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# Storm King Revisited: A View From the Mountaintop

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## THE SIXTEENTH ANNUAL LLOYD K. GARRISON LECTURE

### Storm King Revisited: A View From the Mountaintop

ALBERT K. BUTZEL\*

It is a privilege for me to be here this afternoon to deliver a lecture in honor of my mentor, Lloyd Garrison. Hard as it is to believe, it was forty-five years ago, almost to the day, that I was summoned to Mr. Garrison's office on the twelfth floor at 575 Madison Avenue, handed an opinion issued two weeks earlier by what was then known as the Federal Power Commission (FPC), given two hours to read it, and asked to return to his office for an afternoon conference with the lawyers.

It was by complete serendipity that I ended up in Mr. Garrison's office that day in 1965. When I had gone to Paul Weiss Rifkind Wharton & Garrison six months earlier, I had agreed to do anything but litigation. That day, however, there were no litigation associates available. So I was commandeered from the corporate department to help on what became the Storm King case.

That is what I am going to talk about today, but not by simply rehashing what is already well known. I want to tell you

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the story of the case, not just focus on the outcome. And I want to give you my impression of where environmental litigation stands up today measured against the promise of the Storm King decision.<sup>1</sup>

The first part of the story is about Lloyd Garrison. To begin with, Lloyd was not a litigator. His expertise lay in corporate and labor law. A native of New York City, after graduating from Harvard College and Law School, he returned to the City in 1922, working at the law firm of Elihu Root, winner of the 1912 Nobel Peace Prize, who became Lloyd's mentor. Several years later, Mr. Garrison began his career in public service as Special Assistant to the U.S. Attorney General. In 1932, he was appointed Dean of the University of Wisconsin Law School, transforming it over the next fourteen years into one of America's top law schools. During this time, he also served as the first Chairman of the National Labor Relations Board and later as its General Counsel. He was a central figure on the War Labor Board and bore much of the burden of maintaining labor-management peace during the Second World War. After the War, he joined three other partners to form Paul Weiss. In the ensuing twenty years, he had a distinguished career as a lawyer while also being heavily involved in matters of public interest. Long interested in civil rights, he was president of the National Urban League from 1947 to 1952, and he represented Arthur Miller and Langston Hughes when they were summoned before the House Committee on Un-American Activities.<sup>2</sup> It was shortly after this that he suffered a

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1. There are several excellent books that tell the Storm King story. *See, e.g.*, ALLAN R. TALBOT, *POWER ALONG THE HUDSON: THE STORM KING CASE AND THE BIRTH OF ENVIRONMENTALISM* (1972); FRANCES F. DUNWELL, *THE HUDSON RIVER HIGHLANDS*, 202-230 (1991); ROBERT H. BOYLE, *THE HUDSON RIVER: A NATURAL AND UNNATURAL HISTORY* 124-52 (1969). Also well worth reading is OLIVER HOUCK, *TAKING BACK EDEN: EIGHT ENVIRONMENTAL CASES THAT CHANGED THE WORLD*, 7-21 (2010). An excellent collection of source materials relating to the Storm King case and other power plants on the Hudson was put together by Ross Sandler and David Schoenbrod. *See THE HUDSON RIVER POWER PLANT SETTLEMENT: MATERIALS PREPARED FOR A CONFERENCE SPONSORED BY NEW YORK UNIVERSITY SCHOOL OF LAW AND THE NATURAL RESOURCES DEFENSE COUNCIL, INC. WITH SUPPORT FROM THE JOHN A. HARTFORD FOUNDATION, INC.* (Ross Sandler & David Schoenbrod eds., 1981) [hereinafter *SETTLEMENT MATERIALS*].

2 *See* Lee A. Daniels, *Lloyd K. Garrison, Lawyer, Dies; Leader in Social Causes was 92*, *N.Y. TIMES*, Oct. 3, 1991, at D20 [hereinafter *Obituary*]; *see also* HARVARD UNIVERSITY LIBRARY, *Garrison, Lloyd K. (Lloyd Kirkham). Papers*,

loss that sometimes seemed to him to offset his other accomplishments. He represented Robert Oppenheimer before the Atomic Energy Commission when Oppenheimer lost his security clearance, something Lloyd felt he was personally responsible for.<sup>3</sup>

Perhaps it was his sense of having failed Oppenheimer that led Mr. Garrison to take on another seemingly hopeless case—the appeal of the FPC decision that had licensed the Storm King Project. Up to that point, no FPC license for a hydroelectric plant had been successfully challenged on the merits, and there was little reason to be optimistic about a case where the central issue was a complaint that the Project would damage scenic beauty. But for Lloyd, the representation was as much personal as professional. He cared deeply about the natural world and loved the Hudson.

There was no such thing as environmentalism at the time, but there was a long history of conservation—a good deal of which emanated from New York and the Hudson River. It is no accident that Theodore Roosevelt was a New Yorker. It is no accident that J.P. Morgan, Colonel Rupert, the Rockefellers, the Harrimans, the Perkins, and many other wealthy families built their summer homes in the Hudson Highlands.<sup>4</sup> Nor is it serendipity that the Adirondacks were declared “forever wild” at the instance of New York City families in 1892, or that in 1910, Charles Evans Hughes, then Governor of New York and later Chief Justice of the Supreme Court, signed into law an extension for the Palisades Park to include the Highlands as far north as Newburgh.<sup>5</sup> John Muir may have founded the conservation movement, but it was the wealth of New York City—and the interest of its patricians—that fueled it. It should, then, be no surprise that Lloyd Garrison, great-grandson of the abolitionist

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1893-1990: *Finding Aid*, <http://oasis.lib.harvard.edu/oasis/deliver/~law00054> (last visited Sept. 14, 2013) [hereinafter *Finding Aid*]; LLOYD K. GARRISON, REMINISCENCES OF LLOYD KIRKHAM GARRISON: ORAL HISTORY (1969) [hereinafter ORAL HISTORY I]; LLOYD K. GARRISON, REMINISCENCES OF LLOYD KIRKHAM GARRISON: ORAL HISTORY (1982) [hereinafter ORAL HISTORY II].

3. See *Obituary*, *supra* note 2; see also *Finding Aid*, *supra* note 2; ORAL HISTORY I, *supra* note 2; ORAL HISTORY II, *supra* note 2.

4. DUNWELL, *supra* note 1, at 111-137.

5. DUNWELL, *supra* note 1, at 138-165.

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William Lloyd Garrison, himself a New Yorker by heritage, cared about the land and believed in conservation. So when he was asked to take an appeal to the Second Circuit, there was no way he was going to say no.

