Foreword

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We are honored to introduce *Ecology Law Quarterly*'s 2015–2016 Annual Review of Environmental and Natural Resource Law. Now in its seventeenth year, the Annual Review is a collaborative endeavor. It is founded on Berkeley 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 Berkeley Law and the Center for Law, Energy and the Environment. More directly, the Annual Review is the product of the hard and selfless work of the *Ecology Law Quarterly* editorial board and members. *ELQ* is the leading journal in the field because of their passion and commitment.

Three students deserve special recognition. Hayley Carpenter, Eric DeBellis, and Shampa Panda devoted a large portion of their final year of law school to assisting and advising the student authors. This Annual Review is infused with their talent and insights. As *ELQ*'s Editor in Chief, John Maher played another key role. He worked with us to compile the list of noteworthy cases, and helped see the issue through to publication even as he prepared for the bar exam. The new group of ELQ editors, led by Caitlin Brown and Taylor Ann Whittemore, have also been deeply engaged, and have been responsible for the final push to publication.

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 papers they have produced. The work they do is extraordinary. Often starting with little background, they each must take a recent case or development, understand its context and import, develop a thesis about it, and write and polish their paper within the space of an academic year. We are awed by the hard work they have put in, very impressed with the products, and grateful to have had the opportunity to teach this special group of future lawyers.

Law professors, students, legal historians, and countless other scholars seeking insight into major recent developments in environmental, natural resource, and land use law will benefit from this Annual Review. In this foreword, we provide a brief preview of the papers that follow. These student papers do far more than just summarize the cases at their foundation. Each of

them provides a new idea or insight inspired by, but going well beyond, the decision.

As is often the case, the important developments this year, and therefore the papers in this issue, cover a wide range of topics. They can, however, be lumped into three general categories: remedies, administrative law, and water quality.

THE ROLE OF REMEDIES

One theme this year is the remedy or remedies available when a plaintiff prevails on the merits. Remedies are of critical importance in environmental conflicts. A substantive victory may prove hollow if no effective remedy is available. Furthermore, because harms are often non-monetary and irreversible, remedies can be difficult to design or evaluate.

The volume begins with Caitlin Brown's analysis of the U.S. Supreme Court's decision in *Kansas v. Nebraska*.[1] The Court has lately made a habit of swimming in the deep waters of interstate water allocation law. *Kansas v. Nebraska*[2] is the latest episode in a long-running dispute under the Republican River Compact,[3] which allocates the waters of the Republican River Basin between Colorado, Nebraska, and Kansas. In 1998, Kansas brought to the Court a claim that groundwater pumping in Nebraska had diminished the flow of the Republican River, depriving Kansas of water to which it was entitled under the Compact. After the Court agreed with Kansas,[4] the states negotiated a settlement detailing methods for measuring and accounting for groundwater pumping. Within a few years, though, Kansas was back at the Court, asserting that Nebraska had once again violated the Compact. The Court again sided with Kansas, finding that Nebraska's sluggish efforts to reduce its overconsumption showed "reckless disregard" for the likelihood that it would exceed its Compact allocation.[5] The Court split, however, on the appropriate remedy. Justice Kagan, writing for the majority, refused to limit the remedy to the economic damage suffered by Kansas. Drawing on the Court's equitable powers, the majority ruled that Nebraska must disgorge some, but not all, of its gains from violation of the Compact. Justice Thomas, joined by Justices Scalia and Alito, dissented. They argued that the Court should follow ordinary contract doctrine, which would require only that Nebraska make good Kansas's loss, which was substantially less than Nebraska's gain.

1. Caitlin Brown, *Climate Change and Compact Breaches: How The Supreme Court Missed an Opportunity to Incentivize Future Interstate-Water-Compact Compliance in Kansas v. Nebraska*, 43 ECOLOGY L.Q. 237, 245 (2016).
2. 135 S. Ct. 1042 (2015).
3. Neb. Rev. Stat. § A1-106 (1943).
4. Kansas v. Nebraska, 530 U.S. 1272 (2000).
5. *Kansas v. Nebraska*, 135 S. Ct. at 1078.

