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Ocean and Coastal Case Alert

The National Sea Grant Law Center is pleased to offer the October 2020 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-20-03-10).

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SECOND CIRCUIT

Connecticut

The Cousteau Soc'y, Inc. v. Celine Cousteau, No. 3:19-CV-1106 (AWT), 2020 WL 5983647 (D. Conn. Oct. 8, 2020).

The Cousteau Society, which holds exclusive rights to ocean explorer Jacques Cousteau's intellectual property portfolio, brought suit against Cousteau's granddaughter Celine Cousteau and her company. The Society alleged that the company's use of certain phrases and images in its short films and promotional materials resulted in trademark infringement and false association violations of Connecticut common law trademark and unfair competition law and violations of the right of publicity under French or Connecticut law. Celine Cousteau filed a motion to dismiss the claims. The U.S. District Court for the District of Connecticut dismissed the federal trademark claims related to one film that was not released in the U.S. The court also held that another film did not violate trademark laws by its use of photos and references to Cousteau. The court allowed the false association, state trademark, and right-of-publicity claims to proceed.

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FOURTH CIRCUIT

South Carolina

Waterkeeper v. Frontier Logistics, L.P., No. 2:20-cv-1089-DCN, 2020 WL 5629717 (D.S.C. Sept. 21, 2020).

Charleston Waterkeeper and South Carolina Coastal Conservation League filed an action pursuant to the citizen suit provisions of the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act (CWA) claiming that Frontier Logistics was responsible for plastic pellets washing up along the shoreline of South Carolina beaches. The

plaintiffs served the South Carolina State Ports Authority (Ports Authority) with a subpoena for documents related to the release of the plastic pellets. Frontier Logistics filed a motion for judgment on the pleadings and a motion to strike. The Ports Authority filed a motion to quash the subpoena. Frontier Logistics argued that the plaintiffs failed to demonstrate standing to bring the suit, failed to state a proper claim, and were prohibited from bringing simultaneous claims under RCRA and the CWA based on the same injury. The court found that the plaintiffs sufficiently demonstrated standing, sufficiently alleged and detailed the harmful environmental effects that the plastic pellets posed, clearly satisfied the requirement that a plaintiff allege ongoing CWA violations, and plausibly alleged that certain pellets could be subject to both the CWA and RCRA. The court denied the motions to quash, for judgment on the pleadings, and to strike.

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FIFTH CIRCUIT

Louisiana

Robin v. Creighton-Smith, No. 20-1987, 2020 WL 5652370 (E.D. La. Sept. 23, 2020).

Van Robin and Oyster Fisheries, Inc. brought suit in state court against Courtney Creighton-Smith alleging breach of contract and unjust enrichment related to the validity and effectiveness of an oyster sublease agreement. The action was removed to federal court. The plaintiffs filed a motion to remand the case to state court for lack of subject matter jurisdiction and sought attorney's fees and costs. The court examined whether the oyster sublease agreement at issue was a maritime contract for purposes of federal admiralty jurisdiction. The court concluded that the agreement was not a maritime contract and held that it could not properly exercise jurisdiction. Furthermore, the court held that imposing attorney's fees and costs on the defendant would plainly contradict Congressional intent and would discourage parties from seeking removal altogether. Therefore, the court remanded the case to the 34th Judicial District Court for the Parish of St. Bernard but denied the request for attorney's fees.

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NINTH CIRCUIT

Pac. Choice Seafood Co. v. Ross, No. 18-15455, 2020 WL 5742046 (9th Cir. Sept. 25, 2020).

A seafood processor brought an action against the National Marine Fisheries Service (NMFS) challenging rules that imposed a quota system for the Pacific non-whiting groundwater fishery, which prohibited any one entity from controlling more than 2.7% of outstanding quota share and requiring divestiture of any excess. The U.S. District Court for the Northern District of California granted summary judgment in favor of NMFS. The seafood processor appealed. The Ninth Circuit affirmed the district court's decision and held that the NMFS rule imposing a 2.7% quota share limit represented a reasonable interpretation of provision of the Magnuson-Stevens Fishery Conservation and Management Act, NMFS did not act arbitrarily or capriciously in imposing the quota, and the agency did not exceed its statutory authority in its rulemaking.

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California

San Francisco Baykeeper v. U. S. Envtl. Prot. Agency, No. C 19-05941 WHA, 2020 WL 5893392 (N.D. Cal. Oct. 5, 2020).

Four separate entities challenged a March 2019 final determination by the Environmental Protection Agency (EPA) that found no jurisdictional waters under the Clean Water Act (CWA) at a salt production complex bordering the southwestern San Francisco Bay. Prior to development, tidal salt marsh interspersed with numerous sloughs occupied the site. The EPA made its determination based on a supposed transformation of the site into "fast land" prior to the passage of the CWA in 1972. Its determination stemmed from a 2012 request by the owner of the salt ponds to explore

its future development. Both the EPA's determination and the administrative record reflected that development and use of the ponds began much earlier. The court held that the EPA misapplied the CWA and remanded to the agency to evaluate the extent of nexus between the salt ponds and the Bay and the extent to which they significantly affect the chemical, physical, and biological integrity of the Bay.

