Law & the Environment

International Environmental Law

Waiting for an Accident to Happen: Disaster Law and Policy

Politics and the Environment

Standing: Who Can Sue to Protect the Environment?

ALSO IN THIS ISSUE:

10 Key Principles in Environmental Law

Learning Gateways

Teaching Legal Docs

CLIMATE CHANGE

DISASTER POLICY

ETHICS

INTERNATIONAL TREATIES

SUSTAINABILITY

STANDING

A magazine for teachers of civics, government, history & law
Profound environmental changes caused by the increasing scale of human activity have led many observers to conclude that the planet has entered the "Anthropocene"—a geologic era signified by human impact on the biosphere. International environmental law is the set of agreements and principles that reflects the world's collective effort to manage our transition to the Anthropocene by resolving our most serious environmental problems, including climate change, ozone depletion, and mass extinction of wildlife. More generally, international environmental law aims to achieve sustainable development—i.e., development that allows people to have a high quality of life today without sacrificing the quality of life of future generations.

International environmental law is, thus, critical both for addressing specific environmental threats and for integrating long-term environmental protection into the global economy.

But not all environmental threats trigger international (as opposed to solely national or local) response. For countries to sacrifice their autonomy, some advantage must be gained in addressing the problem collectively. Typically, countries turn to international cooperation where (1) the environmental impacts are transboundary (such as pollution into the Great Lakes) or global (such as climate change); (2) some international activity contributes to environmental harm (for example, the international trade in elephant ivory or the killing of whales); or (3) international coordination of financial or technical support can catalyze action (for example, the global conservation of biological diversity). In these circumstances, international cooperation—whether in the form of a binding treaty or a non-binding "soft law" agreement—is necessary for an effective response to the environmental challenge.

Throughout most of the last century, international environmental law primarily reflected bilateral or regional disputes over shared resources, such as rivers or lakes that cut across national boundaries. These disputes led to diplomatic tensions that either resulted in an international legal case or were settled through relatively narrow regional or bilateral treaties. The most famous and important of these disputes was the Trail Smelter Arbitration, where Canada was held responsible for air pollution entering the United States.

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ment at the 1972 UN Conference on the Human Environment in Stockholm. The Stockholm Conference highlighted the international aspects of emerging environmental challenges and legitimized the environment as an area for international cooperation. The Stockholm Conference also created the United Nations Environment Programme (UNEP)—an institutional home for environmental protection in the United Nations. Headquartered in Nairobi, Kenya, UNEP continues today to be a leading catalyst for global environmental cooperation.

Since the 1972 Stockholm Conference, the world has met regularly in a series of major summits aimed at shifting the world toward a path of sustainability. The most important by far has been the 1992 UN Conference on Environment and Development (UNCED), also known as the Rio “Earth Summit.” Virtually every world leader attended the Earth Summit, where they agreed to three major treaties (addressing climate change, biological diversity, and desertification) and a 500-page blueprint for sustainable development (known as Agenda 21). Most importantly, Rio marked the formal acceptance of sustainable development as the goal of a modern economy and of international environmental law. Indeed, since Rio, the concept of sustainable development has received nearly universal acceptance among every sector of international society.

Sustainable Development Summits
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In recent years, bilateral disputes involving, for example, Slovakia’s proposed construction of a dam on the Danube River near Hungary, Uruguay’s authorization of two pulp mills that threatened to pollute Argentina, and Australia’s challenge of Japanese whaling operations, have highlighted the importance of international law in peacefully resolving environmental conflicts between countries. Such disputes are resolved at the International Court of Justice, the UN Law of the Sea Tribunal, or other international tribunals.

In addition to peacefully resolving environmental conflicts, international environmental law also is relied on to balance the planet’s ecological limits with the world’s ever-growing economy to prevent irreversible environmental harm in the first place. Today, governments regularly meet to address the general sustainability of the planet or to negotiate one of the literally hundreds of bilateral, regional, and global treaties aimed at managing specific environmental challenges before it’s too late.

Sustainable Development Summits
The United Nations first convened countries to address the global environ-
Protocol to reduce their overall emissions to approximately 5 percent below 1990 levels by the year 2012. Having agreed to cap emissions, the countries also established elaborate procedures for trading the rights to pollute under the cap. The Kyoto Protocol’s “cap and trade” approach thus envisioned a global market for reducing carbon dioxide and other greenhouse gases. The United States first signed the Protocol in 1998 but rejected it three years later after President Bush took office. The Kyoto Protocol would have catalyzed Europe’s environmental law since the 1992 United Nations Framework Convention on Climate Change (the UNFCCC), which recognized climate change as “a common concern of humankind” and set out a framework for global action to avoid harmful impacts. The Convention set an informal goal to reduce emission levels of greenhouse gases to 1990 levels by the year 2000, but it did not impose any binding targets or timetables on any country.

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International Environmental Principles
At both Stockholm in 1972 and Rio in 1992, participating countries adopted a set of basic principles (see, e.g., the Rio Declaration on Environment and Development). Some of these principles are emerging as customary law, helping to resolve environmental disputes and guide negotiations of the various environmental treaties. Ten of the most important environmental principles are briefly defined in the sidebar box on page 1.4.

Global Environmental Agreements
Since the 1972 Stockholm Conference, countries have embarked on an ambitious schedule of international environmental treaty negotiations. Today, these treaties form the core of international environmental law. They can be grouped into treaties aimed at: (1) protecting the global atmosphere, including preventing climate change and ozone depletion; (2) conserving wildlife and biological diversity; (3) managing the oceans and marine environment; and (4) regulating global movement of chemicals, wastes, and other hazardous substances (see table of Global Environmental Agreements).

Addressing climate change
At least since the 1980s, scientists have warned that increasing concentrations of carbon dioxide and other greenhouse gases would warm the earth’s atmosphere and change our climate. Today, climate change is the most serious environmental challenge of our time, and we are already seeing its impacts: increased global temperatures, melting glaciers, reduced Arctic sea ice, increased tidal and storm surges, and increased heat waves and droughts.

Avoiding the most dangerous impacts from climate change has been a major focus of international environmental law since the 1992 United Nations Framework Convention on Climate Change (the UNFCCC), which recognized climate change as “a common concern of humankind” and set out a framework for global action to avoid harmful impacts. The Convention set an informal goal to reduce emission levels of greenhouse gases to 1990 levels by the year 2000, but it did not impose any binding targets or timetables on any country.

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reduction in GHG emissions and created a market for GHG emission credits—but the departure of the United States from the Protocol and the need to include China and other major emitting countries led to a search for a different approach. That approach would (finally) come in the form of the 2015 Paris Agreement on Climate Change.

The Paris Agreement, which sits within the framework established by the 1992 UNFCCC, significantly advanced the world’s effort to address climate change. For the first time, all countries, including the two largest emitters (China and the United States), pledged to make serious—if not binding—commitments. The governments endorsed a specific, global-average temperature goal—of “well below” 2°C increase over pre-industrial levels—as the temperature that would give the world a reasonable chance of avoiding the worst climate impacts. The Parties also signaled that if necessary they would “pursue efforts” to limit the temperature increase to 1.5 °C.

Most significantly, the Paris Agreement signaled a long-term shift from fossil fuels as parties agreed to reach a “global peaking” of GHG emissions “as soon as possible” and “to undertake rapid reductions thereafter” to achieve a balance between net GHG emissions and removals in the “second half of this century.” Achieving this post-2050 goal would not necessarily require the elimination of fossil fuels, because efforts could also increase GHG removals from the atmosphere, for example by growing more trees or by developing effective carbon-capture technology. The Agreement nonetheless built momentum for drastically lower dependence on fossil fuels and provided a clear market signal for long-term investments in alternative energy sources.

Having set long-term, shared goals, the Paris Agreement de-emphasized the cap-and-trade approach of prior negotiations in favor of a “pledge and review” approach, relying primarily on each country’s commitment or “nationally determined contribution” (NDC) to reduce climate change. By the end of the Paris negotiations, 186 countries announced an NDC. The United States, for example, agreed to reduce, by 2020, its overall GHG emissions 26–28% from 2005 levels, and China agreed, among other things, to peak its emissions and improve its GHG efficiency by 60–65% by 2030. Each party’s implementation of its pledge is subject to some form of monitoring, reporting, and verification.

The primary weakness of the Paris Agreement’s approach is that an “ambition gap” exists between the countries’ cumulative pledges and what is scientifically necessary to avoid the worst climate impacts. Indeed, current commitments are estimated to allow an increase in global-average temperatures somewhere between 2.5 and 3.7 °C, well above safe levels. The parties acknowledged the need for reviewing their NDCs every five years, beginning in 2020. Successive commitments are supposed to build on previous commitments, taking into account each country’s particular circumstances.

