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# THE SEA GRANT LAW AND POLICY DIGEST is a bi-annual publication indexing the law review and other articles in the fields of ocean and coastal law and policy published within the previous six months. Its goal is to inform the Sea Grant community of recent research and facilitate access to those articles. The staff of the Digest can be reached at: the Sea Grant Law Center, Kinard Hall, Wing E - Room 256, P.O. Box 1848, University, MS 38677-1848, phone: (662) 915-7775, or via e-mail at sealaw@olemiss.edu.



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Journals featured in this issues of the LAW AND POLICY DIGEST. For more information, click on the name of the journal.

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VIV.

### ADMIRALTY

### King, Bruce A. "Ships as Property: Maritime Transactions in State and Federal Law." 79 *Tulane Law Review* 1259 – 1337 (2005).

King discusses the application of federal and state law to the construction, sale, repair, rebuilding, chartering, and financing of vessels. King pays particular attention to the increasing use of the Uniform Commercial Code as a source of federal law where a nonstatutory federal law solution is required.

### Zapf, Robert J. "Appurtenances: What Are They and Are Fishing Permits Among Them?" 79 *Tulane Law Review* 1339 – 1353 (2005).

Zapf examines the maritime lien and explores the objects to which such liens attach. Zapf discusses both historical and modern definitions of maritime liens and analyzes whether maritime liens attach to intangibles like fishing permits.

#### II. AQUACULTURE

Hamouda, Luai, et. al. "The Salmon Aquaculture Conflict in British Columbia: A Graph Model Analysis." 48 Ocean & Coastal Management 571 – 587 (2005).

A heavily debated moratorium on the expansion of the salmon aquaculture industry in British Columbia, Canada recently ended, encouraging economic growth in the region. Hamouda and co-authors examine the obstacles to salmon aquaculture development in British Columbia and explain the difficulties of simultaneously trying to reach sustainability, protect aquatic ecosystems, and foster economic development.

### III. CLIMATE CHANGE

Scott, Karen N. "The Day After Tomorrow: Ocean CO<sub>2</sub> Sequestration and the Future of Climate Change." 18 Georgetown International Environmental Law Review 57 – 108 (2005).

Scott explores the extent to which oceanic  $CO_2$  sequestration is compatible with the international law of the sea and regional regimes such as those that apply to the North Sea and the Southern Ocean. Scott examines the application of international legal principles to three different  $CO_2$  sequestration techniques: disposal beneath the seabed, direct injection into the water column, and ocean fertilization.

#### COASTAL ZONE MANAGEMENT

### Bloch, David J. "Colonizing the Last Frontier." 29 American Indian Law Review 1 – 42 (2005).

Bloch analyzes the 1998 Ninth Circuit decision in *Native Village of Eyak v. Trawler Diane Marie, Inc.* in which the claims of several native Alaskan villages to aboriginal title to the seabed were deemed legally inconsistent with federal sovereignty. Bloch discusses the nature of common law aboriginal title in the U.S. and argues that the judiciary misapplied the "federal paramountcy doctrine" by mistaking the nature of aboriginal title. Bloch argues that *Eyak* should be overturned and the native villages granted title to the seabed or compensated for the taking of their right of occupation.

### Buanes, Arild, et. al. "Stakeholder Participation in Norwegian Coastal Zone

Planning." 48 Ocean & Coastal Management 658 – 669 (2005).

Buanes and co-authors examine stakeholder participation in Norwegian coastal zone planning. The authors detail how variations in participatory forms are linked to the different powers of particular stakeholder groups and to what extent informal interactions are correlated with influence. The challenges of stakeholder involvement at a municipal level are also discussed.

## D'Agnes, Heather, et. al. "Gender Issues within the Population-Environment Nexus in Philippine Coastal Areas." 33 Coastal Management 447 - 458 (2005).

D'Agnes and co-authors review the experiences of the IPOPCORM project in the Philippines which examined whether food security will be achieved more quickly when coastal resources management and reproductive health management are implemented together. Trends observed during program monitoring and evaluation during 2001-2004 suggests that impacts on reproductive health and coastal resources management are higher in sites where a synergistic approach is applied.

## **Irvine, Kolleen. "Influence of Trampling Intensity versus Hydration State on Loss of Biomass from the Intertidal Rockweed,** *Fucus gardneri."* **33** *Coastal Management* **471** – **481 (2005).**

Irvine investigates the impact of human tramping on *Fucus gardneri* populations at Cattle Point on San Juan Island, Washington. Irvine found that damage did not differ with the hydration state of the plants, but loss of biomass did increase with number of tramping steps.

### Kalo, Joseph J. "North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of Littoral Owners in the Twenty-First Century." 83 North Carolina Law Review 1427 – 1505 (2005).

Kalo examines the traditional list of littoral rights of North Carolina oceanfront property owners and argues that this list no longer accurately describes the rights of owners in the twenty-first century. Kalo goes on to identify what common law and statutory littoral rights oceanfront property owners have today and explores the circumstances under which property owners can lose those rights.

## Kellogg, Wendy A., et. al. "Training Needs of Coastal Resources Decision Makers in Ohio's Lake Erie Basin." 33 *Coastal Management* 335 - 351 (2005).

Kellogg and co-authors discuss the results of a study of the information and knowledge needs of local coastal resources decision-makers in the Ohio Lake Erie basin. The results suggest that trainers and decision-makers have different perceptions of needs and venues.

### Pedersen, Jesper Duer, et. al. "Capacity Development in Integrated Coastal Zone Management: Some Lessons Learned from Malaysia." 33 *Coastal Management* 353 – 372 (2005).

Pedersen and co-authors examine the difficulties associated with developing capacities for integrated coastal zone management, paying particular attention to newly industrialized and developing countries. The authors discuss lessons learned from an integrated coastal zone management project in Malaysia and offer some practical approaches to capacity development.

Ramachandran, A., et. al. "Coastal Regulation Zone Rules in Coastal Panchayats (Villages) of Kerala, India vis-à-vis Socio-economic Impacts from the Recently Introduced Peoples' Participatory Program for Local Self-governance and Sustainable Development." 48 Ocean & Coastal Management 632 – 653 (2005).

Ramachandran examines the socio-economic impact of India's Coastal Regulation Zone (erosion prevention and protection of natural resources) and the Peoples' Participatory Program for Local Self-governance and Sustainable Development (local government rule over natural resources). Suggestions are offered regarding the improvement of India's natural resource management systems, as well as raising the living standards of the country's coastal populations.

## **Rivera-Arriaga, Evelia. "Assessing Foreign Aid Efforts for Coastal Management in Latin America and the Caribbean Regions." 48** *Ocean & Coastal Management* **693** – **720** (2005).

Rivera-Arriaga reviews the performance of major international organizations that support coastal management projects and programs in Latin America and the Caribbean regions from 1992 to 2000 and provides recommendations for future international aid.

Sekhar, Nagothu Udaya. "Integrated Coastal Zone Management in Vietnam: Present Potentials and Future Challenges." 48 Ocean & Coastal Management 813 – 827 (2005). Sekhar discusses the development of industrial ventures, tourism, and the growth of cities in Vietnam's coastal zone. An analysis of the impacts of these activities is provided, as well as a discussion of the constraints of integrated coastal management and benefits of local partnerships.

### **Vallega, Adalberto. "From Rio to Johannesburg: The Role of Coastal GIS." 48** Ocean & Coastal Management **588 – 618 (2005).**

Vallega examines the use of coastal GIS in relation to the 2000 United Nations Millennium Declaration, the 2001 Road Map Towards the Implementation of the UN Millennium Declaration, and the 2002 Plan of Implementation of the World Summit of Sustainable Development. Vallega proposes a new approach to integrated coastal management which embraces the ontological, semiotic, and hermeneutical arenas.

