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# Foreword

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# FOREWORD

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*Ecology Law Quarterly* is proud to bring you its fifth Annual Review of Environmental and Natural Resources Law. The Annual Review issue provides explanations and analyses of recent cases and changes in environmental law, and, since its first year, has received a warm welcome from students, scholars, and practitioners alike. Additionally, it has played an important role in the life of the journal and has a special place in the hearts of the environmental law students at Boalt Hall. Since *ELQ*'s inception over thirty years ago, encouragement of student writing has been one of its core goals. In the beginning, that was embodied by *ELQ*'s publication of student Notes and Comments and student-written Book Reviews. The Annual Review builds on this rich tradition and brings readers an issue written entirely by the student members of the *Ecology Law Quarterly*.

The preparation for the Annual Review each year involves a special collaborative effort of student authors, student advisors, and student editors during which skills are honed and friendships are strengthened. The student energy and talent devoted to this year's issue epitomizes the spirit that *ELQ* has embodied since its founding. Regrettably, this past year also brought a sad event in the journal's history: *ELQ* mourns the loss of Pat O'Hern in April 2002. Pat, one of *ELQ*'s founders, helped establish this amazing tradition of student research and writing. *ELQ*'s first Editor in Chief Bill Chamberlain aptly notes: "Pat was tireless in his advocacy that the *ELQ* existed to support law student writing and thinking regarding environmental problems. His dedication to this goal and his work ethic were pivotal to the ultimate success of the Quarterly, which went on to inspire many of the nation's leading environmental lawyers to write about how the law should approach and resolve

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environmental problems and later to make their careers in that field." Pat began the tradition that in many ways the Annual Review is a culmination of. He supported *ELQ* throughout his life including helping to establish the Ecology Law Research Institute, which is not only *ELQ*'s alumni association but also promotes students writing by offering a yearly writing award for the top Boalt student Comment on environmental law. In honor of Pat's tremendous contribution to the *Ecology Law Quarterly*, we dedicate this issue of student research and writing to him.

This Fifth Edition of the Annual Review contains fourteen comprehensive Notes and Comments, in addition to several brief summaries of recent developments in environmental law. Benson Cohen[1] discusses *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[2] a significant regulatory takings decision by the United States Supreme Court. *Tahoe-Sierra* held that a temporary development moratorium is not considered a taking for which just compensation is due. The various development moratoria at issue were enacted in the 1980s in order to allow the Tahoe Regional Planning Agency ample time to study the effects of development on the Lake Tahoe region and ensure adequate environmental protection standards. Since the moratoria's enactment, there has been an ongoing controversy between landowners and environmentalists. This tension between public interest in preservation and private property rights has led to extensive litigation. Cohen explains the Supreme Court's refusal to adopt an approach under which any temporary delay or imposition on landowners' property interests would require governmental compensation.[3]

The Ninth Circuit also issued an important decision regarding the controversial moratoria in the Lake Tahoe region, putting a stop to the serial litigation of claims involving the rights of affected property owners.[4] As explained in Liwen Mah's Case Summary, after five such lawsuits, the Ninth Circuit advanced the interest of finality and dismissed the claim based on *res judicata*.[5] The Ninth Circuit concluded that plaintiffs were allowed only one opportunity to challenge the requirements of the development moratoria. Although the controversy surrounding development in the Lake Tahoe region continues, this decision prevents other potential claims from being litigated.

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1. Benson Cohen, In Brief, Tahoe-Sierra, *or How I Learned to Stop Worrying and Love the Moratorium*, 30 ECOLOGY L.Q. 733 (2003).

2. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

3. Cohen, *supra* note 1.

4. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064 (9th Cir. 2003).

5. Liwen Mah, In Brief, *Property Owners Cannot Repeatedly Challenge Regional Planning Process Every Time that Development Permits Are Denied*, 30 ECOLOGY L. Q. 741 (2003).

Claims based on the Clean Water Act (CWA) are regularly before the federal courts. Since the birth of the Act, courts have been litigating its definitions of terms and phrases, and this year was no different. The Clean Water Act prohibits the discharge of pollutants into navigable waters from a point source in the absence of a permit.[6] In *Miccosukkee Tribe of Indians v. South Florida Water Management District*,[7] the Eleventh Circuit addressed whether the pumping of urban runoff into water conservation areas constitutes an addition of pollutants from a point source. Miranda Gong describes this case, which is now pending before the Supreme Court.[8] In essence, the Eleventh Circuit found that moving water between unconnected water bodies constitutes an addition of a pollutant when the receiving body is of higher water quality. Because many western states transfer water between basins and irrigation systems, this case could have major impacts for Clean Water Act regulation.

