

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 07-002-02

~ ~ February 20, 2007 ~ ~

FIRST CIRCUIT

ITT Federal Services Corp. v Montano, 2007 U.S. App. LEXIS 1742 (1st Cir. Jan. 26, 2007).

Edgar Colon, an employee of ITT Federal Services in Puerto Rico, was injured when a Navy pilot accidentally dropped two bombs near the control tower where Colon was working. Colon sought benefits under the Defense Base Act (DBA), which includes the Longshore and Harbor Workers' Compensation Act (LHWCA). ITT and Colon's insurance company settled the compensation claim. Colon later brought suit against ITT and the Navy, but the suit was dismissed against the Navy since individual military departments may not be sued under the Federal Tort Claims Act. Colon's lawyer did not refile the suit and the statute of limitations on the claim ran. ITT then brought suit against Colon's attorney, claiming that it could have recovered payments made to Colon under the DBA if the attorney had properly handled the lawsuit. The U.S. District Court for the District of Puerto Rico dismissed the claims and ITT appealed. On appeal, the First Circuit affirmed the decision, holding that LHWCA did not provide the employer with a right to bring a claim against a third party.

SECOND CIRCUIT

Riverkeeper, Inc. v United States EPA, 2007 U.S. App. LEXIS 1642 (2d Cir. Jan. 25, 2007).

Several states, Riverkeeper, Inc., the Natural Resources Defense Council, and other organizations challenged a final rule promulgated by the EPA under the Clean Water Act that was intended to protect aquatic organisms from being harmed or killed by regulating cooling water intake structures at large, existing power-producing facilities. The United States Court of Appeals for the Second Circuit remanded parts of the rule to the EPA, including parts that were inadequately explained or inconsistent with the statute, not supported by sufficient evidence, or not properly subject to notice and comment. The court dismissed the challenge to the definition of the Great Lakes.

Connecticut

Simsbury-Avon Preservation Society, LLC v Metacon Gun Club, Inc., 2007 U.S. Dist. LEXIS 7177 (D. Conn. Jan. 31, 2007).

The Simsbury-Avon Preservation Society maintained a suit against the Metacon Gun Club, alleging that the lead shot from the club was being discharged into navigable waters in violation of Section 402 of the Clean Water Act. Metacon moved for summary judgment, arguing that the wetlands did not meet the definition of navigable waters as determined in *Rapanos v. United States*. The United States District Court for the District of Connecticut granted summary judgment in favor of the gun club. The court found that the plaintiffs did not offer evidence showing a continuous connection between the club's wetland and the cove or river, as required by *Rapanos*. Furthermore, the court found that the wetlands' effects on water quality were speculative or insubstantial.

THIRD CIRCUIT

New Jersey

Doyal v New Jersey Department of Environmental Protection, 2007 N.J. Super. LEXIS 18 (App. Div. Jan. 24, 2007).

The New Jersey Department of Environmental Protection (DEP) denied Samuel Doyal's application for a general permit to fill wetlands on his property. The trial court affirmed the DEP's ruling. The court agreed with the DEP that the permit would have been in violation of the New Jersey Freshwater Wetlands Protection Act (FWPA), since the wetlands discharged into a surface water tributary system. The FWPA authorizes issuance of a general permit for an activity in a freshwater wetland "which is not a surface water tributary system discharging into an inland lake or pond, or a river or stream." The owner argued that, since the tributary into which his wetlands drained was not "inland," he should have been issued a general permit. The court held that the word "inland" only modified lake or pond, and therefore, a general permit could not be issued to fill wetlands that ran into a tidal stream.

FIFTH CIRCUIT

O'Reilly v United States Army Corps of Engineers, 2007 U.S. App. LEXIS 1630 (5th Cir. Jan. 24, 2007).

The Corps of Engineers' issued a Finding of No Significant Impact (FONSI) under the National Environmental Policy Act regarding a developer's dredge and fill of wetlands in St. Tammany Parish, Louisiana. Residents challenged the FONSI, claiming that the Corps acted arbitrarily and that their dwellings, businesses, and recreational areas would be harmed by the activity. The United States District Court for the Eastern District of Louisiana agreed with the residents that the Corps acted arbitrarily in making its decision. The Corps appealed, and the Fifth Circuit affirmed the district court's ruling. The court amended the injunction to enjoin Corps from issuing a § 404 permit until the district court issued further orders and reversed and remanded a portion of the district court's opinion to the Corps.

