

THE COST OF IGNORANCE: Contaminated Property Redux

Jim Derouin*

“Environmental Law” is, on the one hand, a phenomenon—an active, sometimes frenetic, area of the law for the last forty years. On the other hand, it is an ages-long reaction of civilization to, variously, preserve, protect, use and/or harness natural resources while, at the same time, protecting society from health risks (e.g., typhus) and providing safe public services (e.g., waste disposal and water supply). It is easy for society today to get carried away with arguments over hot topics such as “global warming,” “environmentalism” and/or the never-ending debate between private property rights and the “public right” to be protected from health threats (whether from air or water sources). It is useful, however, from time to time to put those debates aside and concentrate on context. That is the purpose of this article.

“Environmental law” used to take the form of common law—often times through familiar tort doctrines such as trespass and nuisance; and, for that matter, zoning and land use law. An excellent work on the evolution of environmental law was produced by Alan Parks, who reported that: “In 1202, King John of England proclaimed the first English food law, the Assize of Bread, which prohibited adulteration of bread with such ingredients as ground peas or beans. Regulation of food in the United States dates from early colonial times.”¹ The same work recites that Benjamin Franklin argued, in 1739, on behalf of the “public right” in the “Liberty of Breathing freely in their own Houses” in a case involving the dumping of tannery and slaughterhouse waste into surface water.² The genesis of the environmental law extends deep into Colonial American history.

*. Jim Derouin is a 1968 graduate of the University of Wisconsin Law School. He has practiced environmental law for more than forty years. He is the founder of Derouin Environmental Law, LLC. His background and experience are available at www.derouinlaw.com.

1. Alan Parks, *Origins of United States Environmental Law*, MSGRAVEL.COM (2006), http://www.msgravel.com/assets/1312/Origins_of_Environmental_Law_Paper_050406.pdf.

2. *Id.*

A review of literature documents that environmental law is as American as apple pie.³ A brief timeline of major stepping stones includes:

- 1681 William Penn orders colonists to conserve one acre of trees for every five acres cut down.⁴
- 1798 The U.S. Marine Hospital Service, a predecessor to the U.S. Public Health Service and eventually, the Environmental Protection Agency, is founded.⁵
- 1872 Congress passes the Yellowstone Act, making it the first national park dedicated for public use and for the “preservation, from injury or spoliation, of all timber, mineral deposits, natural curiosities, or wonders . . . and their retention in their natural condition.”⁶
- 1899 Congress passes the Rivers and Harbors Act, a predecessor to the Clean Water Act, intended to protect navigation in interstate waters.⁷ The U.S. Army of Engineers was authorized to carry out the navigation improvement duties under the law. At the time, according to Parks, West Point was the leading engineering school in the country.⁸ The Corps of Engineers was given dredge and fill authority.⁹ The law prohibited, among other things, the dumping of refuse into navigable waters without a permit.¹⁰
- 1900 The Lacey Act, a predecessor to the Endangered Species Act, prohibited the transport of illegally obtained wildlife across state lines and outlawed hunting in the Yellowstone National Park.¹¹

3. See Parks, *supra* note 1; Jack Lewis, *Looking Backward: A Historical Perspective on Environmental Regulations*, EPA.GOV (1988), <http://www2.epa.gov/aboutepa/looking-backward-historical-perspective-environmental-regulations>.

4. WILLIAM PENN, CONCESSIONS TO THE PROVINCE OF PENNSYLVANIA XVIII (1681).

5. An Act for the Relief of Sick and Disabled Seamen, ch. 77, 1 Stat. 605 (1798).

6. Yellowstone Act, 17 Stat. 32 (1872).

7. Rivers and Harbors Act of 1899, ch. 425, 30 Stat. 1151.

8. Parks, *supra* note 1, at 7.

9. *Id.*

10. 33 U.S.C. § 407 (2012).

11. Lacey Act, § 3, 31 Stat. 187 (1900).

- 1902 The U.S. Marine Hospital Service becomes the U.S. Public Health and Marine Service.¹²
- 1902 The National Reclamation Act is enacted.¹³ During the Theodore Roosevelt presidency (1901–1909), the National Forest Service was founded, the National Monuments Act was enacted and 230 million acres of national parks, national forests, federal reservations and game and bird preserves were created.¹⁴ Not to be overlooked—Roosevelt Dam in Arizona, a reclamation act project, was dedicated in 1912.¹⁵
- 1905 President Roosevelt, in his address to Congress and in another harbinger of the Endangered Species Act, calls for the preservation of the bison (which had dwindled from 70 million to 300).¹⁶
- 1906 Presaging the ongoing debate between “public” and “private” power, Congress passes the Burton Act prohibiting the use of Niagara Falls for hydroelectric power.¹⁷
- 1906 In a decision that suggested clean water fights and legislation to come, the United States Supreme Court decides *Missouri v. Illinois*¹⁸ relating to the discharge of sewage by Chicago into the Mississippi River. Illinois won—then.¹⁹
- 1907 In a decision that presaged clean air fights and legislation to come, the United States Supreme Court ruled in favor of Georgia in its suit against the Tennessee Copper Company

