

Rivers Coalition Asks Three Judge Panel to Overthrow Trial Court Order Against Lawsuit

The Board of Directors of the Rivers Coalition Defense Fund has voted unanimously to appeal to a three-judge panel in an effort to reverse a first-round ruling against the river advocates' riparian-rights federal lawsuit.

The "very strong" appeal is being pursued by attorneys for the Rivers Coalition in the U.S. Court of Appeals for the Federal Circuit in Washington, D.C.

Seeking to stop the polluting discharges from inland in wet years, the appellate panel is asked to reverse a Jan. 29 order in the Court of Federal Claims which found in favor of the U.S. Army Corps of Engineers.

The trial court's decision sparked an immediate reaction from the Rivers Coalition. "The citizens of our area should be outraged," said Chair Leon Abood. "We should rest assured that with their support we will stand shoulder-to-shoulder with them and continue the fight for clean water." Abood was joined in the decision to appeal by Kevin Henderson, Mark Perry, Ted Guy and Karl Wickstrom. Guy expressed Defense Fund sentiments by saying: "This decision should shock the conscience of the community and make us more determined than ever."

The federal "takings" lawsuit was filed in November 2006, alleging that the Corps violated riparian property rights of 22 waterfront residents by discharging hundreds of billions of gallons of polluted water into the St. Lucie estuary, citing damages in the years 2003-05. The intent of the lawsuit is to stop toxic discharges from inland, and plaintiffs themselves have waived any claim for personal compensation.

The trial court's recent rejection of the claim was not unexpected, according to Defense Fund attorney Nancie Marzulla, who had predicted that the takings issue would eventually be settled at the appellate level. "We believe we have strong grounds for winning a reversal," she said.

At the heart of the legal battle is the government's position that the waterfront owners have no compensable property rights of this type. Claimants counter that riparian rights against pollution date back to a 1909 ruling and before.

In the 1909 case, Florida Supreme Court Justice C. J. Whitfield wrote for a unanimous court that common law gives riparian owners "...the right to have the water kept free from pollution." "The court in Washington failed to defer to Justice Whitfield's opinion," said Attorney Monica Reimer of the EarthJustice environmental law organization. "The authority on riparian rights under Florida law is Justice Whitfield, not a Court of Claims judge sitting in a courtroom in Washington, D.C."

The Court of Claims also ruled that the six-year statute of limitations had run out before the cited discharges because of other discharges made over previous decades. Plaintiffs contend

that newer discharges were different due to unprecedented toxicity and other factors, including health department warnings against citizens' even touching water in the estuary.

Still another issue is the Corps' position that a priority for "navigational servitude" trumps all other considerations, including transfers of polluted water. Plaintiffs, however, emphasize that discharges through floodgate structures have nothing whatever to do with navigation. The Corps declined comment on the case.

The new appeal is expected to run well into 2010. "It's a long journey that must be taken because our own officials, using public funds, have let this pollution persist at the expense of one of the world's most diverse and valuable treasures," said Defense Fund Coordinator Wickstrom.