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# Ocean and Coastal Case Alert

## The National Sea Grant Law Center

is pleased to offer the December 2013 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-13-03-11).

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## FIRST CIRCUIT

### Massachusetts

#### ***Beverly Port Marina, Inc. v. Comm'r of Dep't of Env'tl. Prot.*, 84 Mass. App. Ct. 612 (2013).**

A Massachusetts appeals court invalidated a license allowing the development of a restaurant in a "designated port area" (DPA). The court noted that state regulations stipulate that a license may not be issued for a project proposed in a DPA if a competing proposal would promote water-dependent industrial uses of the project site to a greater extent. The judge noted that the regulation "is not to ensure that the competing proposal actually goes forward but, instead, to ensure that the applicant's less satisfactory project (from the perspective of the regulatory purpose of fostering water-dependent industrial uses) will not preempt availability of the tidelands site for alternative uses more in keeping with that objective."

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## THIRD CIRCUIT

## West Virginia

### ***Alt v. U.S. E.P.A., 2013 WL 5744778 (N.D.W. Va. Oct. 23, 2013).***

The U.S. District Court for the Northern District of West Virginia ruled that stormwater from a concentrated animal feeding operation (CAFO) for raising poultry is exempt from the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permit requirements. The Environmental Protection Agency (EPA) alleged that dust and manure blown out of the CAFO's confinement houses by ventilators resulted in a violation of the CWA when the waste was washed away by rain. The owner of the farm brought suit against the EPA. The judge agreed with the farming operation, finding that the definition of "point source" exempts agricultural stormwater discharges. The EPA alleged that the exemption only applied to areas where manure, litter, or processed wastewater had been applied according to nutrient management practice. The judge disagreed, stating "Common sense and plain English lead to the inescapable conclusion that Ms. Alt's poultry operation is 'agricultural' in nature and that the precipitation-caused runoff from her farmyard is 'stormwater.'"

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## FOURTH CIRCUIT

### ***Turner v. United States, 736 F.3d 274 (4th Cir. 2013).***

The U.S. Court of Appeals for the Fourth Circuit ruled that the U.S. Coast Guard did not breach any duty in attempting to rescue a boater who fell overboard from his private boat and drowned. Rescuers receive some liability protection under the "Good Samaritan" doctrine, which requires evidence showing that the rescuer failed to exercise reasonable care in a way that worsened the position of the victim. The court ruled that the Coast Guard did not violate the doctrine, since its actions neither increased the risk of harm facing the boaters nor induced reliance by the boaters or other potential rescuers on the rescue efforts.

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## New Jersey

### ***Petrozzi v. City of Ocean City, 2013 WL 5975093 (N.J. Super. Ct. App. Div. Oct. 28, 2013).***

A New Jersey appellate court ruled that Ocean City, New Jersey owed property owners compensation following the construction of dunes in front of their homes. The owners had brought suit against the city, alleging inverse condemnation and breach of contract based on failure to maintain height limitation on beachfront sand dunes as required under easement agreements. A lower court dismissed the inverse condemnation claims and some breach of contract claims. In a separate damages trial for the owners with breach of contract claims, the court awarded damages. Ocean City appealed the damages award and, in a separate appeal, the owners whose claims were dismissed also appealed. In a consolidated opinion, the court first ruled that Ocean City was liable for damages for the breach of contract claims. The court remanded the case to the trial court to determine the amount of damages taking the New Jersey Supreme Court's decision in *Harvey Cedars v. Karan* into consideration. The court also ruled that the property owners whose claims were dismissed were due compensation.

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## FIFTH CIRCUIT

### ***Lexington Ins. Co. v. St. Bernard Parish Gov't*, 2013 WL 6333864 (5th Cir. Dec. 6, 2013).**

Following Hurricane Katrina, St. Bernard Parish passed an ordinance requiring Parish residents to repair their properties before specific deadlines and authorized St. Bernard to remove unsafe buildings if residents did not comply. The St. Bernard Parish Council ultimately approved the condemnation of more than 5,700 structures and later demolished many of these properties. In 2009, property owners sued St. Bernard, asserting inverse condemnation. The parish sought defense and indemnity under three Lexington Insurance Co. (Lexington) policies. Lexington did not assume the defense of the parish. This month, the Fifth Circuit upheld a lower court decision requiring Lexington to defend Bernard Parish but ruled that the lower court erred in forcing the insurer to cover the parish for potential damages.

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## NINTH CIRCUIT

### **Hawaii**

### ***Detting v. United States*, 2013 WL 6061986 (D. Haw. Nov. 15, 2013).**

In May, the U.S. District Court for the District of Hawaii dismissed the claims of two fishermen who claimed that the National Oceanic Atmospheric Administration (NOAA) violated their fishing rights by not permitting them to fish in two marine national monuments located near Hawaii. The fishermen filed an amended complaint with the court. The court ruled that the fishermen failed to exhaust their administrative remedies before bringing suit. Further, the court found that allegations that NOAA breached a duty to implement the proclamation and Consolidated Appropriations Act, which are related to establishment of the national monument, were not actionable under the Federal Tort Claims Act. Finally, the court found that NOAA did not abuse its discretion in implementing the proclamation or Consolidated Appropriations Act.

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## FEDERAL CIRCUIT

### ***Arkansas Game & Fish Comm'n v. United States*, 2013 WL 6231552 (Fed. Cir. Dec. 3, 2013).**

Last December, the U.S. Supreme Court held that temporary, government-induced flooding could be subject to a Fifth Amendment takings claim. The Court remanded the claim to the Federal Circuit Court of Appeals to determine whether the U.S. Army Corp of Engineers' operation of a dam that resulted in damage to a timber growing operation was in fact a taking. On remand, the appellate court upheld the trial court's ruling, finding the flooding to be a taking.

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