

The SANDBAR

Volume 2:3, 2003

Mariana Islands Lacks Authority Over Its Submerged Lands

Commonwealth of the Northern Mariana Islands v. U.S., Civil Action No. 99-0028 (D. N. Mar. I. filed Aug. 7, 2003).

Stephanie Showalter, J.D., M.S.E.L.

The United States District Court for the Northern Mariana Islands recently held that the United States possesses superior rights to the submerged lands of the Commonwealth of the Northern Mariana Islands. Consequently, Commonwealth statutes claiming authority over those lands are pre-empted by U.S. law.

Background

The Commonwealth of the Northern Mariana Islands (Commonwealth or Mariana Islands) has a unique and special relationship with the United States. In 1947, the United States agreed to act as Trustee for the Trust Territory of the Pacific Islands, which included the Mariana Islands. In the late 1960s, a number of countries within the Trust Territory began exploring their political options with the U.S. On February 15, 1975, the United States agreed that, upon the termination of the Trusteeship Agreement in 1986, the Mariana Islands would become a self-governing commonwealth, similar in status to Puerto Rico.

Almost immediately, questions arose regarding control of the submerged lands of the Mariana Islands. In January 1978, pursuant to the Fishery Conservation and Management Act of 1976, the United States declared a 200-mile fishery conservation zone around the Mariana Islands. The Mariana Islands challenged the U.S. action in court, but to no avail.¹ In response, the Mariana Islands enacted

two statutes claiming sovereignty over their submerged lands and marine resources. In the "Submerged Lands Act," the Mariana Islands claimed ownership of the submerged lands out to 200 nautical miles. With the "Marine Sovereignty Act of 1980," the Mariana Islands asserted authority over a twelve-mile territorial sea and a 200-mile exclusive economic zone (EEZ). In 1995, the Mariana Islands unilaterally leased submerged

See Submerged, page 13

Attorney and Expert Witness Fees Awarded in *New Carissa* Litigation

Clausen v. M/V New Carissa, 339 F.3d 1049 (9th Cir. 2003).

Joseph Long, 3L

Litigation stemming from the 1999 *New Carissa* oil spill is slowly making its way through the courts. The Ninth Circuit Court of Appeals recently addressed two separate issues in a single appeal. The first issue involved an evidentiary question for admission of expert testimony. The second issue was whether attorney fees and expert witness fees are appropriate awards for successful plaintiffs in a civil suit brought under the Federal Oil Pollution Act and the Oregon Spill Act. The Court found the plaintiff's expert testimony was admissible.

See Carissa, page 4

Table of Contents

| | |
|---|----|
| Mariana Islands Lacks Authority Over its Submerged Lands <i>Stephanie Showalter</i> | 1 |
| Attorney and Expert Witness Fees Awarded in <i>New Carissa</i> Litigation <i>Joseph Long</i> | 1 |
| Takings Claim Reconsidered in Light of Recent Supreme Court Decision <i>Leah Huffstatler</i> | 2 |
| North Carolina Shellfish Contamination Case Moves Forward <i>Jason Savarese</i> | 6 |
| SEANET Announcement | 7 |
| International Coastal Management: Tools for Successful Regional Partnerships and Initiatives | 8 |
| The Great Barrier Reef Marine Park - A Bold Experiment <i>Simon Woodley</i> | 8 |
| Climate Change, A Canadian Perspective <i>Meinhard Doelle</i> | 11 |
| Book Review <i>The Empty Ocean</i> by Richard Ellis <i>Stephanie Showalter</i> | 14 |
| Coast To Coast <i>And Everything In-Between</i> | 15 |



Takings Claim Reconsidered in Light of Recent Supreme Court Decision

McQueen v. South Carolina Coastal Council, 580 S.E.2d 116 (S.C. 2003).

Leah Huffstatler, 2L

The South Carolina Supreme Court recently reconsidered a takings claim in which the court originally determined the property owner was not due compensation even though the property could not be developed under state wetlands regulations. Based on a ruling in a similar case, the United States Supreme Court had remanded *McQueen* to the state court for a determination of the amount of compensation due based on background principles of state law.

Background

In the early 1960s, Sam McQueen purchased two undeveloped lots in North Myrtle Beach, South Carolina. The lots, situated alongside man-made saltwater canals, remained unimproved throughout the next thirty years while surrounding lots were developed and improved with bulkheads or retaining walls. In 1991, McQueen requested permission from the South Carolina Office of Ocean and Coastal Resource Management (OCRM) to build bulkheads on both lots. After an administrative delay, he again applied for permits to build the bulkheads and also to backfill the lots.

At a 1994 hearing regarding McQueen's applications, it was determined that the majority of both lots had reverted to tidelands or critical area saltwater wetlands with only a few irregular portions of high ground remaining on either lot. This meant that without backfill and bulkheads, there was not enough high ground to develop the property. The backfill, however, would permanently destroy the critical area environment on the lots. Based on this fact, the OCRM denied the permits.

McQueen then initiated action in state court to receive compensation for the regulatory taking of the two lots. The lower state courts granted McQueen compensation, but the South Carolina Supreme Court reversed and held that while McQueen was deprived of all economically beneficial use of the lots, he had no reasonable investment-backed expectations because of pre-existing wetlands regulations.¹ McQueen appealed to the United States Supreme Court, which granted McQueen's petition for a writ of certiorari, vacated the state supreme court's decision, and remanded the issue for further consideration in light of the recent *Palazzolo* decision.

Palazzolo and a New Approach to Takings

In *Palazzolo v. Rhode Island*, Anthony Palazzolo was unable to develop a waterfront parcel of land in Westerly, Rhode Island due to the property's designation under state law as protected coastal wetlands. Palazzolo filed suit in state court claiming the application of wetlands regulations to his property constituted a total taking requiring compensation. The Rhode Island Supreme Court held that Palazzolo had not suffered a total taking since a portion of the property was upland and free from the state's wetlands regulations. Additionally, the state court held that Palazzolo never held the right to backfill the property's wetlands because such action was already prohibited under state law at the time he acquired title to the parcel. The United States Supreme Court reversed the holding of the Rhode Island Supreme Court in *Palazzolo* and found that in takings claims, pre-existing state regulations are not dispositive of whether a landowner is on notice of those restrictions to his property.²

Ruling

On remand, the South Carolina Supreme Court reconsidered McQueen's claim in light of *Palazzolo*. First, the court determined that McQueen's property held no economic value and, thus, a total taking had occurred.³ Next, the court identified the threshold question for determining if compensation is due as whether the property interest affected is inherent in the plaintiff's ownership rights.⁴ According to *Palazzolo*, this inquiry should be anchored in background principles of state property and nuisance law.⁵ The court noted South Carolina's long history of applying the public trust

doctrine to the state's coastal lands and that historically, the state retains presumptive title to lands below the high water mark. Based on this notion, the state has exclusive control of these lands and must protect them for the public good.⁶