The appeal was from a decision of the Federal Power Commission, since renamed the Federal Energy Regulatory Commission.<sup>6</sup> The FPC had just granted a license for what Con Edison had named the “Cornwall Project”—a reference to the town in which plant was to be built. It was to be the largest pumped storage hydroelectric project in the world, capable of providing 20% of New York City’s peak energy load. The powerhouse was to be carved into the north flank of Storm King Mountain, extending 800 feet along the shore and rising 110 feet above the Hudson, with eight six-story transformers and a huge crane on top of it. The powerhouse would contain a series of so-called “reversible” pump-turbines that would be used at night to pump water from the Hudson into a reservoir 1,000 feet above the River, where it would be stored until daytime electric demand began to grow. Then the water would be released to course down through a huge tunnel and drive the reversed pumps—now turbines—generating power at the time it was needed most. It would take three kilowatts of power to pump the water up to the reservoir for each two kilowatts that came from the Project. But the three kilowatts would come from efficient plants that were not being fully utilized at night, while the two kilowatts would be available at peak hours when Con Edison’s other capacity was limited. In effect, the plan was to create a huge storage battery at Storm King Mountain.<sup>7</sup>

The problem was that the plant was to be located at one of the most dramatic and beautiful spots on the Hudson or any other eastern river. The Hudson Highlands were, as *Life Magazine* described them in 1964, “one of the grandest passages of River scenery in the world.”<sup>8</sup> The great German traveler

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6. See generally *Consol. Edison Co. of N.Y., Inc., Fed. Power Comm’n Opinion No. 452, Project No. 2338, 57 P.U.R.3d 279 (F.P.C.) (1965)* [hereinafter *FPC Opinion No. 452*].

7. See *FPC Opinion No. 452, supra* note 6; *Scenic Hudson Pres. Conference v. Fed. Power Comm’n, 354 F.2d 608, 611-12 (2d Cir. 1965)* [hereinafter *Scenic Hudson I*].

8. *Editorial: Must God’s Junkyard Grow?*, *LIFE MAG.*, July 31, 1964, at 4.

Baedeker had found the landscape of the Highlands to be “grander and more inspiring than the Rhine’s,”<sup>9</sup> while the *New York Times*, editorializing against the Project, described the area as “one of the most stunning regions in the Eastern United States.”<sup>10</sup> And the northern portal to the Gorge, with Storm King on the west and Breakneck Ridge on the east, provided the most magnificent of all views.

It was into this scene that the powerhouse would be carved. An artist’s rendering in Con Edison’s 1962 Annual Report sent to its shareholders in April 1963 showed the side of the Mountain cut away, leaving a gash the size of three football fields laid end-on-end with a high cliff behind.<sup>11</sup> It was this illustration, in particular, that roused lovers of the Highlands to action. There was little precedent for citizen opposition in these circumstances, but a small group of individuals organized themselves as the

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9. *Editorial: Defacing the Hudson*, N.Y. TIMES, May 29, 1963, at 22. See also *Scenic Hudson I*, 354 F.2d at 613.

10. *Editorial*, *supra* note 9. The *Times Editorial* read, in relevant part, as follows:

If any utility proposed to construct a plant in the middle of Central Park, the absurdity of such a defacement of precious natural (or nearly natural) surroundings would be immediately apparent. It is almost as bad to plunk down a couple of power installations right in the heart one of the most stunning natural regions in the Eastern United States: Storm King Mountain (north of Bear Mountain and West Point) and Breakneck Ridge on the opposite (eastern) side of the Hudson.

All of us who have driven down from New England and northern New York have looked with awe at these breath-taking mountains. All of us who have hiked and played in the Palisades Interstate Park know what a beautiful backyard exists 50 miles north of New York. Is it too close to home to appreciate? “This is a very good land to fall with and a pleasant land to see,” said one of Henry Hudson’s officers, going up the river under these high blue hills. The great traveler Baedeker found the Hudson’s scenery “grander and more inspiring” than the Rhine’s.

The proposed power plants of Consolidated Edison at Storm King and of Central Hudson Gas and Electric at Breakneck Ridge would desecrate great areas that are part of the natural and historic heritage of our country, are still largely unspoiled and should remain that way.

11. The rendering is reproduced in DUNWELL, *supra* note 1, at 203.

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Scenic Hudson Preservation Conference and set out to make a difference.<sup>12</sup>

Their first approach was to Governor Nelson Rockefeller, whose response was that if they did not like the Project, they should buy the Mountain.<sup>13</sup> Short of the required funds and with Con Edison uninterested in selling, Scenic Hudson was relegated to finding some other way of opposing the plant. The organizers soon learned that the Project required a license from the FPC, and after several weeks of searching, they hired a lawyer—Dale Doty, a former FPC Commissioner—to represent them. The hearings were scheduled to come on quickly, but Dale was able to secure a delay of several months, giving him an opportunity to prepare a rudimentary case.<sup>14</sup>

There were four days of hearings in 1964. Most of Scenic Hudson's testimony was directed toward the natural beauty and historic importance of Storm King and the Highlands. But Dale Doty also presented a witness who described alternatives in very general terms. Con Edison's cross-examination of the Scenic Hudson witnesses was brutal. The FPC staff, for its part, backed the Project with no pretense of objectivity or neutrality. When the hearings were closed, the future looked grim.<sup>15</sup>

But Scenic Hudson chose to fight on and made a key decision in this regard. It hired a public relations firm—Selvage & Lee—to get the story out, and the new consultants immediately started to do exactly that. Among other things, the firm organized a flotilla of yachts and other boats to sail up the Hudson to Storm King and plant signs in response to Con Edison's then motto—"Dig We Must for a Growing New York." "Dig You Must Not," the

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12. TALBOT, *supra* note 1, at 91-96; DUNWELL, *supra* note 1, at 207-08; BOYLE, *supra* note 1, at 155-56.

13. TALBOT, *supra* note 1, at 95.

14. TALBOT, *supra* note 1, at 96-98; DUNWELL, *supra* note 1, at 209-10; BOYLE, *supra* note 1, at 157.

15. TALBOT, *supra* note 1, at 98-106; DUNWELL, *supra* note 1, at 210-11; BOYLE, *supra* note 1, at 157-58. All testimony before the FPC in the 1964 and all subsequent hearings can be found in the transcripts of the proceedings in Case No. 2338, copies of which are available in the Scenic Hudson archives at Marist College. See Marist Environmental History Project, *The Scenic Hudson Decision Hearings Transcripts Collection*, MARIST COLLEGE, <http://library.marist.edu/archives/shdht/shdht.xml> (last visited Sept. 14, 2013).

signs read, and the national media picked the story up.<sup>16</sup> Stephen Currier, a philanthropist whose lawyer happened to be Lloyd Garrison, took note of the story and decided he wanted to help. He was willing to give money if it could be used.<sup>17</sup>

As to that, there was no doubt—Scenic Hudson intended to press on with the case. Alexander Lurkis, the recently-retired Chief Engineer for the City's Department of Water Supply, Gas and Electricity, had written a *Letter to The Editor of the Times*, identifying what he said was a superior alternative—a series of jet engine gas turbine generators that were new to the market. The PR firm reached out and hired him to develop the alternative in detail. Scenic Hudson then persuaded a New York State Senator to call legislative hearings on the Project in November of 1964. Lurkis made a detailed presentation of the alternative, including cost comparisons showing his plan to be much less costly than Cornwall.<sup>18</sup>

Also appearing was Bob Boyle, the Outdoors writer for *Sports Illustrated* and a Hudson River worshipper writ-big. Boyle had discovered a report from ten years earlier that suggested the center of the spawning grounds for the recreationally- and commercially-important Hudson River striped bass was at Storm King Mountain. Since the Project would ingest vast amounts of water—some 8,000,000 gallons a minute—in which the eggs and fish larvae would be floating helplessly, the danger to the striped bass population was obvious. What made the disclosure all the more dramatic is that the study had been supervised by Con Edison's fisheries expert, who had testified in the FPC hearings that the Plant posed no threat to aquatic or marine life.<sup>19</sup>

Scenic Hudson promptly arranged to have the Lurkis and Boyle testimony submitted to the FPC, with a request that the hearings be reopened to consider the new evidence.<sup>20</sup> The FPC rejected the submissions as untimely. Then, in February 1965,

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16. DUNWELL, *supra* note 1, at 212-13; see TALBOT, *supra* note 1, at 108-10; BOYLE, *supra* note 1, at 156.

