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Shanna Foley

Susan L. Dautel

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IN THIS EDITION

SHANNA FOLEY* & SUSAN DAUTEL**

As the *Golden Gate University Environmental Law Journal* enters its fourth year of publication, our *Pacific Region Edition* continues to focus on environmental issues affecting the Pacific Rim and the western United States.

In the first article, Tim Eichenberg explains how the public trust doctrine can be used to combat the harmful effects climate change has on the San Francisco Bay in *Climate Change and the Public Trust Doctrine: Using an Ancient Doctrine to Adapt to Rising Sea Levels in San Francisco Bay*. The San Francisco Bay has long been subject to environmental degradation from erosion, development, and wetlands loss. Climate change adds fuel to fire; rising sea levels are expected to dramatically change the Bay's shoreline, threatening valuable infrastructure including airports and other economic strongholds in the Bay Area, as well as ecologically valuable wetlands and coastal forests. These climate impacts may prompt construction of additional flood and erosion control infrastructure, having the unintended consequence of restricting public access to the shoreline.

Eichenberg argues that the public trust doctrine can be an effective tool for agencies such as the San Francisco Bay Conservation and Development Commission (BCDC) to use in mitigating and preventing further adverse harm. As sea levels rise and land uses change, the public trust doctrine can be used to ensure continual support for public use and access to coastal lands, as well as to help preserve these lands in their natural state.

The next article also addresses legal tools and remedies that can be used to address climate change. Benjamin Eichenberg, in *Green House Gas Regulation and Border Tax Adjustments: The Carrot and the Stick*,

* J.D. Candidate 2010, Golden Gate School of Law; Edition Editor, *Pacific Region Edition, Environmental Law Journal* Vol. 3(2) (2010).

** J.D. Candidate 2010, Golden Gate School of Law; Editor-in-Chief, *Environmental Law Journal*.

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argues that Border Tax Adjustments (BTAs) can be used as an incentive to reduced green house gas (GHG) emissions. Although BTAs can be arranged in various ways, they essentially place a tax on products being imported into a country based on the level of GHG emissions created in manufacturing that product.

The biggest obstacle in instituting an effective BTA however, is the trade policies and regulations of the World Trade Organization (WTO). Eichenberg analyzes recent decisions of policies of the WTO to determine whether a BTA would violate WTO regulations. Eichenberg concludes that relatively recent WTO decisions may have opened the door to measures, such as a BTA, that increase environmental protection.¹ Thus, a BTA, if carefully drafted, could pass WTO muster.

The third article *One False Move: History of Organic Agriculture and Consequences of Non-Compliance with the Governing Laws and Regulations*, by Sara Pasquinelli, examines the burgeoning organic agriculture industry. Particularly in California, certified organic agriculture is growing at an exponential rate. While resulting in obvious environmental and health benefits, such as a decrease in pesticide exposure, the increase in organic foods has also led to new challenges in labeling and regulation. Pasquinelli provides an overview of the federal Organic Foods Production Act,² and other regulatory schemes governing the certification, labeling, and oversight of organic food production. She then goes on to examine how, while such laws and regulations are necessary in order to ensure the integrity of organic food (i.e., that “organic” food is actually organic), these laws can also act as a disincentive for farmers who are considering, or attempting to switch, from traditional to organic production. For instance, the expense of reporting and monitoring requirements for certified organic crops can cost small farmers a prohibitive amount of money, thus hindering future organic production.

In identifying some of the issues farmers have with certifying or maintaining their organic certification, Pasquinelli provides a starting point for improving the certified organic regulatory system.

Next, a student comment by Nancy Mullikan provides an overview of, and argues for a needed expansion of, the Responsible Corporate Officer (RCO) doctrine. In *Holding the “Responsible Corporate Officer” Responsible: Addressing the Need for Expansion of Criminal Liability*

¹ See e.g., Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 128, WT/DS58/AB/R, (Oct. 12, 1998), available at www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm

² 7 U.S. C.A. § 6501 et. seq. (Westlaw 2010).

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for *Corporate Environmental Violators*, Mullikan first provides an overview of the common-law RCO doctrine, which holds that corporate officers can at times be held personally liable for the environmental damage their company is responsible for, as well as providing an overview of the codification of this doctrine in the Clean Air³ and Clean Water Acts.⁴ Mullikan also provides an examination of the pertinent case law that has applied, or more aptly, failed to apply the RCO doctrine, concluding that the RCO doctrine can be a powerful tool in combating environmental crimes, and its expansion will aid in this effort.

This edition concludes with student Jon-Erick Magnus's comment, *Lyon's Roar, Then a Whimper: The Demise of Broader Arranger Liability in the Ninth Circuit after the Supreme Court's Decision in Burlington Northern*. Magnus examines recent case-law under CERCLA, one of the country's most powerful environmental laws. In 2007, the Ninth Circuit in *United States v. Burlington Northern*⁵ provided for an expanded view of "arranger liability." That is, those who arranged for the transfer or disposal of hazardous waste, could, under the test proffered by the Ninth Circuit, be held liable if the disposal of waste was not the sole purpose of the arrangement but a foreseeable byproduct of the transaction.

However, the Supreme Court quickly rejected this new foreseeability standard, replacing it with an intentional standard.⁶ Magnus concludes his case-study with an examination of real-world CERCLA liability implications. By using the example of dry-cleaners, frequent defendants in CERCLA actions, Magnus suggests how this intentional standard may affect future CERCLA case-law.

³ 42 U.S.C.A. § 7413(c)(6) (Westlaw 2010).

⁴ 33 U.S.C.A. § 1319(c)(6) (Westlaw 2010).

⁵ *U.S. v. Burlington Northern & Santa Fe Ry. Co.*, 520 F.3d 918 (9th Cir. 2008).

⁶ *Burlington Northern & Santa Fe Ry. Co. v. U.S.*, 129 S. Ct. 1870 (2009).

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