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John Dernbach

A Widener University law professor made public a new research report intended to strengthen recycling and waste reduction in Pennsylvania. The report includes recommendations for ways an expansion of the practice can help create jobs and spur the Commonwealth’s economy – ideas that provide a platform for a serious conversation about the future of Pennsylvania’s recycling program.

The report, “Next Generation Recycling and Waste Reduction: Building on the Success of Pennsylvania’s 1988 Legislation” is the work of Distinguished Professor John C. Dernbach director of the school’s Environmental Law Center, and five students who took his spring 2010 Harrisburg-campus seminar on climate change law.

Dernbach and his students did a comprehensive study of the Commonwealth’s recycling law in observance of its 20th anniversary. The result is a 46-page document that is part report card, part blueprint for the future of Pennsylvania recycling. It contains an ambitious set of recommendations to expand recycling and waste reduction in ways that would benefit Pennsylvania environmentally and economically.

Their findings indicate that Pennsylvania’s recycling program is “rudderless and drifting.” It is clear from the report that the amount of materials recycled under the law is much greater now than in 1988, when the legislation was first signed. However, in the last decade, the Commonwealth has not reported its recycling data in a way that Dernbach, his students, or the general public can draw conclusions on whether recycling has increased or decreased. The report goes on to state that Pennsylvania’s claim to national leadership “is fading as other states continue to improve and strengthen their programs.”

The report has been delivered to key lawmakers, including Gov. Tom Corbett, Secretary of the Department of Environmental Protection Michael Krancer and members of House and Senate Environmental Resources and Energy committees. Corbett served as general counsel to Waste Management Inc. in the 1990s.

The students in Dernbach’s seminar were in elementary school when the mandatory provisions of Pennsylvania’s recycling law took effect. Recycling has been a way of life for them. The students each researched a different facet of the law, its impact and ways Pennsylvania could improve or grow. Dernbach supervised the research and molded their findings into the report he spent the fall 2010 semester writing and the first part of this year polishing.

“Recycling creates jobs and economic development and it does more of that than landfills do,” Dernbach said. “Widener’s Environmental Law Center would be happy to participate in a conversation with Commonwealth officials and others about what we should do next to improve recycling and waste reduction.”



Professor May and Students Attend Oral Argument and Meet Litigants in U.S. Supreme Court Case, *AEP v. Connecticut*

On April 19, 2011 Professor May and a group of students headed off to Washington, DC to witness oral argument in an important case concerning the environment and the U.S. Constitution. Regardless, *AEP* could be one of the most important decisions ever issued in the field of environmental law. *AEP* stands astride several junctures: public and private law; environmental, constitutional, and international law; injunctive and legal relief; state and federal action; and judicially, legislatively, and administratively fashioned responses. With its cornucopian issues extraordinaire—separation of powers, federalism, standing, displacement, political question, tort, and prudence—it has something for nearly all legal tastes, temperaments, and talent.

In *American Electric Power Co. v. Connecticut* ("*AEP*"), several states, the city of New York, and a land trust organization sued the nation's five largest fossil-fuel-burning electric utility companies to reduce their emissions of greenhouse gases, arguing that these emissions constitute a public nuisance under federal common law. The plaintiffs sued under federal common and state public nuisance law, asking the court for injunctive relief to "cap" defendants' emissions, develop a schedule for reducing defendants' emissions on a percentage basis over time, assess and measure available alternative energy resources, and reconcile its relief with U.S. foreign and domestic policy. The utility defendants, on the other hand, contended that federal courts should exercise judicial restraint in "resolving questions of high policy, which are for the political branches." The Environmental Law Center sponsored lunch after oral argument. Professor May – who is counsel of record and co-author for the *Law Professors' Amicus Brief on Behalf of Respondents* in the case – and some students also attended a follow-up event at the Georgetown University Law Center, at which they discussed the case with Barbara Underwood, the Attorney General for the State of New York, who argued the case for Respondents (see photo).

In December 2010, the U.S. Supreme Court granted Ameri-

can Electric Power and the other utility defendants' petition for certiorari on the multiple issues of whether (1) the states and other plaintiffs lack standing, (2) federal law displaces plaintiffs' claims, and (3) the case raises nonjusticiable political questions.

The Obama administration filed a brief on behalf of defendant Tennessee Valley Authority—on the same side as the utility defendants—arguing that plaintiffs lack prudential standing, and that federal law displaces the need for common law causes of action for climate change.

Professor May said "Oral oral argument was a fascinating, crowded event." At oral argument, none of the justices seriously questioned that climate change is occurring, that human activity is playing a role in that dynamic, that the Clean Air Act bestows upon EPA the authority to regulate greenhouse gases as a "pollutant" under *Massachusetts v. EPA*, that at least the states possess both constitutional and prudential standing, or that the political question doctrine consigns climate cases to the political branches.

May noted, "a strong and perhaps unanimous majority of the Court seemed to accept the notion that EPA's discretionary authority under the Clean Air Act to regulate greenhouse gas emissions displaces federal common law."