The Fourth Circuit examined the term "fill material" as used by the Army Corp of Engineers in *Kentuckians for the Commonwealth, Inc. v. Riverburgh*.[9] Section 404 of the Clean Water Act prohibits the disposal of fill material into navigable waters without a permit.[10] As the permitting agency for section 404, the Army Corps of Engineers interprets "fill material" to include excess debris from mountain top mining operations in river valleys. Alexandra Manchik's Case Summary describes the small Kentucky community group's challenge to the Corps' policy.[11] The community group argued that the mountain top debris constitutes "waste" not "fill material." The Fourth Circuit, however, rejected this claim and found the agency's interpretation of the Act permissible.

The Fourth Circuit also addressed the meaning of Clean Water Act permits in *Piney Run Preservation Association v. County Commissioners*.[12] The court specifically addressed the meaning of the permit shield provision of the Act. In general, dischargers operating under a valid permit are shielded from liability. In *Piney Run*, a citizens group brought suit against the county sewage treatment plant. Although the facility was operating under a state issued permit, it was discharging a pollutant not listed in their permit: heat. The citizens argued that only pollutants specifically listed in the permit should be allowable. The Fourth Circuit disagreed explaining that as long as dischargers fully

6. 33 U.S.C. § 1311 (2003).
7. 280 F.3d 1364 (11th Cir. 2002).
8. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 123 S.Ct. 2638 (2003).
9. 317 F.3d 425 (4th Cir. 2003).
10. 33 U.S.C. § 1344 (2003).
11. Alexandra Manchik, In Brief, *Fourth Circuit Upholds the Army Corps of Engineers' Decision to Permit Mountaintop Waste Disposal in America's Rivers*, 30 ECOLOGY L.Q. 747 (2003).
12. 268 F.3d 255 (4th Cir. 2001).

disclose potential pollutants during the permitting process, they will be shielded from litigation involving any of those disclosed pollutants. Jessica Owley explains in her Note that although this case gives more permit certainty to the regulated community, the public will have trouble learning about the pollutants to which they are being exposed.[13]

The Clean Water Act has a two-tiered system for regulating waters of the United States. There are the permitting programs described above, but there are also strict guidelines requiring states to establish a water-quality-based approach to pollution prevention.[14] Under this program, states must calculate permissible levels of pollution, which are called Total Maximum Daily Loads (TMDLs). States are required to submit lists of both TMDLs and water bodies with limited impaired water quality to the EPA for review. In *Pronsolino v. Nastri*,[15] the Ninth Circuit addressed the issue of how to regulate these TMDLs. The court affirmed the EPA's authority to enforce these standards in waters polluted exclusively by pollutants from hard to identify sources, called non-point sources. In her Note, Jocelyn Garovoy explains the significance of this decision.[16] Non-point sources contribute a significant portion of pollution entering into navigable waters, but are among the most difficult to regulate. Garovoy sees the Ninth Circuit's decision as a big step in a much-needed direction, but warns that the battle has not been won. Under the framework of an unfriendly administration, she emphasizes the need for advocates to pursue multiple avenues for addressing the problems of non-point sources.

The Ninth Circuit addressed TMDLs again in *San Francisco BayKeeper v. Whitman*,[17] a case described by Aaron Monick.[18] There, the Ninth Circuit upheld the dismissal of a lawsuit seeking a court declaration that the state of California failed to implement an adequate water pollution control program and failed to establish TMDLs for pollutants on certain waters. BayKeeper argued that the state failed to submit TMDLs, and therefore the EPA should not have approved the state's plan. Because the State had plans to eventually submit the TMDLs, the Ninth Circuit ruled that a delay in submission was not the same as a failure to submit.

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13. Jessica Owley, Note, Piney Run: *The Permits Are Not What They Seem*, 30 ECOLOGY L.Q. 429 (2003).

14. 33 U.S.C. § 1313 (2003).

15. Pronsolino v. Nastri, 291 F.3d 1123, 1129 (9th Cir. 2002)

16. Jocelyn Garovoy, Note, *"A Breathtaking Assertion of Power"? Not Quite.* Pronsolino v. Nastri *and the Still Limited Role of Federal Regulation of Nonpoint Source Pollution*, 30 ECOLOGY L.Q. 537 (2003).

