



Widener Environmental Law Center



Widener Law

LAW FOR SUSTAINABILITY

DERNBACH, EGGEN, HODAS, KELLY, KRISTL, MAY, STRAUSS

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Widener Law recently sent two distinguished members of the Delaware campus faculty to participate in a United Nations program on global constitutional environmental rights.

The consultation, convened in Johannesburg, South Africa Jan. 23-24, explored the idea of the right to a healthy, safe environment, which is built into constitutions of countries around the world. Widener Professors James R. May, Center co-director, and Erin Daly, Vice Dean and interim co-dean (DE), were invited to serve as delegates to the program. They were two of four North Americans who attended the event, which drew more than 40 participants. Other delegates included leading figures in governance, environmental policy and constitutional litigation from Africa and around the globe.

Daly gave introductory remarks on a panel at the program. She provided an overview of the global trend to include environmental rights as constitutional rights, and discussed the relationship between human rights and environmental rights. May chaired a group on considering what kinds of tools work well to implement such rights, known as "good practices."

The event was convened by the United Nations Independent Expert on Human Rights and the Environment, the United Nations Environment Programme, the Office of the High Commissioner for Human Rights, and the Legal Resources Centre, a South African human rights organization.

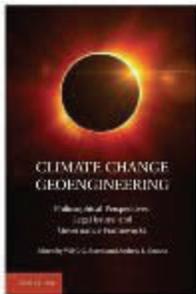
May and Daly are collaborating on the book "Global Environmental Constitutionalism," forthcoming from Cambridge University Press.



Daly has written extensively on comparative constitutional law and transitional justice issues around the world. She published "Dignity Rights: Courts, Constitutions, and the Worth of the Human Person" in 2012, with a foreword by Aharon Barak, the former president of the Israeli Supreme Court. It was the first book to explore the constitutional law of dignity around the world.

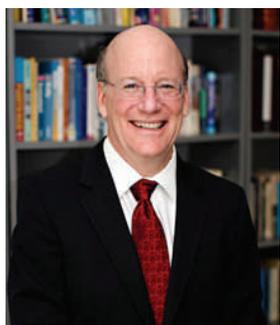
May is co-director of Widener's Environmental Law Center and previously directed the school's Environmental and Natural Resources Law Clinic. He has litigated more than 200 public interest environmental claims at levels up to the U.S. Supreme Court. He authored and edited "Principles of Constitutional Environmental Law" in 2011.

Law Professor Publishes Book On Geoengineering



The international community is not taking the action necessary to avert dangerous increases in greenhouse gases. Facing a potentially bleak future, the question that confronts humanity is whether the best of bad alternatives may be to counter global warming through human-engineered climate

interventions. In his recently-published book, *Climate Change Geoengineering*, (Cambridge 2013), Widener Law Professor and Associate Dean Andrew L. Strauss co-editor Will C.G. Burns and eleven prominent



authorities on climate change consider the legal, philosophical and policy issues presented by geoengineering. The book asks: when, if ever, are decisions to embark on potentially risky climate modification projects justified? If such decisions can be justified, in a world without a central governing authority, who should authorize such projects

and by what moral and legal right? If states or private actors undertake geoengineering ventures absent the blessing of the international community, what recourse do the rest of us have? Congratulations, Andy!

Widener Law Professor's Work Cited in Major Pennsylvania Supreme Court Opinion

The Pennsylvania Supreme Court has extensively quoted the work of **Distinguished Law Professor John C. Dernbach** in a high-profile decision that significantly affects the state's booming oil and gas industry.

The case, *Robinson Township v. Commonwealth of Pennsylvania*, decided Dec. 19, 2014 cites Dernbach in seven instances throughout the 162-page plurality decision. The court ruled that significant parts of Act 13, Pennsylvania's Marcellus Shale drilling law, are unconstitutional.

"It's a very important decision," Dernbach said, after reading the court's four opinions, including the plurality opinion by three justices, another by a fourth justice who concurred under a different line of legal reasoning, and two separate dissents by other justices. Two more justices did not participate in the decision. "I am also gratified that members of the court found my work helpful."