In particular, the more "liberal" wing of the court—Justices Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan, and Sonia Sotomayor—upon whom Respondents were counting to support their common law claims—expressed skepticism during oral arguments about the propriety of using federal common law in this case. For example, Justice Breyer said, "if the courts can set emission standards, why can't they also set carbon taxes, which are likely to be more effective? What's the end of it?" Justice Kagan said, "this sounds like the paradigmatic thing that administrative agencies do rather than courts." Even Justice Ginsburg seemed dubious, remarking to respondents' attorney: "Congress told EPA to set the standards; you're setting up a district judge as a kind of 'super' EPA."

Summing up the Court's sentiment, Justice Kagan, the Court's newest member and the former solicitor general, observed: "Much of your argument depends on this notion that this suit is really like any other pollution suit. But all of those other pollution suits that you have been talking about are much more localized affairs, one factory emitting discharge into one stream. They don't involve these kinds of national, international, policy issues of the kind that this case does. I mean there is a huge gap, a chasm, between the precedents you have and this case, isn't there?"

So the tea leaves suggest that a strong and perhaps unanimous majority of the court will hold that the Clean Air Act displaces the federal common law of public nuisance when it comes to climate change.

With its cornucopian issues extraordinaire—separation of powers, federalism, standing, displacement, political question, tort, and prudence—*AEP* is sure to rock the foundation of climate law and policy for many years, perhaps generations, to come.

Then again, it's hard to make assumptions based upon 80 minutes of argument by three sides before eight people. We'll find out soon enough.

Widener Students, Alumnus Revive Publication for Environmental and Energy Lawyers



Pennsylvania attorneys who specialize in environmental and energy law have a new way to stay up to date on their area of practice, thanks to the work of an ambitious Widener Law alumnus and three students who are supported by the school's Env Law Center and the Pennsylvania Bar Association Environmental & Energy Law Section.

The group launched the online [Environmental & Energy Law Section Newsletter](#) in early April. The newsletter is intended to provide section members with relevant information about their practice area, help them be better attorneys and give them a platform to communicate with other members on relevant topics. It is distributed to roughly 500 attorneys. The newsletter is the work of 2009 Harrisburg campus graduate Brandon J. Pierce, who serves as editor in chief, and current Harrisburg campus students Jon Johnson, Matt McDonnell and Mark Wieder, who serve as staff members.

The project began after Pierce, who is the judicial law clerk to Common Pleas Court Judge John Thompson Jr. in York County, contacted Distinguished Professor John C. Dernbach, director of the Environmental Law Center, and asked about environmental-law-related projects he could assist. He learned the newsletter had gone defunct over the last decade, and was invited to help revive it.

The newsletter is available only online, in a format that is both cost- and environmentally friendly. It also allows the staff to include links to outside relevant content that would be difficult to include on paper. The first issue went live April 4 and was highlighted two days later at an annual meeting for environmental attorneys in Pennsylvania.

"We're definitely very thankful to both the Pennsylvania Bar Association's Environmental & Energy Law Section and Widener's Environmental Law Center for the opportunity to put this together," Pierce said. "We hope to continue putting out a high-quality publication."

Dernbach also said Widener's Environmental Law Center is pleased to provide institutional support to the effort. Johnson, McDonnell and Wieder have all expressed interest in environmental law issues, and work on the newsletter provides them an opportunity to work on matters of importance in that area – as well as begin making connections in the legal community.

Professor Eggen Launches Nanotechnology Blog Examines White House Science Policies

Professor Jean Macchiaroli Eggen has been publishing a blog on nanotechnology and the law since April, 2010. The blog may be accessed at <http://blogs.law.widener.edu/nanolaw/>. This legal analysis blog provides insights on the health and safety aspects of nanomaterials, which are virtually unregulated. The purpose of this site is to raise legal questions about the impact of nanotechnology and comment upon the ways in which those questions are likely to be raised in the legal system. Professor Eggen discusses the public health and environmental impacts of nanomaterials, the status of regulatory interest in nanotechnology (FDA, EPA, the EU and more), and the impact on business that regulation will likely have.

In this excerpt from a recent post, Professor Eggen examined the White House science-based policy for nanoregulation:

In a June 9, 2011, memorandum to the heads of U.S. executive departments and agencies, entitled *Policy Principles for the U.S. Decision-Making Concerning Regulation and Oversight of Applications of Nanotechnology and Nanomaterials*, the White House confirmed its commitment to a "science-based" approach to health and safety matters related to nanotechnology. . . . The memorandum described its approach as "generally applicable principles relevant to promoting a balanced, science-based approach to regulating nanomaterials and other applications of nanotechnology in a manner that protects human health, safety, and the environment without prejudging new technologies or creating unnecessary barriers to trade or hampering innovation." . . .

Intending to provide guidance to existing federal agencies, the memorandum stated: "Federal agencies should avoid making scientifically unfounded generalizations that categorically judge all applications of nanotechnology as intrinsically benign or harmful." . . .

