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# Sea Grant Law and Policy Digest

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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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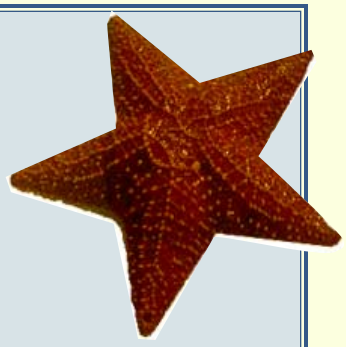

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Journals featured in this issues of the *Law and Policy Digest*. For more information, click on the name of the journal.

- Akron Law Review
- Alabama Law Review
- American Criminal Law Review
- American Indian Law Review
- Arizona State Law Journal
- Boston College Environmental Affairs Law Review
- Campbell Law Review
- Chicago Kent Law Review
- Colorado Journal of International Environmental Law and Policy
- Columbia Journal of Environmental Law
- Ecology Law Quarterly
- Environmental Law
- Environs: Environmental Law & Policy Journal
- Florida Law Review
- Fordham Environmental Law Journal
- Fordham Law Review
- Harvard Environmental Law Review
- Hastings Law Journal
- Indiana Law Review
- Journal of Environmental Law and Litigation
- Journal of International Wildlife Law and Policy
- Journal of Land, Resources, and Environmental Law
- Journal of the National Association of Administrative Law Judiciary
- McGeorge Global Business and Development Law Journal
- McGeorge Law Review
- Marquette Law Review
- Michigan Law Review

- Missouri Environmental Law and Policy Review
- New York University Environmental Law Journal
- Northwestern Journal of International Law and Business
- Ocean and Coastal Law Journal
- Ocean Development and International Law
- Review of Litigation
- San Joaquin Agricultural Law Review
- Seton Hall Circuit Review
- Stanford Environmental Law Journal
- Texas International Law Journal
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## I. ADMIRALTY

**Bederman, David J., and John E. Wierwille. "The Contemporary Contours of Admiralty Jurisdiction." 31 *Tulane Maritime Law Journal* 291 – 314 (2007).**

Bederman and Wierwille examine modern admiralty jurisdiction and contemplate its justification in the current legal climate. The authors analyze the basic requirements of admiralty jurisdiction, including subject matter considerations. The authors conclude that federal admiralty jurisdiction is necessary, given the need for unique admiralty procedural laws and the need for uniform choice-of-law guidelines. The article notes that in recent years admiralty jurisdiction has been broadened by the courts.

## II. ALTERNATIVE ENERGY

**Dinnell, Adam M., and Adam J. Russ. "The Legal Hurdles to Developing Wind Power as an Alternative Energy Source in the United States: Creative and Comparative Solutions." 27 *Northwestern Journal of International Law & Business* 535 – 590 (2007).**

Dinnell and Russ discuss how political parties have used domestic environmental laws to curb the development of "environmentally-friendly" alternative energy sources, namely wind power. The authors suggest that recent wind power project proposals have been stalled by legislation designed to protect the environment. The authors propose that the U.S. should look to international examples of environmental policy that are conducive to investment in alternative energy sources. The authors also suggest that Congress should pass legislation that would provide the framework for the growth of wind power. Ideally, these laws would supersede other environmental laws as the authoritative source for the regulation of all aspects of wind power projects in the U.S.

## III. CLIMATE CHANGE

**Abate, Randall S. "Climate Change Liability and the Allocation of Risk: Climate Change, the United States, and the Impacts of International Environmental Human Rights." 26 *Stanford Environmental Law Journal* 3 – 76 (2007).**

Climate change has significant effects on indigenous groups. Abate notes that the Inuit, who are affected by climate change, should have a right to an environment that will ensure the continuing viability of their subsistence culture. The article examines the evolution of environmental human rights theories in United States law, international human rights law instruments, and the laws of other nations. Abate also discusses the Inuit petition before the Inter-American Commission on Human Rights, stressing the necessity of a forum to address international environmental human rights violations. Finally, the article explores other theories of recovery, including the Alien Tort Claims Act (ATCA).

**Chemerinsky, Erwin, et. al. "California, Climate Change, and the Constitution." 37 *Environmental Law Reporter* 10653 – 10679 (2007).**

While the United States has not passed meaningful legislation to address the problem of climate change, several states are taking steps to reduce the carbon footprints of their

industries and citizens. The authors describe the climate change policies proposed by California and examine the possible constitutional issues inherent in these policies, including the roles of the dormant Commerce Clause and the dormant foreign relations power in moderating state efforts at regulation.

**Farber, Daniel A. "Responses to Global Warming: The Law, Economics, and Science of Climate Change: Basic Compensation for Victims of Climate Change." 155 *University of Pennsylvania Law Review* 1605 – 1656 (2007).**

Farber discusses the possibility of compensating victims of climate change by shifting costs to responsible parties. The article outlines possible compensation schemes, including litigation. The author notes that other compensation schemes tailored to specific environmental harms might be more effective than litigation. Finally, Farber identifies methods that could be used for measuring damages, such as measuring marked geographical changes.

**Wood, Mary, C. "Nature's Trust: Reclaiming an Environmental Discourse." 25 *Virginia Environmental Law Journal* 243 – 276 (2007).**

Wood discusses the impending future of the earth in light of global warming. She coins the term "bioneer" as a group of citizens sharing the goal of reducing harm to the earth by their actions and encouraging others to do the same. However, just being a bioneer will not save the impending future of the earth. Wood describes the earth's natural resources in the context of property rights. All property has a trustee, beneficiary, and corpus. She labels the earth's natural resources that are vital for future generations as the corpus, while the government is the trustee that is supposed to protect the corpus for the beneficiary, which she labels as all future generations of society. In order to preserve the earth's natural resources for future generations, bioneers must enlist the government to do its part as trustee. Wood discusses how environmental agencies are allowing more permitting than was intended by our environmental laws, and, therefore, the laws are not protecting the environment as they should. Wood concludes by challenging all bioneers to do their part in helping the government, including environmental agencies, to protect the environment. All it takes is for people to find a project, whether it is saving a wetland, adopting a stream, or preserving our wildlife and bring it to the appropriate local, state, or federal government's attention as to what needs to be done.

**Zinn, Matthew D. "Adapting to Climate Change: Environmental Law in a Warmer World." 34 *Ecology Law Quarterly* 61 – 105 (2007).**

Zinn expands on the global warming debate by pointing out that climate policy focusing on adaptation rather than mitigation is substantially flawed. The author points out the potential for adaptation to negatively impact the environment, which would effectively compound climate change problems. Additionally, policy focusing on adaptation undermines environmental law that seeks to reduce and control pollution that leads to climate change. Zinn concludes with a push for climate change policy that focuses on mitigation rather than adaptation.

## IV. COASTAL HAZARDS

**Eagle, Joel. "Divine Intervention: Re-Examining the "Act of God" Defense in a Post-Katrina World." 82 *Chicago Kent Law Review* 459 – 493 (2007).**

Eagle discusses the effects of the oil and hazardous substance releases that occurred as a result of Hurricane Katrina. He first describes the relevant federal statutes and standards of liability in assessing environmental cleanup cases. Eagle specifically looks at the damage caused by Katrina, comparing it to previous natural disasters. He concludes that the hurricane would not qualify for an act of God defense, mainly because it would be difficult to establish that the hurricane was the sole cause of the destruction. He notes that the oil companies and others would be hard-pressed to prove that they used due care and foresight in guarding against such a disaster. Eagle concludes with policy reasons for denying act of God defenses.

**Nolon, John R. "Disaster Mitigation through Land Use Strategies." 37 *Environmental Law Reporter* 10681 – 10708 (2007).**

The devastation wrought by Hurricane Katrina brought to public attention the role of land use planning in mitigating natural disasters and which level or levels of government should decide whether and how to undertake this planning. In the Upper Mississippi River Basin, federal agencies, state agencies, and local governments share jurisdiction over various activities on the river. Nolon calls for cooperative federalism and a clarification of agency roles as a remedy for this complexity and explores how federal and state framework laws can be linked to facilitate disaster mitigation planning.

**Weaver, Matthew P. "Fear and Loathing in Post-Katrina Emergency Debris Management: According to Whom, Pursuant to What, and You Want To Dump That Where?" 20 *Tulane Environmental Law Journal* 429 – 446 (2007).**

Hurricane Katrina left tons of debris in her path. Weaver examines the federal, state, and local laws and actions that address the disposal of emergency debris management. The article explains the problems caused by the interaction of the different governments, arguing in favor of federal intervention. The author looks at the opening and closing of the Chef Menteur landfill site. He advocates for future generations to engage in planning to avoid similar incidents.

**Zellmer, Sandra. "A Tale of Two Imperiled Rivers: Reflections from a Post-Katrina World." 59 *Florida Law Review* 599 – 630 (2007).**

One year after Hurricane Katrina devastated much of the Mississippi and Louisiana coastal areas, the Army Corps of Engineers presented a report to Congress admitting culpability for much of the damage sustained by New Orleans based on the failure of their levees. Zellmer begins by discussing the historical events and physical characteristics that shaped the Missouri-Mississippi River system. The author discusses the current federal laws governing the Corps activities within the river system. Zellmer then delves into the current obstruction of integrated and sustainable management strategies by federalism and the use of a cost benefit analysis. Zellmer concludes by proposing the enactment of an Interior Rivers Ecosystem Act by the federal government that would create a large scale, basin-wide strategy to govern the Missouri-Mississippi River system.

