

SYMPOSIUM: FROM EXXON TO PARIS: A REVIEW OF ENVIRONMENTAL LAW OVER THE LAST 30 YEARS

A Tribute to Environmental Law's Past, Present, and Future

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Today, as we celebrate the field of environmental law, we are given an opportunity to pause and reflect on the past, assess the current state of affairs, and make predictions for the future. We bring to this gathering our life experiences and legal acumen, following in the footsteps of environmental pioneers who came before us, and hopefully providing a clearer path for the next generation of environmental lawyers. I have been fortunate to have practiced in this field for over twenty years. And over the course of that time, I have come to believe that we must view our practice as a collective exercise, where each weighty decision we make will combine with all other decisions to have cumulative impacts for years to come. Unlike other areas of law, the practice of environmental law is deeply intertwined with the fate of the human race and our planet. It is a profession that not only determines legal responsibility for environmental harm, but also shapes the cultural, societal, and economic impact of human activity on the earth and on its inhabitants.

Our nation has led the world in the most sophisticated and complex environmental legal system, and other countries strive to replicate us. While many conservation and environmental protection movements existed starting in the early 1900s, the 1970s marked a broader national awakening of the need for federal environmental regulation, prompted by the 1969 Santa Barbara oil spill off the coast of California.¹ Congress responded with passage of multiple, landmark environmental statutes, such as the Clean Air Act of 1970, the National

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1. See, e.g., David M. Hunter & Kara McQueen-Borden, *From Santa Barbara to Macondo to SEMS*, 4 LSU J. ENERGY L. & RES. 2, 233 (2016).

Environmental Policy Act of 1970, the Clean Water Act of 1972, the Resources and Recovery Act of 1976, and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1980.² The nation similarly responded to the Exxon Valdez oil spill in 1989 in Prince William Sound, Alaska, with the swift passage of the Oil Pollution Act, which provides for strict liability, requirements for oil spill prevention plans, the establishment of a liability trust fund, and increased, daily penalties for violators.³

I learned about our nation's environmental legacy from Professor Buzz Thompson when I was a student at Stanford Law School. I continued to immerse myself in the field in the mid-1990s as an Honors Trial Attorney in the Environmental Enforcement Section in the Environment and Natural Resources Division at the U.S. Department of Justice (DOJ). I worked beside seasoned DOJ litigators, who taught me the importance of building your case based on the unique statutorily-defined regulated actions and penalties. I was part of the team working on the notorious Bunker Hill litigation, involving CERCLA and natural resource damages claims against mining companies in northern Idaho, where age-old mining practices led to significant contamination. I grappled with questions such as whether an intermittent arroyo in the dry, high desert of the Navajo Nation was a water of the United States under the Clean Water Act. I was charged with allocating liability between parties covering vast periods of time, calculating penalties for continuing violations, and crafting creative settlements when a defendant faced an inability to pay fines. I was a small cog in the wheel, but I felt the power of the laws I was enforcing and the responsibility that went with that role.

The singular and clear purpose I experienced as a DOJ environmental enforcer would give way the older I got and the more I was exposed to the world of politics. At the state level in New Mexico during the early 2000s, both in my role representing tribes and as chief counsel to Governor Bill Richardson, I saw the nearly insurmountable challenges in negotiating water uses on the Middle Rio Grande. The legal obligations were extensive and often conflicting: to protect endangered species such as the silvery minnow and meet interstate compact requirements, while fulfilling water delivery obligations to satisfy competing human uses and water rights. The legal incentive to achieve consumptive use under the prior appropriation doctrine clashed with Endangered Species Act (ESA) requirements to protect the species. The fish required very specific habitat conditions, yet their habitat was smack dab in the middle of an agriculture district, municipalities such as Albuquerque, and a number of Pueblos who possessed senior water rights with their own unique needs. On top of that, upstream federal storage projects further complicated matters with the annual ritual of

2. 42 U.S.C. § 7401 (1955); 42 U.S.C. § 4321 (1970); 33 U.S.C. § 1281a (1977); 42 U.S.C. § 6901 (1976); 42 U.S.C. § 9601 (1980).