Furthermore, the court cited South Carolina law which states that wetlands "created by the encroachment of navigable tidal water" belong to the state.⁷ Since the wetlands on McQueen's property were created by continuous erosion from the adjacent man-made canal, the state now holds title to them and they must be managed in accordance with the state's public trust doctrine.⁸ This reversion of McQueen's lots to tidelands effected a restriction on the rights inherent in the ownership of property bordering tidal water. As the proscribed use of the wetlands was not an inherent right of ownership, McQueen is due no compensation.⁹



Conclusion

After reconsideration of this issue under *Palazzolo*, the South Carolina Supreme Court found that while there has been a total taking of McQueen's property, he is due no compensation based on state law holding wetlands in public trust. ❧

ENDNOTES

1. *McQueen v. South Carolina Coastal Council*, 530 S.E.2d 628 (S.C. 2000).
2. *Palazzolo v. Rhode Island*, 533 U.S. 626, 629-30 (2001).
3. *McQueen v. South Carolina Coastal Council, et al.*, 580 S.E.2d 116, 119 (S.C. 2003).
4. *Id.*
5. *Palazzolo*, 533 U.S. at 629.
6. *McQueen*, 580 S.E.2d at 119.
7. *Id.* at 120.
8. *Id.*
9. *Id.*

Further, concluding that the oil statutes contain specific provisions providing for fee awards, the Ninth Circuit upheld the district court's award of attorney fees and expert witness fees.

Background

On February 3, 1999, the *M/V New Carissa*, an oil cargo vessel, anchored two miles off Coos Bay North Spit, Oregon after determining that the weather was too rough to enter Coos Bay. The *New Carissa* carried 400,000 gallons of bunker and diesel fuel. Unfortunately, the vessel's anchor did not hold and rough weather pushed the ship shoreward. The *New Carissa* ran aground and began to leak oil. To contain the spilling oil, the Navy and the Coast Guard used napalm and explosives to burn the leaking fuel and sink the ship. This was the first time such methods were employed upon the United States' mainland. Even with those efforts, an estimated 70,000 gallons of fuel escaped into the surrounding coastal areas, including Coos Bay.

Mr. and Mrs. Max Clausen, the plaintiffs, owned and operated Clausen Oysters, an oyster farm located in Coos Bay. The Clausens and other oyster farmers were forced to shut down operations after the Oregon Department of Agriculture detected oil in the Coos Bay oyster beds. The oil infiltration caused an estimated 3.5 million oyster deaths during the week following the spill.

The Clausens brought suit in federal district court against the *New Carissa* and its corporate owners and operator under the Federal Oil Pollution Act and the Oregon Spill Act, which hold a party strictly responsible for damages caused by a spill of oil under its control. At trial the defendants sought to exclude the Clausens' expert witness testimony concerning causation of the oyster deaths based on the Supreme Court ruling in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*¹ The trial court allowed the testimony and the jury returned a verdict in favor of the Clausens for \$1.4 million. Upon the Clausens' request, the district court awarded the plaintiffs attorney fees totaling \$651,382.30 and expenses, including expert witness fees, totaling \$149,170.05.² The ship owners appealed.

Admissibility of Expert Testimony

The defendants argued that the Clausens' expert witness' testimony should not have been allowed

based upon the Supreme Court holding in *Daubert* and subsequent court interpretation. Under *Daubert*, "scientific evidence is deemed reliable [and admissible] if the principles and methodology used by an expert are grounded in the methods of science."³ Dr. Elston, the Clausens' expert witness, testified that the toxicity levels in the dead oysters were caused by the oil spill from the *New Carissa*. Dr. Elston used a process called differential diagnosis, which is a "scientific method of identifying a medical problem by eliminating the likely causes until the most probable one is isolated."⁴ If shown to be reliable, differential diagnosis properly conducted is admissible under *Daubert*. To be reliable, an expert's chosen cause must be "capable of causing the injury"⁵ and other alternative causes must have been rejected "using scientific methods and procedures."⁶ Dr. Elston testified that low-level toxic effects of oil were the likely cause of the oyster deaths. The defendants argued that this testimony was unreliable because the quantity of oil that causes harm to shellfish has not been scientifically determined.

The Ninth Circuit concluded that precise evidence is not needed to show the toxicity of a substance. The court found that, due to the rarity of oil spills, scholarly study is infrequent and incomplete. The lack of published research, however, does not bar Dr. Elston's testimony. The Ninth Circuit held that a conclusion as to the cause of the oyster mortalities is admissible "without supporting peer-reviewed literature specific to that subject, so long as the expert witness relied upon a variety of objective, verifiable evidence."⁷

Attorney Fees

The ship owners put forth three arguments in support of their claim that the Oregon Spill Act does not provide for an award of attorney fees, no matter the factual outcome. First, the ship owners claimed that Oregon adheres to the general contractual rule that attorney fees are not awarded as damages "when sought in the same action in which the services were rendered."⁸ Second, the ship owners argued that "the district court's interpretation of the damages provision fails to give effect to all of the words of the statute."⁹ Third, they argued that where the legislature intended shifting attorney fees to exist, it specifically pro-

vided for such fees by statute. The owners claimed the legislature did not do so in the Oregon Spill Act, and therefore the attorney fees award to the plaintiffs was inappropriate.

The Ninth Circuit addressed the first argument quickly by first acknowledging the general contractual rule, but pointed out that the standard exists only in breach of contract actions, not in claims of this kind. The court also noted that the Oregon Spill Act has its own damages provision, which is extremely broad and more inclusive than damage provisions in other Oregon statutes.

The court dispensed with the second argument by pointing to the ship owners' failure to include all of the language of the Oregon Spill Act in its argument. The entire section cited by the defendants states that damages "include attorneys fees of any kind for which liability may exist under the laws of this state resulting from, arising out of or related to the discharge or threatened discharge of oil."¹⁰ The defendants interpreted this provision to mean that an award for fees cannot be received in the same action in which damages are awarded. The court disagreed and stated that fees can be awarded upon a finding of liability under the Act itself or under another law. Since the Act includes a provision for attorney fees, the award of attorney fees was appropriate.

Finally, the ship owners argued that when the Oregon legislature means to allow fee shifting it does so explicitly, unlike in this case where a damages provision was interpreted to provide for the shift. The Ninth Circuit explained that the legislature is not limited in its means of providing for fee shifting. The court acknowledged that attorney fees are not normally included in damage awards, but, again, emphasized the specific definition of damages set forth in the Oregon Spill Act. Recuperation of attorney fees for a successful plaintiff is explicitly included in the Spill Act's statutory definition of damages.

