Harvard Environmental Law Program
Annual Report 2014-2015
Introduction
The Harvard Law School Environmental Law Program (ELP) brings together dedicated students, innovative clinical instruction, and renowned professors with both real-world expertise and passion for teaching. Together, we employ rigorous legal analysis and policy savvy to tackle our most pressing environmental challenges.

At ELP, students explore cutting-edge environmental law and policy issues in the classroom, engage with leading experts at special events and programs, and practice environmental/energy law in actual litigation, rulemakings, and policy proceedings with their supervisors in the Emmett Environmental Law and Policy Clinic. The ELP Environmental Policy Initiative, established in 2012, conducts applied research on oil and gas law, regulating the power sector under the Clean Air Act, and state clean energy law. These tremendous opportunities provide students with a comprehensive approach to environmental problem solving and position Harvard Law School as a leader in environmental law and policy.

Outstanding Academic Offerings
Environmental courses during the 2014-2015 academic year included both traditional and practice-focused offerings. Professor Jody Freeman taught Environmental Law as well as Energy and Climate Law and Policy. Professor Richard Lazarus taught a course on the Supreme Court and Environmental Law. Professor Wendy Jacobs taught a practice-focused course, Environmental Practice Skills, Methods, and Controversies: Siting and Permitting of a Wind Farm as a Case Study, led a reading group for 1Ls questioning whether and how laws can be used to motivate behavioral change, especially with regard to greenhouse gas emissions, and directed the Environmental Law and Policy Clinic. ELP Environmental Policy Initiative Director Kate Konschnik taught Contemporary Issues in Oil and Gas Law: Fracking, Takings, Pipelines, and Regulation.

In addition to the courses offered by ELP faculty, Professor Kristen Stilt taught a course in Animal Law, Professor Leib taught Food Law and Policy and Professor, and Jacob Gersen taught the Food Law Lab. Professor Gerald Frug taught Green New York and Clinical Instructor Bonnie Docherty taught Human Rights and the Environment. Visiting Professor Helen Hershkoff taught Sinking Islands: Imagining Disasters and Visiting Professor Jim Salzman taught International Environmental Law.

ELP Environmental Policy Initiative
Overview
The Environmental Policy Initiative (EPI) provides real-world legal analysis for today’s environmental and energy challenges. EPI’s aim is to catalyze productive dialogue and creative problem solving, by conducting rigorous and relevant research, and sharing our findings with decision-makers, stakeholders, and the general public. EPI is led by
Director Kate Konschnik with Ari Peskoe as Energy Law Fellow. Ari is being promoted to Senior Fellow and EPI is now hiring a new Law Fellow to join the team.

**Major Projects**

Since 2012, EPI has been engaged in three broad policy areas: Governing Shale Oil and Gas Development; Clean Air Act Regulation of Greenhouse Gases; and State Clean Energy Laws and the U.S. Constitution. EPI provides expertise to decision-makers and creates opportunities for students to engage on cutting-edge environmental topics.

**Governing Shale Oil and Gas Development**

EPI focuses on the role of disclosure to effectively regulate shale oil and gas development. A few highlights from 2014-2015 include:

- FracFocus 3.0 officially launched in spring 2015. Kate Konschnik worked on the site’s upgrade with states, government agencies, and industry for over a year. Importantly, the website’s improvements meet concerns outlined in her 2013 white paper, *Legal Fractures*.
- EPI suggested changes to West Virginia’s oil and gas rules to facilitate reporting on FracFocus 3.0. EPI also helped to draft warranties and terms of use for raw FracFocus data being provided on the FracFocus website for the first time.
- Kate Konschnik presented on disclosure rules, research gaps in shale gas risk analysis work, and baseline water quality testing programs at multiple conferences hosted by the Groundwater Protection Council and the National Governors Association.
- Aladdine Joroff, who serves as Program Chair of the Boston Bar Association’s air programs, and Kate Konschnik organized a meeting on methane leakage from natural gas infrastructure.
- EPI researched liability for induced seismicity and models for pooled liability schemes for states and industry, and will present findings to states and industry at the next conference of the Groundwater Protection Council.

