

OCEAN AND COASTAL LAW - 2023

Lizzie Lewis, Caroline Park, Sarah M. Reiter, and Michael Jasny
Environmental Law Center
Vermont Law School, Summer Session Term 1
Oakes 110
May 30 – June 15, 2023
9:00am – 12:00 pm

SYLLABUS

Required Texts: Refer to Canvas for required readings
Strongly Recommended: Baur, Eichenberg, Snusz and Sutton, *Ocean and Coastal Law and Policy*, ABA (2015) available at bookstore
Recommended Reading (RR): Refer to Canvas for recommended readings
Office Hours: By appointment
Exam: Open-book, take-home, anonymous grading, due Sunday, June 18, 3:00 pm. Instructors reserve the right to raise or lower final grades as a result of superior or inferior performance.

May 30-June 2/Lizzie Lewis and Caroline Park

CLASS I:

Tuesday, May 30: **Coastal Ownership & The Public Trust Doctrine**

Required Reading:¹

The Tidelands Controversy –

United States v. California, 332 U.S. 19 (1947)
United States v. Texas, 339 U.S. 707 (1950)
United States v. Louisiana, 363 U.S. 1 (1960)
Ten Taxpayer Citizens Grp. v. Cape Wind Assocs., 373 F.3d 183 (1st Cir. 2004)

The Public Trust Doctrine –

Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988)
Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892)
People ex rel. Scott v. Chi. Park Dist., 360 N.E.2d 773 (Ill. 1976)

Private Rights Of Littoral Landowners –

Part I of Alyson C. Flournoy, *Beach Law Cleanup: How Sea-Level Rise Has Eroded The Ambulatory Boundaries Legal Framework*, 42 Vermont L. Rev. 89 (2017)
Schultz v. Dania, 156 So.2d 520 (Fl. Dist. App. 1963)
Lummis v. Lilly, 429 N.E.2d 1146 (Mass. 1982)
United States v. Milner, 583 F.3d 1174 (9th Cir. 2009)

¹ Please note that case excerpts for Week 1's required reading will be posted on Canvas. The citations are provided for your information only.

Recommended Reading:

- RR *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012)
- RR Mary Turnipseed et al., *The Silver Anniversary of the United States' Exclusive Economic Zone: Twenty-Five Years of Ocean Use and Abuse, and the Possibility of a Blue Water Public Trust Doctrine*, Ecology L.Q. (2009)
- RR Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 Penn. State Envtl. L. Rev. 1 (2007)
- RR Parts II – IV of Donna R. Christie, *Of Beaches, Boundaries and SOBS*, 25 J. Land Use & Envtl. L. 19 (2009)

CLASS II:**Wednesday, May 31:****The Takings Issue: Public Access, Beach Protection, & Sea Level Rise****Required Reading:**

Takings –

- Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)
- Parts I – IV of Peter Spencer, *When Giving Almost Becomes a Taking: An Analysis of Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 16 Roger Williams Univ. L. Rev. 751 (2011)
- Surfrider Foundation v. Martins Beach 1*, 14 Cal. App. 5th 238 (Ct. App. 2017), *cert. denied*, 139 S. Ct. 54 (2018)

Public Access –

- State v. Ibbison*, 448 A.2d 728 (R.I. 1982)
- Jesurum v. WBTSCC Ltd. P'ship*, 151 A.3d 949 (N.H. 2016)
- Stevens v. Cannon Beach*, 854 P.2d 449 (Or. 1993)
- Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984)

Beach Protection –

- Shell Island Homeowners Ass'n v. Tomlinson*, 517 S.E.2d 406 (N.C. Ct. App. 1999)
- St. Bernard Parish Gov't v. United States*, 887 F.3d 1354 (Fed. Cir. 2018)
- Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine & Takings in a Changing Climate*, Stanford Envtl. L.J. 51 (2011)

- RR E. Britt Bailey, *From Sea to Rising Sea: How Climate Change Challenges Coastal Land Use Laws*, 33 Univ. Haw. L. Rev. 289 (2010)
- RR Justin Ponds, *How Much Land Can a Sand Pump Dump: Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 31 Miss. C.L. Rev. 125 (2012)

CLASS III:

