

# Foreword

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The 2004 Annual Review of Environmental and Natural Resources Law seeks to report and analyze the major developments in these fields during the prior year. Boalt students author the entire issue, and the pieces primarily focus on domestic judicial decisions and regulatory developments. Together, the students have covered areas ranging from the federal Clean Air and Water Acts to state common law remedies for damages from hazardous waste to international human rights and conservation efforts and many other diverse topics. In its sixth year, the Annual Review has become a successful means both for training students in the process of academic legal writing and for providing our readers with timely and original analysis of new developments in environmental and natural resources law.

## THE CLEAN WATER ACT

The Annual Review reports a number of important decisions relating to the Clean Water Act. In *Friends of the Earth v. Environmental Protection Agency*,<sup>1</sup> the D.C. Circuit held that the Clean Water Act does not provide for direct circuit court review of total maximum daily loads (TMDLs) set by the EPA.<sup>2</sup> While the CWA provides for direct review in the circuit courts of “effluent limitations[] and other limitations[] under section 1311,”<sup>3</sup> the court held that TMDLs, which arise under section 1313, are not included in this grant of jurisdiction.<sup>4</sup> Judicial review of TMDLs is still possible, but plaintiffs must bring the suit in a district court under the Administrative Procedure Act.<sup>5</sup> In reaching this conclusion, the D.C. Circuit acknowledged that they did not have much confidence in their interpretation of this confusing statute, and suggested that Congress could always correct their interpretation by clarifying the statute.<sup>6</sup> In her

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1. *Friends of the Earth v. EPA*, 333 F.3d 184 (D.C. Cir. 2003).
  2. *Id.* at 193.
  3. 33 U.S.C. § 1369(b)(1) (2000).
  4. 333 F.3d at 187-193.
  5. *Id.* at 185 (citing 5 U.S.C. §§ 701-706).
  6. *Id.* at 193.

note, Estie Manchik argues that Congress should do just that.<sup>7</sup> She contends that vesting the circuit courts with jurisdiction to review TMDLs would promote judicial efficiency, be consistent with the current provision's intent to have the circuit courts review discharge regulations, and prevent fragmentation in the TMDL review process.<sup>8</sup>

The scope of the CWA is addressed by two notes in brief. Caitlin Sislin in her note<sup>9</sup> analyzes conflicting decisions on non-navigable waterways in *United States v. Deaton*<sup>10</sup> and *In re Needham*.<sup>11</sup> In these cases, the Fourth and Fifth Circuits differed both as to whether the CWA should be read broadly to reach many non-navigable waterways and whether such a broad reading would be constitutional.<sup>12</sup> Ms. Sislin argues that the disagreement is due to the Supreme Court's recent decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,<sup>13</sup> which "significantly narrowed the federal government's jurisdiction over non-navigable waterways without providing adequate guidelines for determining jurisdictional boundaries."<sup>14</sup> She concludes that the Fourth Circuit's broader reading of the CWA is more appropriate because it advances Congress's intent to protect and rehabilitate the nation's waterways.<sup>15</sup> Edward Bacha examines *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*,<sup>16</sup> where the Ninth Circuit held that the CWA requires a permit for the discharge of groundwater pumped to the surface during methane gas extraction.<sup>17</sup> The court found that the unaltered groundwater fell within the definition of "pollutant" and that states may not create exemptions to the CWA.<sup>18</sup> Mr. Bacha concludes that the Ninth Circuit reached a conclusion that is "doctrinally legitimate and results in a fair policy."<sup>19</sup>

Rounding out our examination of developments in the Clean Water Act, Liwen A. Mah examines the EPA's exemption of ballast water from

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7. Estie Manchik, *Friends of the Earth v. United States Environmental Protection Agency: A Battle for the Proper Forum to Protect the Nation's "Forgotten River,"* 31 ECOLOGY L.Q. 531 (2004).

8. *Id.* at 535.

9. Caitlin Sislin, *After SWANCC, the Fourth and Fifth Circuits Dispute Federal Jurisdiction over Non-navigable Waterways*, 31 ECOLOGY L.Q. 745 (2004).

10. 332 F.3d 698 (4th Cir. 2003).

11. 354 F.3d 340 (5th Cir. 2003).

12. Sislin, *supra* note 9, at 745.

13. 531 U.S. 159 (2001).

14. Sislin, *supra* note 9, at 745.

15. *Id.*

16. 325 F.3d 1155 (9th Cir.), *cert. denied*, 124 S. Ct. 434 (2003).

