

2010

Foreword

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Recommended Citation

Konar-Steenberg, Mehmet K. (2010) "Foreword," *William Mitchell Law Review*: Vol. 36: Iss. 3, Article 4.
Available at: <http://open.mitchellhamline.edu/wmlr/vol36/iss3/4>

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FOREWORD

Mehmet K. Konar-Steenberg[†]

December 31, 2009, marked the end of the warmest decade ever recorded.¹ It also ended a decade of tepid political responses in Washington, D.C. to the serious problem of global warming. President Bush's term began with his rejection of the Kyoto Protocol in 2001, setting the tone for much of his administration.² Towards the end, President Bush did bring together major greenhouse gas emitting nations for informal talks.³ But other than this tentative step, U.S. policy remained essentially frozen while the polar ice caps melted.

Many hoped that the 2008 election of President Obama would change this situation. But the Great Recession and a partisan food fight over health care reform pushed climate change down on the list of legislative priorities, at least in the new administration's first year.⁴ Meanwhile, on the international stage, President Obama's involvement in the Copenhagen Climate Conference failed to live up to (probably unreasonably high) expectations, throwing the international climate change movement into disarray for the near term.⁵

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1. *2009: Second Warmest Year on Record; End of Warmest Decade*, NASA, Jan. 21, 2010, <http://www.nasa.gov/topics/earth/features/temp-analysis-2009.html>. Some might argue that the decade actually ends on December 31, 2010; in any case, I think it doubtful that the warming trend will have moderated significantly in a year.

2. Edmund L. Andrews, *Bush Angers Europe by Eroding Pact on Warming*, N.Y. TIMES, April 1, 2001, § 1, at 3.

3. John M. Broder et al., *Environmental Views, Past and Present*, N.Y. TIMES, Feb. 7, 2009, at A12.

4. As this is being written, the Senate is considering a "last ditch" effort to pass a climate change bill. Richard Cowen, *Senate Weighs Final Push to Move Climate Bill*, REUTERS, Feb. 21, 2010, <http://www.reuters.com/article/idUSTRE61K13620100221>.

5. Juliet Eilperin & Steven Mufson, *Climate Pact Appears Increasingly Fragile; U.N. Climate Chief Resigns*, WASH. POST, Feb. 19, 2010, at A3.

Ironically, the disappointments of the “lost decade” may have set the stage for true progress in the next decade. Because even though the federal government’s response floundered, states responded with their own global warming laws and regional carbon management initiatives.⁶ These efforts are important to the extent that they actually reduce carbon emissions and familiarize local governments with carbon management practices. But their lasting importance may lie in their nuisance value: the proliferation of new laws and regional regimes have generated interstate political conflicts⁷ and a patchwork regulatory environment.⁸ These familiar drawbacks to the “think global, act local” approach may be just the thing to finally unite politicians, business interests, and environmental activists around a uniform national response to the problem of global warming.

But what, exactly, should that response look like? Traditional command-and-control regulation of carbon emissions? A market-based cap-and-trade system? Some hybrid? What role, if any, should the states play in a new federal system? And how do international obligations and politics fit in?

These and other questions were the subject of “Carbon Management and the Law,” a symposium held at William Mitchell College of Law in St. Paul, Minnesota, on January 14, 2010.⁹ With support from Xcel Energy, AT&T, and CenterPoint Energy, the William Mitchell Law Review brought together government officials, academics, and industry representatives to debate these important questions. To mark this event, this Issue of the *William Mitchell Law Review* collected articles by some symposium presenters and other authors on global warming, as well as articles on other environmental and natural resource law issues.

6. Erin Kelly, *States Work to Reduce Global Warming*, USA TODAY, Mar. 25, 2007, http://www.usatoday.com/news/washington/2007-03-25-states-greenhouse_N.htm.

