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# Ocean and Coastal Case Alert

**The National Sea Grant Law Center** is pleased to offer the September 2012 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-12-03-09).

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## FIRST CIRCUIT

### ***United States v. Place*, 2012 U.S. App. LEXIS 17663 (1st Cir. Mass. 2012).**

The First Circuit Court of Appeals recently upheld a Lacey Act conviction against a defendant accused of illegally trafficking in sperm whale teeth and narwhal tusks in violation of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES). The defendant appealed his conviction, alleging that the district court erred in failing to give a lesser-included Lacey Act jury instruction since he did not actually know his transactions were illegal. The court disagreed, finding that no reasonable jury could have accepted his testimony and rejected the "mountain of evidence" that the defendant knew his conduct was illegal. The court also held that the conviction was substantively appropriate, rejecting the defendant's claims that the smuggling statute did not criminalize violations of regulations like those implementing CITES.

<http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=11-1246P.01A>»

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## SECOND CIRCUIT

***Spain v. Am. Bureau of Shipping, Inc*, 2012 U.S. App. LEXIS 18425 (2d Cir. N.Y. Aug. 29, 2012).**

The Second Circuit granted summary judgment to the American Bureau of Shipping (ABS) in connection with the 2002 oil spill off the coast of Spain from the oil tanker *Prestige*. Spain alleged that the organization breached its duty of care to the country by its reckless classification of the oil tanker. The court disagreed, noting that ABS did not owe Spain a duty of care in inspecting the tanker. Further, even if ABS did owe a duty of care, Spain did not produce evidence sufficient to show that ABS recklessly breached its duty or that its actions constituted a proximate cause of the wreck.

[http://www.ca2.uscourts.gov/decisions/isysquery/ca164cb5-c3ee-43f3-9925-26827c484c16/1/doc/10-3518\\_opn.pdf](http://www.ca2.uscourts.gov/decisions/isysquery/ca164cb5-c3ee-43f3-9925-26827c484c16/1/doc/10-3518_opn.pdf) »



## THIRD CIRCUIT

### Delaware

***Sierra Club Citizens Coalition, Inc. v. Tidewater Env'tl. Servs., Inc.*, 2012 Del. LEXIS 430**

**(Del. Aug. 16, 2012).**

An environmental group challenged a judgment upholding a decision by the Delaware Department of Natural Resources and Environmental Control (DNREC) to issue a company a permit to build and operate a sewage treatment facility within an area protected by the Coastal Zone Act (CZA). The Delaware Supreme Court held that the facility was neither a "heavy industry" use under the CZA, Del. Code Ann. tit. 7, § 7002(e), nor a "manufacturing" use. The case was remanded to the Coastal Zone Industrial Control Board.

<http://courts.delaware.gov/opinions/download.aspx?ID=176990> »

### New Jersey

***Mullen v. Ippolito Corp.*, 2012 N.J. Super. LEXIS 150 (App.Div. Sept. 10, 2012).**

Homeowners alleged a borough ignored their numerous complaints about an adjacent motel expanding its physical footprint and intensifying its business operations, all in violation of municipal zoning and dune protection ordinances. The homeowners claimed that they were without a realistic alternative form of administrative relief, under R. 4:69-6(a). The court ruled that the interest of justice warranted granting the plaintiffs an extension of the time limit for filing an action in lieu of prerogative writs against the borough.

<http://njlaw.rutgers.edu/collections/courts/appellate/a5823-10.opn.html> »



## NINTH CIRCUIT

***Ctr. for Biological Diversity v. Salazar*, 2012 U.S. App. LEXIS 17558 (9th Cir. 2012).**

The Ninth Circuit Court of Appeals affirmed a decision upholding regulations under Section 101(a)(5)(A) of the Marine Mammal Protection Act (MMPA) that authorize incidental take of polar bears and Pacific walrus resulting from oil and gas exploration activities in the Chukchi Sea and on the adjacent coast of Alaska. The court found that the regulations authorizing incidental take of the species did not violate the MMPA because the U.S. Fish and Wildlife Service (FWS) had determined the anticipated take would have only a negligible impact on the mammals' annual rates of recruitment or survival. The court also found that FWS's biological opinion and Environmental Assessment complied with both the Endangered Species Act and the National Environmental Policy Act.