The Paris Agreement aimed not only at reducing GHG emissions but also at maintaining forests, improving land-use, expanding financial and technical resources for developing countries, supporting adaptation to unavoidable climate change impacts, and compensating

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10 Key Principles in International Environmental Law

- **State Sovereignty** Countries have the sovereign right to exploit their own resources, pursuant to their own environmental and developmental policies.
- **Common Concern** The global environment is a common concern of humanity.
- **Duty Not to Cause Environmental Harm** Countries have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other countries or of areas beyond the limits of national jurisdiction.
- **Common but Differentiated Responsibilities** In view of the different contributions to global environmental degradation, countries have common but differentiated responsibilities.
- **The “Polluter Pays” Principle** National authorities should promote the internalization of environmental costs, reflecting the approach that the polluter should bear the cost of pollution.
- **Environmental Impact Assessment** Environmental impact assessment shall be undertaken for proposed activities that are likely to have a significantly adverse impact on the environment.
- **The Precautionary Principle** Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.
- **Public Participation** Environmental issues are best handled with the participation of all concerned citizens.
- **Notification and Consultation** Countries shall provide prior and timely notification to, and consult with, potentially affected countries on activities that may have a significantly adverse, transboundary environmental effect.
- **Peaceful Resolution of Disputes** Countries shall resolve all of their environmental disputes peacefully.
those who suffer loss and damage from climate change. Both in the large number of countries making commitments and the scope of issues addressed, the Paris Agreement was the most comprehensive effort yet to address climate change. Nonetheless, the Trump Administration has renounced the Paris Agreement, leaving the United States once again isolated globally with respect to fighting climate change.

Climate change is currently the dominant environmental issue, but other multilateral environmental agreements address other critical environmental challenges.

Reversing ozone depletion
Beginning in the late 1970s, scientists warned that certain widely used chemicals could be depleting the earth’s protective stratospheric ozone layer. In response, countries negotiated the 1985 Vienna Convention for the Protection of the Ozone Layer and, two years later, the Montreal Protocol on Substances that Deplete the Ozone Layer. The Montreal Protocol has subsequently been revised or amended every two or three years, resulting in a comprehensive phase-out of most chlorofluorocarbons (CFCs) and other ozone-depleting substances. Nearly every country in the world has joined the Montreal Protocol, and the use of ozone-depleting substances has plummeted. The ozone layer is slowly recovering. Recently, the parties to the Montreal Protocol have extended it to phase out certain related chemicals that contribute to climate change.

Conserving nature
The planet is facing a sixth great wave of extinctions and a general decline in wildlife and natural habitats. The leading global treaties for conserving nature are the Convention on Biological Diversity, the Convention on International Trade in Endangered Species (CITES), and the Convention on Migratory Species. The 1992 Biodiversity Convention has the general goal of conserving the planet’s biological diversity. The Convention sets up an international framework to support domestic conservation efforts and includes binding protocols on managing genetically modified organisms (GMOs) and ensuring that local communities share the benefits from biodiversity conservation. CITES establishes binding controls on international trade in parts of rare species of animals and plants. For example, CITES prohibits all commercial trade in elephant ivory, tiger pelts, rhinoceros horns, and thousands of other plants and animals. The Convention on Migratory Species (CMS) provides a framework for countries to protect the entire life cycles of threatened migratory species. The CMS includes separate annexes tailored to the needs of specific animals or groups of animals (for example, migratory bats). Other nature-conservation treaties protect internationally important wetlands, natural heritage sites, and certain species such as whales, sea turtles, or migratory birds.

Protecting the marine environment
The UN Convention on the Law of the Sea sets forth rules for managing the oceans, including marine conservation. Under the protocol, coastal states are responsible for protecting the marine environment within 200 miles of their coasts, and flag states (i.e., the countries that license a particular vessel) are responsible for controlling their ship’s activities in the high seas beyond 200 miles. More specific treaties limit marine pollution from ships and regulate fishing for highly mobile fish species that straddle territorial waters and the high seas.

Regulating chemicals and wastes
The global management of chemicals is organized around a non-binding Strategic Agreement for Integrated Chemicals Management and four global treaties that regulate hazardous chemicals and wastes. The Rotterdam Prior Informed Consent Convention requires that chemical exporters ensure that receiving countries have given their prior, informed consent. Importing governments can then manage the environmental and public health risks inherent to hazardous chemicals. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal imposes similar consent requirements for shipments of hazardous wastes and requires the environmentally sound management of such wastes. The Stockholm Convention on Persistent Organic Pollutants prohibits or significantly restricts the production and use of some of the world’s most environmentally harmful chemicals, including dioxins, PCBs, and DDT. More recently, the Minamata Mercury Convention has curbed global mercury pollution.

International environmental law has successfully addressed many serious issues. Many harmful chemicals are now controlled, the ozone layer is recovering, and populations of important wildlife species, including whales and sea turtles, are increasing because of international environmental agreements. But many other indicators of global environmental quality have deteriorated in the decades since the Stockholm conference. For instance, fish stocks have declined, temperatures have increased, and more forest has been lost. Perhaps most urgently, today we face growing evidence that human-made environmental change will cause profound global impacts if not addressed. International environmental law is just one tool to successfully face these new challenges. But the strong record of international environmental cooperation from Stockholm to Paris provides hope for the future.
An Ounce of Prevention

Natural disasters aren’t utterly unforeseeable events. We track hurricanes from their origins as tropical depressions. And spring flooding rather predictably follows a winter of heavy snow. To be sure, earthquakes are harder to predict than many other potential catastrophes, but these events do not lie beyond our forecasting powers.

The real question, as a matter of legal policy and economic wisdom, is why we spend so little to prepare for foreseeable disasters. An ounce of prevention is worth a pound of cure. By one estimate, each dollar spent on disaster preparedness is worth roughly $15 in mitigated future damage. In a note at the end of this essay, I will cite sources that perform this economic calculation. But even if this estimate is wrong by a whole order of magnitude, a rational person would still spend $1.00 to avoid losing $1.50.

The failure to take reasonable, even obvious, steps in anticipation of natural disasters is a variation on a common legal theme. All facets of finance, from banking to investment to insurance, are branches of risk management. Miscalculations by hedge funds or actuaries are typically classified as mismeasurement of risk. In other circumstances, financial failures are blamed on the poor implementation of theoretically sound predictive models.

So which of these explanations accounts for poor management of risk from natural disasters? I will identify two mutually related causes.

First, natural disasters are big, rare, and destructive events that exceed the financial resources of individuals and businesses. Spending money before disaster strikes means spending money up front. We apply the metaphor of disaster planning to everyday conversation. We literally speak of “saving money for a rainy day.” An alternative to saving money is to transfer the risk through insurance. But private insurance companies have historically refused to cover certain losses, such as flood damage.

Although it’s certainly a contestable point, and probably cause for some controversy, natural disasters overwhelm the managerial abilities and resources of the private sector. Therefore, the case for treating disaster management as a governmental responsibility is that much stronger. In The Sympathetic State: Disaster Relief and the Origins of the American Welfare State (University of Chicago Press 2012), Michele Landis Dauber argues that disaster relief may be the sole basis for governmental
proof that some individual or corporate defendant has breached a duty of care. Certain laws tailor recovery according to particular types of disaster. For example, the Oil Pollution Act of 1990 imposes liability for “removal costs and damages” upon “each responsible party for a vessel or a facility from which oil is discharged… into or upon… navigable waters or adjoining shorelines.”

More typically, though, risk transfer is voluntary. Let’s return to our hypothetical seaside house. You may be able to buy insurance against some of the risks you encounter when you live by the sea. By issuing a policy, an insurance company agrees to bear certain risks of seaside living, as long as you pay a periodic premium.

Across the landscape of disaster, from natural events, such as hurricanes, to losses more typically blamed on humans (including industrial accidents like Three Mile Island and the Exxon Valdez), systematic underinvestment in prevention, precaution, and preparation leaves society awash in “accidents waiting to happen.” Risk management can respond with four tools: avoidance, reduction, retention, and transfer.

If these are the four horses of risk management’s anti-apocalypse, the hardest to feed and ride is risk transfer. Consider the problem of living by the sea. Along with the view and the maritime lifestyle comes risk of hurricanes, tsunamis, and rising sea levels. You can avoid the risk by living elsewhere or at least building your house a little farther inland. You can reduce certain risks by building a sturdier house. Or you can retain risk by accepting the consequences of living seaside and setting money aside to rebuild when storms or waves eventually force the issue.

If you do none of those things, however, you have one last choice. You can transfer risk to someone else. Notably, the recipient of a risk transfer doesn’t have to be a voluntary partner. A successful lawsuit is said to transfer risk from the winning party to the loser. To say the least, this is an extreme way to execute a risk transfer strategy.

Recovery through tort suits requires intervention in civilian life that draws support from all parts of the ideological spectrum.

Public-sector involvement in natural-disaster management leads to my second criticism. If disaster management becomes a governmental responsibility rather than a set of duties left to individuals and private insurance companies, then disaster law becomes an instrument of politics. Alas, voters prefer heroic intervention over prosaic prevention. As a result, disaster management by the government can become a series of catastrophic responses to catastrophic risk.

Accidents Waiting to Happen

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Risk transfer through homeowner’s or renter’s insurance is an ordinary, everyday transaction. As long as a house remains mortgaged, the lender will insist that the homeowner carry insurance, if only to protect the bank’s security interest. But few property and casualty insurance companies will underwrite a rider...
of 2012 promised to put the NFIP on better financial footing, this law resulted in sharp increases in premiums charged for flood insurance. A public outcry prompted Congress to delay or undo much of the original reform by passing the Homeowner Flood Insurance Affordability Act of 2014.

Catastrophic Responses to Catastrophic Risks

The federal government’s frustration in its efforts to reform flood insurance may not seem terribly dire. Other insurance programs, such as crop insurance for farmers, have faced similar problems. There, too, the habit of awarding ad hoc relief after disaster reduces or eliminates incentives to take preventive measures ahead of time.

