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 06-003-07

~ ~ July 14, 2006 ~ ~

SUPREME COURT

Rapanos v. U.S., 126 S. Ct. 2208 (2006).
In 1985 it was established that the Clean Water Act (CWA) authorizes the Corps to regulate the filling of wetlands that are adjacent to navigable waters. The question in this closely watched case was whether the Corps has authority to regulate the filling of wetlands that are adjacent to tributaries of navigable waters. A majority of the Court was unable to agree on a yes-or-no answer to that question. Four justices (Scalia, Thomas, Roberts, Alito) said "no," four justices (Stevens, Breyer, Souter, and Ginsburg) said "yes," and one justice (Kennedy) said "maybe." So for now the answer is "maybe." Thus, it appears the Corps must make a case-by-case determination every time it seeks to assert CWA jurisdiction over wetlands that are adjacent to tributaries to navigable waters. The Corps must decide whether the wetland has a "significant nexus" to a navigab le waterway. If there is a significant nexus to navigable waters, the Corps has jurisdiction. ("Significant nexus" has been the legal standard since 2001.) The cases (there were two, consolidated into one for the Supreme Court, *Rapanos v. U.S.* and *Carabell v. U.S. Army Corps of Engineers*) will now go back down to the lower courts, presumably to be decided under the current "significant nexus" standard.

FIRST CIRCUIT

Napier v. F/V Deesie, *Inc.*, 2006 U.S. App. LEXIS 17270 (1st Cir. July 11, 2006).
During a fishing accident, a hook impaled Napier's abdomen. A week later, physicians discovered that he had suffered a perforated duodenal ulcer. Napier filed an action against his employer, F/V *Deesie*, seeking damages for negligence under the Jones Act, unseaworthiness, and for maintenance and cure. Napier's medical expert testified that, although the fishing hook did not directly cause the perforated ulcer, there was a causal relationship between the hook injury and the ulcer because nonsteroidal anti-inflammatory drugs (NSAIDs) could cause ulcers. The district court concluded that there was no evidence that the seaman ingested two types of NSAIDs. On appeal, the First Circuit held that the district court erred in granting summary judgment because the employer admitted Napier took NSAIDs following the fishing accident and Napier stated that he took the NSAIDs. The questions of whether the ulcer was foreseeable and wh ether the taking of NSAIDs was an intervening cause were issues for the jury to decide.

FIFTH CIRCUIT

Louisiana

Pelts & Skins, L.L.C. v. La. Dep't of Wildlife & Fisheries, 2006 La. App. LEXIS 1394 (La. Ct. App. June 21, 2006).
Pelts & Skins, an alligator farm, alleged that the Louisiana Department of Wildlife and Fisheries' practice of collecting tag fees on alligators and alligator skins shipped out of state was unconstitutional. The Appellate Court found that, under a Commerce Clause analysis, the failure to tax all raw hides could be found to be an unfair apportionment and a discriminatory burden on interstate commerce. Similarly, under the *Michelin* analysis, a discriminatory tax could have been found to have violated the Export-Import Clause. The court thus determined that the farm had sufficiently stated at least one basis for its cause of action The case was remanded to the trial court for further proceedings.

Louisiana Crawfish Producers Ass'n v. Amerada Hess Corp., 2006 La. App. LEXIS 1568 (La. Ct. App. July 12, 2006).
The Louisiana Crawfish Producers Association sued Amerada Hess Corporation and others who were allegedly engaged in oil and gas exploration, dredging and pipeline activities, or providing surveying services. The Association alleged that in the course of these activities the defendants created spoil banks and dams which impeded the natural flow of water in the Buffalo Cove, Louisiana area, resulting in stagnant water and destruction of the aquatic ecosystem and elimination or diminishment of their ability to catch crawfish in the area. The Association sought damages for loss of jobs, profits, wages, and earning capacity; loss of enjoyment of recreational use; and inconvenience and mental distress. The court affirmed the trial court's dismissal of the Association's state law claims, finding that fishermen do not have a cause of action for economic loss arising from the destruction of a fishing site.

Mississippi

Dotts v. Pat Harrison Waterway Dist., 2006 Miss. App. LEXIS 504 (Miss. Ct. App. June 27, 2006).
Dunn Fall's Water Park is a water park owned and operated by the Pat Harrison Waterway District, an agency of the State of Mississippi. Following a drowning death in the Park, the deceased representative filed a wrongful death action against the District. The Lauderdale County Circuit Court determined that the district was immune from liability under Mississippi Tort Claims Act. The Appellate Court affirmed. The court found that the district's actions were discretionary in nature since there were no statutory requirements in Mississippi concerning the operation of swimming facilities.

NINTH CIRCUIT

Pakootas v. Teck Cominco Metals, Ltd., 2006 U.S. App. LEXIS 16684 (9th Cir. July 3, 2006).
Plaintiffs filed a citizen suit under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to enforce an order issued by the Environmental Protection Agency (EPA) against Teck Cominco Metals, a Canadian corporation. At issue was the application of CERCLA to a Canadian corporation that disposed wastes from a location in Canada, but which eventually came to be located in a river in the United States. The Ninth Circuit held that the case involved a domestic application of CERCLA because the leaching of hazardous substances from the slag at the contaminated river site in the U.S. was the CERCLA "release" which triggered liability. Therefore, this case did not involve an extraterritorial application of CERCLA, even though the original source of the hazardous substances was located in a foreign country.