17. 297 F.3d 877 (9th Cir. 2002).

18. Aaron Monick, In Brief, *Limping Towards Clean Water Act Compliance:* San Francisco BayKeeper v. Whitman, 30 ECOLOGY L.Q. 757 (2003).

San Francisco BayKeeper was also before the Ninth Circuit in a case regarding mootness in Clean Water Act citizen suits. The environmental group alleged that the Tosco Corporation allowed illegal discharges of petroleum coke to enter the San Francisco Bay from its large, uncovered storage piles. Additionally, BayKeeper alleged that Tosco's procedures for loading ships were careless, causing additional coke to enter the Bay. In their notice letter, SF Baykeeper did not specify the exact dates of discharge but provided enough information for the company to determine the dates at issue. In *San Francisco BayKeeper, Inc. v. Tosco Corp.*,[19] the court held that BayKeeper's letter was sufficient. Estie Manchik's Case Summary explains this decision's impact on CWA mootness.[20] During the litigation, Tosco sold their facility and moved for summary judgment arguing that because they no longer owned the facility, the case was moot. Relying on the Supreme Court's decision in *Friends of the Earth v. Laidlaw Environmental Services, Inc.*,[21] the court found against Tosco because the facility was still operating and violations could recur at the facility. In general, the court expressed concern about setting a precedent that would remove a polluter's liability and allow them to escape monetary sanctions by selling their facility.

There have also been several important developments related to the Clean Air Act (CAA). On March 3, 2003, significant amendments to the Clean Air Act's New Source Review (NSR) regulations took effect.[22] The EPA's revisions to NSR exempt older generating plants from certain pollution control requirements. The new amendments are the culmination of a decade-long debate between environmentalists and industry groups. Industry groups disliked the original NSR, asserting that the permitting standards were too rigid, and sought changes that would allow them to more easily make modifications to older plants without triggering NSR's permitting requirements. Environmental organizations saw these proposals as a weakening of pollution control standards that would encourage industry to modernize older, dirtier sources of emissions rather than install updated pollution control technology. David Mastroyannis-Zaft explains the pending NSR litigation and the EPA's reconsideration of the new regulations, and speculates that however the final rule gets resolved, the debate between industry and

19. 309 F.3d 1153 (9th Cir. 2002).

20. Estie Manchik, In Brief, *Ninth Circuit Protects Ability of Citizens to Sue Under Clean Water Act*, 30 ECOLOGY L.Q. 753 (2003).

21. 528 U.S. 167 (2000).

22. Prevention of Significant Deterioration (PSD) and Non-attainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plant-wide Applicability Limitations, Clean Units, Pollution Control Projects, 67 Fed. Reg. 80,186 (Dec. 31, 2002) (codified at 40 C.F.R. pts. 51, 52).

environmentalists about NSR regulations will continue for some time.[23]

Several pending cases that hinge on the interpretation of NSR requirements have been essentially stalled during this overhaul of the NSR program. In 2002, the Eleventh Circuit handed down a decision that acknowledges and favors industry claims on NSR issues, and could have a significant impact on other pending claims in NSR cases. *Tennessee Valley Authority v. EPA*[24] granted standing to third-party power companies who feared their prices would rise as a result of the new pollution restrictions imposed by the EPA's enforcement of the Clean Air Act. This decision provides industry groups standing to challenge an EPA action whenever even an uncertain economic injury might result from CAA enforcement. In her Note, Marnie Riddle argues that the court may have overemphasized the CAA's requirement that the EPA consider economic interests during the standard-setting process.[25] She contends that this may lead to courts to view economic interests that are merely incidental to the central purposes of the CAA as sufficient to invalidate an enforcement action.

The D.C. Circuit delivered good news to CAA advocates when it upheld a new emissions regulation that, if successfully implemented, is likely to result in much improved air quality. On January 18, 2001, the EPA issued a rule entitled Control of Air Pollution from New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements.[26] This new regulation, which will take effect in 2007, aims to dramatically reduce diesel engine emissions from heavy-duty, on-road vehicles. In *National Petrochemical & Refiners Ass'n v. EPA*,[27] the court rejected the challenge brought by engine manufacturers, automobile makers, and fuel refiners. In her Case Summary, Jasmine Starr explains that the EPA's victory has significantly discouraged challenges to the new rule, and has directed the attention of affected parties to the development technology necessary to implement the new standards.[28]

In another Clean Air Act case, the D.C. Circuit emphasized the importance of public involvement in the creation of CAA regulations in

23. David Mastroyannis-Zaft, In Brief, *EPA's Revised New Source Review Regulations Take Effect*, 30 ECOLOGY L.Q. 797 (2003).

