Committee Newsletter | Fall 2015

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MESSAGE FROM THE CHAIR

The ABA-YLD-EER Committee strives to keep our members up-to-date on interesting issues related to the environment, energy, and natural resources. With this issue of the newsletter, I would like to introduce myself, Alexandra Campbell-Ferrari, as your new Chair, and Debra Levin, Lisa Lowry, and Christina I. Reichert, as your new Vice-Chairs. We are excited to take on these positions and look forward to engaging with Committee Members.

As always, our newsletter depends on contributions from our members. Please contact Alexandra at acampbellferrari@gmail.com if you wish to contribute an article, cartoon, or graphic that creatively explains new laws or regulations. We look forward to hearing from you and hope you enjoy our Fall Issue.

ARTICLES

The Arctic: A Changing Landscape that Presents Opportunities and Challenges
By Robert Bryson II

The Arctic Ocean is undergoing a dramatic transformation that will change the planet. In August 2015, average sea ice coverage was 5.61 million square kilometers, 1.61 million below the 1981–2010 average.1 The U.S. Navy predicts that portions of the Arctic will have ice-free summers as early as 2020.2

The Arctic: Remote, Cold and Full of Money

The Arctic is a polar region located at the northernmost part of Earth. It includes a vast ocean and landmasses present in several countries. Much of its ocean is covered by ice that expands and contracts with the seasons.3 It is a dangerous and inhospitable region devoid of major human settlement. The area is traversed primarily by animals, indigenous humans, militaries, and research vessels, as well as the occasional tourist.

The Arctic is also full of money. The U.S. Geological Survey estimates that the Arctic holds between 13% and 25% of the world’s fossil fuel reserves,4 equaling roughly $1 trillion dollars in economic potential. Additionally as the sea ice recedes, new trade routes open up from Asia to Europe that can halve transit times.5 Both of these possibilities have companies and countries vying for a slice of the region. However, even with warming temperatures, the Arctic will remain one of the most isolated and inhospitable regions on the planet. This necessitates expensive

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upfront capital costs to account for both the difficulty of operations and the great risk to the environment and human life. Any endeavor this complex requires close cooperation among the governments involved.

The Arctic: How to Manage this New Frontier?

Modern maritime operations are complex endeavors and require close cooperation among governments. Matters as simple as safety standards, search and rescue operations, and ship-to-ship communication protocols must be negotiated and coordinated. Moreover, these difficulties do not even begin to address the complex issues associated with the Arctic, such as: jurisdiction, economic development, environmental safety, and military coordination. In an attempt to address these issues, the states with Arctic borders organized themselves into the Arctic Council. To date, it has only passed two agreements—the Ottawa and Ilulissat Declarations—which both avoided the tough issues.6

The Council is composed of voting members which border the Arctic (the United States, Canada, Russia, Norway [Svalbard], Denmark [Greenland], and Iceland) and observer members which do not (China, Korea, Japan, the United Kingdom, France, Germany, and the European Union). The Council’s goal is to organize countries’ claims to the Arctic to ensure the peaceful division and management.

In addition to the Council, the United Nations Law of the Sea (UNCLOS) treaty governs the peaceful claiming of jurisdictional “zones” over the high seas. The “high seas” are any area of external water that is more than twelve miles from a country’s coast.7 The high seas are nominally international, however UNCLOS provides for two methods to extend a limited form of sovereignty: (1) the Exclusive Economic Zone and (2) the Continental Shelf.8 Both of these mechanisms permit the holding country to manage the economic affairs of an extended maritime border into the high seas. Currently, all members of the Council, except the United States, are members of UNCLOS.9 However, it is the official position of the United States that UNCLOS represents customary international law and considers itself bound by the terms.10

For a member to claim jurisdiction, it must conduct a comprehensive study detailing the extent of the claim and submit it to the UNCLOS committee for approval.11 So far, Russia, Denmark, and Norway have filed submissions that are under various stages of review.12

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8 Id. at pt. V, arts. 56–57.
9 Id. at pt. XXI; depositary notifications C.N. 236 (1984).

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Summations: A Less than Rosy Picture

UNCLOS and the Arctic Council are the key mechanisms for the peaceful division and management of the Arctic. However, the recent breakdown of diplomatic relations between Russia and the Western States threatens to politicize and militarize this vulnerable region. Efforts by activists to block any development of the Arctic will not prevail. Unfortunately, the climate change rabbit is out of the hat, so someone, at some point, will develop the Arctic. Too many riches lie beneath the waves to be ignored. However, as tempting as those riches may be, it is critical that every possible measure be taken to safeguard the environment and native populations. The Arctic is a remote and delicate environment; therefore activism should focus on ensuring swift and responsible management. The challenges in the Arctic grow with each passing year, and the longer the Arctic Council abrogate their responsibilities, the more daunting the obstacles become.

