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# Ocean and Coastal Case Alert

**The National Sea Grant Law Center** is pleased to offer the November 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-20-03-11).

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## FIRST CIRCUIT

### Maine

***Portland Pipe Line Corp. v. City of S. Portland***, 2020 ME 125 (Oct. 29, 2020).

In 2017, the U.S. District Court for the District of Maine dismissed a challenge to the City of South Portland's "Clear Skies Ordinance" prohibiting bulk loading of crude oil onto tankers in the city's harbor. The court rejected the claim that state law preempted the ordinance. On appeal, the First Circuit certified three questions to the Maine Supreme Judicial Court to determine whether the ordinance conflicts with state law. In response, the Maine Supreme Court ruled that state law does not preempt the ordinance. The case will now return to the First Circuit, which will consider the constitutional law questions.

[Opinion Here](#)

### Massachusetts

***Ari Soroken, trustee, AMS Revocable Tr. v. Conservation Comm'n of Falmouth***, No. 19-P-1500, 2020 WL 6554038 (Mass. App. Ct. Nov. 9, 2020).

A Massachusetts appellate court upheld the Falmouth Conservation Commission's (Commission) decision to deny a landowner permission to build an elevated walkway and viewing platform on his beachfront property. The walkway would have replaced a footpath that provides direct beach access. The landowner challenged the denial, and a lower court ruled in favor of the Commission. On appeal, the court agreed that the Commission's findings were reasonable and supported by substantial evidence.

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## THIRD CIRCUIT

### Pennsylvania

***United States, et al., v. Pozsgai***, No. CV 88-6545, 2020 WL 6562060 (E.D. Pa. Nov. 9, 2020).

The U.S. District Court for the Eastern District of Pennsylvania entered an order in a thirty-year old case over wetland restoration on private property in Pennsylvania. In 1990, a judge ruled that the landowners were enjoined from further filling of protected wetlands on their property without a permit and ordered restoration of the wetlands. The court issued an Order of Civil Contempt in 2007 for the landowners' failure to comply with the restoration order. After years of attempted settlement, the U.S. Army Corps of Engineers (Corps) recently sought to have the court implement the 2007 contempt order. The court granted the Corps' motion. The Corps may now remediate the site and the landowners will be responsible for the costs. Under the order, a lien will be assessed against the property and a deed restriction will place limitations on the use of the property.

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## SEVENTH CIRCUIT

***Prairie Rivers Network v. Dynegy Midwest Generation, LLC***, No. 18-3644 (7th Cir. 2020).

An environmental group appealed the dismissal of a Clean Water Act (CWA) suit against the owner of a power station in Vermillion, Illinois. The group alleged that the power station was releasing contaminants into groundwater. The district court concluded that the CWA does not regulate groundwater. The group appealed, questioning validity of the district court's decision in light of the U.S. Supreme Court's *County of Maui* decision. The Seventh Circuit recently ruled on a motion to admit *amicus curiae* briefs filed by three groups. The court agreed that the briefs added value to the parties' briefs.

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## NINTH CIRCUIT

***Lam v. United States***, 2020 WL 6304703 (9th Cir. Oct. 28, 2020).

A tree collapsed onto a camper's tent while he and his family slept at the Kyen campground at Lake Mendocino in California. The lake is a recreation area built and operated by the U.S. Army Corps of Engineers (Corps). Corps employees maintain the campsites and the surrounding trees. The plaintiff brought suit against the Corps under the Federal Tort Claims Act (FTCA) alleging the agency negligently failed to cut down the tree. The district court granted the government's motion to dismiss. On appeal, the Ninth Circuit held that the Corps is entitled to the discretionary function exception defense under the FTCA. The Corps' policies regarding maintenance of trees at recreation areas allow for discretion on the part of Corps employees, and the Corps' policies provide rangers with discretion to make the type of policy decisions that the discretionary function exception was designed to shield from litigation.

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### California

***Inst. for Fisheries Res., et al., v. United States Food & Drug Admin., et al.***, No. 16-CV-01574-VC, 2020 WL 6495656 (N.D. Cal. Nov. 5, 2020).

The Institute for Fisheries Resources challenged a decision by the U.S. Food and Drug Administration (FDA) to allow a company to create and farm genetically engineered salmon. The court granted the Institute's motion for summary

judgment regarding the issue of whether the FDA violated the National Environmental Policy Act by concluding that approval of a new drug application would not have a significant impact on the environment, specifically on wild salmon. The court found that the FDA did not adequately assess the risk of harm before making a finding of no significant impact. The court also agreed that the FDA violated the Endangered Species Act by failing to consult with the appropriate agencies.

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## Oregon

***Chernaik v. Brown***, 367 Or. 143 (2020).

Plaintiffs, a group of minor children, sued the State of Oregon for declaratory and equitable relief related to the state's alleged failure to take sufficient steps to protect the state's public trust resources from the effects of climate change. The circuit court granted the state's motion to dismiss the action for lack of subject matter jurisdiction. On appeal, the Oregon Court of Appeals reversed and remanded, holding that because the case was for declaratory relief, dismissal of the case was the incorrect disposition. The court noted that the trial court should have entered a judgment declaring the parties' respective rights. Additionally, the court held that the state did not have an inherent fiduciary obligation under the public trust doctrine to take affirmative action to prevent substantial impairment to public trust resources from the effects of climate change.

[Opinion Here](#)

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## Washington

***Puget Soundkeeper Alliance v. APM Terminals Tacoma, LLC, et al.***, No. C17-5016 BHS, 2020 WL 6445825 (W.D. Wash. Nov. 3, 2020).

A federal district court ruled that industrial stormwater discharges from a wharf at a large marine cargo terminal were not subject to National Pollution Discharge Elimination System (NPDES) permit requirements under the Clean Water Act. An industrial stormwater discharge permit (IGSP) covers industrial activities like vehicle maintenance at the Port of Tacoma. An environmental group alleged that the entire port should be subject to the IGSP, including the wharf. The court disagreed, reasoning that equipment maintenance performed at the wharf is not an industrial activity covered by the ISGP.

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