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June  
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# Ocean and Coastal Case Alert

**The National Sea Grant Law Center** is pleased to offer the June 2022 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-22-03-06).

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## FIRST CIRCUIT

***Rhode Island v. Shell Oil Products LLC***, No 19-1818, 2022 WL 1617206 (1st Cir. May 23, 2022).

The State of Rhode Island filed an action in state court asserting oil and gas companies misled the public about the climate risks caused by the companies' products. The suit alleged several state law claims, including public nuisance, products liability, trespass, impairment of public trust resources, and violation of Rhode Island's Environmental Rights Act. The companies sought to remove the case to federal court, but the U.S. District Court for the District of Rhode Island remanded it back to state court. The companies appealed the remand, and the First Circuit Court of Appeals upheld the district court's ruling and held that there were no grounds for removing the case to federal court. The court remanded the case to the Rhode Island state court.

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## FOURTH CIRCUIT

### Maryland

***Maryland Small MS4 Coal. v. Maryland Dep't of the Env't***, No. 25, Sept. Term, 2021, 2022 WL 1771709 (Md. June 1, 2022).

Operators of small municipal separate storm sewer system (MS4) filed suit against the Maryland Department of the Environment over its issuance of a general permit for operators of 35 small MS4s in Maryland. The plaintiffs alleged that the permit unlawfully exceeded the minimum requirements of the Clean Water Act (CWA) and would make the operators responsible for third party discharge. A lower court upheld the permit, and an intermediate appellate court affirmed. On appeal, the state's highest court also affirmed, relying on previous state court decisions. The court found that the permits for MS4s are lawful even if they exceeded a minimum requirement of the CWA. The court also ruled that the permit requirement did not unlawfully make the county responsible for discharge by third parties.

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## FIFTH CIRCUIT

### Texas

***Sheffield v. Bush***, No. 3:21-cv-122 2022 WL 1638205 (S.D. Tex. May 23, 2022).

After a series of tropical storms destroyed the natural vegetation line in the Village of Surfside Beach, the Texas General Land Office issued an order temporarily establishing that the landward boundary of the public beach extends 200 feet inland from the mean low tide line. Beachfront property owners Charles Sheffield and Pedestrian Beach, LLC filed a lawsuit claiming that the order amounted to an unconstitutional taking, an unreasonable seizure, and a violation of due process. The court denied in part and granted in part the state's motion to dismiss. The court held that the homeowners had demonstrated sufficient facts to allege the takings claim and a Fourth Amendment seizure claim, since the language of the order clearly deprived them of their right to exclude people from their property. Additionally, the court denied the motion to dismiss the procedural due process claim because the order did not provide any notice or a hearing prior to their property being taken. The court granted the motion to dismiss the substantive due process claim since the homeowners did not establish that the law was not supported by a legitimate policy. Finally, the court denied the motion for a preliminary injunction on the grounds that the homeowners had failed to meet the burden of demonstrating irreparable harm.

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## SEVENTH CIRCUIT

***Pavlock v. Holcomb***, No. 21-1599 2022 WL 1654038 (7th Cir. May 25, 2022).

Two property owners filed a lawsuit against Indiana Governor Eric Holcomb, the Attorney General, and the directors of the Department of Natural Resource and the State Land Office following the Indiana Supreme Court's ruling in *Gunderson v. State* and the subsequent passage of House Enrolled Act (HEA) 1385 codifying the ruling. The plaintiffs claimed that the *Gunderson* ruling and the subsequent passage of HEA 1385 amounted to an unconstitutional taking of their property by declaring that they did not have exclusive possession of the land below the ordinary highwater mark of Lake Michigan. The Seventh Circuit Court of Appeals ruled that the plaintiffs lacked standing to bring the lawsuit since they had failed to establish causation and redressability.

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## NINTH CIRCUIT

***Environmental Defense Center v. Bureau of Ocean Energy Management***, No. 19-55526, 2022 WL 1816515 (9th Cir. June 3, 2022).