24. 278 F.3d 1184 (11th Cir. 2002).

25. Marnie Riddle, Note, *Interpreting the Relevance of Economic Harm in the Clean Air Act:* Tennessee Valley Authority v. Environmental Protection Agency, 30 ECOLOGY L.Q. 611(2003).

26. Control of Air Pollution from New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements, 40 C.F.R. §§ 69, 80, 86 (2003).

27. 287 F.3d 1130 (D.C. Cir. 2002).

28. Jasmine Starr, In Brief, *D.C. Circuit Upholds Restrictions on Diesel Emissions*, 30 ECOLOGY L.Q. 779 (2003).

*Ethyl Corp. v. EPA*.[29] There, the court held that the EPA could not delegate to automobile manufacturers its regulatory authority to establish tests for new automobile emissions. Reda Dennis-Parks explains the court's decision, which held that such a delegation violated the CAA's statutory directive to establish such tests through agency regulation.[30] In rejecting the EPA's argument that involving the public in the regulation process would be too burdensome, the court emphasized that public participation through Notice and Comment rulemaking is an essential aspect of the Clean Air Act.

Again emphasizing the importance of public participation in environmental regulations, the D.C. Circuit, in *General Electric Co. v. EPA*,[31] expanded the circumstances in which the EPA must use Notice and Comment procedures. At issue in *General Electric* was a "guidance document" that set forth the EPA's interpretation of two regulations regarding the cleanup and disposal of polychlorinated biphenyls waste. The court held that this document, because it appeared binding on its face, was legislative in nature. Thus, the EPA should have engaged in the Notice and Comment procedures and involved the public in its decision-making process. In her case summary, Lindsay Nichols speculates that this case will frustrate the efforts of administrative agencies that wish to explain their regulations in practical terms through the use of informal documents.[32] She also notes that this decision will aid the litigation efforts of industry groups and environmentalists alike, as it offers a useful tool for challenging any agency guideline or document of this sort.

Several cases before the circuit courts addressed the regulatory authority of administrative agencies. In *W.R. Grace & Co. v. EPA*,[33] a case involving the Safe Drinking Water Act, the Third Circuit diminished the EPA's authority to respond to emergencies. The court deemed that the EPA's emergency order to cleanup an ammonia plume in a public water system was "arbitrary and capricious." Like many American environmental laws, the Safe Drinking Water Act contains a special provision allowing the EPA flexibility to act quickly in response to emergencies. Although the EPA's action was based upon the recommendations of a technical study team, the court held that that EPA failed to provide a rational basis for its factual determination that the specified methodology of cleanup was necessary to protect the public

29. 306 F.3d 1144 (D.C. Cir. 2002).

30. Reda Dennis-Parks, In Brief, *Instructing the EPA How to Regulate Vehicle Emissions*, ECOLOGY L.Q. 791 (2003).

31. 290 F.3d 377 (D.C. Cir. 2002).

32. Lindsay Nichols, In Brief, *D.C. Circuit Invalidates EPA Document as "Binding on its Face,"* 30 ECOLOGY L.Q. 785 (2003).

33. 261 F.3d 330 (3d Cir. 2001).

health. In her Note, Andrea Issod argues that this decision falls out of line with the general requirement for courts to apply heightened deference to factual determinations within the agency's area of special expertise, and undermines the importance of an agency having the flexibility and authority to act quickly in an emergency.[34]

In *United States v. Power Engineering Co.*,[35] another case addressing the regulatory authority of the EPA, the Tenth Circuit created a circuit split on the issue of "overfilling" under the Resource Conservation and Recovery Act (RCRA). In a decision directly contrary to the Eighth Circuit's decision in *Harmon Industries, Inc. v. Browner*,[36] the Tenth Circuit upheld the right of the EPA to file an action that duplicates an enforcement action filed by a state agency. Margaret May explains the ongoing debate regarding the EPA's authority to overfile.[37] The ability to overfile, or file a separate federal action against the polluter, ensures that the strict enforcement of RCRA will not be watered down by lenient state agencies. On the other hand, overfiling decreases the polluter's incentive to settle with state agencies if they anticipate further enforcement by the EPA. The Supreme Court denied Power Engineering's petition for writ of certiorari, leaving the lower federal courts to continue debating the EPA's right to overfile.

