

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 06-003-09

~ ~ September 15, 2006 ~ ~

FIRST CIRCUIT

Massachusetts

Rodgers v. Conservation Commission, 2006 Mass. App. LEXIS 908 (Mass. App. Ct. August 24, 2006).

Property owners in Massachusetts sought to build a permanent pier adjoining their property on Cotuit Bay. Upon review of the owners' application, the town conservation commission denied the request, citing concerns that the pier would interfere with recreational shellfishing. The commission relied on the state wetlands protection act and Barnstable's wetlands protection by-law to make its decision. The property owners sought to overturn the ruling, and the Barnstable Superior Court agreed that the commission's decision was unsupported by substantial evidence. The Appeals Court of Massachusetts reversed the trial court's decision, holding that the commission's conclusions were based on detailed and specific findings that the pier would negatively impact shellfishing in the area.

THIRD CIRCUIT

United States v. Abrogar, 2006 U.S. App. LEXIS 21156 (3d Cir. August 18, 2006).

The Coast Guard determined that Noel Abrogar, the chief engineer of a foreign ship, had known of improper oil discharges, ordered improper discharges, and concealed the discharges on the ship's oil record books. In the United States District Court for the District of New Jersey, Abrogar pled guilty to failing to keep an accurate oil record book. The district court applied a six-level sentencing enhancement pursuant to U.S. Sentencing Guidelines manual § 201.3. Abrogar appealed the sentencing enhancement, arguing that the failure to keep an accurate record book did not result in the improper discharges. The Court of Appeals agreed, reasoning that since the discharges did not occur in U.S. waters, the conduct was not relevant to the sentencing guidelines and the sentencing enhancement was not warranted. The court vacated defendant's sentence and remanded the case to the district court for resentencing.

FOURTH CIRCUIT

Moore v. Matthews, 2006 U.S. Dist. LEXIS 62866 (D. Md. August 24, 2006).

At a Kent County High School Picnic in 2002, two students driving jet skis collided after one of the drivers, Tracy Moore, unexpectedly made an 180 degree turn and the other student failed to stop his jet ski. Moore claimed that the other student was negligent in his operation of the jet ski and that he had violated several of the Inland Navigational Rules in 33 U.S.C. §§ 2001 through 2073. The court found that the defendant did not neglect to maintain a proper lookout; however, the court did find that the defendant could have been proceeding at an unsafe speed. The court also found that the accident would not have occurred if the plaintiff had not made the unexpected turn. Additionally, the court found that the other student was not obligated to keep out of the way of Moore's jet ski after she made the unexpected turn. The court granted defendant's summary judgment in part and denied it in part, with regard to the Inland Navigational Rules that require vessels to travel at safe speeds and to take action to avoid collision.

FIFTH CIRCUIT

La. Crawfish Producers Ass'n v. Rowan, 2006 U.S. App. LEXIS 22217 (5th Cir. August 29, 2006).

Buffalo Cove is a Pilot Management Unit of the Atchafalaya Basin, a flood control area in Louisiana. Buffalo Cove was designated by the Corps of Engineers as an area in which new techniques to maintain water flow and restore the ecosystem could be tested. From 1999 to 2003 the Corps conducted an environmental assessment (EA) on the Buffalo Cove Management Unit. The Corps issued an EA and made the project available for public review. The Louisiana Crawfish Producers Association (LCPA), a non-profit organization, suggested a plan to open the historical bayous and enforce the permit requirements for pipelines. The Corps did not consider the alternative and entered a Finding of No Significant Impact. The LCPA sued, arguing that the EA failed to consider the cumulative impact of the project on the surrounding areas. The district court granted summary judgment for the Corps, and the LCPA appealed. The Court of Appeals affirmed the summary judgment, holding that the Corps was not required to consider and reject the proposed alternative and the LCPA's proposal would result in increased sedimentation.

Louisiana

State v. All Prop. & Casualty Ins. Carriers Authorized & Licensed to Do Business in Louisiana, 2006 La. LEXIS 2214 (La. August 25, 2006).

After Hurricanes Katrina and Rita, the Governor of Louisiana issued Louisiana Acts 729 and 802, extending the period under which insurance claims arising from hurricane damage could be filed. Louisiana insurance companies sought to have the Acts declared unconstitutional, since they altered the contract terms of insurance policies. The insurance companies argued that the Acts violated the Contracts Clauses in the U.S. and Louisiana constitutions. The court rejected the companies' argument, holding that the Acts were enacted to protect the health and general welfare of the citizens and the impairment to the companies could have been anticipated by the industry. The court also rejected the companies' argument that the Acts violated the Supremacy Clause of the U.S. Constitution, because the legislature was not attempting to regulate the National Flood Insurance Program.

SEVENTH CIRCUIT

Wisconsin

Hilton v. Dep't of Natural Resources, 2006 WI 84 (Wis. 2006).