3. 33 U.S.C. §§ 2701–20 (1990).

debating and negotiating storage quantities and the timing and amount of water releases.

My Middle Rio Grande experience was my first exposure to the conflicting perspectives and interests of all the players: federal, state, and tribal governments, politicians, environmentalists, farmers, scientists, and other stakeholders, all with their own attorneys! While there were many attorneys in the room, crafting a solution required skills that most lawyers do not possess: patience, empathy, innovation, and collaboration. Given the enormity and complexity of the issues, the courts became a refuge for aggrieved participants, with federal judges playing the role of *de facto* natural resource managers. Perhaps not surprisingly, the silver minnow litigation continued during my tenure at Interior, with lawyers and judges remaining as key influencers in shaping the fate of the Middle Rio Grande.⁴

I left New Mexico to return to federal service in 2009 as Solicitor for the U.S. Department of the Interior in the Obama administration. At that time, the country was in the midst of a recession, where the mortgage crisis and bank bailouts were front and center. This was quite the contrast from my prior stint working at the DOJ during the Clinton Administration. In the face of these economic woes, the appetite for environmental regulation was at an all-time low. During the first term, if the White House's Office of Management and Budget's (OMB) regulatory impact analysis of a proposed rule resulted in adverse economic burdens, the rule's fate was grim. The Stream Protection Rule, proposed by the Office of Surface Mining at Interior, which sought to regulate mountain top coal mining impacts in streams, repeatedly went back to the drawing board, in part, due to concerns about economic impacts.⁵ Interior also continued to defend existing litigation positions from the second Bush administration that eschewed expansive environmental review, such as maintaining the position that the Bureau of Land Management (BLM) did not need to evaluate specific climate change impacts from coal operations under the National Environmental Policy Act (NEPA).⁶ The economic climate created great reluctance to drastically shift environmental policy. The exception to this general rule was for the more egregious threats to environmental values. For example, early in the Obama administration, Secretary Ken Salazar cancelled oil and gas lease sales near Arches National Park and withdrew public lands from uranium mining near the Grand Canyon. Industry fiercely challenged these decisions, with the latter case currently the subject of industry's

4. *Rio Grande Silvery Minnow v. U.S. Bureau of Reclamation*, 601 F.3d 1096 (10th Cir. 2010).

5. *Stream Protection Rule*, 81 Fed. Reg. 93066 (December 20, 2016). Congress repealed the rule under the Congressional Review Act in January 2018. 2017 CONG US HJ 16 (Jan. 4, 2017); *see also* Congressional Review Act 5 U.S.C. § 801.

6. *See, e.g.,* *Wildearth Guardians v. U.S. Forest Service*, 828 F.Supp.2d 1223 (D. Colo. 2011); *Wildearth Guardians v. U.S. Forest Service*, 120 F.Supp.3d 1237 (D. Wy. 2015), *rev'd and remanded*, 870 F.3d 1222 (10th Cir. 2017).

petition for certiorari before the Supreme Court.⁷ But these drastic moves were not the norm.

Without question, a poor economic forecast will drive environmental policy under any political party's watch. However, environmental disasters don't wait for economies to recover or political parties to change. The Deepwater Horizon oil spill in April 2010 proves this point. Not since Exxon Valdez had the country experienced an environmental disaster of this magnitude. Eleven lives were lost on the rig in the Gulf of Mexico. It is estimated that 4.9 million barrels of oil were released into the Gulf.⁸ Interior was the primary actor under the Outer Continental Shelf Lands Act (OCSLA) given its role in issuing the leases and conducting oversight.⁹ My boss, Secretary Ken Salazar, was faced with the unenviable task of managing the government's response, with Interior serving as the focal point for scrutiny and criticism, both inside and outside the government.

