

Ocean and Coastal Case Alert

~ ~ September 19, 2008 ~ ~

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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 wsurwete@clemis.edu with "Case Alert" on the subject line. MASGC 08-002-08

FOURTH CIRCUIT

U.S. v. MV Sanctuary, 2008 U.S. App. LEXIS 18161 (4th Cir. Aug. 25, 2008)

The Fourth Circuit affirmed the district court's granting of an administrative warrant authorizing an inspection of a vessel for polychlorinated biphenyls (PCBs) and a preliminary injunction to prohibit the vessel owner from moving the vessel until the EPA's inspection was complete. The EPA has the authority under the Toxic Substances Control Act (TSCA) to obtain administrative warrants to inspect premises. The Fourth Circuit held that the district court had a substantial basis for finding probable cause to issue the warrant because sampling data revealed that PCBs were present in paint coating and EPA sought the warrant to determine if the vessel was in compliance with TSCA.

<http://caselaw.findlaw.com/data2/circs/4th/072123p.pdf>

FIFTH CIRCUIT

Mississippi

Marquez v. Imbornone, 2008 WL 4170026 (Miss. Sept. 11, 2008).

The Mississippi Supreme Court affirmed the ruling of the Chancery Court of Hancock County that the riparian rights can be alienated and separated from upland property. Willaim Marquez purchased real property in Hancock County, Mississippi from Joseph and Mary Fleuriet by special warranty deed in 1985. In 2000, the Fleuriets conveyed certain littoral or riparian rights to Charles and Judith Imbornone by warranty deed. Marquez filed suit against the Fleuriets and Imbornones claiming the Fleuriets conveyed water rights he owned to the Imbornones. The Chancery Court determined that Marquez's deed conveyed only the upland portion of the property as it made no reference of riparian or littoral rights.

Texas

City of Sherman v. Wayne, 2008 WL 3823981 (Tex. App. Aug. 18, 2008)

The Texas Court of Appeals upheld the trial court's ruling that the application of the City of Sherman's residential zoning ordinance deprived a property owner of all economically viable use of the property. At trial, the jury found the property had a market value of zero with the residential zoning applied and a market value of \$250,000 without the residential zoning. The Court of Appeals upheld the trial court's award of \$250,000 in actual damages.

SIXTH CIRCUIT

Kentucky Waterways Alliance v. Johnson, 2008 U.S. App. LEXIS 18802 (6th Cir. Sept. 3, 2008)

Kentucky Waterways Alliance challenged the EPA's approval of Kentucky's antidegradation implementation regulation under the Clean Water Act. The Sixth Circuit held the EPA's approval of the procedures was not arbitrary and capricious simply because of plaintiffs contention that less than 90 percent of the state's waters were afforded Tier II protection. However, the EPA did act contrary to law by relying on certain unenforceable commitments made by a state agency in evaluating the de minimis impact of the regulation on the quality of Kentucky's Tier II waters.

<http://caselaw.lp.findlaw.com/data2/circs/6th/065614p.pdf>

NINTH CIRCUIT

Fairbanks North Star Borough v. U.S. Army Corps of Engineers, 2008 U.S. App. LEXIS 19351 (9th Cir. Sept. 12, 2008).

Fairbanks North Star Borough sought judicial review of a Corps of Engineers "approved jurisdictional determination" that Fairbanks' property contained waters of the United States subject to regulation under the Clean Water Act. The district court dismissed Fairbanks claim for lack of jurisdiction. The Ninth Circuit affirmed on the grounds that the approved jurisdictional determination is not a reviewable final agency action within the meaning of the Administrative Procedure Act.

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/05EC084FC11E4DEE882574C100798724/\\$file/0735545.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/05EC084FC11E4DEE882574C100798724/$file/0735545.pdf?openelement)

Wong v. Bush, 2008 U.S. App. LEXIS 18973 (9th Cir. Sept. 5, 2008)

Opponents of Hawaii's new Super Ferry alleged that by establishing a security zone to enable the HSF to dock at Nawiliwili Harbor (and thereby limiting the area available for protests), the U.S. Coast Guard violated their First Amendment right to free speech, the National Environmental Policy Act, and federal laws and regulations governing the Coast Guard's authority to create security zones safeguarding United States waters and harbors. The security zone was established to "better protect people, vessels, and facilities in and around Nawiliwili Harbor in the face of non-compliant protesters who have impeded passage of the Hawaii Super Ferry to its dock in the harbor." The Ninth Circuit held that the security zone did not infringe on the plaintiffs' First Amendment rights, violate NEPA, or exceed the Coast Guard's authority.

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/EB9141DB024766C48825748B004C53AA/\\$file/0716799.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/EB9141DB024766C48825748B004C53AA/$file/0716799.pdf?openelement)

Kingman Reef Atoll Investments v. U.S., 2008 U.S. App. Lexis 18863 (9th Cir. Sept. 4, 2008)

Kingman Reef Atoll Investments (KRAI) filed an action against the U.S. to quiet title to Kingman Reef, a small, low-lying coral reef atoll located approximately 930 miles south of Honolulu, Hawaii. The Ninth Circuit affirmed the district court's dismissal of the claim for lack of subject matter jurisdiction. The district court held that the action was untimely under the 12-year statute of limitations provided by the Quiet Title Act. The court stated that KRAI's predecessor in interest had acknowledged in 1937 that either the State or the Navy Department owned the reef. Actual notice, therefore, was provided more than twelve years prior to the filing of the complaint.

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/B47E3CE713FA6E2A8825748A004B1CF8/\\$file/0716817.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/B47E3CE713FA6E2A8825748A004B1CF8/$file/0716817.pdf?openelement)