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## Symposium Examines Sustainable Development Implications of Deep Shale Horizontal Hydraulic Fracturing

Experts in a variety of fields assembled at Widener Law's Harrisburg campus on Friday, September 27th for a global symposium to examine the sustainable development implications of deep shale horizontal hydraulic fracturing (known as "fracking," "fracing," or "HF.") called "Marcellus Shale Development and Pennsylvania: What Lessons for Sustainable Energy?" Topics explored during the program examined the practice of hydraulic fracturing and its impact from environmental, community, public health, energy and climate change, and governance perspectives, in the context of sustainability.

Following Dean Linda Ammons' welcome, Distinguished Professor John C. Dernbach, the co-director of Widener Law's Environmental Law Center and the conference's principal organizer, framed the discussion for the day with an overview of just how important and far-reaching the developments in Pennsylvania are for energy, security, and the economy. He observed that the rest of the world can learn from Pennsylvania's experiences about the prospects of "fostering sustainability of

shale gas production."

The symposium was a collaboration between the campuses sponsored by the Widener Environmental Law Center, and featured the expertise of the Center's faculty from both campuses. Professor and Environmental Law Center co-director and symposium co-chair James R. May then provided an overview of the myriad technical and legal issues associated with fracking. Center Professors Eggen, Family, Hodas and Kristl also served as panel moderators and/or participants. Law student Timothy Bishop also delivered a lunchtime presentation based on his the 2012-13 Widener Law Journal Best Student Article, "North to the Future: Modeling Pennsylvania's Development of Natural Gas After Alaska's Permanent Fund Dividend."



Other speakers on the opening panel included Diana Stares (Center for Energy Policy & Management, Washington & Jefferson College), and Scott Perry (Pennsylvania Department of Environmental Protection)

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The first substantive panel addressed Public Health and fracking. Panelists included Bernie Goldstein (University of Pittsburgh School of Public Health); Dean Lynn Goldman (George Washington University School of Public Health) (via Skype); and Dean Patricia Salkin (Touro Law School) and Professor Pam Ko (Sage College).

The second panel addressed fracking and Environmental Sustainability. Panelists included moderator Tim Lambert (WITF); Elizabeth Bjerke (University of Pittsburgh School of Public Health); Alan Krupnick (Resources for the Future); Tom Beauduy (Susquehanna River Basin Commission); and John Quigley (John H. Quigley LLC).

The topic of the third panel was Community Sustainability. Panelists included Professor Ross Pifer (Penn State University Law School); Professors Jonathan Williamson and Bonita Kolb (Lycoming College); and Elam Herr (Pennsylvania State Association of Township Supervisors).

Panel 4 examined Governance and Sustainability. Panelists included George Bibikos (K&L Gates LLP); Tom Merrill (Columbia University Law School); Professor David Spence (McCombs School of Business, University of Texas); Terry Bossert (Range Resources-Appalachia LLC), and, Andrew Place (Center for Sustainable Shale Development)

The final panel addressed Energy, Climate Change, and Ethics. Panelists included John Hanger (Eckert Seamans LLC); Don Brown (Widener University Law School); and, John (“Skip”) Laitner (Economic and Human Dimension Research Associates).

Widener Law commends all of the speakers for sharing their expertise on this important topic, and thanks all those who attended – whether in person or via the live webcast!

## Barros Comments on Fracking and Personal Property Rights in Pennsylvania



In a related story, Harrisburg campus Associate Dean for Faculty Research and Development **D. Benjamin Barros** recently commented on the intersection of personal property rights and the effects of hydraulic fracturing for a Bloomberg Businessweek article about six Pennsylvania families who have sued Chevron Corp. and two other energy companies over the practice. Efforts to develop deep shale gas reserves have been of particular importance in Pennsylvania because of the Marcellus Shale play, thought to be one of the commercially largest in the world.

The case, *Headley v. Chevron Appalachia LLC*, was filed in the Pennsylvania Court of Common Pleas for Allegheny County and provides a different avenue of legal challenge to the practice of fracking. Nuisance suits are based on personal property rights and brought when noise, odors, vibrations, or similar issues infringe on the enjoyment of personal property rights. Unlike environmental impact claims that rely on conclusive scientific evidence proving causation, nuisance claims need only show that the practice has caused substantial and unreasonable damage to a landowner’s use of his or her property.