## V. COASTAL MANAGEMENT

**Khuu, Jenni. "A Loophole to Repair: 'Repair and Maintenance' as a Way around the Coastal Act's Prohibition against Seawalls." 58 *Hastings Law Journal* 1297 – 1330 (2007).**

Khuu describes coastal and bluff erosion and the consequences of the various types of shoreline protections used to guard against it. The article focuses on a project approved by the California Coastal Commission to develop the Dana Point Headlands. Khuu notes that the Commission found the project proposal was inconsistent with two sections of the Coastal Act, yet still approved it. She found that the project approval would allow the city to circumvent the coastal permit process for repairing and maintaining an existing revetment. Finally, the article examines shoreline protection policies among other coastal states. Khuu concludes that the Commission's approval of the proposal is contrary to the legislative intent behind shoreland regulation.

**Mize, James. "Protecting California's Coastal Communities: Four Models of Public Interest Lawyering." 30 *Environs: Environmental Law & Policy Journal* 199 – 219 (2007).**

Mize, using the state of California as a model, analyzes the legal approaches of four different environmental organizations: Earthjustice, The Oceans Conservancy, Surfrider Foundation, and the United Anglers of Southern California. All four groups have the same goal of protecting marine resources and coastal communities; however, each group uses a different approach to achieve their goal of protecting marine resources. Mize critiques each organization's response to the use of marine resources in the Channel Islands and uses this information to build his analysis. Mize opines that a community organizer model, such as one that United Anglers of Southern California uses, is the best option for achieving a balance of the protection of marine resources and the protection of the public's use of the coastal areas. Mize notes that Earthjustice's use of litigation is helpful when laws are already in place but can create socioeconomic problems within the community, the Oceans Conservancy's use of legislation is helpful to implement new laws but is often inflexible for the community, and Surfrider Foundation's use of advocacy is great for individual rights but is often too rigid.

## VI. DAMS

**Amos, Adell Louise. "At the Crossroads: In Search of Sustainable Solutions in the Klamath Basin: Hydropower Reform and the Impact of the Energy Policy Act of 2005 on the Klamath Basin: Renewed Optimism or Same Old Song?" 22 *University of Oregon Journal of Environmental Law and Litigation* 1 – 26 (2007).**

Amos focuses on the Klamath Basin of Southern Oregon and Northern California in an examination of the major hydropower relicensing provisions of the Energy Policy Act of 2005. In addition to relicensing, the author evaluates the relevant provisions of the Department of Interior's implementing regulations for section 241 of the Energy Policy Act. Amos discusses two significant administrative and judicial opinions that will most likely impact the water users and managers in the Klamath Basin. Amos

briefly discusses several factors outside the Federal Energy Regulatory Commission (FERC) relicensing process. The author mentions the resolution of the legal challenge to the 2001 water curtailment, the results of the challenge to the most recent biological opinion for the Coho salmon in the Klamath River, and the pending Fifth Amendment takings litigation in the Court of Federal Claims as factors that may change the dynamics of the FERC relicensing process.

**Spain, Glen "At the Crossroads: In Search of Sustainable Solutions in the Klamath Basin: Dams, Water Reforms, and Endangered Species in the Klamath Basin." 22 *Journal of Environmental Law and Litigation* 49 – 129 (2007).**

Spain analyzes the current condition of the geographically isolated Klamath Basin. Spain's criticism focuses on the fact that the Klamath basin does not fall within one specific agency's jurisdiction and is divided by state boundaries, leaving no one to feel responsible for its restoration. The author discusses habitat problems, such as dams that do not allow for fish passage and the resulting effect that this has on endangered species and the economy of the tribal communities. Spain concludes by commending several agencies that are using their legal tools for watershed restoration and water reallocation for the Klamath Basin.

## VII. ECOSYSTEM MANAGEMENT

**Adler, Robert W. "Restoring the Environment and Restoring Democracy: Lessons from the Colorado River." 25 *Virginia Environmental Law Journal* 55 – 109 (2007).**

A whole new science of restoration ecology has developed over the past several decades. Adler explains how the growing practice of environmental restoration meshes with existing environmental laws. Adler uses environmental law and policy and fundamental value choices to elucidate the ongoing efforts to restore the species, habitats, and ecosystems of the Colorado River.

**Colburn, Jamison. "Bioregional Conservation May Mean Taking Habitat." 37 *Environmental Law* 249 – 300 (2007).**

Colburn discusses privatized conservationism, arguing that this conservation strategy is beginning to fail. He offers strategies to answer this failure, namely by taking title or portions of title to protect ecosystems. He argues that such actions are a legitimate use of sovereign power and suggests that these takings may not result in Constitutional takings.

**Feldman, Ira R., and Richard J. Blaustein. "Ecosystem Services as a Framework for Law and Policy." 37 *Environmental Law Reporter* 10756 – 10791 (2007).**

Law and policy have traditionally lagged behind economics and ecology as fields addressing the value and protection of ecosystem services. Environmental lawyers and policymakers need to work to close the gap in ecologist- and economist-dominated discourse on these vital services. The authors examine the potential intersections of ecosystem services and law and policy and discuss how economic considerations might figure in the policy opportunities for ecosystem services.

**McKinstry, Robert B., Jr., et. al. "Coordination and Planning Tools That Can Be Applied to Biodiversity Conservation." 16 *Widener Law Journal* 879 – 908 (2007).**

The authors discuss coordination and planning tools that may be used in biodiversity conservation. The authors suggest that an institutionalized planning process could be an effective tool to protect valuable, biodiverse areas, specifically discussing the role of land use planning. The authors conclude that the implementation of these plans could help fill the gaps left by ineffective legal tools.

**McKinstry, Robert B., Jr., et. al. "Legal Tools that Provide Direct Protection for Elements of Biodiversity." 16 *Widener Law Journal* 909 – 945 (2007).**

The authors analyze three categories of laws that protect biodiversity: fish and wildlife laws, endangered species laws, and laws regarding invasive species control. They examine regulatory and planning tools that are available to federal, state, and local governments and point out positive and negative attributes of these laws. The authors analyze select states' laws as an illustration of the gaps that are left in the protection of biodiversity. The authors point out that federal and state laws are geared towards protecting traditional fish and game and endangered species, leaving gaps in protection of non-gaming species and other unprotected groups. The authors conclude by challenging the states to use their broad planning authority for better protection of biodiversity.

**Sinden, Amy. "The Tragedy of the Commons and the Myth of a Private Property Solution." 78 *University of Colorado Law Review* 533 – 610 (2007).**

There are two potential solutions to the tragedy of the commons: government regulation or privatization. Sinden explains how government regulation and privatization can be distinguished from each other based on the answers to certain questions. Sinden argues that proposed privatization regimes involving land, oceans, and wildlife could conceivably meet the conditions for the private property or market solutions in a theoretical world, but the dynamics and conditions of ecological degradation make privatization untenable solutions in the real world.

**"Law and Policy for Ecosystem Services." 37 *Environmental Law Reporter* 10573 – 10592 (2007).**

On February 21, 2007, the Environmental Law Institute hosted a seminar on law and policy for ecosystem services. After the moderator provided an overview of the challenges and opportunities for regulation of ecosystem services, the panelists shared their expertise on a range of topics surrounding this issue, including the Millennium Ecosystem Assessment, the economics of ecosystem services, differences between provisioning services and regulating services, and information and incentive programs for the private sector. This is a transcript of the event.

## VIII. ENDANGERED SPECIES

**Drew, Cynthia A. "Beyond Delegated Authority: The Counterpart Endangered Species Act Consultation Regulations." 37 *Environmental Law Reporter* 10483 – 10548 (2007).**

Wildlife agencies entrusted by Congress to administer the Endangered Species Act (ESA) have revised interagency cooperation procedures in ways that appear to fall short of statutory requirements. Two federal district courts have now ruled in a contradictory manner on the validity of these regulations. Drew questions the ultimate legality of the wildlife agencies affecting such intra-agency delegations of statutorily required interagency cooperation and argues that such intra-agency delegation practices pass neither statutory nor constitutional muster.

**Gaffney, Brian P. "A Divided Duty: The EPA's Dilemma under the Endangered Species Act and Clean Water Act Concerning the National Pollutant Discharge Elimination System." 26 *Review of Litigation* 487 – 533 (2007).**

The Endangered Species Act and the Clean Water Act are two of the most significant and prominent environmental statutes Congress has ever enacted. Gaffney describes the conflict between the two statutes and examines pertinent court decisions. Gaffney also scrutinizes the Ninth Circuit's approach in *Defenders of Wildlife v. EPA*.

**Mank, Bradford C. "After *Gonzales v. Raich*: Is the Endangered Species Act Constitutional Under the Commerce Clause?" 78 *University of Colorado Law Review* 375 – 463 (2007).**

Mank reviews the United State Supreme Court's decision in *Gonzales v. Raich*, which broadened Congress' authority to regulate intrastate activities under the Commerce Clause in certain circumstances. He suggests that the decision will give Congress the authority, pursuant to the Commerce Clause, to regulate all endangered species, including those with no direct commercial value.

