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Foreword

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Foreword

*Dave Owen**

Now in its fourth year, Ecology Law Quarterly's Annual Review provides a concise and insightful summary of the previous year's leading developments in environmental and natural resources law. This year's Annual Review addresses the period from the fall of 2000 until the fall of 2001, during which environmental issues continued to create controversy and generate important judicial and policy decisions. The Annual Review's notes, comments, and case summaries provide environmental law scholars, policymakers, and practitioners with sophisticated and timely analyses of a turbulent year in environmental law.

In perhaps the year's most significant environmental case, the Supreme Court resoundingly rejected the D.C. Circuit's attempted revival of the Nondelegation Doctrine.¹ The D.C. Circuit found an absence of "intelligible principles" behind the Environmental Protection Agency's (EPA) lowered National Ambient Air Quality Standards (NAAQS) seemingly requiring Congress to produce more specific environmental legislation, and threatening to throw regulatory policy into disarray.² The Supreme Court, however, rejected these demands, unanimously concluding that the discretion exercised by EPA in setting the NAAQS was "well within the outer limits" of constitutional permissibility.³

Although *American Trucking* approved of EPA's exercise of discretion, the Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, the year's other major Supreme Court administrative/environmental law case, evinced a willingness to

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1. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001).

2. Elizabeth Mills, Note, *Whitman v. American Trucking Associations, Inc.*, *infra* at 159.

3. *American Trucking Ass'ns*, 531 U.S. at 474

limit federal regulatory jurisdiction.⁴ In a hotly contested 5-4 decision, the Court found the Corps' "migratory bird rule," which allowed it to assert federal jurisdiction over any body of water used by migratory birds, to be beyond the intended scope of the Clean Water Act.⁵ In so holding, the Court restricted the ability of the federal government to regulate isolated waters, potentially causing a dramatic shift towards state rather than federal regulation of wetlands.⁶

The Supreme Court also waded into the takings fray. Recent years have seen a wealth of takings cases but, in the eyes of many commentators, little increase in the clarity of takings jurisprudence.⁷ *Palozzolo v. Rhode Island*⁸ seems to have continued this trend.⁹ Eschewing categorical rules, the Court seemingly erased a prohibition on takings claims by plaintiffs who had "come to the taking" by acquiring property after the challenged regulation had gone into effect.¹⁰ In addition, the Court appeared to blur the rules about ripeness analysis in regulatory takings cases, allowing the judiciary to hear such claims prior to the completion of regulatory processes.¹¹

Recent years have seen ongoing Supreme Court battles over citizens' powers to bring suit under environmental law citizen suit provisions.¹² Although the past year produced no further Supreme Court environmental standing/mootness/ripeness jurisprudence, several appellate and district court decisions had major implications for the power of citizens to bring environmental law suits in federal courts.

One of the most important of these cases was also a major disappointment for environmental justice advocates. When a federal district court in New Jersey enjoined construction of a

4. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 162 (2001)

5. *Id.*

6. See Tobias Halvarson, Note, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers: The Failure Of "Navigability" as a Proxy in Demarcating Federal Jurisdiction for Environmental Protection*, *infra* at 181.

7. See H. David Gold, Note, *Relaxing the Rules: The Supreme Court's Quest for Balance in Palozzolo v. Rhode Island*, *infra* at 137n.3 (citing academic commentary on the absence of clarity in the Supreme Court's recent takings jurisprudence).

8. 533 U.S. 606 (2001).

9. Gold, *supra* note 7.

10. *Id.* at 137 (text accompanying notes 87 and 88) (discussing notice).

11. *Id.* at (text accompanying notes 114-116).