**Clean Air Act Regulation of Greenhouse Gases**

EPI has been a leading voice in exploring the extent of EPA’s authority under the Clean Air Act and the strong potential for energy efficiency programs to cut pollution cost-effectively. A few accomplishments from 2014-2015 include:

- EPI submitted an amicus brief in the Clean Power Plan litigation on behalf of Jody Freeman and Richard Lazarus and organized a national media call for the professors, joined by Matthew Stephenson, to field questions about the lawsuit.
- Ari Peskoe joined Dr. Jeremy Fisher of Synapse Energy Economics for a free, public webinar offering a look at the final Clean Power Plan and discussing changes in the rule from the proposed version.
- EPI provided a reading of the Clean Power Plan proposal to more than thirty states in private calls and meetings held in Minneapolis, Minnesota, Des Moines,
Iowa, and Park City, Utah. EPI presentations focused on enforceable elements in different plan designs, and compliance strategies based on existing state renewable energy and energy efficiency programs.

- Kate Konschnik co-taught a Clean Power Plan two-part seminar at the Kennedy School with David Cash, former Massachusetts Department of Environmental Protection Secretary, and spoke about the Clean Power Plan at a Harvard Electricity Policy Group conference.

**State Clean Energy Laws and the U.S. Constitution**

EPI tracks constitutional challenges to State clean energy laws. As part of this project, the EPI team created the website statepowerproject.org to serve as a clearinghouse for interested States and stakeholders.

**Power Shift**

This calendar year, EPI launched Power Shift in partnership with Duke University’s Nicholas Institute, to study the legal framework we need to “shift” our electricity sector to a low-carbon yet reliable and affordable future. The project bridges three communities of experts – state and federal utility regulators; energy legal scholars; and energy and environmental policy stakeholders. The back-and-forth between practitioners and academics helps to set a deeply informed research agenda and identifies the regulatory innovators ready to put new ideas to practice. As such, the project offers an independent and influential voice to electricity sector policy debates.

Our kick-off event was held in Washington, DC alongside the winter National Association of Regulatory Utility Commissioners. Most recently, EPI hosted a workshop to mark the 80th anniversary of the Federal Power Act (FPA). The attendees – including state utility commissioners, a former FERC general counsel, a former DOE general counsel, energy law academics, environmental groups, and energy industry attorney and consultants – had a lively discussion on the FPA’s record and opportunities for reform or re-interpretation over the coming decades. Ari Peskoe took the lead on organizing this event and drafting a report of the proceedings. EPI will publish the report in September.

**Student Work with the Environmental Policy Initiative**

EPI staff supervised a number of student research projects. Kate Konschnik and Ari Peskoe supervised students conducting FracFocus data analysis and researching “least cost” authority and decision-making in public utility commissions at the request of Kentucky PSC Commissioner Jim Gardner. In addition, Kate Konschnik supervised a Clinic student studying green infrastructure in the fall 2014 semester, and four law students conducting independent studies over the course of the academic year.1 She also continued to lead an inter-disciplinary Oil and Gas Discussion Group, drawing on the expertise of the university and beyond.

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**Selected EPI Publications**
The EPI staff published a number of scholarly articles and received media coverage in the popular press.


**The Emmett Environmental Law & Policy Clinic**

**Overview**
The Emmett Environmental Law and Policy Clinic offers law students an opportunity to work on multi-disciplinary, real-time legal and policy projects covering a broad spectrum of environmental and energy issues. Students and lawyers in the Clinic litigate, participate in appeals, comment on proposed government rules, draft model statutes and ordinances, write briefs, and prepare white papers advocating for legal reform. The projects are cutting-edge, complex and highly challenging. Because today’s legal challenges require interdisciplinary solutions, the Clinic is open to students from all of the other schools at Harvard. As a result, students from the Kennedy School, the Business School, the School of Public Health, the Engineering School and even MIT have participated in the Clinic. The Clinic also attracts students from all over the world, enabling us to work effectively on projects requiring international expertise and fluency in other languages. To date, we have worked on projects involving Japan, China, Chile, and the European Union. The Clinic is developing more connections and partnerships to expand its international presence.

