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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the October 2017 issue of *Ocean and Coastal Case Alert*.

The Case Alert is a monthly newsletter highlighting recent court decisions impacting ocean and coastal resource management. (NSGLC-17-03-10).

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FIRST CIRCUIT

Ironshore Specialty Insurance Co. v. United States, 2017 WL 4082071 (1st Cir. Sept. 15, 2017).

Ironshore Specialty Insurance Company paid cleanup costs after a military vessel spilled 11,000 gallons of fuel next to Boston Harbor. Ironshore sought cleanup costs and damages under the Oil Pollution Act (OPA). The company also filed for a declaratory judgment finding American Overseas Marine Company, LLC (AMSEA) and the United States strictly liable for the spill under OPA and for damages in general admiralty and maritime law as a result of the alleged negligence. The district court dismissed all claims. On appeal, the First Circuit affirmed the dismissal of all claims against AMSEA and the dismissal of the OPA claims against the United States, because these claims are barred by OPA. However, the court found that general admiralty and maritime negligence law still applied. The court reversed the district court's dismissal of negligence claims against the United States; however, the court affirmed the dismissal of negligence claims against AMSEA, as it only acted as an agent of the United States and had immunity under the Suits in Admiralty Act.

Opinion Here

Massachusetts

United States v. Rafael, 2017 WL 4542051 (D. Mass. Oct. 11, 2017).

Carlos A. Rafael, owner of Carlos Seafood, operated one of the largest commercial fishing companies in the country, with 32 fishing vessels and 44 permits. On March 30, 2017, Rafael pled guilty to twenty-three counts of false labeling

and identification, in violation of the Lacey Act, for misreporting the quantity and species of approximately 782,812 pounds of fish. He also pled guilty to counts of conspiracy, bulk cash smuggling, and tax evasion. In September, Rafael received a 46-month prison term. He is also required to serve three years of supervised release and pay a $200,000 fine. In October, a federal district court ruled that Rafael was required by law to forfeit his interest in 34 of his 44 fishing permits.

Opinion Here

FIFTH CIRCUIT

Louisiana

Avoca v. State Dep't of Nat. Res., 2017 WL 4081624 (La. App. Ct. Sept. 15, 2017).

In May 2013, the St. Mary Levee District (District) submitted a coastal use application to the Louisiana Department of Natural Resources (DNR) to install a permanent flood control structure across Bayou Chene, Avoca Island, and Tabor Canal. The District requested the structure to protect against backwater flooding during extreme flood events. DNR granted the permit. Avoca LLC, part owner of Avoca Island, sued, claiming that the DNR did not adequately consider the impacts of the flood control structure to Avoca Island. Avoca argued: 1) the structure would impact water and sediment flow during floodgate closures; 2) the economic assessment evidence was insufficient; and 3) the borrow pit was not analyzed under the Coastal Use Guidelines. The court held that DNR relied on sufficient evidence to show that since the floodgate would remain open unless there was extreme flooding, water and sediment flow would not be significantly impacted. The court also upheld DNR's economic impact assessment. Additionally, the flood control structure borrow pit was five feet above sea level, so it would not have an impact on coastal waters; therefore, there was no need to analyze the pit under the Coastal Use Guidelines. The court upheld the permit.

Opinion Here

NINTH CIRCUIT

Sturgeon v. Frost, 2017 WL 4341742 (9th Cir. Oct. 2, 2017).

John Sturgeon sought to use hovercraft on a portion of the Nation River located within the Yukon-Charley National Preserve. The National Park Service (NPS) bans the use of hovercraft in federally managed preservation areas. Sturgeon sued, claiming that Alaska permits hovercraft usage on its waterways, and that the NPS could not regulate or prohibit the use of hovercraft on that stretch of the Nation River because it belonged to Alaska. The Ninth Circuit upheld the ban; however, the U.S. Supreme Court vacated the ruling and held that land units in Alaska may be treated differently than other federally managed areas due to the Alaska National Interest Lands Conservation Act (ANILCA). The Supreme Court remanded the case to the Ninth Circuit. In October, the Ninth Circuit upheld the ban, finding that ANILCA did not limit application of the hovercraft ban. The court ruled that the United States had an interest in the river through the reserved water rights doctrine. The land was reserved as a federal conservation area, and the river's management was necessary to promote that interest; therefore, the river and hovercraft use on it were properly regulated by the NPS.

