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 06-003-05

~~ May 19, 2006 ~~

U.S. SUPREME COURT

S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 2006 U.S. LEXIS 3955 (May 15, 2006).

The Supreme Court held that a processing plant owner's operation of a dam to produce hydroelectricity could result in a discharge into navigable waters, and thus, the owner was required to obtain a state certification under § 401 of the Clean Water Act.

FOURTH CIRCUIT

Holly Hill Farm Corp. v. U.S., 2006 U.S. App. LEXIS 11375 (4th Cir. May 8, 2006).

The United States Department of Agriculture (USDA) denied a farm owner's application for farm benefits under 16 U.S.C. §§ 3821(c) and 3822(i) because the agency found that he had converted a one-acre field from a wetland to a pastureland. The USDA's decision resulted in the denial of farm benefits for the owner's entire 650 acres. The Fourth Circuit affirmed the district court's grant of summary judgment to the USDA because the evidence, which included aerial photos and testimony by a government inspector, supported the agency's determination that the land was converted to pastureland.

Virginia

Cherrystone Inlet, LLC v. Bd. of Zoning Appeals, 2006 Va. LEXIS 35 (Va. Ct. App. April 21, 2006).

A county board of zoning appeals denied Cherrystone Inlet's application for variances to permit residential construction on five lots of land located within a preservation area under the Chesapeake Bay Preservation Act (Act). Cherrystone's land was subject to zoning regulations that imposed setback requirements from the shore and the road that overlapped, rendering all but one of the lots unbuildable. Cherrystone knew when it purchased the land that, without variances, only one residence could be built. The Virginia Circuit Court affirmed the zoning board's decision and Cherrystone appealed. The Virginia Court of Appeals affirmed finding that Cherrystone had not established that the lots existed in 1988, when the Act took effect, and failed to show that denial of the variances interfered with all reasonable beneficial uses of the property since the parcel could have been treated as one large lot with a single residence on the portion unaffected by the setback requirements.

FIFTH CIRCUIT

Louisiana

La. Envtl. Action Network v. United States Army Corps of Eng'rs, 2006 U.S. Dist. LEXIS 24344, (E.D. La. April 27, 2006).

Louisiana Environmental Action Network and Citizens for a Strong New Orleans East sued for declaratory and injunctive relief against the Army Corps of Engineers seeking to stop the Corps' issuance of an emergency permit to Waste Management of Louisiana for the purpose of dumping hurricane construction and demolition debris at 16600 Chef Menteur Highway, a site mostly comprised of navigable waters of the United States and adjacent to the Bayou Sauvage National Wildlife Refuge. Plaintiffs complained about the lack of public notice and an opportunity to comment, and they questioned whether emergency status still existed. The court found that the plaintiffs had not shown a substantial likelihood that they would succeed on the merits of their Clean Water Act or National Environmental Policy Act claims because the Corps is currently considering Waste Management's application for a permit and plans to issue a public notice. In addit ion, the court found that although the removal work should have begun months ago, no reasonable person could argue that an emergency does not still exist in New Orleans as the result of Hurricane Katrina.

SEVENTH CIRCUIT

Tagliere v. Harrah's Ill. Corp., 2006 U.S. App. LEXIS 10945 (7th Cir. May 3, 2006).

Tagliere appealed an order of the Illinois District Court dismissing her admiralty action against Harrah's for injuries sustained after falling off a stool on a riverboat casino. Tagliere filed suit within the three-year statute of limitations applicable to admiralty tort suits, but the statute of limitations applicable to personal-injury suits under Illinois law was only two years. The Seventh Circuit noted that a boat which is permanently moored or otherwise rendered practically incapable of transportation or movement is not a "vessel" for purposes of admiralty jurisdiction. However, no evidence had been presented that Harrah's' boat, though stationary for the past two years, was permanently moored. The court reversed the district court and remanded the case for further proceedings. Harrah's may attempt to prove on remand that its boat is permanently, rather than indefinitely moored, and therefore no longer a &quo t;vessel."

NINTH CIRCUIT

Alaska

Alaska Bd. of Fisheries v. Grunert, 2006 Alas. LEXIS 53 (Alaska April 21, 2006).

The Alaska Board of Fisheries and the Alaska Department of Fish and Game sought review of the invalidation of Alaska Admin. Code tit. 5, § 15.358 (2005) by the Alaska Superior Court. The court found that former Emergency Regulation 5, Alaska Admin. Code tit. 5, § 15.358, which amended the invalid tit. 5, § 359 creating a cooperative fishery was also invalid because it was not a valid exercise of the board's authority and the regulation still allowed permit holders in the cooperative to benefit economically from the work of others in violation of the Limited Entry Act.

City of St. Paul v. Alaska, 2006 Alas. LEXIS 48 (Alaska April 21, 2006).

The City of St. Paul applied to the Alaska Department of Natural Resources for a conveyance of state-owned tidelands. The Commissioner of the Department approved the city's request for conveyance, but used the adjoining uplands owner's method for describing the conveyed tidelands' boundary. The city argued that the Commissioner lacked authority to decide the disputed boundary through administrative adjudication and that the dispute could only be resolved in a judicial action. The Alaska Supreme Court found that in approving a city's request for a conveyance of state-owned tidelands, the Commissioner of the Alaska Department of Natural Resources did not adjudicate a disputed boundary between the city and an adjoining uplands owner. The court also found that Alaska Stat. § 38.05.825 does not require the Commissioner to resolve the parties' incipient boundary dispute. By using the statutory definition of tidelands to describe th e conveyance, the Commissioner properly avoided addressing the boundary dispute, leaving the point open for judicial resolution if it arises in a future court action.

