

C O M M E N T

The Environmental Law and Policy Annual Review: Top 20 Articles

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The *Environmental Law and Policy Annual Review* (ELPAR) is published by the Environmental Law Institute's (ELI's) *Environmental Law Reporter* in partnership with Vanderbilt University Law School. This edition marks ELPAR's 10th anniversary. In accordance with its objective to provide a vehicle for the movement of ideas from the academy to the policymaking realm, ELPAR has provided a forum each year for the presentation and discussion of some of the most creative and feasible environmental law and policy proposals culled from the legal academic literature.

The student editors of ELPAR, with input from the course instructors, narrow down the pool of environmental articles published during the prior year to a list of about 20 contenders, all of which meet ELPAR's criteria of persuasiveness, impact, feasibility, and creativity. From this group of articles, the ELPAR student editors—in consultation with ELPAR's Advisory Committee, Environmental Law Institute staff, and the course instructors—select several articles to re-publish in shortened form with commentaries from leading practitioners and policymakers.¹

This year, ELPAR elected for the first time to share the year's list of top 20 articles, found in Table 1. Of the 20 articles outlined below, seven call for a federal agency—such as the U.S. Environmental Protection Agency, the U.S. Department of Interior, or the U.S. Department of Agriculture—to change regulations, policies, or practices. Three articles envision explicit presidential action through either the federal procurement, regulatory review, or the federal agency budget process. In addition, three articles focus on actions that could be taken by state or local governments, two by the judiciary, and one by private parties. Four articles contemplate actions that can be taken at the international level.

The student editors categorize the top 20 articles using the *Environmental Law Reporter's* topic categories. Because articles do not always fit neatly into a category, and often topic categories are interrelated, such as energy and climate, articles often are assigned a primary and secondary topic. Primary topics addressed in the top 20 articles are: climate change (12); governance (5); and energy (3). Secondary topics include: climate change (2); energy (3); governance (3); land use (4); air (1); and water (1). When both primary and secondary topics are considered, 14 articles addressed climate change in some manner.

This year's pool of articles came from both general and environmental law journals. Eleven out of the top 20 articles came from specialty journals focusing on environmental issues, while the other nine articles were originally published in general law review journals. Only two of these articles were published in the same journal, the *Harvard Environmental Law Review*.

The lead authors of the articles came from a range of law schools, but the following universities had two professors who each published a piece, as a lead author, that was included in the top 20: Georgetown University Law School; University of Texas-Austin Law School; Florida State Law School; and University of Minnesota Law School. The pool of articles this year also featured one practitioner who practices law in the United States Air Force as a Judge Advocate Officer.

The chart below lists every article included in the top 20 with a brief description of each article's big idea. The descriptions of the big ideas presented in the articles were drafted by the student editors and reflect the key points they thought made an important contribution to the environmental law and policy literature. Links are provided to the full articles and most of the links contain the authors' own abstracts.

1. For a full description of the methodology used for selecting articles, please refer to Environmental Law Institute, *Environmental Law and Policy Annual Review*, Publications, Trends in Environmental Law Scholarship Methodology: <https://www.eli.org/environmental-law-policy-annual-review/publications> (last visited May 10, 2017).