Expert Witness Fees

The ship owners further argue that expert witness fees are inappropriate in federal court where state law governs the distribution of such fees. The defense cites *Aceves v. Allstate Ins. Co.* to argue that "federal courts should control the reimbursement of expert witnesses in federal courts sitting in

diversity jurisdiction."¹¹ The court distinguishes between cases of state and federal cost provision conflicts and the present case, where the conflict is between a federal cost provision and a state damages provision. The court concludes that where plaintiffs have shown they are entitled to recovery under the state statute, they are also entitled to recover under that statute's damages provision and are not governed by federal expert cost provisions.

Conclusion

Regarding expert testimony, the court held that Dr. Elston's conclusion that low-level toxicity of oil within the bay was the cause of the oysters' deaths was admissible, because his conclusion was supported by verifiable and objective facts.

As to the attorney fees and expert witness fees, the court concluded that both fees were appropriately awarded to the Clausens because the controlling statutes, the Oregon Spill Act and the Federal Oil Pollution Act, contain explicit provisions allowing for such awards. ❧

ENDNOTES

1. 509 U.S. 579 (1993).
2. Attorney fees and costs (or expenses) may be awarded as a part of damages pursuant to the Oregon Spill Act (Or. Rev. Stat. §§ 468B.310(1) and 300(6) (2002)). Section 486B.300(6) defines "damages" as "damages, costs, losses, penalties, or attorney fees of any kind for which liability may exist under the laws of this state resulting from, arising out of or related to the discharge or threatened discharge of oil."
3. *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1056 (9th Cir. 2003).
4. *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4th Cir. 1999).
5. *Hall v. Baxter Healthcare Corp.*, 947 F.Supp. 1387, 1413 (D.Or. 1996).
6. *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994).
7. *Clausen*, 339 F.3d at 1060-61.
8. *Id.* at 1062.
9. *Id.*
10. Or. Rev. Stat. § 468B.300(6) (2002).
11. *Aceves v. Allstate Ins. Co.*, 68 F.3d 1160, 1168 (9th Cir. 1995).

North Carolina Shellfish Contamination Case Moves Forward

North Carolina Shellfish Growers Ass'n and North Carolina Coastal Fed'n v. Holly Ridge Assocs., LLC, and John A. Elmore, No. 7:01-CV-36-BO(3) (E.D.N.C. filed July 23, 2003).

Jason Savarese, 3L

A federal judge recently ruled that a lawsuit concerning the pollution of North Carolina's shellfish waters could proceed to trial.

Background

In January, 1998, Holly Ridge Associates (HRA) began constructing new ditches, and widening existing ones, on a 1,262-acre section of land in Onslow County, North Carolina, known as the Morris Landing Tract (Tract). HRA was attempting to drain the wetlands and nearby upland areas to permit further development. The land in question borders waters used to grow shellfish for human consumption.

The North Carolina Shellfish Growers Association (NCSGA), an association of shellfish businesses, and the North Carolina Coastal Federation (NCCF), an environmental group, sued the HRA in February 2002. The plaintiffs claimed HRA's twelve miles of ditches were draining into Stump Sound, the Atlantic Intercoastal Waterway (AIWW), and Cypress Branch, a perennial stream and tributary of Batts Mill Creek. Many of these waters support shellfish farms, with more than 130 acres of Stump Sound being dedicated to this venture. The drainage reaching these waters had allegedly been introducing pollutants, the most dangerous of which is fecal coliform bacteria. This bacterium comes from the intestines of warm-blooded animals, and can infect shellfish and cause serious illness or even death when contaminated shellfish are consumed by humans. NCSGA and NCCF claimed that increased levels of fecal coliform bacteria had been identified in monitoring data from Stump Sound, showing a spike in coliform counts in adjacent waters, allegedly due to the ditching and excavation efforts on the Tract.

The plaintiffs claim HRA failed to secure the necessary Clean Water Act (CWA) permits before digging these ditches and polluting nearby shellfish waters. Section 402 of the CWA requires developers to obtain a permit for the discharge of dredge and fill materials into waters of the U.S. and § 404 requires a permit for the filling of wetlands.¹ HRA did not obtain either of these permits, claiming the CWA did not apply to its property, as the wetlands on the Tract were isolated from the nearby shellfish waters.

Waters of the U.S.

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANNC*), the Corps denied a state agency's application for a § 404 permit for the creation of a landfill. The U.S. Supreme Court held that the Corps had exceeded the scope of its authority under the CWA by defining "navigable waters of the U.S." to include intrastate, isolated, non-navigable waters used by migratory birds. The Court required a "significant nexus" between waters of the U.S. and the wetland in question in order for the CWA to apply to a water body. Some courts have read the *SWANNC* decision to mean the CWA is limited to actual navigable waters or those adjacent to such waters.² Other courts have held that *SWANNC* does not change the traditional jurisdiction of the Corps, but controls only in cases involving isolated waters.³

HRA argued that the ditches on its property were not draining into waters of the U.S. The court, however, declared Stump Sound, AIWW, Cypress Branch, and Batts Mill Creek to be waters of the U.S., and thus HRA's ditches are subject to permit requirements under the CWA. The court's ruling was based on its determination that a significant nexus exists between the wetlands on the Tract and waters of the U.S.

The court held that the Corps had jurisdiction over Cypress Branch, which the court found to be a tributary of Batts Mill Creek, even though Cypress is separated from Batts by a one-half mile wetland flat. While Cypress Branch does not have a consis-

tent flow into Batts, the court stated that it could have such a flow after heavy rains. This intermittent flow of Cypress Branch would then be capable of carrying pollutants into Batts, and onward to shellfishing areas. Because the court found Batts to be a water of the U.S., Cypress Branch's hydrological connection to Batts meets the "significant nexus" requirement espoused in *SWANCC*, and subjects Cypress to the Corps' jurisdiction under the CWA. The court stated that when a hydrological connection exists, even if the waters are miles apart on the surface, a finding of significant nexus is warranted.⁴

As tributaries of waters of the United States, any ditches on the property flowing into Cypress are subject to the CWA, as are several ditches flowing into the Tract's on-site lake, which also drains into the adjacent waters. Because the wetlands and streams on the Tract fall within the jurisdiction of the Corps, HRA's activities required CWA permits.

