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 07-002-08

~ ~ August 15, 2007 ~ ~

FIRST CIRCUIT

Maine v Johnson, 2007 US App. LEXIS 18761 (1st Cir. Aug. 8, 2007).

Pursuant to the Clean Water Act (CWA), Maine applied to take over discharge permitting within the state. The Environmental Protection Agency (EPA) granted Maine the authority to regulate areas within the state, excepting areas within disputed Indian territory. The EPA later granted Maine the authority to regulate nineteen discharge facilities owned by non-Indians that discharged to boundaries within Indian territorial waters. However, the EPA refused to grant the state authority for two other sites that discharged into navigable waters within tribal territory and that later passed to downstream communities. Maine and the Indian tribes disputed different aspects of the EPA's order. The First Circuit affirmed part of the EPA's order for nineteen sites that were not in Indian Territory. However, the court vacated the EPA's order for two disputed Indian-owned sites. The court found that those discharge source points may have consequences for non-members of tribes an d could be subject to state regulation.

http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=1st&navby=docket&no=041363

Maine

Save Our Sebasticook, Inc. v Board of Environmental Protection, 2007 ME 102, P5 (Me. Aug. 7, 2007).

Pursuant to the Maine Waterway Development and Conservation Act (MWDCA), the Board of Environmental Protection (Board) granted a permit to FPL Energy Maine Hydro LLC for the partial removal of a dam. A trial court affirmed the Board's decision, and Save our Sebasticook filed an appeal contending that the Board's decision violated MWDCA because it failed to perform the appropriate tests and because FPL Energy was not in compliance with the applicable water quality laws. The Supreme Judicial Court of Maine affirmed the Board's decision, finding that the Board had made all of the necessary determinations and that FPL Energy met the standards for water quality certification.

http://www.courts.state.me.us/opinions/2007%20documents/07me102sa.pdf

FPL Energy Maine Hydro LLC v Department of Environmental Protection, 2007 ME 97 (Me. July 26, 2007).

The Board of Environmental Protection (Board) denied a water quality certification for FPL Energy Maine Hydro's Flagstaff Storage Project. The Board denied the application on the grounds that the Department had employed a new standard for assessing water quality and FPL Energy was required to obtain approval under the new standard. The trial court affirmed the Board's decision and FPL Energy appealed. FPL Energy argued that 1) the Board's decision was after the one-year statutory deadline and was therefore ineffective, 2) that the Board had applied the wrong standard when analyzing water quality, and 3) that the board erred in concluding that the Flagstaff Project would not meet the Class C water quality standards. The court ruled that it would defer to the Board's decision, since the Board had expertise in the area and its interpretation of the new requirements would support the legislative intent behind the laws.

http://www.courts.state.me.us/opinions/2007%20documents/07me97fp.pdf

New Hampshire

New Hampshire Department of Environmental Services v. Marino, 2007 N.H. LEXIS 120 (N.H. July 18, 2007).

Joseph and Rose Marino began constructing a home on their lot located on Back Lake, Pennsylvania. The Department of Environmental Services contacted the Marinos to inform them that their construction was in violation of the Shoreland Protection Act, because they were constructing within 50 feet of the shoreline without DES approval. The Marinos continued construction, responding that they were not subject to the SPA because their lot was a nonconforming lot of record. A New Hampshire trial court found that the couple had violated the SPA and granted partial summary judgment to the DES. The New Hampshire Supreme Court upheld that decision, finding that the DES was authorized to compose conditions on a nonconforming lot of record under RSA 483-B:10(I).

THIRD CIRCUIT

Delaware

Bernie's Conchs, LLC v State, Div. of Natural Res. & Envtl. Control, 2007 Del. Super. LEXIS 158 (Del. Super. Ct. June 8, 2007).

The Delaware Department of Natural Resources and Environmental Control (Department) issued regulations ordering a two-year moratorium on horseshoe crab harvesting. Bernie's Conchs sued the Department, arguing that the regulations were invalid. The court agreed that they were invalid, since they were not supported by substantial evidence that the population was endangered or that a moratorium made an appreciable difference in egg viability for red knots. The finding that the economic harm to the fishermen was outweighed by the dangers to horseshoe crabs and the red knots that depended on them was not supported by the record. The regulations were vacated and the matter was remanded to the Department.

http://courts.delaware.gov/opinions/(54v2vn45twlep3bddqm3etvw)/download.aspx?ID=93180

Pennsylvania

United States v Eisenberg, 2007 U.S. Dist. LEXIS 54199 (D. Pa. July 26, 2007).

