# Ocean and Coastal Case Alert

~ ~ June 15, 2011 ~ ~

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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 with ***"Case Alert"*** on the subject line.
NSGLC-11-03-06

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## FIRST CIRCUIT

*U.S. v. Coal. for Buzzards Bay*, 2011 WL 1844221 (1st Cir. May 17, 2011).
The United States Court of Appeals for the First Circuit concluded that the U.S. Coast Guard violated its National Environmental Policy Act (NEPA) obligations by failing to perform the proper analysis before it issued a 2007 rule purporting to preempt certain provisions of the Massachusetts Oil Spill Prevention Act (MOSPA). Previously, a court had ruled that those provisions of MOSPA were preempted by the Coast Guard's rule and enjoined enforcement of those laws. On appeal, the court reversed the summary judgment in favor of the U.S., vacated the injunction, and returned the case to the district court with instructions to remand it to the Coast Guard for further proceedings consistent with this opinion.
http://www.ca1.uscourts.gov/pdf.opinions/10-1664P-01A.pdf

### Massachusetts

*U.S. v. Manghis*, 2011 WL 2110212 (D. Mass. May 26, 2011).
In a case regarding the importation of whale and elephant ivory, a Massachusetts court denied a scrimshaw artist's motion on appeal for a new trial and judgment for acquittal. Charles Manghis is an accomplished scrimshaw artist. Scrimshaw is the art of etching designs, figures, and patterns into the bones and teeth of whales. Manghis was charged with knowlingly importing whale and elephant ivory, which is a violation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). CITES is enforced by the Endangered Species Act, the Lacey Act, general criminal statutes, and a series of regulations. Manghis contended that he did not know he was violating federal law, but the court found his arguments unpersuasive.
https://ecf.mad.uscourts.gov/doc1/09514311000

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## THIRD CIRCUIT

### New Jersey

*N.J. Dept. of Envtl. Protection v. Exxon Mobil Corp.*, 2011 WL 2150050 (N.J. App. Div. May 31, 2011).
A New Jersey appeals court ruled that a common law strict liability claim could be pursued by the Department of Environmental Protection (DEP) against defendant Exxon Mobil to obtain natural resource damages under the New Jersey Spill Compensation and Control Act. DEP filed complaints against Exxon for spills and leaks at Bayonne and Bayway refineries. Exxon argued, and the trial court agreed, that the statute of limitations had run on the common law claims for nuisance and trespass. The lower court found that the laws extending the statute of limitations did not apply. The appellate court found that the extension statute did apply to the claim reasoning that common law claims precede statutory claims would lead to an absurd result.
http://lawlibrary.rutgers.edu/courts/appellate/a0314-09.opn.html

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## FOURTH CIRCUIT

### North Carolina

*U.S. v. Freedman Farms, Inc.*, 2011 WL 1884000 (E.D.N.C. May 18, 2011).
The United States District Court for the Eastern District of North Carolina denied the government's motion for reconsideration for the preliminary jury instruction on what constitutes "waters of the United States." The U.S. Supreme Court in *Rapanos v. United States* issued a split decision regarding the meaning of "waters of the United States" in the context of adjacent wetlands. The government argued that the jury instruction regarding "waters of the United States" should include both definitions. The court ruled that it would instruct the jury solely on Justice Kennedy's significant nexus test.

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## FIFTH CIRCUIT

*Brochtrup v. Mercury Marine*, 2011 WL 2118644 (5th Cir. May 27, 2011).
The United States Court of Appeals for the Fifth Circuit affirmed the district court's ruling denying Mercury Marine and Sea Ray's motion for judgment as a matter of law. Jacob Brochtrup sued Mercury Marine and Sea Ray after losing his leg in a boating accident. He claimed that there was a design defect in the boat because there was no guard on the propeller. After the third time at trial, the jury determined there was a design flaw and awarded damages to Brochtrup. The court rejected the motion for judgment as a matter of law, finding that a reasonable jury could find the engine to be unreasonably dangerous. The court also ruled that Mercury Marine failed to meet any of the requirements to successfully challenge a jury instruction.
http://www.ca5.uscourts.gov/opinions/unpub/10/10-50534.0.wpd.pdf

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## NINTH CIRCUIT

*Northwest Envtl Def. Ctr v. Brown*, 2011 WL 1844060 (9th Cir. May 17, 2011).
The United States Court of Appeals for the Ninth Circuit reversed a decision finding that certain discharges were exempted from the National Pollution Discharge Elimination System (NPDES) permitting process under the Silvicultural rule. The Northwest Environmental Defense Center argued that stormwater runoff from logging roads into streams and rivers was a point source discharge subject to NPDES permitting under the Clean Water Act because it was collected in a system of ditches, culverts, and channels leading to the streams and rivers. Defendants countered by saying that the Silvicultural Rule does not define such runoff as a point source discharge and therefore it is exempt from NPDES permitting process. The court determined that the runoff was a point source discharge and a NPDES permit is

