recordkeeping problems and the restriction of any activities on the entire parcel that may impact the formation of a wetland. The Court, however, suggested implicitly that the acreage was to remain a set figure and not be subject to fluctuation. *Id.* at n.8.

In line with the decision in *North Dakota*, the Johansen panel ruled that the federal wetland easements were limited to the acreage provided in the easement summaries. 93 F.3d at 460. In addition the court rejected the government's reliance on *United States v. Vesterso*, in which the same circuit had rejected the concept of limiting the federal wetland easements to the summary acreage. In *Vesterso*, a North Dakota county water board undertook and completed two drainage projects on properties subject to federal wetland easements without consulting FWS. The Eight Circuit upheld their convictions under 16 U.S.C. § 668dd and wrote, "it is sufficient for the United States to prove beyond a reasonable doubt that identifiable wetlands were damaged and that those wetlands were within parcels subject to federal easements." *Id.*, citing *Vesterso* at 1242. The U.S. attorneys in Johansen interpreted this language to mean that "the drainage of any wetlands on a burdened parcel violates § 668dd." The court maintained that the government had taken its language out of context and, when read in context, the language the government thought supported its argument, in effect, merely outlined what the government was expected to prove in its prosecution of wetlands destruction cases. Furthermore, the court noted that Vesterso actually bolstered the defendants' argument wherein it states, "landowners are not without recourse if the easements cause flooding, for example, which results from nonnatural obstructions to water flow . . . [t]he prudent course in any event requires consultation with the [FWS] before undertaking drainage on parcels covered by easements." *Johansen* at 467, citing *Vesterso* at 125.

The Johansens followed the dictates of *Vesterso* and applied to FWS for relief and guidance. FWS refused to assist them or provide a reasonable alternative to the 16 percent loss of use of the land. This forced the Johansens to take action or risk their livelihood. And, in proceeding in that fashion, the Eighth Circuit flatly held that a criminal prosecution should not have followed.

The Eighth Circuit held that although the Johansens had undoubtedly violated the strict letter of the law by draining the wetland, it remained the government's burden to prove that the drained area was subject to the federal wetland easement in the first instance. Conversely, the court felt that the defendant should have been "permitted to introduce evidence proving that they did not drain the Summary Acreage." *Johansen* at 468. The decision is being hailed by private property advocates as a hallmark for future litigants who may be prosecuted for their attempts to "contain surplus water to the protected federal wetlands" and who seek the cooperation of the government but whose efforts are halted by the bureaucracy. The *Johansen* decision also should provide a useful precedent to stymie the efforts of government to broaden the scope of tools, such as wetlands easements, to increase regulation over private property. It will be interesting to observe how the government—and other jurisdictions—react to this decision.

# An Environmental Rights Amendment: Good Message, Bad Idea

*J.B. Ruhl*

After having lain dormant for almost twenty years, proposals for an amendment to the United States Constitution that would elevate environmental protection to the status of a fundamental right are on the rise. Since 1990, several such measures have been offered by groups as diverse as New Jersey fifth graders and well-funded environmental preservation organizations. Now, led by concerned members of thirty-seven state legislatures, a politically viable initiative is fully underway to have such a resolution introduced in Congress. *See* Richard L. Brodsky and Richard L. Russman, *A Constitutional Initiative*, DEFENDERS, Fall 1996, at 37. The proposed language of their environmental rights amendment declares:

> The natural resources of the nation are the heritage of present and future generations. The right of each person to clean and healthful air and water, and to the protection of other natural resources of the nation, shall not be infringed by any person.

These two sentences, faithful to the constitutional tradition of conciseness, express an elegant message of national commitment to environmental protection and to a future of environmental sustainability. But what a terrible idea it is to embody that message in the form of an amendment to the Constitution.

This is not the first push for an environmental protection amendment, but it is the most forceful and well organized to surface in decades. The first serious proposals for an environmental amendment emerged in the late 1960s, coinciding with the mood leading up to the first Earth Day and the enactment of the federal statutes that ushered in the era of command-and-control regulation of the environment. Typical of amendment resolutions introduced in Congress during that period was one purporting to protect "[t]he right of the people to clean air, pure water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment." H.R.J. Res. 1321, 90th Cong., 2d Sess. (1968). What little support existed for such measures quickly eroded as it became apparent that the legislative antipollution framework was in place and beginning to work effectively. By the late 1970s, environmental amendment proposals were rare at the federal level, though a number of states adopted constitutional mea-

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sures expressing aspirational goals of environmental quality. During the 1980s, proposals for a federal environmental amendment appeared almost exclusively in academic settings.

