

## OCEAN AND COASTAL LAW - 2018

Tim Eichenberg, Sarah Reiter, Donald Baur  
Environmental Law Center  
Vermont Law School, Summer Session Term 1  
May 29 – June 14, 2018  
9:00 am – 12:00 pm

### SYLLABUS

**Required Texts:** Rieser, et al, *Ocean and Coastal Law (OCL)*, West Group (4<sup>th</sup> Edition, 2013) available at bookstore;  
Supplemental Materials (SM) are available online and by request at the Bookstore

**Strongly Recommended:** Baur, Eichenberg, Snusz and Sutton, *Ocean and Coastal Law and Policy*, ABA (2015) available at bookstore

**Recommended Reading (RR):** On reserve in Library or URLs\*

**Office Hours:** 1:00-2:00 p.m., Mondays – Thursdays

**Exam:** Open-book, take-home, anonymous grading, due 3:00 pm, June 17

**Required Reading:** Advance reading required for first class

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### May 29 – June 1 / Tim Eichenberg

CLASS I:

**Tuesday, May 29:** **Course Introduction: Marine Boundaries and Jurisdictions; Coastal Ownership and Public Trust Rights**

#### **Required Reading:**

The Tidelands Controversy – **OCL pp. 73-74; 82-90**  
Public Trust in Coastal Lands and Waters – **OCL pp. 125-162**  
Public Purpose: Warriors Case Study (Slides)

**SM 088** *U.S. v. California*, 332 U.S. 19 (1947)

**SM 093** *National Audubon Society v. Superior Court*, 33 Cal. 3d 419 (1983)

**SM 102** *San Francisco Baykeeper v. California State Lands Commission*, California Court of Appeals, First Appellate District, November 18, 2015

**SM 109** Public Trust Legislation: Assembly Bill 1273 (2013)

#### **Recommended Reading:**

RR Gary Kinder, *Ship of Gold in the Deep Blue Sea*, pp. 366-373 and Epilogue (1998)

RR S. Roady, “The Public Trust Doctrine,” *Ocean and Coastal Law and Policy*, Chapter 2 (2008)

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\* RR is not necessary for the class. These materials provide additional information and legal authority for the issues discussed in the corresponding class.

**CLASS II:**  
**Wednesday, May 30:     Coastal Zone Management**

**Required Reading:**

Saving the Bay: The Nationals First Coastal Management Agency (Video)  
The Coastal Zone Management Act – **OCL pp. 249-311**

- SM 113**     *Surfrider Foundation v. Martins Beach*, Case No. CIV520336 (2014)  
**SM 120**     *Natural Resources Defense Council v. Winter*, 645 F. Supp. 2d 841 (2007)  
**SM 123**     Presidential Exception from the CZMA (January 15, 2008)

**Recommended Reading:**

- RR           K. Fletcher, “Managing Coastal Development,” *Ocean and Coastal Law and Policy*, Chapter 5 (2008)  
RR           O. Pilky and Young, *The Rising Sea*, Chapter 1, “Living on the Edge” (2008)

**CLASS III:**  
**Thursday, May 31:     Beach Erosion, Public Access and Private Property Interests**

**Required Reading:**

Beach Erosion, Sea Level Rise and Shoreline Protection – **OCL pp. 338-351**  
Private Property Interests in Coastal Waters and Lands – **OCL pp. 163-179**  
Loss of Littoral Rights – **OCL pp. 193-205**  
Public Access and Use of Beaches and Shores – **OCL pp. 216-238**

- SM 125**     *McGarvey v. Whittredge*, 628 A.3d 620 (2011)  
**SM 132**     H. Rice, *Mayor faults ‘blow to Galveston’ after state halts beach project*, Houston Chronicle, November 15, 2010 (<http://www.chron.com/business/real-estate/article/Mayor-faults-blow-to-Galveston-after-state-1708528.php>)

