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Introduction

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INTRODUCTION

Joseph L. Sax*

This symposium was conceived as a way of asking how much, and in what ways, environmental law had changed since its beginnings some twenty years ago. Except for Samuel Hays, a prominent historian of the environmental movement, none of the participants addresses those questions directly. By indirection, however, each one provides an answer. Far from fading away, environmental law has become institutionalized, an accepted and significant enterprise both for government and for attorneys. It was not always thus. Twenty years ago, there was probably not a single lawyer in the United States who devoted any significant part of his or her working day to the environmental problems associated with coal mining. Today, John Dernbach works for the Commonwealth of Pennsylvania as one of a staff of full-time professionals devoted to enforcing the state and federal mine reclamation law. The same is true in other states, and in the federal government.

Mark Van Putten is employed by a major and long-established conservation organization, the National Wildlife Federation. Back in the 1960's it had no staff lawyers engaged in environmental practice. The Federation today has a legal department in Washington, D.C., and branch offices in Michigan, Colorado, Oregon, Georgia, and North Dakota. It is only one of a number of national organizations that now support law offices in various places around the country. Another is the Environmental Defense Fund (EDF), where Michael Oppenheimer works as a scientist. Today EDF has over 50,000 members and offices on both coasts. Twenty years ago it was a committee of a dozen or so scientists on Long Island concerned about pesticides. Twenty-five years ago it didn't exist.

Zygmunt Plater is a well-known professor of environmental law at Boston College. There are now over 300 individuals listed as teachers of that subject.¹ In 1966 there was only one such

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1. See ASSOCIATION OF AM. LAW SCHOOLS, DIRECTORY OF LAW TEACHERS 1985-86, at 890-92 (1985).

course—called Conservation and the Law—being taught at an American law school. As to the Endangered Species Act,² about which Professor Plater writes, it too has become an acknowledged part of our lives. A cadre of experts employed by the federal Fish and Wildlife Service is engaged in administering the Act, and compliance with it is a major responsibility of every federal land manager in the country.

To anyone who has watched the field develop over the last two decades, the degree to which environmental obligations have gained legitimacy is simply astonishing. When I first came to Michigan in the mid-1960's, a state official concerned with water pollution told me that he couldn't even get officials of polluting industries to talk to him; he was just kept sitting in outer offices until he got tired and left. At about the same time, seeking materials with which to put together a course, I began clipping every article related to conservation and environment that I could find in the *New York Times*. It took me two years to fill an ordinary three-ring binder.

Another indication of how times have changed is revealed by an early environmental case, *Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc.*,³ in which owners of a private reserve were seeking to prevent condemnation for a pipeline crossing that they feared would endanger the wildlife. The year was 1967 and the place was the Superior Court in Morristown, New Jersey. As the trial was about to begin, the judge, Joseph H. Stamler, called over the lawyers and said, "Before this case started I looked up the meaning of ecology in the dictionary because I noted it in the Supreme Court's opinion. I was not aware of that before."⁴

As the field of environmental law has grown and matured, there has grown with it a widespread view that the old days of the late 1960's and early 1970's—when most of the major state and federal environmental laws were first enacted—evinced a spirit of naive good will and optimism that must now be replaced with hardheaded and precise analysis. As Mark Van Putten and Bradley Jackson's article notes, there has been no greater target of the new "hardheads" than the zero discharge

2. 16 U.S.C. §§ 1531-1543 (1982 & Supp. II 1984).

3. No. L-8612-64 (N.J. Super. Ct. Law Div. Jan. 1967), *aff'd*, 49 N.J. 403, 230 A.2d 505 (1967). For the prior history of this case, see 89 N.J. Super. 1, 213 A.2d 193 (Law Div. 1965), *aff'd*, 90 N.J. Super. 385, 217 A.2d 646 (App. Div.), *rev'd*, 48 N.J. 261, 225 A.2d 130 (1966).

4. Sax, *The Search for Environmental Quality: The Role of the Courts*, in *THE ENVIRONMENTAL CRISIS* 99, 108-09 (H. Helfrich ed. 1970).

goal of the 1972 Federal Water Pollution Control Act Amendments.⁵ The very idea of getting rid of all pollution, as opposed to achieving a level of discharge that maximizes efficient resource use, seems an idea that no sensible person could now embrace.

