

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 waurene@olemiss.edu with "**Case Alert**" on the subject line. MASGC 09-002-11

FIRST CIRCUIT

R.I. Fishermen's Alliance, Inc. v. R.I. Dep't of Env'tl. Mgmt., 2009 U.S. App. LEXIS 23344 (1st Cir. R.I. Oct. 23, 2009). Several lobstermen brought an action in state court challenging the constitutionality of Rhode Island Department of Environmental Management (DEM) regulations imposing restrictions on lobster-trap allocations for state waters. The lobstermen primarily objected to the use of retroactive control dates in the regulations. The case was removed to federal district court. The district court denied the lobstermen's request to remand the case to state court and granted upheld the regulations, granting summary judgment in favor of DEM. On appeal, the First Circuit found that the district court appropriately exercised federal question jurisdiction and affirmed the summary judgment and the denial of remand. <http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=08-2390P.01A>

Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt., 2009 U.S. App. LEXIS 23491 (1st Cir. Oct. 26, 2009). The First Circuit upheld a federal district court's decision finding that the Rhode Island Coastal Resources Management Council (CRMC's) assent to an energy company's dredging plans for the construction of an LNG terminal was conclusively presumed under 16 U.S.C.S. § 1456(c)(3)(A). The CRMC argued that the six-month deadline for presumed concurrence should have been tolled pending additional information from the company. The appellate court found that the additional information, which included a letter certifying acceptance of dredged material, was not information the company was required to submit. Further, the court found that the state's assent process was preempted by FERC's delegated authority. <http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=08-2440P.01A>

Nulankeyutmonen Nkihtaqmikon v. Impson, 2009 U.S. App. LEXIS 23714 (1st Cir. Oct. 28, 2009). An Indian tribe appealed a Bureau of Indian Affairs decision to approve a lease of tribal land for the construction and operation of a LNG facility. The approval was contingent on Federal Energy Regulatory Commission approval. The tribe claimed that the Bureau's approval violated the National Historic Preservation Act and the Administrative Procedure Act. The U.S. District Court for the District of Maine dismissed the case for "lack of exhaustion." The tribe appealed the court's ruling, arguing that exhaustion was not mandatory. The Sixth Circuit affirmed the dismissal, holding that the exhaustion ruling was mandatory unless the plaintiffs met an exception by showing both blatant error and a threat of serious injustice if the court adhered to the mandate. <http://www.ca1.uscourts.gov/pdf.opinions/08-2122P-01A.pdf>

THIRD CIRCUIT

New Jersey

Sea Vill. Marina, LLC v. A 1980 Carlcraft Houseboat, Hull ID No. LMG37164M80D, 2009 U.S. Dist. LEXIS 96651 (D.N.J. Oct. 19, 2009).

Sea View Marina, a marina primarily for floating homes, filed suit against several floating home owners seeking a maritime lien for dockage and other fees. The plaintiffs claimed that their homes were not vessels and therefore not subject to admiralty jurisdiction. The U.S. District Court for the District of New Jersey ruled that the floating homes in this instance are in fact vessels subject to admiralty jurisdiction for the purposes of 46 U.S.C. § 31342, noting that the homes were not permanently moored and had the capability of being moved across the water.

<https://ecf.njd.uscourts.gov/doc1/11914279246>

FIFTH CIRCUIT

Comer v. Murphy Oil USA, 2009 U.S. App. LEXIS 22774 (5th Cir. Oct. 16, 2009).

Reversing the U.S. District Court for the Southern District of Mississippi, the Fifth Circuit ruled that a climate change lawsuit against several energy and chemical companies may proceed. Mississippi Gulf Coast landowners and residents filed the suit, alleging that the companies' greenhouse gas emissions contributed to global warming that subsequently caused sea level rise and added to the ferocity of Hurricane Katrina, which resulted in damage to their property. Relying on the U.S. Supreme Court's decision in *Massachusetts v. EPA*, the court held that the landowners have standing to proceed with their nuisance, trespass, and negligence claims and that the claims are not precluded by the political question doctrine.

<http://www.ca5.uscourts.gov/opinions/pub/07/07-60756-CV0.wpd.pdf>

Solana v. GSF Dev. Driller I, 2009 U.S. App. LEXIS 24331 (5th Cir. Oct. 29, 2009).

The Fifth Circuit ruled that two crew members of a semi-submersible drilling platform are not eligible to assert a salvage claim for helping prevent the platform from sinking following Hurricane Katrina. The employees had sought payment as salvors, arguing that they were "off duty" when their employer asked them to help a salvage company and other crew members to save the unit. Their employer argued that as crew members, the employees were not entitled to a salvage award for assistance rendered to their own vessel since they did not qualify for any exceptions to the principle barring crew member compensation. The district court granted summary judgment in favor of the employer. On appeal, the Fifth Circuit agreed that the crew members were not entitled to a salvage award. However, the court held that summary judgment should not have been granted regarding the amount of compensation for the crew members' work in stabilizing the rig and remanded the case to determine the appropriate level of compensation.

<http://www.ca5.uscourts.gov/opinions/pub/06/06-30930-CV0.wpd.pdf>

SEVENTH CIRCUIT

Ill. Dunesland Pres. Soc'y v. Ill. Dep't of Natural Res., 2009 U.S. App. LEXIS 22495 (7th Cir. Oct. 14, 2009).

A nonprofit corporation that helped create and continues to support Illinois Beach State Park filed a 42 U.S.C. § 1983 action against the Illinois Department of Natural Resources and certain state officials, alleging infringement of free speech. The department had denied the nonprofit space in its display rack for its pamphlets, "Tips for Avoiding Asbestos Contamination at Illinois Beach State Park." The court noted that the message of the plaintiff's pamphlet was contrary to the Department's message, stating "[t]he message of the plaintiff's pamphlet is: you think you're in a nice park but really you're in Chernobyl, so if you're dumb enough to come here be sure not to step on the sand because that would disturb or agitate it, and to scrub under your fingernails as soon as you get home." The court recognized that studies have not found levels of asbestos sufficient to menace human health. The Seventh Circuit affirmed the district court's grant of summary judgment in favor of the state, noting that the department was not required to provide display space and that the plaintiff could distribute its flyer within the park through other means.

http://www.ca7.uscourts.gov/fdocs/docs.fwx?submit=rss_sho&shofile=09-1535_002.pdf

ELEVENTH CIRCUIT

Florida

Nat'l Wildlife Fed'n v. Souza, 2009 U.S. Dist. LEXIS 99674 (S.D. Fla. Oct. 23, 2009).

The U.S. Corps of Engineers issued a § 404 Clean Water Act (CWA) permit for the construction of a luxury residential golf community. Several environmental groups challenged the permit, claiming that the land in question "stores and filters water needed to sustain life in the Western Everglades" and "provides essential 'core' foraging habitat for the endangered word stork." The plaintiffs specifically alleged violations of the Endangered Species Act (ESA), the CWA, the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA). The court found that the Fish and Wildlife's biological opinion (BiOp), which is required by the ESA, is "inadequate with regard to its failure to analyze the impacts of other federal projects in the area in analyzing the environmental baseline and based on the FWS's calculation of fish prey density in the opinion." The court did not reach the argument that the Corps' reliance on the BiOp was arbitrary and capricious and found the remaining arguments without merit.

MASGC 09-002-11

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