

ENVIRONMENTAL LAW

Lewis & Clark Law School

VOLUME 44

SPRING 2014

NUMBER 1

ARTICLES

- Turning the World Upside Down: How Frames of Reference Shape
Environmental Law 1
James Salzman and Martin Doyle

Models and representations help us understand complex phenomena. The Mercator map presents a familiar, two-dimensional view of our three-dimensional world, for example, but it can distort as much as it clarifies. In the natural sciences, too, there are very different ways of framing reality. The classic method developed by Leonard Euler measures a system from a fixed point. A competing method developed by Joseph Louis Lagrange measures from the perspective of a particle moving within the system. These Eulerian and Lagrangian methods of measurement dominate the physical sciences and provide different, though equally valid, measures of how the system operates. This Article explores how our frame of reference shapes our understanding and application of environmental law. Using examples from the Clean Air Act, Clean Water Act, and other statutes, we argue that environmental law is just as sensitive to Eulerian and Lagrangian frames of reference as fluid mechanics or cartography, and that this predetermines how we conceive of environmental problems and solutions far more than we realize. Understanding the implicit but fundamental importance of frames of reference can help explain emerging challenges such as water pollution from fracking, air pollution hot spots, and epigenetic sensitivities to pollution.

- Presidential Authority over EPA Rulemaking Under the Clean Air
Act 31
Christopher D. Ahlers

Recent efforts to revise the national ambient air quality standards for ozone have revived the longstanding tension between the EPA Administrator and the President with respect to rulemaking

under the Clean Air Act. This Article explores the differing views regarding the autonomy of the EPA from the perspectives of the legislative, executive, and judicial branches of government. The Article concludes with an analysis of how presidential interference with EPA rulemaking may make agency decisions more vulnerable to judicial review.

Environmental Democracy and Forest Carbon (REDD+)	71
<i>David Takacs</i>	

Public funders and private investors are pouring billions of dollars into Reducing Emissions from Deforestation and forest Degradation (REDD+) in the developing world. In REDD+, investors pay people to preserve carbon in trees, and then sell credits based on the stored carbon to those who wish to offset their own greenhouse gas emissions. REDD+ promises a dynamic synergism that mitigates climate change, conserves biodiversity, and alleviates poverty. When done poorly, however, REDD+ may dispossess already impoverished people from their sources of sustenance and may do little to mitigate climate change or conserve biodiversity.

In this project, I review the current international legal status of Environmental Democracy, i.e., the right to participate in environmental decision-making; the right to acquire information on environmental decisions; the right to redress and remedy when environmental rights are violated; and the right to Free Prior and Informed Consent when decisions are made that will affect vital resources and lands. I explain and expand current thinking of how the aspirational language of the principles ought to be implemented, and connect the principles' relevance to REDD+, currently the most important laboratory for expanding Environmental Democracy in international conservation and development work. To illustrate how Environmental Democracy is or is not working in REDD+, I explore examples from Vietnam and Cambodia, where I conducted fieldwork in December 2012 and suggest how REDD+ project developers can fulfill the legal exigencies of Environmental Democracy, both as a matter of equity, and as a pragmatic approach to maximizing benefits for human and nonhuman communities.

Planning for Fracking on the Barnett Shale: Soil and Water Contamination Concerns, and the Role of Local Government	135
<i>Rachael Rawlins</i>	

In the last decade, hydraulic fracturing for natural gas has exploded on the Barnett Shale in Texas, now home to the most intensive hydraulic fracking and gas production activities ever undertaken in a densely urbanized area. Texas has adopted chemical disclosure requirements, but they are very limited, and unless trade secret claims are challenged, they are largely optional. After evaluating the federal and state regulatory framework, this Article reviews local regulatory efforts and

concludes by discussing reasonable regulatory approaches to further strengthen and address soil and water contamination concerns.

<i>AES v. Steadfast</i> and the Concept of Foreseeability in Climate Change Litigation.....	201
<i>David P. Vincent</i>	

“There is no longer any credible scientific debate about the basic facts: our world continues to warm, with the last decade the hottest in modern records, and the deep ocean warming faster than the earth’s atmosphere. Sea level is rising. Arctic Sea ice is melting years faster than projected. . . . The only uncertainty about our warming world is how bad the changes will get, and how soon.”

Increasing Mitigation Ambition: Establishing “Mitigation Reference Points” to Trigger Mandatory Greenhouse Gas Reductions	225
<i>Chris Wold & Amelia Schlusser</i>	

Parties to the United Nations Framework Convention on Climate Change (UNFCCC) pledged in the Cancun Agreements to reduce their greenhouse gas (GHG) emissions by certain percentages or take other action to limit their GHG emissions. However, at the 2011 climate change negotiations in Durban, they acknowledged the “significant gap” between their pledges and the goal of limiting global average temperature below 2°C above pre-industrial levels—the stated goal of the climate regime. The United Nations Environment Programme concluded that, in 2020, the pledges included in the Cancun Agreements will be eight to thirteen GtCO₂e short of the 2°C goal. To bridge this gap, parties must raise their level of ambition and make additional mitigation commitments to avoid the worst impacts of climate change. Yet, they have made no progress to increase their mitigation ambition before 2020 when the Cancun pledges expire or after 2020 as part of any new agreement under the Durban Platform. To increase ambition before 2020, parties should adopt “mitigation reference points” that trigger automatic, predetermined mitigation action by parties. Modeled on the precautionary reference points found in fisheries regimes, these reference points could include, for example, atmospheric GHG concentrations or global average temperatures reaching a specific target. When a reference point is reached or exceeded, automatic action, such as increasing mitigation commitments by some specified amount, would be required. The predetermined actions triggered by mitigation reference points could take a variety of forms. They could require prorated or sector-specific emissions reductions. They could require all parties to undertake the same action or be tailored according to parties’ past and present emission rates and mitigation capacities. Regardless, these mitigation actions must be predetermined, mandatory, and result in a measurable decrease in GHG emissions or a measurable increase in sequestration capacity.

NOTE

The Birth, Death, and Afterlife of the Wild Lands Policy: the Evolution of the Bureau of Land Management's Authority to Protect Wilderness Values

249

Olivia Brumfield

Since the enactment of the Federal Land Policy and Management Act (FLPMA) in 1976, the Bureau of Land Management (BLM) has had a troubled relationship with wild lands, the nation's last remaining places with wilderness characteristics. Although for twenty-five years BLM recognized wilderness values as resources it must balance and protect consistent with the agency's multiple use mandate, BLM largely disclaimed that interpretation in 2003, potentially imperiling future protection of wild lands that were not designated as wilderness or wilderness study areas. Since then, the agency has made incremental—but potentially powerful—steps toward reclaiming a view of its authority that could afford more protection for yet-undesignated wild lands. Although BLM's current policy does not provide as strong of "default" protection for wild lands as it did before 2003, it does direct the agency to survey and consider wild lands in all land plans and project approvals.

This Note traces the evolution of BLM's interpretation of its duty and authority under FLPMA to manage lands with wilderness characteristics. The Note concludes that, although BLM's view of its responsibility toward yet-undesignated wilderness has narrowed, the recent controversial Wild Lands Policy and ensuing agency guidance re-acknowledge wilderness values as a legitimate FLPMA resource to be protected. However, whether and how the agency will use its reclaimed authority to meaningfully protect the nation's remaining vulnerable federal public wild lands remains uncertain.