Or. Trollers Ass'n v. Gutierrez, 2006 U.S. App. LEXIS 16840 (9th Cir. July 6, 2006).
The Oregon Trollers Association alleged that the National Marine Fisheries Service (NMFS) violated the Magnuson-Stevens Fishery Conservation and Management Act when it adopted a regulation establishing a natural spawner escapement floor for salmon, which it implemented on a yearly basis through fishery management measures. The court first determined that the fishermen's action was not time-barred under 16 U.S.C.S. § 1855 because the action was filed within 30 days after the management measures were published. The court then determined that the regulation was not inconsistent with the Magnuson Act because NMFS was not prevented from regarding naturally spawning salmon as a stock and there was no evidence disputing the scientific basis for the escapement goal. Nor were the management measures inconsistent with the national standards because NMFS considered the socio-economic impact of the measures and addressed safety concerns. Finally, the court concluded that the NMFS adequately explained its reasons for invoking the good cause exception.

California

Turlock Irrigation Dist. v. Zanker, 2006 Cal. App. LEXIS 944 (Cal. Ct. App. June 26, 2006).
The Town of La Grange sought review of a declaratory judgment from the Superior Court of Stanislaus County which ruled that two water districts had a contractual obligation to continue to provide water to the town and that the reasonable cost of treating the water to make it suitable for domestic use could be passed through to consumers. The court held that since no price was specified in the contract, the districts could determine the price and include the cost of treating the water.

Schneider v. California Coastal Comm., 2006 Cal. App. LEXIS 986 (Cal. Ct. App. June 28, 2006).
Dennis Schneider owns a 40-acre oceanfront lot on the California coast. The property abuts an ocean bluff, but there is no beach nearby. In 2000, the San Luis Obispo County Planning Commission granted Schneider a permit to construct a 10,000 square foot residence, a barn, and a 1.25 mile access road. In 2004, the California Coastal Commission (CCC) approved the Coastal Development Permit, but imposed fifteen special conditions one of which required that all structures be single story and the road relocated to reduce its visibility. Schneider applied the permit conditions, alleging that the CCC has no authority to impose development conditions to protect views from offshore, ocean-based vantage points. The California Court of Appeals agreed, finding that the CCC abused its discretion and subordinated Schneider's property rights to the occasional boater's "right to a view" of the coastline.

Washington

Pres. Our Islands v. Shorelines Hearings Bd., 2006 Wash. App. LEXIS 1280 (Wash. Ct. App. June 19, 2006).
Environmentalist groups challenged an order of the Shorelines Hearings Board that reversed the King County Department of Development and Environmental Services' determination that a mining company's proposed barge-loading facility did not satisfy the requirements for shoreline permits and ordered the County to issue the permits. The court held that the current principal use of the company's site was a commercially significant mining operation and that the barge-loading facility was an integral part of the principal use, because the company's mine was located on a small island without viable large-scale ground transportation options. The court also held that the Board's conclusion that the company's mitigation measures and other imposed conditions made the facility consistent with shoreline management policies was supported by substantial evidence.

ELEVENTH CIRCUIT

U.S. v. Stickle, 2006 U.S. App. LEXIS 16844 (11th Cir. July 6, 2006).
Stickle's shipping company had purchased an oil tanker, but certified it for use as a freight ship to carry grain to India. While on route, diesel fuel leaked into the cargo hold and contaminated the wheat. Stickle arranged for laborers to join the ship for the purpose of dumping the 440 metric tons of contaminated grain into the South China Sea. The United States District Court for the Southern District of Florida entered a jury's verdict convicting him of conspiring to violate the laws of the United States and of knowingly discharging an oily mixture into the sea without an oil discharge monitoring system. Stickle appealed and the Circuit Court affirmed finding that the indictment properly charged Stickle with a violation of 33 C.F.R. § 151.10(a) because the ship's certificate did not allow for the discharge of oil into the sea and the dumping was illegal.

Florida

Atlantis at Perdido Ass'n v. Warner, 2006 Fla. App. LEXIS 11210 (Fla. Ct. App. July 6, 2006).
Atlantis at Perdido Association appealed a final Department of Environmental Protection (DEP) order approving a permit application authorizing construction of a nine-story condominium complex on Perdido Key in Escambia County. The proposal would locate the complex 193 feet seaward of the coastal construction control line and 45 feet seaward of a reasonably continuous and uniform line of buildings, a line that is nearly 150 feet closer to the Gulf of Mexico than the current coastal construction control line. The Florida Court of Appeal reversed. The order under review directs issuance of a permit authorizing new construction, not "rebuilding." The DEP, therefore, was required to take into account the "reasonably continuous and uniform line of construction." Because the DEP did not take this line into account, it acted beyond its discretion.

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