

Foreword

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I was honored to direct Boalt Hall's 2006–2007 Environmental Law Writing Seminar because it afforded me the opportunity to work with the talented students who produced the notes in this edition of the Ecology Law Quarterly. The students are the greatest assets of Boalt Hall's renowned environmental law program, and the Annual Review of Environmental and Natural Resource Law is evidence of that. It is the product of the extraordinary talent, hard work and commitment of the student authors and the Ecology Law Quarterly's editorial board and staff. Four editors deserve special recognition. Corie Calfee, Jenna Musselman Yott, Katherine McCormick, and Misti Schmidt have since begun their careers as lawyers, but as third year students in 2006–2007 they devoted countless hours serving as advisors to the student authors. Their energy and insights are imprinted on the notes.

In its eighth year, the Annual Review is intended to supply law professors, students, legal historians, and other scholars with an understanding of the major developments in environmental, natural resource, and land use law during 2006. The notes comprising this Annual Review analyze a wide range of developments, from fundamental questions stemming from the principal federal environmental statutes to international issues. Perhaps as a sign of the times in which we live, 2006 witnessed national security concerns finding their way into environmental law jurisprudence.

NATIONAL ENVIRONMENTAL POLICY ACT

The Ninth Circuit was a fertile source of decisions for the 2006 Annual Review. In *Bad Timing: The Ninth Circuit Takes NEPA Backwards*,¹ Michael Askin analyzes the Ninth Circuit's decision in *Northern Alaska Environmental Center v. Kempthorne*.² The National Environmental Policy Act (NEPA) requires that environmental impacts

1. Michael Askin, *Bad Timing: The Ninth Circuit Takes NEPA Backwards*, 34 ECOLOGY L.Q. 1041 (2007).

2. 457 F.3d 969 (9th Cir. 2006).

be assessed and disclosed before a governmental entity irreversibly and irretrievably commits resources to a project. In *Northern Alaska Environmental Center*, however, the Ninth Circuit held that the federal Bureau of Land Management could move forward with a plan to issue oil and gas leases on a large tract of pristine Alaskan land without conducting site-specific Environmental Impact Statements. The court held that such Statements could wait until the exact drilling locations are determined. Mr. Askin argues that *Northern Alaska Environmental Center* undermines NEPA by discouraging sponsoring agencies from taking a “hard look” at environmental impacts, failing to take into account cumulative impacts of a number of related projects, and excluding public participation at an important stage.

Joseph Farris focused on another Ninth Circuit decision, *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*,³ with an unusual twist. The facts positioned the court at the intersection of NEPA’s public participation objective and the need to maintain national security secrets. The Nuclear Regulatory Commission had refused to evaluate and disclose the likelihood of a terrorist attack on a proposed nuclear waste storage facility, reasoning that matters involving national security should not be discussed in an Environmental Impact Statement disseminated to the public. The Ninth Circuit disagreed. Nonetheless, in *Mothers for Peace and the Need to Develop Classified NEPA Procedures*,⁴ Mr. Farris argues that *Mothers for Peace* failed to articulate clear guidelines for resolving the tension between the public’s right to know and the need for state secrets. He proposes using members of Congress as a surrogate for the people they represent when national security is at stake in a federal project.

AIR QUALITY

As one would expect, several decisions of the D.C. Circuit made their way into the Annual Review. One such decision involved a perennial issue in the energy sector. In 2002, EPA implemented regulations allowing electric utilities to update their generating facilities without installing the latest pollution control devices so long as the cost of the modifications did not exceed 20 percent of the cost of the entire plant. In *New York v. EPA*⁵ the D.C. Circuit held that the regulations violated the Clean Air Act. As the title makes clear, Katherine Rankin argues in *Big Win for Environmentalists in New York v. EPA May Have Limited*

3. 449 F.3d 1016 (9th Cir. 2006).