## Hodas Speaks at International Environmental Congress in Bogata



In keeping with considerations of sustainability, on October 17, 2013 Distinguished Professor David R. Hodas, the H. Albert Young Fellow in Constitutional Law, spoke at the Center for Sustainable Development Studies’ (CEID Columbia) VI International Environmental Congress, in Bogota Columbia.

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The Congress was devoted to the theme of “Corporate Innovation for Sustainability: Maintaining Competitiveness in a Changing Environment” and was organized around the book *Corporation 2020: Transforming Business for Tomorrow’s World* by Pavan Sukdhev (the Spanish language edition was launched at the Congress). Prof. Hodas spoke about "Incorporating ecosystem values into project evaluation and policy decision-making" and was on the concluding panel that assessed the lessons learned from the Congress. Prof. Hodas joined governmental, business and academic speakers from the United States, Spain, Ireland, Belgium, and the Netherlands, as well as Colombia.

The Congress is renowned for the timeliness of the content, the quality of the international speakers who participate and for being a unique opportunity for Colombian leaders to obtain innovative information. During the Congress, CEID Colombia launched the Spanish version of Pavan Sukdhev’s book *Corporation 2020: Transforming Business for Tomorrow’s World*. The entire Congress was made carbon neutral, through the use of forestry offsets.

The Congress addressed a new model - “Corporation 2020” - for corporations in the emerging (and necessary) global, green economy and the opportunities that this new economic model brings. It explored how to create competitive corporations in the new green economy, analyzed successful experiences in the implementation of innovative, sustainable corporate models, and shared practical tools with the business and governmental sectors for innovative policies and strategies for sustainability.

## **May Speaks at Annual Meeting of the International Bar Association About Environmental Human Rights**

On October 9, Professor and Center Co-director Jim May joined a featured panel at the International Bar Association’s Annual Meeting in Boston on the topic of “Environmental Constitutionalism – Environmental Protection as a Fundamental Constitutional or Human Right?”



Environmental concerns such as climate change are taking on increasing legal and political importance as new or unusual impacts on the earth’s ecosystem are reported. Climate change is blamed by many as the cause for the increasing frequency and intensity of major storm ‘events’ and for rising ocean levels as the ice caps shrink. Persistent chemical emissions may have less recognised but potentially long-term and widespread health impacts. This session provided a balanced discussion on such challenging and controversial issues as whether human rights regimes and treaties should include remedies to prevent activities endangering people and their environment; whether serious environmental degradation should be regarded as an international crime against humanity and be made a domestic crime per se; and, whether constitutional rights to a healthy environment should be deployed to protect citizens from significant environmental harm.

“Whether and the extent to which humans enjoy a human right to a quality environment is a major global issue. I am thrilled to be a part of such an esteemed panel,” May said.

Other panellists included Michelle Ouellette, Best & Krieger, Riverside, California, Senior Vice-Chair, IBA Environmental, Health and Safety Law Committee (moderator); David Estrin (Gowling Lafleur Henderson, Toronto, Ontario); Tracy-Lynn Humby (University of the Witwatersrand, Johannesburg, South Africa), Els Reynaers Kini (MV Kini & Co, Mumbai, India), and Jose Antonio Urrutia Urrutia & Cia, Santiago, Chile.

## Faculty Publications and Presentations



**Professor Jean Eggen** spoke at the ABA Section on Environment, Energy and Resources fall conference in Baltimore in October as a participant in the panel entitled "Less is More? The Expanding Universe of Low-Level Toxic Tort Claims." Her paper, "Being Small in a Super-sized World: Tackling the Problem of Low-Level Exposures in Toxic Tort Actions," was selected as Best Paper for the conference. In September, Professor Eggen served as the moderator of the panel on Public Health for the conference on "Marcellus Shale Development and Pennsylvania: What Lessons for Sustainable Development?" at Widener Law's Harrisburg campus. In November, she lectured on "Toxic Substances Litigation in a Nutshell" at the University of Delaware's Osher Lifelong Learning Institute.

