

Foreword

*Abby Neal and Jordan Perry**

We are honored to introduce *Ecology Law Quarterly's* 2024-25 Annual Review, presented in this 52.2 edition. The Annual Review is unique in authorship, scope, and scale: All pieces within this edition are scholarship written by Berkeley Law students and recent graduates. The range of topics analyzed reflects the wide scope of environmental law as a field, as this edition includes works addressing developments in environmental, land use, natural resources, and energy law that are shaping current conversations in these fields. Further, many of these pieces reflect the nature of environmental law and analysis of environmental issues as multifaceted and inherently requiring consideration of environmental justice, tribal sovereignty, community participation, and changes to federal policy priorities that accompany changes in presidential administrations. While many of the areas covered are in a state of flux at the time of publication, we are certain that the analysis of these developments' immediate and projected impacts will provide long-lasting insight.

The first portion of this year's Annual Review features seven student Notes written during the Environmental Law Writing Seminar under the supervision of Professor Sharon Jacobs. In these Notes, Seminar students present novel arguments grounded in the holding of a recent major environmental case, a case with environmental law implications, or a major new law or regulation. This analysis is presented in the form of a full-length academic article.

The second portion features six short In Briefs. These pieces are written throughout the academic year under the editorial directions of *ELQ's* Books & Research Editor. In Briefs allow students, particularly students in their first year of law school, to publish academic scholarship. These pieces address significant recent cases implicating environmental law and analyze their impacts on the field.

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ELQ's Annual Review is a time-honored tradition, providing cutting-edge analysis of major developments in environmental law and serving as a platform for emerging scholars and practitioners to present their ideas. This year's edition contributes to the scholarly conversation around topics ranging from water rights to climate change to toxics regulation. Each piece has been a significant undertaking for student authors and editors, and we would like to thank the *ELQ* publishing board for all of their work along the way. It takes a village to publish *ELQ*, and we are grateful for the dedicated and thoughtful work each student editor has contributed along the way. The rest of this Foreword introduces each Note published in 52.2.

In *Incorrect & Pernicious: The Chlorpyrifos Litigation, Sugarbeet Growers, and the Proper Role of Courts in Arbitrary and Capricious Review*, Cat Chervenak contrasts the reasoning the Eighth and Ninth Circuits used in interpreting federal pesticide statutes when reviewing federal regulation of the pesticide chlorpyrifos. Chlorpyrifos is a neurotoxic pesticide, and affected communities have challenged its use in administrative proceedings and through litigation. Chervenak addresses the most recent chapter of this litigation, in which the Eighth Circuit held that the EPA's revocation of safety tolerances for chlorpyrifos was arbitrary and capricious. This Note delves into the Eighth and Ninth Circuits' interpretation of the statutes governing pesticide regulation and critiques the Eighth Circuit's arbitrary and capricious analysis as improperly interpreting the underlying statute and misrepresenting the challenged EPA action. The Note argues that arbitrary and capricious analysis cannot be applied separately from the underlying substantive statute, and that courts should instead let statutory text guide arbitrary and capricious analysis, particularly when the underlying statute provides a clear mandate for agencies to act.

Logan Graham's Note, *A Seat at the Table: How Texas v. New Mexico Provides Tribes a Potential Route to Assert Outstanding Water Rights Claims in Water Compact Disputes*, applies the holding of a recent Supreme Court case to articulate a new pathway for Native American tribes to assert their water rights claims in water compacts. In *Texas v. New Mexico*, the Supreme Court held that once the federal government has intervened in a dispute over a water compact between two states, the states involved in the original dispute cannot resolve their claims without the consent of the federal government. Graham analyzes how tribes may be able to similarly intervene in state water compact disputes to remedy their exclusion from water compacts that

