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# Ocean and Coastal Case Alert

**The National Sea Grant Law Center** is pleased to offer the November 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-21-03-11).

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## FIRST CIRCUIT

### Maine

***Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aero. Workers Local Lodge 207 v. Raimondo***, No. 1:21-CV-00275-LEW, 2021 WL 4823269 (D. Me. Oct. 16, 2021).

In an effort to protect the endangered North Atlantic right whale population, the National Marine Fisheries Service (NMFS) issued a Final Rule that effectively closes Lobster Management Area One (LMA 1) to commercial lobster fishing for most permit holders. LMA 1 encompasses nearly the entire coastal Maine lobster fishery. The Final Rule also includes gear and operation restrictions to limit right whale mortalities or serious injuries. Plaintiffs sought a temporary restraining order or preliminary injunction to set aside the closure measure in the Final Rule until NMFS issues a final rule that implements mitigation measures based on effectiveness of existing regulations, updated data, and reasonable alternatives. NMFS argued that the closure measure covers the period in which LMA 1 is a hotspot for right whales, but the court determined that the evidence did not indicate that right whales actually congregate in or pass through LMA 1 with enough regularity to render it a "hotspot." The court also found that the potential economic effects of the closure measure were sufficient to support preliminary injunctive relief. The court concluded that the plaintiffs presented sufficient evidence to show a likelihood of success and irreparable harm, and the balancing of equities supported stalling implementation of the closure measure. Therefore, the court granted the temporary restraining order and preliminary injunction pending a ruling on the merits.

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## FIFTH CIRCUIT

***Stevens v. St. Tammany Par. Gov't***, No. 20-30644, 2021 WL 5104865 (5th Cir. Nov. 3, 2021).

Three individuals (plaintiffs) sued the St. Tammany Parish and the Louisiana Department of Environmental Quality (LDEQ) for Clean Water Act (CWA) and Louisiana Pollution Discharge Elimination System Permit violations, alleging that sanitary sewer overflows and other pollutants are conveyed by St. Tammany drainage ditches to a catch basin that flows to the individuals' properties, increasing their storm and sewage burden, and to United States waters. Before filing this case, the plaintiffs litigated the same claims against the same defendants in the Louisiana state court system. The defendants moved to dismiss the case for failure to state a claim and *res judicata*. Under Louisiana law,

*res judicata* occurs when 1) the judgment in the prior action is void and 2) the judgment is final. The court granted the motion to dismiss. The plaintiffs then moved to alter or amend the judgment or, alternatively, stay the case until it could be resolved on appeal, which the court denied. The court determined that a minor and inconsequential factual error was insufficient to sustain a motion to alter or amend. The court concluded that all non-CWA claims were barred by *res judicata* and that if the CWA claims were not barred by *res judicata*, they were still dismissed for failure to state a claim. Therefore, the court denied the motion to amend or reconsider.

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## SIXTH CIRCUIT

### Michigan

***Waid v. Snyder***, No. 5:16-cv-10444 (E.D. Mich., Nov. 10, 2021).

The U.S. District Court for the Eastern District of Michigan granted final approval of a partial settlement for those impacted by contaminated drinking water in Flint, Michigan. The \$626.25 million settlement provides compensation to tens of thousands of residents who were impacted by exposure to lead, legionella, and other contaminants from the city's municipal water supply system during the Flint Water Crisis. According to the court, "The settlement reached here is a remarkable achievement for many reasons, not the least of which is that it sets forth a comprehensive compensation program and timeline that is consistent for every qualifying participant, regardless of whether they are members of a class or are non-class individuals represented by their own counsel."

