Foreword

Robert D. Infelise and Holly Doremus

We are honored to introduce the *Ecology Law Quarterly*'s 2020–21 Annual Review of Environmental and Natural Resource Law. Now in its twenty-second year, the Annual Review is a collaborative endeavor of students and faculty. But the greatest contributors to the Annual Review are *Ecology Law Quarterly*'s (ELQ) editorial board and members. ELQ continues to be the leading journal in the field because of their passion and commitment.

Three former students, all of whom are members of the bar, deserve special recognition: Natasha Geiling, Robert Newell, and Naomi Wheeler devoted a substantial 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.

Finally, the Annual Review would not be possible without the extraordinary group of student authors whose work is profiled in this Foreword. Their aptitude and zeal for the law is evident in the papers they have produced. Often starting with little background, each dove into a recent decision, worked tirelessly to understand its context and import, used the decision as a starting point for analyzing a broader set of issues, developed a thesis, and wrote and polished their paper, all within one academic year. We are awed by their commitment, impressed with the product, and grateful for the opportunity to work with them.

Environmental law is a broad field, intersecting with other fields such as energy law and land use law. The range of topics in the Annual Review is a tribute to the diversity of the field. The contributions to this issue demonstrate that innovative legal analysis can not only advance legal doctrine but can also identify pathways for improving policy. All of those who contributed to the issue deserve credit for continuing ELQ's tradition of excellence over the past half-century. Law professors, students, legal historians, and countless other scholars seeking insight into the major developments in environmental, natural resource, and land use law will benefit from this Annual Review.

ADDRESSING CLIMATE CHANGE THROUGH THE COURTS

Climate change is an existential threat to everyone around the world, but the impacts of climate change will not be the same for everyone. In 2015, a group of young people brought a federal court action in Oregon against the United States government, alleging its complicity in perpetuating greenhouse gas emissions

and exacerbating climate-related harms. Although *Juliana v. United States*[1] foundered in the Ninth Circuit, similar lawsuits have been filed in other parts of the country and around the world. While much scholarship has analyzed the *Juliana* plaintiffs' constitutional claim, Jina Kim assessed a critical component of a successful lawsuit: the remedy.[2] Ms. Kim argues that climate litigants must incorporate an environmental justice focus into their litigation, and that to do so effectively, they must bring that lens to their remedy requests. In light of ongoing challenges to the power of judges to craft broad injunctive relief, she suggests that litigants advocate for narrowly tailored relief. Ms. Kim argues that courts can provide such relief in a way that does not violate the separation of powers, while both promoting justice and fulfilling their responsibility to uphold the Constitution.

In recent years, dozens of cities, counties, and states have sued energy companies in state courts for causing or contributing to climate change. The government plaintiffs in these actions assert that they are suffering a variety of climate harms, including most immediately threats to infrastructure from sea level rise. Against a backdrop of congressional inaction and unsuccessful federal climate litigation, the plaintiffs turned to state courts. The defendants responded by removing the actions to federal courts. Federal circuit courts recently sent three of these lawsuits back to the state courts.[3] Nick Eberhart argues that local government plaintiffs should seek abatement remedies, rather than broad policy changes.[4] Like Ms. Kim, Mr. Eberhart argues that narrowly tailored remedies better align with the traditional role of local governments to protect resident welfare, and follows the model of successful public nuisance suits that have addressed other widespread harms such as lead paint contamination.

ADDRESSING SOIL AND GROUNDWATER CONTAMINATION

In 2020, the United States Supreme Court decided *Atlantic Richfield Co. v. Christian*,[5] a case requiring the Court to reconcile ostensibly competing concerns in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): the jurisdictional bar limiting challenges to the Environmental Protection Agency's (EPA) ongoing cleanup plans and the savings clause that makes room for state restoration claims not available under the Act. Betsy Marshall considers whether *Atlantic Richfield* aligns with CERCLA's goals to

DOI: https://doi.org/10.15779/Z38X05XD4C

1. 947 F.3d 1159 (9th Cir. 2020).

