Subject: Re: Ocean and Coastal Case Alert, Review II
From: Stephanie Showalter <sshowalt@olemiss.edu>
Date: Fri, 15 Feb 2008 15:14:46 -0600
To: Waurene Roberson <waurene@olemiss.edu>
CC: Terra <tmharget@olemiss.edu>

Hi Waurene,

My fonts all look right now except the case site for the Fourth and Seventh Circuits.

Steph

On Feb 15, 2008, at 3:06 PM, Waurene Roberson wrote:

If you are not able to view this properly, please go to
http://www.olemiss.edu/orgs/SGLC/casealert.htm

<14bc2b9.jpg>

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 08-002-02

~ ~ February 15, 2008 ~ ~

FIRST CIRCUIT

Maine

First Specialty Insurance Corp. v. Maine Coast Marine Construction, Inc., 2008 U.S. Dist. LEXIS 4551 (D. Me. 2008).

First Specialty Insurance issued a commercial general liability policy to Maine Coast Marine Construction. Another marine construction company leased a 25-foot tug boat from Maine Coast to push a 150-foot barge. During the voyage, both vessels were grounded. First Specialty Insurance filed an action claiming that it had no duty to defend or indemnify the losses from the incident. The insurance policy had several exclusions, including "property damage arising out of the ownership [or] use of any … watercraft owned or operated by or rented or loaned to any insured." However, the exclusion did not cover watercraft less than 26 feet long and not being used to carry persons or property for a charge. The court held that the insurance company had no duty to indemnify the losses, because, although the tug boat was shorter than 26 feet, it towed the 150-foot barge behind it and the watercraft exclusion barred coverage of a watercraft in excess of 26-feet in length.

https://ecf.med.uscourts.gov/doc1/0911502453

SECOND CIRCUIT

New York

Burch v. Trustees of Freeholders & Commonalty of Town of Southampton, 2008 NY Slip Op 214, 1 (N.Y. App. Div. Jan. 15, 2008).

Several Southampton residents filed an action against the town, claiming that the large number of vehicles parked along the town's easement interfered with the quiet enjoyment of their property. The lower court dismissed the residents' claims on the basis of res judicata, since the matter had been litigated in a prior case challenging the same code provisions at issue. On appeal, the court reinstated several of the causes of action holding that res judicata was inapplicable since the residents had demonstrated a substantial increase in the intensity of the easement's usage.

http://www.courts.state.ny.us/courts/ad2/calendar/webcal/decisions/2008/D17511.pdf

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FOURTH CIRCUIT

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 2008 U.S. App. LEXIS 2854 (4th Cir. 2008).

Several environmental groups brought suit against Gaston Copper Recycling under the Clean Water Act. The United States District Court for the District of South Carolina imposed civil penalties against the plant, relying on a response from the South Carolina Department of Health and Environmental Control informing a property owner that the plant's runoff extended to his property. When the property owner died, the environmental groups amended their complaint to reflect that they had standing through two other property owners downstream of the plant's discharge point. Because the Fourth Circuit could not determine whether the other property owners had a requisite connection to the waters, the court remanded the case to determine whether the plaintiffs still had standing to bring the action.

http://207.41.17.117/ISYSquery/IRL9DC7.tmp/2/doc

FIFTH CIRCUIT

Silver Slipper Casino Venture LLC v. Does, 2008 U.S. App. LEXIS 2227 (5th Cir. Jan. 31, 2008).

During Hurricane Katrina, a casino barge moored in the Broadwater Beach Marina in Biloxi, Mississippi was ripped free of its moorings and carried several thousand feet, ultimately crashing into a hotel. The casino filed suit seeking exoneration from or limitation under liability under the Limitation of Liability Act. The United States District Court for the Southern District of Mississippi dismissed the case, citing lack of admiralty jurisdiction. The court held that the casino was not a vessel for purposes of admiralty jurisdiction because it was indefinitely moored in a marina, it received electricity and water from land-based sources, and it was not practically capable of being transported over water. The casino appealed the decision to the Fifth Circuit. The court affirmed the district court's decision, holding that a permanently moored watercraft not capable of being used in maritime transport is not a vessel subject to admiralty jurisdiction.

United States v. Lucas, 2008 U.S. App. LEXIS 2331 (5th Cir. 2008).