Thursday, June 1:

Primer On The Administrative Procedure Act; Coastal Zone Management; National Environmental Policy Act

Required Reading:

Judicial Review of Agency Action –

Todd Garvey, Cong. Res. Serv., *A Brief Overview of Rulemaking and Judicial Review* (Mar. 27, 2017)
Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)
Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502 (2009)
Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016)
Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)
Humane Society of U.S. v. Zinke, 865 F.3d 585 (D.C. Cir. 2017)
Loper Bright Enters., Inc. v. Raimondo, 45 F.4th 359 (2022)

The Coastal Zone Management Act –

California v. Norton, 311 F.3d 1162 (2002)
Parts I & V of *Envtl. Def. Ctr. v. BOEM*, 36 F.4th 850 (9th Cir. 2022)
Decision & Findings by the U.S. Sec'y of Commerce in the Consistency Appeal of Broadwater Energy LLC & Broadwater Pipeline LLC by the State of N.Y. (2009)

The National Environmental Policy Act –

Cong. Res. Serv., *Judicial Review and the National Environmental Policy Act of 1969* (Aug. 4, 2022)
Anderson v. Evans, 371 F.3d 475 (9th Cir. 2004)
Ctr. for Biological Diversity v. U.S. Dep't of Interior, 563 F.3d 466 (D.C. Cir. 2009)
Ctr. for Biological Diversity v. Bernhardt, 982 F.3d 723 (9th Cir. 2020)
Part III of *Envtl. Def. Ctr. v. BOEM*, 36 F.4th 850 (9th Cir. 2022)

Recommended Reading:

- RR Nicholas R. Bednar, *What to Do About Chevron—Nothing*, 72 Vand. L. Rev. En Banc 151 (2019)
- RR Phillip Dane Warren, *The Impact of Weakening Chevron Deference on Environmental Deregulation*, 118 Colum. L. Rev. Online 62 (2018)
- RR Michael Burger, *Consistency Conflicts and Federalism Choice: Marine Spatial Planning Beyond the States' Territorial Seas*, 41 Env'tl. L. Rep. News & Analysis 10602 (2011)
- RR Rachel Keylon, *Rulemaking Doubletake: An Opportunity to Repair and Strengthen the National Environmental Policy Act*, 22 Sustainable Dev. L. & Pol'y 4 (2021)
- RR Sam Kalen, *NEPA's Trajectory: Our Waning Environmental Charter from Nixon to Trump?*, 50 Env'tl. L. Rep. 10398 (2020)

CLASS IV:

Friday, June 2:

Fisheries: U.S. Federal & International Conservation & Management

Required Reading:

Magnuson-Stevens Fishery Conservation and Management Act and National Standard Guidelines: Excerpts (4 pages)

Case Excerpts (* requesting student volunteers to present on each case during class):

Natural Resources Defense Council v. Daley, 209 F.3d 747 (D.C. Cir. 2000) (4 pages)

Flaherty v. Bryson, 850 F.Supp.2d 38 (D.D.C. 2012) (3 pages)

State of New York v. Raimondo, 2022 WL 912682 (S.D.N.Y. 2022) (8 pages)

Hulk Grouper Fishery Management Plan: Reading for In-Class Exercise (2 pages)

International Convention for the Conservation of Atlantic Tunas (ICCAT), May 14, 1966, 673 U.N.T.S. 63: Treaty Excerpts (2 pages)

ICCAT Recommendation 22-10: Western Atlantic Bluefin Tuna (5 pages)

Recommended Reading (not printed, go to links below):

J. Wolman, “Offshore wind is set to soar. Fishing groups want to pump the brakes.” *Politico* (March 11, 2022), available at <https://www.politico.com/news/2022/03/11/offshore-wind-fishing-groups-00016469>

Z. Burden, “Biden, NOAA announce new actions on illegal fishing.” *The Hill* (June 27, 2022), available at <https://thehill.com/policy/energy-environment/3538576-biden-noaa-announce-new-actions-on-illegal-fishing/>

June 5-June 8/ Sarah Reiter

CLASS V:

Monday, June 5:

International Marine Law/Emergence and Principles

Required Reading:

Refer to Canvas for required and recommended readings on the sources and principles of international environmental law and the United Nations Convention on the Law of the Sea, including but not limited to:

Treaty (202 pages): UNCLOS, in particular, Articles 87-89, 136, 137, 192, 194, 197

Law Review Article (7 pages): D. Freestone, *Modern Principles of High Seas Governance: The Legal Underpinnings* (2009) 39 International Environmental Policy and Law 49, 7 p.

