Foreword

Daniel A. Farber

Follow this and additional works at: http://scholarship.law.berkeley.edu/elq

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/elq/vol32/iss3/1

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z382V8H

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact JCERA@law.berkeley.edu.
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.¹ Among the significant developments discussed in the issue are proposed exemptions by the Defense Department from hazardous waste laws,² the regulation of zinc-bearing hazardous secondary materials,³ the validity of a fire restoration plan that opened old-growth forest to logging,⁴ pro-industry rules governing cooling water intake structures,⁵ an evidentiary ruling favoring victims of oil spills,⁶ and a judicial mandate that EPA

---

¹ This is not unique to this year’s issue. Last year, the Annual Review “covered areas ranging from the federal Clean Air and Water Acts to state common law remedies for damages from hazardous waste to international human right and conservation efforts and many other diverse topics.” Jasmine Starr, *Foreword*, 31 ECOLOGY L.Q. 425, 425 (2004).

² Caitlin Sislin’s comment argues that the present statutory scheme properly balances the Defense Department’s readiness concerns with environmental protection. See infra p. 647. She characterizes the Department’s requested exemptions from hazardous waste laws as unwarranted, egregious, and a threat to public health.

³ Casey Roberts’ description of *Safe Food and Fertilizer v. EPA*, 350 F.3d 1263 (D.C. Cir. 2003), argues that the decision reduces the regulatory burden associated with environmentally sound recycling of certain hazardous wastes. *Safe Food* upheld an EPA rule exempting such materials from the Resource Conservation and Recovery Act (RCRA) when they are recycled into zinc fertilizer, because these materials cannot be considered “discarded” if they are managed as valuable commodities and are incorporated into products that pose no greater health risk than products made with virgin materials. See infra p. 749.

⁴ *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291 (9th Cir. 2003) (remanding a fire restoration plan that delisted two spotted owl habitats and opened portions of old-growth forest to more extensive logging in the aftermath of a catastrophic fire in the Eldorado National Forest) (discussed by Julia Thrower, infra p. 721).

⁵ *Riverkeeper, Inc. v. EPA*, 358 F.3d 174 (2d Cir. 2004) (a judicial decision described by Reda Dennis-Parks, infra p. 689, as seemingly determined to give the industry as much leeway as possible, except for rejecting a provision allowing industry to substitute restoration efforts for compliance).

⁶ *Clausen v. M/V New Carissa*, 339 F.3d 1049 (9th Cir. 2003) (approving differential diagnosis as a technique for proving causation) (discussed by Tom Fletcher, infra p. 729).
review all changes in the methodology used to assess water quality.\textsuperscript{7} This is not even to mention such issues as the ownership of gravel deposits under certain federal land grants,\textsuperscript{8} or the conflicting rights of Indians and scientists to an ancient skeleton,\textsuperscript{9} or two cases concerning nuclear waste disposal.\textsuperscript{10} 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\textsuperscript{11} or a pioneering district court decision requiring EPA to control the release of ballast water from ships.\textsuperscript{12}

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 \textit{South Florida Water Management District v. Miccosukee Tribe of

\textsuperscript{7} Florida Pub. Interest Research Group Citizen Lobby, Inc. v. EPA, 386 F.3d 1070 (11th Cir. 2004) (described by Leah Granger, \textit{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).

\textsuperscript{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 \textit{infra} p. 683.

\textsuperscript{9} Bonnichsen v. United States, 357 F.3d 962 (9th Cir.), amended by 367 F.3d 864 (9th Cir. 2004). \textit{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, \textit{infra} p. 707.

\textsuperscript{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 Entergy Arkansas, Inc. v. Nebraska, 358 F.3d 528 (8th Cir. 2004), \textit{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 \textit{infra} p. 699. For a discussion of the district court opinion in the \textit{Nebraska} case, see Emma Garrison, \textit{Note, Entergy Arkansas, Inc. v. Nebraska: Does a Radioactive Waste Compact Nuke Sovereign Immunity?}, 30 \textit{ECOLOGY} L.Q. 449 (2003).

\textsuperscript{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, \textit{infra} p. 715).

the Court devoted itself to dissecting the issue of when two water bodies are distinct. As Priscillia de Muizon’s Note makes clear, the Court seemed to have had no understanding that the ultimate issue was the restoration of the severely impaired Everglades ecosystem. Similarly, as Miyoko Sakashita describes, the Court limited the scope of judicial review of the government’s compliance with a mandate to preserve potential wilderness areas, with little or no consideration of the environmental implications. In two other cases, the Court undermined efforts to improve air quality in the drastically impaired Southern California area. Michael Gadeberg criticizes one opinion for taking a wooden approach to preemption, while Jeannette MacMillan critiques another statutory interpretation decision that allowed the government to avoid the pollution impact of trade liberalization.

