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# Foreword

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In just three years, the Annual Review of Environmental and Natural Resources Law has become one of the most popular and well-received volumes of *Ecology Law Quarterly*. This issue, which provides timely and sophisticated analyses of the year's leading developments in environmental and natural resources law, is finding a permanent home on the desks of an increasing number of environmental practitioners, policymakers, and scholars. This year's edition of the Annual Review builds upon this model by adding a series of case summaries to the twelve extended Notes.

Although the attention of the environmental law community recently has been drawn to the change in presidential administrations and the significant emerging shift in environmental policy, the twelve months ending on August 31, 2000 witnessed a number of important judicial decisions, regulatory reforms, and international developments in environmental law and policy. The year's most significant environmental case was the Supreme Court's decision in *Friends of the Earth v. Laidlaw Environmental Services (Laidlaw)*.[1] In a spirited 7-2 decision, the Court expanded its interpretation of "injury in fact" and granted standing to environmental groups seeking to enforce the Clean Water Act (CWA) against a South Carolina wastewater treatment facility. The decision stirred a long-awaited sigh of relief among nonprofit environmental groups, who have been battered over the last decade by the narrowing of citizen standing in such cases as *Lujan v. Defenders of Wildlife*[2] and *Steel Co. v. Citizens for a Better Environment*.[3]

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1. 528 U.S. 167 (2000).
2. 504 U.S. 555 (1992).

Coupled with the Court's holding in another recent case,[4] the decision in *Laidlaw* signals significant shifts in the Court's interpretation and application of the *Lujan* test, its willingness to look to Congressional intent in authorizing private enforcement, and its overall approach to citizen standing claims in environmental law cases.

While citizen groups were gaining greater access to the courts, the Environmental Protection Agency (EPA) had its wings clipped by several circuit courts of appeal. In *Harmon Industries, Inc. v. Browner*,[5] the Eighth Circuit Court of Appeals invalidated the agency's practice of selective "overfiling"— bringing a parallel enforcement action against a polluter after a state agency has already initiated proceedings— under the Resource Conservation and Recovery Act (RCRA). This decision, which has spawned similar cases in other circuits, limits EPA's ability to promote national uniformity in the enforcement of federal environmental statutes and may insulate from adequate scrutiny "sweetheart" settlements entered into by state authorities.

EPA's regulatory power under another key environmental statute, the Clean Air Act (CAA), may be constrained by the D.C. Circuit court's decision in *Michigan v. United States Environmental Protection Agency*[6]— even though the agency actually won the case. States in the Northeast have long argued that pollution drift from power plants in the Ohio River Valley dirties their air and prevents them from meeting federal air quality standards for ground-level ozone. In response, EPA issued a final rule in 1998 mandating that twenty-two states and the District of Columbia revise their state implementation plans to prevent "significant contributions" to another state's nonattainment. The agency specifically required states to reduce ozone precursors by the amount achievable through what EPA termed "highly cost-effective controls," which it defined as those costing $2,000 or less per ton of pollution. Although the D.C. Circuit court held that EPA's interpretation of "significant contribution" violated neither the nondelegation doctrine nor principles of federalism, it also authorized the agency to inject cost considerations into the process. This ruling may come back to haunt EPA and subvert its ability to protect the environment and public health.

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3. 523 U.S. 83 (1998). *See also* Heather Elliott, Note, Steel Company v. Citizens for a Better Environment, *523 U.S. 83 (1998)*, 26 ECOLOGY L.Q. 709 (1999).

4. *See* Fed. Election Comm'n v. Akins, 524 U.S. 11 (1998).

5. 191 F.3d 894 (8th Cir. 1999).

6. 213 F.3d 663 (D.C. Cir. 2000).

Finally, in a significant administrative law decision, the Supreme Court altered the traditional two-step *Chevron*[7] test in a way that may restrict EPA's ability to act in uncharted areas of regulation. In *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*,[8] the Supreme Court invalidated the FDA's attempt to assert jurisdiction over tobacco under the Food, Drug, and Cosmetic Act (FDCA). In determining whether Congress had excluded tobacco regulation from the FDA's authority under *Chevron*'s first step, the five-member majority looked beyond the literal statutory language to the legislative "context" surrounding the statute. The Court concluded that Congress' silence regarding FDA regulation of tobacco over the long history of the FDCA demonstrated a clear and unambiguous intent to bar agency regulation of tobacco products. In reaching its holding, the Court narrowed the circumstances under which courts will uphold an agency's reasonable interpretation of a statutory gap or ambiguity. The Court's augmentation of *Chevron*'s first step may thus hamper EPA efforts to assert authority in areas of concern (such as indoor air pollution) that are not directly authorized by federal legislation.

