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Foreword

Sea State:

An Introduction to Reflections on Fisheries, Oil Spills, and Emerging Issues in Ocean Law and Policy

Susan E. Farady*

*Laws and institutions, like clocks, must occasionally be cleaned,
wound up, and set to true time.* – Henry Ward Beecher¹

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1. Henry Ward Beecher was born in 1813, the son of Lyman Beecher, an outspoken Calvinist clergyman and brother to Harriet Beecher Stowe. He became a minister and his sermons at the Plymouth Congregational Church in Brooklyn, New York, often in opposition to slavery, soon established that church as a major force for social reform. His funeral procession was led by

The human race is challenged more than ever before to demonstrate our mastery – not over nature but of ourselves.

– Rachel Carson²

Law sets out to order human conduct in the context of our expectations and social norms, and in the case of natural resources, ecological conditions. When that context changes, the law is pushed to evolve in response. How the law adapts, or does not, to changing conditions often illustrates the political will and societal values present at a particular point in time. Today, ocean and coastal law is being tested by a remarkable change in conditions. How we treat ocean resources and the stakeholders who depend on them, and design an ocean management regime is being scrutinized as never before. Apparently vast, blue, and endless, our oceans and the resources beneath their waves, are, in fact, finite. Our ocean territory is the last American “wild west” to be exploited, explored, and divvied up. Quite simply, we want more and more from the ocean to meet our appetites for energy, food, and recreation; as a result, we demand increased application of the law to allocate access, resolve conflicts, and enforce limitations.

In response, our current ocean governance framework is increasingly frayed, strained, and broken, but not for lack of attention. We have pondered how to govern our oceans numerous times at the highest levels of government, starting with the Stratton Commission in 1969, then the U. S. Commission on Ocean Policy in 2006, and most recently the President’s

two men, marching arm in arm in testimony to his message: one was a black commander of the Union Army from Massachusetts, the other a former Confederate general and slaveholder from Virginia.

2. RACHEL CARSON, *SILENT SPRING* (1962). Rachel Carson was born in 1904. A zoologist by training, she became the Editor in Chief for the U.S. Fish and Wildlife Service where she wrote pamphlets on conservation and natural resources, and edited scientific articles. In her free time she turned her government research into lyric prose. In 1952 she published her prize-winning study of the ocean, *The Sea Around Us*, which was followed by *The Edge of the Sea* in 1955. Carson resigned from government service in 1952 to devote herself to her writing. In *Silent Spring* (1962), she challenged the profligate use of pesticides and called for a change to how humankind viewed the natural world. Rachel Carson died in 1964 after a long battle against breast cancer.

Interagency Ocean Task Force, concluded in 2009.³ The reports issued by these bodies are redundant, acknowledging our increasing ability to degrade marine ecosystems and the need for a more cohesive and responsive governance system. Yet as of 2012, as illustrated by the issues raised in this publication, little has improved. We struggle to manage fisheries sustainably. Our energy demands prompt increased offshore development of both petroleum as well as wind resources. Existing legal and regulatory structures contort in attempts to adapt to the changing seascape. At the heart of the matter is a basic question: is the law up to the challenge of managing ocean resources, and the behavior of ocean users, to ensure we can continue to coexist in a watery world?

This special marine affairs edition of the *Roger Williams University Law Review* explores this question from many facets, building on two exceptional gatherings of marine law and policy professionals convened by the Roger Williams University Marine Affairs Institute in 2010 and 2011 at our waterfront Rhode Island campus, *Taking Stock: The Magnuson-Stevens Act Revisited*, and *Blowout: The Legal Legacy of the Deepwater Horizon Catastrophe*.⁴ As a national clearinghouse for the marine law community dedicated to educating the next generation of marine law professionals, the Marine Affairs Institute hosted discussion on two of the most timely and complex situations in not only marine law, but in all of American law and policy: the future of fisheries management, and lessons learned from the Deepwater Horizon oil disaster. Speakers at these events as well as other marine law experts have provided a diverse and provocative commentary on the state of ocean and coastal law today. The common theme among the pieces in this edition is one of how the law confronts and responds to change.

When many people think of the ocean, they think of fish.

3. See STRATTON COMMISSION, OUR NATION AND THE SEA: A PLAN FOR NATIONAL ACTION (1969), available at <http://www.lib.noaa.gov/noaainfo/heritage/stratton/title.html>; U.S. COMM'N ON OCEAN POL'Y, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY (2004) available at http://www.oceancommission.gov/documents/full_color_rpt/; *The Interagency Ocean Policy Task Force*, COUNCIL ON ENVTL. QUALITY, <http://www.whitehouse.gov/administration/eop/ceq/initiatives/oceans> (last visited Dec. 18, 2011).

4. See <http://law.rwu.edu/academics/institutes-programs/marine-affairs-institute/symposia> for event presentations, video and materials.

