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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the May 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-21-03-05).

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FOURTH CIRCUIT

South Carolina

Def. of Wildlife, v. U.S. Fish & Wildlife Serv., No. 2:20-CV-3657-BHH, 2021 WL 1909917 (D.S.C. May 12, 2021).

The U.S. District Court for the District of South Carolina granted a preliminary injunction halting the harvest of horseshoe crabs from the Cape Romain Wildlife Refuge in South Carolina for a pharmaceutical company's research. The Defenders of Wildlife brought the suit, arguing that the U.S. Fish and Wildlife Service's authorization of the harvest violated several federal laws, including the Refuge Improvement Act, the Endangered Species Act, and the Migratory Bird Treaty Act. The court held that the plaintiff established that the balance of equities and the public interest weighed in favor of issuing a preliminary injunction. The court granted the state's motion to intervene in the suit, and the state may file a response within fourteen days of the order. The pharmaceutical company has already filed an appeal in the Fourth Circuit and is seeking to stay the preliminary injunction.

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FIFTH CIRCUIT

Douglass v. Nippon Yusen Kabushiki Kaisha, No. 20-30382, 20-20379, 2021 WL 1711637 (5th Cir. Apr. 30, 2021).

Nippon Yusen Kabushiki Kaisha (NYK Line) chartered a ship that collided with a U.S. Navy destroyer in Japanese territorial waters. Two plaintiffs sued NYK Line in the U.S. District Court for the Eastern District of Louisiana, asserting personal jurisdiction over NYK Line pursuant to Fed. R. Civ. Pro. 4(k)(2). The plaintiffs alleged that, despite NYK Line's status as a foreign corporation, NYK Line's substantial, systematic, and continuous contacts with the United States should make NYK Line amendable to suit in federal court. NYK Line moved to dismiss for lack of personal jurisdiction, which the district court granted. The plaintiffs appealed. Because NYK Line's contacts with the United States represent a small portion of its contacts worldwide, the Fifth Circuit found that they are not so substantial and of such a nature as to render NYK Line essentially at home in the United States; therefore, the Fifth Circuit held that personal jurisdiction over NYK Line could not be established under existing Fifth Circuit precedent, affirming the district court decision.

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San Antonio Bay Estuarine Waterkeeper v. Formosa Plastics Corp. Tex., No. 20-40675, 2021 WL

1726813 (5th Cir. Apr. 30, 2021).

San Antonio Bay Estuarine Waterkeeper (San Antonio Bay) sued Formosa Plastics Corporation Texas and Formosa Plastics Corporation U.S.A. (jointly, Formosa) for discharging plastic materials through its stormwater and wastewater in violation of the Clean Water Act (CWA). The parties entered into a Consent Decree to settle the CWA claims; however, the parties disagreed over whether Formosa's reporting and payment obligations were triggered only on a "new discharge" of plastics, as Formosa contended, or on the "visual detection" of plastics irrespective of when those plastics had actually been discharged, as San Antonio Bay contended. The federal district court, agreeing with San Antonio Bay, held that the presence of plastics constituted violations of the Consent Decree. Formosa appealed. The Fifth Circuit held that the Consent Decree contemplated only post-Consent Decree, i.e., new discharges, finding that if the mere presence of plastics were sufficient to trigger Formosa's reporting and payment obligations, then Formosa would be in perpetual violation. The Fifth Circuit reversed the decision of the Texas District Court and remanded the case for reconsideration.

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NINTH CIRCUIT

California

Oceana, Inc. v. Coggins, No. 19-CV-03809-LHK, 2021 WL 1788516 (N.D. Cal. May 5, 2021).

Oceana, Inc. sued Wynn Coggins, acting Secretary of Commerce, the National Oceanic and Atmospheric Administration (NOAA), and the National Marine Fisheries Service (NMFS), for violating a September 2020 Order regarding Annual Catch Limits for the anchovy fishery. Oceana argued that the defendants failed to comply with the September 2020 Order, which vacated a 2019 catch rule, by issuing a 2020 catch rule. The court reasoned that the 2020 catch rule was beyond the scope of the September 2020 Order because the judge expressly declined to address the substance of any new catch rule on remand. Furthermore, because the court determined that the 2019 rule was arbitrary and capricious based on evidence specific to the 2019 rule, the court must consider the new administrative record and evidence specific to the 2020 rule to determine whether it is also arbitrary and capricious. Therefore, the court concluded that Oceana must file a separate lawsuit to challenge the 2020 rule, which Oceana has already done. Thus, the court denied the motion to compel.

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Collins v. County of Monterey, No. 19-CV-01214-NC, 2021 WL 1561511 (N.D. Cal. Apr. 21, 2021).

