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Student review of selected panels at the California State Bar' s 2009 Environmental Law Conference at Yosemite

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Student Review of Selected Panels at the California State Bar's 2009 Environmental Law Conference at Yosemite

*Jessica Intrator, Lala Wu, Holly Wagenet, Sarah Barker-Ball,
Camille Pannu, & Emily Jeffers**

WEED IN THE WILD: ENVIRONMENTAL CONSEQUENCES OF MARIJUANA CULTIVATION ON
PUBLIC LANDS

SPEAKER: CHIEF RANGER STEVE SHACKELTON, YOSEMITE NATIONAL PARK

Yosemite Chief Ranger Steve Shackelton has a lot on his plate. Together with only sixty rangers to cover Yosemite's nearly 1200 square miles,¹ he oversees the safety of more than 3.5 million visitors annually.² Yet, an unprecedented problem threatens Chief Shackelton's ability to meet his goals: illegal cultivation of marijuana within the park has recently turned his team of safety rangers into drug enforcement agents and taken them away from their other duties.

Marijuana cultivation on public lands is an increasing problem. Chief Shackelton took the time to speak to environmental lawyers at the California State Bar Environmental Law Conference in order to frame the problem as an environmental, and not just a drug enforcement, issue. He believes that the unprecedented crisis lacks "public outrage," and hopes that a public education campaign can help spread the word.³

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* Jessica Intrator, Lala Wu, Holly Wagenet, Sarah Barker-Ball, Camille Pannu, and Emily Jeffers are students at the University of California, Berkeley, School of Law (Boalt Hall). They were awarded tuition scholarships to the State Bar of California Environmental Law Section 2009 Environmental Law Conference at Yosemite. The panel reviews are based on their own observations and reflections. No citations should be attributed directly to the panelists themselves.

1. Yosemite National Park (U.S. National Park Service), <http://www.nps.gov/yose/index.htm> (last visited Nov. 20, 2009).

2. Yosemite National Park, Park Statistics (U.S. National Park Service), <http://www.nps.gov/yose/parkmgmt/statistics.htm> (last visited Nov. 20, 2009).

3. Yosemite National Park, Marijuana Gardens Raided in Yosemite National Park (U.S. National Park Service), <http://www.nps.gov/yose/parknews/marijuana2007.htm> (last visited Nov. 20, 2009).

So, what is the extent of the problem with marijuana cultivation in Yosemite?

The scope of the issue is vast. According to Chief Shackelton, the rangers in Yosemite handle over 5000 marijuana cases each year. Cultivating marijuana in the Park has noticeably affected the water quality, animal life, and health and safety of the public.

Chief Shackelton has found that growers dam streams and divert the water to their crops for irrigation. In some instances, growers placed fertilizer and pesticides directly into water sources and then used that water for irrigation. Additionally, irrigation increases erosion and damages riparian habitats, which in turn can impact fish and spawning grounds.

When the water system is compromised, plants and wildlife suffer as well. Pesticides such as DDT, fertilizer, and even gasoline from generators all enter the water supply, to the detriment of park flora and fauna. Chief Shackelton reported that his staff detected “off the charts” nitrate levels at downstream sites. These chemicals can work their way up the food chain and into endangered species that live in the park. For example, the Chief noted that truffles take up these chemicals, squirrels eat the truffles, and spotted owls then eat the squirrels.

Other harmful impacts on wildlife are more direct. Chief Shackelton recalled finding sites where growers had hunted deer for meat, killed bear to hang as a deterrent to other wildlife, and even poached an endangered ring-tail cat for a souvenir. Growers living in the park have also left a variety of hazardous materials behind, including sewage, trash from campsites, and discarded drip line.

Chief Shackelton emphasized the myriad ways that marijuana cultivation has impacted human health, safety, and enjoyment of the park. For example, growers are usually armed, which may be dangerous for backcountry hikers who inadvertently stumble onto a site. In addition, gasoline generators, camp stoves, and campfires all increase fire risks. Combating marijuana cultivation has diverted Rangers’ attention from other public safety tasks, namely search and rescue services.

