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# Foreword

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# Foreword

*Robert Infelise and Holly Doremus*

We are honored to introduce Ecology Law Quarterly's 2008–09 Annual Review of Environmental and Natural Resources Law. Now in its tenth year, the Annual Review is a collaborative endeavor. It is founded on Berkeley Law's renowned environmental law program, which itself is built upon some of the leading scholars in the field. Their research and teaching depends upon the resources, financial and otherwise, of Berkeley Law and the Center for Law, Energy and the Environment. More directly, the Annual Review is the product of the hard and selfless work of the Ecology Law Quarterly editorial board and members. ELQ is the leading journal in the field because of their passion and commitment.

Four students deserve special recognition. Soon to be members of the California Bar, Nicole Reis, Matthew Sieving, and Stefanie Gitler devoted a large portion of their final year of law school to assisting and advising the student authors. This Annual Review is infused with their talent and insights. Christie Henke, ELQ's Editor in Chief, also played a key role in the success of this issue. She worked with us to compile the list of noteworthy cases. More critically, through her leadership and hard work, she developed and held everyone to a much more rapid publication schedule than that used in the past. Thanks to her efforts, the issue is timely as well as instructive.

Finally, the Annual Review would not be possible without the extraordinary group of student authors. Their aptitude and zeal for the law is evident in the Notes that follow. We are grateful to have had the opportunity to teach this special group of future lawyers.

Law professors, students, legal historians, and countless other scholars seeking insight into the major developments in environmental, natural resource, and land use law during 2007–08 will benefit from this Annual Review. In this Foreword, we provide a brief preview of the Notes that follow.<sup>1</sup>

The year covered by this issue was a quiet one in the U.S. Supreme Court. There were only two cases with an environmental angle. One, covered in this issue and described in more depth below, dealt with control of the banks of a

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1. We take them out of order here to organize them by topic. In the issue that follows, the casenotes are organized by the deciding court and date of decision.

river separating two states.<sup>2</sup> The other finally resolved the long-running dispute over punitive damages for the Exxon Valdez oil spill,<sup>3</sup> but broke little legal ground and therefore is not covered here. The federal courts of appeal were busier, largely struggling with the Bush Administration's failure to enforce or properly implement environmental law. To the extent there is a theme that unites many of these Notes, it is the outgoing Administration's abysmal environmental record, and the challenges that executive branch intransigence has posed for the courts. Also covered in this issue is a noteworthy California Supreme Court case interpreting the state's environmental assessment law,<sup>4</sup> and a unique federal district court decision upholding a law permitting broad waiver of environmental laws to facilitate construction of a fence at the Mexican border.<sup>5</sup>

#### ENFORCEMENT

Citizen suits are a fundamental component of environmental enforcement, playing a vital role in seeing that statutes are implemented as Congress intended. In *Environmental Conservation Organization v. City of Dallas: Creating Unnecessary Burdens for Citizen Suits under the Clean Water Act*, Catherine Mongeon argues that the Fifth Circuit decision unnecessarily imposes obstacles for environmental citizen suits.<sup>6</sup> Faced with a claim by defendants that the case was moot, the court required that the plaintiff citizen group show that the alleged violations might recur.<sup>7</sup> Ms. Mongeon argues that the Fifth Circuit erred in imposing that standard, and concludes that the court's decision could undermine the ability of citizen suits to supplement enforcement when the government lacks the resources, information, and political will to demand compliance with the law.

#### JUDICIAL REVIEW

In *Lack of Deference: The Ninth Circuit's Misstep in NRDC v. EPA*, Adam Trott analyzes the court's decision not to apply *Chevron* deference to a recent about-face by EPA.<sup>8</sup> While the decision is environmentally friendly in the short-term, Mr. Trott doubts the sagacity of the court in refusing to defer to the relatively accountable and expert agency. He argues that while EPA may

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2. *New Jersey v. Delaware*, 128 S. Ct. 1410 (2008).

3. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008).

4. *In re Bay Delta Programmatic Env'tl. Impact Report Coordinated Proceedings*, 43 Cal. 4th 1143 (2008).

5. *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007).

6. Catherine Mongeon, Note, *Environmental Conservation Organization v. City of Dallas Creates Unnecessary Burdens for Citizen Suits under the Clean Water Act*, 36 *ECOLOGY L.Q.* 237 (2009).

7. *Env'tl. Conservation Org. v. City of Dallas*, 529 F.3d 519 (2008).

8. Adam Trott, Note, *Lack of Deference: The Ninth Circuit's Misstep in NRDC v. EPA*, 36 *ECOLOGY L.Q.* 355 (2009).

opt for administrative or political convenience in marginal cases, decisions about whether or not to regulate in “gray areas” should be made by the political branches, not the judiciary.

The Ninth Circuit has struggled to set the appropriate level of deference due to Forest Service decisions based on complex scientific information. On the one hand, courts are hesitant to overrule those decisions, based on the perceived scientific expertise of the agency. On the other hand, however, the Forest Service faces constraints in its structure, mission, and culture that tend to bias agency decision making toward resource extraction. In *Lands Council v. McNair*, an en banc panel of the Ninth Circuit forcefully returns the court to a highly deferential standard of review.<sup>9</sup> In *Taking a Hard Look at Agency Science: Can the Courts Ever Succeed?*, Sara Clark argues that such highly deferential review may encourage the Forest Service to engage in a “science charade,” where the agency disguises policy judgments as scientific decisions in order to avoid both stringent judicial review and political accountability.<sup>10</sup> Such a charade has negative implications for the agency, the courts, the environment, and the public as a whole.

#### DELEGATION OF LEGISLATIVE POWER

After the 9/11 attacks, Congress passed several laws that broadened the scope of executive power. While this extension of muscular authority to executive branch officials is seen by some as a crucial component of the United States’ defense against future terrorist attacks, many question Congress’ authority to confer such broad executive power. In *Defenders of Wildlife v. Chertoff*,<sup>11</sup> the limits of this authority were challenged by environmental groups concerned about an unusually broad waiver provision found in the REAL I.D. Act of 2005.<sup>12</sup> That Act, which the D.C. Circuit ultimately upheld as constitutional, allows the Secretary of Homeland Security to waive all laws he deems necessary to ensure expeditious construction of border fencing along the United States-Mexico border. While *Defenders of Wildlife* confirms the legality of broad waiver provisions, it also raises the interesting question of what drives legislative decision making in the face of uncertainty. In *Risky Business: Barriers to Rationality in Congress*, Rachel Jones argues that conditions in the post-9/11 United States, when combined with the uncertainty legislators face regarding the threat of future terrorist attacks, encourage Congress to rely on heuristics and biases when crafting legislation aimed at

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9. 537 F.3d 981 (9th Cir. 2008).

10. Sara Clark, Note, *Taking a Hard Look at Agency Science: Can the Courts Ever Succeed?*, 36 *ECOLOGY L.Q.* 317 (2009).

11. 527 F. Supp. 2d 119 (D.D.C. 2007).

12. Pub. L. No. 109-13, 119 Stat. 231, 8 U.S.C. § 1103 note.

reducing the threat of terrorist attacks.<sup>13</sup> She proposes several measures that would push toward more rational lawmaking.

#### AIR QUALITY

Section 112(f) of the Clean Air Act directs EPA to set residual risk standards that leave “an ample margin of safety to protect public health,” but also directs that EPA shall “promulgate standards” when cancer risks exceed one-in-one million.<sup>14</sup> In its first application of this provision, EPA decided that it requires only a further evaluation of risk, not necessarily additional emission restrictions. In *Natural Resources Defense Council v. EPA*, environmental groups challenged this interpretation, arguing that section 112(f) requires EPA to eliminate all risks above one-in-one million.<sup>15</sup> The D.C. Circuit disagreed, holding that EPA reasonably interpreted its obligations under the statute. In *EPA’s Fuzzy Bright Line Approach to Residual Risk*, Alex Jackson elaborates on the impact of EPA’s interpretation and cautions that, while dubious on its face, the impact of scientific uncertainty on the risk calculation process may render the agency’s position preferable to the bright line standard advanced by NRDC.<sup>16</sup> Instead, Mr. Jackson argues courts should take a particularly hard look at residual risk standards to ensure EPA adequately considers risks on a case-by-case basis.

