

# 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 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 [wauzene@clemson.edu](mailto:wauzene@clemson.edu) with "Case Alert" on the subject line. MASGC 08-002-012

## SECOND CIRCUIT

### New York

*Peconic Baykeeper, Inc. v. Suffolk County*, 2008 U.S. Dist. LEXIS 93137 (E.D.N.Y. Nov. 17, 2008).

An environmental group and others filed suit against Suffolk County and its public works department, alleging that the county's mosquito control program violated the Clean Water Act (CWA) by spreading spoil from drainage ditch maintenance over wetlands; discharging fecal coliform bacteria; and spraying pesticides over open water. The trial court held that the discharges into tidal wetlands were covered by an existing U.S. Army Corps of Engineers nationwide permit. Additionally, the plaintiffs failed to show that the fecal coliform bacteria was discharged in the maintenance of the ditch system. Finally, the court found that the aerial pesticide distribution did not require additional permits under the CWA. The court dismissed the complaint.

<https://ecf.nyed.uscourts.gov/doc1/12314385952>

## THIRD CIRCUIT

### New Jersey

*Borough of Avalon v. New Jersey Department of Environmental Protection*, 2008 N.J. Super. LEXIS 239 (App.Div. Nov. 19, 2008).

The Borough of Avalon, New Jersey brought suit against the New Jersey Department of Environmental Protection (DEP) challenging the Department's regulations requiring a municipality to allow public access to tidal waterways and shores at all times and to provide parking and rest rooms. The court invalidated two sections of the rules, N.J.A.C. 7:7E-8.11(f) and (p) and N.J.A.C. 7:7E-8A.2(c)(2)(i). The court found that the state legislature had not delegated or implied any authority to the DEP to preempt or supervise a municipality's operation of its beaches.

<http://lawlibrary.rutgers.edu/decisions/appellate/a3410-07.opn.html>

*Bubis v. Kassin*, 2008 N.J. Super. LEXIS 256 (App.Div. Dec. 11, 2008).

When Sophie Bubis sat on a beach below the mean high water line in front of private property and refused to move, she was cited for trespass. She filed an action alleging that the private property owners, Jack and Joyce Kassin, interfered with her rights to access the beach under the public trust doctrine. The trial court held that the Kassins could limit the use of the beach below the mean high water mark and did not have to provide additional public access above the mean high water mark. An appellate court agreed that the Kassins were not obligated to allow public access to their property above the mean high water mark. However, the court reversed the lower court's judgment limiting the public's use of the beach below the mean high water mark. The appellate court held that owners of private property adjoining property held by the state under the public trust doctrine may not impose limitations upon the public's use of that property simply to enhance the enjoyment of their own property.

<http://lawlibrary.rutgers.edu/decisions/appellate/a5783-06.opn.html>

## FIFTH CIRCUIT

*Paul v. Landsafe Flood Determination, Inc., No. 07-60652* (5th Cir. Dec. 5, 2008).

Before purchasing a home, Mary Dobsa and Neil Paul hired Landsafe Flood Determination, Inc., to assess whether her home was located in a flood zone. Landsafe determined that the property was not in a flood zone. Accordingly, Dobsa was not required to purchase flood insurance under the National Flood Insurance Program. After Hurricane Katrina caused substantial damage to Dobsa's home, she learned that her property was in fact located in a flood-hazard area. She brought a negligence suit against the company. The lower court held that Landsafe had no duty to provide the homeowners with a correct determination. The Fifth Circuit reversed the decision, finding that the lower court should have asked whether it was reasonably foreseeable that the homeowners would rely on the company's report. The court noted that a flood zone determination was the kind of professional opinion which may induce justifiable and detrimental reliance by a reasonably foreseeable person.

<http://www.ca5.uscourts.gov/opinions%5Cpub%5C07%07-60652-CV0.wpd.pdf>

## SIXTH CIRCUIT

*Fednav, Ltd. v. Chester*, 2008 U.S. App. LEXIS 24038 (6th Cir. Nov. 21, 2008).

A coalition of shipping companies, non-profit shipping associations, a port terminal and dock operator, and a port association appealed a district court's dismissal of their constitutional challenges to the Michigan ballast water statute, Mich. Comp. Laws § 324.3112(6), and associated regulations. On appeal, the Sixth Circuit found that several of the plaintiffs lacked standing to challenge the statute. With respect to the remaining plaintiffs' claims, the court found that the permit requirement was not preempted by federal law because the National Invasive Species Act of 1996 indicated that the prevention of aquatic nuisance species introduction should be accomplished under state authority and coordinated by a state and local agency panel. The court further found that there was no Commerce Clause violation, because the regulations were applied evenly to in-state and out-of-state parties. Finally, the court found that the permit did not violate due process, because the requirements were rationally related to a legitimate government purpose. For those reasons, the court upheld the ballast water statute.

<http://www.ca6.uscourts.gov/opinions.pdf/08a0414p-06.pdf>

## NINTH CIRCUIT

*Alaska Wilderness League v. Kempthorne*, 2008 U.S. App. LEXIS 23861 (9th Cir. Nov. 20, 2008).

The Minerals Management Services (MMS) approved a plan submitted by an oil company to explore the Beaufort Sea. Several environmental groups challenged MMS's action under the National Environmental Policy Act (NEPA) and the Outer Continental Shelf Lands Act (OCSLA). The groups alleged that MMS failed to take a hard look at the impact of drilling on bowhead whales and Inupiat subsistence activities. The groups also challenged the agency's finding that no environmental impact statement was required. Finally, the groups claimed that the MMS failed to meet OCSLA's requirements to review and approve specific proposed well location and spacing. The court agreed with the plaintiffs and vacated MMS's approval.

[https://ecf.ca9.uscourts.gov/cmecf/servelet/TransportRoom?servelet=ShowDoc&caselid=171708&dkType=dkPublic&dls\\_id=009115795510](https://ecf.ca9.uscourts.gov/cmecf/servelet/TransportRoom?servelet=ShowDoc&caselid=171708&dkType=dkPublic&dls_id=009115795510)

### Hawaii

*Carlisle v. One (1) Boat*, 2008 Haw. LEXIS 266 (Haw. Nov. 17, 2008).

The state of Hawaii filed a petition for the forfeiture of fishing boats used for the illegal taking of stony coral and live rocks in violation of state law. The circuit court had dismissed the petition, but an appellate court vacated that decision. The Hawaii Supreme court found that the appellate court had timely heard the appeal. Furthermore, the state supreme court held that the circuit court properly dismissed the petition, because the fishing boat owners had violated Haw. Admin. R. 13-95-70 and 13-95-71 in illegally taking the coral, and these were not covered offenses for which property is subject to forfeiture under Haw. Rev. Stat. § 712A-4.

<http://www.state.hi.us/jud/opinions/sct/2008/26995.htm>

## DISTRICT OF COLUMBIA

*Atlantic Sea Island Group LLC v. Connaughton*, 2008 U.S. Dist. LEXIS 98867 (D.D.C. Dec. 8, 2008).

The Administrator of the Maritime Administration designated New Jersey as an additional adjacent coastal state with respect to the Atlantic Sea Island Group's (ASIG) application for a license to construct and operate a liquefied natural gas (LNG) import facility. ASIG brought suit alleging that the decision was unlawful. The US District Court for the District of Columbia ruled that the Administrator was acting within his authority under the Deepwater Port Act. Furthermore, the decision was not arbitrary and capricious. The Court granted summary judgment in favor of the Administrator.

<https://ecf.dcd.uscourts.gov/doc1/04512339884>

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