

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 wautens@olemiss.edu with "Case Alert" on the subject line. MASGC 08-002-011

UNITED STATES SUPREME COURT

Winter v. NRDC, 2008 U.S. LEXIS 8343 (U.S. Nov. 12, 2008).

The Supreme Court has ruled that the Navy may continue the use of mid-frequency active sonar in its training exercises off the coast of southern California. The ruling overturns the Ninth Circuit's grant of a preliminary injunction imposing restrictions on the training exercises. Several environmental groups brought the suit against the Navy charging that the training activities caused serious injury to marine mammals. The majority held that the possible harm to the marine mammals was outweighed by the Navy's need to conduct realistic training with active sonar to respond to underwater threats from enemy submarines.

<http://www.supremecourtus.gov/opinions/08pdf/07-1239.pdf>

FIRST CIRCUIT

Massachusetts

Evans v. Nantucket Cmty. Sailing, Inc., 2008 U.S. Dist. LEXIS 85628 (D. Mass. Oct. 22, 2008).

During a sailboat race, a passenger was struck by a boom, a part of the sailboat attached to the mainsail, resulting in her loss of taste and smell. The passenger brought suit against the helmsmen of both sailboats involved in the accident. The helmsmen claimed that the passenger was comparatively negligent for failing to pay attention during the race and not moving out of the way before the boom struck her neck. The court found that the helmsmen violated navigational rules under 33 U.S.C.S. § 1602 and both were at fault for failing to maintain a proper distance between the racing sailboats. The court agreed that the plaintiff was partially at fault and reduced her damages of \$150,000 by 40 percent.

<http://pacer.mad.uscourts.gov/dc/cqi-bin/recentops.pl?filename=bowler/pdf/evans.pdf>

FOURTH CIRCUIT

South Carolina

S.C. Coastal Conservation League v. S.C. Dept of Health & Envtl. Control, 2008 S.C. App. LEXIS 174 (S.C. Ct. App. Oct. 23, 2008).

The South Carolina State Ports Authority (SPA) and the South Carolina Department of Transportation (DOT) filed permit applications with the South Carolina Department of Health and Environmental Control (DHEC) to construct a 300-acre marine container terminal. A conservation organization filed a request for a final review of the permit before DHEC issued the permit. The SPA and DOT objected to the review as untimely and a South Carolina Administrative Law judge agreed. On appeal, the court ruled that the request for a final review of the decision was untimely because the organization did not conform to the mandatory filing requirements of S.C. Code Ann. § 44-1-60(E).

<http://www.judicial.state.sc.us/opinions/displayOpinion.cfm?caseNo=4450>

Virginia

Chesapeake Bay Foundation, Inc. v. Commonwealth ex rel. Va. State Water Control Bd., 2008 Va. App. LEXIS 493 (Va. Ct. App. Nov. 4, 2008).

A Virginia Water Protection Permit was issued to a city for building and operating a county reservoir. An environmental group filed suit claiming that the construction activity would destroy natural river resources or impair the aesthetic value of the rivers. A trial court held that the environmental group lacked standing to bring the claim. The appellate court reversed the trial court's judgment, finding the group had standing, because the petition indicated an injury in fact, a causal connection, and that the injury could be redressed to show individual standing. Furthermore, the petition indicated that there was representational standing because the environmental group's individual members would have standing to sue in their own rights.

<http://www.courts.state.va.us/opinions/opncawwp/2545072.pdf>

NINTH CIRCUIT

Oregon

Norgaard v. Port of Portland, 2008 Ore. App. LEXIS 1661 (Or. Ct. App. Nov. 5, 2008).

An employee of the Port of Portland was injured while working aboard a vessel providing assistance to a dredge. The employee filed suit under general maritime law and the Jones Act, 46 U.S.C.S. § 30104. The Port claimed Eleventh Amendment immunity, which provides immunity for states in federal actions. The plaintiff argued that the Port was not entitled to immunity under the Eleventh Amendment because it was not an "arm of the state." Although the court found that the Port was a state instrumentality under state law immunity, the port was not an arm of the state for Eleventh Amendment purposes because the Port was financially independent from the state and the state was not a substantial party in interest at the time of the suit.

