

NATURAL RESOURCES & ENVIRONMENT

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NATURAL RESOURCES & ENVIRONMENT CELEBRATES 25 YEARS

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Features

Twenty-Five Years of *NR&E*

Steven G. McKinney

Natural Resources & Environment (NR&E) magazine, the flagship publication of the ABA Section of Environment, Energy, and Resources (Section), turns twenty-five years old with its Summer 2010 issue. On the occasion of this 25th anniversary, former *NR&E* Executive Editor and 2010-2011 Section Chair Steve McKinney looks back at his collection of *NR&E* issues like an old family photo album to see what Section members were thinking and writing about over the years and to compare that picture with where we are today on those issues. He includes snapshots of water, air, and energy law, as seen through the prism of *NR&E*.

The Arc of Environmental Criminal Enforcement

John F. Cooney, Judson W. Starr, and Joseph G. Block

For the last quarter century, Department of Justice prosecutors have worked hard to develop an environmental criminal enforcement program that will deter polluters from treating noncompliance with law as a cost of doing business, while reinforcing the American public's sense of fairness that society's ultimate punishment is being imposed on the most serious violators. This article describes the factors that have entered into the exercise of charging discretion by environmental prosecutors and highlights the principal accomplishments of the environmental crimes program.

EPA's Indian Policy at Twenty-Five

James M. Grijalva

Developers and other regulated entities in and near Indian country confront a unique and complex regulatory scheme arising from an anomalous confluence of federal environmental, administrative, and Indian law. Today's regulatory environment can be traced directly to an official Indian Policy the U.S. Environmental Protection Agency (EPA) adopted in 1984 to guide its actions through that morass. The Policy is premised on tribal self-determination and envisions partnerships with tribes operating or assisting in the operation of federally delegable programs. Twenty-five years later, EPA has built the legal and administrative foundations for implementing the Policy, assisted a small cadre of tribes in becoming regulatory partners, and been generally successful in turning back legal challenges to its Indian program. What remains, however, is the real work necessary for full realization of the Indian Policy's self-determination and environmental justice goals.

The Public Trust Doctrine: New Frontiers for Sustainable Water Resources Management

David Aladjem

This article examines the evolution of the public trust doctrine over the past quarter-century by considering developments in five states: Pennsylvania, Florida, Michigan, California, and Hawaii. These states reflect the variety of approaches to the public trust doctrine, which have largely been driven by water availability and different background legal regimes. The article also attempts to project the future development of the public trust doctrine. The chief task of the next quarter-century will be the need to address the unfinished business of *National Audubon Society v. Superior Court*: to develop standards and procedures for balancing the various needs of public trust resources against each other, as well as balancing the legitimate demands of consumptive uses of water against the needs of public trust resources in an effort to serve the public interest.

Correcting Mismatched Authorities: Erecting a New “Water Federalism”

Robert H. “Bo” Abrams

In the twentieth century, even while laws and rhetoric respected the division of authority over water favoring the states, the real power over water in most basins passed into the federal government’s programmatic and regulatory control, creating a mismatch of supposed authority and actual power over water. The federal imperatives that may have justified that shift when the relevant laws were enacted are now a half century old and seem out of touch with the modern reality of water management. The authors take a look back at how this all happened and support a new statute that employs a structure similar to that of the CZMA that they believe will put the states back in control of the water and concurrently use federal authority in a role for which it is well suited, putting the states under pressure to make genuine concessions to one another in the management of shared basins and playing referee if they do not treat one another fairly.

A Dose of History: Nuclear Energy Cases That Shaped Environmental Law

David A. Repka and Tyson R. Smith

Many of the key test cases for environmental and administrative statutes, and landmark decisions in the past twenty-five years were tied to proposed nuclear power projects. This is due in large part to the public’s strong concern with the safety of this form of power. The growth of nuclear power, therefore, has played a central role in the development of legal standards and processes for addressing environmental issues. The authors look back at the last twenty-five years of the nuclear power cases that have shaped environmental law. They also show that despite all of the changes in environmental and administrative laws, there are still similarities between issues of twenty-five years ago and today.

Twenty-Five Years of Electricity Law, Policy, and Regulation: A Look Back

Jeffery S. Dennis

When *Natural Resources & Environment* was first published in Winter 1985 energy law, policy, and regulation was in the midst of a fundamental shift. Legislation passed in the wake of the energy crises of the 1970s marked the beginnings of two significant trends or patterns that would emerge over the last twenty-five years of energy regulation. First, policymakers moved to encourage the restructuring of the electric utility sector, with an eye toward promoting more competition in that industry. Second, legislative and regulatory developments in electricity served to increase the federal role in shaping public policy and regulatory approaches to electric service. Subsequent legislation and FERC regulatory actions generally followed these trends, and key judicial decisions have allowed the efforts to restructure and bring more competition to electricity markets and the gradual shift in policy influence to the federal level to continue. These trends appear likely to persist as electricity policy evolves in the coming years.