After being sued by several environmental groups, the Bureau of Ocean Energy Management (BOEM) conducted an environmental review of the authorization of unconventional oil drilling methods in the Pacific Outer Continental Shelf. The agencies who prepared the environmental assessment issued a finding of no significant impact and the environmental groups sued again on the grounds that the review was inadequate and violated the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the Coastal Zone Management Act (CZMA). The Seventh Circuit Court of Appeals ruled that the agencies had violated NEPA by relying on incorrect assumptions about the frequency of well stimulation treatments, failing to consider the full range of alternatives, and not preparing a full environmental impact statement. The court then held that the agencies had violated the ESA by not engaging in the consultation process to determine if a species would be adversely affected. The court also held that the agencies had violated the CZMA by not preparing a review of the impacts their actions would have on the California coastal zone.

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## Alaska

***United States v. Alaska***, No. 1:22-cv-00054-SLG 2022 WL 1746844 (D. Alaska May 31, 2022).

The United States brought suit against the State of Alaska after it issued an emergency order opening the Kuskokwim River within the Yukon Delta National Refuge to gillnet fishing by all Alaskans. The federal government claimed that this resulted in a violation of a federal order issued to give effect to the Alaska National Interest Lands Conservation Act's rural subsistence priority provisions. The United States sought a temporary restraining order to prevent the Alaskan government from implementing the emergency order. The court denied the motion, ruling that there was insufficient evidence to demonstrate that the non-federally qualified users would contribute to a decline in the Kuskokwim River salmon populations if a temporary restraining order were not issued prior to the court ruling on the motion of a preliminary injunction.

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## California

***Almond Alliance of California v. Fish and Game Commission***, No. C093542, 2022 WL 1742458 (Cal. Ct. App. May 31, 2022).

In 2018, several public interest groups petitioned the California Fish and Game Commission (CFGF) to list four species of bumble bees as endangered. The Commission listed the species under the California Endangered Species Act (CESA). The following year, the Almond Alliance of California filed suit alleging that the Commission exceeded its legal authority because CESA only covers species of "bird, mammal, fish, amphibian, reptile or plant." However, CFGF's definition of "fish" includes "wild fish, mollusk, crustacean, invertebrate, or amphibian." The trial court ruled that the word invertebrates contained in the definition of fish in the CESA was limited to marine invertebrates. On appeal, the court looked to the legislative history and the express language in the Act regarding other invertebrates being listed. The court ruled that "fish" was a term of art and was not limited to only aquatic species.

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## D.C. CIRCUIT

***City of Salisbury v. Federal Energy Regulatory Commission***, No. 20-1238, 2022 WL 2080343 (D.C. Cir. June 10, 2022).

The City of Salisbury, North Carolina operates a pump station for their drinking water 20 miles upstream of the High Rock Dam on the Yadkin River. During the relicensing process for the dam, the city brought concerns to the Federal Energy Regulatory Commission (FERC) about potential damage to the pump station during floods. FERC declined the city's request to require a new pump station and instead proposed a flood protection plan, which it ultimately did not require. The State of North Carolina subsequently required a flood protection plan as part of its water quality

certification. The city brought suit after a dispute about the scope of the requirement and the approval of a proposed plan. The court adopted FERC's interpretation of the terms and ruled that the dam operator needed to develop a flood protection plan that considered feasible alternatives for improved access and ensured that the station can continue to operate during a flood. Additionally, the court ruled that FERC's approval of the proposed plan was not arbitrary.

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***Oceana, Inc. v. Raimondo***, No. 21-5120, 2022 WL 2028199 (D.C. Cir. June 7, 2022).

Oceana Inc., an environmental nonprofit, filed suit against the National Marine Fisheries Service (NMFS) claiming that it violated the Magnuson-Stevens Fishery Conservation and Management Act by failing to provide sufficient protection for the dusky shark. Oceana claimed that NMFS failed to actually reduce dusky shark bycatch, hold fisheries accountable for bycatch, and establish that there was a reasonable likelihood that current measures in place would reduce dusky shark bycatch to a degree sufficient to rebuild the population. The court rejected the claim on the grounds that the zero-catch limit, the training protocol for bycatch, and the circle hooks requirement were sufficient efforts to reduce bycatch and hold fishermen accountable to the zero-catch limit. The court also ruled that NMFS had sufficient information to conclude that the training and certification measures put in place would reduce bycatch of the dusky shark. The D.C. Circuit affirmed the trial court's ruling in favor of NMFS.

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