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# Ocean and Coastal Case Alert

**The National Sea Grant Law Center** is pleased to offer the December 2021 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-21-03-12).

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## U.S. SUPREME COURT

***Mississippi v. Tennessee***, 142 S. Ct. 31 (2021).

The Middle Claiborne Aquifer supplies groundwater to many states, including Mississippi and Tennessee. The City of Memphis's local public utility company Memphis Light, Gas & Water (MLGW) pumps millions of gallons of groundwater from the aquifer to supply drinking water. Mississippi filed an original jurisdiction claim with the U.S. Supreme Court, arguing that MLGW's pumping has altered the historic flow of groundwater within the Middle Claiborne Aquifer and forcibly siphoned water owned by Mississippi into Tennessee. A Special Master appointed to the case by the Court determined that the Middle Claiborne Aquifer is an interstate water resource, and the doctrine of equitable apportionment applied. Equitable apportionment means that states have equal rights to shared water resources. The Special Master suggested the Court dismiss or grant leave to amend because Mississippi did not seek equitable apportionment. Mississippi argued that it owned the groundwater from the aquifer beneath its surface, and equitable apportionment did not apply. The Court held that equitable apportionment applied because the water of the aquifer naturally flows between the states, and neither could have unfettered ownership of the groundwater beneath its surface. Therefore, the Supreme Court dismissed Mississippi's complaint and declined leave to amend.

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## FIRST CIRCUIT

***Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers Loc. Lodge 207 v. Raimondo***, 18 F.4th 38 (1st Cir. 2021).

To protect the North Atlantic right whale from extinction, the National Marine Fisheries Services (NMFS) issued a rule creating a seasonal ban on certain methods of lobster harvesting in portions of the Atlantic Ocean off the Maine

coast. Several commercial fishermen and an organization impacted by the closure challenged the rule, and the district court granted a preliminary injunction, enjoining enforcement. On appeal, the government argued that the district court erred by enjoining enforcement and requested the rule go into effect during the appeal process. The court

reasoned that Congress charged NMFS with protecting endangered marine animals and that NMFS, as a policy choice, chose to protect right whales at the cost to commercial fishing operations. The court found that because NMFS based its models on the best evidence available, its decision was not arbitrary and capricious, contrary to the district court holding, and NMFS made a strong showing on the likelihood of success on the merits. The court recognized that postponing enforcement may result in irreparable harm, namely extinction of the right whale, while enjoining enforcement may prevent or delay the economic loss to the commercial fishing industry. Because the court must defer to an agency carrying out its congressional mandate unless the action is arbitrary or capricious, the First Circuit granted the stay pending appeal, allowing the rule to go into effect.

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## THIRD CIRCUIT

***Nederland Shipping Corp. v. United States***, 18 F.4th 115 (3d Cir. 2021).

A cargo ship, *Nederland Reefer*, was held in port pending an investigation after a shipboard inspection revealed an illegal discharge of bilge water in violation of the Act to Prevent Pollution from Ships (APPS). The owner of the vessel, Nederland Shipping Corporation, contracted with the United States for its release. Nederland completed its requirement under the contract, but the vessel was detained for an additional two weeks. Nederland sued the United States in federal district court, but the court dismissed the case for lack of jurisdiction. On appeal, Nederland argued that its agreement with the government was a maritime contract, invoking admiralty jurisdiction, and that the United States waived sovereign immunity regarding the APPS claim. The court determined that because the primary objective of the agreement was to release the ship to continue maritime trade, the district court had admiralty jurisdiction over the breach of contract claim. Further, because the plain text of the APPS waives sovereign immunity for monetary claims, the district court had jurisdiction over Nederland's APPS claim for compensatory damages for the unreasonable detention of the *Reefer*. The Third Circuit reversed and remanded the case to the district court to hear Nederland's claims.

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***United States v. Vastardis***, No. 20-2040, 2021 WL 5781647 (3d Cir. Dec. 7, 2021).

Nikolas Vastardis, a Greek national, appealed his conviction and sentence, which included a lifetime ban from entering the United States, for crimes related to maritime pollution that took place while he was onboard a foreign vessel on the high seas in international waters. Upon entering the Delaware Bay port, the U.S. Coast Guard inspected the vessel and found evidence of maritime pollution violations. The government charged Vastardis with four violations of the Act to Prevent Pollution from Ships (APPS). The governmental also charged Vastardis with obstructing the Coast Guard's inspection, arguing that Vastardis falsified records and gave false statements to hide the APPS violations. On appeal, Vastardis argued that the violations occurred while on the high seas, divesting the United States of jurisdiction. The court determined that the vessel's arrival in Delaware Bay triggered a duty to maintain accurate records while in U.S. waters, which brought Vastardis's conduct within U.S. jurisdiction under APPS. Further, the court determined that Vastardis knowingly intended to impede an investigation into the discharge records. Moreover, the court determined that the Coast Guard inspection qualified as a proceeding within § 1505, meaning Vastardis obstructed justice. Additionally, the court determined that because Vastardis made false statements to the Coast Guard during the inspection, those statements fell within U.S. jurisdiction. Therefore, the court found that the U.S. had jurisdiction to prosecute Vastardis on all counts and upheld the convictions and sentences, except the ban prohibiting Vastardis from entering the United States.

