ENVIRONMENTAL LAW
Lewis & Clark Law School

VOLUME 38 FALL 2008 NUMBER 4

ARTICLES

Taking Congress's Words Seriously: Towards a Sound Construction of NEPA's Long Overlooked Interpretation Mandate ..... ###
Joel A. Mintz

This Article analyzes subsection 102(1) of the National Environmental Policy Act (NEPA) which directs that "to the fullest extent possible, the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter . . . ." After a discussion of the plain language and the (pithy) legislative history of this often overlooked yet nonetheless significant Congressional mandate, the Article examines the substantive policies that NEPA sets forth as a guidepost for regulatory and statutory interpretation and implementation. It also focuses on whom the subsection applies to and the likely meaning of the phrase "to the fullest extent possible." Finally, drawing for illustration on a recently decided United States Supreme Court case, National Ass'n of Home Builders v. Defenders of Wildlife, the Article explores the rich potential of this portion of NEPA as a mechanism for illuminating and harmonizing the requirements of federal environmental statutes.

Rethinking Recycling ..... ###
Jeffrey M. Gaba

The United States Environmental Protection Agency (EPA) has created a complex and somewhat incoherent set of requirements that apply the Resource Conservation and Recovery Act (RCRA) hazardout waste regulatory program to recycled materials. This Article evaluates EPA's current regulatory requirements and suggests an alternative approach to regulating hazardous recycled materials under RCRA.

Property Pieces in Compensation Statutes: Law's Eulogy for Oregon's Measure 37 ..... ###
Keith H. Hirokawa

In this Article, Professor Hirokawa attributes the demise of Oregon's Measure 37 to tension between the rights granted in compensation statutes and the systemic needs of property. Drawing upon the doctrine of capture, he artgues that the Measure excused claimants from the duty to acquire a right in property uses. Looking to the correlative basis of property rights, he also argues that Measure 37 allowed claimants to piece apart property duties from property rights, effectively reallocating property expectations throughout the

property system. This Article concludes that the damage caused by Measure 37 to property may have been too difficult for the legal system to bear.

Wind Power, Wildlife, and the Migratory Bird Treaty Act: A Way Forward ..... ###
Meredith Blaydes Lilley and Jeremy Firestone

We begin this paper by discussing the rapid domestic growth of wind power and the implications for turbine-related avian and bat impacts, and then examine other anthropogenic sources of avian mortality. Next, we provide a broad overview of the U.S. wildlife laws most pertinent to the conservation of bats and migratory birds, before moving on to provide a detailed account of the legistlative history and judicial interpretation of liability for incidental take under the Migratory Bird Treaty Act (MBTA). We then broaden our view and consider the take of migratory birds by wind turbines in context—that is, we compare the effects of wind turbines on wildlife to the impacts caused by other means of electricity generation. Finally, we suggest a way forward.

Courts and the EPA Interpret NPDES General Permit Requirements for CAFOs ..... ###
Terence J. Centner

To abate and control the emission of water pollutants rom concentrated animal feeding operations (CAFOs), the United States Environmental Protection Agency adoped a federal CAFO rule. Several provisions of the Rule have been challenged, leaving to judicial directives for agencies to do more in overseeing point-source pollution from CAFOs. Prior to issuing permits under the National Pollutant Discharge Elimination System program, permitting authorities need to meaningfully review nutriet management plans and discharge rates.

A Train Without Tracks: Rethinking the Place of Law and Goals in Environmental and Natural Resources Law ..... ###
Annecoos Wiersema

This Article discusses and analyzes the response of environmental and natural resources lawyers to the work of ecosystem management and new governance writers and the institutional models that have arisen from that response. Exploring two case studies in detail, the Chesapeake Bay Program and the Ramsar Convention on Wetlands, the Article argues that the models are currently implemented are missing an important role for law that is necessary if we want to ensure more effective long-term environmental protection.

CHAPTERS

Overly Restrictive Administrative Records and the Frustration of Judicial Review ..... ###
James N. Saul

Recent agency efforts to unilaterally define the contents of administrative records through improper claims of privielge only serve to hamper judicial review. But an increasing number of courts have rejected these efforts by requiring agencies to complete administrative records from which key documents are omitted, and by requiring agencies to justify claims of privilege

and produce a privilege log of withheld documents.

Protecting Water Quality and Salmon in the Columbia Basin: The Case for State Certification of Federal Dams ..... ###
Jane G. Steadman

Although many runs of Pacific salmon in the Northwest have been listed under the Endangered Species Act for decades, their population levels are still dangerously low. One of the reasons for their imperiled status is water quality impairment caused by federal dams on the mainstream Columbia and Snake Rivers. This Comment explores the novel theory that federal dams are subject to section 401 certification under the Clean Water Act because the incidental take statements (ITSs) under which they operate amount to a "Federal license or permit" within the meaning of section 401. The author asserts section 401 certification of federal dam operations by Pacific Northwest states could result in alterations to ITSs' terms and conditions that would lead to improved water quality in the Columbia Basin, and thus increased salmon populations.

ERRATA..... ###

VOLUME 38 INDEX..... ###