The court held unconstitutional significant parts of Act 13, a 2012 law enacted to foster gas extraction from Pennsylvania's Marcellus Shale reserves. Several parts of the law limited local governments' abilities to review and approve gas operations under their planning and zoning laws. Another part of the law allowed the Department of Environmental Protection to waive mandatory distance limits between gas operations and water bodies like streams and wetlands.

The three-justice plurality opinion, written by Chief Justice Ronald E. Castille and joined by Justice Debra McCloskey Todd and Seamus P. McCaffery, held these provisions unconstitutional under Article I, section 27 of the Pennsylvania Constitution. Justice Max Baer concurred under a different line of legal reasoning, and would have struck the law as violative of substantive due process.

The opinion cited multiple Dernbach publications, including two articles published in 1999 in the *Dickinson Law Review*. They include "Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part I – An Interpretative Framework for Article I, Section 27," and "Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part II – Environmental Rights and Public Trust." The plurality also cited a chapter he authored for "The Pennsylvania Constitution: A Treatise on Rights and Liberties," published in 2004.

Dernbach said the implications of the decision will be felt for years, or even decades. He was impressed with the depth of legal reasoning that went into the opinion. "The plurality treats Article I, Section 27 as actual constitutional law, and treats its text seriously," he said. "It begins to free the amendment from decades of judge-made limits on its meaning and applicability."

Widener Environmental Law Distinguished Speaker Series

Widener Law and its Environmental Law Center's Distinguished Speaker Series lineup includes:



Tuesday, March 18
E. Christopher Abruzzo '92,
secretary of the Pennsylvania Department of Environmental Protection: "Environmental Priorities and Accomplishments of the Corbett Administration."

Thursday, March 27
Professor Hope M. Babcock of Georgetown Law: "A Dystopian Dance – the Dysfunctional Coupling of the Supreme Court and the Ninth Circuit in Environmental Cases."



Tuesday, April 8
Professor Zygmunt J.B. Plater of Boston College Law School: "TVA v. Hill: A Little Fish in a Pork Barrel."

Faculty News

Professor **John Dernbach's** presentations include: "Our Water, Our Air, Our Communities—And Forced Gas Drilling?" for the Delaware Riverkeeper Network (March 13, 2014); "The Pennsylvania Supreme Court's Robinson Township Decision and the Future of Environmental Rights and Public Trust" at the Public Interest Environmental Law Conference ELAW Conference, University of Oregon Law School (Feb. 28, 2014) (via Skype); "Sustainability Law for Smart Cities, Smart Law for Smart Cities: Regulation, Technology, and the Future of Cities," Fordham Law School (Feb. 28, 2014) New York, New York; "Sustainability: Re-imagining Law, Politics and our Future," Annual Humanities Symposium, Messiah College (Feb. 26, 2014); *(continued)*

"The Robinson Township Decision and the Future of Article I, Section 27, Robinson Township v. Commonwealth of PA: More than an Oil and Gas Decision?" Ballard Spahr LLP (Feb. 25, 2014,); "A New Era in Environmental Law: The Robinson Township Case and Article 1, Section 27," Pennsylvania Bar Institute Webinar (Feb. 11, 2014) (with Franklin L. Kury)

Widener Professor **Jean M. Eggen** As a member of the Special Committee on Congressional Relations of the ABA Section on Environment, Energy & Resources, Distinguished Professor of Law Jean Eggen co-authored a white paper on TSCA Preemption of Private Rights of Action. The white paper is part of a series of papers published by SEER addressing various issues related to the modernization of TSCA. In March, Jean presented a paper at a symposium on "Neuroscience and Law: Injury, Capacity, and Illness" at the Robert H. McKinney School of Law of Indiana University. The symposium brought together legal and medical experts from around the country to discuss the impact of developments in neuroscience on various aspects of civil law. She spoke on "Neuroscience and the Mentally Challenged Tort Defendant." Her article will be published in the *Indiana Health Law Review*.

Widener Professor **David R. Hodas** is on sabbatical in New Zealand. He lectured on sustainable energy and taught a class at University of Waitako in Hamilton. He also taught a class and gave a public lecture on ecosystem services at the University of Otago in Dunedin.

