The National Sea Grant Law Center is pleased to offer the November ***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 06-003-011

~ ~ November 16, 2006 ~ ~

FIRST CIRCUIT

United States v Johnson, 2006 U.S. App. LEXIS 27042 (1st Cir. Oct. 31, 2006).

The United States brought an action against cranberry farmers in Carver, Massachusetts, alleging that the farmers had discharged pollutants into federally-regulated waters without a permit in violation of § 301 and § 502 of the Clean Water Act. The farmers claimed that the federal government did not have jurisdiction of the properties in question. The United States District Court for the District of Massachusetts ruled in favor of the United States and, on appeal, the First Circuit affirmed. After the *Rapanos* decision, which ruled on federal jurisdiction under the CWA, the cranberry farmers requested a rehearing, or, alternately that the court vacate the decision with prejudice. The government requested that the court vacate its prior decision and remand to the district court. The First Circuit remanded the case to the district court and found that the U.S. could establish jurisdiction through either the plurality decision or Justice Stevens' opinion in *Rapanos*.

SECOND CIRCUIT

United States v General Electric, 2006 U.S. Dist. LEXIS 80183 (D.N.Y. Nov. 2, 2006).

The United States brought an action against General Electric (GE) pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Subsequently, the parties entered a consent decree that would require GE to dredge sediment contaminated by PCBs that the company had released into the Hudson River. The sediment would be removed to a sediment processing facility in Fort Edward, N.Y. The decree noted that the sediment processing facility would be exempt from federal, state, or local permits. CERCLA allows such exemptions, as long as remediation takes place "entirely onsite." Fort Edward intervened in the suit, arguing that the facility should not receive the exemption, because it was not located entirely onsite. The Second Circuit found that the facility would be entirely onsite and approved the decree, holding that it was both procedurally and substantively fair.

THIRD CIRCUIT

Yurchak v Atkinson & Mullen Travel, Inc., 2006 U.S. App. LEXIS 27019 (3d Cir. Oct. 30, 2006).

Gale and Patrick Yurchak received a brochure from a travel agency advertising a Mexican vacation travel package. The brochure contained a photograph of someone on a jet ski. After purchasing the package and traveling to Cancun, Mexico, the Yurchaks rented jet skis from an independent company. While using the jet ski, Gale Yurchak was injured. The couple brought an admiralty action against the travel agency, alleging that the agent had a duty to warn of the dangers of jet skiing in the waters of Mexico. The Third Circuit affirmed the decision of the United States District Court for the Western District of Pennsylvania that the agent did not have a duty to warn.

FIFTH CIRCUIT

In re Royal Caribbean Cruises, Ltd., 2006 U.S. Dist. LEXIS 77646 (D. Fla. Oct. 23, 2006).

While on a jet ski outing led by Royal Caribbean employees, Keith Howard and his son, Mark, collided with an island. Royal Caribbean brought a claim for exoneration, citing release agreements signed by Keith Howard. The Howards filed claims against the cruise line, which then moved for summary judgment. The United States District Court for the District of Florida denied in part and granted in part the motion for summary judgment. The court found that the release signed by Keith Howard was valid, because it was clear and unambiguous. The court found that the release was not valid against Mark's claims, because he was a minor at the time of the accident, but, since the doctrine of unseaworthiness was limited to seamen and did not extend to a ship's passengers, Mark's claims of unseaworthiness had to be dismissed. Mark's remaining claims were based in negligence, and the court found that he could not support those claims using Florida statutory law because the suit was governed by substantive general maritime law.

Dredging v Sanchez, 2006 U.S. App. LEXIS 26899 (5th Cir. Oct. 27, 2006).

Ricardo Sanchez filed a suit under the Jones Act, claiming that he was injured while working aboard the M/V *Ms. Paula*, which is owned by Inland Dredging Company. The dredging company filed an action in the United States District Court for the Northern District of Mississippi, claiming limitation of liability under the Limitation of Liability Act. Pursuant to that claim, the district court granted an injunction preventing other claims against the vessel or dredging company from being filed. Sanchez appealed the injunction. The Fifth Circuit vacated the injunction, finding that the Limitation Act did not prohibit Sanchez from bringing suit in the forum of his choice.