But disaster policy isn’t just one program or one industry. Proper social responses to disaster require coordination among private actors (including charitable relief agencies) and government agencies at all levels. A closer look at political and practical realities shows why disaster policy so often delivers catastrophic responses to catastrophic risks.

All sorts of inevitable events require advance planning. Bad health, old age, death...we can’t avoid these negative outcomes, but we can take measures to soften the blow to ourselves and our families. It is also true that smart preparation—proper diet and exercise, retirement- and estate-planning—takes effort. When it comes to getting ready for bad outcomes, most people fall far short.

So, too, with disaster. Scholars of disaster law spend much of their time urging individuals, private companies, relief charities, and governments to assemble a mixture of plans and policies. The goal is to strike the right balance between prevention, emergency response, compensation and insurance, and reconstruction. Perhaps the hardest trick is knowing how much to spend on advance preparation, as opposed to rescue efforts after the fact.

Certain services, such as education for earthquake damage. Even fewer will cover flood damage.

Limits on insurability arise from the nature of catastrophic loss. The pooling of risks remains profitable for insurance companies only to the extent that claims don’t happen at the same time and within a concentrated geographic area.

In other words, risks don’t exist in isolation. They often travel in packs and arrive at the same time. Economists and actuaries describe this problem as one of correlation.

For reasons deeply rooted in American history, culture, and politics, the business of insurance in the United States is regulated mostly at the state level. The McCarran-Ferguson Act, a federal statute passed in 1945, commits the regulation of insurance companies to state governments. As a result, American insurance companies have smaller geographic footprints—and lower financial reserves—than some of their counterparts in other wealthy countries.

But even the largest insurance companies avoid covering flood-related losses. The correlation of such losses in time and space is simply too severe for insurance companies to bear. The private sector does have ways to respond. The specialized business of reinsurance pools losses among insurers. Exotic instruments such as catastrophe bonds (which are often established as “special purpose vehicles” under the laws of financial havens like the Cayman Islands) enable reinsurance companies to transfer some of their risk to very wealthy individuals and institutions.

If all else fails, though, there is a reinsurer of last resort: the federal government. Through the National Flood Insurance Program, the United States government has subsidized insurance policies that will cover flood-related losses. Despite those subsidies, many homeowners have failed to buy flood insurance. Congress often passes ad hoc relief after storms. Buying insurance, even at discounted rates, may not make financial sense if you expect a cost-free bailout from Congress.

Moreover, the NFIP has struggled to contain its costs. Although the Biggert-Waters Flood Insurance Relief Act
and law enforcement, are considered “public goods” because they are open to all. Not only are public goods widely available but consumers can usually take advantage of them without getting in each other’s way. Until congestion clogs the quality of transportation or classroom instruction, people who make use of roads and schools don’t really reduce the value of these public goods to other people.

Investments in disaster preparedness are quite often public goods. Some of these investments, such as dikes and levees, are visible, even physically formidable. Other investments are virtual or analytical in nature, such as databases on flood vulnerability and early warning systems for storms and earthquakes.

For example, Congress has ordered the Federal Emergency Management Authority (FEMA) to develop a protocol and database for allocating losses between water and wind in “named” storms. The federal government appropriates $400 million each year so that FEMA can produce flood maps in 100-year floodplains, 500-year floodplains, and “residual risk areas.”

Evidence supporting public-sector investment in disaster preparedness is global. In comparing recovery after disaster in richer countries with recovery in poorer countries, economists have concluded that economic resilience requires advance financial planning and reserves. With proper resources in place, countries can withstand the initial shock, prevent spillovers into the broader economy, and pay for reconstruction.

In every country, however, investments in disaster preparedness are subject to the no-holds-barred politics of taxing and spending. Rarely do politicians win campaigns by promising to bring actuarial soundness and proper management to the National Flood Insurance Program. It is very difficult to turn hurricane and earthquake databases into compelling political ads.

On the other hand, politicians look very impressive when they lead dramatic missions to rescue flood victims and deliver desperately needed food and medical aid. “Sending in the cavalry” makes great political theater. It is also very expensive, and almost always less cost-effective than advance investments in physical infrastructure and analytics.

In other words, sending troops, food, and medical supplies wins elections. It may be wiser to spend money on prevention, detection, preparation, and insurance, but politicians don’t care to stake their careers on measures that are as slow as they are dull. The Stafford Disaster Relief and Emergency Relief Act, a heroic and visionary law for delivering federal aid to state and local governments overwhelmed by disasters, has now become legal first aid rather than disaster assistance of last resort.

The politicization of disaster relief can endanger even the politicians themselves. When stricken areas realize sudden “windfalls” from federal funding, the influx of money creates conditions that invite corruption and waste. Not every elected official successfully resists the temptation.

In short, natural disasters aren’t the only things that make it hard to develop sensible laws and public policy. Human nature, especially the instincts that enable us to evaluate risk and to make smarter decisions in the future, is a formidable foe in its own right. Quite often, communities imagine that surviving a disaster means that a long period of calm and relative safety will follow. That assumption flies in the face of environmental probability. Nevertheless, the urge to restore a vulnerable waterfront to its previous glory is emotionally and politically irresistible. What is true of beloved beachfront homes is true of entire towns. We rebuild, only to suffer loss anew when storms return.

There’s No Such Thing as a Natural Disaster
It is often said that there is no such thing as a natural disaster. This apparent paradox reminds us that terrible physical events, from hurricanes to earthquakes, have social consequences. Nature lashes out, but human choices put vulnerable people in harm’s way.

Just as there is no such thing as a strictly natural disaster, there is no such thing as strictly private disaster law. All sorts of calamities overwhelm the capability of ordinary citizens, companies, and private charities. Government at all levels has a role to play. Everything from flood insurance to dikes, levees, and storm-damage databases engages the public sector.

But because law is a human institution, we must temper our expectations of disaster law and policy. When government sends in the cavalry after the next catastrophe, we should remember that it might have been wiser and cheaper to spend money on duller acts of disaster preparedness in advance. Memories, of course, are short. Soon enough, we’ll vote against spending money during periods of calm, and wait for calamity to strike again.

Note
The economic estimate that each dollar in disaster preparedness saves $15 in future damage is based on these sources:

In 2007, the environment—in particular, global warming—burst into the public consciousness. Former Vice President Al Gore won the Nobel Peace Prize and saw his film, “An Inconvenient Truth,” win an Oscar and become the fourth highest-grossing documentary of all time. International leaders gathered in Bali at the close of the year to launch a new round of climate change negotiations. And here at home, the United States Congress took up varying proposals to combat global warming while the Supreme Court issued a landmark ruling on the issue.

Global warming may represent the newest frontier in environmental law, but the lawmaking institutions working to address it have more than 30 years of history on which to build. This history has been tumultuous, but throughout it, environmental law has grown, overcoming challenges and demonstrating a surprising resilience. Whether tackling global warming, water pollution, or the protection of endangered species, environmental lawmaking is uniquely and inherently difficult. As such, its persistence over the past three decades is even more remarkable. Making environmental law is difficult in part because the environment itself is so complex. Ecological systems are complicated and dynamic, as are the factors that contribute to environmental change. Environmental law must take this complexity...
Public consciousness of environmental issues was also growing. Publications such as *Silent Spring*—Rachel Carson’s 1962 missive against pesticide use—captured the nation’s attention. So did highly visible environmental disasters later in the decade, including the 1969 oil spill off the Santa Barbara coast and, famously, the burning of the polluted Cuyahoga River. By 1970, the stage had been set: a diffuse body of environmental law already existed, and the public supported more.

The 1970s was a seminal decade for environmental protection. Its first year saw three major accomplishments: the National Environmental Policy Act (NEPA), the Clean Air Act, and the creation of the EPA. NEPA alone was groundbreaking. Often called the “Magna Carta of environmental law,” it articulated a broad declaration of national policy to protect the environment. NEPA’s action-forcing requirements were even more significant than its aspirational policy statements. The law required federal agencies to assess the environmental impacts of their actions and to identify alternatives less likely to harm the environment. This “look before you leap” approach changed the way...
the federal bureaucracy operated and proved—along with the law’s information-disclosure requirements—NEPA’s most enduring legacy.

Congress enacted nearly two dozen environmental laws over the course of the decade, and it did so with overwhelming bipartisan majorities. The federal environmental laws of the 1970s were dramatic, sweeping, and uncompromising. In addition to NEPA, there were public-health and pollution-control laws such as the Clean Air Act and Clean Water Act. There were also natural resources laws such as the Endangered Species Act, Natural Forest Management Act, and Marine Mammal Protection Act. The natural-resources laws of the 1970s were particularly noteworthy for the balance they struck in favor of conservation and against exploitation. The most sweeping—the Endangered Species Act—went even farther, making the prevention of extinction its overriding policy objective.

The 1970s also witnessed the emergence of the criticism and controversy that face environmental law to this day. Ironically, President Nixon began the decade as one of environmental law’s biggest supporters but ended his term a skeptic of the very laws he initially championed. Controversy arose in other corners, too. Some environmentalists were dissatisfied with the pace of progress, while regulated industries argued that the EPA was overreaching. By the end of the decade, the federalist and regulatory reform movements that would later flourish had begun to take shape. Nonetheless, Congress continued passing far-reaching laws, and the courts—including the Supreme Court—broadly interpreted them both in terms of their jurisdictional reach and their regulatory rigor.

