

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 warene@olemiss.edu with "Case Alert" on the subject line. MASGC 07-002-06

~ ~ June 15, 2007 ~ ~

UNITED STATES SUPREME COURT

United States v. Atlantic Research Corp., No. 06-562 (U.S. June 11, 2007).

Atlantic Research Corp., a company that contracted with the United States government to retrofit rocket motors, voluntarily cleaned up pollution from burnt rocket fuel that had polluted soil and groundwater around the facility. Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the company sued the United States government, a liable third party, to recover its clean-up costs. On appeal from a district court's ruling, the Eight Circuit held that the company was entitled to pursue an action for direct recovery from the United States without waiting for government enforcement action or for regulators to first sue them. On cert to the United States Supreme Court, the court issued a unanimous decision that CERCLA did in fact allow companies to directly sue another liable party without first waiting for enforcement or regulatory action.

<http://www.supremecourtus.gov/opinions/06pdf/06-562.pdf>.

FIRST CIRCUIT

New Hampshire

Anderson v Motorsports Holdings, LLC, 2007 N.H. LEXIS 88 (N.H. Apr. 30, 2007).

Motorsports Holdings sought to build a private racetrack on its 250 acres of land. The development would have involved the dredging and filling of 14,759 square feet of wetlands. The company obtained the appropriate permits from the New Hampshire Department of Environmental Services, the United States Army Corps of Engineers, and the town's planning board. The residents appealed to a New Hampshire superior court for a declaration that the property owners were required to obtain a special use permit under the town's wetlands conservation ordinance. The superior court held that the owners were required to obtain a special use permit, despite the fact that the company had met more rigorous state and federal requirements. On appeal, the court affirmed the superior court's decision, affirming that the town's ordinance was not nullified by more stringent state and federal regulations.

<http://www.courts.state.nh.us/supreme/opinions/2007/ander074.pdf> ...

Massachusetts

Kennie v Natural Resources Department, 69 Mass. App. Ct. 158 (Mass. App. Ct. May 29, 2007).

A Massachusetts couple applied for a permit allowing them to build a dock on their property, but later abandoned their plan when a shellfish survey led them to believe that their application would be denied by the town conservation commission. The property owners filed suit against the state Natural Resources Department, a shellfish constable, and a natural resource officer. The couple claimed that the constable had wrongfully planted shellfish in the riverbed to generate artificially high results in the survey, leading them to expend time and money pursuing a new application for an alternative site. A state court granted summary judgment in favor of the state and dismissed the claims against the natural resources officer. On appeal, the couple contended that the constable had violated the Massachusetts Civil Rights Act (Act) by interfering with their rights "secured by the constitution of the commonwealth" by "threats, intimidation, or coercion." The court held that the constable's statements to the couple could not be interpreted as threats and it was unreasonable of the couple to assume that his statements expressed intent to inflict physical harm. Furthermore, the court held that fear of further spending was not financial harm under the Act.

http://www.ma-appellatecourts.org/display_docket.php?dno=2006-P-0463 .

SECOND CIRCUIT

New York

United States v Bengis, 2007 U.S. Dist. LEXIS 35902 (D.N.Y. May 17, 2007).

Three men, Arnold Bengis, Jeffrey Noll, and David Bengis, were convicted of conspiracy to import lobster into the United States contrary to U.S. law. The government argued that the defendants should play restitution under the Mandatory Victims Restitution Act (MVRA) for the harm that the defendants had caused to South Africa by taking its lobsters; however, the magistrate recommended that the government's request be declined. The Government next argued that the defendants should pay over \$41 million under the Victim and Witness Protection Act (VWPA). The magistrate also recommended that he court reject this request, because the VWPA required direct harm to the victim, but the illegal importation of the fish from South Africa did not directly harm the government of South Africa.

EIGHTH CIRCUIT

United States v Opore-Addo, 2007 U.S. App. LEXIS 11961 (8th Cir. May 22, 2007).

A jury in the U.S. District Court for the District of Minnesota found Sam Opore-Addo guilty of eight counts of violating or aiding and abetting in the violation of the Clean Water Act (CWA). The jury acquitted him on a related account. Opore-Addo appealed his conviction on the eight counts, arguing that there was insufficient evidence to convict him of those counts in light of the jury's acquittal on the related count. The Eighth Circuit Court of Appeals affirmed the district court's decision, finding that the evidence showed that Opore-Addo was more than a passive observer of the illegal discharges into the sewer system and that he had, in fact, directed the discharges.

<http://www.ca8.uscourts.gov/opns/opFrame.html> .

Minnesota

In re City of Annandale, 731 N.W.2d 502 (Minn. May 17, 2007).

The Minnesota Pollution Control Agency (MCPA) issued a National Pollutant Discharge Elimination System (NPDES) permit for a wastewater treatment plant for two cities, Annandale and Maple Lake. A Minnesota appeals court reversed the MPCA's decision, concluding that the NPDES permit would have led to the discharge of phosphorus into the waterways, violating water quality standards. The Minnesota Supreme Court reversed that decision, finding that the agency's allowance of offsets from another source was reasonable in determining whether the wastewater treatment plant would contribute to the violation of water quality standards.

<http://www.sctimes.com/assets/pdf/DR74098521.PDF> .

NINTH CIRCUIT

Southeast Alaska Conservation Council v United States Army Corps of Engineers, 2007 U.S. App. LEXIS 11968 (9th Cir. May 22, 2007).

