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Foreword

Robert Infelise and Eric Biber

Professor Biber and I are honored to introduce *Ecology Law Quarterly's* 2010–11 Annual Review of Environmental and Natural Resource Law. Now in its ninth year, the Annual Review is a collaborative endeavor. The foundation of the Annual Review is University of California, Berkeley, School of 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 Boalt Hall 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. Three students deserve special recognition. Soon to be members of the Bar, Olivia Odom, Katy Lum, and Taiga Takahashi devoted a large portion of their final year of law school to assisting and advising the student authors. The Annual Review is infused with their talent and insights.

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 articles that follow. We are grateful to have had the opportunity to direct this special group of future lawyers.

Law professors and students, practicing lawyers and judges, legal historians and countless other scholars seeking insights into the major developments in environmental, natural resource, and land use law during 2010–11 will benefit from this Annual Review. The casenotes cover a broad range of topics, from the effects of climate change, to the intricacies of federal environmental laws, to cross-border disputes. The Ninth Circuit Court of Appeals was the source of many of the opinions addressed in this Annual Review, although it did not always have the last word.

CLIMATE CHANGE

In the past year, the federal government took steps, albeit small ones, toward addressing climate change. In May 2010, the Environmental Protection Agency issued the Prevention of Significant Deterioration and Title V

Greenhouse Gas Tailoring Rule.¹ Best known as the Tailoring Rule, it brings stationary sources of greenhouse gas emissions under federal regulation by adjusting the statutory thresholds for permitting requirements.

In *The Tailoring Rule: Exemplifying the Vital Role of Regulatory Agencies in Environmental Protection*, Meredith Wilensky argues that the Tailoring Rule illustrates how agencies can fill the gap when the inherent characteristics of what some commentators refer to as “wicked problems,” such as climate change, prevent Congress from itself enacting standards; instead, Congress’s decision to delegate decision-making power to agencies can provide great potential for government action in the public interest.² Ms. Wilensky notes that agencies’ classic advantages—insulation, flexibility, and expertise—are particularly important in addressing “wicked problems”: Delegating to agencies can result in effective regulation in which environmental protection has a better chance of taking priority over short-term political and economic concerns.

The federal courts also addressed the inevitable results of global warming. Congress enacted the Rivers and Harbors Act³ in 1899 to ensure that the nation’s waterways remain navigable. The Act forbids building and maintaining structures within navigable waters absent permission from the Army Corps of Engineers. The Ninth Circuit’s late 2009 decision in *United States v. Milner*⁴ addressed the application of the Act to structures that only intersect with navigable waters as a result of the rising oceans. The court held that six coastal property owners had violated the Act by refusing to remove structures intended to protect their homes from erosion. The structures were originally erected lawfully on the owners’ property, but as the seas rose the structures transformed into obstructions violating the Act.

The Rivers and Harbors Act has rarely been employed as a means of providing environmental protection. But in *Forcing Adaptation through the Rivers and Harbors Act*, Leah Rindner argues that *Milner*’s treatment of the Act may be useful to address the environmental challenges created by sea level rise.⁵ She suggests that *Milner* provides a means by which private property owners can be forced to adapt to inevitable changes. Ms. Rindner further argues that the Act, as interpreted in *Milner*, allows the government to regulate private property to protect the environment and ecosystems.

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1. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70 & 71).

2. Meredith Wilensky, *The Tailoring Rule: Exemplifying the Vital Role of Agencies in Environmental Protection*, 38 ECOLOGY L.Q. 449 (2011).

3. 33 U.S.C. § 407 (2006).

4. *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009).

5. Leah Rindner, *Forcing Adaptation through the Rivers and Harbors Act*, 38 ECOLOGY L.Q. 347 (2011).

AIR QUALITY

Common law principles continue to play a role in protecting the environment. After failing to convince the EPA, through the administrative channels available under the Clean Air Act, to order numerous large electric utilities in bordering states to decrease their air pollution emissions, North Carolina employed public nuisance law in suing the Tennessee Valley Authority (TVA). The complaint alleged that emissions from nine of TVA's coal-fired power plants located in three surrounding states crossed North Carolina's borders in unreasonable amounts, creating a public nuisance under the laws of each source state. In *The Gap-Filling Role of Nuisance in the Interstate Air Pollution Context*, Emily Sangi argues that the Fourth Circuit erred in striking down the lower court's finding of nuisance and abatement order for some of TVA's plants.⁶ Ms. Sangi argues that public nuisance claims brought under the law of the source state can play an important role in curbing interstate air pollution problems that the Clean Air Act fails to address. The author weighs the comparative merits of common law nuisance and federal statutes to demonstrate why both are needed. Ms. Sangi also defines the proper edges of the gap public nuisance actions may fill in the interstate air pollution context by offering guiding principles for the courts to follow.