The 1980s: Consensus Breaks Down

The 1980s were tumultuous years that saw numerous challenges to environmental law—but in the end confirmed its surprising persistence. President Nixon may have begun his administration as a cheerleader for environmental law and ended as a skeptic, but President Ronald Reagan left no doubt about where he stood on the body of laws enacted in the 1970s. Reagan aligned himself with the “Sagebrush Rebels,” a movement of western opponents of federal ownership of public lands. Immediately after his inauguration, he launched a cabinet-level task force on “regulatory relief” that suspended numerous pending regulations and encouraged industry to target particularly burdensome ones. Similarly, he signed an executive order requiring cost-benefit analysis of major rules and giving the Office of Management and Budget significant authority to review and shape regulations.

The heads of Reagan’s Interior Department and EPA—James Watt and Anne Gorsuch (mother of current U.S. Supreme Court justice Neil Gorsuch, and the first woman to lead the agency)—were openly hostile toward the agencies they led. Watt described the Interior Department as “oppressive,” and Gorsuch drew fire for attempting to cut the EPA’s budget by as much as one third. Both eventually left their posts with controversy in their wake (Gorsuch’s refusal to turn over documents to Congress led to an inter-branch confrontation and the ultimate perjury conviction of one of her assistants). Ironically, Watt and Gorsuch were such lightning rods that they undermined Reagan’s environmental agenda. While Watt succeeded in expanding oil, gas, and mineral leasing on public lands, he and Gorsuch failed to achieve many of the big reversals of environmental protection that Reagan supported.

Canal and other abandoned and inactive hazardous waste sites across the country, created a dramatic new liability program that forced polluting industries to pay for the cost of toxic waste cleanup. Congress also amended and strengthened existing laws, such as the Clean Water Act and the Resource Conservation and Recovery Act, over the course of the decade. Reflecting Congress's dwindling trust in the executive branch, the new laws were increasingly prescriptive and less deferential to federal agency expertise; they added tough new deadlines on the EPA's implementation of new regulatory programs, and they imposed even stricter controls on industry. Finally, Congress reaffirmed the importance of information disclosure that it first embraced in NEPA, passing the Emergency Planning and Community Right to Know Act of 1986. Enacted in the wake of a chemical plant explosion in Bhopal, India, the law required industry to inform communities when it used and released dangerous substances.

**The 1990s: Partisan Gridlock**

The political makeup of the federal government changed dramatically in the 1990s. President George Bush, like Nixon, marked the beginning of his term with environmental accomplishments, signing the 1990 Clean Air Act amendments into law. And like Nixon, Bush ended his term a skeptic, proposing to drill for oil in Alaska's Arctic National Wildlife Refuge and only grudgingly attending the 1992 Earth Summit in Rio. The election of President Bill Clinton changed the executive branch's approach to environmental law, but countervailing changes in the composition of Congress and the courts led to increasing conflicts over environmental goals and policies.

In 1994, Republican congressional candidates swept into power, capturing control of the House and Senate. As part of its “Contract with America,” the 104th Congress proposed legislation to elevate the rights of landowners, require cost-benefit analysis of environmental laws, and single out environmental programs for disproportionate budget cuts. While his campaign for the presidency stressed the economy and not a green agenda, Clinton found political advantage in fighting Congress's proposed environmental reforms—and few ultimately became law. This same partisan gridlock prevented the legislative overhauls that characterized the previous two decades. Interior Secretary Bruce Babbitt and EPA administrator Carol Browner responded by pursuing an activist, ambitious lawmaking agenda by administrative regulation. Congress, in turn, sought to block new regulations by attaching "riders," or unrelated policy provisions, to its annual spending bills.

Controversy, gridlock, and the demise of bipartisanship were hallmarks of environmental lawmaking in the 1990s. These hallmarks have continued throughout the current Bush administration, which suspended a host of Clinton-era environmental regulations immediately upon taking office. The Bush administration also drew fire for promoting energy and national forest policies that emphasized exploitation of natural resources. When Congress took up these issues, it divided largely on party lines. This continuing deterioration of bipartisanship stands in stark contrast to the broad congressional support that environmental law drew from both parties in its early decades.

The courts also underwent major changes beginning in the 1990s, as years of conservative judicial appointments by Presidents Reagan and Bush came to fruition. The courts became increasingly skeptical of the efficacy of environmental protection laws. In a series of cases narrowing Congress's authority to regulate economic activity under the Constitution's Commerce Clause, the Supreme Court called into question the very foundation on which laws such as the Endangered Species Act rest.

While domestic environmental law persisted, international environmental law became the engaging and dynamic focus area in the 1990s. By the end of the decade, the United Nations listed approximately 1,000 international environmental agreements of one kind or another—far greater than the 52 agreements that existed in 1970. At the same time, concern about the intersection of trade and the environment, as well as energy and the environment, arose.

**The Future**

The 21st century has brought new challenges, none greater than global warming. The most powerful and wealthiest nations in the world are the greatest cause of greenhouse gas emissions; by contrast, many of the poorest parts of the globe are most immediately and devastatingly threatened. Effective control of global warming, moreover, will require not only major reductions by the world's most powerful countries but also the agreement of developing nations now caught in a bind between economic development and the environment.

In short, environmental lawmaking to address global warming will need to conquer the same kind of hurdles it has always faced, which have made environmental lawmaking so difficult and controversial. The only significant difference is that the hurdles are now much higher in light of global warming's extraordinary spatial and temporal dimensions. Lawmaking to address global warming will require sweeping international and domestic laws, the creation of new international lawmaking institutions, and perhaps also new domestic institutions. The challenges are enormous, but so too are environmental law's past achievements and future aspirations.
Standing: Who Can Sue to Protect the Environment?

by Marisa Martin

Editor’s note: This is an updated version of an article with the same title, addressing the same topic, by Marisa Martin, which appeared in the Spring 2008 issue of Insights on Law & Society and the April 2008 issue of Social Education, the magazine of the National Council of the Social Studies. Marisa A. Martin is a Chicago lawyer at the firm of Baker & McKenzie.

On November 2, 2018, the U.S. Supreme Court announced that the trial in a case brought by 21 people, including minors, against the federal government for its role in the global warming crisis, could continue. Juliana v. United States is underway in the 9th circuit, in Oregon. The plaintiffs, many of whom live in regions of the country suffering from effects of climate change, including extreme weather events, want a federal judge to order the federal government to develop a plan to address climate change.

Environmental lawsuits range from the highly local to the global. A plaintiff may file a lawsuit challenging the pollution of a nearby stream, the threats facing polar bears in the Arctic, or the increase in global warming due to unregulated greenhouse gas emissions. Whether alleging a global or local concern, parties bringing claims in federal court must satisfy the same hurdles before the merits of their case can be heard. One such hurdle is known as “standing,” which requires the parties bringing the lawsuit to demonstrate that they are the appropriate parties to bring the case in front of a court.

The basic idea behind “standing”—that only parties who have an interest in the case can bring the lawsuit—is relatively straightforward. In practice, however, developing a principled basis upon which standing can be demonstrated has proven to be extremely difficult, especially for those cases involving environmental issues. This article outlines the basic requirements for constitutional standing and how standing can be demonstrated in environmental cases.

The article also discusses the Supreme Court’s landmark 2007 ruling in Massachusetts v. EPA, which involved claims related to global warming and greenhouse gas emissions.

Background

The principle of standing is premised on the U.S. Constitution. Under Article III of the Constitution, judicial power extends over “cases” and “controversies.” In sim-
plified terms, this has been interpreted to mean that only lawsuits alleging an injury to the plaintiff can be heard by the federal courts. The Supreme Court has noted that notwithstanding how many persons have been injured by the challenged action, the plaintiff bringing the lawsuit must demonstrate that the action injures him or her in a personal way. The requirement of standing ensures that the action brought is an adversarial one, which tends to sharpen the issues in front of the court.

Economic harm has been the traditional means by which to show a plaintiff suffered an injury. However, many environmental harms—such as polluted water, species in threat of extinction, and contaminated air—may not translate into an economic injury to an individual plaintiff. In the 1970s, the Supreme Court held that noneconomic injuries such as harm to recreational, conservational, and aesthetic interests can represent an “injury-in-fact,” so long as the plaintiff is among the injured.

Decades later, in the 1990s, the Supreme Court more fully elaborated Article III standing requirements as applied to an environmental case. In *Lujan v. Defenders of Wildlife* (1992), environmental plaintiffs challenged a new rule by the U.S. Department of Interior, which interpreted a section of the Endangered Species Act as not applicable to actions in foreign nations. Plaintiffs included individuals who had visited Egypt in order to view the Nile crocodile and Sri Lanka to view the Asian elephant and Asian leopard. Plaintiffs alleged that the Department of Interior’s rule would negatively affect their future ability to view these species in their natural habitats.

The *Lujan* Court delineated three elements that must be met to demonstrate the constitutional minimum of standing to sue. First, a plaintiff must show an “injury-in-fact.” The “injury-in-fact” must be “concrete and particularized” and “actual or imminent,” not conjectural or hypothetical. The Court has noted that “particularized” means that the injury must affect the plaintiff in a personal and individual way. Second, the plaintiff must demonstrate a “causal connection between the injury and the conduct complained of.” The injury must be “fairly traceable” to the defendant’s challenged actions. Third, the plaintiff’s injury must be one that is likely to be redressed by a favorable decision in the case.

