

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 wahren@olemiss.edu with "Case Alert" on the subject line. MASGC 07-002-05

~~ May 15, 2007 ~~

THIRD CIRCUIT

Raab v Borough of Avalon, 2007 NJ Super. LEXIS 132 (App. Div. Apr. 30, 2007).

Property owners in the Borough of Avalon, New Jersey, sought compensation for the physical taking of their beachfront property. The parties stipulated that the property was not capable of development because it was situated directly between the borough's dune line established in 1968 and the ocean high-water line. The Superior Court of New Jersey, appellate division, determined that the borough's actions constituted undue condemnation; however, the court held that the property owners' takings claim was time barred. The court held that the action had begun to accrue in 1965 when the property owners first realized that they would be unable to develop their property. The court affirmed the lower court's judgment because the action had exceeded the six-year statute of limitations set forth in a New Jersey Statute

<http://lawlibrary.rutgers.edu/decisions/appellate/a6028-04.opn.html>.

FOURTH CIRCUIT

Virginia

Philip Morris USA, Inc. v Chesapeake Bay Foundation, Inc., 643 S.E.2d 219 (Va. Apr. 20, 2007).

Pursuant to the Virginia Pollution Discharge Elimination System, the Virginia State Water Control Board (Board) renewed Philip Morris USA's discharge permit allowing the company to discharge treated wastewater into the James River. The Chesapeake Bay Foundation filed an appeal of the renewal, charging that the permit violated provisions of the Clean Water Act and the State Water Control Law. The circuit court agreed with the company and the state that the foundation did not have standing to bring suit. On appeal, the appellate court determined that the group did have standing to bring suit. Philip Morris subsequently filed an appeal with the Supreme Court of Virginia. The supreme court ruled that the foundation did have standing to appeal since it demonstrated an actual and ongoing injury to the recreational interests of its members, the alleged facts showed a connection between the injury and the Board's decision, and the foundation had an available civil remedy.

<http://www.courts.state.va.us/opinions/opnscvwp/1060858.pdf>.

FIFTH CIRCUIT

Louisiana

In re Southern Scrap Material Co., L.L.C., 2007 US Dist. LEXIS 30937 (D. La. Apr. 26, 2007).

When Hurricane Katrina struck New Orleans, a drydock owned by Southern Scrap Material broke free from its moorings and partially sank, creating a navigation hazard. The Army Corps of Engineers removed the drydock and submitted a claim to Southern Scrap for \$8 million in removal costs. Southern Scrap filed an action to limit its liability to the post-casualty value of the drydock under the Limitation of Liability Act. The United States District Court for the District of Eastern Louisiana granted Southern Scrap's request to prohibit further action against Southern Scrap based on the drydock breakaway. The United States moved for an order lifting the stay of all actions arising out of the drydock breakaway so that it could pursue its damages claim in an *in personam* action against Southern Scrap. It asserted an exclusion from the limitation proceeding under the Wreck Act. The Wreck Act has an implied *in personam*

remedy against the owner of a sunken vessel, regardless of the wreck owner's fault in sinking the vessel, and escapes the bar of the Limitation Act. The district court ruled that the United States could proceed with its *in personam* action.

https://ecf.laed.uscourts.gov/cgi-bin/login.pl?121194030075344-L_835_0-1.

NINTH CIRCUIT

Center for Biological Diversity v Lohn, 2007 US App. LEXIS 9463 (9th Cir. Apr. 26, 2007).

The Center for Biological Diversity (Center) and other groups petitioned the National Marine Fisheries Service (NMFS) to list the Southern Resident Killer Whale as an endangered species. NMFS issued a proposed ruling that found the listing was not warranted under its distinct population segment policy, because the Southern Resident killer whale was not "significant" to its taxonomy. In an action challenging the determination, the United States District Court for the Western District of Washington held that NMFS' distinct population segment policy was valid, but ordered NMFS to reexamine its conclusion that listing was not warranted. The Center appealed the court's ruling that the policy was valid. On appeal, the Ninth Circuit vacated the district court's opinion, reasoning that the case was moot since the NMFS had issued a final rule listing the Southern Resident Killer Whale as an endangered species.

