

Ocean and Coastal Case Alert

~ ~ August 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 with "**Case Alert**" on the subject line. NSGLC-11-03-08

FIRST CIRCUIT

Maine

Phippsburg Shellfish Conservation Comm'n v. United States Army Corps of Eng'rs, 2011 U.S. Dist. LEXIS 83554 (D. Me. July 29, 2011).

The U.S. District Court for the District of Maine denied a motion for a preliminary injunction to prevent the U.S. Army Corps of Engineers from dredging two areas of the Kennebec River. The project would allow the *U.S.S. Spruance*, a billion-dollar guided missile destroyer, an unobstructed path from a shipbuilding company to the ocean. The plaintiffs alleged that the project would violate the Clean Water Act (CWA) and the National Environmental Policy Act (NEPA). The district court declined to grant the injunction, finding that the plaintiffs were not likely to succeed on their claims that the Corps' findings were arbitrary and capricious.

http://www.med.uscourts.gov/Opinions/Woodcock/2011/JAW_07292011_2-11cv259_PHIPPSBURG_V_US_ARMY.pdf

Rhode Island

Kent v. R.I. Dep't of Env'tl. Mgmt., 2011 R.I. Super. LEXIS 92 (R.I. Super. Ct. 2011).

A property owner appealed a Rhode Island Department of Environmental Management decision denying his application to construct a garage and foundation next to freshwater wetlands. The Superior Court of Rhode Island affirmed the decision. The court reasoned that the property owner had not employed all possible steps to avoid impact on wetlands; therefore, the project was inconsistent with the state Freshwater Wetlands Act.

<http://www.courts.ri.gov/Courts/SuperiorCourt/DecisionsOrders/decisions/10-0026.pdf>

NINTH CIRCUIT

California

Pac. Coast Fed'n of Fishermen's Ass'n v. Locke, 2011 U.S. Dist. LEXIS 86662 (N.D. Cal. Aug. 5, 2011).

The U.S. District Court for the Northern District of California dismissed a lawsuit filed by two West Coast fishing organizations regarding two Amendments in the Pacific Coast Groundfish Fishery Management Plan. The plaintiffs alleged that the Amendments, which related to the groundfish trawl rationalization program, violated national standards requiring management measures to prevent overfishing and to minimize bycatch and bycatch mortality. The court concluded that NOAA Fisheries "properly interpreted and met its obligations under the [Magnuson Stevens Act] and balanced National Standards." The court cited data provided by the agency showing the program would increase accountability for total catch, including bycatch.

<https://ecf.cand.uscourts.gov/doc1/03518363724>

Nevada

Lawrence v. Clark County, 254 P.3d 606 (Nev. 2011).

The Nevada Supreme Court issued a decision formally adopting the public trust doctrine as state law. The case involved the transfer of 330 acres of land adjacent to the Colorado River. The state legislature had required that the land be transferred to Clark County; however, the state lands registrar declined to transfer it on the basis of the public trust doctrine. Clark County filed an action for declaratory relief. The court held that the doctrine applied in Nevada based on the state constitution, statutes, and inherent limitations on the state's sovereign power. The court remanded the case to the trial court to determine whether the land in question was covered by navigable waters when Nevada became a state and whether it became dry through avulsion.

<http://www.nevadajudiciary.us/images/advanceopinions/127nevadvopno32.pdf>

Oregon

Audubon Soc'y of Portland v. Nat'l Marine Fisheries Serv., 2011 U.S. Dist. LEXIS 83268 (D. Or. July 29, 2011).

The U.S. District Court for the District of Oregon denied a motion for a preliminary injunction to stop dredging activity on a portion of the Willamette River. Among other claims, the plaintiffs alleged that the activity would violate the Endangered Species Act by adversely modifying designated critical habitat of threatened salmon and steelhead. In its Biological Opinion, NOAA Fisheries had found that the proposed action cause minor effects on the critical habitat. The court denied the injunction because the plaintiffs "failed to show either a likelihood of success on the merits or substantial questions going to the merits, and a likelihood of irreparable harm..."

<https://ecf.ord.uscourts.gov/doc1/15113822130>

Nat'l Wildlife Fedn v. Nat'l Marine Fisheries Serv., 2011 U.S. Dist. LEXIS 85701 (D. Or. Aug. 2, 2011).

After reviewing the effects of the Columbia River hydroelectric system on salmon for the third time in a decade, a federal district court held that federal agency plans to mitigate the system's impacts on salmon only satisfy Endangered Species Act requirements through 2013. The agencies intended for the Biological Opinion (BiOp) to cover operations through 2018, but the court found that the BiOp did not adequately ensure that the mitigation projects will occur or do enough to improve conditions for salmon. The judge ordered the federal agencies to continue implementing the mitigation plans in the existing BiOp through 2013, to report to the court annually, to continue spilling water over dams in the spring and summer to help migrating juvenile salmon, and to produce a new BiOp by January 1, 2014.

<https://ecf.ord.uscourts.gov/doc1/15113825047>

Washington

Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hearings Bd., 2011 Wash. App. LEXIS 1862 (Wash. Ct. App. Aug. 5, 2011).

A private group challenged a county's vegetation regulation, which was part of a critical areas ordinance, requiring property owners to retain all vegetation located in high-risk channel migration zones for five of the county's rivers. The plaintiffs claimed that the regulation violated the "best available science" requirement in the Washington Growth Management Act. The court disagreed, reasoning that the

county addressed the relevant sources of best available scientific information.

<http://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=402726MAJ>

D.C. CIRCUIT

Otay Mesa Prop., L.P. v. United States DOI, 2011 U.S. App. LEXIS 14998 (D.C. Cir. July 22, 2011).

The U.S. Court of Appeals for the District of Columbia vacated the U.S. Fish and Wildlife Service's designation of a property owner's land as critical habitat for the San Diego fairy shrimp. The ruling reversed a district court decision upholding the critical habitat designation. The FWS based the designation on a single 2001 sighting of four of the ant-sized species on the property. The appellate court found that the FWS had not reasonably explained how the isolated sighting demonstrated that the owners' property was occupied by the San Diego fairy shrimp.

[http://www.cadc.uscourts.gov/internet/opinions.nsf/8C72E8E8E62BAE37852578D5004FBBE2/\\$file/10-5204-1320114.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/8C72E8E8E62BAE37852578D5004FBBE2/$file/10-5204-1320114.pdf)

Lake Carriers' Ass'n v. EPA, 2011 U.S. App. LEXIS 14996 (D.C. Cir. July 22, 2011).

Several maritime trade associations challenged the Environmental Protection Agency's final Vessel General Permit for the discharge of pollutants incidental to the normal operation of commercial vessels operating on the navigable waters of the United States. The plaintiffs raised several procedural challenges to the EPA's inclusion of state-specific conditions in the permit. The U.S. Court of Appeals for the District of Columbia rejected the plaintiffs' claims. The court found that the EPA correctly concluded that it could not amend or reject the state conditions, so providing notice and an opportunity for comment on state VPG certifications would have served no purpose.

[http://www.cadc.uscourts.gov/internet/opinions.nsf/66379A4AC3922C5D852578D5004FBB83/\\$file/09-1001-1320085.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/66379A4AC3922C5D852578D5004FBB83/$file/09-1001-1320085.pdf)

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