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# Ocean and Coastal Case Alert

**The National Sea Grant Law Center** is pleased to offer the May 2016 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-16-03-05).

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## SECOND CIRCUIT

### New York

***Friends of Thayer Lake LLC v. Brown***, 2016 WL 2633031 (N.Y. May 10, 2016).

After a journalist took a canoe trip on a waterway that crossed private property, the property owners brought a trespass action and sought both a judgment barring public use and declaration that the waterway was not navigable-in-fact. The State of New York and the Department of Environmental Conservation intervened and asserted counterclaims seeking a declaratory judgment that the waterway was navigable-in-fact and an injunction against the property owners. A New York court declared that the waterway was navigable-in-fact and granted summary judgment in favor of the journalist and the state. On appeal, the appellate court held that the trial court was precluded from issuing summary judgment, as there were genuine issues of material fact as to whether the waterway was navigable-in-fact.

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***Bay Head, Inc. v. New York State Dep't of Envtl. Conservation***, 2016 WL 1577189 (N.Y. App. Div. Apr. 20, 2016).

Participants of the surfclam fishery brought an action challenging a memorandum issued by the New York State

Department of Environmental Conservation allocating the amount of surfclams that could be taken by each fishery participant in a particular harvest year. The participants alleged that the memorandum improperly altered the method of apportioning the amount taken. The trial court denied the fishery participants' motion for preliminary injunction, dismissing the complaint. On appeal, the court held that absent extraordinary circumstances, the court improperly directed dismissal of the complaint.

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## THIRD CIRCUIT

### New Jersey

***Olmo v. Atl. City Parasail, LLC***, 2016 WL 1704365 (D.N.J. Apr. 28, 2016).

Dina Olmo was injured while riding a boat on a parasailing trip with her family. She brought suit against the parasailing company, alleging negligence and unseaworthiness, among other claims. The parasailing company moved for summary judgment, claiming that the liability waiver signed by Olmo prior to the parasailing trip released the company from liability. The U.S. District Court for the District of New Jersey dismissed the claims, finding that the liability waiver was clear and unambiguous, conformed to public policy, and was not a contract of adhesion. Olmo, therefore, had waived her liability claims against the company.

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## SIXTH CIRCUIT

### Michigan

***Boler v. Early***, 2016 WL 1573272 (E.D. Mich. Apr. 19, 2016).

In a federal class action lawsuit arising from the water contamination in Flint, Michigan, plaintiffs claimed that the City of Flint violated their constitutional rights and state law by providing contaminated water and requiring them to pay for it. The defendants argued that the plaintiffs' constitutional claims under § 1983 were precluded by the Safe Drinking Water Act (SDWA), because the SDWA provides plaintiffs with a comprehensive scheme of remedies. The court agreed. The federal court dismissed the case, finding that it lacked jurisdiction because the state claims were precluded and the plaintiffs failed to state a claim under the SDWA.

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## NINTH CIRCUIT

***Boardman v. Pac. Seafood Grp.***, 2016 WL 1743350 (9th Cir. May 3, 2016).

Fishermen brought an action against seafood processors, asserting antitrust claims and seeking a declaratory judgment that one processor's proposed acquisition of another processor violated a resolution agreement in a prior

lawsuit between the parties. The U.S. District Court for the District of Oregon entered orders granting the fishermen's motion for a preliminary injunction and denying the processors' motion to compel arbitration. On appeal, the Ninth Circuit affirmed the decision, holding that the resolution agreement's arbitration provision did not include the fishermen's present claims and that the fishermen did not release their present claims. The court also ruled that the proposed acquisition was an unlawful merger under the Clayton Act. Finally, the court found that the fishermen would be irreparably harmed absent a preliminary injunction, and the injunction was not overbroad.

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## California

***Friends of Martin's Beach v. Martin's Beach 1 LLC***, 2016 WL 1704100 (Cal. Ct. App. Apr. 27, 2016).

A state appellate court reinstated a lawsuit over public access to Martin's Beach in California. The suit arose when a private property owner restricted access to the beach. An advocacy group brought suit alleging that the public had a right to access the beach, alleging public access rights under the California constitution and a public easement. The landowners filed a cross complaint to quiet title, as well as for declaratory and injunctive relief. A lower court granted the property owner's motion for summary judgment. On appeal, the appellate court affirmed in part and reversed in part the lower court's opinion. The appellate court held that neither the United States nor California held any public interest in the oceanfront land because it had transferred into private ownership before California statehood. The court ruled, however, that the facts in the complaint were sufficient to establish a common law dedication of oceanfront property for beach access; therefore, it reversed and remanded the dedication claims. The court also ruled that the judgment quieting title to the property in favor of the landowners improperly exceeded the scope of the cross-complaint.

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## Oregon

***National Wildlife Federation, et al., v. National Marine Fisheries Service, et al.***, 2016 WL 2353647 (D.

Or. May 4, 2016).

Environmental organizations filed suit alleging that NOAA Fisheries violated the Endangered Species Act (ESA) and the Administrative Procedure Act (APA) when it issued a 2014 biological opinion (BiOp) on the effects of the Federal Columbia River Power System on salmon and steelhead. The organizations also alleged that the U.S. Army Corps of Engineers (Corps) and the U.S. Bureau of Reclamation (BOR) violated the National Environmental Policy Act (NEPA) by failing to prepare an environmental impact statement in connection with their records of decision implementing the 73 reasonable and prudent alternatives (RPAs) described in the 2014 BiOp. The court agreed that NOAA Fisheries violated the ESA and the APA in determining that the RPAs in the BiOp did not jeopardize the listed species, but did not violate the laws in determining that the RPAs do not adversely modify critical habitat and are not likely adversely to affect endangered Southern Resident Killer Whales. The court found that the Corps and BOR violated NEPA in failing to prepare an EIS. The court ordered NOAA Fisheries to issue a new BiOp no later than March 1, 2018.

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## Florida

***Miami Dade Cty. v. Florida Power & Light Co.***, 2016 WL 1578462 (Fla. Dist. Ct. App. Apr. 20, 2016).

An electric utility submitted its site certification application to the Florida Department of Environmental Protection, pursuant to the state Electrical Power Plant Siting Act (PPSA), seeking approval to construct and operate two new nuclear generating units and associated facilities. An administrative law judge (ALJ) issued its recommended order approving the project, and the Siting Board issued a final order adopting ALJ's recommended order. On appeal, a Florida district court judge reversed and remanded that order. The court held that the Siting Board was required to consider local regulations when certifying a utility's request to install new transmission lines. Further, the "development" exception to the requirement that the Board consider local land regulations when certifying projects pursuant to PPSA did not apply to the certification of a utility's request. Finally, the court ruled that the Board was empowered, pursuant to the PPSA, to condition certification of the utility's expansion project on the utility's installation of power lines underground, at the utility's expense.

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## FEDERAL CLAIMS

***St. Bernard Par. Gov't v. United States***, 2016 WL 2641792 (Fed. Cl. May 4, 2016).

On May 1, 2015, the U.S. Court of Federal Claims issued a Memorandum Opinion finding that the U.S. Army Corps of Engineers' (Corps) construction, expansions, operation, and failure to maintain the Mississippi River–Gulf Outlet caused increased storm surge flooding on plaintiffs' properties during Hurricane Katrina and subsequent hurricanes and severe storms, effecting a temporary taking under the Fifth Amendment to the U.S. Constitution. On May 4, 2016, the court issued a final partial judgment on the amount of just compensation due the owners of eleven "trial properties" selected by the court. The court's order will allow other businesses and residential property owners to file a class action for just compensation.

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