7. For example, coal-rich North Dakota has threatened to sue Minnesota over its law requiring utilities to factor in the likelihood of a future carbon tax when planning for new electricity production. Jennifer Bjorhus, *Dust Up Over Carbon*, STAR TRIB. (Minneapolis), Jan. 15, 2010, at D1; Christopher Bjorke, *N.D. Likely to Sue Minnesota Over Carbon Tax*, BISMARCK TRIB., Dec. 29, 2009, at B1.

8. See, e.g., NAT’L AUTO. DEALERS ASS’N, PATCHWORK PROVEN: WHY A SINGLE NATIONAL FUEL ECONOMY STANDARD IS BETTER FOR AMERICA THAN A PATCHWORK OF STATE REGULATIONS (2009), <http://www.nada.org/NR/rdonlyres/DBCC625E-2E8E-4291-8B23-B94C92AFF7C4/0/patchworkproven.pdf> (criticizing the “regulatory patchwork” emerging from the California Air Resources Board’s efforts to regulate greenhouse gas emissions from automobiles).

9. William Mitchell Law Review, <http://www.wmitchell.edu/lawreview/2010Carbon.html>.

In “Who Pays for Carbon Costs? Uncertainty and Risk in Response to the Current Patchwork of Carbon Regulation for Public Utilities,”¹⁰ Megan Hertzler and Mara Koeller argue that utilities are entitled to pass along the costs of carbon regulation to consumers under traditional ratemaking principles.

Elizabeth Burleson’s article, “China in Context: Energy, Water, and Climate Cooperation,”¹¹ discusses China’s role in international climate change law, including the First World Climate Conference, the Intergovernmental Panel on Climate Change, the United Nations Framework Convention on Climate Change, and the Kyoto Protocol. Professor Burleson also presents cooperative steps that China and the United States should take to mitigate climate change, including bilateral agreements to improve energy efficiency and reduce emissions, and discusses the role of human rights principles in guiding China’s climate change policies.

Andrew Long’s article, “Tropical Forest Mitigation Projects and Sustainable Development: Designing U.S. Law for a Supportive Role,”¹² discusses the emerging market for carbon offset projects and the need for U.S. government involvement to ensure that such programs do not unintentionally make matters worse. Long cautions that “[w]ithout proper incentives, the infusion of finances into tropical forest countries could exacerbate existing problems and incentivize unsustainable forest practices in the name of carbon emissions reductions.”¹³ Long also argues that the United States, as the world’s second-largest greenhouse gas emitter, should lead in the development of sustainable practices. Long’s specific proposals include establishing a tiered system of offset credits that would require a purchase of credits from projects that meet a high level of environmental and socioeconomic co-benefits, but would allow lower-tiered credits where high-benefit level credits are not available.

Darrell A. Fruth and Joseph A. Ponzi’s article on carbon sequestration illustrates the important intersection of environmental science and law.¹⁴ The authors focus on a carbon sequestration technique

10. Megan Hertzler & Mara Koeller, *Who Pays for Carbon Costs? Uncertainty and Risk in Response to the Current Patchwork of Carbon Regulation for Public Utilities*, 36 WM. MITCHELL L. REV. 904 (2010).

11. Elizabeth Burleson, *China in Context: Energy, Water, and Climate Cooperation*, 36 WM. MITCHELL L. REV. 950 (2010).

12. Andrew Long, *Tropical Forest Mitigation Projects and Sustainable Development: Designing U.S. Law for a Supportive Role*, 36 WM. MITCHELL L. REV. 968 (2010).

13. *Id.* at 990.

14. Darrell A. Fruth & Joseph A. Ponzi, *Adjusting Carbon Management Policies to*

called “biochar” and explain how current regulatory regimes related to carbon sequestration (e.g., Kyoto Protocol, the Regional Greenhouse Gas Initiative, and the California Global Warming Solutions Act) should be modified to encourage development of this technology.