Professor and WELC co-director **James R. May's** recent publications include: *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); *Constitutional Directions in Procedural Environmental Rights*, 28 *Jrnl. Env'tl. L. & Lit.* 101 (2013); and, *MODERN ADMINISTRATIVE LAW: CASES AND MATERIALS* (2014).

May's recent presentations include: "Technical and Legal Issues in Hydraulic Fracturing," at "Marcellus Shale Development and Pennsylvania: What Lessons for Sustainable Energy?" on the Pennsylvania campus of Widener Law School (Sept. 19, 2013); "Environmental constitutionalism – environmental protection as a fundamental constitutional or human right?" at the International Bar Association's Annual Meeting in Boston (Oct. 9, 2013); "U.S. Supreme Court Developments," (Widener, Nov. 18, 2013), "Hydraulic Fracturing: Legal and Technical Issues Update," for the National Judicial College (Dec. 12, 2013).

Widener to Host Symposium on Global Environmental Constitutionalism



Friday, April 11, 2014

8:00—5:00 pm

(Continental breakfast from 8:00—8:30 am)

Symposium Chair: James R. May, Professor of Law and Co-Director of the Environmental Law Center
Widener Law Review Editor-in-Chief: Nicolle M. Vasconez

Most people live under constitutions that protect environmental rights in some fashion, including by committing to environmental stewardship, recognizing a basic right to a quality environment, guaranteeing a right to water or natural resources, and ensuring public participation in environmental decision making.

This symposium will examine whether and the extent to which to adopt constitutional protections of substantive or procedural rights to a quality environment in national and/or subnational instruments.

Payment Information:

CLE Registration: \$125 (6 CLE credits)

Widener Law Alumni: \$100

Students (no lunch/materials): Free

Participants: K. Bosselmann and C. Magallanes (New Zealand), D. Anton and A. Akhtarkhavari (Australia), L. Kotze (South Africa), E. Imperato (Italy), B. Hudson (Louisiana), L. Benjamin and M. Stevenson (Bahamas), D. Bonilla (Columbia), B. Rao (Michigan), N. Bryner (Wash D.C.), J. Gellers (California), E. Brown (Georgia), D. Gatmaytan (Philippines), H. Echeverria (Ecuador), I. Kornfeld (Israel), S. McKenzie (France), N. Stewart (UK), J. Tuholske (Vermont), R. Percival (Maryland), J. Bonine (Oregon)

Clinic News

The Environmental & Natural Resources Law Clinic has had an extremely busy Spring semester. It briefed its appeal of the Delaware Coastal Zone Industrial Control Board's August decision dismissing its appeal of a permit issued to the Delaware City Refinery on the basis of standing, as well as cross-appeals filed by the Refinery and Delaware Department of Natural Resources and Environmental Control on the issue of the Board's jurisdiction to hear the underlying appeal. In addition, in January it conducted a hearing before the Delaware Environmental Appeals Board on a parallel appeal in that matter.

The Clinic also took on two new, high profile matters. The first relates to the zoning of a 279 MW power plant within the City of Newark, DE. The Clinic represented 5 individuals, a group of city residents, and the Delaware Audubon in a challenge to the City's verification that the power plant—proposed to be the sole source of power for a data center—met the City's zoning laws as an accessory use. The Clinic engaged in extensive briefing on an accelerated schedule and participated in a March public hearing before the Board of Adjustment attended by an audience more than 700 onlookers.

The second matter is an appeal of the Remediation Plan for a brownfields development on the site of a former pickle plant in Millsboro, DE that is slated to be converted into a chicken processing plant. One of the big issues in the case is the Plan's failure to address offsite groundwater and drinking water impacts at the site. The matter is scheduled for hearing before the Environmental Appeals Board in May.

The Clinic also completed its draft of its report, *ASSESSING THE LEGAL TOOL BOX FOR ADAPTING TO SEA LEVEL RISE IN DELAWARE*, in connection with the grant it received from Delaware's Coastal Programs Office. Outreach to public officials, public workshops, and public library displays will all be completed by the end of May. Hopefully, the Report will be the first step in starting the long and important public conversation on developing a strategy for adapting to sea level rise in Delaware.

Have news or updates? Please contact:

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