12. *History*, U.S. PUB. HEALTH SERV., <http://www.usphs.gov/aboutus/history.aspx> (last visited May 26, 2014).

13. National Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388.

14. *Theodore Roosevelt and Conservation*, U.S. NAT'L PARK SERV., <http://www.nps.gov/thro/historyculture/theodore-roosevelt-and-conservation.htm> (last visited May 26, 2014).

15. Phoenix Area Office, Lower Colo. Region, *A Brief History of Roosevelt Dam*, U.S. DEP'T OF INTERIOR, BUREAU OF RECLAMATION, <http://www.usbr.gov/lc/phoenix/projects/rooseveltdam/rdhistory.html> (last visited May 26, 2014).

16. President Theodore Roosevelt, State of the Union Address (Dec. 5, 1905).

17. Burton Act of June 29, 1906, 34 Stat. 626.

18. 200 U.S. 496 (1906).

19. *Id.* at 526.

claiming damage to its forests and air quality.²⁰ Chief Justice Holmes wrote: “It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains . . . should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.”²¹ (Note the terminology about “threatened” and “endangered” natural resources—concepts picked up generations later in federal legislation.)

- 1912 The U.S. Public Health and Marine Service becomes the U.S. Public Health Service—the forerunner to the Environmental Protection Agency.²² A large part of its early work related to combatting typhus (a waterborne pathogen), but expanded to include the development of workplace air standards.²³
- 1916 Congress creates the National Park Service.²⁴ Today there are approximately 400 parks with more than 84 billion acres of land under management.²⁵
- 1918 Canada and the United States enter into the Migratory Bird Treaty Act to protect birds in migration; another predecessor to the Endangered Species Act.²⁶
- 1921 The United States Supreme Court rules in favor of New Jersey against New York relating to the dumping of sewage by New Jersey into interstate waters.²⁷ New Jersey won—then.²⁸

20. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907).

21. *Id.* at 238.

22. *History*, U.S. PUB. HEALTH SERV., <http://www.usphs.gov/aboutus/history.aspx> (last visited May 26, 2014).

23. *Id.*

24. National Park Service Organic Act, § 1, 39 Stat. 535 (1916) (codified at 16 U.S.C. § 1).

25. *About Us*, NAT'L PARK SERV., <http://www.nps.gov/aboutus/index.htm> (last visited May 26, 2014).

26. Migratory Bird Treaty Act of 1918, ch. 128, 40 Stat. 755 (codified as amended at 16 U.S.C. §§ 703–712).

27. *New York v. New Jersey*, 256 U.S. 296 (1921).

28. *Id.* at 314.

- 1926 Congress passes the Recreation and Public Purposes Act relating to the use of federal lands.²⁹
- 1933 As part of the New Deal, and in response to the Great Depression, the Emergency Conservation Work Act is passed, creating the Civilian Conservation Corps to provide work on natural resource and erosion projects.³⁰
- 1935 In response to the Dust Bowl, the Soil Conservation Act is passed to deal with natural resource and erosion issues.³¹ More than 100 million acres were impacted by the Dust Bowl and 2.5 million people migrated from affected areas.³²
- 1937 In another harbinger of the Endangered Species Act, Congress passes the Bald Eagle Preservation Act to prevent the extinction of the Bald Eagle.³³
- 1947 President Truman establishes the Everglades National Park.³⁴
- 1948 Congress passes the Federal Water Pollution Control Act updating the Rivers and Harbors Act of 1899.³⁵ The U.S. Public Health Service is given jurisdiction over the law which mandates the reduction of discharges to interstate waters (and its tributaries), the protection of surface and underground waters and the protection of various uses of water including fishing, recreation, drinking and agriculture.³⁶ The law provides for assistance to states and municipalities for the construction of treatment facilities.³⁷

29. Recreation and Public Purposes Act, 44 Stat. 741 (1926).

30. Emergency Conservation Work Act, 48 Stat. 22 (1933).

31. Soil Conservation and Domestic Allotment Act, 49 Stat. 163 (1935).

32. TIMOTHY EGAN, *THE WORST HARD TIME: THE UNTOLD STORY OF THOSE WHO SURVIVED THE GREAT AMERICAN DUST BOWL* 223 (2006); DONALD WORSTER, *DUST BOWL: THE SOUTHERN PLANS IN THE 1930S* 49 (2004).