Chief Shackelton believes drawing an environmental connection to marijuana growing can help mitigate the problem. He suggests broadening the scope of enforcement methods to include prosecution under the Clean Water Act and the Endangered Species Act. Most importantly, he hopes to build alliances with members of the environmental legal community and to launch a public education campaign to overcome public indifference.

TRAFFIC COPS NEEDED AT THE INTERSECTION OF PRODUCT LIABILITY AND ENVIRONMENTAL LITIGATION!

MODERATOR: THOMAS VANDENBURG, DONGELL LAWRENCE FINNEY LLP, LOS ANGELES

PANELISTS: JAMES COLOPY, FARELLA BRAUN + MARTEL LLP, SAN FRANCISCO; TODD ROBBINS, SHER LEFF LLP, SAN FRANCISCO

Products liability and environmental litigation are generally considered distinct practice areas, mainly because they focus on different liable parties. This panel explored the use of “hybrid” legal theories to address problems of product safety and manufacturer/distributor responsibility for harm to the environment and public health. For example, water suppliers are using products liability theories to influence their claims against manufacturers and distributors for the chemical contamination of their drinking water supplies by pesticides, fumigants, and chemicals like methyl tert-butyl ether (MTBE), tetrachlorethylene (PCE), and dibromochloropropane (DBCP). This marks a contrast from traditional environmental law doctrines that focus liability on the party responsible for ultimately discharging the harmful product, not the manufacturer or the distributor.

This “hybrid” approach faces several challenges. First, responsible parties are rarely as easy to pinpoint as PG&E, the unsympathetic defendant in the popular film *Erin Brockovich*. Instead, contamination is usually the result of the wide distribution of a product that lacks appropriate protocols for proper use and disposal. As a result, litigators are often uncertain whom to target for litigation. Individual commercial users, like a mom-and-pop dry cleaner, gas station owner, or individual farmer, do not make attractive targets for economic or political reasons, even if they are ultimately responsible for discharging the product. The manufacturer—often a multi-million dollar corporation, such as DuPont or Monsanto—might be a more effective target, especially when there is evidence of failure to warn or provide instructions as to application or disposal of the chemical product.

In addition, plaintiffs struggle to distinguish which legal theory to employ against a manufacturer. Using a product liability framework, in some cases plaintiffs have successfully demonstrated that manufacturers had actual knowledge of the harm caused by their products, yet did not provide appropriate warning or instructions as to their use and disposal.⁴ Courts have also held chemical manufacturers liable or potentially liable under theories such as strict liability.⁵

Trial court decisions have led to a wide variety of outcomes, and a number of issues are still percolating through the courts. These include whether water suppliers have a legal claim when there is contamination present but it remains below the legal cap that would force the supplier to warn consumers or shut

4. See, e.g., *City of Modesto Redevelopment Agency v. Superior Ct.*, 13 Cal. Rptr. 3d 865 (Cal. Ct. App. 2004).

5. See, e.g., *Nelson v. Superior Ct.*, 50 Cal. Rptr. 3d 684 (Cal. Ct. App. 2007).

down services⁶ and whether manufacturers and distributors can be held liable for water supply contamination under a nuisance claim.⁷ The panel members conducted an animated debate over both of these issues, focusing especially on the unresolved question of whether the Maximum Contaminant Level (MCL) should serve as a bright-line rule defining harm. Industry representatives argue that without the bright-line rule, they may face liability for harm that does not surpass the legal level, while water suppliers maintain that the MCLs are not good bright-line indicators of the harm contaminants have on public health and the environment.

PRODUCT-BASED ENVIRONMENTAL REGULATIONS: GREEN CHEMISTRY AND RELATED NEW FRAMEWORKS FOR ENVIRONMENTAL MANAGEMENT

MODERATOR: MARILEE HANSON, DEPARTMENT OF TOXIC SUBSTANCES CONTROL, SACRAMENTO

PANELISTS: EDWARD QUEVEDO, PALADIN LAW GROUP, LLP, WALNUT CREEK; JOSEPH GUTH, SCIENCE & ENVIRONMENTAL HEALTH NETWORK, ALBANY; DONALD OWEN, DEPARTMENT OF TOXIC SUBSTANCES CONTROL, SACRAMENTO

