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# Ocean and Coastal Case Alert

**The National Sea Grant Law Center** is pleased to offer the August 2014 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-14-03-08).

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## FIRST CIRCUIT

### ***Friends of Merrymeeting Bay v. Hydro Kennebec, LLC*, 2014 WL 3400520 (1st Cir. July 14, 2014).**

The United States Court of Appeals for the First Circuit vacated and remanded a lower court decision in favor of operators of four hydroelectric dams on the Kennebec River. Conservation groups brought the citizen-enforcement actions, claiming that the operators failed to comply with terms of their settlement agreement with government agencies regarding downstream fish passage through the dams' turbines. The First Circuit ruled that the lower court erred by not considering the record as a whole in the light most favorable to plaintiffs.

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## FOURTH CIRCUIT

### ***Alt v. U.S. E.P.A.*, 2014 WL 3397761 (4th Cir. July 14, 2014).**

The U.S. Court of Appeals for the Fourth Circuit upheld a lower court's denial of the Chesapeake Bay Foundation, Inc. to intervene as a defendant in an action brought by a farmer against the U.S. Environmental Protection Agency (EPA).

The EPA had initiated an administrative enforcement proceeding against the farmer in connection with discharges from her chicken farm. The farmer then sought declaratory relief. The appellate court ruled that the lower court properly denied the Chesapeake Bay Foundation's motion to intervene, as the motion was untimely.

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## FIFTH CIRCUIT

### ***Belle Co. v. U.S. Army Corps of Engineers, No. 13-30262, (5th Cir. July 30, 2014).***

The U.S. Court of Appeals for the Fifth Circuit upheld a district court's dismissal of a lawsuit challenging the U.S. Army Corps of Engineers' jurisdictional determination (JD) finding that a proposed landfill site contained wetlands subject to regulation under the Clean Water Act. The lower court dismissed the property owner's challenge, finding that the JD is not a "final agency action" and therefore not reviewable under the Administrative Procedure Act. On appeal, the appellate court affirmed, concluding that in this instance the JD is not "an action by which rights or obligations have been determined, or from which legal consequences will flow." Essentially, the JD is a notification of the property's classification as wetlands but does not require the property owner to do or refrain from doing anything to its property.

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## Louisiana

### ***BP Am., Inc. v. Chustz, 2014 U.S. Dist. LEXIS 98581 (M.D. La. July 21, 2014).***

During the cleanup efforts following the Deepwater Horizon oil spill, BP lost two containment boom anchors and a vessel ramp. The Federal On-Scene Coordinator (FOSC) prohibited BP from attempting to find the lost anchors and ramp. The Louisiana Department of Natural Resources (LDNR) demanded that BP create a plan to locate and remove the anchors and the ramp. BP filed suit for injunctive relief against LDNR's attempts to force the removal of the anchors and ramp. BP argued that impossibility and obstacle preemption applied, because compliance with both the FOSC's prohibition on future attempts to remove the lost anchors and the LDNR's demands conflicted. The court agreed and granted summary judgment for BP on the issues of impossibility and obstacle prevention.

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## SEVENTH CIRCUIT

### ***Michigan v. United States Army Corps of Eng'rs, 2014 U.S. App. LEXIS 13349, 2014 WL 3401174 (7th Cir. July 14, 2014).***

The U.S. Court of Appeals for the Seventh Circuit upheld the dismissal of an action seeking to prevent Asian Carp from entering Lake Michigan. Five states and a Native American Tribe brought the lawsuit, seeking an injunction that would require the U.S. Army Corps for Engineers, Chicago, and the Metropolitan Water Reclamation district of Greater Chicago, as operators of the Chicago Area Waterway System (CAWS), to take more aggressive measures to prohibit the carp from reaching Lake Michigan. The court found that the Corps and the CAWS operators' efforts to prevent the spread of Asian Carp into Lake Michigan have been successful. Accordingly, the court held that the states

and tribe failed to state a claim for which relief could be granted under a public nuisance theory or under the Administrative Procedure Act.

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## NINTH CIRCUIT

### Oregon

***Sea River Properties, LLC v. Parks, CC 062011, 2014 WL 4049813 (Or. Aug. 14, 2014).***

The Oregon Supreme Court recently ruled on a dispute over ownership of 40 acres of property created by sand and silt being deposited on upland property after the U.S. government built two jetties to contain the Nehalem River. The plaintiff filed an action to quiet title to the disputed property, arguing that it owned the property through the law of accretion or by adverse possession. The defendant counterclaimed with the same arguments. The trial court found that the plaintiff's predecessors in interest took title to the disputed property through the law of accretion; however, the defendant later acquired title to the disputed property through adverse possession. The court awarded title to the defendant, and the appellate court affirmed. The Oregon Supreme Court disagreed with the conclusion that the defendant met the elements of adverse possession. The court remanded the case for further proceedings.

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### Washington

***Puget Sound Harvesters Ass'n v. Washington State Dep't of Fish & Wildlife, 71362-1-I, 2014 WL 3929117 (Wash. Ct. App. Aug. 11, 2014).***

A Washington appellate court affirmed the dismissal of a petition seeking to invalidate two administrative rules adopted by the Washington Department of Fish and Wildlife (DFW) regulating nontreaty commercial chum salmon fishing in South Puget Sound for the 2012 season. The Puget Sound Harvesters Association (PSHA), an industry group representing nontreaty commercial salmon gillnet fishers, appealed the trial court's decision claiming that the 2012 rules violate constitutional principles of equal protection and are arbitrary and capricious. The appellate court disagreed. The court found that there is no constitutional or statutory right to equal catch shares among gear groups. Further, the court ruled that the record reflects that the 2012 rules satisfy DFW's statutory obligations and management objectives.

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## ELEVENTH CIRCUIT

### Georgia

***Georgia River Network v. Turner, 2014 WL 3557407 (Ga. Ct. App. July 16, 2014).***

A Georgia appellate court ruled on a challenge to a buffer variance issued in connection with a county's plans to construct a 960-acre fishing lake. The court held that the 25-foot buffer requirement in the state Erosion and Sedimentation Act applies not only to banks of state waters with vegetation wrested by normal stream flow or wave action but to all state waters and wetlands. The appellate court reversed two lower court rulings upholding the variance. The appellate court noted none of the six exceptions to the buffer requirement in the Act applied here.

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