In violation of the Clean Water Act, developer Robert J. Lucas and others sold house lots and certified septic systems on wetlands that were certified as dry. When the septic systems failed, waste discharges ensued and the government charged defendants with Clean Water Act violations, mail fraud, and conspiracy to commit mail fraud and to violate the CWA. The defendants were found guilty. On appeal, the defendants argued that the jury instructions did not require the jury find that the wetlands were "waters of the United States" and subject to the CWA. The Fifth Circuit held that the instructions correctly covered the defendants' requested instruction by requiring adjacency to navigable waters as defined by a significant nexus. Additionally, the court recognized that although 40 C.F.R. § 122.1(b)(2) excluded septic systems, the systems could be point sources discharging pollutants under § 122.1(b)(1). The court affirmed the convictions.

SEVENTH CIRCUIT

Robinson v. Alter Barge Line, Inc., 2008 U.S. App. LEXIS 871 (7th Cir. 2008).

A deckhand sued his former employer, a barge owner, alleging that he was fired in retaliation for complaining that other crew members were using illegal drugs while on duty. The deckhand filed claims under the Illinois Whistleblower Act, The Seaman's Protection Act, state common law for retaliatory discharge, and admiralty tort law. The United States District Court for the Southern District of Illinois granted summary judgment in favor of the barge owner. On appeal, the Seventh Circuit agreed that the Illinois Whistleblower Act was inapplicable, because it prohibited retaliation based on an employee's refusal to participate in an illegal activity and there was no indication that the deckhand was fired because he refused to do drugs. Likewise, the court held that the Seaman's Protection Act did not apply, because the deckhand had not attempted to report the drug use to the Coast Guard or other federal agency. However, the court held that the deckhand was not precluded from bringing a claim under state common law, because there was no indication that the Seaman's Protection Act was intended to occupy the entire field of retaliatory discharge of seamen. Additionally, the savings to suitors provision in 28 USCS § 1331(1) precluded automatic preemption of state remedies by admiralty law.

http://www.ca7.uscourts.gov/tmp/AU1FG3A2.pdf

EIGHTH CIRCUIT

Missouri v. United States Army Corps of Engineers, 2008 U.S. App. LEXIS 2802 (8th Cir. 2008).

Missouri filed a claim alleging that the U.S. Army Corps of Engineers violated 42 U.S.C.S. § 4332(2)(C) of the National Environmental Policy Act (NEPA) when it revised a river water control manual without preparing a supplemental environmental impact statement. The Corps had prepared an environmental assessment evaluating a plan that would allow water to be released from a dam to benefit endangered or threatened species. In the EA, the Corps concluded that there were no new significant environmental impacts that had not been included in a prior final environmental impact statement. The district court granted the Corps summary judgment and Missouri appealed. On appeal, the Eighth Circuit found that the Corps was not required to prepare a supplemental environmental impact statement, because the revision was not a substantial change from previously considered alternatives. The court affirmed the district court's decision.

https://ecf.ca8.uscourts.gov/cmecf/servlet/TransportRoom?servlet=CaseSummary.jsp&incOrigDkt=Y&incDk

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NINTH CIRCUIT

NRDC, Inc. v. Winter, 2008 U.S. App. LEXIS 1423 (9th Cir. Jan. 16, 2008).

The United States District Court for the Central District of California granted several environmental groups a preliminary injunction barring the Navy from using mid-frequency active (MFA) sonar. The groups alleged that the sonar harms marine mammals and violates the Coastal Zone Management Act (CZMA). The Navy filed an emergency motion with the U.S. Court of Appeals for the Ninth Circuit to stay the injunction. Noting that the President had issued a Memorandum exempting use of the sonar from the requirements of the CZMA and that the Council on Environmental Quality had provided accommodations for certain emergency situations, the Ninth Circuit remanded the case to the district court for reconsideration.

http://www.ca9.uscourts.gov/ca9/newopinions.nsf/81E9CA637C63E18C882573DB00543732/$file/0855054p

California

Farm Raised Salmon Cases, 2008 Cal. LEXIS 1413 (Cal. 2008).