2. Jina Kim, Note, *Leave No One Behind Realizing Environmental Justice through Climate Litigation Remedies*, 48 ECOLOGY L.Q. 409 (2021).

3. *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020); *Cty. of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020); *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452 (4th Cir. 2020).

4. Nick Eberhart, Note, *State Climate Suits The Case for a Limited Remedy*, 48 ECOLOGY L.Q. 311 (2021).

5. 140 S. Ct. 1335 (2020).

promote cooperative federalism and efficient cleanups of so-called Superfund sites.[6] She argues that persons owning contaminated land should have the ability to use every legal tool under both state and federal law to remediate their land as expeditiously as possible. Ms. Marshall further contextualizes this proposal against the backdrop of current debates regarding the regulation of emerging contaminants, such as per- and polyfluoroalkyl substances, which may drastically impact Superfund cleanups in the coming years.

JUDICIAL OVERSIGHT OF EXECUTIVE BRANCH DECISIONS

The Federal Advisory Committee Act[7] is one of several statutes intended to protect the integrity of federal agencies' advisory committees. As applied to EPA, the statute governs a wide range of committees, including those responsible for setting air quality standards, providing scientific peer review, and advising the agency on its research program. Federal Advisory Committee Act was front and center in 2017 when EPA announced a policy barring recipients of agency grants from serving on its advisory committees. This policy, which EPA defended as necessary to prevent a conflict of interest, primarily impacted academic scientists, resulting in a tilt toward industry over-representation on EPA's scientific advisory committees. Amanda Rudat details how the court decisions which eventually struck down EPA's policy, including *Physicians for Social Responsibility v. Wheeler*[8] were largely procedural, leaving open the possibility that a future administration might be able to successfully enact the policy's substantive mandate.[9] She goes on to argue that, based on prior case law, the Federal Advisory Committee Act as currently written would not prevent that outcome. To correct this, Ms. Rudat proposes an amendment to the Act which would bar agencies from excluding categories of highly qualified experts from committee service.

Since their inception, administrative agencies have played a critical role in setting the trajectory of national regulatory schemes. Over the last several decades, agencies have become increasingly responsive to White House policy choices. Executive control of agency action has long been accepted. But the increasingly partisan and politicized nature of executive policymaking has consequences, including the potential for agencies to undermine legislative mandates. These consequences are exacerbated by the uber-deferential standard employed by the courts when reviewing an agency's nominally science-based decisions. Together, strong executive control and deferential judicial review allow agencies to disguise their politically motivated decisions in deliberately ambiguous and evasive "doublespeak." The dangers of doublespeak, and the

---

6. Betsy Marshall, Note, *A Landowner Walks into a Bar Using State Common Law to Encourage Efficient CERCLA Cleanups*, 48 ECOLOGY L.Q. 477 (2021).

7. Federal Advisory Committee Act, 5 U.S.C. app. II §§ 1–16.

8. 956 F.3d 634 (D.C. Cir. 2020).

9. Amanda Rudat, Note, *Amending the Federal Advisory Committee Act to Protect Independent Scientific Expertise*, 48 ECOLOGY L.Q. 597 (2021).

shortcomings in the current system of judicial review, were particularly notable in *Clean Wisconsin v. EPA*.[10] Delia Scoville argues that by moving away from super-deferential review and towards a "fidelity model" that transparently interrogates the underlying motivations for agency action, courts can counteract the negative consequences of agency doublespeak and strengthen environmental protections.[11]

