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# Ocean and Coastal Case Alert

**The National Sea Grant Law Center** is pleased to offer the August 2017 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-17-03-08).

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## FIRST CIRCUIT

### Massachusetts

***Cave Corp. v. Conservation Comm'n of Attleboro***, No. 16-P-944, 2017 WL 2989550 (Mass. App. Ct. July 14, 2017).

Cave Corporation filed several notices of intent with the Conservation Commission of Attleboro to construct and develop an existing subdivision, which was partially located on vegetated wetlands. The Commission did not act on the notice for construction on one lot (Lot 7), and the Massachusetts Department of Environmental Protection (DEP) issued a superseding order that approved the proposed work. The Commission responded to the other filed notices and conditionally approved the proposed construction for a roadway extension. The Commission did not approve the construction of a driveway, which happened to be located on Lot 7, because it was located in a protected area. Cave filed a complaint seeking to have the DEP order declared as the authority for the construction of the roadway extension on Lot 7, which would permit Cave to build the driveway. The lower court judge determined that the Commission's order regarding the roadway extension condition applied to the driveway on Lot 7 despite the DEP order regarding Lot 7. Cave appealed, and the appellate court affirmed the lower court's decision stating that there was no error of law by the lower court judge, and the condition prohibiting the roadway extension in the wetland protection zone was appropriate.

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## THIRD CIRCUIT

### New Jersey

***Zitter v. Petruccelli***, No. 15-6488 (NLH/KMW), 2017 WL 3393805 (D.N.J. Aug. 7, 2017).

Marc Zitter brought a claim against the New Jersey Department of Environmental Protection's Division of Fish and Wildlife (F&W) and the Department of Health (DOH). Zitter, an oyster farmer, alleged that the agencies violated his constitutional rights when charging him with harvesting shellfish from prohibited waters and confiscating and destroying his oysters. Zitter had purchased the seed oysters from a lab located in prohibited waters, then moved the oysters two more times to prohibited waters. Later, he moved the oysters to an approved site. A DEP permit is required to move oysters from prohibited waters to approved waters, and Zitter did not have a permit for any of the removals. The court found that all equipment and oysters seized from Zitter's property was seized under a warrant, so his Fourth Amendment rights were not violated. Zitter claimed there was no probable cause for the warrant because he never sold or marketed any of the oysters from prohibited waters. However, he was charged with harvesting, not selling the oysters. Zitter argued that he still had a possessory interest in the oysters, and that the warrant did not permit the officials to destroy the oysters. The court reasoned that property acquired criminally does not reside with the criminal. Therefore, Zitter had no possessory interest in the oysters, and their destruction did not violate the Fourth Amendment or Due Process Clause. The defendant's motion to dismiss the federal law claims was granted, and the court declined jurisdiction over the state law claims.

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## FOURTH CIRCUIT

### South Carolina

***James Jefferson Jowers Sr., et al. v. S.C. Dep't of Health and Env'tl. Control***, No. 27725, 2017 WL 3045982 (S.C. July 19, 2017).

James Jefferson Jowers Sr. and others brought suit against the South Carolina Department of Health and Environmental Control (Department), claiming that exemptions from the Surface Water Withdrawal Act for agricultural users resulted in an unconstitutional taking of their right to reasonable use of the water adjacent to their property, as upstream agricultural users were withdrawing thousands of gallons of water with limited oversight. The plaintiffs also claimed that the exemptions violated the public trust doctrine. The lower court granted the Department's motion for summary judgment, reasoning that the plaintiffs did not suffer an injury in fact under the Act and that the case was not ripe for adjudication. The appellate court affirmed.

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## FIFTH CIRCUIT

### Louisiana

***Sheldon v. C&C Fishery, LLC***, No. 16-16293, 2017 WL 3033797 (E.D. La. July 18, 2017).

Martha Sheldon filed suit against C&C Fishery, LLC and others alleging that her son obtained a fatal infection while aboard C&C's boat and subsequently died due to the negligence of the crew. Sheldon claimed that under the Jones Act her son was considered a seaman and employee of the defendant. The defendants removed the case to federal court, alleging that Sheldon fraudulently pleaded her Jones Act claim and argued that the federal court is the proper venue because the applicable law for legal recourse and compensation is the Federal Employees Compensation Act. After removal, Martha Sheldon filed a motion to remand the case back to state court. The federal court judge granted Sheldon's motion to remand, because the defendant could not meet the burden of showing that the Jones Act claim was actually fraudulently pleaded.