4. Joseph Farris, *Mothers for Peace and the Need to Develop Classified NEPA Procedures*, 34 ECOLOGY L.Q. 951 (2007).

5. 443 F.3d 880 (D.C. Cir. 2006).

*Impact on Air Quality*⁶ that the D.C. Circuit's decision does not go far enough to satisfy the Clean Air Act's objectives, and that more must be done to address air pollution.

HAZARDOUS WASTE

In 2006, the Ninth Circuit took a simplistic approach to an issue involving hazardous waste. Some, including Jordan Diamond, would argue that the court's approach was too simple. In *Pakootas v. Teck Cominco Metals, Ltd.*⁷ the Ninth Circuit extended the reach of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to a Canadian company for releases of pollutants in Canada impacting American soil. The decision was premised not on a finding that CERCLA reached beyond the borders of the United States, but on the basis of a domestic application of a remedial statute. In *How CERCLA's Ambiguities Muddled the Question of Extraterritoriality in Pakootas v. Teck Cominco Metals, Ltd.*,⁸ Ms. Diamond makes the case that the Ninth Circuit distorted the ordinary meaning of "extraterritoriality" and otherwise missed an opportunity to clarify the parameters of the presumption against the extraterritorial application of U.S. laws.

NATURAL RESOURCES

There were a number of important decisions in 2006 affecting natural resources. In *Central Delta Water Agency v. Bureau of Reclamation: How the Ninth Circuit Paved the Way for the Next Fish Kill*,⁹ Elisabeth Skillen expresses grave concerns about the long-term implications of what otherwise appears to be a pro-environment decision. In *Central Delta Water Agency v. Bureau of Reclamation*¹⁰ the Ninth Circuit rejected farmers' arguments that the federal Bureau of Reclamation needed to allocate more water to agriculture and less to maintain fisheries, on the grounds that the evidence supporting the farmers' claims was too speculative. In doing so, the court accorded substantial deference to the Bureau's authority to allocate water among competing interests. Ms. Skillen questions whether the "hands-off" approach taken by the Ninth Circuit will give the Bureau too much

6. Katherine K. Rankin, *Big Win for Environmentalists in New York v. EPA May Have Limited Impact on Air Quality*, 34 *ECOLOGY L.Q.* 833 (2007).

7. 452 F.3d 1066 (9th Cir. 2006).

8. Jordan Diamond, *How CERCLA's Ambiguities Muddled the Question of Extraterritoriality in Pakootas v. Teck Cominco Metals, Ltd.*, 34 *ECOLOGY L.Q.* 1009 (2007).

9. Elisabeth Skillen, *Central Delta Water Agency v. Bureau of Reclamation: How the Ninth Circuit Paved the Way for the Next Fish Kill*, 34 *ECOLOGY L.Q.* 975 (2007).

10. 452 F.3d 1021 (9th Cir. 2006).

latitude in the future, and require unavoidable harm to the environment before future courts will review the Bureau's actions.

In 2006 the Supreme Court revisited the vexing question of the reach of a federal statute, the Clean Water Act, in matters that do not have an obvious interstate impact. *Rapanos v. United States*¹¹ exposed sharp divides within the Supreme Court about the appropriate approach to statutory interpretation. The question before the Court was the extent to which the Army Corps of Engineers can exercise jurisdiction over wetlands under the Clean Water Act. In *Rapanos v. United States: Evaluating the Efficacy of Textualism in Interpreting Environmental Laws*,¹² Courtney Covington contrasts Justice Scalia's text-based approach to statutory interpretation with the more traditional methodology employed by other members of the Court. Ms. Covington argues that textual interpretations of the Clean Water Act and other environmental statutes tend to undermine their objectives, all to the detriment of the environment.

