

# 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 listerv 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 [wsurene@clemson.edu](mailto:wsurene@clemson.edu) with "Case Alert" on the subject line. MASGC 08-002-010

## FIRST CIRCUIT

### Rhode Island

*Rhode Island Fishermen's Alliance, Inc. v. Department of Environmental Management*, 2008 U.S. Dist. LEXIS 77887 (D.R.I. Oct. 3, 2008).

Rhode Island Fishermen's Alliance and several individuals brought suit against the state Department of Environmental Management (DEM) challenging state regulations limiting lobster fishing by way of certain traps in state waters. The plaintiffs claimed that the regulatory scheme violated the state constitution and several state statutes. The state had enacted the regulations to comply with the Atlantic States Marine Fisheries Compact, approved by the U.S. Congress in December 2003, to foster better utilization of the fisheries (marine, shell and anadromous) of the Atlantic seaboard. Relying on a recent Rhode Island Supreme Court decision, *Riley v. DEM*, 941 A.2d 198, 209 (R.I. 2008), the court found that there is no fundamental right to harvest lobster using a specific method of fishing. The regulations at issue were a valid regulatory restriction imposed to protect and conserve the state's fisheries and therefore did not violate the Rhode Island Constitution. Furthermore, the enactment of the regulations did not violate state law. Accordingly, the court granted the DEM's motion for summary judgment.

<https://ecf.rid.uscourts.gov/doc1/1611303832>

## NINTH CIRCUIT

*NRDC v. United States EPA*, 2008 U.S. App. LEXIS 19755 (9th Cir. Sept. 18, 2008).

The National Resources Defense Council (NRDC) and Waterkeeper Alliance brought suit against the Environmental Protection Agency (EPA) to require the agency to develop effluent limitation guidelines (ELGs) and new source performance standards (NSPSs) for storm water pollution discharges caused by the construction industry. The United States District Court for the Central District of California granted partial summary judgment in favor of the NRDC and issued a permanent injunction requiring the EPA to develop ELGs and NSPSs for the construction industry. The Ninth Circuit affirmed. The appellate court found that because the EPA listed the construction sites as a point source category, the agency must promulgate industry-wide rules regulating storm water runoff from the sites.

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/6ED225FE6B60ED24882574C80000B98B/\\$file/0755183.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/6ED225FE6B60ED24882574C80000B98B/$file/0755183.pdf?openelement)

*Salmon Spawning & Recovery Alliance v. Gutierrez*, 2008 U.S. App. LEXIS 21063 (9th Cir. Oct. 8, 2008).

Three conservation groups challenged the United States' participation in a treaty with Canada managing Chinook and coho salmon and steelhead trout populations. According to the groups, the treaty allowed Canadian overharvesting of the salmon and trout. The United States District Court for the Western District of Washington dismissed the claims for lack of standing. On appeal, the Ninth Circuit affirmed the dismissal of two claims for lack of standing, but reversed dismissal of the third claim. The third claim alleged that National Marine Fisheries Service (NMFS) was required to reinstate consultation on its 1999 Biological Opinion (BiOp) because new criteria developed by NMFS since the BiOp had been issued showed that the Canadian harvest was taking more Puget Sound chinook than the BiOp projected. The Ninth Circuit held that in light of the new information, the plaintiffs established associational standing on their claim of procedural failure by the NMFS to reinstate consultation.

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/4E598C0BD70FF84F882574DB007CC0FF/\\$file/0635979.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/4E598C0BD70FF84F882574DB007CC0FF/$file/0635979.pdf?openelement)

### Alaska

*Vanek v. State*, 2008 Alas. LEXIS 132 (Alaska Sept. 19, 2008).

Commercial salmon fishermen sought a declaratory judgment on regulations promulgated by the Alaska Board of Fisheries that reduced the amount of fish the fishermen were allowed to catch. The fishermen claimed that the regulations reduced the value of their entry permits and shore fishery leases resulting in a taking of their property interests without just compensation in violation of the Fifth Amendment and the Alaska Constitution. The lower court dismissed the case. On appeal, the Supreme Court of Alaska affirmed the superior court's decision, finding that the fishermen failed to state a takings claim. The court reasoned that the permits and leases were not compensable property, and, even if they were, the property interests were not taken or damaged through the regulations.