California

Benson v. California Coastal Comm'n, 2006 Cal. App. LEXIS 687 (Cal. Ct. App. May 9, 2006).

Benson challenged the California Coastal Commission's issue determination and findings at a de novo hearing regarding the developer's application for a coastal development permit. The Superior Court of San Luis Obispo County, California denied the developer's petition for review. The California Court of Appeals found on appeal that the developer was not denied due process, even though he was not present at the hearing. Written notice of de novo hearing was adequate because the California Coastal Commission sent developer a copy of opponents' appeal. The appeal stated the issues on which it was based. There was no need for the notice to specify what issues would be considered at the hearing, as the developer was aware of what issues were in contention.

ELEVENTH CIRCUIT

Florida

Save Our Beaches v. Fla. Dep't of Envtl. Prot., 2006 Fla. App. LEXIS 6244 (Fla. Dist. Ct. App. April 28, 2006).

The Florida District Court of Appeal held that a Florida Department of Environmental Protection (DEP) order approving a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands allowing renourishment of 6.9 miles of beaches and dunes amounted to an unconstitutional taking of individual riparian rights without an eminent domain proceeding. The court found that the DEP's final order eliminated the plaintiffs' riparian rights to: (1) receive the accretions and relictions to their property and (2) have the property's contact with the water remain intact. The DEP, therefore, had to hold eminent domain proceedings before approving the renourishment project. The case was remanded to the DEP to provide satisfactory evidence of sufficient upland interest.

D.C. CIRCUIT

Friends of the Earth v. EPA, 2006 U.S. App. LEXIS 10264 (D.C. Cir. April 25, 2006).

Friends of the Earth sought review of the decision by the D.C. District Court that the Environmental Protection Agency could establish seasonal Total Maximum Daily Loads (TMDLs). The court addressed the question of whether the word "daily," as used in the Clean Water Act (CWA), was sufficiently pliant to mean a measure of time other than daily. To remedy two violations in the Anacostia's river system, the EPA approved one TMDL limiting the annual discharge of oxygen-depleting pollutants, and a second limiting the seasonal discharge of pollutants contributing to turbidity. The Court found that nothing in the language of 33 U.S.C. § 1313 or the regulations even hints at the possibility that EPA can approve total maximum seasonal or annual loads. The law says "daily." The court concluded that while the EPA advanced a reasonable policy justification for deviating from the CWA's plain language, the most reliabl e guide to congressional intent was the legislation the Congress enacted. The district court's decision was reversed and the case remanded with instructions to vacate the EPA's approvals.

FEDERAL CIRCUIT

Northwest La. Fish & Game Pres. Comm'n v. U.S., U.S. App. LEXIS 10868 (Fed. Cir. May 2, 2006).

Northwest Louisiana Fish and Game Preserve Commission alleged that the United States Corps of Engineers Red River Navigation Project effected a taking. The project limited the ability of the Commission to draw down the level of Louisiana's Black Lake and control the growth of vegetation, specifically hydrilla, in the lake. The Commission alleged that the increase in vegetation rendered the northern part of the lake inaccessible, unmanageable, and virtually useless, which resulted in a taking. The Corps claimed that the plaintiff's claim was time-barred by 28 U.S.C. § 2501 because it was filed more than two years after the construction of the project. The court held that the taking did not accrue when the Commission knew or should have known of the damage that was going to occur as a result of raising the pool level, but rather it accrued when the hydrilla had grown to harmful levels and the Corps refused to drain the lake to alleviate the harm. The Commission's claim, therefore, was not time-barred.

COURT OF INTERNATIONAL TRADE

Selivanoff v. United States Sec'y of Agric., 2006 Ct. Intl. Trade LEXIS 52 (Ct. Int'l Trade April 18, 2006).

Selivanoff, a salmon fisherman, filed suit seeking review of a decision of the U.S. Secretary of Agriculture denying his application for trade adjustment assistance (TAA) cash benefits under 19 U.S.C. § 2401e. Selivanoff reported on his tax forms an income of $ 19,025 for 2001 and $ 25,390 for 2003. The Department's Foreign Agricultural Service (FAS) denied the fisherman TAA benefits on the ground that his 2003 net fishing income was higher than his 2001 net fishing income. The fisherman argued that the 2003 income was higher only because he had to make an expensive repair to his boat in 2001 due to storm damage and that the repair was not reflected in his 2001 income. After pointing out that the object of § 2401e was to provide a complete picture of all of the factors affecting the change in a person's financial status, the Court of International Trade remanded the case to the Department because the court could not discern w hether FAS relied only on fisherman's tax forms to calculate net fishing income or whether FAS properly considered all factors.

Crawfish Processors Alliance v. United States, 2006 Ct. Intl. Trade LEXIS 64 (Ct. Int'l Trade May 5, 2006).

Crawfish processors and the Louisiana Department of Agriculture and Forestry contested the exclusion of crawfish etouffee from the antidumping duty order of the U.S. Department of Commerce covering prepared and preserved freshwater crawfish tail meat. The plaintiffs argued that the Department failed to conduct an anti-circumvention inquiry as part of its scope investigation to determine the products subject to the order. The Court of International Trade found that because the Department had determined that its initial criteria did not resolve whether etouffee was within the scope of the order, the Department's decision to apply a Diversified Products analysis was supported by substantial evidence. The court concluded that the Department correctly determined that etouffee was not within the scope of the anti-dumping order since it was neither "preserved" nor "prepared" freshwater crawfish tail meat.

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