**Nash, Jonathan Remy. "Trading Species: A New Direction for Habitat Trading Programs." 32 *Columbia Journal of Environmental Law* 1 – 40 (2007).**

Nash explores marketable permit schemes as an alternative to the Endangered Species Act (ESA). He first provides an overview of the ESA and then discusses the problems with the Act. Next, he analyzes the advantages and disadvantages of tradable pollution permit regimes. Nash then focuses on the prospect of marketable permit regimes for species conservation, discussing how the tradable air pollution permit programs could serve as a basic model. Finally, he provides design modifications that might ensure trading programs protect endangered species and their ecosystems.

**Renshaw, Katherine. "Leaving the Fox to Guard the Henhouse: Bringing Accountability to Consultation under the Endangered Species Act." 32 *University Columbia Journal of Environmental Law* 161 – 207 (2007).**

Renshaw begins with an examination of the "best available science" standard in the Endangered Species Act (ESA). The author specifically focuses on the deference afforded to agency decisionmaking founded on the best available science standard and political tensions created by the reliance on that standard. Renshaw examines the Section 7 consultation process by looking at the Ninth Circuit's recent decision in *Pacific Coast Federal of Fishermen's Associations v. U.S. Bureau of Reclamation*. Renshaw then compares the Pacific Coast decision with a case study from a challenge to a "no jeopardy"

decision in the D.C. District Court regarding the interaction between the Atlantic Scallops Fishery and endangered and threatened sea turtles. Renshaw focuses on the Sound Science Amendment, a proposed reform of the ESA.

**Thompson, Josh. "Critical Habitat Under the Endangered Species Act: Designation, Re-Designation, and Regulatory Duplication" 58 *Alabama Law Review* 885 – 902 (2007).**

Thompson discusses the Fish and Wildlife Service's (FWS) implementation of the Endangered Species Act (ESA). He states that the agency's interpretation of the ESA has led to the reduction of critical habitat for endangered species. The article first looks at the critical habitat designation and how the FWS interprets the statutory language of the ESA, including an evaluation of the FWS regulations pertaining to the ESA. Thompson argues that the FWS' interpretation and implementation of the ESA is contrary to the intent of the ESA.

## IX. ENVIRONMENTAL LAW

**Adler, Jonathan H. "When is Two a Crowd? The Impact of Federal Action on State Environmental Regulation." 31 *Harvard Environmental Law Review* 67 – 114 (2007).**

Adler explains how federal environmental policy impacts state environmental policy decisions. He notes that the influences may be positive or negative, direct or indirect. The article first gives an overview of the development of state and local environmental regulation. Adler next shows how federal regulatory decisions directly influence state regulatory decisions. Finally, he points out the indirect effects of the federal policies, including the increase of state regulation and the increase of public awareness of environmental issues. Conversely, he addresses instances in which the indirect effects negatively influence states from enacting more protective state laws.

**Bartelma, Katy, et. al. "Environmental Crimes." 44 *American Criminal Law Review* 409 – 511 (2007).**

Nine principal statutes govern the enforcement of federal environmental regulation through criminal prosecution. The authors discuss issues common to most of these statutes, including theories of liability, defenses, and sentencing, and the statutes' overlapping penalty provisions.

**Blumm, Michael C., and David H. Becker. "From Martz to the Twenty-First Century: A Half-Century of Natural Resources Law Casebooks and Pedagogy." 78 *University of Colorado Law Review* 647 – 694 (2007).**

The authors trace the history of natural resources casebooks and pedagogy beginning with the first published natural resources casebook in 1951. Blumm and Becker explore the first and second generation of casebooks, discussing each generation's particular emphasis. The authors address the casebook, "Federal Public Land and Resources Law" by Coggins, Wilkinson, and Leshy, which ushered in the third generation of casebooks through innovation and establishment of the Western canon of natural resource law. The authors discuss the evolution of natural resources casebooks through the three gen-

erations by comparing their treatment of water as a natural resource. In conclusion, Blumm and Becker examine the emerging fourth generation of casebooks and their departure from the well-settled Western Canon of natural resource law established by Coggins, Wilkinson, and Leshy.

**Burleson, Elizabeth. "Tribal, State, and Federal Cooperation to Achieve Good Governance." 40 *Akron Law Review* 207 – 253 (2007).**

Burleson discusses how the current legal framework affects American Indians and Alaska Natives. She examines the laws that affect the native populations, noting the effects of uncertainty in criminal jurisdiction. Burleson also discusses civil jurisdiction over tribal water quality regulation. Next, the article examines homeland security and the methamphetamine crisis in tribal communities. Burleson considers the potential for integrated management, addressing equity concerns in natural resource protection.

**Colburn, Jamison E. "Habitat and Humanity: Public Lands Law in the Age of Ecology." 39 *Arizona State Law Journal* 145 – 207 (2007).**

Colburn examines the history of public lands law and argues that public lands law legislation has deviated from its original path. The author suggests ways in which public lands law may improve, specifically calling for a change in vocabulary with regard to the conservation of public lands.

**Colburn, Jamison, et. al. "Access to Courts after *Massachusetts v. EPA*: Who Has Been Left Standing?" 37 *Environmental Law Reporter* 10692 – 10717 (2007).**

On May 3, 2007, the Environmental Law Institute (ELI) hosted a seminar to discuss the recent U.S. Supreme Court ruling in the *Massachusetts v. EPA* case. After the moderator offered introductions and an overview of standing law prior to *Massachusetts v. EPA*, the panelists discussed a range of issues inherent in the opinion, including separation of powers and procedural rights, special solicitude, state standing, procedural standing, and standards of judicial review. The seminar concluded with a question-and-answer period. This is a transcript of the event.

**Cole, Daniel H. "Kelo's Legacy." 37 *Environmental Law Reporter* 10540 – 10555 (2007).**

Rather than signaling the death of private property rights, as media and the public initially feared, the Supreme Court decision in *Kelo v. City of New London* ushered in an era of increased state and federal protection for private property. Cole examines *Kelo*'s repercussions for urban redevelopment by describing the case, examining the media and public backlash, and concluding with some thoughts on the implications of *Kelo*'s legacy for legal theory and practice.

**Czarnezki, Jason J. "Is the Wisconsin Constitution Obsolete: Article: Environmentalism and the Wisconsin Constitution." 90 *Marquette Law Review* 465 – 495 (2007).**

Czarnezki notes that Wisconsin has strong environmental protections, but asks whether the Wisconsin constitution could be amended to better serve the state's environmental needs. The author first examines the environmental constitutional provi-

sions in place. He then looks at potential changes to the constitution, including the expansion of the public trust doctrine, an inclusion of an environmental policy statement, and the implementation of a mechanism to improve standing in environmental cases. Czarnezki concludes that adding these elements to the constitution would better balance the state's economic and environmental interests.

**Daniels, Brigham. "Emerging Commons and Tragic Institutions." 37 *Environmental Law* 515 – 600 (2007).**

If there is a central fable to environmental law, it is Garrett Hardin's *Tragedy of the Commons*. Daniels explains how we find commons in all sorts of places – fisheries, grazing lands, aquifers, etc. Whereas *The Tragedy of the Commons* explores the tragedy of competing users, Daniels explores the tragedy of competing uses.

**Freeland, Deborah M. Hussey. "'Getting the Science Right' in Public Decisionmaking." 26 *Stanford Environmental Law Journal* 373 – 475 (2007).**

Freeland discusses the challenges of integrating scientific information into the public decisionmaking process and identifies the strategies necessary to ensure that science is included in this process. The article presents a model structure that may be used to evaluate and design proposals regarding ecosystem management. Freeland uses the metaphor of a membrane between different cellular devices to explain how science and political process may work together for better ecosystem management.

**Gaba, Jeffrey M. "*United States v. Atlantic Research*: The Supreme Court Almost Gets It Right." 37 *Environmental Law Reporter* 10810 – 10825 (2007).**

In 2004, *Cooper Industries v. Aviall Services* challenged the legal community's understanding of rights of cost recovery under the Environmental Response, Compensation, and Liability Act (CERCLA), ruling that potentially responsible parties (PRPs) who voluntarily cleaned up property did not have a cause of action. However, earlier this year, in *United States v. Atlantic Research Corp.*, the Court held that PRPs who voluntarily clean up contaminated properties may have a right of recovery. Gaba examines the background on the private rights of cost recovery under CERCLA and explores the issues of the two opinions.

**Heath, Milton, S., and Alex L. Hess. "The Evolution of Modern North Carolina Environmental and Conservation Policy Legislation." 29 *Campbell Law Review* 535 – 589 (2007).**

The authors create a sequel to a North Carolina Law Review article that covered North Carolina's environmental legislation between 1967 and 1983. The authors analyze legislative history and compare it with North Carolina's preceding period of conservation. North Carolina's modern environmental legislation places importance on the protection and preservation of resources and bringing an end to pollution rather than the safe absorbing of the waste. Finally, the authors analyze the potential legal consequences of North Carolina's environmental legislation.

**Percival, Robert V. "Environmental Law in the Twenty-First Century." 25 *Virginia Environmental Law Journal* 1 – 35 (2007).**

In the Virginia Journal of Environmental Law's Twenty-Fifth Anniversary Symposium, Percival, who began practicing environmental law twenty-five years ago, discusses the evolution of environmental law over the span of his career. Percival first looks at the history of environmental law, including its common-law roots and federal regulatory infrastructure. He discusses the globalization of environmental concerns, specifically issues facing China today. The author concludes with a forecast for the future of environmental law.

