The National Sea Grant Law Center is pleased to offer the January ***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 and provide a link to the opinion. 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 07-002-01

~ ~ January 17, 2007 ~ ~

FIRST CIRCUIT

Maine People's Alliance & NRDC v. Mallinckrodt, Inc., 2006 U.S. App. LEXIS 31506 (1st Cir. Dec. 22, 2006).

The National Resources Defense Council and the Maine's People Alliance filed suit under the Resource Conservation and Recovery Act (RCRA) alleging that a plant owned by Mallinckrodt, Inc., had dumped waste containing mercury into the Penobscot River, causing environmental and health problems downriver from the plant. The groups sought to have the company fund an independent scientific study to determine the degree of pollution. The U.S. District Court for the District of Maine ordered the company to pay for the study and Mallinckrodt appealed. The First Circuit held that the groups had standing to sue under RCRA and affirmed the district court's ruling that the plant's activities could cause substantial harm; therefore, the study is necessary.

New Hampshire

Northwest Bypass Group v. United States Army Corps of Engineers, 2007 U.S. Dist. LEXIS 936 (D.N.H. Jan. 5, 2007).

The U.S. Army Corps of Engineers (Corps) issued a permit under Section 404 of the Clean Water Act (CWA) that allowed the city of Concord to fill 3.5 acres of wetlands to construct a 4,300-foot road. The Northwest Bypass Group and individual plaintiffs filed suit, alleging that the permit was issued violation of the CWA, the National Environmental Policy Act (NEPA), and the National Historic Preservation Act (NHPA). Among other arguments, the plaintiffs claimed that the Corps' issuance of the permit was "arbitrary and capricious," since it did not adequately consider other alternatives. The district court did not grant a preliminary injunction, finding that "the plaintiffs are not likely to succeed on the merits; they have not demonstrated irreparable harm from denial of preliminary relief; the balance of hardships favors the defendants over the plaintiffs; and, the public interest does not favor a preliminary injunction."

Greenland Conservation Commission v. New Hampshire Wetlands Council, 2006 N.H. LEXIS 195 (N.H. Dec. 19, 2006).

The New Hampshire Wetlands Council affirmed the issuance of a permit by the New Hampshire Department of Environmental Services (DES) to Endicott General Partnership to fill wetlands for the construction of roadways to serve a proposed housing development. Greenland Conservation Commission (GCC) and Conservation Law Foundation (CLF) filed suit, but the superior court affirmed the issuance of the permit. The conservation groups presented several issues on appeal, including claims that the review process for permits was flawed and that the bureau should have assessed the impacts of upland construction on protected wetlands. The appeals court rejected the arguments, finding that the permit process would be an issue for the legislature, not the court, and that an impact assessment would have exceeded DES authority.

THIRD CIRCUIT

Delaware

United States v. Donovan, 2006 U.S. Dist. LEXIS 92317 (D. Del. Dec. 21, 2006).

In 1987, David Donovan filled .77 acres of wetlands on his 3.967 acre property near Smyrna, Delaware. The Corps informed Donovan that if he filled more than one acre of wetlands, he would have to obtain a permit. Several years later, the Corps discovered that Donovan had filled a total of 1.771 acres without obtaining a permit. Donovan was given the option of either removing the extra .771 acres of fill or submitting a pre-discharge notification to maintain the filled acreage. Donovan refused to comply with either option, and the Corps filed suit. The United States District Court for the District of Delaware granted summary judgment in favor of the United States, ordering Donovan to restore .771 acres of wetlands and to pay a civil penalty of $256,000.

FIFTH CIRCUIT

Mississippi

Broussard v. State Farm Fire & Casualty, Co., 2007 U.S. Dist. LEXIS 2611 (D. Miss. Jan. 11, 2007).

Norman and Genevieve Broussard's home was entirely destroyed by Hurricane Katrina. State Farm rejected the Broussards' claim, citing the insurance policy's coverage of damage from wind but not from water. When the Broussards brought a claim in the District Court for the Southern District of Mississippi, Judge Senter found that State Farm would be unable to prove that all of the damage to the home resulted from the storm surge. The judge granted the couple's motion for summary judgment and awarded the Broussards the entire amount available under their policy, $211,222. The jury awarded the couple $2.5 million in punitive damages.

Texas

TH Investments, Inc. v. Kirby Inland Marine, L.P., 2007 Tex. App. LEXIS 71 (Tex. App. Jan. 9, 2007).

TH Investments (THI) filed an action to determine ownership of two tracts of property (Tracts 1 and 2) on two rivers subject to the tides. The district court in Harris County, Texas, found that Tract One had never been owned by THI, but belonged to the state since it was submerged as a result of erosion and subsidence, and the state's patent did not intend for the land to remain in private ownership once it was submerged. The court also held that THI did not own Tract 2. The court of appeals affirmed the trial court's decision, rejecting THI's claim that the trial court's ruling violated the takings clauses in the Texas and United States Constitutions.