The Eleventh Circuit eroded the protections of the Endangered Species Act in *Center for Biological Diversity v. Hamilton*¹³ by holding that the statute of limitations on claims based on the failure to designate critical habitat begins to run upon a failure of the Fish and Wildlife Service to act in designating critical habitat. In a brief note, *Center for Biological Diversity v. Hamilton: Eviscerating the Citizen Suit Provision of the Endangered Species Act?*,¹⁴ Stephen Butler describes why a trigger based on a failure to act creates a major obstacle for use of the ESA's citizen suit provision.

Civil War-era easements are the subject of the Tenth Circuit's decision in *Southern Utah Wilderness Alliance v. Bureau of Land Management*.¹⁵ Thousands of miles of federal public land are criss-crossed with roads, only some of which may have been created as easements, granted in connection with the Lode Mining Act of 1866. Utah, whose borders contain large tracts of federal land, is home to roads on ten thousand such potential easements. The Tenth Circuit held that the Bureau of Land Management has the right to regulate changes in the existing easements, but does not have authority to determine the underlying validity of the easements. Claims of invalidity must be adjudicated on a case-by-case basis. In *From Blazing Trails to Building Highways: SUWA v. BLM & Ancient Easements over Federal Public*

11. 126 S. Ct. 2208 (2006).

12. Courtney Covington, *Rapanos v. United States: Evaluating the Efficacy of Textualism in Interpreting Environmental Laws*, 34 *ECOLOGY L.Q.* 799 (2007).

13. 453 F.3d 1331 (11th Cir. 2006).

14. Stephen Butler, *Center for Biological Diversity v. Hamilton: Eviscerating the Citizen Suit Provision of the Endangered Species Act?*, 34 *ECOLOGY L.Q.* 1133 (2007).

15. 425 F.3d 735 (10th Cir. 2005), *as amended on denial of rehearing* (2006).

Lands,¹⁶ Tova Wolking makes the case for the creation of a national plan to settle the validity of these ancient easements. Ms. Wolking argues that forcing courts to decide competing claims to the easements is untenable, and that Congress needs to balance the protection of federal lands against the transportation needs of rural residents in states like Utah.

WATER QUALITY AND RESOURCES

Water issues received a great deal of attention from appellate courts in 2006. In *Balancing the Pollution Budget After Friends of the Earth v. EPA*,¹⁷ Jason Malinsky applauds the D.C. Circuit for recognizing in *Friends of the Earth, Inc. v. EPA*¹⁸ that “Total Maximum *Daily* Loads” for the purposes of regulating pollutants under the Clean Water Act really means “*daily*” and not, as the Second Circuit found in *Natural Resources Defense Council, Inc. v. Muszynski*,¹⁹ “seasonally” or “annually.” In doing so, the D.C. Circuit seemingly forced EPA to do more to protect water resources. Mr. Malinsky finds fault, however, with EPA’s reaction to *Friends of the Earth* which, while satisfying the four corners of the decision, maintains a regulatory framework that does not do enough to avoid water quality degradation.

In a particularly important decision, the Supreme Court confirmed that states share authority for relicensing hydroelectric dams with the federal government in *S.D. Warren Co. v. Maine Board of Environmental Protection*.²⁰ The Federal Energy Regulatory Commission has authority under the Federal Power Act of 1920 to license dams used to produce electricity. As one would expect, the Commission traditionally has been more concerned about producing power and less focused on environmental concerns. In *S.D. Warren*, however, the Supreme Court confirmed that water released from such dams constitute a “discharge” under the Clean Water Act. That, in turn, triggers the provisions of section 401 of the Clean Water Act requiring federal licensees to obtain state certification that dam operations comply with state water quality standards, giving the states a powerful tool to ensure that dams conform to state-formulated environmental goals. In *S.D. Warren and the Erosion of Federal Preeminence in Hydropower Regulation*,²¹ Daniel Pollak urges states to seize the opportunity to go beyond a one-time review of

16. Tova Wolking, *From Blazing Trails to Building Highways: SUWA v. BLM & Ancient Easements over Federal Public Lands*, 34 *ECOLOGY L.Q.* 1063 (2007).