<http://159.121.112.45/A134586.htm>

ELEVENTH CIRCUIT

Black Warrior Riverkeeper, Inc. v. Cherokee Mining, LLC, 2008 U.S. App. LEXIS 23296 (11th Cir. Nov. 13, 2008).

Black Warrior Riverkeeper filed suit against Cherokee Mining (Cherokee), the owner and operator of two coal mines. The environmental group alleged that Cherokee had violated the Clean Water Act (CWA) and Alabama law in its operation of the coal mines. The mining company argued that the citizen suit was barred by a provision of the CWA that precludes citizen suits when a state agency has an active enforcement action against a polluter, since the Alabama Department of Environmental Management (ADEM) had commenced an action against Cherokee. The federal district court denied Cherokee's motion to dismiss for lack of subject matter jurisdiction. The Eleventh Circuit affirmed. The court held that the limitations against the suit were lifted pursuant to another provision of the CWA that allows citizen suits as long as notice and filing requirements are met. The court found that Riverkeeper met those requirements, since it gave notice of intent to sue defendant prior to ADEM's enforcement action and filed suit in federal court within 120 days of its notice.

<http://www.ca11.uscourts.gov/opinions/ops/200810810.pdf>

Florida

Save the Homosassa River Alliance, Inc. v. Citrus County, 2008 Fla. App. LEXIS 16449 (Fla. Dist. Ct. App. 5th Dist. Oct. 24, 2008).

A nonprofit and several property owners challenged a county's approval of a resort's development application. The plaintiffs claimed that the development was inconsistent with the county's comprehensive use plans. A trial court ruled that the plaintiffs lacked standing to bring the claims because they failed to show that their interests were adversely affected by the project in a way not experienced by the general population and because of insufficient "nexus" allegations. The appellate court reversed the decision, finding that the parties had adequately alleged their standing, pursuant to § 163.3215(2), Fla. Stat., to challenge the approval of the development project.

<http://www.5dca.org/Opinions/Opin2008/102008/5D07-2545.op.pdf>

Smith v. Carnival Corp., 2008 U.S. Dist. LEXIS 87149 (S.D. Fla. Oct. 27, 2008).

A cruise ship passenger's family brought a wrongful death claim against a cruise line and tour company after the passenger drowned during a snorkel trip excursion in the Cayman Islands. Although both parties agreed that the Death on the High Seas Act (DOSHA) applied, the family also argued that it should be able to maintain actions under general maritime law and the laws of the Cayman Islands. The defendants disagreed. The court found that admiralty jurisdiction did exist, pursuant to 28 U.S.C.S. § 1333(1), because the wrongful death claim satisfied the conditions both of location and of connection with marine activity.

<https://ecf.flsd.uscourts.gov/doc1/05115857635>

Georgia

Aqua Log, Inc. v. Lost & Abandoned Pre-cut Logs & Rafts of Logs, 2008 U.S. Dist. LEXIS 84429 (S.D. Ga. Oct. 21, 2008).

A salvage company recovered abandoned, decades-old pre-cut logs from the bottom of the Altamaha River in Georgia. The state claimed ownership, and the salvage company filed a complaint seeking ownership under the Salvage Act, 46 U.S.C.S. § 721. The State of Georgia moved to dismiss, arguing that the court did not have subject matter jurisdiction under the Eleventh Amendment. The court held that the state lacked grounds to invoke its Eleventh Amendment immunity because the State did not have actual possession of the logs.

<https://ecf.gasd.uscourts.gov/doc1/0571913234>

COURT OF FEDERAL CLAIMS

Banks v. United States, 2008 U.S. Claims LEXIS 304 (Fed. Cl. Oct. 15, 2008).

Last fall, the United States Court of Federal Claims held the United States Army Corps of Engineers partially liable for the erosion of private property on Lake Michigan. In the post-liability trial briefings, the property owners submitted two theories in support of allowing the presentation of additional evidence regarding the nearshore lakebed composition, which would affect the extent of the Corps' liability. Although the court found that the arguments failed to show a circumstance which would have supported reconsideration, the court ruled that it would accept the additional evidence to avoid possible inefficiency and delay in resolving the claims.

http://www.uscfc.uscourts.gov/sites/default/files/HEWITT_BANKS101508.pdf

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