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Foreword

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Foreword

Daniel A. Farber*

The cases discussed in this issue of Ecology Law Quarterly manifest the range and diversity of environmental issues facing our society. Among the significant developments discussed in the issue are proposed exemptions by the Defense Department from hazardous waste laws, the regulation of zinc-bearing hazardous secondary materials, the validity of a fire restoration plan that opened old-growth forest to logging, pro-industry rules governing cooling water intake structures, an evidentiary ruling favoring victims of oil spills, and a judicial mandate that EPA...
review all changes in the methodology used to assess water quality. This is not even to mention such issues as the ownership of gravel deposits under certain federal land grants, or the conflicting rights of Indians and scientists to an ancient skeleton, or two cases concerning nuclear waste disposal. At first sight—and even on second or third sight—it is far from apparent what these cases have in common with each other or with a successful challenge to a forest plan that mis-described a hawk’s habitat needs or a pioneering district court decision requiring EPA to control the release of ballast water from ships.

In addition to brief assessments of the cases described above, this Annual Review issue contains seven detailed Notes about prominent cases. Four of these cases are from the Supreme Court, and the Notes about those cases make it clear that the Court recognized nothing distinctively environmental about them. Rather, the Court focused narrowly on issues of statutory construction or administrative law. In *South Florida Water Management District v. Miccosukee Tribe of* 

7. Florida Pub. Interest Research Group Citizen Lobby, Inc. v. EPA, 386 F.3d 1070 (11th Cir. 2004) (described by Leah Granger, *infra* p. 735, as a victory for citizen watchdog groups concerned about state efforts to circumvent the Clean Water Act through complicated administrative rule changes).

8. BedRoc Ltd. v. United States, 541 U.S. 176 (2004) (holding that land grants under the Pittman Act do not reserve sand and gravel rights to the federal government because Congress did not consider sand and gravel to be valuable resources when the statute was passed). Katherine Daniels Ryan views BedRoc as undermining the principle that land grants are construed favorably to the government. See *infra* p. 683.

9. Bonnichsen v. United States, 357 F.3d 962 (9th Cir.), amended by 367 F.3d 864 (9th Cir. 2004). *Bonnichsen* rejected a claim that the Native American Graves Protection and Repatriation Act required the return of the skeleton to a tribe inhabiting the area in question, on the ground that the remains could not be linked with any present tribe. The consequences of the decision for Indian law, historic preservation, and the protection of natural resources are discussed by Jenna Musselman, *infra* p. 707.

10. The first of these cases is Nuclear Energy Institute, Inc. v. EPA, 373 F.3d 1251 (D.C. Cir. 2004) (upholding the choice of site but invalidating EPA’s reliance on a 10,000 year compliance period for determining public health and safety standards). Beko Reblitz-Richardson describes this case as effectively approving the decision to construct a Yucca Mountain repository but ultimately extending the project’s timeline. The second case is Energy Arkansas, Inc. v. Nebraska, 358 F.3d 528 (8th Cir. 2004), cert. dismissed, 125 S. Ct. 22 (2004). As Erin Jones explains, this case upheld a stunning district court judgment of $151 million in damages against Nebraska for denying licenses to a low-level radioactive waste disposal site that Nebraska was required to host under an interstate compact. See *infra* p. 699. For a discussion of the district court opinion in the *Nebraska* case, see Emma Garrison, *Note, Entergy Arkansas, Inc. v. Nebraska: Does a Radioactive Waste Compact Nuke Sovereign Immunity?*, 30 ECOLOGY L.Q. 449 (2003).

11. Ctr. for Biological Diversity v. United States Forest Serv., 349 F.3d 1157 (9th Cir. 2003) (faulting the agency for failing to address reasonable scientific arguments in opposition to its own views) (discussed by Amanda Goad, *infra* p. 715).

In this Note, we explore the role of the Supreme Court in environmental law. The Court is often tasked with interpreting federal statutes and regulations that govern matters such as air and water quality, wilderness preservation, and hazardous waste management. These statutes are critical tools in protecting our natural environment and ensuring the health and well-being of future generations.

In the case of *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, the Court held that a California rule requiring certain fleet owners to purchase clean-fueled alternatives to diesel where commercially available was preempted by the Clean Air Act's standards for mobile sources. According to Gadeberg, the case has important (and unfortunate) implications for the future of federal preemption and the continued viability of local control, especially in the context of environmental law.

In *Dep't of Transp. v. Pub. Citizen*, the Supreme Court concluded that the National Environmental Protection Act (NEPA) did not require production of an Environmental Impact Statement (EIS) for the opening of borders to the Mexican fleet of trucks and buses. This decision is of great concern to environmentalists, as it undermines the ability of federal agencies to consider environmental impacts when making decisions.

The remaining three Notes discuss a trio of circuit court opinions. Katherine Saral criticizes the Ninth Circuit for endorsing a narrow construction of the Resource Conservation and Recovery Act in a case involving the burning of grasslands, while Katherine Daniels Ryan applauds a broad interpretation of the Wilderness Act by the same court. A final Ninth Circuit opinion reversed the decision to list the...
pygmy-owl as an endangered species. Benjamin Fenton argues that the court was correct in interpreting agency policy, but that the policy itself is questionable.

