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# Foreword: A Burning Issue

*Claudia Polsky\**

Writing a foreword for Ecology Law Quarterly (ELQ) is always an honor. Writing one for an issue devoted to a recent Wildfire Symposium is also a shot at intergenerational atonement.

My late great-uncle Erwin took much pride in his 1940s work on an Ad Council campaign that featured a button-nosed bear in blue jeans and ranger hat. The endearing ursine memorably urged Americans to *Prevent Forest Fires*. A few decades later, however, patriotic duties counsel the opposite: *ignite forest fires*, manage forest fires, and suppress natural ignitions at our peril.

To be fair to Uncle Erwin, the fault lay not with him or his graphics team. Smokey Bear was simply the furry mouthpiece for federal land managers' multidecade policy of all-out forest fire suppression. This extinguishment of essential natural processes, born of ecological ignorance and colonial disregard for Indigenous landscape knowledge, created today's massive forest fuel loads. These in turn produce the terrifying conflagrations now frequent in the arid West.

Forest megafires, in their turn, create opaque white-gray skies above distant cities. They deposit ash on vehicles, lawns, and clotheslines. And they send smoke into topographically unlucky air basins continent-wide. In so doing, these immolations demonstrate the core ecological principle that everything (and by extension, everywhere) is connected to everything and everywhere else.<sup>1</sup>

Meanwhile, rising global temperatures and increasing drought from climate change have desiccated soils, leaf litter, and trees themselves, rendering forests highly combustible. Exurban sprawl, including vacation home development, has at the same time pushed housing into the wildland margin. This adjacency increases wildfire risk to human life and property. And if that litany were insufficient: a pandemic virus characterized by respiratory distress has made smoke inhalation more health-hazardous than ever. Further, because the

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1. Although the articles in this volume center California and national concern about wildfire, climate change has globalized the fire crisis. Emblematic were the hundreds of simultaneous blazes in Siberia in mid-2021 that caused smoke to reach the North Pole for the first time in recorded history. Sharon Pruitt-Young, *For the 1st Time in Recorded History, Smoke from Wildfires Reaches the North Pole*, NAT'L PUB. RADIO (Aug. 10, 2021), <https://www.npr.org/2021/08/10/1026423546/first-time-ever-smoke-wildfires-siberia-russia-north-pole>.

chemistry of modern wildfire smoke reflects inputs from homes and melted consumer goods, smoke is more toxic than ever.

Is there any escape from the consequences of man's near-Promethean arrogance with fire?

In spring 2021, ELQ and the Center for Law, Energy, and the Environment at UC Berkeley School of Law centered this question in a half-day virtual symposium. The event brought academics, students, activists, and regulators into conversation about five burning issues: Federal Public Lands Management;<sup>2</sup> Essential Workers;<sup>3</sup> Air Pollution;<sup>4</sup> Homeowner's Insurance;<sup>5</sup> and Prescribed Burns.<sup>6</sup>

This journal issue reflects the academy's symposium contributions. Eric Biber and Moira O'Neill describe how regulatory permissiveness in land use approvals places homeowners in harm's way. William Boyd presents a provocative financial remedy for federal forest mismanagement. Joan Flocks and Maria Espinoza describe those most vulnerable to wildfire health and safety risks yet missing from conversations about government and private property: landless agricultural guestworkers, who live and labor on fire-prone land under inhumane conditions.

In *Building to Burn? Permitting Exurban Housing Development in High Fire Hazard Zones*, Biber and O'Neill examine land use in California's "WUI" (Wildfire-Urban Interface), a contested landscape margin where human structures are built in settings of extreme fire risk.<sup>7</sup> As developers propose and regulators approve the domestication of the WUI, these agents of expansion deprive fire of the room it needs to roam. Fire's ecological impetus to spread is as basic as a sand dune's need to migrate. And the consequences of its denial are

2. This panel featured William Boyd, Professor of Law, UCLA School of Law; Dr. Scott Stephens, Wildland Fire Scientist, Stephens Lab Research; Karen Bradshaw, Professor of Law, Sandra Day O'Connor School of Law; and Ted McArthur, District Ranger, U.S. Forest Service, in conversation with Dan Farber, Professor, UC Berkeley School of Law.

3. This panel featured Fernando Torres, Community Worker, California Rural Legal Assistance; Estella Cisneros, Legal Director, California Rural Legal Assistance; Dr. Michael Wilson, Research and Standards, Cal/OSHA; and Joan D. Flocks, Associate in Law, University of Florida Law, in conversation with Claudia Polsky, Clinical Professor, UC Berkeley School of Law.

4. This panel featured Michael Wara, Research Fellow, Stanford Law; Rosana Aguilera, Postdoctoral Scholar, UC San Diego Scripps Institution of Oceanography; and Sara A. Clark, Partner, Shute, Mihaly & Weinberger, in conversation with Ted Lamm, Senior Research Fellow, UC Berkeley Center for Law, Energy and the Environment.

5. This panel featured Robert Herrell, Executive Director, Consumer Federation of California; Rex Frazier, President, Personal Insurance Federation of California; and Carolyn Kousky, Executive Director, Wharton Risk Center, in conversation with Dave Jones, Climate Risk Initiative, UC Berkeley Center for Law, Energy and the Environment.

6. This panel featured Patrick Gonzalez, Principal Climate Change Scientist, U.S. National Park Service; Brian Rice, President, California Professional Firefighters; Margo Robbins, President, Cultural Fire Management Council; and Jason Branz, Air Pollution Specialist, California Air Resources Board, in conversation with Eric Biber, Professor, UC Berkeley School of Law.

