Ocean and Coastal Case Alert

~ ~ March 16, 2009 ~ ~

If you are not able to view this properly, please go to http://www.olemiss.edu/orgs/SGLC/casealert.htm

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 09-002-03

FIRST CIRCUIT

Massachusetts

Hertz v. Sec'y of the Exec. Office of Energy & Envtl. Affairs, 2009 Mass. App. LEXIS 266 (Mass. App. Ct. Feb. 27, 2009).
Several condominium owners and residents challenged an amendment to a municipal harbor plan that would allow the development of a wharf abutting their property. The defendants, including the Secretary of the Executive Office of Energy and Environmental Affairs, argued that the residents lacked standing to bring the claim. The Appeals Court of Massachusetts agreed and dismissed the claim. The court found that municipal harbor plan regulations did not provide the residents with special status for standing purposes and their interests were not protected under trust lands regulations.

http://www.massreports.com/opinionarchive/

THIRD CIRCUIT

Am. Bird Conservancy v. Kempthorne, 2009 U.S. App. LEXIS 5139 (3d Cir. Mar. 11, 2009).
The American Bird Conservancy and other conservation groups petitioned the Fish and Wildlife Service (FWS) to undertake emergency rulemaking to list the red knot, a migratory shore bird, as endangered. When the FWS declined, the groups filed suit claiming that the FWS was in violation of the Endangered Species Act (ESA). Although the FWS did not engage in emergency rulemaking, it issued a final determination finding that the listing of the red knot was "warranted but precluded." The United States District Court for the District of New Jersey dismissed the complaint. The groups appealed. The FWS argued that the "warranted but precluded" listing rendered the groups' claim moot. The Third Circuit agreed, noting that because the red knot is on the agency's watchlist, an emergency monitoring system was available for emergency protection of the red knot.

New Jersey

Dragon v. New Jersey Dep't of Envtl. Prot., 2009 N.J. Super. LEXIS 45 (App.Div. Mar. 6, 2009).
The New Jersey Department of Environmental Protection (DEP) denied a homeowner a New Jersey Coastal Area Facility Review Act (CAFRA) coastal general permit that would allow him to rebuild an oceanfront home nine feet closer to the ocean. When the homeowner challenged the denial, the DEP issued an authorization to build the home "in lieu of the permit" after finding a "litigation risk." Adjacent landowners challenged the DEP's authorization. Noting that the homeowner did not meet the express language of the exception to the regulatory development ban, the court held that DEP incorrectly assessed its litigation risk. Furthermore, the court held that the DEP could not use its settlement process to circumvent substantive permitting requirements of CAFRA to allow regulated development in coastal region governed by CAFRA.

http://www.judiciary.state.nj.us/opinions/a5743-06.pdf

FIFTH CIRCUIT

Texas

United States v. Scruggs, 2009 U.S. Dist. LEXIS 15425 (S.D. Tex. Feb. 26, 2009).
In 2006, Charles Scruggs violated the Clean Water Act when a contractor working on his property placed fill in wetlands adjacent to a bayou without a permit. The court found that Scruggs had not accepted responsibility for his actions, did not have a reasonable belief that a violation did not exist or that a permit was unnecessary, and had a history of violations of environmental laws and regulations. Although the court noted that the violation was not significant, it ordered Scruggs to pay a civil penalty of $ 65,000 under 33 U.S.C.S. § 1319.

https://ecf.txsd.uscourts.gov/doc1/17918711521

NINTH CIRCUIT

Exxon Valdez v. Exxon Mobil Corp., 2009 U.S. App. LEXIS 4891 (9th Cir. Mar. 10, 2009).
In a claim related to the Exxon Valdez oil spill, the United States District Court for the District of Alaska rejected Exxon Mobil's attempt to introduce extrinsic evidence regarding whether prejudgment interest should be calculated by means of simple interest or compound interest. The Ninth Circuit reversed the decision and remanded the case to the district court, which will now consider the extrinsic evidence.

http://www.ca9.uscourts.gov/datastore/memoranda/2009/03/10/07-35715.pdf

California

People ex rel. Brown v. Tri-Union Seafoods, LLC, 2009 Cal. App. LEXIS 309 (Cal. App. 1st Dist. Mar. 11, 2009).
The State of California sued several tuna companies claiming that they were required to provide methylmercury warnings on their tuna products sold in the state under Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986. Specifically, the state wanted to require the companies to warn pregnant women and women of childbearing age that they are exposed to methylmercury when they consume canned tuna, because the chemical is a reproductive toxin that can harm a developing fetus. The Superior Court of the City and County of San Francisco found that the companies were not required to post warnings, because Proposition 65 was preempted by federal law, the amount of methylmercury in tuna did not require a warning, and methylmercury was naturally occurring in the tuna. On appeal, the appellate court affirmed the trial court's ruling on the grounds that substantial evidence supported the finding that methylmercury in tuna was naturally occurring, which exempted the tuna companies from Proposition 65's warning requirements.

http://www.courtinfo.ca.gov/opinions/documents/A116792.PDF

Washington

Samson v. City of Bainbridge Island, 2009 Wash. App. LEXIS 454 (Wash. Ct. App. Feb. 24, 2009).
The city of Bainbridge Island, Washington, amended its Shoreline Master Program (SMP) to allow the city to limit dock and pier development in Blakely Harbor. Several residents appealed the amendment and its approval by the Puget Sound Growth Management Hearings Board (Board). The residents claimed that the amendment was inconsistent with the city's SMP, Comprehensive Plan Policies, and the Department of Ecology's new guidelines. The court found that the Department's guidelines were not applicable to the amendment because they were not in effect when the amendment was reviewed. Additionally, the court found that the amendment was consistent with the city's SMP and Comprehensive Plan. The amendment elevated the public interest over local interest, preserved the unique character of the harbor, and did not violate the public trust doctrine.

http://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=347806MAJ

ELEVENTH CIRCUIT

Downs v. United States Army Corps of Eng'rs, 2009 U.S. App. LEXIS 5053 (11th Cir. Mar. 4, 2009).
Dwight Downs was rendered a quadriplegic when he dove into the surf at Miami Beach and struck his head on a basketball-sized rock. Downs filed suit under the Federal Tort Claims Act (FTCA), claiming that the United States Army Corps of Engineers was negligent in its use of fill material for a renourishment project, because the Corps had contracted with Dade County to use only non-rocky sandy material in the project. The Corps claimed it was immune from liability under the discretionary function exception to the FTCA, which grants the government immunity from suit when agencies or federal employees exercise discretion in the performance of their duties. The United States District Court for the Southern District of Florida held that the government was immune from suit under the FTCA because the contract between the Corps and Dade County left decisions about what rock could remain in the fill material to the discretion of Corps employees. On appeal, the Eleventh Circuit held that the district court erred in its finding that the contract terms gave the government discretion to decide what fill material to use. Furthermore, the court found that the district court erred when it construed the contract term in question using parol evidence without first determining the term was ambiguous. The court remanded the case to the district court.

http://www.ca11.uscourts.gov/unpub/ops/200711827.pdf

MASGC 09-002-03

To subscribe to the email version, send an email to Case Alert Subscription with ***Subscribe Alert*** in the subject line.