33. Bald Eagle Protection Act of 1940, 54 Stat. 250.

34. Act of May 30, 1934, 48 Stat. 816 (codified at 16 U.S.C. § 410).

35. Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. §§ 1251–1376).

36. ANDREW STODDARD, ET AL., *MUNICIPAL WASTEWATER TREATMENT: EVALUATING IMPROVEMENTS IN NATIONAL WATER QUALITY* 29–30 (2002).

37. RICHARD N. L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY* 205 (2008).

- 1954 Congress passes amendments to the Recreation and Public Purposes Act.³⁸
- 1954 Smog conditions in Los Angeles force city officials to close schools for most of the month of October.³⁹
- 1955 Congress passes the Air Pollution Control Act providing for research of air pollution issues.⁴⁰
- 1961 Congress passes the Federal Water Pollution Control Act Amendments of 1961.⁴¹
- 1962 Rachel Carson publishes *Silent Spring* dealing with the impacts of pesticides, particularly DDT.⁴²
- 1963 Congress passes the Clean Air Act of 1963 establishing a research and monitoring program within the U.S. Public Health Service.⁴³
- 1964 Congress passes the Wilderness Act establishing the National Wilderness Preservation System—a law that now encompasses 90 million acres.⁴⁴
- 1965 Congress passes the Solid Waste Disposal Act, which represented the initial effort to deal with the disposal and recycling of solid waste by encouraging municipalities to convert open dumps into soil-covered sanitary landfills.⁴⁵
- 1965 Congress passes the Water Quality Act requiring states to develop water quality standards for interstate waters.⁴⁶

38. Recreation and Public Purposes Act, 68 Stat. 173 (1954).

39. Bill Kovarik, *Environmental History Timeline*, <http://66.147.244.135/~enviror4/20th-century/cold-war-1950-59/> (last visited May 26, 2014).

40. Clean Air Act, ch. 360, 69 Stat. 322 (1954).

41. Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204.

42. *See generally* RACHEL CARSON, *SILENT SPRING* (1962).

43. Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392.

44. Wilderness Act of 1964, Pub. L. No. 88-577 (codified at 16 U.S.C. §§ 1131–1136); *Wilderness*, NAT'L PARK SERV., <http://www.nps.gov/deva/naturescience/wilderness.htm> (last visited May 26, 2014).

45. Solid Waste Disposal Act of 1965, Pub. L. No. 89-272, 79 Stat. 992.

46. Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903.

- 1966 Congress passes the Clean Water Restoration Act of 1966.⁴⁷
- 1967 Congress passes the Air Quality Act of 1967 to include the development of air pollutant emission inventories, ambient monitoring techniques and control techniques.⁴⁸
- 1968 Congress passes the Wild and Scenic Rivers Act to protect designated waterways from pollution, commercialization and development.⁴⁹
- 1968 Congress passes the Aircraft Noise Abatement Act.⁵⁰
- 1969 Floating chemicals and pollutants on the surface of the Cuyahoga River in Ohio ignite. *Time* refers to the river as “oozing rather than flowing.”⁵¹
- 1969 Congress passes the National Environmental Policy Act (NEPA) requiring the preparation of Environmental Impact Statements (EIS) for every major federal action that significantly affects the quality of the human environment.⁵² The law also established the Council of Environmental Quality (“CEQ”) in the Office of the President.⁵³ Russell Train is the first chairman of the CEQ.⁵⁴
- 1970 Congress passes the Clean Air Act of 1970 establishing (1) National Ambient Air Quality Standards (NAAQS); (2) State Implementation Plans (SIPs); (3) New Source Performance Standards (NSPS); and (4) National Emission Standards for Hazardous Air Pollutants (NESHAPS).⁵⁵ Enforcement

47. Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246.

48. Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485.

49. Wild and Scenic Rivers Act, Pub. L. No. 90-542, 82 Stat. 906 (1968).

50. Aircraft Noise Abatement Act, Pub. L. No. 90-411, 82 Stat. 395 (1968).

51. *America's Sewage System and the Price of Optimism*, TIME, Aug. 1, 1969, available at <http://content.time.com/time/magazine/article/0,9171,901182,00.html>.

52. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321–4347).

53. *Id.* § 4342.