17. BOYLE, *supra* note 1, at 168; TALBOT, *supra* note 1, at 114-15.

18. TALBOT, *supra* note 1, at 111-12; DUNWELL, *supra* note 1, at 213; BOYLE, *supra* note 1, at 162.

19. BOYLE, *supra* note 1, at 158-61, 165; TALBOT, *supra* note 1, at 112-14; DUNWELL, *supra* note 1, at 213.

20. TALBOT, *supra* note 1, at 114; see BOYLE, *supra* note 1, at 164-65.

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the State Legislative Committee issued its report in which it found the Lurkis testimony compelling and the Boyle discovery disturbing. It urged the FPC to reopen the case, finding that the scenic beauty of the area was unexcelled and concluding, with respect to the Project, that “the committee must go on record as being opposed to its approval.”<sup>21</sup>

All this went unheeded. On March 9, 1965, the FPC granted the license application, finding, among other things, that the scenic beauty of Storm King Mountain would not be diminished by the plant but would actually be improved by the removal of a number of derelict structures. It also found that there was no feasible alternative and no danger to the fisheries.<sup>22</sup>

Two and a half weeks later, at the behest of Stephen Currier, who agreed to finance the appeal, the case came to Mr. Garrison. Actually, it did not come only to Mr. Garrison. Before Lloyd said “yes,” he had recruited his partner to work with him. This was Judge Simon Rifkind, one of the twentieth century’s great trial and appellate attorneys, who, Lloyd believed, would argue the case before the Second Circuit. As it turned out, that did not happen, and Lloyd argued the case himself. But Judge Rifkind made his own invaluable contributions.<sup>23</sup>

The first of these, which he and Mr. Garrison hit on jointly, was to rename the Project. No longer would it be the Cornwall Project, which had no sex-appeal. In our briefs and announcements, this was, from then on, the Storm King Project.

There is, for me, a certain irony in how central this minor adjustment became as the case progressed. Storm King was all very well, but this was a belated title. The original Dutch settlers had called the mountain Boterberg, which, translated into English, became Butter Hill. Can anyone doubt that a battle over Butter Hill would have been considerably less impassioned than a battle over Storm King? Happily, Nathaniel Willis, a romantic

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21. DUNWELL, *supra* note 1, at 213-14 n.15 (citing N.Y. STATE LEGIS., PRELIMINARY REP. OF THE JOINT LEGIS. COMM. ON NATURAL RES. ON THE HUDSON RIVER VALLEY AND THE CONSOLIDATED EDISON CO. STORM KING MOUNTAIN PROJECT 1-2 (1965)). See TALBOT, *supra* note 1, at 112 (suggesting that the Report was drafted by one of Scenic Hudson’s PR consultants).

22. See generally FPC Opinion No. 452, *supra* note 6.

23. From this point on, except as otherwise indicated, the narrative of events is based on the author’s personal experience and knowledge.

writer who lived in the Highlands, felt Butter Hill was an indignity for such a grand geological feature. Remembering the clouds and lightning that raged around the Mountain in the summer, he renamed it Storm King.<sup>24</sup> So, if you will, modern environmental law may be indebted to Mr. Willis for its start.

The further wisdom that Judge Rifkind brought to the case was his counsel that it could not be won on the grounds that the FPC had misjudged the impacts on scenic beauty, because of what is known as the “substantial evidence” test. This traditional test, incorporated into section 313(b) of the Federal Power Act, provided that the Commission’s findings of fact, if supported by substantial evidence, were conclusive.<sup>25</sup> Whatever else might be said about the hearing record, there had been testimony on both sides regarding the impacts of the Project on the landscape, and that, the Judge felt, put the issue of scenic beauty beyond reach. Instead, both he and Mr. Garrison agreed that we needed to emphasize the gaps in the FPC record, including the limited discussion of alternatives in light of the later Lurkis testimony and the Commission’s indifference to fisheries impacts. The Power Act expressly provided that a party to the FPC’s proceedings could apply to the Circuit Court for leave to adduce additional evidence,<sup>26</sup> and this fit nicely with the idea that the focus should be on what the Commission had largely ignored rather than directly confronting the core issue of the damaging impact of the Project on the natural beauty of the Hudson Highlands. At the same time, Judge Rifkind urged that scenic beauty be used to set the context of the case. Because the area was so magnificent, we would argue—and did—that the FPC

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24. TALBOT, *supra* note 1, at 9-10. The following quote from Willis’s *Outdoors at Idlewild* is included in DUNWELL, *supra* note 1, at 63-64.

The tallest mountain, with its feet in the Hudson at the Highland Gap, is officially called the Storm King—being looked to, by the whole country around, as the most sure foreteller of a storm. When the white cloud-beard descends upon his breast in the morning (as if with a nod forward of his majestic head), there is sure to be a rain-storm before night. Standing aloft among the other mountains of the chain, this sign is peculiar to him. He seems the monarch, and this seems his stately ordering of a change in the weather. Should not STORM-KING, then, be his proper title?

25. 16 U.S.C. § 8251(b) (2012).

26. *Id.*

should have bent over backwards to find an alternative. Instead, it sat on its hands.

After all the strategizing, Lloyd Garrison went to work, and the papers he produced were exquisite. He had a poetic sense of the English language and used it to extraordinary effect in our briefs. Several of us—in time narrowed to myself—would prepare drafts of different sections of the papers. Lloyd would then call his secretary into his office and pacing back and forth would dictate late into the night translating what he had been given into prose that stirred the soul and made the desired outcome seem obligatory. He had that knack, and it is not surprising that many of the words Judge Hays used in the 1965 *Scenic Hudson* opinion came directly from our briefs. My contribution was the research, and I do not make light of that. But it was Lloyd Garrison who put it to good use and created the road map that led the Second Circuit to the decision it reached.

Lloyd was also acutely aware of the times in which we were proceeding. He did not have much confidence the case could be won, but to the extent there was hope, it was because, as Bob Dylan sang, “the times, they were a-changin’.” This was 1965, three years after Rachel Carson had published *Silent Spring*, which in many ways changed Americans’ way of thinking about the environment. The concern over DDT had already resulted in one unsuccessful lawsuit.<sup>27</sup> There were plans to dam the Colorado in the Grand Canyon, and Dave Brower and the Sierra Club were already on that case.<sup>28</sup> Increasing concern was being expressed about the new interstate highways being slashed through cherished landscapes, and more and more Americans found themselves impacted by the vast web of new transmission wires being woven across the country to meet the soaring demand for electricity. Perhaps most important of all, President Lyndon B. Johnson had begun to emphasize the “quality of life” with his

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27. See generally *Murphy v. Benson*, 151 F. Supp. 786 (E.D.N.Y. 1957).