The Ninth Circuit handed down two decisions affecting the regulatory authority of the Fish & Wildlife Service (Service) within the Endangered Species Act (ESA). In *Biodiversity Legal Foundation v. Badgley*,[38] the Ninth Circuit cracked down on the Service's delays in its determinations of which species should be listed in the ESA. The court held that when the Service receives a petition to list a species as threatened or endangered, it must determine within twelve months whether the listing is warranted. This decision represents a victory for ESA advocates in that it prevents agency delay in the listing of species. Jennifer Schlotterbeck points out, however, that the Service may be forced to devote its limited resources to compliance with the new deadlines.[39] Her Note expresses concern that this decision will actually hinder the Service's ability to detect and protect at-risk species that are not the subject of listing petitions or court orders.

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34. Andrea Issod, Note, W.R. Grace & Co. v. EPA: *An Arbitrary Outcome*, 30 ECOLOGY L.Q. 409 (2003).

35. 303 F.3d 1232 (10th Cir. 2002).

36. Harmon Indus., Inc. v. Browner, 191 F.3d 894 (8th Cir. 1999).

37. Margaret May, In Brief, *Tenth Circuit Upholds the EPA's Right to Overfile under RCRA*, 30 ECOLOGY L.Q. 769 (2003).

38. 309 F.3d 1166 (9th Cir. 2002).

39. Jennifer Schlotterbeck, Note, Biodiversity Legal Foundation v. Badgley: *Good News for Endangered Species Act Advocates, Bad News for At-Risk Species*, 30 ECOLOGY L.Q. 587(2003).

In *Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife*,[40] the Ninth Circuit similarly hindered the authority of the Fish & Wildlife Service by rejecting its scientific determination that cattle grazing in a riparian habitat could result in a "take" of listed species. In his Note, Paul Stinson contends that this opinion narrows the Supreme Court's holding in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,[41] thus eroding the "indirect injury" provision in section 9 of the ESA.[42] Stinson notes that, in addition to limiting the protections envisioned by the ESA, this ruling threatens the Service's regulatory authority by questioning and rejecting its factual determinations. *Arizona Cattle Ranchers* is a disappointment for the Fish & Wildlife Service and environmentalists interested in conserving species protected by the ESA.

The Ninth Circuit also handed down two important decisions interpreting the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[43] In *United States v. Shell Oil Company*,[44] in addition to clarifying CERCLA's sovereign immunity provision and the arranger liability provision, the Ninth Circuit, for the first time, defined the meaning of the "act of war" defense. CERCLA, which governs liability regarding the improper discharge of hazardous substances, provides a defense when the release of a hazardous substance is solely caused by an act of war. The Ninth Circuit severely restricted the availability of the defense, holding that the oil companies were not entitled to the benefit of the defense because their disposal of waste was not "solely" caused by an act of war. In her Note, Sachiko Morita points out that the court's narrow construction of the act of war provision is solidly in line with the remedial purpose of CERCLA.[45] Morita also points out that, although this case is helpful articulation of CERCLA's "arranger liability" provision, the Ninth Circuit steered away from a bright line rule, leaving ambiguity surrounding this provision.

In *Carson Harbor Village v. Unocal Corp.*[46] the Ninth Circuit faced a question that has split courts around the nation for a decade. The *en banc* panel held that "disposal" under CERCLA does not encompass passive migration of contaminants. The exclusion of passive migration of contaminants (as opposed to the active discharge of pollutants) may,

40. 273 F.3d 1229 (9th Cir. 2001).

41. 515 U.S. 687 (1995)

42. Paul Stinson, Note, Arizona Cattle Growers' Association v. U.S. Fish & Wildlife Service: *Has the Ninth Circuit Weakened the "Take" Provisions of the Endangered Species Act?*, 30 ECOLOGY L.Q. 493 (2003).

43. 42 U.S.C. §§ 9601-9675 (2003).

44. 294 F.3d 1045 (9th Cir. 2002).

