

Ocean and Coastal Case Alert

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The National Sea Grant Law Center is pleased to offer the Ocean and Coastal Case Alert. The Case Alert is a monthly listserve 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 lawcenter@olemiss.edu with "Case Alert" on the subject line. MASGC 09-002-01

FIRST CIRCUIT

Massachusetts

Pollard v. Conservation Commission of Norfolk, 2008 Mass. App. LEXIS 1227 (Mass. App. Ct. Dec. 17, 2008).

Property owners in Norfolk, Massachusetts filed an application to build a three-bedroom, single-family house with a private well and subsurface septic system on an undeveloped lot of land. The town's conservation commission denied the application because the owners failed to show that the work would not violate the town's wetlands bylaws. A trial court overruled the commission's decision. The Appeals Court of Massachusetts affirmed the trial court's ruling because the commission's decision was not supported by substantial evidence.

Macero v. Macdonald, 2008 Mass. App. LEXIS 1226 (Mass. App. Ct. Dec. 18, 2008).

The Board of Health in Falmouth, Massachusetts granted variances from the state environmental code and the town's health regulation to allow the construction of a septic system in a coastal dune. A superior court upheld the Board's decision. The Appeals Court of Massachusetts vacated the judgment of the lower court, finding that the Board did not address the siting criteria of the state code, the standards for granting a variance under state law, or the town's regulation prohibiting a septic system in a dune.

FIFTH CIRCUIT

Zertuche v. Great Lakes Dredge & Dock Co., LLC, 2009 U.S. App. LEXIS 144 (5th Cir. Jan. 6, 2009).

After Armando Zertuche was injured while working on a dredge, he filed a Jones Act suit against his employer, Great Lakes Dredge & Dock Co. (Great Lakes), in a Texas state court. Great Lakes removed the suit to federal district court on the grounds that Zertuche was not a seaman under the Jones Act. The district court granted summary judgment in favor of Great Lakes. On appeal, the Fifth Circuit held that the district court should have remanded the case to state court, because the burden was on Great Lakes to establish that there was no possibility that Zertuche could establish his seaman status before removing the case to federal court.

<http://www.ca5.uscourts.gov/opinions/unpub/08/08-40132.0.wpd.pdf>

SIXTH CIRCUIT

National Cotton Council of America v. United States EPA, 2009 U.S. App. LEXIS 45 (6th Cir. Jan. 7, 2009).

The Environmental Protection Agency (EPA) published a Final Rule providing that pesticides applied pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act were exempt from the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permitting requirements. Several environmental and industry interest groups filed suit, claiming that the rule exceeded the EPA's authority. The United States Court of Appeals for the Sixth Circuit vacated the Final Rule, citing statutory text of the Clean Water Act including dischargers of pesticide pollutants in the NPDES. The court also noted the EPA's past interpretation of the Act finding that point sources need only convey pollutants into navigable waters to be subject to the CWA.

<http://www.ca6.uscourts.gov/opinions.pdf/09a0004p-06.pdf>

NINTH CIRCUIT

California

La Jolla Friends of the Seals v. Nat'l Oceanic & Atmospheric Adm'n., 2008 U.S. Dist. LEXIS 102380 (S.D. Cal. Dec. 18, 2008).

In 2007, a California appellate court affirmed a state court decision ordering the City of San Diego to remove harbor seals from Children's Pool Beach in La Jolla and restore the beach to its designated use as a children's recreation area. A seal protection group filed an action for injunctive relief in the United States District Court for the District of California. In December, the group filed an application for a temporary restraining order to require the city to follow two City Council resolutions requiring a pupping season rope at the beach. The court found that it had federal question jurisdiction to hear the case, given the conflict between the state court's order and the mandates of the federal Marine Mammal Protection Act. The court granted the temporary restraining order. The court reasoned that the balance of hardships tipped in favor of the plaintiffs, because the potential harm to the seals was serious and irreparable.

<https://ecf.casd.uscourts.gov/doc1/03713275279>

D.C. CIRCUIT

N.C. Fisheries Association v. Gutierrez, 2008 U.S. App. LEXIS 25579 (D.C. Cir. Dec. 16, 2008).

A fisheries association, commercial fishermen, and a fish-packing plant (plaintiffs) filed an action alleging that an amendment to the Fishery Management Plan for South Atlantic Snapper Grouper violated the Magnuson-Stevens Fishery Conservation and Management Act. The United States District Court for the District of Columbia found that the Department of Commerce had not completed a statutorily required rebuilding plan for the species and ordered the parties to submit either joint or separate proposals to remedy the problem. The district court adopted the government's proposal with slight adjustments. The plaintiffs appealed to the United States Court of Appeals for the District of Columbia. The appellate court dismissed the appeal, finding that it lacked jurisdiction because the district court's order was not final for purposes of appeal.

<http://pacer.cadc.uscourts.gov/docs/common/opinions/200812/07-5389-1154252.pdf>

District of Columbia

Midcoast Fishermen's Association v. Gutierrez, 2008 U.S. Dist. LEXIS 104898 (D.D.C. Dec. 30, 2008).

The Midcoast Fishermen's Association and the Northwest Atlantic Marine Alliance requested that the Secretary of Commerce, through the National Marine Fisheries Service, take emergency action to address continued overfishing in the Northeastern multispecies fisheries by excluding midwater trawl vessels from groundfish closed areas. NMFS denied the petition and the groups brought a motion to compel completion of the administrative record. The court denied the motion, holding that the plaintiffs failed to show that the administrative record as certified was incomplete and failed to express adequate grounds to supplement the record.

https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2007cv2336-30

FEDERAL CIRCUIT

Salmon Spawning and Recovery Alliance v. U.S. Customs and Border Protection, 2008 WL 5247721 (C.A.Fed. 2008).

Environmental groups alleged that various federal agencies and officials violated the Endangered Species Act (ESA) by not enforcing a ban on the importation of threatened and endangered salmon from Canada into the United States and by failing to consult with the National Marine Fisheries Service (NMFS). The Court of International Trade dismissed the action for lack of standing. On appeal, the United States Court of Appeals for the Federal Circuit affirmed the dismissal of the plaintiffs' claim with regard to the Custom Service's failure to enforce the ban because it was not a reviewable agency decision. The court reversed and remanded the dismissal with regards to the plaintiffs' standing to bring the claim. The court found that the environmental groups had prudential standing and satisfied Article III standing requirements.

<http://www.ca9.uscourts.gov/opinions/07-1444.pdf>

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