28. The concern over the Grand Canyon dams culminated in a series of full-page ads placed by the Sierra Club and David Brower in the *New York Times* and the *Washington Post* in July 1966. These strongly opposed the dams. One of them was headlined: “Should we also flood the Sistine Chapel so tourists can get nearer the ceiling?” Sierra Club, *Should We Also Flood the Sistine Chapel So Tourists Can Get Nearer the Ceiling?* (1966), available at [http://www.infomarketingblog.com/space\\_ads/Sistine\\_Chapel.pdf](http://www.infomarketingblog.com/space_ads/Sistine_Chapel.pdf).

Great Society programs, and he related this specifically to landscape in his 1965 State of the Union address, saying:

For over three centuries, the beauty of America has sustained our spirit and enlarged our vision. We must act now to protect this heritage. In a fruitful new partnership with the States and the cities the next decade should be a conservation milestone. We must make a massive effort to save the countryside and establish—as a green legacy for tomorrow—more large and small parks, more seashores and open spaces than have been created during any other period in our national history.<sup>29</sup>

The times, in short, were ripe for a case like Storm King to be heard in federal court.

It is worth noting that President Johnson made no mention of the environment. The word he used was *conservation*, and in that sense, the new values being identified had their roots in the past. We too thought in terms of conservation. Yet, as it turned out, it was a conservation looking forward that soon enough would morph into the broader environmental litigation movement. But neither Lloyd nor I nor any of the others who helped write the briefs had any idea that the case would have the broad implications that it did. We were simply trying to save Storm King.

The case was argued to the Second Circuit in late October 1965. Mr. Garrison was eloquent and persuasive. Con Edison's counsel ranted, to little effect. And the panel found it incredible when the attorney for the FPC argued that the Project would improve the scenery of the Highlands.

Two weeks later, the City went dark. The Great 1965 Blackout rolled out of Canada and within ten minutes, Con Edison's electric system closed down for thirteen hours. The next day, the company had ads in every major paper stating that if the Cornwall Project had been on line—and but for the opposition it would be under construction—the City would have been saved. And only Cornwall could have made the difference because of its

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29. The full address can be found at the website of The American Presidency Project. Lyndon B. Johnson, Annual Message to Congress on the State of the Union (Jan. 4, 1965), <http://www.presidency.ucsb.edu/ws/index.php?pid=26907> (last visited Sept. 14, 2013).

special hydro characteristics. The Lurkis alternative we were asking the court to order the FPC to consider would have done no good. Needless to say, we did not regard the Blackout as good news.

The story, however, is that the three judges were in the midst of reviewing a first draft of their opinion at the time the Blackout hit and when the lights went out, they simply lit candles and continued their work.<sup>30</sup> This is probably apocryphal, but seven weeks later, on December 29, 1965, the court came down with its landmark *Scenic Hudson* decision. I will return to discuss the opinion in a few minutes, noting only at this point that enough commentators have suggested that modern environmental law was born out of the decision to make me believe it might be true.<sup>31</sup>

What I want to do first is to recount the rest of the story, because the case did not end, and Storm King was not saved, for another fifteen years. Of these, the first five were spent before the FPC in two series of remanded hearings involving, among other issues, impacts on natural beauty, geology, alternatives, fisheries impacts, underground transmission, costs and the potential of damaging the City's Catskill Aqueduct. Among the celebrities to give testimony on scenic beauty were Dave Brower, Sierra Club Executive Director, Vincent Scully, distinguished professor of art history at Yale, Brooks Atkinson, the *New York Times* drama critic, and Richard Pough, founder of The Nature Conservancy. Also putting in an appearance was Edward Teller, father of the H Bomb, who testified in support of the commercial

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30. DUNWELL, *supra* note 1, at 218.

31. See, e.g., Oliver A. Houck, *Environmental Law and the General Welfare*, 19 PACE ENVTL. L. REV. 675 (2002) (Fourth Annual Lloyd K. Garrison Lecture on Environmental Law); A. Dan Tarlock, *The Future of Environmental 'Rule of Law' Litigation*, 19 PACE ENVTL. L. REV. 575, 583 (2002) (Sixth Annual Lloyd K. Garrison Lecture on Environmental Law); John E. Bonine, *Private Public Interest Environmental Law: History, Hard Work and Hope*, 26 PACE ENVTL. L. REV. 465, 466 (2009) (15th Annual Lloyd K. Garrison Lecture on Environmental Law); *E-law: What Started It All?*, Natural Resources Defense Council, <http://www.nrdc.org/legislation/helaw.asp> (last visited Sept. 14, 2013). See also, HOUCK, *supra* note 1, at 19-20.

use of nuclear power, only to be embarrassed on cross examination by knowing practically nothing about it.<sup>32</sup>

The concern over the Aqueduct arose when Con Edison redesigned the powerhouse to relocate it largely underground. This, however, required excavation and blasting within 140 feet of the Aqueduct, which supplies 40% of the City's water—something the City strenuously opposed. This led to a further set of hearings that also considered the possible relocation of the plant into the Palisades Interstate Park. When the testimony finally came to an end in 1969—almost three years after it had begun—several rounds of briefing followed before a final appeal to the full Commission, all of which came to naught.

In 1970, the FPC relicensed the Project, finding again that it would do no damage to the natural beauty of Storm King Mountain, brushing aside the risks to the Catskill Aqueduct and finding, on the basis of an interagency report that had never been placed in the record or subject to cross examination, that the impacts on the Hudson River fish populations, including striped bass, would be negligible.<sup>33</sup>

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32. The remanded hearings began in the fall of 1966, and were continued originally to May 1967. In 1968, the hearings were reopened to consider the potential dangers to the City's Catskill Aqueduct and continued into 1969. The testimony in the hearings can be found in the transcripts for FPC Project 2338, available in the Scenic Hudson Archives of the Marist College Library. It is worth quoting Professor Scully's testimony. In giving the basis for his conclusion that the redesigned powerhouse would damage the scenic features of Storm King Mountain, he responded:

. . . Storm King is the central issue, and it is a mountain that should be left alone. It rises like a brown bear out of the river, a dome of living granite, swelling with animal power. It is not picturesque in the softer sense of the word, but awesome, a primitive embodiment of the energies of the earth. It makes the character of wild nature physically visible in monumental form. As such it strongly reminds me of some of the natural formations which mark sacred sites in Greece and signal the presence of the Gods; it preserves and embodies the most savage and untrammled characteristics of the wild at the very threshold of New York. It can still make the city dweller emotionally aware of what he most needs to know: that nature still exists, with its own laws, rhythms, and powers, separate from human desires.

DUNWELL, *supra* note 1, at 220.

33. Consol. Edison Co. of N.Y., Inc., Fed. Power Comm'n, Opinion No. 584, Project No. 2338, 85 P.U.R.3d 129 (F.P.C.) (1970) [hereinafter FPC Opinion No. 584].

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Scenic Hudson again appealed, joined this time by the Sierra Club and other national conservation organizations represented by David Sive, and also joined by the City and the Palisades Interstate Park Commission. The difference this time around was that there were 19,000 pages of testimony and 675 exhibits to which the FPC could point as “substantial evidence” to support its conclusions. Faced with the expansive record, which we understood would carry great weight, our briefs laid their principal emphasis on the Commission’s failure to honor the earlier Scenic Hudson mandate in substance and spirit, rather than simply by mouthing the words. In effect, we asked the court *not* to apply the “substantial evidence” test in the area of scenic and historic values and to recognize that only the judiciary could offset the inherent bias of the FPC and its lack of expertise in matters of culture and aesthetics.