De La Rosa v St. Charles Gaming Co., 2006 U.S. App. LEXIS 27156 (D. La. Oct. 31, 2006).

While in the Isle of Capri Casino, which is located on a boat, a patron slipped and fell. He subsequently filed an action in admiralty, claiming unseaworthiness. The United States District Court for the Eastern District of Texas granted summary judgment in favor of the casino, finding that the casino was not a vessel for purposes of general maritime law, and it therefore lacked jurisdiction over the suit. On appeal, the Fifth Circuit considered whether the vessel could be used as a means of transportation. The Fifth Circuit held that indefinitely moored, shore-side, floating casinos were not vessels under general maritime law, and the casino in question was indefinitely moored and the corporations had no plans to use the casino as a sea-going vessel.

Jauch v Nautical Services, Inc., (5th Cir. Nov. 9, 2006).

Jauch, an employee of Nautical Services, injured his back while working as a deckhand for Nautical Services. Prior to his employment, Jauch was required to fill out a medical questionnaire. On his questionnaire, Jauch represented that he had never had back, neck, or spine trouble or received chiropractic treatment; however, Jauch had injured his back several times, most recently in a work-related incident six months earlier. Nautical Services demonstrated that it would not have hired Jauch if it knew of his medical history. The Fifth Circuit ruled that Jauch's claim was barred, because he had actively concealed material facts relating to his physical condition and medical history from his prospective employer.

EIGHTH CIRCUIT

United States v Capital Sand Co., 2006 US App. LEXIS 26431 (8th Cir. Oct. 25, 2006).

A river lock and gate were damaged by a barge towed by the M/V *Jamie Leigh*, owned by Capital Sand. The United States District Court for the Eastern District of Missouri awarded damages to the Army Corps of Engineers for expenses it incurred in repairing the river lock and gate. Capital Sand appealed the award of overhead damages, since the Corps also repaired another gate that was damaged in a previous incident. After reviewing testimony from an independent accountant and an accountant from the Army Corps of Engineers, the Eighth Circuit affirmed the district court's decision, finding that the amount of overhead claimed was reasonable.

NINTH CIRCUIT

Ctr. for Biological Diversity v Kempthorne, 2006 U.S. App. LEXIS 25795 (9th Cir. Oct. 18, 2006).

The Center for Biological Diversity brought suit challenging the U.S. Fish and Wildlife Service's determination that the listing of the Sierra Nevada Mountain Yellow-Legged Frog as an endangered species was "warranted but precluded." The United States District Court for the Eastern District of California ruled in favor of the Service, finding that, although the Service did not follow the requirements under the Endangered Species Act when listing a species as "warranted but precluded," the Service's finding should be upheld, because the Service's reasoning was easily discerned. The Ninth Circuit reversed, holding that the Service was required to publish its findings in the Federal Register, including a description and evaluation of the reasons and data on which the finding was based.

Diamond v State, 2006 Haw. LEXIS 559 (Haw. Oct. 24, 2006).

Caren Diamond and Harold Bronstein filed a complaint with Hawaii's Board of Land and Natural Resources (BLNR) when a landowner obtained a shoreline survey for his property that sited the shoreline by using induced coastal vegetation, allowing him to build closer to the shore. The BLNR ruled in favor of the landowner. Diamond and Bronstein filed a complaint in the circuit court, which denied the appeal. The Supreme Court reversed the circuit court's denial of an appeal and issued a ruling that will help clarify shoreline certification in Hawaii by rejecting induced vegetation as a means of determining certified shoreline.

W. Watersheds Project v Matejko, 2006 U.S. App. LEXIS 27092 (9th Cir. Nov. 1, 2006).

Environmental groups sought an injunction of the use of certain dams and pipes on public lands in central Idaho. The groups alleged that the BLM did not follow proper procedures under the Endangered Species Act by failing to require consultation when allowing diversions by private parties holding vested rights-of-way to divert water. The United States District Court for the District of Idaho granted summary judgment in favor of the environmental groups. The Ninth Circuit reversed the ruling, finding that the BLM's duty to consult was triggered only by affirmative actions.

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