7. Eric Biber & Moira O'Neill, *Building to Burn? Permitting Exurban Housing Development in High Fire Hazard Zones*, 48 *ECOLOGY L.Q.* 943, 943–84 (2021).

severe: the loss of over 2,000 homes in the Tubbs Fire (Santa Rosa, 2017), for example, and 85 lives and \$18 billion in property in the Camp Fire (Paradise, 2018).

Biber and O’Neill write that California’s regulation of land use, which is primarily local, has done little “to deter development in these high fire hazard areas.”<sup>8</sup> They note that land use permitting agencies have financial incentives to maximize development irrespective of its location because of its property tax benefits. Further, the state law requiring environmental impact review of projects that may substantially impact the environment—the California Environmental Quality Act (CEQA)—has been held *not* to require analysis of how the environment may reciprocally impact building projects, such as by subjecting them to fire risk.<sup>9</sup>

The authors bring valuable empirical data to the discussion of fire management in populated landscapes. Their examination of land use approval processes in three California counties reveals how CEQA analysis of proposals for new housing has failed to mitigate landscape-level fire risks to housing developments, even as CEQA reports and mitigation requirements have grown more robust at the level of individual projects. The authors further explain the inextricable intermingling of questions of wildfire policy and affordable housing policy, insofar as WUI residents are often economic refugees from high-priced coastal cities. They note that California inevitably faces “sharp trade-offs . . . in managing wildfire hazards and housing costs.”<sup>10</sup> They conclude by suggesting that state-level policy intervention is likely warranted to discipline “how local governments manage land use in the WUI,” albeit intervention that is sufficiently context-responsive to reflect the different challenges posed by, say, Northern California’s conifer forests and Southern California’s chaparral.<sup>11</sup>

In *Climate Liability for Wildfire Emissions from Federal Forests*, Boyd makes the case for a new climate liability mechanism that would produce funds for investment in forest restoration and resilience.<sup>12</sup> Reasoning that many megafires occur on poorly managed federal lands, he suggests imposition of “a strict liability regime for all greenhouse gas emissions from [these] unintentional fires.”<sup>13</sup> Boyd notes that forest lands offer much more than cheap and easy “near-term mitigation opportunities” with respect to climate change; they should, to the contrary, be seen as valuable investment opportunities.<sup>14</sup> Rather than serving as incidental instruments in carbon offset schemes, forests could and should be

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8. *Id.* at 943.

9. *Id.*

10. *Id.* at 949.

11. *Id.* at 982.

12. William Boyd, *Climate Liability for Wildfire Emissions from Federal Forests*, 48 *ECOLOGY* L.Q. 985, 985–1018 (2021).

13. *Id.* at 985.

14. *Id.*

made the intended beneficiaries of climate policy dividends. In short: we mustn't fail to see the forest for the fees.

Flocks and Espinoza tighten the frame from fire-prone land (Boyd) to the flammable buildings thereon (Biber and O'Neill), to the most fire-vulnerable people atop: agricultural guestworkers. In *Historical and Current Insights on Environmental Health and Agricultural Guestworkers*, these authors detail the cruel conditions under which many non-white agricultural workers toil.<sup>15</sup> All of these create background vulnerability to wildfire health effects, and greater direct exposure to fire-related health and safety hazards.

Flocks and Espinoza focus on the worker mistreatment tolerated by the H-2A visa program, a temporary entry program under which thousands of Mexican-born field workers enter the United States. This program, the authors assert, is notorious for the substandard housing employers provide to workers, and the health and wellness infirmities that ensue. During the COVID-19 pandemic, employers of agricultural guestworkers also frequently failed to provide H-2A workers with personal protective equipment, access to hand-washing and laundry facilities, and sufficient social distance between employees to create safe working conditions.<sup>16</sup>

In this setting of multiple health assaults, the specific thread of wildfire health risk is difficult to disentangle but clearly in the mix: the authors note that in 2017, the grievances prompting a strike by H-2A workers in Washington State included "poor quality and quantity of food, lack of shade at the worksite, warm drinking water, *being required to work in smoke from nearby wildfires*, and the death of a coworker they attributed to being forced to work during an illness."<sup>17</sup>

Unrecorded in this volume, and thus less apparent, were the real-time sparks ELQ's symposium released. By bringing panelists with shared concerns into conversation, the event prompted mutual education, and promises of salutary policy intervention. An example: When an environmental justice lawyer explained that California growers can persuade their local fire departments to exempt them from wildfire evacuation orders, thus permitting landowners to send workers into fields in perilous fire conditions to save lucrative crops (like wine grapes), a co-panelist from California's occupational health agency grew morally outraged and vowed to investigate this phenomenon.<sup>18</sup> In so doing, he will be aided by data from a community worker who joined the symposium panel and offered to share his documentation of the parties involved in these labor-rights abuses.<sup>19</sup>

Beyond the articles in this volume and the conference sidebars, panelists addressed many wildfire topics not here reflected: how the Clean Air Act's

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15. Joan Flocks & Maria Espinoza, *Historical and Current Insights on Environmental Health and Agricultural Guestworkers*, 48 *ECOLOGY L.Q.* 1019, 1019–45 (2021).

16. *Id.* at 1034–40.

17. *Id.* at 1040 (emphasis added).

18. See panel description at *supra* note 3.

19. *Id.*

structure impedes prescribed burning, even where this would confer long-term air quality benefits; how dominant-culture fire managers have, to their great detriment, failed to learn from centuries of effective Indigenous fire management practices; and how the increasing use of the nation's vast prisoner population to battle the wildfire problem raises moral and practical questions.

We hope scholar readers may be moved to tackle these themes, which extend well beyond Smokey Bear soundbites. In the meantime, we are delighted to bring you this issue of *Ecology Law Quarterly*, whose pages will remain readable up to 450 degrees Fahrenheit.