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## NINTH CIRCUIT

***Inland Empire Waterkeeper v. Corona Clay Co.***, Nos. 20-55420, 20-55678, 2021 WL 5166295 (9th Cir. Nov. 5, 2021).

Two affiliated nonprofit groups brought a Clean Water Act (CWA) citizen suit against Corona Clay Company, asserting the recreational and aesthetic injuries of three members. A National Pollutant Discharge Elimination System (NPDES) permit is required when discharge from a point source flows directly into navigable waters of the United States, or when there is functional equivalent of a direct discharge. The plaintiffs raised one discharge violation claim, specifically that Corona illegally discharged pollutants into waters of the United States outside the terms of its NPDES permit, and two procedural violation claims, namely that Corona violated its NPDES permit by failing to monitor that discharge and report violations. Corona admitted that its storm water discharge flows indirectly to Temescal Creek, a tributary of the Santa Ana River that flows into the Pacific Ocean. The court held that if the required jurisdictional discharge has occurred, a CWA citizen suit can be premised on ongoing or reasonably anticipated monitoring or reporting violations. Therefore, the court vacated the trial court's judgment and remanded the case for further proceedings in accord with the court's interpretation of the intervening U.S. Supreme Court opinion *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020). The court reasoned that to meet the jurisdictional requirement established in *County of Maui*, the trial court must determine whether Corona's indirect discharges are the functional equivalent of a direct discharge into waters of the United States, or whether a jurisdictional discharge can otherwise be established. The court amended its September 20th opinion by changing the word "into" at page 20, line 16 of the September opinion to "to" in the November opinion and by omitting the word "admitted" at page 20, line 27 of the September opinion. Also, the court denied the petition for rehearing.

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### California

***Ctr. for Biological Diversity, Inc. v. Haaland***, No. 21-CV-01182-JCS, 2021 WL 4893401 (N.D. Cal. Oct. 20, 2021).

Two environmental groups brought suit against the Secretary of the U.S. Department of Interior and the U.S. Fish and Wildlife Service (collectively, FWS) asserting that the FWS failed to revise Stock Assessment Reports (SARs) for nine stocks of protected mammals, including certain populations of sea otters, polar bears, walrus, and manatees, as required by the Marine Mammals Protection Act (MMPA) and the Administrative Procedure Act (APA). FWS moved to dismiss for lack of standing and failure to state a claim on which relief may be granted. In a hearing this July, the parties agreed that the case is moot as to three of the stocks at issue (the southern sea otter, Chukchi/Bering Seas polar bear, and Southern Beaufort Sea polar bear) because FWS has now published revised SARs for those stocks. The

court therefore granted the motion to dismiss claim based on those stocks. The court concluded that the plaintiffs sufficiently alleged constitutional standing for the other stocks at issue, but the plaintiffs failed to sufficiently allege a violation of the MMPA. The court therefore granted the motion to dismiss claims related to the remaining stocks, with leave for the plaintiffs to amend the complaint.

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***In re Clean Water Act Rulemaking***, No. C 20-04636 WHA, 2021 WL 4924844 (N.D. Cal. Oct. 21, 2021).

Several states, tribes, and conservation groups challenged the Clean Water Act (CWA) certification rule. The Environmental Protection Agency (EPA) moved to remand the proceedings without vacatur. When an agency requests voluntary remand, a district court may vacate an agency's action without first ruling on the merits because vacatur is a form of equitable relief not expressly precluded by the Administrative Procedure Act (APA). The EPA argued that the court should not have considered whether to vacate the certification rule. The court concluded that whether to vacate a rule without a merits determination turns on 1) the seriousness of the order's deficiencies and the extent of doubt whether the agency chose correctly and 2) the consequential disruption of an interim change that may be also changed. Remand is generally only refused when the request is in bad faith or frivolous; remand is generally appropriate when the request is to consider a decision without confessing error and the agency's concern is substantial and legitimate. The court held that the gravity of the deficiencies of the certification rule support vacatur because: 1) the changes to the scope of the certification rule are arbitrary and capricious, 2) the rule is inconsistent with the purpose of the CWA, and 3) the EPA showed that it will not adopt the same rule on remand. Because the rule has only been in effect for thirteen months, vacatur will not invade any justifiable reliance. Further, the court reasoned that significant environmental harms will likely occur if the rule remains without vacatur. Therefore, the court vacated and remanded the rule to the EPA, temporarily returning to the previous rule until the EPA finalizes a new certification rule.