The fascination of the Van Putten and Jackson article is its demonstration, using legislative history, that Congress was not in the least naive back in 1972, nor was it unaware of the potential for "over-protection" of waters when national technology-based effluent standards are used rather than site-specific regulation based on achieving a precisely desired water quality. Congress knowingly opted for broad technology-based standards, the article shows, because it feared the difficulty of proving in court just how much is enough, and how much is too much or too little. Van Putten and Jackson recall a history that is no longer as familiar as it was a dozen years ago. Several earlier attempts at federal water pollution legislation had been disastrous failures precisely because their enforcement mechanisms were amenable to endless argumentation and to practically impossible requirements of proof. The result was that by 1972 Congress chose to use standardized effluent limits, accepting some imprecision and the risk of overspending and overregulation because it feared a case-by-case, site-specific approach would bog down in endless litigation and delay.

Van Putten and Jackson clearly imply on the basis of their experience that what Congress assumed in 1972 has turned out to be correct: The difficulties of proof in trying to fine-tune pollution control remedies to a precise ambient water quality goal would subvert the fundamental goals of the statute in maintaining and restoring usable, high quality water. It is unfortunate that they did not extend their article, drawing on cases in which the authors were involved, to demonstrate this empirical point in detail. They make a strong showing of what Congress intended in 1972, but it would be very helpful to know the extent to which that assumption squares with the current experience of practicing attorneys.

The issue is a fundamental one. Is it necessary, in order to achieve the basic goals of laws such as the Clean Water Act, to sacrifice precision for a rough, admittedly second-best, strategy like technology-based effluent standards? How clear does evidence of harm have to be? How much risk of overregulation

5. Pub. L. No. 92-500, 86 Stat. 816 (1972); see Van Putten & Jackson, *The Dilution of the Clean Water Act*, 19 U. MICH. J.L. REF. 863 (1986).

should we be willing to take? This is an issue with which Congress has struggled and that has plagued the courts in trying to make sense of a variety of environmental laws.⁶ The testimony of those who work in the field, as to what happens as we try to seek ever greater precision in the name of efficiency and fairness to the regulated, is sorely needed.

Happily, John Dernbach, in his article on the surface mining reclamation laws,⁷ provides information drawn from his experience as a state official charged with enforcing environmental laws. While his comments are, inevitably, to some extent the special pleading of an advocate, they are extremely interesting as a confirmation of the Van Putten and Jackson article. Dernbach makes a strong plea for simplification, whatever its losses in precision, as essential to a mine reclamation program that works at all. If there is to be effective implementation of the statute, Dernbach says, there must be basic, understandable, manageable rules. One of the major enemies of effective enforcement is discretion, he says, and he applauds the law because it requires definite responses to specified violations and departs from the traditional view that enforcement officials should be vested with substantial discretion. This is a theme that is also emphasized by Professor Plater in his discussion of remedies under the Endangered Species Act.

Though he never says it in so many words, Dernbach's experience must be that the regulatory agency—if it has discretion and flexibility—simply cannot resist the political and economic pressures to wink at violations. It is quite striking how unequivocally Dernbach comes out in favor of the simplest, plainest, most predictable strategy. "In designing an enforcement program," he says, "it is important to minimize an agency's litigation burden in individual cases. Enforcement should be based on easily proven violations of simply stated rules that contain few elements, with as few factual or affirmative defenses as possible."⁸

6. *E.g.*, *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) (involving the question of what must be shown before benzene exposure standards can be tightened).

7. Dernbach, *Pennsylvania's Implementation of the Surface Mining Control and Reclamation Act: An Assessment of How "Cooperative Federalism" Can Make State Regulatory Programs More Effective*, 19 U. MICH. J.L. REF. 903 (1986).

8. *Id.* at 947.