Our briefs were bulky and lacked the easy logic that had been so successful in 1965. Mr. Garrison labored mightily, as did I, but the ringing prose of our earlier briefs often eluded us.

In the end, the majority of the three judges rejected our arguments and upheld the Commission’s re-licensing of the Storm King Project. In doing so, the court summarized at some length the evidence that supported the FPC findings and then applied the “substantial evidence” test. There being testimony on both sides of every issue, the Commission’s findings were conclusive, and that was that.<sup>34</sup>

Judge Oakes dissented in an opinion which sharply illuminated the divide between traditional interpretations of administrative law, which the majority of the panel had adhered to, and the potential of a new kind of judicial review in matters involving the environment, which, if it had been accepted, could have changed the fundamental relationship between the agencies and the courts in such matters. I will return to this subject in a few minutes, but I think it is worth quoting here the portion of the Oakes dissent where he made his point:

The final matters which, to my mind, tip the scales for a reversal rather than simply a reversal and remand are two. The first

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34. *Scenic Hudson Pres. Conference v. Fed. Power Comm’n*, 453 F.2d 463, 463 (2d Cir. 1971) [hereinafter *Scenic Hudson II*].

concerns what may broadly be called aesthetics, impairment by the project of the mountain's scenic grandeur. The commission's Findings 148 refers to the mountain "swallow[ing]" the "scar of the highway, the intrusive railroad structure and fills and tolerat[ing] both the barges and scows which pass by it and the thoughtless humans [sic] who visit it without seeing it. . . ." The findings go on to say that just as the mountain swallows present day intrusions, "it will swallow the structures which will serve the needs of people for electric power." This argument borders on the outrageous; it can be used to justify every intrusion on nature from strip mining to ocean oil spills . . . . Two scenic wrongs do not necessarily make a right. On the basis of the commission's thesis, wherever you have one billboard you can put two, wherever you have one overhead transmission line you can put another, you can add blight to blight to blight. That a responsible federal agency should advance that proposition in the form of a finding and in the teeth of the NEPA seems to me shocking. The commission's finding overlooks the fact that we are considering here a power station which above ground will consist of a concrete tailrace with abutments 32 feet high and 685 feet long, cutting back existing shore line from 195 to 260 feet, exclusive of any access road. This location, as the commission concedes, is on a small riverbottom foothill which "is visually a part of Storm King Mountain." The mountain may "swallow" the project, but the concrete tailrace and abutments, as long as a good-sized football stadium—over an eighth of a mile—and three stories high, will surely be stuck in its craw.<sup>35</sup>

It is worth noting that if Judge Oakes had prevailed, he would have reversed the FPC decision without any remand. The court would have had the last word. The court would have identified the values that deserved to be protected, and that would have been the end of it.

At this point, many felt the game was over, but it was not. Early in 1972, before Con Edison could start construction, Congress passed the Clean Water Act Amendments, which, in section 401, required that before any federal license could be issued that affected the waters of the United States, the state in

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35. *Id.* at 491 (Oakes, J. dissenting) (internal footnotes omitted). A petition for rehearing *en banc* was denied by an equally-divided Second Circuit, with Justice Timbers adding his own dissent.

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which the project was located had to certify that its operation would comply with state water quality standards.<sup>36</sup> The Storm King Project fell within the definition and New York State ordered hearings. When DEC granted the certification, Scenic Hudson (which I now represented on my own) appealed. We won in the Supreme Court, before a Judge with the wonderful name of DeForest C. Pitt,<sup>37</sup> but the decision was reversed by the Appellate Division, and the Court of Appeals upheld the reversal.<sup>38</sup> In the intermediate eighteen months, however, Con Edison had held off beginning construction due to the pending litigation.

In early 1974, the company announced that it intended to start and began to assemble a construction team on site. However, it was a reluctant start, because by then, Con Edison was in serious financial distress. The company felt forced to initiate construction because the Federal Power Act required that work begin within four years of the date the license was issued or the license would lapse.

Before work could start, Scenic Hudson brought another lawsuit, invoking section 404 of the Clean Water Act Amendments, which required a permit for any landfill in navigable waters.<sup>39</sup> The Storm King project included fifty-seven acres of landfill—the material blasted from the Mountain was to be dumped along the waterfront immediately to the north and used for a local park. Con Edison, initially supported by the government, argued that the Federal Power Act overrode all other legislation. But after thinking about it a while, the government changed its mind and supported our position that section 404 applied and a permit was needed. The U.S. District Court agreed and enjoined the landfill, but not the entire project.<sup>40</sup> The Second Circuit affirmed.<sup>41</sup>

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36. 33 U.S.C. § 1341(a)(1), (a)(6) (2012).

37. *See generally* deRham v. Diamond, 69 Misc. 2d 1 (Sup. Ct. Albany Cnty. 1972).

38. *See generally* deRham v. Diamond, 39 A.D.2d 302 (3d Dep't 1972), *aff'd* 32 N.Y.2d 34 (1973).

39. 33 U.S.C. § 1344.

40. *See generally* Scenic Hudson Pres. Conference v. Callaway, 370 F. Supp. 162 (S.D.N.Y. 1973).

41. *See generally* Scenic Hudson Pres. Conference v. Callaway, 499 F.2d 127 (2d Cir. 1974).

Meanwhile, licensing hearings for the nuclear plants at Indian Point had revealed that the fisheries study on which the FPC had based its 1970 licensing decision—the interagency report that was not in the record and had never been subject to cross examination—was fundamentally flawed. It had failed to take account of the tidal nature of the Hudson and, as a result, had understated the potential impact of Storm King on the striped bass population. Rather than 4% of the first year striped bass being sucked into the plant, the corrected number was 40%—a harrowing threat to the fisheries.<sup>42</sup>

Armed with this information, Angus Macbeth, one of the original NRDC attorneys who represented the Hudson River Fisherman's Association, petitioned the FPC to revisit the fisheries impacts of the plant on a novel theory. In granting the license, the Commission had included a condition requiring Con Edison to continue to study the potential fisheries impacts and if necessary to modify the operations of the plant to mitigate the damage.<sup>43</sup> Angus asked the Commission to address the new evidence on impacts *under* this license condition and to do so immediately in view of the extraordinary magnitude of the change in the predicted damage. It was a brilliant concept that invoked the limited protections the FPC had itself included in the license.

At the same time, Scenic Hudson petitioned the FPC to reopen the *entire* proceedings based not only on the discrepancies in the fisheries report, but also because the economics of the Project had changed compared to the gas turbine alternative, as revealed in a detailed study by the City's Department of Environmental Protection. When the FPC denied both petitions, Angus and I appealed for a third time to the Second Circuit.

The prospects of success were not great. There were powerful Supreme Court precedents to the effect that once a

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42. The study was conducted by a Policy Committee funded by Con Edison that included representatives of the company, the Fish & Wildlife Service and the New York State Department of Environmental Conservation. The Policy Committee's report, which was issued after the hearings closed, but before the FPC had issued its 1970 licensing opinion, was titled *Hudson River Fisheries Investigation 1965-68*. See *Hudson River Fishermen's Ass'n v. Fed. Power Comm'n*, 498 F.2d 827, 830-31 (2d Cir. 1974).