Clinical Professor and Director Wendy Jacobs develops projects that meet two key goals: each project must serve the Clinic’s mission to teach students how to be creative, confident and great lawyers, and each project must address a significant and thorny environmental, energy or land use problem. In all projects, clinic students interact with and make presentations to clients, regulators, policy makers and other decision makers (including judges) and also produce significant written work. Hence, participation in the Clinic offers students a sophisticated and challenging setting in which to learn a wide range of practical lawyering skills under the supervision of Professor Jacobs, Senior Clinical Instructor Shaun Goho, and Clinical Instructor Aladdine Joroff. Among the skills taught are:

- Writing briefs for state and federal courts, including the U.S. Supreme Court;
- Drafting statutes, regulations, and ordinances;
- Writing legal guides and handbooks that demystify laws for the public;
- Interviewing clients and taking testimony from witnesses;
• Presenting policy and regulatory reform recommendations to federal, state and local regulators;
• Preparing and submitting comments on proposed regulations; and,
• Working with clients, other professionals, lawyers, and non-lawyers.

Sample of Recent Clinical Projects

• Helping states and municipalities develop laws and policies to facilitate their ability to adapt to climate change;

• Identifying and recommending federal legal reforms to protect the Arctic from adverse impacts of offshore oil and gas drilling;

• Advancing the solar industry in Massachusetts by defending it against legal challenges and creating new legal precedent;

• Filing briefs in the U.S. Supreme Court to defend federal regulations designed to reduce greenhouse gas emissions and to reduce emissions of hazardous air pollutants from power plants;

• Providing regulatory advice to Massachusetts agencies about ocean energy, biofuels, and the state’s plan for reducing greenhouse gas emissions by 2020;

• Filing briefs in state and federal courts to advocate for environmental justice, to protect local water supplies from injurious industrial activities, and to challenge destructive mountaintop coal mining practices that devastate the environment and the communities that sit in the valleys;

• Developing concrete recommendations for shifting the American public’s response to climate change and circulating concrete action plans for implementing these recommendations;

• Identifying barriers to and developing a strategy for implementing local energy distribution systems known as microgrids as a municipal climate resiliency strategy; and,

• Identifying legal strategies to reduce or prevent the public health and environmental harms caused by toxic chemicals used to disperse oil spills.

Going Forward

Four pressing issues to which the Clinic is turning its attention are (1) climate migration; (2) water management and allocation; (3) storage and transmission of renewable energy; and, (4) barriers to court access to resolve environmental claims. The Clinic is working with the Immigration Law Clinic and the International Human Rights Clinic at HLS to convene a major conference on climate migration during the fall of 2016. We are also developing relationships with government agencies and law clinics in Israel and Mexico.
with regard to water management and renewable energy projects.

**Clinic and Policy Initiative Collaboration**

Within ELP, Clinic and EPI faculty, staff, and students collaborate closely on a range of efforts. One representative project is ELP’s ongoing collaboration on the Clean Air Act and new EPA regulation of greenhouse gas emissions from power plants, the largest domestic source.

In 2007, the United States Supreme Court ruled that greenhouse gases (GHGs) are “air pollutants” under the Clean Air Act, setting the stage for regulation by EPA. Since that decision, EPA has taken a number of steps to regulate greenhouse gases from power plants, the largest domestic source, most recently issuing a final Clean Power Plan that will reduce GHG emissions from the electricity sector.

ELP faculty and students have been involved at each step, and continue to work on these issues. ELP’s publications about greenhouse gas regulation under the Clean Air Act includes an amicus brief filed Supreme Court, a paper cited by EPA in its Clean Power Plan proposal, and an op-ed published in the *New York Times*.

**Other Events and Activities**

*ELP Co-Hosts Forum on “The Use of Land” at 40*

On October 16–17, 2014, the Harvard Law School Environmental Law Program and the Lincoln Institute of Land Policy co-hosted “The Use of Land at 40: A Forum on What We’ve Learned and What Needs to be Done to Build Healthy, Vibrant, Resilient Communities for the Future.” The event commemorated the 40th anniversary of The Use of Land: A Citizens’ Policy Guide to Urban Growth, the groundbreaking final report of the Task Force on Land Use and Urban Growth, funded by the Rockefeller Brothers Fund and chaired by Laurance S. Rockefeller. The conference, which brought together over thirty land use scholars and practitioners, focused on how far we have come in the last 40 years in urban development and land use policy, and considered the trends and challenges that are shaping tomorrow’s communities. The event was supported by a generous grant from the Rockefeller Brothers Fund, with additional assistance from the Packard Foundation, the Harvard University Center on the Environment, and individual donors.