This panel addressed the regulatory movement toward product-based, as opposed to “end of pipe,” regulations. Panelists explored how companies can use green chemistry principles to respond proactively to environmental regulations. Jurisdictions are adopting product regulation regimes based on developments in green chemistry—the science of reformulating and designing products to reduce or eliminate toxic substances. These new rules provide the backdrop for a shift in product-based regulation. Instead of waiting for liability enforcement against products that have already damaged health and the environment, jurisdictions within and especially outside of the United States are shifting to a planned regime of product regulation more closely based on the precautionary principle and public access to chemical ingredient information. For example, the California Green Chemistry Initiative aims to set a framework for addressing chemicals of concern and to force companies to evaluate alternative designs and establish a consumer clearinghouse of product information vital to assessing health risks.⁸

Both industry and regulatory bodies, such as California’s Department of Toxic Substances Control (DTSC), have a specific role to play in the transformation. Mr. Quevedo of the Paladin Law Group argued that companies gain distinct competitive advantages by engaging in the development of a

6. For a discussion of this issue, see Julia B. Anderson & Aaron W. Rapier, *Federal MCL Regulatory Standards and Common Law Causes of Action: A Discussion on Why the MCL Has No Place in Common Law Causes of Action*, 8 VT. J. ENVTL. L. SUPP. ¶ 6 (2007), <http://www.vjel.org/journal/VJEL10061.html>.

7. Numerous cases have upheld liability under a nuisance claim. See, e.g., *Selma Pressure Treating Co. v. Osmose Wood Preserving Co.*, 271 Cal. Rptr. 596 (Cal. Ct. App. 1991); *County of Santa Clara v. Atlantic Richfield Co.*, 40 Cal. Rptr. 3d 905 (Cal. Ct. App. 2006). But see *City of San Diego v. U.S. Gypsum Co.*, 35 Cal. Rptr. 2d 876 (Cal. Ct. App. 1994).

8. CALIFORNIA GREEN CHEMISTRY INITIATIVE, FINAL REPORT 27–33 (2008), available at http://www.dtsc.ca.gov/PollutionPrevention/GreenChemistryInitiative/upload/GREEN_Chem.pdf.

product-based framework and driving the sustainability movement through scrutiny of the supply chain, reformulation of products, and publicity of product life cycle information.

In contrast, according to the panelists, the Toxic Substances Control Act (TSCA)⁹ does not incentivize companies to explore alternatives and develop greener products, and instead relies upon the false assumption that most chemicals are safe and the government should bear the heavy burden of regulation. Companies have no reason to make product data available, leaving consumers with a dearth of usable information.

A regulatory solution centered on green chemistry can change the incentive structure and force companies to innovate and redesign while providing consumer groups with accurate, readily accessible information. Further, with product data readily available, companies have a stronger basis to increase competitiveness by demonstrating to consumers that, compared to their competitor, their product is the “greenest” of all.

ENERGY, DESALINATION, AND THE CALIFORNIA COAST

MODERATOR: ELIZABETH LAKE, HOLLAND & KNIGHT, LLP, SAN FRANCISCO

PANELISTS: HOPE SCHMELTZER, CALIFORNIA COASTAL COMMISSION, SAN FRANCISCO; LINDA KROP, ENVIRONMENTAL DEFENSE CENTER, SANTA BARBARA; RICK ROTHMAN, BINGHAM MCCUTCHEN, LLP, LOS ANGELES

The session began with the moderator’s overview of state and federal policies affecting energy and desalination plants on the California coast, with a particular emphasis on the statutory scheme governing the California Coastal Commission (CCC). Hope Schmeltzer, Chief Counsel of the CCC, emphasized that all but one of the CCC’s statutorily-mandated directives begins with the word “protect,” indicating that concerns for ocean and beach resources motivate nearly all of the CCC’s activities, at least in theory. Despite this backdrop, a number of projects permitted by the CCC may have dire environmental consequences. Moreover, a considerable number of local, state and federal authorities, in addition to the CCC, are involved in California coastal development projects. This results in an inefficient system that may halt some relatively “clean” projects necessary to meet California’s growing demand for electricity and drinking water, while allowing others that have more negative environmental impacts.

