

FOREWORD

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I am honored to introduce *Ecology Law Quarterly's* 2007–08 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 California Center for Environmental Law and Policy. More directly, the Annual Review is the product of the hard and selfless work of the *Ecology Law Quarterly* editorial board and members. *Ecology Law Quarterly* is the leading journal in the field because of their passion and commitment. Three students deserve special recognition. Now members of the California Bar, Courtney Covington, Matthew Gerhart and Tova Wolking 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 casenotes that follow. I am 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, natural resource, and land use law during 2007–08 will benefit from this Annual Review. The casenotes cover a broad range of topics, from developments involving the longstanding federal statutory schemes intended to protect our planet to environmental justice concerns on an international scale to efforts to address the ultimate threat to our planet, global warming.¹ A theme that weaves its way through many of the casenotes is the Bush Administration's abysmal record in dealing with environmental concerns. Under President Bush, the Environmental Protection Agency (EPA) has failed in its essential mission to provide leadership in protecting the planet.

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1. The order of the casenotes in this issue is not by topic, as they are here introduced. Instead, they are organized by the deciding court and date of decision.

FEDERALISM

States have often disagreed with approaches taken by EPA and other federal agencies to address environmental concerns. In *Massachusetts v. EPA*,² the United States Supreme Court confronted a fundamental question of federalism: when states may challenge federal agency action or inaction. The Court held that a state suing on behalf of its citizens deserves “special solicitude” in determining whether that state has standing. In *Giving States More to Stand On: Why Special Solicitude Should Not Be Necessary*,³ Christie Henke makes the case for broadening the states’ ability to challenge the federal government, but questions whether the standard crafted in *Massachusetts v. EPA* changed the outcome. Ms. Henke argues that the Court did not go far enough and articulates a proposal to broaden further the opportunities for states to police the federal government on matters involving the environment.

HAZARDOUS WASTE

Three federal appellate decisions focused on the effectiveness of the principal federal statutory schemes—the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the 1976 amendments to the Solid Waste Disposal Act known as the Resource Conservation and Recovery Act (RCRA)—in addressing contaminated sites and creating incentives for voluntary action by responsible parties. In *Settling the Tradeoffs between Voluntary Cleanup of Contaminated Sites and Cooperation with the Government under CERCLA*,⁴ Stefanie Gitler analyzes the United States Supreme Court’s decision in *United States v. Atlantic Research Corp.*⁵ In *Atlantic Research*, the Court attempted to reconcile CERCLA section 107, the principal liability-creating provision, with CERCLA’s provision authorizing contribution claims among parties liable under section 107. Ms. Gitler illustrates the manner in which *Atlantic Research* increases incentives for private parties to clean up polluted sites voluntarily. On the other hand, Ms. Gitler argues that a perhaps unintended consequence of *Atlantic Research* is that a party potentially liable under section 107 will be less likely to settle with the government because the settling party is not shielded from section 107 actions brought by other private parties.

The incentives to settle claims under CERCLA section 107 were also at the heart of the Eighth Circuit Court of Appeals’ decision in *K.C. 1986 Ltd. Partnership v. Reade Manufacturing*.⁶ Section 107 does not explicitly impose

2. 127 S.Ct. 1438 (2007).

3. Christie Henke, Note, *Giving States More to Stand On: Why Special Solicitude Should Not Be Necessary*, 35 ECOLOGY L.Q. 385 (2008).

4. Stefanie Gitler, Note, *Settling the Tradeoffs between Voluntary Cleanup of Contaminated Sites and Cooperation with the Government under CERCLA*, 35 ECOLOGY L.Q. 337 (2008).

5. 127 S. Ct. 2331 (2007).

6. 472 F.3d 1009 (8th Cir. 2007).

liability on successors to corporate entities liable for cleanup costs under CERCLA, but the federal appellate courts have read successor liability into the Act. A persistent question, however, has been the appropriate standard for imposing successor liability. In *Reade*, the court tacitly endorsed a broader test for successor liability than the traditional common law approach. In *Rising Phoenix-Like from the Ashes: An Argument for Expanded Corporate Successor Liability under CERCLA*,⁷ Matt Sieving analyzes the extent to which the competing tests for successor liability create incentives to remediate contaminated sites voluntarily. Mr. Sieving concludes that if the trend of adopting the “substantial continuity test” continues among the circuit courts, successor corporations will more willingly remediate polluted sites.