12. See, e.g. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that a Congressionally enacted citizen suit provision could not create Article III standing, and that plaintiffs seeking extraterritorial enforcement of the Endangered Species Act lacked sufficient injury in fact to bring suit); *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83 (1998); *Friends of the Earth v. Laidlaw Env'tl. Serv.*, 528 U.S. 167 (2000).

cement processing facility in an already heavily polluted South Camden neighborhood, the environmental justice movement appeared to have won one of its greatest victories.¹³ For the first time, a federal court had found an environmental justice violation on the basis of disparate racial impact. A legal roller coaster followed, however. First, the Supreme Court found that no private cause of action existed under Title VI of the 1964 Civil Rights Act.¹⁴ Then, after the district court used Section 1983 as an alternate basis for its holding,¹⁵ the Third Circuit found that EPA's disparate impact regulations could not create a privately enforceable right.¹⁶ As a result, the South Camden plaintiffs found themselves unable to enforce those regulations, and the environmental justice movement may have lost one of its best hopes for directly challenging racially disparate impacts.¹⁷

On entirely different grounds, the Fourth Circuit may have created another potentially far-reaching limitation on citizens' ability to enforce environmental law. In *Bragg v. West Virginia Coal Association*, the Fourth Circuit held that West Virginia's scheme for regulating coal mining, developed and approved under the federal Surface Mining Control and Reclamation Act, was state and not federal law. Thus, the state's violations of this regulatory scheme thus could not be challenged in federal court without running afoul of the Eleventh Amendment.¹⁸ This holding stripped activists of a potentially powerful tool to combat the widespread practice of mountaintop removal mining, and, if it remains as good law, threatens citizen enforcement of other environmental laws incorporating cooperative federalism-based regulatory schemes.¹⁹

The circuit courts also produced important developments in substantive environmental law. The Endangered Species Act (ESA) has provided ample grist for the litigation mill, and last year was no exception. In *Defenders of Wildlife v. Norton*, one of

13. Brendan Cody, Note, *South Camden Citizens in Action: Siting Decisions, Disparate Impact Discrimination, and Section 1983*, *infra* at 231; see *S. Camden Citizens in Action v. N.J. Dept. of Env'tl. Prot.*, 145 F. Supp. 2d 446 (D.N.J. 2001).

14. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

15. *S. Camden Citizens in Action v. N.J. Dept. of Env'tl. Prot.*, 145 F. Supp. 2d 505 (D.N.J. 2001).

16. *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771 (3d Cir. 2001).

17. Cody, *supra* note 13.

18. 248 F.3d 275 (4th Cir. 2001), *cert. denied*, __ U.S. __, 122 S. Ct. 920 (Jan. 22, 2002); Margo Hasselman, Note, *Bragg v. W. Va. Coal Ass'n and the Unfortunate Limitation of Citizen Suits Against the State in Cooperative Federalism Regimes*, *infra* at 205.

19. Hasselman, *supra* note 18.

the year's most significant ESA cases, the Ninth Circuit addressed the ambiguous meaning of the term "all or a significant portion of its range" contained in the Act's definition of species.²⁰ The court rejected two alternate constructions of the phrase, finding both the interpretation of the Secretary of the Interior and that of the environmental organization plaintiffs to be inadequate, and remanded to the Secretary the difficult task of coming up with a more workable definition.²¹

The year also produced widespread litigation over MTBE contamination, preemption doctrine, and the Clean Air Act. In recent years, state and lower federal courts have been embroiled in widespread litigation over liability arising from MTBE contamination. As municipalities face rapidly rising economic costs arising from such contamination, and questions about MTBE's health risks remain unanswered, the courts have seen increasing numbers of claims against MTBE manufacturers.²² The defendants in these cases have argued that the 1990 Clean Air Act Amendments, which mandated the use of oxygenates in fuels, preempted state law claims against MTBE manufacturers.²³ While the courts are split on this preemption question, a majority seems to be edging towards a rejection of this preemption defense, potentially allowing widespread MTBE litigation.²⁴

In one of the most dramatic state environmental law developments of the year, Hawaii's Supreme Court held that all state waters, ground and surface alike, are subject to the Public Trust Doctrine.²⁵ In addition, the Court held that some domestic and native uses of water, in addition to the in-stream flows traditionally assumed by commentators to be protected, fell within the scope of the doctrine.²⁶ The decision has the potential to increase levels of water protection in Hawaii and, if other

20. 258 F.3d 1136 (9th Cir. 2001).