Conclusion

In an order issued July 23, 2003, Chief U.S. District Judge Terrence W. Boyle determined that Stump Sound, Batts Mill Creek, Cypress Branch, the Tract's lake, and several of its ditches were waters of the U.S., covered by the CWA. He also found that the Tract's owners had discharged pollutants and

dredge and fill material into those waters from several point sources, without first obtaining a permit from the Army Corps of Engineers. The judge allowed two issues to go forward to trial: whether the Tract's owners discharged fecal coliform bacteria into the waters and whether the defendants were exempt from CWA permit requirements under a silvicultural exception.✎

ENDNOTES

1. 33 U.S.C. §§ 1342, 1344 (2003).
2. See *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001); *FD & P Enters., Inc. v. United States Army Corps of Engineers*, 239 F. Supp. 2d 509, 516 (D.N.J. 2002); *United States v. RGM Corp.*, 222 F. Supp. 2d 780, 785-86 (E.D. Va. 2002); *United States v. Newdunn Assocs.*, 195 F. Supp. 2d 751, 767-68 (E.D. Va. 2002); *United States v. Rapanos*, 190 F. Supp. 2d 1011, 1015-16 (E.D. Mich. 2002).
3. See *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001); *United States v. Lamplight Equestrian Center, Inc.*, 2002 WL 360652, at *6 (N.D. Ill. Mar. 8, 2002); *United States v. Buday*, 133 F. Supp. 2d 1282, 1292 (D. Mont. 2001).
4. *North Carolina Shellfish Growers Ass'n and North Carolina Coastal Fed'n v. Holly Ridge Assocs., LLC, and John A. Elmore*, No. 7:01-CV-36-BO(3) at 27 (E.D.N.C. filed July 23, 2003).



The National Sea Grant Law Center is embarking on an exciting new venture, the expansion of SeaNet, the Sea Grant Law and Policy Network. Some of you have been members of SeaNet for years, which has consisted of informal meetings and a published directory of colleagues in the marine law and policy field. The Sea Grant Law Center is revitalizing and expanding SeaNet to provide the network of marine law and policy specialists with current information and easier access to others in the field.

It is our hope that you will all take advantage of this opportunity to either join or continue your affiliation with SeaNet. SeaNet is open to anyone working in the marine law and policy field.

The Center Staff will be maintaining a list serve and a web page solely dedicated to SeaNet. Building upon the relationships already existing within SeaNet, the new list serve will provide a vehicle for the dissemination of information, including job opportunities, current research projects, and upcoming conferences and meetings. The network will also provide a valuable service to members. Requests for information can be sent to a SeaNet email address and a Center staff member will then facilitate the delivery of that message to the network.

If you are already a member of SeaNet, this is a great time to reaffirm your commitment to the network. If you are not a member, there has never been a better time to join. Great things are in the works for SeaNet. In the near future, the Sea Grant Law Center will be partnering with the Nova Southeastern University Law School to provide on-line conferencing and webcasting of special events.

To become a member of SeaNet, simply send us an email at sealaw@olemiss.edu or give us a call at (662) 915- 7775. We look forward to hearing from you.✎



International Coastal Management: Tools for Successful Regional Partnerships and Initiatives

In June, the Sea Grant Law Center, with co-sponsors the Dean Rusk Center at the University of Georgia, the Rosenstiel School of Marine and Atmospheric Science at the University of Miami, and the Croft Center for International Studies at the University of Mississippi, hosted a conference on international coastal management in Athens, Georgia. During the two-day conference, speakers and attendees caught up on recent developments in the field and shared case studies. A wide range of topics was discussed including fisheries management, climate change, and the roles of science, politics, and the law. Case studies were presented from Australia, Belize, Panama, and the United States. The conference was small, providing an excellent opportunity for everyone involved to get to know each other, exchange ideas, and engage in stimulating discussions. Because the presentations given during the conference were simply too good to keep to ourselves, the PowerPoint presentations are available on the Law Center's website at <http://www.olemiss.edu/orgs/SGLC/conference.html>.

Two of the conference speakers graciously provided excerpts of their presentations for us to share with you, our readers. Meinhard Doelle's article, "Climate Change, a Canadian Perspective," discusses the anticipated impacts of climate change in Canada and the nation's struggles since its ratification of the Kyoto Protocol. Simon Woodley, in "The Great Barrier Reef Marine Park - A Bold Experiment," describes Australia's initial efforts to protect the Great Barrier Reef.

The conference organizers are currently developing a proceedings volume from this conference, which we hope to publish in Spring 2004. Please take a moment to enjoy this exclusive sneak peek!☺

The Great Barrier Reef Marine Park - A Bold Experiment

Simon Woodley, S&F Woodley Pty. Ltd.

Simon Woodley is a freelance environmental consultant in marine and coastal ecosystem management, particularly tropical marine protected area management. From 1978-1998 he was involved in the establishment and management of the Great Barrier Reef Marine Park. The views in this paper are his. He can be contacted at simon@magwood.com.au.

Introduction

In 1975 the Australian Government established the Great Barrier Reef Marine Park with specific and

innovative legislation. At the time this was an unprecedented approach to the management of natural resources in Australia and the world. Even today it is regarded by many as a benchmark for ecologically sustainable use of marine resources.

Political and Social Context

The genesis of the Marine Park can be found in the social dynamism of the 1960's in the Western world. Along with the revolutions in thought and political values and the challenge to accepted conventions, people were becoming increasingly aware and concerned about environmental issues,

globally and nationally. Concerned scientists talking or writing publicly about environmental issues, for example, pesticide use (Carson 1962) and pollution issues (Commoner 1966) fueled these concerns. The first World Conference on National Parks held in Seattle in 1962 recommended that countries with coastal boundaries should give priority to the establishment of marine protected areas (Adams 1962).

At the same time, increased awareness of the richness and beauty of the underwater environment was reaching the living rooms of citizens through the technological advances of SCUBA diving, underwater films and television. Coincidentally, catastrophic marine disasters such as oil well blowouts at Santa Barbara in 1969 and the break-up of the oil tanker *Torrey Canyon* in the English Channel in 1967 added to unease about human impacts on the marine environment. On the Great Barrier Reef, the first recorded outbreak of crown-of-thorns starfish (a coral-eating predator) was found at a popular tourist site in 1965, and was attributed by some to human impacts.

In Queensland, Australia, a pro-development government was intent on expanding investment in tourism, agriculture (mainly beef cattle and sugar cane in coastal catchments adjacent to the Great Barrier Reef) and exploiting the State's mineral resources. Plans in 1969 to prospect for oil on the Great Barrier Reef and mine coral reefs for limestone were the trigger for intense public concern and debate in Australia and overseas.

