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# Ocean and Coastal Case Alert

**The National Sea Grant Law Center** is pleased to offer the December 2012 issue of *Ocean and Coastal Case Alert*.

The Case Alert is a monthly newsletter highlighting recent court decisions impacting ocean and coastal resource management.  
(NSGLC-12-03-12).

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## U.S. SUPREME COURT

### ***Ark. Game & Fish Comm'n United States, 2012 U.S. LEXIS 9409 (U.S. Dec. 4, 2012).***

The U.S. Supreme Court recently held that recurrent temporary flooding caused by a government agency is not exempt from takings claims. The Arkansas Game and Fish Commission had sued the U.S. government alleging that the United States Army Corp of Engineers' operation of a dam upstream from the Commission's wildlife management area resulted in a taking. The Corps had released more water than usual, causing damage to the Commission's timber growing operation. The United States argued that the federal government should not be liable for a taking for temporary flooding from government water releases. The U.S. Supreme Court disagreed, finding that even temporary takings are subject to compensation. Whether compensation is due requires a case-by-case analysis of several factors, including the severity of the damages.

[http://www.supremecourt.gov/opinions/12pdf/11-597\\_i426.pdf](http://www.supremecourt.gov/opinions/12pdf/11-597_i426.pdf) »

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## FIRST CIRCUIT

### ***Newton v. Locke, 2012 U.S. App. LEXIS 24589 (1st Cir. Mass. 2012).***

Under the Magnuson-Stevens Fishery Conservation and Management Act, the New England Fishery Management Council regulates fishery resources within the federal waters off New England's coast. Several plaintiffs filed suit

following the New England Council's adjustment of the Fishery Management Plans of the Northeast Multispecies Groundfish Fishery. They argued that the Council should have implemented changes according to new studies on overfishing. The court disagreed and granted summary judgment against the plaintiffs. The court determined that the Secretary's decisions were derived from the record, rational, and not based on any error of law.

<http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=11-1952P.01A> »



## SEVENTH CIRCUIT

### ***Muscarello v. Winnebago Country Bd.*, 2012 U.S. App. LEXIS 25077 (7th Cir. Dec. 7, 2012).**

A property owner filed suit against the County Board, the County Zoning Board of Appeals and various officials and landowners in Winnebago County, Illinois, contesting an amendment to the county zoning ordinance that facilitated wind farm construction on land zoned for agriculture. The property owner claimed that the 2009 Amendment damaged her property value, deprived her of her constitutional right to property, and violated substantive due process. The court determined that, though the petitioner did potentially have standing, the claims had no merit. The court reasoned that none of the landowners adjacent to the property owner had built wind farms damaging her property; therefore, the court dismissed the claim.

<http://www.ca7.uscourts.gov/tmp/O1oSQRT9.pdf> »

## Illinois

### ***Michigan v. United States Army Corps of Eng'rs*, 2012 U.S. Dist. LEXIS 170968 (N.D. Ill. Dec. 3, 2012)**

States surrounding Lake Michigan filed suit against the United States Army Corp of Engineers (Corps) alleging that the Corps is not taking adequate measures to prevent the Asian Carp from entering Lake Michigan. Specifically, the states alleged that the Corps should be required to hydrologically separate Lake Michigan from the bodies of water from which the Asian Carp are entering. The states argued that the Corps' actions violated the federal common law of public nuisance. The court disagreed since the Corps did not have the congressionally delegated authority to create a hydrologic separation and the Corps must have Congressional approval prior to building a dam. The court dismissed the claim and suggested that the states use the legislative process to seek a remedy.

<https://ecf.ilnd.uscourts.gov/doc1/067111864065> »



## EIGHTH CIRCUIT

### **Minnesota**

### ***In re Decision on the Approval for Submittal of a 401 Water Quality Certification to the U.S. Environmental Protection Agency for the Draft 2013 Vessel General Permit and the Draft 2013 Small Vessel General Permit*, 2012 Minn. App. LEXIS 129 (Minn. Ct. App. 2012).**

A Minnesota appeals court recently upheld a ballast water discharge permit issued by the Minnesota Pollution Control Agency (MPCA). Environmental groups had contested the permit, arguing that the MPCA could not conclusively determine a numeric standard that would protect water quality and an unaltered species composition of the ecosystem. The groups also claimed that the agency used the incorrect legal standard concerning future

compliance with water quality standards under the Clean Water Act. The appeals court determined that the MPCA's issuance of the permit was not arbitrary or capricious and that the agency complied with all standards under state and federal law.

