UNFINISHED STORIES

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INTRODUCTION

Lawsuits die, and even the most consequential cases are reduced over time to short names and headnotes—empty picture frames. Environmental law, the new kid on the block of American jurisprudence for the last three decades, is aging as well, and its seminal cases, decisions that lit up the sky in the 1970s, are now simply citations modified by subsequent citations in textbooks from an era before today's law students were born.

Yet for some of us who practice, teach, and study law, there is something artificial about the reduction of a case like *Overton Park* or *Storm King* to a citation, to a snapshot from what was, in a very real sense, a life. Gettysburg was more than who won and who lost. So was *Mineral King*. These battles came from places deep in the American psyche, conflicting places, and even when one side was declared victorious they were not over. They were started by people who at times went on to greater things and at other times, their fifteen minutes expired, simply faded away. Sometimes they lost their case but went on to prevail in another way. Sometimes they won their case and went on to lose the war. Today, busy with deadlines and burdened by electronic overload, we do not even pause to consider that what we are reading and citing and then deleting are stories that tore up people's lives and changed the places they lived, and the way that we live since.

Perhaps the most unasked questions about the lawsuits that, literally, created environmental law are: how did they come about, and what happened afterwards? This Article presents the story of five such cases, chosen by criteria no more sophisticated than that they came early in the history of envi-

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ronmental law and their impacts were huge. It does not attempt to re-argue their legal issues. Such analysis has already been performed by a string of scholars and will continue as long as the issues are at play. Rather, what follow are histories, truncated for purposes of time and space, biased by the sources discovered, and, doubtless, by the biases of the author. What may become apparent, even from a sample this small, is that winning and losing in environmental law are temporary phenomena and that, no matter what the courts decide, the stories continue.

But as an historian I have already misspoken. I have stated that these cases were selected for their impact, and nothing more. Not quite so. They were also selected because there was something magnificent about each of them, something they said and did to connect the life of the law to the life of the world around them. They each involved unique places, and each pitted a variety of ordinary Americans against some of the icons of their day: the Friendly Atom, the Disney Corporation, the Tennessee Valley Authority—God-returned-to-earth in the Appalachian South. As this author has written in another context, none of the decisions rendered were foreordained; it is a fair bet none of them would have been written in the same fashion, or even *decided* in the same fashion, by the federal courts of today.[1] And so too, simply in an historical sense, it is thrilling in the sense of reading a Civil War diary or watching a newsreel from World War II, to remember the emotion of these cases, which, as much as their arguments, propelled them forward. Here is the United States Court of Appeals for the District of Columbia Circuit in 1971:

> These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment. Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engines of material 'progress.'[2]

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1. *See* Oliver Houck, *The Secret Opinions of the Supreme Court on Leading Cases in Environmental Law, Never Before Published!*, 65 U. COLO. L. REV. 459 (1994).

2. Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

Let it, then, be confessed. This Article is an homage to people of a now-distancing time and to how they perceived the world, and to what they did about it. None of these cases was easy. And none has really ended.

I. STORM KING: *Scenic Hudson Preservation Conference v. Federal Power Commission*[3]

In 1965, the United States Court of Appeals for the Second Circuit decided a case that would prepare the landscape for environmental law. The decision involved the licensing of a pumped storage hydroelectric plant along the Hudson River at the foot of Storm King Mountain, about sixty miles upstream from New York City. The Second Circuit's opinion is widely credited for affording environmental interests "standing to sue," authority that empowered hundreds of local and national groups to enforce laws against polluters, even against their own governments, and became an engine moving new statutes towards their stated goals. As it turned out, the decision was but the first of several federal cases surrounding Storm King. By the time the dust had settled, seventeen years later, the project was finally withdrawn and new institutions had been formed that are still in motion, expanding, like pieces of an exploding star.