**Recommended Reading:**

- RR           Carolyn Lochhead, *Is rebuilding in hurricane zones wise?* San Francisco Chronicle, Jan. 8, 2013 (<http://www.sfgate.com/default/article/Is-rebuilding-in-hurricane-zones-wise-4206433.php>)  
RR           Meg Caldwell and Craig Holt Segall, *No Day at the Beach: Sea Level Rise, Ecosystem Loss and Public Access Along the California Coast*, 34 Ecology Law Quarterly 533 (2007)

**CLASS IV:**  
**Friday, June 1:        The Takings Issue, Climate Change and Sea Level Rise**

**Required Reading:**

Creating Beach Access by Regulation – **OCL pp. 238-248**  
The Takings Issue and Sea Level Rise – **OCL pp. 364-385**

Effects of Government Funding – **OCL pp. 351-364**

Climate Change and Sea Level Rise in San Francisco Bay (slides)

Lecture by Dr. Heidi Weiskel, ELAW on “How Scientists and Lawyers Work Internationally to Protect Coastal Communities and Environments.”

Class Discussion (if time permits): Effect of the Trump Administration’s Agenda on Climate Change, Oceans and Coasts (*see links below for background on Clean Power Plan, Gorsuch Nomination, Waters of the U.S. Rule, and EPA Budget*).

**SM 135** A. Phillips, *How the New Flood Insurance Reforms Make Costly Future Climate Disasters More Likely*, Climate Progress, March 26, 2014  
(<http://thinkprogress.org/climate/2014/03/25/3418323/flood-insurance-program-reforms/>)

**SM 138** J. Upton, *Bay Area Adopts Historic Climate-Change Rules*, Bay Citizen, October 6, 2011

*Also access these links at SM 139*

See Executive Order Promoting Energy Independence and Economic Growth at [http://legal-planet.org/wp-content/uploads/2017/03/document\\_pm\\_02-1.pdf](http://legal-planet.org/wp-content/uploads/2017/03/document_pm_02-1.pdf)

See “How Justice Gorsuch Would Impact Environmental Law” at <http://www.martenlaw.com/newsletter/20170404-justice-gorsuch-environmental-law>

See “Trump Dismantling EPA Clean Water Rule” at <http://www.vox.com/energy-and-environment/2017/2/28/14761236/wotus-waters-united-states-rule-trump>

See “Analysis of Trump Budget for EPA” at <https://drive.google.com/file/d/0B-47Xatg07SQk5rMGhkSHQtc0U/view>

See “National Monuments Under Trump” at <http://legal-planet.org/2017/04/10/national-monuments-under-trump/>

**Recommended Reading:**

RR Michael C. Blumm and Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 Harv. Envtl. L. Rev. 321, 341-354 (2005)

RR C. Tulou, et al “Climate Change and the Marine Environment,” *Ocean and Coastal Law and Policy*, Chapter 18 (2008)

RR T. Eichenberg, Bothwell and Vaughn, *Climate Change and the Public Trust Doctrine: Using an Ancient Doctrine to Adapt to Rising Sea Levels in San Francisco Bay*, 3 Golden Gate University Environmental Law Journal 243-282 (2010)

RR BCDC, “Bay Plan Amendment No. 1-08 to the San Francisco Bay Plan” addressing climate change and sea level rise, October 6, 2011  
[http://www.bcdc.ca.gov/proposed\\_bay\\_plan/10-01Resolution.pdf](http://www.bcdc.ca.gov/proposed_bay_plan/10-01Resolution.pdf)

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**June 4-7 / Sarah Reiter**

**CLASS V:**

**Monday, June 4:** **The United Nations Convention on the Law of the Sea and The South China Sea Arbitration**

**Required Reading:** International Law of the Sea, The Deep Seabed and High Seas: OCL Chapter 1, pp. 1-7, 19-31, 50-56, 68-71

## SM

- South China Sea: [The South China Sea](#), The Economist, July 12, 2016; [What Can the South China Sea Learn from the Arctic?](#) The National Interest, April 5, 2017; [South China Sea Arbitration \(skim\)](#)
- [1972 Stockholm Conference on the Human Environment \(skim\)](#)
- [1992 Rio Declaration: Article 15—The Precautionary Approach](#)
- [UNCLOS \(for reference\)](#)

