Ocean and Coastal Case Alert

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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 09-002-05

U.S. SUPREME COURT

Burlington Northern & Santa Fe Ry. v. United States, 2009 U.S. LEXIS 3306 (May 4, 2009).
The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund, provides federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. Federal and state agencies brought a CERCLA action against a pesticide supplier and a property owner to recover remediation costs at a railroad facility contaminated by hazardous waste. The Ninth Circuit held the supplier and the property owner jointly and severally liable for the remediation costs. The U.S. Supreme Court reversed the decision, holding that parties that arrange for disposal (in this instance, the pesticide supplier) are not liable under CERCLA unless they intend to dispose of the waste within the meaning of the Act. The Court also held that liable parties at a multi-party Superfund site are not jointly and severally liable if a reasonable basis exists to apportion their liability.
http://www.supremecourtus.gov/opinions/08pdf/07-1601.pdf

FIFTH CIRCUIT

Six Flags Inc. v. Westchester Surplus Lines Ins. Co., 2009 U.S. App. LEXIS 8273 (5th Cir. Apr. 21, 2009).
Six Flags theme park in New Orleans was damaged by flooding associated with Hurricane Katrina. Six Flags sought recovery from several of its insurers for $150 million in damages. The park recovered $25 million under a primary coverage policy and sought the remainder from excess policies, which were capped at $425 million. The excess insurers limited their coverage to $5 million, citing sublimits that apply to flood loss. The excess policies contained a sublimit "applicable to all loss or damage . . . per occurrence and in the term aggregate as respects Flood at any location in a Flood Zone A or V as designated by . . . the Federal Emergency Management Agency" and separate deductibles for the perils of flood and of a named storm. Six Flags argued that the sublimit in the insurance policies "as respects Flood" did not limit liability for loss and damage resulting from Hurricane Katrina-related flooding. The United States District Court for the Eastern District of Louisiana granted summary judgment in favor of the insurance companies. On appeal, the Fifth Circuit held that six of the excess policies unambiguously excluded "all loss of damage resulting from flood" caused by, associated with, or occurring in conjunction with the hurricane. The court remanded the case to the district court on a seventh policy, finding that language in that policy was ambiguous and merited separate consideration.
http://www.ca5.uscourts.gov/opinions/pub/08/08-30476-CV0.wpd.pdf

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SIXTH CIRCUIT

Michigan

U.S. Attorney's Office Eastern District of Michigan
Wayne Duffiney was convicted of sinking his vessel, the *Misty Morning*, in the navigable channels of Lake Huron, failing to mark the wreck with navigation aids, and discharging pollutants into the navigable waters of the United States in violation of the Clean Water Act. He was acquitted on the charge that alleged willfully causing and permitting destruction and injury to the *Misty Morning* in the territorial waters of the United States. He faces a maximum penalty of three years in custody and fines of up to $50,000 per day for the pollution violations and a maximum of a year in custody and $25,000 per day for the other counts. Duffiney also faces possible administrative forfeiture of the vessels used to tow the vessel that was sunk and loss of his mariner's license. Duffiney has the right to appeal the judgment.
http://www.justice.gov/opa/pr/2009/April/09-enrd-392.html

NINTH CIRCUIT

Alaska

Alaska Department of Environmental Conservation
In 2004, a bulk carrier, the *Selendang Ayu*, went aground and broke in two off the coast of Alaska, spilling over 350,000 gallons of oil and thousands of tons of soy beans into the Bering Sea. The operator and owner of the ship have settled the oil spill penalty, wreck removal, and lost fish tax claims with the state of Alaska for $844,707. The settlement also includes a $1 million letter of undertaking from the vessel's insurers to cover wreck removal if any remaining portions of the vessel move onto tidelands or beaches before August 30, 2015. The companies had previously paid more than $111 million in cleanup costs and other charges.
http://www.dec.state.ak.us/press_releases/2009/2009_04_27_Selendang_Ayu_Settlement.pdf