Twenty-Five Years of EU Environmental Law

Chris Bryant

This article examines the evolution of EU environmental law over the last twenty-five years. It is hard to believe now that less than twenty-five years ago the EU did not have any specific powers or competencies in the area of environmental law. Indeed, this was not the case until the adoption of the Single European Act in 1987. Since

then, the EU has developed policies on almost every aspect of environmental law, from chemicals to waste and air quality to ozone layer protection. Most environmental law in Europe now emanates from the EU. The law has evolved from limited measures dealing with specific cross-border environmental issues, as was the case at first, to an extensive policy and integrated approaches, even extending to criminal law. This article reviews the development of the law from its original position outside the EU's areas of competence to one of the key areas of activity in both policy and legislative terms.

Torture by TSCA: Retrospectives of a Failed Statute

James T. O'Reilly

Europe's REACH system for chemical regulation fills gaps left by the 1976 U.S. Toxic Substances Control Act. Its likelihood of success in public health is far greater than TSCA, which the author and the industry team were able to encumber with many procedural pitfalls for regulators. TSCA's failure likely will lead to EU-like legislative fixes in 2011-12.

New Kids on the Block—A Survey of Practitioner Views on Important Cases in Environmental and Natural Resources Law

James Salzman and J. B. Ruhl

To commemorate *Natural Resources & Environment's* silver anniversary, authors James Salzman and J. B. Ruhl take the pulse of what environmental, energy, and natural resources lawyers in the United States believe are today's most important cases—the cases every practitioner should know by heart. The results are based on a 2009 survey conducted by members of the ABA Section of Environment, Energy, and Resources. What would your top case be? Very likely, your answer is on the authors' top ten list. The authors found a consistency of responses across regions, ages, experience, practice fields, and practice settings that suggests to them that, as a group, NR&E lawyers have a strong sense of the cases that matter most to their profession.

Departments

Vantage Point Insights:

Third-Party Discovery: Who's in Control?

Paula J. Schauwecker

The duty to preserve documents and electronic information is triggered when a party reasonably anticipates litigation. This duty can extend to third parties who have worked with or been retained by a party. Environmental litigation often concerns sites or issues where third parties, such as consultants, engineers, scientists and others, have been involved. The duty to preserve documents and electronically stored information may extend to those third parties, and it is important that counsel investigate the nature of the relationship.

FERC Formally Adopts Limited *Brady* Obligations

Scott B. Grover

FERC issued a policy statement in December 2009 in which it announced that it was formally adopting a policy of disclosing *Brady* materials in Section 1b investigations and enforcement actions under Part 385 arising out of such investigations. In light of the March 2010 announcement that FERC was adopting the United States Sentencing Guidelines for the calculation of civil penalties for organizations, the scope of the *Brady* materials statement warrants further scrutiny and in fairness should be extended to apply to any proceeding where a penalty may issue.

The Summers Effect

Maria V. Gillen

The 2009 Supreme Case of *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009), imposed strict limits on the showing of standing for plaintiffs alleging harm from environmental regulations. In the wake of the *Summers* decision, lower courts have used this standard to dismiss several cases alleging environmental harm on the basis that plaintiffs failed to demonstrate standing. Thus, the already narrow pigeonhole through which environmental plaintiffs must pass is getting smaller all the time. Only the most specific of allegations of injury-in-fact are sufficient to confer standing on plaintiffs.

Educating the Next Generation of Environmental Lawyers

Madeline June Kass

In 2007, the Carnegie Foundation for the Advancement of Teaching published the results of an intensive, multiyear study of legal education in the United States and Canada. The Carnegie Report identifies the lack of professional skills training as a critical limitation of the existing legal education model. This article examines efforts by U.S. environmental law professors to address this area of concern. Specifically, the article sets forth a sampling of efforts aimed at advancing the education of future environmental, energy, and natural resource lawyers by providing practical lawyering opportunities to law students.

Consulting with Tribes for Off-Reservation Projects

Dean B. Suagee

To author Dean Suagee it seems obvious that tribal governments need to be sovereign partners in national and regional programs to deal with the climate crisis, including strategies to promote energy efficiency and renewable energy. However, despite four decades of federal policy supporting the basic principle that Indian tribes really are governmental entities in our federal system, many, including many well-educated lawyers working with dedication to deal with the climate crisis, just don't think of Indian tribes as governments. Author Dean Suagee asks readers who are working on climate change issues, especially at the state and local government levels, to ask themselves how tribal governments should fit in to those plans. Most likely, there are logical ways in which tribal governments should be included.

California Leads Way in Curbing Auto Emissions

Ankur Tarneja

The following article provides the basic legal structure of San Francisco's Commuter Benefit Ordinances and briefly explains why it went virtually unopposed by "big business." Then the article provides a background on California's Waiver application to Clean Air Act Section, its timeline, and its effects on California and U.S. policy. Finally, the article presents the author's proposal for one other measure to reduce the global warming effect.

Literary Resources

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