Foreward to the 2011-12 Annual Review

Holly Doremus

Robert D. Infelise

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Foreword

Holly Doremus & Robert D. Infelise

We are honored to introduce Ecology Law Quarterly’s 2011–12 Annual Review of Environmental and Natural Resource Law. Now in its fourteenth year, the Annual Review is the product of a collaboration of many. First, there are the scholars who form the core of the University of California, Berkeley School of Law’s renowned environmental law program. Their research and teaching depends in part upon the resources, financial and otherwise, of Berkeley Law’s Center for Law, Energy and the Environment. Second, Berkeley Law attracts, trains and nurtures some of the nation’s finest and most dedicated future environmental lawyers; it is those students who comprise ELQ’s editorial board and membership, which in turn produces the Annual Review. ELQ is the leading journal in the field because of the students’ passion and commitment. Three students deserve special recognition for their role in this year’s Annual Review. Soon to be members of the profession, Leah Rindner, Jill Jaffe, and Nell Green Nylen devoted a large portion of their final year of law school assisting and advising the student authors. The Annual Review is infused with their talent and insights.

Finally, this Annual Review would not have been possible without the extraordinary group of student authors whose work appears in this issue. Their aptitude and zeal for the law is evident in the Notes that follow. We are grateful to have had the opportunity to direct this special group of future lawyers.

Law professors and students, legal historians and countless other scholars seeking insights into the major developments in environmental and natural resource law over the past year will benefit from this Annual Review. The Notes cover a broad range of topics, from a Civil-War-era law governing federal land, to the delisting of the gray wolf, to the role of science in the courtroom. Despite the breadth of substantive topics, this year’s Annual Review is dominated by issues surrounding enforcement.

ENFORCEMENT

Two 2011 circuit court decisions laid the foundation for two authors to promote different approaches to citizens suits.

In a perfect world, the cost of violating environmental laws should exceed the cost of compliance. When noncompliance is cheaper, rational profit maximizers may choose to violate the law. But extracting incentives to breach
from environmental laws incentives is a challenge. In Pakootas v. Teck Cominco Ltd. (Pakootas II), the Ninth Circuit prevented a polluter from efficiently breaching the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). On the unusual facts in Pakootas II, the court held that only the U.S. Environmental Protection Agency (EPA) could enforce penalties provided for in CERCLA clean-up orders. But, in “Making Pollution Inefficient Through Empowerment,” Cody McBride argues that, in cases more typical than Pakootas II, a better strategy for preventing efficient breaches of environmental laws is to confer greater enforcement authority on citizen stakeholders. He maintains that, due to a lack of resources and an anemic political will, EPA will more likely under-enforce, often because violations go undetected, thereby creating an incentive for polluters to breach. Mr. McBride advocates an alternative approach in which EPA shares enforcement authority with citizens groups, states, and Native American tribes, thus limiting opportunities for undetected violations. While acknowledging that barring the citizen suit in Pakootas II ensured the defendant’s compliance with the CERCLA order, Mr. McBride argues that citizen suits are particularly powerful tools to counteract EPA’s shortcomings and that, in the long run, citizens’ groups should be empowered to impose and enforce penalty provisions in clean-up orders. The author proposes a case-by-case approach to determine whether a citizen suit seeking to impose penalties would increase or decrease the likelihood of compliance should be allowed to proceed.

Jason Levy is less optimistic about the value of citizen suits in the context of the Resource Conservation and Recovery Act (RCRA) in some circumstances. RCRA assigns enforcement authority to EPA, state governments, and the general public. Yet, thirty-six years after RCRA was enacted, the courts have yet to fully define the competing roles of these potential enforcers, especially in circumstances in which a state agency and a citizens group jockey for enforcement primacy in connection with the same pollution event. Circuit courts rarely second guess how district courts sort out such cases; however, three federal appellate courts recently addressed the balance between citizens’ groups and state enforcement under RCRA. Each refused to dismiss a citizen suit, despite a previously filed state agency action. Each also overturned the district court’s decision to abstain from exercising federal jurisdiction, which would have allowed state agencies to prosecute the action in state court. These opinions enhance the power of RCRA citizen suits and may carry important implications for states’ ability to set and maintain its own waste disposal policy. But, in “Conflicting Enforcement Mechanisms