> To those who know it, the Hudson River is the most beautiful, messed up, productive, ignored, and surprising piece of water on the face of the earth. There is no other river quite like it, and for some persons, myself included, no other river will do. The Hudson is the river.[4]
>
> —Robert Boyle, Founder
> Hudson River Fisherman's Association

> I think no American river *per mile* is deeper in history, art, and perhaps literature than the Hudson, and some of its varied richness shows in the lore of the toponyms thereabouts. The river itself has been, to name a few, Cahohatatea, Shattemuck, Muhheakunnuk, Mahicanittuck, Mohegan, Grande Rivière, Angoleme, Rio San Antonio, Rio de Gomez, Rio de Montaigne, Norumbega, Manhattan, Mauritius, River of the

3. 354 F.2d 608 (2d Cir. 1965).

4. ROBERT BOYLE, THE HUDSON RIVER: A NATURAL AND UNNATURAL HISTORY 15 (1969) (emphasis omitted).

> Prince, Nassau, Grotte, Noordt, River of the Mountains, and (even today) the North. Along its banks no name is richer than Storm King, which Henry Hudson knew as Klinkersberg but Dutch settlers called Butter Hill, a description the local nineteenth-century "dude poet" N.P. Willis found not at all befitting its dominance of the lower river. He, according to one journalist, "bestowed in cold blood" the name Storm King.[5]
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> —William Least Heat-Moon

The Hudson River rises in the northern Adirondacks and runs more than three hundred miles to the island of Manhattan and into New York Bay.[6] Halfway through its journey, it emerges from the mountains at Albany, nearly flat with the sea, creating a 150-mile estuary above New York Harbor and one of the great natural ports of the world.[7] For two centuries, the Hudson defined the primary routes of commerce and defense for the English colonies.[8] British and American armies would fight, fortify, and attack the length of it, and the very mention of Hudson names—Saratoga, Ticonderoga, West Point, Washington Heights—is to recount much of the Revolutionary War. Dutch family dynasties—the Schuylers, the Roosevelts—settled along the Hudson and remain social and economic powers to this day. In 1825, the Erie Canal would connect the Hudson to the Great Lakes and the Ohio Territories, routing trade through New York City to every continent on the globe.

But there has always been more to the Hudson than commerce. Fifty miles northwest of the City rise the Hudson Highlands, in the words of *Life* magazine, "one of the grandest passages of river scenery in the world."[9] The abrupt, craggy ranges of the Highlands inspired *The Legend of Sleepy Hollow* and America's first, internationally-acclaimed school of paint-

5. WILLIAM LEAST HEAT-MOON, RIVER-HORSE: THE LOGBOOK OF A BOAT ACROSS AMERICA 22–23 (1999).

6. Sara Rimer, *Long-Abused Hudson Thrives Again*, N.Y. TIMES, Nov. 6, 1986, at B1.

7. *Id.*

8. JOHN CRONIN & ROBERT F. KENNEDY, JR., THE RIVERKEEPERS 21 (1997). The historical summary that follows is taken from this account.

9. *Id.*

ing, the Hudson River School,[10] for which the scenery was "an almost obligatory subject."[11] Within the Hudson Highlands, the crown jewel was a dominant, sugarloaf formation rising some 1,700 feet from the river's edge, Storm King Mountain.[12] It was this scene, and no more and no less, that would initiate—but not ultimately carry—the ensuing litigation.

In the early 1960s, Consolidated Edison (Con Ed), electric power supplier for the New York City region, faced booming demands from residential growth, air conditioning, and rate schedules that promoted ever-greater consumption.[13] Con Ed's answer was a pumped storage electrical power plant on Storm King. The utility would use electricity from its conventional plants during slack periods to pump water from the Hudson up through a tunnel forty feet in diameter, to a mountaintop reservoir, more than 230 football fields in size.[14] To form the reservoir, the top of the mountain would be removed. During peak demand times, the stored water would be released to rush back down the tunnel and drive turbine generators in a powerhouse at the base of the mountain. Three kilowatts of electricity from conventional plants would be needed to obtain two kilowatts from the Storm King facility, but the three were cheap and the two were worth real money. Power from the plant would be carried by transmission lines strung from 150-foot towers in a 125-foot wide swath across residential Westchester and Putnam Counties. Storm King would be the largest pumped storage hydroelectric plant in the world.