From the time a human first cast a spear into an ancient sea to catch the day's dinner, we have related to the ocean through the food we harvest. The fish stocks off the United States' shores were harvested centuries before the signing of the Constitution, and in fact, contributed in many ways to the founding of our nation. Over the course of two hundred years, changing population, technology, international law and consumer demand led to changes in how fishermen fished and how the law governed their activities. In response, Congress passed the Magnuson-Stevens Act nearly 35 years ago. This law not only carved out the U.S. Exclusive Economic Zone, but it also set in motion a remarkable exercise in natural resource management that continues to this day.

Fishery management law in the United States is one of the most compelling, complex natural resource management issues of our time. The Magnuson-Stevens Act is staggering in its range, incorporating scientific, social, and economic considerations, and a unique management structure incorporating industry participants as decision-makers. The state of U.S. fisheries law is examined in this issue by authors from the regulatory, legislative, academic and journalistic perspectives. U.S. Senator Sheldon Whitehouse, the country's top federal fisheries manager, and expert fisheries law and policy practitioners provide insight into how the law is designed, how it functions, and considerations for future legal and policy changes.

Another evolution in ocean law concerns exploitation of offshore oil and gas resources, and what happens when things go wrong in these endeavors. On April 20, 2010, a chain of events led to the explosion of the Deepwater Horizon oilrig, killing eleven people, devastating marine ecosystems, and harming thousands of coastal communities. One year after this disaster, we gathered legal experts and others from scientific, economic, and journalism disciplines to assess the legacy of this disaster. How did this tragedy happen? How can we keep it from happening again? What tradeoffs are we willing to make to ensure affordable energy, sustainable coastal communities, and healthy oceans? The contributions on this topic by Senator Jack Reed, and specialists in admiralty, tort, and environmental law reveal the complexity of these questions, from the regulatory thicket governing the oil and gas industry, to the legal remedies available

to mass disaster victims. As one indicator of how quickly this field of law is evolving, the lead regulatory agency was reorganized and renamed for the second time in less than two years in the few months between the time that we received author submissions and the publication of this edition. The one agency known as the Bureau of Ocean Energy Management and Enforcement (“BOEMRE”), established in May, 2010 to replace the Minerals Management Service, was divided into two offices in October 2011 – the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement.

The final group of contributions explores emerging issues in ocean and coastal law. One recent development is the call for a more systematic way of ordering ocean uses and users, known as “marine spatial planning.” Endorsed by President Obama’s Interagency Ocean Task Force in their final report in 2009 and in the subsequent Executive Order on Ocean Policy issued in 2010,⁵ marine spatial planning appears to be the overhaul and resetting of ocean and coastal law “to true time” noted by Henry Beecher Stowe. This construct can provide an overlay that will inevitably affect all ocean uses, including fishing and offshore energy production.⁶ Our contributors speak from direct experience in this experiment, and include the leader of Rhode Island’s Ocean Special Area Management Plan process and legal practitioners. Additional commentary provides insight on the courts’ response to issues of first impression raised by offshore wind development and the intricacies of establishing waterfront property lines.

One thing is clear today in ocean and coastal law: the management challenges we face will only increase. Our current system of law and regulation is complex and not always up to the task of addressing these challenges. It is imperative as citizens of this watery planet that we participate in the ongoing debate about how ocean and coastal governance can best function. Ultimately, as Rachel Carson so presciently pointed out over 50 years ago, it is not the ocean that we are managing; it is ourselves.

This edition of the Roger Williams University Law Review

5. See Executive Order 13,547, 75 Fed. Reg. 43,023 (July 19, 2010), available at <http://www.whitehouse.gov/the-press-office/executive-order-stewardship-ocean-our-coasts-and-great-lakes>.

6. See, e.g., *Coastal and Marine Spatial Planning*, NAT’L OCEANIC AND ATMOSPHERIC ADMIN., <http://www.cmsp.noaa.gov/> (last visited Dec. 18, 2011).

was designed around our 2010 Marine Law Symposium and 2011 oil spill conference. Thank you to all who participated in both gatherings. These events required significant amounts of time, money, advice, and cheerleading from many supporters. Thanks to Dean David Logan for his cheerful support and encouragement, the Marine Affairs Institute Advisory Board for their guidance, the planning committee members for their valuable input and ability to tolerate multiple conference calls and emails, and our colleagues at Rhode Island Sea Grant, the University of Rhode Island, the RWU School of Law and the Roger Williams University community for their support. Special thanks to Marine Affairs Institute staff Charlotte Ferris and Julia Wyman, and School of Law Alumni and Special Event coordinator Chelsie Horne, for their thoughtfulness, good humor and hard work. Finally, this edition came to fruition through the tireless efforts and vision of the *Roger Williams University Law Review* editorial board and staff. I thank you all for supporting the work of the Marine Affairs Institute.