

~ ~ December 15, 2006 ~ ~

## SUPREME COURT

*Massachusetts v. Environmental Protection Agency*, Case No. 05-1120.

On November 29, the Supreme Court heard oral arguments in *Massachusetts v. EPA*. The Sierra Club, the Natural Resources Defense Council, twelve states, three major cities, and other environmental groups brought the case in an effort to require the EPA to regulate carbon dioxide and other greenhouse gases as air pollutants under the Clean Air Act. The D.C. Circuit previously upheld the EPA's assertion that it had no authority to regulate the gases. A transcript of the oral argument is available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/05-1120.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1120.pdf)

## FIRST CIRCUIT

### Massachusetts

*Giovannella v. Conservation Commission of Ashland*, 447 Mass. 720 (Nov. 28, 2006).

When a Massachusetts property owner attempted to get approval to build a house on one of his two adjoining lots, the town conservation commission denied the request. The commission noted that the lot contained wetlands and a wetlands buffer and that construction could cause pollution and loss of wildlife habitat. The Superior Court Department, Middlesex, upheld the commission's ruling, and the property owner appealed to the Massachusetts Supreme Court, seeking damages for a regulatory taking. The court ruled that there was no taking, because the property owner was able to sell his other lot for a substantial profit; therefore, the commission's ruling did not leave the land economically valueless.

## SECOND CIRCUIT

*Cassidy v. Chertoff*, 2006 U.S. App. LEXIS 29388 (2d Cir. Nov. 29, 2006).

Two commuters claimed that a ferry company's practice of searching carry on baggage of randomly selected passengers and vehicles violated the Fourth Amendment. The Maritime Transportation Security Act of 2002 requires owners and operators of ferries that weigh over 100 gross tons to implement certain safety regulations. The U.S. District Court for the District of Vermont granted the ferry company's motion to dismiss. The Second Circuit affirmed the district court's ruling, finding that the searches fell under the special needs doctrine which applied due to the threat of terrorist attacks on large vessels engaged in mass transportation. The court also held that the searches were minimally intrusive and did not constitute an unreasonable method of preventing terrorist attacks.

## FIFTH CIRCUIT

*Hyman v. Transocean Offshore U.S.A., Inc.*, 2006 U.S. App. LEXIS 29802 (5th Cir. Dec. 5, 2006).

An employee injured on a staircase of a mobile offshore drilling unit removed a skid resistant plate from the staircase in order to take a photograph replicating the circumstances of his injury. He was subsequently fired. The employee brought claims against his employer under the Jones Act and general maritime law for his injuries and other claims regarding his discharge. The United States District Court for the Eastern District of Louisiana granted summary judgment for the employer. On appeal, the Fifth Circuit affirmed the judgment, finding that the employee could not bring a claim under the Jones Act, since the drilling unit was still under construction and not yet a vessel in navigation. The Jones Act did apply to the employee's discharge, since the vessel was in navigation at the time of his termination; however, the court rejected the employee's claims noting that he was discharged for disassembling the staircase without asking permission, not for filing a personal injury suit.

*Fuesting v. Lafayette Parish Bayou Vermilion Dist.*, 2006 U.S. App. LEXIS 28135 (5th Cir. Nov. 14, 2006).

Michael Fuesting's boat allided with an unmarked, sunken shrimp boat. The parish district, with permission from the shrimp boat's owner, had previously tried to refloat and remove the shrimp boat from the river, but was unsuccessful. Fuesting brought a claim against the parish and its insurer under the Wreck Act and a negligence claim under general maritime law. The United States District Court of the Western District of Louisiana granted summary judgment in favor of the parish and its insurer, citing the district's immunity from suit under local law. The Court of Appeals for the Fifth Circuit reversed that decision holding that an entity that enters into a towing contract may be considered an operator under the Wreck Act. The Fifth Circuit remanded the case to the district court to consider several matters, including whether the district was immune from suit under the under the U.S. Constitution.

### Mississippi

*Sierra Club v. Mississippi Environmental Quality Permit Board*, 2006 Miss. LEXIS 657 (Miss. Nov. 30, 2006).

After the Mississippi Environmental Quality Permit Board issued an air pollution control permit to the owner of a pig farm, several residents around the farm appealed the permit. The Oktibbeha County Chancery Court upheld the permit board's decision. The Mississippi Supreme Court upheld the chancery court's ruling, finding that the permit provided adequate controls that complied with regulation requirements and that the permit board had correctly interpreted the state's Air Quality Standard APC-S-4.

### Texas

*United States v. Kun Yun Jho*, 2006 U.S. Dist. LEXIS 87493 (D. Tex. Dec. 4, 2006).

A chief engineer of a vessel and the vessel's owner were charged with violating several U.S. Coast Guard regulations for failing to maintain an Oil Record Book for the vessel. The owner and chief engineers were not charged with polluting U.S. waters, so it could only pursue civil penalties for violations of the regulations by foreign-flag ship personnel under the United Nations Conference on the Law of the Sea.