Applying this test, the Court determined that the plaintiffs did not have standing to sue because it found no “imminent” injury to the plaintiffs. The Court noted that the members of the Defenders of Wildlife who had visited Egypt and Sri Lanka only expressed an “intent” to return to these places and did not have concrete plans. The Court found these “someday” intentions were insufficient for the purposes of showing an “actual and imminent” injury.

The Court’s decision in *Lujan* highlighted a shift in the Court toward a stricter interpretation of standing in both environmental cases and other areas of the law. But the trend toward a more restrictive interpretation of standing was mitigated to some extent in 2000. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.* (2000), plaintiffs brought a suit against a corporation discharging pollutants in violation of the Clean Water Act. Members of Friends of the Earth alleged injuries to their recreational, economic, and aesthetic interests and stated that the river “looked and smelled polluted." The Court recognized that plaintiffs held “reasonable concerns” about the alleged Clean Water Act violations that directly affected their interests. The Court stated that injury to the environment was not necessary to show Article III standing, so long as injury to the plaintiffs was shown. Applying the *Lujan* three-part test, the Court found that the plaintiffs had standing to bring the suit.
Justice Scalia, who authored the Lujan decision, dissented in Friends of the Earth. In his dissenting opinion, he stated that by accepting plaintiffs’ vague concerns about the environment even in the face of evidence that the environment was not harmed, the majority made the “injury-in-fact requirement a sham.”

The Global Warming Case—Massachusetts v. EPA

The cases described above illustrate the contentious nature of standing in environmental litigation and the lack of a consistent approach to standing in environmental cases. Standing analysis has been further challenged by lawsuits alleging global environmental problems like global warming. Unlike other air pollutants that have health and environmental impacts on the ground, greenhouse gases interfere with our climate high in the Earth’s atmosphere. As a result, most people do not experience direct harm from the emission of greenhouse gases.

The United States has not ratified the Kyoto Protocol, which is the international treaty that mandates greenhouse gas reduction targets for developed countries and creates incentives for the transfer of cleaner, lower-carbon technologies to developing countries. Nor has it implemented any greenhouse gas controls on the national level. This lack of regulation has led to legal challenges by environmental groups and others based on existing environmental statutes, such as the Clean Air Act, or common law nuisance claims.

A significant obstacle in these types of cases is the ability of the plaintiffs to meet standing requirements. In part, the difficulty relates to the scientific basis underlying climate change. While the majority of mainstream scientists agree that carbon dioxide and other greenhouse gases cause increased global temperatures, there is less agreement about the effects of global warming. Without certainty about the effects of global warming, plaintiffs have a harder time proving that they will suffer an injury as a result of increased greenhouse gas emissions. The redressability element of standing is also problematic because greenhouse gases are emitted around the world, and halting the greenhouse gas emissions of one particular country is not likely to reverse or stop climate change on its own.

The Supreme Court has affirmed standing in a global warming case, Massachusetts v. Environmental Protection Agency (2007). This landmark case held that the Environmental Protection Agency (“EPA”) had the authority to regulate carbon dioxide, which was contrary to the EPA’s position that it lacked such authority. The Court also provided some guidance on standing in global warming cases.

The actions leading up to the Supreme Court’s decision in Massachusetts vs. EPA began in 1999 when a group of 19 private organizations submitted a petition for rule-making to the EPA, requesting that standards be set for greenhouse gases emitted by new motor vehicles. Under Section 202(a)(1) of the Clean Air Act, standards must be set for “air pollution” emitted from motor vehicles when the pollution endangers public health and welfare.

In 2003, the EPA denied the petition and stated that it lacked authority to regulate greenhouse gas emissions under the Clean Air Act. The EPA also identified several policy reasons why its decision not to regulate greenhouse gases was appropriate, including that there were “numerous areas of scientific uncertainty” surrounding climate change and that the causal link between greenhouse gases and warmer temperatures “cannot be equivocally established.”

Petitioners requested review of the EPA’s denial of the rule-making petition by the U.S. Court of Appeals for the D.C. Circuit, which denied the petitions, although the judges each wrote separate opinions.

Judge Randolph announced the decision of the court. He avoided a definitive ruling on standing and assumed for the sake of argument that the EPA had authority under the Act to...
regulate greenhouse gas emissions from new motor vehicles. He found that the EPA properly declined to exercise that authority and could take into account scientific evidence as well as policy judgments when determining whether regulation is advisable.

A second judge, Judge Sentelle, determined that the petitioners lacked standing because global warming is harmful to humanity at large, and thus petitioners’ grievances were too generalized to support standing. However, Judge Sentelle joined Judge Randolph’s decision to ensure a majority of the panel could agree on the disposition of the case.

In a 38-page dissent, the third judge, Judge Tatel, determined that the State of Massachusetts had demonstrated all three elements of Article III standing—jury, causation, and redressability. With respect to injury, Tatel stated that there was a “substantial probability” that global warming would result in sea level rise, which would threaten Massachusetts's coastline and coastal property. Tatel found that the plaintiffs adequately showed that the EPA’s failure to regulate greenhouse gases contributed to global warming, which caused projected sea level rises. With respect to redressability, Tatel decided that plaintiffs’ expert testimony established that reductions of greenhouse gases from motor vehicles would delay and moderate many of the adverse impacts of global warming. Turning to the merits, Judge Tatel determined that the EPA possessed statutory authority to regulate greenhouse gas emissions and that the policy considerations identified by the EPA fell outside its range of discretion.

Plaintiffs then sought review of the case by the Supreme Court, which was granted. The Court first addressed the question of standing and focused on the special position of the state of Massachusetts. The Court emphasized that the fact the state of Massachusetts is a sovereign state and not a private party like in Lujan is of “considerable relevance” and that Massachusetts was given “special solicitude” in the standing analysis. However, exactly how this “special solicitude” affected the standing analysis was not clear from the Court’s opinion.

With respect to the injury element of standing, the Court found that Massachusetts adequately demonstrated that rising global sea levels have already swallowed some of the state’s coastal land and that if sea levels continue to rise as predicted, the state’s injury will become more severe over time. As an owner of significant coastal property, the Court found that Massachusetts’ injury was “actual” and “imminent.”

With respect to causation, the Court noted that a substantial percentage of greenhouse gases are emitted by motor vehicles and that 6% of worldwide carbon dioxide emissions can be attributed to the transportation sector in the U.S. Thus, the Court found that the regulation of greenhouse gases from motor vehicles would make a meaningful contribution to reducing greenhouse gas concentrations.

The Court found the third element of standing—redressability—was also adequately demonstrated. The Court determined that the regulation of greenhouse gases emitted by motor vehicles would have some impact on global warming, thus reducing to some extent the harm to the state of Massachusetts.

After finding that the plaintiffs demonstrated standing, the Court addressed the merits of the case. The Court agreed with plaintiffs that greenhouse gases fall within the definition of “air pollutants” in the statute. As such, the EPA held the authority to regulate greenhouse gases from new motor vehicles under Section 202(a)(1) of the Clean Air Act. The Court found that the EPA provided no reasoned explanation for its refusal to determine whether greenhouse gases contributed to global warming and remanded the case for further proceedings.

On remand, the EPA found that six greenhouse gases “in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare.” The EPA also introduced regulations of certain greenhouse gases as a result. In February 2010, the states of Alabama, Texas, and Virginia and several other parties sought judicial review of the EPA’s determination in the U.S. Court of Appeals, District of Columbia Circuit. On June 26, 2012, the court issued an opinion, which dismissed the states’ and other parties’ challenges to the EPA’s endangerment finding and the related regulations. The three-judge panel unanimously upheld the EPA’s central finding that greenhouse gases, such as carbon dioxide, endanger public health and were likely responsible for the global warming experienced over the past half century.

The U.S. Supreme Court’s 2007 decision in Massachusetts v. EPA had an impact on subsequent climate change lawsuits as well as on environmental standing and standing in general. The Court’s finding that carbon dioxide is considered a “pollutant” under the Clean Air Act has been used to support separate litigation challenging the EPA’s failure to regulate greenhouse gases from stationary sources and other sources covered by the Clean Air Act. Also, the Court’s recognition of the injuries caused by global warming, the causation between increased greenhouse gases and global warming, and the EPA’s ability to mitigate harmful impacts of climate change will likely be used to demonstrate standing in other global-warming-related cases.

While the legacy of Massachusetts v. EPA is still in development, it is clear that the issue of environmental standing will continue to be a contentious one.
Learning Gateways

Case Study in Environmental Law: 
The Exxon Valdez Oil Spill

**Estimated Time:** From 30 minutes to several class periods

**Grade Level:** Secondary, but adaptable for other levels

**Overview**
This unit is comprised of many parts highlighting the Exxon Valdez story, including a photograph presentation with discussion questions, maps, personal stories, and Supreme Court documents. Individual parts may be selected or combined for use in the classroom, depending on classroom needs. The entire unit is designed to teach students about the 1989 Exxon Valdez oil spill and its impact on the environment and larger society. Students will learn that seemingly isolated incidents—in both time and place—affect larger areas for years beyond the event. The Exxon Valdez disaster affected all of the United States, as victims came from every state, and it continued to resonate in the United States, especially following a 2008 U.S. Supreme Court decision.

