

~ ~ August 16, 2006 ~ ~

FIRST CIRCUIT

The Puerto Rico Ports Authority v. Umpierre-Solares, 2006 U.S. App. LEXIS 18797 (1st Cir. July 27, 2006).

The Puerto Rico Ports Authority sued contractors Umpierre-Solares to enforce a contract for the removal and disposal of a sunken vessel. The United States District Court for the District of Puerto Rico had admiralty jurisdiction over the case, because the contract related to a vessel that was lying at the bottom of the harbor, obstructing navigation. The district court granted summary judgment for Umpierre-Solares and denied the Ports Authority's motion to alter, amend, or vacate the judgment. The Court of Appeals upheld the district court's ruling that the Ports Authority was barred by laches from bringing suit. The court found that the 11-year delay in bringing suit was unreasonable, in light of the fact that plaintiffs had knowledge that the vessel had not been removed during that time. The court held that, even assuming that the 15-year statute of limitations set forth in 31 P.R. Laws Ann. § 5294 was analogous to the case, the fact that plaintiffs filed their action before the end of that time did not keep their lawsuit from being barred.

Commercial Union Insurance, Co. v. Pesante, 2006 U.S. App. LEXIS 20391 (1st Cir. Aug. 9, 2006).

Commercial Union Insurance appealed the entry of summary judgment issued by the United States District Court for the District of Rhode Island. The insurance company argued that it was not liable under a marine insurance policy it had issued to Dean Pesante. The policy for Pesante's boat contained an express warranty stating that the only commercial use of the insured vessel could be for lobstering. Pesante admitted that he used the boat for gill netting and had never used the boat for lobstering. The insurer claimed that the misrepresentation by Pesante was material and that the policy was voidable under either federal or Rhode Island law. The Court of Appeals found that the insurer would not have insured the vessel at the quoted price if it had known the vessel would be used for gill netting. The court agreed that the material misrepresentation made the policy voidable.

Massachusetts

U.S. v. Massachusetts, 2006 U.S. Dist. LEXIS 50093 (D. Mass. July 24, 2006).

The United States, along with shipping trade associations, sought to invalidate provisions of Massachusetts' Act Relative to Oil Spill Prevention and Response in Buzzards Bay and Other Harbors and Bays of the Commonwealth (OSPA). The OSPA provisions: 1) prohibited vessels with certain design characteristics from docking, loading, or unloading in state waters; 2) set forth manning and navigation watch requirements for towing vessels and tank barges; 3) required vessels carrying oil in certain state waters to take on and employ a Massachusetts licensed pilot; 4) required tank vessel owners and operators to implement alcohol and drug testing policies and procedures, and to equip their vessels to carry out such testing; 5) mandated tugboat escorts for tank vessels traveling in certain waters of the state; 6) required tank vessels to follow mandatory vessel routes through state waters; and 7) required any vessel carrying oil in state waters to present a certificate of financial assurance to the state. The United States District Court for the District of Massachusetts held that the provisions were preempted by federal law and unconstitutional under the Supremacy Clause of the U.S. Constitution.

SECOND CIRCUIT

Vermont

Beyers v. Water Resources Board, 2006 Vt. LEXIS 170 (Vt. July 31, 2006).

The Water Resources Board issued rules to protect the Chittenden Reservoir, a body of water located in the Green Mountain National Forest. The rules were promulgated to protect wildlife, as well as to provide for public safety. The rules included a prohibition against personal watercraft, a five mile-per-hour speed limit, and a prohibition on waterskiing. Robert Beyers, a riparian landowner, filed a complaint in Washington Superior Court seeking invalidation of the rule and alleging that the board violated its own statutory and regulatory guidelines. The superior court held that it was within the board's authority to regulate the use of public waters. On appeal, the supreme court affirmed the decision, finding that the court acted within the scope of its authority, made findings supported by the evidence, and articulated a rational explanation for its decisions.

FOURTH CIRCUIT

U.S. v. Hillyer, 2006 U.S. App. LEXIS 19306 (4th Cir. Aug. 1, 2006).

Michael Hillyer, a construction project manager, pled guilty to the violation of two environmental law violations. The crimes occurred during the construction of a bridge in North Carolina's Croatan Sound, when Hillyer directed employees to dredge in violation of existing permits. The United States District Court for the Eastern District of North Carolina sentenced Hillyer to a three-year term of probation. The district court based its sentencing on an aberrant behavior sentencing departure under U.S. Sentencing Guidelines Manual § 5K2.20. The court of appeals found that Hillyer's actions did not warrant a departure from the guidelines, given that his conduct constituted multiple criminal acts. Additionally, the court considered that the contractor's conduct required considerable planning and persisted for 10 days. The court remanded the case for resentencing, without allowing a departure from the sentencing guidelines.

EIGHTH CIRCUIT

Noe v. Henderson, 2006 U.S. App. LEXIS 20113 (8th Cir. Aug. 7, 2006).