45. Sachiko Morita, Note, United States v. Shell Oil Company: *Is The Decision Too Lenient on the United States Government?*, 30 ECOLOGY L.Q. 563 (2003).

46. 270 F.3d 863 (9th Cir. 2001).

contrary to the statute's intent, create a disincentive for landowners to prevent spills or to clean up any contamination that occurs. This holding was reached on the basis that a plain meaning analysis of the statute did not contradict CERCLA's legislative history. Andréa Ruiz-Esquide argues in her Note that the courts interpreting CERCLA should instead utilize the canon of statutory interpretation that remedial statutes are to be construed liberally.[47] Ruiz-Esquide advocates that this approach would result in interpretations that are more consistent with congressional intent.

The circuit courts also produced two significant decisions related to the effect of federal regulatory schemes on the laws and rights of the states. In 2002, a case involving the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)[48] posed a significant federal preemption question. In *Nathan Kimmel, Inc. v. DowElanco*,[49] the court expanded FIFRA's preemptive scope by holding that the allowance of a state tort claim would interfere with the EPA's administration of FIFRA. In his Note, Michael Shields takes a critical look at the Ninth Circuit's preemption analysis and argues that, by ignoring FIFRA's express preemption clause, this decision may weaken the force of other statutes' express preemption clauses.[50] Shields also contends that *Kimmel* unreasonably expands FIFRA's preemptive scope, and thus may limit plaintiffs' ability to seek compensation for pesticide related injuries.

In *Entergy Arkansas, Inc. v. Nebraska*,[51] a significant decision regarding the Low-Level Radioactive Waste Policy Act (LLRWPA or Act), the Eighth Circuit denied Nebraska's ability to assert the defense of Eleventh Amendment immunity in litigation surrounding the Central Interstate Low-Level Radioactive Waste Compact (Compact). In *Entergy*, the Compact's governing commission sued Nebraska for sidestepping its obligations to the Compact and failing to create a low-level radioactive waste disposal facility. Once the Eighth Circuit held that Nebraska had waived its state sovereign immunity, the District of Nebraska entered a judgment against Nebraska in the amount of $150 million.[52] In her Note, Emma Garrison ponders whether the tremendous financial judgment against Nebraska will serve to encourage other states

47. Andrea Ruiz-Esquide, Note, Carson Harbor Village v. Unocal Corporation: *Using Background Principles to Solve CERCLA's Ambiguities?*, 30 ECOLOGY L.Q. 473 (2003).

48. 7 U.S.C. §§ 136 - 136y (2003).

49. 275 F.3d 1199 (9th Cir. 2002).

50. Michael Shields, Note, Nathan Kimmel, Inc. v. DowElanco: *Broadening the Preemptive Scope of FIFRA*, 30 ECOLOGY L.Q. 517 (2003).

51. 241 F.3d 979 (8th Cir. 2001).

52. 226 F.Supp.2d 1047, 1054 (D. Neb. 2002).

to comply with their respective compacts created under LLRWPA.[53] Following the invalidation of the Act's "take-title provision" in *New York v. United States*, the Act has been virtually ineffective in its goal of ensuring the safe disposal of low-level radioactive waste and creating a nationwide system of disposal facilities. Garrison's Note examines the tension that exists between protecting state sovereignty and empowering the federal government to effectively encourage the states to help solve the national problem of safe radioactive waste disposal.

In addition to significant court cases, there have also been important legislation and policy changes relating to environmental laws. For example, a Comment by Sheridan Pauker addresses some of the potential ecological impacts of the war on drugs.[54] Specifically, she examines United States policy in Colombia and its environmental side effects. For the past few years, the federal government has been working with the Colombian government in a coca eradication project. The United States funds aerial pesticide spraying of coca plants. In her Comment, Pauker discusses the potential environmental harm from this spraying and presents a framework for addressing the side effects.

Both the environmental and agricultural community eagerly anticipate (and sometimes dread) each renewal of the Farm Bill. Jesse Ratcliffe describes how the most recent iteration of the Bill impacts the environment.[55] As with past Farm Bills, the current version contains provisions which sacrifice ecological health for farmer stability and prosperity. After presenting a less than encouraging ecological picture, Ratcliffe's Comment presents a proposal for future farm bills. He suggests that Congress could harmonize the Farm Bill with environmental protection goals by tying subsidies to compliance with Environmental Goals and Strategies.