This teaches students to:
- Analyze the historical significance of events and how historical events impact present circumstances
- Develop historical empathy by perceiving past events as they were experienced by people at the time
- Appreciate the role of the accidental in history
- Understand the relationship between geography and history, and geographical context for historic events
- Recognize the roles of popular culture and federal, state, and local governments and how such roles and relationships demonstrate change and continuity over time
- Appreciate and articulate the importance of the rule of law for protecting the environment

**Materials**
- Exxon Valdez PowerPoint presentation downloaded from the ABA Division for Publication website
- Personal stories about the disaster available on the Exxon Valdez Oil Spill Trustee Council website: [http://www.evostc.state.ak.us/index.cfm?FA=main.home](http://www.evostc.state.ak.us/index.cfm?FA=main.home)
- “I Am” poem template, handout or online
- “Found Poetry” handout
- Notebook paper, chart paper, or white board, depending on Concept Web activity

1. The historical thinking skills outlined in the overview are adapted from *History's Habits of Mind™*, from the National Council for History Education, Inc.
Activities

- Use the Exxon Valdez PowerPoint presentation as an introduction to, or as an entire lesson on, the disaster, the clean up, the impact on wildlife, and the long-term effects on Alaska residents.

- Choose a few personal stories about the oil spill’s impact on local communities to share with your students. Have them read the stories and discuss them as a class.

- Ask students to create an “I Am” poem based on the personal stories that they read. Ask them to put themselves in the positions of the people affected by the Exxon Valdez oil spill or the recent Supreme Court decision. A handout template of the poem is included in this packet; or students may write the poem “Mad Libs”-style online at [http://ettcweb.lr.k12.nj.us/forms/iampoem.htm](http://ettcweb.lr.k12.nj.us/forms/iampoem.htm) then print it.

- Ask students to create a “found poem,” using the personal stories that they read. “Found poetry” involves students selecting words right from a document, in this case the newspaper articles with personal stories, and creating a poem. ONLY words from the document, or newspaper article, may be used. A handout template of the poem is included in this packet, along with a possible rubric for easy assessment.

- Ask students to create a concept web, individually, in small groups, or as a class, using the Exxon Shipping v. Baker case. Put the 1989 oil spill in the middle of the web, and branch out by brainstorming possible effects, followed by more effects, followed by more effects, and so on, to illustrate the complexity of this particular incident/case. Draw the web on notebook paper, chart paper, or the white board in front of the class, depending on your needs and preferences. Concept web templates are available online at [http://www.teach-nology.com/web_tools/graphic_org/concept_web/](http://www.teach-nology.com/web_tools/graphic_org/concept_web/).

Debrief

- Ask students what they learned about the far-reaching and long-term effects of seemingly isolated environmental disasters, such as an oil spill.

- Talk with students about the role of laws and government at all levels in this particular situation, and ask what can be learned for other situations. What might be learned from this case?

Additional Resources

- **Exxon Valdez Oil Spill Trustee Council**
  Available at: [http://www.evostc.state.ak.us](http://www.evostc.state.ak.us)

  Established by the state of Alaska and the federal government in response to the Exxon Valdez disaster, the Trustee Council is responsible for overseeing injury assessments and payments. The Council’s site offers an extensive history of the oil spill, photos, clean-up efforts, and up-to-date information on the state of Prince William Sound and its ecosystems.

- **Office of Exxon Valdez Oil Spill Damage Assessment and Restoration, National Oceanic and Atmospheric Administration’s National Marine Fisheries Office**
  Available at: [http://www.fakr.noaa.gov/oil/default.htm](http://www.fakr.noaa.gov/oil/default.htm).

  The NOAA website chronicles the oil spill, clean-up efforts, and the ecological impact—including habitat restoration and lingering oil, both historic and current. Other useful resources include site pages detailing how weather affected the oil spill and clean-up efforts.

- **Exxon Shipping Company v. Baker et al. No. 07-219**, Legal Information Institute, Cornell University

  The Legal Information Institute website is one-stop shopping for the case syllabus, formal opinions, and dissenting opinions of the Supreme Court justices. Everything is available for free download.

- **Exxon Shipping Company v. Baker et al. No. 07-219**, Oyez U.S. Supreme Court Media Project

  The Oyez Project is a collection of U.S. Supreme Court Media. The case is outlined, similar to the style of the Legal Information Institute, but also summarized for easy consumption by readers. The Oyez site also offers court transcripts and recorded oral arguments for free download.

- **Omeara, Jan, ed. Cries from the Heart: Alaskans Respond to the Exxon Valdez Oil Spill.**

  This 90-page book is a printed collection of personal stories in the aftermath of the devastating oil spill. Though out of print, used copies are available at various bookselling websites.
### I Am Poem

**Directions:** Using the personal stories from the *Exxon Valdez* oil spill and resulting *Exxon Shipping v. Baker* Supreme Court case, create an “I Am” Poem. Put yourself in the position of the people described in the stories and try to describe their feelings and thoughts in the areas below. When you are finished, read over your poem, make any needed changes, and decide where you want stanzas to begin and end. Rewrite the poem on the back.

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td>I am</td>
<td>(<strong>two special characteristics of your historic person</strong>)</td>
</tr>
<tr>
<td>I wonder</td>
<td>(<strong>something your historic person might be curious about</strong>)</td>
</tr>
<tr>
<td>I hear</td>
<td>(<strong>something your historic person might hear</strong>)</td>
</tr>
<tr>
<td>I see</td>
<td>(<strong>something your historic person might see</strong>)</td>
</tr>
<tr>
<td>I want</td>
<td>(<strong>something your historic person might desire</strong>)</td>
</tr>
<tr>
<td>I am</td>
<td>(<strong>Repeat the first line of the poem.</strong>)</td>
</tr>
<tr>
<td>I pretend</td>
<td>(<strong>something your historic person might pretend to do or think</strong>)</td>
</tr>
<tr>
<td>I feel</td>
<td>(<strong>something your historic person might feel</strong>)</td>
</tr>
<tr>
<td>I touch</td>
<td>(<strong>something your historic person might touch</strong>)</td>
</tr>
<tr>
<td>I worry</td>
<td>(<strong>something your historic person might be worried about</strong>)</td>
</tr>
<tr>
<td>I cry</td>
<td>(<strong>something that might make your historic person sad</strong>)</td>
</tr>
<tr>
<td>I am</td>
<td>(<strong>Repeat the first line of the poem.</strong>)</td>
</tr>
<tr>
<td>I understand</td>
<td>(<strong>something your historic person might know is true</strong>)</td>
</tr>
<tr>
<td>I say</td>
<td>(<strong>something your historic person might believe</strong>)</td>
</tr>
<tr>
<td>I dream</td>
<td>(<strong>something your historic person might dream about</strong>)</td>
</tr>
<tr>
<td>I try</td>
<td>(<strong>something your historic person might make an effort to do</strong>)</td>
</tr>
<tr>
<td>I hope</td>
<td>(<strong>something your historic person might hope for</strong>)</td>
</tr>
<tr>
<td>I am</td>
<td>(<strong>Repeat the first line of the poem.</strong>)</td>
</tr>
</tbody>
</table>
Found Poem Instructions

1. Carefully read the personal stories you selected from the Anchorage Daily News website. Look for 50–100 words that stand out in the article(s). Highlight or underline details, words, and phrases that you find particularly powerful, moving, or interesting. Be sure to include passages or quotes that also reflect your personal beliefs and ideas.

2. On a separate sheet of paper, make a list of the details, words, and phrases you underlined, keeping them in the order that you found them. Double space between lines so that the lines are easy to work with.

3. Look back over your list and cut out everything that is dull or unnecessary or that just doesn’t seem right for a poem about an oil spill, the Exxon Valdez incident, or the ensuing legal issues. Try to cut your original list in half.

4. As you look over the shortened list, think about the tone that the details and diction convey. The words should all relate to the topic, since you are creating a poem about the effects of the Exxon Valdez oil spill. Make sure that you have words that communicate your emotions or those of the person in the prose text.

5. Copy the words and phrases onto a clean sheet of paper, or type them. Begin creating your “found poem” using the words in your list, in order. Space or arrange the words in any way you would like to so that they’re poem-like. Pay attention to line breaks, layout, and other elements that will emphasize important words or significant ideas in the poem.

   • Read aloud as you arrange the words! Test the possible line breaks by pausing slightly. If it sounds good, it’s probably right.

   • Arrange the words so that they make a rhythm you like. You can space words out so that they are all alone or all run together.

   • You can also put key words on lines by themselves.

   • You can shape the entire poem so that it’s wide or tall or shaped like an object—i.e., barrel of oil, drop of water, fish.

   • Emphasize words by playing with boldface and italics, different sizes of letters, and so forth.

6. Make any minor changes necessary to create your poem. You can change punctuation and make little changes to the words to make them fit together (such as change the tenses, possessives, plurals, and capitalizations). If you absolutely need to add a word or two to make the poem flow more smoothly, or to make sense, to make a point, you may add up to five words of your own. That’s five and only five!