17. Jason Malinsky, *Balancing the Pollution Budget After Friends of the Earth v. EPA*, 34 *ECOLOGY L.Q.* 857 (2007).

18. 446 F.3d 140 (D.C. Cir. 2006).

19. 268 F.3d 91 (2d Cir. 2001).

20. 126 S. Ct. 1843 (2006).

21. Daniel Pollak, *S.D. Warren and the Erosion of Federal Preeminence in Hydropower Regulation*, 34 *ECOLOGY L.Q.* 761 (2007).

licensees' operations to embrace concepts of what is known as adaptive management, including long-term monitoring of environmental impacts and flexibility in light of new developments.

In *Statutory Complexity Disguises Agency Capture in Citizens Coal Counsel v. EPA*,²² Reid Mullen tells a cautionary tale of agency capture—in this instance, EPA—by industrial polluters. EPA had promulgated regulations designed to give coal companies an incentive to reopen abandoned mines. The regulations permitted operators to mine without regard to pollution thresholds in the Clean Water Act. In *Citizens Coal Council v. EPA*²³ the Sixth Circuit rejected challenges to the regulations. The court held that the regulations were reasonably consistent with the broad objectives of the Clean Water Act, and that the regulations would actually improve water quality at what would otherwise be an abandoned site. Mr. Mullen argues that the Sixth Circuit, faced with making sense of a maze of regulations which were themselves an interpretation of an intricate statutory scheme, failed to recognize signs of agency capture.

After almost two decades of litigation, 2006 saw the potential end of the state court litigation over competing rights to the water held behind the Friant Dam and down California's San Joaquin River. The litigation pitted agricultural, environmental, and governmental interests against each other, and spawned several appellate court decisions. In *Rewatering the San Joaquin River: A Summary of the Friant Dam Litigation*,²⁴ Nathan Matthews details the history of the litigation and the settlement, and places the lawsuit in the context of a broader debate about how to best allocate an increasingly scarce commodity.

INTERNATIONAL ISSUES

The Montreal Protocol on Substances that Deplete the Ozone Layer provides for "critical use" exemptions. The United States applied for an exemption so that U.S. farmers could continue to use a chemical known as methyl bromide. An exemption was granted, but EPA violated its terms by permitting farmers to use more methyl bromide than what was authorized under the exemption. An environmental watchdog group filed an action against EPA alleging a violation of international law stemming for the overuse of methyl bromide. In *Natural Resources Defense Council v. EPA*²⁵ the D.C. Circuit turned back the challenge on the grounds that a violation of the Montreal Protocol was a political issue and not appropriate for judicial review. Equally notable, the court also opined

22. Reid Mullen, *Statutory Complexity Disguises Agency Capture in Citizens Coal Council v. EPA*, 34 ECOLOGY L.Q. 923 (2007).

23. 447 F.3d 879 (6th Cir. 2006).

24. Nathan Matthews, *Rewatering the San Joaquin River: A Summary of the Friant Dam Litigation*, 34 ECOLOGY L.Q. 1105 (2007).

25. 464 F.3d 1 (D.C. Cir. 2006).

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that a multilateral treaty might be unconstitutional on the basis of an excessive delegation to an international body. In *NRDC v. EPA: Testing the Waters of the Constitutionality of Delegation to International Organizations*,²⁶ Alice Bodnar criticizes EPA for violating the Protocol. More fundamentally, Ms. Bodnar raises concerns about the possibility that the Protocol might eventually be held unconstitutional. She argues that the Protocol and related provisions of the Clean Air Act should not be tampered with to minimize the risk of a constitutional challenge to the Protocol.

Congratulations to the Ecology Law Quarterly and the student authors for another outstanding Annual Review.

26. Alice L. Bodnar, *NRDC v. EPA: Testing the Waters of the Constitutionality of Delegation to International Organizations*, 34 *ECOLOGICAL L.Q.* 891 (2007).