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Maa v. Carnival Corp. & PLC, CV 20-6341 DSF (SKx), 2020 WL 5633425 (C.D. Cal. Sept. 21, 2020).

Toyling Maa and the Estate of Wilson Maa filed suit for two claims of negligence, one of which was a survivor cause of action, against Carnival and Princess Cruise Lines after Mr. and Mrs. Maa contracted COVID-19 on a cruise that resulted in Mr. Maa's death. The defendants moved to dismiss the plaintiffs' complaint in its entirety. The plaintiffs opposed and moved to remand. The court concluded that a forum selection clause warranted denial of remand because the plaintiffs had waived their right to object to removal and to seek remand. Further, the court held that the plaintiffs failed to meet their burden of establishing that the forum selection clause was invalid or unenforceable. With respect to the motion to dismiss, the court held that the Death on the High Seas Act preempted the survival claim brought on behalf of the Estate of Wilson Maa. Moreover, the court concluded that the plaintiffs did not adequately allege that Carnival was the alter ego of Princess, and the complaint did not plausibly allege that both defendants participated equally in every action alleged to have occurred. Therefore, the court denied plaintiffs' motion to remand and granted the defendants' motions to dismiss, with leave given to the plaintiffs to amend their complaint by October 20, 2020 to remedy the complaint's deficiencies.

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American Samoa

Territory of American Samoa v. Nat'l Marine Fisheries Serv., No. 17-17081, 2020 WL 5743277 (9th Cir. Sept. 25, 2020).

The National Marine Fisheries Service (NMFS) sought reversal of the district court's partial grant of summary judgment and vacatur of a final rule regarding large fishing vessels in the waters off the coast of American Samoa. The rule reduced the size of the prohibited fishing zone around the territory for boats larger than 50 feet. The court held that NMFS's decision was not arbitrary or capricious because it considered the relevant factors and articulated a rational connection. Therefore, the court reversed.

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ELEVENTH CIRCUIT

Florida

SOSS2, Inc., v. U. S. Army Corps of Eng'rs, No. 8:19-CV-462-T-23JSS, 2020 WL 5814326 (M.D. Fla. Sept. 30, 2020).

Save Our Siesta Sands, Inc. filed suit alleging that the U.S. Army Corps of Engineers (Corps) violated several federal laws, including the National Environmental Policy Act, the Clean Water Act, the Endangered Species Act, the Marine Mammal Protection Act, and the Administrative Procedure Act by approving a beach nourishment project that would remove sand from Big Sarasota Pass, among other sources. The plaintiffs claimed that the Corps' environmental assessment of the project incorrectly concluded with a "finding of no significant impact." Both parties moved for summary judgment. Upon a review of the administrative record, the court held that the Corps arrived at rational conclusions through a thorough review of the project's effect on the affected environment and granted the Corp's motion for summary judgment.

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Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., No. CV 418-251, 2020 WL 5837650 (S.D. Ga. Sept.

30, 2020).

Four environmental organizations challenged a permit issued and later modified by the U.S. Army Corps of Engineers (Corps) to Sea Island Acquisition, LLC, a private resort and real estate developer. The permit allowed Sea Island Acquisition to construct a new T-head groin on the Sea Island Spit and to dredge and pump sand from an offshore source for construction of a groin, new dunes, and beach nourishment. The defendants, in their motion for summary judgment, argued that the Corps did not act arbitrarily and capriciously by issuing the permit and modification. The plaintiffs argued that the court should vacate the permit and require removal of any portion of the groin that had been built and require mitigation of any impact caused by the project. The court denied the plaintiff's motions for summary judgment and granted defendants' motion for summary judgment, finding the plaintiffs failed to show the defendants acted arbitrarily and capriciously.

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Georgia

Altamaha Riverkeeper v. U. S. Army Corps of Eng'rs, No. CV 418-251, 2020 WL 5837650 (S.D. Ga. Sept. 30, 2020).

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D.C. CIRCUIT

District of Columbia

Oceana, Inc. v. Ross, No. 08-1881 (PLF), 2020 WL 5834838 (D.D.C. Oct. 1, 2020).

Oceana, Inc. challenged the adequacy of the National Marine Fisheries Service's (NMFS) revisions to its Incidental Take Statement (ITS) for a 2012 Biological Opinion assessing the impact of the Atlantic Sea Scallop Fishery on the Northwest Atlantic distinct population segment of loggerhead sea turtles. NMFS's revisions resulted from the court's August 2018 order requiring the agency to better explain its reliance on a monitoring surrogate to measure loggerhead turtle takes caused by dredge fishing. In response to the revisions, Oceana, Inc. argued that the ITS remained defective and NMFS failed to demonstrate that its monitoring methods were not arbitrary and capricious. The court agreed. The court explained that NMFS must either 1) clearly explain whether there is a correlation between the dredge hour surrogate and the numerical take limit, and its selection of 359,757 dredge hours or, if unable to do so, or 2) select a more appropriate surrogate or other mechanism for monitoring loggerhead takes resulting from dredge fishing. The court also directed NMFS to explain the discrepancy between its briefing and the second revised ITS regarding the reliability of the bycatch estimates for sea turtles from the dredge fishery. The court remanded the case to NMFS for a third time in order to revise the ITS as it pertained to dredge hour monitoring.

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