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SUSTAINABILITY LAW**

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EDITOR'S PERSPECTIVE

The Journal of Environmental & Sustainability Law is pleased to continue the dialogue started in our inaugural edition. In this issue, we have two well-known individuals in the field of sustainability law, both of whom were speakers in our symposium entitled, Environmental Justice Issues in Sustainable Development.

First, we have an article authored by Columbia Law School professor, Michael Gerrard, titled *What Does Environmental Justice Mean in an Era of Global Climate Change?* His thoughtful, well-written article explores the convergence of climate change and environmental justice issues; how the two interact in complex ways; and the intricate ways in which to deal with both of them.

After summarizing a statutory background that is deficient in regards to recent environmental statutes, Gerrard explores three issues arising from the potential “collisions between efforts to fight climate change and the effort to achieve greater environmental justice.” He examines these issues in turn: “1) environmental justice implications of mitigation, 2) environmental justice implications of adaptation, and 3) a number of difficult choices ahead, some fairly painless, some quite painful.”

Gerrard identifies and explains these relevant issues, but does not make an attempt to solve them, as that is an enormous task, one of which many scholars are working to resolve.

Our second article comes from University of West Virginia School of Law professor, Patrick McGinley. McGinley's piece, entitled, *Collateral Damage: Turning A Blind eye to Environmental and Social Injustice in The Coalfields*, examines the decrease in coal's market share in United States' electric generation. Along with this, McGinley explores the claims of coal lobbyists and politicians that federal government regulators are waging a “war on coal.” His piece acknowledges both sides of the war on

coal debate and “seeks to penetrate the exaggerations and misstatements of the competing interests and to separate fact from fiction in the evolving debate about the future of coal.”

McGinley’s discussion includes an analysis of the historic impact of coal mining on coalfield communities and the extent to which legislation intended to protect the health and safety of coal miners and the environment has succeeded. He ultimately finds that those on both sides of the “war on coal” have failed to approach the issue with level heads and common sense; “there is often emotional and vociferous public discourse over coal.” McGinley’s article seeks to address and provide levelheaded solutions for the hard choices ahead as coal loses its grip as the foremost fuel for generating electricity in the United States.

In addition to our professor articles, we have four student-written case notes. Our student notes begin with *The Beans of Wrath: Genetic Patent Holders Reap Further Protection* authored by Burke Bindbeutel. In his case note, Bindbeutel explores the impact of *Monsanto Co. v. Bowman*, a case in which the Federal Circuit Court of Appeals examines the legal parameters of agreements between soybean farmers and Monsanto, the producer of genetically engineered soybean seeds. The court, yet again expands the protections for patents of genetically engineered, herbicide-resistant seeds.

Bindbeutel argues “intellectual property holders deserve protection for their investments, but only to a point where the public interest is not harmed.” He contends that farmers should be allowed to put forth arguments claiming Monsanto has created an illegal monopoly by tying the genetically engineered seeds and herbicide. Without some protection for the farmers “agricultural competition becomes more one-sided with each harvest.”

Our next student note, by Trever Neuroth, is titled, *Possession is Not Nine-Tenths of the Law: An Exploration of the Ninth Circuit’s Decision in San Pedro Boatworks*. Neuroth examines a case out of the Ninth Circuit Court of Appeals, *City of Los Angeles v. San Pedro Boat Works*. In that

case, the Ninth Circuit found a permit holder was not liable as an owner under CERCLA. The court's reasoning was based on state case law holding that a permit is a mere possessory interest and can never rise to ownership. Neuroth argues the court could have decided that the permit in this case did not rise to the level of ownership under CERCLA without excluding all permits from possible liability.

Neuroth contends the court could have decided the case on three separate, alternative theories: using the Commander Oil test, distinguishing between a lease and a revocable permit, or by creating its own test to determine ownership liability, such as using generally accepted accounting principles. He concludes that any three of these alternatives would have better solved this case all while better serving the goals of CERCLA, but the most appropriate alternative would be to recognize the legally significant differences between a lease and a revocable permit.

Ryan Niehaus is the author of our next note, entitled, Sustaining a Jurisdictional Quagmire(?): Analysis and Assessment of Clean Water Act Jurisdiction in the Third Circuit. Niehaus analyzes the case of *United States v. Donovan*, a case in which the Third Circuit considered the appropriate standard for determining whether the U.S. Army Corps of Engineers has jurisdiction over wetland areas under the Clean Water Act.

Donovan is significant in that it is the first Third Circuit opinion to address that question in the wake of *Rapanos v. United States*, a case where a plurality Supreme Court opinion established two competing legal standards.

Niehaus finds that *Donovan* has importance in analyzing both "the tension between building development and environmental protection, which gives the case particular significance vis-à-vis issues of sustainability" and in "implications for the interpretation of plurality Supreme Court opinions." He argues the Third Circuit's decision in *Donovan* is lacking as it "does little if anything to reduce the barriers to sustainable land use created by broad Corps jurisdiction under the CWA."

Our final student note is, *Wind Power and Patent Law: How the Enforcement of Wind Technology Patents May Lead to Restricted Implementation in the US, and Necessary Solutions*, and was authored by Christopher Strobel. Strobel examines the effects of patents on the advancement of wind technology through the lens of a dispute between two of the largest wind technology producers, Mitsubishi and General Electric. He contends “patent laws hinder wind power implementation in the U.S., despite providing incentives for investment in technology and allowing the innovators to recoup research and development costs.”

Strobel examines how different industries use and respond to patents in different ways, and how these different responses affect enforcement and the pace of technology innovation. According to Strobel, there are two competing trends: “the pharmaceutical industry tends to favor stronger patent laws to help offset the high cost of developing and testing drugs, while the software industry favors weaker patent laws due to the fast paced nature of technology growth and the culture of reuse and improvement.” Strobel argues that the wind technology industry has favored an approach similar to that of the pharmaceutical industry, which has slowed the pace of innovation in wind technologies. In order to expedite implementation of clean energy production from wind power, he argues standard-setting organizations, patent pools, and compulsory licenses are alternatives that do not undermine existing patent laws, and will allow for a more unrestricted implementation of wind power.

You will find there are no environmental updates in the back of this issue. The Journal has decided to post those updates on our webpage. If you would like to read these updates, please go to <http://law.missouri.edu/jesl>.

We offer a special thanks and recognition to the 2012-2013 Editorial Board and associates for their hard work on this issue. Each edition requires diligence, dedication, and passion to be successful and all members have had an abundance of these attributes throughout the year.

Finally, a huge amount of gratitude goes to our advisor, Professor Troy Rule, for his incalculable assistance and limitless encouragement for the journal and our new direction.

TREVER L. NEUROTH
Editor-in-Chief