#### **COASTAL HAZARDS**

**V**.

## Adger, W. Neil, et. al. "Social-Ecological Resilience to Coastal Disasters." 309 Science 1036 – 1039 (2005).

Adger and co-authors argue that social and ecological vulnerability to disasters and the outcomes of extreme weather events are influenced by the resilience of the community and the environment before and after the disaster. The authors assert that disaster management requires multilevel governance systems that can mobilize diverse sources of resilience thereby enhancing capacity to cope with uncertainty and surprise. VI.

#### CORAL REEFS

### Hawkins, Julie P., et. al. "Sustainability of Scuba Diving Tourism on Coral Reefs of Saba." 33 Coastal Management 373 - 387 (2005).

Hawkins and co-authors examine the effects of recreational scuba diving in the Saba Marine Park in the Netherlands Antilles over a nine-year period. The authors found that across the five sites studied damage was not significantly related to diving intensity and it did not seem to accumulate over time.

#### VII. ECOSYSTEM MANAGEMENT

## **Breckenbridge, Lee P. "Can Fish Own Water? Envisioning Nonhuman Property in Ecosystems."** 20 *Journal of Land Use & Environmental Law* 293 – 331 (2005).

Breckenbridge argues for the creation of a new legal regime that recognizes nonhuman entities as property owners. For example, if people and their organizations have property rights in water, Breckenbridge states, so should the fish. Breckenbridge claims important insights can be gained by viewing various forms of resource allocation to human and nonhuman organisms in an analogous and connected manner.

### Hyun, Karen. "Transboundary Solutions to Environmental Problems in the Gulf of California Large Marine Ecosystem." 33 *Coastal Management* 435 – 445 (2005).

Hyun assesses the Gulf of California Large Marine Ecosystem using Duda and Sherman's (2002) modular approach. Hyun's analysis identifies three areas of concern: pollution, habitat destruction, and fishery depletions. Hyun argues that land-based pollution controls, marine protected areas, and stricter fisheries regulations are needed to address these concerns, in addition to reconnecting the Gulf of California with the Colorado River.

### Salzman, James. "Creating Markets for Ecosystem Services: Notes from the Field." 80 New York University Law Review 870 – 961 (2005).

Ecosystem services support human society by providing clean air and water, decomposing waste, and regulating climate, among other things. In recent years, a number of initiatives have emerged which seek to create markets for these ecosystem services. Salzman examines the challenges and opportunities of an ecosystem services approach to environmental protection. Salzman reviews current payment schemes, identifies key requirements, and argues that they should be favored over more traditional regulatory and tax-based approaches in far more situations than commonly assumed.

### VIII. ENDANGERED SPECIES

### **Brader, Valerie J. M. "Shell Games: Vicarious Liability of State and Local Government for Insufficiently Protective Regulations under the ESA." 45** *Natural Resources Journal* **103 – 133 (2005).**

The First, Ninth, and Eleventh Circuits have held that local and state governments violate the Endangered Species Act if their regulations do not sufficiently restrain

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third-party actions. In *Strahan v. Coxe*, for example, the First Circuit found that Massachusetts's regulation of its fishing industry constituted a take of endangered whales because it permitted the use of gillnets and lobster pots. Brader examines the weaknesses of this vicarious liability jurisprudence including constitutional obstacles.

## George, Anna L., and Richard L. Mayden. "Species Concepts and the Endangered Species Act: How a Valid Biological Definition of Species Enhances the Legal Protection of Biodiversity." 45 *Natural Resources Journal* 369 – 407 (2005).

New species are discovered every day. George and Mayden discuss the importance of adopting a legal definition of "species" that reflects the biological reality of these entities as they exist in nature. According to the authors, continued disagreement and confusion regarding species concepts has made it difficult to articulate a clear policy that can be used in the Endangered Species Act (ESA) to protect biodiversity. An overview of the ESA is provided, followed by a discussion of how the faulty application of species concepts or definitions leads to bad decisions, both biologically and legally.

### Hendrickson, Laura J. "Coverage of the Endangered Species Act in Four Major Newspapers." 45 Natural Resources Journal 135 – 168 (2005).

Hendrickson examines the amount and character of coverage of the Endangered Species Act (ESA) in four major U.S. newspapers over the course of one year. Results reveal that popular, familiar species are more widely covered than less popular species, although species regarded as unappealing and obstructionist received significant attention. Hendrickson also found that conflict scenarios were fairly common, with interests of residents set against preservation interests protected by the ESA.

### Hooper, Joanna M. "When Fish Climb Ladders: NOAA Fisheries Unconscionable New Interpretation of the Endangered Species Act and the Dangers it Portends for Snake River Salmon." 24 Virginia Environmental Law Journal 49 – 74 (2005).

The Columbia River is one of the most dammed rivers in the world. Hooper examines the general operations of the Federal Columbia River Power System and the role played by dams on the Lower Snake River. Hooper chronicles the legal challenges to multiple biological opinions for the project and discusses the most recent Biological Opinion's apparent sweeping changes to the jeopardy analysis for endangered and threatened Snake River salmon and steelhead.

Kunich, John Charles. "Losing Nemo: The Mass Extinction Now Threatening the World's Ocean Hotspots." 30 Columbia Journal of Environmental Law 1 – 133 (2005). Kunich argues that we are currently in the midst of a mass extinction that has reached into the world's oceans to an alarming extent. Kunich details how existing international and domestic laws have failed to prevent this disaster and argues for a dramatic departure from the legal status quo requiring a shift in focus towards protecting marine hotspots.

Vanderzwaag, David L. and Jeffrey A. Hutchings. "Canada's Marine Species at Risk: Science and Law at the Helm, but a Sea of Uncertainties." 36 Ocean Development & International Law 219 - 259 (2005). Vanderzwaag and Hutchings examine Canada's legislative "lifeboat" for saving species from extinction, the Species at Risk Act (SARA), and how it has fared in its first two years of implementation with a focus on efforts to protect marine fish species. The implementation process is facing a sea of uncertainties, such as contested listing criteria; politically dependent listing decisions; hazy general prohibitions; leeway for incidental harm permitting; recovery strategy and action plan fogginess; critical habitat issues; unsettled relationships with other federal laws; and methodological tensions in how risks should be managed. Besides amendments to SARA, Vanderzwaag and Hutchings advocate the urgent need to move from "deathbed treatment" to proactive encouragement of biodiversity health through such initiatives as fully implementing Canada's Oceans Act, establishing a network of marine protected areas, and modernizing Canada's antiquated Fisheries Act. *(Abstract courtesy of Ocean Development & International Law.)* 

#### **ESTUARIES**

XIX.

**X**.

Varnell, Lyle M. and C. Scott Hardaway, Jr. "A Risk Assessment Approach to Management of Estuarine Dunefields." 48 Ocean & Coastal Management 767 – 781 (2005). Varnell and Hardaway review a land use-based risk assessment for the dunefields of the Chesapeake Bay used by resource managers to develop an efficient management strategy.

### **FISHERIES MANAGEMENT**

### Alidina, Hussein M. "Local Level Fisheries Management in Diani-Chale, Kenya: Current Status and Future Directions." 33 Coastal Management 459 - 470 (2005).

Alidina examines the current fisheries management regime in Diani-Chale, Kenya and investigates the prospects for attaining a more collaborative system. Alidina argues that a more formal role for local institutions, clarification of tenure and access rights, and improved enforcement of local fishing rules would further local management.

## **DeLuca, Dallas. "One for Me and One for You: An Analysis of the Initial Allocation of Fishing Quotas." 13** New York University Environmental Law Journal **723** – **768** (2005).

DeLuca discusses the history of Individual Fishing Quotas and examines the importance of the initial allocation in the overall process. DeLuca reviews initial allocations in fisheries in the U.S. and abroad and compares those practices with several property theories.