The spill continued, unabated, for a total of eighty-seven days straight.¹⁰ We came into the office seven days a week, viewing the underwater robot camera's image of the riser near the sea floor, gushing oil, with no remedy in sight. We were astounded that BP had no plan B when plan A—the blowout preventer—failed to properly shut off the flow. We also had no explanation as to what had caused the blowout. Under these circumstances, using his authority under OCSLA to suspend operations in order to protect against “. . . a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment,” Secretary Salazar issued a moratorium ceasing all drilling operations in the Gulf of Mexico, subject to a few limited exceptions.¹¹

Naturally, industry challenged the decision in court. We were enjoined by the district court in Louisiana on the grounds that we had issued an overly broad, unsubstantiated moratorium, resulting in arbitrary and capricious decision-making under the Administration Procedures Act (APA), notwithstanding OCSLA's clear empowerment of the Secretary to stop operations in order to protect the environment.¹² We issued a more detailed moratorium a few weeks later, which provoked the district court judge to hold Secretary Salazar personally in contempt

7. *Impact Energy Resources v. Salazar*, 693 F.3d 1239 (10th Cir. 2012); *Nat'l Association of Mining v. Zinke*, 877 F.3d 845 (9th Cir. 2017), *petition for cert. filed*, Mar. 13, 2018.

8. Joel Achenbach & David A. Fahrenthold, *Oil Spill Dumped 4.9 Million, Latest Measure Shows*, WASH. POST (Aug. 3, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080204695.html>.

9. 43 U.S.C. § 1331 (1953).

10. DEEPWATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING—REPORT TO THE PRESIDENT, NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL 165 (Jan. 2011).

11. *Hornbeck Offshore Services, L.L.C. et al. v. Salazar, et al.*, 696 F.Supp.2d 627, 630–31 (E.D. La. 2010) (citing OCSLA, 43 U.S.C. § 1334(a)(1)).

12. *Id.* at 638–39.

of the injunction.¹³ Ultimately, justice prevailed when the Fifth Circuit reversed and vacated the contempt order.¹⁴ In advising the Secretary through this dilemma, the one vexing reality was that there was no specific statutory language empowering him to act quickly to address an environmental crisis outside the confines of standard agency decision-making processes and oil spill response actions. In the face of the worst oil spill in our nation's history, gushing uncontrollably 5,000 feet below the surface, I had to advise the Secretary that his tools to respond under the law were nuanced at best.

Once the spill was finally abated, reforms ensued under the watchful eye of the bipartisan Deepwater Horizon Commission, environmental groups, and the public at large. The Minerals Management Service at Interior—largely viewed as too cozy with industry—was dismantled and three new agencies were formed—the Bureau of Ocean Energy Management (BOEM) for the leasing function, the Bureau of Safety & Environmental Enforcement (BSEE) for the oversight and inspection function, and the Office of Natural Resource Restoration (ONRR) for the royalty collection function.¹⁵ We also promulgated other regulatory reforms to improve inspections and blowout preventer requirements, among other things.¹⁶ The DOJ enforcers in my old office went to work on a massive effort that led to the settlement of BP's civil liability for more than \$20 billion dollars—the largest civil environmental penalty in our nation's history.¹⁷ Natural resource damages projects also ensued to restore the coastal areas of affected states.¹⁸

Having witnessed firsthand the incredible challenges and ill-preparedness of industry to address a spill in the frontier environment of deep sea drilling left me with the inescapable impression that the government must have some oversight role to ensure that our environment is protected and restored. In this regard, it is disturbing that Secretary Zinke has called for the rollback of the post-Deepwater Horizon safety regulations.¹⁹ The Deepwater Horizon Commission called for even greater reforms than what the Obama administration ultimately enacted.²⁰ The Co-Chairmen of the Commission, Bob Graham and Bill Reilly, published an editorial in the *New York Times* last year criticizing the Trump administration's

13. *Hornbeck Offshore Services, L.L.C. et al. v. Salazar et al.*, 713 F.3d 787 (5th Cir. 2013).

14. *Id.*

15. See SECRETARY OF THE INTERIOR ORDER NOS. 3299 (May 19, 2010) and 3302 (June 18, 2010), and 30 C.F.R. Chapters II, V, and X, as revised by final rules of the Department of the Interior at 75 Fed. Reg. 61051 and 76 Fed. Reg. 64432.