Several California consumers filed suit against various grocery stores, claiming that the stores sold artificially colored farmed salmon without disclosing the use of color additives in violation of state and federal law. The defendants argued that the plaintiffs' state law claims were preempted by 21 U.S.C. § 337(a), which precludes private enforcement of the Food, Drug, and Cosmetic Act. The trial court and subsequently the court of appeals agreed that the plaintiff's state law claims were preempted. However, the California Supreme Court held that the state laws regulating color additives and their labeling were authorized by 21 U.S.C. § 343-1(a), and, therefore, they could be privately enforced in a consumer action against the grocery stores.

Douda v. California Coastal Commission, 2008 Cal. App. LEXIS 185 (Cal. Ct. App. 2008).

A property owner filed an application for a coastal development permit with the California Coastal Commission. The Commission denied the request, finding that the property contained a previously undesignated environmentally sensitive habitat area. The property owners filed a petition for writ of administrative mandate, which the trial court denied. On appeal, the court determined that state law gave the commission the power to designate sensitive coastal resources, including the power to designate the areas prior to the certification of a local coastal program.

http://www.courtinfo.ca.gov/opinions/documents/B188210.DOC

Washington

Creveling v. Department of Fish & Wildlife, 2008 Wash. App. LEXIS 179 (Wash. Ct. App. 2008).

A Washington landowner constructed a dam across a creek that diverted fish from the creek into an irrigation ditch. When the Washington Department of Fish and Wildlife removed the dam, the landowner appealed the decision to the Department. The Department entered a final order affirming the decision and the landowner appealed. The Okanogan County Superior Court affirmed the decision. On appeal, the landowner claimed that he had an ownership interest in the fish. The Court of Appeals of Washington held that because the landowner did not own the property from which the fish were taken, the fish belonged to the state under Wash. Rev. Code § 77.04.012, and the Department had the authority to remove the dam under state law.

http://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinionTextOnly&filename=263029MAJ&

DC CIRCUIT

Southeastern Federal Power Customers, Inc. v. Geren, 2008 U.S. App. LEXIS 2501 (D.C. Cir. 2008).

The United States District Court for the District of Columbia approved a settlement agreement that provides for a temporary reallocation of over twenty percent of the water storage in a federal reservoir located in Georgia. Alabama and Florida filed suit, alleging that the Water Supply Act (WSA) required congressional approval of the agreement, because it was a major operational change and it seriously affected the purposes of the reservoir project. The United States Court of Appeals for the District of Columbia reversed the district court's judgment. The appellate court agreed with Alabama and Florida

that the settlement agreement required Congressional authorization under the WSA, given that the agreement would reduce the amount of water flowing downstream and that reallocating more than 20 percent was a major operational change.

http://pacer.cadc.uscourts.gov/docs/common/opinions/200802/06-5080a.pdf

National Association of Home Builders v. U.S. Army Corps of Engineers, 2008 U.S. App. LEXIS 2895 (D.C. Cir. 2008).

The National Association of Home Builders challenged the U.S. Army Corps of Engineers 2002 five-year nationwide pollutant discharge permits. The Association questioned whether the permits would cause only "minimal adverse environmental effects" as required by the Clean Water Act. The federal district court held that the permits were not "final agency action" and granted the Corps' motion for summary judgment. The Court of Appeals for the District of Columbia reversed, finding that the issuance of the permits did constitute final agency action, which was subject to review. The district court held that the agency's action was neither arbitrary nor capricious and granted the Corps summary judgment. The Association appealed. Although the permits expired while the appeal was pending, the Association argued that the matter was not moot because of the capable of repetition, yet evading review exception. However, the court held that this case did not meet this exception because the permits in 2007 were not likely to "evade review." The appellate court dismissed the action, but left the door open for the association to challenge future permits.

US COURT OF FEDERAL CLAIMS

Palmyra Pacific Seafoods, L.L.C. v. United States, 2008 U.S. Claims LEXIS 19 (Ct. Cl. 2008).

The Secretary of the Interior signed an order designating tidal lands, submerged lands, and waters out to a twelve-nautical mile distance surrounding the island of Palmyra as a National Wildlife Refuge. Commercial fishing licensees were precluded from fishing within the refuge. The licensees filed an action asserting a regulatory taking against the United States. The United States Court of Federal Claims dismissed the complaint. The court held that because the fishing licensees did not have a cognizable Fifth Amendment property interest, no taking occurred.

http://www.uscfc.uscourts.gov/Opinions/Miller/08/CMILLER.PALMYRA012208.pdf

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