

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, just send an email to [waurene@olemiss.edu](mailto:waurene@olemiss.edu) with "Case Alert" on the subject line. MASGC 06-003-010

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~ ~ **October 18, 2006** ~ ~

## FIRST CIRCUIT

*Griffin v. Town of Cutler*, 2006 U.S. Dist. LEXIS 66818 (D. Me. Sept. 15, 2006).

Two lobstermen, Dale and Michael Griffin, brought suit against the town of Cutler when the town's harbor masters denied their applications for permits to moor their fishing boats in Cutler Harbor. The brothers alleged that the town violated both the Equal Protection Clause and the Commerce Clause by allowing resident lobster fishermen full access to the harbor. In a recommended decision, Judge Margaret Kravchuk of the United States District Court for the District of Maine suggested that the court deny the town's motion for summary judgment with regard to the Equal Protection clause claim and grant summary judgment with regard to the Commerce Clause claim. The decision will be reviewed by another judge.

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## SECOND CIRCUIT

*Islander E. Pipeline Co., LLC v. Conn. Dep't of Env'tl. Prot.*, 2006 U.S. App. LEXIS 25111 (2d Cir. Oct. 5, 2006).

Connecticut's Department of Environmental Protection denied Islander East Pipeline's Water Quality Certificate application, citing an amendment to the Natural Gas Act of 1938 in the Energy Policy Act of 2005. The company had been issued a certificate of public convenience and necessity to operate an interstate gas pipeline across the Long Island Sound from the Federal Energy Regulatory Commission. The Second Circuit ruled that the Connecticut DEP had no basis to deny the certificate, because it did not withdraw from the CWA and the NGA and went forward with its federally deputized role even after the EPACT's enactment; therefore, it waived its Eleventh Amendment Immunity from suit under NGA § 19(d). The court also found that the department's Tenth Amendment challenge failed, because it could only regulate the powers conferred by Congress. The court remanded the case to the DEP to conduct a review required by federal law within 75 days.

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## THIRD CIRCUIT

*Bilyeu v. City of Ocean City*, 2006 U.S. App. LEXIS 24881 (3d Cir. Oct. 2, 2006).

Danette Bilyeu brought a wrongful death action against Ocean City, New Jersey, the state's beach patrol, and the city police, after her husband was caught in a rip current and drowned. The United States District Court for the District of New Jersey granted summary judgment in favor of Ocean City, finding that the defendants were immune from suit under the New Jersey Tort Claims Act because the beach was unimproved property. On appeal, Bilyeu alleged that the beach had been improved by a beach nourishment project, which contributed to the conditions causing her husband's death. The Third Circuit affirmed the district court's decision, finding that the record did not contain evidence to support the claim that the nourishment project created a hazard that did not previously exist.

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## FIFTH CIRCUIT

*Bertucci Contr. Corp. v. M/V Antwerpen*, 2006 U.S. App. LEXIS 23807 (5th Cir. Sept. 19, 2006).

After an allision between a vessel traveling upriver and a stationary barge, the upriver vessel brought suit against a downriver vessel, alleging that it was responsible for the accident due to negligent navigation. The United States District Court for the Eastern District of Louisiana found that the upriver vessel's pilot was responsible for its crash into the barges. The Court of Appeals affirmed the district court's judgment, finding that the upriver vessel's pilot failed to maintain proper steerageway by decreasing his speed more than necessary while rounding a bend, which resulted in the vessel being caught in a current.

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*W. Seafood Co. v. United States*, 2006 U.S. App. LEXIS 25520 (5th Cir. Oct. 11, 2006).

The city of Freeport, Texas, and the Freeport Economic Development Corporation (FEDC) proposed taking a portion of riverfront property owned by Western Seafood Company and giving it to a private party that planned to construct a private marina on the river. Western Seafood brought suit, alleging that the taking was in violation of the U.S. Constitution and the state constitution. The United States District Court for the Southern District of Texas granted the city and the FEDC summary judgment. On appeal, the Fifth Circuit determined that the construction would not be an unconstitutional taking under the U.S. Constitution. However, the court ruled that in light of a recent state legislative action, which placed new limitations on using eminent domain for economic development or where the taking conferred a benefit on a particular private party, the taking could be in violation of the Texas Constitution.