Con Ed saw nothing but pluses in Storm King: profits, no air pollution, and service to its ever-expanding customer base. It had a friend in the Federal Power Commission (FPC), which, despite statutory language directed towards preserving recrea-

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10. Monica Michael Willis, *Save Our Countryside; Scenic Hudson Conservation Group Helps Protect the Hudson River Valley*, COUNTRY LIVING, Feb. 1996, at 19.

11. *Living on Earth: Interview by Steve Curwood with Robert Kennedy, Jr., Attorney, Natural Resources Defense Council* (National Public Radio Broadcast, Nov. 27, 1998), *available at* www.loe.org/archives/981127.htm [hereinafter *Living on Earth*].

12. *Id.*

13. Natural Resources Defense Council, *E-law: What Started It All?*, *at* http://www.nrdc.org/legislation/helaw.asp (last modified May 5, 2000).

14. Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608, 612 (2d Cir. 1965). The reservoir was to be 240 acres in size, *id.*, which computes in square feet to 232 football fields. The descriptions of the project that follow are taken largely from this opinion.

tional and other public interests, saw its mission as promoting electrical power generation and little more. Neither saw the fight ahead.

The Hudson Valley was no ordinary part of the United States. Its residents were well-placed, sophisticated—and conservationist. Their ranks had produced Teddy Roosevelt, Frederick Law Olmstead, and other environmental leaders of their time, and had a track record of fighting to defend their landscape dating back to a struggle by Washington Irving against railroading the Highlands almost a century and a half before.[15] They saw the Storm King project as an assault on their history, their property, and the natural world. In November 1963, a group of residents, organized by Wall Street lawyer Stephen Duggan, formed the Scenic Hudson Preservation Conference and went to war.[16] They enlisted some of the best law firms, public relations firms, and fund-raising experts in America.[17] With a staff of three, an army of volunteers, and mailings that reached 24,000 pieces a month, the Scenic Hudson group ultimately drew contributions from 22,000 people in forty-eight states, fourteen countries, and three continents.[18] This was not only a new kind of war, it was a new way of waging it.

Represented by a resident and senior partner at a silk-stocking New York City firm and joined by several neighboring towns and townships, Scenic Hudson intervened in the FPC's licensing proceeding for Storm King.[19] They based their case on aesthetic and cultural injury from the project, injury that was characterized by Con Ed as no more than the "self-centered complaints" of "a few local dreamers."[20] By July 1964, however, the FPC's hearing examiner had recommended ap-

15. *See* CRONIN & KENNEDY, JR., *supra* note 8, at 22.

16. *See Living on Earth*, *supra* note 11.

17. *Id.*

18. The Storm King Legacy, *Scenic Hudson News Archives 1999 Annual Report*, *at* http://www.scenichudson.org/news/archives/ar_2/pg9.htm (last visited June 12, 2001) (on file with author).

19. The lead attorney for petitioners was Lloyd K. Garrison, a senior partner in Paul, Weiss, Rifkind, Wharton, & Garrison of New York City. Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608 (2d Cir. 1965). An endowed series of Lloyd K. Garrison lectures in environmental law is now sponsored by the Pace University School of Law in White Plains, New York. *See* Pace University School of Law, *Earth Day at 28: Good Wind, Bad Knees, Can It Finish the Game?, The Fourth Annual Lloyd K. Garrison Lecture on Environmental Law*, Apr. 20, 1998 (brochure, on file with author).

20. CRONIN & KENNEDY, JR., *supra* note 8, at 29.

proval of the license.[21] Commission approval was pending, but appeared to be a mere formality. Which might have ended the matter, but for the fish.

There is yet another Hudson River. It is a huge, diverse nursery, a 13,500 square mile watershed supporting a great mix of fresh and saltwater fish and historic runs of migratory shad, sturgeon, herring, alewives, blue crab, mackerel, and menhaden.[22] As in all estuaries, the nutrient and mineral soup drained from the interior is checked by the tides, mixed, and provided in steady doses to nurseries at the base of the food chain. The Hudson estuary was one of the two principal nurseries on the Atlantic coast, supporting recreational and commercial fishing from Maine to the Carolinas and, within the Hudson, a commercial fishery that dated back 350 years. And within it all was the prize, one of the premier commercial and game fish of all time, the striped bass. The Hudson estuary produced sixty percent of the striped bass in America. Enter a whole new constituency.