43. FPC Opinion No. 584, *supra* note 32, at Articles 15, 16, 36.

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license survives judicial review, the courts cannot revisit it again, even though circumstances may have changed dramatically; otherwise, the administrative process would never come to an end. At the same time, the potential impacts on the striped bass were frightening, and the new calculations of those impacts had been made by government scientists and biologists. At the argument, the panel was clearly sympathetic to our position, and in the end, in a truly remarkable decision (which is well worth reading), the court avoided the Supreme Court precedents by ordering the FPC to *promptly* hold hearings on the discredited study *under* the license condition that the Commission itself had approved.<sup>44</sup> The court denied the Scenic Hudson petition to reopen the hearings in their entirety, but said that if, by the end of year, the hearings had shown that the damage to the striped bass could be substantial, a full reopening might be ordered.<sup>45</sup>

By this time—early May 1974—construction had begun at Storm King, but on a limited scale. The first charges of dynamite had been laid and the first rock blasted to create the main water tunnel, but Con Edison was clearly in no hurry. In an effort to stop the work altogether, I asked the Second Circuit to issue an injunction against construction in light of its decision, which might require the reopening of the entire case and reconsideration of the entire project. Con Edison responded by saying it would forfeit its license if it could not proceed. The Court of Appeals denied my request, but in doing so offered its opinion that construction had clearly started within the meaning of the Federal Power Act and if the company were to stop building at this point, there would be no license forfeiture.<sup>46</sup> A week later, Con Edison called a halt to the work. It was never to start up again.

There is much more to the story, but because my time is limited, I will abbreviate the later chapters. The fisheries hearings that the Second Circuit ordered were both exciting and revealing. Faced with the court's deadline, the FPC did everything it could—fair and unfair—in an effort to expedite them. But the evidence was insistent, confirming in short order

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44. *See generally Hudson River Fishermen's Ass'n*, 498 F.2d 827.

45. *Id.* at 835.

46. *Id.* (On Petitions for Rehearing).

the fundamental flaw in the 1970 fisheries report and then exposing the potential for severe damage to the striped bass, with little to rebut that conclusion. As the year-end approached with a record developing in the wrong way, Con Edison and the FPC petitioned the Second Circuit for more time to carry out additional studies to try to disprove the adverse impacts. The Court of Appeals granted the request for additional time and rejected a simultaneous petition by Scenic Hudson to reopen the case in its entirety. But in doing so, it enjoined further work on the Project. Shortly after that, the Department of the Interior and the FPC's own staff came to the conclusion that the plant should not be built. The handwriting was on the wall.

Still, it took another five years before Con Edison surrendered its license and gave the property it had acquired for the Project to the Palisades Park Commission. There were no more court decisions. The *coup de grace* came by way of a complex settlement agreement negotiated over two years and involving not only the Storm King Project but also seven other power plants that used the Hudson for cooling water, three of which had been ordered by EPA to install closed-cycle cooling to protect the fisheries. Russell Train, the first chair of the Council on Environment Quality and EPA Administrator from 1973 to 1977, served as an independent mediator and worked a miracle in bringing the twelve parties to the table and helping them forge a final agreement, which was signed in December 1980.<sup>47</sup>

In addition to giving up the Storm King Project, Con Edison and its fellow utilities agreed to modify the operations of their other power plants to sharply reduce the intake of water during the critical spawning and early growth seasons; they contributed \$12 million to establish a Hudson River research foundation; and most important of all—at least to the lawyers—they agreed to pay \$500,000 of our legal fees. In return for these and other concessions, the utilities were relieved of their obligations to build cooling towers at Indian Point and two other large power plants. The settlement was hailed by the *New York Times* as a “Peace

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47. For an excellent description of the settlement and settlement negotiation, see ALLAN R. TALBOT, *SETTLING THINGS: SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION* 1-24 (1983). For materials bearing on the settlement, including the actual settlement agreement, see *SETTLEMENT MATERIALS*, *supra* note 1.

Treaty for the Hudson.”<sup>48</sup> Charles Luce, Chairman of Con Edison, was more pointed. “We lost the fight,” he acknowledged.<sup>49</sup> Bob Boyle, President of the Hudson River Fisherman’s Association, put in another way: “We raked in most of the chips and they got cab fare home.”<sup>50</sup> Thus, the saga of Storm King came to an end.

So, the story of persistence aside, what did it all mean? How does the case bear on environmental law today? Is there a legacy or has the promise of the 1965 decision been cut short? These are questions that I would like to address in my remaining time.

I begin with *standing*. This is one of the most frequently referenced bases on which the Scenic Hudson decision is identified as having initiated modern environmental law. That standing was an issue at all was almost accidental. The Federal Power Act provided that any person aggrieved by an FPC decision could seek review in the Court of Appeals, and as we drafted our initial papers, it never occurred to us that there was any question of Scenic Hudson’s right to appeal. It was the FPC, out of the blue, that challenged standing. It was fortunate for us that the Federal Power Act required that any license that FPC issued be in accordance with a comprehensive plan for the waterway, *including*, in specific language added only in 1935, “recreational use.”<sup>51</sup> We were also fortunate that in an earlier case, the FPC, in a decision written by Dale Doty, had itself recognized the

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48. *Editorial: A Peace Treaty for the Hudson*, N.Y. TIMES, (Dec. 20, 1980), at 24.

49. HOUCK, *supra* note 1, at 19.

50. *Id.*

51. 16 U.S.C. § 803(a) (2012). It is interesting to note that in 1986, the following specific language was added to the Act in section 4(e), 16 U.S.C. § 797(e):

In deciding whether to issue any license under [16 U.S.C. §§ 792-825] for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

maintenance of natural beauty as a component of recreational use and had *denied* a license on that basis.<sup>52</sup>

We argued, and the court accepted, that because the Federal Power Act recognized and forwarded recreational uses, including the maintenance of scenic beauty, as a factor, the FPC was required to take into account, the judicial review provisions of the Act had to be read to empower those specially interested in protecting recreation and scenic beauty to seek review under those provisions. If there had been no reference to “recreational uses” in the statute, our contentions regarding standing might have been for naught.

What made the Second Circuit holding the more remarkable, however, and what, as much as anything else, laid the basis for environmental litigation going forward under the Administrative Procedure Act, was the court’s holding that “*interest*” constituted an appropriate basis for standing, and that under a statute such as the Federal Power Act, *interest in the environment*, without a pecuniary stake, was sufficient to confer standing. As the court put it:

In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, *those who by their activities and conduct have exhibited a special interest in such areas*, must be held to be included in the class of “aggrieved” parties under § 313(b). We hold that the Federal Power Act gives petitioners a legal right to protect their special interests.<sup>53</sup>

In retrospect, this may have been the most thrilling and potentially expansive of all the court’s holdings. This was so in major part because it explicitly said that petitioners like Scenic Hudson did not have to suffer *economic* damage to be able to sue. But beyond this, the decision effectively held that the case and controversy requirement of Article III could be met as a result of

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52. *Namekagon Hydro Co. v. Fed. Power Comm’n*, 216 F.2d 509, 512 (7th Cir. 1954).