<http://www.state.ak.us/courts/ops/sp-6308.pdf>

### California

*Center for Biological Diversity, Inc. v. FPL Group, Inc.*, 166 Cal. App. 4th 1349 (Cal. App. 1st Dist. 2008).

Environmental groups brought suit alleging that the owners and operators of wind turbine electric generators were killing and injuring raptors and other birds in violation of the public trust doctrine. The Superior Court of Alameda County dismissed the action. Although the appellate court agreed that the birds were a public trust resource and that the private groups had standing to bring an action to enforce the public trust, the court affirmed the decision to dismiss. The court stated that the appropriate method of challenging the conditional use permits was by petition for a writ of mandate or request for other appropriate relief brought against trustees of the public trust and the time had passed for filing such a mandate. Further, the court dismissed the case because the plaintiffs had failed to join the county, which was a necessary party to the action.

<http://www.courtinfo.ca.gov/opinions/documents/A116362.PDF>

### Oregon

*Fishermen Against Irresponsible Reallocation, Inc. v. Fish & Wildlife Comm'n*, 2008 Ore. App. LEXIS 1296 (Or. Ct. App. Sept. 24, 2008).

Fishermen Against Irresponsible Reallocation brought suit challenging two administrative rules limiting the number of crab pots that could be used by commercial fishing vessels. The Court of Appeals of Oregon held that the Oregon Fish and Wildlife Commission acted within its statutory authority when adopting the rules, because the allocation system was consistent with the statutory goal of promoting equitable utilization of available food fish as outlined in Or. Rev. Stat. § 506.109(3).

<http://www.publications.ojd.state.or.us/A135023.htm>

## ELEVENTH CIRCUIT

### Florida

*Walton County v. Stop the Beach Renourishment, Inc.*, 2008 Fla. LEXIS 1646 (Fla. Sept. 29, 2008).

Stop the Beach Renourishment, a nonprofit organization consisting of beachfront property owners, alleged an unconstitutional taking of private land in a beach restoration project authorized by the Beach and Shore Preservation Act, §§ 161.011-161.45, Fla. Stat. The First District Court of Appeals ruled in favor of the organization, holding that the Act resulted in an unconstitutional taking of the littoral rights to accretion and contact with the water without an eminent domain proceeding. On appeal, the Florida Supreme Court asked whether the Act, on its face, unconstitutionally deprived upland owners of littoral rights without just compensation. The court held that the Act was facially constitutional because if the shoreline is lost due to an avulsive event, such as a hurricane, the public has the right to reclaim the land it lost. The court quashed the appellate court's decision.

<http://www.floridasupremecourt.org/decisions/2008/sc06-1447.pdf>

*Curd v. Mosaic Fertilizer, LLC*, 2008 Fla. App. LEXIS 14241 (Fla. Dist. Ct. App. 2d Dist. Sept. 17, 2008).

Several fishermen sought recovery from a fertilizer company for economic losses allegedly caused by the company's release of pollution in Florida waters. The fishermen claimed that the storage facility's pollution of the bay reduced the available supply of fish and reduced their income. The trial court dismissed the complaint. The appellate court affirmed, holding that because the fishermen lacked ownership or possessory interest in the property damaged they could not show a right to recover under common law or § 376.313(3), Fla. Stat.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2008/September/September%2017,%202008/2D07-352.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2008/September/September%2017,%202008/2D07-352.pdf)

## FEDERAL CIRCUIT

*Casitas Mun. Water Dist. v. United States*, 2008 U.S. App. LEXIS 20297 (Fed. Cir. Sept. 25, 2008).

The United States required the Casitas Municipal Water District to construct a fish ladder and divert water to the ladder to protect an endangered species. The District sued the United States alleging breach of contract and a Fifth Amendment taking. The United States Court of Federal Claims ruled in favor of the government. The Federal Circuit Court of Appeals affirmed in part and reversed in part. The appellate court agreed with the lower court that the government was not liable for breach of contract for the construction of a fish ladder because that was a maintenance and operational cost, and that the government did not breach the contract guaranteeing perpetual water-use rights to plaintiff because it was a sovereign act and did not give rise to any liability. However, the court found that the government's taking of the district's exclusive water-use right was a physical taking and reversed the lower court's grant of summary judgment in favor of the government.

<http://www.ca9.uscourts.gov/opinions/07-5153.pdf>

MASGC 08-002-010

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