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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the February 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-22-03-02).

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FIRST CIRCUIT

Massachusetts

Man Against Xtinction v. Massachusetts Port Authority, No. 21-CV-10185-DJC, 2022 WL 344560 (D. Mass. Feb. 4, 2022).

Richard Maximus Strahan, aka Man Against Xtinction, an avid whale watcher and "professional endangered species recovery agent," sued the Massachusetts Port Authority (Massport), alleging that vessels transiting to and from the Port of Boston injured or killed endangered whales in violation of the Endangered Species Act (ESA). Massport moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim. The court determined that Massport was not liable under the ESA for the unlawful taking of whales or under state-law tort claims because it does not operate nor have authority to regulate any of the vessels that might encounter the whales while in port. Strahan moved for leave to amend his complaint and for an injunction requiring Massport to conduct port operations in a whale-safe manner; both were denied.

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SECOND CIRCUIT

New York

Brookhaven Baymen's Ass'n, Inc. v. Town of Southampton, No. 2019-05726, 2022 WL 221101, (N.Y. App. Div. Jan. 26, 2022).

Several plaintiffs brought suit for a declaratory judgment against the Town of Southampton and members of the Town Board, challenging local legislation passed by the Town Board that regulates who may take, and the manner of taking, shellfish from waters within the town. The Suffolk County court denied the motion for preliminary injunction and dismissed the complaint for failure to state a cause of action. An appellate court found that the fishermen stated a

claim but held that the preliminary injunction was properly denied. On appeal, the court agreed that the challenged laws are not unconstitutional, void, and unenforceable. The placement of fishing gear on underwater lands would constitute a trespass, and the Town Board is empowered to pass an ordinance prohibiting a trespass on both public and private property. The court remitted the case to the county court to rule accordingly.

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FIFTH CIRCUIT

SCF Waxler Marine, L.L.C. v. Aris T M/V, 24 F.4th 458 (5th Cir. 2022).

Three vessels, *Aris T, Elizabeth*, and *Loretta*, ran into each other while attempting to pass in the Hahnville Bar on the Mississippi River. To avoid colliding with *Loretta*, *Aris T* took emergency maneuvers that resulted in a collision with several moored vessels and two berths. An employee panicked, fell on a berth, and was allegedly injured. The injured parties sued *Aris T*. *Aris T* and *Loretta* sued *Elizabeth*. Evidence showed that during the passage, the captain of *Elizabeth* was incommunicado, the captain of *Loretta* was on his cellphone, and the captain of *Aris T* failed to react appropriately. The district court found that *Elizabeth* and *Loretta* were equally 45% at fault for creating a dangerous situation with an overtaking plan and that *Aris T* was 10% at fault. Further, the court found that *Elizabeth* and *Loretta* could not limit liability because they were negligent, but *Aris T* could because the compulsory pilot was solely negligent. On appeal, the court affirmed the allocation of fault. Further, the court found that *Elizabeth* had privity or knowledge of conditions that contributed to the allision, and *Loretta*'s captain's distraction was a cause of the allision, meaning they could not limit liability. Moreover, because *Aris T*'s negligence was attributable solely to the compulsory pilot, it could limit liability. Finally, the negligence was not the proximate cause of the employee's injuries.

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NINTH CIRCUIT

Alaska

Sagoonick v. State, No. S-17297, 2022 WL 262268 (Alaska Jan. 28, 2022).

Several young Alaskan residents sued the State of Alaska, claiming the state violated both state constitutional natural resources provisions and their individual constitutional rights through existing policies and past actions related to resource development. A lower court dismissed the action. On appeal, the Alaska Supreme Court upheld the lower court ruling. The court agreed that the claims for injunctive relief presented a non-justiciable political question. Further, the claims for declaratory relief did not present actual controversy and were non-justiciable. Finally, the court concluded that the state Department of Environmental Conservation's denial of the plaintiffs' rulemaking petition was not arbitrary and therefore did not violate due process.

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ELEVENTH CIRCUIT

Savage Servs. Corp. v. United States, No. 21-10745, 2022 WL 368281 (11th Cir. Feb. 8, 2022).

Owners and operators of an inland towing vessel brought suit against the United States under the Suits in Admiralty Act (SAA) and the Federal Tort Claims Act (FTCA) to recover damages from an oil spill allegedly caused by the U.S. Army Corps of Engineers' negligent operation of a lock. The U.S. District Court for the Southern District of Alabama granted the government's partial motion to dismiss and denied the plaintiffs' motion for partial summary judgment. On appeal, the Eleventh Circuit held that, as a matter of first impression, the Oil Pollution Act (OPA) did not create a cause of action for responsible parties to seek contribution from the United States government. Further, the OPA did not allow the responsible party to escape all liability by asserting the federal government's negligence. Finally, as a

matter of first impression, the OPA displaced any claim the plaintiffs may have brought under common law or the SAA. The court affirmed the lower court's rulings.