## Recommended

RR [Making law on the high seas](#)

RR [Her Deepness](#)

## CLASS VI:

### Tuesday, June 5: [The United States as an Ocean Conservation Leader: Cumulative Impacts & Federal Fisheries Management](#)

**Required Reading: All Students:** Federal Fisheries Management: OCL Chapter 6, pp. 610-658, 665-693, Chapter 6, pp.571-573, 596-600

## SM

- [First Global Integrated Marine Assessment \(First World Ocean Assessment\)](#): Part I; Part II: Chapter 1, Chapter 2; Part III: Chapter 9; Part IV Chapter 16; Part V Chapter 32; Part VI: Chapters 33,34,35,53; Part 7: Chapters 54, 55
- Cumulative Impacts and Environmental Assessments: [Erin Prahler, Sarah M. Reiter, et al., It All Adds Up: Enhancing Ocean Health by Improving Cumulative Impacts Analyses in Environmental Review Documents, 33 STAN. ENVTL. L.J. \(2014\)](#); [Halpern, B. et al, A global map of human impact on marine ecosystems \(2008\)](#); [Clarke Murray, Cathryn l , Mach, Megan E.2 , and Martone, Rebecca, G.2 \(2014\). Cumulative effects in marine ecosystems: scientific perspectives on its challenges and solutions. WWF-Canada and Center For Ocean Solutions. 60 pp.](#); [Melissa M. Foley, Matthew H. Armsby, Erin E. Prahler, Margaret R. Caldwell, Larry B. Crowder, Ashley Erickson, John Kittinger. Improving ocean management through the use of ecological principles and integrated ecosystem assessments. 2013. BioScience 63: 619-631](#);
- Federal Fisheries Management: [How Dwindling Fish Stocks Got a Reprieve, New York Times, April 19,2016](#)

## Recommended

RR [Tagging tuna in the deep ocean](#)

## CLASS VII:

### Wednesday, June 6: [Leading Examples of International Sectoral Regulation and Tools for Ecosystem Based Management](#)

**Assignment(s):** Come prepared to present your group project by 0900.

#### **Required Reading:**

1. **All:** OCL Chapter 8, pp. 944-969
2. **Group 1:** International Fisheries: OCL, Chapter 1, pp.47-48, Chapter 6, pp. 701-721, 731-744
3. **Group 2:** International Mining Management: OCL, Chapter 1, pp. 48-49, Chapter 5, pp.552-570

## SM

- **All: Marine Spatial Planning**: [Ehler, Charles, and Fanny Douvère. Marine Spatial Planning: a step-by-step approach toward ecosystem-based management. Intergovernmental Oceanographic Commission and Man and the Biosphere Programme. IOC Manual and Guides No. 53, ICAM Dossier No. 6. Paris: UNESCO. 2009 \(English\).; Ehler, Charles; A Guide to Evaluating Marine Spatial Plans, Paris, UNESCO, 2014. IOC Manuals and Guides, 70; ICAM Dossier 8](#)
- **Group 1: International Fisheries**: [UNCLOS Arts. 61-67;116-120; Straddling & Highly Migratory Fish Stocks Agreement Arts. 5-6; 1992 Rio Declaration: Article 15—The Precautionary Approach ; First Global Integrated Marine Assessment \(First World Ocean Assessment\) Part IV](#)
- **Group 2: International Mining Management**: [First Global Integrated Marine Assessment \(First World Ocean Assessment\) Part V Chapter 23; UNCLOS Arts. 1, 133, 136, 137, 141, 145, 158, 162; Protecting the Oceanic Gardens of Eden ; David Hartley, Guarding the Final Frontier: The Future Regulations of the International Seabed Authority, 26 Temp. Int'l & Comp. L.J. 335, 352 \(2012\) ; The International Seabed Authority: Structure and Functioning](#)