### Garza-Gil, M. Dolores, and Manuel M. Varela-Lafuente. "The Profitability of the Spanish Swordfish Fleet in the North Atlantic." 29 Marine Policy 533 – 538 (2005). The Spanish swordfish fleet has grown over the past decade to become one of the most stable fleets in Spain. Garza-Gil and Varela-Lafuente analyze the profitability of the

swordfish fleet on the basis of the estimate of the gross profit per standard vessel, the average yield, and the investment payback period. Their results reveal increases in prof-

it per vessel, relatively high rates of return, and payback periods which are shorter than the average life of the standard vessel.

#### **González-Laxe, Fernando. "The Precautionary Principle in Fisheries Management." 29** *Marine Policy* **495** – **505** (2005).

González-Laxe examines the concept of precaution and stresses the application of the precautionary principle to fisheries management. González-Laxe also evaluates the principles of precaution in European Community policy and discusses implementation problems.

### **Grafton, R. Quentin. "Social Capital and Fisheries Governance." 48** Ocean & Coastal Management **753** – **766 (2005)**.

Grafton explains how social capital shapes fisheries management and suggests that "topdown" fisheries management is inferior to "co-management." Grafton argues that comanagement can reduce the "race to the fish" and increase trust and cooperation between the managers and fishermen.

### Hønneland, Geir. "Towards a Precautionary Fisheries Management in Russia?" 48 Ocean & Coastal Management 619 – 631 (2005).

Hønneland describes the post-USSR fisheries management system in Russia. Despite the management system's technical and scientific proficiency, the nation has few fisheries laws, which Hønneland argues causes conflicts among agencies and encourages corruption.

## Johnsen, Jahn Peter. "The Evolution of the 'Harvest Machinery': Why Capture Capacity Has Continued to Expand in Norwegian Fisheries." 29 Marine Policy 481 – 493 (2005).

Johnsen present a case study of Norwegian fisheries to explain why capture capacity has continued to expand around the North Atlantic despite focused efforts to reduce it. Johnsen argues for the replacement of the rational actor approach with a relational approach which can offer new insights into political, economical, and technological forces which continue to fuel capacity expansion.

### Kieves, Nicola. "Crisis at Sea: Strengthening Government Regulation to Save Marine Fisheries." 89 *Minnesota Law Review* 1876 – 1915 (2005).

Kieves examines privatization and government regulation as options for achieving sustainable development of U.S. marine fisheries. Kieves concludes that privatization is ultimately unable to lead to healthy fisheries on a national scale and regulation remains the most viable framework, although she argues that new federal government regulation is necessary to sustainably manage these resources.

Miller, Joanna. "Six Million Sockeye Salmon and the Kenai Refuge: Analysis of the Ninth Circuit Court of Appeals' Two Decisions in The Wilderness Society v. United States Fish and Wildlife Service." 25 Journal of Land Resources & Environmental Law 85 – 97 (2005).

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The Ninth Circuit recently enjoined the Cook Inlet Aquaculture Association from annually stocking Tustumena Lake with six million sockeye salmon fry, essentially terminating a thirty-year-old salmon hatchery. This was contrary to a 2003 ruling of the Ninth Circuit that allowed the stocking to continue. Miller examines the contradictory decisions of the two appellate courts.

**Price, Tracy M. "Negotiating WTO Fisheries Subsidy Disciplines: Can Subsidy Transparency and Classification Provide the Means Towards an End to the Race for Fish?" 13** *Tulane Journal of International & Comparative Law* **141 – 175 (2005).** 

Price explores the global fish crisis and examines the international negotiating strategies that accompany a proposal to regulate a global commons or common pool resource. Particular attention is paid to the World Trade Organization negotiations on the Subsidies and Countervailing Measures Agreement relating to fisheries subsidies. Price argues that information gaps created by a lack of transparency must be closed in order to overcome the "tragedy of the commons."

## Safina, Carl, et. al. "U.S. Ocean Fish Recovery: Staying the Course." 309 Science 707 - 708 (2005).

Safina and co-authors mount a defense of existing U.S. legislative policy towards ending overfishing and rebuilding depleted populations. While the fishing industry continues to use litigation and seek legislative changes that would relax or eliminate recovery mandates, the authors argue that the existing timetable is responsible, reasonable, and biologically feasible.

## Silver, Jennifer J. and Lisa M. Campbell. "Fisher Participation in Research: Dilemmas with the Use of Fisher Knowledge." 48 Ocean & Coastal Management 721 – 741 (2005).

Silver and Campbell evaluate fisher reactions to participation in a socioeconomic survey of local fishers in the Turks and Caicos Islands. The authors highlight the perceived benefits and drawbacks of participating and reflect on some dilemmas with participation as a tool in fisheries management and research.

## Stead, Selina M. "Changes in Scottish Coastal Fishing Communities – Understanding Socio-economic Dynamics to Aid Management, Planning and Policy." 48 Ocean & Coastal Management 670 – 692 (2005).

Stead examines how Scottish coastal areas, socio-economically dependent on marine capture fisheries, are working towards long-term sustainable community development. Two case studies, the Shetland Islands and the North East region, are discussed in detail. The Shetland Islands have been encouraging development opportunities in its traditional fishing industries, whereas the North East is focusing on broadening its business base and re-training its workforce.

## Wroblewski, Joe, et. al. "Inshore Stocks of Atlantic Cod Are Important for Rebuilding the East Coast Fishery." 33 Coastal Management 411 – 432 (2005).

Wroblewski and co-authors argue that the East Coast inshore cod stocks should be managed under a new paradigm that recognizes the importance of these fish to the

entire stock complex. Efforts of coastal communities in Gilbert Bay, Labrador to protect and manage a local population of cod are detailed.

## Xue, Guifang (Julia). "Bilateral Fisheries Agreements for the Cooperative Management of the Shared Resources of the China Seas: A Note." 36 Ocean Development & International Law 363 – 374 (2005).

Xue analyzes the two bilateral fisheries agreements signed between China and Japan in 1997 and China and South Korea in 2000 for the conservation and management of the shared fisheries resources of the Yellow Sea and the East China Sea (China Seas). A review of the management regimes of the agreements will illustrate their significance and constraints and emphasize the importance of regional cooperation. (Abstract courtesy of Ocean Development & International Law.)

### XI. FLAGS OF CONVENIENCE

Ademun-Odeke. "An Examination of Bareboat Charter Registries and Flag of Convenience Registries in International Law." 36 Ocean Development & International Law 339 – 362 (2005).

Ademun-Odeke re-examines the legal regime of bareboat charter ship registration and flags of convenience in international law with particular reference to the 1958 Geneva Convention and the 1982 Law of the Sea Convention; compares and contrasts the two systems against a common denominator (the "litmus test"); and asks whether bareboat charters are flags of convenience. *(Abstract courtesy of Ocean Development & International Law.)* 

## Ferrell, Jessica K. "Controlling Flags of Convenience: One Measure to Stop Overfishing of Collapsing Fish Stocks." 35 Environmental Law 323 – 390 (2005).

Despite the efforts of regional fisheries management organizations to conserve marine species, these organizations have no power to sanction vessels that violate conservation measures. Exclusive jurisdiction vests with the flag state that registered the vessel. Unfortunately, a significant number of flag states register vessels whose owners do not have a genuine link to the state itself. These are known as "flags of convenience" (FOC). Many FOC allow vessel owners to remain anonymous, which makes enforcement even more difficult. Ferrell argues that regional fisheries management organizations must promote adoption of international conservation agreements and flag state responsibility and all parties must pursue diplomatic, financial, and litigious means to discourage FOC use that permits anonymity and pillage of the seas.

### XII. INTERNATIONAL AGREEMENTS

### Schiffman, Howard S. "Reservations in Marine Environmental Treaties: Practical Observations and Legal Limitations." 26 *Whittier Law Review* 1003 – 1024 (2005).