Table I: Article Overview Chart

Author	Title	Citation and URL	Primary/ Secondary Topic	The Big Idea
Barsa, Michael & David Dana	<i>A “Switching Costs” Approach: EPA’s Clean Power Plan as a Model for Allocating the Burden of Carbon Reductions Among Nations</i>	7 SAN DIEGO J. CLIMATE & ENERGY L. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2809210	Climate Change/ Energy	Carbon reduction responsibilities among nations should be determined by a “switching costs” approach, as used in the Clean Power Plan, in which a state’s responsibility for emissions reduction is based largely on its ability to obtain energy from sources other than fossil fuels.
Behles, Deborah	<i>Controlling Ancillary Emissions Under the Clean Air Act: Consideration of Energy Storage as Best Available Control Technology</i>	42 ECOLOGY L.Q. 573 http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2105&context=elq	Climate Change/ Energy	Energy storage and renewable energy should be considered Best Available Control Technologies for purposes of reducing greenhouse gas emissions from the starting, stopping, and running of fossil fuel facilities that are used to back up renewable resources.
Burger, Michael, Ann E. Carlson, Michael B. Gerrard, Jayni F. Hein, Jason A. Schwartz, & Keith J. Benes	<i>Legal Pathways to Reducing Greenhouse Gas Emissions Under Section 115 of the Clean Air Act</i>	28 GEO. ENVTL. L. REV. 359 https://web.law.columbia.edu/sites/default/files/microsites/climate-change/legal_pathways_to_reducing_ghg_emissions_under_section_115_of_the_caa.pdf	Climate Change/ Governance	EPA should regulate GHG emissions under Section 115 (“International Air Pollution”) of the Clean Air Act, which provides EPA with authority to require state implementation plans to address emissions that endanger public health or welfare in other countries if those countries provide the U.S. with reciprocal protections.
Byrne, J. Peter & Kathryn Zyla	<i>Climate Exactions</i>	75 MD. L. REV. 758 http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2681&context=facpub	Climate Change/ Land Use	Local governments should impose monetary exactions on developments that increase carbon emissions or reduce the natural resiliency of the locality, and use the fees collected to mitigate harmful environmental effects within the jurisdiction.
Cheever, Federico & Jessica Owley	<i>Enhancing Conservation Options: An Argument for Statutory Recognition of Options to Purchase Conservation Easements (OPCEs)</i>	40 HARV. ENVTL. L. REV. 1 http://harvardelr.com/wp-content/uploads/2016/03/Cheever-Owley.pdf	Climate Change/ Land Use	Options to Purchase Conservation Easements (OPCEs) could flexibly and efficiently conserve resources in the face of shifting coastlines and species migration due to climate change, if state legislatures amended current conservation easement enabling statutes to: (1) specifically recognize OPCEs; (2) immunize OPCEs from a range of potential common-law challenges; and (3) integrate OPCEs into the burgeoning body of conservation easement law.
Coleman, James W.	<i>How Cheap Is Corporate Talk? Comparing Companies’ Comments on Regulations With Their Securities Disclosures</i>	40 HARV. ENVTL. L. REV. 47 http://harvardelr.com/wp-content/uploads/2016/03/Coleman.pdf	Governance	Environmental regulators should use public companies’ securities disclosures to assess the sincerity of companies’ comments about the cost of proposed regulation.
Hull, Jason Robert	<i>Hey Now, Let’s Be Social: The Social Cost of Carbon and the Case for Its Inclusion in the Government’s Procurement of Electricity</i>	7 J. ENERGY & ENVTL. L. 18 https://gwuheel.files.wordpress.com/2016/02/jeel_vol7_issue1_hull.pdf	Climate Change/ Governance	Pursuant to authority under the Federal Property and Administrative Services Act, the president should require by executive order that agencies apply a social cost of carbon-based downward adjustment to electricity pricing to advantage low emitters in the federal procurement process.