Opinion Here

California

Living Rivers Council v. State Water Resources Control Board, 2017 WL 4296959 (Cal. Ct. App. Sept. 28, 2017).

Living Rivers sought a writ of mandate to compel the California State Water Resources Control Board (Board) to rescind its approval of a policy designed to maintain instream flows in coastal streams north of San Francisco. Living Waters claimed the policy violated several aspects of the California Environmental Quality Act due to the indirect environmental effects of surface water users switching to groundwater pumping. The court rejected these arguments and did not grant the writ. Living Waters appealed, citing a revised supplemental environmental declaration (RSED). A California appellate court affirmed the lower court's opinion. The court found that the RSED clarified earlier conclusions, and there were no internal inconsistencies.

Opinion Here

ELEVENTH CIRCUIT

Pizzino v. NCL Ltd., 2017 WL 4162194 (11th Cir. Sept. 20, 2017).

Antionette Pizzino sued Norwegian Cruise Line after she slipped and fell on one of its cruise ships. She claimed that she fell in an area where a Norwegian employee spilled water. A jury found Norwegian not liable. Pizzino appealed, claiming that the district court erred by declining to give a jury instruction that if Norwegian caused the spill, the company did not need actual or constructive notice of the wet floor. The Eleventh Circuit held that while Pizzino's proposed rule may be sound policy, the federal maritime law precedent in the Eleventh Circuit rejected that rule. Creation of a defect does not overcome the notice requirement in cruise ship slip and fall cases. Therefore, the trial court judgment was affirmed.

Opinion Here

Florida

Cosmo v. Carnival Corp., 2017 WL 4142674 (S.D. Fla. Sept. 18, 2017).

Wayne Cosmo was a passenger on a Carnival cruise when he fell on his right wrist during an organized game that was a combination of a scavenger hunt and musical chairs. During the game, Cosmo jumped over a lounge chair, then slipped and fell in a puddle of water near a swimming pool. Cosmo claimed that the fall caused permanent damage to his arm, depression, anxiety, and an exacerbation of his ulcerative colitis. Carnival argued that Cosmo's jump was the proximate cause of his own injuries. The cruise company also claimed that Cosmo failed to show that Carnival had constructive or actual notice of the alleged dangerous condition. Further, even if Carnival had notice, the dangerous condition was open and obvious, so it had no duty to warn Cosmo. The court held that it was uncertain whether the injury would have occurred regardless of the puddle of water on the floor. Additionally, Cosmo presented sufficient evidence that Carnival knew or should have known that the puddle was there and that it was dangerous. The court also held that the risk was not necessarily open and obvious, because Carnival knew the game involved running and jumping and knew that the area where the game was played would be excessively wet and slippery. Therefore, Carnival's motion for summary judgment was denied. However, the court noted that Cosmo's decision to launch himself over a lounge chair would likely limit his recovery.

Opinion Here

FEDERAL CLAIMS

Baley v. United States, 2017 WL 4342771 (Fed. Cl. Sept. 29, 2017).

Several farmers filed claims regarding water delivery from the Klamath Project. The farmers claimed that the decision by the Bureau of Reclamation to shut off its irrigation delivery service in 2001 was a physical taking under the Fifth Amendment, and they were entitled to just compensation for the value of the lost water. The Bureau shut off the water to help sustain shortnose suckers and coho salmon. However, the plaintiffs argued that their rights stemmed from various contracts with the United States, which guaranteed them the delivery of this water. The plaintiffs' claims were dismissed and summary judgment was granted to the defendants.

Opinion Here

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