SIXTH CIRCUIT

Glass v. Commissioner, 2006 U.S. App. LEXIS 31387 (6th Cir. Dec. 21, 2006).

Charles and Susan Glass own a ten-acre parcel of land located on the shores of Lake Michigan. When the couple claimed charitable deductions for two conservation easements on their income taxes, the Internal Revenue Service issued a notice of deficiency, claiming that the easements were not "exclusively for conservation purposes" and could not qualify for the deductions. The tax court found that the easements were qualified conservation contributions, and the Sixth Circuit affirmed the decision. The court found that the property constituted a habitat for threatened species such as bald eagles, Lake Huron tansy, and pitcher's thistle and that the easements would adequately prohibit any activity that would endanger the threatened species. The court of appeals also agreed with the district court's finding that the landowners appeared to be willing and able to monitor and enforce compliance with the easement.

EIGHTH CIRCUIT

K.C. 1986 Limited Partnership v. Reade Manufacturing, 2007 U.S. App. LEXIS 95 (8th Cir. Jan. 4, 2007).

The U.S. District Court for the Western District of Missouri issued a judgment allocating past and future costs to several companies for the clean up of a Kansas City superfund site. The judgment required K.C. Limited Partnership and other parties to pay another company, Borax, 90 percent of past response costs it incurred and to be responsible for 90 percent of future response costs. The Eighth Circuit affirmed part of the judgment; however, the court found that the district court had abused its discretion in refusing to consider a motion to amend its cost allocation order based on settlements which Borax had obtained. The court reversed in part and remanded in part. On remand, the district court must consider the application of settlement credits against the judgment, the prejudgment interest award based on any application of settlement credits, and reallocate the share improperly charged to a non-liable party.

Minnesota

Breza v. City of Minnetrista, 725 N.W.2d 106 (Minn. Dec. 21, 2006).

After buying property consisting mainly of wetlands, Richard Breza applied to the city of Minnestra for an exemption from wetland replacement requirements. Two years later, the city informed Breza that his application had been denied; however, he had already filled more than 5,000 square feet of wetlands. Breza filed an action seeking a writ of mandamus that would force the city to approve his application, claiming that the city's failure to respond to his application within 60 days amounted to an approval of the application. The district court granted the writ. The Minnesota Court of Appeals found that the writ was in error, since the city was only authorized to grant a 400 square foot exemption under the Wetland Conservation Act. The Minnesota Supreme Court affirmed the decision.

NINTH CIRCUIT

Baker v. Exxon Mobil Corp., 2006 U.S. App. LEXIS 31503 (9th Cir. Dec. 22, 2006).

In 1989, the Exxon Valdez ran aground in the Prince William Sound, causing a large oil spill in Alaskan waters. The district court found defendants liable for $513.1 million in harm, and a jury assessed $5 billion in punitive damages. After two appeals of the punitive damage award, the district court imposed $4.5 million in punitive damages on the company. Exxon appealed the punitive damages for the third time. The court noted that the company knowingly and recklessly allowed a relapsed alcoholic to captain its tanker; nevertheless, the court found that a reduction in the award was necessary, since Exxon's actions were not intentionally malicious and the company had promptly attempted to clean up the spill. Consequently, the Ninth Circuit reduced the punitive damages award to $2.5 billion.

Huseman v. Icicle Seafoods, Inc., 2006 U.S. App. LEXIS 31816 (9th Cir. Dec. 27, 2006).

While working aboard the Discovery Star as a seafood processor for Icicle Seafoods, Lanny Huseman injured his shoulder. After his injury, Huseman received medical benefits and disability payments from the Alaska Workers' Compensation system but never inquired about other available remedies. When Huseman filed an action in federal district court three and a half years later alleging federal maritime claims of negligence under the Jones Act, unseaworthiness, and maintenance and cure, the district court found that the claims were either barred by time or laches. The court of appeals affirmed the district court's decisions regarding the Jones Act and the unseaworthiness claims. The court reversed and remanded the maintenance and cure claim, since district court made no specific findings of prejudice with regard to the claim of laches and improperly stated why the delay was unreasonable.

California

State of California v. Underwriters at Lloyd's London, 2006 Cal. App. LEXIS 2062 (Cal. Ct. App. Dec. 28, 2006).

At a state-designed hazardous waste site, liquid industrial wastes were deposited into unlined evaporation ponds. A heavy rainfall caused polluted rainwater to overflow the pond, contaminating the environment. Although the state closed the site, heavy rainfall caused the ponds to overflow and leak several years later. To prevent further leakage from a damaged dam, the state released some of the contaminated water into a stream that flows into the Santa Ana River. The state and the federal government filed an action against the companies that had deposited the waste into the ponds; however, the companies counterclaimed and the court found that the state was 100 percent liable for the damage. In an indemnity action filed by the state against insurers, the Superior Court of Riverside County ruled that insurers were not required to indemnify the State against liability for the damage. On appeal, the court reversed summary judgment, finding that t he record raised a triable issue as to whether the discharge of pollutants fell within the insurance policy's sudden and accidental exception to its pollution exclusion.

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