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# Ocean and Coastal Case Alert

**The National Sea Grant Law Center** is pleased to offer the November 2022 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-22-03-11).

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## FOURTH CIRCUIT

### North Carolina

***State ex rel. Stein v. E. I. du Pont de Nemours & Co.***, 2022-NCSC-110 (N.C. Nov. 4, 2022).

The State of North Carolina brought suit against a chemical company that produced agricultural and other specialty products and its successor companies for negligence, trespass, public nuisance, fraud, and fraudulent transfer. The state alleged that the company knowingly operated a plant that released harmful per- and polyfluoroalkyl substances (PFAS) into the environment for over 40 years and subsequently engaged in fraudulent restructuring to avoid liability. The out-of-state successor companies moved to dismiss the case for lack of personal jurisdiction. The lower court denied the motion. On appeal, the North Carolina Supreme Court considered whether the Due Process Clause allowed the court to exercise jurisdiction over the out-of-state successors. The court held that jurisdiction was proper under the Due Process Clause because the successor companies expressly assumed the predecessor's liabilities and the state sufficiently alleged that the predecessor fraudulently engaged in reorganization transactions.

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## NINTH CIRCUIT

***Save Bull Trout v. Williams***, 51 F.4th 1101 (9th Cir. 2022).

Several environmental organizations filed a citizen suit under the Endangered Species Act challenging U.S. Fish and Wildlife Service's (FWS) 2015 bull trout recovery plan. The U.S. District Court for the District of Montana entered summary judgment in favor of the FWS. On appeal, the Ninth Circuit Court of Appeals affirmed. The appellate court found that the organizations had standing to bring the suit; however, the suit was barred by claim preclusion.

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## California

***California Sportfishing Prot. All. v. Allison***, No. 2:20-CV-02482 WBS AC, 2022 WL 16577384 (E.D. Cal. Nov. 1, 2022).

The California Sportfishing Protection Alliance and Amador County, California filed a Clean Water Act (CWA) citizen suit against the Secretary of the California Department of Corrections and Rehabilitation and the Warden of Mule Creek State Prison. The defendants filed a motion for partial summary judgment on the issue of whether Amador County has standing to bring suit as a “citizen” under the CWA. The U.S. District Court for the Eastern District of California denied the motion. The court concluded that state and local government bodies fall within the CWA’s definition of “citizen” based on the statute’s unambiguous language.

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## Hawaii

***Dempsey v. Wild Side Specialty Tours, LLC***, No. CV 21-00342 HG-KJM, 2022 WL 14846548 (D. Haw. Oct. 26, 2022).

During a snorkel tour off the coast of Oahu, a tour participant fell while walking in wet fins on the vessel’s deck. The participant and her husband sued the tour owner and operator for negligence, loss of consortium, and damages pursuant to federal maritime law. The plaintiffs claimed that the tour company’s failure to provide instructions on safety regarding the snorkeling equipment caused the fall. The tour company asserted that the plaintiff signed a release and waiver of liability prior to the snorkel tour that precludes their recovery. The plaintiffs filed a motion for partial summary judgment, claiming the release and waiver is not enforceable due to 46 U.S.C. § 30509, a federal maritime regulation that prohibits vessel owners transporting passengers between U.S. ports from including liability limiting provisions for personal injury or death caused by negligence in contracts with passengers. The U.S. District Court for the District of Hawaii granted the plaintiffs’ partial summary judgment. The court agreed that the waiver was void under federal law. The questions of whether the defendant was negligent and caused the plaintiff’s alleged damages will be addressed at trial.