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Robert Bryson II is a solo practitioner in San Diego, California. He graduated from the University of San Diego in 2014 and is admitted in California, New York, and New Jersey. Robert also volunteers at the Legal Aid Clinic.

Mass Incarceration, Mass Contamination

By Stinson Woodward Ferguson

One purpose of incarceration is to protect the un-incarcerated from harm. But how does incarceration actually cause the un-incarcerated harm? Although the inmates are kept behind bars, the high-density living conditions in prisons can cause negative environmental effects that are suffered by those in communities outside the confines of cell walls.

Because we house more bodies in prisons than any other country in the world,¹ the mass imprisonment of Americans is a hot legal and social topic. But what about the environmental issues? In a recent Op-ed² discussing links between the environment and mass incarceration, a quote from Panagioti Tsolkas, head of the Prison Ecology Project,³ states that prisons “function like a small city packed into one building.”⁴

In 2011, the U.S. Environmental Protection Agency (EPA) and U.S. Department of Justice (DOJ) announced a settlement with Pennsylvania correctional agencies for alleged Clean Air

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⁴ Poon, supra note 2.

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Act violations at boiler plants generating power and heat at four state prisons. The subject pollutants are linked to respiratory problems, childhood asthma, and haze. The settlement mandated pollution reduction measures, heightened reporting requirements, and charged a $300,000 civil penalty. EPA Region III Administrator Shawn M. Garvin commented that the settlement “will improve the air quality in four Pennsylvania communities” and added that it is “important that all sources of air emissions, including prisons, comply with environmental regulations to ensure that the standards are met in nearby communities.”

Prisons around the country are working to reduce the negative environmental effects caused by their operations. Government mandates prompted by strained resources have forced some prisons to conserve. For example, last year, California state correctional facilities used 7.2 billion gallons of water. In response to this year’s record-breaking drought, California Governor Jerry Brown announced mandatory water use restrictions in April and ordered public agencies to reduce their water consumption by 25%. Consequently, inmates reported that officials for the thirty-four California state prisons placed restrictions on showering privileges, toilet flushing ability, and access to clean clothes.

The conservation of resources applies to energy as well. In response to a state energy-reduction mandate, the Oregon Department of Corrections invested in new, energy-efficient appliances, solar water heaters, and a geothermal well. Washing machines were also modified to “reuse rinse-water to wash about a million pounds of clothes a month.”

The Indiana Department of Corrections invested in water boilers fueled by waste wood chips and erected a wind turbine at one of its prisons that generates roughly ten kilowatts per hour and saves over $2000 per year.

It is not uncommon to see prison inmates lining roadways in fluorescent outerwear collecting litter. But what about recycling programs in place within prison walls? In addition to reduced stress on area landfills, prison recycling programs save taxpayers money through decreased expenses and increased revenue. The Marion County, Oregon, jail recycling team saved nearly $10,000 in 2014 and spared the local landfill from 112 tons of trash through measures

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6 Id.
7 Id.
8 Id.
11 Pishko, supra note 9.
13 Id.
14 Id.

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like switching to bulk milk cartons from traditional pint-sized cartons, discontinuing the delivery of laundry items in plastic bags, and removing unnecessary garbage cans from the premises.\textsuperscript{16} Additionally, expanded trash sorting procedures led to $300 in savings and diverted from landfills to compost areas over 6500 pounds of food every month. Kitchen staff now “save, clean and flatten tin cans used for food preparation” and send them to a local recycling company, bringing in about $150 per year.\textsuperscript{17} Discarded soap is sorted from trash and sent to third world countries. And about $1000 of revenue is generated each year from recycling pallets used for deliveries to the prison by selling them to a local company.\textsuperscript{18}

Some other examples of recycling programs include the following:

- Inmates at Eastern Oregon Correctional Institution in Pendleton, Oregon, recycle uniform scraps into diaper bags for women’s shelters.\textsuperscript{19}

- Cedar Creek Corrections Center in Littlerock, Washington, now composts 100% of its food waste, saving between $6000 and $8500 each year in reduced garbage costs and eliminating the need for a $1.4 million sewage treatment plant upgrade.\textsuperscript{20}

- A 2008 summer drought prompted the North Carolina Department of Corrections to transform fifty-gallon food barrels into rainwater collecting cisterns.\textsuperscript{21}

Prison recycling and resource conservation programs make both environmental and economic sense by reducing costs and negative environmental effects. While we continue to address the harmful effects of mass incarceration from the outside in, we must also devote more attention to developing strategies and programs to help mitigate negative environmental effects from the inside out.