In the early 1960s, *Sports Illustrated Magazine* assigned an ex-marine and journalist, Robert Boyle, to its New York office, and gave him the leeway to cover fishing on the Hudson.[23] Not much was expected on this front; New York Harbor was widely regarded as a cesspool from which sea life had long been extinguished.[24] To Mr. Boyle's surprise, he discovered commer-

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21. *Id.*

22. *Id.* at 21. The description of the Hudson estuary that follows is taken largely from this account. For a less prosaic description of the Hudson fishery, see HEAT-MOON, *supra* note 5, at 22:

> Beyond the numerous biological arguments (such as self-preservation) for clean water and abundant life in the river is the poetry in the names of Hudson fishes. How impoverished the river would be without stoneroller, horny-head chubs, comely shiners, margined madtoms, northern hogsuckers, hogchokers, short-head redhorses, four-beard rocklings, mummichogs, naked gobies, striped searobins, slimy sculpins, and – more rarely – oyster toadfish, gags, lookdowns, four-eye butterfly fish, northern stargazers, freckled blennies, fat sleepers, and whole classes of bowfins, anchovies, needlefish, pipefish, silversides, jacks, wrasses, puffers, and flounders (left-eyed or right-eyed).

23. CRONIN & KENNEDY, JR., *supra* note 8, at 24–25.

24. Writing in 1944, one author observed:

> The bulk of the water in New York Harbor is oily, dirty, and germy. Men on the mud suckers, the big harbor dredges, like to say that you could bottle it and sell it for poison. The bottom of the harbor is dirtier than the water. In most places, it is covered with a blanket of sludge that is composed of silt, sewage, industrial wastes, and clotted oil.... The

cial fishing as far south as the George Washington Bridge, and recreational fishing off the docks and even through the manhole covers of sewers in downtown Manhattan.[25] These fishermen fished for striped bass. They called them "stripers." He met the people who did it. He, too, began fishing—and fell in.

Before long, Boyle had also discovered a disheartening string of illegal dumps, toxic discharges, and piles of dead fish killed at the intakes of power plants along the river. The fish were stripers, and the sight made him angry. He had followed the press on the Storm King challenge, now before the FPC for a final ruling. He had information that the Storm King site was the spawning ground for most of the Hudson River stripers. He had proof that these fish, juveniles and adults alike, were slaughtered on the intake screens of power plants. He had a photo of dead fish piled ten feet in the air. He took his information to Scenic Hudson. They were ecstatic. They now had a new case on their hands.[26]

It was not a new case for Con Ed or the federal regulators, however. Calling the fisheries evidence "irrelevant," the FPC granted the Storm King license in March 1965.[27] Scenic Hudson appealed, under the Federal Power Act, directly to the Second Circuit Court of Appeals. The Commission's primary defense was "standing"; Scenic Hudson had no economic or other recognizable interest in the proceeding.[28] Breaking with tradition and on slender precedent, the Second Circuit held that an economic interest was not necessary to challenge an agency action and that in this case, under a statute requiring considera-

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> sludge rots in warm weather and from it gas-filled bubbles as big as basketballs continually surge to the surface. Dredgemen call them "sludge bubbles." Occasionally, a bubble upsurges so furiously that it brings a mass of sludge along with it. In midsummer, here and there in the harbor, the rising and breaking of sludge bubbles makes the water seethe and spit. People sometimes stand on the coal and lumber quays that line the Gowanus Canal and stare at the black, bubbly water.

JOSEPH MITCHELL, THE BOTTOM OF THE HARBOR 37–38 (1944), *cited in* HEAT-MOON, *supra* note 5, at 2.

25. *See* CRONIN & KENNEDY, JR., *supra* note 8, at 24–30. The descriptions of Mr. Boyle that follow are taken from these accounts.

26. "[Mrs. Smokey] Duggan recognized that this was the issue that could win the case. She rose with a gleeful smile and proclaimed, 'They're going to kill the fish! They're going to kill the fish!'" CRONIN & KENNEDY, JR., *supra* note 8, at 29.