***Pac. Coast Fedn. of Fishermen's Ass'ns v. Blank*, 2012 U.S. App. LEXIS 18974**

**(9th Cir. Sept. 10, 2012).**

The Ninth Circuit rejected a challenge to Amendments 20 and 21 to the Pacific Coast Groundfish Fishery Management Plan. Among other components, the Amendments included a "trawl rationalization," which divides the trawl fishery into three sectors and then assigns a discrete number of fishing privileges within each sector. Several non-trawl fishermen's associations and others filed suit alleging that the National Marine Fisheries Service (NMFS) violated the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and the National Environmental Policy Act (NEPA). Specifically, the groups alleged that Amendment 20's limited access program violated 16 U.S.C. § 1853a by failing to protect and promote the interests of fishing communities and by failing to restrict the authority to receive and hold privileges to those who "substantially participate" in the fishery. The court affirmed the district court's grant of summary judgment, finding that NMFS complied with MSA, which required the agency to consider fishing communities but did not require it to develop criteria for allocating fishing privileges to such communities or to restrict privileges to those who "substantially participate" in the fishery. NMFS also complied with NEPA by preparing a separate study for each amendment, analyzing a reasonable range of alternatives, adequately evaluating potential environmental effects, and adopting flexible mitigation measures.

<http://www.ca9.uscourts.gov/datastore/opinions/2012/09/10/11-17108.pdf> »

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## **Hawaii**

***In re Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications & Petition*,**

**2012 Haw. LEXIS 268 (Haw. Aug. 15, 2012).**

The Hawaii Supreme Court recently reviewed the state's Commission on Water Resource Management's Findings of Fact, Conclusions of Law (FOF/COL), and Decision and Order in which it amended Interim Instream Flow Standards (IIFS) for two streams and retained existing IIFS for two additional streams. Environmental groups appealed the decision, alleging that the IIFS did not protect traditional and customary native Hawaiian rights, appurtenant water rights, or the public trust. The Supreme Court of Hawaii ruled that because the FOF/COL did not contain any information on the effect the interim instream flow standards would have on native Hawaiian practices, the Commission did not fulfill its duty to protect native Hawaiian rights under Haw. Const. art. XII, § 7. The court vacated the Commission's decision and remanded the case to the Commission for further consideration of the effect the IIFS will have on native Hawaiian practices, as well as the feasibility of protecting the practices.

[http://www.courts.state.hi.us/docs/opin\\_ord/sct/2012/aug/SCAP-30603ada.pdf](http://www.courts.state.hi.us/docs/opin_ord/sct/2012/aug/SCAP-30603ada.pdf) »

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## **ELEVENTH CIRCUIT**

***Chaparro v. Carnival Corp*, 2012 U.S. App. LEXIS 18660 (11th Cir. Sept. 5, 2012).**

Recently, the Eleventh Circuit Court of Appeals reversed the dismissal of a case filed by the parents and brother of a cruise ship passenger killed by a stray bullet while on a cruise ship excursion. The passenger was riding with her family in an open-air bus that encountered a funeral service of a gang member. Gang-related, retaliatory violence erupted at the funeral and shots were fired, killing the daughter. The passenger's family filed a complaint alleging that the cruise ship operator failed to warn them of a local crime problem. The claim was dismissed by a lower court. On appeal, however, the court found that the complaint was more than a mere recitation of the elements of the cause of

action, given that the alleged facts were plausible and raised a reasonable expectation that discovery could supply additional proof of liability of the cruise line.

<http://www.ca11.uscourts.gov/opinions/ops/201114047.pdf> »

## Georgia

***Defenders of Wildlife v. United States Dep't of the Navy*, 2012 U.S. Dist. LEXIS 126924**

**(S.D. Ga. Sept. 6, 2012).**

A federal district court dismissed a lawsuit challenging the U.S. Navy's plans to install an undersea warfare training range off the coast of Jacksonville, Florida. The range would be constructed adjacent to the calving grounds of the North Atlantic right whale, which is "the world's most critically endangered large whale species and one of the world's most endangered mammals." However, the court found that the Navy fully complied with its responsibilities under the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). Further, the court ruled that the National Marine Fisheries Service's biological opinion was not arbitrary and capricious.

<https://ecf.gasd.uscourts.gov/doc1/05711839173> »



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