53. *Scenic Hudson I*, 354 F.2d 608, 616 (2d Cir. 1965) (citing *Wash. Dep’t of Game v. Fed. Power Comm’n*, 207 F.2d 391, 395 n.11 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954)) (emphasis added).

injury to a special interest in the environment, rather than the more traditional concept of “injury in fact” or “to self.” If future decisions had continued down this road, ease of access to the courts for environmental claimants would have been much greater than it is today.

Unhappily, this was not the case. Six years later, in *Sierra Club v. Morton*, the Supreme Court held that interest alone was not enough—there had to be injury in fact.<sup>54</sup> The decision, however, upheld the central *Scenic Hudson* holding that economic injury was not a prerequisite to standing and made it relatively easy for both organizational and individual petitioners to meet the threshold requirements in most environmental law cases.<sup>55</sup> The story after that is a matter of highs, followed by lows, followed, in *Laidlaw* and *Massachusetts v. EPA*, by a return to somewhat more liberal standing requirements.<sup>56</sup> But the switch of a single vote on the Supreme Court would make entry to the courts ever more difficult for environmental interests. It is hard to comprehend how, after the promise of *Scenic Hudson*, the Supreme Court and, until recently, the New York State Court of Appeals,<sup>57</sup> have moved quite so far in the opposite direction. In

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54. 405 U.S. 727, 734-35 (1972).

55. *Id.* at 735-38.

56. *See generally* Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000); *Massachusetts v. EPA*, 549 U.S. 497 (2007). Several earlier Supreme Court decisions had significantly narrowed the scope of standing in environmental cases. *See generally* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). The *Laidlaw* and *Massachusetts v. EPA* decisions were both in the direction of liberalizing standing somewhat, but have certainly not returned the situation to where it was in the 1970s. For valuable articles on problems and directions of standing in environmental litigation, *see, e.g.*, Philip Weinberg, *Unbarring the Bar of Justice: Standing in Environmental Suits and the Constitution*, 21 PACE ENVTL. L. REV. 27 (2003); David N. Cassuto, *The Law of Words: Standing, Environment, and Other Contested Terms*, 28 HARV. ENVTL. L. REV. 79 (2004); Oliver A. Houck, *Standing on the Wrong Foot: A Case for Equal Protection*, 58 SYRACUSE L. REV. 1 (2007); Bradford C. Mank, *Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Future Generations to Come?*, 34 COLUM. J. ENVTL. L. 1 (2009).

57. The New York State Court of Appeals only recently eased the standing requirements in environmental lawsuits, conforming them fairly closely to those laid down by the U.S. Supreme Court in *Sierra Club v. Morton*. *See generally* *Save the Pinebush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297 (2009).

this regard, it is my view that the full promise of the 1965 decision has not been fulfilled.

A second basis for regarding the *Scenic Hudson* opinion as a landmark is the importance it attached to *alternatives*. To my considerable consternation when I was doing research for our initial brief, the Federal Power Act did not refer specifically to alternatives, but Mr. Garrison was confident that the overall public interest language of the statute required their consideration. Here, I think, my research actually made a difference. I was able to find two cases in the D.C. Circuit that reversed FPC decisions for failing to evaluate proffered alternatives under the Federal Natural Gas Act, which was also administered by the FPC.<sup>58</sup> The circumstances in both those cases were so akin to the FPC's rejection of the Lurkis testimony that it was no stretch to assert that the same standard should be applied under the Federal Power Act. All we were asking the court was to hold the FPC to a standard that had already been established in other cases—we invoked what Professor Tarlock has called the “rule of law.”<sup>59</sup> Our goal was to make the court's decision easier in circumstances where the “substantial evidence” rule usually overrode everything else.

In this, we succeeded beyond anything we had imagined. The court's strong language, which included extended references to the Lurkis proposal (rather than dismissing it as merely a conflict of experts), as well as an elaboration of the cases I had found as guiding precedents, raised the evaluation of alternatives

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58. *Mich. Consol. Gas Co. v. Fed. Power Comm'n*, 283 F.2d 204, 226 (D.C. Cir. 1960), *cert. denied*, *Panhandle Eastern Pipe Line Co. v. Mich. Consol. Gas Co.*, 364 U.S. 913 (1960); *City of Pittsburgh v. Fed. Power Comm'n*, 237 F.2d 741, 751 (D.C. Cir. 1956).

59. See A. Dan Tarlock, *The Future of Environmental 'Rule of Law' Litigation*, 19 PACE ENVTL. L. REV. 575 (2002) (Sixth Annual Lloyd K. Garrison Lecture on Environmental Law). The observations made by Professor Tarlock in his presentation apply not only to the issue of alternatives, but even more so to our briefing, and the Second Circuit's analysis, of why the FPC was obligated to consider the preservation of scenic beauty. This derived from a reading of section 10(a) of the Federal Power Act, which required that the Project be “best adapted to a comprehensive plan for improving or developing a waterway” for, among purposes, recreation. 16 U.S.C. § 803(a)(1). We used this language to inject environmental issues—the protection of scenic beauty and fisheries resources—into the case, arguing that all we were asking was for the court to enforce the section 10(a) obligation. See *supra* text accompanying note 57.

to a new level of importance. The court, in effect, articulated—or some would say created—a standard that when important natural resources are in issue, the search for alternatives must be exactly that—*searching*. Out of this, in turn, came NEPA's requirement that federal agencies “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources,” and that they also include an analysis of alternatives in every EIS.<sup>60</sup>

For several years after NEPA was enacted, the courts enforced the alternatives mandates of NEPA rigorously, culminating, perhaps, in Judge Mansfield's opinion in *NRDC v. Callaway*.<sup>61</sup> However, it has been mostly downhill since then. Indeed, after the initial ringing affirmations of NEPA in cases such as *Calvert Cliffs*,<sup>62</sup> it has generally been downhill for the statute as a whole. As Professor Rogers put it in an earlier Garrison Lecture, the Supreme Court has largely emasculated the effectiveness of NEPA,<sup>63</sup> reducing it to a series of procedural hoops through which most federal agencies have long since learned to jump without it having any effect on their decisions. And the situation is worse in New York State under SEQRA. Indeed, in many cases, New York City agencies use the alternatives sections of environmental impact statements to *justify* the action they are proposing, rather than making any serious effort to identify options that might have less of a

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60. National Environmental Policy Act of 1969, § 102(E), 42 U.S.C. § 4332(E) (2012); § 102(C)(iii), 42 U.S.C. § 4332(C)(iii). See also Oliver Houck, *Unfinished Stories*, 73 U. COLO. L. REV. 867, 878 (2002) (“The original Second Circuit opinion opened the way for citizen suit standing . . . [and] the principles of review of environmental impacts and alternatives that are at the heart of NEPA . . .”) (internal footnotes omitted).

61. See generally *Natural Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79 (2d Cir. 1975).

62. See generally *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

63. William H. Rodgers, Jr., *Defeating Environmental Law: The Geology of Legal Advantage*, 19 PACE ENVTL. L. REV. 687, 698 (2002) (Third Annual Lloyd K. Garrison Lecture on Environmental Law).

negative impact.<sup>64</sup> Here, too, in my judgment, the promise of the *Scenic Hudson* decision has not been fulfilled.