54. Michael R. Greenberg, *Russell E. Train: A Leading Environmental Figure of the 1970s*, 100 AM. J. PUB. HEALTH 606, 606 (2010).

55. Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

authority was also expanded.⁵⁶ The focus is on “conventional pollutants” defined as: carbon monoxide; sulfur dioxide; particulate matter; nitrogen dioxide; ozone; and sulfur oxide.⁵⁷

1970 The first Earth Day is celebrated by 20 million people across the country.⁵⁸

1970 Congress passes the Occupational Safety and Health Act (“OSHA”).⁵⁹

1970 In response to public clamor and a recognition that the management of environmental issues was fragmented, President Nixon, through Reorganization Plan Number 3 (July 1970), establishes the Environmental Protection Agency (“EPA”) by combining various functions from (1) the Interior Department (Federal Water Quality Administration and pesticide responsibilities); (2) the Department of Health, Education and Welfare (the National Air Pollution Control Administration, the Food and Drug Administration’s pesticide functions, the Bureau of Solid Waste Management, the Bureau of Water Hygiene and portions of the Bureau of Radiological Health); and (3) the Agriculture Department (pesticide responsibilities).⁶⁰ The feeling was that a more interventionist approach was needed.⁶¹ The EPA is created at the front end of the greatest period of environmental regulatory expansion in United States history.⁶² William Ruckelshaus becomes the first EPA Administrator, followed by Russell Train.⁶³

56. *Id.*

57. THE CLEAN AIR ACT HANDBOOK 227 (Robert J. Martineau & David P. Novello eds., 2004).

58. Jack Lewis, *The Birth of the EPA*, EPA J., Jan.–Feb. 1985, at 6, 7.

59. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590.

60. Reorganization Plan No. 3 of 1970, 3 C.F.R. 1072 (1966–1970).

61. *See* Lewis, *supra* note 58, at 8.

62. *See generally id.*

63. *Id.* at 9; William D. Ruckelshaus et al., *Views from the Former Administrators*, EPA J., Jan.–Feb. 1985, at 12. A similar consolidation of various functions occurred with the creation of the Arizona Department of Environmental Quality in 1986. *See* Arizona Environmental Water Quality Act of 1986, tit. 49. California is an example of a state which still employs a highly fragmented approach to environmental regulation.

46:0429]	<i>CONTAMINATED PROPERTY REDUX</i>	437
1970	Congress amends the Solid Waste Disposal Act and requires comprehensive investigation of hazardous waste management practices. ⁶⁴	
1970	Congress establishes the Apostle Islands National Lakeshore. ⁶⁵	
1970	Congress passes the Water Quality Improvement Act of 1970. ⁶⁶	
1972	Congress passes the Federal Water Pollution Control Act Amendments of 1972 establishing the National Pollutant Discharge Elimination System, technology-based secondary treatment effluent limitations and the use of Best Available Control Technology; it also designated surface water uses and required the development of water quality criteria and water quality standards and the adoption of an anti-degradation policy. ⁶⁷ The law exempted “non-point sources” from the permit program. ⁶⁸ The law established effluent guidelines for existing sources and New Source Performance Standards (NSPS) for new sources. ⁶⁹ The law introduced the concepts of Waste Load Allocations (“WLA”) and Total Maximum Daily Loads (“TMDL”) on “water quality limited” stretches of water. ⁷⁰	
1972	Congress passes the Noise Control Act. ⁷¹	
1972	Congress passes the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”). ⁷²	
1972	Congress passes the Consumer Protection Safety Act. ⁷³	

64. Resource Recovery Act of 1970, Pub. L. No. 91-512, 84 Stat. 1227.

65. Act of Sept. 26, 1970, Pub. L. No. 91-424, 84 Stat. 880.

66. Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 114.

67. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816.

68. *Id.*

69. *Id.*

70. *Id.*

71. Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234.

72. Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973.

73. Consumer Produce Safety Act of 1972, Pub. L. No. 92-573, 86 Stat. 1207.

- 1972 Congressional action leads to the 1972 Stockholm Conference on the Environment.
- 1973 Congress passes the Endangered Species Act.⁷⁴
- 1974 Congress passes the Safe Drinking Water Act.⁷⁵
- 1975 Congress passes the Hazardous Materials Transportation Act.⁷⁶
- 1976 Congress passes the Resource Conservation and Recovery Act (“RCRA”)⁷⁷ to improve the design and operation of solid waste landfills and plan for the proper management and disposal of hazardous waste—a goal that would take years and extensive pages of regulations to accomplish. The term “cradle-to-grave” is coined in environmental law.⁷⁸
- 1976 Love Canal discovered.⁷⁹
- 1976 Kepone, manufactured by Life Science Products Company for Allied Chemical Company, is disclosed to have poisoned workers and contaminated the environment.⁸⁰
- 1976 Congress passes the Toxic Substances Control Act (“TSCA”) to require that the impact of chemicals be considered prior to their use.⁸¹
- 1976 Congress enacts the Federal Land Policy and Management Act of 1976 relating to the management of federal lands and their use for various purposes such as mining.⁸²

74. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–1544).