Ms. Brown contends that the majority did not go far enough. She argues for complete disgorgement of profits as the appropriate remedy for breach of water compacts. The Court, she believes, failed to recognize the true costs of breach to downstream communities, which are not fully captured by calculation of economic damages. Moreover, through application of a detailed analytic framework, she demonstrates that climate change will make compliance with compact obligations more difficult in the Republican River Basin and the equally contentious Rio Grande Basin. Under the circumstances, she writes, anything less than full disgorgement will not sufficiently discourage societally undesirable compact violations.

Emma Kennedy's paper[6] takes up the standard for winning injunctive relief, which may be crucial in an environmental dispute where irreversible harm is threatened. In *Cottonwood Environmental Law Center v. U.S. Forest Service*,[7] a Ninth Circuit panel found that the Forest Service had violated the procedural requirements of the Endangered Species Act[8] (ESA) by failing to reinitiate consultation on the effects of its plan for management of the threatened Canada lynx following designation of critical habitat for the lynx on lands covered by the plan. Nonetheless, the panel, over a dissent, declined to enjoin actions that might affect the lynx pending correction of the procedural violation. The *Cottonwood* panel concluded that recent Supreme Court decisions tightening the standard for injunctive relief under the National Environmental Policy Act[9] (NEPA) had effectively overruled long-standing Ninth Circuit precedent presuming irreparable harm from procedural violations of the ESA. Ms. Kennedy contends that the Court's NEPA decisions need not, and should not, be extended to the ESA, which is both more substantive and more precautionary. She argues that requiring plaintiffs to demonstrate that irreparable harm will flow from actions that have not been properly analyzed through ESA consultation both improperly shifts the burden of proof and unnecessarily puts courts in the role of resolving scientific disputes.

ENVIRONMENTAL LAW IS ADMINISTRATIVE LAW

Another theme which emerges in this volume is the importance of general administrative law doctrines to the resolution of environmental conflicts, and the difficulties those conflicts often pose for application of administrative law. It is no coincidence that many foundational administrative law decisions arise from environmental disputes. Environmental conflicts are often centered around the decisions of federal agencies to permit or restrict private conduct or to take action on their own account. Environmental lawyers must be well

6. Emma Kennedy, *No Relief: How the Ninth Circuit's New Standard for Injunctions Threatens the Precautionary Nature of the Endangered Species Act*, 43 ECOLOGY L.Q. 237, 275 (2016).

7. 789 F.3d 1075 (9th Cir. 2015).

8. Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2012).

9. National Environmental Policy Act, 42 U.S.C. §§ 4321–4370(h) (2012).

versed in the doctrines of administrative law, and prepared to push those doctrines in ways that account for the unique features of environmental conflicts.

When agency action becomes reviewable was at issue in *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*,[10] the decision evaluated by Jacob Finkle.[11] The Corps had completed a "jurisdictional determination," concluding that Hawkes' property, which it wished to mine for peat, contained wetlands protected by the federal Clean Water Act[12] (CWA). Rather than apply for a permit under CWA section 404,[13] Hawkes sought to challenge the jurisdictional determination. The district court refused to allow that challenge, ruling that it was premature.[14] The Eighth Circuit reversed,[15] and the Supreme Court granted certiorari to resolve a circuit split.[16] In a much-anticipated decision, the Court held that the jurisdictional determination was final agency action subject to judicial review.

It might seem that EPA's recent regulatory attempt to clarify the CWA's definition of "waters of the United States"[17] would reduce the importance of the *Hawkes* decision by reducing the need for reliance on agency jurisdictional determinations. Mr. Finkle notes, however, that the new Clean Water Rule,[18] even assuming it survives litigation, still leaves the definition of the "significant nexus" with navigable waters that is necessary for federal jurisdiction quite vague. He argues that the root of the problem in *Hawkes* is the complexity of determining the limits of federal jurisdiction over wetlands, combined with the opaqueness of the Corps' jurisdictional determination process. He suggests that the Corps could both increase transparency and make jurisdictional determinations more efficient by issuing regional guidance on the necessarily context-specific nature of the significant nexus evaluation.