James Collins sought a declaratory judgment to quiet title, arguing that the Conservation and Scenic Easement on his property in Monterey County, California had terminated or, alternatively, that he was a good faith purchaser without notice of the easement and that the County of Monterey should be equitably estopped from enforcing it. Prior to Collin's purchase, the title search of the property did not disclose the existence of any active easements encumbering the property because the title company does not report terminated easements. Collin's property was zoned as Resource Conservation Coastal Zone, which restricts the use of the property and requires a permit for other development, including construction of a house. An easement may be terminated by the passage of legislation that restricts the use of property for scenic or recreational uses. The court found that the Conservation and Scenic Easement was terminated by the passage of the Monterey County zoning ordinance that restricted the use of the

property; therefore, the court granted Collin's declaratory relief to quiet title. The court also found that Collins did not present adequate evidence that he was without notice; therefore, the court denied Collins' claims for good faith purchaser and equitable estoppel.

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Oregon

Klamath Tribes v. United States Bureau of Reclamation, No. 1:21-cv-00556-CL, 2021 WL 1819695 (D. Or.

May 6, 2021).

In response to the extensive drought in the Klamath Basin, the U.S. Bureau of Reclamation has implemented a plan to regulate waterflow, which may result in an incidental taking of some endangered fish. The Klamath Tribes, a federally recognized tribe, sued the U.S. Bureau of Reclamation (Bureau), arguing that the Bureau's current plan to regulate water in the Klamath Basin violates the government's obligations under the Endangered Species Act (ESA) because the Bureau has failed to adequately consult with the U.S. Fish and Wildlife Service. The Klamath Tribes sought an injunction to limit the flow of water coming out of Upper Klamath Lake, claiming it was to the detriment of a threatened salmon population, an endangered Orca population that depends on salmon recovery, and irrigation interests. The court denied the injunction, finding that the Bureau consulted with the relevant authorities and stakeholders and is better equipped to serve the public interest than a judge. The judge also acknowledged that the

stakeholders and is better equipped to serve the public interest than a judge. The judge also acknowledged that the current plan might result in the incidental taking of some endangered fish, but he reasoned that the Bureau was complying with the ESA requirements during a very difficult drought situation. Furthermore, he concluded that the Bureau was not and is not responsible for the unprecedented drought situation.

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Washington

State v. Shobbell, No. 80215-1-I, 2021 Wash. App. LEXIS 937, 2021 WL 1530261 (Wash. Ct. App. Apr. 19, 2021).

In 2015, the Washington Department of Fish and Wildlife (WDFW) began investigating Puget Sound Seafood Distributors, LLC (PSSD), owned by Hazen Shobbell and Anthony Paul, for purchasing illegally harvested, closed-season fish. In 2018, Shobbell and Paul were charged with two licensing counts, which were later replaced by two unlawful fish and shellfish catch accounting counts, and three trafficking counts. In 2019, the plaintiffs moved to suppress evidence related to clams that WDFW officers destroyed during the execution of a search warrant, arguing that destruction of the clams was done in bad faith and deprived them of evidence in violation of Due Process. The trial court granted the motion to suppress, finding that the destroyed clams potentially could be used to exculpate, or exonerate, the plaintiffs. The State appealed. The court held that the destroyed clams were not material exculpatory evidence and were only potentially useful; thus, destruction of the clams did not violate Due Process unless it was done in bad faith. To prove bad faith, the defendant must establish specific, nonconclusory factual allegations that the police had knowledge of the exculpatory value of the evidence at the time it was destroyed. The Washington Court of Appeals reversed the ruling and remanded the case to determine whether WDFW officers destroyed the clams in bad faith.

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TENTH CIRCUIT

Colorado

Colo. Dep't Nat. Res. v. 5 Star Feedlot, Inc., No. 19SC986, 2021 WL 1728726 (Colo. May 3, 2021).

5 Star Feedlot, Inc. (5 Star) operated a cattle feedlot within three miles of the South Fork of the Republican River. In 2015, a once-in-a-century, three-day rainstorm caused overflow from, and a partial breach in, one of 5 Star's wastewater containment ponds to flow into the Republican River and Hales Pond, killing approximately 15,000 fish. The state sued 5 Star to recover for the unlawful taking of protected wildlife, arguing that the discharge from the containment pond killed the protected fish. The trial court found for the state and fined 5 Star \$625,755. On appeal, the Colorado Supreme Court held that the state, in order to prevail, had to prove that 5 Star killed or otherwise acquired possession of or control over the fish without authorization. Finding that the state only presented evidence that 5 Star lawfully operated waste containment ponds, and that the discharge, which killed the fish, was triggered by the severe rainstorm, not by an act performed by 5 Star, the Colorado Supreme Court concluded that the district court erred in entering judgment against and fining 5 Star; therefore, the Colorado Supreme Court remanded the case with instructions to return it to the district court for entry of judgment against the state and in 5 Star's favor.

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