**Markell, David L. "Citizen-Friendly Approaches to Environmental Governance." 37 *Environmental Law Reporter* 10362 – 10406 (2007).**

Numerous commentators have urged governments to increase opportunities for citizen participation as a way to advance a variety of public policy goals. Markell explores the experience of an international decisionmaking process that relies heavily on citizen participation, the Commission for Environmental Cooperation's (CEC) citizen submissions process, through the lens of the procedural justice literature, which seeks to understand the reasons why citizens are satisfied with decisionmaking processes.

**Rotenberg, Edan. "Ending Both Forms of Grandfathering in Environmental Law." 37 *Environmental Law Reporter* 10717 – 10766 (2007).**

Grandfathering is the payment of compensation for a legal change. Grandfathered polluters and grandfathered emissions permits are both compensations for legal transitions, but the two are fundamentally different. Rotenberg defines the two types of grandfathering, exposes the problems these practices pose for environmental law, and suggests some possible compensation alternatives.

**Ruhl, J.B., and James Salzman. "In Defense of Regulatory Peer Review." 37 *Environmental Law Reporter* 10247 – 10301 (2007).**

There has been vigorous debate about the use of peer review in regulatory settings. The authors seek to show that regulatory peer review can meaningfully improve agency decisions that rely on the use or interpretation of scientific information, but that this alone does not determine whether peer review should become part of agency decision processes. The authors propose an approach of randomized peer review to provide a more productive, empirically grounded vantage from which we can more intelligently assess the proper role for this process in agency settings.

**Sturkie, Cassandra, and Nathan H. Seltzer. "Developments in the D.C. Circuit's Article III Standing Analysis: When Is an Increased Risk of Future Harm Sufficient to Constitute Injury-in-Fact in Environmental Cases?" 37 *Environmental Law Reporter* 10287 – 10308 (2007).**

The federal courts of appeal are currently engaged in debate over the increase in probability of future harm that must be demonstrated by petitioners to establish a cognizable injury for Article III standing purposes. Two recent decisions in the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit may herald a new, quantitative

approach to standing analysis with great implications for environmental law. The authors review the D.C. Circuit developments, examine the constitutional requirement of injury-in-fact and the D.C. Circuit's unique precedent in cases involving increased risk of future harm, and discuss the striking differences in the court's two positions.

**Wieman, Jennifer. "The Reality of NEPA: Can the Act Realize Its Potential." 14 *Missouri Environmental Law and Policy Review* 393 – 420 (2007).**

Wieman discusses the decision in *Great Rivers Habitat Alliance*, a case centering on National Environmental Policy Act (NEPA) requirements. The author summarizes the case and then shows how the decision illustrates the waning effectiveness of NEPA. She points out the court's lack of interest in enforcing the Corps' responsibilities under NEPA. Wieman calls for NEPA to be strengthened to help offset an immense population growth in the United States and to ensure that the act serves its original purpose.

**Editorial staff of the Ocean and Coastal Law Journal. "A Review of Recent Development in Ocean and Coastal Law" 12 *Ocean and Coastal Law Journal* 365 (2007).**

The editorial staff at the Ocean and Coastal Law Journal presents summaries of recent developments in the area of Ocean and Coastal Law. The staff separates its review into 3 sections: recent legislation, administrative law, and recent cases in the area of ocean and coastal law. In reviewing recent legislation, the editorial staff critiques topics including Ireland's establishment of the Sea Fisheries Protection Authority for the regulation of marine resources, Japan's effort to redraft International Whaling Commissions regulations, Canada's revisions to the Fisheries Act, and many other new legislative changes worldwide. In administrative law, the staff discusses Guam's prohibition on large vessels, the NMFS's proposed rules for summer flounder, scup, and black sea bass, and NMFS's rule for habitats of Southern Resident killer whales. Finally, the staff analyzed six recent cases in the area of ocean and coastal law.

## X. FISHERIES MANAGEMENT

**Cantorna, Ana I. Sinde, et. al. "Spain's Fisheries Sector: From the Birth of Modern Fishing through to the Decade of the Seventies." 38 *Ocean Development and International Law* 359 – 374 (2007).**

The current problems involving Spain's oversized fishing fleet are explained by the growth of the fleet throughout the 20th Century. This article reviews the birth and development of Spain's distant-water fishing fleet that led to it becoming one of the world's largest fleets, albeit a fleet now devoid of fishing grounds, following the implementation throughout the world of the 200-mile exclusive economic zone.

Abstract courtesy of *Ocean Development and International Law*

**Lynch, Kevin J. "Application of the Public Trust Doctrine to Modern Fishery Management Regimes." 15 *New York University Environmental Law Journal* 285 – 313 (2007).**

Lynch examines the public trust doctrine's relevance to modern fishery management, focusing specifically on the U.S. Exclusive Economic Zone (EEZ). First, the author

looks at the origins of the public trust doctrine by examining whether it applies to federal waters and analyzing the impact of the doctrine on fishery management. Lynch examines limited access privilege programs (LAPPs) and evaluates the arguments against them based on the public trust doctrine. Finally, Lynch demonstrates how properly designed LAPPS may be consistent with the public trust doctrine.

**Matulich, Richard H. et. al. "Policy Formulation versus Policy Implementation under the Magnuson-Stevens Fishery Conservation and Management Act: Insight from the North Pacific Crab Rationalization." 34 *Boston College Environmental Affairs Law Review* 239 – 272 (2007).**

Matulich and co-authors examine the Magnuson-Stevens Fishery Conservation and Management Act. The article explains the unique role of the National Marine Fisheries Service (NMFS) in the administration of the Act and suggests that the agency's abuse of its administrative authority may undercut the intent of the Magnuson-Stevens Act, as well as Regional Fishery Management Council Policy. The article specifically looks at NMFS' actions regarding the North Pacific Fishery Management Council's crab rationalization policy. The authors argue that NMFS attempted to undermine the council's intent though its regulatory process. The article concludes with a solution to avoid similar incidents.

**Mulier, Vincent. "Recognizing the Full Scope of the Right to Take Fish under the Stevens Treaties: The History of Fishing Rights Litigation in the Pacific Northwest." 31 *American Indian Law Review* 41 – 102 (2006/2007).**

Mulier traces the history of Northwest fishing rights litigation and argues that the fishing clauses impliedly reserve three essential fishery rights to the tribes: 1) a right of access by tribe members to customary off-reservation fishing sites; 2) a right to up to fifty percent of harvestable fish that pass or are destined to pass these fishing sites; and 3) a right to healthy spawning, rearing, and migratory habitats for fish runs that spawn upstream of tribal fishing sites. Mulier also follows the courts' efforts to reconstruct and apply the meaning of the fishing clauses with respect to the tribes' asserted rights of access, allocation, and fisheries habitat conservation and restoration.

**Schartz, Brian E. "Fishing for a Rule in a Sea of Standards: A Theoretical Justification for the *Boldt* Decision." 15 *New York University Environmental Law Journal* 314 – 361 (2007).**

Schartz discusses an action filed by several Indian tribes from the Pacific Northwest alleging that the state of Washington had failed to protect salmon habitat, in violation of a duty under several federal treatises. Schartz compares the pending litigation to a 1974 district court opinion, known as the "*Boldt* decision," that held that two treaty tribes are not bound by state regulation and that treaty tribes are entitled to half of all harvestable salmon. The author analyzes the history and implications of the *Boldt* decision.

**Vellucci, Margreta. "Fishing for the Truth: Achieving the 'Best Available Science' by Forging a Middle Ground between Mainstream Scientists and Fishermen." 30**

*Environmental Law and Policy Journal* 275 – 321 (2007).

The manner by which our nation's fisheries are managed is important. Vellucci discusses whether cooperative research, conducted through a joint effort between scientists and fishermen, comports with the Magnuson-Stevens Act's "best available science" mandate. Vellucci discusses the controversies surrounding cooperative research and the hurdles that cooperative research must overcome in order to achieve the "best available science" standard. The author concludes that cooperative research does comport with the best available science mandate.

**Verani, Andre. "Community-Based Management of Atlantic Cod by the Georges Bank Hook Sector: Is It a Model Fishery?" 20 *Tulane Environmental Law Journal* 359 – 379 (2007).**

Verani's primary focus is whether the Georges Bank Hook Sector should be considered a model fishery by persons interested in better conservation of local fisheries and those who seek to preserve local fishing communities and cultures. Verani provides a brief history of the Atlantic cod fishery, focusing primarily on abundance, open access, and the generation of wealth. The author provides several explanations for the demise of the Atlantic cod stock and the subsequent state, regional, national, and international management regimes. Verani also questions the advent of community-based approaches to natural resource management and why they appear. The author outlines the structure of the Georges Bank Hook Sector, discusses whether the sector is a model fishery, and assesses the sector's outcome. Verani concludes that the Georges Bank Hook Sector may be viewed as a model fishery.

