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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the April 2020 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-20-03-04).

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U.S. SUPREME COURT

CITGO Asphalt Ref. Co. v. Frescati Shipping Co., Ltd., No. 18-565, 2020 WL 1496603 (U.S. Mar. 30, 2020).

In 2004, an oil tanker traveling from Venezuela to New Jersey struck an abandoned ship anchor near a marine terminal, spilling more than a quarter million gallons of heavy crude oil into the Delaware River. The owner of the ship and the United States, as the owner's subrogee, brought suit against the ship's charterer to recover cleanup costs. The plaintiffs alleged that the charterer breached a "safe-berth clause" in the subcharter agreement. The Third Circuit held that the charterer was responsible for \$140 million in damages. The U.S. Supreme Court upheld the ruling, holding that the safe-berth clause established a warranty of safety that imposed liability for unsafe berth regardless of the charterer's diligence in selecting the berth.

[Opinion Here](#)

FIRST CIRCUIT

Massachusetts

Conservation Law Found., Inc. v. ExxonMobil Corp., No. CV 16-11950-MLW, 2020 WL 1332949 (D. Mass. Mar. 21, 2020).

An environmental group filed suit over a Clean Water Act (CWA) discharge permit for a petroleum storage and distribution terminal. The suit alleged that the company, ExxonMobil, violated the permit, the CWA, and the Resource Conservation and Recovery Act. The plaintiffs argued that the terminal owner failed to consider likely weather patterns, including flooding and severe storms caused by climate change, in operating the terminal. ExxonMobil moved to stay the case until the EPA renewed its permit. The court granted the motion.

[Opinion Here](#)

FIFTH CIRCUIT

Louisiana

Atchafalaya Basinkeeper v. U.S. Army Corps of Engineers, No. CV 18-23-SDD-EWD, 2020 WL 1450750 (M.D. La. Mar. 25, 2020).

Environmental groups sued the U.S. Army Corps of Engineers (Corps) for the issuance of permits to construct and maintain a pipeline capable of transporting nearly half a million barrels of crude oil a day across the Atchafalaya Basin. The groups alleged that the Corps violated the National Environmental Policy Act, the Clean Water Act, and the Rivers and Harbors Act in issuing the permits. Both parties filed a motion for summary judgment. The U.S. District Court for the Middle District of Louisiana denied the environmental groups' motion for summary judgment and granted summary judgment in favor of the Corps. The court found that the Corps met its obligations under federal law, and the agency's findings were entitled to deference.

[Opinion Here](#)

D.C. CIRCUIT

District of Columbia

Marino v. Nat'l Oceanic & Atmospheric Admin., No. 18-CV-2750 (DLF), 2020 WL 1479515 (D.D.C. Mar. 26, 2020).

In 2017, a SeaWorld orca featured in the documentary *Blackfish* died. Scientists and animal protection advocacy groups sought to compel the National Marine Fisheries Service (NMFS) to require SeaWorld to provide a necropsy report of the animal's death, as this was a provision included in the orca's take permit. The agency concluded that amendments to the Marine Mammal Protection Act (MMPA) superseded this requirement and declined to request the report from SeaWorld. The scientists and groups filed suit, alleging that NMFS' decision was arbitrary and capricious in violation of the Administrative Procedure Act. The U.S. District Court for the District of Columbia dismissed the case, holding that the plaintiffs lacked standing to sue because they were unable to establish an injury.

[Opinion Here](#)

California v. Trump, No. CV 19-960 (RDM), 2020 WL 1643858 (D.D.C. Apr. 2, 2020).

The states of California, Oregon, and Minnesota challenged an Executive Order that requires agencies to repeal two existing rules for each new rule promulgated. The plaintiffs claimed that the order and the implementing guidance violated the separation of powers, the Constitution's Take Care Clause, and the Administrative Procedure Act. The U.S. District Court for the District of Columbia dismissed the case for lack of standing. The court stated that the plaintiffs did not establish standing, even with special considerations for state claims and relaxed requirements suitable for procedural injury cases. The court concluded that the plaintiffs did not show any material delay in action or any agency action was caused by the Executive Order or the guidance.

[Opinion Here](#)

Ctr. for Biological Diversity v. Ross, No. CV 18-112 (JEB), 2020 WL 1809465 (D.D.C. Apr. 9, 2020).

The U.S. District Court for the District of Columbia held that the National Marine Fisheries Service's (NMFS) 2014 Biological Opinion (BiOp) for the North Atlantic right whale violated the Endangered Species Act (ESA). The BiOp found that the American lobster fishery would not jeopardize the continued existence of the North Atlantic right whale. The court concluded that NMFS failed to include an "incidental take statement" as required under the ESA, and its reasons for doing so were "unavailing."

[Opinion Here](#)

FEDERAL CLAIMS

Lemon Bay Cove, LLC v. United States, No. 17-436L, 2020 WL 1316839 (Fed. Cl. Mar. 20, 2020).

A Florida property owner brought suit against the United States, claiming that the U.S. Army Corps of Engineers' denial of a permit to bulkhead and fill mangrove wetlands on the property resulted in a taking of both the property itself and the "vested statutory special riparian right" arising under Florida law. The government disputed that a "vested statutory special riparian right" applied, but if it did, it would be subject to reasonable regulation. It also contended that there was neither a regulatory nor a categorical taking because the property retains significant economic value. Both parties moved for summary judgment. The Court of Federal Claims denied the motions, finding that factual issues precluded summary judgment.

[Opinion Here](#)

City of Fresno v. United States, No. 16-1276L, 2020 WL 1451987 (Fed. Cl. Mar. 25, 2020).

The City of Fresno, irrigation districts, and landowners sued the United States, the Bureau of Reclamation, and a water authority, alleging breach of contract and a Fifth Amendment taking related to reduced water deliveries during a California drought. The defendants moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim. The Court of Federal Claims granted the motion in part and denied it in part. The court declined to dismiss the breach of contract claims for the city and irrigation districts, but it held that the landowners lacked standing to pursue the breach of contract claims. The court found that all plaintiffs lacked standing to pursue the takings claims.

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