1. 646 F.3d 1214 (9th Cir. 2011).
under RCRA: The Abstention Battleground between State Agencies and Citizen Suits,” Mr. Levy argues that state agencies should be able to supplant citizen suits when the state agency truly demonstrates diligence in pursuing its own enforcement policy. The author reasons that courts should retain the option to abstain from exercising jurisdiction over, and thereby barring, citizen suits only in those particular circumstances. In order to ensure a fair balance between the competing enforcement mechanisms, Mr. Levy would require states to seek input from citizen groups before filing enforcement actions.

JUDICIAL REVIEW OF AGENCY ACTION

In *Barnum Timber v. EPA*, the Ninth Circuit broadened the ability of parties negatively affected by acts of federally regulated entities to judicially challenge not the entities themselves, but the decisions of the regulating agencies. In “Standing as a Limitation on Judicial Review of Agency Action,” Jerett Yan argues that the policy underlying the Ninth Circuit’s decision is flawed. He weighs the aggrieved party’s right to redress against the effects of heightened judicial review of agency action on the ability of the executive branch to set and pursue an agenda and remain accountable for its decisions. The author warns that the *Barnum* decision could blur the separation of powers. Mr. Yan concludes that, unless the plaintiff can demonstrate either a causal relationship between the agency decision and the regulated entity’s acts or that the agency authorized an otherwise illegal act, the more appropriate mechanism is to grant third parties private rights of action against the regulated entities, rather than the federal agencies.

In *Aera Energy v. Salazar*, the D.C. Circuit was presented with a clear case of inappropriate political influence in what was then known as the Minerals Management Service (MMS). On one hand, the political influence caused Aera Energy to lose a potentially valuable offshore drilling lease. On the other hand, it prevented the MMS from improperly extending the lease. Ironically, the inappropriate political forces led to the correct, scientifically supported result. The D.C. Circuit upheld the district court’s determination that termination of the lease was proper, since an unbiased assessment of the scientific reasons for terminating the lease “cured” the determination of its political taint. In “Controlling Administrative Politics with Sunshine by Expanding the Aera Energy V. Salazar Principles,” Nick Jimenez argues for expanding the principles behind the *Aera Energy* decision into a “Sunshine Rule,” requiring disclosure of political influence in agency decisions.

5. 633 F.3d 894 (9th Cir. 2011).
7. 634 F.3d 212 (D.C. Cir. 2011).
Southern California’s struggle to meet federally-mandated standards for air pollution is manifest. The South Coast Air Basin, which includes the Ports of Los Angeles and Long Beach, does not comply with the federal ozone and particulate matter standards. The Ports handle 40 percent of the nation’s imports; the shipping industry is the single biggest source of sulfur dioxide; and, the Ports combined are the fifth biggest emitter of nitrogen dioxide in the region. In an effort to curb emissions, the California Air Resources Board enacted “Vessel Fuel Rules” requiring ships bound for California ports to use low sulfur fuels within twenty-four miles of the coast. In Pacific Merchant Shipping Ass’n v. Goldstene, the Vessel Fuel Rules were challenged on the grounds they are preempted by federal law. The Ninth Circuit rejected the challenge, applying a presumption against preemption and concluding that the Vessel Fuel Rules fall under an area of traditional state control. In “Factors to Consider in Applying a Presumption Against Preemption to State Environmental Regulations,” Gabrielle Cuskelly argues that, in determining whether a presumption against preemption applies, courts should examine the strength of the state’s interests, whether subsequent legislation further explains the relative weight of federal interests in the area, whether the federal regulation is insufficiently protective or serves only as a regulatory floor, and whether the level of decision making reinforces political accountability. The author maintains that, in the environmental law context, these factors will frequently support a consistent and strong presumption against preemption. Ms. Cuskelly concludes that limiting the contours of preemption would promote public health and safety.