So what has changed? Why the resurgence of interest in an environmental amendment in the mid-1990s, after over twenty-five years of a buildup of the most extensive set of environmental legislation, regulations, and jurisprudence known in history? Two reasons seem predominant. First, according to the amendment's state legislator proponents, there is a "powerful band of extremist ideologues" who are waging a "concerted attack on environmental laws and programs." As evidence of that siege they point to the bills introduced and even passed by one chamber in the 104th Congress that would have scaled back many environmental protection measures in the name of allegedly competing interests such as property rights, risk-benefit analysis, and the economy. To be sure, the experience of the 104th Congress and many statehouses in 1996, and the reelection of the Republican majorities in both chambers of Congress and many of the statehouses, suggests that the debate over the limits of command-and-control environmental programs will continue. But since when has debate in Congress and state legislatures over social policy meant that a federal constitutional amendment is needed to resolve the matter? In any event, for purposes of analysis we can take at face value that the perception of impending war over environmental policy is offered as a principal reason for proposing an environmental rights amendment to the Constitution.

The second reason for a resurgence of interest in an environmental rights amendment is the emergence in the past decade of the "biodiversity crisis." In the 1970s, the concerns that led to proposals for an environmental protection amendment related principally to the highly visible and pernicious sources of pollution that were rampant throughout the nation. Burning rivers and smoggy skylines were easy to see. The legislative agenda of that day was focused on those obvious problems and was sufficiently effective to undercut the sense that a constitutional response was needed. But today, as told through the "new" ecology espoused in the discipline of conservation biology, we learn that there is a much more insidious and invisible environmental offense afoot in the form of an eroding diversity of biological resources. Notions of "ecosystem management" and "sustainable development" are sweeping through international, national, state, and local policy and reshaping the appearance of environmental law at all levels. Apparently, the proponents of the environmental rights amendment are not satisfied that this transformation is happening swiftly or deeply enough. Hence, while "clean and healthful air and water" remain a part of the environmental amendment proposal of today, the subtle attention their proposal gives to "future generations" and "other natural resources of the nation" cannot be mistaken as anything but an effort to elevate biodiversity preservation, ecosystem management, and sustainable development to the status of constitutional norms.

So what is wrong with that? Simply put, even accepting that a "war" on environmental protection is underway and that the "biodiversity crisis" is all it is portrayed to be, the environmental rights amendment makes no sense from the perspectives of constitutional doctrine and environmental policy. To believe as much does not require by any means that one be opposed to environmental protection as a general policy. Indeed, the charge of "antienvironmentalist" is often used to silence those who question the environmental protection dogma of the day, but in this case common sense must be allowed to prevail. Proponents of an environmental rights amendment cannot reasonably expect to be allowed to wrap themselves in a green flag and thereby immunize their amorphous amendment from sober, rational scrutiny. Their proposal fails under that light.

First let us consider whether the proposed environmental rights amendment fits our precepts of what makes sense for the Constitution. The nature of the proposal as aspirational and conferring citizen rights makes it suspect in this regard from the start. Such creatures are rare indeed in the Constitution. Most of the Constitution's amendments are devoted to fine-tuning the institutional rules of government's operation. After the Bill of Rights, which embodies rights that existed in well-accepted form at the time of its adoption, very few amendments attempt to take on the type of social engineering proposed in the environmental rights amendment. The era of Prohibition is an example of how dangerous such experiments can be. Thus we do not find amendments establishing, say, the right to well-paying employment, or to adequate health care, or to safe and durable housing. Of course, there is nothing in the Constitution to preclude such amendments. So why are they so infrequent? There are several reasons, and each operates forcefully in the case of the environmental rights amendment.

First, it is reasonable to expect that an aspirational, substantive rights amendment would be borne of broad and deep social consensus. On this score the environmental rights amendment proponents are guilty of some double-speak. On the one hand, they allege that the walls are about to fall in on environmental protection policy in Congress, statehouses, agencies, and the courts. If that is true, it suggests that a substantial debate over environmental priorities exists and that consensus over any environmental rights amendment would be elusive. Those kinds of debates have been left to unfold through democratic processes in the halls of legislatures, agencies, and the courts for centuries. That is where they belong. On the other hand, the amendment proponents attempt to deflect the significance of their alleged war on the environment by claiming that the battle is being masterminded by just a small group of extremist ideologues. It seems unlikely—unless this cell of conspirators consists of aliens with special mind-control powers—that a small band of misfits could bring about a full scale war on the environment, but if it really is the case then the vast majority of environmental protection supporters ought to be able to squash the saboteurs without having to go so far as amending the Constitution. After all, notwithstanding their war-like approach, in the end the alleged plotters left very small footprints in the 104th Congress in terms

of actual measures enacted. Hence, an environmental rights amendment is either inappropriate and inviable because there is no well-formed nucleus of social consensus on the subject, or it is unnecessary because the environment bashers can be easily tagged and routed.