Ever since the enactment of the Clean Air Act, states’ struggles to attain the National Ambient Air Quality Standards have been complicated by air pollution created in other states drifting across their boundaries. In 2005, EPA promulgated a historic regulation, the Clean Air Interstate Rule (CAIR),<sup>17</sup> that aspired to ease interstate tensions and improve air quality in the eastern United States by establishing a cap-and-trade system governing emissions of sulfur dioxide and nitrous oxides. In July 2008, the D.C. Circuit announced a surprising decision that temporarily vacated CAIR in its entirety.<sup>18</sup> In *The Difficulty of Fencing in Interstate Emissions: EPA’s Clean Air Interstate Rule Fails to Make Good Neighbors*, Harry Moren traces the regulatory history of the cap-and-trade systems preceding CAIR and describes why the court vacated the rule.<sup>19</sup> Mr. Moren argues that a market-based solution can be both legal and effective for controlling pollution in the region, and concludes with design

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13. Rachel Jones, Note, *Risky Business: Barriers to Rationality in Congress*, 36 *ECOLOGY L.Q.* 467 (2009).

14. 42 U.S.C. § 7412 (2006).

15. 529 F.3d 1077 (D.C. Cir. 2008).

16. Alex Jackson, Note, *EPA’s Fuzzy Bright Line Approach to Residual Risk*, 36 *ECOLOGY L.Q.* 439 (2009).

17. Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule), 70 Fed. Reg. 25,162 (May 12, 2005).

18. *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008).

19. Harry Moren, Note, *The Difficulty of Fencing in Interstate Emissions: EPA’s Clean Air Interstate Rule Fails to Make Good Neighbors*, 36 *ECOLOGY L.Q.* 525 (2009).

recommendations for EPA to consider as it redevelops CAIR in accordance with the court's requirements.

#### PUBLIC LANDS MANAGEMENT

*Navajo Nation v. United States Forest Service*<sup>20</sup> involved a dispute over the management of sites claimed as sacred by Native Americans within a national forest. Reversing an earlier panel decision, the Ninth Circuit ruled en banc that allowing a ski resort operator to make snow from recycled water did not substantially burden the free exercise of religion, and consequently did not violate the Religious Freedom Restoration Act of 1993 (RFRA).<sup>21</sup> In *Making Snow in the Desert: Defining a Substantial Burden under RFRA*, Jonathan Knapp argues that, although the Ninth Circuit ultimately reached the correct conclusion, the case reflects the pressing need for clarification as to how a burden on religious exercise should be analyzed.<sup>22</sup> The lack of clear guidance in RFRA has resulted in confusion, conflict between appellate courts, and ultimately, profound limitations on the statute's ability to achieve its goals.

#### LAND USE PLANNING AND REGULATION

Since the early years of the republic, states have relied upon interstate compacts to solve issues crossing jurisdictional lines. The interpretation of one such agreement, written in 1905 to resolve a fishing dispute between Delaware and New Jersey, was presented to the Supreme Court in *New Jersey v. Delaware*.<sup>23</sup> Deciding a case with significant energy implications for the Mid-Atlantic region, the Court held that the 1905 Compact gave Delaware the right to prohibit New Jersey from building a liquid natural gas terminal on the New Jersey bank of the Delaware River. In *Creating Flexibility in Interstate Compacts*, Emily Jeffers argues that relying on a static document to solve complex interstate disputes is a recipe for litigation that often disregards the complex realities of modern problems.<sup>24</sup> Restructuring compacts to allow for greater flexibility would allow signatory states to adapt to future developments without expensive and time-consuming litigation.