After a Wisconsin homeowner's association increased the number of boat slips on its pier without obtaining a permit, the Wisconsin Department of Natural Resources (DNR) requested an abatement hearing. An administrative law judge (ALJ) ruled that the number of boat slips on the pier should be limited to comply with a "reasonable use" standard. The ALJ based its decision on factors such as environmental impact, natural scenic beauty, and historic use. On appeal, the circuit court modified the ALJ's order. The Wisconsin Court of Appeals overturned the circuit court's decision and upheld the ALJ's decision requiring the homeowner's association to reduce the number of boat slips on its pier. The Wisconsin Supreme Court agreed with the court of appeal's conclusion that the DNR's decision followed applicable law and was supported by evidence showing that the pier had direct and cumulative adverse impacts. The court did not determine whether or not the reduction in the number of boat slip was an unconstitutional taking.

NINTH CIRCUIT

Northwest Envtl. Advocates v. Nat'l Marine Fisheries Serv., 2006 U.S. App. LEXIS 21486 (9th Cir. Aug. 23, 2006).

Northwest Environmental Advocates sought to have a summary judgment overturned that had been granted in favor of the National Marine Fisheries Service, the U.S. Army Corps of Engineers, and others. The group challenged a Final Supplemental Integrated Feasibility Report and Environmental Impact Statement (FSEIS) that had been prepared as part of a project to deepen the Columbia River navigation channel. The environmental group argued that the FSEIS was inadequate because the groups failed to take a hard look at the cumulative impact on coastal erosion. The court found that the Corps had adequately considered erosion by performing exhaustive studies over several years, soliciting and accommodating input from stakeholders, and thoroughly re-analyzing areas of particular concern. The court also found that the district court did not abuse its discretion in striking the testimony of the environmental group's economist, because the group did not establish any exception to the general rule against allowing extra-record evidence.

Washington Toxics Coalition v. United States DOI, 2006 U.S. Dist. LEXIS 60138 (D. Wash. August 24, 2006).

A group of wildlife conservation organizations, including the Washington Toxics Coalition, brought suit against the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). The organizations claimed that the FWS and the NMFS had violated section 7 of the Endangered Species Act (ESA) by delegating consultations required by the Act to the EPA. Additionally, the parties claimed that the services did not comply with the procedural requirements of the National Environmental Policy Act when promulgating new rules. The judge overturned rules promulgated by the FWS and the NMFS, finding that they were "arbitrary and capricious" and that they would "actually result in harm to the listed species."

ELEVENTH CIRCUIT

National Parks Conservation Association v. United States Army Corps of Engineers, 2006 U.S. Dist. LEXIS 57584 (D. Fla. August 15, 2006).

The National Parks Conservation Association and the Tropical Audubon Society brought suit against the U.S. Army Corps of Engineers, claiming that it violated the Clean Water Act (CWA), the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the Administrative Procedure Act by granting a 120-day extension of an agricultural fill permit. The Corps had suspended the permittee's right to fill wetlands on the belief that the company was no longer performing agricultural improvements, but was planning residential development on the land. After meeting with the permittee, the Corps reinstated the permit without a public NEPA or CWA hearing. The United States District Court for the District of Florida found that the NEPA and CWA requirements were not triggered, because the Corps did not issue a new permit. Both parties filed a motion for summary judgment, but the court granted the Corps' motion and denied the environmental groups' motion.

DC CIRCUIT

City of Tacoma v. FERC, 2006 U.S. App LEXIS 21400 (D.C. Cir. August 22, 2006).

The Skokomish Indian Tribe and Tacoma, Washington, sought a review of orders issued by the Federal Energy Regulatory Commission (FERC). The tribe argued that the conditional license to operate a hydroelectric project on the Skokomish River did not provide adequate protection for the environment or the tribe's reservation. The tribe claimed that the license should have included the conditions contained in the Department of the Interior's Federal Power Act. The Court of Appeals agreed that the FERC should have considered the Interior's FPA § 4(e) conditions; therefore, the court remanded the case so that the FERC could determine the effect of Interior's § 4(e) conditions.

District of Columbia

Colorado River Cutthroat Trout v. Kempthorne, 2006 U.S. Dist. LEXIS 63473 (D.D.C. September 7, 2006).

The United States Fish and Wildlife Service (FWS) rejected a 1999 petition to list the cutthroat trout as an endangered species under the Endangered Species Act (ESA). As a result, the plaintiffs sought a judgment that the FWS's ruling on the petition violated mandatory ESA procedures and standards. The plaintiffs argued that the FWS failed to solicit public comments, went beyond the petition, and solicited information from several state and federal agencies during the 90-day review. The court granted plaintiffs' motion for summary judgment and ordered the defendants to conduct a full status review of the trout within nine months.

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