Because of these threats, concerned citizens joined together in the late 1960's to form conservation movements and to launch a "Save the Reef" campaign. Protest rallies were held, bumper stickers were printed and politicians lobbied. Scientific organizations such as the Great Barrier Reef Committee brought their scientific knowledge to bear on the problem and lobbied vigorously for conservation of the Reef. National media editorialized about the need to save the Reef. Trade unions became involved by banning the unloading of ships carrying oil drilling equipment. The public concern eventually became such a political issue that the national government of the day and the opposition both pledged to protect the Reef. The highest level of public inquiry available in Australia, a Royal Commission, was established in 1970 to look

into the proposal to drill for oil on the GBR and subsequently reported that there should be a moratorium on drilling. The governments of the day supported this recommendation.

In 1972 a new federal Labor government with a social democratic reform agenda was elected. It immediately set about implementing one of its electoral promises to establish the Great Barrier Reef as a national park. The Great Barrier Reef Marine Park Act 1975 (GBRMP Act) was then passed in 1975 to put the policy into practice. Although there was bipartisan support for the legislation in federal Parliament, it was strongly resisted by the State of Queensland which felt that the federal government was intruding on an area of "States' rights."

The Constitutional Setting

There is no specific head of power in the Australian Constitution that grants the federal government the right to legislate on environmental matters within the States, nor to exercise environmental protection powers within the three mile territorial sea. The High Court, however, in 1975 upheld the Seas and Submerged Lands Act 1973 that claimed national sovereignty over offshore areas from low water. This ruling was derived from the constitutional power of the federal government to enter into treaties and conventions on behalf of the nation; in this case, the international convention on the continental shelf developed under the United Nations Conference on the Law of the Sea.

Great Barrier Reef Marine Park Act 1975

The GBRMP Act was innovative and unprecedented in scope and direction. When enacted, the Act was one of the most powerful on the Australian Government's statute books. It prevailed, in the event of conflict, over all other laws of Australia (Federal and State) with the exception of legislation related to defense, the right of innocent passage of shipping and shipping in distress. Rather than adopt an approach similar to that of national parks on land (nature based recreation and no extractive use) the GBRMP Act took a town planning approach. The GBRMP Act established a Federal statutory authority with sweeping powers to develop a marine park over the whole of the Great Barrier Reef Region, an area of approximate-

See Great Barrier, page 10

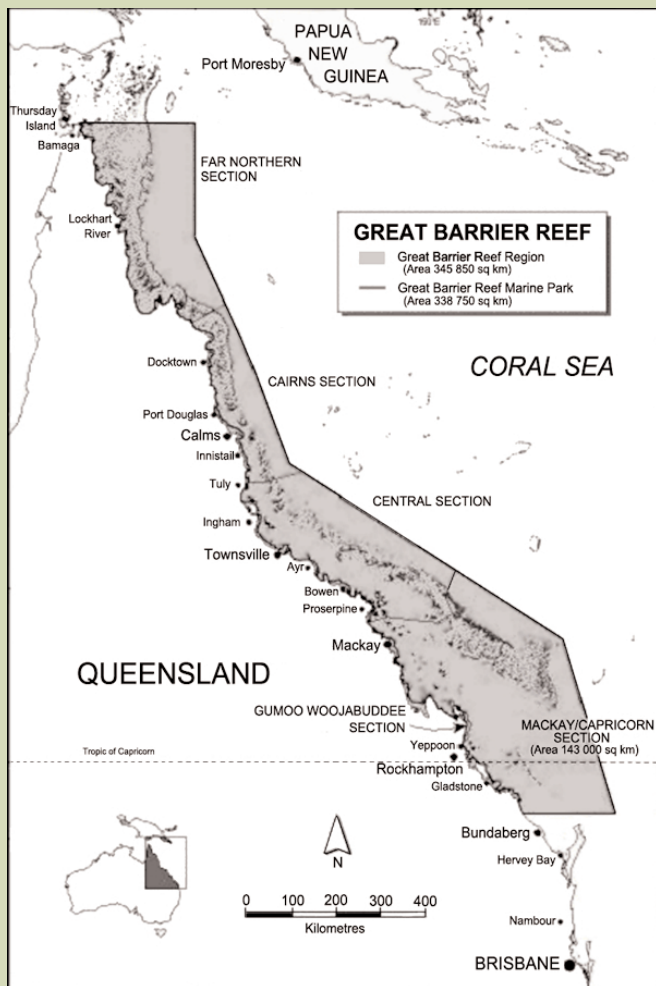


Figure 1

1). Commonwealth or federal power extended to low water mark on the coast and around the 962 islands most of which belonged to the State of Queensland. The legislators saw that cooperation between the federal government and Queensland State government was essential to be able to plan and manage the whole area on an ecologically sustainable basis. To attempt to manage the reefs and surrounding waters without due regard for the activities that occurred under State jurisdiction (e.g. fisheries and management of islands) would have been costly and inefficient. Co-operation with Queensland was essential and this was mandated in the legislation, through membership of the governing board and an advisory committee, as well as through agreements to provide funding to assist in the management of the area.

The legislation also established the concept of a multi-use park within which “reasonable use” could co-exist with conservation. The guiding philosophy in the legislation was to establish a marine

park while providing for “protection, wise use, understanding and enjoyment.” Spatial zoning plans that provided for a gradation of uses from “general use” to “preservation” were mandated as the main management tool. Public consultation was required by law. Research, education and day-to-day field management in the form of surveillance, enforcement and education was also mandated.

Conclusions

The policy and enabling legislation to protect the Great Barrier Reef was a political response to public concerns that were based on emotions, perceptions and values rather than hard science or facts demonstrating risk to the Reef environment. At the time, the Great Barrier Reef was relatively lightly used and in excellent condition overall. The primary threats of oil drilling and extraction of minerals, which were the major trigger for the establishment of the Marine Park, were immediately dealt with in the new GBRMP Act by prohibition. This gave the new management agency, the Great Barrier Reef Marine Park Authority, the time and space to establish the marine park without the intense use pressures that are characteristic of marine conservation efforts in developing countries.

After 25 years of management, the legislative framework is still the most appropriate for providing for “protection, wise use, understanding and enjoyment” even though the issues that confront the managers have changed in scope and intensity. The main issues facing the management agency and reef users today are ecologically sustainable and economically viable reef-based tourism, improving water quality and the impacts of coastal agriculture and urban development, ecologically sustainable fishing, conservation of the biodiversity of the Reef at different scales and finding acceptable ways of meeting the rights and aspirations of indigenous communities.