In the months leading up to the November 2020 presidential election, environmentalists and progressive policy wonks speculated about how a Biden White House could counteract some of the harmful environmental policies enacted under the Trump administration. Some advocated borrowing a strategy the Republican-dominated 115th Congress used to great effect in 2017: utilizing a previously little-known-or-noticed law called the Congressional Review Act. The Act is an appealing option because it allows a congressional majority to repeal a federal agency rule, while at the same time mandating that a substantially similar rule cannot replace it. The courts' treatment of challenges to the legitimacy of the Congressional Review Act suggests that congressional acts to repeal agency rules are at least partially shielded from judicial review. Former ELQ co-Editor-in-Chief Samantha Murray weighs whether a Democrat-aligned Congress and president should use the Congressional Review Act to further their agendas.[12] Ms. Murray traces the historical origins of the Act and how the Act has been treated by courts. She starts with the Ninth Circuit's decision in *Center for Biological Diversity v. Bernhardt*.[13] The circuit court upheld the constitutionality of the Act's bar on judicial review, and ruled that the Act barred jurisdiction over plaintiffs' statutory challenge. Using the case as a jumping-off point, Ms. Murray examines the history of resort to the Act. She concludes that although it is tempting to use the Act to undo the vestiges of a particularly toxic presidency, doing so would not be desirable. Ultimately, she argues, the Act is fundamentally antidemocratic at its core and should be substantially amended, if not entirely repealed.

ACTIVITIES COVERED BY THE CLEAN WATER ACT

The Clean Water Act[14] was one of the key environmental statutes passed in the 1970s. Its core objective is to maintain the integrity of the nation's water resources by, among other things, regulating discharges of pollutants into bodies of water. While the Clean Water Act is undeniably ambitious in scope, ambiguity has surrounded what exactly constitutes a discharge. Until recently, the circuit courts had applied various standards based on somewhat vague United States

10. 964 F.3d 1145 (D.C. Cir. 2020).

11. Delia Scoville, Note, *The Dangers of Agency Doublespeak The Role of the Judiciary in Creating Accountability and Transparency in EPA Actions*, 48 ECOLOGY L.Q. 629 (2021).

12. Samantha Murray, Note, *Transition Critical What Can and Should be Done with the Congressional Review Act in the Post-Trump Era?*, 48 ECOLOGY L.Q. 513 (2021).

13. 946 F.3d 893 (9th Cir. 2019).

14. Clean Water Act, 33 U.S.C. §§ 1251–1389.

Supreme Court precedent. In *County of Maui v. Hawai'i Wildlife Fund*,[15] the Court supplanted all these standards with a new "functional equivalence" standard, requiring a permit when there is a direct discharge from a point source into navigable waters or when "there is the functional equivalent of a direct discharge." Rafael A. Grillo Avila argues that the "functional equivalence" standard risks replacing old ambiguities with new ones. Absent clarification, he worries that it risks undermining the purposes of the Clean Water Act.[16] Drawing on prior decisions interpreting the Clean Water Act as well as its text, structure, and common law roots, Mr. Grillo Avila emphasizes that "functional equivalence" should be understood in terms of the potential impact that an indirect point-source discharge can have on navigable waters. Using this approach, Mr. Grillo Avila posits a series of context-specific factors that courts can use to determine whether impact-based functional equivalence exists for certain discharges.

PROTECTING OCEANS

Our oceans are home to some of the United States' most valuable resources, but the degree to which those resources are regulated varies drastically. Megan Raymond uses *Gulf Fishermens Ass'n v. National Marine Fisheries Service*[17] as a springboard to explore United States policy governing two essential ocean resources—energy and fish.[18] The twentieth century yielded robust, development-first legal schemes that enabled the exploitation of offshore oil and gas and capture fishing. Through a comparison with those traditional resources, Ms. Raymond discusses the development of their twenty-first-century counterparts—offshore renewable energy and aquaculture. She argues that while these industries need clearer legal schemes to foster their industrial development, the laws that govern them must reflect our growing recognition of the interconnectedness and fragility of our oceans and the resources therein.

ADDRESSING INTERSTATE POLLUTION UNDER THE CLEAN AIR ACT

The EPA regulates interstate air pollution pursuant to the Clean Air Act's Good Neighbor Provision.[19] Over the years, there has been much litigation over EPA's regulation of interstate air pollution, which it has done primarily through the Cross-State Air Pollution Rule. Recent cases, including *New York v. EPA*,[20]

15. 140 S. Ct. 1462 (2020).

