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Issue 1

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EDITOR'S PROSPECTIVE

We begin this edition with remarks from The University of Chicago Law School professor David Weisbach in *Designing Subsidies for Low-Carbon Energy*, the keynote address at our second annual symposium entitled, *Promoting Sustainable Energy Through Tax Policy*. In the paper Mr. Weisbach investigates whether a subsidy can be neutral across the choice of technologies by discussing whether clean energy can be subsidized without simultaneously picking between types of clean energy or choosing the overall mix of energy technologies. In concluding a technology-neutral subsidy cannot be designed Mr. Weisbach analyzes the nature of the climate change problem to highlight the importance of an efficient carbon pricing system. Mr. Weisbach explains a tax on emissions creates incentives to reduce emission by changing prices and with a carbon tax, energy prices would increase and fossil fuel energy would become relatively more expensive in comparison to renewable energy.

According to Mr. Weisbach, a carbon tax has the potential to raise substantial amounts of money in times of great fiscal need. Consequently, Mr. Weisbach states that since a carbon tax is designed to stop climate change and would raise the price of gasoline, without support from the United States House of Representatives a carbon tax will never be implemented. In regards to a subsidy Mr. Weisbach explains even if the best possible subsidy for clean energy can be designed it would still be inferior to a carbon tax. Mr. Weisbach ultimately concludes a carbon tax or an equivalent cap and trade system is superior to subsidies for clean energy, but unfortunately it seems clear that a carbon tax is unlikely.

University of Minnesota Law School professor Alexandra Klass authors our second article, *Tax Benefits, Property Rights, and Mandates: Considering the Future of Government Support for Renewable Energy*. Ms. Klass begins her article by explaining how support for the development of renewable energy is desirable in addition to how market conditions and past government support for fossil fuel development make it unlikely that renewables will amount to more than just a small percentage of the country's energy use without some form of continued government support. By focusing primarily on tax benefits, as opposed to direct government subsidies and research and development grants, Ms.

Klass compares and contrasts the varying types and levels of support for fossil fuel development, renewable fuels, and renewable electricity sources.

In Part II of her article Ms. Klass discusses property rights incentives, and discusses the long-time property rights benefits states have conveyed to oil, gas, and other natural resource developers as well as to electric utilities to encourage the development and use of energy resources. This part of her article suggest policymakers should use caution in conveying new property rights incentives to renewable energy developers to avoid upsetting existing certainty in property law and also to avoid a situation where the burdens of such changes fall too heavily on a small and discrete number of landowners. In Part III of her article Ms. Klass considers mandates in the energy industry and explores how the federal Renewable Fuels Standard has provided significant benefits to the biofuels industry while at the same time it has often worked at cross-purposes with environmental protection and climate change goals, and has created instability in corn and related food markets.

In the final part of her article, Ms. Klass considers the important role certainty and continuity play in efforts to support renewable energy development by looking at the various tools lawmakers have used to support energy development and considers which tools provide more and less optimal levels of certainty with reference to past successes and failures in other energy sectors. Ms. Klass concludes that the continuity and relative certainty associated with certain types of tax benefits and mandates may be the best means of providing long-term support to renewable energy markets and that property rights incentives should be used more sparingly to provide benefits to particular energy sectors or markets, but may be best used to create the nationwide, physical networks such as electric transmission grid expansions necessary for those markets to exist.

University of Oregon School of Law professor Roberta Mann authors our final article, *Lighting in a Bottle: Using Tax Policy to Solve Renewable Energy's Storage Challenges*. In this article Ms. Mann describes the energy storage problem and its link to government subsidies. Ms. Mann explains that since fossil energy sources do not require the same type of storage capacity this is primarily a renewable energy issue. Next, Ms. Mann reviews the current state of energy storage technology

development and prospects for innovation, by focusing on energy storage for electrical generation. Ms. Mann explains that while there has been some sporadic market interest in battery and other forms of energy storage technologies, the market has not provided adequate stimulus for development.

Ms. Mann then assesses current governmental support for energy storage research and development. Finally, Ms. Mann makes recommendations for encouraging more rapid development and deployment of improved energy storage technology through environmental taxation. Ms. Mann concludes tax incentives for energy storage may help facilitate a transition to a clean energy economy and in designing tax incentives the government should take care to design them in the most effective way.