BIODIVERSITY

Since the inception of the federal Endangered Species Act,⁷ litigants on both sides of the political spectrum have challenged the U.S. Fish and Wildlife Service's designations of critical habitat for species protected under the Act. Developers want to limit the designation of critical habitat because it imposes procedural and substantive restrictions on development, and environmentalists seek to expand it. For many years, the Service limited designations by linking critical habitat to mere survival of a species rather than the more ambitious goal of recovery for the species, a position that often effectively eliminated critical habitat. Many commentators have argued that this position improperly undermines the Act's goals of protecting endangered species. Stephanie Brauer asserts that *Arizona Cattle Growers' Association v. Salazar* is yet another example of this dynamic.⁸ In *Arizona Cattle Growers*, the court upheld the Service's critical habitat designation for the Mexican spotted owl, rejecting the ranching industry's claim that the agency improperly designated areas as occupied by the owl to avoid the onerous process of designating "unoccupied critical habitat." Ms. Brauer argues that while a superficial reading of *Arizona Cattle Growers* suggests the case turned on semantics, the occupied/unoccupied

6. Emily Sangi, *The Gap-Filling Role of Nuisance in Interstate Air Pollution Context*, 38 *ECOLOGY L.Q.* 479 (2011).

7. 16 U.S.C. §§ 1531–1544.

8. 2010 WL 2220036 (9th Cir. June 4, 2010). Stephanie Brauer, *Arizona Cattle Growers and Unoccupied Critical Habitat*, 38 *ECOLOGY L.Q.* 369 (2011).

distinction is much more significant than a battle of definitions. She explains that unoccupied critical habitat affords species greater protection—and thus a greater likelihood of recovery—than occupied critical habitat. Ms. Brauer argues that although the Service’s broad interpretation of “occupied” may further the prospect of short-term species recovery, the Service’s refusal to designate unoccupied critical habitat deprives species of greater protection in the future, especially in the face of climate change.

The U.S. Forest Service and other federal agencies often face tough choices about how to reconcile competing congressional mandates for development and environmental protection of public lands. The balance the Forest Service achieves determines the long-term health of many of our nation’s ecosystems and the sustainability of the invaluable services they perform. As the Forest Service actively reworks the rules that guide its land management planning process, past failures provide valuable lessons about how to amend the rules to improve biodiversity protections. In *Native Ecosystems Council v. Tidwell*,⁹ the Ninth Circuit found that the agency relied on faulty methodology in concluding that an updated grazing plan for Montana’s Beaverhead-Deerlodge National Forest would have no significant impact on the viability of sagebrush-dependent species. Nell Green Nysten argues that the decision highlights some of the problems inherent in the current system of Forest Service planning: a biodiversity protection rule lacking scientific support; a myopic, front-loaded environmental review process that fails to facilitate learning and perpetuates unsuccessful practices; and a lack of transparency in Forest Service decision making that can render the National Forest Management Act’s biodiversity mandate unenforceable.¹⁰ Ms. Green Nysten argues that the new planning rule should include strong requirements for native species viability, employ the best available science, and a truly adaptive management framework based on ongoing monitoring, frequent reevaluation, and changed practices when failures occur. She argues that although the Forest Service’s draft planning rule issued in February 2011 takes tentative steps in the right direction, it does not adopt the meaningful, enforceable changes needed.¹¹

HAZARDOUS WASTE

Thirty years after Congress enacted the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),¹² courts are still sorting out the right to intervene. CERCLA section 113(i)

9. *Native Ecosystems Council v. Tidwell*, 599 F.3d 926 (9th Cir. 2010).

10. 16 U.S.C. §§ 1600–1614 (2006).

11. Nell Green Nysten, *To Achieve Biodiversity Goals, the New Forest Service Planning Rule Needs Effective Mandates for Using the Best Available Science and Adaptive Management*, 38 *ECOLOGY L.Q.* 241 (2011).

12. 42 U.S.C. §§ 9601–9675 (2006).

provides that a person may intervene as a matter of right in a pending action if that person can prove an interest in the pending action and that the disposition would, as a practical matter, impair that person's ability to protect that interest.¹³ One issue is the breadth of the right of a polluter to intervene in litigation between the government and other polluters. In *United States v. Aerojet General Corp.*,¹⁴ the Ninth Circuit held that section 113(i) allows for polluter intervention. In *Refocusing CERCLA: A Proposal to Balance Polluter and Community Intervention in CERCLA Litigation*, Maya Waldron argues that allowing polluter intervention in cases like *Aerojet*, while simultaneously denying victim community intervention, undermines CERCLA's objectives.¹⁵ Thus, she proposes two amendments to rebalance CERCLA. First, Congress should amend the provisions governing the timing for intervention so that polluters with knowledge, yet voluntarily uninvolved in the litigation, waive their right to intervene. Second, section 113(i) should embody a presumption that the government does not adequately represent community groups living near toxic sites.

