

# ENVIRONMENTAL LAW

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## THIRTIETH ANNIVERSARY EDITION ESSAYS

- Entrepreneurial Environmentalism: A New Approach for the New Millennium..... 1  
*Congressman Earl Blumenauer*

As the environmental movement enters the new millennium, it must confront an array of hurdles. Faced with political stalemate concerning environmental remedies and policy and shrinking public revenues and resources, Congressman Blumenauer suggests adoption of an entrepreneurial environmentalism strategy. Environmentalism in the coming millennium, according to Congressman Blumenauer, must provide comprehensive solutions, use "cheap and green" strategies, look to performance based regulations, and encourage economic incentives.

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- Coming of Age in the Environment..... 15  
*Honorable Richard D. Cudahy*

Judge Cudahy traces the history of the environmental movement in the United States and concludes with a peek into the future of environmental law. He questions the direction in which the United States is headed in terms of urban sprawl and also ponders the population dilemma.

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- The Past and Future of Environmental Law ..... 23  
*James L. Huffman*

From the perspective of a legal educator at the school that invented environmental law as a specialty, Dean Huffman presents his vision of the future of environmental law. Dean Huffman chronicles the rise of the economic marketplace alternatives to command and control mandates. With these two dominant approaches to environmental law in mind, Dean Huffman next examines the future of environmental law. While command and control directives will remain a central fixture of environmental law in the next century, Dean Huffman predicts their steady decline in favor of more efficient market controls.

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A Road Map for Environmental Law in the Twenty-First Century: Follow the Oregon Trail .....	35
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*Senator Ron Wyden & Joshua Sheinkman*

Senator Wyden and Joshua Sheinkman share the many strategies used by Oregon to promote smart growth and protect its valuable open spaces. The authors introduce a few examples undertaken on the national level that demonstrate how transportation and energy policies can work together to further environmental policies. They conclude that transportation and energy policies that promote smart growth and protect open spaces are the vehicles of development and preservation that should be used in the new millennium.

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“Who Do You Think You Are?": Tales from the Trenches of the Environmental Standing Battle.....	41
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*Peter Van Tuyn*

Mr. Van Tuyn identifies as a significant trend in environmental law the increasing tendency of federal judges to dismiss pro-environment lawsuits for lack of standing. The trend has been facilitated by United States Supreme Court Justice Antonin Scalia, who urged in a 1983 law review article a stricter application of the standing doctrine for environmental plaintiffs and who has applied this strict test in several Supreme Court cases. The private defense bar and Department of Justice have followed suit, raising standing as a defense in improbable circumstances without regard to the practical results of their position, including the greatly increased costs of litigating cases in the public interest.

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## ARTICLES

Essential Fish Habitat: Does Calling it Essential Make it So?.....	51
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*Kristen M. Fletcher & Sharonne E. O'Shea*

With the advent of Essential Fish Habitat (EFH) Amendments to fishery management plans nationwide, environmentalists, fishing communities, and developers have anticipated the onslaught of heavy regulation concerning what can and cannot be done in the nation's waters. This article examines EFH, providing the realities behind the provisions, and analyzes the provisions in light of decades of implementation of the Endangered Species Act, National Environmental Policy Act, and Fish and Wildlife Coordination Act.

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Pollutants Without Half-lives: The Role of Federal Environmental Laws in Controlling Ballast Water Discharges of Exotic Species .....	99
<i>Brent Foster</i>	

Despite the catastrophic effects on native ecosystems and billions of dollars in economic damage caused by exotic (or nonindigenous) species, discharges of ballast water containing exotic species from ships are virtually unregulated by the federal government. Surprisingly, the lack of federal regulation is not due to a lack of federal law to apply. Mr. Foster argues that several federal environmental statutes restrict unpermitted ballast water discharges, notwithstanding the lack of current enforcement efforts. He contends that if federal agencies are willing to enforce these statutes, ample opportunities for citizen enforcement exist.

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## COMMENTS

When Is a Trade Secret Not So Secret? The Deficiencies of 40 C.F.R. Part 2, Subpart B .....	143
<i>Christopher J. Lewis</i>	

Mr. Lewis examines the contrast between the public need for dissemination of information regarding environmental protection and industry's need to protect certain trade information as confidential. He discusses the deficiencies inherent in the environmental statutory reporting schemes for each interest group and argues that the regulatory framework should be realigned to mirror the protection scheme of the Emergency Planning and Community Right to Know Act. Mr. Lewis concludes that realignment will provide businesses with consistent protection and allow public dissemination of all information not entitled to trade secret protection.

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Prospective Purchaser Agreements: EPA's New Outlook on Landowner Liability.....	177
<i>Margi C. Lifsey</i>	

Prospective Purchaser Agreements (PPAs) are agreements in which the Environmental Protection Agency (EPA) provides a prospective purchaser of a brownfield a covenant not to sue in exchange for a substantial benefit. Ms. Lifsey takes a close look at EPA's prospective purchaser agreements, focusing on the benefits furnished by the prospective purchaser and the liability protections provided by the purchaser. The author concludes that EPA should continue to negotiate prospective purchaser agreements while

extending greater protection to prospective purchasers in certain circumstances.

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**CLEAR THE AIR**

A Millennial Update on Procedural Issues in Environmental Litigation <i>Carl Tobias</i>	227
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Professor Tobias updates readers on rules 8 and 11 of the Federal Rules of Civil Procedure, observing that changes are presenting relatively few problems to environmental plaintiffs. He discusses the potential impact of proposed amendments to the Federal Rules of Civil Procedure and warns environmental litigants that local procedures adopted pursuant to the Civil Justice Reform Act of 1990 may or may not still apply. Professor Tobias ultimately suggests that environmental plaintiffs will want to keep a watchful eye on the progression of the proposed changes and be wary of their potential detrimental effects.

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