States may exclude or modify terms of a multilateral treaty through reservations. Although many environmental agreements expressly prohibit general reservations, most provide for some sort of "opt-out" procedure. Schiffman examines specific reservation and objection procedures in key marine environmental conservation agreements and explores the extent to which they have been invoked, concluding with a discussion of some legal limitations on their usage.

### XIII. INTERNATIONAL TRADE

Kelly, J. Patrick. "The Seduction of the Appellate Body: Shrimp/Sea Turtle I and II and the Proper Role of States in WTO Governance." 38 *Cornell International Law Journal* 459 – 491 (2005).

Kelly proposes new interpretations of Article XX of the General Agreement on Tariffs and Trade to minimize the effects of recent World Trade Organization jurisprudence which he claims allows wealthy nations to impose their preferred environmental policies on developing nations.

## **Rietvelt, Marc. "Multilateral Failure: A Comprehensive Analysis of the Shrimp/Turtle Decision." 15** *Indiana International & Comparative Law Review* **473** – **499 (2005).**

Rietvelt examines the recent Shrimp/Turtle decision, paying particular attention to the Appellate Body's refusal to apply sustainable development as a legal concept. Rietvelt argues a more neutral forum than the Appellate Body of the World Trade Organization is necessary to arbitrate international trade-environment issues.

### **Robbins, Rebecca A. "The Ships Passed By: Can Anti-dumping Laws Help Save Ocean Resources and Traditional Fisheries?"** 11 Hastings West – Northwest Journal of Environmental Law & Policy 225 – 249 (2005).

Robbins examines the potential usefulness of U.S. and World Trade Organization antidumping laws in protecting marine resources and traditional fishing communities. Robbins pays particular attention to the Alaska salmon industry.

## Showalter, Stephanie. "The United States and Rising Shrimp Imports from Asia and Central America: An Economic or Environmental Issue?" 29 Vermont Law Review 847 – 876 (2005).

Showalter presents a case study of the petition filed by the Southern Shrimp Alliance and the rulings of the Department of Commerce. Showalter also discusses the environmental impacts of shrimp farms and argues that, in light of the World Trade Organization's favorable rulings on environmental issues in recent years, the U.S. shrimp industry should refrain from seeking antidumping duties and should instead appeal to the environmental conscience of the American people, as previously done to protect dolphins and sea turtles.

#### XIV. INVASIVE SPECIES

Firestone, Jeremy and James J. Corbett. "Coastal and Port Environments: International Legal and Policy Responses to Reduce Ballast Water Introductions of Potentially Invasive Species." 36 Ocean Development & International Law 291 -316 (2005).

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Firestone and Corbett discuss the new Global Ballast Water Convention, what the Convention suggests about the International Maritime Organization (IMO), and its relationship to the United Nations Convention on the Law of the Sea. They also consider the implementation of the Ballast Water Convention by presenting a decision support model that allows regulators to explore tradeoffs between costs and benefits of new technologies and derive optimal reductions of ballast-water-borne biological pollutants. *(Abstract courtesy of Ocean Development & International Law.)* 

#### LAW OF THE SEA

Serdy, Andrew. "Towards Certainty of Seabed Jurisdiction beyond 200 Nautical Miles from the Territorial Sea Baseline: Australia's Submission to the Commission on the Limits of the Continental Shelf." 36 Ocean Development & International Law 201 - 217 (2005).

On 15 November 2004, Australia lodged only the third submission by a coastal state to the Commission on the Limits of the Continental Shelf. The ten discrete areas in which Australia's continental shelf extends beyond 200 nautical miles from the territorial sea baseline total over 3 million square kilometers. Serdy outlines Australia's submission on the basis of the published executive summary and the procedural rules of the Commission that are to govern its examination, exploring some of the submission's implications for other states in terms of Article 76 of the Law of the Sea Convention. *(Abstract courtesy of Ocean Development & International Law.)* 

## Song, Yann-huei. "Declarations and Statements with Respect to the 1982 UNCLOS: Potential Legal Disputes between the United States and China after U.S. Accession to the Convention." 36 Ocean Development & International Law 261 - 289 (2005).

Song discusses the implications of U.S. accession to the 1982 United Nations Convention on the Law of the Sea (UNCLOS) for the future development of Sino-American relations in the areas of ocean law and politics. The declarations and understandings contained in the Senate Resolution of Advice and Consent to U.S. Accession to the UNCLOS are examined in detail in the context of previous maritime conflicts between the United States and China. *(Abstract courtesy of Ocean Development & International Law.)* 

#### MARINE DEBRIS

### **Cho, Dong Oh. "Challenges to Marine Debris Management in Korea."** 33 *Coastal Management* 389 – 409 (2005).

Marine debris is a challenge for all nations because much of it, derelict fishing gear, plastics, and Styrofoam, remains in the sea almost in perpetuity. Cho examines the challenges to managing marine debris in Korea.

#### XVII. MARINE MAMMALS

**Inkelas, Daniel. "Security, Sound, and Cetaceans: Legal Challenges to Low Frequency Active Sonar Under U.S. and International Environmental Law."** 37 *George Washington International Law Review* 207 – 249 (2005).

Inkelas discusses the legal constraints upon the use by the U.S. Navy and federal researchers of active sonar and its equivalents in U.S. and international waters. Inkelas analyzes the major sonar-related cases since 2002, discusses the purpose and effect of the 2003 amendments to the Marine Mammal Protection Act, and examines the potential application of international law to address Low Frequency Active Sonar.

### Laist, David W. and John E. Reynolds. "Florida Manatees, Warm-Water Refuges, and an Uncertain Future." 33 *Coastal Management* 279 - 295 (2005).

Most Florida manatees depend on warm-water refuges in southern Florida to survive winter. The future availability of these refuges is in doubt, as most of the power plants whose outfalls create the refuges may be retired in the next twenty years. Laist and Reynolds examines the possible effect of the loss of these outfalls on the manatee populations and discuss possible management options such as construction of new nonindustry dependent warm-water refuges or creation of new thermal basins.

## Ward-Geiger, Leslie I., et. al. "Characterization of Ship Traffic in Right Whale Critical Habitat." 33 Coastal Management 263 – 278 (2005).

Ward-Geiger and co-authors estimate ship tracks between sequential ship locations to illustrate traffic patterns within the Mandatory Ship Reporting System. The characterization provides a portrait of ship traffic in right whale aggregation areas which the authors hope will be used to develop measures to reduce the threat of ship strikes.

#### XVIII. MARINE PROTECTED AREAS

## Kundis Craig, Robin. "Protecting International Marine Biodiversity: International Treaties and National Systems of Marine Protected Areas." 20 Journal of Land Use & Environmental Law 333 – 369 (2005).

Kundis Craig reviews the intersection of science and international law with regard to the preservation of marine biodiversity, provides an overview of how the focus of marine biodiversity preservation has shifted over the last decade, and explores how international law is reacting to these changes in scientific emphasis. Kundis Craig recommends that nations adopt more comprehensive approaches to marine biodiversity preservation similar to those starting to make an appearance in international law.

## **Dahl-Tacconi, Nancy. "Investigating Information Requirements for Evaluating Effectiveness of Marine Protected Areas – Indonesian Case Studies."** 33 *Coastal Management* 225 - 246 (2005).

Dahl-Tacconi discusses the importance of identifying the information needs of managers and other stakeholders as a first step in designing an evaluation of management effectiveness for marine protected areas (MPAs). Results of an investigation at two MPAs in Indonesia reveal that evaluation tools based primarily on stated management objectives or the views of a few stakeholders are unlikely to be useful for improving management.

Grant, Susanna M. "The Applicability of International Conservation Instruments to the Establishment of Marine Protected Areas in Antarctica." 48 Ocean & Coastal XIX.

