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# Ocean and Coastal Case Alert

**The National Sea Grant Law Center** is pleased to offer the August 2021 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-21-03-08).

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## FOURTH CIRCUIT

***Zito v. N. Carolina Coastal Res. Comm'n***, No. 20-1408, 2021 WL 3483291 (4th Cir. Aug. 9, 2021).

The U.S. Court of Appeals for the Fourth Circuit affirmed a federal district court's dismissal of a Fifth Amendment takings claim over North Carolina's coastal setback requirements. Property owners Michael and Catherine Zito brought suit after the North Carolina Coastal Resources Commission denied their application to rebuild a beachfront vacation home in South Nags Head, North Carolina. The district court granted North Carolina's motion to dismiss for lack of subject matter jurisdiction due to the state's immunity from suit in federal court. The court relied on court precedent holding that "the Eleventh Amendment bars Fifth Amendment taking claims against States in federal court where the State's courts remain open to adjudicate such claims." The Fourth Circuit affirmed on the same grounds and found that North Carolina's courts remain open for litigation of the takings claim.

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## NINTH CIRCUIT

***San Francisco Bay Conservation & Dev. Comm'n v. U.S. Army Corps of Eng'rs***, No. 20-15576, 2021 WL 3439655 (9th Cir. Aug. 6, 2021).

The U.S. Court of Appeals for the Ninth Circuit dismissed Coastal Zone Management Act (CZMA) and Clean Water Act (CWA) challenges to the dredging of San Francisco Bay's eleven navigational channels during and after 2017 by the U.S. Army Corps of Engineers (Corps). The San Francisco Bay Conservation and Development Commission and the San Francisco Regional Water Control Board approved the dredging subject to certain conditions. The Commission alleged that the Corps' failure to comply with certain conditions violated the CZMA, and an environmental group intervened claiming the dredging violated the CWA. The federal district court ruled in favor of

the Corps. On appeal, the Ninth Circuit agreed that the Commission's condition regarding disposal of the dredged material was not an enforceable policy under the CZMA, and the Corps was not required to comply. The court also found that the Corps' final 2017 plan complied with the condition limiting the Corps' hydraulic dredging in two

particular channels; therefore, the plan violated neither the CZMA nor the CWA.

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***Lil' Man in the Boat, Inc. v. City & Cty. of San Francisco***, 5 F.4th 952 (9th Cir. 2021).

The owner and operator of commercial charter vessel brought suit against municipalities and municipal officials alleging that landing fees imposed on commercial charters operating out of particular marina violated the Rivers and Harbors Act (RHA). The U.S. District Court for the Northern District of California granted summary judgment in favor of defendants. On appeal, the Ninth Circuit affirmed, holding that the RHA did not create private right of action for enforcement.

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## Alaska

***Scudero v. Alaska***, No. S-17549, 2021 WL 3123069 (Alaska July 23, 2021).

A member of the Metlakatla Indian Community in Alaska was convicted in state court for violating state commercial fishing laws. The defendant appealed, claiming that his aboriginal fishing rights precluded enforcement of the state laws. He also argued that the lower court erred in excluding portions of his testimony and by admitting evidence of his past convictions for commercial fishing in state waters without a permit. The Alaska Supreme Court affirmed the lower court's decision, finding that the state has authority to regulate fishing in state waters in the interests of conservation regardless of the defendant's claimed fishing rights. The court also concluded that the trial court did not abuse its discretion in its procedural rulings.

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## California

***San Francisco Baykeeper v. U.S. Fish and Wildlife Serv.***, No. 21-CV-02566-JCS, 2021 WL 3426961 (N.D.

Cal. Aug. 5, 2021).