27. *Id.* at 32.

28. Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608, 615 (2d Cir. 1965).

tion of recreational interests, persons with those interests, too, could sue.[29] Turning to the merits, the court held that the FPC was not permitted to "act as an umpire blandly calling balls and strikes" for adversaries in the proceeding; rather, its duty was to seek out all evidence, including the critical fisheries evidence and alternative courses of action with less damaging impacts on these resources.[30] Remand.

The victory for Scenic Hudson was short-lived. Con Ed conducted elaborate studies of power production alternatives and empanelled a policy committee on fisheries impacts.[31] To no one's surprise, Con Ed found alternatives to its project infeasible, and the impacts on the fisheries negligible. It would accommodate local concerns, nonetheless, by placing the powerhouse below ground, routing the transmission lines away from the protesting neighborhoods, adding fish screens to the intake structure, and dedicating some on-site parks and recreational facilities.[32] Scenic Hudson was not accommodated, however. Joined by the City of New York, the Palisades Interstate Parks Commission, several national environmental organizations, and the newly-formed Hudson River Fishermen's Association led by Robert Boyle, Scenic Hudson appealed again. This time they lost. A split Second Circuit panel held that the FPC had dotted its i's and crossed its t's; the Federal Power Act required no more.[33] The United States Supreme Court declined to review.[34]

Which might have ended the matter, but for other Con Ed plans that went awry. Over the course of the Storm King proceeding, the utility was also asking the Atomic Energy Commission (AEC) to license its second nuclear reactor unit at In-

29. *Id.* at 615–18. The Federal Power Act required projects "best adapted to a comprehensive plan for improving or developing a waterway . . . for . . . water-power development . . . and other beneficial public uses, including . . . recreational . . . purposes." 16 U.S.C. § 803(a) (1994).

30. *Scenic Hudson Pres. Conference,* 354 F.2d at 620. This language, of course, presages that of the later and more famous *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

31. Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 453 F.2d 463, 468–81 (2d Cir. 1971).

32. *Id.* at 465–66.

33. *Id.* at 481.

34. Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 407 U.S. 926 (1972).

dian Point.[35] The Hudson River Fisherman's Association intervened to oppose, with evidence of massive fish entrainment in the existing unit that withdrew nearly a million gallons of water per minute from the river, along with fish larvae, fry, and juveniles.[36] Sensitized by the severe rebuke it had recently received from the District of Columbia Circuit in the Calvert Cliffs nuclear license proceeding,[37] the AEC looked into the allegations. It discovered not only evidence of serious fisheries impacts resulting from the Indian Point project, but also that the assumptions underlying the FPC's conclusions on the Storm King project's impacts were in error.

More particularly, the fisheries at Storm King, because they would be carried back and forth by the ebb and flow of the estuary, would be exposed to the intakes and entrainment at ten times the rate that the FPC had calculated,[38] with mortality at not three, but closer to forty percent.[39] The AEC also found that the Hudson River produced as much as eighty percent of the East Coast striped bass population, that the Indian Point reactor, as proposed, would kill tens of millions of young fish and larvae annually, and that it would drop striped bass numbers by one third within the first ten years of operation.[40] Based on these findings, the AEC proposed to require closed system cooling at Indian Point.[41] This system, applied to all Con Ed nuclear units, would cost Con Ed an extra $500 million in construction, and $180 million a year to run.[42] And this was not the end of it. Con Ed's Storm King intakes were twice the size of those at Indian Point.

Armed with the Indian Point findings, Scenic Hudson and the Fisherman's Association wasted no time returning to the FPC to re-argue Storm King. Scenic Hudson sought to reopen the entire licensing proceeding; the Fisherman's Association, as a tactical alternative, petitioned only to reintroduce evidence

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35. *See* Hudson River Fishermen's Assoc. v. Fed. Power Comm'n, 498 F.2d 827, 831 (2d Cir. 1974).

36. *AEC Averts Fish Kills*, ENVTL. DEF. NEWSL. (Environmental Defense Fund, New York, N.Y.), Nov. 1973 (on file with author).

37. *See* Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971).

38. *Hudson River Fishermen's Assoc.*, 498 F.2d at 831.

