

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 07-002-07

~ ~ July 16, 2007 ~ ~

UNITED STATES SUPREME COURT

National Association of Home Builders v Defenders of Wildlife, 2007 US LEXIS 8312 (June 25, 2007).

The Defenders of Wildlife challenged the Environmental Protection Agency's (EPA) decision approving a transfer of permitting powers to Arizona state authorities under the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES) program. The U.S. Court of Appeals for the Ninth Circuit held that the EPA's transfer was arbitrary and capricious. On appeal to the U.S. Supreme Court, the EPA contended that the state had met all of the CWA's criteria for the transfer, and, therefore, the transfer was proper. The Defenders of Wildlife argued that the Endangered Species Act required the EPA to perform a jeopardy analysis on the effect of the transfer on endangered or threatened species. The Court disagreed, finding that the no-jeopardy assessment was required only if the agency action was discretionary. The Court reversed the decision and remanded the case back to the Ninth Circuit.

<http://www.supremecourtus.gov/opinions/06pdf/06-340.pdf>

FIRST CIRCUIT

United States v Massachusetts, 2007 US App. LEXIS 14719 (1st Cir. June 21, 2007).

After a Buzzards Bay oil spill, Massachusetts enacted a law requiring tank vessels operating in state waters to comply with certain operational and financial responsibility standards. The United States, along with several shipping organizations, filed suit arguing that the state law was preempted by the Ports and Waterways Safety Act of 1972 (PWSA). The United States District Court for the District of Massachusetts permanently enjoined the challenged provisions. On appeal, Massachusetts argued that there was an overlap in Title I and Title II of the PWSA and that the district court had failed to apply an overlap analysis. The First Circuit agreed with the state that the district court erred in concluding that the PWSA left no room for the state to enact the protection measures without applying the overlap analysis. The First Circuit vacated the district court's decision and remanded it to the district court for further proceedings.

FIFTH CIRCUIT

In the Matter of American River Transportation Company, No. 05-30878 (5th Cir. June 19, 2007).

Jacques Allemand, a longshore worker, died after he jumped from a barge in an effort to save his coworker. Allemand's parents sued American River Transportation Company, the owner of the barge and Allemand's employer, seeking damages for loss of society. The U.S. District Court for the Eastern District of Louisiana granted summary judgment in favor of the company, reasoning that non-dependent parents may not recover for loss of society in maritime wrongful death actions. The Fifth Circuit agreed, further finding that loss of society was not recoverable under the Miles rule, which allows for the recovery of pecuniary damages, but precludes non-pecuniary damages.

<http://www.ca5.uscourts.gov/opinions/pub/05/05-30878-CV0.wpd.pdf>

NINTH CIRCUIT

Peru v. Sharpshooter Spectrum Venture LLC, 2007 U.S. App. LEXIS 15238 (9th Cir. June 27, 2007).

Cheryl Peru worked as a photographer for Sharpshooter Spectrum Venture, a company that takes pictures of tourists aboard the *USS Missouri* and then sells those photos on the pier. While aboard the ship, Peru bumped her head while ascending a ladder and suffered head and neck injuries. She attempted to apply for Hawaii's workers' compensation benefits, but a claims adjuster denied her eligibility. Peru then filed a claim with the Department of Labor's Office of Workers' Compensation Programs under the Longshore and Harbor Workers' Compensation Act (LHWCA). The office issued a decision denying her claims, which the Benefits Review Board affirmed. The Board based its decision on the LHWCA's exclusion of employees from retail outlets. The appellate court agreed with the board that the company's operation of the booth on the pier constituted a retail outlet; however, the court held that if, on remand, the Board determined that Peru was not covered by the state worker s' compensation law then she would be eligible for LHWCA benefits.

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/4B97BF2891383BD48825730600829913/\\$file/0575337.r](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/4B97BF2891383BD48825730600829913/$file/0575337.r)

Washington

Echo Bay Community Association v Department of Natural Resources, 2007 Wash. App. LEXIS 1674 (Wash. Ct. App. June 19, 2007).

The Echo Bay Community Association owns tidelands adjacent to a bay. The Washington Department of Natural Resources (DNR) leased bedlands to F/V Puget L.L.C., for use as herring net pens. The community association objected to the leases and sued in state court, alleging that the leases were invalid because state law allowed DNR to lease beds only to property owners or lessees abutting the tidelands or shoreland. The association further argued that even if the DNR could lease the lands, the herring pens were not used for aquaculture and, therefore, the lease was invalid. The trial court ruled in favor of the DNR. The appellate court affirmed the judgment, holding that the DNR could lease the bedlands to the company and that the company's activities were permitted because they qualified as aquaculture processing.

<http://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=348837MAJ>

ELEVENTH CIRCUIT

Georgia

Coastal Marshlands Protection Committee v Center for a Sustainable Coast, 2007 Ga. App. LEXIS 821 (Ga. Ct. App. July 11, 2007).

The Georgia Coastal Marshlands Protection Committee (Committee) issued a permit under the Coastal Marshlands Protection Act (CMPA) to a developer for construction on or over state-owned coastal marshlands and water bottoms. The Center for a Sustainable Coast filed suit alleging that Committee did not properly apply the CMPA to protect the marshlands. An administrative law judge (ALJ) agreed and reversed parts of the permit and remanded it to a Georgia trial court, which affirmed the ALJ's decision. The trial court held that the Committee should be required to regulate portions of the upland development because its stormwater runoff would adversely affect the marshlands. On appeal, the Georgia Court of Appeals reversed the decision, finding that the CMPA should not regulate the stormwater runoff since there was no evidence that the runoff from the upland development would affect the marshlands through removing, filling, dredging, or draining, a requirement of O.C.G.A. § 12-5-286(a).

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Fisherman's Harvest, Inc. v PBS & J, 2007 US App. LEXIS 14701 (Fed. Cir. Jun. 21, 2007).

The Army Corps of Engineers (Corps) commissioned certain contractors, subcontractors, and suppliers to dredge a river in Texas. Oyster growers that held leases in the area claimed that the contractors negligently designed and implemented the project, causing silt, sediments, and toxic materials to be deposited in areas affecting their oyster beds. The oyster growers filed suit in federal district court and the contractors filed a third party complaint seeking contribution and indemnity from the Corps. The Corps argued that the district court did not have jurisdiction over the matter, and the district court transferred the case to the United States Court of Appeals for the Federal Circuit. The court of appeals held that the district court had diversity jurisdiction over the matter and that 28 U.S.C.S. § 1497 did not give the court jurisdiction to hear the oyster growers' claims against the contractor.

<http://caselaw.lp.findlaw.com/data2/circs/fed/061208p.pdf>

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