On the one hand, the memorandum eased industry concerns that nanotechnology will be viewed as "bad" and all nanomaterials as "hazardous" because of the flurry of attention focused on the technologies and the concerns voiced by various groups. But on the other hand, the message is clear that science will govern the study of nanomaterials and any decisions about whether or how to regulate. And that is also a message to industry to come forward with the science that the agencies need. . . .

The entire post may be read at <http://blogs.law.widener.edu/nanolaw/2011/06/15/white-house-takes-a-science-based-approach-to-the-study-and-regulation-of-nanotechnology/>

Creator of documentary *Gasland*, 2010 Academy Award nominee for Best Documentary Feature, visits Harrisburg campus

Josh Fox, creator of the documentary *Gasland*, a 2010 Academy Award nominee for Best Documentary Feature, visited the Harrisburg campus on Monday, April 18th for a screening of the film followed by a question and answer session. The Student Bar Association, the Environmental and Natural Resources Law Clinic, and the Environmental and Law Policy Society sponsored the event.

The screening of the film took place in the administration building, and was also videoconferenced on the Delaware campus. The two-hour documentary chronicled Fox's travels across the United States to visit people whose lives had been affected by natural gas drilling.

The genesis of the project occurred when Fox received a letter from a natural gas company offering to lease his family's land for compensation. After the offer, he looked up information concerning the Marcellus Shale, which runs under Pennsylvania, New York, Ohio, and West Virginia. The Marcellus Shale holds natural gas that many gas companies are anxious to retrieve.

After his initial research, he visited families in Dimock, Pennsylvania where natural gas drilling had already started. He found that people there were becoming sick because of contaminated well water that was a result of the natural gas drilling. Fox then traveled the country to see the impact of natural gas drilling on other communities in Colorado, Wyoming, Utah and Texas.

After the film, Fox gave a presentation and showed a gallon of the contaminated water featured in the film. He explained that, "We are in a moment where a real choice needs to be made about how we are going to deal with this crisis."

He mentioned current Pennsylvania Governor Tom Corbett believes that there is no problem, but Fox noted that he receives hundreds of emails a week about people reporting these problems. After visiting 120 cities, he finds the same problems over and over again.

He told the students, "I hope some of you are the type of lawyers that are preparing to get people out of jail or get out of jail yourselves. Look at history. When did anything ever change without civil struggle?"

Following the presentation, he entertained questions. One audience member asked whether there would be a *Gasland 2*. Fox said that there would be a *Gasland 2* and that it would include many scenes that were cut out of the original film, including more of the Senate hearing, a huge explosion sequence, and a car chase which involved a truck throwing the contaminated water onto the side of the road.

"We never stopped shooting," said Fox, adding, "We are still shooting. We taped yesterday and we'll be taping tomorrow. I do know that the focus of the next film is going to be Stand and Fight, or Move. What are you going to do?"

Clinic Corner

The Environmental and Natural Resources Law Clinic wrapped up a very busy year in June 2011. According to a 3-page summary that will be in the center of the expanded (8-page) Fall 2011 *Clinic News* issue coming soon to the web or a mailbox near you, the 2010-2011 academic year saw the Clinic participate in 3 full trial/evidentiary hearings, file 14 briefs or major legal memoranda, submit and/or file 31 notices, motions, complaints, or other legal filings, participate in 16 conferences, depositions, arguments, or other proceedings, file 4 sets of public comments in four different matters, and publish 3 different Citizen Guides. Among the highlights:

- Harrisburg Student-Attorney Jon McVey co-first chairing a 3-day evidentiary hearing before the PA Environmental Hearing Board
- Filing of federal litigation in DE over activities at Prime Hook National Wildlife Refuge and in WV over Clean Water Act enforcement
- Filing an Amicus Curie brief in the DE Supreme Court in support of the state's appeal of a decision voiding certain regulations designed to protect the Inland Bays
- Filing public comments on Delmarva Power & Light's 2010 Integrated Resource Plan focused on the externalities of coal-fired power generation

Widener students—as summer interns and/or Student Attorneys during the school year—did more than 4000 hours of pro bono work on behalf of Clinic clients, and the Clinic Director and Staff Attorney contributed 1000 more. Wow—were we busy! The Clinic website now offers the Clinic's public docket list of all matters in which the Clinic has appeared at <http://blogs.law.widener.edu/envirolawcenter/environmental-law-clinic/clinic-current-public-docket/>. The list is updated monthly. Check out the Clinic's pages on the ELC website (www.widenerELC.org) to find our Citizen Guides, copies of documents filed by the Clinic, and other useful information. The Environmental Help Line (1-888-953-6853) continues to assist PA citizens and organizations address environmental problems. After 18 months of operation, it has handled more than 100 inquiries, resulting in more than 35 Clinic projects.

Widener University School of Law Environmental Law Center harnesses the expertise of the seven environmental law faculty Widener has on two campuses to benefit both its students and the public. For more information, please contact:
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