17. *Id.* at 1157.

18. *Id.*

19. Edward Bacha, *Ninth Circuit Explains Meaning of the Word "Pollutant" Under the Clean Water Act and Refuses to Ignore the Constitution's Supremacy Clause*, 31 ECOLOGY L.Q. 751, 754 (2004).

regulation under the CWA.<sup>20</sup> While the EPA has the authority to regulate ballast water, it has deferred to the Coast Guard.<sup>21</sup> Unfortunately, Mr. Mah notes, the Coast Guard is over-utilized already and does not have the ability to regulate ballast water in this period of heightened concern about national security.<sup>22</sup> He argues that courts should review an agency's decision not to regulate despite having authority to do so.<sup>23</sup> This is necessary to "ensure that agencies such as the EPA do not pass regulatory responsibility to other agencies that are beyond their influence and authority."<sup>24</sup>

#### OCEANS AND INTERNATIONAL ISSUES

Two independent reports this year by the Pew Oceans Commission and the U.S. Commission addressed the overall state of the oceans. Kathryn J. Mengerink focuses on the Pew report and evaluates its recommendations for instilling new values to guide ocean governance, restructuring overall ocean governance, and for changing fisheries management.<sup>25</sup> She concludes that the values and structural changes will result in a more cohesive system for protecting the oceans, but she expresses concern that the recommendations for changing fisheries management could result in a more opaque process that lacks the support of the fishing community.<sup>26</sup>

Fishing practices are also at issue in Patricia Svilik's note on *Defenders of Wildlife v. Hogarth*.<sup>27</sup> In this case, the Federal Circuit upheld a regulation that defines when fishing boats must loosen their purse seine nets to allow encircled dolphins to escape.<sup>28</sup> Ms. Svilik notes that the timing of the release is crucial, because after sunset dolphins have difficulty escaping even from the loosened nets.<sup>29</sup> Despite the fact that the regulation at issue in *Defenders* differed from the rule specified by Congress in the International Dolphin Conservation Program Act, the Court held that the regulation properly reflected what Congress

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20. Liwen A. Mah, *Sailing by Looking in the Rearview Mirror: EPA's Unreasonable Deferral of Ballast-Water Regulation to a Now Ineffective Coast Guard*, 31 *ECOLOGY L.Q.* 665 (2004).

21. *Id.* at 668.

22. *Id.* at 672-74.

23. *Id.* at 679-84.

24. *Id.* at 686.

25. Kathryn J. Mengerink, *The Pew Oceans Commission Report: Navigating a Route to Sustainable Seas*, 31 *ECOLOGY L.Q.* 689 (2004).

26. *Id.*

27. Patricia Svilik, *A Hole in the Net: Errors in Statutory Interpretation Hurt Domestic Efforts to Reduce Dolphin Mortality in Defenders of Wildlife v. Hogarth*, 31 *ECOLOGY L.Q.* 589 (2004); 330 F.3d 1358 (Fed Cir. 2003).

28. 330 F.3d at 1374; 50 C.F.R. § 216.24(c)(6)(iii) (2004).

29. Svilik, *supra* note 27, at 594.

intended.<sup>30</sup> Ms. Svilik challenges this holding, finding that the Court's flawed statutory interpretation allowed NMFS to rewrite the Act and weaken the program for protecting dolphins from these fishing practices.<sup>31</sup>

International law impacts the environment far beyond the seas. In her note in brief, Jill Meyers examines the Ninth Circuit's decision in *Doe v. Unocal*, a case brought under the Alien Tort Claims Act complaining of human rights abuses connected to the development of a gas pipeline by Unocal in Burma/Myanmar.<sup>32</sup> These human rights abuses occur in connection with environmental degradation. Accordingly, EarthRights International, an organization that works to defend "rights that demonstrate the connection between human well-being and a sound environment, and include the right to a healthy environment, the right to speak out and act to protect the environment, and the right to participate in development decisions" represented the plaintiffs in *Doe*.<sup>33</sup> Ms. Meyers reviews the Ninth Circuit's decision in the case and recommends that the en banc panel that is currently considering the issue adopt a domestic standard of liability in evaluating Unocal's involvement in the human rights abuses.<sup>34</sup>

