

Spring 2000

Introduction to the Issue: Fluidity in the Law

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Recommended Citation

30 GGU Law Rev. vii (2000)

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INTRODUCTION TO THE ISSUE: FLUIDITY IN THE LAW

Clarity is one criteria by which we often distinguish the rule of law from the mere rule of power. Political differences aside, most of us agree that citizens and the government are entitled to general notice of what is required, what is permitted and what is prohibited. Without proper notice of whom and what is being regulated, compliance and enforcement become arbitrary, and the legitimacy of the law declines.

Great efforts have been made to achieve clarity in coastal law and policy. The federal Clean Water Act requires the Environmental Protection Agency and the Army Corps of Engineers to geographically define coastal wetlands subject to permitting. The California Coastal Act limits the California Coastal Commission's jurisdiction to a precise distance from the tideline. Under the federal Magnuson-Stevens Act, the National Marine Fisheries Service oversees the specific delineation of essential fish habitat in all the coastal waters of the United States. These laws are designed to let both the regulators and the regulated know what is expected of them.

Unfortunately for the law, coastal ecology does not seem to share a similar interest in clarity. For example, as the sea rises due to global warming, the tideline moves upland. Upland areas become coastal wetlands, coastal wetlands become ocean, and property lines and agency jurisdiction shift. As another example, fish habitat in the coastal zone is directly impacted by adjacent coastal land use activities. Pesticide runoff from agriculture and storm water from city sewers affect the quality of offshore waters. These types of problems do not lend themselves to precise boundaries and discrete sections of agency jurisdiction. At times, the fluidity of the coast and the clarity sought by the law can operate at cross-purposes.

The coast's unstable nature was the subject of Cornelia Dean's recent book *Against the Tide: The Battle for America's Beaches*.¹ *Against the Tide* details the ever-changing coastal landscape, as ocean waves incessantly redistribute and relocate sand, from the beaches to subsurface sandbars and back again, from upwind beaches to downwind beaches, from beaches and subsurface sandbars to coastal barrier islands. This constant process of creation, destruction and transformation, however, runs counter to the objectives of many of the human inhabitants who settle in the coastal zone. As Dean observes, "There is no erosion problem until people get into the act."² That is, there is no problem until people begin to impose their notions of stable property rights and legal boundaries on an inherently unstable ecological phenomenon.

In this special edition of the *Golden Gate University Law Review*, titled *The American Coast: Law on the Edge*, we focus on the interplay between law and nature in the coastal zone. In particular, this edition explores coastal problems that have only recently been identified, and coastal policies that are at early experimental stages.

In the first article, James Titus of the U.S. Environmental Protection Agency examines the federal government's response to the rising seas. As a result of global warming, ocean levels have begun to rise. This has profound consequences for the coastal zone in terms of wetlands, water quality, harbors, fisheries, and property rights. Sea rise presents the federal government with a number of policy alternatives. Should efforts focus on preventing global warming and sea rise or should global warming and sea rise be accepted as inevitable? Should efforts focus on building structures to keep the rising ocean back, or on pulling structures back from the current coastline to accommodate the rising ocean? Titus evaluates these policy alternatives, and considers why the federal

¹ Cornelia Dean, *AGAINST THE TIDE: THE BATTLE FOR AMERICA'S BEACHES* (1999).

² Kate Barne, *The Amicus Journal* 43 (Fall 1999) (book review of *AGAINST THE TIDE*).

government has so far failed to develop a coordinated response to the problem.

The second article, by Dr. Andrew Cohen of the San Francisco Estuary Institute and Brent Foster of Lewis & Clark Law School, addresses the issue of ballast water discharges and invasive marine species. Before arriving in port, many ocean tankers discharge ballast water which was initially drawn from distant foreign coastal waters. This discharged ballast water often contains living marine species. These exotic (or invasive) marine species can wreak havoc on coastal ecosystems. Locally, the clearest example is the Asian clam, which has spread exponentially over the last decade throughout San Francisco Bay and the Bay Delta. Cohen and Foster provide a historic, scientific and economic primer on the ballast water problem, and evaluate the numerous federal and California laws which may provide a solution.

In the third article, attorney Joan Hartmann recounts the story behind the Southern California Wetlands Recovery Project, a collaborative effort of 16 state and federal agencies. Although the Southern California Wetlands Recovery Project was only formally launched in 1999, the project's origins date back to the mid-1990s, when former California Governor Peter Wilson created the Southern California Wetlands Clearinghouse. The project's history is a tale of tangled politics, and of the heroic and ultimately successful efforts of agency staff for the California State Coastal Conservancy. As Outreach Director for the project, Hartmann has been privy to this unfolding, and is thus uniquely positioned to tell this tale.

The final article in the American Coast edition deals with the emerging federal regime for essential fish habitat (EFH). Under the Magnuson-Stevens Act, regional fishery councils around the nation must now designate EFH for all managed fisheries. Once EFH is designated, the Magnuson-Stevens Act mandates a consultation process for all federal activities that could adversely impact EFH. This consultation process is somewhat analogous to the consultation process for critical habitat under the federal Endangered Species Act. Lee Benaka of the National Marine Fisheries Service and Dennis Nixon of

the University of Rhode Island's Graduate School of Marine Affairs explain the new EFH regime, and provide a case study of how it is being implemented in the Gulf of Mexico. Benaka and Nixon explore the difficulties involved in integrating a federal EFH program with traditional state coastal land-use jurisdiction.

In these articles, we witness the challenge that the coast presents to the law. This challenge is to craft rules that are flexible enough to respond to the complex ecology of the coast, yet clear enough to inform citizens and government of their respective rights and responsibilities. May we prove worthy to the task.

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