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## SEVENTH CIRCUIT

**Wisconsin**

***Sullivan v. Lucky 239, LLC***, No. 2020AP1891, 2021 WL 5457843 (Wis. Ct. App. Nov. 23, 2021).

The Sullivans purchased real estate located south of the Shaides's waterfront property. The Sullivans and Shaides disputed a portion of the common property boundary, including the location of the ordinary high water mark

(OHWM) and their respective rights to land extending into the lake. The Sullivans sued, claiming ownership of the disputed area. The court determined that the useable land beyond the OHWM should be apportioned to divide the total navigable waterfront in proportion to each party's actual shoreline, effectively giving the Shaides exclusive use of most of the disputed area. The Sullivans moved for reconsideration, which the court granted. The court determined that the method originally adopted to identify the OHWM neglected to adequately consider on-the-ground physical attributes. Further, the court needed to determine how to extend the common boundary to the OHWM, rather than apportion riparian rights beyond the OHWM, which effectively gave the Sullivans exclusive use of the disputed area. Subsequently, the Shaides appealed arguing that the court should not have reconsidered its prior decision. On appeal, the court found that the trial court reasonably determined that it did not properly apply the correct legal standard in its original decision because it did not adequately weigh the physical evidence at the site when identifying the location of the OHWM. Accordingly, the court did not err in reconsidering ownership of the disputed area.

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## NINTH CIRCUIT

### California

***In re Clean Water Act Rulemaking***, No. C 20-04636 WHA, 2021 WL 5792968 (N.D. Cal. Dec. 7, 2021).

In 2020, the Trump administration revised the Clean Water Act (CWA) Section 401 Certification Rule. Several states, tribes, and non-profit conservation groups challenged the rule. After taking office, President Biden revoked the rule by Executive Order. Subsequently, the Environmental Protection Agency (EPA) notified the court of its intent to revise the rule and moved for remand. Upon review, the court vacated and remanded the rule. Several states and industry groups intervened as defendants (intervenor) and filed a motion to stay the order vacating and remanding the rule. The district court denied the motion to stay. The court determined that the intervenors did not make a sufficiently strong showing of likelihood of success of appeal of the issue. Further, because the permitting process had already restarted, the intervenors did not show irreparable harm absent a stay. Moreover, the intervenors mostly described only speculative harm. Additionally, the court determined that to preserve some certainty in the administrative process, equity favored denying the stay.

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### Oregon

***Hayes Oyster Co. v. Dep't of Env't Quality***, 316 Or. App. 186 (2021).

In 2017, Hayes Oyster Co., an oyster harvesting business in Tillamook Bay, sought judicial review of a total maximum daily load (TMDL) for the Tillamook Bay Watershed. A TMDL is the calculation of the maximum amount of a pollutant allowed to enter a waterbody so that the waterbody will meet and continue to meet water quality standards for particular pollutants. The trial court ultimately granted summary judgment for the Oregon Department of Environmental Quality (DEQ). On appeal, Hayes Oyster argued that the fecal coliform bacteria levels permitted in the TMDL violate the federal Clean Water Act because they were not calculated to restore shellfish harvesting in certain areas of the bay. The court concluded that the claims were time barred and affirmed the trial court's ruling.

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## ELEVENTH CIRCUIT

### Florida

***Macias v. Celebrity Cruises, Inc.***, No. 21-CV-20813, 2021 WL 5853585 (S.D. Fla. Nov. 19, 2021).

During a cruise, two Macias family members presented symptoms of COVID-19 but were never tested. Upon returning home, all four Macias family members, all sixty-five or older, tested positive for COVID-19, and one died, despite the cruise line's assurances during the trip that no person aboard had contracted COVID-19. Macias sued Celebrity Cruises, alleging Celebrity was liable for the harm associated with the family's COVID-19 infection. Celebrity moved to dismiss. The court determined that because Macias comingles three separate negligence theories without each supported independently, the negligence claim should be dismissed with leave to amend. Further, upon amendment, Macias must present a plausible causation theory, noting that causation is typically not justiciable on a

amendment, plaintiffs must present a plausible causation theory, noting that causation is typically not justiciable on a motion to dismiss. Additionally, the court determined that because Celebrity's conduct was not outrageous as a matter of law, the intentional and/or reckless infliction of emotional distress claim should be dismissed with prejudice. Moreover, the court determined that the balance of interests weighed against an advisory jury at this stage, but it could be raised again closer to trial. Lastly, the court determined that it is too early to assess whether the Death on the High Seas Act applied to the estate's claims.

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## D.C. CIRCUIT

### District of Columbia

***AquAlliance v. United States Bureau of Reclamation***, No. CV 21-632 (JEB), 2021 WL 5823715 (D.D.C. Dec. 8, 2021).

AquAlliance filed a Freedom of Information Act (FOIA) request with the Bureau of Reclamation seeking summaries of certain water transfers. The Bureau's search determined that no summaries of the kind requested existed. AquAlliance sued challenging the adequacy of the search. Both parties moved for summary judgment on whether the Bureau was required to look for summaries only or whether it was obligated to look for the underlying information as well. The court determined that because AquAlliance specifically requested summaries, which the Bureau does not make, and because FOIA does not obligate agencies to create documents, the Bureau was not obligated to look for underlying information in response to the FOIA request. Therefore, the court granted the motion for summary judgment in favor of the Bureau.

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National Sea Grant Law Center  
256 Kinard Hall, Wing E  
University, MS 38677-1848



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