CLASS VI:

Tuesday, June 6: International Marine Law & The Ocean-Climate Nexus

Required Reading:

Refer to Canvas for required and recommended readings on bridging the gap between UNCLOS and the United Nations Framework Convention on Climate Change (UNFCCC) through the study of GHGs, ocean acidification, and requirements under UNCLOS and the Paris Agreement, including but not limited to:

Treaty (52 pages): UNFCCC, 25 p.; The Paris Agreement, 27 p.

Decisions: (4+ pages): COP Decision Texts, 4 p.+

Law Review Article(s) and additional resources (81 pages): IPCC SROCC Report Summary for Policymakers, 36 p.; Susan Biniaz, *Comma But Differentiated Responsibilities: Punctuation and 30 Other Ways Negotiators Have Resolved Issues in the International Climate Change Regime*, 6 Mich. J. Envtl. & Admin. L. 37 (2016), 28 p.; Gallo, N., Victor, D. & Levin, L., Ocean commitments under the Paris Agreement. *Nature Climate Change* 7, 833-838 (2017) 5 p.; Oral, N., *Ocean Acidification: Falling between the legal cracks of UNCLOS and the UNFCCC?*. 45 Ecology L. Q. 9 (2018) 12 p.

CLASS VII:**Wednesday, June 7: International Marine Law & Biodiversity on the High Seas****Required Reading:**

Refer to Canvas for required and recommended readings on integrated ocean governance and the International legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including but not limited to:

Treaties (50+ pages): Draft BBNJ text, 50 p.; Proposed comments on BBNJ (skim); Pending BBNJ text (under reconciliation May 15, 2023)

Resolutions: (4+ pages): UNGA 59/24, 69/292, 72/249

Law Review Article(s) (126 pages): Gjerde, K.M., Clark, N., Harden-Davis, H., (2019), *“Building a platform for the future: The relationship of the expected new agreement for marine biodiversity in areas beyond national jurisdiction and the UNCLOS,”* *Ocean Yearbook* 33: 3-44, 44 p.; Wright, G., et al. (2018) *The long and winding road: negotiating a treaty for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction*. IDDRI, Studies No 08/18, 82 p.

CLASS VIII:**Thursday, June 8: International/Federal Marine Law & Plastic Pollution****Required Reading:**

Refer to Canvas for required and recommended readings on international and national instruments to address plastic pollution and its interlinkages with biodiversity, climate change, health, and social issues, including but not limited to:

Resolution: U.N. Env't Assemb. Draft Res., U.N. Doc. UNEP/EA.5/L.23/Rev.1, End Plastic Pollution: Towards an International Legally Binding Instrument (Mar. 2, 2022) ("UNEA Resolution")

Report: Reckoning with the U.S. Role in Global Ocean Plastic Waste, (2021) Consensus Study Report Highlights, National Academy of Sciences, 4p.;

Law Review Article (29 pages): McKayla McMahon, *Tides of Plastic: Using International Environmental Law to Reduce Marine Plastic Pollution*, 28 Hastings Env't'l L.J. 49 (2022).

Cases: San Antonio Bay Estaurine Waterkeeper v. Formosa Plastics Corporation Texas, (S.D. Tex. 2019); No. 20-40575 (5th Cir. Apr. 30, 2021)

June 12-15 / Michael Jasny

CLASS IX

Monday, June 12 **Marine Biodiversity and Species-Based Management**

J.L. Penn and C. Deutsch, *Avoiding Ocean Mass Extinction from Climate Warming*, 376 Sci. 524 (2022)

Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. § 1361 et seq. (excerpts)

Endangered Species Act of 1973, as amended, 16 U.S.C. § 1531 et seq. (excerpts)

Take prohibitions (MMPA, ESA)

Strong v. Secretary of Commerce, 5 F.3d 905 (5th Cir. 1993)

