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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the February 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-21-03-02).

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THIRD CIRCUIT

New Jersey

New Jersey Transit Corp. v. Certain Underwriters at Lloyd's London, No. 083801, 2021 WL 261989 (N.J. Jan. 27, 2021).

The New Jersey Supreme Court affirmed a New Jersey appellate court's decision in an action brought by New Jersey Transit Corporation (NJT) against property insurers. NJT sought a declaration regarding the coverage provided under its property insurance program for water damage that occurred during Superstorm Sandy. The trial court had ruled that the \$100 million flood sublimit in the policies did not apply to NJT's claim, and NJT was entitled to coverage up to the full \$400 million policy limits for the Sandy-related water damage. The trial court also found that defendant insurers had not submitted sufficient evidence to support their claims for reformation of the policies. The appellate court held that NJT's claim for coverage of water damage was not subject to the policy's flood sublimit because the plain language of the policies provides that water damage resulting from a "storm surge" associated with a "named windstorm" does not fall within the definition of "flood." The appeals court also held that even if water damage was caused by both a flood and a named windstorm, NJT was still entitled to coverage pursuant to efficient proximate cause doctrine. The Supreme Court of New Jersey affirmed relying on the appellate court's analysis of the plain language of the insurance policies.

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Lincoln Harbor Enterprises, LLC, & Lincoln Harbor Yacht Club Condominium Ass'n v. Hartz Mountain Industries & Port Imperial Ferry Corp., 2021 WL 406464 (D.N.J. Feb. 5, 2021).

After ferry traffic increased near the Lincoln Harbor Marina, one marina owner and its management company sued another developer at the marina. The plaintiffs asserted various claims related to tort and nuisance; the New Jersey Environmental Rights Act (NJERA); a New Jersey boating regulation; and the federal Magnuson-Stevens Fishery Conservation Management Act. The defendants sought dismissal and attorneys' fees. The U.S. District Court for the

District of New Jersey dismissed the tort and nuisance claims, one of the NJERA claims, the boating claim, and the Magnuson-Stevens claim. One NJERA claim survived because it did not require any predicate violation.

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FIFTH CIRCUIT

Stringer v. Town of Jonesboro, No. 20-30192, 2021 WL 150735 (5th Cir. Jan. 18, 2021).

A property owner brought a citizen suit against a town and its mayor under the Clean Water Act (CWA) and the Civil Rights Act, 42 U.S.C. § 1983, for the uncompensated taking of her property and for retaliation. The U.S. District Court for the Western District of Louisiana dismissed the property owner's claims, and she appealed. On appeal, the Fifth Circuit affirmed in part and reversed and remanded in part. The appellate court found that the trial court erred in dismissing the property owner's CWA claim because the Louisiana Sanitary Code was not comparable to the CWA for purposes of the Act's bar on "citizen suits" where the state law contains comparable penalty provisions that the state is authorized to enforce. The court also found that Louisiana's one-year statute of limitations for personal injury actions applied to the property owner's § 1983 claims. The court held that the property owner's takings claim against the town under § 1983 accrued, and the applicable one-year statute of limitations began to run, when she first became aware of sewage backups on her property. Additionally, the one-year limitations period was not tolled by the town's alleged misrepresentations. As a result, the one-year Louisiana statute of limitations that applied to the property owner's First Amendment retaliation claim against the town and town mayor also began to run from the time the property owner made the first complaint about the town's sewage system.

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Ortega Garcia v. United States, No. 19-40718, 2021 WL 164828 (5th Cir. Jan. 19, 2021).

A Mexican citizen was fatally struck by a Coast Guard vessel while attempting to enter the United States. The decedent's spouse brought action against the United States for negligence and wrongful death. Additionally, the spouse alleged products liability, gross negligence, and wrongful death against manufacturers of the vessel and its engines. The U.S. District Court for the Southern District of Texas granted the United States' motions to dismiss and the manufacturers' motions for partial summary judgment. On appeal, the Fifth Circuit held that the district court had admiralty jurisdiction over wrongful death and survival claims because a vessel on navigable water caused the injury suffered, and the activity bears a connection with maritime activity. However, the court held that the spouse was not a common law spouse under Texas law and lacked standing to bring wrongful death and survival claims. Further, the harm from the collision between the decedent and vessel was not foreseeable under the circumstances, and thus neither the United States nor the Coast Guard owed a duty of care to the decedent. The court also held that the alleged design defects in the vessel and its engines did not cause the decedent's injuries, and the manufacturers were not liable for strict products liability. As a result, the manufacturers owed no duty to warn the decedent of any design defect and were not liable for negligent failure-to-warn. The court also held that the defendants were not liable for wrongful death under Texas law.

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NINTH CIRCUIT

YCS Investments v. U.S. Fish & Wildlife Serv., No. 20-15514, 2021 WL 195023 (9th Cir. Jan. 20, 2021).

YCS Investments and others brought suit against the U.S. Fish and Wildlife Service (FWS) under the Endangered Species Act (ESA) and the Administrative Procedure Act (APA), alleging that FWS's actions injured their conservation interest in the threatened bay checkerspot butterfly. YCS appealed the district court's dismissal for lack of standing. YCS alleged that errors by FWS in approving a habitat conservation plan and issuing an incidental take permit "may" have resulted in the butterfly population on its property "being extirpated." On appeal, YCS was unable show that FWS's approval of the plan and issuance of the permit caused it any injury because neither action affected YCS's

ability to conserve its land or caused a loss of butterfly habitat on that land. As a result, the Ninth Circuit affirmed the district court's judgment.

