

# Ocean and Coastal Case Alert

~ ~ MARCH 15, 2011 ~ ~

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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-11-03-03

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## FOURTH CIRCUIT

*Dow Agrosciences LLC v. Nat'l Marine Fisheries Serv.*, 2011 U.S. App. LEXIS 3907 (4th Cir. Mar. 2, 2011).

The United States Court of Appeals for the Fourth Circuit ruled that a biological opinion (BiOp) issued by the National Marine Fisheries Service (NMFS) to the Environmental Protection Agency (EPA) was a final agency action subject to judicial review under the Administrative Procedure Act. NMFS' opinion, issued pursuant to its consulting role under the Endangered Species Act, concluded that the sale and use of insecticides chlorpyrifos, diazinon, and malathion would destroy or harm Pacific salmonids and their habitat. Three pesticide manufacturers holding registrations from the EPA for the sale and use of the insecticides filed suit challenging the BiOp, and the district court dismissed the action finding that the BiOp was not a final agency action since the EPA had not yet acted on it. The appellate court concluded that the BiOp was a final agency action because it marked the consummation of the agency's decisionmaking process, it was an action from which legal consequences flowed, and, if the pesticide manufacturers took an action that complied with the EPA's reregistration decision, but did not comply with all of the terms of the BiOp, they would not be protected by the BiOp's safe harbor.

<http://pacer.ca4.uscourts.gov/opinion.pdf/091968.P.pdf>

### Maryland

*Pomeranc-Burke, LLC v. Wicomico Env'tl. Trust, Ltd.*, 2011 Md. App. LEXIS 31 (Md. Ct. Spec. App. Mar. 2, 2011).

A Maryland appellate court ruled that a developer's proposed "cluster subdivision" in an agricultural district was properly denied by the Wicomico County Planning and Zoning Commission. The court affirmed the county's Board of Appeals decision upholding the denial. The court ruled that the Board's findings made in denying the request related to the county's requirements for such a development and the relevant ordinances' purposes were properly considered.

<http://mdcourts.gov/opinions/cosa/2011/2492s09.pdf>

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## FIFTH CIRCUIT

### Louisiana

*Farmer's Seafood Co. v. State*, 2011 La. App. LEXIS 185 (La. App. 1 Cir. Feb. 14, 2011).

A Louisiana appellate court held that a contractor who supplied seafood to riverboat casinos made a prima facie showing that a statute and regulation governing the "suitability" of certain employees in the Louisiana gaming industry was unconstitutional. The contractor brought suit after its permit renewal to continue selling to the casinos was denied citing the company's employment of a convicted felon in a position of "significant influence." The court ruled that the statutory scheme was unconstitutional due to the fact that it did not prescribe sufficient standards to guide the Board in determining what persons must be "suitable" under state law.

<http://www.la-fcca.org/Opinions/Pub2011/2011-02/2010%20CA%201746%20Decision%20Appeal.pdf>

### Mississippi

*Gulf Restoration Network v. Hancock County Dev., LLC*, 2011 U.S. Dist. LEXIS 17352 (S.D. Miss. Feb. 22, 2011).

The United States District Court for the Southern District of Mississippi found that a developer violated the Clean Water Act (CWA) during construction of a large residential and commercial development in approximately 700 acres of wetlands near Bay St. Louis, Miss. The court ruled that the developer violated the CWA by discharging storm water from its construction project into area streams without a § 402 permit. The court also held that the company violated § 404 of the CWA by conducting dredge and fill

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## SEVENTH CIRCUIT

### Indiana

*B&B, LLC v. Lake Erie Land Co.*, 2011 Ind. App. LEXIS 347 (Ind. Ct. App. Feb. 28, 2011).

An Indiana appellate court ruled that a landowner, who created a federally regulated wetland on his property, could not invoke the common enemy doctrine of water diversion and shield himself from liability to adjoining landowners whose property also became federally regulated wetlands. The adjoining landowners had filed suit seeking damages for lost profits, clean-up costs, and the lost value of its land. The court found that because the water was groundwater, it was not governed by the common enemy doctrine; therefore, neighbor's claim against the landowner was not barred. Further, the neighbor presented sufficient evidence that the owner breached a duty by not stopping the propagation of wetland species that culminated in the establishment of the wetlands on the neighbor's parcel.