When a regulation is challenged as inconsistent with the underlying statute, the reviewing court will determine whether the statute is clear on its face, in which case the intent of Congress controls. Northwest Environmental Defense Center v. Brown involved a successful challenge to EPA’s “silvicultural rule,” which would have exempted logging road runoff from regulation under the Clean Water Act (CWA). The Ninth Circuit ruled that the runoff clearly met the applicable regulatory definitions and that EPA exceeded its authority by trying to exempt silvicultural runoff from regulation under the Act. In “The Myth of EPA Over-Regulation,” Arthur Pugsley maintains that the result in Brown is part of a broader trend of EPA attempting to exclude discrete categories of activities from regulation despite a broad

11. 640 F.3d 1063 (9th Cir 2011).
Congressional mandate to regulate. He also examines the contemporary political rhetoric suggesting that EPA regulates too much. Mr. Pugsley concludes that the rhetoric often distorts reality, and he notes that there is ample evidence that EPA tends toward under-regulation.

One of the flaws in the CWA is its seeming inability to adequately regulate pollution emanating from something other than a single source. In “Restoring Our Nation’s Waters Through Public Land Law,” Mary Tharin focuses on nonpoint sources on public lands, where the federal government has authority to regulate water quality outside the CWA. In Greater Yellowstone Coalition v. Lewis, a mining operation was permitted to expand its operations and, in so doing, continue to pollute already impaired waters. Because the mine was located on federally owned land, it was subject to an independent federal permitting process outside the ambit of the CWA. Ms. Tharin argues that agencies should employ the multiple use mandates of their organic statutes to more aggressively address water restoration. Specifically, she advocates a multi-agency planning rule that would require consideration of water restoration under a multiple use and sustainable yield framework for every planning and permitting decision.

In “The Supreme Court’s Problematic Deference to Special Masters in Interstate Water Disputes,” Elizabeth Sarine addresses an important feature of water law disputes that rarely receives attention, which was on display in the Supreme Court decision in Montana v. Wyoming: the use and criteria for selection of outside experts to hear disputes between and among states in original jurisdiction cases. Ms. Sarine examines the Court’s virtually unfettered discretion to select these special masters, as well as the Court’s deference to the special masters’ determinations of both factual and legal issues. Ms. Sarine argues for reform and makes several recommendations to effectuate reform, including the provocative suggestion that the Court engage masters in pairs to increase the chances that at least one will manifest the independence of an Article III judge.

Concentrated Animal Feeding Operations (CAFO) produce a large portion of the nation’s animal-based food supply. They also generate vast quantities of manure that, if mismanaged, end up in drinking water supplies. While EPA has authority to regulate CAFO discharges under the CWA, it has yet to promulgate regulations that successfully prevent them. The most prominent product of those regulations to date is litigation, with National Pork Producers v. Environmental Protection Agency being the most recent. In “To Promote Compliance with the Clean Water Act, the EPA Should Pursue a National

14. 628 F.3d 1143 (9th Cir. 2010).
16. 635 F.3d 738 (5th Cir. 2011).
Enforcement Initiative to Regulate Concentrated Animal Feeding Operations,” Catherine Groves urges EPA to determine the location of every CAFO in the United States, select the worst offenders, and pursue enforcement actions against them using as a model a program regulating new pollution sources under the Clean Air Act.\footnote{Catherine Groves, Note, To Promote Compliance with the Clean Water Act, the EPA Should Pursue a National Enforcement Initiative to Regulate Concentrated Animal Feeding Operations, 39 ECOLOGY L.Q. 321 (2012).} Ms. Groves argues that her proposal will create a more effective national enforcement strategy to reduce ongoing CAFO violations of the CWA.