**Williams, Austin. "The Pacific Salmon Treaty: A Historical Analysis and Prescription for the Future." 22 *University of Oregon Journal of Environmental Law and Litigation* 153 – 195 (2007).**

While the United States and Canada enjoy a seemingly peaceful existence, there is a long history of conflict over the management of Pacific salmon. This conflict came to a head in the summer of 1997 when an Alaskan ferry carrying 300 passengers was blockaded by Canadian fishing vessels. The Pacific Salmon Wars, as it is known, arose from the interception of salmon from one another's waters. Williams first provides a brief history of Pacific salmon management and international agreements and then identifies the major threats to the Pacific salmon stock. Next, Williams analyzes the signing and collapse of a 1985 Treaty regarding Pacific salmon management and discusses the reauthorization of the treaty in 1999. Williams concludes by discussing the major challenges to Pacific salmon management and possible solutions to the ongoing disputes over the Pacific salmon stock.

## XI. INTERNATIONAL ENVIRONMENTAL LAW

**Goldman, Patti. "Public Interest Environmental Litigation in China: Lessons Learned from the U.S. Experience." 8 *Vermont Journal of Environmental Law* 251 – 279 (2007).**

In the face of increasing environmental challenges faced by China, Goldman looks at opportunities for Chinese citizens to participate in legal processes and prevent environmental harm. Goldman first looks at the issue of standing, noting that access to the

courts is essential for citizen involvement. Next, the author looks at the most effective means to implement the intent behind China's Environmental Impact Assessment Law. Relying on experience in enforcing environmental protection laws in the United States, Goldman explains principles and methods Chinese citizens may use to protect the environment. She compares the use of litigation in the U.S. and China to seek compensation for victims of pollution. Goldman concludes with a review of the effectiveness of environmental impact statements.

**Kahn, Jordan C. "Baikal Beckons: Siberia's Sacred Sea Compels the Tahoe Watershed Protection Approach." 18 *Colorado Journal of International Environmental Law and Policy* 379 – 416 (2007).**

Lake Baikal, a waterbody shared by Russia and Mongolia, holds the most freshwater on Earth. Kahn examines the effect of Mongolian mining on the lake and advocates the use of the Lake Tahoe model by the Russian and Mongolian governments to protect the lake. The article gives an overview of the Lake Tahoe model and describes how it could be applied to Lake Baikal.

**Roughton, Geoffrey E. "The Ancient and the Modern: Environmental Law and Governance in Islam." 32 *Columbia Journal of Environmental Law* 99 – 139 (2007).**

Roughton explains the environmental principles in Islamic law, showing how the laws relate to conservation, the prevention of pollution, and the protection of plants and animals. The article then describes how Muslim governments incorporate Islamic law into their governments and show the actions taken by Muslim governments to protect their environment. Roughton concludes that Muslim governments that enact environmental laws based on Islamic principles will benefit their countries and the environment.

## XII. INVASIVE SPECIES

**Landis-Marinello, Kyle H. "Noontime Dumping: Why States Have Broad Discretion to Regulate Onboard Treatments of Ballast Water." 106 *Michigan Law Review* 135 – 168 (2007).**

Shipping vessels' discharge of ballast water has fueled the spread of aquatic invasive species. Landis-Marinello notes that in the absence of federal action, several states in the Great Lakes are considering legislation regarding ballast water discharge. The author examines the discretion of states in regulating onboard treatment of ballast water. He looks at legal challenges that these laws might face, specifically Constitutional challenges under the Supremacy Clause and the Dormant Commerce Clause. He argues that state regulation of ballast water discharge would withstand these challenges.

## XIII. LAW OF THE SEA

**Beckman, Robert C. "PSSAs and Transit Passage – Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS." 38 *Ocean Development and International Law* 325 – 357 (2007).**

On 22 July 2005, the International Maritime Organization (IMO) approved the extension of the Great Barrier Reef Particularly Sensitive Sea Area (PSSA) to the Torres Strait in Resolution MEPC.133(53). Australia amended its regulations and issued marine orders imposing a compulsory pilotage system in the Torres Strait. Australia's actions triggered protests from maritime states at the IMO and in bilateral diplomatic exchanges. This article examines the legal issues raised by Australia's establishment of a compulsory pilotage system in a strait used for international navigation, including the prospects for Australia being challenged under the compulsory dispute settlement provisions of the UN Convention on the Law of the Sea. It is recommended that the PSSA Guidelines of the IMO be amended to ensure that such legal issues do not arise in the future.
Abstract courtesy of *Ocean Development and International Law*

**Prows, Peter. "Tough Love: The Dramatic Birth and Looming Demise of UNCLOS Property Law (and What Is to Be Done About It)." 42 *Texas International Law Journal* 241 – 309 (2007).**

Prows asks whether UNCLOS will continue to serve as the basis of property law for the sea. He reviews the development of UNCLOS, including the manner in which the rights of coastal states' claims of offshore areas have been balanced against the rights of others to use the sea. Next, Prows describes a new proposal from the general assembly, consensual law of the sea. He examines the implementation of Article 76 on the legal continental shelf and then questions the efficacy of the spatial regime governing certain seabed resources. The article concludes with an agenda to address the evolving challenges of the law of the sea.

## XIV. MARINE SECURITY

**Babcock, Hope. "National Security and Environmental Laws: A Clear and Present Danger." 25 *Virginia Environmental Law Journal* 105 – 156 (2007).**

Babcock examines environmental laws both pre and post 9/11. The article gives an overview of the USA PATRIOT Act, noting how the Act has changed civil liberties. Babcock next describes the changes made and proposed to environmental laws, such as wildlife or pollution control laws, after 9/11. The article analyzes how the new laws have modified public disclosure laws and policies and asks whether these laws are necessary for national security.

**Kaye, Stuart. "International Measures to Protect Oil Platforms, Pipelines, and Submarine Cables from Attack." 31 *Tulane Maritime Law Journal* 377 – 423 (2007).**

In light of the terrorist attacks on September 11, Kaye discusses the threat of maritime terrorism. Specifically, he considers the threat of submarine cables, oil and gas platforms, and pipelines. He looks at the jurisdictional issues involved explaining how protection measures may interact with navigational rights under the Law of the Sea Convention. Kaye separately discusses the legal regimes for oil and gas platforms and submarine cables and pipelines.

## XV. MARITIME BOUNDARIES

**Elferink, Alex G. Oude. "Maritime Delimitation Between Denmark/Greenland and Norway." 38 *Ocean Development and International Law* 375 – 380 (2007).**

This note discusses the recent agreement between Denmark/Greenland and Norway delimiting the maritime boundary between the Norwegian territory of Svalbard and Greenland.

**Abstract courtesy of *Ocean Development and International Law***

**Papanicolopulu, Irini. "A Note on Maritime Delimitation in a Multizonal Context: The Case of the Mediterranean." 38 *Ocean Development and International Law* 381 – 398 (2007).**

This article points out some of the issues that may arise during the delimitation of maritime boundary in a sea area where coastal states have proclaimed various maritime zones. Issues considered include delimitation in the presence of overlapping or coincident zones, the role of existing boundaries, use of all-purpose maritime boundaries, and the delimitation of future zones. Special reference is made to the Mediterranean Sea where coastal states have advanced various claims consisting of zones sometimes different from the ones provided for in the 1982 United Nations Convention on the Law of the Sea.

**Abstract courtesy of *Ocean Development and International Law***

**Thao, Nguyen Hong, and Ramses Amer. "Managing Vietnam's Maritime Boundary Disputes" 38 *Ocean Development and International Law* 305 – 324 (2007).**

This article examines the progress made in managing Vietnam's maritime boundary disputes and analyzes the challenges that lie ahead relating to unsettled disputes. The continuity and change in Vietnam's approach to dispute a settlement and the difficulties in managing the unresolved maritime disputes are assessed. Vietnam has made considerable progress in managing its maritime disputes; however, continued efforts are needed to address the unresolved disputes.

**Abstract courtesy of *Ocean Development and International Law***

## XVI. OCEAN GOVERNANCE

**Cummings, Jim. "Regulating Ocean Noise: Entering Unchartered Waters: Introduction to the Special Issue of the Journal of International Wildlife Law and Policy." 10 *Journal of International Wildlife Law and Policy* 101 – 107 (2007).**

Ocean noise is an increasing problem. Cummings introduces this special issue of *Journal of International Wildlife Law and Policy*, which is dedicated to ocean noise regulation.

**Firestone, Jeremy, and Christina Jarvis. "Response and Responsibility: Regulating Noise Pollution in the Marine Environment." 10 *Journal of International Wildlife Law and Policy* 109 – 152 (2007).**

Firestone and Jarvis discuss the problem of increasing ocean noise. The authors provide an overview of the physics of sound, outline the sources of sound in the ocean, and discuss the potential impacts of these sounds. The article also provides a basic overview of

international regulation of sound in the ocean, including an overview of U.S. court decisions regarding ocean noise.

**Haren, Angela M. "Reducing Noise Pollution from Commercial Islands National Marine Sanctuary: A Case Study in Marine Protected Area Management of Underwater Noise." 10 *Journal of International Wildlife Law and Policy* 153 – 173 (2007).**

Haren explains why Marine Protected Areas need increased protection from ocean noise. She uses the Channel Islands National Marine Sanctuary as a case study to show the potential threats caused by ocean noise. The author suggests policy changes to reduce noise pollution caused by commercial shipping.