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## SIXTH CIRCUIT

***Herr v. United States Forest Serv.***, No. 16-2126, 2017 WL 3160845 (6th Cir. July 26, 2017).

In 2010, David and Pamela Herr purchased lakefront property on Crooked Lake in the Upper Peninsula of Michigan. The couple planned to use the lake for recreational boating and fishing. Congress gave the U.S. Forest Service authority to regulate any use of Crooked Lake and nearby lakes, "subject to valid existing rights." The Forest Service prohibited gas-powered motorboats and limited electrically powered motorboats to no-wake speeds throughout the wilderness area in the 2007 Forest Order. The plaintiffs used their motorboat on the lake without interference until 2013 when the Forest Service informed them they would enforce the regulations against them. The Herrs brought suit, seeking to enjoin the Forest Service from enforcing the restrictions. The court held that under Michigan law, the Herrs' littoral rights ensured their right to reasonably use the lake. The court ruled that the plaintiffs' property rights took precedence over the Forest Service's authority to regulate the lake. One justice dissented, reasoning that the Forest Service could still impose reasonable restrictions on riparian and littoral rights because they were given authority by Congress to impose regulations.

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## NINTH CIRCUIT

### California

***Orange Cty. Water Dist. v. Sabic Innovative Plastics US, LLC***, No. D070553, 2017 WL 3326959 (Cal. Ct. App. Aug. 4, 2017).

The Orange County Water District alleged various business operations contaminated groundwater. The Water District filed suit under the Hazardous Substance Account Act (HSAA), the Orange County Water District Act (OCWD Act), and for negligence, nuisance, and trespass. The trial court granted summary judgment in favor of the defendants. On appeal, the court held that the HSAA claims against several defendants were dismissed in error. The HSAA only requires the plaintiff to show a release at the site caused the Water District's necessary response costs. It does not require the Water District to show how the defendant caused the release. The appellate court also held that the Water District's remedial costs being investigatory was not dispositive of an OCWD claim, and, in fact, those costs accrued as a response to the pollution. However, dismissal of this claim was proper, because the Water District could not show causation between the specific business and the contamination. The appellate court affirmed the dismissal of trespass

claims, because before capture or appropriation water cannot be owned by a private person. However, the nuisance claim dismissal was reversed, because the defendants failed to show that the plaintiff had no property interest in the water. Therefore, the appellate court affirmed the trial court in part and reversed in part.

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## Oregon

***Sea Water Seafoods Co. v. Frank Dulcich***, No. 6:16-cv-01607-MC, 2017 WL 3083259 (D. Or. July 17, 2017).

Sea Water Seafoods and others filed an antitrust action against Frank Dulcich and the Pacific Seafood Group alleging violations of the Sherman Act and the Clayton Act for illegally using market power to interfere with the plaintiffs' businesses by blocking access to fishing docks. The plaintiffs also claimed tortious interference with business relations, trespass, and negligence. Dulcich and the Pacific Seafood Group filed a motion to dismiss all the claims. After arguments, the court denied the motion and will set a trial date for this matter.

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## DC CIRCUIT

### District of Columbia

***Blue Water Baltimore v. Pruitt***, No. 16-452 (RBW), 2017 WL 3049405 (D.D.C. July 18, 2017).

Blue Water Baltimore and other environmental organizations (plaintiffs) filed suit challenging the Environmental Protection Agency's (EPA) approval of reclassifications in Maryland's 2012 Surface Water Quality report. The EPA motioned to dismiss, arguing that the plaintiffs lack standing to sue, they failed to state a claim for which relief could be granted, and the issue is moot. The court granted the motion and dismissed the complaint reasoning that the issue was moot because the 2014 Report superseded the 2012 Report.

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