Second, assuming there is a meaningful public consensus on the desired social policy, an amendment to the Constitution should be reserved for instances in which there is strong reason to believe that the institutions of government will fail to bring about the desired policy if left to their own constitutional authorities. In other words, only where it appears that legislatures, agencies, and the courts are either incapable or steadfastly unwilling to install the agreed upon social policy should we resort to a constitutional amendment. It would be preposterous to contend that the environmental rights amendment satisfies this condition. Over the past twenty-five years environmental law has evolved into a veritable gargantuan of legal complexity and power. The machinery and infrastructure associated with environmental protection pervade society at every level and in every quarter. The proponents of the amendment appear to hold the position that this system is failing unless every utterance of legislatures, agencies, and the courts on matters of environmental policy increases the power and stringency of that command-and-control regime. Measures to accommodate property rights (which actually do have a constitutional foundation), market incentives, regulatory simplification, devolution of power to the states, and cost-benefits analysis are portrayed as "failures" under that standard; whereas in reality most who advocate some sensitivity to those goals are simply seeking to keep environmental policy active and adaptive. Government ought to have the chance to use its democratic institutions to explore ways of balancing those interests with environmental protection before we rush to amend the Constitution.

Third, there ought to be some sense that a constitutional amendment can be equitably, consistently, and rationally enforced. The environmental rights amendment, which is far from self-executing, poses a nightmare in that respect. The scope of the right is entirely undefined; the forum for enforcement is left unspecified; and the standards of measurement are ambiguous. It is not hard, particularly in this age of aggressive rights enforcement, to envision a litigation *tsunami* emanating from the environmental rights amendment. What does it mean, for example, to say that "the right of each person to clean and healthful air . . . shall not be infringed upon by any person"? Most people are daily bombarded by such infringements by others. Will each person have the right to sue others who infringe upon an environmental right? Could one person sue another for smoking at a nearby restaurant table? If so, where will the amendment not reach, and if not, where is the line between the petty and the substantial? How clean is clean? How do future generations assert their claim today? What remedies are available against private and public entities? Addressing these questions is what makes environmental legislation so dense and complicated, both undesirable qualities for a constitutional amendment. But by failing to address them, the environmental rights amendment would fuel an environmental rights litigation free-for-all.

There may be additional criteria by which we can measure the merit of proposed constitutional amendments, but consensus, necessity, and enforceability certainly go to the heart of the matter. It would be one thing if the amendment purported only to provide a guiding theme for federal legislators, agencies, and courts when those institutions take action—a constitutional form of the National Environmental Policy Act, only with substantive teeth. But by expanding the scope of the amendment to include investing individual rights to environmental quality in all people, enforceable against all public and private transgressors, the environmental rights amendment loses all fit with constitutional integrity. Regardless of its message, therefore, and regardless of whether it might actually lead to increased environmental quality, the proposed environmental rights amendment is simply a bad idea.

But the analysis cannot stop there, for the amendment's proponents might be willing to press the point that the environmental benefits they allege will accrue to society make it worth jettisoning all constitutional sensibilities. The amendment fails on this score as well, however, as its proponents can make no guarantees about how it will influence policy. The amendment's sponsors know full well that the debate over environmental policy runs too deep and wide to permit them to write into the Constitution what they and their constituencies really want to say. Were they left with a free hand, they would be explicit about the expanded rights they want citizens to have against polluters, about the stronger protections they want the amendment to afford to species and ecosystems, and, most important to their cause, about the overriding effect they want the environmental rights amendment to have on the takings clause of the Fifth Amendment. Let's face it, everyone knows that is their agenda, but they know they will never get it in words of the Constitution. So instead they are left to proposing a relatively aspirational, amorphous, undefined environmental right, a right which, ironically, would have to be interpreted and enforced by the very same legislatures, agencies, and courts they allege are on the brink of destroying environmental protection as we know it. If those institutions really are as bent on scaling back environmental protection as the amendment sponsors say they are, there is little in the language of the amendment or the Constitution that would keep them from marginalizing its importance to the overall policy debate. Hence, it would be a stretch for anyone to contend that the proposed environmental rights amendment will assuredly save the environment from the rest of the government.