16. 30 C.F.R. Part 250, subpart H.

17. Environment and Natural Resources Division, *Proposed Consent Decrees: Deepwater Horizon*, DEPT. OF JUSTICE, <https://www.justice.gov/enrd/deepwater-horizon> (last visited Apr. 9, 2018).

18. *Id.*

19. Oil and Gas and Sulphur Operations on the Outer Continental Shelf—Oil and Gas Production Safety Systems—Revisions, 82 Fed. Reg. 61703 (proposed Dec. 29, 2017) (to be codified at 30 C.F.R. pt. 250).

20. DEEPWATER, *supra* note 10, at 250–60.

weakening of offshore safety regulations, noting that the BP oil spill may have been prevented if tougher rules were in place.²¹

Indeed, we now are facing a radically different approach to environmental law and policy under the current administration. The great environmental legacy we have built as part of our rule of law society is slowly being chipped away by overzealous politicians who seek to appease disgruntled sectors of society. This radicalization against environmental protection charts a dangerous path that fails to appreciate the fact that good lawyers can execute regulatory reforms in a way that alters the policy without destroying the underlying executive authority and Congressional intent. As Solicitor, one of the key tools in my toolbox was executive discretion. Congress delegated authority to Interior under various statutes, which included vesting the agency with some flexibility to execute its statutory mission. Discretion was vital in our day-to-day operations at Interior. It gave us the necessary leeway to determine how to implement a vast portfolio of responsibilities, which, depending on the circumstance, may skew more towards a conservation ethos or an energy development focus. For instance, the term “multiple use” under the Federal Land Management Policy Act (FLPMA), which guides BLM in its management of the public lands “breathes discretion at every pore,” with no single value overtaking another value.²² The current administration can use its discretion to change land management plans, increase energy lease sales, and alter regulations.

But executive discretion is under assault by the current agenda of governance by repeal. The ever present mania to repeal any regulation of the prior administration invites arguments that agencies lack statutory authority in the first instance. A political agenda to deregulate threatens the underlying agency authority. A more conscientious approach would be to find, as a matter of discretion, the agency will not pursue certain environmental regulations, as opposed to concluding that such regulation is prohibited as a legal matter.

Thus, it is important to not conclude that the EPA lacks authority under the Clean Air Act to regulate power plants in some respects, or that the BLM cannot regulate venting and flaring emissions from oil and gas operations on public lands, or that the Fish & Wildlife Service cannot require certain kinds of mitigation to offset impacts to endangered species and habitat.²³ Circumscribing the executive branch’s authority is particularly ill-advised given Congress’ apparent

21. Bob Graham & William K. Reilly, Opinion, *Trump’s Risky Offshore Oil Strategy*, N.Y. TIMES (July 5, 2017), <https://www.nytimes.com/2017/07/05/opinion/trump-oil-drilling-energy-gulf.html>.

22. Nat. Res. Def. Council v. Hodel, 624 F. Supp. 1045, 1058 (D. Nev. 1985) (citing Perkins v. Bergland, 608 F.2d 803 (9th Cir. 1979), quoting Strickland v. Morton, 519 F.2d 467, 469 (9th Cir.1975)).

23. See Exec. Order No. 13783, Order on Promoting Energy Independence and Economic Growth (Mar. 28, 2017) (directing review of the Clean Power Plan, among other matters); Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 46458 (proposed Oct. 5, 2017) (to be codified at 43 C.F.R. pts. 3160, 3170) (suspending BLM’s waste prevention rule, effective Jan. 8, 2018); Mitigation Policies of the U.S. Fish

inability to enact legislation of any significant substance. My plea to federal officials is to preserve what discretion you have, and use it wisely in fulfilling your agenda, but don't be so quick to disavow it. You may need it someday under your watch or under the next administration's watch.

