

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 08-002-04

~ ~ April 15, 2008 ~ ~

U.S. SUPREME COURT

New Jersey v. Delaware, 2008 U.S. LEXIS 3088 (U.S. 2008).

The state of New Jersey proposed the construction and operation of a liquefied natural gas (LNG) import facility off the New Jersey Shore that encroached into Delaware's submerged lands. Delaware refused to grant permission to build the facility, and New Jersey filed suit alleging that a 1905 Compact gave it exclusive regulatory authority over the area. The United States Supreme Court held that the compact did not confer exclusive jurisdiction on New Jersey. Furthermore, New Jersey had previously recognized Delaware's right to regulate in areas beyond the usual riparian rights in order to preserve Delaware's coastal zone. The Court concluded that the states shared jurisdiction over the area and, therefore, Delaware had the authority to deny the permit.

<http://www.supremecourtus.gov/opinions/07pdf/134Orig.pdf>

SECOND CIRCUIT

City of New York v. Agni, 2008 U.S. App. LEXIS 6416 (2d Cir. Mar. 27, 2008).

After the Staten Island Ferry crashed into a maintenance pier on October 15, 2003 killing ten passengers and injuring nineteen, the United States District Court for the District of New York found the city negligent for the crash and denied the city's motion to limit its liability. On appeal to the Second Circuit, the court had to determine whether the ferry owner's practice of allowing the ferry to be operated with a single pilot in the pilothouse met the standard of reasonable care as a matter of law. The court held that the Coast Guard's pilothouse watch regulation required one other person in addition to the pilot to pay attention to the navigational situation of the ship. Because the ferry was not in compliance with this standard of care, New York was not entitled to limit its liability under the Limitation of Liability Act.

<http://www.ca2.uscourts.gov:8080/isysnative/RDpcT3BpbNcT1BOXDA3LTeYNTetY3Zfb3BuLnBkZg==/0>

SEVENTH CIRCUIT

Indiana

Ctr. Townhouse Corp. v. City of Mishaw, 2008 Ind. App. LEXIS 551 (Ind. Ct. App. 2008).

Property owners brought an inverse condemnation action against a city and its Parks and Recreation Board alleging that the construction of a pedestrian bridge violated their riparian rights by blocking their view of the water and constituted a taking. A trial court found that there had been a taking; however, a jury returned a verdict of zero damages. The property owners appealed the damages award and the city cross-appealed on the takings issue. The property owners argued that riparian rights in Indiana should include the right to an unobstructed view of the water and that a loss of view is compensable in an inverse condemnation action. The Court of Appeals of Indiana disagreed, observing that the scope of a landowner's view should be left to the state legislature and zoning authorities. The court found that even if the view were a compensable property right, a taking may not have occurred in this case given that the loss of view may not have been substantial. Finally, the court held that the trial court properly instructed the jury on the damages award and affirmed the judgment.

<http://www.in.gov/judiciary/opinions/pdf/03200803jsk.pdf>

EIGHTH CIRCUIT

Minnesota

United States v. Bailey, 2008 U.S. Dist. LEXIS 25178 (D. Minn. 2008).

The United States District Court for the District of Minnesota has issued a final injunction requiring Gary Bailey to restore wetlands in Lake of the Woods County, Minnesota. Bailey had constructed a road on the wetlands without a permit under Section 404 of the Clean Water Act (CWA) and refused to comply with the U.S. Army Corps of Engineers' restoration order. In a previous order, the court granted the Corps' motion for summary judgment and indicated that it would issue an injunction. The parties both submitted a proposed restoration plan, and Bailey moved for a stay of judgment in the case. The court denied the motion and issued the injunction. The court declined to adopt the Corps' new restoration plan and tailored the injunction to the Corps' original restoration order. However, the court did adopt several of the Corps new proposals, requiring Bailey to conduct site surveys, to allow the Corps access to the site, and to remove culverts and fill placed on the site.

https://ecf.mnd.uscourts.gov/cgi-bin/show_multidocs.pl?caseid=79390&arr_de_seq_nums=662&magic_num=

NINTH CIRCUIT

United States v. Approximately 64,695 Pounds of Shark Fins, 2008 U.S. App. LEXIS 5637 (9th Cir. Mar. 17, 2008).

After 64,695 pounds of shark fins were found on board a U.S. vessel, the United States brought a civil forfeiture action under the Shark Finning Prohibition Act. Under the Act, it is unlawful for any person on a U.S. fishing vessel to possess shark fins obtained through "shark finning." The United States District Court for the Southern District of California ruled in favor of the United States. On appeal, the Ninth Circuit held that neither the Act nor its regulations provided fair notice that the vessel would be considered a fishing vessel under 16 U.S.C.S. § 1802(18)(B), and, therefore, the seizure violated due process. The forfeiture order was reversed.

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/B36C33B16501581D8825740F0058F5FC/\\$file/0556274.pdf?op](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/B36C33B16501581D8825740F0058F5FC/$file/0556274.pdf?op)

California

California Sportfishing Protection Alliance v. State Water Resources Control Bd., 2008 Cal. App. LEXIS 382 (Cal. Ct. App. Mar. 21, 2008).