prevents them from asserting their senior water rights. By providing an overview of tribal water rights, exploring the reasoning and implications of *Texas v. New Mexico*, and articulating how tribes may be able to intervene in water compact disputes under this framework, this Note outlines a potential path forward for tribes to finally have an equal legal voice in water compact issues, especially in the context of the current negotiation of the Colorado River Compact. Fiona Grant's Note, *Who the ADVANCE Act Leaves Behind: The Neglected Needs of Nuclear Closure Communities*, analyzes the continued failure of Congress to adequately provide for the needs of communities surrounding nuclear energy facilities when those facilities close. Beginning with the recent ADVANCE Act, which initially contained a section focused on supporting nuclear closure communities that was later deleted, Grant details the history of nuclear closure communities' treatment in statutes proposed and passed by Congress. She then contrasts the lack of attention paid to nuclear closure communities with legislation supporting coal communities affected by the energy transition. Ultimately, the Note identifies unique aspects of nuclear closure communities that make them differ from coal communities, argues that these communities should nonetheless receive federal support and attention, and proposes ways legislation, funding, and community engagement could ensure communities do not suffer when nuclear energy plants close.

Connor Hughes presents a new framework for offshore wind developers to use in considering community engagement in *Sea Change: Social Derisking America's Offshore Wind*. Developers already use the idea of "project derisking," which involves largely financial analysis, to ensure that their investments are wise. Hughes proposes that developers embrace community engagement as a form of "social derisking." By framing early and meaningful community engagement as a way to ensure a project's success by minimizing the risk of community opposition down the line, Hughes identifies how community engagement benefits not only communities affected by new infrastructure, but also the entities seeking to develop offshore wind. This Note examines the Biden Bureau of Ocean Energy Management's 2024 offshore wind lease expansion and its terms regarding community engagement and identifies ways in which federal guidance falls short of meeting community and developer needs. It then examines the literature around community engagement, identifies offshore wind's unique challenges for public involvement, and

provides recommendations for better including communities in offshore wind development.

Ryan Laws applies the implications of landmark Supreme Court precedent interpreting the statute of limitations to regulatory challenges to endangered species advocates in *Endangered Justice? Exploring Corner Post's Ripple Effects on Endangered Species Act Litigation*. In holding that the default six-year statute of limitations for challenging federal regulations begins to run when the plaintiff suffers an injury, rather than when the regulation is finalized, the Supreme Court in *Corner Post* shifted the way federal courts, agencies, and advocates approach challenges to agency actions. Laws argues that endangered species advocates should see this change in doctrine as an opportunity to challenge agencies' failure to protect endangered species. This Note analyzes the interactions between *Corner Post* and the Endangered Species Act on three levels: whether *Corner Post* applies to ESA claims, whether it should be applied to such claims, and how it will affect stakeholders impacted by ESA claims.

Abby Neal's Note, *Settling for More in Climate Litigation*, analyzes the settlement achieved in *Navahine F. v. Hawai'i Department of Transportation*, in which youth climate activists secured commitments from the state agency to take tangible steps to decarbonize Hawai'i's transportation system. Neal argues that plaintiffs in rights-based climate litigation suits should consider settling their cases by identifying advantages that settlement may have over litigating the case to a full judicial conclusion. By comparing the terms of the *Navahine* settlement to the outcomes of other rights-based climate cases in the U.S. and internationally, Neal argues that settlements may prevent judges from dismissing cases based on justiciability and separation of powers concerns, may lead to better environmental justice outcomes by providing plaintiffs disproportionately affected by climate change a seat at the table where remedies are negotiated, and may create outcomes that are more likely to be carried out than judicial rulings ordering governments to improve their efforts to address climate change.

In *Navigating PFAS: Reevaluating the U.S. Navy's Reliance on Aqueous Film-Forming Foam*, Misa Scharfen explores the implications of the Navy's use of PFAS-containing foam in firefighting in light of efforts to regulate and ban PFAS use. Although Congress mandated the Department of Defense to discontinue aqueous film-forming foam (AFFF) use on land, it allowed its continued use on ships. Scharfen details the history of PFAS use, its environmental and

human health impacts, and efforts to end its use through regulation and litigation. She then addresses the factors making sea-based PFAS use different, and more difficult to end, than land-base use and argues that the Navy should continue using AFFF when necessary but move toward a future free of PFAS use.

Ecology Law Quarterly has long been at the forefront of environmental legal scholarship, in large part because of the contribution of student authors and editors like those whose work is presented here. It is with great pride that we present issue 52.2 as the latest in the journal's long history as a platform for deep analysis of emerging issues, a forum for student voices, and a community for those who are passionate about the environment.

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