I believe our true calling as environmental law practitioners is not to find the easy way out through deregulation, but to tackle head on the difficult balancing act of policymaking that achieves economic vitality while respecting environmental values. We are a capitalist society that rewards individual self-sufficiency and economic dominance, but we also cherish the land of the beautiful and the home of the brave. Congress has enshrined this cultural paradigm into our environmental laws. I have witnessed this dual belief system in energy executives, land developers, and corporate leaders, who can easily identify their favorite, pristine place in America that they believe should be preserved for future generations. We have seen proof of this sentiment with the current, bipartisan opposition of coastal Governors to Secretary Zinke's opening of the Outer Continental Shelf to oil and gas development.²⁴

More and more, state Governors are relying on federalism principles to pursue their own environmental agenda through clean energy targets and demands for delegation of federal authority to the state level.²⁵ Corporations have likewise expressed their support for the Paris Accord and commitments to utilize renewable energy, some with a 100% target.²⁶ A diversified coalition of opposition, including five Indian nations, has also sued President Trump for his recent revocation of two national monuments in Utah: the Bears Ears National Monument and the Grand Staircase Escalante National Monument, to solidify the fact that Congress empowered Presidents to protect our special places, but did not give subsequent Presidents the power to destroy that protection.²⁷ And Indian Country has likewise reached a breaking point, where environmental threats to reservation homelands are less likely to be tolerated, as we witnessed in the titanic clash between a pipeline and treaty rights in the Dakota Access controversy at Standing

and Wildlife Service); Request for Comments, 82 Fed. Reg. 51382 (published Nov. 6, 2017) (announcing public comment on the review of Fish & Wildlife Service's mitigation policy).

24. Timothy Puko, *Trump Administration Says New Drilling Won't Be Allowed Off Florida Coast*, WALL ST. J. (Jan. 9, 2018), <https://www.wsj.com/articles/trumps-offshore-drilling-plan-faces-choppy-political-waters-1515515503>.

25. John Myers et al., *Gov. Jerry Brown, America's Unofficial Climate Change Ambassador in the Trump Era, Heads to China*, L.A. TIMES (Jun. 1, 2017), <http://www.latimes.com/politics/la-pol-sac-jerry-brown-china-trip-20170601-story.html>.

26. Kevin Lui, *Top CEOs Are In a Last Ditch Bid to Persuade Trump to Stick with the Paris Climate Deal*, FORTUNE (Jun. 1, 2017), <http://fortune.com/2017/06/01/apple-google-facebook-trump-stay-paris-accord/>.

27. Hopi Tribe et al. v. Trump, 1:17-cv-02590 (TSC), Utah Dineh Bikeyah et al. v. Trump, 1:17-cv-02605 (TSC), Nat. Res. Def. Council et al. v. Trump, 1:17-cv-02606 (TSC), consolidated cases. At the time of this Article's submission, the United States' motion for transfer to Utah federal district court was pending.

Rock.²⁸ These expressions of environmentalism are a part of our nation's identity.

But we must continue to reach across the aisle, talk with our perceived adversaries, and educate our youth, to pass on the lessons of the past and instill pride in our country's environmental leadership. I fear that our message is getting drowned out by other voices and interests. The non-profit, non-partisan Environmental Voter Project has a data analytics project to determine participation levels for voters who express interest in environmental issues.²⁹ The latest report from the project is telling, with voters ranking environmental issues 15th out of the nineteen issues polled, and only 2% stating it was a top priority.³⁰ And for those voters that self-identified as environmentalists in the project, in the 2014 midterm election cycle approximately 15.7 million did not vote and in the 2016 presidential election approximately 10.1 million did not vote.³¹

These results show that while the environment is a critical and pervasive aspect of our daily existence, it is not a top issue for politicians to consider in attracting voters. So there remains much work to be done. But I believe together we can spread the word and share our knowledge, and inspire others to participate in this exceptional field of law, as the fate of our world depends in large part on the trajectory of environmental law and policy.

28. *Standing Rock Sioux Tribe et al. v. U.S. Army Corps of Engineers*, No. 16-1534 (D.D.C. Jul. 27, 2016).

29. ENVIRONMENTAL VOTER PROJECT, 2017 IMPACT REPORT (2017), <http://www.environmentalvoter.org/sites/environmentalvoter/files/2017-impact-report.pdf>.

30. *Id.* at 3.

31. *Id.* at 4.