7. Read back over your poem draft one more time and make any deletions or minor changes.

8. Check the words and choose a title—is there a better title than “Found Poem”?

9. At the bottom of the poem, tell where the words in the poem came from—cite your source(s)!
# I Am Poem and Found Poetry Rubric

<table>
<thead>
<tr>
<th>Category</th>
<th>4 points</th>
<th>3 points</th>
<th>2 points</th>
<th>1 point</th>
<th>Points</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Focus on the topic of environmental law, Exxon Valdez oil spill</strong></td>
<td>The entire poem focuses on the topic. The topic stands out throughout the poem.</td>
<td>Most of the poem focuses on the topic. The poem wanders off topic.</td>
<td>Some of the poem focuses on the topic. The poem often wanders off topic.</td>
<td>No attempt was made to relate the poem to the topic.</td>
<td></td>
</tr>
<tr>
<td><strong>Use of details</strong></td>
<td>The entire poem reflects close attention to the primary sources.</td>
<td>Most of the poem relates directly to the primary sources.</td>
<td>Some of the poem relates directly to the primary sources.</td>
<td>No connections were made in the poem to the primary sources.</td>
<td></td>
</tr>
<tr>
<td><strong>Expression and creativity</strong></td>
<td>The poem is very expressive and creative.</td>
<td>The poem is mostly expressive and creative.</td>
<td>The poem is somewhat expressive and creative.</td>
<td>The poem is not expressive or creative.</td>
<td></td>
</tr>
<tr>
<td><strong>Logical progression and sequence</strong></td>
<td>The poem is presented in a logical sequence.</td>
<td>Most of the poem is in a logical sequence, but 1–2 lines are out of order.</td>
<td>Some of the poem is in a logical sequence, but 3–4 lines are out of order.</td>
<td>The poem is not presented in a logical sequence. More than 5 lines are out of order.</td>
<td></td>
</tr>
<tr>
<td><strong>Clear, consistent tone</strong></td>
<td>The poem maintains a clear and consistent tone and effectively communicates the writer’s ideas.</td>
<td>The poem does not maintain a clear and consistent tone, but the writer’s ideas are still communicated effectively.</td>
<td>The poem maintains a clear and consistent tone, but the writer’s ideas are not effectively communicated.</td>
<td>The poem does not maintain a clear and consistent tone, and does not effectively communicate the writer’s ideas.</td>
<td></td>
</tr>
<tr>
<td><strong>Overall use of primary sources</strong></td>
<td>The poem makes excellent use of primary sources.</td>
<td>The poem makes good use of the primary sources, but could be improved.</td>
<td>The poem makes use of the primary sources, but needs improvement.</td>
<td>The poem does not make use of the primary sources.</td>
<td></td>
</tr>
<tr>
<td><strong>Understanding of the key concepts</strong></td>
<td>The poem demonstrates an excellent understanding of the key concepts.</td>
<td>The poem demonstrates a good understanding of key concepts.</td>
<td>The poem demonstrates some understanding of the key concepts, but needs improvement.</td>
<td>The poem does not demonstrate any understanding of the key concepts.</td>
<td></td>
</tr>
</tbody>
</table>

| Total points earned                          |                                                                           |                                                                         |                                                                         |                                                                         |        |
Estimated Time: 30-45 minutes, homework assignment

Grade Level: Secondary, but adaptable for other levels

Overview
This lesson serves as a review of important environmental laws and their impact, not only on society as a whole, but in the everyday lives of students. This jigsaw is presented as a classroom discussion, but it could be modified into a written exercise for homework.

This teaches students to:
• Analyze the historical significance of environmental legislation
• Consider how historical environmental legislation might impact present circumstances
• Appreciate the significance of environmental history in their own lives
• Appreciate and articulate the importance of the rule of law for protecting the environment

Materials
• Access to the Internet or materials for research
• List of legislation to be studied and discussion questions, printed on handout or displayed in the classroom

Activities
Note: This activity assumes students have a basic understanding of the concept of environmental law and the existence of relevant federal policy and international standards.

Split students into six small groups, and assign each group a significant environmental policy to research:

Federal policy in the United States
• Clean Air Act (1963)
• National Environmental Protection Act (1969)
• Endangered Species Act (1973)
• Safe Drinking Water Act (1974)

International agreements
• Kyoto Protocol (2005)
• Paris Agreement (2016)

Each group should research and report on the following:
• What is the policy and what was its purpose or goal?
• What are the most important things that people should know about the policy?
• When was the policy enacted? How might it affect your community today?

Involve a Legal Professional
• Ask a local attorney or judge to talk with your students about their experiences with environmental law. For assistance, contact your local or state bar association for a possible referral.
• Invite a local police officer or city official to talk with your students about the environmental regulations in your community.
• Contact your local EPA office or sustainability organization to see if an official might be able to talk with your students about environmental issues in your community.
Step One
Share with students the three-part requirement for standing, outlined in *Lujan v. Defenders of Wildlife* (1992). Either students can read the description of *Lujan* in the article “Standing: Who Can Sue to Protect the Environment?” by Marisa Martin in this issue, or you can write the three elements, listed below, on the board:

1. The plaintiff must show an “injury-in-fact” that is “concrete and particularized” and “actual or imminent,” not conjectural or hypothetical.
2. The plaintiff must demonstrate a “causal connection between the injury and the conduct complained of” (i.e., the injury must be “fairly traceable” to the defendant’s challenged actions).
3. The plaintiff’s injury must be one that is likely to be redressed by a favorable decision in the case.

Make sure that students understand that the “injury-in-fact” suffered by the plaintiff does not have to be an economic injury. Injuries to a recreational or aesthetic interest, for example, can also satisfy the “injury-in-fact” requirement. Also point out that, in *Massachusetts v. EPA* (2007), the Court gave “special solicitude” to a state that was seeking standing to challenge an action by the Environmental Protection Agency.

Step Two
Share with students the following scenario:

Pleasant Lake lies along the border of two states. The lake’s shoreline in State A lies along the edge of a state park and is largely undeveloped; only a few small structures (outhouses and a shower) for a rustic campground in the state park have been built near the shoreline. More development (primarily private, single-family vacation homes) has occurred along the shoreline in State B. A public-access boat landing is also on the State B shoreline.

Getaway Resorts, a private company, has proposed a major resort development on one of the last remaining tracts of undeveloped land along the shoreline in State B. The edge that were of this tract lies along the border with State A. It is zoned for single-family residences. Getaway Resorts has applied for a zoning variance to allow development of the resort.

An environmental assessment of the proposed development has identified what might result if the property is developed as a resort instead of as single-family residences. Possible consequences: increased traffic from motorboats and other recreational watercraft on the lake and a slight increase in runoff of lawn fertilizers in the proposed resort development. In addition, the resort will border the state park in State A and may disrupt wildlife populations at the edge of the park.

A number of parties have challenged Getaway Resorts’ application for a zoning variance.
Using the three standing requirements that were outlined in *Lujan v. Defenders of Wildlife* and the “special solicitude” ruling in *Massachusetts v. EPA*, ask students to debate whether any of the following parties should have standing to sue. You may want to divide the students into small groups to discuss standing of the parties. Then, have small groups share their conclusions and discuss them with the class as a whole.

1. A group of owners of lakeside, private residences in State B argues that the presence of a large resort property will diminish the economic value of their properties.

2. A group of individuals who use the public-access boat landing for recreational fishing argues that increased runoff of fertilizers into the lake will have a negative impact on fish populations and diminish recreational enjoyment of the lake.

3. A family who vacations every year at the state park campsite argues that increased traffic on the lake will diminish the sense of solitude they experience when camping in the state park.

4. State A challenges the resort project, citing its interest in conserving wild places for its citizens to enjoy.

**Extended Activities**

- *Sierra Club v. Morton* (1972), an early Supreme Court decision on standing in an environmental case, included a dissenting opinion by Justice William O. Douglas, a well-known conservationist. Justice Douglas proposed a federal rule “that [would allow] environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage.”

Have students read Justice Douglas’s dissent. Ask them to consider how the standing rule proposed by Justice Douglas would work in the Pleasant Lake scenario described above. What arguments could be made on behalf of Pleasant Lake? Which of the parties described above would be best suited to speak for the lake? Would Pleasant Lake, as a party, be able to meet the three requirements of standing as defined in *Lujan v. Defenders of Wildlife*?

- On November 2, 2018, the U.S. Supreme Court announced that the trial could continue in a case brought by 21 people, including minors, against the federal government for its role in the global warming crisis. *Juliana v. United States* is underway in the 9th circuit, in Oregon. The plaintiffs, many of whom live in regions of the country suffering from effects of climate change, including extreme weather events, want a federal judge to order the federal government to develop a plan to address climate change.

Students could consider the facts of this pending case to determine if the plaintiffs satisfy the criteria for standing as outlined by the Court in *Lujan*. Do the facts of the case in *Juliana* satisfy standing requirements as outlined by the Court in *Lujan*? If not, what looks different? Why might the Court have ruled to allow this trial to continue?

*James Landman is associate director of the American Bar Association Division for Public Education in Chicago.*
What Is an Environmental Impact Statement?

by Tiffany Middleton

The environmental impact statement (EIS) is a government document that outlines the impact of a proposed project on its surrounding environment. In the United States, these statements are mandated by federal law for certain projects. Environmental impact statements are meant to inform the work and decisions of policymakers and community leaders. Here, Teaching Legal Docs will explore the EIS—what it is, who writes one and why, what parts and information are typically included, and why environmental impact statements are significant resources for teaching about the environment and environmental policy in the classroom.