On the energy generation front, all three panelists pointed out that the oceans off the California coast have been used for oil drilling for several decades. Rick Rothman, Chair of Bingham McCutchen’s environmental practice group, questioned the near-term viability of using the ocean for more environmentally friendly forms of electricity generation, including wave energy technologies (not yet commercially feasible), off-shore wind turbines (not cost effective near a state with on-shore wind resources), or increased importation of

9. 15 U.S.C. § 2601–2695d (2006).

liquefied natural gas (LNG) (less attractive following recent price drops for domestically-produced gas).

With regard to water desalination facilities, Linda Krop from the Environmental Defense Center described a number of issues relating to desalination plants, including intensive energy use and consequent greenhouse gas emissions, biological and water quality impacts caused by high-salinity discharge, the privatization of public resources, and the inducement of population growth. Both Krop and Rothman focused extensively on the relationship between desalination facilities and the “once through cooling” (OTC) electricity generation plants that have lined the California coast for several decades. OTC plants rely on a massive intake of ocean water to provide the cold reservoir necessary for electricity generation, resulting in the high-temperature discharge back into the ocean as well as the impingement and entrainment of several marine species.¹⁰ Proponents of desalination have looked to OTC power plants as an optimal target for source water because they would not require an entirely new facility. Fitting an OTC plant with desalination equipment also provides a prime opportunity to upgrade the power facilities so as to decrease water flow and lessen their impact on marine animals. Such arguments are only valid, however, if one assumes that OTC plants are likely to remain in operation. As the panelists made clear, for those trying to phase out OTC plants and replace them with cleaner and less environmentally harmful electricity generation facilities, a discussion of on-site desalination merely impedes progress.

The economic downturn of 2008 and 2009 has dramatically slowed the pace of new development projects on the California coast. The panelists—led by Rick Rothman—argued that this slower pace creates a prime opportunity to rethink current approaches to permitting and development of desalination plants, and to reach consensus on where good resources are located and which sites should remain off-limits to development. A new, streamlined process for project development could enable adequate state and local input and control, while helping to ensure that only the best and most efficient energy and water technologies come online.

Ultimately, I found it both promising and perturbing that the environmentalist, the corporate lawyer, and the state bureaucrat advocated for the same path moving forward. While it brings hope that traditional foes may be willing to stand together in California’s ever-growing quest for new sources of energy and drinking water, history suggests that such an integrated planning approach—effectively balancing environmental and development needs—is highly unlikely to come about in time.

10. See National Pollutant Discharge Elimination System--Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 69 Fed. Reg. 41,586 (July 9, 2004); Heal the Bay, Industrial Sea Water Intake: Coastal Power Plants, <http://www.healthebay.org/currentissues/powerplants/default.asp> (last visited Nov. 20, 2009).

PUBLIC TRUST: LET'S GIVE 'EM SOMETHING TO TALK ABOUT

MODERATOR: JAMES WHEATON, ENVIRONMENTAL LAW FOUNDATION, OAKLAND

PANELISTS: DOUG CARSTENS, CHATTEN-BROWN AND CARSTENS, SANTA MONICA; RICHARD ROOS-COLLINS, NATURAL HERITAGE INSTITUTE, BERKELEY; VIRGINIA CAHILL, CALIFORNIA DEPUTY ATTORNEY GENERAL (RET.), DAVIS

The public trust doctrine, until several recent court decisions, was largely confined to academia. In essence, the doctrine indicates that the government is required to maintain certain resources available for the public's reasonable use.¹¹

Panelists from the public, private, and non-profit sectors discussed the doctrine's recent evolution and increasing relevance outside of academia and in the courtroom. The most remarkable example, in their opinion, involved *National Audubon Society*,¹² in which the California Supreme Court held that the state must consider the public trust in decisions affecting the allocation of water resources.¹³ The decision marked the rebirth of the doctrine in legal opinions, and more importantly, the court extended the public trust doctrine to consider environmental values, such as the impact on wildlife.¹⁴