In *Crown Point Development v. City of Sun Valley*,<sup>25</sup> the Ninth Circuit removed a barrier to bringing substantive due process challenges to land use restrictions. In *Realizing Judicial Substantive Due Process in Land Use Claims: The Role of Land Use Statutory Schemes*, Nisha Ramachandran finds that despite this overture, substantive due process land use claims are largely

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20. 535 F.3d 1058 (2008).

21. 42 U.S.C. §§ 2000bb–2000bb-4.

22. Jonathan Knapp, Note, *Making Snow in the Desert: Defining a Substantial Burden under RFRA*, 36 *ECOLOGICAL L.Q.* 259 (2009).

23. 128 S. Ct. 1410 (2008).

24. Emily Jeffers, Note, *Creating Flexibility in Interstate Compacts*, 36 *ECOLOGICAL L.Q.* 209 (2009).

25. 506 F.3d 851 (2007).

unwelcome in federal courts and increasingly restricted in state courts as well.<sup>26</sup>

#### ENDANGERED SPECIES

In *Who Can Enforce the Endangered Species Act's Command for Federal Agencies to Carry Out Conservation Programs?*,<sup>27</sup> Sara Gersen analyzes the Eleventh Circuit's decision in *Florida Key Deer v. Paulison*.<sup>28</sup> In that case, the court considered whether the Federal Emergency Management Agency had violated section 7(a)(1) of the Endangered Species Act (ESA), which demands that all federal agencies "carry[] out programs for the conservation of endangered species."<sup>29</sup> The Eleventh Circuit recognized the agency's discretion in implementing conservation programs under the ESA, but held that FEMA could not satisfy the ESA requirement with a program of "insignificant effect." Ms. Gersen notes that *Florida Key Deer* belongs to a line of cases that strives to make ESA section 7(a)(1) meaningful and enforceable, yet argues that the provision's ambitious goals—agency cooperation and biodiversity protection—cannot be achieved without strong executive leadership.

#### ENVIRONMENTAL IMPACT ASSESSMENT

Pursuant to the California Environmental Quality Act (CEQA), any actor undertaking a project that may have significant environmental effects must prepare an environmental impact report that contains a list of alternatives to the proposed action. The usefulness of environmental impact studies under state and federal law is often questioned, in part because agencies undertaking potentially environmentally-damaging projects may be able to limit the alternatives considered. In *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*,<sup>30</sup> the California Supreme Court stated that an environmental impact report prepared by a group of state and federal agencies met CEQA's requirements, despite the fact the report did not include some specific alternatives. In *Consideration of Alternatives in Environmental Impact Reports: The Importance of CEQA's Procedural Requirements*, Sara Wimberger explains that the court made the right decision under the facts of this unique case.<sup>31</sup> She goes on to argue, though, that the decision should not be read to loosen CEQA's procedural requirements in other cases.

26. Nisha Ramachandran, Note, *Realizing Judicial Substantive Due Process in Land Use Claims: The Role of Land Use Statutory Schemes*, 36 *ECOLOGY L.Q.* 381 (2009).

27. Sara Gersen, Note, *Who Can Enforce the Endangered Species Act's Command for Federal Agencies to Carry Out Conservation Programs?*, 36 *ECOLOGY L.Q.* 407 (2009).

28. 522 F.3d 1133 (11th Cir. 2008).

29. 16 U.S.C. § 1536(a)(1) (2006).

30. 43 Cal. 4th 1143 (2008).

31. Sara Wimberger, Note, *Consideration of Alternatives in Environmental Impact Reports: The Importance of CEQA's Procedural Requirements*, 36 *ECOLOGY L.Q.* 499 (2009).

Congratulations to the student authors and the Ecology Law Quarterly for another outstanding Annual Review.