Lastly, I turn to what many of us felt was the most significant of all the court's holdings. This followed from Judge Hays' ringing directive that the FPC's renewed proceedings "must include as a *basic concern* the preservation of natural beauty and of national historic shrines, keeping in mind that, in our affluent society, the cost of a project is only one of several factors to be considered."<sup>65</sup>

For me—and I think for Mr. Garrison as well—this seemed to signal that the courts—or at least the judges of the Second Circuit—were prepared to inject into the legal process, as a *fundamental consideration*, the same concern for the environment that President Johnson had spoken about earlier in 1965. *After all, Judge Hays did not say that the FPC simply had to take the preservation of scenic beauty into account—he directed that the Commission do so as a basic concern.* In that moment, and for that moment, it appeared that the judiciary, recognizing the inherent biases of administrative agencies and knowing how they had often been taken over by the industries they were asked to regulate, was prepared to make its own judgments regarding priorities when environmental damage was threatened. If that had happened, a new environmental common law might have followed, placing in the courts a broader role when environmental conflicts were involved—a balancing function that did not automatically defer to agencies on the basis of their supposed expertise but closely scrutinized their decisions and, in the end, applied the courts' own series of developing environmental precedents to future decisions.

Unfortunately, this was not to be. The high water mark of what in my view turned out to be an aborted attempt to take a different approach in cases involving threats to the environment

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64. *See, e.g.*, DEPARTMENT OF CITY PLANNING, NOTICE OF COMPLETION OF THE FINAL ENVIRONMENTAL IMPACT STATEMENT [FOR] 53 WEST 53RD STREET, CEQR No. 09DCP004M (2009), *available at* [http://www.nyc.gov/html/dcp/pdf/env\\_review/53\\_west\\_53/notice\\_completion\\_feis.pdf](http://www.nyc.gov/html/dcp/pdf/env_review/53_west_53/notice_completion_feis.pdf) (where the impacts of the 1,250 foot high tower that is the subject of this EIS is justified on the basis that a totally theoretically "as-of-right" alternative would have essentially the same impacts).

65. *Scenic Hudson I*, 354 F.2d 608, 624 (2d Cir. 1965) (emphasis added).

was probably *Overton Park*, where the Supreme Court held that the judiciary was obligated to closely scrutinize a substantive decision of the Secretary of Transportation to approve a highway through a Memphis Park, when the Federal Highway Act said that that could only be justified if there was no prudent and feasible alternative.<sup>66</sup> One might have thought from that decision, and from early NEPA decisions such as *Calvert Cliffs*, that the judiciary recognized the urgency of protecting the American landscape and the environmental health of its citizens and was prepared to play an expanded role in cases that came before it. Instead, the courts stepped back, or were required to step back by decisions of the Supreme Court that, as commentators have noted, have reduced environmental litigation to little more than a subset of administrative law.

The handwriting, I think, was on the wall in the second *Scenic Hudson* decision.<sup>67</sup> As I have already noted, Judge Oakes was prepared to take the step that could have led to a more expansive role for the courts in matters of the environment. He was prepared to look at the realities and make the decision that the FPC had *not* treated the preservation of scenic beauty as a basic concern. And he was ready to say that in the circumstances of the case, the law, as articulated by the courts, required that conservation values be given priority (or at least that they not be relegated to a “so-what” status). Thus, he would not only have vacated the license—he would have called an end to the Project altogether (rather than remand it to the FPC for yet another round of hearings). That was a decision that he felt it was appropriate for the courts to make.

Judge Hays, on the other hand, who had laid down the criterion that the preservation of scenic beauty be treated as a *basic* concern, was unwilling to act on that criterion the second time around. Instead, he retreated to the traditional rules, which deferred almost entirely to the agency’s supposed expertise. As long as there was evidence on both sides of the issue, the courts had to defer to the agency. Biases and values and even the state

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66. See generally *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402 (1971).

67. See generally *Scenic Hudson II*, 453 F.2d 463 (2d Cir. 1971).

of the nation had no bearing; the agencies, not the courts, had been given the decision-making role.

In my view, that is the dogma that continues to operate today. There have, of course, been resounding litigation victories in the environmental arena, but few of them have been substantive. Where statutes are involved—and soon after *Scenic Hudson*, statutes became the fundamental and overriding form that defined environmental law—courts have regularly held agencies to the mandates of the law. But where discretion is involved—where priorities have not been set out in legislation—the courts have largely maintained a passive role. The fact that environmental quality may be at stake has not made a difference.

It could have been otherwise. In their time, judges like Skelly Wright, Bazelon, Mansfield and Oakes were willing to wade in, to take an active role in shaping the law—one might even say in creating it—in the environmental arena.<sup>68</sup> But today, there seems little enthusiasm among judges to think or act in an expansionist way. And for good reason: the Supreme Court has discouraged it. Still, in his time, Judge Cardozo was able to change fundamentally the reach of tort law from his seat on our State's Court of Appeals. Perhaps one day another Cardozo will do that for environmental law.

Great leaps have, in fact, been made. I recommend to you Oliver Houck's recent book *Taking Back Eden*, which recounts cases in Japan, the Philippines, India, Russia, and Greece, where the judiciary has taken upon itself the role of determining the priority of competing values and has handed down decisions, many of them constitutionally-based, holding that a Shinto temple, the Taj Mahal, a Russian glade or the Philippine forests take priority, and if other branches of government are unwilling or unable to protect them, the courts will.<sup>69</sup> So, too, in Argentina, where, commenting on a court decision that ordered the clean up of a filthy river running through the poorest part of Buenos Aires,

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68. In addition to Judge Oakes' dissent in *Scenic Hudson II*, see, e.g., *Calvert Cliffs' Coordinating Council v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971) (Skelly Wright, J.); *Natural Res. Def. Council v. Callaway*, 524 F.2d 79 (2d Cir. 1975) (Mansfield, J.); *Env'tl. Def. Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971) (Bazelon, J.).

69. See generally HOUCK, *supra* note 1.

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the chief judge explained the ruling, which many regarded as beyond the proper role of the judiciary, by saying rather dryly, “the function of the court is to make noise.”<sup>70</sup>

It has always been so, from the earliest days of the English chancery. In the United States, it is a role that inevitably raises issues of the separation of powers and, indeed, of democracy itself. Yet our courts have risen up to make noise on many occasions, not least of all in John Marshall’s seminal constitutional rulings and more recently, when the Supreme Court set the civil rights revolution in motion in *Brown v. Board of Education*.<sup>71</sup> Protection of the environment may seem of lesser importance, and in terms of individual rights, that is true. But in terms of the collective—of our society as a whole—the implications of a degraded environment—a National treasure irrevocably defaced or the continuing loss of the ecosystems that sustain us—are equally compelling. We can hope—and I do hope—that you will live to see the courts assume a more active role once again. Or better yet, that some of you will be part of making it happen.

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70. Robert V. Percival, *The Globalization of Environmental Law*, 26 PACE ENVTL. L. REV. 451, 455-56 (2009) (Fifteenth Annual Lloyd K. Garrison Lecture on Environmental Law).

71. See generally *Brown v. Bd. of Education*, 347 U.S. 483 (1954).