The Southeast Alaska Conservation Council and other conservation groups sued the United States Army Corps of Engineers, as well as the United States Forest Service (USFS), a private company, and the State of Alaska. The groups alleged that the Corps issued a permit allowing the mining company to discharge wastewater into a navigable water of the United States in violation of the Clean Water Act (CWA). The United States District Court for the District of Alaska granted the defendant's motion for summary judgment. The Ninth Circuit, however, disagreed and reversed the decision, finding that the Corps' issuance of a permit to the company was in violation of the CWA, since the company was discharging slurry from the froth-flotation mill at the gold mine. These discharges were in violation of the EPA's performance standards for froth-flotation mills, which were promulgated under § 301 and § 306 of the CWA. The appellate court reversed the district court's judgment and ordered it to vacate the permits and the records of decisions issued by the USFS approving operations of the gold mine and marina.

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/78D39A1D1656DDEE882572E2007E347D/\\$file/0635679.pdf?open](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/78D39A1D1656DDEE882572E2007E347D/$file/0635679.pdf?open)

Gruver v Lesman Fisheries, Inc., 2007 U.S. App. LEXIS 13020 (9th Cir. June 6, 2007).

After Jeff Gruver quit working for Lesman Fisheries and began working on another vessel, he disputed the amount of his final check from the company by placing a threatening phone call to the owner of the company, Robert Lesmen. Lesman and another person later attacked Gruver while he was on his new employer's ship, leaving him with broken ribs and a punctured lung. Gruver filed suit in federal district court, alleging negligence in connection with assault and unpaid wages. The United States District Court for the Western District of Washington granted the employer's motion to dismiss for lack of subject matter jurisdiction. On appeal, the Ninth Circuit held that admiralty jurisdiction was proper for two reasons: 1) the physical beating of Gruver left him unable to perform his fishing duties, resulting on a detrimental effect on maritime commerce, and 2) the employer's failure to pay Gruver lent the claim a sufficient connection to traditional maritime activity. The Ninth Circuit reversed the case and remanded it to the district court.

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/1E1C3AFF936829B4882572F1007D223B/\\$file/0535916.pdf?open](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/1E1C3AFF936829B4882572F1007D223B/$file/0535916.pdf?open)

California

LT-WR, LLC. v California Coastal Commission, 151 Cal. App. 4th 427 (Cal. Ct. App. May 25, 2007).

A property owner applied for a permit to maintain gates and a no trespassing sign on its property. The California Coastal Commission (CCC) denied the permit citing potential prescriptive public rights. The property owner brought the matter to the Los Angeles Superior Court. The court granted the property owner a writ mandating the CCC to issue the permit. The CCC appealed the decision, but the court held that the CCC did not have the power to adjudicate the existence of prescriptive rights for public use of privately owned property. The appellate court therefore affirmed the trial court's decision.

<http://www.lexisnexis.com/clients/CACourts/> .

Washington

Quality Rock Prods., Inc. v Thurston County, 2007 Wash. App. LEXIS 1330 (Wash. Ct. App. May 30, 2007).

Quality Rock Products and Eucon Corporation (Quality Rock) applied for a special use permit (SUP) to expand its gravel mining operations. A county examiner granted the permit, but a board of county commissioners (Board) later rejected the SUP, finding that Quality Rock did not establish that the SUP would not have an adverse effect on the Black River. Quality Rock brought suit against the Board, and the trial court reinstated the SUP, but denied the companies' damage claims. The appellate court reversed the trial court's judgment, holding that under the Land Use Petition Act the board did not err in its finding. The court found that Quality Rock did not assess the impact that the increased mining would have on the river, the board was not bound by the county's Mitigated Determination of Non-significance and mitigating factors were correctly rejected.

<http://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=341280MAJ> .

ELEVENTH CIRCUIT

Florida

Board of Commissioners v Thibadeau, 2007 Fla. App. LEXIS 7485 (Fla. 4th DCA May 16, 2007).

The Florida Department of Environmental Protection issued a dock permit to Paul Thibadeau for his residential property. The Jupiter (Fla.) Inlet District (JID) filed a petition for an administrative hearing to determine whether the dock met state criteria for the permit and whether the dock would affect the navigability of the waterway. The administrative law judge ruled in favor of Thibadeau. When the JID appealed that decision, Thibadeau questioned whether the JID had the standing to challenge the permit. The court held that the JID did have such standing under Florida Statute § 120.52(12)(b); however, the agency did not have standing to appeal findings that the dock complied with Florida riparian rights setbacks, because the JIP did not own property next to the dock owner's property.

<http://www.4dca.org/opfrm.html> .

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Oceana, Inc. v Gutierrez, 2007 U.S. App. LEXIS 12638 (D.C. Cir. June 1, 2007).

Several environmental groups claimed that the National Marine Fisheries Service (NMFS) acted arbitrarily by predicting that its rule pertaining to longline fisheries would result in a 13.1 percent mortality rate for leatherback turtles. The United States District Court for the District of Columbia granted summary judgment in favor of NMFS. On appeal, the United States Court of Appeals for the District of Columbia affirmed the judgment. The court held that the prediction was based on the agency's experience and expert judgment. Additionally, it found that NMFS thought that the rule would change fishing crews' behavior to better protect the turtles and had a backstop if the rule did not properly control the take and mortality levels. The court held that NMFS' judgment was within the bounds of reason and was upheld.

<http://pacer.cadc.uscourts.gov/docs/common/opinions/200706/05-5448a.pdf> .

If you are a first-time reader and would like to subscribe to the *Ocean and Coastal Case Alert*, send an email to warene@olemiss.edu with "Case Alert" on the subject line. If you are getting this e-publication and wish to unsubscribe for any reason, please hit your reply button and replace the subject line with "Unsubscribe". Thank you.

<http://www.olemiss.edu/orgs/SGILC/casealert.htm>