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Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation into the Americas 501
Greg Block

Professor Block evaluates the lessons learned from NAFTA and its environmental side agreement and suggests ways to apply these lessons to the Free Trade Area of the Americas. The Article concludes that unless the NAFTA model for protecting environmental values in the context of free trade is strengthened and provided with adequate financial resources, efforts to protect human health and the environment and to promote the enforcement of environmental law in Latin America will likely fail.

Just Another Goldfish Down the Toilet? The Fate of Pacific Salmon After *Alsea Valley* and the *de Facto* Rescission of the 4(d) Rule 547
Brian J. Perron

Mr. Perron discusses the issues facing threatened salmon in the Pacific Northwest, the implications of the National Marine Fisheries Service's section 4(d) rule extending take protection to those salmon species listed as threatened, and the United States District Court for the District of Oregon's decision in *Alsea Valley Alliance v. Evans* ordering the delisting of Oregon Coast coho salmon. The Article concludes that the section 4(d) rule is the best hope to recover Pacific salmon, and that the *Alsea Valley Alliance* decision, if upheld, could be an unrecoverable setback in the in the efforts to save the salmon.

Priority, Probability, and Proximate Cause: Lessons from Tort Law

About Imposing ESA Responsibility for Wildlife Harm on Water Users and Other Joint Habitat Modifiers 595
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In *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, the Supreme Court held that proving unlawful take under section 9 of the Endangered Species Act requires proof that any challenged habitat modifying activity, such as diverting water, is the proximate cause of harm to an endangered or threatened animal. This Article applies the rich, but largely ignored, body of tort law to this proximate cause inquiry and concludes that the current approach to causation of wildlife harm fails to account properly for background risks, multiple habitat modifiers, and, in prior appropriation settings, for priority. In addition, where it can be determined that harm is the proximate result of the actions of multiple habitat modifiers, the agencies need to reconsider their approach of effectively imposing joint and several responsibility without any right of contribution and instead move toward the equitable apportionment approaches that have come to dominate a reforming tort law.

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Association to Protect Hammersley, Eld, and Totten Inlets v. Taylor Resources: Taking the "Mussel" Out of the Clean Water Act 787
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Ms. Spencer-Scheurich dissects *Association to Protect Hammersley, Eld, and Totten Inlets v. Taylor Resources*, which held that mussel production facilities do not need National Pollution Discharge Elimination System permits. This Chapter suggests that the court's definition of "pollutant" was not broad enough and that the court's decision was contrary to Supreme Court and Ninth Circuit case law and demonstrates that either the Ninth Circuit misinterpreted the CAAPF regulation or the regulation itself can be challenged under the Administrative Procedure Act. The Chapter concludes that, while the case may seem simple, it conflicts with existing case law and should not be followed.

Pronsolino v. Nastri: Are TMDLs for Nonpoint Sources the Key to Controlling the "Unregulated" Half of Water Pollution? 807
Erin Tobin

Ms. Tobin examines *Pronsolino v. Nastri*, which affirmed that the Environmental Protection Agency (EPA) has the authority to develop Total Maximum Daily Loads (TMDLs) for rivers polluted solely by nonpoint source pollution. The Chapter criticizes the court for stopping short of holding that the Clean Water Act *requires* EPA to do so. The Chapter also demonstrates that environmental plaintiffs should be able to use *Pronsolino* to force EPA to list and set TMDLs for nonpoint source polluted waters when states and the agency fail to do so, and predicts that if EPA rescinds nonpoint source TMDLs in revised regulations, the regulations should fail to survive judicial scrutiny. The Chapter concludes that with congressional and EPA attention, the TMDL provision should provide a workable framework for nonpoint source pollution control.

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