**Professor David Hodas** lectured at Williams College in June on The Law and Policy of Climate Change Denialism. Also in June, he presented a plenary session paper, Sustainable Energy Law for a Climate Change Epoch: A Global Imperative, at the 2013 IUCN Academy of Environmental Law Colloquium which took place at the University of Waikato in Hamilton, New Zealand. While in New Zealand, he participated in the annual meeting of the editorial board of the IUCN ACADEMY OF ENVIRONMENTAL LAW E-JOURNAL; he was named the Journal's

book review editor. Also in June, David published Law, the Laws of Nature and Ecosystem Energy Services: A Case of Wilful Blindness, 16 POTCHEFSTROOM ELECTRONIC LAW JOURNAL 67 (2013). David also thoroughly revised and updated his chapter, State Initiatives for the 2<sup>nd</sup> Edition of GLOBAL CLIMATE CHANGE AND U.S. LAW (M. Gerrard and J. Freeman, eds) (forthcoming). This summer he commenced his research as the 2013-2015 H. Albert Young Fellow in Constitutional Law. His research will examine the relationship between science and the Constitution, particularly the meaning and application of the Constitution in the context of 21<sup>st</sup> Century science.



**Professor Ken Kristl** completed his book ENGAGING IN ENVIRONMENTAL AND COMPLEX CIVIL LITIGATION and is using it in the Environmental Clinic classes in Wilmington and Harrisburg this Fall. On behalf of Environmental Clinic clients, he argued a case before Pennsylvania's Commonwealth Court in May and conducted an evidentiary hearing before the Delaware Coastal Zone Industrial Control Board in July. He also applied for and won a grant for the Clinic from the State of Delaware to prepare an analysis of legal tools available for adapting to sea level rise; the analysis will be in the form of a book to be published by March 2014, followed by public workshops conducted with Clinic interns and public library displays throughout Delaware.



**Distinguished Professor John Dernbach and Professor May** have signed a contract

with Edward Elgar to produce an edited volume, *Shale Gas and the Future of Energy: Law and Policy for Sustainability*, which is based on the highly successful conference they led in September. Professor Dernbach was recently appointed by American Bar Association President James Silkenat to the ABA Task Force on Sustainable Development. The Task Force, made up of lawyers and nonlawyers from the federal government, the private bar, and academia, will review and make recommendations regarding the involvement of the ABA in implementing sustainable development matters worldwide. In October, Professor Dernbach keynoted the annual water law conference at the University of Nebraska and made a presentation on the evolving law of sustainability to the faculty at the University of Nebraska Law School. He was a member of the planning committee of the ABA Section on Environment, Energy and Resources Fall Meeting, which was held in Baltimore in October.

**Professor May** published *Healthcare, Environmental Law, and the Supreme Court: An Analysis Under the Commerce, Necessary and Proper and Tax and Spending Clauses*, 43 *Envtl. L.* 233 (2013); and *Constitutional Directions in Procedural Environmental Rights*, 28 *Jrnl. Env'tl. L. & Lit.* 101 (2013). May is a signing participant to the *Brief of Law Professors as Amicus Curiae in Support of Plaintiffs-Appellants Seeking Reversal* (D.C. Cir., No. 13-5192)(filed Nov. 13, 2013). On September 27, May presented "Technical and Le-

gal Issues in Hydraulic Fracturing," at "Marcellus Shale Development and Pennsylvania: What Lessons for Sustainable Energy?" on the Pennsylvania campus of Widener Law School (see above for related story). On October 9, May presented "Environmental constitutionalism – environmental protection as a fundamental constitutional or human right?" at the International Bar Association's Annual Meeting in Boston. On November 5, May recorded, "Hydraulic Fracturing: Legal and Technical Issues Update," for the National Judicial College, a 'flip' in advance of a national presentation on December 12. On November 18<sup>th</sup>, May joined a panel discussion on the Delaware campus addressing U.S. Supreme Court developments, "Pizza With Professors." May also serves as co-counsel with Professor Kristl and the clinic in *Funk v. Pennsylvania Department of Environmental Protection* (see related story, above), and assists Professor Kristl on occasions in matters before the Delaware Industrial Control Board (see related story, above). He was recently named as a consultant to the Delaware Audubon Society.