Perhaps the most significant regulatory development of the year has been the resurrection and revitalization of EPA's Total Maximum Daily Load (TMDL) program under the CWA. Although TMDLs have been part of the Act since 1972, EPA has spent the last three decades focused primarily on point sources— the pipes and drains attached to factories, municipal sewer districts, and other easy-to-spot polluters— while virtually ignoring agriculture, logging operations, mining, and other significant "nonpoint" sources of pollution. In 2000, EPA issued groundbreaking new regulations requiring states to identify and list waters for which point source controls have failed to achieve applicable water quality standards. States must then identify the pollutants causing the impairment and establish a TMDL— a cap on pollutants, allowing for seasonal variation and a margin of safety— for each pollutant flowing into the identified waterbody. Once the overall cap is set, the states must then work their way upriver, allocating pollutant load reductions among the sources in a given watershed. Finally, the new regulations are the first to require states to include implementation plans and schedules when establishing TMDLs, and to submit these standards to EPA for approval.

7. Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984).
8. 529 U.S. 120 (2000).

While TMDLs represent a crucial technique for reducing nonpoint source pollution, they are beset by several lingering problems. Cost estimates run from roughly four thousand to one million dollars per TMDL, not including implementation and monitoring costs. In addition, the CWA includes loopholes that may allow major polluters to escape effective controls regardless of EPA's new regulations, and the agency is still powerless over local land use decisions, which lie at the heart of the nonpoint source pollution problem in the United States. Finally, even though the courts have closed the final legal loophole by making TMDLs mandatory even for waterways polluted exclusively by nonpoint sources,[9] state sovereignty issues make it impossible for EPA to compel state TMDL implementation. For this crucial next round of water quality improvements to take flight, EPA must invigorate a sometimes moribund national grant program, and make the successful attainment of state TMDLs a condition of federal funding.

In the natural resources area, the Fourth Circuit Court of Appeals held that the "take" provision of the Endangered Species Act (ESA) does not violate the Commerce Clause of the Constitution, even when it is implemented to protect species wholly on private lands.[10] The decision indicates a reluctance to apply the Supreme Court's recent limitations on Congress' Commerce Clause authority[11] in a manner that restricts the ESA. The court's holding also adds to a growing line of cases recognizing broad and significant connections between endangered species and commerce.

It has also been a momentous year in international law, as three important environmental tools have been limited, undercut, or delayed by decisionmakers in both the U.S. and abroad. The strongest and most substantial is the United Nations Convention for the Law of the Sea (UNCLOS), which establishes a comprehensive legal regime for the oceans and requires signatories to take the unique step of consenting to compulsory jurisdiction through arbitration, the International Court of Justice, or the International Tribunal for the Law of the Sea (ITLOS). This groundbreaking provision was figuratively "gutted" in late 2000, after Australia and New Zealand sued

9. *See* Pronsolino v. Marcus, 91 F. Supp. 2d 1337 (N.D. Cal. 2000).

10. Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000).

11. *See* United States v. Lopez, 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act, which prohibited possession of a handgun within 1,000 feet of a school, was an unconstitutional overextension of Congress' authority to regulate interstate commerce).

Japan for its over-fishing of the southern bluefin tuna in violation of a side-agreement signed by the three parties. In the first decision of its kind, an ad hoc arbitral tribunal ruled that UNCLOS does not primarily govern the case, that ITLOS thus lacks jurisdiction even to issue provisional measures to protect the tuna, and that the dispute resolution procedures of the side agreement trump the "compulsory" framework of the Law of the Sea.[12] The decision throws the groundbreaking dispute resolution procedures of UNCLOS into jeopardy and threatens the efficacy of the entire convention in the process.

