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# Ocean and Coastal Case Alert

**The National Sea Grant Law Center** is pleased to offer the April 2015 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-15-03-04).

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## FOURTH COURT

### Maryland

#### ***Diffendal v. Dep't of Natural Res.*, 2015 WL 1514718 (Md. Ct. Spec. App. Apr. 6, 2015).**

An oyster fisherman and the Maryland Department of Natural Resources challenged the final decision of an administrative law judge (ALJ) to deny an application for an aquaculture lease. The circuit court reversed the ALJ's decision. An appellate court agreed and affirmed the lower court ruling. The appellate court found that the ALJ's determination that the oyster farmer's aquaculture lease was for a submerged land lease, and not a water column lease, was legally incorrect and not supported by substantial evidence. Further, the court concluded that the ALJ erred in denying the lease on public trust grounds, as the public trust doctrine does not impose additional, extra-statutory restrictions on the grant of an aquaculture lease. Finally, the court found no evidence in the record that denial of the application was sufficient due to a threat to public health, safety, or welfare.

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### Virginia

#### ***Virginia Marine Res. Comm'n v. Insley*, 2015 WL 1526206 (Va. Ct. App. Apr. 7, 2015).**

Two oyster fishermen appealed a Virginia Marine Resources Commission (VMRC) decision imposing one-year license

and fishing privileges revocations following convictions for violating state fishing laws. A lower court reversed and remanded the VMRC decision. On appeal, the court overturned the lower court's ruling. The appellate court found that there was sufficient evidence to support the revocation and its duration.

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## FIFTH CIRCUIT

### ***Gulf Restoration Network v. McCarthy*, 2015 WL 1566608 (5th Cir. Apr. 7, 2015).**

The Fifth Circuit Court of Appeals overturned a district court decision requiring the Environmental Protection Agency (EPA) to determine whether new water quality standards were necessary for waterbodies in states in the Mississippi River basin. Environmental advocacy groups had brought the action challenging the EPA's denial of their petition. The U.S. District Court for the Eastern District of Louisiana granted in part plaintiffs' motion for summary judgment and ordered EPA to conduct a determination as to whether new water quality standards were necessary under the Clean Water Act (CWA). On appeal, the Fifth Circuit held that the EPA may decline to make a necessity determination under the CWA, as long as the agency provides an explanation, grounded in the statute, for not doing so. The court vacated and remanded the case.

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## Mississippi

### ***Hosemann v. Harris*, 2015 WL 1485011 (Miss. Apr. 2, 2015).**

Abutting landowners brought actions to quiet and confirm title to a sand beach. A lower court granted partial summary judgment in favor of the landowners on the issue of whether the beach was a public trust tideland, and after a bench trial, vested title to the beach to the private parties in fee simple subject to prescriptive easements to the city and county. On appeal, the Mississippi Supreme Court reversed and remanded the case, finding that the chancery court abused its discretion in striking evidence on the issue of whether the beach was a public trust tideland. Further, there were genuine issues of material fact as to whether the sand beaches at issue were considered tidelands under the state's Public Trust Tidelands Act.

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## NINTH CIRCUIT

## California

### ***Our Children's Earth Found. v. Nat'l Marine Fisheries Serv.*, 2015 WL 1458156 (N.D. Cal. Mar. 30, 2015).**

Two environmental groups alleged that the National Marine Fisheries Service and the U.S. Fish and Wildlife Service failed to comply with the Freedom of Information Act in responding to requests for documents. The underlying action is related to challenges to a Biological Opinion evaluating the impact of upgrades to two water diversion facilities for Stanford University's steelhead habitat enhancement project. Both the plaintiffs and the defendants filed motions for summary judgment. The court agreed with the plaintiffs that the agencies did not produce the requested documents

in a timely manner, violating statutory deadlines mandated by Congress. The court therefore granted partial summary judgment to the plaintiffs.

