

# Ocean and Coastal Case Alert

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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-11-03-05

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## SUPREME COURT

*Montana v. Wyoming*, 2011 U.S. LEXIS 3369 (U.S. May 2, 2011).

In a dispute over water rights, the U.S. Supreme Court recently affirmed a decision by a Court appointed Special Master rejecting Montana's claim that Wyoming's use of more efficient irrigation systems violated the Yellowstone River Compact. Montana claimed that the irrigation systems violated the compact by reducing runoff back into the river and decreasing water to downstream users. The Court ruled that upstream users may send less water downstream, as long as they do not increase the amount of water diverted.

<http://www.supremecourt.gov/opinions/10pdf/137Orig.pdf>

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## THIRD CIRCUIT

New Jersey

*In re Treatment Works Approval 09-0026*, 2011 N.J. Super. Unpub. LEXIS 1185 (App.Div. May 10, 2011).

A New Jersey court affirmed a treatment works approval for a company to construct and operate pumping stations, sanitary sewer lines, and force mains for an age-restricted development and two community centers. The American Littoral Society and the Pinelands Preservation Alliance challenged the approval claiming that the project was inconsistent with DEP regulations prohibiting the installation of sewer services in an environmentally sensitive area, the DEP failed to conduct the required consistency review, and the project violated the National Parks and Recreation Act of 1978. The court rejected all of the appellants claims, concluding that "[t]he present appeal is simply a last ditch effort to prevent the construction of a project that has been involved in the development process for over a decade" and that the project complied with all "applicable environmental standards."

<https://www.judiciary.state.nj.us/opinions/a4811-08.pdf>

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## FOURTH CIRCUIT

Maryland

*Smith v. County Comm'rs*, 2011 Md. LEXIS 213 (Md. Apr. 25, 2011).

A Maryland appellate court vacated a lower court decision with instructions to dismiss the petition challenging an amendment to Kent County's local critical area plan under the Chesapeake and Atlantic Coastal Bays Critical Area Protection Program. The court found that the county's approval of the amendment was not a final and appealable action. The court reasoned that because a county growth allocation policy stated that no local approval action was effective until approved by the Chesapeake Bay Critical Area Commission, the Commission might override the county's decision to approve the growth allocation request.

<http://mdcourts.gov/opinions/coa/2011/2a10.pdf>

South Carolina

*Estate of Tenney v. S.C. Dep't of Health & Envtl. Control*, 2011 S.C. LEXIS 161 (S.C. Apr. 25, 2011).

In an action to quiet title to an undeveloped marsh island in Beaufort County, the Supreme Court of South Carolina ruled in favor of the plaintiff. The action stemmed from the South Carolina Department of Health and Environmental Control's (DHEC) rejection of Patricia Tenney's application to construct a dock on the island. Upon receiving an opinion from the state Attorney General's office, the DHEC required Tenney to produce evidence of a sovereign grant of the island before the agency could review her application. In the quiet title action, the court overruled a previous state court decision stating that title to islands situated within marshland followed title to the marshland. The court noted that the public trust doctrine extends only up to the land below the high water mark, and therefore title to the island was quieted in favor of Tenney.

<http://m.sccourts.org/opinions/displayOpinion.cfm?caseNo=26965>

*Friends of Congaree Swamp v. FHA*, 2011 U.S. Dist. LEXIS 45925 (D.S.C. Apr. 27, 2011).

In a suit to block a Federal Highway Administration (FHA) project to construct new bridges and expand causeways within the Congaree River floodplain, the court rejected a challenge to the agency's 2009 Environmental Assessment. The environmental group claimed that the agency violated NEPA and the APA in its determination that an EIS was not warranted. In addition, the plaintiffs claimed that the agency violated § 4(f) of the Department of Transportation Act in failing to look at alternatives to the project. The court rejected all of the claims, denying the plaintiffs motion for summary judgment and granting summary judgment in favor of the FHA.

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## SIXTH CIRCUIT

Michigan

*Anglers of the Au Sable, Inc. v. Dep't of Envtl. Quality*, 2011 Mich. LEXIS 700 (Mich. Apr. 25, 2011).