Washington

Cmty. Ass'n for Restoration of the Env't v. Dep't of Ecology, 2009 Wash. App. LEXIS 903 (Wash. Ct. App. Apr. 21, 2009).
The Washington Pollution Control Hearings Board (PCHB) affirmed a general permit issued by the Washington Department of Ecology governing nitrate generation from dairies and other livestock operations. An environmental group appealed the approval, arguing that the Department should have included groundwater monitoring as part of the permit and that the permit violated the Clean Water Act. The court held that the PCHB did not err in affirming the permit, because the issue of whether soil monitoring, lagoons, and diversion would protect groundwater was within the Department's expertise under Wash. Rev. Code ch. 90.48 and state law did not expressly require groundwater monitoring.
http://www.courts.wa.gov/opinions/pdf/36974-5.09.doc.pdf

ELEVENTH CIRCUIT

Sea Byte, Inc. v. Hudson Marine Mgmt. Servs., 2009 U.S. App. LEXIS 8429 (11th Cir. Apr. 20, 2009).
In 2004, a vessel ran aground on an underwater coral reef off the coast of Fort Lauderdale, Florida. State and county officials ordered the ship's owner to repair the reef. The ship owner hired a marine environment casualty management company, Hudson Marine Management Services, to oversee the repairs. Hudson subcontracted with another company, Sea Byte, to restore the reef. The contract between the companies contained a clause that allowed renegotiation in the event of severe weather. When two hurricanes struck the area and worsened the damage to the reef, the parties attempted to renegotiate the contract per their earlier agreement. The parties were unable to reach an agreement, and Sea Byte never finished the job. A trial court found that the original contract had terminated after the hurricanes hit, pursuant to the contract's severe weather clause. The appellate court affirmed the trial court's findings, except for the trial court's calculation of the value of the work completed prior to the hurricane. The appellate court remanded the case with instructions to calculate the amount owed by determining the project value provided by Sea Byte under the contract and then multiplying that percentage by the total contract price.
http://www.ca11.uscourts.gov/opinions/ops/200814069.pdf

Miccosukee Tribe of Indians v. United States, 2009 U.S. App. LEXIS 9715 (11th Cir. May 5, 2009).
In 2005, the Miccosukee Tribe filed a lawsuit alleging that the U.S. Fish and Wildlife Service (FWS) violated the Endangered Species Act in its approval of an Interim Plan guiding an Everglades restoration project. The tribe claimed that while the Interim Plan protected one endangered species, the Cape Sable seaside sparrow, it negatively impacted another, the Everglade Snail Kite. The tribe argued that the Biological Opinion (BiOp) issued by the FWS was not in accordance with the law, the BiOp was arbitrary and capricious, and that the incidental take statement was deficient. The United States District Court for the Southern District of Florida entered summary judgment in favor of the FWS. On appeal, the Eleventh Circuit affirmed the biological opinion since it used the best available scientific data and its conclusions were not counter to the scientific data in the record. The court reversed the lower court's ruling on the incidental take statement, finding that it did not contain an adequate trigger for re-consultation.
http://www.ca11.uscourts.gov/opinions/ops/200810799.pdf

DC CIRCUIT

Ctr. for Biological Diversity v. United States DOI, 2009 U.S. App. LEXIS 8097 (D.C. Cir. Apr. 17, 2009).
The U.S. Court of Appeals for the District of Columbia vacated the Department of Interior's five-year leasing program for oil and gas development on the Outer Continental Shelf (OCS). Several environmental organizations and an Alaskan village challenged the program under the Outer Continental Shelf Lands Act (OCSLA), the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA). The court dismissed the NEPA and ESA claims, finding the claims were not ripe for review since no drilling had occurred. The court also dismissed the groups' OSCLA claim that the agency failed to consider the climate change impacts of oil and gas consumption before approving the lease program. The court found that OSCLA did not require the agency to consider global or local environmental impact, but only potential damage to a localized area. The court vacated the program, however, on the grounds that the agency's environmental sensitivity analysis violated OSCLA, because the analysis was limited to shoreline areas, not the OCS, in violation of §18(a)(2)(G).
http://pacer.cadc.uscourts.gov/common/opinions/200904/07-1247-1176224.pdf

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