Alexander Tom takes up another perennially difficult administrative law issue, that of standing to sue.[19] His platform is *WildEarth Guardians v. U.S. Department of Agriculture*,[20] in which the Ninth Circuit allowed an environmental group to challenge the U.S. Department of Agriculture's (USDA) compliance with NEPA in connection with its predator control

10. 136 S. Ct. 1807 (2016).

11. Jacob Finkle, *Jurisdictional Determinations: An Important Battlefield in the Clean Water Act Fight*, 43 ECOLOGY L.Q. 237, 301 (2016).

12. Clean Water Act, 33 U.S.C. §§ 1251–1388 (2012).

13. § 1344.

14. Hawkes Co. v. U.S. Army Corps of Eng'rs, 963 F. Supp. 2d 868, 878 (D. Minn. 2013).

15. Hawkes Co. v. U.S. Army Corps of Eng'rs, 782 F.3d 994, 1002 (8th Cir. 2015).

16. U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 615 (2016).

17. 33 C.F.R. § 328.3 (2015); 40 C.F.R. § 230.3 (2015).

18. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,056 (June 29, 2015) (codified at 33 C.F.R. pt. 328, 44 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401).

19. Alexander Tom, *Standing in a Federal Agency's Shoes: Should Third-Party Action Affect Redressability under the National Environmental Policy Act?*, 43 ECOLOGY L.Q. 237, 337 (2016).

20. 795 F.3d 1148 (9th Cir. 2015).

activities in Nevada. The USDA argued that WildEarth Guardians did not satisfy the constitutional standing requirement of redressability because if the USDA stopped its predator control program then Nevada would step into the same role. The Ninth Circuit panel described the USDA and Nevada as independent causes of harm, and noted that *Massachusetts v. EPA*[21] allows standing even if the defendant is just one of multiple causes of injury. The Ninth Circuit went on to argue that there was no showing that Nevada would precisely replace the USDA's efforts should they be halted, a test for redressability that has been applied in past NEPA cases. Mr. Tom writes that the "independent cause" framework of *Massachusetts v. EPA* is better suited to analyzing redressability in NEPA cases than the "third-party replacement" approach. He argues both that the replacement approach has proven difficult to apply consistently, and that the independent cause framework better accords with the nature of NEPA as a procedural statute imposed only on federal agencies.

The third contribution we group under this thematic heading is Kit Reynolds' discussion[22] of the Ninth Circuit's decision in *Organized Village of Kake v. U.S. Department of Agriculture*.[23] The case involved application of the Forest Service's Roadless Rule to the vast and remote Tongass National Forest, which dominates the landscape of southeast Alaska. The Roadless Rule,[24] issued at the very end of the Bill Clinton administration, sharply limits road construction and timber harvest on currently roadless areas in the National Forests. When it issued the Roadless Rule, the Forest Service explicitly considered but rejected exempting the Tongass National Forest from its scope. Acknowledging both special economic and special environmental concerns, the Service concluded that the latter outweighed the former. Subsequently, the Service settled a lawsuit brought by the state of Alaska by promulgating a rule temporarily exempting the Tongass from the Roadless Rule. A tribal government and a number of environmental groups challenged the Forest Service's reversal of its policy on the Tongass. A panel of the Ninth Circuit initially upheld the new Tongass exemption, but on rehearing *en banc* the divided court reversed itself by the narrowest of votes.

The *en banc* majority relied on the Administrative Procedure Act[25] (APA) to justify its decision, ruling that the Forest Service had failed to provide good reasons for revising its view of the economic and environmental consequences of application of the Roadless Rule to the Tongass. The dissenters disagreed with the majority's characterization, arguing that the exemption derived not

21. 549 U.S. 497 (2007).

22. Katherine Reynolds, *Alternative Reasoning: Why the Ninth Circuit Should Have Used NEPA in Setting Aside the Tongass Exemption*, 43 ECOLOGY L.Q. 237, 381 (2016).

23. 795 F.3d 956 (9th Cir. 2015).

24. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001) (codified at 36 C.F.R. pt. 294).

25. 5 U.S.C. §§ 551–559 (2012).

from a changed view of the facts but from a wholly permissible rebalancing of priorities.