Lewis Eisenberg was convicted of violations of the Lacey Act, the Endangered Species Act (ESA), and the Marine Mammal Protection Act (MMPA) for purchasing imported sperm whale teeth. After the defendant agreed to pay $150,000, the government moved to supplement the record with regard to whether the agreed fine exceeded the statutory maximum. The government granted the motion. The court found that the maximum fines under the Lacey Act and the MMPA had been replaced with higher maximum fines by §§ 3373(d)(1)(B) and 1375(b) for a maximum of $250,000 under the Lacey Act and $100,000 for the MMPA. The court found that the maximum fine under the ESA was $50,000. The agreed upon fine was within the $400,000 maximum.

FOURTH CIRCUIT

South Carolina

Smiley v South Carolina Department of Health and Environmental Control, 2007 S.C. LEXIS 292 (S.C. July 30, 2007).

The Office of Coastal and Resource Management issued a permit to Wild Dunes to excavate sand from a public beach and transport it to private property. Smiley filed a complaint with an Administrative Law Judge (ALJ), alleging that the excavation made it impossible for him to enjoy and use the beach. The ALJ concluded that Smiley lacked standing to bring the claim. Smiley had relied on S.C. Code Ann. §48-39-150, which, at the time, allowed any person adversely affected by an OCRM decision to request a hearing. On appeal, the South Carolina Supreme Court held that Smiley did have standing to bring suit, given that he used the beach almost daily for rehabilitative jogging.

http://www.judicial.state.sc.us/opinions/displayOpinion.cfm?caseNo=26365

FIFTH CIRCUIT

Park v Stockstill Boat Rentals, Inc., 2007 U.S. App. LEXIS 16927 (5th Cir. July 16, 2007).

John Park, an employee of Stockstill Boat Rentals (Stockstill), slipped and fell while aboard the *Miss Sissy*. The night before the fall, Park's vessel had run aground on a sand bar during a delivery. He was alone on the vessel and kept watch overnight. Park alleged that Stockstill had required him to work all night, resulting in a state of fatigue that led to his slip. Park also claimed that the ship had violated manning requirements and that the dilapidated condition of the vessel's decking contributed to his fall. The court found that there was no evidence to show that Stockstill had asked Park to make a delivery by himself and to remain on watch. The court rejected Park's claims that the company violated the manning requirements of its Certificate of Inspection, since the vessel was operating a "route of less severity." Finally, the court rejected his contention that the ship's condition contributed to his injury, finding that there was no evidence that the deck was in an unsafe condition.

http://www.ca5.uscourts.gov/opinions/pub/06/06-30655-CV0.wpd.pdf

SIXTH CIRCUIT

National Ecological Foundation v Alexander, 2007 U.S. App. LEXIS 18601 (6th Cir. Aug. 3, 2007).

The State of Tennessee filed a motion to clarify its obligations under a 1985 consent degree to establish whether or not it could implement a restoration project on a stream. The United States District Court for the Western District of Tennessee denied the motion. On appeal, the Sixth Circuit reversed and remanded certain parts of the decision. The court found that the consent decree did not limit the role of the state to maintain the work of the Army Corps of Engineers within a certain project area.

http://caselaw.lp.findlaw.com/data2/circs/6th/065700p.pdf

EIGHTH CIRCUIT

Ballanger v Johanns, 2007 US App. LEXIS 18245 (8th Cir. Aug. 1, 2007).

John Ballanger, Jr., converted woody vegetation to row crop planting. The United States Department of Agriculture (USDA) found that the land had been wetlands and as a result of the conversion, Ballanger was ineligible to receive benefits. Ballanger appealed his case to the United States District Court for the District of Iowa, raising several claims that he had not brought before the USDA. The court held that Ballanger was required to exhaust his claims with the USDA before filing suit. The Eighth Circuit agreed that issue exhaustion was required. Regarding the claim that Ballanger previously brought before the USDA, the court held that the USDA was not required to prove an impairment of reduction in the flow, circulation, or reach of water to prove that the land had been manipulated. Additionally, the court found that the USDA's definition of "converted wetland" was appropriate.

http://caselaw.lp.findlaw.com/data2/circs/8th/063889p.pdf

NINTH CIRCUIT

Golden Pisces, Inc. v Fred Wahl Marine Construction, Inc., 2007 U.S. App. LEXIS 17527 (9th Cir. July 24, 2007).

Golden Pisces, Inc., made an oral agreement with Fred Wahl Marine Construction to repair its fishing vessel, the *Golden Pisces*. Fred Wahl later had the captain of the *Golden Pisces* sign a form warranty limiting liability and assigning attorney's fees to the prevailing party in the event of litigation; however, the ship's manager never signed the agreement. In the midst of the fishing season, the vessel broke down due to a misaligned propeller shaft. The United States District Court for the District of Oregon awarded damages to Golden Pisces, which then sought to recover its attorneys' fees. The Ninth Circuit ruled that the American Rule precludes the prevailing party from recovering attorneys' fees, absent statutory authorization, an enforceable contract provision, or an equitable exception.

http://www.ca9.uscourts.gov/ca9/newopinions.nsf/679D33FA3FF9F01588257321006FB13E/$file/0535477.

