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# Ocean and Coastal Case Alert

**The National Sea Grant Law Center** is pleased to offer the December 2018 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-18-03-12).

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## U.S. SUPREME COURT

***Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.,*** 139 S. Ct. 361 (2018).

The dusky gopher frog, listed as endangered under the Endangered Species Act (ESA), currently only lives in Mississippi, but its historic range included Louisiana and Alabama as well. However, the U.S. Fish & Wildlife Service (FWS) designated land in Louisiana, known as Unit 1 and which has been unoccupied by the frog for decades, as critical habitat. FWS based its decision largely on the presence of ephemeral ponds, which are needed for the frog to breed. Weyerhaeuser and the other property owners of Unit 1 challenged the critical habitat designation on two grounds. First, the landowners argued that the designation was unlawful, claiming that the frog could not currently live in the closed canopy forest of Unit 1. Second, the landowners argued that the FWS should have excluded Unit 1 from critical habitat due to the economic impact of the designation. The U.S. Court of Appeals for the Fifth Circuit found for the FWS on both grounds, holding that there is no habitability requirement for critical habitat under the ESA and the FWS's decision not to exclude Unit 1 was a discretionary decision that is not reviewable under the Administrative Procedure Act (APA). The Supreme Court vacated both of these rulings, first finding that critical habitat must be habitat for the species. Since "habitat" is not defined under the ESA, the Court remanded to the Fifth Circuit to determine if Unit 1 can be considered habitat for the frog. Second, the Court found that the decision whether to exclude Unit 1 due to economic impacts is reviewable by the courts. Once again, the Court remanded to the Fifth Circuit to determine whether the FWS's decision not exclude Unit 1 was arbitrary and capricious under the APA.

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## FIRST CIRCUIT

### Rhode Island

***Rhode Island v. Atl. Richfield Co. et al.,*** 2018 WL 6505394 (D.R.I. Dec. 11, 2018).

The State of Rhode Island brought suit claiming several oil and chemical companies contaminated state waters by using methyl tertiary butyl ether (MTBE), a hazardous gasoline additive. The companies filed a motion to dismiss all claims. The U.S. District Court for the District of Rhode Island partially denied and partially granted the motion. The court dismissed the claims arising under the public trust doctrine and the Underground Storage Tank Financial Responsibility Act. The majority of the claims, including those for tort, nuisance, trespass, public trust, and the state Water Pollution Act, will proceed.

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## FOURTH CIRCUIT

***Sierra Club v. United States Army Corps of Eng'rs,*** 2018 WL 6175671 (4th Cir. Nov. 27, 2018).

The U.S. Army Corps of Engineers (Corps) certified a natural gas pipeline under Nationwide Permit 12 (NWP 12), instead of an individual permit. Environmental groups sought review of the certification. The U.S. Court of Appeals for the Fourth Circuit held that the Corps exceeded its authority by substituting its own special condition in lieu of a special condition imposed by West Virginia as part of its certification of NWP 12. The court held that the state could not waive a special condition previously imposed as part of its certification without completing the notice-and-comment procedures required by the Clean Water Act. The state's condition requires permittees to obtain an individual water quality certification. Because the developer did not do this, the Corps' verification of the project under NWP 12 was invalid.

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## SEVENTH CIRCUIT

### Wisconsin

***Wisconsin v. Schnepf,*** 2018 WL 6264595 (Wis. Ct. App. Nov. 29, 2018).

Allen Schnepf was found liable for discharging fill material into a wetland without a certification of compliance with state water standards. A lower court granted summary judgment in favor of the state. On appeal, Schnepf argued summary judgment was improper. The state appellate court affirmed the lower court's decision, finding Schnepf's admitted placement of a topsoil layer on pre-existing wetland established his liability as a matter of law.

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## NINTH CIRCUIT

### California

***San Francisco Baykeeper, Inc. v. State Lands Comm'n,*** 2018 WL 6181285 (Cal. Ct. App. Oct. 31, 2018).

The California State Lands Commission (SLC) approved a project to mine sand from state lands under San Francisco Bay pursuant to 10-year mineral extraction leases. In 2015, a state appellate court held that although the SLC adequately performed a California Environmental Quality Act (CEQA) review, the agency failed to consider whether the activity implicated the public trust doctrine. On remand, a lower court issued a preemptory writ directing the SLC to reconsider the impact of the project on the public trust doctrine. The SLC reapproved the project and the court discharged the writ in April 2017. San Francisco Baykeeper appealed. On appeal, the court ruled that the SLC erred by concluding that private commercial sand mining constitutes a public trust use of sovereign lands; however, there was substantial evidence that the project will not impair the public trust and, the court affirmed the discharge.

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### Washington

***Puget Soundkeeper Alliance v. Wheeler,*** 2018 WL 6169196 (W.D. Wash. Nov. 26, 2018).

Environmental groups in Washington challenged an Environmental Protection Agency and U.S. Army Corps of Engineers rule adding an applicability date to the 2015 Waters of the United States (WOTUS) Rule. The "applicability rule" suspended the effectiveness of the WOTUS Rule until February 2020. The U.S. District Court for the Western District of Washington vacated the applicability rule, finding that the agencies violated the Administrative Procedure Act during the rulemaking. Although the agencies followed the proscribed 21-day public comment period, they excluded substantive comments on the rulemaking. The court therefore granted summary judgment in favor of the plaintiffs, vacating the rule.

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***Spokane Cty. v. Dep't of Fish & Wildlife,*** 2018 WL 6381064 (Wash. Dec. 6, 2018).

The Washington Supreme Court has held that upland projects entirely landward of the ordinary high water mark (OHWM) may be subject to regulation by the state Department of Fish and Wildlife (DFW). Several counties brought

(OHWM) may be subject to regulation by the state Department of Fish and Wildlife (DFW). Several counties brought suit against DFW, challenging its authority to regulate hydraulic projects that would occur exclusively above OHWM. A lower court ruled in favor of DFW. On appeal, the court found that that the plain language of the statute uses "reasonably certain effects" of hydraulic projects on waters of the state in determining the scope of the DFW's permitting authority. The court noted that at least some projects above the OHWM are reasonably certain to affect those waters. Additionally, legislative history confirms that the legislature intended DFW's regulatory jurisdiction to include projects above the OHWM that affect state waters.

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## FEDERAL CIRCUIT

***Natural Res. Def. Council v. Ross,*** No. 2018-2325 (Fed. Cir., Nov. 28, 2018).

The U.S. Court of Appeals for the Federal Circuit upheld a ban on the importation of Mexican shrimp and other seafood caught using gillnets. The ban was promulgated in response to gillnets' impact on the critically endangered vaquita porpoise—of which there are only fifteen members remaining in the wild. This ruling marks the most recent in a line of failed legal challenges several U.S. governmental agencies have made in a hope to have the ban struck down. Several environmental advocacy groups relied on this language in March when they first filed suit against federal officials in the U.S. Court of International Trade (CIT), arguing that Marine Mammal Protection Act (MMPA) coverage includes endangered species outside of U.S. waters. The CIT granted a temporary injunction in July, when the court ordered the United States to stop accepting imported seafood from Mexico if it was caught using gillnets. In response, NOAA Fisheries implemented an import ban in August. The agencies moved to stay enforcement of the injunction pending appeal. If granted, the stay would have temporarily suspended the injunction while the appeal was given time to progress. However, the agencies were, again, defeated when the court concluded that they had not established that such a stay was warranted. The agencies' appeal will move forward with the CIT's preliminary injunction and the ban intact.

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