

**Pollute our river and damage our property rights?
It's apparently OK if government is doing it**

--TCPalm

Eve Samples

July 11, 2011

This just in from a federal appeals court:

It's OK for government to muck up our waterways and erode the rights of private property owners, so long as the damage has been going on for decades.

That was the takeaway message from a ruling issued by the U.S. Court of Appeals for the Federal Circuit in a case lodged by a group of local waterfront property owners.

The homeowners were sick of watching algae bloom and marine life die in the St. Lucie River when polluted freshwater was released from Lake Okeechobee, so — with backing of the grassroots Rivers Coalition Defense Fund — they sued the federal government in 2006.

They made the compelling case that the Army Corps of Engineers' releases from Lake O robbed them of their property rights.

But it turned out to be less-than-compelling to the courts. A lower court, and now the appeals court, have taken the rigid view that the lawsuit didn't comply with a six-year statute of limitations in such "takings" cases.

From the appeals court's June 30 ruling:

"The obligation to sue arises once the permanent nature of the government action is evident, regardless of whether damages are complete and fully calculable."

And:

"The corps has released large volumes of polluted non-saline water from Lake Okeechobee into the St. Lucie River for almost 80 years, and the environmental effects have been evident since the 1950s."

So there was no tipping point for the St. Lucie River in recent years?

Those of us who lived here during the 2004 and 2005 hurricane seasons know better.

"It wasn't until after the 2004 hurricanes that the health department closed the river to swimming," said John Mildenberger, the lead plaintiff in the case and a Sewall's Point resident.

Mildenberger and his family moved to Martin County in 2002, in part to get away from the pollution he saw choking the Chesapeake Bay area where he grew up.

Now, he's fighting a similar battle here.

"It's the same issues," Mildenberger told me Monday. "It's basically runoff of nitrates and phosphates and sediment."

He called the appeals court ruling "unbelievably frustrating."

Not only did the court rule that the property owners didn't meet the statute of limitations requirements, it also asserted that state laws doesn't recognize the very "riparian rights" to waterfront property that the suit hinges on.

From the appeals court ruling:

"The trial court correctly rejected claimants' assertion that they have a property right in viewing wildlife in the adjacent waters. ... Such a right is unsupported by any legal authority. The right to have access to the water refers to physical access to the edge of the water, not access to its full potential, including swimming and viewing wildlife."

Tell that to Mildenberger's children, whom he instructed to stay away from the water after the algae outbreaks.

Mildenberger pays a premium on his property taxes for waterfront property, and he doesn't understand why state law wouldn't protect his rights to it.

"Florida wants it both ways," he said.

The local group's riparian rights claim was an innovative strategy that set the lawsuit apart from Clean Water Act cases elsewhere in Florida. The local lawsuit sought some \$50 million in compensation for lost property values, but all of the property owners said they would donate the money back to the Rivers Coalition if they won.

Their real goal was to get a court order to stop the pollution.

Almost five years after the suit was filed, that possibility remains out of reach. As soon as heavy rains raise Lake Okeechobee to levels beyond the corps' comfort zone, damaging releases to the St. Lucie River will resume.

Though the outcome was not what they wanted, the Washington D.C.-based attorneys that represented the property owners stand by their approach.

"You can't destroy property rights of another party," said Nancie Marzulla, an attorney for the plaintiffs.

She does not buy the argument that the property owners waited too long to sue.

"I can guarantee you that if these landowners had brought this case 10 years ago, 15 years ago, they would have been laughed out of court," she said.

Then, she said, they would have called it premature.

Eve Samples is a columnist for Scripps Treasure Coast Newspapers. This column reflects her opinion. For more on Martin County topics, follow her blog at TCPalm.com/samples. Contact her at 772-221-4217 or eve.samples@scripps.com.

© 2011 TCPalm. All rights reserved. This material may not be published, broadcast, rewritten or redistributed.