Terrebonne v K-Sea Transportation Corp., 2007 U.S. App. LEXIS 1805 (5th Cir. Jan. 26, 2007).

Dextel Terrebonne, a crew member on a tug for K-Sea Transportation, injured himself while lifting a pump while aboard the tug and was later diagnosed with a hernia. Terrebonne was compensated for the injury and signed an agreement to arbitrate future claims related to his injury. When Terrebonne re-injured himself several months later, he brought a claim under the Jones Act. K-Sea moved to arbitrate the claim. The United States District Court for the Eastern District of Louisiana granted the motion. The district court later approved the arbitration award and Terrebonne appealed. The Fifth Circuit held that the arbitration agreement was enforceable under the Federal Arbitration Act, noting that the scope of the language in the arbitration agreement was broad enough to cover the re-injury.

Mississippi

Broussard v State Farm Fire and Casualty Company, No. 1:06-cv-00006-LTS-RHW (S.D. Miss. Jan. 31, 2007).

A jury in the United States District Court for the Southern District of Mississippi awarded Norman and Genevieve Broussard \$2.5 million dollars in punitive damages after State Farm Insurance denied their Hurricane Katrina-related claim. In January, a federal district judge reduced the award to one million dollars. Although the judge found that the insurance company acted negligently in denying the claim, he felt that one million, which was five times the value of the couple's home, was a more appropriate assessment of punitive damages against the insurance company.

Woullard v State Farm Fire and Casualty Company, No. 1:06cv1057 LTS-RHW (S.D. Miss. Jan. 26, 2007).

After State Farm insurance agreed to pay thousands of policyholders for Hurricane Katrina-related claims and reopen claims it had previously denied, a federal district judge rejected the agreement. State Farm had agreed to pay fifty million dollars, but Judge L.T. Senter of the United States District Court for the Southern District of Mississippi noted that he was unable to determine how that amount compared to the total claims of the members of the proposed class. Judge Senter cited concerns that the procedure established in the settlement would not be fair, just, balanced, or reasonable.

SEVENTH CIRCUIT

Illinois

National Mitigation Banking Association v United States Army Corps of Engineers, 2007 U.S. Dist. LEXIS 10528 (D. Ill. Feb. 14, 2007).

The Army Corps of Engineers issued a Section 404 permit under the Clean Water Act (CWA) to the city of Chicago allowing it to fill wetlands at the O'Hare International Airport. The permit allowed the city to fill 97.1 acres of wetlands, but the city was required to pay approximately \$4.5 million to a mitigation bank provider in exchange for 62 acres of mitigation credits and to pay a \$26 million fee to an in-lieu fee provider that agreed to undertake an additional 280 credits of mitigation. Wetlands Research, Inc., Land and Water Resources, Inc., and Wetlands Mitigation of Illinois, LLC, brought suit against the Corps, claiming that the permit was issued in violation of the National Environmental Policy Act (NEPA) and the CWA. The United States District Court for the Northern District of Illinois held that the Corps decision did not violate NEPA or the CWA, finding that the Corps gave due consideration to concerns over the use of in-lieu fees for mitigation purposes.

NINTH CIRCUIT

Northwest Environmental Defense Center v Bonneville Power Administration, 2007 U.S. App. LEXIS 1493 (9th Cir. Jan. 24, 2007).

The Northwest Environmental Defense Center, the Public Employees for Environmental Responsibility, the Northwest Sportfishing Industry Association, and the Yakama Indian Nation sought a review of the Bonneville Power Administration's (BPA) decision to transfer the functions of the Fish Passage Center (FPC) to two other entities. The FPC was put in place to mitigate adverse effects to salmon and steelhead caused by the Columbia River's hydropower system. The Ninth Circuit Court of Appeals granted the petition for review because the BPA did not show a rational basis for its decision. The court also held that the congressional committee report language that the BPA relied on to transfer power did not carry the force of law.

