Foreword

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Foreword

By Casey Roberts

Over the past eight years Ecology Law Quarterly's Annual Review of Environmental Law has proven a valuable resource to practitioners and researchers. Readers of the Annual Review have consistently found in-depth examinations of important cases and legislative enactments over the previous year, along with legal and policy insights that extend far behind the confines of the cases themselves. The 2005 Annual Review continues this tradition. This year saw a number of important environmental law cases, including two that pitted states against the Environmental Protection Agency (EPA) on issues of Clean Air Act interpretation; three decisions from the U.S. Supreme Court on eminent domain and takings; and a range of decisions on citizen participation and enforcement in water and hazardous materials. While most of these decisions evince the courts' studied deference to administrative agencies, three are notable for their rejection of EPA's policy position: Duke Energy v. United States, Frey v. EPA, and American Chemistry Council v. EPA. This year's developments in the statutory and case law revisit perennial themes in environmental law and generate new questions—some of which will be resolved by the Supreme Court in 2006 and 2007, but others whose full consequences remain unclear.

This year's Annual Review contains extremely timely analyses of a pair of Clean Air Act cases in which the Supreme Court has granted certiorari: Environmental Defense v. Duke Energy Corp.\(^1\) and Massachusetts v. EPA.\(^2\) Addressing the Environmental Defense case, which was titled United States v. Duke Energy Corp. in the lower courts, Brian Potts argues that the Fourth Circuit overreached its authority by invalidating a critical New Source Review rule. The Fourth Circuit invalidated the rule because EPA interpreted the term "modification" under New Source Review differently than under the Clean Air Act's New Source Performance Standard provisions. Mr. Potts' Article

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counters nearly every aspect of the Fourth Circuit's reasoning, including the court's misunderstanding of the distinctive purposes of the two programs and its own authority to invalidate the EPA rule. Mr. Potts appraises EPA's rulemaking response and concludes by proposing two alternative methods for harmonizing the New Source Review and New Source Performance Standard programs.

Joel Smith evaluates another Clean Air Act case before the Supreme Court—*Massachusetts v. EPA*—in which Massachusetts led nearly a dozen states in a challenge to EPA's failure to regulate carbon dioxide emissions from automobiles. Mr. Smith observes that the D.C. Circuit failed to distinguish between the types of policy considerations that are appropriate to risk assessment and risk management. As a result, the court misconstrued the range of policy factors that the EPA Administrator may cite as a basis for finding that carbon dioxide emissions do not pose a threat to the public health and welfare.

Completing a trio of influential Clean Air Act cases, the D.C. Circuit rejected challenges by regulated industry, environmental groups, and nearly a dozen states to EPA's first major revision of the New Source Review program in more than two decades. The court issued an extensive opinion in *New York v. EPA*, which I review with a focus on the court's holding that two of the claims were unripe. I examine the legal and factual questions likely to arise if states resist implementation of the new rules and conclude that state implementation and the attendant judicial review will provide an avenue for much-needed scrutiny of the air quality impacts of EPA's revised New Source Review program.

In contrast to the great deference shown to EPA in *New York v. EPA* and *Massachusetts v. EPA*, the D.C. Circuit rejected EPA's reading of the Emergency Planning and Community Right-to-Know Act (EPCRA) and required the agency to remove a chemical from the Toxic Release Inventory in *American Chemistry Council v. EPA*.

Nimish Desai evaluates the court's conclusion that EPA must delist a chemical that does not have a direct effect on human health or the environment. Mr. Desai points out the court's flaws on both statutory interpretation and policy grounds—concluding, after a searching evaluation of the text and legislative history of EPCRA, that Congress did not intend the kind of direct toxicity requirement imposed by the D.C. Circuit. Mr. Desai then demonstrates how the D.C. Circuit's reasoning renders a wide range of chemicals currently regulated under the statute vulnerable to delisting—an extremely effective illustration of the need for courts to defer to EPA's scientific expertise on subjects as complex as the effect of industrial chemicals on the environment.

Citizen participation in the administrative and enforcement process was another theme of several of this year's decisions. As Jennifer Seidenberg explains, the Seventh Circuit's decision in *Texas Independent Producers & Royalty Owners Ass'n v. EPA* failed to acknowledge the pivotal role of public participation in Clean Water Act enforcement. The court upheld EPA's decision to not require public notice and comment when individual construction site operators file "notices of intent" to operate under EPA's general permit for stormwater discharge from construction sites. Ms. Seidenberg discusses how the Seventh Circuit departed from the decisions of two other circuits that treated notices of intent as the functional equivalents of discharge permits under the Clean Water Act. Ms. Seidenberg acknowledges the difficult problems of implementation posed by non-point source pollution and suggests potential middle ground for the Court and policy makers to consider in balancing public participation and administrative efficiency.

Laura Evans uses the Ninth Circuit's decision in *Headwaters Inc. v. United States Forest Service* as a platform for discussing problems of virtual representation and preclusion in the context of public rights litigation. In *Headwaters*, the Ninth Circuit held that plaintiff's challenges under the National Environmental Protection Act and the National Forest Management Act were not precluded by the fact that other plaintiffs had settled nearly identical challenges with the Forest Service and had stipulated to a dismissal with prejudice. More specifically, the court held that Headwaters had not been virtually represented by the prior plaintiffs. Following a thorough analysis of competing theories of virtual representation, Ms. Evans argues that a broader doctrine of preclusion is appropriate in cases in which litigants seek to enforce public, rather than private rights.