required.
http://www.ca9.uscourts.gov/datastore/opinions/2011/05/17/07-35266.pdf

*Pakootas v. Teck Cominco Metals, Ltd.,* 2011 WL 2138157 (9th Cir. June 1, 2011).
The United States Court of Appeals for the Ninth Circuit affirmed a district court's ruling that it lacked jurisdiction to collect penalties from a company for its noncompliance with an EPA administrative order. The order required Teck Cominco and its American subsidiary to clean up parts of the Columbia River contaminated by slag - a mixture of metal oxides and silicon dioxide - from its smelter in Trail, British Columbia, just ten miles north of the Washington border. The EPA took no action to enforce Teck Cominco's 892 days of noncompliance with the EPA's unilateral administrative order. Citizens Joseph Pakootas and Donald Michel sued to have this order enforced, but the court ruled that since the penalty was not payable to them as citizens, and it did not fall under the citizen suit exception, the court did not have jurisdiction.
http://www.ca9.uscourts.gov/datastore/opinions/2011/06/01/08-35951.pdf

*Resurrection Bay Conservation Alliance v. City of Seward*, Alaska, 2011 WL 1886358 (9th Cir. May 19, 2011).
The United States Court of Appeals for the Ninth Circuit vacated a district court's decision to deny an award of attorney fees and litigation costs in a Clean Water Act (CWA) suit. The court remanded the matter to the district court with instructions to award fees and costs that were reasonably incurred in furtherance of the CWA's purpose. The Resurrection Bay Conservation Alliance (RBCA) claimed that the city had violated the CWA by discharging pollutants into Resurrection Bay without a National Pollution Discharge Elimination System (NPDES) permit. The RBCA prevailed, and the sole issue in front of the Ninth Circuit was whether awarding fees to RBCA was inappropriate because special circumstances existed. The court ruled that no special circumstances existed and reasonable award fees and costs must be paid.
http://www.ca9.uscourts.gov/datastore/opinions/2011/05/19/10-35446.pdf

### Arizona

*Ctr. for Biological Diversity v. Salazar*, 2011 WL 2160254 (D. Ariz. May 28, 2011).
The United States District Court for the District of Arizona determined that the Fish and Wildlife Service's (FWS) Biological Opinion (BiOp) for proposed ongoing and future operations at Fort Huachuca violated the Endangered Species Act (ESA), and the Army's reliance on the BiOp was arbitrary and capricious. The plaintiff argued that the FWS violated § 7 of the ESA because it did not insure that the Army's authorized function was not likely to jeopardize the continued existence of any endangered species or threatened species or their critical habitat. The court found that the BiOp failed to look at how Fort Huachuca's operations would affect species and their critical habitat, and failed to provide a connection between the BiOp and the ultimate conclusion that the operations would not affect recovery. As a result, the court granted the plaintiff's motion for summary judgment.
http://www.courthousenews.com/2011/06/02/Uranium%20Mining%20AZ%20Strip.pdf

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## COURT OF FEDERAL CLAIMS

*Wolfsen Land & Cattle Co. v. U.S.*, 2011 WL 2020809 (Ct. Fed. Cl. May 24, 2011).
The United States Court of Federal Claims denied the Pacific Coast Federation of Fishermen's Associations (PCFFA) and Natural Resources Defense Council's (NRDC) motion to intervene as defendants. A settlement agreement and subsequent San Joaquin River Restoration Settlement Act led the Bureau of Reclamation to open the valves at the base of the Friant Dam. Plaintiff Wolfsen Land & Cattle Company filed their complaint to the court under the Takings Clause of the Fifth Amendment to recover compensation for the legislative and physical taking of approximately 12,973 acres of prime agricultural land, buildings, and crops. The PCFFA and NRDC filed motions to intervene but the court denied these motions for two reasons. The first reason was that the applicants are able to protect their interests in the U.S. district courts if they do not believe the United States is meeting its obligations under their Settlement, the Settlement Act, or California Fish and Game Code Section 5937. The second reason was that the United States adequately represents the applicants' interests.
http://www.uscfc.uscourts.gov/sites/default/files/HEWITT.WOLFSEN052411.pdf

*Placer Mining Co., Inc. v. U.S.*, 2011 WL 2039623 (Ct. Fed. Cl. May 25, 2011).
Placer Mining Co. sought compensation under the Fifth Amendment of the United States Constitution for the alleged taking of its property. After a major flood, the Environmental Protection Agency (EPA) ordered Placer Mining to provide unrestricted access to its property so the EPA could properly design a solution to the possibility of another 100-year event such as the recent flood. During the construction process the Reed Portal, the sole access point to some of the mine's underground workings, collapsed for reasons that are disputed. The United States Court of Federal Claims denied both parties' motions for summary judgment. There are factually disputed issues such as whether the government's physical invasion eliminated all feasible access to the property and summary judgment can only be granted when there is no genuine issue of material fact. Due to the fact-intensive nature of the takings claim, the court denied both motions for summary judgment.
http://www.uscfc.uscourts.gov/sites/default/files/BRUGGINK.PLACER052511.pdf

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