<http://caselaw.lp.findlaw.com/data2/circs/9th/0535638p.pdf>.

Earth Island Inst. v Hogarth, 2007 US App. LEXIS 9572 (9th Cir. Apr. 27, 2007).

The National Marine Fisheries Service (NMFS) issued a finding that a yellowfin tuna fishery had no adverse impact on a dolphin population. Several environmental groups brought suit against NMFS. The United States District Court for the Northern District of California found that the determination was arbitrary and capricious, citing inconclusive evidence regarding the practice of catching yellowfin tuna by encircling dolphins with purse-seine nets. NMFS appealed the decision. The Ninth Circuit affirmed the district court's ruling, but instructed the district court to limit its mandate to directing the Secretary to vacate NMFS' final finding of no significant adverse impact. The court also held that, absent a Congressional mandate, the "dolphin safe" label would continue to signify that the tuna was not harvested with purse-seine nets and that no dolphins were killed or seriously injured when the tuna were caught.

<http://caselaw.lp.findlaw.com/data2/circs/9th/0417018p.pdf>.

Consejo De Desarrollo Economico De Mexicali, A.C. v United States, 2007 U.S. App. LEXIS 8166 (9th Cir. Apr. 6, 2007).

In response to a project to build a concrete-lined canal to replace an unlined portion of the All-American Canal, several groups filed suit. The groups alleged the violation of the National Environmental Policy Act, the Endangered Species Act, the Migratory Bird Treaty Act, and the San Luis Rey Indian Water Rights Settlement. A motions panel of the court granted a temporary injunction halting work on the project pending appeal. The United States filed a motion to vacate the injunction pending appeal, claiming that the groups' claims were moot. The court agreed that the Tax Relief and Health Care Act of 2006 rendered the claims moot, because an injunction would have been contrary to Congress' intent. The court vacated and remanded the judgment.

<http://caselaw.lp.findlaw.com/data2/circs/9th/0616345p.pdf>.

Hawaii

Sierra Club v City & County of Honolulu, 2007 US Dist. LEXIS 28137 (D. Haw. Apr. 16, 2007).

The Sierra Club and other environmental organizations alleged that the City and County of Honolulu violated the national pollution discharge elimination system permit (NPDES) program at its Sand Island Wastewater Treatment Plant. The court had denied two claims in the organizations' motion for summary judgment, citing factual discrepancies that could not be resolved regarding the way that the violations were counted. The organizations filed a motion for reconsideration on two counts. In its opinion, the court determined the appropriate method for determining violations; however, it held that it would not make assessments of the violations until all of the violations had been established in order to avoid double counting of the violations. The court granted the motion for reconsideration.

https://ecf.hid.uscourts.gov/cgi-bin/login.pl?311406080303703-L_835_0-1.

Washington

Burke v Tyee Yacht Club, Inc., 2007 Wash. App. LEXIS 717 (Wash. Ct. App. Apr. 17, 2007).

Robert Burke brought an action to quiet title by adverse possession or mutual recognition to a strip of land that consisted mainly of tidelands. The land in dispute was owned by Tyee Yacht Club, but Burke had built a new bulkhead within the tidelands. The trial court held that Burke had not met all of the elements of adverse possession. The appellate court overturned the trial court's ruling with regard to a 60 square-foot section of land, since Burke had exclusively, openly, notoriously, actually, and uninterruptedly, possessed that portion of land since he built the new bulkhead in 1986.

<http://www.courts.wa.gov/opinions/pdf/34496-3.07.doc.pdf>.

ELEVENTH CIRCUIT

In re Everglades Island Boat Tours, LLC, 2007 US Dist. LEXIS 29618 (D. Fla. Apr. 23, 2007).