There are always changes in federal policy that have accompanied a change in administration. One of these changes was President Clinton's eleventh hour Roadless Rule proclamation. The Forest Service's Roadless Rule prohibited the construction of new roadways on millions of acres of federal land.[56] A recent case described in the case summaries represents one step in the ongoing legal challenges to the Rule. In *Kootenai Tribe of Idaho v. U.S. Forest Service*,[57] the Ninth Circuit

53. Emma Garrison, Note, Entergy Arkansas, Inc. v. Nebraska: *Does a Radioactive Waste Compact Nuke Sovereign Immunity?*, 30 ECOLOGY L.Q. 449 (2003).

54. Sheridan Pauker, Comment, *"Spraying First and Asking Questions Later": Congressional Efforts to Mitigate the Harmful Environmental, Health, and Economic Impacts of U.S.-Sponsored Coca Fumigation in Colombia*, 30 ECOLOGY L.Q. 655 (2003).

55. Jesse Ratcliffe, Comment, *A Small Step Forward: Environmental Protection Provisions in the 2002 Farm Bill*, 30 ECOLOGY L.Q. 631 (2003).

56. Preamble and Final Roadless Area Rule, 66 Fed. Reg. 3244 (January 12, 2001).

57. 313 F.3d 1094 (9th Cir. 2002).

overturned a district court's issuance of a preliminary injunction barring implementation of the Roadless Rule. As Mazen Basrawi describes in his Case Summary, the case also has interesting implications for standing doctrine.[58] Although the Forest Service chose not to appeal the district court decision, the environmental group interveners were successfully able to defend the Forest Service's policy. Additionally, the case represented an interesting dilemma under the National Environmental Policy Act (NEPA) as the environmental interveners found themselves in the strange position of arguing against further NEPA review. There are still many pending cases on the Roadless Rule and it will be interesting to see how other areas draw upon this Ninth Circuit decision.

There were also a few notable developments in California law in the past year. Continuing its reputation as a promoter of renewable energy and environmental values, California recently adopted a Renewable Portfolio Standard (RPS). The RPS requires retail electricity sellers to include in their resource portfolios a determined percentage of renewable energy sources, such as wind, solar, and geothermal. With the RPS in place, renewable sources are guaranteed a market for their energy. In his Comment, Kevin Golden explains California's RPS program and explains the hurdles still to be overcome.[59] His message is a hopeful one, explaining that California can be the renewable energy leader by establishing careful methodology and effective enforcement mechanisms.

Besides dealing with state energy problems, in the past year California has also been seeking to improve its air quality. To this end, California recently enacted a Climate Law requiring automakers to reduce carbon dioxide emissions in new vehicle fleets.[60] The state grounds its authority to pass such a law in the special exception carved out for California in the Clean Air Act.[61] Despite this legal foundation, Deborah Keeth explains why this new law is likely to face legal challenges.[62] Regulation of fuel efficiency is a field occupied entirely by the federal government. In her Comment, Keeth explains what the state can do to fortify itself against preemption challenges, but warns that politics, not interpretations of law, may ultimately shape the future success of this initiative.

58. Mazen Basrawi, In Brief, *Roadless Rule Retains Respect*, 30 ECOLOGY L.Q. 761 (2003).

59. Kevin Golden, Comment, *Senate Bill 1078: The Renewable Portfolio Standard–California Asserts Its Renewable Energy Leadership*, 30 ECOLOGY L.Q. 687 (2003).

60. 2002 Cal. Legis. Serv. Ch. 200 (AB 1493) (West), *codified at* CAL. HEALTH & SAFETY CODE § 43018.5(a) (2002).

61. 42 U.S.C. § 7543(b)(1) (2003).

62. Deborah Keeth, Comment, *The California Climate Law: A State's Cutting-Edge Efforts to Achieve Clean Air*, 30 ECOLOGY L.Q. 707 (2003).

The Notes and Comments published in the Annual Review are written by students who participated in the Environmental Law Writing Seminar. Their efforts were greatly assisted by Boalt's environmental law faculty, the writing seminar's student advisors, and *ELQ*'s dedicated editorial board and members. As always, it was a great pleasure for the students and professors involved to bring you the Annual Review. We expect that you will find this issue a useful and informative guide to recent developments in environmental law. Additionally, we hope you will value this Annual Review as the most recent chapter in the ongoing tradition of insightful student writing begun by Pat O'Hern and the founders of the *Ecology Law Quarterly*.