XX.

XXI.

### Management 782 - 812 (2005).

Grant analyzes several international conservation treaties and other agreements, paying particular attention to their application to marine protected area development in Antarctica.

## **Pomeroy, Robert S., et. al. "How is Your MPA Doing? A Methodology for Evaluating the Management Effectiveness of Marine Protected Areas."** 48 Ocean & Coastal Management 485-502 (2005).

Pomeroy and co-authors discuss a 2000 initiative to improve marine protected area (MPA) management, which included a MPA management effectiveness methodology.

#### MARITIME EMPLOYMENT

### Pettit, S. J., et. al. "Ex-Seafarers Shore-based Employment: the Current UK Situation." 29 *Marine Policy* 521 – 531 (2005).

Certain sectors of the UK economy which have traditionally relied on ex-seafarers as a source of skilled labor have been significantly impacted by the decline of the British shipping industry. Pettit and co-authors conducted an in-depth study of the problem in 2003 and assessed the UK economy's requirement for people with seafaring experience to fill land-based jobs and the implications of a shortfall.

#### **OFFSHORE INSTALLATIONS**

## Kaiser, Mark J. and Robert C. Byrd. "The Non-explosive Removal Market in the Gulf of Mexico." 48 Ocean & Coastal Management 525 – 570 (2005).

Kaiser and Byrd review non-explosive severance techniques used to remove decommissioned oil rigs in the Gulf of Mexico. Removal options such as mechanical, abrasive water jet, diamond wire, and diver torch are explained.

#### POLLUTION

## Benson, Reed D. "Pollution Without Solution: Flow Impairment Problems Under Clean Water Act Section 303." 24 Stanford Environmental Law Journal 199 – 267 (2005).

Flow impairment is a form of hydrologic modification that occurs when human activities cause river flows to be artificially low or high. Flow impairment can significantly affect a stream's ecology and human recreational activities. Benson examines whether Section 303 of the Clean Water Act (CWA), which focuses on the quality of individual waterbodies, might be used to address flow impairment issues. Benson discusses the CWA's potential to regulate water quantity and looks specifically at how the EPA and the states have applied Section 303 requirements to flow-impaired streams.

### **Casado, Carmen. "Vessels on the High Seas: Using a Model Flag State Compliance Agreement to Control Marine Pollution." 35** *California Western International Law Journal* **203** – **236 (2005).**

The many environmental catastrophes that occur on the high seas, including the recent

sinking of the Prestige oil tanker, highlight the need for changes in the current legal regime for international shipping. Casado argues that the current international laws are dangerously deficient because they are still based on the freedom of the high seas. Casado urges a reconfiguration of the law of sea framework and the implementation of comprehensive legal guidelines with respect to flag states and vessels.

### **Duchesne, Matthew. "Discharging the Clean Water Act's NPDES Requirements:** Why the 'Unitary Waters' Theory does not Hold Water." 23 Virginia Environmental Law Journal 461-477 (2005).

In South Florida Water Management District v. Miccosukee Tribe of Indians, the government made the argument that "the waters of the United States" should be viewed as a unitary whole and therefore no NPDES permit should be required if a pollutant is transported from one body of water to another. The Supreme Court refused to rule on this particular issue because it was not raised in either party's original brief. Duchesne examines this "unitary waters" argument and concludes that it is not supportable by the Clean Water Act or case law.

## Murchison, Kenneth M. "Learning from More than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future." 32 Boston College Environmental Affairs Law Review 527 – 598 (2005).

Over the past fifty years, the federal government has assumed a more dominant role in pollution control of surface waters, shifting from providing research support to promulgating effluent standards and enforcing water quality standards. Murchison details this evolution, focusing primarily on the 1972 water pollution control statute that prescribed feasibility-based controls for point sources and recent litigation surrounding the establishment of total maximum daily loads.

## National Research Council, Ocean Studies Board. Oil Spill Dispersants: Efficacy and Effects. Washington, D.C. (2005).

The primary response mechanism for oil spills in the U.S. is the deployment of mechanical on-water containment and recovery systems. In 2002, the Coast Guard promulgated changes to the oil spill contingency planning regulations which may increase the use of chemical dispersants. In light of this potential increase in dispersant use, the Minerals Management Service, NOAA, the Coast Guard, and the American Petroleum Institute commissioned a study of the existing information and ongoing research regarding the efficacy and effects of dispersants as an oil spill response technique.

### **Ritter, Kathryn. "Navigating the Clean Water Act: Analyzing the Requirements of a Point Source." 9** *Great Plains Natural Resources Journal* **128 – 138 (2005).**

Ritter discusses the South Florida Water Management District v. Miccosukee Tribe of Indians litigation and examines the progression of jurisprudence surrounding the Clean Water Act and the requirements for a NPDES permit. Ritter also analyzes what constitutes a point source and whether all waters of the U.S. should be considered "unitary."

**Rose, Carol M. "Environmental Law Grows Up (More or Less), and What Science Can Do to Help."** 9 *Lewis & Clark Law Review* 273 – 294 (2005).

Rose examines the role of science in modern environmental law beginning in the early 1970s with the first wave of "behavior-based" (BB) regulations. BB regulations were useful for reducing large pollution sources, but have proved ineffective in confronting small and diffuse sources of pollution. To address these pollution sources, a now-maturing environmental law has turned to quality-based (QB) approaches which attempt to connect regulatory efforts to improvements in environmental quality. QB approaches place new demands on the scientific community to develop methods to measure or model small pollution sources, effects of resource uses, and synergistic effects. Rose argues that policymakers need the scientific community to take these critical measurement tasks to heart while being tolerant of the ways in which uncertainty affects policy decisions.

### Santos, Isaac Rodrigues, et. al. "Influence of Socio-economic Characteristics of Beach Users on Litter Generation." 48 Ocean & Coastal Management 742 – 752 (2005).

Santos and co-authors investigate the perception of beach users to solid waste pollution and attempt to quantify the input of tourism-related litter to the southern Brazilian coastal ecosystem in areas occupied by users with different socio-economic characteristics. Survey results indicated that litter input was higher in the beach regions frequented by people with lower annual income and literacy degree.

Welsh, Erin T. "South Florida Water Management District v. Miccosukee Tribe of Indians: Has the U.S. Supreme Court 'Opened Up the Floodgates' on Federal Regulation of Water Diversion Facilities?" 36 Seton Hall Law Review 289 – 326 (2005). In South Florida Water Management District v. Miccosukee Tribe of Indians, the government

argued that "the water Management District of Miccosucce Tribe of Indians, the government argued that "the waters of the United States" should be viewed as a unitary whole and therefore no NPDES permit should be required when a pollutant is simply transported from one body of water to another. Welsh analyzes this "unitary waters" theory and considers the many consequence of imposing strict permitting requirements on water diversion facilities that could result if the government's theory is ultimately rejected.

#### XXII. RECREATION

### Burns, Ravis H. "Floating On Uncharted Headwaters: A Look at the Laws Governing Recreational Access on Waters of the Intermountain West." 5 *Wyoming Law Review* 561 – 603 (2005).

Disputes between recreational water users and riparian owners in the West are on the rise, with some private property owners claiming a right to block access to river floaters. Burns examines how western states have attempted to reconcile private versus public rights to access waterways in the intermountain west.

### **Ferrara, Jennifer.** "Delgado v. Reef Resort Ltd.: **The Fifth Circuit Fails to Throw Scuba Divers a Lifeline.**" **29** Maritime Law (Tulane Maritime Law Journal) **471** - **479 (2005).**

Ferrara presents a case study of *Delgado v. Reef Resort Ltd.* in which the wife of a scuba diver who disappeared during a dive off the coast of Belize sued the organizers of the excursion for negligence. Reef moved to dismiss for lack of admiralty jurisdic-

tion, claiming the death did not result from a maritime tort. The Fifth Circuit agreed. Ferrara examines the court's refusal to extend maritime tort jurisdiction to scuba accidents.