In addition to our professor articles, we have six student-written casenotes. Amie Coleman authors our first student note, *Unwise Beats Uninformed: The Rock, Paper, Scissors of NEPA Challenges*. In her casenote, Ms. Coleman explores the impact of *Webster v. United States Department of Agriculture*, a case in which the United States Court of Appeals for the Fourth Circuit affirmed the decision of the United States District Court for the Northern District of West Virginia after examining the National Environmental Policy Act. Ms. Coleman explains the National Environmental Policy Act exists to encourage agencies to make informed decision about their actions effecting the environment and it requires agencies to create an Environmental Impact Statement whenever the agency is dealing with legislative recommendations or major federal actions that have significant environmental impacts.

Ms. Coleman states under certain circumstances agencies will be required to prepare a Supplemental Environmental Impact Statement prior to issuing a final rule of decision and proceeding on with their proposed action. Ms. Coleman argues that even in the event that a proposed action has been approved and a rule of decision issued, if new material information becomes available it would be nonsensical to allow the agency to proceed without addressing this information with a Supplemental Environmental Impact Statement. Ms. Coleman concludes that to not require otherwise would be a failure to fulfill the public participation portion of the National Environmental Policy Act's purpose.

Paul Conklin III authors our second student note, *Murky Waters: The Supreme Court's Decision on Navigability and its Implications on Judicial Power*. Mr. Conklin examines *PPL Montana, LLC v. Montana*, a United States Supreme Court case that reversed and remanded a Montana state supreme court decision. In that case, the Court was tasked with determining how navigability applies to riverbed title. Mr. Conklin explains that before this case the state of Montana had never sought compensation for use of the riverbeds and during review the Court cited many materials that were not included in the record or any of the submitted briefs.

Mr. Conklin argues this decision is controversial because of the process the Court used to arrive at its holding. Mr. Conklin states the Court seems to have overstepped its judicial notice rights by using evidence not offered to it as a means to reach the holding it desired and this decision has set a dangerous precedent by actually making a determination of the navigability of the Great Falls stretch. Mr. Conklin concludes that while the holding is correct, the fact that the Court made the holding itself takes away any discretion of the Montana state supreme court to make its own holding and can lead to an improper broadening of the power of the United States Supreme Court.

Salama Gallimore authors our third student note, *A Fine Romance: The Indulgent Relationship between Federal Courts and Federal Agencies and the Broken NEPA Decision-Making Process*. Ms. Gallimore analyzes *Prairie Band Pottawatomie Nation v. Federal Highway Administration*, a United States Court of Appeals for the Tenth Circuit case in which the court bowed to the expertise and analysis of the Federal Highway Administration and sanctioned the building of a South Lawrence, Kansas roadway despite electrified public objections. Ms. Gallimore explains this case illuminates a system in which courts give deference to an agency's finding of fact and interpretation of their own regulations.

Ms. Gallimore states this case demonstrates that even if an agency does not follow the procedural scheme, an agency's actions will only be overturned due to extreme abuses of power. Ms. Gallimore concludes that together, these pieces of the system wholly defy the spirit of the National Environmental Policy Act that was created to involve the public decision, which will affect their environment and this case reduces the act's effect

so that it favors federal agencies and marginalizes public comment and public participation.

Ryan Harris authors our fourth student note, *Deepwater Exploration in the Gulf: The Eleventh Circuit Balances Energy Independence and Environmental Responsibility post-Deepwater*. In his casenote Mr. Harris examines *Defenders of Wildlife v. Bureau of Ocean Energy Management*, a case from the United States Court of Appeals for the Eleventh Circuit in which the major issue is whether the Bureau of Ocean Energy Management violated either the National Environmental Policy Act or the Endangered Species Act in approving a Shell Exploration Plan after a finding of no significant impact. In holding the Bureau of Ocean Energy Management's approval of the Shell Exploration Plan was not an abuse of discretion in violation of the National Environmental Policy Act or the Endangered Species Act, the Eleventh Circuit states the Bureau of Ocean Energy Management's decision reflects the agency's balance of environmental concerns with the expeditious and orderly exploration of resources under the Outer Continental Shelf Land Act.

Mr. Harris explains the Eleventh Circuit's opinion is a troubling sign for environmental groups seeking meaningful judicial review of Gulf Outer Continental Shelf drilling operations in increasingly deeper waters, and at an increased risk of environmental catastrophe. Mr. Harris concludes the Eleventh Circuit's decision in this case implicates two important interests. First, the government's interest in meeting national energy needs and achieving energy independence through the expeditious leasing, exploration, development and production of presently untapped oil and gas resources on the Outer Continental Shelf in the Gulf of Mexico. Second an interest in ensuring the potentially catastrophic environmental impacts of such exploration and development are given due consideration before agency action is taken.