*Emmett Clinic Co-Hosts Film Screening of Power to the Pedals*

On March 2, 2015, the Emmett Environmental Law & Policy Clinic and the Transactional Law Clinics co-hosted a special film screening of *Power to the Pedals: Wenzday Jane and the Culture of Change*, followed by a discussion with Wenzday Jane and filmmaker Bob Nesson. *Power to the Pedals* portrays the transformative vision and extraordinary efforts of Wenzday Jane to create a successful and sustainable, green business in Somerville, Massachusetts based on the use of cargo tricycles for linking city
residents with agricultural farm shares and for transporting composting materials, recyclables, and municipal waste.

**Professors Debate Clean Power Plan**
In March and April 2015, Professors Freeman and Lazarus sparred with Professor Larry Tribe over the constitutionality of EPA’s Clean Power Plan. The debate began when Professor Tribe testified before Congress on March 17, 2015, arguing that EPA’s actions are akin to “burning the Constitution.” Professors Freeman and Lazarus quickly replied, firmly asserting that these “sweeping assertions of unconstitutionality are baseless. Were Professor Tribe’s name not attached to them, no one would take them seriously.” A series of collegial but vigorous exchanges ensued, in what Professor Tribe labeled an “uncommon event” among Harvard Law faculty.

On March 25, 2015, Professors Freeman and Lazarus were featured in Politico Magazine, where they underscored Professor Tribe’s “flagrant constitutional error.” In their piece, Freeman and Lazarus noted that, while Tribe’s arguments “deserve to be addressed seriously,” they are “completely wrong” and cannot serve the basis for states that may refuse to comply with EPA’s Plan.

**Professors Submit Clean Power Plan Amicus Brief**
On February 19, 2015, Professors Freeman and Lazarus submitted an amicus brief to Court of Appeals for the D.C. Circuit in support of the U.S. Environmental Protection Agency (EPA). Kate Konschnik, Director of the Environmental Policy Initiative, is counsel of record on the brief. The amicus brief addresses the unusual issue of statutory interpretation before the court. In 1990, as part of a package of amendments to the Clean Air Act, each house of Congress passed different versions of section 111(d), and the President signed both into law. Opponents of EPA’s rulemaking argue that the resulting provision prohibits EPA from regulating carbon from existing power plants. After noting the “highly unusual” nature of the case, in that it challenges a non-final rule, Professors Freeman and Lazarus argue that EPA’s interpretation of the Clean Air Act is reasonable and entitled to deference. They explain why the Senate Amendment cannot be ignored, how both can be read in context with the rest of the statute to require EPA’s rulemaking in this case, and that traditional canons of statutory construction support EPA’s reading.

**Events, Workshops, and Conferences**
In 2014-2015, environmental law faculty also regularly presented and participated in programs with faculty and students at Harvard and beyond.

Professor Freeman:

• “Confronting Evidence of Climate Change at Home and Abroad,” The Takeaway, December 2, 2014
• “The President’s Efforts to Combat Climate Change Without Congress: What is EPA Proposing to Do and Is It Legal?” Harvard University Center for the Environment, October 8, 2014

Professor Lazarus:

• “Lessons from U.S. Environmental Law,” University of Tokyo, July 9, 2015
• “Environmental Lawlessness,” Arnold Arboretum Director’s Lecture Series, April 20, 2015
• “Judicial Missteps, Legislative Dysfunction, and the Public Trust Doctrine: Can Two Wrongs Make It Right?,” Public Trust Symposium, Lewis and Clark Law School, April 11, 2015
• “Hiding in Plain Sight: Revising Supreme Court Opinions (After Initial Publication),” U.S. Department of Justice, Environment and Natural Resources Division Lecture Series, March 25, 2015
• “Symposium on Climate Regulation under the Clean Air Act,” Panelist, Harvard Environmental Law Review, February 27, 2015
• “Senator Edmund Muskie’s Enduring Legacy in the Courts,” Connecting Law and Legislature: The Legacy of Senator Ed Muskie, University of Maine School of Law, November 15, 2014
• “The President’s Efforts to Combat Climate Change Without Congress: What Is EPA Proposing to Do and Is It Legal?” Harvard University Center for the Environment, October 8, 2014
  Keynote Address, Pace Law School Future Environmental Law Professors Workshop, September 26, 2014