### Till, Dustin Trowbridge. "The Right to Float on By: Why the Washington Legislature Should Expand Recreational Access to Washington's Rivers and Streams." 28 Seattle University Law Review 1093 - 1120 (2005).

Till examines the current status of Washington state's navigability doctrine and public trust laws, paying particular attention to the increasing conflicts between riparian owners and recreational river users. Till argues that Washington should adopt modern stream access law, similar to Montana's Stream Access Law, which would grant the public minimal access above the high-water mark for portages and other activities closely associated with river recreation.

### Wang, Cheng-Ping and Chad P. Dawson. "Recreation Conflict along New York's Great Lakes Coast." 33 Coastal Management 297 - 314 (2005).

Wang and Dawson use goal interference theory to examine the recreation conflict among motorboat users, personal watercraft users, and riparian landowners in the New York Great Lake coastal area.

#### XXIII. SCIENTIFIC RESEARCH

### Sanchirico, James N. "A Social Scientist's Perspective on the Census of Marine Life." 29 Marine Policy 507 – 520 (2005).

The Census of Marine Life (CoML) is a collaborative endeavor involving 53 nations and 300 scientists to inventory past, present, and future marine life. Sanchirico discusses the potential applications of the CoML and recommends developing policy advisory committees which could integrate natural science activities to maximize research benefits and avoid unintended consequences.

### XXIV. SHIPWRECKS

### Hallwood, Paul and Thomas J. Miceli. "Economic Analysis of the Legal Regimes Governing Salvage of Historic Shipwrecks." 36 Ocean Development & International Law 323 - 337 (2005).

Hallwood and Miceli offer an economic analysis of the international and U.S. laws governing the recovery of archaeological data from historic shipwrecks. They suggest that U.S. salvage law, sometimes extended to international waters, gives insufficient protection to archaeological value, but that UNESCO's Convention on the Protection of the Underwater Cultural Heritage goes too far in the other direction. Hallwood and Miceli also suggest that a move towards maximizing social values would be promoted if the U.S. admiralty courts tied the size of salvage awards more closely to the quality of the archaeological work performed. (*Abstract courtesy of Ocean Development & International Law.*)

Regan, Rob. "When Lost Liners Become Found: An Examination of the Effectiveness of Present Maritime Legal and Statutory Regimes for Protecting Historic Wrecks in

## **International Waters with Some Proposals for Change.**" 29 Maritime Law (Tulane Maritime Law Journal) 313 – 351 (2005).

In January 2000, Canada, France, England, Ireland, and the United States entered into an agreement to protect the wreck of the *R.M.S. Titanic* and its contents. Years of litigation over salvage rights provided the impetus for this historic agreement. Technological advances in deep-sea diving and exploration have made it possible to find many long-lost shipwrecks. Regan discusses the problems surrounding the determination of ownership of such long-abandoned wrecks.

### XXV. SMALL ISLAND STATES

### **Kerr, Sandy A. "What is Small Island Sustainable Development About?" 48** Ocean & Coastal Management **503 – 524 (2005)**.

Kerr describes how small islands develop in the context of achieving sustainable development, using the Galapagos Islands as an example.

#### XXVI. TAKINGS

### Blumm, Michael C., and Lucus Ritchie. "Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses." 29 Harvard Environmental Law Review 321 – 368 (2005).

Although private property rights advocates cheered the Supreme Court's 1992 decision in *Lucas v. South Carolina Coastal Commission* as the dawn of a new era in which landowners could receive compensation for regulatory burdens, subsequent decisions have limited the categorical takings rule to regulations that result in complete economic wipeouts. Blumm and Ritchie examine the post-*Lucas* landscape and argue that *Lucas*'s principal legacy lies in affording government defendants numerous effective categorical defenses based on background principles of property and nuisance law with which to defeat takings claims.

Harris, Christopher L., and Daniel J. Lowenberg. "Recent Development: Kelo v. City of New London, Tulare Lake Basin Water Storage District v. United States, and Washoe County v. United States: A Fifth Amendment Takings Primer." 36 St. Mary's Law Journal 669 - 696 (2005).

The Supreme Court's decision in *Kelo v. City of New London* upholding a city's use of eminent domain for economic development is extremely controversial. Harris and Lowenberg review *Kelo* and two other recent Supreme Court takings cases involving water rights and examine how plaintiffs and defendants might incorporate these decisions into future takings litigation.

### **XXVII. WATER RESOURCES**

**Baker-Jud, Shems. "The Ninth Circuit's Differential Approach to Alternative Analysis in NEPA Cases:** Westlands Water District v. United States Department of Interior." **35** Environmental Law **583 – 603 (2005).** 

In July 2004, the Ninth Circuit upheld an Environmental Impact Statement that gave serious consideration only to alternatives that increased water flow in the Trinity River, effectively reducing the amount of water available for irrigation in California's Central Valley. Westland Water District had argued that the range of alternatives was impermissibly narrow because other measures, such as restoring fish populations, would have fulfilled the desired goal. Baker-Jud discusses the range of alternatives the Ninth Circuit requires agencies to analyze to satisfy requirements of the National Environmental Policy Act (NEPA). Baker-Jud argues the Ninth Circuit would have conducted a more substantial inquiry into the range of alternatives if the federal agency had proposed a non-conservation action. This approach may therefore reduce the federal agencies' NEPA burden for conservation actions.

### Dellapenna, Joseph W. "Transboundary Water Allocation in the Twenty-First Century: Colloquium Article: Interstate Struggles Over Rivers: The Southeastern States and the Struggle Over the 'Hooch." 12 New York University Environmental Law Journal 828 – 900 (2005).

Dellapenna examines the reasons for the collapse of the negotiations over the Apalachicola-Chattahoochee-Flint basin. Dellapenna includes an analysis of the law of interstate water compacts in general and considers the options remaining to the three states.

### Desai, Nirav K. "Up a Creek: An Introduction to the Commission's Final Report Discussion of Uncertainty in California Water Rights Law." 36 McGeorge Law Review 29-41 (2005).

In 1978, the Governor's Commission to Review California Water Rights Law issued its Final Report. Desai examines the Commission's findings with regard to uncertainty in California water rights laws and its proposed recommendations.

### **Dunning, Harrison C. "California Instream Flow Protection Law: Then and Now." 36** *McGeorge Law Review* **363 – 392 (2005).**

About the time the Governor's Commission to Review California Water Rights Law was established, hostility towards protecting instream flows was beginning to change. Dunning traces the evolution of instream flow protection in California. Dunning argues that although the Commission's recommendations on instream flow protection were not adopted, over the years the public trust doctrine was introduced to the world of California water rights. Despite some progress, Dunning concludes that the California instream flow protection law is in poor shape.

## Gray, Brian E. "The Uncertain Future of Water Rights in California: Reflections on the Governor's Commission Report." 36 McGeorge Law Review 43 – 71 (2005).

In 1978, the Governor's Commission to Review California Water Rights Law issued its Final Report. The Commissioners were an impressive group of experts on water law drawing on expertise as judges, law professors, and designers and directors of water projects. The Commission urged California to amend the Water Code to enhance certainty of water rights, improve efficiency of water use, increase statutory protection of

instream uses, and authorize more effective regional management of groundwater. Gray discusses the impact of the Commission Report.

### Hein, James K. "The 'Sound Science' Amendment to the Endangered Species Act: Why it Fails to Resolve the Klamath Basin Conflict." 32 Boston College Environmental Affairs Law Review 207 – 246 (2005).

