# Ocean and Coastal Case Alert

**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 08-002-03

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# ~ ~ March 17, 2008 ~ ~

## FIRST CIRCUIT

### Massachusetts

*Glavin v Eckman*, 2008 Mass. App. LEXIS 221 (Mass. App. Ct. 2008).

To improve their ocean view, Bruce and Shelly Eckman hired a landscaper to trim or cut trees that blocked their view. Before starting work, the landscaper asked another neighbor's permission to cut trees on her property and she agreed. However, the landscaper never consulted another neighbor, James Glavin, who had previously denied the couple's request to cut trees on his property. The landscaper proceeded to cut down ten mature oak trees located on Glavin's lot. Glavin brought suit against the Eckmans and the landscaper, and the jury awarded Glavin restoration damages. The Eckmans appealed the decision arguing that they were not liable because the landscaper was an independent contractor and they did not advise him to cut down the trees. The appellate court affirmed the trial court's ruling that the owners could be held liable because they controlled the scope of the landscaper's work.

http://masscases.com/cases/app/71/71massappct313.html

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## SECOND CIRCUIT

*Harmony Mark J. Fisher, Inc. v M/V DG Harmony (In re M/V DG)*, 2008 US App. LEXIS 4483 (2d Cir. 2008).

A container ship was destroyed at sea when its cargo, Calhypo, an industrial bactericide prone to thermal runaway, caused an explosion that left the ship burning for three weeks. The United States District Court for the Southern District of New York found the manufacturer of Calhypo solely liable for the explosion and the loss of the ship and its cargo. The court held that the manufacturer breached its duty to provide a warning informing the carrier of the risks involved in shipping the chemical in the method it was shipped. On appeal, the Second Circuit held that the manufacturer could not be held strictly liable, because the ship owners knew that Calhypo was an unstable substance. While the appellate court agreed that the manufacturer breached its duty to warn the carrier of the dangers posed by the Calhypo in the manner it was packaged, it found that the carrier must show whether an adequate warning would have prevented the explosion. The court remanded the case to the district court.

http://www.ca2.uscourts.gov:8080/isysnative/RDpcT3BpbnNcT1BOXDA1LTYxMTYtY3Zfb3BuLnBkZg==/

### Connecticut

*Hackett v J.L.G. Props., LLC*, 285 Conn. 498 (Conn. 2008).

When a property owner attempted to construct a wooden deck and lighthouse that did not comply with the town's zoning ordinances, a building official filed suit. In court, the property owner argued that he was not required to comply with the ordinances because the deck and lighthouse were built within a federal hydropower project under a license. After the lower court ruled in favor of the property owner, the defendant appealed. The Connecticut Supreme Court upheld the trial court's ruling, finding that the Federal Power Act and the Supremacy Clause preempted the town's ordinances.

http://www.jud.ct.gov/external/supapp/Cases/AROcr/CR285/285CR157.pdf

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## FIFTH CIRCUIT

*United States ex rel. Marcy v Rowan Co.*, 2008 US App. LEXIS 4814 (5th Cir. 2008).

An employee of an offshore drilling unit filed suit under the False Claims Act, alleging his employer illegally dumped oil and other hazardous substances into the Gulf of Mexico and did not report the discharges in its oil record book. Under U.S.C.S. § 3729(a) of the False Claims Act,
a person who makes a false record to get a fraudulent claim paid by the government or makes a false record to avoid paying money or giving property to the government is liable for a civil penalty. On appeal to the Fifth Circuit, the employee alleged that his employer violated the False Claims Act by not reporting the discharges in violation of the oil and gas lease granted by the United States. The court held that the claim failed, because the oil and gas leases never required the employer to report a claim for payment as required by 3729(a)(2). The employee also alleged that the defendants avoided fines under the Clean Water Act, resulting in violation of § 3729(a)(7) of the Fair Claims Act. The court held that this allegation was an insufficient claim because any fines that might arise from the alleged violations were speculative.

http://www.ca5.uscourts.gov/opinions/pub/06/06-31238-CV0.wpd.pdf

*Cain v Transocean Offshore USA, Inc.*, 2008 US App. LEXIS 3643 (5th Cir. 2008).

