

# Ocean and Coastal Case Alert

~ ~ January 15, 2012 ~ ~

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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-11-03-12

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## THIRD CIRCUIT

### Delaware

*Del. Dep't of Natural Res. & Env'tl. Control v. Sussex County*, 2011 Del. LEXIS 682 (Del. Dec. 29, 2011).

The Delaware Supreme Court recently ruled that the Delaware Department of Natural Resources and Environmental Control exceeded its authority by enacting pollution control strategy regulations that established a water quality buffer and controlled stormwater. The court upheld the lower court opinion finding that the regulations constituted zoning, which exceeded the agency's authority. Further, the regulations directly conflicted with the county's zoning ordinance.

<http://courts.delaware.gov/opinions/download.aspx?ID=165570>

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## FIFTH CIRCUIT

### Texas

*Tex. Gen. Land Office v. Porretto*, 2011 Tex. App. LEXIS 9869 (Tex. App. Houston 1st Dist. Dec. 15, 2011).

In December, a Texas appellate court ruled that a lower court lacked jurisdiction to hear a challenge to the Texas Open Beaches Act. The trial court had found that the state's claim to the land under the Open Beaches Act was a taking. On appeal, the court ruled that the lower court erred in declaring that the private property owners held title to the property submerged under the Gulf of Mexico. As a result, the trial court erred in denying the State's amended plea to the jurisdiction with respect to the state-owned property in question. The court also concluded that because the property owners did not exclude state-owned submerged land from its claim, the trial court's improper declaration of title and the lack of any state action were fatal to their claims.

<http://www.1stcoa.courts.state.tx.us/opinions/htmlopinion.asp?OpinionId=89850>

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## SEVENTH CIRCUIT

### Wisconsin

*N. Lake Mgmt. Dist. v. Wis. Dep't of Natural Res.*, 2012 Wisc. App. LEXIS 23 (Wis. Ct. App. Jan. 11, 2012).

A Wisconsin appellate court recently dismissed a challenge to plans for a public access and boat launch site on state owned land. The North Lake Management District (NLMD) claimed that the Wisconsin Department of Natural Resources (DNR) did not comply with state waterway and wetland protection laws in its proposal to build the site. The DNR had determined that it was not required to prepare an environmental impact statement for the project. The court ruled that the DNR's finding that the development was not a major action significantly affecting the human environment was reasonable based upon the record; therefore, no basis existed to disturb its decision not to prepare an EIS.

<http://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=76264>

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## NINTH CIRCUIT

### California

*Sierra Club v. Department of Parks & Recreation*, 2012 Cal. App. LEXIS 9 (Cal. App. 2d Dist. Jan. 9, 2012).

A California appellate court dismissed an action seeking to require the California Department of Parks and Recreation to amend a development plan for the Oceano Dunes State Vehicular Recreational Area (Area) and

ban off-highway vehicle (OHV) recreational activities. The plan allows recreational use of dune buggies and OHVs near Pismo Beach State Park within the Area. The Sierra Club alleged that the development plan conflicts with the county's local coastal plan map. The court ruled that there was no showing that the Department was violating coastal development permit or a California Coastal Commission cease and desist order. Further, the court found that the Sierra Club lacked standing to sue the Department for declaratory or equitable relief.

<http://www.courtinfo.ca.gov/opinions/documents/B230095.PDF>

## Washington

*Five Corners Family Farmers v. State*, 2011 Wash. LEXIS 955 (Wash. Dec. 22, 2011).

The Washington Supreme Court held that Wash. Rev. Code § 90.44.050 does not limit the amount of groundwater that can be withdrawn for livestock-watering purposes. State law requires permits for the withdrawal of public groundwater; however, there are exemptions from the permit requirement for certain uses, including withdrawals for stock-watering purposes. Several local farmers and environmentalists sought a declaration that the stock-watering exemption is limited to uses of less than 5,000 gallons per day and sought an injunction ordering a large cattle feedlot operation to cease groundwater use without a permit. The court ruled that under a plain reading of a law, the exemption did not contain a 5,000 gallons per day limit.

<http://www.courts.wa.gov/opinions/pdf/846324.opn.pdf>

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## ELEVENTH CIRCUIT

### Florida

*Donovan v. Okaloosa County*, 2012 Fla. LEXIS 20 (Fla. Jan. 5, 2012).

The Florida Supreme Court upheld a lower court's validation of a county's authority to issue revenue bonds to finance a beach restoration project in Okaloosa County. The court found that the order validating the bonds was proper because the county fulfilled relevant state law conditions when adopting the bond resolution. The court also found that the county met the requirements of the Municipal Service Benefit Unit Ordinance.

<http://www.floridasupremecourt.org/decisions/2012/sc10-794.pdf>

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## DISTRICT OF COLUMBIA

*Nat'l Ass'n of Home Builders v. United States Army Corps of Eng'rs*, 2011 U.S. App. LEXIS 24956 (D.C. Cir. Dec. 16, 2011).

The United States Court of Appeals for the District of Columbia held that the National Association of Home Builders lacked standing to challenge a U.S. Army Corps of Engineers' generic nationwide permit (NWP). The NWP allowed approval for qualifying discharges into "waters of the U.S." without individual permits. The association claimed that by issuing the permit, the Corps unlawfully asserted jurisdiction over upland ditches. The court dismissed the association's claim that it would incur injury by not knowing whether an upland ditch is a "water of the U.S." and risk violating the CWA. The court reasoned that the risk of sanctions without approval predated the permit and was not fairly traceable to the NWP.

[http://www.cadc.uscourts.gov/internet/opinions.nsf/8A521CA06F0D905D852579680054A3BC/\\$file/10-5169-1348005.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/8A521CA06F0D905D852579680054A3BC/$file/10-5169-1348005.pdf)

### District of Columbia

*District of Columbia v. Potomac Elec. Power Co.*, 2011 U.S. Dist. LEXIS 138317 (D.D.C. Dec. 1, 2011).

The District of Columbia filed suit against a power company alleging that six documented releases of toxic polychlorinated biphenyls (PCBs) at one of the company's power facilities seeped into the sediment of the Anacostia River. After reaching a settlement requiring the company to conduct a remedial investigation and feasibility study, the parties sought approval of the settlement agreement. Several environmental organizations opposed approval of the agreement and sought to intervene. The court denied the motion to intervene, but allowed the parties to participate as amici curiae. Further, the court approved the consent decree subject to several conditions, including requiring opportunities for public participation during the implementation of the requirements in the consent decree.

<https://ecf.dcd.uscourts.gov/doc1/04513652593>

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## COURT OF FEDERAL CLAIMS

*Banks v. United States*, 2011 U.S. Claims LEXIS 2377 (Fed. Cl. Dec. 22, 2011).

The United States Court of Federal Claims dismissed Fifth Amendment takings claims arising from coastal erosion on Lake Michigan caused by an Army Corps of Engineers project. The court ruled that the claims were untimely under 28 U.S.C.S. § 2501, which requires plaintiffs to file claims within a six-year limitations period.

The court pointed to trial evidence showing that erosion caused by the Corp jetties had been a long-standing problem by 1952; therefore, the plaintiffs filed the actions outside the limitations period. The court noted that “because there was evidence apparent to an ordinary landowner that the jetties accelerated erosion, plaintiffs were not entitled to postpone their claims until they received scientific confirmation...”

<http://www.uscfc.uscourts.gov/sites/default/files/HEWITT.BANKS122211.pdf>

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NSGLC-11-03-12

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