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Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Eng'rs, No. 20-35546, 2021 WL 509850 (9th Cir. Feb. 11, 2021).

The Ninth Circuit affirmed the U.S. District Court for the Western District of Washington's holding that the U.S. Army Corps of Engineers violated the Clean Water Act and the National Environmental Policy Act (NEPA) in issuing Nationwide Permit 48 (NWP 48) for shellfish aquaculture in Washington state. The court held that the agency abused its discretion by failing to adequately explain its conclusions that NWP 48 would have "no significant impact" pursuant to NEPA and "will have only minimal cumulative adverse effect on the environment." Additionally, the court held that the district court did not abuse its discretion by crafting an equitable remedy.

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Alaska

Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt., 2021 WL 343925 (D. Alaska Feb. 1, 2021).

On May 10, 2018, ConocoPhillips requested that the Bureau of Land Management (BLM) prepare an Environmental Impact Statement (EIS) for the Willow Project on the National Petroleum Reserve in Alaska. Sovereign Inupiat for a Living Arctic (SILA) filed suit and sought preliminary injunctive relief, asserting that the federal agencies inappropriately relied on Marine Mammal Protection Act mitigation measures for Endangered Species Act (ESA) § 7 determinations concerning Southern Beaufort Sea polar bears. SILA also brought a National Environmental Policy Act (NEPA) claim arguing that the defendants failed to take a "hard look" at the impacts of the Willow Project. The Center for Biological Diversity also filed a motion for preliminary injunctive relief and brought two NEPA claims. Both plaintiffs sought an immediate order enjoining the winter 2021 construction activities. The U.S. District Court for the District of Alaska held that since plaintiffs' complaints were both filed more than 60 days after the notice of availability was published for the Willow EIS, the NEPA claims were likely time-barred. The court found that the plaintiffs did not demonstrate questions related to the merits with respect to their NEPA challenges. Additionally, with respect to SILA's ESA claim, the court held that they did not demonstrate that irreparable injury to polar bears was likely in the absence of an injunction for the winter 2021 construction activities. The court dismissed the plaintiffs' motions.

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Washington

Sea Shepherd Legal v. Nat'l Oceanic & Atmospheric Admin., 2021 WL 351362 (W.D. Wash. Feb. 2, 2021).

Sea Shepard Legal (Sea Shepherd) submitted a Freedom of Information Act (FOIA) request to the National Marine Fisheries Service (NMFS) for records concerning the New Zealand Maui dolphin. The agency acknowledged receipt of the request, but Sea Shepherd filed suit after hearing nothing further from the agency. The court ordered NMFS to disclose two documents in their entirety and portions of another document related to a Federal Register notice, but denied Sea Shepherd's request with regard to the remainder of the requested documents.

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ELEVENTH CIRCUIT

Florida

Pass-A-Grille Beach Cmty. Church, Inc. v. City of St. Pete Beach, 2021 WL 252372 (M.D. Fla. Jan. 26, 2021).

The U.S. District Court for the Middle District of Florida ruled that a church allowing the general public to use its parking lot to access the beach was a protected religious act not subject to the City of St. Pete Beach's regulation of commercial parking lots. Beginning in 2016, the church's youth group sought donations for their mission trips from people parking in the lot. The city began citing the church for violation of certain municipal parking restrictions on commercial parking lots. One of the city's special magistrates entered orders allowing the church to accept donations as long as they did not advertise the parking as a "fundraiser." Following this, the city cited the church for parking violations. The city's code enforcement magistrate held that the church could not allow beach parking, free or otherwise, and fined the church \$1,000. The church filed suit against the city, contending that the land use regulation restricting use of its parking lot presents a substantial burden on its sincerely held beliefs, restricts its free exercise of religion, and treats the church differently than other non-religious places of assembly. The church requested a preliminary injunction. The federal district court granted the preliminary injunction because the city placed a substantial burden on the church and its religious exercise.

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D.C. CIRCUIT

District of Columbia

Red Lake Band of Chippewa Indians, et al., v. United States Army Corps of Engineers, et. al., 2021

WL 430054 (D.D.C. Feb. 7, 2021).

The Red Lake Band of Chippewa Indians brought an action against the U.S. Army Corps of Engineers (Corps) alleging violations of the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), the Rivers and Harbors Act (RHA), and the Corps' permitting regulations. The plaintiffs challenged the Corps' issuance of a permit to Enbridge Energy, authorizing the company to discharge dredged and fill material into waters of the United States under § 404 of the CWA and to cross waters protected by the RHA in its construction of a replacement for the Line 3 oil pipeline. The plaintiffs filed a motion for a preliminary injunction and argued that the Corps' environmental assessment underlying its decision to authorize the construction of Line 3 falls short of the requirements of NEPA and the CWA. Specifically, the plaintiffs challenged the adequacy of the Corps' discussion of the effects of potential oil spills, alternative construction routes, and alternative construction methods. The U.S. District Court for the District of Columbia denied the plaintiffs' motion because they were unable to demonstrate a likelihood of success on the merits and that they would suffer irreparable harm. The plaintiffs were unable to demonstrate that the Line 3 pipeline would permanently alter the specific acreage in question.

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