United States v Moses, 2007 US App. LEXIS 18483 (9th Cir. Aug. 3, 2007).

A real estate broker, Charles Lynn Moses, was charged and convicted for violating the Clean Water Act (CWA) by rerouting and reshaping a creek. On appeal to the Ninth Circuit, Moses alleged that the creek was not a "water of the United States" and, therefore, he did not violate the CWA. He also claimed that there was insufficient evidence to prove that he made a discharge into the creek. The Ninth Circuit disagreed, finding that the creek was a water of the United States and that the evidence showed that Moses had discharged pollutants into it. The court also dismissed Moses' allegations that his actions were exempt from the CWA.

http://caselaw.lp.findlaw.com/data2/circs/9th/0630379p.pdf

Northern California River Watch v City of Healdsburg, 2007 U.S. App. LEXIS 18615 (9th Cir. Aug. 6, 2007).

The Ninth Circuit has affirmed the district court's finding that a city violated the Clean Water Act (CWA) by discharging sewage from its waste treatment plant into a body of water, the Basalt Pond. The court agreed that the body of water was adjacent to navigable waterways and that it possessed a significant nexus to navigable waters. Therefore, the city had violated the CWA by discharging wastewater into the Pond without an NPDES permit. Further, the Ninth Circuit ruled that the plant did not meet the wastewater treatment or the excavation exceptions to the CWA.

http://www.ca9.uscourts.gov/ca9/newopinions.nsf/04485f8dcbd4e1ea882569520074e698/7d5e7756b67c1

California

NRDC v Winter, 2007 U.S. Dist. LEXIS 57909 (D. Cal. Aug. 7, 2007).

In March, environmental protection groups filed suit against the U.S. Navy and the National Marine Fisheries Service (NMFS), seeking to enjoin the Navy's use of mid-frequency active sonar (MFA) during training exercises until the Navy adopts measures that would lessen the likelihood of serious injury and death to marine life. The defendants filed a motion to dismiss or stay. The United States District Court for the Central District of California issued a preliminary injunction to prevent the exercises while the lawsuit is pending. The court stated that the plaintiffs demonstrated a probability of success in its allegations that the Navy violated the National Environmental Policy Act (NEPA), the Administrative Procedures Act (APA), and the Coastal Zone Management Act (CZMA).

City of Santa Barbara v. Superior Court, 41 Cal. 4th 747 (Cal. July 16, 2007).

The City of Santa Barbara operated a camp for developmentally disabled children. In 2002, Katie Janeway, a camp participant, drowned. Katie's parents filed a wrongful death action. The lower courts denied the city's motion for summary judgment, and the city appealed to the California Supreme Court. The city argued that the parents had signed a camp application form that had contained a clause releasing the city from liability for any negligent act related to a child's participation in the camp. Because the form had released the city from even gross negligence, which requires a lower standard of care than ordinary negligence, the court agreed that, as a matter of public policy, the release was invalid. The court held that an agreement made in the context of sports or recreational programs or services that acts as a release for future gross negligence generally is unenforceable.

http://www.courtinfo.ca.gov/opinions/documents/S141643.PDF

Alaska

Gottardi v State, 2007 Alas. App. LEXIS 151 (Alaska Ct. App. July 25, 2007) .

A fire fed by sabotaged fuel lines in Juneau, Alaska, polluted Auke Bay and caused thousands of dollars in damage. A third party testified that a few months prior to the fire, Rickey Gottardi stated that he intended to burn the harbor master's office. Based on this evidence, an Alaska trial court convicted Gottardi of first degree arson, criminal mischief, and oil pollution. Gottardi appealed the decision, alleging that his statement to the third party was inadmissible character evidence. The Alaska Court of Appeals found that the statement was admissible as an exception to the hearsay rule under Alaska R. Evid. 803(3). The court held that the trial judge's decision to admit the evidence was within the judge's discretion and affirmed the trial court's judgment.

http://www.state.ak.us/courts/ops/am-5243.pdf

UNITED STATES COURT OF FEDERAL CLAIMS

Nicholson v United States, 2007 U.S. Claims LEXIS 242 (Ct. Cl. July 27, 2007).

After Hurricane Katrina, several property owners brought an action alleging that the government's failure to implement adequate flood control measures resulted in a taking of their property under the Fifth Amendment. The court held that the hurricane, rather than the government, caused the flooding. Therefore, the government's motion for summary judgment was granted.

http://www.uscfc.uscourts.gov/Opinions/Baskir/07/BASKIR.NICHOLSON072707.pdf

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