While on a drilling rig undergoing construction in a floating shipyard, an employee was injured. The employee brought suit against his employer under the Jones Act. The employer made a motion for summary judgment, arguing that the rig was not a vessel under the Jones Act. The United States District Court for the Western District of Louisiana denied the employer's motion finding that the rig was a vessel under the Jones Act since it was capable of transporting workers and equipment over water. On appeal, the Fifth Circuit held that a watercraft under construction is not a vessel in navigation for purposes of the Jones Act. The court found that the rig lacked vital equipment that would make it operational and the vessel had not been certified by the US Coast Guard.

http://www.ca5.uscourts.gov/opinions/pub/05/05-30963-CV0.wpd.pdf

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## EIGHTH CIRCUIT

### Minnesota

*Save Our Creeks v City of Brooklyn Park*, 2008 Minn. App. Unpub. LEXIS 175 (Minn. Ct. App. Unpub. 2008).

The Minnesota Environmental Quality Board (EQB) determined that several residential developments planned by the city of Brooklyn Park did not require an Environmental Assessment Worksheet (EAW) or an Environmental Impact Statement (EIS). A non-profit corporation, Save Our Creeks, filed suit alleging that the projects violated the Minnesota Environmental Policy Act and the Minnesota Environmental Rights Act. The district court dismissed the case. On appeal, Save Our Creeks argued that EQB acted arbitrarily and capriciously in denying the request for further review, which was required because the projects eliminated a protected water or wetland and consisted of a project area that included over 1,500 units. The appellate court upheld the trial court's decision because Save Our Creeks did not show that the creek in question was a protected water or wetland under Minnesota state law. Additionally, because the developments were not connected, they did not meet the required threshold of 1,500 units.

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## NINTH CIRCUIT

*Pacific Merchant Shipping Association v Goldstene*, 2008 US App. LEXIS 4171 (9th Cir. Feb. 28, 2008).

In January, the California Air Resources Board began enforcing regulations limiting emissions from the auxiliary diesel engines of oceangoing vessels within 24 miles of the state's coast. The Pacific Merchant Shipping Association brought suit alleging that the regulations were preempted by the Clean Air Act (CAA) and the Submerged Lands Act. The United States District Court for the Eastern District of California ruled in favor of the shipping association. On appeal to the Ninth Circuit, the court found that the CAA required the state to obtain permission from the Environmental Protection Agency before adopting standards related to the control of emissions from vehicles and engines. In this instance, the court found that the regulations were emissions standards and were therefore preempted by the CAA. The court did not address preemption under the Submerged Lands Act. The Ninth Circuit affirmed the district court's injunction.

http://www.ca9.uscourts.gov/ca9/newopinions.nsf/5B4B6E612240C77B882573FB0083CD50/$file/0716695.pdf?open

*N. Cal. River Watch v Wilcox*, 2008 US Dist. LEXIS 17441 (D. Cal. 2008).

The Northern California River Watch filed suit against property owners and two California Department of Fish and Game employees alleging that the defendants harmed an endangered species in violation of the Endangered Species Act (ESA).
The suit came after two Department employees inspected the property owner's land and confiscated *Sebatopol meadowfoam*, an endangered species. Section 9(a)(2)(B) of the ESA makes it unlawful to remove endangered plants from areas under federal jurisdiction. The Army Corps of Engineers had certified the property owners' land as wetlands, making it subject to the requirements of the Clean Water Act (CWA). The district court had to determine whether areas under federal jurisdiction in ESA § 9 encompassed wetlands subject to the CWA. The court held that the site was not under federal jurisdiction for the purposes of § 9(a)(2)(B). Furthermore, because the plaintiffs did not present evidence that the department employees knowingly violated state law, the court granted the defendants summary judgment.

https://ecf.cand.uscourts.gov/doc1/03514378739

### California

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https://ecf.cand.uscourts.gov/doc1/03514378739

### Hawaii

*Ocean Mammal Inst. v Gates*, 2008 US Dist. LEXIS 15815 (D. Haw. 2008).

In another case contesting the Navy's use of mid-frequency active sonar in its training exercises, the Ocean Mammal Institute brought suit asking for a preliminary injunction to stop the Navy from using MFA sonar in its remaining exercises. The United States District Court for the District of Hawaii granted the injunction. In making its decision, the district court closely examined *NRDC v Winter*
(above). The court found that the case at bar met all of the requirements for an injunction. First, the court held that the plaintiffs had a high likelihood of success on their NEPA and CZMA claims. Next, the court found that there was a possibility of irreparable harm if the exercises continued. The court also balanced the hardships of the parties, finding that the threat of irreparable harm to the environment was compelling in granting the injunction. Finally, the court considered the public interest, finding that it was in the public interest to allow the Navy to continue its exercises "in a way that will not compromise its overall training objectives or the safety of its personnel." Noting these issues, the court issued a narrowly tailored injunction ordering the Navy to implement mitigation measures, create a safety zone, and provide monitoring during the exercises.

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