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Foreword

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Enforcement has been called "the dark side of environmental law." Perhaps this is because this constantly changing and expanding area raises so many new, unexplored and controversial legal issues. Environmental law is often characterized by hastily and inadequately drawn legislation placing vast discretionary authority in regulatory agencies. The result is a myriad of legal questions only now being addressed by the federal courts. Rising public concern makes environmental litigation and enforcement a relevant and timely subject of our Symposium in this last issue of Volume 19 of the *Loyola of Los Angeles Law Review.*

Our Symposium draws together Articles from current and former regulatory officials as well as from practitioners and scholars. In our first Article, Steven D. Ramsey, former Chief of the Environmental Enforcement Section of the United States Justice Department, and Robert I. McMurry, an environmental and land use specialist at the law firm of Sidley & Austin, examine the numerous criminal sanctions presently available to enforce environmental laws. After reading this Article, corporate executives and their counsel may become more concerned with the risk of their violating environmental laws.

Not only the guilty but the innocent may be subject to liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), according to the authors of the second Article. Joel S. Moskowitz, former head of the California Toxic Substance Control Program, and Scott R. Hoyt, an environmental litigator who, along with Moskowitz, is associated with the law firm of Gibson, Dunn & Crutcher, persuasively argue that courts have misconstrued the "hazy language" of CERCLA and that innocent owners of property should not be held liable for hazardous waste cleanup under the Act.

Two top officials of the Environmental Protection Agency (EPA) authored the third Article. Courtney M. Price, formerly Assistant Administrator for Environment and Compliance Monitoring, who recently left the EPA to practice with the law firm of Rifkin, Radler & Bayh, and Allen J. Danzig, currently the Special Assistant to the Assistant Administrator for Environment and Compliance Monitoring, present an interesting and informative look at EPA's efforts to encourage environmental auditing to maximize compliance by the regulated community.

Our fourth Article presents some important factors for Superfund defendants to consider in multi-party lawsuits. In "Strategic Considera-

tions in Defending and Settling a Superfund Case," Michael L. Hickok and Joyce A. Padleschat offer their thoughts on the advantages of impleader, bifurcation and implementing remedial measures. Included as an Appendix to that Article is EPA's Interim CERCLA Settlement Policy.

Should polluters be able to pass on to their insurance companies the liability for environmental harm, despite pollution exclusion clauses in their policies? Authors Erwin E. Adler and Steven A. Broiles, both partners in the law firm of Richards, Watson, Dreyfuss & Gershon, examine the social policy underlying pollution exclusion clauses. The authors contend that courts' failure to recognize this social policy has resulted in inconsistent judical interpretations of the scope of such pollution exclusion clauses. They assert that eliminating insurance coverage for pollution will encourage business executives to adopt preventative measures, resulting in a cleaner environment.

Our sixth Article is a comprehensive survey of state environmental statutes imposing civil penalties. Professor Daniel P. Selmi of Loyola Law School, Los Angeles, reviews the varied characteristics and approaches of state statutes and draws several conclusions. First, state statutes should provide more direction to enforcement agencies and should require explanations of agency policies and settlement considerations. Second, penalty criteria in state statutes are vague; agencies should adopt interpretive policies to flesh out the penalty criteria. Finally, the author concludes that agency assessment, rather than penalty assessment through courts, is likely to improve the penalty process.

Our seventh Article is entitled "When Citizens Sue: Some Federalism Issues." Authors Michael R. Barr, of the law firm of Pillsbury, Madison & Sutro, and Jennifer L. Hernandez, of the law firm of Graham & James, suggest that California legislators consider possible conflicts with federal suit provisions in enacting similar provisions for California.

Our last Symposium Article contains some personal reflections from Steven J. Castleman, Assistant District Attorney and head of the Environmental Enforcement and Compliance Program for the City and County of San Francisco. The author ponders his role as the City's chief environmental enforcement officer who has also become aware of numerous City violations of the environmental laws he is charged with enforcing. The author identifies problems common to both enforcement and compliance. Several thoughtful suggestions are offered to put local government in a position to adequately enforce the law—as well as comply with it.