21. *Id.*; Linda C. Maranzana, Note, *Defenders of Wildlife v. Norton: A Closer Look at the "Significant Portion of its Range" Concept*, *infra* at 263.

22. Carrie L. Williamson, Comment, *"But You Said We Could Do It!": Oil Companies' Liability for the Unintended Consequence of MTBE Water Contamination*, *infra* at 315.

23. *Id.*

24. *Id.*

25. *In Re Water Use Applications*, 9 P.3d 409 (Haw. 2000).

26. *Id.*; see Keala C. Ede, Note, *He Kanawai Pono no ka Wai (A Just Law for Water): The Application and Implications of the Public Trust Doctrine in In re Water Use Permit Applications*, *infra* at 283.

jurisdictions find the case's reasoning persuasive, could trigger expansions of the doctrine elsewhere.²⁷

International environmental issues also continued to generate controversy. In perhaps the most important international environmental law development of the year, negotiations on the Kyoto Protocol continued first at Bonn and then at Marrakech. Ironically, the absence of the U.S. from the negotiations did not prevent the nations attending from reaching agreements on emissions trading and sink credits that were rather consistent with prior U.S. positions.²⁸ Nevertheless, in the absence of U.S. support, the future effectiveness of the Protocol remains uncertain. The negotiations also failed to alleviate continuing concerns about the viability of mechanisms to enforce the Protocol.²⁹

In another major international development, a NAFTA arbitration case confirmed many environmentalists' fears about the trade accord. An arbitration panel held that a Mexican city's denial of a permit to construct a hazardous waste management facility constituted a violation of NAFTA Chapter 11 investor protections.³⁰ The holding raises concerns that arbitrators may ignore environmentally protective side agreements to NAFTA, and that enforcement of NAFTA will compromise both environmental protection and fair trade by granting foreign corporations a level of immunity from environmental regulation not enjoyed by their domestic counterparts.³¹

Finally, the year produced major developments from the executive branch. President Clinton's national monument designations had already generated intense controversy.³² Perhaps his most cutting-edge designation, however, involved the oceans. In December, 2000, President Clinton issued an order directing the National Oceanic and Atmospheric Administration to begin the process of designating an extraordinarily large area northwest of the Hawaiian Islands as a marine reserve.³³ The proposed designation has already proven rather controversial,

27. Ede, *supra* note 26.

28. Matthew Vespa, Comment, *Climate Change 2001: Kyoto at Bonn and Marrakech*, *infra* at 395.

29. *Id.*

30. Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, 21 Award of Aug. 30, 2000, 40 I.L.M. 36 (2001).

31. Jenny Harbine, Note, *NAFTA Chapter 11 Arbitration: Deciding the Price of Free Trade*, *infra* at 371.

32. See, e.g., Sanjay Ranchod, *The Clinton National Monuments: Protecting Ecosystems With the Antiquities Act*, 25 HARV. ENVTL. L. REV. 535 (2001).

33. Exec. Order No. 13,178, 65 Fed Reg. 76,903 (Dec. 7, 2000).

and its fate is uncertain, but if Clinton's initiative succeeds, most of the U.S.'s coral reefs may receive unprecedented levels of protection.³⁴

The Annual Review concludes with a series of short case summaries addressing significant developments in interstate water allocations, Indian water rights, RCRA and federal overfiling, the relationship between the Endangered Species Act and takings jurisprudence, and citizen standing.

As always, preparing the Annual Review involved the combined efforts of Boalt's environmental law faculty, students participating in the environmental writing seminar, student advisors, and the dedicated board and members of Ecology Law Quarterly. We hope and expect that you will find this issue an informative and valuable guide to another important year in environmental law.

34. Matthew Chapman, Note, *Northwest Hawaiian Islands Coral Reef Ecosystem Reserve*, *infra* at 347.