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## Hawaii

***Conservation Council For Hawaii v. Nat'l Marine Fisheries Serv.*, 2015 WL 1499589 (D. Haw. Mar. 31, 2015).**

A federal district court ruled that the National Marine Fisheries Service (NMFS) violated several federal laws by allowing the U.S. Navy to take substantial numbers of marine mammals incidental to training and testing activities in the Hawaii-Southern California Training and Testing Study Area in the Pacific Ocean. First, the court held that the agency's finding that the proposed activities would have a "negligible impact" was arbitrary and capricious under the Marine Mammal Protection Act. Next, the court ruled that the no jeopardy finding for whales and an invalid incidental take statement and no jeopardy finding for turtles in the agency's Biological Opinion were arbitrary and capricious in violation of the Endangered Species Act. Finally, the court found that NMFS violated the National Environmental Policy Act by adopting an Environmental Impact Statement prepared by the Navy that did not consider alternatives with less environmental harm.

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## Oregon

***Fick v. Oregon Dep't of Fish & Wildlife*, 2015 WL 1247078 (Or. Ct. App. Mar. 18, 2015).**

Participants in a small commercial fishery challenged administrative rules adopted by the Oregon Department of Fish and Wildlife (ODFW) for the management of recreational and commercial fisheries on a state river. The fishery alleged that the rules would have a negative impact on small businesses, which would violate a state law governing the mitigation of the economic effect of a rule on small businesses. The court disagreed, finding that the agency considered the effect of the rules on small business and included mitigation measures within the rules but declined to take additional actions to reduce the effect of the rules on small business.

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## ELEVENTH CIRCUIT

***Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 2015 WL 1285250 (11th Cir. Mar. 23, 2015).**

Two environmental advocacy organizations brought suit against the U.S. Army Corps of Engineers (Corps), claiming that the issuance of a general permit that allowed surface coal mining operations to discharge dredged or fill materials into navigable waters violated both the Clean Water Act and the National Environmental Policy Act. A coal mining association and several mining companies intervened. The U.S. District Court for the Northern District of Alabama granted summary judgment to the defendants. On appeal, the Eleventh Circuit held that one environmental advocacy organization had Article III standing; the district court abused its discretion in finding the organization's action was barred by the doctrine of laches; and, remand was warranted for the Corps to reconsider its determinations.

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## Florida

### ***Florida Wildlife Fed'n v. McCarthy, 2015 WL 1189946 (M.D. Fla. Mar. 16, 2015).***

Environmental groups filed suit claiming that the Environmental Protection Agency (EPA) should review not just the portion of Florida's Impaired Water Rule (IWR) that constitutes a new or revised water quality standard but the entire IWR. The court found that the groups did not establish that the entire IWR is either a reviewable new or revised water quality standard or a list of impaired waters requiring review by the EPA. The court also rejected the plaintiffs' argument that because the IWR lacks an "antidegradation methodology," the EPA must disapprove the IWR. The court reasoned that there was no evidence that Florida's antidegradation policy requires a new or revised water quality standard to contain an "antidegradation methodology."

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## Georgia

### ***Ctr. for a Sustainable Coast v. U.S. Army Corps of Engineers, 2015 WL 1505976 (S.D. Ga. Mar. 31, 2015).***

Environmental groups challenged a 2012 decision by the U.S. Army Corps of Engineers to reissue Programmatic General Permit 0083 (PGP0083), which covers construction of single-family docks in Georgia's coastal counties. Specifically, the groups objected to a provision that allows an individual to exceed the permit's maximum dock area and length by up to 25% when constructing the dock with grated decking materials designed to allow more sunlight to pass through compared to traditional wood-plank decking. The groups claimed that the decision violated the Rivers and Harbors Act, the National Environmental Policy Act, and the Administrative Procedure Act. The groups pointed to scientific reports showing the negative impact of grated docks. The court noted that it was required to give the agency deference in making such decisions and granted summary judgment in favor of the Corps.

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