<http://www.lawlibrary.state.mn.us/archive/ctappub/1211/opa121661-111312.pdf> »



## NINTH CIRCUIT

### California

***Surfrider Foundation v. California Regional Water Quality Control Bd., San Diego Region, 2012 Cal. App. LEXIS 1223 (Cal. App. 4th Dist. Nov. 30, 2012).***

A California court recently struck down an environmental group's challenge to the approval of a National Pollutant Discharge Elimination System (NPDES) permit for a desalination facility. The environmental group argued that the mitigation plan did not adequately offset the intake and mortality of marine life. The court upheld the California Regional Water Quality Control Board's issuance of the NPDES permit. The court held that the board complied with California Water Code's requirement to use the best available site, design, technology, and mitigation measures feasible to minimize the intake and mortality of all forms of marine life. The court determined that the board evaluated both the feasibility of alternative measures and the benefits of mitigation measures based on all available data.

<http://www.courts.ca.gov/opinions/documents/DO60382.pdf> »

***Habitat and Watershed Caretakers v. City of Santa Cruz, 2012 Cal App. LEXIS 1213 (Cal. App. 6th Dist. 2012).***

Habitat and Watershed Caretakers filed suit against the City of Santa Cruz for failure to comply with the California Environmental Quality Act. Santa Cruz wished to increase its ability to develop portions of a state university. The environmental group argued that the environmental impact report (EIR) was inadequate and violated CEQA with respect to erosion in a watershed and wetlands project area. The court decided that because the statement of the project's objectives in the draft EIR and final EIR did not describe the underlying purpose of the project and because they failed to discuss alternatives that could deter the project's environmental impact, the EIR did not comply with CEQA. The court then reversed the judgment and remanded the case to the trial court.

<http://www.courts.ca.gov/opinions/documents/H037545.pdf> »

### Oregon

***Sea River Props., LLC v. Parks, 2012 Ore. App. LEXIS 1456 (Or. Ct. App. Dec. 5, 2012).***

Plaintiffs appealed a quiet title by adverse possession ruling on 40 acres of undeveloped land located in the coastal town of Nedonna Beach. Ownership of the land was in contention because the land only appeared within the last 100 years as a result of accretion. Plaintiffs argued that they acquired chain of title through the previous owner of the land. The appellate court determined that the trial court erred in its utilization of accretion principles, but still ruled in favor of the defendants. Instead, the court determined that the defendant's predecessors owned the tidelands, and therefore, the defendant owned the disputed property by chain of title.

<http://www.publications.ojd.state.or.us/docs/A145896.pdf> »

### Washington

***Trident Seafoods Corp. v. Bryson*, 2012 U.S. Dist. LEXIS 171253 (W.D. Wash. Nov. 30, 2012).**

Owners and operators of on-shore fishing plants in Kodiak Alaska claimed that the National Marine Fisheries Service, the National Oceanic and Atmospheric Administration, and the Secretary of Commerce violated the National Environmental Policy Act (NEPA). Plaintiffs argued that the agencies violated NEPA by not considering the Rockfish Pilot Program, a program instituted to stabilize the fish population, as a reasonable alternative to Amendment 88 of the Gulf of Alaska Rockfish Fishery. The court granted the defendant's motion for summary judgment. The court held that the plaintiffs lacked standing to bring a NEPA claim because the plaintiff's economic concerns fell outside the interests protected by NEPA.

<https://ecf.wawd.uscourts.gov/doc1/19715022023> »

***Nw. Sportfishing Indus. Ass'n v. Dep't of Ecology*, 2012 Wash. App. LEXIS 2760 (Wash. Ct. App. Nov. 27, 2012)**

The Washington Department of Ecology (Department) is responsible for proposed water quality standards, which includes exceptions for Total Dissolved Gas (TDG) on the Columbia and Snake Rivers. Several organizations petitioned the Department to reconsider the TDG standards. They argued that the Department's decision to use the TDG standard was arbitrary and capricious because there were contradictory field studies that suggested 115% removal of the TDG forebay standard. The court determined that the decision to use the Department's original TDG standard was not arbitrary or capricious. The court reasoned that despite contrary studies, the Department based its decision on hundreds of studies, including at least two outside the Department literature reviews that justified the Department's formation of the rule.

<http://www.courts.wa.gov/opinions/pdf/42364-2.12.doc.pdf> »



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