

# ENVIRONMENTAL LAW

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## ESSAY

- Putting a Price on Whales to Save Them: What Do Morals Have  
to Do with It? ..... 1  
*Hope M. Babcock*

The author explores the moral implication of a proposal to create an international market in whale shares as an alternative to the dysfunctional International Whaling Commission. She finds the proposal amoral because whales, like humans, have an intrinsic right to life. Since this leaves whales vulnerable to whale hunting nations, she suggests that international environmental organizations might help a whale preservation norm emerge in whaling nations by using education and interventionist activities that focus on whaling's cruelty to ultimately encourage the citizens and governments of those nations to change their self-image as whale eating cultures.

## ARTICLES

- Frayed Seams in the "Patchwork Quilt" of American Federalism:  
An Empirical Analysis of Invasive Plant Species Regulation ..... 35  
*James S. Neal McCubbins, A. Bryan Endres, Lauren Quinn,  
& Jacob N. Barney*

Increased demand for biomass feedstocks to meet renewable energy mandates will require developing new and higher-yielding plant resources. Ideal biomass traits are: rapid growth and the ability to outcompete local vegetation, prolific seed production, adaptability to soil and climatic conditions, and resistance to pests and diseases. These traits typify invasive flora. Next-generation biofuel feedstocks could be more productive and profitable at the farm level, but may pose the risk of becoming invasive, which would cause economic and ecological harm. Our analysis reveals that most states fail to regulate invasive plant species (which are distinct from

“noxious weeds”) and are ill-prepared, from a regulatory perspective, to manage potential ecological pressure arising from the introduction of invasive plants. We offer three recommendations to improve state responses to invasive plant species: formalization of state invasive species councils within regulatory structures; improved pre-commercialization control through weed risk assessments; and negligence-based liability regimes to shift economic incentives to control the introduction and spread of invasive plant species.

Coming to Terms with Wilderness: The Wilderness Act and the Problem of Wildlife Restoration.....	83
<i>Sean Kammer</i>	

The Wilderness Act of 1964 calls for the preservation of certain areas in their natural, untrammeled condition. Even as wilderness preservation continues to be among the most popular of environmental causes, federal land management agencies have encountered various dilemmas in fulfilling their preservationist obligations. The Wilderness Act was designed to protect these areas from direct and immediate human disturbances, but serious questions are raised about the legal meaning of “wilderness” when the areas are deemed threatened by human-induced changes occurring on a much wider, or even global, scale. Some have advocated for increased interventions into the natural ecologies of wilderness areas, including an emphasis on restoring wildlife populations, in order to preempt or counteract such changes. This Article contends, however, that whatever “wilderness” is, it cannot be something that depends upon the active manipulation of humans for its continued existence. While it is commendable to strive to restore ecosystems that have been unduly degraded due to human behaviors, the Wilderness Act recognized the value of keeping some areas beyond humans’ manipulative reach altogether—even if it is well-meaning.

Challenges in China’s Natural Resources Conservation and Biodiversity Legislation.....	125
<i>Wenxuan Yu &amp; Jason J. Czarnecki</i>	

Despite China’s legislative attempts to conserve its natural resources, and in turn protect biodiversity, Chinese law in many aspects remains ineffective in pursuit of these goals due to struggles with implementation, enforcement, and insufficient public participation, as well as legislative prioritization of economic values over ecological ones. This Article provides an overview of biodiversity and conservation legislation in China, and suggests that China can improve this legislation by increasing the public’s role in conservation efforts, increasing liability and enforcement mechanisms, and improving administrative coordination.

SEED: Sustainable Environmental and Economic Development —A Call to Incorporate Verifiable Sustainability Ratings into NEPA Reviews.....	145
<i>Kyle Carlson</i>	

Policymakers must confront the twin challenges of maintaining economic growth while protecting environmental quality. To that end, this Article’s “SEED Proposal” suggests a framework for incorporating sustainability ratings into National Environmental Policy Act (NEPA) environmental reviews of infrastructure projects. The SEED Proposal can be implemented administratively and seeks to foster a more cooperative relationship between private project developers, the public, and agency decision makers. The United States Green Building Council’s LEED certification for green buildings serves as a proof of concept for many of the cooperative, voluntary measures within the SEED Proposal. At its heart is a sustainability ratings system with a third party verification process designed by the Institute for Sustainable Infrastructure and the Harvard University Graduate School of Design: the Envision Sustainable Infrastructure Rating System.

Monumental Seascape Modification Under the Antiquities Act.....	173
<i>Peter H. Morris</i>	

This Article is the first to explore an alternate means to modify and protect existing national marine sanctuaries when Congress fails to do so. The 1972 National Marine Sanctuaries Act is the only federal legislation that provides for the designation of large-scale ocean areas for long-term protection and management. For nearly thirty years, it was customary for Congress to reauthorize the Act to meet the increasingly complex regulatory and stakeholder needs of sanctuary management—until now. Congress has not reauthorized the Act since 2000, and a pall of uncertainty has been cast over the National Marine Sanctuaries Program. The most pressing need for national marine sanctuaries is the development of a resourceful way to achieve conservation objectives despite this congressional inaction. The Antiquities Act, a century-old statute providing for the declaration of national monuments (which has been applied almost exclusively to dry land) may provide a useful tool to help maintain existing national marine sanctuaries until Congress is able to reauthorize the National Marine Sanctuaries Act.