Ms. Reynolds agrees with the outcome of the case, but not with the *en banc* majority's reasoning. She argues that rather than focusing on the APA, the court should have given more attention to the plaintiffs' NEPA claim. She contends that the court's approach gives too little deference to agency policy choices, and arrogates too much power to the courts. She writes that, had they focused on the NEPA claim, the courts could have found that the Forest Service had not sufficiently analyzed the reasonable alternatives to the Tongass exemption. More complete NEPA analysis might have produced a compromise decision, permitting some limited timber harvest or providing greater mitigation of the economic impacts of roadlessness, without wholly abandoning the Roadless Rule throughout the Tongass National Forest. Requiring robust NEPA analysis would also better hold the Forest Service accountable for its political balancing of environmental and economic concerns as presidential administrations come and go.

THE WATER QUALITY CHALLENGE

The final theme that emerges from this issue is the persistent difficulty of maintaining and restoring the nation's water quality. Although the CWA has been in effect for more than forty years, some old water quality problems remain, and new ones have developed. Two pieces in this collection deal with water quality, one with the persistent challenge of controlling urban stormwater pollution, the other with the way that providing strong protection from litigation to users of CWA general permits could make protection of our waterways from new hazards such as offshore fracking more difficult.

Roopika Subramanian uses EPA's new Clean Water Rule[26] as a jumping-off point to ask why urban stormwater pollution remains so problematic.[27] The Rule explicitly exempts constructed "stormwater control features" from federal CWA jurisdiction, in response to concerns that it might sweep portions of municipal storm sewer systems into the jurisdictional fold, imposing additional regulatory burdens for system construction and maintenance. Ms. Subramanian writes that the Rule to some extent reduces tensions between the CWA and local stormwater management efforts. However, she notes that the CWA's permitting program is inadequate as a tool to incentivize or govern stormwater management. She advocates for a multi-pronged approach at the federal and state level to reduce barriers to the use of green infrastructure.

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26. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (codified at 33 C.F.R. pt. 328, 44 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401).

27. Roopika Subramanian, *Rained Out: Problems and Solutions for Managing Urban Stormwater Runoff*, 43 ECOLOGY L.Q. 237, 421 (2016).

Mae Manupipatpong addresses the extent to which general permits under the CWA should shield their users from citizen litigation.[28] The CWA provides that compliance with a permit "shall be deemed compliance" with the CWA.[29] That "permit shield" has been held to cover the discharge of pollutants not explicitly mentioned in an individual permit, provided that the discharge is disclosed and the permitting authority has contemplated that the source might discharge that pollutant.[30] In *Sierra Club v. ICG Hazard*,[31] the Sixth Circuit applied the same test to a general permit, ruling that a state-issued general permit for surface coal mining operations shielded a mining company from a citizen suit based on selenium discharges. Ms. Manupipatpong argues that the permit shield doctrine developed in the individual permit context should not be applied to the very different context of general permits. She points out that disclosures may be minimal in the general permit context, and may follow rather than precede permit issuance. Furthermore, general permits by their nature cover many sources on many waterways. That the permitting agency may reasonably have contemplated the discharge of a pollutant by one or more sources into one or more waterways should not be taken as a blanket shield for discharges of that pollutant by other sources into other waterways. Ms. Manupipatpong uses a recently issued general permit for offshore fracking operations to test the efficacy of the test endorsed in *ICG Hazard*, concluding that it will leave the waters at serious risk of harm, in effect allowing state permitting agencies "to permit away statutory protections."

Whether you ultimately agree with the authors or not, we are confident that you will find this collection of papers interesting, insightful, and informative. Congratulations to the authors and editors of this year's Annual Review issue! Once again, they have produced a fine volume that will prove useful for legal analysts and researchers for years to come.

28. Mae Manupipatpong, *ICG Hazard: Permitting Away the Clean Water Act*, 43 ECOLOGY L.Q. 237, 449 (2016).

29. 33 U.S.C. § 1342(k) (2012).

30. Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty., 268 F.3d 255, 271 (4th Cir. 2001).

31. 781 F.3d 281 (6th Cir. 2015).