Doug Carstens, partner at Chatten-Brown and Carstens, discussed *Center for Biological Diversity v. FPL Group, Inc.*,¹⁵ in which the First District Court of Appeals held that wildlife is a resource within and protected by the public trust.¹⁶ Earlier cases, including *National Audubon Society v. Superior Court*¹⁷ and *Environmental Protection Information Center v. Department of Forestry*,¹⁸ hinted at this position, but the court in *Center for Biological Diversity* unequivocally stated that the public trust doctrine extended to all wildlife, and not just those protected by the federal and state statutes.¹⁹ Further, the *Center for Biological Diversity* court held that plaintiffs suing under the public trust must take care to name a public agency as a defendant.²⁰

Richard Roos-Collins, director of Natural Heritage Institute's legal program, hypothesized that the public trust doctrine will eventually be expanded to groundwater, but admitted that no authority supports his position just yet. While groundwater is non-navigable (a key feature of the doctrine), in regions where there is a significant nexus between surface and groundwater, there may be room to argue that this connection will be vital for long-term water conservation and ecological protection. For example, the California Supreme Court in *National Audubon* applied the doctrine to non-navigable

11. The public trust doctrine was first invoked into United States common law in *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892).

12. *Nat'l Audobon Soc'y v. Superior Ct.*, 658 P.2d 709 (Cal. 1983).

13. *Id.* at 728.

14. *Id.* at 712.

15. *Ctr. for Biological Diversity v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588 (Cal. Ct. App. 2008).

16. *Id.* at 599.

17. *Nat'l Audobon Soc'y*, 658 P.2d at 709.

18. *Env'tl. Prot. Info. Ctr. v. Dep't of Forestry*, 50 Cal. Rptr. 2d 892 (Cal. Ct. App. 1996).

19. *Ctr. for Biological Diversity*, 83 Cal. Rptr. 3d at 599–600.

20. *Id.* at 602–03.

tributaries to Mono Lake,²¹ and groundwater is a non-navigable tributary. When a significant nexus exists between groundwater and public trust resources, Roos-Collins believes that courts will rule that the public trust protects against unreasonable uses of those resources. In turn, this would allow the State Water Board to order pumpers of over-drafted aquifers to develop a conservation plan for their common resource.

Virginia Cahill, former California deputy attorney general, discussed the implications of sea level rise on the public trust: namely, if the state holds title to submerged tidelands, what will happen when these high-water boundaries shift? Will private lands become public? She discussed three options to deal with this problem: preventing development through setbacks, creating rolling easements over newly submerged lands, and ignoring it. A recent Ninth Circuit case, *United States v. Milner*, held that a landowner cannot maintain a seawall on land that has been inundated by the sea,²² indicating that courts are willing to accept the proposition that public trust boundaries can move.

EMERGING ISSUES UNDER A CARBON CAP AND TRADE REGIME

MODERATOR: BETH DEANE, PAUL, HASTINGS, JANOFSKY & WALKER, LLP, SAN FRANCISCO
PANELISTS: JON F. ELLIOTT, TOUCHSTONE ENVIRONMENTAL, INC., OAKLAND; KEVIN KENNEDY, CALIFORNIA AIR RESOURCES BOARD, SACRAMENTO; ANGELA JOHNSON MESZAROS, CALIFORNIA ENVIRONMENTAL RIGHTS ALLIANCE, LOS ANGELES

Currently, proposals at the state and federal levels to limit greenhouse gas (GHG) emissions have all incorporated cap and trade systems. At the U.S. House and Senate, there are two different proposals for reducing carbon emissions:

	House (ACES)²³	Senate (CEJAP)²⁴
Stated Goals	Targeted GHG reductions (from 1990 levels): 3% by 2012, 17% by 2020, 42% by 2030, 83% by 2050 GHG tonnage limits on individual sources; focuses predominantly on stationary sources that produce “dirty” energy	Targeted GHG reductions (from 2005 levels): 20% by 2020, 80% by 2050 Annual tonnage limit from specified activities to be established by EPA
Regulator	Dept. of Agriculture & EPA	EPA

21. *Nat'l Audobon Soc'y*, 658 P.2d at 721.

22. *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009).

