The National Sea Grant Law Center is pleased to offer the ***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. 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, send an email to waurene@olemiss.edu with "*Case Alert*" on the subject line. MASGC 07-002-11

~ ~ November 15, 2007 ~ ~

FIRST CIRCUIT

City of Fall River v FERC, 2007 US App. LEXIS 25146 (1st Cir. Oct. 26, 2007).
The Federal Energy Regularity Commission (FERC) granted conditional approval of a company's plans to site, construct, and operate a liquefied natural gas (LNG) terminal and pipeline in Fall River, Massachusetts. The conditional permit stipulated that the company must have its transportation plan approved by the United States Coast Guard and the Department of Interior must ensure that the plan is consistent with the Wild and Scenic Rivers Act. On review, the First Circuit held that it would be premature to hear the merits of the claim, since the Coast Guard and the DOI had not completed their evaluations. The court held that the statute of limitations on a future challenge would not begin to run until the challenge was ripe for review. Recently, the Coast Guard completed its evaluation concluding that the waterway would be unsafe for LNG carriers.

http://www.ca1.uscourts.gov/pdf.opinions/06-1203-01A.pdf

Massachusetts
Oyster Creek Pres., Inc. v Conservation Commission, 449 Mass. 859 (Mass. Oct. 23, 2007).
Oyster Creek Preservation, Inc. sought permission to dredge a creek in Harwich, Michigan, to improve boat access. The Harwich Conservation Commission denied the request, citing both the state and the town's wetlands protection laws. The commission issued the decision after the 21-day time period prescribed by the state and town's laws. A superior court judge decided that the commission's denial was preempted by an order issued by the Department of Environmental Protection (DEP) and did not consider the elapsed time period in its decision. An appeals court affirmed the judgment. The Supreme Judicial Court of Massachusetts held that the DEP's order superseded the commission's order because the commission had failed to issue a ruling within the prescribed 21-day time period.

http://www.suffolk.edu/sjc/archive/opinions/SJC_09886.pdf

FIFTH CIRCUIT

Corus UK Ltd. v Waterman Steamship Co., 2007 US App. LEXIS 24400 (5th Cir. Oct. 18, 2007).

A cargo owner, Corus UK Ltd., sued a ship owner for damage to its cargo under the Carriage of Goods by Sea Act (COGSA). The United States District Court for the Eastern District of Louisiana ruled in favor of the ship owner, finding that an unforeseeable severe storm caused the damage, entitling the owner to a peril of the sea defense under COGSA. On appeal, the Fifth Circuit agreed. The court noted that credible testimony from the captain and the anemometer readings supported the district court's conclusion that the cargo damage was caused by a peril of the sea as defined by COGSA.

http://www.ca5.uscourts.gov/opinions/unpub/06/06-30205.0.wpd.pdf

Robinson v Orient Marine Co., 2007 US App. LEXIS 24439 (5th Cir. Oct. 19, 2007).
Pan Ocean Shipping Co. chartered a boat from Oldendorff Carrier GmbH and Co. to carry plywood from Indonesia to New Orleans, Louisiana. The crates were stacked in an unstable manner. While unloading the cargo in New Orleans, Leonal Robinson was injured when one of the crates flipped over and landed on him. Robinson sued both Pan Ocean and Orient Marine. The United States District Court for the Eastern District of Louisiana granted Oldendorff summary judgment but denied Pan Oceans's motion for summary judgment. The Fifth Circuit reversed. The court recognized that the charter agreement specified that the charterer would perform all cargo handling at its own risk and expense; however, the court held that the charter agreement only extended the duty to warn of known defects.

http://www.ca5.uscourts.gov/opinions/pub/06/06-30791-CV0.wpd.pdf

In re Katrina Canal Breaches Consolidated Litigation, 495 F.3d 191 (5th Cir. Nov 2, 2007).

The United States District Court for the Eastern District Court of Louisiana had ruled in favor of several homeowners whose homes were damaged by flood waters caused by Hurricane Katrina. The court concluded that without a specific definition included in an exclusion in the policy, the term "flood" in many of the policies was ambiguous. The court concluded that the insurance policies containing an ambiguous definition of "flood" were therefore required to compensate the homeowners according to their policies. The Fifth Circuit Court of Appeals, however, disagreed with the court's decision. On appeal, the court concluded that even if the plaintiffs could prove that the construction or maintenance of levees caused damage to their property, the flood exclusions in the homeowners' policies unambiguously precluded their recovery. The court held that the term "flood" included in the insurance policies was unambiguous. The court vacated the judgment of the district court and entered judgment in favor of the defendant insurance companies.