* * * * *

\textbf{Stinson Woodward Ferguson} is an attorney and licensed apprentice funeral director based in Greenville, SC. She has a B.A. in French from Converse College; a J.D. from University of Georgia School of Law; and an LL.M. in Environmental Law from Vermont Law School.

\textsuperscript{16} Alisha Roemeling, \textit{Marion County Jail’s Recycling Team Saves nearly $10,000}, Statesman J. (Jan. 9, 2015), available at \url{http://www.statesmanjournal.com/story/news/2015/01/09/marion-county-jails-recycling-team-saves-nearly/21495995/} (“Average disposal costs have gone from $900 per dump to $256 per dump.”).

\textsuperscript{17} \textit{Id.}

\textsuperscript{18} \textit{Id.}

\textsuperscript{19} Shake, \textit{supra} note 15.

\textsuperscript{20} Le, \textit{supra} note 12.

\textsuperscript{21} \textit{Id.}

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The Clean Water Act and Agricultural Runoff: Where’s the Regulation?

By Rachel Ramos

The Clean Water Act (CWA) has led to the national regulation and reduction of water pollution. However, nonpoint pollution sources—specifically from key agricultural practices—are largely omitted from the jurisdiction of the CWA. Two cases below are current examples of creative legal theories that attorneys use to address the issue of non-regulation or nonpoint source pollution. In Board of Water Works v. Sac County Board of Supervisors, the Complaint argues that an agricultural drainage system is itself a point source that differs from general agricultural runoff because it has a clear conveyance to another water source. In American Farm Bureau Federation v. U.S. Environmental Protection Agency, the Third Circuit Court of Appeals upheld a Total Maximum Daily Load (TMDL) watershed approach that allocates pollution restrictions for each source that emits into a watershed, whether it is a point source or a nonpoint source.

Board of Water Works v. Sac County Board of Supervisors

Des Moines Water Works filed a complaint against the leaders of three Iowa counties on March 16, 2015, in the U.S. District Court for the Northern District of Iowa Western Division.1 The Iowan public utility alleges that tile drains located on farm fields, operated by upstream municipal drainage districts, are illegally discharging pollutants into the Raccoon River in violation of the CWA, the Safe Drinking Water Act, and Iowa state law.2 Because the Raccoon River is one of two rivers that supply drinking water to Des Moines,3 the utility experiences significant stress to remove the excessive nitrates before the water reaches roughly 50,000 Iowans for their drinking water supply.4 The nitrate runoff causes Des Moines to run frequently its nitrate removal facilities, which is costly for the utility and consumers. More importantly, the runoff poses a health threat to tens of thousands of people.5

This case represents a larger trend in water pollution issues around the country. The CWA has played an integral role in cleaning up urban and industrial water pollution for the past forty-three years. However, the CWA has not been able to address adequately agricultural runoff. Agricultural practices are a significant source of pollutants, adding nitrites, phosphorous, ammonium, and sediment to water from agricultural runoff during rainstorms. Will Baker, Chesapeake Bay Foundation President, asserts that agriculture “is the leading source of pollution fouling our waterways . . . and it is the least expensive to prevent.”6

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2 Id.
5 Id.

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Yet, the CWA’s National Pollutant Discharge Elimination System (NPDES) only requires discharge permits for point source pollutants—“any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged”—and expressly exempts key agricultural functions from the definition of point source.\(^7\) The Des Moines Water Works Complaint alleges that the tile drains qualify as a point source with a clear discharge conveyance unlike general agricultural runoff. Therefore farms must acquire an NPDES permit before discharging pollutants from the tiles drains into Raccoon River.\(^8\) Many agricultural drainage systems use tile drains to transport runoff, giving this case the possibility of taking a significant step towards the regulation of agricultural runoff. However, courts may not feel comfortable labeling farms as “industrial” under the CWA’s Section 402 Phase I standards, nor may they be ready to uphold such an expansion of Environmental Protection Agency’s (EPA) regulatory power under the CWA.

**American Farm Bureau Federation v. U.S. Environmental Protection Agency**

On July 6, 2015, the Third Circuit Court of Appeals upheld the EPA’s 2010 final TMDL program for the Chesapeake Bay.\(^9\) The program aims to reduce the amount of nutrients entering into the Chesapeake Bay by using a watershed approach that requires pollution reduction from all impairment sources, including both point sources and nonpoint sources, within the watershed to meet the Bay’s Water Quality Standards. The Court of Appeals found the phrase “total maximum daily load” to be ambiguous, which gives the EPA deference to create pollution caps for detailed allocations of the “total” waters that make up the watershed. The court called the decision a huge legal win for “environmental groups, the states that border the Bay, tourists, fishermen, municipal waste water treatment works, and urban center.”\(^10\) This decision could help set legal precedent for an alternative way to address agricultural run-off in jurisdictions beyond the Chesapeake Bay.