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## Oregon

***Northwest Env't Advocs. v. United States EPA***, No. 3:21-CV-01136, 2022 WL 15331465 (D. Or. Oct. 24, 2022).

Northwest Environmental Advocates (NWEA) sought judicial clarification of the scope of review with respect to three of its four claims brought under the Clean Water Act (CWA) and Administrative Procedure Act (APA). The plaintiff argued that the scope of review of its three CWA claims is not restricted to the administrative record, because the CWA, not the APA, provides the basis of relief for such claims. Second, NWEA argues that Claim Four, its APA unreasonable delay claim, is not restricted to the record because the agency has not issued a final decision and thus there can be no closed record of a final decision. The court concluded that the existing caselaw on agency inaction covers all three of NWEA’s claims, and held that the EPA was correct in that judicial review of agency decisions is limited to the agency record, subject to four narrow exceptions. The court concluded that the record is open with respect to Claims One, Three, and Four, and may therefore be supplemented as appropriate by any party, provided the proposed supplementation is justified given the existing record and evidentiary needs of the case. The court further allowed the NWEA to supplement the record for its claim regarding the agency’s failure to act because the alleged failure leaves no final administrative record and such supplemental materials may assist the court in fashioning an appropriate remedy, if any.

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## Washington

***Bang v. Lacamas Shores Homeowners Ass'n***, No. 3:21-CV-05834, 2022 WL 16553016 (W.D. Wash. Oct. 31, 2022).

A resident brought a Clean Water Act (CWA) citizen’s suit against Lacamas Shores Homeowners Association (HOA) seeking an injunction to stop the discharge of pollutants into Lacamas Lake and its wetlands. The HOA is responsible for maintaining the wetland biofilter stormwater treatment system of the residential community of Lacamas Shores.

The plaintiff alleged that the biofilter system has fallen into disrepair, which has caused it to generate new pollutants that are then released into Lacamas Lake. Both parties filed motions for summary judgment. The plaintiff requested the court to rule that the HOA is liable under the CWA for its pollutant discharge even if the biofilter falls within the definition of a “water of the United States.” The court denied this part of the motion, finding that a theory of liability premised on the biofilter simultaneously being a point source and a water of the United States is incompatible with the CWA. Second, the plaintiff requested the court rule that pollutant discharges from the privately owned biofilter are not covered by the existing Municipal Permit for the area and, therefore, are unauthorized. The court granted this part of the plaintiff’s motion, finding that the Municipal Permit does not apply to any pollutant discharged from the biofilter. In its summary judgment motion, the HOA contended that the biofilter cannot discharge pollutants to Lacamas Lake and its abutting wetlands because all of those waters are hydrologically connected and, therefore, they are not “meaningfully distinct water bodies.” The court disagreed, noting the HOA’s failure to cite to anything in the record supporting its conclusory assertion, and denied the HOA’s motion.

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## ELEVENTH CIRCUIT

### Alabama

***Barnes v. Town Council of Perdido Beach***, No. 1210072, 2022 WL 12240411 (Ala. Oct. 21, 2022).

Several residents sought an injunction to prevent the Perdido Beach Town Council from constructing a public boat launch and pier at the end of a public street and establishing a public park in the surrounding area. An Alabama circuit court ruled in favor of the Town Council. On appeal, the Alabama Supreme Court affirmed. The court found that construction of the boat launch and pier did not violate the street’s public dedication. Further, the construction of the boat launch and pier was a governmental function, not a proprietary one, and thus the wetland-setback provisions of city zoning ordinances and subdivision regulations did not preclude the construction project even though it would take place near a creek. Finally, the fact that certain amendments to zoning ordinances made it easier for Town Council to go through with the project did not make the amendments arbitrary.

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## D.C. CIRCUIT

### District of Columbia

***Kinsella v. Bureau of Ocean Energy Management***, No. CV 22-2147 (JMC), 2022 WL 16852674 (D.D.C. Nov. 10, 2022).

A resident of East Hampton, New York brought suit challenging the Bureau of Ocean Energy Management’s (BOEM) approval of the South Fork offshore wind energy project off the coast of Long Island. BOEM moved to transfer the case to the U.S. District Court for the Eastern District of New York. The court concluded that public-interest factors weighed heavily in favor of transfer, specifically citing the local interest in having a local controversy adjudicated locally, and the fact that the transferee court is more familiar with the issues in this case.

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