<http://www.in.gov/judiciary/opinions/pdf/02281101jgb.pdf>

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## NINTH CIRCUIT

*Ctr. for Food Safety v. Vilsack*, 2011 U.S. App. LEXIS 3790 (9th Cir. Cal. Feb. 25, 2011).

The Ninth Circuit Court of Appeals reversed a preliminary injunction issued by the district court requiring agricultural companies to destroy juvenile genetically engineered sugar beets. The district court had found that the Department of Agriculture's issuance of permits to plant the genetically engineered sugar beets violated the National Environmental Policy Act. The appellate court reversed the injunction, finding that the sugar beets posed a negligible risk of genetic contamination, as they could not biologically flower or cross-pollinate before agricultural companies' permits would expire.

<http://www.ca9.uscourts.gov/datastore/opinions/2011/03/03/10-17719.pdf>

*NRDC v. County of L.A.*, 2011 U.S. App. LEXIS 4647 (9th Cir. Mar. 10, 2011).

The Ninth Circuit affirmed in part and reversed in part a ruling regarding alleged Clean Water Act violations in four watersheds. Environmental groups brought the suit, claiming that Los Angeles County, several municipalities, and a flood control district were discharging polluted urban stormwater runoff collected by municipal separate storm sewer systems into navigable waters. The United States District Court of the Central District of California entered summary judgment in favor of the defendants. On appeal, the appellate court reversed the district court's judgment on two of the claims. The court found that the environmental groups showed that stormwater with standards-exceeding pollutants passed through pollution monitoring stations in municipal separate storm sewer systems owned and operated by flood control district it was discharged into two rivers. The district court's judgment for the flood control district on Claims 2 and 3 were reversed, and the matter was remanded to the district court for further proceedings. The district court's grant of summary judgment for the water district on Claims 1 and 4, and for the county on all watershed claims, was affirmed.

<http://www.ca9.uscourts.gov/datastore/opinions/2011/03/10/10-56017.pdf>

#### California

*Bollay v. Office of Administrative Law*, 2011 Cal. App. LEXIS 225 (Cal. App. 3d Dist. Mar. 1, 2011).

A California appellate court ruled that a policy of the State Lands Commission prohibiting development seaward of the most landward historical position of the mean high tide line was an "invalid underground regulation." Several property owners had brought suit seeking declaratory relief from the policy. A superior court ruled in favor of the defendants. On appeal, the court reversed and remanded. The court found that the policy was a regulation because it had general application and implemented the commission's authority to protect state tidelands from trespass and encroachment. The court ruled that the regulation was not adopted according to the procedural requirements of the Administrative Procedure Act (APA), which requires, among other things, public notice and an opportunity for public comment before the regulation takes effect. Under state law, regulations that are adopted inconsistently with the APA are an "underground regulation" and may be declared invalid.

<http://www.courtinfo.ca.gov/opinions/documents/C063268.PDF>

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#### FEDERAL CIRCUIT

*Klamath Irrigation Dist. v. United States*, 2011 U.S. App. LEXIS 3204 (Fed. Cir. Feb. 17, 2011).

The Federal Circuit Court of Appeals has vacated a lower court decision granting summary judgment in favor of the United States. Plaintiffs, including irrigation districts and agricultural landowners, appealed the final judgment of the United States Court of Federal Claims that dismissed their Fifth Amendment takings claims, their claims under the Klamath River Basin Compact, and their breach of contract claims. On appeal, the Federal Circuit certified three questions to the Oregon Supreme Court. After the state supreme court issued its decision, the plaintiffs contended that the takings and compact decisions should be overturned. The court remanded the case for consideration of those claims.

<http://www.ca9.uscourts.gov/images/stories/opinions-orders/07-5115.pdf>

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NSGLC-11-03-03

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