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# Ocean and Coastal Case Alert

## The National Sea Grant Law Center

is pleased to offer the February 2019 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-19-03-02).

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## FIRST CIRCUIT

### New Hampshire

***State v. Lilley***, No. 2017-0116, 2019 WL 493721 (N.H. Feb. 8, 2019).

The New Hampshire Supreme Court upheld the convictions of three women who performed nude yoga on a local beach. According to the plaintiffs, they were protesting a town ordinance that prohibits public nudity. The town defines “nudity” as “[t]he showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple.” The women claimed that because the ordinance used a gender-based classification, it violated equal protection and free speech rights under the New Hampshire and United States Constitutions. The court, in a 3-2 ruling, held that the ordinance does not discriminate on the basis of gender, nor did it violate the women’s right to free speech. The court concluded, “The ordinance merely reflects the fact that men and women are not fungible with respect to the traditional understanding of what constitutes nudity.”

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## SECOND CIRCUIT

***Nat'l Fuel Gas Supply Corp. v. New York State Dep't of Env'tl. Conservation***, No. 17-1164-CV, 2019 WL 446990 (2d Cir. Feb. 5, 2019).

The New York State Department of Environmental Conservation denied a Clean Water Act water quality certification for a natural gas pipeline between northwestern Pennsylvania and western New York. The company appealed the denial. The U.S. Court of Appeals for the Second Circuit agreed, vacating the department’s decision. The court found that the denial letter inadequately expressed “any rational connection between facts found and choices made.”

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## FOURTH CIRCUIT

***Save Our Sound OBX, Inc. v. N. Carolina Dep't of Transportation***, 914 F.3d 213 (4th Cir. 2019).

A nonprofit organization and its members brought suit against the Federal Highway Administration and the North Carolina Department of Transportation, challenging a decision to replace a highway with a bridge across the Pamlico Sound. The group alleged that the agencies' approval violated the National Environmental Policy Act (NEPA) and the Department of Transportation Act (DTA). The U.S. District Court for the Eastern District of North Carolina granted summary judgment in favor of the agencies. On appeal, the Fourth Circuit affirmed, finding that the agencies did not violate NEPA by failing to prepare a supplemental environmental impact statement before issuing a record of decision. The court noted that the proposed amended complaint failed to state a claim for the violation of the DTA.

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## FIFTH CIRCUIT

### Louisiana

***Joseph v. Sec'y, Louisiana Dep't of Nat. Res.***, 18-414 (La. App. 5 Cir. Jan. 30, 2019).

A Louisiana appellate court upheld a Louisiana Department of Natural Resources (DNR) Coastal Use Permit issued for the construction and operation of a crude oil pipeline, two pump stations, and other ancillary facilities. The court overturned a lower court decision finding that the agency did not properly apply coastal use guidelines in issuing the permit. The appellate court found that the guidelines were not applicable to the permit, and the lower court erred in remanding the case to DNR for the development of further environmental protection and emergency or contingency plans.

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***Atchafalaya Basinkeeper v. U.S. Army Corps of Engineers***, No. CV 18-23-SDD-EWD, 2019 WL 491312 (M.D. La. Feb. 7, 2019).

The U.S. District Court for the Middle District of Louisiana denied a preliminary injunction motion to stop construction on an oil pipeline in the Atchafalaya Basin. The district court had previously granted a preliminary injunction, but the U.S. Court of Appeals for the Fifth Circuit overturned that ruling. In the current motion, the plaintiffs claimed that the Fifth Circuit did not consider flooding issues and alleged permit violations; therefore, the motion was ripe for review. The district court disagreed and denied the motion. The court noted that construction in the Basin is near completion, and the request for relief may already be moot.

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## NINTH CIRCUIT

### California

***Oceana, Inc. v. Ross***, No. 16-CV-06784-LHK, 2019 WL 266517 (N.D. Cal. Jan. 18, 2019).

In January 2018, the U.S. District Court for the Northern District of California granted an environmental group's motion for summary judgment on a challenge to the National Marine Fisheries Services' 2016 Catch Rule for the central subpopulation of northern anchovy. The court found that the rule violated the Magnuson-Stevens Act and the Administrative Procedure Act. This January, the court granted the environmental group's motion to enforce the court's previous order.

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## Washington

***Swinomish Indian Tribal Cmty. v. Army Corps of Engineers***, No. 2:18-CV-598-RSL, 2019 WL 469842

(W.D. Wash. Feb. 6, 2019).

The U.S. District Court for the Western District of Washington ruled that a shellfish aquaculture company may intervene in a lawsuit challenging the U.S. Army Corps of Engineers' (Corps) issuance of Nationwide Permit 48. The Swinomish Indian Tribal Community filed the suit alleging that the Corps violated the Clean Water Act and the National Environmental Policy Act in issuing the permit, which authorizes certain activities for the continued operations of existing commercial aquaculture farms. The court allowed the shellfish company to intervene for several reasons: 1) the company has beds authorized under the permit; 2) the company's interest would be impacted by the court's decision; and 3) the company's interests may not be adequately represented by the existing defendants.

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## ELEVENTH CIRCUIT

### Florida

***Kanter Real Estate, LLC v. Dep't of Env'tl. Prot.***, No. 1D17-5096, 2019 WL 436613 (Fla. Dist. Ct. App. Feb. 5,

2019).

A Florida court held that the Florida Department of Environmental Protection (DEP) must issue a permit to drill an exploratory oil well in an "environmentally degraded" property located in the Florida Everglades. The court found that in denying the permit, the DEP incorrectly applied a statutory balancing test weighing environmental interests against the right to explore for oil. The court ruled that it was an abuse of discretion for the agency to ignore an administrative law judge's factual findings in applying the test.

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## DC CIRCUIT

***Hoopa Valley Tribe v. Fed. Energy Regulatory Comm'n***, 913 F.3d 1099 (D.C. Cir. 2019).

The Hoopa Valley Tribe sought review of a Federal Energy Regulatory Commission decision finding that the licensee for a hydroelectric project failed to diligently pursue relicensing of the project and that Oregon and California had not waived their authority to issue water quality certifications for the project. The U.S. Court of Appeals for the District of Columbia ruled the licensee's withdrawn and resubmitted requests did not trigger new statutory review periods of review. Thus, the states waived their water certification authority for the project.

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