A famous saying describes history as "just one damn thing after another." Reading the cases discussed in this issue, one might well conclude the same thing about environmental law. No doubt, this is also a conclusion reached by some students at the end of an introductory survey course in the field. The field seems to be incredibly fragmented. Not only is the range of environmental issues remarkably broad, but the statutory provisions are multitudinous and seemingly unrelated. Rather than finding any unifying themes in environmental law, the courts seem to devote themselves to the narrow implications of each statute. To the extent the courts look beyond a specific statutory provision, it is only to broad principles of statutory interpretation and administrative law that apply equally to securities law and telecommunications regulation. Nothing distinctively environmental seems to be in sight.

One of the important contributions of ELQ's Annual Developments issues is to highlight the fragmentation of the field. This is not only because the issues cover such a tremendous diversity of legal issues and environmental problems; it is also because the student authors so often direct our attention to how a particular case actually relates to real-world environmental issues and policy concerns. These observations by students only highlight the extent to which the courts so often seem oblivious to these implications.

Winston Churchill reportedly once criticized a dessert by observing that "this pudding has no theme." Is the same true of environmental law? Or is there something distinctively environmental that unifies these

fishery enhancement project in Alaska, finding that the fish stocking project violated the ban on commercial enterprise even though the fish would not actually be harvested inside the wilderness boundary. Ryan views the case as establishing a strong presumption against commercial use of any kind in wilderness areas and emphasizing the importance of preservation as a statutory goal.

20. Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835 (9th Cir. 2003) (holding that under the Fish and Wildlife Service's own policy, a population of wildlife cannot be listed as endangered solely because it is the last remaining U.S. population of its species).

21. See infra p. 575.

22. I have not yet been able to trace the origin of this phrase.

23. As Professor Carol Rose puts it:

A mature environmental law is not pretty. It is past the stage of grand theory, and well into the stage of acronyms and statutory sections . . . . None of this makes the environmental novice happy. She wants to keep the air sparkling, and what she finds are the PSD requirements. She wants to save the whales, and all she gets is the MMPA.


disparate statutes and cases? At present, the answer seems to be "no." Given the manifest diversity of environmental issues, we certainly should not expect a grand theory that would unite all of environmental law into a simple framework. But without having any overall vision of the field, it is unclear how either agencies or courts can produce a halfway coherent approach to environmental law.

At the dawn of the environmental era, Congress actually made an effort to provide such a unifying vision of environmental law. Almost four decades ago, in the National Environmental Policy Act (NEPA), Congress committed the nation to some key goals: fulfilling "the responsibilities of each generation as trustee of the environment for succeeding generations," attaining "the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences," and preserving "important historic, cultural, and natural aspects of our national heritage." These goals, along with the others set forth in the statute, amounted to a mandate for sustainable development well before that term had passed into common usage.

NEPA expressly requires that "to the fullest extent possible," "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act." In order to achieve these goals, the statute imposes its best

25. As the Council on Environmental Quality explains, NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a) (2005).
26. National Environmental Policy Act of 1969 § 101(b), 42 U.S.C. § 4331(b) (2000). Because of these goals, NEPA was called "the Magna Carta of environmental law." RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 68 (2004). It is worth noting that the CEQ has directed every agency to interpret NEPA "as a supplement to its existing authority and as a mandate to view traditional policies and missions in light of the Act's national environmental objectives." 40 C.F.R. § 1500.6. The regulations require agencies to "review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act." Id. Moreover, the "President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101." 40 C.F.R. § 1500.1(a).
27. Other goals in section 101(b) were assuring safe and healthful surroundings, achieving a balance between population and resource use to permit a high standard of living, enhancing renewable resources, and recycling. NEPA § 101(b), 42 U.S.C. § 4331(b).

The first subsection of section 101 highlights the connection between development and the environment, referring to "the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances...." NEPA § 101(a), 42 U.S.C. § 4331(a).
29. NEPA § 102(1), 42 U.S.C. § 4332(1). For discussions of how this provision vanished from judicial awareness and arguments in favor of its revival, see Harvey Bartlett, Is NEPA
known requirement, the mandate for environmental impact statements.\textsuperscript{30} But this is only one of several important requirements. The statute also directs all federal agencies to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts,"\textsuperscript{31} not to mention requiring agencies to "recognize the worldwide and long-range character of environmental problems" and where consistent with U.S. foreign policy, to "maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment."\textsuperscript{32}

These directives fall well short of constituting a detailed roadmap, and perhaps it is not surprising that courts focus on the relatively specific EIS requirement and virtually ignore the rest of the statute.\textsuperscript{33} Thus, the portion of the statute that is most amenable to rigorous legal enforcement received support, but the promise of the remainder of the statute goes unfulfilled.\textsuperscript{34} If the statute once provided a possible unifying vision for environmental law, we seem to have lost it.\textsuperscript{35}

It remains to be seen whether we can develop a twenty-first century version of that unifying vision.\textsuperscript{36} Undoubtedly, this brief Foreword is not the place to attempt to do so.\textsuperscript{37} In the meantime, \textit{Ecology Law Quarterly}
deserves great credit for its annual effort to describe the complex and shifting terrain of environmental law.\(^\text{38}\) Certainly, a reader in search of intelligent and insightful analysis of the "state of play" in environmental law can find nothing better in print.\(^\text{39}\) All of us who study the field are in \textit{ELQ}'s debt.

\(^{38}\) The continued effort to understand not just the technical legal issues but also the environmental implications of judicial decisions is another great contribution of the Annual Review.

\(^{39}\) Thus, the Annual Review has amply fulfilled the hope of its founders that it would "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." See Peter S. Menell, \textit{Foreword}, 26 \textit{ECOLOGY L.Q.} 679, 681 (1999).