Indeed, there is a strong possibility that an environmental rights amendment could lead to a step backward for environmental protection. Legislatures, agencies, and courts might come to view the amendment as expressing a maximum in terms of protection and rights, and might become reluctant to go farther. Who is to say that the current mix of command-and-control

regulations, government enforcement, and citizen suit enforcement does not surpass what that maximum might become? We don't know how the amendment will be interpreted and implemented, and thus its sponsors cannot assure us that it will advance rather than stifle the progressive environmental policy it seeks.

Perhaps the environmental rights amendment is proposed as a symbolic gesture, or to up the ante in Congress, but its proponents appear serious about taking it all the way. The reality, however, is that the dialogue on the constitutional doctrine and environmental policy merits of an environmental rights amendment will most likely never be reached, because the amendment will die the death thousands of other proposed amendments have died soon after having been introduced in Congress. But if sufficient momentum were to coalesce behind the amendment to push it farther into congressional deliberations, the factors discussed above undoubtedly would be put on the table for debate, and cogent responses to the concerns raised will not come easily. Ultimately, the time and energy environmentalists would have to put into defending such a constitutional misfit would most likely be wasted, particularly given how much might be accomplished were those forces focused in the legislative, administrative, and judicial arenas. And the divisions the debate would cause would not be quickly forgotten. One has to wonder whether the proponents of an environmental rights amendment are really providing a service to their cause.

# How Green Is Green? Partial Ownership Interests under Superfund Laws

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> CERCLA gives no definition of "owner" and therefore does not tell us whether parties owning an interest that is much less than a fee—such as an easement—are to be deemed owners for purposes of CERCLA liability. Rather, 42 U.S.C. § 9601(20)(A) defines "owner or operator" as "any person owning or operating" a toxic waste facility, which is a bit like defining "green" as "green."
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> *Long Beach Unified School District v. Dorothy B. Godwin California Living Trust*, 32 F.3d 1364, 1368 (9th Cir. 1994).

How "green" does an entity or individual have to be to be deemed an "owner" under state and federal Superfund statutes? The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Oregon Superfund Statute, and the Washington Model Toxics Control Act (MTCA), each impose liability on owners of facilities where a release of a hazardous substance has occurred. Each statute defines "owner" differently, however. For example, the federal statute defines the phrase "owner or operator" to encompass "any person who owned, operated, or otherwise controlled activities at such facility. . . ." 42 U.S.C. § 9601(20)(A) (1995). The Oregon statute finds an "owner" to include "any person who owned, leased, operated, controlled or exercised significant control over the operation of a facility." OR. REV. STAT. § 465.200(12) (1995). Washington's adoption of the Model Toxics Control Act considers "[a]ny person with any ownership interest in the facility or who exercises any control" to be an owner. WASH. REV. CODE § 70.105D.020(6) (1994). These statutes, as well as those from other states, are patterned after CERCLA. As such, the state agencies and courts that interpret these statutes often look to CERCLA case law for guidance. As a result, the differences between state and federal law are compounded by a new wrinkle to the definitional scheme added by the Ninth Circuit in the CERCLA case of *Long Beach Unified School District v. Dorothy B. Godwin California Living Trust*. The full import of the statutory definitions when taken in the context of *Long Beach* is unclear. This article addresses some of the issues raised by *Long Beach*—specifically in the context of the Oregon and Washington Superfund statutes—and concludes that significant room for argument remains as to which partial ownership interests are sufficient to trigger Superfund liability. In addition, *Long Beach* may stand as an obstacle to both consistency between state and federal statutory schemes and to the effectuation of their remedial purpose.

The majority of CERCLA cases that address the subject hold that, although the terms "owner" and "operator" are defined as a single phrase, they represent two distinct classes of potentially liable parties. *See, e.g., United States v. Fleet Factors*, 901 F.2d 1550, 1554 n.3 (11th Cir. 1990). The court in *Long Beach* acknowledges that "a party may be liable as either an owner or as an operator (or both, of course)." *Long Beach*, 32 F.3d at 1367.

## *Partial Ownership Interests in a Superfund Context*

The statutory definitions of "owner" under the Oregon Superfund statute and Washington's MTCA contemplate, but do not expressly state, that partial ownership interests are sufficient to impose liability. For example, under the Oregon Superfund statute, a person who leases a facility is by definition an owner, and under the MTCA the holder of any ownership interest in a facility is deemed an owner. Although the CERCLA definition of an owner is silent regarding partial ownership interests, courts interpreting CERCLA have found partial ownership interests, such as leaseholds, sufficient to impose owner status. *See, e.g., Burlington Northern Railroad Co. v. Woods Industries, Inc.*, 815 F. Supp. 1384, 1391 (E.D. Wash. 1993). CERCLA courts rationalize that a possessory interest in a facility, such as a leasehold, is sufficient to

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