ENVIRONMENTAL PROTECTION THROUGH INFORMATION DISSEMINATION

One model for protecting the environment is to provide information to decision makers and the public about the potential environmental impacts of a project. This requires an initial assessment of the environment *without the project* for use as a baseline for comparison. In *Communities for a Better Environment v. South Coast Air Quality Management District*,¹⁶ the California Supreme Court held that existing conditions, not permitted rights for polluting facilities, set the baseline under the California Environmental Quality Act,¹⁷ an environmental review statute similar to the federal National Environmental Policy Act (NEPA).¹⁸ The federal courts have yet to address this issue under NEPA. In *Baseline in the Sand*, Megan McQueeney argues that the "existing conditions" rule articulated by the California Supreme Court should be the rule under NEPA because it is consistent with NEPA precedent and purpose, and promotes critical accuracy and transparency in the review process.¹⁹

The scientific innovation that altered the genetic makeup of alfalfa to allow for the broader application of weed-controlling herbicide on crops was applauded in many circles. But it also gave rise to a garden-variety environmental lawsuit. In *Monsanto Co. v. Geertson Seed Farms*,²⁰ the U.S.

13. 42 U.S.C. § 9613(i).

14. *U.S. v. Aerojet General Corp.*, 606 F.3d 1142 (9th Cir. 2010).

15. Maya Waldron, *Refocusing CERCLA: A Proposal to Balance Polluter and Community Intervention in CERCLA Litigation*, 38 *ECOLOGY L.Q.* 401 (2011).

16. 226 P.3d 985 (Cal. 2010).

17. CAL. PUB. RES. CODE §§ 21000–21177 (West 2010).

18. 42 U.S.C. §§ 4321–4375 (2006).

19. Megan McQueeney, *Baseline in the Sand*, 38 *ECOLOGY L.Q.* 293 (2011).

20. *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010).

Supreme Court reversed the Ninth Circuit's injunction against planting Roundup Ready alfalfa following the federal Animal and Plant Health Inspection Service's approval of unconditional deregulation. In determining the injunction was invalid, the Court relied on the traditional test for the propriety of permanent injunctive relief, and held that one of the elements of the test—irreparable injury—was not demonstrated in the case of the Roundup Ready alfalfa. In *Reframing the Judicial Approach to Injunctive Relief in Environmental Cases*, Sarah Axtell considers the impact of using this test in other NEPA cases.²¹ Ms. Axtell argues that *Monsanto* undermines the longstanding practice of granting injunctions for NEPA violations where environmental harm was presumed, and instead requires district courts to employ a balancing test. Finally, Ms. Axtell argues that when irreparable harm is not presumed, the traditional test may allow judges to systematically devalue complicated environmental effects in favor of the pressing economic needs of the present.

ENFORCEMENT

Many environmental crimes are based on regulatory provisions that lack a mens rea requirement. Convictions under these provisions may be limited by constitutional due process concerns. Courts developed the public welfare doctrine as one method of justifying a lack of a mens rea requirement for certain types of crimes. In *Are Migratory Birds Extending Environmental Criminal Liability?*, Alex Arensberg argues that the Tenth Circuit's interpretation of the Migratory Bird Treaty Act²² provides another way of ensuring that due process is met for environmental crimes that lack a mens rea requirement.²³ In *United States v. Apollo Energies*,²⁴ the court employed a proximate cause standard in order to hold two oil producers liable after migratory birds became fatally caught within their drilling equipment. Through his comparison of the *Apollo Energies* holding and the public welfare doctrine, Mr. Arensberg provides a "template" for how environmental regulatory crimes may be addressed in the future.

INTERNATIONAL DISPUTES

In its simplest form, the precautionary principle provides that if an action or policy has a suspected risk of causing harm to the environment, the burden to prove that the proposed action or policy is *not* harmful falls on the proponent, even in the absence of a scientific consensus that the action or

21. Sarah Axtell, *Reframing the Judicial Approach to Injunctive Relief in Environmental Cases*, 38 *ECOLOGY L.Q.* 317 (2011).

22. 16 U.S.C. §§ 703–711 (2006).

23. Alex Arensberg, *Are Migratory Birds Extending Environmental Criminal Liability?*, 38 *ECOLOGY L.Q.* 427 (2011).

24. *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010).

policy is harmful. International tribunals have regularly considered whether to apply the precautionary principle under international law. Daniel Kazhdan demonstrates that up until 2010, many international tribunals, such as the International Tribunal for the Law of the Sea and the World Trade Organization, frequently understood the precautionary principle to reverse the burden of proof or to lower the standard of proof when risk of environmental harm existed.²⁵ The International Court of Justice, meanwhile, had avoided addressing the definition and status of the precautionary principle. Mr. Kazhdan argues that the recent ruling of the International Court of Justice in *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*²⁶ eviscerated the precautionary principle: The court rejected prior interpretations and, while paying lip service to the principle, adopted a vague and weak form of the principle. Mr. Kazhdan argues that while political considerations motivated the court to rule substantively for Uruguay, the court could have infused the principle with more vitality while achieving the same result.

Congratulations to the *ELQ* board and members, and to the authors.

25. Daniel Kazhdan, *Precautionary Pulp: The Case Concerning Pulp Mills and the Evolving Dispute between International Tribunals over the Reach of the Precautionary Principle*, 38 *ECOLOGY L.Q.* 527 (2011).

26. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, (Apr. 20, 2010), available at <http://www.icj-cij.org/docket/files/135/15877.pdf>.