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In addition to the Symposium, we are pleased to present four student written pieces—one Note and three Comments—in this last issue of Volume 19.

The Note analyzes the legal and practical viability of future "must carry" rules for the cable television industry following the District of Columbia Circuit Court of Appeals' recent decision in *Quincy Cable TV, Inc. v. Federal Communications Commission*. Since 1965, the FCC had required all cable television systems to carry the signals of all local broadcast television stations located within the general area served by the cable system. However, the *Quincy* court held that this FCC requirement as written—collectively called the "must carry" rules—violated the first amendment. The heart of the Note is the author's use of the *Quincy* case to analyze three proposals for new must carry rules submitted to the FCC by broadcast industry interest groups. The author concludes that *Quincy* constitutionally forbids the must carry requirement proposed by the commercial broadcast industry, whereas the must carry rules proposed by public broadcasters do meet the *Quincy* standard.

The first Comment delves into the developing theories of criminal accountability of both corporations *and* corporate agents after the recent Illinois trial court case of *People v. Film Recovery Systems, Inc.* The Comment describes how the *Film Recovery* case—now on appeal—not only fits into the trend of finding corporations criminally liable for criminal acts, but also takes the revolutionary step of finding corporate officers and agents *personally* liable for those acts. The author of the Comment then suggests two proposals to aid the *Film Recovery* appellate court and other courts imposing such liability. First, the author sets out a standard to determine when corporations and individuals that cause injuries should be held criminally liable. Next, the author establishes a method of assessing penalties for criminal corporate conduct that meets the goal of deterrence. It is especially appropriate that this Comment appears in this issue: the developing common law theories of corporate criminal liability supplement the potential individual liability for corporate environmental crimes discussed in the Symposium.

The author of the next Comment explores the practical, moral and constitutional problems of an extremely newsworthy issue: mandatory employee urinalysis drug testing by private employers. Societal concern with drug abuse has sparked employers ranging from professional sports franchises to Fortune 500 companies to institute drug testing programs. This author first describes the suspect reliability of urinalysis and then explains how these tests are wholly inconsistent with the precepts of the United States Supreme Court search and seizure case of *Schmerber v.*

California. The author then applies a *Schmerber* analysis to private California employers through California's expressed constitutional right to privacy.

In the final Comment, the last piece in Volume 19, the author explains how California's acceptance of the peculiar risk doctrine effectively exempts all construction workers in this state from workers' compensation recovery limits. This doctrine makes all landowners liable for injuries caused by "inherently" dangerous activity on their property. The author's examination of California case law reveals that: (1) almost every construction activity has been classified as inherently dangerous; (2) this state takes the minority position that the peculiar risk doctrine applies to employees of third parties; and (3) the landowner's duty to prevent "inherent dangers" is nondelegable. As a result, the nature of the construction industry—where most employees work for independent contractors hired by landowners—almost always enables construction workers to circumvent workers' compensation limits and sue landowners to whatever extent necessary to fully compensate themselves. The author concludes that California's use of the peculiar risk doctrine is appropriate in this highly dangerous industry.

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This last issue of Volume 19 is the culmination of a record-setting year for the *Law Review*. Truly, these 1534 pages are the result of a group effort. In addition to the hard work of our staff and editors, the Loyola faculty support office, graphics department and public relations department have contributed mightily to this effort. We feel it is particularly appropriate that this issue is dedicated to Lloyd Tevis, a beloved and respected member of the Loyola Law School faculty who retired at the end of this school year.

Finally, we present the last part of our volume-long Salute to the new architecture of Loyola Law School. As in the first three issues of Volume 19, we have included a photograph of another perspective of the new campus, accompanied by a description by architect Frank O. Gehry.

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