The conflict in the Klamath Basin is a dramatic battle between environmentalists, tribes, and fishermen over an extremely scarce resource: water. When a 2001 court order allocated water to fish instead of irrigation ditches there were widespread calls for legal reform. Hein discusses the proposed Sound Science for Endangered Species Act Planning amendment, which would have required all ESA decisions to be based upon peer-reviewed, "sound" science, and argues that such an amendment would only delay agency decision-making and result in additional litigation.

## Jungreis, Jeremy Nathan. "'Permit' Me Another Drink: A Proposal for Safeguarding the Water Rights of Federal Lands in the Regulated Riparian East." 29 Harvard Environmental Law Review 369 – 419 (2005).

As water resources become scarcer in the East, states will begin to adopt comprehensive permit programs similar to those used for years in the arid West. Federal land managers can no longer assume that there will always be adequate water supplies to meet their missions. Jungreis discusses the various mechanisms by which federal installations may acquire water rights under state and federal law and the degree to which states may exercise their police powers to limit the exercise of these rights.

## King, Mary Ann, and Sally K. Fairfax. "Beyond Bucks and Acres: Land Acquisition and Water." 83 *Texas Law Review* 1941 – 1984 (2005).

Although buying land is generally regarded as the best way to protect natural resources in the United States, King and Fairfax are concerned that the discussion too often proceeds as if water is included in land acquisition by implication, which is generally not the case. King and Fairfax chronicle the tendency of early land acquisitions for conservation purposes to overlook water, offer an account of the confusion that can arise from combining conservation easements and water as property, and offer some tools that might be used to minimize confusion.

## McCool, Daniel. "The River Commons: A New Era in U.S. Water Policy." 83 Texas Law Review 1903 – 1927 (2005).

McCool assesses some of the accomplishments, and costs, of 200 years of water development. McCool then presents an analysis of current uses and preferences which he argues reveals a significant gap between what we have done to our rivers and what we want from our rivers.

**Mumme, Stephen P. "Developing Treaty Compatible Watershed Management Reforms for the U.S. – Mexico Border: The Case for Strengthening the International Boundary and Water Commission." 30** North Carolina Journal of International Law & Commercial Regulation **929 – 955 (2005).** 

In 2002, the United States and Mexico signed Minute No. 308, a groundbreaking agreement seen as a partial solution to the dispute over Mexico's water debt on the Rio Grande. Minute No. 308 was negotiated through the International Boundary and Water Commission (IBWC). Despite this historic agreement, the regime created by the 1994 Water Treaty between Mexico and the U.S. continues to be strained by drought and rising demands for border water resources. Mumme reviews options for improving the IBWC's performance with respect to the current bi-national water management.

## Olson, Samantha K., and Erin K. L. Mahaney. "Searching for Certainty in a State of Flux: How Administrative Procedures Help Provide Stability in Water Rights Law." 36 McGeorge Law Review 73 – 115 (2005).

Olson and Mahaney explore the concept of certainty as it relates to water rights law and review the Governor's Commission to Review California Water Rights Law conclusions and recommendations with respect to certainty. Olson and Mahaney also identify additional sources of uncertainty not addressed by the Commission and argue that the most feasible means of improving certainty is vigorous application of existing administrative procedures.

Roos-Collins, Richard. "A Perpetual Experiment to Restore and Manage Silicon Valley's Guadalupe River." 35 Golden Gate University Law Review 291 – 319 (2005).

The Guadalupe River, originating in the Santa Cruz Mountains, flows northwest through San Jose, California into San Francisco Bay. Roos-Collins examines the settlement of a water rights complaint brought against the Santa Clara Valley Water District to modify the operation of its water supply systems in the upper reaches of the Guadalupe River and a citizens' suit brought against flood protection projects. Roos-Collins discusses the future implementations of these various settlements and the potential consequences for the Guadalupe watershed and other urban rivers.

## Sherk, George William. "Transboundary Water Allocation in the Twenty-First Century: Colloquium Article: The Management of Interstate Water Conflicts in the Twenty-First Century: Is it Time to Call Uncle?" 12 New York University Environmental Law Journal 764 – 827 (2005).

Sherk examines the inability of U.S. states to resolve interstate water conflicts without federal or judicial intervention. Sherk presents a case study of the doomed Apalachicola-Chattahoochee-Flint River Basin Compact and argues that Congress needs to establish a mechanism for the allocation and management of interstate water resources.

## **Snowden, Benjamin L. "Bargaining in the Shadow of Uncertainty: Understanding the Failure of the ACF and ACT Compacts."** 13 New York University Environmental Law Journal 134 – 196 (2005).

On August 31, 2003, the Apalachicola-Chattahoochee-Flint River Basin Compact (ACF Compact) expired. This interstate compact was signed in 1996 by Alabama, Florida, and Georgia in an attempt to apportion water in the ACF River Basin. Alabama and Georgia signed a companion compact for the Alabama-Coosa-Tallapoosa (ACT) River Basin. Despite enormous investment in the negotiations following the compacts, no agreement was reached and litigation seems inevitable. Snowden examines how the structure of the ACF and ACT negotiations hindered agreement on the allocation of the rivers and suggestions some changes that could be made to foster agreement.

Spiegel, Carolin. "International Water Law: The Contributions of Western United States Water Law to the United Nations Convention on the Law of the Non-Navigable Uses of International Watercourses." 15 Duke Journal of Comparative & International Law 333 – 361 (2005).

Water shortages are a serious problem around the world. Rivers are essential sources of water, but their use is complicated by the fact that 145 nations share 261 international river basins. The United Nations Convention on the Law of Non-navigable Uses of Watercourses was adopted in 1997 and drew heavily on principles of water law developed in the western U.S. Spiegel details the western water rights regime, examines the Convention and its adoption of key provisions of U.S. law, and presents two case studies exploring how the Convention's principles might apply to the Nile and Colorado Rivers.

## Thomas, Gregory A. "The Future of Water Law Reform in California a Quarter Century after the Governor's Commission." 36 McGeorge Law Review 495 – 533 (2005).

Since the issuance of the Governor's Final Report on water rights in 1978, the California legislature has taken steps to secure rights to save water and created a mechanism for dedicating existing water rights to instream flows. The Legislature, however, declined to adopt recommendations that would have removed uncertainties in water rights associated with the beneficial use doctrine. Thomas poses the question: "If a new water law reform effort were to take up today where the 1978 Governor's Commission left off, would its neglected recommendations still constitute the most pressing agenda, or has the water world moved on?"

### XXVIII. WETLANDS

## Baumgartner, Matthew B. "SWANCC's Clear Statement: A Delimitation of Congress's Commerce Clause Authority to Regulate Water Pollution." 103 Michigan Law Review 2137 – 2171 (2005).

Baumgartner argues that the Supreme Court's avoidance of difficult constitutional issues in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)* through its reliance on the clear statement rule revives the navigable waters doctrine as a channels-of-commerce power. Baumgartner contends that any regulation invoking substantial effects-based reasoning is not valid under the Clean Water Act, but that the channels-of-commerce power is broad enough in scope to permit the federal government to regulate any body of water that is hydrologically connected to navigable waters.

Broderick, Gregory T. "From Migratory Birds to Migratory Molecules: The Continuing Battle over the Scope of Federal Jurisdiction under the Clean Water Act."

#### **30** Columbia Journal of Environmental Law **473 – 523 (2005)**.

Broderick examines the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* and the diverging paths federal courts have taken. Broderick concludes that the federal courts are in irreconcilable conflict over the proper scope of federal jurisdiction and argues that a Supreme Court decision clearly outlining the proper scope is needed.

### **Flanagan, Erin R. "It's the 'Supreme Law of the Land': Using the Migratory Bird Treaty Act to Protect Isolated Wetlands Left High and Dry by** *SWANCC."* **22** *Pace Environmental Law Review* **175 – 206 (2005).**

Flanagan investigates how the Migratory Bird Treaty Act might be used to protect the habitats of migratory birds, particularly those habitats located in isolated wetlands. Flanagan argues that a plain reading of the treaty and its underlying statutes obligates the U.S. to protect and preserve the migratory birds and their habitats in isolated wetlands. The adoption of such an approach to the MBTA could help the federal agencies address reduced protection of isolated wetlands following the U.S. Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC*).