The Resource Conservation and Recovery Act also contains a citizen suit provision, enabling private parties to attempt to force polluters to remediate contaminated sites in the absence of effective government action. In *Maine People’s Alliance v. Mallinckrodt*,⁸ the First Circuit Court of Appeals addressed the avenues for citizens groups to intervene where EPA has initiated an action against the polluter but, in the citizens group’s view, is not doing enough to protect the environment. The court adopted a “minimal burden test” for the right of private citizens to intervene in a RCRA action initiated by the government. In *The Next Step in Revitalizing RCRA: Maine People’s Alliance and the Importance of Citizen Intervention in EPA Actions*,⁹ Jonathan York describes the factors that undermine RCRA’s usefulness as a tool for ordinary citizens to advance their agenda. Mr. York makes the case that the test adopted by the First Circuit substantially improves RCRA’s effectiveness as a tool for citizens groups to protect the environment.

AIR QUALITY

The Bush Administration has been less than aggressive in promoting industry’s use of the best available technology for reducing air emissions. Perhaps no one decision illustrates that more than the United States Supreme Court’s decision in *Environmental Defense v. Duke Energy Corp.*¹⁰ and its aftermath. In *Duke*, the Court upheld EPA’s discretion to interpret the word “modification” differently in different contexts. That, in turn, permitted EPA to use an *annual* emissions test under the Clean Air Act’s Prevention of Significant Deterioration program and an *hourly* emissions test under the New Source Performance Standards. But that was not the end of it. *After* the decision in *Duke* was handed down, EPA reversed course and formulated a policy that effectively diluted the protections afforded by the bifurcated

7. Matt Sieving, Note, *Rising Phoenix-Like from the Ashes: An Argument for Expanded Corporate Successor Liability under CERCLA*, 35 *ECOLOGY L.Q.* 427 (2008).

8. 471 F.3d 277 (1st Cir. 2006).

9. Jonathan York, Note, *The Next Step in Revitalizing RCRA: Maine People’s Alliance and the Importance of Citizen Intervention in EPA Actions*, 35 *ECOLOGY L.Q.* 405 (2008).

10. 127 S.Ct. 1423 (2007).

approach to interpreting the word “modification.” In *Environmental Defense v. Duke Energy Corp.*: *Paving the Way for Cap and Trade?*,¹¹ Shawn Eisele takes the position that EPA’s changing positions can only be interpreted as an attempt to marginalize the Prevention of Significant Deterioration program to permit industry to avoid emission control upgrades to existing facilities more easily. In doing so, Mr. Eisele lays bare the Bush Administration’s hollow commitment to enforcing air quality standards from industrial sources.

EPA is apparently no more committed to addressing ground level ozone. In *The Ozone Saga*,¹² Max Baumhefner describes the D.C. Circuit decision in *South Coast Air Quality District v. EPA*,¹³ a prior decision of the Supreme Court, and EPA’s chilling reaction to both. *The Ozone Saga* tells the story of the willingness of the agency charged with protecting the environment to ignore even the Supreme Court to avoid effective regulation of a dangerous pollutant.

GLOBAL WARMING

Given the Bush Administration’s track record on other environmental issues, it is little wonder that states have assumed a leadership position on issues involving global warming. In *A Necessary Collision: Climate Change, Land Use, and the Limits of A.B. 32*,¹⁴ Henry Stern provides a comprehensive analysis of The California Global Warming Solutions Act of 2006. The Act requires that development patterns and impacts that potentially contribute to global warming be taken into account in the project planning stage. Nonetheless, Mr. Stern casts a wary eye on the bureaucracy that will oversee the Act. He argues that the Act will only reach its full potential if the regulations promulgated pursuant to it are as sweeping as the Act itself.

The development of the western United States has largely followed the availability of water. There has never been enough water to satisfy everyone, and global warming is only going to make things worse by reducing winter snow packs. In *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*,¹⁵ the California Supreme Court established standards for water supply analyses in environmental impact reports under the California analogue of the National Environmental Policy Act. In *Water Supplies Finally Take Center Stage in the Land Use Planning Arena*,¹⁶ Jamey Volker describes a future where the conservation of water is an overriding objective of any

11. Shawn Eisele, Note, *Environmental Defense v. Duke Energy Corp.: Paving the Way for Cap and Trade?*, 35 *ECOLOGY L.Q.* 363 (2008).

12. Max Baumhefner, Note, *The Ozone Saga*, 35 *ECOLOGY L.Q.* 557 (2008).

13. 472 F.3d 882 (D.C. Cir. 2006).

14. Henry Stern, Note, *A Necessary Collision: Climate Change, Land Use, and the Limits of A.B. 32*, 35 *ECOLOGY L.Q.* 611 (2008).

15. 150 P.3d 709 (Cal. 2007).