Although the GBRMP Act provides the framework for management, it is not sufficient by itself. Ultimately, changes in human use are needed to ensure that the impacts of such use on biodiversity are within sustainable limits. The most lasting changes occur where reef users accept the need to change their behavior where it is not compatible with the long-term conservation of the Reef. Without community support and co-operation

(and through it the support of politicians) the task of managing the Reef would be almost impossible.☞

References and Additional Reading

- RACHAEL CARSON, *SILENT SPRING* (Houghton Mifflin, Boston 1962).
- BARRY COMMONER, *SCIENCE AND SURVIVAL* (Gollanz, London 1966).
- RICHARD A. KENCHINGTON, *MANAGING MARINE ENVIRONMENTS* (Taylor & Young, New York 1992).
- DAVID LAWRENCE, RICHARD A. KENCHINGTON, & SIMON J. WOODLEY, *THE GREAT BARRIER REEF - FINDING THE RIGHT BALANCE* (Melbourne University Press, Australia 2001).
- NATIONAL PARKS SERVICE, *FIRST WORLD CONFERENCE ON NATIONAL PARKS: SEATTLE* (A.B. Adams ed., 1962).
- JUDITH WRIGHT, *THE CORAL BATTLEGROUND* (HarperCollinsPublishers Australia 1996).
- Great Barrier Reef Marine Park Authority website at [http:// www.gbrmpa.gov.au](http://www.gbrmpa.gov.au) .

Climate Change, A Canadian Perspective

Meinhard Doelle, Dalhousie Law School

Meinhard Doelle is an Assistant Professor at Dalhousie Law School in Halifax, Nova Scotia, Canada where he teaches environmental law. He served as Executive Director of Clean Nova Scotia from 1996 - 2001 and as an advisor on international negotiations on climate change. Meinhard is currently pursuing a J.S.D. at Dalhousie University, with a focus on compliance with Multilateral Environmental Agreements.

Until recently climate change policies in Canada and the United States were more or less in line with each other. Both countries have been struggling to make reductions at home as a result of their heavy reliance on fossil fuels as the major source of energy. An abundance of energy since the end of the energy crisis of the 1970's and the historically low energy prices have made conservation and efficiency less attractive in North America than in other parts of the world. It is not surprising, therefore, that both countries have economies that are very energy intensive. Both Canada and the United States, at the same time, have begun to feel the effects of climate change. Finally, both countries historically have made significant efforts to reach international agreement on how to address this global issue.

At the same time, there have been startling differences, especially in recent years. Domestically, for example, the United States, in large part as a

result of the leadership roles of states such as California, has taken considerably more action to reduce greenhouse gas (GHG) emissions than Canada to date. On the other hand, the United States has opted out of the current international effort to develop a global response to this issue, the Kyoto Protocol, whereas Canada has consistently taken a multilateral approach, and has been an active player on the international front on this issue.

In terms of climate change impacts, the Canadian arctic is expected to be one of the most drastically affected regions in the world, with predictions in average temperature changes in the range of ten degrees or more, completely changing the ecosystems in the Canadian North. Similar changes can be expected in Alaska. Other parts of Canada significantly affected include coastal areas, which can expect sea level rise, increased severe weather events, and changes in ocean currents and temperatures. One example of a direct human impact of climate change in the coastal regions of Canada is the main transportation link between the provinces of Nova Scotia and New Brunswick. The predicted level of sea level rise for this region in combination with expected storm surges is predicted to result in frequent flooding of the only rail and road connections between Nova Scotia and the rest of Canada.

The overall impact of climate change on coastal ecosystems is still not well understood, but recent

See Doelle, page 12

collapses of cod and salmon stocks in Canada are thought by some to be caused by changes in water temperatures. Another region of Canada likely to be significantly affected is the Canadian prairies, the heart of Canada's agriculture industry. In this part of Canada, significant increases in temperature combined with expected decreases in precipitation are likely to create new challenges for an already threatened industry. Lack of predictability of emerging new weather patterns will make crop selection and planning difficult. Severe droughts over the past few years have been early warning signs of what is likely to come.

Canada ratified Kyoto in December 2002, and has now formally entered the implementation phase. Canada's implementation plan calls on individuals to reduce their GHG emissions by one ton for the first commitment period. Large industrial emitters received a number of concessions leading up to the ratification decision, including a fifty-five megaton reduction limit from business as usual, access to domestic and international credits to meet any targets, a commitment to set targets based on intensity rather than based on absolute limits, and a commitment from the Canadian government to cover any cost above \$15 per ton of credit purchased by any large emitter to meet its target. Canada is currently in the process of negotiating covenants with large emitters. Other measures, especially in the areas of transportation, buildings, and renewable sources of energy, are still under development. Canada expects to rely significantly on the use of sinks in meeting its first commitment period target.

Climate change negotiations internationally have been more or less stalled since the signing of the Marrakech Accords in November 2001. The inadequacy of developed country targets and the absence of Australia, the United States, and possibly Russia from the process have made it difficult to bring developing countries on board. The U.S., on the other hand, has indicated its refusal to join the process as long as developing countries are not part of the process in the form of emission reduction targets. The further lack of commitment from the industrialized world to assisting developing countries in any meaningful way with sustainable development has now created a significant impasse in the negotiations.

Canada may have an important role to play in finding a way to bring both sides along to accelerate the modest international momentum on GHG emission reductions achieved by bringing Kyoto into force. Now that Kyoto is essentially ready for implementation by states that have agreed to be bound by it, the process of developing a next step toward a meaningful international response to climate change is under way, with the focus on how to bring the United States back on board internationally, how to make reductions in developed countries meaningful in terms of actually mitigating climate change, and how to prevent emissions in developing countries from reaching levels similar to those in developed countries without hampering their right to development.

In the meantime, from a coastal zone management perspective, it is important to keep in mind that climate change impacts are not necessarily the only cause for concern. Certain mitigation measures also have the potential to add stresses and new challenges to the protection of ocean ecosystems. One obvious example of this is the proposal to use enzymes to increase deep sea storage of carbon. Other mitigation measures that may introduce competing uses and possibly add other new challenges include proposals for offshore wind farms and a renewed interest in tidal power.

Perhaps the most important conclusion of the current state of climate change in Canada and globally for coastal zone management is that mitigation is not likely to significantly reduce the risk of climate change in the foreseeable future. The need to consider the impacts of climate change on coastal ecosystems is therefore higher than ever. Managers will not be able to forecast the future state of coastal ecosystems based on historical data, including such fundamental issues as sea level, ocean currents, temperatures, precipitation patterns and extreme weather events to name a few. The challenge for coastal zone policy makers and managers alike will be to facilitate human adaptation to changes that can be predicted and to find ways to reduce other stresses to give coastal ecosystems a better chance at adapting, while supporting efforts at mitigation to slow down the rate of change and buy humans and natural ecosystems the time needed to adjust to the changes that are taking place. ☺

lands to a developer for the construction of a marina. In 1996, the Department of Interior asserted U.S. authority over the lands and required the developer to enter into a separate agreement with the U.S. The Mariana Islands again filed suit.