U.S. v. Hayashi, 5 F.3d 1278 (9th Cir. 1993)

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995)

Strahan v. Cox, 127 F.3d 155 (1st Cir. 1997)

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

Species listings (ESA)

Center for Biological Diversity v. Lohn, 296 F. Supp.2d 1223 (W.D. Wa. 2003)

Take exceptions and limits: standards for authorization of incidental take (MMPA)

Center for Biological Diversity v. Salazar, 695 F.3d 893 (9th Cir. 2012)

NRDC v. Pritzker, 828 F.3d 1125 (9th Cir. 2016)

Take exceptions and limits: jeopardy and adverse modification (ESA)

National Wildlife Federation v. NMFS, 524 F.3d 917 (9th Cir. 2008)

Pacific Coast Federation of Fishermen's Associations v. NMFS, 265 F.3d 1028 (9th Cir. 2001)

R. Williams et al., *Destroying and Restoring Critical Habitats of Endangered Killer Whales*, 71 Biosci. 1117 (2021)
D. Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 Fla. L. Rev. 141 (2012) (excerpt)

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

CLASS X

Tuesday, June 13 **Marine biodiversity and species-based management (continued)**

Cumulative impacts/ sublethal effects and the incidental take provision

Sonic Sea (see above)

NMFS, Notice of Issuance of Five Incidental Harassment Authorizations, 83 Fed. Reg. 63,268 (Dec. 7, 2018) (excerpt)

National Research Council, *Marine Mammal Populations and Ocean Noise: Determining When Noise Causes Biologically Significant Effects* (2005) (excerpt)

L. Hatch and K. Fristup, *No Barrier at the Boundaries: Implementing Regional Frameworks for Noise Management in Protected Marine Areas*, 395 Mar. Ecol. Prog. Ser. 223 (2009) (excerpt)

Domestic bycatch

Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. § 1361 et seq. (excerpts)
K. Ohnemus, *The (En)Tangled Web They Weave: Stakeholder Perceptions of the Large Whale Take Reduction Plan Process* 1-19 (2020) (unpublished M.A. thesis)

T.B. Werner et al., *Preventing Entanglements of North Atlantic Right Whales (Eubalaena glacialis) in Pot Fishing Gear* (undated presentation)

Center for Biological Diversity v. Raimondo, Civ. No. 18-112 JEB (D.D.C. Jul. 8, 2022)
Omnibus Appropriations Act for Fiscal Year 2023, H.R. 2617, 117th Congress, Div. JJ (2022)

Foreign bycatch

Conservation of Sea Turtles, Importation of Shrimp, 16 U.S.C. § 1537note
General Agreement on Tariffs and Trade (GATT) art. XX, Oct. 30, 1947, 55 U.N.T.S. 187

Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products* ¶¶ 161-86, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998)

NRDC v. Ross, 331 F.3d 1338 (2018)

NMFS, Final rule: Fish and fish product import provisions of the Marine Mammal Protection Act, 81 Fed. Reg. 54,390 (Aug. 15, 2016) (excerpt)

Standing and relief in wildlife cases

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)

C. Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163 (1992) (excerpt)

Center for Biological Diversity v. EPA, 937 F.3d 533 (5th Cir. 2019)

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978)

Winter v. NRDC, 555 U.S. 7 (2008)

CLASS XI

Wednesday, June 14 **Marine biodiversity and place-based management**

E.O. Wilson, *Half-Earth: Our Planet's Fight for Life* 185-87 (2016)

K. Grorud-Colvert, *The MPA Guide: A Framework to Achieve Global Goals for the Ocean*, 373 Sci. 1215 (2021)

T. Agardi, *Justified Ambivalence about MPA Effectiveness*, 75 ICES J. Mar. Sci. 1183 (2017)

National Marine Sanctuaries

National Marine Sanctuaries Act of 1972, as amended, 16 U.S.C. § 1431 et seq. (see esp. §§ 1431, 1433-39)

National Marine Sanctuaries Program Amendments Act of 1992, Pub. L. No. 102-587, at § 2203 (“Monterey Bay National Marine Sanctuary”)

