# ECOLOGY LAW QUARTERLY

Vol. 50 | 2023 | No. 2

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# LAND ACKNOWLEDGEMENT STATEMENT

***Ecology Law Quarterly* recognizes that Berkeley sits on the territory of Xučyun, the ancestral and unceded land of the Chochenyo Ohlone, the successors of the historic and sovereign Verona Band of Alameda County. This land was and continues to be of great importance to the Ohlone people. We recognize that every member of the Berkeley community has, and continues to benefit from the use and occupation of this land, since the institution's founding in 1868. Consistent with our values of community and diversity, we have a responsibility to acknowledge and make visible the university's relationship to Native peoples. By offering this Land Acknowledgement, we affirm Indigenous sovereignty and will work to hold University of California, Berkeley, more accountable to the needs of American Indian and Indigenous peoples.**

## What is a Land Acknowledgement?

A Land Acknowledgement is a formal statement that recognizes and respects Indigenous Peoples as traditional stewards of this land and the enduring relationship that exists between Indigenous Peoples and their traditional territories.

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## ARTICLES

*Please visit* Ecology Law Quarterly *online at http://www.ecologylaw quarterly.org. On our website, you will find information about past, current, and future issues of the journal, environmental events at the University of California, Berkeley, and more. You will also find* Ecology Law Currents*,* Ecology Law Quarterly's *online companion journal. Articles in* Ecology Law Currents *include notes on recent cases, current events, and new developments in the law; opinion commentary; responses to articles published in* Ecology Law Quarterly*; and other short-form research and writing. If you are interested in submitting to* Ecology Law Currents*, please contact cse.elq@law.berkeley.edu.*

*Ecology Law Quarterly* is printed on reclaimed paper.

# Foreword

The 50th Annual Review is historic as the largest issue *Ecology Law Quarterly* (*ELQ*) has published. This issue includes eighteen pieces of Berkeley Law student scholarship. It begins with twelve student Notes written in the Environmental Law Writing Seminar taught by professors Holly Doremus and Bob Infelise during the 2022–2023 school year. The second part of this issue consists of short form pieces, fondly called Blurbs, written by students with the editorial oversight of *ELQ*'s Books and Research Editor. All of the articles featured in this Annual Review are focused on notable decisions or other significant developments in the fields of environmental, land use, natural resources, and energy law.

As co-Editors-in-Chief of *ELQ*, we are delighted to both be published in this historic Annual Review as Note authors. We are also honored to have led our publishing board through this taxing editorial process and thrilled to share the end product with you, our reader.

The following Notes touch on a variety of topics. First, authors dug deep into administrative and regulatory law, identifying new opportunities for regulatory reform and environmental benefits.

Grace Koster's *Closing the Ocean Fracking Gap* dives into the permit processes required for offshore hydraulic fracturing, which were at the center of *Environmental Defense Center v. Bureau of Ocean Energy Management*, 36 F.4th 850 (9th Cir. 2022). The author walks through the complex bureaucracy surrounding offshore oil and gas, meant to promote environmental safety and ocean health, but that nonetheless allowed toxic fracking fluid discharges into the ocean in Southern California without environmental review. Ms. Koster then outlines an improved regulatory structure for the aging and evolving industry. The author argues for an elevated role for the Environmental Protection Agency (EPA) to lead standard-setting under its Clean Water Act authority, but doing so in closer coordination with the industry's principal permitting authority, the Bureau of Environmental Enforcement and Safety.

Max Learner's Note, *The Californian Case for a Western RTO*, is based on the Ninth Circuit decision in *California Public Utilities Commission v. Federal Energy Regulatory Commission*, 29 F.4th 454 (9th Cir. 2022). The court upheld the Federal Energy Regulatory Commission's decision to allow the California electric utility Pacific Gas & Electric to charge its customers a fee for its participation in California's independent system operator (CAISO). Mr. Learner argues that the benefits of participating in CAISO are worth the fee, but that California ratepayers would benefit even more if CAISO were to expand into the

other western states, which do not currently operate within the footprint of any independent system operator or regional transmission operator. Mr. Learner proposes that a western RTO would both bring economic benefits and advance California's ambitious climate agenda.