#### NATURAL RESOURCES

Last year, courts issued two conflicting decisions regarding the ability of Congress to protect endangered intrastate species under the Endangered Species Act. In *Rancho Viejo v. Norton* and *GDF Realty v. Norton*, the D.C. and Fifth Circuits considered Commerce Clause attacks on the ESA.<sup>35</sup> While both courts upheld the ESA, Sara Van Loh notes that they used different reasoning, with the D.C. Circuit concluding that the regulated activity is the development that results in taking an endangered species and the Fifth Circuit defining the regulated activity as the taking itself.<sup>36</sup> Ms. Loh is critical of both circuits and suggests that courts should consider that the ESA serves Congress's interest in preventing a race to the bottom among states and that the concept of

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30. 330 F.3d at 1374

31. Svilik, *supra* note 27, at 612.

32. Jill Meyers, *Ninth Circuit Grants En Banc Rehearing in Doe v. Unocal*, 31 ECOLOGY L.Q. 757 (2004).

33. EarthRights International, *About ERI: Mission*, at <http://www.earthrights.org/about/mission.shtml> (last visited Nov. 9, 2004).

34. Meyers, *supra* note 32, at 765.

35. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003).

36. Sara D. Van Loh, *The Latest and Greatest Commerce Clause Challenges to the Endangered Species Act: Rancho Viejo and GDF Realty*, 31 ECOLOGY L.Q. 459 (2004).

biodiversity provides a connection between intrastate species and interstate commerce.<sup>37</sup>

Concern for the protection of habitat for endangered species also animates a comment and a note in brief on developments in the area of public lands management. Reda Dennis-Parks asks whether the Healthy Forests Restoration Act<sup>38</sup> will really protect homes and communities from forest fires in her note on this controversial piece of legislation.<sup>39</sup> Congress passed HFRA to protect communities and endangered species from the devastation of forest fires.<sup>40</sup> However, Ms. Dennis-Parks analyzes the science and politics and concludes that HFRA will not achieve its goals due to a lack of resources for the EPA to implement projects, an incentive for companies to log rather than thin forests, and a reduction in endangered species review that will permit the destruction of crucial habitat.<sup>41</sup> She argues that a better approach would be to adopt defensive space measures that focus on creating a buffer between human communities and forests to stop the destructive potential of a fire while allowing the natural benefits of periodic forest fires.<sup>42</sup> Paul Stinson's note in brief on the Ninth Circuit's decision in *Forest Guardians v. United States Forest Service* also addresses the management of public lands.<sup>43</sup> In that decision, the Ninth Circuit upheld a decision by the Forest Service to phase-in grazing reductions over ten years and to allocate all available forage for grazing to livestock, despite its knowledge that elk and deer also grazed in the area.<sup>44</sup> Mr. Stinson points out that, while the Forest Service's plan to phase-in grazing reductions may be commendable, it seems to be in conflict with the statutory scheme designed by Congress.<sup>45</sup>

#### CLEAN AIR

In brief notes address two major developments that could greatly impact the quality of the nation's air: the entry of trucks from Mexico and the revision of New Source Review rules under the Clean Air Act. Michael Bhargava tackles the Supreme Court's decision that the United States can allow Mexican trucks to enter the country pursuant to an agreement in NAFTA without first conducting an assessment of the

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37. *Id.* at 481-83.

38. 108 Pub. L. No. 148, 117 Stat. 1887 (codified at 16 U.S.C.A. §§ 6501-91 (West Supp. 2004)).

39. Reda M. Dennis-Parks, *Healthy Forest Restoration Act—Will It Really Protect Homes and Communities?*, 31 *ECOLOGY L.Q.* 639 (2004).

40. 16 U.S.C.A. § 6501(1), (6).

41. Dennis-Parks, *supra* note 39, at 648-49.

42. *Id.* at 659-62.

43. Paul Stinson, *Forest Guardians v. United States Forest Service: All Cattle, No Wildlife = "Balanced" Use of Range Land*, 31 *ECOLOGY L.Q.* 773 (2004).

44. 329 F.3d 1089, 1098-1100 (9th Cir. 2003).