75. Safe Water Drinking Act, Pub. L. No. 93-523, 88 Stat. 1660 (1974).

76. Hazardous Materials Transportation Act, Pub. L. No. 93-633, 88 Stat. 2156 (1975).

77. Resource Conservation and Recovery Act, Pub. L. No. 94-580, 90 Stat. 2795 (1976).

78. *Hazardous Waste Regulations*, ENVTL. PROT. AGENCY, <http://www.epa.gov/osw/laws-regs/regs-haz.htm> (last visited May 26, 2014).

79. Michael H. Brown, *Love Canal*, U.S.A., N.Y. TIMES, Jan. 21, 1979 § 6 (Magazine) at 23.

80. *The Costs of Kepone*, WASH. POST, Oct. 9, 1976, at A16.

81. Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976).

- 1977 Congress passes the Clean Air Act Amendments of 1977, mostly dealing with the issue of Preventing Significant Deterioration (“PSD”) of air quality in areas which attain the NAAQS.⁸³
- 1977 Congress passes the Clean Water Act of 1977 providing for tertiary treatment on conventional pollutants, for the control of toxic pollutant discharges and for development of Best Management Practices for area-wide planning purposes.⁸⁴
- 1977 The United States Supreme Court, in *Tennessee Valley Authority v. Hill*, issues its famous decision in favor of the snail darter against the Tellico Dam in the Tennessee Valley.⁸⁵
- 1977 Congress passes the Surface Mining Control and Reclamation Act of 1977.⁸⁶
- 1978 Congress passes the Outer Continental Shelf Lands Act Amendments of 1978.⁸⁷
- 1978 Congress passes the Quiet Communities Act.⁸⁸
- 1980 Congress passes the Alaska National Interest Lands Conservation Act designating more than 100 million acres of parks, wildlife refuges and wilderness areas.⁸⁹
- 1980 Sparked by Love Canal, Congress passes the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA” aka “Superfund”) establishing retroactive, joint and several liability on persons who generated, transported, arranged for the disposal of and/or owned (or used) property at

82. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743.

83. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685.

84. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566.

85. 437 U.S. 153, 195 (1978).

86. Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445.

87. Outer Continental Shelf Lands Act Amendments, Pub. L. No. 95-372, 92 Stat. 629 (1978).

88. Quiet Communities Act, Pub. L. No. 95-609, 92 Stat. 3079 (1978).

89. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980).

which hazardous substances were released to the environment.⁹⁰ A tax on certain chemicals was imposed to provide funds for EPA to use to clean up orphan sites or sites which responsible parties refused to remediate.⁹¹ A whole new era of environmental litigation and remediation commences. Confusion exists over the meaning of the term “innocent landowner.” Environmental assessments of conditions on contaminated property become necessary for buyers and lenders. Issues relating to lender liability and the potential liability of owners of property over groundwater plumes for which they are not responsible become important.

1984 Congress passes the Hazardous and Solid Waste Act Amendments of 1984 (“HSWA”) providing for a “land ban” on the disposal of hazardous wastes unless land disposal was found to not pose a risk to human health or the environment.⁹² Subtitle I dealing with underground storage tanks was included.⁹³ “Small quantity generators” of hazardous waste were subjected to separate requirements.⁹⁴ The concept of “corrective actions” was created for contaminated sites. Licensing was required for treatment, storage and disposal (“TSD”) facilities.⁹⁵ Used oil regulations were included.⁹⁶ Citizen suit provisions were included in cases posing an “imminent hazard.”⁹⁷ A manifest system for the transportation and disposal of hazardous waste was provided.⁹⁸

1984 Bhopal disaster occurs, killing more than 2000 people.⁹⁹

90. Comprehensive Environmental Response Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767.

91. *Id.*

92. Hazardous and Solid Waste Act Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221.

93. *Id.* § 601.

94. *Id.* § 234, 302.

95. *Id.* § 206.

96. *Id.* § 241, 242.

97. *Id.* § 401, 402.

98. *Id.* § 221.

99. Stuart Diamond, *The Pain of Progress Racks the Third World*, N.Y. TIMES, Dec. 9, 1984, <http://www.nytimes.com/1984/12/09/weekinreview/the-pain-of-progress-racks-the-third-world.html>.