Grayson Peters criticizes the federal executive branch's use of cost-benefit analysis to evaluate environmental regulations as inconsistent with environmental justice in *The Social Cost of the Social Cost of Carbon*. Mr. Peters analyzes the institutionalization of regulatory cost-benefit analysis, centered in the White House's Office of Information and Regulatory Affairs, and its use of the social cost of carbon, which attempts to place a dollar value on the economic damage caused by climate change. Mr. Peters argues that the social cost of carbon feeds into an anti-regulatory and inequitable cost-benefit framework and has led to needless obstructions, such as the nationwide injunction issued in *Louisiana v. Biden*, 585 F.Supp.3d 840 (W. D. La. 2022) that temporarily held up important regulations. Mr. Peters concludes that "[t]he way forward is not better cost-justification of climate regulation; it is to assign less importance to cost-justification."

In *Environmental Justice in Cumulative Impacts Analysis*, Hayley Uno uses *Center for Community Action and Environmental Justice v. Federal Aviation Administration*, 18 F.4th 592 (9th Cir. 2021) to discuss how current cumulative impacts analysis (CIA) requirements fail to serve environmental justice aims adequately. Ms. Uno argues that the current CIA requirements under the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA) are statutorily inadequate to address environmental justice concerns. The author proposes that, to better account for environmental justice concerns moving forward, government agencies should modify the CIA provisions under NEPA and CEQA to include community input procedures, analysis at a regional scale, interagency coordination, and consultation with national baselines.

Second, authors grappled with how to adapt old legal frameworks or invent new methods to meet the pressing challenges of climate change.

Becky Hunter discusses creating specialized fora for cases implicating climate change in *A California Environmental Court to Adjudicate Climate Change*. Ms. Hunter describes the venue disputes that have come to characterize *County of San Mateo v. Chevron Corporation*, 32 F.4th 733 (9th Cir. 2022) and similar climate change suits brought under state common law in state and federal courts. At the time of writing, several circuits had remanded these cases to state courts to be heard on the merits. Ms. Hunter proposes that, following similar models in Vermont and Hawai'i, California is a promising laboratory for a climate-prepared environmental court to fairly adjudicate this growing body of high stakes climate litigation, given the state's robust judicial resources and political will.

Evan Levy's note is titled *Today's Crutch, Tomorrow's Calamity: Interstate Aquifer Management Must Center Sustainable Yield*. Mr. Levy discusses

*Mississippi v. Tennessee*, 595 U.S. 15 (2021), the first case in which the Supreme Court considered disputes over interstate aquifer use. The Court decided that the doctrine of equitable apportionment, previously applied to surface waters, should also apply to groundwater. However, the Court did not apportion the waters of the aquifer beneath Mississippi and Tennessee. Mr. Levy discusses how the Supreme Court should divide interstate aquifers, arguing that any apportionment must limit groundwater use to a sustainable rate. Mr. Levy projects that "[c]limate change induced drought and the over appropriation of surface waters will intensify interstate groundwater disputes going forward."

In *Living with Major Questions: West Virginia Leaves Opportunity for USDA in Farm Bill Commodity Subsidies*, David White argues that, despite the Supreme Court's constraint on agency rulemaking via its major questions doctrine ruling in *West Virginia v. EPA*, 142 S. Ct. 894 (2022), a pathway still exists for agencies to address climate change in their regulatory activities. Mr. White proposes that the U.S. Department of Agriculture has undiscovered statutory discretion in the Farm Bill's crop subsidies program to advance progressive climate policy through a carbon sequestration rule.

Third, authors explored timely issues in environmental health and toxics law, arguing for improved warnings and safety to protect consumers.

