

Ocean and Coastal Case Alert

~ ~ August 15, 2008 ~ ~

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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 www@nslc.clemson.edu with "Case Alert" on the subject line. MASGC 08-002-08

FIFTH CIRCUIT

Kirksey v. Tonghai Maritime, 2008 WL 2735870 (5th Cir. July 15, 2008).

Patrick Kirksey, a lonshoreman, was unloading a vessel when a steel coil that had shifted during high winds at sea fell and injured him. He sued the ship owner, operator, and charterer seeking damages under the Longshore and Harbor Workers Compensation Act (LHWCA). The United States District Court for the Southern District of Texas ruled in favor of Kirksey. On appeal, the Fifth Circuit reversed the decision, finding that the dangerous condition of the cargo was open and obvious; therefore, the shipowner and others were not liable for the injury that occurred.

<http://www.ca5.uscourts.gov/opinions/pub/07/07-40616-CV0.wpd.pdf>

NINTH CIRCUIT

Northwest Environmental Advocates v. U.S. E.P.A., 2008 WL 2813103 (9th Cir. July 23, 2008).

Several environmental groups challenged a regulation promulgated by the Environmental Protection Agency (EPA) exempting certain discharges "incidental to the normal operation of a vessel" from the National Pollutant Discharge Elimination System (NPDES). The United States District Court for the Northern District of California granted the groups' motion for summary judgment. The Ninth Circuit upheld the decision. The court found that the district court had subject matter jurisdiction of the suit and that the EPA exceeded its authority under the Clean Water Act (CWA) in promulgating the regulation and in denying the group's petition requesting a repeal of the regulation.

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/1B1275291668F0348825748F00481607/\\$file/0374795.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/1B1275291668F0348825748F00481607/$file/0374795.pdf?openelement)

Center for Biological Diversity v. Marina Point Development Company, 2008 WL 3009692 (9th Cir. Aug. 8, 2008).

Environmental groups and local residents sought to enjoin the development of a residential condominium on a lakeshore, claiming that the development would be in violation of the Clean Water Act (CWA) and the Endangered Species Act (ESA). The United States District Court for the Central District of California ruled in favor of the plaintiffs. On appeal, the Ninth Circuit held that the delisting of the bald eagle rendered the ESA claim moot and that the district court lacked jurisdiction under the CWA.

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/066DD67AF274D3538825749D004CE172/\\$file/0656193.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/066DD67AF274D3538825749D004CE172/$file/0656193.pdf?openelement)

ELEVENTH CIRCUIT

Board of Commissioners of Orleans Levee Dist. v. M/V Belle of Orleans, 2008 WL 2853878 (11th Cir. July 25, 2008).

Under a long-term contract, the owner of the *M/V Belle of Orleans*, a gaming vessel, leased land along Lake Pontchartrain from the Board of Commissioners. During Hurricane Katrina, the vessel broke loose from its moorings, damaging both the pier and the vessel. The vessel owners were unable to continue operating the vessel and subsequently discontinued making lease payments to the Board. The Board filed a suit in admiralty, seeking payment for damages and for breach of the lease. The United States District Court for the District of Alabama dismissed the suit, finding that the gaming vessel was not a vessel for purposes of admiralty jurisdiction. The Eleventh Circuit disagreed, finding that a vessel is subject to admiralty jurisdiction in tort if it is certified by the Coast Guard and is capable of being used for maritime transport; therefore, the Board could seek payment for the damages. However, the court found that the lease contract was not sufficiently maritime in nature to support a maritime lien.

<http://www.ca11.uscourts.gov/opinions/ops/200613614.pdf>

DC CIRCUIT

Washington Gas Light Co. v. FERC, 532 F.3d 928 (D.C. Cir. July 18, 2008).

The Federal Energy Regulatory Commission (FERC) granted permission for the expansion of a liquefied natural gas facility at Cove Point. A local distribution company that received natural gas from the terminal filed a petition to review the approval, claiming that the expansion would cause leakage throughout its distribution system. Although the court agreed with FERC that any leakage would be due to the distribution company's system, it found the agency's conclusion that the distribution company could address safety concerns before the project's in-service date was not supported by substantial evidence. The court granted the petition and remanded the issue to FERC for further review.

<http://pacer.cadc.uscourts.gov/common/opinions/200807/07-1015-1128289.pdf>

Defenders of Wildlife v. Gutierrez, 532 F.3d 913 (D.C. Cir. July 18, 2008).

The District of Columbia Court of Appeals ruled that the U.S. Coast Guard is required to consider the impact on the endangered North Atlantic right whales in its designation of ship routing schemes. The appellate court affirmed the district court's grant of summary judgment with regard to the National Marine Fishery Service's denial of an emergency rulemaking petition. However, because the appellate court found that the Coast Guard's failure to consult with other agencies as required by § 7(a)(2) of the ESA resulted in a final reviewable agency action, the court reversed the district court's grant of summary judgment to the Coast Guard and remanded to the district court, which will determine whether the Coast Guard was in violation of the Endangered Species Act.

<http://pacer.cadc.uscourts.gov/docs/common/opinions/200807/07-5278-1128311.pdf>

FEDERAL CIRCUIT

Salmon Spawning and Recovery Alliance v. U.S., 532 F.3d 1338 (Fed. Cir. July 15, 2008).

Environmental groups brought suit against the U.S. Customs & Border Protection (Customs Service), as well as other federal agencies, claiming that they violated their duties under the Endangered Species Act (ESA) by: (1) failing to enforce a ban on the importation of threatened and endangered salmon from Canada into the U.S., and (2) failing to consult with the National Marine Fisheries Service as required by § 7(a)(2) of the ESA regarding this lack of enforcement. The Court of International Trade (CIT) dismissed plaintiffs' claims for lack of subject matter jurisdiction and standing, respectively. On appeal, the Federal Circuit Court of Appeals held that while the CIT properly ruled that the Customs Service's failure to enforce the ban was discretionary and thus not subject to judicial review, the plaintiffs had standing to contest the Customs Service's alleged procedural failure to engage in ESA consultation. The Circuit Court remanded the matter to determine whether plaintiffs' remaining claim falls within the CIT's exclusive jurisdiction, or instead must be brought before a district court.

<http://www.cafc.uscourts.gov/opinions/07-1444.pdf>

MASGC 08-002-4

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