A Purpose under Law

In the United States at the federal level, an EIS is a report mandated by the National Environmental Policy Act of 1969 (NEPA) to assess the potential impact of actions “significantly affecting the quality of the human environment.” This requirement under NEPA does not prohibit harm to the environment, but rather requires advanced identification and disclosure of harm. Examples include building, clean-up, and infrastructure projects. But the NEPA mandate is broader. A development project that constitutes major federal action, as defined by law, including use of federal land or federal tax dollars, or jurisdiction under a federal agency, is required to assess the impact of the proposed project on the physical, cultural, and human environments affected by the proposed project. The U.S. Bureau of Land Management submitted one of the earliest environmental impact statements in February 1970, for the Trans-Alaska Pipeline project. The Alabama Trustee Implementation Group worked with several federal agencies in 2017 to produce an EIS in the wake of the Deepwater Horizon oil spill. Approximately 500 statements are prepared by federal agencies in the U.S. each year. An EIS outlines the status of the environment in the affected area, provides a baseline for understanding the potential consequences of the proposed project, identifies positive and negative effects on the environment, and offers alternative actions—including inaction—in relation to the proposed project.

Not all major federal projects that could affect the environment require an EIS. The EIS requirement is one of three possible environmental review categories under NEPA. Some projects require no review and earn a “categorical exclusion determination” (CAEX). The I-35W Saint Anthony Falls Bridge, which replaced the collapsed I-35W Mississippi River Bridge in Minnesota, for example, qualified for this exempt designation. Smaller projects might require an environmental assessment (EA), a simpler investigation of environmental impact. Evaluation of an EA could prompt a larger investigation and result in a full EIS, or could result in a “finding of no significant impact” (FONSI) and proceed without further review. When the U.S. Department of Agriculture prepared an EA prior to building Willow Creek Cabins in Allegheny National Forest in 2005, for example, it resulted in a FONSI.

Local Applications

Environmental impact statements often address local areas and projects that are tangible and potentially well-known, making them widely available and accessible. They are tools for informing the public about the development and engineering of the built environment. They also serve as windows into the civic planning that shapes communities. They reveal details about the environmental health and development of a specific area in a comprehensive report. An EIS helps to illustrate how federal legislation might be enforced, how federal agencies contribute to local projects and provide oversight through protocols, and how the public might engage with federal agencies as part of these processes.

Unpacking the Document as a Primary Source

The U.S. Environmental Protection Agency (EPA) maintains the Environmental Impact Database (https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search), which includes records of all statements filed since 1987, including PDF copies of all statements filed since 2012. The database is free and fully searchable. There are notes that specify which stage the statement is at in the review process (i.e., draft, final), so it is clear what type of statement is available.

Each EIS in the database has a “details” page, which opens with one
click in the database. The details page outlines basic information: title of the statement, which generally conveys the Proposed Action; the EIS Number, which includes the year the statement was submitted (example: 20180271); several notes about the document type, which detail where the statement is in the review process; and contact details for the submitting federal agency. There are links to all of the PDF documents (including attachments) that have been submitted for the Proposed Action.

An EIS might have one or more authors. Federal agencies typically outsource the writing of an EIS to third-party contractors (including lawyers, scientists, and engineers) with expertise related to the proposed project and/or to EIS preparation. As a result, different EIS vary in appearance, as well as in the length and number of supplemental attachments. Notice the contrast between two example statements above, one submitted by the U.S. Department of Agriculture (above left) and one on behalf of the Federal Highway Administration (above right).

The table of contents in the statement provides the best guide for seeing and locating all of its parts. Many statements include an executive summary or other front matter, in addition to the formal introduction, which helps to provide an overview of the Proposed Action and identify the sections.

**Standard Contents**

The content of a federal EIS is regulated by the Council on Environmental Quality (CEQ), an office in the executive branch of the federal government tasked with enforcing the rules established by NEPA. A typical federal EIS includes the following four sections:

- **Section 1**—Introduces the Proposed Action and its Purpose and Need
- **Section 2**—Describes the Affected Environment, provides a baseline for understanding the current environmental situation in relation to the Proposed Action.
- **Section 3**—Presents a Range of Alternatives to the Proposed Action—this is considered the “heart” of the EIS. There is always a No Action Alternative presented. Understanding how the environment would respond if no action were taken helps to evaluate the Proposed Action and Alternatives.
- **Section 4**—Analyzes the environmental impact of each of the Proposed Actions and Range of Alternatives. The analysis includes:
  - Impacts to threatened or endangered species
  - Air and water quality impacts
  - Impacts to historical and cultural sites, particularly sites of significance for indigenous peoples
  - Social and economic impacts to local communities, including housing stock, businesses, property values, and considerations of aesthetics and expected noise
  - Cost and schedule analysis for all of the actions and alternatives presented

The EIS may include additional topics not required for every project, such as financial plans, environmental mitigation plans, and plans for complying with any required federal, state, or local permits.

With so much to address, the typical EIS is a lengthy document, often more than 100 pages. The table of contents, however, makes it easy to identify the specific sections that would be most useful for a classroom discussion or civic action.
Beyond the Document

The EIS is meant to be a comprehensive decision-making tool for federal, state, and local policy makers, and to inform the public about proposed projects that could affect the environment. Beyond drafting the document itself, development of the EIS prompts a formal process of review to facilitate the decision-making process (see table). The process includes opportunities for members of the public to voice opinions and influence projects that affect their environment. In 1970, days after the Bureau of Land Management submitted their EIS for the Trans-Alaska Pipeline, three organizations raised concerns that the statement—at just eight pages—was inadequate, given the complexities of the permafrost environment in Alaska. Ultimately, the report grew from eight pages to eight feet thick!

Each federal agency is required to develop its own protocols to implement the review process for environmental impact statements. Although all federal agencies follow the 8-step process outlined in the chart, exact review processes differ. The Bureau of Prisons, for example, assigns specific staff to review statements. The National Oceanic and Atmospheric Administration involves their Office of the General Counsel for review. The Federal Highway Administration outlines an extensive review process that involves staff and project stakeholders. The EIS is an enforcement tool to ensure that federal agencies adhere to the goals outlined in NEPA.

Environmental Impact Assessment Around the World

Since the mandate was issued by the U.S government, the use of environmental impact statements has boomed. The International Association for Impact Assessment was established in 1981 to provide resources for professionals and persons interested in environmental assessment. Since then, individual states have also adopted similar requirements. California, for example, requires environmental assessments under the California Environmental Quality Act. Montana, Washington, D.C., and Puerto Rico have comparable policies. Internationally, the World Bank began including environmental assessment in its funding-appraisals process in 1986. The United Nations adopted the EIS requirement for certain programs in 1987, and over 100 countries, including Australia, China, India, Nepal, and Ukraine, have adopted similar environmental assessment protocols. The EIS requirement in NEPA was a watershed development, fundamentally reshaping—and documenting—stakeholders' work in the built environment.

Review Process for Federal Environmental Impact Statements

<table>
<thead>
<tr>
<th>Step</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Scoping</td>
<td>First meetings are held, and needs for work and research are assessed and delegated. This stage is open to decision makers and those involved with the proposed project.</td>
</tr>
<tr>
<td>2. Notice</td>
<td>Public is notified that the relevant agency is preparing an EIS. An announcement is filed in the Federal Register, notices are sent to local media, and letters are sent to individuals and groups that might be interested. The public may submit comments identifying issues that the EIS should address.</td>
</tr>
<tr>
<td>3. Draft EIS</td>
<td>Agency assembles all comments and prepares a draft statement.</td>
</tr>
<tr>
<td>4. Comment</td>
<td>Members of the public who are affected by the proposed action are welcome to provide feedback on the draft through written comments and public hearings over a 45-day period.</td>
</tr>
<tr>
<td>5. Final EIS and Proposed Action</td>
<td>The agency announces its Proposed Action, based on the feedback and analysis it received in earlier steps. A 30-day waiting period is required after comments close before announcing the Proposed Action.</td>
</tr>
<tr>
<td>6. Re-evaluation</td>
<td>This is needed if changes are required to the Proposed Action, or if a length of time has passed between Final EIS and planned action.</td>
</tr>
<tr>
<td>7. Supplemental EIS</td>
<td>This is prepared if new environmental impacts are discovered, or if the size and scope of the Proposed Action change.</td>
</tr>
<tr>
<td>8. Record of Decision</td>
<td>This is the final action prior to implementation of the Proposed Action. Any outstanding issues, including protests, are resolved. After this stage, protestors may sue the agency in federal court.</td>
</tr>
</tbody>
</table>

Environmental Impact Assessment: Classroom Applications

1. Locate the EIS for a planned or completed local or regional project, if applicable. Allow students to read about the proposed action and the considered alternatives and discuss whether they think the proposed action is most appropriate.
2. Encourage students to submit comments on a draft EIS (during the comment period) concerning a local project, if applicable.
3. Ask students to research examples in state history where an EIS was challenged in federal court and identify the result.
4. Assign students to consider projects in their community that could require an EIS, and have them explain why. Invite a local expert (e.g., city manager, lawyer, engineer, forestry professional, park ranger) to discuss the students’ findings. They might bring examples of past EIS-worthy projects that have been completed in the community.