Lisa Anne Hamilton’s article, “Canary in the Coal Mine: Can the Campaign for Mandatory Climate Risk Disclosure Withstand the Municipal Bond Market’s Resistance to Regulatory Reform?,”¹⁵ explores how the municipal bond market’s traditional resistance to regulatory reform affects the prospects for climate risk disclosure legislation. Even though the U.S. Securities and Exchange Commission is considering a requirement that publicly traded companies disclose climate risk, Hamilton says there has been little discussion about disclosure for municipal securities. Hamilton argues that climate risk disclosure should be required for municipal securities to protect investors of municipal utilities and tax-exempt rural electric cooperatives, which carry a significant amount of climate risk.

In “Climate Change and Environmental Review: Addressing the Impact of Greenhouse Gas Emissions Under the Minnesota Environmental Policy Act,”¹⁶ Thaddeus R. Lightfoot examines the issue of global warming under Minnesota’s environmental review laws. Lightfoot rejects calls to amend Minnesota’s environmental review laws to require analysis of greenhouse gases. Instead, he argues that these laws, as currently interpreted by the courts and the Minnesota Pollution Control Agency, already impose such requirements.

This Issue is rounded out by other articles addressing important questions of environmental and natural resources law. Paula Goodman Maccabee’s article, “Mercury, Mining in Minnesota, and Clean Water Act Protection: A Representative Analysis Based on the Proposed PolyMet NorthMet Project,”¹⁷ considers the environmental implications of the PolyMet NorthMet sulfide mining project in northern Minnesota. Maccabee argues that the Clean Water Act and Great

Encourage Renewable, Net-Negative Projects such as Biochar Sequestration, 36 WM. MITCHELL L. REV. 992 (2010).

15. Lisa Anne Hamilton, *Canary in the Coal Mine: Can the Campaign for Mandatory Climate Risk Disclosure Withstand the Municipal Bond Market’s Resistance to Regulatory Reform?*, 36 WM. MITCHELL L. REV. 1014 (2010).

16. Thaddeus R. Lightfoot, *Climate Change and Environmental Review: Addressing the Impact of Greenhouse Gas Emissions Under the Minnesota Environmental Policy Act*, 36 WM. MITCHELL L. REV. 1014 (2010).

17. Paula Goodman Maccabee, *Mercury, Mining in Minnesota, and Clean Water Act Protection: A Representative Analysis Based on the Proposed PolyMet NorthMet Project*, 36 WM. MITCHELL L. REV. 1110 (2010).

Lakes Initiative are implicated in sulfide mining projects, even though she acknowledges that neither completely prohibits the permitting of the project. Maccabee argues that projects, such as the PolyMet NorthMet project, should be forced to analyze their mercury discharge, including increased mercury air emissions and methylmercury, before obtaining a permit.

In “Spreading Its Wings: Using the Migratory Bird Treaty Act to Protect Habitat,”¹⁸ Collette L. Adkins Giese argues that conservationists should use the 1918 Migratory Bird Treaty Act, which prohibits the “taking” of migratory birds to protect habitat, when other laws—such as the National Forest Management Act and the Endangered Species Act—fall short.

Jay Krienitz and Susan Damon’s article, “The Rivers Belong to the People! The History and Future of Wild and Scenic River Protection in Minnesota,”¹⁹ narrates Minnesota’s dynamic history of river protection and analyzes the state’s successes and failures. Relying on a variety of primary source materials, the authors detail the history of the wild and scenic rivers program in Minnesota and conclude by analyzing the recent Minnesota Supreme Court decision in *Hubbard v. State, Department of Natural Resources* and considering the future of river protection in Minnesota.

As the variety of articles in this Issue illustrates, environmental and natural resources lawyers continue to confront a wide range of important issues. As we leave behind a lost decade on climate change and other environmental matters, we hope this Issue will contribute towards a decade that will be remembered for the solutions it generated rather than for the problems it avoided.

18. Collette L. Adkins Giese, *Spreading Its Wings: Using the Migratory Bird Treaty Act to Protect Habitat*, 36 WM. MITCHELL L. REV. 1157 (2010).

19. Jay Krienitz & Susan Damon, *The Rivers Belong to the People! The History and Future of Wild and Scenic River Protection in Minnesota*, 36 WM. MITCHELL L. REV. 1179 (2010).