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**Rachel Ramos** is a second year student at Georgetown University Law Center. She is clerking for the Environmental Protection Agency’s Office of Enforcement and Compliance this Fall and will be interning with the Natural Resources Defense Council this Summer.

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\(^7\) 33 U.S.C. § 1362(14) (“This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.").

\(^8\) Complaint, supra note 1.


\(^10\) Id.
WATER PHOTOGRAPH SUBMISSIONS

By Alexandra Campbell-Ferrari
This is a photo taken from the Es Trenc beach on Mallorca, one of the Balearic Islands in Spain, looking out at the Mediterranean Sea. It was one of the most peaceful afternoons, sitting on the rocks, listening to the crashing waves, smelling the sea salt and watching the birds.

By Christina I. Reichert
This photograph shows the view from my parent’s home as the sun rises over the Indian River Lagoon in Sebastian, Florida. This beautiful estuary is home to Pelican Island, the Nation's first National Wildlife Refuge, and supports a diverse ecosystem with manatees, sharks, dolphins, rays, and all manner of crustacean, fish, and birds.
RECENT LEGAL DEVELOPMENTS

1. The United Nations General Assembly approved the new Sustainable Development Goals (SDGs) to succeed the Millennium Development Goals (MDGs). These seventeen goals are priorities for advancing sustainable development in all countries.

2. This term the Supreme Court of the United States will be reviewing the D.C. Circuit Court of Appeal's decision last year to strike down FERC's Order No. 745 regarding demand response. The Circuit Court held that Order No. 745 infringed on states' jurisdiction to regulate retail electricity markets.

3. On August 3, 2015, EPA issued the final Clean Power Plan to reduce carbon pollution from existing power plants. Then, on October 1st, the agency issued new National Ambient Air Quality Standards (NAAQS) for ground-level ozone from seventy-five parts-per-billion (ppb) to seventy ppb.

NEWS AND ANNOUNCEMENTS

Here are news, announcements, and events from around the ABA YLD.

Update from the Member Services Project:

- On October 14, the ABA YLD will host a Twitter chat at 3PM PT/6 PM ET entitled Addressing Mental Health Stigmas in the Legal Profession. Rachael Barrett of The Dave Nee Foundation (@Neefoundation) will host the chat.
- On October 15, Hilary Chancy will present an Ethics-CLE program entitled “The Bipolar Attorney: When the Mental Impairment is Your Own.”
- October 16, Judi Cohen of Warrior One will present a CLE program entitled “Chaos to Mindfulness.”
- The Fit to Practice program will be launched at Fall Conference.

Update from the National Conferences/Events Team:

The ABA Everyday membership initiative found at http://www.abaeveryday.org.

Update from YLD Public Service Project:

Inaugural Outreach: The Public Service Team will hold its inaugural “World Wise Web (“WWW”) outreach on Friday, October 16, 2015, at 9:00 a.m. at Henderson Middle School in Little Rock,
Arkansas. This outreach is in conjunction with the ABA YLD Fall Conference. If anyone is interested in volunteering for this outreach, please contact ckannenb@fclaw.com.

**Update from Disaster Legal Services Team:**

- **New Team for 2015-2016.** The DLS team welcomes three new members to its team for this bar year: Karl Bach, Victor Flores, and Victoria Nedospasova. Returning to the team from last year are Wendy Ellard, Kim Goins, and Matthew Vlasman. Former DLS Director David Nguyen was appointed as Special Advisor and is helping the incoming DLS Director Andrew VanSingel transition into his new role.

- **A Disastrous Start to the Bar Year.** The DLS team responded to an unusually high number of disasters in a short period of time (four, to be exact) in Texas, Wyoming, Saipan, and Kentucky. To put things in perspective, last year DLS was implemented only once, for the flooding in Michigan. The DLS team dodged the proverbial bullet as several hurricanes in the Atlantic and Pacific bypassed U.S. soil. Despite the volume of disasters, the DLS team responded swiftly and quickly to help disaster survivors get the legal help that they need.

- **September Was Disaster Preparedness Month.** September was National Preparedness Month, and the DLS Team worked with YLD District Representatives to create a disaster plan for each district. When finalized, we will have a single document containing the disaster plan for each district. When disaster strikes, the District Representative will be able to quickly implement the DLS plan. The DLS team hopes to have this document finalized soon.

- **Resources.** Everyone should be thinking about disaster planning, whether it’s to help out the YLD DLS team, or in your own personal or professional life. Visit Ready.gov for ways you can prepare yourself for disaster. Also, don’t forget to check out the ABA Disaster Legal Services website as well as the Disaster Legal Aid website for up to date disaster-related information.