16. Rafael Alberto Grillo Avila, Note, *Defining, Supporting, and Scoping an Impact-Based Approach to* Maui*'s "Functional Equivalence" Standard for Clean Water Act Permitting*, 48 ECOLOGY L.Q. 349 (2021).

17. 968 F.3d 454 (5th Cir. 2020).

18. Megan Raymond, Note, *Changing Oceans, Lagging Management*, 48 ECOLOGY L.Q. 557 (2021).

19. 42 U.S.C. § 7410(a)(2)(D).

20. 964 F.3d 1214 (D.C. Cir. 2020).

Maryland v. EPA,[21] and *Wisconsin v. EPA*,[22] have showcased the difficulties downwind states face in seeking relief for Good Neighbor violations under the Cross-State Air Pollution Rule's current framework. Angela Luh argues that the Cross-State Air Pollution Rule's regulatory framework and incongruities between Clean Air Act provisions hinder, rather than help, the regulation of interstate air pollution.[23] Ms. Luh identifies four key issues EPA should address in future air pollution transport regulations, particularly as it looks to promulgate regulation of interstate pollution under the 2015 federal ozone standards and from industrial sources.

DESIGNATING PUBLIC LANDS

America's "public" lands are Indigenous lands. President Obama recognized as much when he used his authority under the Antiquities Act[24] to create the first "Native" national monument in 2016. Originally proposed by a coalition of Tribes, Bears Ears National Monument was to be co-managed by a committee of Tribal officials and federal officials working together in collaboration. A few months later, President Trump de-designated 85 percent of Bears Ears. In so doing, he turned what had been an affirmative act of Native nation building into yet another site for ranching and resource extraction. Emma Blake starts with *Massachusetts Lobstermen's Ass'n v. Ross*[25] but pivots to argue that President Biden has both a moral obligation and a legal duty to resurrect Bears Ears's original boundaries.[26] "Restoring the original boundaries and protections of Bears Ears National Monument is a necessary step, but an insufficient one. President Biden must go further," she writes. Ms. Blake proposes using the Antiquities Act to protect vast swaths of the public lands as "Native national monuments," co-managed by Tribes and federal agencies in accordance with principles of Indigenous ecological knowledge and land stewardship.

ENCOURAGING RENEWABLE ENERGY

The California coast is an ideal location for an offshore wind energy project: the state offers attractive incentives for renewable energy generation, Pacific wind patterns are strong and consistent, and the unusually long coastline provides plenty of space for offshore wind facilities to expand. Despite these favorable factors, the State of California is woefully behind its East Coast counterparts with respect to offshore wind development. Nadia Senter argues that the Department

---

21. 958 F.3d 1185 (D.C. Cir. 2020).

22. 938 F.3d 303 (D.C. Cir. 2019).

23. Angela Luh, Note, *Being a Good Neighbor Evaluating Federal Regulation of Interstate Air Pollution under the Cross-State Air Pollution Rule*, 48 ECOLOGY L.Q. 435 (2021).

24. 54 U.S.C. § 320301(a).

25. 945 F.3d 535 (D.C. Cir. 2020).

26. Emma Blake, Note, *Tribal Co-Management A Monumental Undertaking?*, 48 ECOLOGY L.Q. 249 (2021).

of Defense's campaign to stymie offshore wind development in California is irrational and misguided, as renewable energy supports the agency's national security mission.[27] Borrowing principles learned from a similar conflict in the recent Supreme Court case, *United States Forest Service v. Cowpasture River Preservation Ass'n*,[28] Ms. Senter offers a series of practical recommendations to reform the Department of Defense's energy project review procedures to offer more transparency and consistency to the public, and better balance the agency's interests to accurately account for the benefits of offshore wind.

We encourage you to read, enjoy, and learn from these contributions. And we congratulate the ELQ board and members and, of course, the authors on another impressive Annual Review.

27. Nadia Senter, Note, *Mission Critical How Offshore Wind Energy Development Aligns with the Department of Defense's National Security Goals*, 48 ECOLOGY L.Q. 671 (2021).

28. 140 S. Ct. 1837 (2020).