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

16. See infra p. 453 (discussing Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004)). Engine Manufacturers involved a California rule requiring certain fleet owners to purchase clean-fueled alternatives to diesel where commercially available, as part of an effort to reduce diesel emissions. The rule was prompted by the discovery that diesel exhaust generated by mobile sources caused seventy percent of airborne cancer risk in California’s South Coast Air Basin. The Court held that the California rule 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.
17. See infra p. 491 (discussing Dep’t of Transp. v. Pub. Citizen, 541 U.S. 752 (2004)). Public Citizen interpreted the National Environmental Protection Act (NEPA) and the Clean Air Act as not requiring environmental review of the consequences of opening American borders to the Mexican fleet of trucks and buses, which is older and more polluting than the American fleet. The Court’s theory was that the agency in charge of establishing the registration rules for the trucks did not have sufficient discretion to consider environmental issues to trigger these statutory obligations. Since the agency would have to implement a presidential decision under the North American Free Trade Agreement to open the borders, regardless of the findings of an Environmental Impact Statement (EIS), the Supreme Court concluded that NEPA did not require production of an EIS.
18. Safe Air for Everyone v. Meyer, 373 F.3d 1035 (9th Cir. 2004) (discussed infra p. 603). Saral argues that the case may lead to contraction of EPA’s authority to regulate in-process hazardous wastes, and also underscores the shortcomings of the federal environmental statutory scheme in resolving interstate disputes.
19. Wilderness Soc’y v. United States Fish and Wildlife Serv., 353 F.3d 1051 (9th Cir. 2003) (discussed infra p. 539). In this en banc decision, the court rejected a special use permit for a
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

---

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
mandatory

25. As the Council on Environmental Quality explains, NEPA “is our basic national
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).
28. For discussions of this concept, see RICHARD L. REVESZ ET AL., ENVIRONMENTAL
LAW, THE ECONOMY AND SUSTAINABLE DEVELOPMENT (2000); John C. Dernbach, Toward a
National Sustainable Development Strategy, 10 BUFF. ENVTL. L.J. 69 (2003); J. William Futrell,
The Transition to Sustainable Development Law, 21 PACE ENVTL. L. REV. 179 (2003); A. Dan
Tarlock, Ideas Without Institutions: The Paradox of Sustainable Development, 9 Ind. J. Global
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}


33. The culmination of this trend was \textit{Robertson v. Methow Valley Citizens Council}, which characterizes the statute as being purely devoted to the development and dissemination of information. 490 U.S. 332 (1989).
34. The Council on Environmental Quality (CEQ) is another lost opportunity. NEPA clearly contemplated that the CEQ would provide coordination and direction to the nation’s environmental programs. \textit{See} NEPA § 204, 42 U.S.C. § 4344. But instead the CEQ has been marginalized. \textit{See LYNTON K. CALDWELL, THE NATIONAL ENVIRONMENTAL POLICY ACT: AN AGENDA FOR THE FUTURE} 38–42, 44–46 (1988) (explaining the origins and evolution of CEQ). Instead, OMB has taken the lead in coordinating environmental policy based on narrowly economic considerations. Given its current record of blocking environmental measures, it is ironic that the drafters of NEPA considered charging OMB with enforcing environmental policies. \textit{See id.} at 150–151.
35. As an operational matter, cost-benefit analysis has been the closest approximation to a unifying principle, at least in terms of the executive branch’s approach to regulation. For discussion of the controversy over this approach, see DANIEL A. FARBER, \textit{ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD} 35–70 (1999).
36. Dan Tarlock has taken the lead in exploring this question in his article, \textit{Is There a There There in Environmental Law?}, 19 J. LAND USE & ENVTL. LAW 213 (2003).
37. Fortunately, the Forewords to these Annual Reviews have not turned into elephantine presentations of the author’s pet theories.
deserves great credit for its annual effort to describe the complex and shifting terrain of environmental law. Certainly, a reader in search of intelligent and insightful analysis of the "state of play" in environmental law can find nothing better in print. All of us who study the field are in 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, Foreword, 26 Ecology L.Q. 679, 681 (1999).