

Foreword

*Ellie Rubinstein & Liam Chun Hong Gunn**

We are honored to introduce *Ecology Law Quarterly's* Annual Review for 2023–24 presented in this 51.2 edition. The Annual Review represents a unique opportunity to highlight the academic scholarship of Berkeley Law students. This year's Annual Review features five student Notes written during the Environmental Writing Seminar under the supervision of Professor Holly Doremus. For Student Notes, participants in the Seminar each craft a novel argument based around the holding of a recent environmental case or a major new law or regulation. They present their work in a full-length academic article.

The second portion of the Annual Review features short form “In Briefs” (or as we lovingly call them internally at *ELQ*, “Blurbs”). The In Briefs are written throughout the previous academic year under the editorial direction of *ELQ's* Books & Research Editor. In Brief's provide an invaluable opportunity to first year law students to publish academic scholarship, while bringing attention to significant recent cases implicating environmental, land use, energy, and natural resource law, as well as issues of environmental justice.

The Annual Review is vital to the work of *ELQ*. Not only does it provide a focused look at critical new developments in environmental law, but it also serves the unique purpose of expanding the voices heard in environmental legal scholarship. This year's selection of cases range from covering landmark decisions on our nation's foundational environmental statutes to the administrative law rulings which impact the reach of local government's environmental efforts. We encourage readers to work through each Note and In Brief, and as always, we welcome responses to any of *ELQ's* publications within our short-form online publication, *Ecology Law Currents*.

We would like to thank the publishing board for all of their work bringing this edition to light for our readers. Taking on the job of a student editor in addition to the baseline pressures of law school is a momentous task—one which our editors do with grace and enthusiasm. We are grateful for this team of authors and editors allowing for this presentation. The following provides introductions to the Student Notes as a preview of what you can expect throughout 51.2.

Megan Conner wrote her note *Establishing Incentives for Building Electrification through Congress: How to Strengthen and Accelerate Local Decarbonization Efforts* in the wake of the recent Ninth Circuit decision,

* Editors-in-Chief, 2024-2025, *Ecology Law Quarterly*.

California Restaurant Association v. City of Berkeley (2023). This policy analysis addresses how the federal government can help local governments to decarbonize buildings without risking local litigation over federal preemption. She analyzes construction companies' incentives and the challenges local governments face. Conner concludes that a cooperative federalism framework based on new federal building electrification legislation would best incentivize swift local electrification efforts.

Liam Gunn wrote *A Textualist's Guide to "Waters of the United States" and Federal Environmental Statutes* to explain how textualism suggests that federal environmental statutes like the Clean Water Act should be interpreted as providing stronger protections. Comparing Justice Alito's majority and Justice Kavanaugh's concurrence in *Sackett v. EPA* (2023), he notes that Congress enacted the Clean Water Act's official purposes into the law's text. This implies a textual outcome that, as Justice Kavanaugh notes, the majority ignored. This case shows how textualist justices' approaches have diverged into two different methodologies: flexible textualism and strict textualism. Gunn argues that strict textualism is more true to textualism's values because it defers to Congress's text under the "enacted purposes canon." Gunn argues that this case shows that a proper application of textualism should lead to more protective interpretations of federal environmental statutes.

Adam David presents his Note *Extraterritorial Toxics: Regulating California Hazardous Waste After National Pork Producers Council v. Ross*. In this piece, David explores the differences between the definition of "hazardous waste" as set by the Resource Conservation and Recovery Act (RCRA) and the more expansive definition set under California state law. David highlights how much of California's hazardous waste is moved across state borders where it is no longer processed under the stricter California standard. This practice effectively displaces the negative environmental impacts the California laws set out to reduce. This Note then provides readers with a history of past conflicts around interstate waste dumping and how the Supreme Court has largely struck down restrictions on the practice as violations under the Dormant Commerce Clause (DCC). However, in recent developments in the case of *National Pork Producers Council (NPPC) v. Ross* (2023), the Supreme Court upheld California state law in the context of selling out-of-state pork products when production practices did not meet California legal standards. The court found that California state law was not per se illegal interstate discrimination under the DCC. David goes on to apply the Court's reasoning in the opinion for *NPPC* to argue that the rules in the previous interstate waste cases may be overruled as the Court has arguably found the DCC's purpose as providing state protectionism. And second, that California should be able to exert control over its waste that crosses state lines without finding a violation of the DCC.

Grace Li's Student Note, "*Tó éí iiná*"—*Water is Life: Repairing the Indian Trust Doctrine With an Environmental Justice- "Plus" Agency Approach*, calls on federal administrative agencies to view the Indian trust responsibility under

an “environmental justice plus” lens. After providing a comprehensive background on the Indian trust doctrine as a moral and fiduciary duty, she notes that the Supreme Court’s recent *Arizona v. Navajo Nation* (2023) decision casts doubt on federal courts’ willingness to uphold the trust doctrine to provide Native Nations the water they need. However, Li forcefully argues that we should not give up on the trust doctrine—courts have simply failed to apply it correctly to provide the Navajo people with appropriate redress. Under an “environmental justice plus” lens, the Supreme Court should have found that the federal government was required to quantify the Navajo Nation’s water rights.

Chloé Smith uses her Note *How Can a Mandatory Right-to-Repair Address the Global E-Waste Problem?* to offer solutions to the growing challenge of global electronic waste (e-waste) management. Smith provides a comprehensive overview of the human and environmental health hazards presented by e-waste disposal and recycling. She details the informal economies that exist around e-waste management, and how they can both present economic opportunity as well as negative environmental externalities for the communities in which they are located. The United States lacks a comprehensive federal e-waste management policy. Smith proposes two policy measures to reduce the negative externalities of e-waste in the United States: a right-to-repair policy and a mandated repairability index. She bases her argument off of the success of similar policies in various other countries in the European Union and beyond. Smith’s note dives into the obstacles in front of adopting a federal policy and provides hope that better policy options are possible for addressing the e-waste challenge.

The second half of the 51.2 Annual Review contains the In Brief offerings from the 2023–24 academic year. This year we are exciting to bring you nine individual In Briefs featuring topics from interpretations of the Endangered Species Act and its impact on the future of North Atlantic right whales, the role of NEPA in restricting oil and gas development on Native land, and the inadequacy of current climate analysis in updating American Infrastructure. These pieces are short looks into fascinating legal topics. We highly encourage our readers to explore them and engage with the authors in responses.

Ecology Law Quarterly remains a leader in environmental law scholarship because of the work of the authors and editors presented in this edition. We are grateful for the long tradition of elevating the voices of students, practitioners, and academics in this field. For over fifty years *ELQ* has served as a community of thinkers who are passionate about using the law as a tool to address environmental issues. We proudly present to you this edition as a continuation of these efforts.

Ellie Rubinstein and Liam Chun Hong Gunn
Editors-in-Chief, 2024–2025, *Ecology Law Quarterly*