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Hersh v. United States, No. 20-10926, 2022 WL 214842 (11th Cir. Jan. 25, 2022).

Two fishermen, Matthew Hersh and Joseph Carter, sued Cavache, Inc. for negligence under maritime law after they hit a submerged pipe that was part of the company's dredging project. Cavache had marked the pipeline with buoys, markers, and lights, as well as posted signs cautioning of the project at local docks and boat ramps. Additionally, the Coast Guard had notified local mariners. Hersh and Carter claimed that after the incident, the vessel was taking on water, but they slept on the vessel that night. Further, neither reported the accident to anyone until four days later when they returned home and sought medical treatment for injuries allegedly caused by the collision. During trial, Hersh and Carter admitted seeing notices of the project at the boat ramp prior to launch, the dredge barge and other equipment during the voyage, and the lights and buoys on the surface near the project. The trial court did not find Hersh and Carter compelling and determined that they were solely at fault. Because the trial court did not specifically rule on whether Hersh and Carter established violations of applicable safety provisions, statues, or regulations by Cavache that would require Cavache to overcome a presumption of fault that it contributed to the allision, the appellate court remanded the issue.

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Georgia

Ctr. for a Sustainable Coast v. United States Army Corps of Engineers, No. 2:19-CV-58, 2022 WL 202893 (S.D. Ga. Jan. 21, 2022).

An environmental group petitioned the U.S. District Court for the Southern District of Georgia to set aside permission to build a private dock on Cumberland Island, arguing that the authorization violated several environmental statutes and the Administrative Procedure Act. Cumberland Island is designated as National Seashore, meaning the island must be preserved in its primitive state except for certain public recreational uses. Lumar owns ninety acres on the island and sought permission from the U.S. Army Corps of Engineers (Corps), pursuant to the Rivers and Harbors Act of 1899, to build a private single-family dock adjacent to the property to serve as access to the property from the mainland. After an environmental assessment and comment period were complete, the dock was permitted. The court determined that the environmental group suffered an aesthetic injury from the dock, but because the dock has already been built, the court can neither enjoin completed construction nor set aside an expired building permit.

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D.C. CIRCUIT

District of Columbia

Friends of the Earth v. Haaland, No. CV 21-2317 (RC), 2022 WL 254526 (D.D.C. Jan. 27, 2022).

Several advocacy groups challenged a lease sale of 80.8 million acres in the Gulf of Mexico for oil and gas production and development, the largest offshore oil and gas lease sale in U.S. history. The groups alleged violations of the National Environmental Policy Act (NEPA) and Administrative Procedure Act (APA). The State of Louisiana and American Petroleum Institute (API) intervened in support of the lease sale. The court determined that the model the Bureau of Oceanic Energy Management (BOEM) used to exclude foreign consumption from the greenhouse gas emissions calculation in the Environmental Impact Statements (EIS) was arbitrary and capricious. The court reasoned that BOEM should have given a quantitative estimate of the downstream greenhouse emissions that would result from the reduced foreign consumption or explained more specifically why it could not have done so. Further, BOEM could not rely on a NEPA determination as a substitute for an EIS without first providing an opportunity for public comment. Consequently, the court vacated the lease sale and remanded to BOEM, allowing the agency an opportunity to remedy its NEPA errors.

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FEDERAL CLAIMS

City of Wilmington v. United States, No. 16-1691C, 2022 WL 225263 (Fed. Cl. Jan. 26, 2022).

The City of Wilmington, Delaware, sued the United States to collect unpaid stormwater management fees assessed to five U.S. Army Corps of Engineers properties pursuant to a city ordinance and the Clean Water Act (CWA). The CWA waives sovereign immunity for reasonable service charges. The city offers a limited appeal process for stormwater charges in which an owner can file a fee adjustment request if they believe there was an error in the calculation, the assigned stormwater class, the assigned tier, and the eligibility for credit. The appeal process applies only to future charges and provides no adjustment to prior billing periods. Further, an owner must pay all fees before the city will consider an appeal. The court determined that Wilmington failed to prove that its charges were reasonable service charges within the meaning of the CWA because the charges did not represent the properties' proportionate contribution to stormwater pollution. The court found that Wilmington made no effort to determine whether the land classification accurately described the characteristics of the property, which drives the runoff coefficient and resulting charges. Further, the court found that Wilmington failed to demonstrate that all the properties within a particular class should be assigned the same coefficient. Additionally, the court found that the Wilmington appeal process forced the government to pay all fees before starting the adjustment process, including unreasonable charges that are prohibited by the CWA. Thus, the court determined that the government could defend against the charges pursuant to the CWA and that Wilmington could not claim interest for unpaid CWA charges.

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