Scheuring v Traylor Brothers, Inc., 2007 U.S. App. LEXIS 3237 (9th Cir. Feb. 14, 2007).

Kevin Scheuring was injured while working aboard a barge as a crane operator. He filed suit against Traylor Brothers, the owner of the barge, under the Jones Act and the Longshore Harbor Workers' Compensation Act (LHWCA). The United States District Court for the Central District of California granted summary judgment in favor of Traylor. The court determined that Scheuring could not bring a claim under the Jones Act, since his work above the barge did not qualify him as a seaman. The court also held that Scheuring was ineligible to sue under the LHWCA, because the alleged negligence in the positioning of the ramp did not implicate a duty owed by Traylor. The Ninth Circuit reversed the district court's decision, since Scheuring raised genuine issues of material fact with regard to both counts.

California

Vineyard Area Citizens for Responsible Growth, Inc. v City of Rancho Cordova, 2007 Cal. LEXIS 748 (Cal. Feb. 1, 2007).

A group of residents in Sacramento County, California, filed suit after the county approved a community plan for a large, mixed-use development project. The residents claimed that the approval was in violation of the California Environmental Quality Act. The residents claimed that the environmental impact report (EIR) failed to adequately identify and evaluate future water sources for the development and the potential impacts on migratory salmon were not incorporated in a draft EIR and circulated for public comment. The trial court denied the plaintiffs' motion to have the plans overturned and a California appeals court affirmed that decision. The California Supreme Court reversed the court of appeals and remanded the case, since the plan failed to provide adequate information about the long-term plans for supplying water to the development. The court also held that the draft EIR had to be revised and recirculated for public comment, in light of the potential impact on salmon migration.

McAllister v County of Monterey, 147 Cal. App. 4th 253 (Cal. Ct. App. Jan. 31, 2007).

Dr. Hugh McAllister, chair of the World Wildlife Fund's Marine Leadership Committee and property owner along the Big Sur Coast, appealed the approval of a development project to the California Coastal Commission and the Superior Court of Monterey County. The project, which included the development of a lot and the construction of a single-family home, was approved by Monterey County after it had issued a mitigated negative declaration. The superior court dismissed the case, and McAllister sought review of that decision. The appeals court affirmed the superior court's decision. The court held that Commission under Public Resources Code § 30603 (a)(1) required exhaustion of administrative remedies by appeal.

ELEVENTH CIRCUIT

Alabama-Tombigbee Rivers Coalition v Kempthorne, 2007 U.S. App. LEXIS 2783 (11th Cir. Feb. 8, 2007).

An Eleventh Circuit case recently raised the question of whether the Alabama sturgeon and the shovelnose sturgeon are separate species. The Alabama-Tombigbee Rivers Coalition and other groups filed suit challenging the United States Fish and Wildlife Service's (FWS) final rule designating a critical habitat for the Alabama sturgeon. The United States District Court for the Northern District of Alabama granted the FWS' motion for summary judgment. The groups claimed that the FWS did not rely on the best scientific evidence available; the FWS violated section four of the Endangered Species Act; and Congress exceeded the power granted to it under the Commerce Clause by authorizing protection of the Alabama sturgeon, an intrastate, noncommercial species. The court of appeals affirmed the district court's grant of summary judgment.

Florida

Brannon v Boldt, 2007 Fla. App. LEXIS 644 (Fla. 2nd DCA Jan. 24, 2007).

In Florida, the Brannon family owned a lot subject to an implied easement allowing residents in their neighborhood access to the Boca Ciega Bay. The neighbors sought a declaration that the easement for "ingress and egress" granted them the right to sit and stand on the lands within the easement to fish, watch fireworks, watch the sunset, and enjoy the view of the bay. The Circuit Court for Pinellas County held that the easement only allowed neighbors access to the water and any area below the mean high-water mark. The court specified that activities that would be allowed under the easement, including the right to build a dock if allowed by law or the right to cross the property to reach any area below the mean high-water mark, but noted that the neighbors could not stay within the easement for an extended period of time for the purpose of viewing the water.

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