employer, Kahikolu Ltd., which conducts whale watching, scuba, and snorkel tour boat cruises. MacDonald filed suit under the Jones Act alleging that his employer failed to provide him with a safe, proper, and suitable work environment. MacDonald was periodically required to do free dives to retrieve mooring lines that had sunk to the sea floor. During a free dive, he sustained an injury to his left ear which left him with permanently severe to profound hearing loss and related maladies. Following a bench trial, MacDonald sought reversal on the ground that the trial court erred in concluding that his employer's failure to comply with the United States Coast Guard regulations did not establish negligence per se liability under the Jones Act. The appellate court vacated the judgment and remanded for the limit ed purpose of having the district court make a finding as to whether the employer's failure to provide an operations manual to the person-in-charge of the vessel, as required by the Coast Guard's scuba diving regulations, played any part, no matter how slight, in producing the injury to the employee.

Washington

Wash. Shell Fish, Inc. v. Pierce County, 2006 Wash. App. LEXIS 536 (Wash. Ct. App. March 28, 2006).

Washington Shell Fish, Inc. challenged a decision of the Superior Court of Thurston County, Washington affirming Pierce County's orders to cease and desist planting and harvesting geoducks without shoreline permits and to cease and desist working in eelgrass beds without authorization as required by the Shoreline Management Act and Growth Management Act. The Washington Court of Appeals held that the company engaged in development under Pierce County, Wash., Code § 20.76.030 when it harvested and planted geoducks on the leased properties because the activities prevented the general public from using certain areas of the water. Since the company engaged in shoreline development worth more than $2500, this constituted a substantial development under § 20.76.030. The court also held that § 20.24.030(A) did not exempt commercial geoduck harvesting from the need for a shoreline substantial development permit and that the county properly o rdered the company to cease working in eelgrass beds on the property where the hearing examiner found that the company was working without the necessary authorization.

ELEVENTH CIRCUIT

Florida

Miccosukee Tribe of Indians v. United States, 2006 U.S. Dist. LEXIS 10595 (S. Fla. March 14, 2006).

The Miccosukee Tribe and several environmental groups challenged the water management decisions of the United States and its Army Corps of Engineers impacting the Everglades. The plaintiffs alleged violations of the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Administrative Procedure Act (APA), and the Federal Advisory Committee Act (FACA). Plaintiffs claimed that new structures and features not included in the Corps's environmental impact statement (EIS) doubled the pumping capacity of the water conveyance system and increased the reservoir capacity tenfold. The court held that cobbling together portions of two older projects to modify a newer plan was inappropriate and the Corps's failure to prepare a supplemental EIS violated NEPA. The court, however, granted the Corps's motion for summary judgment as to all other claims.

D.C. CIRCUIT

Sierra Club v. Flowers, 2006 U.S. Dist. LEXIS 12579 (D. D.C. March 22, 2006).

Sierra Club filed suit against the U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service claiming that the government's issuance of mining permits violated environmental statutes. In 1991 the limestone mining industry approached federal, state, and local government regulators with a sixty-year plan for mining in wetlands in southeastern Florida, in an area described by the industry as the "Lake Belt," near Everglades National Park. The mining plan included significant new areas of mining as well as continued mining in areas previously permitted, and required the destruction of tens of thousands of acres of wetlands to reach the limestone rock. The court found an underlying theme of pre-determination based on historical mining in the Everglades area and that the agencies negotiated with the miners rather than serving as regulatory agencies. The court also held that the environmental impact statement was inaccu rate, incomplete, and unclear; its analysis of alternatives was misleading; methods for protecting the water supply were not established; seepage impacts were not mitigated for; and the Corps failed to account for foreseeable loss of species habitat. In addition, because the agencies determined that an endangered species was in the area, the Corps should have done a Biological Assessment. The court entered a judgment for the environmental groups on their claims. The matter was remanded to the Corps for further development.

Hornbeck Offshore Transp., LLC v. U.S. Coast Guard, 2006 U.S. Dist. LEXIS 14354 (D. D.C. March 27, 2006).

Hornbeck Offshore Transportation filed suit against the Coast Guard alleging that the agency's assignment of a phase-out date for its barge under the Oil Pollution Act of January 1, 2005, rather than January 1, 2015, violated the Administrative Procedure Act (APA). In 2004, the barge's gross tonnage was 4660 gross tons using the Convention measurement system. The court held that the barge's phase-out date should have been January 1, 2015. The Coast Guard's assignment of a 2005 phase-out date was therefore arbitrary, capricious, and otherwise not in accordance with the law, in violation of the APA.

Millennium Pipeline Co., L.P. v. Gutierrez, 2006 U.S. Dist. LEXIS 14273 (D.D.C. March 31, 2006).

During its appeal of New York's objection to its pipeline project, Millennium Pipeline claimed the Secretary of Commerce exceeded his statutory authority under the Coastal Zone Management Act by extending the six-month period for state action during consistency review. The court held that the mere submission of a consistency certification did not commence CZMA review until the company provided all necessary information and data specified by the state. The Secretary did not abuse his discretion in finding that an agreement between the company and the state to stay the consistency time period was lawful. In addition, the Secretary's conclusion that the pipeline was unnecessary to national security was not an abuse of discretion even though it was contrary to two agencies' advice.

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