The California State Water Resources Control Board and a regional board adopted a stream temperature amendment to an existing water quality control plan. Several organizations, including the California Sportfishing Alliance, challenged the amendment, claiming that it violated the California Environmental Quality Act (CEQA) and the Porter-Cologne Water Quality Control Act. A lower court denied their petition and the groups appealed. The organizations argued that the temperature amendment findings were not supported by the evidence in the administrative record and that the agencies did not meet the environmental review requirements. The appellate court held that the adoption of the amendment was supported by evidence and that the agencies did not violate the administrative regulations regarding the environmental review of a basin plan. The court affirmed the lower court's order.

ELEVENTH CIRCUIT

Fla. Key Deer v. Paulson, 2008 U.S. App. LEXIS 6850 (11th Cir. Apr. 1, 2008).

Several wildlife organizations filed suit against the Federal Emergency Management Agency (FEMA) and the U.S. Fish and Wildlife Service (FWS) alleging that the agencies violated § 7(a) of the Endangered Species Act (ESA) in the implementation of the National Flood Insurance Program in the Florida Keys. Section 7(a)(1) of the ESA requires agencies to carry out programs to conserve species. Section 7(a)(2) requires agencies to consult with the FWS to determine the effects of their actions on endangered species and to insure that their actions do not jeopardize the species or their habitat. The United States District Court for the Southern District of Florida granted summary judgment and injunctive relief to the wildlife organizations. On appeal, the Eleventh Circuit affirmed the judgment, finding that under § 7(a)(1) FEMA should have adopted species- and location-specific conservation programs for the listed species.

<http://www.ca11.uscourts.gov/opinions/ops/200516374.pdf>

Booth v. Carnival Corp., 2008 U.S. App. LEXIS 6920 (11th Cir. Apr. 1, 2008).

A passenger on a Carnival cruise ship, Steve Booth, died during a scuba diving excursion. His survivors filed a wrongful death action. Booth's cruise ticket required written notice of claims within 185 days of injury or death and established a one-year limitation period within which a suit must be commenced. The ticket also contained a forum selection clause specifying the District Court for the Southern District of Florida as the appropriate venue when the federal district court had subject matter jurisdiction and in the state courts in Miami-Dade County, Florida, when state courts had subject matter jurisdiction. Representatives of the estate gave written notice and filed a timely wrongful death action in the state courts. After the contractual limitation period had run and while the state court case was pending, the representative filed suit in federal court. The state court action was dismissed for improper venue. In federal court, the cruise line argued that the action should be dismissed, based on the lapsed limitation period. The United States District Court for the Southern District of Florida found that the limitations period was equitably tolled during the state court proceedings. The Eleventh Circuit affirmed the ruling, since the defendant knew of the claim, the plaintiff had thoroughly pursued his claim, and the state action was dismissed based on improper venue.

<http://www.ca11.uscourts.gov/opinions/ops/200710689.pdf>

D.C. CIRCUIT

District of Columbia

Pac. Shores Subdivision Cal. Water Dist. v. United States Army Corps of Eng'rs, 2008 U.S. Dist. LEXIS 20164 (D.D.C. Mar. 17, 2008).

A water district and other plaintiffs challenged the United States Army Corps of Engineers' issuance of a permit to breach a sand bar separating two lakes from the Pacific Ocean. The lakes are home to several endangered and threatened species, including the tidewater goby, the brown pelican, and Coho salmon. The Corps had consulted with the National Marine Fisheries Service (NMFS) regarding the effect of the project on the Coho salmon. The Corps also consulted with the Fish and Wildlife Service (FWS) concerning the effects of the project on the other species. The water district and other concerned citizens alleged that the permit was in violation of the Endangered Species Act and the Administrative Procedures Act. The court held that the Corps properly relied on NMFS' conclusions regarding the Coho salmon. However, the court held that FWS did not provide an adequate incidental take statement for the brown pelican, and the Corps' reliance on the biological opinion was arbitrary and capricious.

<https://ecf.dcd.uscourts.gov/doc1/04512015183>

National Association of Home Builders v. United States Army Corps of Engineers, 2008 U.S. Dist. LEXIS 23466 (D.D.C. Mar. 26, 2008).

The National Association of Homebuilders challenged the U.S. Army Corps of Engineers' issuance of a Nationwide Permit, claiming that the permit was in violation of the Corps' authority under the Clean Water Act. Specifically, the association claimed that the Corps did not have the authority to regulate upland ditches. The Corps made a motion for a judgment on the pleadings, citing the association's lack of standing. The United States District Court for the District of Columbia denied the motion. The court held that the association had standing to sue in a representative capacity because the individual members of the association had standing to sue, the interests at issue were relevant to the association's interest, and neither the claim nor the relief requested required the members' participation.

<https://ecf.dcd.uscourts.gov/doc1/04512025993>

API v. Johnson, 2008 U.S. Dist. LEXIS 24963 (D.D.C. Mar. 31, 2008).

American Petroleum Institute and Marathon Oil Company brought suit challenging a regulation promulgated by the Environmental Protection Agency (EPA) defining the term "navigable waters" under the Clean Water Act (CWA). The plaintiffs alleged that the definition violated the CWA, the Administrative Procedure Act, and the Declaratory Judgment Act. The United States District Court for the District of Columbia held that the plaintiffs had standing to challenge the rule, since they met all the elements required to show standing. The court also held that the EPA's rule was arbitrary and capricious, because the agency did not properly consider the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC), which held that the EPA's jurisdiction is not coextensive with the U.S. Congress' commerce power.

<https://ecf.dcd.uscourts.gov/doc1/04512030922>

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