45. Stinson, *supra* note 43, at 778-79.

environmental impact of these trucks.<sup>46</sup> The Court reasoned that neither the Clean Air Act nor NEPA required an environmental review, because the Department of Transportation did not have discretion to prevent the entry of the trucks.<sup>47</sup> Mr. Bhargava explains that this decision may not have much impact in the immediate situation, because the EPA had nearly finished an environmental assessment ordered by the lower court.<sup>48</sup> However, it does demonstrate how international agreements can impact domestic environmental quality while evading domestic environmental regulations. Shane Moses tackles the controversial modifications to the New Source Review rules under the Clean Air Act.<sup>49</sup> By expanding an exception to the requirements imposed on new sources under the CAA, Mr. Moses argues that the EPA has given an unfair, competitive advantage to older plants that pollute more heavily than their newer competitors.<sup>50</sup>

Sky Stanfield also takes issue with the EPA's regulatory choices in her note on the Mobile Source Air Toxics Rule.<sup>51</sup> In 1990, Congress required the EPA to study emissions from mobile sources and develop a program that would attain the "greatest degree of emission reduction achievable."<sup>52</sup> However, the D.C. Circuit upheld the EPA's final rule, which does not require oil refineries to produce cleaner fuel.<sup>53</sup> Ms. Stanfield criticizes the court's decision for frustrating Congress's intent and weakening the Clean Air Act.<sup>54</sup> She suggests that the decision be narrowly interpreted so it does not open up a loophole in implementing technology-forcing provisions.<sup>55</sup>

Regulation of emissions by the states is the topic of two in brief notes. Audrey Walton-Hadlock considers the Second Circuit's decision in *Clean Air Markets Group v. Pataki*<sup>56</sup> that New York can not require its electrical companies to forfeit any profit they make from transferring emissions credits to plants in upwind states.<sup>57</sup> Ms. Walton-Hadlock explains that this ruling effectively eliminates any meaningful state

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46. Michael Bhargava, *Supreme Court Allows Mexican Trucks to Enter the United States Without Environmental Impact Assessments*, 31 ECOLOGY L.Q. 719 (2004).

47. Department of Transportation v. Public Citizen, 124 S. Ct. 2204 (2004).

48. Bhargava, *supra* note 46, at 723.

49. Shane J. Moses, *Keeping Grandfathered Polluters Alive: EPA's New Equipment Replacement Provision*, 31 ECOLOGY L.Q. 787 (2004).

50. *Id.*

51. Sky Stanfield, *The Mobile Source Air Toxics Rule: How Does the Greatest Reduction Become No Reduction?*, 31 ECOLOGY L.Q. 563 (2004).

52. 42 U.S.C. § 7521(1)(2) (2000).

53. Sierra Club v. EPA, 325 F.3d 374 (D.C. Cir. 2003).

54. Stanfield, *supra* note 51, at 565.

55. *Id.*

56. 338 F.3d 82 (2d Cir. 2003).

57. Audrey Walton-Hadlock, *Second Circuit Limits State Power to Regulate Sulfur Dioxide Emissions: Clean Air Markets Group v. Pataki*, 31 ECOLOGY L.Q. 731 (2004).

regulation that interferes with the federal cap-and-trade system for sulfur dioxide, despite the Clean Air Act's express reservation of this power to the states.<sup>58</sup> Katherine Saral examines another conflict between a state and the EPA in her note in brief exploring California's application for an exemption from the Clean Air Act's requirement that oxygenated gasoline be used in areas that do not attain National Ambient Air Quality Standards.<sup>59</sup> The Ninth Circuit held that the EPA should have considered California's evidence that non-oxygenated gasoline would more effectively reduce levels of particulate matter before they denied the waiver.<sup>60</sup> Ms. Saral points out, however, that due to the delay in issuing the waiver, most refineries have moved to making oxygenated gasoline using ethanol and may not want to switch back to making non-oxygenated gasoline.<sup>61</sup>

#### HAZARDOUS WASTE

Local innovation was also at issue in *Fireman's Fund Insurance Co. v. City of Lodi*.<sup>62</sup> This suit challenged a local ordinance modeled on CERCLA, allowing the City to engage in cleanups of a serious contamination of their groundwater and then go after the insurers of the responsible parties for the costs.<sup>63</sup> In her note, Alexandra Barnhill argues that the Ninth Circuit correctly rejected most of the insurer's preemption arguments.<sup>64</sup> However, Ms. Barnhill criticizes the court for striking down those parts of the ordinance that would have allowed the City to cleanup its groundwater to higher standards than required under federal law.<sup>65</sup>

The City of Lodi was prompted to create its own ordinance due to the inadequacies of CERCLA, the federal hazardous waste cleanup law that is the subject of three notes. In my note on liability for passive migration of hazardous waste under CERCLA, I analyze the efforts of Congress and the courts to create a fair and workable system to assign liability for spreading pollution.<sup>66</sup> Liability for passive migration under CERCLA turns on the definitions of "disposal" and "release."<sup>67</sup> I argue that these terms should be interpreted to provide for *prima facie* liability

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58. *Id.*

59. Katherine Saral, *No Ethanol Needed: California Wins Reconsideration of its Request for an Oxygenate Waiver*, 31 *ECOLOGY L.Q.* 767 (2004).