ENDANGERED SPECIES

The reintroduction of gray wolves to the Northern Rockies in 1995 marked the beginning of one of the most significant recovery success stories of the Endangered Species Act (ESA). The wolves quickly multiplied, moved into other states, and restored the balance to ecosystems as keystone predators. The reintroduction was not without controversy, however, and the wolf’s status under the ESA has been the subject of litigation since its reintroduction. In 2011, Congress waded into the controversy, ordering the Fish and Wildlife Service (FWS) to reissue a rule removing ESA protections from the gray wolf in Montana and Idaho after a court challenge by environmental groups forced FWS to withdraw the rule. The Gray Wolf Rider,\footnote{Pub. L. 112-10 § 1713 (2011).} as the legislation has been known, was praised by the governors of Montana and Idaho for returning wildlife management authority to the states. Environmental groups, on the other hand, criticized the Gray Wolf Rider as an unprecedented interference with ESA protections, motivated not by science but by politics. In “The Gray Wolf Delisting Rider and State Endangered Species Management,” Somerset Perry analyzes state wildlife management and argues that the ESA should allow for greater state involvement in managing endangered species when a state has demonstrated that it is capable of maintaining adequate protections.\footnote{Somerset Perry, Note, The Gray Wolf Delisting Rider and State Endangered Species Management, 39 ECOLOGY L.Q. 441 (2012).} Mr. Perry reasons that greater involvement by the states would promote political support for the ESA.

TOXIC TORTS

In environmental and toxic tort litigation, the use of expert testimony is pervasive. In \emph{Milward v. Acuity Specialty Products Group, Inc.}, the First Circuit authorized the use of a “weight-of-the-evidence” methodology to establish causation in a toxic tort case.\footnote{639 F.3d 11 (1st Cir. 2011), cert. denied, 132 S. Ct. 1002 (2012).} If broadly accepted, \emph{Milward} would permit greater use of expert testimony, thereby limiting the number of claims that would be resolved at the pre-trial stage. In “Epidemiological-Study
Reanalyses and Daubert: A Modest Proposal to Level the Playing Field in Toxic Tort Litigation,” Alexander Bandza argues that, in light of Milward, courts should revisit the practice of excluding one particular form of evidence: reanalyses of existing epidemiological studies. He argues that reanalysis is appropriate considering the general difficulty in using scientific evidence in legal proceedings, the unique challenges of using scientific evidence to establish causation in toxic tort litigation, and the courts’ overreliance on publication as a proxy for scientific merit. Mr. Bandza reasons that his proposal strikes a measured balance between allowing greater numbers of meritorious toxic tort claims to proceed to trial and limiting corporate exposure to unwarranted liability.

PUBLIC LANDS

The controversy over rights of way under R.S. 2477, a Civil-War-era federal law, is a continual source of litigation. Kane County, Utah, asserted a right-of-way over the Grand Staircase Escalante National Monument and opened the land to off-road vehicles, which violated the Bureau of Land Management’s plan for the Monument. In The Wilderness Society v. Kane County, Utah, the Tenth Circuit held that an environmental group did not have standing to sue Kane County for infringing on the federal government’s property rights. The Tenth Circuit held that the plaintiff, which was suing not to vindicate its own rights, but to enforce the federal government’s property rights, did not satisfy the requirements for third party standing. In “This Land Is Your Land, This Land Is My Land: The Case For Allowing Third party Standing To Enforce Federal Property Rights On The Context Of Environmental Harms,” Daniel Pulver argues that an environmental organization’s standing to represent the government’s rights on public land deserves a deeper analysis than the summary one undertaken in The Wilderness Society. In the context of oil and gas leases, grazing permits, and R.S. 2477, Mr. Pulver analyzes whether environmental organizations can satisfy the requirements for third party standing to sue on the federal government’s behalf for environmental damage to public lands.

Congratulations to the authors and to ELQ for a job very well done.

22. 632 F.3d 1162 (10th Cir. 2011).