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## Hawaii

***Hawai'i Wildlife Fund v. Cty. of Maui***, No. CV 12-00198 SOM/KJM, 2021 WL 4898661 (D. Haw. Oct. 20, 2021).

This case is on remand following the U.S. Supreme Court decision holding that the Clean Water Act (CWA) requires a National Pollutant Discharge Elimination System (NPDES) permit when there is a functional equivalent of a direct discharge from a point source into navigable waters. In making the determination that it was the functional equivalent, the court examined each of the seven factors enumerated by the Supreme Court, paying particular attention to the time and distance factors, i.e., the most important factors. The court also considered the volume of the discharge, which was not a factor enumerated by the Supreme Court. The court found that because the record did not (and probably could never) establish the precise path of most of the wastewater, the county could not escape liability. The county argued that the court erred by considering volume, but the court concluded that it added context to the case. Further, the court concluded that considering the seven Supreme Court factors alone supports requiring a NPDES permit. The county argued that the court mischaracterized the wastewater as a pollutant, but because the county did not raise this argument until the motion for reconsideration, it was waived. Therefore, the court denied the motion for reconsideration.

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## ELEVENTH CIRCUIT

***Brizo, LLC v. Carbajal***, No. 20-11204, 2021 WL 5029390 (11th Cir. Oct. 29, 2021).

While cleaning the hull of the M/V Honey, a diver was killed when a crew member activated a bow thruster. The personal representatives of the diver's estate filed a wrongful death lawsuit in Florida state court alleging, among other things, negligence against Brizo, LLC, the vessel owner, and the crew of the vessel. Pursuant to the Limitation of Liability Act and Supplemental Rule 5 for exoneration of liability, Brizo then filed a complaint in admiralty in the U.S. District Court for the Southern District of Florida. In response, the plaintiffs filed a Notice of Claims against Brizo, alleging negligence. The district court granted Brizo summary judgment. The court found the diver solely at fault for the accident because he never notified the crew that he was present before he began his dive. In addition, the court faulted the diver for having failed to employ a dive flag, as required by safety regulations. On appeal, the Eleventh Circuit affirmed.

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## FEDERAL CLAIMS

***Biloxi Marsh Lands Corp. v. United States***, No. 12-382, 2021 WL 4979879 (Fed. Cl. Oct. 27, 2021).

Several property owners alleged the United States took their property in southeast Louisiana for public use through inverse condemnation without just compensation in violation of the United States Constitution, federal statutes, and certain servitudes granted by plaintiffs and assigned to the United States. In 2018 and 2019, the parties filed cross-motions for summary judgment on the issue of whether plaintiffs' claims are barred by the six-year statute of limitations for claims brought under the Tucker Act. In January 2021, the court issued an order granting in part and denying in part the government's motion for summary judgment. In February 2021, plaintiffs filed a motion for partial reconsideration of the January order, arguing the court committed clear legal error by considering the landowners' subjective knowledge in analyzing the doctrine of justifiable uncertainty. Plaintiffs asked the court to follow a 2007 Court of Federal Claims decision, *Banks v. United States*, which found government efforts to mitigate shoreline erosion caused justifiable uncertainty about the permanency of erosion although certain property owners did not know of the government's mitigation efforts or did not believe the government's efforts would be successful. The government argued the 2007 *Banks* decision incorrectly pieced together elements of the justifiable uncertainty doctrine. The court denied the plaintiffs' motion for partial reconsideration and found the doctrine of justifiable uncertainty contains both subjective *and* objective elements—the plaintiffs must be subjectively "uncertain," and their belief must be objectively "justifiable."

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