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ARTICLES

- Justice Kennedy and Ecosystem Services: A Functional Approach to
Clean Water Act Jurisdiction after *Rapanos* ###
Robin Kundis Craig

The U.S. Supreme Court's most recent -- and fractured -- decision regarding Clean Water Act jurisdiction, *Rapanos v. United States*, has been greeted with disappointment, puzzlement, and even anger. However, now that Justice Kennedy's "significant nexus" test has emerged as the dominant test for which waters qualify as "waters of the United States," the Court's limitation of Clean Water Act jurisdiction may have a silver lining. Specifically, Justice Kennedy's test forces the EPA, the Army Corps, and the courts to articulate how various waters are connected and what they are doing ecologically and for humans. As such, the test highlights the functions and ecosystem services that non-navigable-in-fact waters provide, underscoring their ecological and economic value to the nation.

- Catch Me If You Can – The Misapplication of the Federal Statute of
Limitations to CAA PSD Permit Program Violations ###
Ivan Lieben

The federal Clean Air Act (CAA) seeks to maintain air quality in areas already meeting tough air quality standards through the Prevention of Significant Deterioration (PSD) permit program. New or modified major stationary sources subject to PSD who fail to obtain a permit or install stringent emission controls are subject to enforcement. Courts—including the only two circuit courts to rule on the issue—are sharply divided as to whether violations of the PSD program are one-time events or are continuing in nature for purposes of the five-year federal statute of limitations. The outcome of this judicial debate contains great import to the administration of the PSD program because the application of a one-time violation theory would result in sources escaping enforcement if they can evade detection for long enough, thus undercutting the important deterrence goals created by the enforcement provisions of the CAA. This article argues that those courts finding PSD violations to be continuous for statute of limitations purposes are correct based upon the legislative history and the explicit provisions of the PSD program, as well as the broad remedial nature of the CAA.

The Shifting Sands of Property Rights, Federal Railroad Grants, and Economic History: <i>Hash v. United States</i> and the Threat to Rail-Trail Conversions.....	###
<i>Danaya C. Wright</i>	

This article analyzes a federal circuit case from 2005 which spawned disturbing precedents in the area of federal transportation and railbanking policy. The decision renders null a number of federal statutes enacted to dispose of abandoned federally-granted railroad corridors and disrupts the important federal policy of converting abandoned rail corridors to recreational trails. By providing the legal foundation for getting the courts back on track, this Article explores the underlying policies behind federal efforts to preserve railroad corridors and promote interim trail use.

Ossification’s Demise? An Empirical Analysis of EPA Rulemaking From 2001–2005.....	###
<i>Stephen M. Johnson</i>	

For more than a decade, academics have suggested agencies are increasingly avoiding notice and comment rulemaking because the process has become “ossified” by procedures imposed by Congress, courts, and the Executive Branch, and because the rules ultimately issued by agencies are frequently challenged. This article reviews the rules the Environmental Protection Agency issued between 2001 and 2005 to determine the validity of those criticisms.

BOOK REVIEW

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<i>Nathaniel Suchy</i>	

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What a Long, Strange Trip It’s Been: Broader Arranger Liability in the Ninth Circuit and Rethinking the Useful Product Doctrine	###
<i>Tommy Tucker Henson II</i>	

The Ninth Circuit recently refined its conception of “arranger liability” under CERCLA to include transactions that contemplate disposal as a part of the transaction, and this “broader” arranger liability is constrained by the “useful products doctrine.” This chapter examines the court’s current analysis and critiques the application of the analysis to the sale of secondary materials, i.e. by-products. The chapter then argues that the court made a wrong turn in earlier cases and proposes a new analysis focusing on the disposal transaction rather than the materials subject to disposal.

Wielding a Finely Crafted Legal Scalpel: Why Courts Did Not Cause the Decline of the Pacific Northwest Timber Industry	###
<i>Carey Catherine Whitehead</i>	

Undoubtedly, judicial decisions to protect forests and the environment sometimes result in economic consequences for individuals. But do these impacts indicate that courts have overstepped the bounds of judicial review? Did court-issued injunctions cause a decline in the timber industry? This comment explores that question as presented in a July 2007 Ninth Circuit decision—*Lands Council v. McNair*. In January 2008, the Ninth Circuit agreed to rehear the case en banc. In June 2008, after the author submitted this article, the Ninth Circuit issued its en banc decision, reversing the three-judge panel. Still, the initial 2007 opinion—particularly Judge Smith’s special concurrence and Judge Ferguson’s concurring opinion written in response—holds enduring significance in the broader, ongoing discussion of the judiciary’s role in reviewing agency decision making.

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