Author	Title	Citation and URL	Primary/ Secondary Topic	The Big Idea
Klass, Alexandra & Jim Rossi	<i>Revitalizing Dormant Commerce Clause Review for Interstate Coordination</i>	100 MINN. L. REV. 129 http://www.minnesotalawreview.org/wp-content/uploads/2015/11/KlassRossi_onlinefinal.pdf	Energy/ Governance	Dormant Commerce Clause review provides “an independent ground” for courts to address challenges to state and local regulators’ failure to approve multistate energy infrastructure projects, and courts should “evaluate political process concerns” to ensure that “state decision-making frameworks allow for consideration of out-of-state benefits.”
Marzen, Chad G. & J. Grant Ballard	<i>Climate Change and Federal Crop Insurance</i>	43 B.C. ENVTL. AFF. L. REV. 387 http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2196&context=ealr	Climate Change/ Land Use	To mitigate the future impact of climate change on agriculture, the definition of “good farming practices” under the federal Crop Insurance Program should be amended to include as a “substantial” factor in making coverage determinations whether the farmer insured used “sustainable, resilient, and soil-building agricultural practices.”
Masur, Jonathan & Eric Posner	<i>Toward a Pigouvian State</i>	164 U. PA. L. REV. 93 https://www.pennlawreview.com/print/164-U-Pa-L-Rev-93.pdf	Governance/ Water/Air	Pigouvian taxes are superior to command-and-control regulation in addressing negative externalities such as pollution, and regulators have the authority to impose them under the Clean Air and Clean Water Acts.
Meyer, Timothy	<i>How Local Discrimination Can Promote Global Public Goods</i>	95 B.U. L. REV. 1937 http://www.bu.edu/bulawreview/files/2016/01/MEYER.pdf	Energy/Climate Change	To promote clean energy: (1) the World Trade Organization should change its position that local subsidy programs are unlawful if they require renewable energy companies to use locally manufactured parts, and instead should assess whether such requirements were politically necessary and if the global benefits exceed the economic discrimination costs; and (2) nations should negotiate limited exceptions for local renewable energy.
Van Nostrand, James M.	<i>Keeping the Lights on During Superstorm Sandy: Climate Change Adaptation and the Resiliency Benefits of Distributed Generation</i>	23 N.Y.U. ENVTL. L.J. 92 http://www.nyu.edu/wp-content/uploads/2015/09/VanNostrand_ready_for_website_1.pdf	Climate Change/ Energy	Distributed generation allows for system “resiliency” in the face of increased dangerous weather, and existing tools can be used to force utilities to adopt it.
Osofsky, Hari M., Jessica Shadian, & Sara Fechtelkotter	<i>Arctic Energy Cooperation</i>	49 U.C. DAVIS L. REV. 1431 http://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1488&context=faculty_articles	Energy/Climate Change	Broader and more formalized “hybrid cooperation” among diverse stakeholders can assuage the environmental risks presented by the current, highly fragmented Arctic energy production governance regime while better protecting traditionally marginalized interests, such as those of indigenous peoples.
Pasachoff, Eloise	<i>The President’s Budget as a Source of Agency Policy Control</i>	125 YALE L.J. 2182 https://perma.cc/532N-QNT5	Governance	The president’s power over agencies through procedural “levers” in the budget and appropriations processes should be acknowledged and transparency improved through an executive order governing the Resource Management Offices, congressional requirements, and civil input.

Author	Title	Citation and URL	Primary/ Secondary Topic	The Big Idea
Prum, Darren A.	<i>Foiled by the Banks? How a Lender's Decision May Support or Undermine a Jurisdiction's Environmental Policies That Promote Green Buildings</i>	5 MICH. J. ENVTL. & ADMIN. L. 435 http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1051&context=mjeal	Climate Change	To support climate change action within the built environment, lenders should adjust the underwriting process and loan documents to properly evaluate and mitigate the risks associated with financing green building.
Ruhl, J.B. & James Salzman	<i>Regulatory Exit</i>	68 VAND. L. REV. 1295 https://www.vanderbiltlawreview.org/wp-content/uploads/sites/89/2015/10/Regulatory-Exit.pdf	Governance	When government regulates, it should consider how it (or the regulated parties) will "exit" the regulatory regime and include that plan in the regulation.
Taylor, Melinda & Holly Doremus	<i>Habitat Conservation Plans and Climate Change: Recommendations for Policy</i>	45 ELR NEWS & ANALYSIS 10863 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2600161	Climate Change/ Land Use	To protect endangered species, current policies and regulations should be modified to allow new and existing Habitat Conservation Plans to accommodate climate change considerations through adaptive management techniques and other approaches.
Verchick, Robert R.M.	<i>Culture, Cognition, and Climate</i>	2016 U. ILL. L. REV. 969 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516887	Climate Change	Judges and legislators can build public support for climate action by writing in a way that recognizes and resonates with their audiences' cultural values.
Wagner, Wendy	<i>A Place for Agency Expertise: Reconciling Agency Expertise With Presidential Power</i>	115 COLUM. L. REV. 2019 http://columbialawreview.org/content/a-place-for-agency-expertise-reconciling-agency-expertise-with-presidential-power/	Governance	To strike the right balance between agency independence in making scientific determinations and Office of Information and Regulatory Affairs review, several institutional reforms are necessary, including improved documentation of technical decisionmaking, more rigorous peer and public review of science-based decisions, and additional timely political input at critical points in the rulemaking process.
Wara, Michael	<i>Building an Effective Climate Regime While Avoiding Carbon and Energy Stalemate</i>	41 COLUM. J. ENVTL. L. 313 http://www.columbiaenvironmentallaw.org/building-an-effective-climate-regime-while-avoiding-carbon-and-energy-stalemate/	Climate Change	By focusing climate change negotiations on short-lived climate pollutants, rather than carbon dioxide emissions, the international community can address climate change with fewer political barriers.