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# Ocean and Coastal Case Alert

**The National Sea Grant Law Center** is pleased to offer the May 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-23-03-05).

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## U.S. SUPREME COURT

***Nat'l Pork Producers Council v. Ross***, No. 21-468, 2023 WL 3356528 (U.S. May 11, 2023).

Organizations representing pork producers sought a declaratory judgment that a ballot initiative barring sales of whole pork meat from animals confined in a manner inconsistent with California standards violated the dormant Commerce Clause. The organizations also requested a permanent injunction barring the initiative's implementation and enforcement. The U.S. District Court for the Southern District of California dismissed the complaint for failure to state a claim. On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed. The U.S. Supreme Court, in an opinion by Justice Gorsuch, affirmed the Ninth Circuit holding. The Court held that there is no per se rule under the dormant Commerce Clause forbidding the enforcement of state laws that have the practical effect of controlling commerce outside the state when those laws do not purposely discriminate against out-of-state economic interests. Further, the initiative was not subject to any balancing tests to assess whether the burden imposed on interstate commerce was clearly excessive in relation to putative local benefits. Finally, the initiative did not impose a substantial burden on interstate commerce.

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## THIRD CIRCUIT

### New Jersey

***Matter of Rulemaking to Amend Coastal Zone Mgmt. Rules***, N.J.A.C. 7:7-4.16, No. A-1771-20, 2023 WL 2994172 (N.J. Super. Ct. App. Div. Apr. 19, 2023).

Bayside Shellfish, LLC (Bayside), an aquaculture business in New Jersey, sought to amend one of New Jersey's Coastal Zone Management Rules to include aquaculture hatchery activities in a "permit by rule" category that covered aquaculture nursery activities. The Department of Environmental Protection (DEP) denied the petition, requiring the business to obtain a Coastal Area Facility Review Act (CAFRA) individual permit for hatchery activities. Bayside appealed the decision, alleging DEP's denial was arbitrary, capricious, and unreasonable because it violated CAFRA's express and implied legislative policies, and DEP's findings were not supported by substantial evidence in the record. The New Jersey Superior Court deferred to DEP's authority and affirmed the denial of Bayside's rulemaking petition.

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## FOURTH CIRCUIT

***South Carolina v. United States Army Corps of Engineers***, 66 F.4th 189 (4th Cir. 2023).

The State of South Carolina and several of its agencies brought suit claiming that the U.S. Army Corps of Engineers' (Corps) proposed fish-passage structure for New Savannah Bluff Lock and Dam did not comply with the Water Infrastructure Improvements for the Nation (WIIN) Act, the National Environmental Policy Act (NEPA), the Administrative Procedure Act (APA), state law, a previous settlement agreement, and certain easements. The U.S. District Court for the District of South Carolina ruled in favor of the state on the WIIN Act claim and entered a permanent injunction. The Corps appealed. On appeal, the Fourth Circuit held that the WIIN Act did not require the Corps to maintain water elevation in existence on date of Act's enactment. The court vacated the lower court opinion and injunction and remanded the case.

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## SIXTH CIRCUIT

### Ohio

***Env't L. & Pol'y Ctr. v. United States Env't Prot. Agency***, No. 3:19-CV-00295, 2023 WL 3266683 (N.D. Ohio May 4, 2023).

The U.S. District Court for the Northern District of Ohio approved a consent decree requiring the Ohio Environmental Protection Agency to submit a Total Maximum Daily Load (TMDL) for western Lake Erie to the U.S. EPA by June 30, 2023. The EPA will have 90 days after submission to approve the plan. If it disapproves, the EPA will have five months to develop its own plan. The terms of the consent decree were published in the [Federal Register](#) in November.

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## NINTH CIRCUIT

### California

***Ctr. for Biological Diversity v. Haaland***, No. 222CV06996CASKSX, 2023 WL 3007920 (C.D. Cal. Apr. 17, 2023).

The U.S. District Court for the Central District of California rejected a motion to dismiss a case alleging that the Bureau of Ocean Energy Management (BOEM) failed to review development and production plans (DPPs) for offshore oil platforms in two California counties. The plaintiff alleged that studies indicating that the platforms and pipelines have deteriorated in quality shows that review of the DPPs, if any, was inadequate. BOEM claimed that the citizen suit provision of the Outer Continental Shelf Lands Act does not authorize suits against agencies for alleged failure to follow procedural requirements. The court disagreed, finding BOEM had a legal obligation to review the plans.

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### Washington

***Wild Fish Conservancy v. Rumsey***, No. 20-CV-417-RAJ, 2023 WL 3204697 (W.D. Wash. May 2, 2023).

The U.S. District Court for the District of Washington adopted a magistrate's report in a lawsuit related to the National Marine Fisheries Service's (NMFS) 2019 Southeast Alaska Biological Opinion (BiOp) evaluating the effects of the Southeast Alaska salmon fisheries on threatened and endangered species. The court remanded the BiOp to NMFS to remedy violations of the Endangered Species Act and the National Environmental Policy Act. The court vacated the incidental take statement authorizing the "take" of the Southern Resident Killer Whale and Chinook salmon for the Chinook summer and winter commercial troll fishery.

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## ELEVENTH CIRCUIT

### Florida

***Shands v. City of Marathon***, No. 3D21-1987, 2023 WL 3214154 (Fla. Dist. Ct. App. May 3, 2023).

Owners of Shands Key, an offshore island in the Florida Keys, sought to construct a dock to allow for increased island access. The owners had inherited the property from their father who purchased the island in 1956. In the time the property was owned by the family, the zoning status of the island changed from “General Use” to “Conservation Offshore Island.” The dock construction application was denied, and the owners were effectively foreclosed from use of the property, other than for beekeeping or personal camping. The owners filed suit, alleging a regulatory taking and sought partial summary judgment on the basis that the regulation deprived them of all economically beneficial use of their property. The trial court denied the motion finding that an award of transferred development rights (TDRs) and Building Permit Allocation System (BPAS) points, considered with the residual land value derived from personal recreation and beekeeping, precluded a *per se* as-applied takings claim. On appeal, the court reversed the trial court’s decision concluding that the owners proved that overly burdensome government regulation deprived them of “all economically beneficial uses” of their property in violation of the U.S. Supreme Court’s *Lucas* opinion.

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## DISTRICT OF COLUMBIA

### District of Columbia

***Massachusetts Lobstermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv.***, No. CV 23-293 (JEB), 2023 WL 3231450 (D.D.C. May 3, 2023).

After the National Marine Fisheries Service (NMFS) announced that it would close an area off the coast of Massachusetts to lobster fishing from February 1 to April 30 of this year, the Massachusetts Lobstermen’s Association filed suit, arguing that the closure is inconsistent with a provision in the Consolidated Appropriations Act of 2023. NMFS moved to dismiss the case as moot because the closure ended on April 30th. The court agreed and granted the motion to dismiss.

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