The Michigan Supreme Court vacated its previous decision finding that an energy company's discharge plan was "manifestly unreasonable" and not an allowable use of water. The plan would have allowed the diversion of contaminated water from one source into an uncontaminated watershed. The court found that the claim is now moot, citing the fact that the defendant quit-claimed its easement interest back to the riparian owner, no longer has the physical means of discharging water into the creek or river, is now disposing of the water by alternative means, and no longer has a permit that allows discharge into the creek or river. Furthermore, the Department of Environmental Quality has verified that the possibility of surface water discharge to the watershed no longer existed.

[http://coa.courts.mi.gov/documents/sct/public/orders/20110425\\_s138863\\_131\\_138863\\_2011-04-25\\_or.pdf](http://coa.courts.mi.gov/documents/sct/public/orders/20110425_s138863_131_138863_2011-04-25_or.pdf)

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## EIGHTH CIRCUIT

### Missouri

*Missouri ex rel. Koster v. United States Army Corps of Eng'rs*, 2011 U.S. Dist. LEXIS 46145 (E.D. Mo. Apr. 29, 2011).

A judge in the United States District Court for the Eastern District of Missouri rejected a motion for a temporary restraining order and preliminary injunction to prevent the U.S. Army Corps of Engineers from breaking a Mississippi River levee to prevent flooding of an Illinois town. The court found "that the Corps is committed to implementing the Plan 'only as absolutely essential to provide the authorized protection to all citizens'" and that "... that no aspect of the Corps' response to these historic floods suggests arbitrary or capricious decision-making is occurring." The Corps breached the levee on May 2nd.

<http://bit.ly/ieRYaY>

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## NINTH CIRCUIT

*Southeast Alaska Conservation Council v. FHA*, 2011 U.S. App. LEXIS 9097 (9th Cir. May 4, 2011).

The United States Court of Appeals for the Ninth Circuit held that an Environmental Impact Statement (EIS) concerning improvements in transportation to Alaskan communities violated the National Environmental Policy Act (NEPA) by failing to examine a reasonable alternative to construction of a highway through a national forest and a new ferry terminal. The case affirmed a decision from the United States District Court for the District of Alaska ordering the FHA to improve existing ferry service before proceeding with the expensive construction of a new ferry terminal. The court agreed that the failure to consider the improvement of ferry services was arbitrary and in violation of NEPA.

<http://www.ca9.uscourts.gov/datastore/opinions/2011/05/04/09-35551.pdf>

### Oregon

*Simpson v. Dep't of Fish & Wildlife*, 2011 Ore. App. LEXIS 557 (Or. Ct. App. Apr. 20, 2011).

Several owners of game ranches in Oregon sought a declaratory ruling from the state Department of Fish and Wildlife on whether animals on their property are "property of the state" under ORS 498.002(1). The DFW ruled that the animals are not property of the state, and the plaintiffs sought review. The court found that although the statute declared that wildlife was the property of the state, this property interest was not proprietary or possessory and therefore the state did not own animals legally kept in captivity by private owners.

<http://www.publications.ojd.state.or.us/A141561.htm>

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## DC CIRCUIT

*Alcoa Power Generating, Inc. v. FERC*, 2011 U.S. App. LEXIS 9041 (D.C. Cir. May 3, 2011).

The U.S. Court of Appeals for the District of Columbia ruled that North Carolina did not waive its Clean Water Act (CWA) certification authority in a petition to relicense a company's hydroelectric facilities. After a state administrative law judge stayed a certification issued by the state Division of Water Quality, the company petitioned the Federal Energy Regulatory Commission for a declaratory order that the state waived its CWA authority. The company claimed that by not acting on the request for certification within one year, as required by CWA § 401(a)(1), the state waived its state certification authority. FERC denied the petition finding that although the state certification was not effective within a year, the state had acted on the request within a year. The company sought review of the agency's order. The court agreed with FERC, ruling that even if the certification was not immediately effective, the certification request was timely granted.

[http://www.cadc.uscourts.gov/internet/opinions.nsf/4A9A8B99949D1B6885257885004D5F16/\\$file/10-1066.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/4A9A8B99949D1B6885257885004D5F16/$file/10-1066.pdf)

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