In another international development, a 1999 ruling by a U.S. circuit court of appeals limited the reach of the Alien Tort Claims Act (ATCA), which grants federal district courts jurisdiction over any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States. Although several plaintiffs have successfully used the ATCA in international human rights cases, a U.S. district court and the Fifth Circuit Court of Appeals dismissed the first (and so far only) attempt to bring an environmental tort case under the ATCA against a private actor not acting in concert with local governments.[13] The court dismissed the suit for failure to state a claim upon which relief could be granted and, more importantly, found that the international environmental law violations alleged were not cognizable torts under the ATCA.

Finally, the last year also witnessed the creation of an entirely new environmental enforcement mechanism, as the Basel Convention became the first international environmental treaty to assign responsibility and to compensate for damages resulting from hazardous waste transportation. Unfortunately, it appears that this new Protocol on Liability and Compensation[14] will only add to the mountain of obstacles keeping the United States from ratifying and implementing the Convention. The U.S. is the only industrialized nation (and one of only thirty countries overall) that has yet to ratify the treaty.

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12. *See* Southern Bluefin Tuna Case (Austl. & N.Z. v. Japan), Award on Jurisdiction and Admissibility, Aug. 4, 2000, Arbitral Tribunal constituted under Annex VII of the United Nations Convention for the Law of the Sea, at 65, *available at* http://www.worldbank.org/icsid/bluefintuna/award080400.pdf (last visited Mar. 19, 2001).

13. *See* Beanal v. Freeport-McMoRan, 969 F. Supp. 362 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999).

14. *See* Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, December 10, 1999, *at* http://www.basel.int/COP5/docs/prot-e.pdf.

The 1999-2000 year also brought two significant decisions clarifying doctrines governing what government actions constitute regulatory "takings" under the Fifth Amendment. The Ninth Circuit Court of Appeals refused to allow landowners to employ "conceptual severance" to fillet their property interests into slices of time.[15] The ruling overturned a district court's finding that a thirty-two month development moratorium around Lake Tahoe had effected a regulatory taking on hundreds of property owners. The Court of Federal Claims fleshed out the "reasonable investment-backed expectations" prong of the test established in *Penn Central Transportation Co. v. City of New York*[16] in rejecting a claim by a Florida developer denied a permit to dredge wetlands on his property.[17] The court found that the developer had expressly acknowledged that his expectations were limited by the uncertainty of the permit process and society's increasing environmental awareness both before purchasing the land and again after the sale.

The Annual Review concludes with a series of case summaries describing nine other significant environmental law cases of the past year. The summaries cover three Supreme Court decisions, which upheld groundbreaking national grazing regulations,[18] required the federal government to pay more than $150 million for breaching oil lease contracts in the name of environmental protection,[19] and invalidated stringent state regulation of oil transport as precluded by federal law.[20] Other significant cases at the circuit court level include a grant of standing to an environmental citizens' group by the Fourth Circuit[21] and a ruling by the Ninth Circuit upholding measures to protect threatened and endangered salmon in the Columbia River Basin.[22] Finally, we have included summaries of two very recent landmark Supreme Court cases that will be analyzed more fully in next year's Annual Review— the unanimous decision to uphold the heart of the CAA against a claim of

15. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764 (9th Cir. 2000).

16. 438 U.S. 104 (1978).

17. Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999).

18. Public Lands Council v. Babbitt, 120 S. Ct. 1815 (2000).

19. Mobil Oil Exploration and Producing Southeast, Inc. v. United States, 120 S. Ct. 2423 (2000).

20. United States v. Locke, 120 S. Ct. 1135 (2000).

21. Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000).

22. Aluminum Co. of Am. v. Administrator, Bonneville Power Admin., 175 F.3d 1156 (9th Cir. 1999).

improper delegation in *Whitman v. American Trucking Ass'ns*,[23] and the controversial ruling in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,[24] which effectively removes millions of acres of intrastate wetlands from the purview of the CWA.

The Notes in this issue reflect the combined efforts of twelve second-year students and a team of four third-year advisors, under the supervision of professors working in environmental and natural resources law. *Ecology Law Quarterly* and the Boalt faculty endeavor to make this compendium a reliable, timely, and insightful resource for lawyers, judges, policymakers, and the academic community working in the ever-changing field of environmental and natural resources law.

23. 121 S. Ct. 903 (2001); *see also* Jeff Brax, Note, American Trucking Ass'ns, Inc. v. EPA, 27 ECOLOGY L.Q. 549 (2000).

24. 121 S. Ct. 675 (2001).