Tuepker v State Farm Fire & Cas. Co., 2007 US App. LEXIS 25786 (5th Cir. Nov 6, 2007).

When John and Claire Tuepker's home was destroyed by Hurricane Katrina, their insurer, State Farm, refused to reimburse the couple for its losses, citing a policy exclusion for water damage. The couple brought suit, and the United States District Court for the Southern District of Mississippi ruled in favor of State Farm. The Fifth Circuit agreed that the water damage exclusion in the insurance policy was valid and excluded coverage for damages caused by tidal water. However, the court disagreed with the district court's ruling on the policy's anti-concurrent causation (ACC) clause, which excluded coverage for indivisible damages caused by both covered and non-covered perils. The Fifth Circuit held that the ACC Clause is unambiguous and enforceable. Finally, the court also concluded that the ACC clause overrode Mississippi's efficient proximate cause doctrine, which would have required the Tuepkers to show that the hurricane proximately or efficiently caused the loss.

http://www.ca5.uscourts.gov/opinions/pub/06/06-61075-CV0.wpd.pdf

SIXTH CIRCUIT

Skowronek v American Steamship Co., 2007 US App. LEXIS 23926 (6th Cir. Oct. 12, 2007).

Larry Skowronek was working aboard an American Steamship Company vessel when he suffered a heart attack. The company paid Skowronek $56.00 per week as a maintenance fee, in accordance with the agreement between his union and the company. Skowronek argued that instead of the $56.00 rate for ill crew members, he should be awarded the $300 per-week rate for injured crew members. The United States District Court for the Eastern District of Michigan granted Skowronek summary judgment. On appeal, the Sixth Circuit reversed the district court's decision. The court found that the maintenance rates were the result of the collective bargaining between the parties and, therefore, should be binding. The court also held that the plaintiff has the burden of proving that the rates were not legitimately negotiated, that the agreement was unfair as a whole, or that the union did not adequately represent him.

http://www.ca6.uscourts.gov/opinions.pdf/07a0417p-06.pdf

NINTH CIRCUIT

Our Children's Earth Found. v United States EPA, 2007 US App. LEXIS 25299 (9th Cir. Oct. 29, 2007).

Our Children's Earth Foundation filed suit against the Environmental Protection Agency (EPA) citing the agency's failure to fulfill its duties under the Clean Water Act (CWA). The group claimed that the EPA had failed to review effluent guidelines and limitations in a timely manner using technology-based standards. The United States District Court for the Northern District of California ruled in favor of the EPA, holding that the challenged acts or omissions were discretionary. The Ninth Circuit reversed the district court's decision regarding the EPA's abandonment of a technology-based approach. The court remanded the case to determine whether EPA had breached its nondiscretionary duties under §§ 301 and 304 of the Clean Water Act, 33 USC.S. §§ 1311 and 1314.
However, the Ninth Circuit held that the district court properly dismissed the foundation's claims regarding the scheduling of plan publication and identification of new polluting sources.

http://www.ca9.uscourts.gov/ca9/newopinions.nsf/BD17666F754B1D13882573830058EE7A/$file/0516214.pdf?openelement

ELEVENTH CIRCUIT

United States v Robison, 2007 US App. LEXIS 24825 (11th Cir. Oct. 24, 2007).

A manufacturer, McWane, and several of its employees were convicted of violating and conspiring to violate the Clean Water Act (CWA). The United States District Court for the Northern District of Alabama convicted the defendants for knowingly discharging contaminated water into a creek that flowed into another creek, a lake, another creek, and then a river. On appeal, the Eleventh Circuit held that the Supreme Court's recent decision in *Rapanos* changed the law under which the defendants were convicted. Under *Rapanos*, the creek at issue would not be defined as "navigable waters." The court therefore vacated the district court's judgment, reversed the convictions and remanded the case.

http://www.ca11.uscourts.gov/opinions/ops/200517019.pdf

INTERNATIONAL COURT OF JUSTICE

The International Court of Justice has ruled on a maritime boundary dispute between Nicaragua and Honduras. Both countries asked the court to create a single maritime boundary of the territorial seas, the Exclusive Economic Zones, and continental shelves. The countries also asked that the court consider the sovereignty of islands above the 15th parallel. The court set a geographical starting point for dividing the sea; however, it held that the parties must negotiate the course of the delimitation line. The court held that although the islands were outside the territorial sea of both Nicaragua and Honduras, Honduras had shown an intent to act as sovereign over the lands and, therefore, had sovereignty over the islands.

http://www.icj-cij.org/docket/files/120/14075.pdf?PHPSESSID=213924e9edf07242936517e4be9e85f5

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