## CLASS VIII:

**Thursday, June 7:**            **Integrated Management of the Oceans at the International Level**

**Assignment(s):** Submit reflection and group partner feedback by 0900.

### **Required Reading:**

#### SM

- **Regional Case Studies & Lessons Learned**: Read only the links required for your case study to get you started: (1) [Sargasso Sea Commission](#) ; (2) [The Collective Arrangement: Information Paper; The Collective Arrangement: \(OSPAR Agreement 2014-09\)](#) ; (3) Antarctica: [Jacquet J, E Blood-Patterson, C Brooks & D Ainley. 2015. 'Rational use' in Antarctic waters. Marine Policy. 63:28-34.; Antarctic Ocean Legacy: Protection for the East Antarctic Coastal Region](#)
- **Preparing for the United Nations Biodiversity Negotiations**: [Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction ; Understanding the Upcoming Negotiations; Discussion Paper on the Development and Drafting of Regulations on Exploitation for Mineral Resources in the Area](#)

### **Recommended**

RR            [Two months breaking ice](#)

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## June 11-15 / Donald Baur

*NOTE: \* indicates a case for which a volunteer student presentation is requested*

**Sunday, June 11:**            **Non-required screening of *The Cove* in the classroom beginning at 6:00 pm.**

## CLASS IX:

**Monday, June 12:**            **PART I: International Authorities – Species Conservation/Whales and Whaling**

**Required Reading:**

- SM 141\***     *Japan Whaling Ass’n v. American Cetacean Society*, 478 U.S. 221 (1986)
- SM 151**     Letter from Department of the Interior to the President regarding Iceland and the Fisherman’s Protective Act (Jan. 31, 2014)
- SM 156**     “Saving Whales, Saving Whaling, Saving the Whaling Convention,” *Environmental Forum*, at 40-45 (May/June 2007) (video shown in class on Taiji dolphin hunt)
- SM 162**     “‘Whale Wars’ Leader: ‘Arrest Me or Shut Up,’” *New York Times* (June 4, 2011)
- SM 164**     “Whale Wars – Eco-Terrorism as Reality TV”, *Huffington Post* (June 5, 2009)
- SM 165\***     *Institute of Cetacean Research v. Sea Shepherd Conservation Society*, 708 F.3d 1099 (9th Cir. 2013)
- SM 171**     Whaling in the Antarctic, *Australia v. Japan*, Int’l Court of Justice (March 31, 2014)
- SM 179**     International Whaling Commission, Response to Japanese NEWREP-A Proposal (February 2015)
- SM 190**     United Nations, Japan Declaration Under Article 36(2) Rescinding ICJ Jurisdiction (October 6, 2015)
- SM 191**     “[Japan kills more than 300 whales in annual Antarctic hunt](#),” *The Guardian* (March 31, 2017)
- SM 193**     “[Under intense international pressure, why does Japan continue whaling?](#)” *Asian Correspondent* (March 29, 2017)

**Taiji Dolphin Hunt (video shown in class)**

**Recommended Reading:**

- RR            *Institute of Cetacean Research v. Sea Shepherd Conservation Society*, 774 F.3d 935 19<sup>th</sup> Cir. 2014)
- RR            P. Hoare, *The Whale: In Search of the Giants of the Sea*, Chapter 12 (2010)
- RR            R. Ellis, *The Empty Ocean*, Chapter 4 (2003)
- RR            R. Gambell, “The International Whaling Commission and the Contemporary Whaling Debate,” *Conservation and Management of Marine Mammals*, Chapter 8 (1999)

**CLASS IX:**

**Monday, June 12:**            **PART II: Federal Marine and Coastal Protected Areas**

**Required Reading:**

- SM 197**     J. Lubchenco, “Making Waves: The Science and Politics of Ocean Protection” (October 15, 2015)
- SM 200**     “To Save Fish and Birds,” *New York Times* (February 15, 2014)
- SM 202**     Maintaining Unimpaired Ocean Resources and Experiences: A National Park Service Ocean Stewardship Strategy (2004)
- SM 211\***     *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977)
- SM 213**     *Organized Fishermen of Florida v. Watt*, 590 F. Supp. 805 (1984), aff’d 775 F.2d 1544, 11th Cir. 1984)