San Francisco Baykeeper brought suit against the U.S. Fish and Wildlife Service alleging that the agency violated the Administrative Procedure Act by concluding 1) listing a Longfin Smelt distinct population segment as threatened or endangered under the Endangered Species Act is warranted but precluded by higher priority listing actions; and 2) expeditious progress is being made to add or remove species from the endangered and threatened species lists. A water district filed a motion to intervene and the FWS filed a motion to dismiss. The court denied both motions. The court concluded the water district did not meet the threshold for intervention. The court also rejected the motion to dismiss based on a lack of subject matter jurisdiction, finding that the plaintiff's claims are based on discretionary duties that are not subject to the citizen-suit provision's 60-day notice requirement.

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## Hawaii

***Hawai'i Wildlife Fund v. Cnty. of Maui***, No. CV 12-00198 SOM/KJM, 2021 WL 3160428 (D. Haw. July 26, 2021).

In April last year, the U.S. Supreme Court created the "functional equivalent" standard—a factor-based test used to measure whether certain discharges that travel through a conduit source, like groundwater, before reaching navigable waters need a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act. In the "functional equivalent" standard's debut, the U.S. District Court for the District of Hawaii granted summary judgment in favor of the environmental groups, finding that the County of Maui must obtain a NPDES permit for its wastewater discharges into the Pacific Ocean. In its analysis, the court considered the following factors related to discharges to navigable water as set out by the Supreme Court: 1) transit time, 2) distance traveled, 3) the nature of the materials through which the pollutant travels, 4) the extent to which the pollutant is chemically changed, 5) the amount of pollutant entering the navigable water relative to the amount that left the point source, 6) the manner of entry into the water, and 7) the degree to which the pollutant maintains its identity. The court also added a factor to this nonexclusive list—the volume of wastewater reaching navigable water. Ultimately, in balancing the factors, the court decided that the sheer volume of pollution caused by the County—3 to 5 million gallons of wastewater per day—tipped the scale.

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## ELEVENTH CIRCUIT

### Florida

***Norwegian Cruise Line Holdings, Ltd. v. Rivkees***, No. 21-22492-CIV, 2021 WL 3471585 (S.D. Fla. Aug. 8, 2021).

The U.S. District Court for the Southern District of Florida granted a preliminary injunction to Norwegian Cruise Lines' (NCL) in the company's challenge of a Florida statute prohibiting them from implementing a vaccination policy for ships leaving Florida. NCL adopted a policy requiring all passengers on its vessels to be fully vaccinated against COVID-19 and to provide documentation confirming their vaccination before boarding. Fla. Stat. § 381.00316 prohibits businesses from implementing the vaccination policy for vessels departing from Florida. NCL alleged that the state statute violated the First Amendment, the dormant Commerce Clause, and the Due Process Clause. The court found that the statute was content-based restriction on speech and subject to strict scrutiny under the First Amendment. The court held that NCL was likely to prevail on the merits of both the First Amendment and the dormant Commerce Clause claim. Finally, the court found that NCL would suffer irreparable injury if required to comply with the statute, and the balance of harm and public interest weighed in favor of an injunction.

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### Georgia

***In Re ACF Basin Water Litigation***, No. 1:18-MI-43-TWT, 2021 WL 3566861 (N.D. Ga. Aug. 11, 2021).

The U.S. District Court for the Northern District of Georgia ruled in favor of Georgia in a case filed by the state of Alabama challenging the U.S. Army Corps of Engineers' allocation of water in Lake Lanier in the Apalachicola-Chattahoochee-Flint (ACF) River Basin. Alabama alleged the Corps acted arbitrarily and capriciously in granting Georgia's request to modify operation of the Buford Dam to ensure sufficient water for the greater Atlanta area. The court denied Alabama's motion for summary judgment. The court concluded that the Corps' actions ensure a dependable supply of water to the Atlanta area through the year 2050 without significant sacrifices to the environment or to other uses of the ACF system such as flood control, hydropower generation, fish and wildlife conservation, navigation and recreation. This case comes on the heels of a U.S. Supreme Court that denied Florida's request to cap Georgia's water withdrawals from the ACF Basin.

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