**Juda, Lawrence. "The European Union and Ocean Use Management: The Marine Strategy and the Maritime Policy." 38 *Ocean Development and International Law* 259 – 282 (2007).**

Problems resulting from contemporary patterns of ocean use and threats to the viability of the marine environment have led to reconsideration of ocean use governance in a number of states, including the United States, Australia, and Canada. For its part, the European Union has been working on the development of a Marine Strategy to safeguard the environment and a more encompassing Maritime Policy into which the Marine Strategy would be folded. The desired Maritime Policy would reflect a holistic perspective of ocean space, embody an ecosystem-based approach to ocean use management, and provide a broad framework for ocean/coastal management. As has been seen elsewhere, developing such a governance system is difficult both in terms of conceptualization and, subsequently, in operationalization. The June 2006 European Commission Green Paper on Maritime Policy sets the stage for a year of consultations designed to develop an effective governance system for ocean management. Institutional and policy changes will be needed and it will be necessary to balance the objectives of economic growth and protection of environmental sustainability. This article examines current developments in efforts to devise a coherent and integrated European Union approach to ocean management.

**Abstract courtesy of *Ocean Development and International Law***

**Mossop, Joanna. "Protecting Marine Biodiversity on the Continental Shelf Beyond 200 Nautical Miles." 38 *Ocean Development and International Law* 283 – 304 (2007).**

States are expending significant effort to chart the extent of their continental shelves where these extend beyond 200 nautical miles. As more is understood about marine biodiversity on the outer continental shelf, states may wish to regulate the use of biodiversity for the purposes of conservation or for future exploitation. This article identifies potential threats to marine biodiversity on the continental shelf, explores whether conservation is a legitimate purpose for exercising coastal state rights over the outer continental shelf under the Law of the Sea Convention, and considers the various legal rules that coastal states may use to protect marine biodiversity. The article concludes that the continental shelf regime is undesirably vague in some instances but that coastal states have a legal basis for taking action to regulate activities that impact

the marine biodiversity of the outer continental shelf.
Abstract courtesy of *Ocean Development and International Law*

**Scott, Karen N. "Sound and Cestaceans: A Regional Response to Regulating Acoustic Marine Pollution." 10 *Journal of International Wildlife Law and Policy* 175 – 199 (2007).**

Scott examines the problem of marine noise pollution. She looks at three distinct regions, the Mediterranean Sea, the Baltic and North Seas, and the Southern Ocean, to decipher how much ocean noise is subject to regional control.

## XVII. POLLUTION

**Fuschino, Julia. "Mountaintop Coal Mining and the Clean Water Act: The Fight over Nationwide Permit 21." 34 *Boston College Environmental Affairs Law Review* 170 – 206 (2007).**

Fuschino discusses the Corps' issuance of general permits under the Clean Water Act (CWA) for the disposal of material from mountaintop coal mining. She argues that the issuance of these permits, specifically Nationwide Permit 21 (NWP), may be contrary to the CWA's goal of protecting the waters of the United States. Although recent court rulings have upheld the use of these permits, the author argues that the adequacy of the minimum impact determinations should be challenged in court cases. Additionally, Fuschino recommends that the Corps should perform minimum impact determinations before a NWP is issued.

**Gaba, Jeffrey M. "Generally Illegal: NPDES General Permits under the Clean Water Act." 31 *Harvard Environmental Law Review* 409 – 473 (2007).**

To satisfy the requirements of the Clean Water Act (CWA), industries must comply with the National Pollutant Discharge Elimination System (NPDES) permit in order to properly discharge pollutants. The EPA or a state agency has the authority to issue individual permits and general permits. Gaba critiques the EPA's general permitting program, citing case authority that essentially raises questions about the scope of the general permits. Individual permits are based on facility specific information, released to the public, and invite public participation, whereas general permits are generic permits and once they are issued there is no further government or public participation. Gaba questions whether general permits that are applicable to many sources of discharge into many different bodies of water can comply with standards for state water quality and questions the legality of the EPA's use of general permits to satisfy the CWA. Gaba analyzes the EPA's regulations regarding general permits, the history of the permitting program, and major issues arising from the use of general permitting. Gaba concludes with proposing a modification of the general permit that would provide public participation and greater government supervision in order to comply with water quality standards.

**"Will the Mercury Cap-and-Trade System Crash and Burn?" 37 *Environmental Law Reporter* 10635 – 10649 (2007).**

The first seminar in the Environmental Law Institute's Congressional Briefing series focused on regulation of mercury emissions from power plants. After the moderator provided an overview of the dangers of and regulatory response to mercury, the panelists shared their expertise on a range of topics surrounding this issue. Some of the issues included: federal mercury programs; the politics of regulation; special challenges for industry; and the roles of Congress and the states. This is a transcript of the event.

## XVIII. PUBLIC TRUST

**Abrams, Robert Haskell. "The Great Lakes: Reflecting the Landscape of Environmental Law: Article: Walking the Beach to the Core of Sovereignty: The Historic Basis for the Public Trust Doctrine Applied in *Glass v. Goeckel*." 40 *University of Michigan Journal of Law Reform* 861 – 889 (2007).**

Abrams explores the public trust doctrine, as applied in *Glass v. Goeckel*. The author examines why the public trust doctrine is so clearly established as a core element in the American concept of state sovereignty. The author focuses specifically on the "great waters" of the United States, a term of art used to describe the oceans, the Gulf of Mexico, the bays, the Great Lakes, and other great inland waterways of the United States. Abrams primary purpose is defending against the contemporary attacks on the public property interests and public rights of use in the Great Lakes foreshore. The author argues in support of the majority's decision in *Glass v. Goeckel* with an in-depth look at the history and relationship of public trust law to the law of accretion, reliction, erosion, and submergence.

**Frey, Bertram C., and Andrew Mutz. "The Great Lakes: Reflecting the Landscape of Environmental Law: Article: The Public Trust in Surface Waterways and Submerged Lands of the Great Lakes States." 40 *University of Michigan Journal of Law Reform* 907 – 993 (2007).**

The surface waterways and submerged lands of the Great Lakes are held in public trust by the eight surrounding states. As such, each of the eight Great Lake states is required to protect the sustainable future of the lakes and maintain traditional public uses. Frey and Mutz provide a brief history of the public trust doctrine as it applies to surface waterways and submerged lands. The authors next discuss and analyze the application of the doctrine among the eight Great Lake states and the differences in the doctrines' development among the states. Analysis of the Great Lake states application of the public trust doctrine is used in crafting new models for implementation of the public trust doctrine in the Great Lakes region. The authors propose a framework for application which includes a geographic scope, public rights of access to waterways, and protected uses of waterways. Frey and Murtz's conclusion points out that regardless of arguments to the contrary, the Great Lakes necessitate protection under the public trust doctrine because they are fundamental to the region.

**Mulvaney, Timothy M., and Brian Weeks. "'Waterlocked:' Public Access to New Jersey's Coastline." 34 *Ecology Law Quarterly* 579 – 618 (2007).**

Mulvaney and Weeks provide an overview of the public trust doctrine, focusing on its use in New Jersey. The article defines the range of public access in New Jersey. The authors look at public access and its interaction with regulatory takings, citing recent New Jersey court decisions that have expanded the public trust doctrine. The article also reviews public trust issues in other states. The authors conclude the article with a description of alternative methods used by New Jersey to uphold the public trust doctrine and note public trust issues that may soon develop in the state's judicial system.

**Paganelli, Carl Shadi. "Creative Judicial Misunderstanding: Misapplication of the Public Trust Doctrine in Michigan." 58 *Hastings Law Journal* 1095 – 1121 (2007).**

Paganelli examines the Michigan Supreme Court's recent decision, *Glass v. Goeckel*, which used the public trust doctrine to open land on the shores of Lake Michigan and Lake Huron to the public. The author argues that the court's use of the doctrine in this instance is an example of "'creative judicial misunderstanding' of Roman law." Paganelli first examines the history of the public trust doctrine. Next, he notes that the Michigan Supreme Court's decision in *Glass* effectuated a change to the common law, affecting the reasonable expectations of property owners. Finally, Paganelli discusses how decisions such as *Glass* result in an unconstitutional taking.

## XIX. SHIPPING

**Dodds, David. "Breaking Up is Hard to Do: Environmental Effects of Shipwrecking and Possible Solutions under India's Environmental Regime." 20 *McGeorge Global Business and Development Law Journal* 207 – 236 (2007).**

Dodds discusses the environmental effects of shipwrecking, which is the process of dismantling cargo ships that are no longer in use. He describes the negative environmental impact caused by the toxic and carcinogenic substances released during the shipwrecking process. Dodds notes that India, with its national environmental scheme that incorporates the precautionary principle and sustainable development, could either require shipwrecking facilities to close down or be modernized.

**Reibstein, Richard. "Time to Get Real: The Necessity of Legal Accountability for Responsible Transnational Commerce." 37 *Environmental Law Reporter* 10414 – 10432 (2007).**

The challenges posed by national sovereignty, corruption, and the traditional business model have made greening the worldwide supply chain difficult to accomplish. Reibstein examines these challenges and proposes ways in which they might be addressed. Using the Bhopal, India, gas leak disaster as a case study, he explains the need for accountability, reasons why the current system is inadequate, and offers specific proposals for governments and corporations interested in greener, more humane trade.

