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# Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the July 2023 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-23-03-07).

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## SECOND CIRCUIT

### New York

***Unkechaug Indian Nation v. New York State Dep't of Env't Conservation***, No. 18CV1132WFKAYS, 2023 WL 4054523 (E.D.N.Y. June 16, 2023).

The Unkechaug Indian Nation and Harry Wallace (collectively, Unkechaug) sought a permanent injunction and declaratory judgment against the New York State Department of Environmental Conservation (NYSDEC), alleging that the agency's regulations, enacted to preserve the declining American eel population, unlawfully interfered with their fishing rights in designated Reservation areas and customary fishing waters. The plaintiffs claimed that the NYSDEC's regulations are preempted by federal law, that their fishing rights are protected by a treaty ("Andros Order"), and that the NYSDEC's regulations interfere with tribal self-government and impair the plaintiffs' freedom of religious expression. The U.S. District Court for the Eastern District of New York held that the NYSDEC's regulations are not preempted by federal law because fish management is an area that is traditionally reserved for the states through their police powers. The court found that the Andros Order was not a treaty and thus does not operate under state or federal law to grant the Unkechaug immunity from state fishing regulations. Therefore, the Unkechaug may fish freely in customary waters and off reservation lands, but they must still adhere to the state's conservation laws. The court additionally held that the Andros Order has no legal effect today, and so has no force under state law. Finally, the court held that the Unkechaug's First Amendment claims lack merit because nothing in the state's fishing regulations target religion in any way.

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## THIRD CIRCUIT

## Delaware

***State ex rel. Jennings v. Monsanto Co.***, No. 279, 2022, 2023 WL 4139127 (Del. June 22, 2023).

For over forty years, Monsanto was the only U.S. manufacturer of polychlorinated biphenyls (PCBs). PCBs, eventually banned in 1977, are forever chemicals that persist indefinitely in the environment and have been linked to many serious health effects. Hoping to recover cleanup costs, the State of Delaware sued Monsanto, asserting claims for public nuisance, trespass, and unjust enrichment for its continued production of PCBs after it knew and misrepresented the risks. The Superior Court of Delaware dismissed Delaware's complaint, holding that the state could not assert a public nuisance or trespass claim because Monsanto's manufactured PCB products entered the environment after sale to third parties. It further held that Delaware had no standing to bring a trespass claim because it held public lands in trust, not outright. On appeal, the Supreme Court of Delaware agreed that Delaware lacks standing to pursue a trespass claim for the land that it holds in trust, and that Delaware cannot assert an unjust enrichment claim to recover PCB cleanup expenses since Monsanto owes no legal duty besides its public nuisance and trespass claims. However, the Delaware Supreme Court partially reversed the lower court's ruling, holding that the question for environmental public nuisance and trespass claims is whether the defendant participated to a substantial extent in carrying out the activity that created the tort. Additionally, it held that Delaware may assert a trespass claim because it owns some land directly, not in trust.

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## FIFTH CIRCUIT

***Louisiana Dep't of Wildlife & Fisheries v. Nat'l Oceanic & Atmospheric Admin.***, 70 F.4th 872 (5th Cir. 2023).

In December 2019, the National Marine Fisheries Service (NMFS) promulgated a rule requiring certain shrimping vessels in Louisiana to use turtle excluder devices (TEDs). The rule required TEDs on all skimmer trawlers over 40 feet, including those that operate inshore. Louisiana's Department of Wildlife and Fisheries sued NMFS under the Administrative Procedure Act, challenging the rule as arbitrary and capricious. The district court found that Louisiana lacked standing to challenge the rule. On appeal, Louisiana argued that it had standing on four bases: the final rule preempts state laws regulating the harvest of shrimp in Louisiana waters, Louisiana has an interest in regulating marine resources, the state has a sovereign interest in the shrimp in its waters, and the rule interferes with Louisiana's enforcement of its wildlife laws. The U.S. Court of Appeals for the Fifth Circuit rejected the first two arguments because the state failed to raise these arguments before the district court. The court rejected the third argument because Louisiana failed to present evidence of a "concrete and particularized invasion of a legally protected interest." The fourth argument also failed because the state failed to provide sufficient proof that the rule would interfere with the enforcement of the state's wildlife laws.