**Professor Andrew Strauss's** co-edited book, *CLIMATE CHANGE GEOENGINEERING: PHILOSOPHICAL PERSPECTIVES, LEGAL ISSUES, AND GOVERNANCE FRAMEWORKS* (with William C. G. Burns) was published by Cambridge University Press in July. Andy's USA Today opinion piece (also coauthored with William C.G. Burns), *Dangers of Trying to Set the Earth's Thermostat*, appeared on August 11th. In June, Andy presented at a Harvard Law School Conference entitled *New Directions in Global Thought*. The title of Andy's presentation was "International Law and its Discontents." Also in June, Andy was a participant in the Geo-engineering Dinner Rountable at the American Enterprise Institute in Washington, D.C.

## Environmental and Natural Resources Law Clinic News

The Environmental & Natural Resources Law Clinic has kept busy working on a wide range of matters on behalf of clients throughout the mid-Atlantic region.

In May, 2013, the Clinic filed simultaneous appeals before Delaware's Coastal Zone Industrial Control Board and Environmental Appeals Board related to an expansion of crude oil transport operations at the refinery in Delaware City, Delaware. The primary focus of these appeals was on the requirements of Delaware's Coastal Zone Act. The Coastal Zone Industrial Control Board conducted a hearing in July at which **Clinic Director Ken Kristl** (assisted by Jim May) argued on behalf of Sierra Club and Delaware Audubon. The Board dismissed the matter solely on the basis of standing (despite 16 affidavits offered in support of standing). That matter is currently on appeal to the Delaware Superior Court. The Environmental Appeals Board action is currently subject to motions on jurisdictional grounds. Those motions will be argued in December.

The Clinic, joined by Professor and Center co-director Jim May, represented Ashley Funk, a 19-year old Pennsylvania resident in connection with a petition for rulemaking Ashley filed seeking to have Pennsylvania issue regulations to reduce carbon dioxide emissions in the State by 6% per year until the year 2050. Her initial petition and a revised version of that petition was blocked from going to the Environmental Quality Board by Pennsylvania's Department of Environmental Protection on the grounds that the petitions failed to meet regulatory requirements concerning the regulations sought and the parties affected. The Clinic filed simultaneous appeals before the Pennsylvania Environmental Hearing Board and the Commonwealth Court of Pennsylvania. In May, Clinic Director Ken Kristl, assisted by Jim May, argued the Commonwealth Court matter, which was ultimately dismissed.

While preparing for trial on the Environmental Hearing Board appeal, the Clinic helped draft a

revised version of the petition which the DEP accepted and forwarded to the Environmental Quality Board, thereby rendering the appeal moot. The Environmental Quality Board accepted the revised Petition at its November 2013 meeting, thereby requiring the DEP to review whether a regulation of carbon dioxide emissions should be issued.

As noted in the previous newsletter, the Clinic was awarded a grant from the Coastal Programs section of the Delaware's Department of Natural Resources and Environmental Control. The Clinic generated a working draft of the first part of its analysis, creating a catalog of potential legal tools for adapting to sea level rise, and has begun working on the second part of its analysis to determine what if any legal obstacles may exist under current Delaware law that would affect the implementation of such tools. The second part of this analysis is scheduled to be completed near the end of 2013, and the final part of the report covering how Delaware can overcome the identified obstacles will be completed by March 2014.

Other Clinic matters include: a FOIA lawsuit filed in the Middle District of Pennsylvania to force the Department of Agriculture's National Conservation Research Service to turn over records; EHB appeals concerning compliance with recycling provisions under Pennsylvania's Act 101 and a stormwater permit from a rock salt storage facility; and advice to numerous clients on various legal matters. Overall, the Clinic's docket includes over 35 active matters on behalf of 30 different clients.

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Have news or updates? Please contact:  
In Harrisburg: Professor John Dernbach, 717.541.1933,  
jcdernbach@widener.edu  
In Wilmington: Professor Jim May, 302.477.2060,  
jrmay@widener.edu  
Credits:  
Editor: Jim May  
Layout: Debbie Dantinne  
Content: Mary Allen, Nathan Garrison, Jim May, John  
Dernbach, Ken Kristl