**SM 217\*** Solicitor’s Opinion (April 16, 1998) – NPS Organic Act  
Marine Sanctuaries – **OCL pp. 944-956** (*Personal Watercraft Industry Association v. Department of Commerce*)

**Recommended Reading:**

- RR K. Connolly, “Marine Protected Areas,” *Ocean and Coastal Law and Policy*, 2d Ed., Chapter 18 (2015)
- RR Baur, Irvin, Misenko, “Putting Protection into Marine Protected Areas,” 28 Vt. L. Rev. 497 (2004)
- RR R. Ellis, *The Empty Ocean*, Chapter 12 (2003)
- RR J. McPhee, *Encounters with the Archdruid*, Part 2 (1971)

**CLASS X:**

**Tuesday, June 13:**            **The Marine Mammal Protection Act**

**Required Reading:**

Federal Preemption

**SM 226\*** *UFO Chuting of Hawaii v. Young*, 327 F. Supp. 2d 1220 (D. Hawaii 2004)

The Moratorium and Take/Import Prohibitions and the Exceptions –  
**OCL pp. 787-791**

**SM 239\*** *Center for Biological Diversity v. National Science Foundation*, 55 ERC 1873 (N.D. Cal. 2002)

**SM 242\*** *Strong v. Secretary of Commerce*, 5 F.3d 905 (5th Cir. 1993); *United States v. Hayashi*, 5 F.3d 1278 (9th Cir. 1993)

**SM 251** *Georgia Aquarium v. Pritzker*, 2015 WL 5730661 (N.D. GA, Sept. 28, 2015)

**Keiko and the MMPA (video shown in class)**

**SM 271\*** *Conservation Council for Hawaii v. NMFS*, 97 F. Supp. 3d 1210 (D. Hawaii 2015) (also discussed under Endangered Species Act on June 14)

Fisheries Incidental Take/Domestic – **OCL pp. 787-791**

Fisheries Incidental Take/Foreign – **OCL pp. 792-796**

**SM 288\*** *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007)

**Screening and discussion of *Sonic Sea*, beginning 6:30 pm, with discussion by a panel of experts.**

**Recommended Reading:**

RR D. Baur, M. Gosliner, N. Young, K. Sedlacek “The Law of Marine Mammal Conservation,” *Ocean and Coastal Law and Policy*, 2d Ed, Chapter 14 (2015)

RR J. Hargrove, H. Chua-Evan, *Beneath the Surface: Killer Whales, SeaWorld, and the Truth Beyond Blackfish* (2015)

- RR S. Casey, *Voices in the Ocean: A Journey into the Wild and Haunting World of Dolphins* (2015)
- RR R. Ellis, *The Empty Ocean*, Chapter 11 (2003)
- RR G. Meffe, W. Perrin, P. Dayton, "Marine Mammal Conservation: Guiding Principles and their Implementation," *Conservation and Management of Marine Mammals*, Chapter 20 (1999)

**CLASS XI:**

**Wednesday, June 14: Marine Endangered Species**

**Required Reading:**

- Listing and Critical Habitat – **OCL pp. 840-847**
- SM 299\*** *Center for Biological Diversity v. Lohn*, 296 F. Supp.2d 1223 (W.D. Wa. 2003)
- Consultation and Jeopardy – **OCL pp. 864-872** (*Greenpeace Foundation v. Mineta*)\*
- SM 313\*** *Oceana v. Gutierrez*, 488 F. 3d 1020 (D.C. Cir. 2007)
- SM 317** *Oceana v. BOEM*, 2014 WL 1281996 (D.D.C. Mar. 31, 2014)
- The Take Prohibition and its Exceptions - **OCL pp. 855-861** (*Straban v. Coxe*)\*
- SM 322** *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996)
- SM 328** *Drifting in Static*, National Geographic (Jan. 2011)
- SM 330** *Navy War Games Face Suit Over Impact on Whales, Dolphins*, Washington Post (November 10, 2014)
- SM 332** *Conservation Council for Hawaii v. NMFS*, 2015 WL 1499589 (D. Hawaii, Mar. 31, 2015) - (Please refer to SM 271-Class X)