- 46:0429] *CONTAMINATED PROPERTY REDUX* 441
- 1986 Congress amends TSCA by including the Asbestos Hazard Emergency Response Act of 1986.¹⁰⁰
- 1986 Congress passes the Emergency Wetlands Resources Act.¹⁰¹
- 1986 Congress passes the Safe Drinking Water Act Amendments.¹⁰²
- 1986 Congress passes the Superfund Amendments and Reauthorization Act (“SARA”) in an attempt to provide clarity to the liability provisions of CERCLA.¹⁰³ SARA Subtitle III is included in response to the Bhopal disaster—the Emergency Planning and Community Right-to-Know Act (“EPCRA”)—requiring for notification of local officials of chemicals kept at industrial facilities.¹⁰⁴ No longer will first-responders be guessing about what they are facing when they enter a burning facility or a facility at which a critical event is occurring.
- 1987 Congress passes the Clean Water Act of 1987 dealing with runoff from industrial stormwater discharges and sanitary/stormwater municipal overflow discharges; it also required the identification of stream segments that would not meet water quality standards even with the application of the Best Available Technology Economically Achievable.¹⁰⁵
- 1987 Long Island garbage, on a barge, moves up and down the East Coast for 6000 miles looking for a place to unload.¹⁰⁶
- 1987 The Montreal Protocol, an international treaty aimed at eliminating chlorofluorocarbons, hydrochlorofluorocarbons

100. Asbestos Hazard Emergency Response Act of 1986, Pub. L. No. 99-519, 100 Stat. 2970.

101. Emergency Wetlands Resources Act of 1986, Pub. L. No. 99-645, 100 Stat. 3582.

102. Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, 100 Stat. 642.

103. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613.

104. *Id.* §§ 300–330; JAMES L. LIEBERMAN, A PRACTICAL GUIDE FOR HAZARDOUS WASTE MANAGEMENT, ADMINISTRATION, AND COMPLIANCE 6 (1994).

105. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7.

106. Robert D. McFadden, *Garbage Barge Returns in Search of a Dump*, N.Y. TIMES, May 18, 1987, <http://www.nytimes.com/1987/05/18/nyregion/garbage-barge-returns-in-search-of-a-dump.html>.

and hydrofluorocarbons from the environment, is adopted in a move aimed at protecting ozone.¹⁰⁷

- 1988 NASA warns Congress of the effects of global warming.¹⁰⁸
- 1988 Congress passes amendments to the Recreation and Public Purposes Act.¹⁰⁹
- 1989 The Exxon Valdez spills 11 million gallons of oil in Prince William Sound.¹¹⁰
- 1990 Congress passes the Clean Air Act Amendments of 1990 dealing principally with acid rain and toxic air pollutants.¹¹¹
- 1990 Congress passes the Oil Pollution Act with the purpose of preventing and better cleaning up catastrophic oil spills.¹¹²
- 1996 Congress passes the Safe Drinking Water Act Amendments.¹¹³
- 2002 Congress passes the Small Business Liability Relief and Brownfields Revitalization Act to further define the liability of bona fide prospective purchasers and contiguous landowners of contaminated property, as well as those who buy and develop contaminated property.¹¹⁴ Concepts such as “all appropriate inquiry” become important.¹¹⁵

107. The Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 15 U.N.T.S. 1550.

108. Philip Shabecoff, *Global Warming Has Begun, Expert Tells Senate*, N.Y. TIMES, June 24, 1988, <http://www.nytimes.com/1988/06/24/us/global-warming-has-begun-expert-tells-senate.html?src=pm&pagewanted=2>.

109. Recreation and Public Purposes Amendment Act of 1988, Pub. L. No. 100-648, 102 Stat. 3813.

110. Bill McAllister, *Million of Gallons of Oil Spill Into Alaskan Sound: Waves Hampering Containment Efforts*, WASH. POST, Mar. 25, 1989, at A1.

111. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399.

112. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484.

113. Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, 110 Stat. 1613.

114. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002).

115. *Brownfields and Land Revitalization*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/brownfields/laws/> (last visited May 26, 2014).