## XX. SUSTAINABILITY

**Jenkins, Benjamin W. "The Next Generation of Chilling Uncertainty: Indirect Exploration Under CAFTA and its Potential Impact on Environmental Protection."**

**12 *University of Maine School of Law Ocean and Coastal Law Journal* 269 – 299 (2007).**

The signatory countries of the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA) have been linked for centuries by the migratory patterns of sea turtle populations. Jenkins uses sea turtles as a means of analyzing the CAFTA agreement with the express purpose of examining how sea turtle populations exhibit the unique challenges of protecting the natural environment in the covered regions. Jenkins proposes that it is possible to forecast the potential impact of CAFTA by considering the challenges of creating effective environmental protections in the Caribbean and Central America.

**George, Susan. "The State of the States: An Overview of State Biodiversity Programs." 37 *Environmental Law Reporter* 10631 – 10640 (2007).**

It is often overlooked that states have long taken action to protect biodiversity before the federal government. George discusses states' roles in biodiversity conservation, including jurisdictional issues and the authority upon which the states base their programs, new protection efforts, and what can be expected from states in the coming years.

**Steinberg, Jessica A. "Appraising Conservation Easement Donations: The Need for More Uniform Standards and Greater Oversight." 37 *Environmental Law Reporter* 10841 – 10872 (2007).**

Standardized appraisal methods for charitable contributions of conservation easement donations do not currently exist. Without such standards, landowners may potentially overvalue their donations of conservation easements to land trusts. The Internal Revenue Service (IRS) has recognized this abuse of the tax laws and has threatened to severely limit or eliminate this deduction program. Steinberg refutes the notion of limiting the charitable contribution program and proposes the establishment of uniform appraisal methods and greater oversight by the IRS.

## XXI. WATER LAW

**Anderson, David. "Water Rights as Property in *Tulare v. United States*." 38 *McGeorge Law Review* 461 – 511 (2007).**

Anderson looks at recent water rights law, specifically examining a United States Court of Federal Claims case, *Tulare Lake Basin Water Storage District v. United States*. The author explains the court's holding in the case. The article uses *Tulare* to explain the basic principles of western water law and describes how and why the case did not follow the basic propositions of this law.

**Benson, Reed D. "Rivers to Live By: Can Western Water Law Help Communities Embrace Their Streams?" 27 *Journal of Land, Resources, and Environmental Law* 1 – 27 (2007).**

Benson examines how traditional western water law has been detrimental to preserving free-flowing rivers. The article cites specific efforts used by some cities and towns to maintain their free-flowing rivers and streams. The efforts have provided the communities with recreation and other public benefits. Benson explains how water law is

beginning to change to accommodate these efforts. Finally, the author offers suggestions for western communities that would like to make water law reforms to sustain their free-flowing rivers.

**Dubuc, Rob. "Snake Valley to Las Vegas: Keep Your Pipes Out of Our Aquifer!" 27 *Journal of Land, Resources, and Environmental Law* 151 – 193 (2007).**

Dubuc looks at the Southern Nevada Water Authority's (SNWA) plan to obtain water for the city by accessing groundwater from Snake Valley in Utah. He examines the water rights in the area and notes the role of the federal agencies charged with managing the land in protecting the water rights. Dubuc examines the origins of federal reserved water rights and explains how the rights apply to federal land. He concludes that the federal agencies are required to protect the water rights in Snake Valley and points out how the residents of the area can ensure agency compliance.

**Jacoby, Andrew K. "Water Pressure: The Eightieth Texas Legislature Attempts to Protect Instream Flows of Rivers and Streams, and Freshwater Inflows to Bays and Estuaries." 20 *Tulane Environmental Law Journal* 381 – 405 (2007).**

In Texas, urban population growth coupled with limited water resources has lead to a growing water rights battle. Jacoby points out that solving the water rights battle in Texas lies with the Texas Legislature and only through a realistic approach to water law reform that correctly prioritizes water allocation will there be a resolution. The author points out the tension between preserving waters instream through statutes mandating a minimum amount of water to be kept in Texas' surface water system and accommodating and encouraging urban growth. Jacoby points out that that the reforms taken up in the 80th Texas Legislature shift water management to a basin-wide perspective and inject needed scientific counsel to the current regime. However, the author argues that the proposed reforms alone are insufficient to protect environmental flows and the wildlife they support.

**Meruelo, Natasha. "Considering a Cooperative Water Management Approach." 18 *Fordham Environmental Law Journal* 335 – 368 (2007).**

Meruelo discusses balancing the growing demand for limited water resources with the protection of natural water systems and surrounding ecosystems. Specifically, the author looks at a water dispute in the Apalachicola-Chattahoochee-Flint (ACF) River Basin. She recommends that Alabama, Georgia, and Florida look to the Tampa Bay Water Authority to resolve their dispute. She notes that the issues faced in Tampa are similar to the dispute in the ACF River Basin and that the implementation of the model's framework could provide a successful solution for the ACF River Basin dispute.

## XXII. WATER RESOURCES

**Mishra, Rupesh. "Preserving the Flow: Legal Protection of Water in Times of Armed Conflict." 37 *Environmental Law Reporter* 10297 – 10316 (2007).**

Few legal tools exist to protect water resources from the threat of terrorism and armed conflict. Mishra examines the vulnerability of freshwater and evaluates some protective

tools. Surveying international law, custom, and emerging principles, he identifies opportunities where existing law might be better utilized for preservation of water. He concludes by advocating the restructuring of the current international conflict and environmental legal regimes.

**Moeller, James W. "Legal Issues Associated with Safe Drinking Water in Washington, D.C." 31 *William and Mary Environmental Law and Policy Review* 661 – 723 (2007).**

Moeller provides an overview of the Safe Drinking Water Act (SDWA) and its application to drinking water provided by the Washington Aqueduct through pipes maintained by the Washington, D.C., Water and Sewer Authority. The author looks at the reasons behind Section 306 of the SDWA amendments and the responses of D.C., Arlington County, and Falls Church. Moeller describes the Corps' remediation of Spring Valley and explores the potential contamination of the Washington Aqueduct. He also looks at agency responses to elevated concentrations of lead in D.C. drinking water and concludes by examining the environmental impact of waste discharge into the Potomac River from water purification activities.

## XXIII. WETLANDS

**Burdette, M. Allison, et. al. "The Historic Navigability Test: How to Use It to Advantage in This Post-*Rapanos* World." 37 *Environmental Law Reporter* 10797 - 10825 (2007).**

Since *Rapanos v. United States*, many have discussed the "Kennedy test" and its significant nexus standard. Burdette and coauthors explore the navigability test, one tool that can be used to establish a significant nexus to a navigable water. The authors begin by providing a history of traditional navigable waters and move on to discuss the *Rapanos* decision. They then discuss three tests for determining whether a water is a traditional navigable water and some key historic-use cases.

**Connolly, Kim Diana. "Survey Says: Army Corps No Scalian Despot." 37 *Environmental Law Reporter* 10317 – 10423 (2007).**

Justice Scalia and others have described the U.S. Army Corps of Engineers' administration of the Clean Water Act (CWA) § 404 permitting process as burdensome and inefficient. Connolly evaluates empirical data collected from Corps Customer Service Surveys as well as the apparent disconnect between applicant experiences and the public's negative perception of the permitting process.

**Currie, Bill. "Opening the Floodgates: The Roberts Court's Decision in *Rapanos v. United States* Spells Trouble for the Future of the Waters of the United States." 18 *Villanova Environmental Law Journal* 209 – 233 (2007).**

Currie discusses the United States Supreme Court's decision in *Rapanos v. United States*, giving an overview of the facts of the case. The author also looks at the Clean Water Act's history and prior Supreme Court decisions on the Corps' jurisdiction

under the CWA. Finally, Currie gives a detailed analysis of all of the opinions in *Rapanos*, assessing the impact of the Court's holding.

**Dearing, David E. "The Continued Highway Requirement as a Factor in Clean Water Act Jurisdiction." 37 *Environmental Law Reporter* 10747 – 10767 (2007).**

U.S. courts have consistently ruled that navigable, intrastate waters are not traditional navigable waters unless they form part of a continued highway of interstate commerce. However, pursuant to the Clean Water Act (CWA), the Army Corps of Engineers has redefined navigable waters to include all navigable, intrastate waters, regardless of whether the waters meet the continued highway requirement. Dearing examines the case law supporting the continued highway requirement, including the recent U.S. Supreme Court case, *Rapanos v. United States*, in order to argue that the Corps has no legal basis for not following the continued highway requirement.

**Fortin, Ryan. "*Rapanos v. United States* - A Historical Perspective on the Recent Decline in 'Judicial Pioneering' in Wetlands Regulation." 33 *William Mitchell Law Review* 1225 – 1277 (2007).**

Ryan Fortin critiques the most recent Supreme Court decisions concerning the United States Corp of Engineers' regulatory jurisdiction under Section 404 of the Clean Water Act (CWA). The issue is how far Congress intended the Corps' jurisdiction to reach when they placed the provision "waters of the United States" in the CWA. Did Congress intend for the Corps to have jurisdiction over wetlands that are part of a tributary system even if those wetlands do not lay adjacent to "navigable waters?" The Supreme Court has answered that question in *Rapanos v. United States* by not giving the provision an overly broad interpretation. Fortin addresses the notion that the Supreme Court has decided *Rapanos* and a previous case incorrectly. Fortin suggest that the Supreme Court's narrow interpretation of the Corps' jurisdiction will result in the Corps' diminished authority to regulate wetlands and in turn result in the states, which historically have not proven effective at regulating wetlands, having to regulate those wetlands taken away from the Corps.