60. *Davis v. EPA*, 348 F.3d 772, 783-85 (9th Cir. 2003).

61. Saral, *supra* note 59, at 770.

62. 302 F.3d 928 (9th Cir. 2002)

63. *Id.* at 934-38

64. Alexandra M. Barnhill, *Entrenching the Status Quo: The Ninth Circuit Interprets Preemption Doctrines to Allow Local Regulation of Environmental Problems If It Meets the Lowest Common Denominator*, 31 *ECOLOGY L.Q.* 487, 512-16 (2004).

65. *Id.* at 516-24.

66. Jasmine M. Starr, *Making Good Neighbors: Liability for Passive Migration of Hazardous Waste Under CERCLA*, 31 *ECOLOGY L.Q.* 435 (2004).

67. *Id.* at 437; 42 U.S.C. § 9607(a) (2000).

for even those not actively responsible for pollution, with defenses to liability available to innocent parties who take action to respond to contamination once they become aware of it.<sup>68</sup> The question of passive migration arises in the context of owner liability, but a recent case also explored the scope of arranger liability under CERCLA. In *Morton International, Inc. v. A.E. Staley Manufacturing Co.*, the Third Circuit defined the elements of arranger liability as ownership or possession of the material, knowledge that the action would result in pollution, and control over the action.<sup>69</sup> Melissa Thrailkill concludes that this holding is consistent with the text and purpose of CERCLA and will provide a definitive test for lower courts applying arranger liability.<sup>70</sup>

Section 309 of CERCLA preempts state statutes of limitations for toxic torts if they begin to run before the plaintiffs knew or should have known that toxic pollution caused their injuries.<sup>71</sup> Christin Cho considers possible constitutional challenges to section 309 under federalism concerns.<sup>72</sup> She looks to the Supreme Court's decision in *Jinks v. Richland County*, upholding federal preemption of state statutes of limitations when the state claims are brought under supplemental jurisdiction in federal court.<sup>73</sup> Ms. Cho concludes that *Jinks* provides support for the constitutionality of section 309.<sup>74</sup> Finally, moving to RCRA, Jim Nickovich evaluates a case from the D.C. Circuit upholding the EPA's interpretation of "hazardous waste" to include hazardous mixtures and derivatives.<sup>75</sup> Mr. Nickovich concludes that this holding is important because it allows for regulation of important forms of hazardous waste without imposing a cumbersome process on the EPA.<sup>76</sup>

The Annual Review represents the work of students in Boalt's Environmental Law Writing Seminar, taught this year by Professor Robert Infelise with the assistance of four student advisors, Deborah Keeth, Emma Garrison, Brendan Cody, and Michael Shields. In addition to the ten notes and comments produced by this class, the Annual Review also contains notes in brief written independently by Boalt students with

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68. Starr, *supra* note 66, at 452.

69. 343 F.3d 669 (3d Cir. 2003).

70. Melissa Thrailkill, *The Third Circuit Clarifies Arranger Liability Under CERCLA*, 31 ECOLOGY L.Q. 739 (2004).

71. 42 U.S.C. § 9658 (2000).

72. Christin Cho, *Jinks and its Implications for Federal Preemption of State Statutes of Limitations under CERCLA Section 309*, 31 ECOLOGY L.Q. 725 (2004).

73. *Jinks v. Richland County*, South Carolina, 123 S. Ct. 1667, 1672-73 (2003).

74. Cho, *supra* note 72, at 729.

75. Jim Nickovich, *EPA Broadens RCRA Definition of "Hazardous Waste" to Include Mixtures and Derivatives*, 31 ECOLOGY L.Q. 781 (2004); *American Chemistry Council v. EPA*, 337 F.3d 1060 (D.C. Cir. 2003).

76. Nickovich, *supra* note 75, at 781.

the guidance of ELQ's Articles Editors. The work of two editorial boards and ELQ's general membership was essential to bringing the pieces to press. Part of ELQ's mission is to promote student writing, and it is with pride that we present this year's Annual Review.