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## NINTH CIRCUIT

***Fish Nw. v. Rumsey***, No. 22-35641, 2023 WL 4071941 (9th Cir. June 20, 2023).

The U.S. Court of Appeals for the Ninth Circuit affirmed and adopted a district court's opinion granting summary judgment to the National Marine Fisheries Service (NMFS) in an action filed by a recreational fishing organization challenging actions related to the management of Puget Sound Fisheries. The group alleged that NMFS violated Endangered Species Act § 7(a)(2) by failing to ensure that its actions in a 2021 Biological Opinion (BiOp) for resource management plans for salmon and steelhead gillnet fisheries do not jeopardize listed Chinook salmon. The district court dismissed this claim for lack of notice. They next claimed that the 2021 BiOp was arbitrary, capricious, and an abuse of discretion in violation of the Administrative Procedure Act (APA). The district court found this claim was not supported by the record and, therefore, NMFS's issuance of the BiOp did not violate the APA.

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## ELEVENTH CIRCUIT

***Wiegand v. Royal Caribbean Cruises***, No. 21-12506, 2023 WL 4445948 (11th Cir. July 11, 2023).

After an eighteen-month-old escaped her grandfather's grasp and fell to her death through an open cruise ship window, the child's parents sued Royal Caribbean Cruises, Ltd. The parents alleged general negligence, negligent failure to maintain, and negligent failure to warn. The district court granted the cruise ship's motion for summary judgment on all three counts. On appeal, the Eleventh Circuit affirmed the dismissal of the negligent failure to warn but reversed the dismissal of the general negligence and negligent failure to maintain claims and remanded those claims to the district court.

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## DC CIRCUIT

***Maine Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.***, 70 F.4th 582 (D.C. Cir. 2023).

The National Marine Fisheries Service (NMFS) issued a biological opinion (BiOp) on the impact of the lobster and Jonah crab fisheries on the North Atlantic Right Whale population, as required by the Endangered Species Act (ESA). Data on North Atlantic Right Whale entanglement is limited, so the NMFS relied on a "scarring analysis" from a 2019 study, concluding that the fishing gear in the lobster and Jonah crab fisheries kill about 46 North Atlantic Right Whales each year. Shortly after, NMFS promulgated a final rule implementing a Conservation Framework designed to be implemented in four stages to reduce right whale entanglements to near zero by 2030. The Maine Lobstermen's Association brought an action under the ESA challenging the BiOp and phase one rule implementing the take-reduction plan. Other lobstermen groups and Maine's Department of Marine Resources intervened as plaintiffs, and conservation groups intervened as defendants. The U.S. Court of Appeals, District of Columbia Circuit held that NMFS may not give an endangered species the "benefit of the doubt" by relying on worst-case scenarios or pessimistic assumptions. The appellate court reversed and remanded the case.

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## COURT OF INTERNATIONAL TRADE

***Sea Shepherd New Zealand v. United States***, No. 20-00112, 2023 WL 4111318 (Ct. Int'l Trade June 21, 2023).

Sea Shepherd New Zealand and Sea Shepherd Conservation Society filed suit claiming that the U.S. Department of Commerce is required to ban imports of fish and fish products from New Zealand under the Marine Mammal Protection Act (MMPA) due to the decline of the Māui dolphin population caused by bycatch in gillnet and trawl fisheries. The MMPA mandates a ban on the importation of fish caught with technology that results in incidental kill or incidental serious injury of ocean mammals in excess of U.S. standards. The court granted a preliminary injunction in November temporarily banning imports into the United States of fish and fish products deriving from nine species caught in New Zealand's West Coast North Island inshore trawl and set net fisheries. Recently, the government motioned to dismiss as moot the plaintiff's claim that the government acted arbitrarily, capriciously, and otherwise not in accordance with law in issuing findings of comparability with U.S. standards because the relevant comparability findings expired in January of 2023. The U.S. Court of International Trade denied the motion to dismiss. Although three of the four reasons given in support of the plaintiff's challenge to the comparability findings were moot, the court held that the final reason, that the government failed to undertake the mandatory considerations outlined in its regulations, was "capable of repetition."

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