16. Jamey Volker, Note, *Water Supplies Finally Take Center Stage in the Land Use Planning Arena*, 35 *ECOLOGY L.Q.* 573 (2008).

future development plan. He argues that planners will increasingly rely on urban management water plans in allocating scarce water supplies.

SPECIES AND WETLANDS PRESERVATION

Agencies other than the EPA have also attempted to shirk their environmental duties under the Bush Administration's leadership by attempting to limit the application of Section 7 of the Endangered Species Act (ESA) to discretionary agency actions. In *National Association of Home Builders v. Defenders of Wildlife*, the United States Supreme Court agreed with this interpretation of the statute, and upheld the Fish and Wildlife Service and National Marine Fisheries Service's joint regulation that limited the ESA's application to discretionary agency actions.¹⁷ In *Loose Canons: The Supreme Court Guns for the Endangered Species Act* in *National Association of Home Builders v. Defenders of Wildlife*, Doug Karpa argues that this decision was poorly crafted, and that it may render Section 7 without legal effect.¹⁸

In 2007, the Ninth Circuit Court of Appeals produced more than one important decision involving habitat preservation. One involved the ESA. Section 7 of the ESA advances the objective of conserving and aiding in the recovery of endangered species by prohibiting federal agency action that jeopardizes endangered species and/or destroys critical habitat. In *National Wildlife Federation v. National Marine Fisheries Service*,¹⁹ the court held that the National Marine Fisheries Service and the U.S. Fish and Wildlife Service must consider both the recovery and survivability of species in reviewing proposed agency actions. In *Reversing the Trend towards Species Extinction, or Merely Halting It? Incorporating the Recovery Standard into ESA Section 7 Jeopardy Analysis*,²⁰ Jennifer Jeffers makes the case for a recovery standard to ensure a more effective means of protecting and conserving species.

In another important decision, the Ninth Circuit grappled with the complex question of what is a "navigable" waterway for the purpose of the Clean Water Act's wetlands protection scheme. In *San Francisco Baykeeper v. Cargill Salt Division*,²¹ the court adopted a narrow view of the circumstances under which a body of water will fall within the purview of the Clean Water Act. In *What Went Wrong in San Francisco Baykeeper v. Cargill Salt Division? The Ninth Circuit's Weak Reading of Kennedy's Rapanos Concurrence, and a*

17. 127 S. Ct. 2518 (2007).

18. Doug Karpa, Note, *Loose Canons: The Supreme Court Guns for the Endangered Species Act* in *National Association of Home Builders v. Defenders of Wildlife*, 35 *ECOLOGY L.Q.* 291 (2008).

19. 481 F.3d 1224 (9th Cir. 2007).

20. Jennifer Jeffers, Note, *Reversing the Trend towards Species Extinction, or Merely Halting It? Incorporating the Recovery Standard into ESA Section 7 Jeopardy Analysis*, 35 *ECOLOGY L.Q.* 455 (2008).

21. 481 F.3d 700 (9th Cir. 2007).

Prescription for Litigating Clean Water Act Claims under Rapanos,²² Genevieve Casey harshly criticizes both the reasoning of and outcome in *Cargill*.

ENVIRONMENTAL JUSTICE

The All-American Canal runs along the U.S.-Mexican border. Over the life of the canal, leaking water has been the lifeblood of a farming community in Northern Mexico. When the United States Bureau of Reclamation began lining the canal with concrete, that community was threatened. In *Consejo de Desarrollo Economico de Mexicali v. United States*,²³ the Ninth Circuit rejected environmental and community groups' challenges to the lining project on the grounds that an international treaty allocated the available water between the United States and Mexico and a federal law mandated that the project proceed "without delay." In *The (Almost) All-American Canal: Consejo de Desarrollo Economico de Mexicali v. United States and the Pursuit Of Environmental Justice in Transboundary Resource Management*,²⁴ Nicole Ries attacks the inflexible terms of the treaty as well as the law that authorized the project. Ms. Ries argues that border nations should develop flexible regimes that can more easily adapt to changing circumstances.

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

22. Genevieve Casey, Note, *What Went Wrong in San Francisco Baykeeper v. Cargill Salt Division? The Ninth Circuit's Weak Reading of Kennedy's Rapanos Concurrence, and a Prescription for Litigating Clean Water Act Claims under Rapanos*, 35 *ECOLOGY L.Q.* 531 (2008).

23. 482 F.3d 1157 (9th Cir. 2007).

24. Nicole Ries, Note, *The (Almost) All-American Canal: Consejo de Desarrollo Economico de Mexicali v. United States and the Pursuit of Environmental Justice in Transboundary Resource Management*, 35 *ECOLOGY L.Q.* 491 (2008).