* * * *

Modern environmental law was built on a theory of public rights—the standing-to-sue of members of the general public to challenge government bureaucracies,⁹ and the rights of the public to have clean air and water and to end the “silent springs” produced by the misuse of agricultural chemicals.¹⁰ As Samuel Hays notes,¹¹ the great case that began the current era was *Scenic Hudson*,¹² which tested a local citizen group’s right to challenge the grant of a federal license to build a power plant on the Hudson River. Much of the early literature stressed the legitimacy and importance of participation by members of the public, and the need for an expansive view of standing-to-sue.¹³

I remember that my own interest was first stirred when in 1962 the (then obscure) Sierra Club and several other groups went to court to protect Rainbow Bridge National Monument from flooding by the Bureau of Reclamation.¹⁴ A federal judge in the District of Columbia asked, with astonishment, if these private organizations thought they could invoke judicial authority to tell a federal department how to implement the mandates Congress had given it. Needless to say, he found the plaintiffs lacked standing.¹⁵

Just as it is now said that in the 1970’s Congress was naively optimistic, so it has been thought that environmental law would grow out of its need for citizen-initiated litigation. The assumption has been that as the field matured, and the issues became ever more complex, the experts would take over from the amateurs, and administrative processes or economic incentives would substitute for cumbersome and inefficient law suits.

Zygmunt Plater’s article on the Tellico Dam controversy is a

9. See generally J. SAX, *DEFENDING THE ENVIRONMENT* (1971).

10. See generally SAX, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

11. Hays, *Environmental Litigation in Historical Perspective*, 19 U. MICH. J.L. REF. 969 (1986).

12. *Scenic Hudson Preservation Conference v. Federal Power Comm’n*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

13. I believe the first such article directed to environmental issues was a student comment by Bryan Morgan, Comment, *Standing to Sue and Conservation Values*, 38 U. COLO. L. REV. 391 (1966). Perhaps the best known article is Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). For the early work in the area, see Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353 (1955); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

14. *National Parks Ass’n v. Udall*, Civil No. 3904-62 (D.D.C. 1962).

15. Findings of Fact and Conclusions of Law at 4 (Jan. 2, 1963) (Holtzoff, J.), *id.*

fascinating memoir by the attorney who litigated one of the most famous citizen-initiated environmental lawsuits of modern times.¹⁶ His is a poignant story of lonely little-guy citizens fighting the powers that be, demonstrating how essential it is that *somebody* be permitted to take on officialdom, including the official protectors of the public interest. Like Dernbach and Van Putten, Plater is an advocate making his case, but he poses a potent question. If we didn't have laws like the Endangered Species Act, permitting "any person" to sue to force government agencies to follow the law,¹⁷ what would happen in situations like that of the Tellico Dam?

For those who remember the snail darter case only as the press painted it, Plater's article will be a revelation. One of his central points is that the Tellico Dam project was from the beginning just bureaucratic self-aggrandizement on the part of the Tennessee Valley Authority (TVA). Yet, fostered by media stereotyping of the Endangered Species Act, almost everyone tried to characterize the suit as an example of cost-benefit analysis gone haywire—the little fish that stopped the big dam. Everyone seemed obsessed with the millions already spent on Tellico, and on the economic insignificance of the snail darter. They were unable to conceive of the case except in terms of the cost of the dam and the possible benefits from the fish, such as some undiscovered cure for cancer it might hold. This perspective reached a bizarre climax of sorts when Justice Powell asked, in oral argument in the Supreme Court, whether the snail darter could be used by fishermen as bait.¹⁸

The irony of the case is that the public and Congress were led to believe that they were preserving their investment in the dam by ultimately permitting its completion, even at the risk of sealing the fate of the snail darter. But—as Plater points out—the case was neither about the dam nor about the fish. It was an effort to maintain one of the last free-flowing streams in the area from mindless bureaucratic development. Tellico Dam was a terrible investment from the outset. A 1936 study of all sites available for dams in the TVA area had given Tellico the lowest priority on a list of some seventy sites because of its marginal

16. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and its Consequences*, 19 U. MICH. J.L. REF. 805 (1986).

17. 16 U.S.C. § 1540(g)(1) (1982). See generally W. RODGERS, ENVIRONMENTAL LAW § 1.13 (1977).

