

Ocean and Coastal Case Alert



~ ~ October 15, 2009 ~ ~

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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 09-002-10

SECOND CIRCUIT

New York

City of New York v. Gowanus Indus. Park, Inc., 2009 NY Slip Op 6498, 1 (N.Y. App. Div. 2d Dep't Sept. 15, 2009).

New York City sued a property owner to require the removal of a wall that it alleged unreasonably interfered with the city's riparian/littoral rights to a basin, was unlawfully constructed, and constituted a nuisance. The trial court ordered the owner to remove the wall and restore access to the basin. On appeal, the court affirmed the judgment, finding that the city had riparian rights in and to the basin. Furthermore, as a riparian owner, the city has a right to equitable relief against material obstructions. The court rejected the property owner's contention that the trial court's injunction was overly broad.

http://www.nycourts.gov/reporter/3dseries/2009/2009_06498.htm

Brown v. United States, 2009 U.S. Dist. LEXIS 91589 (E.D.N.Y. Sept. 30, 2009).

Robert Brown filed suit against the U.S. government, alleging that the government's negligence in operating, controlling, and managing the beach at Jacob Riis Park caused him to suffer serious injuries during a diving accident. The U.S. District Court for the Eastern District of New York found in favor of the government. The court held that the plaintiff's claims were barred by the discretionary function exception to the Federal Tort Claims Act, because the government conduct at issue involved an act of official discretion, which was grounded in policy considerations. The court noted that even if the discretionary function exception did not apply, the plaintiff "failed to establish that the government had a duty to warn or that it was negligent in this case."

<https://ecf.nyed.uscourts.gov/doc1/12315112332>

THIRD CIRCUIT

Henry v. St. Croix Alumina, LLC, 2009 U.S. Dist. LEXIS 88851 (D.V.I. Sept. 25, 2009).

Seventeen residents of St. Croix filed suit claiming personal injuries and property damage due to exposure to hazardous materials from a nearby refinery in the wake of Hurricane Georges. The plaintiffs sought injunctive relief for the "cleanup, abatement or removal" of substances they alleged were a public nuisance. The court granted summary judgment in favor of the companies, ruling that the plaintiffs did not provide sufficient evidence to prove the existence of a continuing nuisance. The court rejected the plaintiffs request to allow further discovery, noting "[p]laintiffs have had ample opportunity for both factual and expert discovery throughout this ten-year litigation."

<https://ecf.vid.uscourts.gov/doc1/1931230928>

FIFTH CIRCUIT

Mississippi

Corban v. United Servs. Auto. Ass'n, 2009 Miss. LEXIS 481 (Miss. Oct. 8, 2009).

The United Services Automobile Association Insurance Agency (USAA) denied the Corban family coverage for their property losses following Hurricane Katrina, claiming that the damage to their property was the result of flooding, a peril excluded from their insurance policy. The Corbans filed suit, arguing that the policy's water damage exclusion and its "anticoncurrent clause," which barred damage caused by wind and water in combination, were ambiguous. A circuit court judge held that the storm surge was, in fact, excluded from the policy. In a 36-page unanimous ruling authored by Justice Michael Randolph, the Mississippi Supreme Court held that insurance companies must cover damage from hurricane winds, even if the home is later inundated by storm surge. The Corbans must now prove to a jury that the damage was caused by wind, not water.

<http://www.mssc.state.ms.us/Images/Opinions/CO58302.pdf>

EIGHTH CIRCUIT

Minnesota

In re U. S. EPA, 2009 Minn. App. Unpub. LEXIS 1074 (Minn. Ct. App. Sept. 22, 2009).

The National Wildlife Federation and the Minnesota Conservation Federation challenged the Minnesota Pollution Control Agency's (MPCA) certification of the EPA general permit regulating ballast water discharges from commercial vessels. The plaintiffs sought to require MPCA to include more stringent provisions to preserve water-quality standards. The court concluded that the claim was moot, because the requested relief

would have no effect on the EPA general permit. The court noted that the applicable federal regulations do not authorize the addition of conditions to the EPA permit.

<http://www.lawlibrary.state.mn.us/archive/ctapun/0909/opa082196-0922.pdf>

NINTH CIRCUIT

United States v. Milner, 2009 U.S. App. LEXIS 22253 (9th Cir. Oct. 9, 2009).

Over the years, the mean high water line in Washington's Strait of Georgia has shifted, leaving several waterfront homeowners' erosion control structures seaward of the MHW line and on tidelands that are part of the Lummi Nation Reservation. The U.S. Government filed an action against several waterfront homeowners for common law trespass and violations of the Rivers and Harbors Appropriation Act of 1899 (RHA) and the Clean Water Act (CWA). The district court found in favor of the government and ordered the homeowners to remove violating structures and to pay a \$1,500 civil penalty. The homeowners appealed. The Ninth Circuit affirmed the judgment holding that the homeowners were liable for trespass. The court first noted that the U.S. owned the tidelands at issue and held them in trust for the Lummi tribe. Furthermore, the court found that the homeowners do not have the right to permanently fix the property boundary absent consent from the United States or the Lummi Nation because both the upland and tideland owners had a vested right to gains from the ambulation of the boundary. And finally, the court ruled that the homeowners met the intent requirement for common law trespass, because they failed to remove the structures as requested by the government.

ELEVENTH CIRCUIT

Northington v. Ala. Dep't of Conservation & Natural Res., 2009 Ala. LEXIS 222 (Sept. 25, 2009).

Several boat owners challenged the constitutionality of an Alabama law prohibiting certain houseboats and recreational vessels on three hydroelectric-impoundment lakes created by the Alabama Power Company. The trial court ruled in favor of the state finding that the law was not unconstitutionally vague and did not violate the Due Process clause. On appeal, Alabama Supreme Court upheld the trial court's ruling, holding that the classifications were rationally related to a legitimate government purpose and that the law was not unconstitutionally vague.

<http://www.alabamaappellatewatch.com/uploads/file/1071429.PDF>

MASGC 09-002-10

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