Annual Review of Environmental and Natural Resource Law

Foreword

Peter S. Menell*

The fields of environmental and natural resource law have grown dramatically over the past three decades. Environmental lawyers face a daunting challenge staying abreast of the myriad developments at state, national, and international levels. As one of the first student-edited environmental law journals, Ecology Law Quarterly (ELQ) has been at the forefront of environmental law scholarship. To expand its coverage, ELQ is introducing a special issue each year called the Annual Review of Environmental and Natural Resource Law.

The Annual Review comprises student-authored Notes on the leading developments—recent cases, legislation, regulations, and other topics—of the prior year (September 1st through August 31st). These pieces, averaging 20 pages in length, concisely summarize these developments, place them within a broader frame of reference, and offer some analytical insights. The Annual Review will serve as a valuable resource for the broad range of practitioners, judges, policymakers, professors, and students working in this area.

This year’s Annual Review comprises Notes on leading cases, regulatory developments, international treaties, and decisions of international tribunals for the year ending August 31, 1998. During this year, the United States Supreme Court addressed a number of significant cases for environmental and natural resource law.

In the area of constitutional law, the Supreme Court in Bennett v. Spear loosened the prudential limitations on standing

* Professor of Law, University of California at Berkeley School of Law (Boalt Hall); Annual Review Supervising Professor.
in cases arising under environmental statutes by holding that Congress may, in defining who may bring citizen suits, extend standing to the full extent of Article III jurisdiction, thereby negating any "zone of interest" limitations. The Court addressed standing again in *Steel Company v. Citizens for a Better Environment*, holding that a citizen's group lacked standing on redressability grounds to challenge an industrial manufacturer's failure to file required reports under the Emergency Planning and Community Right-to-Know Act of 1986. Although the Court was unanimous in its judgment, the Justices divided sharply over the grounds for dismissal, introducing further confusion over the Article III standing threshold. In *Eastern Enterprises v. Apfel*, a plurality of the Supreme Court expanded the scope of Takings jurisprudence in holding that the Coal Industry Retiree Health Benefit Act, which imposed a large retirement benefit liability upon a former coal operator, constituted a taking of private property without just compensation. In so doing, the Court potentially opened to Takings Clause scrutiny a vast range of laws governing pure economic liabilities and social regulations.

In the area of federal statutory law, the Court in *United States v. Bestfoods* interpreted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) as not displacing traditional corporate law principles of veil piercing to determine whether parent corporations bear liability for the environmental hazards caused by their wholly-owned subsidiaries. The Court reaffirmed, however, that parent corporations bear responsibility under CERCLA to the extent that they directly operate a facility that violates CERCLA's dictates.

This year's Annual Review also comments on an interesting development in regulatory enforcement policy: the EPA's Supplemental Environmental Projects (SEP) Policy. Under this policy, EPA may mitigate civil penalties where the responsible party agrees to implement an alternative remedy that offers environmental remediation beyond that required by law. Although the government and private litigants have used SEPs for some time, EPA adopted a final policy statement governing the exercise of this discretion in negotiating remedies for environmental violations.

On the international stage, the Conference of Parties to the United Nations Convention for Climate Change took an important step toward implementing controls on greenhouse gas emissions with the adoption of the Kyoto Protocol, which assigns
binding emission reduction targets and authorizes the use of market mechanisms to achieve compliance. In another international forum, the World Trade Organization, which resolves trade disputes, continued to place the free flow of commerce above environmental protection in ruling that the United States may not unilaterally ban importation of shrimp caught with nets that endanger sea turtles.

The Notes in this issue reflect the combined efforts of seven second-year students and a team of three third-year advisors under the supervision of professors working in the diverse areas of environmental and natural resource law. ELQ hopes that this endeavor will provide a reliable, up-to-date resource for lawyers, judges, policymakers, and the academic community interested in following and understanding the fields of environmental and natural resource law as those fields evolve in the years to come.