18. Plater, *supra* note 16, at 848 (quoting Cohen, *Judicial Predictability in United States Supreme Court Advocacy: An Analysis of the Oral Argument in Tennessee Valley Authority v. Hill*, 2 U. PUGET SOUND L. REV. 89, 104 (1978)).

economic justification. Plater says it has subsequently been demonstrated to be a "development debacle."¹⁹ The real purpose of the project all along, he says, was just a way for the TVA, a building bureaucracy, to keep busy. They had run out of good river projects decades earlier.

Though he ultimately lost his cause in the Congress, Plater did not let the TVA's blundering pass quietly. In forcing the issue into the open—as citizen-standing laws permitted him to do—he performed an important public service. And he obtained a powerful Supreme Court endorsement of the Endangered Species Act in a decision that stands as one of the landmarks of environmental law.²⁰

* * * *

The editors of the *Journal of Law Reform* planned a symposium looking across the history of modern environmental law, and they are fortunate to have the articles of Samuel Hays²¹ and Michael Oppenheimer,²² which range from a history of the first days of environmental law to an analysis of one of the most pressing current environmental issues, acid rain. Reading these two articles side by side, along with the others in this symposium, stimulates a question that I, as a long-time student of the field, have often asked myself: Is there anything distinctive about environmental law, or is it just a mishmash of aesthetics and public health, administrative law and torts, statutory interpretation, and common law development? Professor Hays notes some of the roots of environmental common law in the conventional protection of person and property, and he observes that even the National Environmental Policy Act of 1969 (NEPA)²³ is just a natural outgrowth of standard judicial supervision of administrative action.

Plainly, environmental law has roots in the traditional legal system. But as several of the articles in this symposium make clear, the environmental field has done at least its fair share of pioneering. The *Scenic Hudson* case, discussed by Professor Hays, was for its time a stunning breakthrough in recognizing

19. *Id.* at 817.

20. *TVA v. Hill*, 437 U.S. 153 (1978).

21. Hays, *supra* note 11.

22. Oppenheimer, *Reducing Acid Rain in Eastern North America: The Scientific Basis for an Acid Rain Control Policy*, 19 U. MICH. J.L. REF. 989 (1986).

23. 42 U.S.C. §§ 4321-4370a (1982 & Supp. II 1984).

that the standing-to-sue of a citizen organization played a primary role in federal licensing. Again and again in early NEPA cases, the federal courts generously expanded citizen standing. The Supreme Court then issued several far-reaching decisions approving private standing, most notably in the *Mineral King*²⁴ and *SCRAP*²⁵ cases.²⁶ And it was environmental law that generated statutory recognition of the citizen suit at both the state and federal level, and nowhere more prominently than in the Endangered Species Act, which is why Professor Plater and his clients were able to go to court.

Citizen standing-to-sue was just one element of a broader recognition of public rights and the right of public participation, and here too environmental law was at the leading edge of development. NEPA, and its requirement of an environmental impact statement open to public view and comment, ventilated the planning processes of federal agencies in a way that had never occurred before. The citizen, once only a nosy intruder, became a legitimate participant. My own recent study²⁷ of the behavior of federal land management agencies persuades me that legitimating public participation, and demanding openness in planning and decisionmaking, has been indispensable to a permanent and powerful increase in environmental protection,²⁸ and that the presence of citizen-initiated litigation is a major factor that keeps public agencies from slackening in their resolve to see that environmental laws are enforced. Pioneering developments in environmental law made it possible. People like Van Putten, Plater, Dernbach, and Oppenheimer make it work. And people like Samuel Hays make sure we will remember where we were, and how far we have come.

24. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

25. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

26. The Supreme Court has recently interposed some constitutional constraints on standing, though it has so far given no hint that it would invalidate a statute expressly granting citizen standing, such as the Endangered Species Act. See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982).

27. A forthcoming article, completed but unpublished at the time of this writing, examines efforts to control environmental damage to Glacier National Park originating on national forest land outside park boundaries.

28. I now recognize that I underestimated the influence of NEPA's "soft law" elements. See Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239 (1973).