Jonell Modys was injured while taking an airboat tour of the Florida everglades. The owners of the airboat, Everglades Island Boat Tours (Everglades), brought suit seeking exoneration from or limitation of liability. In a cross-claim, Modys' husband claimed loss of companionship/consortium. Everglades sought dismissal of that claim, reasoning that loss of consortium was not a valid claim under federal admiralty law. The Modys argued that admiralty law did not apply, since the claim was based on an accident that occurred in wetlands. The court recognized that in some instances wetlands are considered navigable waters; therefore, torts that occur within wetlands may be subject to admiralty jurisdiction. The court granted Everglades' motion to strike the claim for loss of consortium.

<https://ecf.fmd.uscourts.gov/cgi-bin/login.pl>.

Gulf Fishermen's Association v Gutierrez, 2007 US Dist. LEXIS 30584 (D. Fla. Apr. 24, 2007).

The Gulf Fishermen's Association challenged the National Marine Fisheries Service's final rule requiring owners or operators of a vessel with a commercial vessel permit for Gulf reef fish, including charter/headboats with commercial reef fish vessel permits even when under charter, to be equipped with an operating Vessel Monitoring System approved by NMFS. Pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, the association was required to file the action within 30 days of the date on which the rule was initially promulgated, which would have been no later than September 8, 2006. The association did not file the action until December 15, 2006. The United States District Court for the Middle District of Florida ruled that the complaint was time-barred, because the association did not challenge any subsequent action by the Secretary that might have, theoretically, reopened the 30-day limitation period.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Crawfish Processors Alliance v United States, 2007 US App. LEXIS 9114 (Fed. Cir. Apr. 20, 2007).

Freshwater crawfish tail meat imported from China is subject to an antidumping duty order. Coastal Foods, an importer of crawfish etouffee, sought a review of the scope of the order from the U.S. Department of Commerce (Department). The Crawfish Processors Alliance petitioned the Department to include etouffees in the antidumping duty order. The Department found that etouffee, which is cooked with many other ingredients over a long period of time, had undergone a significant transformation into a new and different product. Due to this transformation, the department determined that etouffee was not included within the scope of the antidumping duty order on freshwater crawfish tail meat. The Court of International Trade sustained the Department's ruling and the Crawfish Processors Alliance appealed. On appeal, the United States Court of Appeals for the Federal Circuit upheld the Court of International Trade's ruling, agreeing that the essential character of the crawfish tail meat in etouffee was altered or "substantially transformed" by its preparation process and was not included in the scope of the order.

<http://caselaw.lp.findlaw.com/data2/circs/fed/061501p.pdf>.

UNITED STATES COURT OF INTERNATIONAL TRADE

Salmon Spawning & Recovery Alliance v Basham, 2007 Ct. Intl. Trade LEXIS 67 (Ct. Intl Trade May 9, 2007).

The Salmon Spawning & Recovery Alliance, Native Fish Society, and Clark-Skamania Flyfishers alleged that several federal agencies violated the Endangered Species Act and the Administrative Procedures Act by allowing prohibited importation of threatened and endangered salmon from Canada into the United States. The Court of International Trade granted the federal agencies' motion to dismiss, and the groups made a motion for reconsideration, arguing that the court misinterpreted the nature of the claim. The court held that even if the claim had been misconstrued, the plaintiffs did not have a claim because their second claim under § 7 (a)(2) was triggered by affirmative action and there was no affirmative action by Customs. The court denied the motion for reconsideration.

http://www.cit.uscourts.gov/slip_op/Slip_op07/07-69.pdf.

UNITED STATES COURT OF FEDERAL CLAIMS

Banks v United States, 2007 U.S. Claims LEXIS 133 (Ct. Cl. May 3, 2007).

Property owners on the eastern shore of Lake Michigan filed suit claiming that the U.S. Army Corps of Engineer's construction and maintenance of jetties caused erosion of their property. The U.S. Court of Appeals for the Federal Circuit originally dismissed the case as time barred, but later reversed that dismissal. The United States moved to dismiss again, claiming that further discovery revealed that dismissal was proper. The court denied the dismissal for two groups of plaintiffs finding that the groups' claims did not accrue until early in 2000 when the final report issued by the Army Corps of Engineers determined that the damage was permanent and irreversible. The court deferred ruling on the third group until more information about the issuance of the Corp's report became available.

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