

# 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 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](mailto:waurene@olemiss.edu) with "**Case Alert**" on the subject line. NSGLC-10-03-03

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## FIRST CIRCUIT

*Gintis v. Bouchard Transp. Co.*, 2010 U.S. App. LEXIS 3644 (1st Cir. Feb. 23, 2010).

Property owners affected by a 2003 oil spill in Buzzards Bay, Massachusetts, filed suit against the owners and operators of the responsible fuel barge. The district court denied the property owners' motion for class certification. On appeal, the US Court of Appeals for the First Circuit reversed and remanded the claim because "the [district] court did not subject the parties' contentions to the plenary analysis that precedent requires." Specifically, the property owners had presented substantial evidence that called for a "searching evaluation" and the district court failed to fully consider those claims.

<http://www.ca1.uscourts.gov/pdf/opinions/09-1717P-01A.pdf>

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## SECOND CIRCUIT

New York

*Matter of Chasm Hydro, Inc. v New York State Dept. of Env'tl. Conservation*, 2010 NY Slip Op 1343 (N.Y. Feb. 16, 2010).

Owners and operate a hydroelectric dam filed a petition to enjoin the New York State Department of Environmental Conservation (DEC) from bringing an administrative enforcement proceeding against them. DEC brought the enforcement proceeding, alleging a violation of state water quality laws in relation to the release of water and sediment from the dam. The dam owners argued that the DEC's authority over the federally regulated dam was preempted by federal law. The court held that "petitioners have failed to meet their heavy burden, as they have not established a clear legal right to relief or that prohibition would provide a 'more complete and efficacious remedy' than the administrative proceeding and resulting judicial review." Further, the court found that "petitioners have not clearly established that DEC's enforcement action is in excess of its jurisdiction." The court affirmed the lower court's dismissal of the petition.

[http://www.law.cornell.edu/nyctap/l10\\_0018.htm](http://www.law.cornell.edu/nyctap/l10_0018.htm)

*Matter of Pletenik v. Town of Brookhaven*, 2010 NY Slip Op 1494 (N.Y. App. Div. 2d Dep't Feb. 16, 2010).

A property owner applied to local authorities for a wetlands permit in order to build a residence. The Department of Environmental Conservation (DEC) indicated that the property was beyond the jurisdiction of the Freshwater Wetlands Act, and the town board denied the owner's application for a wetlands permit. The Suffolk County Supreme Court (New York) annulled the town board's denial and directed it to issue the permit. On appeal, the court found that the trial court erred in granting the owner's petition and in ordering the town board to issue the requested wetlands permit because the property was a wetland as defined in a town's code and the owner failed to establish that the proposed activity was in accordance with the policies and provisions of that code.

<http://www.courts.state.ny.us/courts/ad2/calendar/webcal/decisions/2010/D26182.pdf>

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## THIRD CIRCUIT

Delaware

*Delaware Dep't of Natural Res. & Env'tl. Control v. United States Army Corps of Eng'rs*, 2010 U.S. Dist. LEXIS 6398 (D. Del. Jan. 27, 2010).

The State of Delaware filed a motion for a preliminary injunction to enjoin the U.S. Army Corps of Engineers from dredging the Delaware River to deepen a navigational channel from a depth of forty feet to forty-five feet. Delaware alleged that the Corps' failure to obtain necessary federal and state permits for the project would result in violations of the Clean Water Act (CWA), the Clean Air Act (CAA), and the Coastal Zone Management Act (CZMA), as well as state law. The court ruled that a navigation exception in the CWA allowed the Corps to proceed with dredging. With regard to the CAA claim, the court noted that although the Corps had identified

mitigation measures, they failed to sufficiently identify the measures such that the court could find that the Corps complied with the CAA. The court also found that the state could not revoke its previous concurrence with the Corps' CZMA consistency determination. The court concluded that Delaware did not carry its burden of clearly demonstrating that the deepening of one section of the project should be enjoined and rejected that motion. However, noting that the remainder of the project would not begin until December 2010 and that Delaware's administrative review would be completed by then, the court "in the competing interest of the environment and the economy" enjoined the remainder of the dredging project.

<https://ecf.ded.uscourts.gov/doc1/04311044403>

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## FIFTH CIRCUIT

### Texas

*STOP v. City of New Braunfels*, 2010 Tex. App. LEXIS 1171 (Tex. App. Austin Feb. 19, 2010).

A Texas city, in response to complaints from residents regarding "tubers" on two public waterways, enacted ordinances pertaining to the consumption of alcoholic beverages, volume drinking devices (aka beer bong, according to the court), and coolers. An alliance of business owners and individual outfitters engaged in the business of renting tubes and ice chests for use on the rivers filed suit seeking declaratory and injunctive relief to restrain enforcement of the ordinances. A lower court dismissed the case for lack of standing. On appeal, the court held that the outfitters demonstrated standing to challenge the cooler and container ordinance's ban on coolers exceeding sixteen quarts in capacity, because they alleged that the ordinance restricted their use of their property, caused them to incur additional expenses, and damaged or destroyed their market for larger cooler rentals within the city limits. Also, the outfitters had standing to assert their declaratory claim concerning the issue of navigability, and the association had associational standing to prosecute the navigability claim and the claims challenging the cooler-size restriction.

<http://www.3rdcoa.courts.state.tx.us/opinions/PDFOpinion.asp?OpinionId=18914>

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## NINTH CIRCUIT

### California

*Consol. Salmonid Cases*, 2010 U.S. Dist. LEXIS 20278 (E.D. Cal. Mar. 5, 2010).

The United States District Court for the Eastern District of California ruled that the United States Bureau of Reclamation's provisional adoption and implementation of the National Marine Fisheries Service's 2009 Salmonid Biological Opinion and its Reasonable and Prudent Alternative without preparing any National Environmental Policy Act documentation violated NEPA.

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### Oregon

*Klamath Irrigation Dist. v. United States*, 2010 Ore. LEXIS 111 (Or. Mar. 11, 2010).

During a drought in 2001, the federal government reallocated water from the federal Klamath Reclamation Project from various water users, including farmers and irrigation districts, to protect three endangered fish species. The water users filed suit in the United States Court of Federal Claims alleging a taking of property in violation of the Fifth Amendment. The Federal Claims Court certified several questions to the Oregon Supreme Court. The Oregon Supreme Court summarized the questions as "whether, as a matter of state law, the farmers and irrigation districts that use water from a federal reclamation project have an equitable property interest in a water right to which the United States holds legal title and whether an equitable property interest in a water right is subject to adjudication in the ongoing Klamath Basin water rights adjudication." The court held that the state water users were not precluded from obtaining compensation for the taking of their water, given evidence that Oregon did not intend to give all of its rights in the reclamation project to the federal government.

<http://www.publications.ojd.state.or.us/S056275.ht>

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