This year also saw two important cases regarding citizen suits under the Comprehensive Emergency Response, Compensation, and Liability Act (CERCLA). In *Frey v. EPA*, the Seventh Circuit clarified the timing of judicial review of EPA actions under CERCLA and established that EPA cannot postpone review indefinitely while it considers subsequent remedial actions at a Superfund site. In her review of *Frey*, Megan Jennings concludes that the court did not adequately explain the factors it considered in finding that EPA had unreasonably delayed further cleanup, and should have clarified whether its holding applies only to citizen suits alleging bona fide risks to health and environment, or also to potentially responsible parties challenging EPA's actions on other grounds.

5. 410 F.3d 964 (7th Cir. 2005).
6. 399 F.3d 1047 (9th Cir. 2005).
7. 403 F.3d 828, 836 (7th Cir. 2005).
In a case of first impression as to CERCLA's application abroad, the Ninth Circuit held in *ARC Ecology v. United States Department of the Air Force* that CERCLA does not provide a cause of action for citizens affected by pollution on two former U.S. military bases in the Philippines. Concluding that the court was correct as to the particular circumstances of the case, Jessica Yarnall evaluates the legislative history of CERCLA and the principles of extraterritorial application of U.S. laws to argue that the court's holding opened new ground for CERCLA's application abroad. Ms. Yarnall describes situations in which other foreign citizens may have valid claims to compel cleanup by the U.S. government of contamination abroad under CERCLA.

Of course, 2005 was a significant year in Supreme Court takings and eminent domain jurisprudence. This issue contains analyses of the Court's decisions in *Kelo v. City of New London* and *Lingle v. Chevron*. Corinne Calfee describes in depth the Connecticut court's decision and each of the four opinions issued by the Supreme Court in *Kelo*. Ms. Calfee argues that *Kelo* was consistent with precedent, though it may have opened the door to future changes in the level of judicial scrutiny applied in eminent domain decisions by suggesting that comprehensive planning could help justify a project. Moving beyond this doctrinal analysis, Ms. Calfee concludes that while the *Kelo* decision did not directly alter eminent domain law, it has inspired political responses by outraged members of the public that may actually move the law in the direction sought by the *Kelo* petitioners.

In a short commentary, Dan Pollak reviews the Supreme Court's holding in *Lingle v. Chevron* that courts adjudicating takings claims should not inquire into whether a government regulation substantially advances a legitimate public interest. Mr. Pollak argues that this decision raises questions about the scope of other takings doctrines that rest in part on the "substantially advances" doctrine—the nexus and rough proportionality tests established in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*. Mr. Pollak contends that the Court's effort to leave these tests undisturbed by emphasizing the physical nature of the takings in these prior cases opens the question of how non-physical exactions such as development fees might be sustained without the "substantially advances" doctrine.

Scott Zimmermann examines federal-state relationships in regulation of energy markets in his Comment on the Energy Policy Act

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8. 411 F.3d 1092 (9th Cir. 2005).
of 2005. Mr. Zimmermann illustrates how the statute upsets the traditional balance of federal and state authority in regulation of energy facilities with respect to liquefied natural gas (LNG) terminals. He argues that exclusive federal jurisdiction over LNG terminal siting will impair the ability of communities to address safety concerns and limit states' ability to shape their energy supply. Mr. Zimmermann concludes that by limiting state participation, Congress actually undermined its objective of speeding the development of LNG and alternative energy sources. In addition to being published in this Annual Review, Mr. Zimmermann's Comment has been recognized by the American Bar Association as the top entry in the Section of Public Utilities, Communications and Transportation Law 2006 Student Writing Competition.

Two Comments examine the National Environmental Protection Act (NEPA): one from a theoretical perspective, and another in its specific application to transportation projects. Julie Thrower looks at how modern ecological theory has undermined NEPA's foundational assumption that we can describe an "undisturbed" ecosystem and identify fixed conditions to reestablish or maintain through environmental management. Dr. Thrower considers alternatives to the current focus on front-end environmental analysis and examines whether and how the existing NEPA structure accommodates more flexible practices such as adaptive management.

Jenna Musselman provides a comprehensive overview of Congress' 2005 transportation bill and its provisions for streamlining the environmental and historical resources review processes for transportation projects. Ms. Musselman argues that the streamlining process undermines NEPA and also fails to improve project timelines since it ignores the real reasons for delay. Ms. Musselman draws on a deep understanding of innovations in transportation planning policy to recommend several legislative changes that would streamline reviews in ways that uphold NEPA's environmental and public participation values.

The Supreme Court's 2006 decision in Rapanos v. United States has reopened questions about the scope of the Army Corps of Engineers' jurisdiction over wetlands. In a short commentary, Tova Wolking evaluates Baccarat Fremont Developers v. United States Army Corps of Engineers, a Ninth Circuit decision predating Rapanos that confirmed federal jurisdiction over adjacent wetlands even without a showing of a

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significant hydrological connection between the two. Ms. Wolking argues that this decision represents a positive step towards wetlands protection, but must be read in light of increasingly restrictive judicial interpretations of the Clean Water Act.

Finally, Marc Campopiano addresses the recent controversy in the land trust community surrounding the exploitation of federal and state tax benefits for donation of conservation easements through excessive easement appraisals and donation of land with dubious conservation value. Mr. Campopiano describes the Land Trust Alliance's recently launched self-accreditation program and argues that this program should be strengthened in order to restore the public confidence, assure long-term protection of conservation easements, and deter governmental intrusion in what has been a successful grassroots movement.

This Annual Review is among the most extensive we have ever published—a reflection, no doubt, on a remarkable year in environmental law. I hope that you find this Annual Review to be engaging, insightful, and helpful in your practice and research.

16. 425 F.3d 1150 (9th Cir. 2005).