23. American Clean Energy and Security Act of 2009 (Waxman-Markey), H.R. 2454, 111th Cong. (2009).

24. Clean Energy Jobs and American Power Act, S.B. 1733, 111th Cong. (2009).

Auction or Allowance?	Prefers auction for up to 70% of credits.	Prefers free allocation to first-movers with possible auction phase-in over time.
Credit Sources	Allows up to 75% of offsets to be banked from international projects.	Seeks to limit crediting to domestic pollution reduction.
Pre-Emption	Pre-empts other federal regulations and state legislation.	Does not pre-empt EPA, but pre-empts state legislation.

It is unclear which of these proposals will prevail, but one panelist commented that there is a possibility that any federal plan will pre-empt California's Global Warming Solutions Act (AB 32), which has higher standards and more aggressive reduction targets.

However, the focus on cap and trade may be misplaced, particularly since it is almost impossible to reliably quantify or measure how reduced emissions from one site are transferred to another site, especially when offsets are available, leading to potential increases in the total amount of GHG emissions. Environmental justice advocates have opposed cap and trade from the onset, arguing for overall emissions reductions rather than quasi-market schemes that allow pollution trading. One reason for the environmental justice community's opposition is that cap-and-trade systems create disparate impacts in environmental pollution. For example, while carbon is a global concern, ambient air and other pollution is usually hyper-concentrated at the local level. This means that communities already subjected to living close to carbon-emitting sources (e.g. power plants, cement plants) are also most at risk for increased levels of co-pollutants (such as VOCs, CO, NO_x, SO_x, PM_{2.5}), when that source purchases emissions credits rather than reduces its emissions. The cumulative impacts of these emissions will have deep health ramifications for those who have the fewest resources to ameliorate them.

There is also significant concern about how to quantify credits, and there is even greater concern regarding the allocation of revenue generated through this trading scheme. Finally, the California EPA has said that a cap-and-trade system will increase GHGs by 4 percent over the State's carbon emissions cap, because it will allow the heaviest polluters to continue polluting, while others attempt to offset their emissions. Ultimately, cap and trade should not be thought of as an inevitability if it is a dysfunctional, costly, and ineffective compromise.

THE ENVIRONMENT AND THE UNITED STATES SUPREME COURT: FRIENDS OR FOES?

MODERATOR: RICHARD M. FRANK, SCHOOL OF LAW, UNIVERSITY OF CALIFORNIA, BERKELEY

PANELISTS: ANN E. CARLSON, UCLA SCHOOL OF LAW, LOS ANGELES; RICHARD J. LAZARUS, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.

The 2008 Supreme Court term was generally considered to be a blow to environmental advocacy. Many of the cases called up on review were not particularly *cert*-worthy based on traditional metrics: they were not representations of circuit splits, ambiguous statutory language, or problematic public policies. Instead, most of the petitions for *certiorari* were filed by experienced members of the private sector Supreme Court bar. In some cases, the United States lost at the appellate level and filed oppositions to corporate petitions for *cert*, but lost again. Perhaps most surprisingly, Justice Breyer voted in the majority on every case (except one, regarding agency deference) that gutted environmental protection.

There is reason to believe that the additional restrictions created in this term will increase the barriers to environmentalists' ability to bring suit. For example:

Procedural Limitations:

The Supreme Court held the preliminary injunction standard to require a higher threshold for showing likelihood of irreparable injury, rejecting the Ninth Circuit's use of a "possibility of irreparable harm" standard in cases where the court finds a strong likelihood of success on the merits.²⁵

The Court also retained a strict interpretation of the requirements for standing, namely injury in fact that is "concrete and particularized" and "actual and imminent."²⁶ Even in the case of an alleged deprivation of a procedural right, the holding requires that litigators document these kinds of "particularized in fact" injuries in relation to the defendant's conduct.²⁷ The Court's holding has perverse implications for settlement, in that it may deter the plaintiff from accepting settlement, because this removes the "in fact" harm, even if the question on review is one of law.²⁸

Agency Deference and the Clean Water Act:

The Court also chipped away at the Clean Water Act's (CWA) protections against effluent pollution. In *Entergy Corp. v. Riverkeeper, Inc. (Riverkeeper II)*, the Court interpreted the CWA to allow the EPA to conduct a cost-benefit analysis when promulgating a rule or evaluating pollution license applications for thermal discharge from cooling water processes.²⁹ Thus far, it is limited

25. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374–75 (2008).

26. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149–50 (2009).

27. *Id.* at 1149.

28. *See id.*

29. *Entergy Corp. v. Riverkeeper, Inc. (Riverkeeper II)*, 129 S. Ct. 1498, 1506 (2009).

only to CWA § 316(b).³⁰ This interpretation is a marked departure from the past thirty years of environmental policy, which emphasized other statutory considerations (best available technology, performance standards, local control, impact on local ecology and livelihood) and did not consider costs.³¹

The Court also expanded agency deference to include policies that are at best problematic and at worst incompatible with the Clean Water Act. In *Coeur Alaska v. Southeast Alaska Conservation Council*, a gold mining company proposed filling a low sea lake with slurry (rock and water waste); alternatively, the owner proposed land disposal (also imperfect since this would have resulted in a pile three times the size of the Pentagon).³² The EPA allowed the mining operation to effectively convert the lake into an unlined slurry pit, which has irreversibly destroyed all wildlife in that lake.³³

SUPERSTRICT SUPERFUND AND THE SUPREMES: THE IMPACT OF BURLINGTON NORTHERN

MODERATOR: MICHAEL B. HINGERTY, ENVIRONMENTAL PROTECTION AGENCY, SAN FRANCISCO

PANELISTS: DAVID T. BUENTE, JR., SIDLEY AND AUSTIN, WASHINGTON, D.C.; BRUCE S. GELBER, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.; DAVID J. JUNG, HASTINGS COLLEGE OF THE LAW, SAN FRANCISCO

Joint and several liability may not sound as exciting as the public trust doctrine or the Endangered Species Act's role in combating global warming; however, for the expensive-to-clean toxic sites across the country, it's an issue of tremendous importance.

Because joint and several liability places the risk of any defendant's insolvency on the other defendant(s) rather than the plaintiff, it could allow the United States to recover the entire cost of clean-up by demonstrating that one deep-pocketed corporation contributed to the damage.

In *Burlington Northern & Santa Fe Railway*,³⁴ the Ninth Circuit held Shell Oil and Burlington Northern jointly and severally liable—Shell for arranging chemical storage and Burlington for owning the land where chemicals were stored.³⁵ The decision was later reversed by the Supreme Court, which found that the district court's apportionment of liability based on comparative negligence was reasonable, and that the government would have to pay for Brown & Bryant's (the property owners) share of damages—since Brown & Bryant's was insolvent and no longer in operation.³⁶

Burlington Northern was significant because it used a tort law overlay of comparative negligence to establish the amount that the corporate defendant

30. 33 U.S.C. § 1326(b) (2006).

31. See *Riverkeeper II*, 129 S. Ct. at 1518 (Stevens, J., dissenting).

32. *Coeur Alaska v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2465 (2009).

33. See *id.* at 2465.

34. *United States v. Burlington N. & Santa Fe Ry.*, 520 F.3d 918 (9th Cir. 2008), *rev'd*, 129 S. Ct. 1870 (2009).

35. *Id.* at 930.

36. *Burlington N. & Santa Fe Ry. v. United States*, 129 S. Ct. 1870, 1884 (2009).

should pay.³⁷ The Supreme Court also clarified the meaning of “arranger,” holding that Shell was not an arranger because it did not enter into a transaction for the sole purpose of discarding a used hazardous substance. Instead, Shell had sold a new and useful product that Brown & Bryant later disposed of in a way that led to contamination.³⁸

The panel consisted of a dynamic mix of speakers, including a torts professor with excellent insight into how joint and several liability operates and two attorneys who worked on the case, one private and one from the Department of Justice.

The Department of Justice attorney was (correctly, in my opinion) downplaying *Burlington*’s applicability, given its unique facts and procedural history, and because of its unfavorable outcome to the United States. The private attorney conceded that the impacts of *Burlington* would probably be felt more in settlement negotiations rather than litigation. One particularly insightful audience member asked what place a tort law overlay had in the application of a statutory scheme that is rooted in a strict liability theory rather than a negligence theory. As an additional bonus, what I learned in my first-year torts class felt like it might be good for something besides cracking cheesy negligence jokes with my law school friends.

37. *Id.* at 1881–82.

38. *Id.* at 1878–79.