46:0429]	<i>CONTAMINATED PROPERTY REDUX</i>	443
2005	The Kyoto Protocol is implemented; the United States is not a signatory, but the European Union develops a complex program to reduce carbon dioxide emissions. ¹¹⁶	
2006	The EPA issues standards for soot, dust and particulate matter too small to see. ¹¹⁷	
2007	The United States Supreme Court rules in <i>Massachusetts v. EPA</i> that the EPA has the authority to regulate greenhouse gases—i.e., carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, sulfur hexafluoride and perfluorocarbons. ¹¹⁸	
2007	Oil spill (58,000 gallons) occurs in San Francisco Bay. ¹¹⁹	
2008	Great Lakes Compact signed by all eight Great Lakes states aimed at preventing the use of water outside the region. ¹²⁰	
2010	British Petroleum Deepwater Horizon oil spill occurs. ¹²¹	

As can be seen, most of the major federal legislation after 1970 (with respect to water, air and solid waste) was built on historic legislation enacted as America transitioned from an agrarian society to an industrial economy. A number of the laws were reactions to major environmental events such as closing Los Angeles schools for a month in 1954; the burning of the Cuyahoga River in 1969; Love Canal in 1976; Bhopal in 1984; and the Valdez oil spill in 1989. As the American economy evolved into a more industrial society, problems relating to water, air and solid waste increased—and the political system responded.

A break with the traditional emphasis on air, water and solid waste occurred with the enactment of CERCLA in 1980. This law, of course, dealt

116. Kyoto Protocol to the United Nations Framework Convention on Climate Change, *opened for signature* Mar. 16, 1998, 993 U.N.T.S. 3 (entered into force Feb. 16, 2005).

117. National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 61,144 (Oct. 17, 2006) (to be codified at 40 C.F.R. pt. 50).

118. 549 U.S. 497 (2007).

119. Felicity Barringer, *Oil Spill Fouls Shores in San Francisco Area*, N.Y. TIMES, Nov. 9, 2007, at A18.

120. Great Lakes-St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110-342, 122 Stat. 3739 (2008).

121. Campbell Robertson, *Oil Leaking Underwater from Well in Rig Blast*, N.Y. TIMES, Apr. 24, 2010, http://www.nytimes.com/2010/04/25/us/25rig.html?_r=0&gwt=pay.

with cleaning up existing contamination rather than the regulation, by permit, of future emissions and discharges. It also stood the traditional tort system on its head by imposing retroactive, strict and joint and several liability on parties deemed to be “responsible” for historic releases to the environment.¹²²

As one can see from the list above, America has, notwithstanding catastrophes such as the eradication of wild bison, a long history of conservation. The term “conservation,” however, means to preserve; it does not mean to protect—either human health or the environment. And as can be seen from the list above, the jump from conservation on the one hand to affirmative protection of human health and the environmental on the other occurred aggressively in the second half of the 20th Century. Federal legislative activity during the 1970s and 1980s is unparalleled in American history and, realistically, will never be replicated.

The federal legislation promoted what became known as “cooperative federalism” wherein states had the opportunity to adopt state laws and regulations which they could implement according to federal guidelines, under federal oversight.¹²³ This approach still exists today; the EPA manages federal environmental laws in those states that have not adopted implementing legislation and rules.¹²⁴

The transition from “conservation” to “environmental protection” occurred during a time of great political and social turbulence in the United States—and laid the seeds for debates since that time. Whereas this article concerns itself with legislation, another entire branch of environmental advocacy was being advanced by opposing forces in the political and judicial arenas.

Environmental and health legislation is enacted in the “public interest.” Elected officials are supposed to serve the “public interest.” The “public interest” is more a political concept than a legal concept. Regardless, courts are called upon to decide where legislative or regulatory acts are so onerous so as to constitute a “taking” that is constitutionally prohibited.

The concept of the “public trust doctrine” is something different. As stated by Professor Joseph Sax in a 1970 seminal work on the subject: “The source of modern public trust law is found in a concept that received much

122. See Alexandra B. Klass, *From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims*, 39 WAKE FOREST L. REV. 903, 920–35 (2004).

123. See Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 669–71 (2001) (discussing cooperative federalism in the context of environmental statutes passed in the 1960s and 1970s).

124. Parks, *supra* note 1, at 11.

attention in Roman and English law—the nature of property rights in rivers, the sea, and the seashore.”¹²⁵ Sax pointed out that “certain interests, such as navigation and fishing, were sought to be preserved for the benefit of the public; accordingly, property used for those purposes was distinguished from general public property which the sovereign could routinely grant to private owners” and that “in certain common properties—such as the seashore, highways and running water—‘perpetual use was dedicated to the public.’”¹²⁶

