

ENVIRONMENTAL LAW

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ARTICLES

- United States v. Abrogar*: Did the Third Circuit Miss the Boat? 1
David P. Kehoe

In *United States v. Abrogar*, the Third Circuit held that the sentencing enhancements under the U.S. Sentencing Guidelines for the discharge of a pollutant to the environment did not apply to a chief engineer of a foreign-flagged vessel who came into a U.S. port and presented a false document to the United States Coast Guard that covered up the fact that the vessel had dumped oily wastes into international waters in violation of the Act to Prevent Pollution from Ships (APPS). The court held that the Guideline enhancements did not apply to the false document charge under APPS, in part because the discharges occurred outside U.S. waters before the vessel came into port. This Article argues that the Third Circuit's reasoning was flawed, because, among other things, the discharges were an element of the offense for the APPS false document violation charged, and then goes on to explore alternative charging mechanisms and Guideline provisions available to authorize jail time in these cases.

- Advancing the Sovereign Trust of Government to Safeguard the
Environment for Present and Future Generations (Part I): Ecological
Realism and the Need for a Paradigm Shift 43
Mary Christina Wood

Society's industrial base has demolished natural systems and has pushed the planet to the brink of irrevocable climate heating. These new conditions of Nature present immense challenges for the law. Transformational legal change is inevitable, either because society will choose a sustainable path, or because the present legal institutions will collapse from economic and social disintegration following ecological chaos. This Article, Part I of a two-part work, points to the stunning failure of modern environmental law, which authorizes agencies to issue permits and take actions that destroy the environment. It argues that only an encompassing vision of sovereign obligation carries hope of turning governmental conduct away from disastrous outcomes. The Article draws upon the venerable public trust doctrine to present a fundamental paradigm shift in natural resources and environmental law, advancing the ancient doctrine into today's world through a framework called Nature's Trust.

Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance	91
<i>Mary Christina Wood</i>	

This Article, Part II of the work, presents the Nature's Trust framework as it relates to the modern regime of statutory and administrative law. It draws upon the essential doctrinal purposes underlying the public trust doctrine to extend government's fiduciary duty of protection in a holistic manner to all natural assets, including air, forests, and soils. The Article maps out the trust obligation as an interstitial duty that finds expression through the statutory procedural edifice, and discusses the role of judicial enforcement. It considers the impact of a Nature's Trust approach on private property rights and concludes with a discussion of specific initiatives to infuse the public trust into governmental institutions.

Borders and the Environment	141
<i>Andrew P. Morriss & Roger E. Meiners</i>	

Environmental policy is usually national policy. This Article argues that focusing on the environment within a single country is problematic because it can produce high-marginal-cost, low-marginal-benefit domestic measures while low-marginal-cost, high-marginal-benefit measures are ignored. Applying the principles of marginal analysis from economics, this Article demonstrates that current domestic policy methodology produces less total environmental quality and treats residents of rich and poor countries differently in a morally unacceptable way.

Counting Every Drop: Measuring Surface and Ground Water in Washington and the West	193
<i>Stephanie Lindsay</i>	

Western states, notoriously plagued by water shortages, have traditionally resisted adopting laws requiring measurement of water diversions. Washington, however, statutorily adopted a measurement plan which has helped manage the state's water and alleviate water shortages. If other western states followed suit, the West could better manage its scarce water resources and would have an effective mechanism for coping with water shortages in a climate-changing world.

COMMENTS

Warm is the New Cold: Global Warming, Oil, UNCLOS Article 76, and How an Arctic Treaty Might Stop a New Cold War	215
<i>Brent Carpenter</i>	

Several countries have claimed sovereignty over the seabed of the Arctic Ocean under Article 76 of the United Nations Convention on the Law of the Sea (UNCLOS) and at least two of these claims could succeed. Sovereignty would allow those countries to develop the region's considerable oil and gas reserves, which would have adverse affects on the Arctic. This Comment argues that the existing nonbinding agreements are insufficient to protect the fragile region and that the Arctic deserves a hard law treaty similar to the treaty that protects Antarctica.

Lessons from the Montreal Protocol: Guidance for the Next International
Climate Change Agreement 253
Bryan A. Green

With its effective application of international environmental legal principles, the Montreal Protocol has been remarkably successful in addressing stratospheric ozone depletion. The Kyoto Protocol, on the other hand, utilized altered interpretations of those principles in its ineffective response to climate change. A return to the lessons from the Montreal Protocol can drive the formulation of a more effective international response to climate change.