Submerged Lands

Under the “paramountcy doctrine,” the United States has paramount authority over the submerged lands of coastal states and territories seaward of the low water mark.² This authority can be transferred to a state or territory, but such a transfer requires a “clear, express and unequivocal Congressional enactment.”³ For example, in 1953, Congress passed the Submerged Lands Act (SLA). The SLA transferred ownership of submerged lands out to three nautical miles to coastal states. In a similar manner, Guam, the Virgin Islands, and American Samoa gained control over their submerged lands through the Territorial Submerged Lands Act.

For the Mariana Islands to claim ownership of their submerged lands, Congress must expressly pass ownership to the Commonwealth. That has not happened yet. Section 101 of the Covenant detailing the rights and responsibilities of the U.S. and the Mariana Islands grants the U.S. complete sovereignty over the Mariana Islands at the termination of the Trusteeship Agreement. The Covenant contains no express reservation of the Commonwealth’s ownership of the submerged lands. Furthermore, Congress has refrained from enacting legislation transferring ownership of the submerged lands to the Mariana Islands, indicating an intent to retain ownership. The District Court held that until such legislation is enacted by Congress, the United States has paramount authority over the submerged lands of the Mariana Islands.

The Statutes

Federal law is “the supreme Law of the Land.”⁴ State and territorial governments do not have the authority to legislate with regard to submerged lands without express federal legislation. As mentioned above, there is no federal legislation granting the Mariana Islands ownership of and sovereignty over its submerged lands. In addition, the Commonwealth’s statutes are in direct conflict with several federal laws, including the Magnuson-

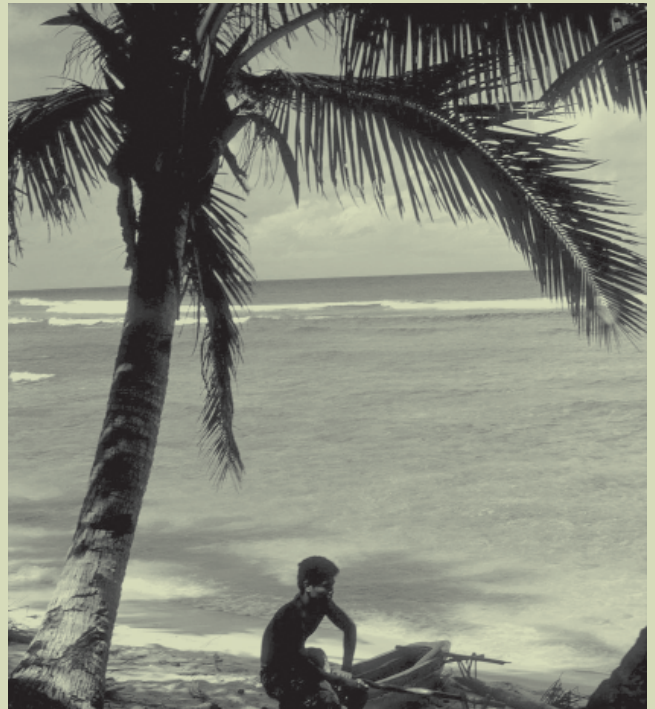
Stevens Fishery Conservation and Management Act, which asserts a 200-mile EEZ regulated exclusively by Congress and federal agencies. If valid, the statutes of the Mariana Islands would nullify any federal law claiming the EEZ exclusively for the U.S. The court ruled that because the United States has paramount authority over the submerged lands and the statutes are in direct conflict with federal laws, the Commonwealth’s “Submerged Lands Act” and “Marine Sovereignty Act of 1980” are pre-empted and, therefore, unenforceable.

Conclusion

The United States possesses superior rights over the submerged lands of the Northern Mariana Islands. As a result, Commonwealth statutes claiming authority over those lands are pre-empted by existing U.S. laws. ☹

ENDNOTES

1. See *Hillblom v. United States of America*, 896 F.2d 426, 431 n.3 (9th Cir. 1990) (U.S. assertion of fisheries jurisdiction was a lawful exercise of federal authority).
2. *Commonwealth of the Northern Mariana Islands v. U.S.*, Civil Action No. 99-0028 at 35 (D. N. Mar. I. filed Aug. 7, 2003).
3. *Id.* at 40.
4. U.S. CONST. Art. VI.



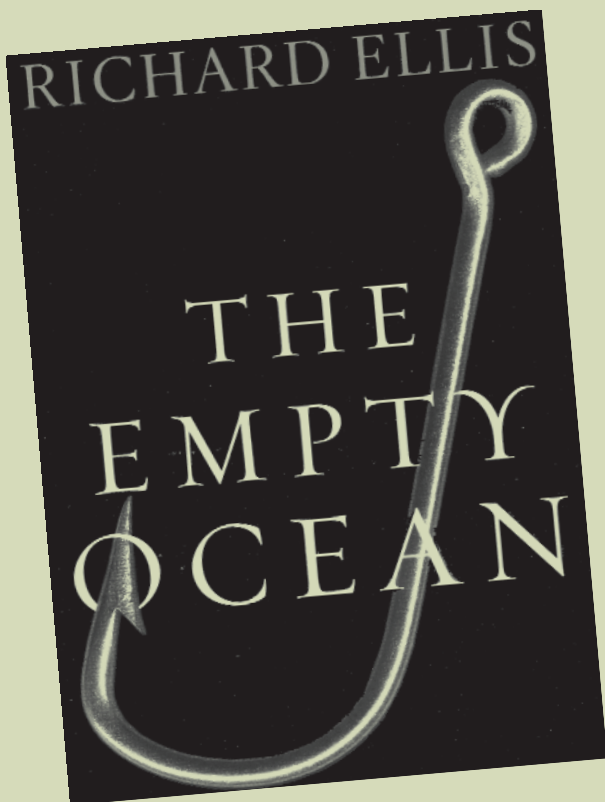
Book Review

The Empty Ocean

Richard Ellis · Island Press 2003

Stephanie Showalter, J.D., M.S.E.L.

Dead zones, coral bleaching, fisheries collapses, widespread poaching. Every day it seems humanity drives another nail into the coffin. In *The Empty Ocean*, Richard Ellis tracks humanity's historic assaults on and the current threats to the resources of the world's oceans. Be warned: if you are looking for a neutral account of the current state of marine affairs, this book is not for you. Richard Ellis is a passionate conservationist, whose disbelief at humanity's apparently insatiable appetite for marine resources is visible on each and every page. However, if you have ever been curious about how shark cartilage became known as a cure for cancer, the emergence of a barndoor skate commercial fishery, or the transformation of the Patagonian toothfish into Chilean Sea Bass, one of the most sought-after fish in the world, *The Empty Ocean* should be your next purchase.