**Frankel, Kevin. "A Flood of Uncertainty: *Rapanos* and *Carabell*." 32 *Columbia Journal of Environmental Law* 141 – 159 (2007).**

Frankel discusses the United State Supreme Court Decisions in *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*. The comment explains that the two opinions provide insight into the court's future decisions on environmental issues. Furthermore, Frankel discusses how the split decisions in the two cases make it difficult for lower courts to apply the Supreme Court's decisions.

**Hanson, Andrew C., and David C. Bender, "Irrigation Return Flow or Discrete Discharge? Why Water Pollution from Cranberry Bogs Should Fall within the Clean Water Act's NPDES Program." 37 *Environmental Law* 339 – 364 (2007).**

This article is aimed at addressing the environmental concerns of Wisconsin's cranberry farms not being subject to the NPDES permit program under the CWA. The authors describe the process of cranberry production and the result of fertilizers and

pesticides being returned to lakes, wetlands, rivers, and other waters during the irrigation process. Currently, cranberry bogs are not subject to the CWA. As a result, Wisconsin's Attorney General has attempted to resolve the issue by filing public nuisance claims against local cranberry farms. The authors look at the current reach of the CWA in relation to cranberry bogs and conclude by suggesting that applying the CWA to discharged pollutants caused by cranberry bogs would be a more efficient use of resources rather than applying costly public nuisance laws.

**Keith, Heather. "*United States v. Rapanos*: Is 'Waters of the United States' Necessary for Clean Water Act Jurisdiction?" 3 *Seton Hall Circuit Review* 565 – 616 (2007).**

Keith provides a legislative history of the Clean Water Act (CWA) while exploring its administration by the Environmental Protection Agency (EPA) and the Army Corps of Engineers. Keith details the struggle between the EPA and the Corps over jurisdictional authority and Congress' failure to clearly define jurisdiction through statutory language. The author focuses on *United States v. Rapanos* to illustrate the confusion in federal courts created by the Supreme Court's efforts to define CWA jurisdiction and the Corps' regulatory responses to their decisions. Keith offers alternative ways to discern the holding in *Rapanos* and outlines three approaches to defining jurisdiction in order to strengthen the legislation and solve any further problems. In conclusion, Keith proposes Congress remove the "navigable waters" limit on jurisdiction and instead root authority in its power to regulate interstate commerce.

**Lakshmanan, Lakshmi. "The Supreme Court Wades Through The Clean Water Act to Determine What Constitutes the 'Waters of the United States'." 14 *Missouri Environmental Law & Policy Review* 371 – 394 (2007).**

Lakshmanan looks at the Clean Water Act (CWA) and relevant case law in order to define "waters of the United States" and determine the scope of the Army Corps of Engineers' authority. The author analyzes the Supreme Court's holding in *Rapanos v. United States* for a definition of waters of the US. Lakshmanan then looks to the CWA for statutory guidance. Finally, the author looks to two Supreme Court holdings that preceded *Rapanos* for further analysis of the issue.

**Lambird, Jill. "A Muddy Decision- The High Court Fails to Define the Corps' Wetland Jurisdiction in *Rapanos v. United States*." 27 *Journal of the National Association of Administrative Law Judiciary* 169 – 208 (2007).**

Lambird analyzes the Supreme Court's decision in *Rapanos v. United States*, suggesting that the court was ambiguous in defining the Army Corp of Engineer's jurisdiction. Petitioner claimed that the wetlands in question were nonnavigable, isolated, and intrastate waters and therefore not within the Corps' jurisdiction given under the Clean Water Act (CWA). The Supreme Court split 4-1-4 over the issue of whether these types of wetlands fall within jurisdiction over "waters of the United States." Lambird analyzes the CWA, as well as prior legislation, and case history before looking at the *Rapanos* case in detail. Lambird critiques each side of the split opinion to determine that a clear test has not been made available. Finally, Lambird speculates as to the legislative, judicial, administrative, and social impact of the *Rapanos* decision.

**Macdonald, Matthew A. "*Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*." 31 *Harvard Environmental Law Review* 321 – 332 (2007).**

In this case comment, Macdonald provides a look at the decisions in *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*. The author reviews the facts of the cases and analyzes the Supreme Court's decisions in *Rapanos* and *Carabell*. He concludes that the Rapanos decision will have a minimal impact on the conservation of wetlands.

**Mank, Bradford C. "Implementing *Rapanos*—Will Justice Kennedy's Significant Nexus Test Provide a Workable Standard for Lower Courts, Regulators, and Developers?" 40 *Indiana Law Review* 291 – 371 (2007).**

In 2001, the Supreme Court in *Solid Waste Agency of Northern Cook County* (SWANCC) *v. United States Army Corps of Engineers* held that the United States Army Corps of Engineers lacked authority under the Clean Water Act to regulate wetlands and waters that serve as habitat for migratory birds when those waters are isolated from navigable waters. After SWANCC, the federal circuit courts of appeals were divided over when the Corps may regulate "tributary wetlands." In 2006, the Supreme Court in *Rapanos v. United States*, finally addressed the question of jurisdiction over tributary wetlands or non-adjacent wetlands, but the Court was unable to provide clear answers. Mank examines the *Rapanos* opinions and the disagreement over which opinions are binding on lower courts.

**Romigh, Taylor. "The Bright Line of *Rapanos*: Analyzing the Plurality's Two-Part Test." 75 *Fordham Law Review* 3295 – 3343 (2007).**

Romigh analyzes the landmark *Rapanos* decision by looking specifically at the plurality's two-part test determining the authority granted to the Army Corps of Engineers under the Clean Water Act (CWA). The author provides background information on the controversy by looking at the history of the CWA, prior Supreme Court precedent, the facts and decision in *Rapanos*, and a discussion of how lower courts have responded to the *Rapanos* decision. Romigh examines the plurality's two criteria and the justifications and critiques of their adoption. In conclusion, Romigh argues that neither of the plurality's two criteria should be more broadly adopted in defining the Corps' jurisdiction under the CWA.

**Sorensen, Brooke. "The Clean Water Act's Application to Cranberry Growers: The Burdened Stewards of the Environment." 16 *San Joaquin Agricultural Law Review* 151 – 169 (2006/2007).**

Sorensen first gives an overview of the Clean Water Act (CWA), its purpose, and its application to wetlands. The article next provides an explanation of cranberry production, showing that the cranberry marshes should be exempt from the CWA because the growing practices do not destroy the natural wetlands. The author suggests an alternative nationwide permit for cranberry growers.

**Squillace, Michael. "The Great Lakes: Reflecting the Landscape of Environmental Law: Article: From 'Navigable Waters' to 'Constitutional Waters': The Future of**

**Federal Wetlands Regulation." 40 *University of Michigan Journal of Law Reform* 799 – 860 (2007).**

Wetlands regulation in the United States has been growing in significance during the last several decades as new scientific evidence has pointed to the ecological impact the loss of wetlands may have on the earth. Squillace's primary focus is the future of wetlands regulation following the landmark *Rapanos* decision, decided by the Supreme Court in 2006. Squillace describes the ecological importance of wetlands and their impact on the planet and the resulting impracticality of state and local regulation of wetlands. Squillace also provides a history or wetlands regulation, focused primarily on the Clean Water Act and the problems that have arisen within the federal agencies charged with implementing regulations and the courts. Squillace concludes with recommendations on improving the Clean Water Act Section 404 program and clarifying the scope of federal authority as it applies to wetlands regulation.

**Stapleford, John. "Wetlands Mitigation: Retroactive Application of Clean Water Act Requirements to Property Destroyed by Natural Disasters." 31 *William and Mary Environmental Law and Policy Review* 861 – 891 (2007).**

Stapleford contends that landowners should be required to comply with the mitigation requirements of the Clean Water Act retroactively even if their property is destroyed by a natural disaster. The author provides a definition and history of wetlands and examines the history and judicial support for retroactive application of wetlands legislation. Stapleford provides a history of natural disaster response and mitigation as justification for the argument that the circumstances created by Hurricanes Katrina and Rita on the Gulf Coast support retroactively implementing wetlands mitigation requirements. Stapleford concludes by examining the policy implications and the pros and cons of retroactive implementation of wetlands mitigation.

## XXIV. WHALING

**Vargas, Jorge. "The California Gray Whale: Its Legal Regime under Mexican Law." 12 *University of Maine School of Law Ocean and Coastal Law Journal* 213 – 238 (2007).**

Vargas first provides information on the physical and biological aspects of the California gray whale. The author also provides a detailed description of the California gray whale's winter breeding grounds in lagoons along Mexico's coast. Next, Vargas walks through Mexico's protective legal regime for gray whales and other marine mammals, focusing specifically on Mexico's Federal Constitution of 1917 and six different presidential decrees, dating back to 1972. The author reviews the history of U.S. federal statutes governing the protection and conservation of gray whales and other marine mammals in Mexico. The author concludes by examining the role international law conventions have played in Mexico's establishment of whale sanctuaries and the contribution Mexico's protective legal regime has made to the resurgence of the gray whale population.