## Goodson, Susanne. "Charting a Course through Non-navigable Waters Using the SWANCC Compass." 78 Temple Law Review 287 – 326 (2005).

In the wake of *SWANCC*, the exercise of Clean Water Act jurisdiction over some nonnavigable waters is questionable. Goodson argues that the courts can, and should, read *SWANCC* narrowly to permit the regulation of two classes of non-navigable, intrastate waters: (1) waters with a nexus to traditional navigable waters; and (2) waters presently used in interstate commerce.

## **Killheffer, Jason. "Connecticut's Inland Wetlands & Watercourses Act after** *Queach v. Inland Wetlands Commission*: A 'Safe Harbor' in a Sea of Regulatory Confusion." 23 *Quinnipiac Law Review* 1149 – 1196 (2005).

Because Connecticut was one of the first states to enact laws protecting freshwater wetlands more than thirty years ago, the U.S. Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)* has had relatively little effect. Under the Connecticut Inland Wetlands and Watercourses Act (IWWA), local wetland commissions have the authority to regulate activities likely to affect wetlands, including small isolated wetlands. In 2001, the Connecticut Supreme Court in *Queach Corporation v. Inland Wetlands Commission of the Town of Branford* confirmed the authority of local wetlands commissions to regulate activities within and outside wetland areas. Killheffer examines the IWWA and the significance of the *Queach* decision in light of uncertain federal regulation of wetlands.

### Knutsen, Brian. "Asserting Clean Water Act Jurisdiction Over Isolated Wetlands: What Happens After the SWANCC Decision." 10 Albany Law Environmental Outlook 155 – 196 (2005).

Knutsen examines the SWANCC decision and the various judicial interpretations that have followed in its wake. Knutsen also discusses the need for administrative action to

clarify the limits of jurisdiction over isolated wetlands under the Clean Water Act. Knutsen argues that the Supreme Court left ample room for jurisdiction over most wetlands, but that the EPA and the Corps will not be able to exercise jurisdiction until new regulations are promulgated which focus on the relationship of the wetlands to navigable-in-fact- rivers and not on any commerce-related functions they may provide.

May, Jonathon. "The Current Status of Clean Water Act Jurisdiction and the Future of Non-tidal Wetlands Protection: A Call to Protect 'Isolated Wetlands." 12 University of Baltimore Journal of Environmental Law 127 – 164 (2005).

Following the U.S. Supreme Court's decision in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC), the jurisdiction of the Corps over isolated wetlands throughout the country became very uncertain. May argues that the Corps of Engineers and the Environmental Protection Agency should issue a rule to address the disparate jurisdictional outcomes resulting from the confusion over SWANCC, claiming such a rule is necessary to assure that isolated wetlands continue to receive adequate protection.

## **Russell, Irma S. "A Common Tragedy: The Breach of Promises to Benefit the Public Commons and the Enforceability Problem."** 11 *Texas Wesleyan Law Review* 557 – 578 (2005).

Russell explores the possibility of using contract law to supplement statutory law that protects the commons. Russell compares the enforcement mechanism of ordinary contracts with that of promises made to further a public interest and speculates that private contract enforcement mechanisms may enhance enforcement of promises made to the public, such as a promise to create a wetland or grant a conservation easement.

## Smoktonowicz, Andrea B. "Federal Conservation of Wetlands Runs Amuck with Wetland Mitigation Banking." 31 Obio Northern University Law Review 177 – 195 (2005).

Smoktonowicz summarizes the current status of U.S. wetlands, outlines federal statutes and regulations concerning wetland conservation, and examines whether wetlands mitigation banking complies with the current federal policy of "no net loss" of wetlands.

### XXIX.

**WHALES** 

### Bakalar, Elizabeth. "Subsistence Whaling in the Native Village of Barrow: Bringing Autonomy to Native Alaskans outside the International Whaling Commission." 30 Brooklyn Journal of International Law 601-639 (2005).

The bowhead whale is a traditional source of food, clothing, shelter, and fuel for the Eskimos of northern Alaska. Since the establishment of the International Whaling Commission (IWC), the Eskimos must limit their take to quotas set by the Commission. Bakalar argues that the IWC is an inadequate mechanism for regulating Alaskan subsistence whaling and suggests an alternative – regulation by the Alaska Eskimo Whaling Commission (AEWC). The AEWC, which represent the ten Eskimo villages of the Arctic region, was established in 1977 and already works closely with the IWC to protect the rights of its members.

**Carlarne, Cinnamon Pinon. "Saving the Whales in the New Millennium: International Institutions, Recent Developments, and the Future of International Whaling Policies."** 24 *Virginia Environmental Law Journal* 1 – 48 (2005).

Carlarne examines recent developments in international whaling law, paying particular attention to the institutional relationship between the International Whaling Commission and CITES and the possibility that Japan and Norway may succeed in defeating the moratorium. Carlarne suggests that the international community needs to modify its approach to maintain the integrity of the IWC and CITES and meaningful whaling policies.

### Kraus, Scott D., et. al. "North Atlantic Right Whales in Crisis." 309 Science 561 – 562 (2005).

Right whale populations are declining despite efforts to reduce human-caused mortalities and recent increases in calving. Kraus and co-authors call for immediate emergency management actions to reduce shipping and entanglement mortalities in right whales.

#### XXX. WIND ENERGY

### **Brisman, Avi. "The Aesthetics of Wind Energy Systems."** 13 New York University Environmental Law Journal 1 – 133 (2005).

Brisman examines the visual or aesthetic opposition to wind farms and claims this antagonism is inconsistent with the aesthetic sensibilities humans bring to the appreciation of fine art. For example, the Dutch painters of the 17<sup>th</sup>-century did not regard windmills as intrusions on the landscape. Brisman argues that we should look to art to guide us in our aesthetic assessment of wind turbines.

## Hayden, Timothy A. "Reception on Nantucket Sound? A Summary of Current Offshore Wind Farm Litigation and a Federal Legislative Proposal Taking Cues From Cellular Tower Legislation." 13 Penn State Environmental Law Review 217 – 238 (2005).

In 2002, Cape Wind Association submitted a proposal for a scientific measurement tower on Nantucket Sound to test the feasibility of the area as a site for an offshore wind energy plant. Opposition to this development is fierce, and Cape Wind has been taken to federal court twice so far. Hayden explores the federal district court opinions in the Cape Wind cases drawing comparisons to the issues and legislation dealing with the erection of cellular towers. Hayden advocates the passage of federal legislation on offshore wind power to reduce judicial intervention that will inevitably arise with any future project.

### Sutton, Victoria, and Nicole Tomich. "Harnessing Wind is Not (by Nature) Environmentally Friendly." 22 Pace Environmental Law Review 91 – 121 (2005).

Sutton and Tomich examine the existing regulatory framework for addressing the environmental impacts of wind energy and argue that the potential for renewable energy must be weighed against the potential bird mortality, ecosystem degradation, and harm to endangered species. Sutton and Tomich summarize the environmental issues associated with the development of both land-based and offshore wind power facilities and offer recommendations for legal guidance on the siting and engineering of wind farms.

### Thompson, Robert. "Reporting Offshore Wind Power: Are Newspapers Facilitating Informed Debate?" 33 Coastal Management 247 - 262 (2005).

Thompson examines the newspaper coverage of Cape Wind's proposal for an offshore wind energy plant over the Massachusetts coast and concludes that the papers did a poor job covering most environmental, social, and regulatory issues. Thompson's analysis also reveals that the papers failed to draw on the expertise of nearby research institutions.