Professor Jacobs:

• Represents HLS on University-wide task force on greenhouse gas emissions and sustainable development
• Member of the American College of Environmental Lawyers (ACOEL)
• Lecturer, Applied Leadership for Renewable Energy and Energy Efficiency Program (with the Harvard School of Public Health Center For Health and the Global Environment (CHGE)), Merida, Morelia, and Mexico City, Mexico, June 4-12, 2015


Carbon Capture and Sequestration, in Global Climate Change and U.S. Law (Jody Freeman & Mike Gerrard eds., ABA 2014).

Please see the Emmett Environmental Law & Policy Clinic website for more publications, http://environment.law.harvard.edu/emmett-clinic/publications/.

Kate Konschnik:

• Clean Power Plan Presentation, National Conference of Regulatory Attorneys, June 16, 2015

• What’s in the New BLM Fracking Rule, Practicing Law Institute Webinar, May 28, 2015

• Clean Power Plan Presentation, Union of Concerned Scientists Board Meeting, May 13, 2015

• Shale Gas Risk and Response, National Governors Association orientation for new energy staff, April 17, 2015

• FracFocus 3.0 Webex, U.S. Department of Energy, April 1, 2015

• Clean Power Plan Seminar with David Cash, former Massachusetts Department of Environmental Protection Commissioner and Department of Public Utilities Commissioner, Harvard Kennedy School of Government, March 20 and April 6, 2015

• UARG v. EPA: Did the Supreme Court Change the Focus of Chevron Analysis?, Panelist, DC Bar Association, February 19, 2015

• Presentation on Baseline Water Quality Testing, Groundwater Protection Council, February 11, 2015

• Presentation on Academic Research into the Risks of Shale Gas Development, National Governors Association, Dec. 3, 2014

Collaboration with Students

ELP Kick-Off BBQ
The ELP kick-off BBQ, which introduces new students to ELP and welcomes returning students back to campus, was held on September 10. Professors Freeman, Lazarus, and Jacobs and Policy Director Kate Konschnik spoke to interested students about academic, clinical, and policy opportunities available at HLS. Student heads of the Environmental Law Society and Environmental Law Review were introduced and spoke about their organizations.

2015 Tom Barron Fellows
Five students doing exceptional work within the public interest environmental law field were awarded Tom Barron Fellowships for the summer of 2015. Author and conservationist T.A. Barron ('82) generously makes these awards available. The 2015 fellowships were awarded to outstanding students working at organizations including Earthjustice, the California Attorney General’s Office, and Natural Resources Defense Council.

Fourth Annual Horizon Award
On March 3, 2015, the Harvard Law School Environmental Law Society presented Frances Beinecke with the fourth annual Horizon Award for her outstanding contributions to environmental, natural resources, and energy law. Ms. Beinecke is the outgoing President of the Natural Resources Defense Council and she also recently served as a Commissioner on the BP Oil Spill Commission. Former recipients of the Horizon Award include Justice John Paul Stevens, former Secretary of the Interior Bruce Babbitt, and former EPA Administrator Lisa Jackson.

Symposium on Clean Air Act Climate Regulation
On February 27, 2015, the Harvard Law School Environmental Law Review hosted a symposium on climate regulation under the Clean Air Act, which Professors Freeman and Lazarus helped to facilitate. The event focused on the Supreme Court’s June 2014 decision in Utility Air Regulatory Group v. EPA and its implications for future climate regulation, including EPA’s Clean Power Plan.

The symposium was designed to bring together leading environmental law scholars who, this past fall, published cutting edge articles with ELR on this topic published in March 2015. ELR was honored to welcome five of these scholars to campus for a panel discussion of their work: Jody Freeman (Harvard Law School), Richard Lazarus (Harvard Law School), William Buzbee (Georgetown Law Center), Megan Herzog (UCLA School of Law), and Craig Oren (Rutgers School of Law).

Reception Honoring Graduating Environmental Law Students
In April, the environmental law faculty hosted its annual reception in celebration of the graduating JD, LLM, and JSD students who were significant members of the HLS environmental law community during their time at Harvard Law School.