In *Ending Pesticide Myopia: Broadening the Role of Alternatives in Assessing Dangerous Products Under FIFRA*, Benjamin Lester argues that EPA has untapped statutory authority to remove dangerous pesticides from the market when safer alternatives exist. In the case *Natural Resources Defense Council v. EPA*, 31 F.4th 1203 (9th Cir. 2022), EPA allowed TCVP collars to remain on the market because it did not find the substance, an organophosphate insecticide, posed an "unreasonable risk to man or the environment"—the standard set by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Mr. Lester argues that, even when a pesticide meets quantitative risk assessment criteria, it can still pose an "unreasonable risk" if there are effective alternatives that pose lower risks. Mr. Lester outlines how EPA could reinterpret FIFRA's provisions to broaden its definition of "unreasonable risk"—the first step toward removing hazardous pesticides from the market.

*More Individualized and Easier to Follow: A Case for Changes to the Production of Pesticide Warning Labels* by Noah Lesko-Kanowitz explores EPA's ability to protect the public against carcinogenic pesticides under FIFRA Mr. Lesko-Kanowitz argues that, by remedying "issues of access to both consumers' risk profiles for developing cancer and EPA's own deliberative process for approving pesticide warning labels, EPA can create a regulatory regime in which consumers will have more information with which to choose how they approach using pesticides and pesticide manufacturers are less likely to face failure to warn lawsuits from consumers." The author centers his discussion of FIFRA on the Eleventh Circuit case *Carson v. Monsanto Co.*, 72 F.4th 1261 (11th Cir. 2023).

Jacob Manheim's Note titled, *First Amendment Constraints on Proposition 65*, examines the future of California's Proposition 65, a law which requires businesses to warn the public about exposures to carcinogens and reproductive toxicants. His work explores the aftermath of *California Chamber of Commerce v. Council for Education and Research on Toxics*, 29 F.4th 468 (9th Cir. 2022), a case that upheld a preliminary injunction against enforcement of a Proposition 65 acrylamide warning on the grounds that the warning was impermissible compelled speech. Mr. Manheim's Note predicts that this case will open the door to more First Amendment challenges for chemicals on the Proposition 65 list, but concludes that Proposition 65 will remain an important feature of California public health law.

Fourth, authors examined natural resources issues on public lands.

Sierra Killian wrote her Note, *Protecting Species and Timber Communities from Extinction: A Case Study on Spotted Owls, Logging, and Cooperative Management in Western Lane County, Oregon*, to explore the relationship between land managers tasked with protecting the northern spotted owl and private forest landowners in unincorporated western Lane County, Oregon. This case study was inspired by *Friends of Animals v. U.S. Fish and Wildlife Service*, 28 F.4th 19 (9th Cir. 2022), which upheld the Fish and Wildlife Service's plan to remove invasive barred owls from the spotted owl's habitat. The Note disaggregates the broad-strokes portrayal of owls versus timber in this region into the relationships between federal government agencies with conservation mandates, small landowners, and county government to better understand the nuances of the tension and how management strategies have fared. The Note identifies five characteristics of species management strategies that benefit the species and its human neighbors: stakeholder engagement, funding, regulatory and relational certainty, monitoring, and reframing the narrative.

Helen Lober wrote about *350 Montana v. Haaland*, 29 F.4th 1158 (9th Cir. 2022), where the Ninth Circuit clarified that the U.S. Department of Interior was not required to use any specific metric to evaluate a coal mine expansion's environmental impact on remand. In *Constraining Federal Policy Whiplash on Public Lands*, Ms. Lober proposes that this case reflects a larger trend in which courts provide land management agencies with excessive leeway, leading to policy whiplash. The author explores how policy whiplash plays out in decisions about energy leasing, road construction and logging, and snowmobile use in National Parks. She argues that the major questions doctrine, frequently perceived as a threat to progressive reform, could limit inappropriate agency discretion and curb policy whiplash on public lands.

We enthusiastically present our work and that of our peers, which follows in a long tradition of cutting-edge commentary on environmental law. In the half-century since *ELQ* was founded in 1971, the journal has evolved into a leading forum for student voices. This issue embodies the passion that Berkeley Law students have for the natural world and consideration for the communities that rely upon it.

We hope you enjoy!

Becky Hunter and Grayson Peters
Co-Editors-in-Chief, 2023-2024