**Mandatory Brown Bag Lunch Lecture by Jean-Michel Cousteau:**

*An Ocean Life - Reflections on a Lifetime of Advocacy, Adventure, Education and Science for the Protection of Our Blue Planet.*

**Recommended Reading:**

- RR J. Horwitz, *War of the Whales: A True Story* (2015)
- RR M. Rowland, "The ESA and Marine Species," *Ocean and Coastal Law and Policy*, 2d Ed., Chapter 17 (2015)
- RR D. Baur, Wm. R. Irvin, *ESA: Law, Policy and Perspectives*, Chapters 2, 6, 11, 15-17 (2010)
- RR R. Ellis, *The Empty Ocean*, Chapter 5 (2003)
- RR D. Domning, "Endangered Species: The Common Denominator" *Conservation and Management of Marine Mammals*, (1999)



CLASS XII:

**Thursday, June 15:**      **PART I: Offshore Energy**

**Required Reading:**

Offshore Oil and Gas Energy Development – OCL pp. 392-394, 397-415

CLASS XII:

**Thursday, June 15:**      **PART II: Deepwater Horizon/Macondo Well and Spill**

**Required Reading:**

- SM 333      “The Deepwater Horizon Threat,” *New York Times* (April 16, 2014)  
SM 336      “Five Years After the Big Spill: Drilling Questions Continue in the Gulf,”  
*Miami Herald* (April 19, 2015)  
SM 342      “Presidential Executive Order Implementing an America-First Offshore Energy  
Strategy,” The White House press release (April 28, 2017)

**Student volunteer teams to give presentations on causes of the spill, effects of the spill, future actions. Discussion lead by Dr. Heather Rally.**

CLASS XII:

**Thursday, June 15:**      **PART III: Ocean Policy**

**Required Reading:**

- SM 348      National Ocean Implementation Plan (April, 2013)  
SM 381      Ocean Action Agenda - Ocean Priorities for the Trump Administration

**Recommended Reading:**

- RR      D. Baur, P. Parenteau, G. Hancock Snusz, “Legal Authorities for Ecosystem-Based Management in U.S. Coastal and Ocean Areas,” *Ocean and Coastal Law and Policy*, 2d Ed., Chapter 21 (2015)  
RR      E. Laschever, F. Baptiste, N. Band, “Oil Spill Liability,” *Ocean and Coastal Law and Policy*, 2d Ed. Chapter 13 (2015)  
RR      P. Smyth, M. Mason, “Offshore Mineral Development,” *Ocean and Coastal Law and Policy*, 2d Ed., Chapter 12 (2015)  
RR      A. Powers, O. Smith, “Emerging Ocean Uses,” *Ocean and Coastal Law and Policy*, 2d Ed., Chapter 15 (2015)  
RR      J. Wood, I. Gutherz, “Offshore Renewable Energy,” *Ocean and Coastal Law and Policy*, 2d Ed., Chapter 14 (2015)  
RR      S. Chasis, “Reforms in U.S. Ocean Policy and Law in Response to Calls for Urgent Action,” *Ocean and Coastal Law and Policy*, Chapter 23 (2015)  
RR      Deepwater: The Gulf Oil Disaster and the Future of Offshore Drilling, Report to the President, National Commission in the BP Deepwater Horizon Oil Spill and Offshore Drilling (Jan. 2011)  
RR      Executive Order 13547 (July 19, 2010)

RR            “Scientific, Legal and Policy Lessons from the Deepwater Horizon Disaster,”  
*Environmental Law Reporter* (Nov. 2010)

**Thursday, June 15:      Hot Topics Lecture**

**Mandatory Brown Bag Lunch Lecture:**

*Lions and Tigers and Bears, Oh My! The Captive Wildlife Crisis in Our Backyard,*  
with Dr. Heather Rally.