Arsenio Mims authors our fifth student note, *Long Live Volumetric Apportionment: Will courts follow Burlington Northern? The mystery continues!* Mr. Mims examines *United States v. NCR Corporation*, a case from the United States Court of Appeals for the Seventh Circuit that was the court's first Comprehensive Environmental Response, Compensation, and Liability Act of 1980 apportionment case since the United States Supreme Court's decision in *Burlington Northern*. The instant case arises

from a 2007 EPA issued Unilateral Administrative Order directing NCR and Appleton Papers Incorporated to complete the removal of 660,000 cubic yards of sediment from the Lower Fox River in Wisconsin. Mr. Mims explains after the EPA issued this order NCR participated in remediation efforts at a cost of approximately \$50 million, but throughout this time NCR maintained that it should not be responsible for one hundred percent of the remediation work and tried to recoup some of the cleanup costs from the other potentially responsible parties. The Seventh Circuit held apportionment in this case to be improper by concluding the discharge of polychlorinated biphenyls by more than one entity is sufficient in itself to bring about conditions hazardous to human health under EPA guidelines, and a delay in the Fox River cleanup would inflict irreparable harm in the form of permitting pollution to continue unabated.

Mr. Mims explains the court's decision was guided by commentary to the Restatement (Second) of Torts § 433A(2) that specifically focuses on indivisible harm. Mr. Mims argues the court made its decision without ever addressing the Restatement's example of divisible harm which shows that apportionment is not just theoretically possible, but appropriate where pollution from two or more sources is discharged into a waterway. Mr. Mims explains the difference between the divisible harm example and the illustrations used by the Seventh Circuit is that divisible harms are cumulative and scalable while the examples in the illustrations are inherently indivisible because either party's action is independently sufficient to cause the entirety of the harm. Mr. Mims concludes the holding of the Seventh Circuit substantially departs from the precedent set forth by the United States Supreme Court in *Burlington Northern* by limiting the instances in which volumetric contributions will be allowed.

John Shikles authors our final student note, *Baby Steps, Not Leaps, Toward Relief: Anatomizing Sackett v. EPA*. In his note Mr. Shikles analyzes *Sackett v. E.P.A.*, a United States Supreme Court case that allows pre-enforcement judicial review of administrative compliance orders for the first time. This case began when the Sacketts filled in part of their lot with rock and dirt in preparation for building a house in which they subsequently received a letter of compliance from the EPA directing them to immediately restore the property and to produce documents relating to the condition of the site because the property contained federally protected wetlands. The Supreme Court granted certiorari to decide whether the

Clean Water Act precludes pre-enforcement judicial review and whether such preclusion violates the due process clause of the Fifth Amendment.

The Supreme Court held an EPA compliance order is a final agency decision, the Clean Water Act does not preclude judicial review, and a compliance order is subject to judicial review under the Administrative Procedure Act. Mr. Shikles explains the Supreme Court's ruling constitutes a major change in federal statutory and case law surrounding EPA-issued compliance orders. Mr. Shikles argues that although the Court's holding is a major change in statutory federal law, the opinion on its face offers little protection to those harmed by frivolously issued compliance orders. Mr. Shikles concludes this opinion takes only baby steps towards relief for those improperly swept under the jurisdiction of the Clean Water Act and recipients of Clean Water Act compliance orders who feel the EPA has wronged them may still have substantially the same remedies they had before *Sackett*.

We offer special thanks and recognition to the 2012–2013 Editorial Board for their hard work on Volume 20 of the Journal. This journal would not be possible without diligence, dedication, and passion for its continued success. Furthermore, we thank the 2013-2014 Editorial Board who contributed much to the editing of this issue. During this year, the Journal of Environmental and Sustainability Law will host its third annual environmental law symposium.

Finally, a huge thank you goes to our advisor, Professor Troy Rule, and our new advisor, Professor Melissa Berry, for their immeasurable help and guidance as we put forth another edition.

TREVER L. NEUROTH
Editor-In-Chief, 2012–2013

ARSENIO L. MIMS
Editor-In-Chief, 2013-2014