The United States District Court for the Eastern District of Arkansas found that Arkansas' regulation of captive-reared mallard ducks was not preempted by federal law. Arkansas businessmen appealed the grant of summary judgment. On appeal, the Court of Appeals upheld the district court's ruling, finding that Congress specifically left room in the Migratory Bird Treaty Act for states to regulate. The court also found that none of the state regulations were in conflict with the federal act. The court's ruling allows states to regulate the breeding and sales of migratory birds reared in captivity, provided the state regulations are in line with federal law.

NINTH CIRCUIT

Northern Alaska Environmental Center v. Kempthorne, 2006 U.S. App. LEXIS 18677 (9th Cir. July 26, 2006).

Environmental groups alleging violations of the National Environmental Policy Act and the Endangered Species Act, brought suit against the Alaska Bureau of Land Management (BLM), the Fish and Wildlife Service (FWS), and the Department of the Interior. The lawsuit stemmed from the BLM's plan to offer long-term oil and gas leases in the Northwest Planning Area of Alaska. The United States District Court for the District of Alaska granted summary judgment for the defendants. On appeal, the environmental groups argued that the Final Environmental Impact Statement lacked site-specific analysis for particular locations where drilling might occur. The court of appeals agreed with the district court that the BLM satisfied the NEPA's requirements by providing a resource-by-resource analysis. The court found that a parcel-by-parcel analysis of potential environmental effects would be inappropriate because the parcels that would be affected were not yet known. The court also decided that the Biological Opinion issued by the FWS did not violate the ESA, since it properly relied on a reasonable and foreseeable oil development scenario.

Cowlitz Indian Tribe v. FERC, 2006 U.S. App. LEXIS 19129 (9th Cir. July 27, 2006).

The Cowlitz Indian Tribe sought review of two orders issued by the Federal Energy Regulatory Commission (FERC). The orders issued a license for the continued operation of a hydroelectric project by the city of Tacoma and amended the license based on a Biological Opinion prepared by the National Marine Fisheries Service (NMFS). The tribe argued that the FERC acted arbitrarily and capriciously in issuing the orders. The court found that by thoroughly reviewing the city's compliance with its original license, the FERC was reasonable in declining to initiate further investigation. The court also held that the NMFS' conclusions in the Biological Opinion were not arbitrary and capricious, but based on the best evidence. Additionally, the court found that FERC's conclusion that the license provided for adequate flood protection was correct.

N. California River Watch v. City of Healdsburg, 2006 U.S. App. LEXIS 20531 (9th Cir. August 10, 2006).

North California River Watch brought suit against the city of Healdsburg for violations of the Clean Water Act (CWA). The city had discharged sewage from its waste treatment plant into Basalt Pond, without first obtaining a National Pollutant Discharge Elimination System permit (NPDES). The city argued that the pond was not subject to the CWA. The United States District Court for the Northern District of California found that the pond was subject to the CWA, because the pond contained wetlands adjacent to a navigable waterway. The Court of Appeals upheld the district court's decision, but followed *Rapanos v. U.S.*, a recent Supreme Court case narrowing the definition of navigable waterways under the CWA. *Rapanos*

requires a waterway to have a significant nexus to a waterway that is in fact navigable. The court found that because the Basalt Pond's water seeps directly into the Russian River, the definition of navigable waterway was met, and the pond is subject to the requirements of the CWA.

Hawaii

Kelly v. 1250 Oceanside Partners, 2006 Haw. LEXIS 413 (Haw. July 28, 2006).

1250 Oceanside Partners planned a large-scale development on property situated between Kailua-Kona and Kealahou on the island of Hawaii. Protect Keopuka Ohana (PKO), along with other concerned citizens, brought suit against the County of Hawaii and the Department of Health (DOH), alleging that the ocean waters off this coastline were being polluted in violation of the organization's NPDES permit. On appeal from the circuit court, the supreme court held: the county has an affirmative duty to protect the waters adjacent to the property; the plaintiffs failed to establish that the county breached its public trust duties with respect to water pollution; that the DOH has a duty under the public trust doctrine to protect the waters adjacent to the property, but the DOH did not violate its public trust duties in relation to construction activities on the property.

ELEVENTH CIRCUIT

Alabama

State v. United States Army Corps of Engineers, 2006 U.S. Dist. LEXIS 53258 (D. Ala. July 25, 2006).

The state of Florida filed a renewed motion for a temporary restraining order (TRO) in an effort to protect mussels listed as threatened under the Endangered Species Act (ESA). The TRO would have required the U.S. Army Corps of Engineers to maintain minimum water releases from a dam that the Corps operated upstream from the mussels' habitat. While the parties had been awaiting a biological opinion from the U.S. Fish and Wildlife Service (FWS), they had reached a settlement agreement requiring the corps to release additional water to protect the mussels. The settlement expired before the FWS issued its opinion. In applying Florida's four-prong test for injunctive relief, the court found that the state failed to show the causal link between the Corps' actions and the harm to the mussels. The lack of causal link demonstrated the unlikelihood of success on the merits, and the court denied the renewed motion for a TRO.

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