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## SEVENTH CIRCUIT

*United States v. Gerke Excavating, Inc.*, 2006 U.S. App. LEXIS 24034 (7th Cir. Sept. 22, 2006).

The United States alleged that Gerke Excavating violated the Clean Water Act by discharging pollutants into navigable waters from point sources without a permit. The United States District Court for the Western District of Wisconsin imposed a civil penalty on the company. The Court of Appeals for the Seventh Circuit upheld the district court's decision. The Supreme Court granted Gerke's petition for certiorari, but remanded the case to the Seventh Circuit after the *Rappanos* decision. On remand, the Seventh Circuit found that Justice Kennedy's "significant nexus" test was controlling. The case was subsequently remanded to the district court, which is charged with determining whether the waters that Gerke had discharged pollutants into met the "significant nexus" test.

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## NINTH CIRCUIT

*Northwest Env'tl. Advocates v. United States EPA*, 2006 U.S. Dist. LEXIS 69476 (D. Cal. Sept. 18, 2006).

Environmental groups brought suit against the EPA to require the agency to include ballast water discharges in its NPDES permitting program. Specifically, the groups challenged Regulation 40 C.F.R. §122.3(a), which gives a blanket exemption for discharges incident to the normal operation of a vessel. The District Court for the Northern District of California granted Northwest Environmental Advocates' motion for permanent injunctive relief and remanded the case to the EPA. The district court judge set a two-year deadline for EPA action before the regulation would be set aside.

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*Baykeeper v. United States Army Corps of Eng'Rs*, 2006 U.S. Dist. LEXIS 67483 (D. Cal. Sept. 20, 2006).

The Deltakeeper chapter of Baykeeper and the Natural Resources Defense Council brought suit against the U.S. Army Corps of Engineers and the Port of Stockton. The environmental groups charged that the Corps violated the National Environmental Policy Act when it issued a permit for dredging the San Joaquin River, without considering the harmful impacts that the activity would have on the river. The District Court for the Eastern District of California granted a preliminary injunction on the dredging activity, finding that the agency's decision not to prepare an environmental impact statement was arbitrary and capricious.

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## Idaho

*City of Coer d'Alene v. Mackin (In re Ownership of Sanders Beach)*, 2006 Ida. LEXIS 124 (Idaho Sept. 22, 2006).

The city of Coer d'Alene and the Kootenai County prosecuting attorney brought suit to have the ordinary high water mark (OHWM) determined for a portion of shoreline along Lake Coer d'Alene. The district court determined that the OHWM was two feet above the OHWM, allowing the public more beachfront access and denying property owners from excluding the public. The appellate court ruled that the district court's finding that the OHWM is determined by how often the water dropped or rose, or by whether there was vegetation was in error. The court held that the OHWM was based on whether water ordinarily covered the soil for a sufficient period of time to destroy the value of the land for agricultural purposes by preventing the growth of vegetation. The case was remanded to the district court.

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## ELEVENTH CIRCUIT

*Cranford v. United States*, 2006 U.S. App. LEXIS 24857 (11th Cir. Oct. 5, 2006).

A seventeen-foot boat struck a submerged vessel in Mobile Bay, injuring two passengers and killing one. The plaintiffs brought suit in federal district court, claiming that the submerged wreck is a former U.S. Army Mine Planter that was deliberately sunk in the 1930s to serve as a breakwater. The United States District Court for the Southern District of Alabama granted the United States' motions to dismiss the complaints for lack of subject matter jurisdiction. On appeal, the plaintiffs argued that the discretionary function exception to the waivers of sovereign immunity in the Suits in Admiralty Act and the Public Vessels Act applied. The U.S. Court of Appeals for the Second Circuit found that the United States had not waived its sovereign immunity by marking the submerged wreck and deciding not to remove it.

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