Richard Ellis spares no detail. His accounts of the declines of many species, such as the Stellar sea cow, the sea otter, and the sperm whale, start with “first contact” by Europeans, and continue to present day. From shipwreck survivors reporting the riches of the Bering Sea back to their homelands to fishermen focusing on new prey, the stories always play out the same way. Overharvesting of a limited resource leads to scarcity and, in a few cases, extinction. The numbers are astounding. An estimated seven million dolphins have been killed due to interactions with the tuna industry and more than 5.2 million fur seals were killed by North American sealers alone. Encountering those kinds of numbers in almost every fishery, it was easy to accept the initial belief of fisherman, whalers, and sealers that the ocean's bounty was inexhaustible.

Despite the tolls taken by fishing, whaling, sealing, and pollution, not all hope is lost. The ecosystems of the oceans are amazing and often, when left alone or with a little help, marine resources have the ability to return from the brink of disaster. Whenever possible, Ellis includes success stories. Here are just a few covered by Ellis: the rebounding of southern elephant seal populations; the recovery of the sea urchin, *Diadema*, in Jamaica; the survival of the fur seals; and the reduction of dolphin takes associated with the tuna fishery in the Eastern Tropical Pacific.

The Empty Ocean is more than a history book. Interspersed with references to scientific reports and eyewitness journals, are literary references revealing the important role played by the oceans in the lives of many of the world's great writers. Quotes from Jack London's *Sea Wolf*, Herman Melville's *Moby Dick*, and Rudyard Kipling's *Jungle Book* add a unique dimension to what could have been a dry, depressing dissertation filled with population estimates and scientific names. Further enhanced with illustrations by the author himself, *The Empty Ocean* is a worthy addition to anyone's bookshelf.

Richard Ellis is a Research Associate at the American Museum of Natural History. He served as a member of the American delegation to the International Whaling Commission from 1980 to 1990 and is the author of many books, including *Monsters of the Sea*, *The Search for the Giant Squid*, and *Aquagensis*. ☞

Coast to Coast

And Everything In-Between

The Bush Administration's plan to drill for oil in ANWR, the Alaska National Wildlife Refuge, has been repeatedly blocked by Congress. Not one to give up, the Administration has set its sights offshore. The Mineral Management Service recently announced a new plan to offer eight oil and gas lease sales in federal waters offshore of Alaska over the next five years. First up, 9.4 million acres in the Beaufort Sea offered on September 24, 2003. Then in May 2004, federal areas of Cook Inlet are up for grabs.

You hear it all the time. The ocean is big. That concept is hard to get your mind around, however, until something like this comes across the news ticker. Scientists have discovered a new volcano in Alaska's Aleutian Islands. Located near the Amchitka Pass, the volcano rises 1,903 feet above the sea floor, but is still 377 feet from the surface. Classified as active, but dormant, the volcano could blow at any time, potentially creating a new island in the Aleutian chain. How do you miss something like that?



Photo courtesy of Naval Meteorology and Oceanography Command

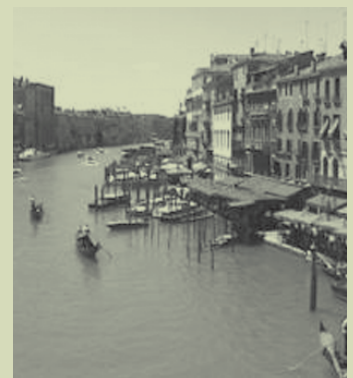
Around the Globe . . .



Photo courtesy of NOAA

While not a total failure, the highly publicized experiment to return a captive killer whale to the wild is struggling, most notably with an orca who refuses to embrace his new-found freedom. Held in captivity from 1979-1998, Keiko, the star of the film *Free Willy*, was "released" in July 2002. Keiko now resides along the Norwegian coast and appears reluctant to leave his trainers and visitors. The few times Keiko has ventured out on his own, he has gotten into trouble, visiting a nearby fish farm, much to the dismay of the farmers, and panicking while trying to swim under an ice pack. It makes one wonder whether his supporters are trying too hard to make a Hollywood story come to life and if Keiko will ever be ready to return to the wild.

In September, over 100 scientists met at Cambridge University in England to address the flooding of Venice. Organized by Venice in Peril, a British organization for the preservation of Venice, this meeting was the first international conference on the issue since 1969. Although it is hard to believe that Venetians would have a problem with water, with annual flooding events increasing ten-fold since 1900, the Adriatic Sea on the rise, climate change, and the fact that the city itself is sinking, they are understandably nervous. Conference organizers hoped the conference would also facilitate discussions regarding the problems facing other coastal areas around the world. For more information about the problems in Venice and the conference, visit <http://www.veniceinperil/org> . ☺





THE SANDBAR is a quarterly publication reporting on legal issues affecting the U.S. oceans and coasts. Its goal is to increase awareness and understanding of coastal problems and issues. To subscribe to *THE SANDBAR*, contact: the Sea Grant Law

Center, Kinard Hall, Wing E, Room 262, P.O. Box 1848, University, MS, 38677-1848, phone: (662) 915-7775, or contact us via e-mail at: sealaw@olemiss.edu. We welcome suggestions for topics you would like to see covered in *THE SANDBAR*.

Editor: Stephanie Showalter, J.D., M.S.E.L.

Publication Design: Waurene Roberson

Research Associates:

Leah Huffstatler, 2L

Joseph M. Long 3L

Jason Savarese, 3L

Contributors:

Meinhard Doelle, Dalhousie Law School

Simon Woodley, S&J Woodley Pty. Ltd.

THE SANDBAR is a result of research sponsored in part by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, under Grant Number NA16RG2258, the Sea Grant Law Center, Mississippi Law Research Institute, and University of Mississippi Law Center. The U.S. Government and the Sea Grant College Program are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon. The views expressed herein are those of the authors and do not necessarily reflect the views of NOAA or any of its sub-agencies. Graphics by ©Corel Gallery, © Nova Development Corp., and NOAA.



The University of Mississippi complies with all applicable laws regarding affirmative action and equal opportunity in all its activities and programs and does not discriminate against anyone protected by law because of age, creed, color, national origin, race, religion, sex, handicap, veteran or other status.

MASGP 03-010-03

This publication is printed on recycled paper.



THE SANDBAR

Sea Grant Law Center
Kinard Hall, Wing E, Room 262
P.O. Box 1848
University, MS 38677-1848