## SIXTH CIRCUIT

*West American Insurance Co. v. Prewitt*, 2006 U.S. App. LEXIS 30285 (6th Cir. Dec. 8, 2006).

After a dam was constructed in a creek, a lake formed on privately owned land. The lake was located behind the fence of a property owner and several neighbors sought a declaratory judgment that the creek was a statutory navigable stream and that its waters, including the lake, are owned by the state, giving the public access for fishing, boating, and recreational purposes. The District Court of Coryell County, Texas, enjoined the owner from interfering with public access to the stream and the lake. On appeal, the Texas Tenth District Court of Appeals held that only the stream was a navigable water available for public use under Texas Natural Resources Code Annotated § 21.001(3).

## NINTH CIRCUIT

*California Sportfishing Protection Alliance v. FERC*, 2006 U.S. App. LEXIS 30412 (9th Cir. Dec. 12, 2006).

The California Sportfishing Protection Alliance and other environmental groups brought suit to review the Federal Energy Regulatory Commission's decision not to initiate a formal consultation with the National Marine Fisheries Service about a Pacific Gas and Electric hydroelectric project. The Ninth Circuit held that there was no action that triggered the Endangered Species Act's consultation requirement, since the thirty-year license was issued in 1980 and the only relevant agency action under contemplation was the renewal of the license.

*United States v. Oregon*, 2006 U.S. App. LEXIS 29663 (9th Cir. Dec. 4, 2006).

The Yakama Nation brought an action to enjoin the Wenatchi Tribe from fishing at their aboriginal fishery. The United States District Court for the District of Oregon ruled in favor of the Yakama Nation, reasoning that an action brought on behalf of the Wenatchi Tribe in 1994 had a res judicata effect on the current proceeding. The Court of Appeals for the Fifth Circuit reversed the decision, because the 1994 action dealt with treaty fishing rights, not fishing rights in general.

*Peru v. USS Mo. Memorial Association*, 2006 U.S. App. LEXIS 28859 (9th Cir. Nov. 20, 2006).

A tourist was injured while climbing a ladder aboard the naval-historical museum in the USS Missouri. The tourist brought a negligence action, invoking maritime jurisdiction. The United States District Court for the District of Hawaii dismissed the case for lack of jurisdiction. The Ninth Circuit affirmed the district court's ruling and dismissed the case, since the defective ladder could not possibly have disrupted maritime commerce, a requirement for maritime jurisdiction to be invoked.

## ELEVENTH CIRCUIT

*United States v. Ardila-Rengifo*, 2006 U.S. App. LEXIS 29093 (11th Cir. Nov. 22, 2006).

The United States Coast Guard boarded a vessel and found 99 bales of cocaine. The district court gave one of the crew an enhanced sentence, based on the fact that he was the captain of the vessel. The "captain" appealed the severity of his sentence. The Eleventh Circuit Court of Appeals affirmed the district court's captain enhancement, since the defendant was paid more than the other crew, had navigational equipment before the trip, the crew considered him to be the captain, and he sometimes drove the boat.

### Florida

*Sierra Club v. United States Army Corps of Engineers*, 2006 U.S. Dist. LEXIS 85132 (D. Fla. Nov. 19, 2006).

The Sierra Club and the National Resources Defense Council filed suits against the Army Corps of Engineers claiming that a regional general permit was issued in violation of the Clean Water Act (CWA). The permit authorized the dredge and fill of wetlands. The District Court for the Middle District of Florida ruled in favor of the Corps, finding that the Corps' could use the special and general conditions of the permit to make its CWA pre-permit minimal effects findings under 33 U.S.C.S. § 1344(e)(1).

*Mid-Chattahoochee River Users v. Florida Department of Environmental Protection*, 2006 Fla. App. LEXIS 19557 (Fla. 1st DCA Nov. 22, 2006).

The Florida Department of Environmental Protection denied a permit application by the U.S. Army Corps of Engineers regarding the dredging of a river. The Mid-Chattahoochee River Users, an association of public and private corporations in Georgia and Alabama, petitioned the Department for an administrative hearing, which was denied on the basis that the group lacked standing. The court found that the association's economic injury was not the type of injury that an administrative hearing was designed to protect and affirmed the dismissal of the complaint.

## DC CIRCUIT

### District of Columbia

*Association of Community Organizations for Reform Now v. FEMA*, 2006 U.S. Dist. LEXIS 86048 (D.D.C. Nov. 29, 2006).

The Federal Emergency Management Agency terminated short-term housing benefits for hurricane evacuees and attempted to transfer the evacuees into its long-term rental housing assistance program under § 408 of the Stafford Disaster Relief and Emergency Assistance Act. During the transition, the computer program that was intended to automatically make benefit terminations left thousands without any benefits and generated form letters lacking detailed explanations for the benefit denials. The court ruled that FEMA violated the Due Process Clause when it failed to give meaningful notice of why the benefits were denied.

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