Within American constitutional law, a traditional, and narrow, concept of “public trust” rights in natural resources exists—particularly with respect to water.¹²⁷ In general, in the eastern part of the United States, the traditional, narrow “public trust doctrine” holds that, for example, private ownership of land on a lake extends only to the ordinary high (or low) water mark of the body of water.¹²⁸ As to the riparian ownership of property on a stream, ownership would normally extend to the “thread” of the stream, but the right of the riparian owner to recreate in the water would be subject to the right of the public to also use it for that purpose.¹²⁹ This body of law supports restrictions on dredging and filling navigable waters found in federal law—and, in many cases, established as a matter of state constitutional law.¹³⁰ Even in this narrow, more traditional context, however, the public trust issue raises many questions which courts have struggled with, and continue to struggle with, including the following:

- What is the relationship between riparian property ownership and water in a body of water?
- Who “owns” groundwater?
- What is the difference between being able to “use” water and “owning” it?
- What is the duty, if any, to limit consumption of water?
- Who owns the beds of navigable waters?
- How do you delineate the beds of water bodies?
- Who has the right to use the beds of navigable waters?

125. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970).

126. *Id.* at 475.

127. *Id.*

128. Sax analyzes the “public trust” decisions in the states of Massachusetts, Wisconsin and California. *See generally* Sax, *supra* note 125.

129. *See* Patrick O. Dunphy, *The Public Trust Doctrine*, 59 MARQ. L. REV. 787, 796 (1976).

130. Sax agrees that: “It is clear that the historical scope of public trust law is quite narrow.” Sax, *supra* note 125, at 556.

- What constitutes “navigable water?”
- What constitutes a “tributary” to “navigable water?”
- Does a wetland constitute “navigable water?”
- Does a dry wash constitute “navigable water?”
- What is the basis of the “public trust doctrine?”
- For purposes of dredging/filling, where does the bed of navigable water start?

To further complicate these issues, western states, when joining the Union, typically were granted lands subject to certain public rights as provided in the individual Enabling Acts which created each state.

Sax, in his law review article, argued that: “Certainly the principle of the public trust is broader than its traditional application indicates.”¹³¹ In a subsequent law review article, Sax argued for “liberating” the doctrine from its “historical shackles,” by which he meant applying it in cases other than those relating to water resources.¹³² The stated purpose of Sax’s efforts were aimed at examining the role of courts in shaping public policy—on process rather than substance and with the expectation that courts would “limit their intervention to regulation which stops short of a compensable taking.”¹³³

As is common, action begets reaction. An example is a memo prepared by Lewis Powell in 1971 (the “Powell Memorandum”) before his nomination to the United States Supreme Court.¹³⁴ The memo was prepared for the U.S. Chamber of Commerce and, in general, lamented what Powell felt was a general antagonism in the media, among politicians and on campuses against the free enterprise system.¹³⁵ Powell complained about the “near-contempt with which businessmen’s views are held” as demonstrated by the “stampedes by politicians to support almost any legislation related to ‘consumerism’ and the ‘environment.’”¹³⁶ His memorandum called for business interests to be more assertive in representing their point of view and, in general, served as an outline for subsequent enhanced business involvement in the political, judicial and regulatory processes.¹³⁷

131. *Id.* at 557.

132. See generally Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 *ECOLOGY L.Q.* 351 (1998); Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 *U.C. DAVIS L. REV.* 185 (1980).

133. Sax, *supra* note 125, at 557.

134. Confidential Memorandum: Attack of American Free Enterprise System, from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce (August 23, 1971).

135. *Id.*

136. *Id.*

137. *Id.*

When looking at the breadth and depth of the issues involved in the practice of “environmental law,” an “environmental lawyer” can be an air lawyer, a water lawyer, a natural resource lawyer or a waste lawyer—or “all of the above.” As is shown above, however, the roots of American environmental law go back to the British colonies and involve no less than one of the signers of both the Declaration of Independence and the United States Constitution. The development of the American legislative/regulatory scheme has been evolutionary, not revolutionary, in nature. The concept of “public interest” and the properly applied doctrine of “public trust” are not foreign concepts and are not inconsistent with the private ownership of property—although more easily applied in riparian/water situations. But, as indicated above, the concept of public trust is as old as the Roman Empire and was not thought up by modern “environmentalists” (although the latter have certainly tried to expand it).

In short, we practice in an exciting area of law. Our practice area involves state and federal laws, regulations and constitutional issues, and is integrally intertwined with our economic and political system. When representing a client with business “overseas,” the practice area involves the domestic laws of literally every country in the world (as well as the European Union). It is, therefore, a phenomenon even though, in historical terms, it remains a relatively new area of law. For all of these reasons, we are fortunate to participate in it, and to have witnessed and experienced the most active period of concentrated legislative and regulatory activity in the history of the United States—and, for that matter, in civilized history.