

COURT EXPANDS CORPS' JURISDICTION OVER SOME SEASIDE ACTIVITY

A federal Circuit Court of Appeals recently found waterfront homeowners liable for trespass and in violation of a federal statute for maintaining seaside structures meant to protect their property from storm damage. In so doing, the court further expands the Army Corps of Engineers' jurisdiction under the Rivers and Harbors Appropriation Act of 1899, an act regulating obstructions in navigable waters. The court's decision allows the Corps to demand a property owner remove previously legal seaside structures if they now intersect the tide line because of shore erosion. The Corps can make this demand even if the structures did not originally require a permit because they were above the tide line when initially built.

In *United States v. Nicholson*, homeowners in the State of Washington erected a variety of shore defense structures, such as rip rap and bulkheads, on tidelands adjacent to their properties to limit erosion and storm damage. At that time, the homeowners leased the tidelands from the Lummi Nation, which gave the homeowners the right to erect the structures. The lease was not renewed after it expired. Over time, the shoreline eroded to the point that some of these structures were located on the seaward side rather than the landward side of the "mean high water" line, which is defined as the upper boundary of any tideland. The mean high water line is determined by projecting onto the shore the average of all high tides over a period of several years. The Corps demanded the homeowners either remove the structures or enter into new agreements with Lummi Nation to lease the tidelands. When the homeowners refused to remove the structures, the United States filed suit alleging the homeowners were liable for trespass and in violation of the Rivers and Harbors Act and the Clean Water Act.

The Ninth Circuit Court of Appeals held that the homeowners were liable for trespass. Notably, the homeowners argued that because the structures were lawfully built on the landward side of the mean high water line, they cannot be liable for trespass despite the movement of the tideland boundary because of erosion. The Ninth Circuit disagreed. Reaching back to ancient legal principles, the court found that both tideland owners and upland owners have a right to an "ambulatory boundary," that is, a boundary created by water that moves over time, and that each owner has a vested right in the potential gains that accrue from the movement of the boundary line. By maintaining their shore defense structures and essentially fixing a permanent tideland boundary, the homeowners were improperly interfering with the Lummi Nation's vested right to tidelands they otherwise would have gained because of the movement of the boundary.

The Ninth Circuit also held that the homeowners were in violation of the Rivers and Harbors Act, which prohibits the creation of any obstruction to the navigable capacity of any water of the United States without a permit. The court held that although the structures may have been legal at the time of construction because they were not built in navigable waters initially, due to the movement of the tidal boundary they are now located within navigable waters and therefore are unauthorized obstructions under the Rivers and Harbors Act. The court found that structures previously erected above the mean high water line can become subject to the Corps' regulations because the tide line has moved, and if those structures prevent the mean high water line from achieving its unobstructed, natural state they can pose a serious risk to navigation, thus making these structures subject to the Corps' jurisdiction.

Finally, the Ninth Circuit considered the question of whether the homeowners were in violation of the Clean Water Act. The court first noted that the Corps' regulations define its Clean Water Act jurisdiction over tidal waters by reference to the high tide line, rather than the mean high water line. This is the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The court evaluated allegations that during the course of reconstructing their shore defense

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structures, at least some of the homeowners discharged fill material without a Clean Water Act permit and below where the high tide line would fall in its unobstructed, natural state. The court held that the homeowners were not in violation of the Clean Water Act, however, because no water actually reaches the area where the fill took place. Although once submerged, that area is now dry upland, or “fast land.” According to the court, any discharge on fast land would not actually be in the waters of the United States, and it would be potentially unfair to occupants of such land to hold them to the strictures of the Clean Water Act if the land has long been dry. The court further noted that this rationale applies even if the land has been maintained as dry through artificial means.

This case is significant for a number of reasons. The court’s holdings regarding trespass are particularly significant in California, a state with several miles of coastline and development that uses erosion control and shore defense-type structures. The case also adds to the Ninth Circuit case law on the extent to which the Corps has jurisdiction over projects subject to the Rivers and Harbors Act. The court stated that the Rivers and Harbors Act’s “central concern” is to insure that the nation’s waterways remain navigable and free of obstruction, and notes that the nation’s navigable waterways can change, and with it the Corps’ jurisdiction. This view of the Corps’ jurisdiction offers little certainty to project proponents with work proposals located near navigable waterways. Perhaps balancing this potentially expansive view of the Corps’ jurisdiction under the Rivers and Harbors Act, the court’s analysis of the Clean Water Act claim may cabin the Corps’ ability to exercise its Clean Water Act jurisdiction over lands that may have included waters of the United States at some point, but now no longer do because of natural or artificial means.

For more information about this client alert, please contact:

R. Clark Morrison at 415.262.5113 or cmorrison@coxcastle.com

Scott B. Birkey at 415.262.5162 or sbirkey@coxcastle.com