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Capping Carbon 1
David M. Driesen

This Article discusses cap setting for a cap-and-trade program, a key problem in pending legislation addressing global climate disruption. While the literature often suggests that trading automatically solves the problems associated with Best Available Technology (BAT) regulation, regulators often use a BAT approach to setting caps for trading programs. This Article examines neglected normative and practical choices between BAT, cost-benefit, and effects-based cap setting in the trading context. It also shows that cap setting exercises can get bogged down in the same sort of lengthy administrative and judicial processes that delayed and weakened BAT regulation, and discusses ways of avoiding these problems in climate legislation.

Climate Exceptionalism 53
John Copeland Nagle

The Supreme Court appears to have rejected "climate exceptionalism" in *Massacusetts v. EPA*, but many people continue to emphasize the differences between climate change and traditional air pollution and question whether the entire pollution paradigm is appropriate for responding to climate change. This Article identifies the ways in which climate change is similar to other air pollution problems and the ways in which it is different. The broader understanding of pollution as a phenomenon that exists outside of environmental law shows why

multiple responses to the emission of greenhouse gases are preferable to mitigation, adaptation, tolerance, or any other single, purported solution to the problem of climate change.

Summers v. Earth Island Institute Rejects Probabilistic Standing, but a "Realistic Threat" of Harm Is a Better Standing Test 89
Bradford Mank

In *Summers v. Earth Island Institute*, the Supreme Court recently rejected the proposed test for organizational standing in Justice Breyer's dissenting opinion based upon the statistical probability that some of an organization's members will likely be harmed in the near future by a defendant's allegedly illegal actions. Implicitly, however, the Court recognized some form of probabilistic standing in *Friends of the Earth v. Laidlaw*, which found standing where plaintiffs avoid recreational activities because of "reasonable concerns" about future health injuries from pollution. This Article applies the *Summers* and *Laidlaw* frameworks to the facts in *Natural Resources Defense Council v. EPA* (*NRDC II*), where the D.C. Circuit found standing because the government's exemption from regulation of certain uses of methyl bromide, an ozone-destroying chemical, would causes two to four lifetime skin cancer cases among the NRDC's members. In light of *NRDC II*, the Court should abandon both the *Summers* and *Laidlaw* approaches to standing and instead adopt Justice Breyer's proposed "realistic threat" test to achieve more equitable and uniform standing determinations.

REPORT

Exempt Well Issues in the West 141
Nathan Bracken, Western States Water Council

Exempt or domestic wells provide water to large portions of the western population. However, these wells are often not subject to permits or adjudication and have the potential to create significant regulatory and administrative challenges. This Report explores those challenges and describes the exemptions in various states throughout the West, while also proposing possible ways to mitigate the adverse impacts associated with exempt water use.

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Flipping *Daubert*: Putting Climate Change Defendants in the Hot Seat 255
Ryan Hackney

Can climate change plaintiffs use *Daubert* challenges to exclude defense expert testimony? Although *Daubert* challenges have traditionally favored defendants, the strong scientific evidence for climate change may allow plaintiffs to exclude or restrict defense testimony. This Note considers actual claims put forth by climate change skeptics to see how *Daubert* challenges can work in four ways: to challenge the witness, to challenge reliability, to challenge relevance, and to challenge conclusions. The paper suggests that *Daubert* challenges in climate change litigation may provide a

blueprint for plaintiffs to use in other scientific contexts, and may help shape the national debate on climate change.

Rumors of *Conley*'s Demise Have Been Greatly Exaggerated: The Impact of *Bell Atlantic Corporation v. Twombly* on Pleading Standards in Environmental Litigation..... 295
Brook Detterman

This Note examines federal pleading standards in light of the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, and the impact on environmental practitioners. Because *Twombly* blurs substance and procedure, parsing the decision is difficult and some courts and commentators have interpreted *Twombly* as announcing a new "plausibility" pleading standard. This Note argues that *Twombly* did not create a new pleading standard, but instead modified substantive antitrust law and clarified the *Conley v. Gibson* decision. *Twombly* may have changed the Court's terminology, but pleading standards remain liberal and unitary for plaintiffs in federal court.

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