Revised Terms of Designation for the Monterey Bay National Marine Sanctuary, 73 Fed. Reg. 70,488, 70,492-95 (Nov. 20, 2008)

National Marine Sanctuary Program Regulations, 50 C.F.R. §§ 922.130-34 (MBNMS regulations)

Personal Watercraft Industry v. Department of Commerce, 48 F.3d 540 (D.C. Cir. 1995)

NOAA, Monterey Bay National Marine Sanctuary Final Management Plan 107-21 (2021)

Northern Chumash Tribal Council, *Chumash Heritage National Marine Sanctuary Nomination* (2015)

Marine National Monuments

Antiquities Act of 1906, 54 U.S.C. § 320301 et seq.

Presidential Proclamation No. 9496, 81 Fed. Reg. 65,169 (Sept. 21, 2016)

Presidential Proclamation No. 10049, 85 Fed. Reg. 35,793 (June 11, 2020)

Massachusetts Lobstermen’s Ass’n v. Ross, 945 F.3d 535 (D.C. Cir. 2019), *cert denied* 592 U.S. __ (2021) (Roberts Statement)

NOAA, USFWS, and HDLR, Papahānaumokuākea Marine National Monument Management Plan ES-1 to ES-5 (2008)

Section 12 withdrawals

Outer Continental Shelf Lands Act of 1953, as amended, 43 U.S.C. § 1331 et seq. (excerpts)

League of Conservation Voters v. Trump, 363 F.Supp.3d 1013 (D. Alaska 2019)

CLASS XII

Thursday, June 15 Special topics: Offshore energy and paralegal activism

Offshore energy

Outer Continental Shelf Lands Act of 1953, as amended, 43 U.S.C. § 1331 et seq. (excerpts)

Implementing an America-First Offshore Energy Strategy, Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (Apr. 28, 2017), *revoked by* Exec. Order 13,990 (Jan. 20, 2021)

White House, “Fact Sheet: Biden Administration Launches New Federal-State Offshore Wind Partnership to Grow American-Made Clean Energy” (June 23, 2022)

E.E. Cordes et al., *Environmental Impacts of the Deep-Water Oil and Gas Industry: A Review to Guide Management Strategies*, 4 Front. Environ. Sci. art. 58, at 1-14 (2016).

Oceana, *Time for Action: Six Years after Deepwater Horizon* 6-11 (2016).

Oceana v. BOEM, 2014 WL 1281996 (D.D.C. Mar. 31, 2014)

Friends of the Earth v. Haaland, 583 F.Supp.3d 113 (D.D.C. 2022)

Inflation Reduction Act of 2022, Pub. L. 117-169, at §§ 50264-50265 (“Lease Sales under the 2017-2022 Outer Continental Shelf Leasing Program” and “Ensuring Energy Security”)

Memorandum Opinion, *Sierra Club v. NMFS*, Civ. No. 20-cv-3060 PX (D. Md. May 24, 2021)

Fisheries Survival Fund v. Jewell, 2018 WL 4705795 (D.D.C. Sept. 30, 2018)

BOEM and NMFS, Draft North Atlantic Right Whale and Offshore Wind Strategy 1-2, 5-11, 14-20 (2022)

K. Moore, “East Coast Congressmen Seek NOAA Response on Scientists’ Offshore Wind Advice,” *National Fisherman* (Mar. 15, 2023)

Paralegal activism

Jedidiah Britton-Purdy, “Environmentalism Was Once a Social Justice Movement,” *The Atlantic* (Dec. 7, 2016)

R. Spilman, “Whale Wars—Eco-Terrorism as Reality TV,” *Huffington Post* (June 5, 2009)

Institute of Cetacean Research v. Sea Shepherd Conservation Society, 708 F.3d 1099 (9th Cir. 2013)

E. Nielsen, “#StopWillow Is Taking TikTok by Storm. Can It Actually Work?” CNN (Mar. 5, 2023) (available at <https://www.cnn.com/2023/03/05/us/willow-project-tiktok-petition-movement-climate/index.html>). Please read online at the foregoing URL in order to view active links.

J. Harvey et al., *Internet Blogs, Polar Bears, and Climate-Change Denial by Proxy*, 68 *Biosci.* 281 (2017)