39. CRONIN & KENNEDY, JR., *supra* note 8, at 34.

40. *AEC Averts Fish Kills*, *supra* note 36.

41. *See* Editorial, *A Peace Treaty for the Hudson*, N.Y. TIMES, Dec. 20, 1980, § 1, at 24.

42. *Id.*

on the fishery.[43] The Commission denied both requests, and the parties, once again, appealed to the Second Circuit. In May 1974 the court split the baby, refusing to require that the proceedings be reopened in full, but requiring new proceedings on the evidence of fisheries impacts.[44]

Con Ed and the FPC were now facing gridlock. With $25 million already sunk into early construction and the licensing proceedings,[45] the utility was also facing a growing number of collateral challenges to, *inter alia*, the State of New York's certification of Storm King discharges under the Clean Water Act,[46] the absence of a federal dredge and fill permit,[47] and compliance with the National Environmental Policy Act (NEPA).[48] For their part, Scenic Hudson and the Fisherman's Association et al., were experiencing the combat fatigue that comes from a decade of struggle against the legal and public relations machinery of a major utility, and stonewalling by entrenched government agencies.[49] It was time to talk, and into that time came another prominent New Yorker, Russell Train, former Chair of the President's Council on Environmental Quality and Administrator of the federal Environmental Protection Agency under President Nixon. Train, trusted by all sides, offered as a private citizen to mediate the dispute.[50] Twenty months of hard negotiation among federal regulators, four state agencies, several utilities, and the litigating environmental groups followed. In December 1980, the "Hudson River Peace Treaty" was signed at, appropriately, given many of the players involved, a ceremony in the Hotel Roosevelt on

43. *See Hudson River Fisherman's Assoc.*, 498 F.2d at 831.

44. *Id.* at 835–36; *see also More on Consolidated Edison's Storm King Project*, 4 ENVTL. L. REP. (Envtl. L. Inst.) 10,093 (July 1974).

45. *See* CRONIN & KENNEDY, JR., *supra* note 8, at 34–35.

46. *See id.*

47. Scenic Hudson Pres. Conference v. Callaway, 499 F.2d 127 (2d Cir. 1974) (per curiam).

48. *See* Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 453 F.2d 463, 481 (2d Cir. 1971); *id.* at 490–92 (Oakes, J., dissenting).

49. *Clam* [sic] *After the Storm: Grandmother of Environmental Lawsuits Settled by Mediation*, 11 ENVTL. L. REP. (Envtl. L. Inst.) 10,074 (Mar.–Apr. 1981).

50. *See* Jill Smolowe, *Con Ed to Drop Storm King Plant as Part of Pact to Protect Hudson*, N.Y. TIMES, Dec. 20, 1980, § 1, at 1.

Madison Avenue in midtown Manhattan.[51] Russell Train called it "one of the most satisfying moments" of his life.[52]

For Con Ed, the settlement was close to a full retreat. It surrendered its Storm King license and donated the property for public, recreational use.[53] The company would not—and this was the chip it took from the table—be required to install closed system cooling towers on its nuclear plants. In return, however, Con Ed and the other utilities committed to steps to reduce impacts on the fisheries, including partial shutdowns from May to August, the spawning season. It would additionally create a $12 million endowment for research on power plant impacts, and would construct a hatchery to restock the Hudson with more than half a million striped bass fingerlings for the next eight years. After the signing, Charles F. Luce, Chairman of the Board of Con Ed said, "We lost the fight."[54] Robert Boyle said, "We raked in most of the chips and they got cab fare home."[55]

The fallout from *Storm King* has been remarkable. The original Second Circuit opinion opened the way for citizen suit standing, the now-commonplace inclusion of citizen suit provisions and fee awards in environmental statutes,[56] the principles of review of environmental impacts and alternatives that are at the heart of NEPA,[57] and the breathtaking opinion, indeed even the metaphors, of the District of Columbia Circuit in *Calvert Cliffs*[58] that made NEPA a fact of life for the entire federal establishment.

Storm King did more. It defined a new strategy for environmental protection that used litigation—as did the civil

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51. *Id.*

52. Editorial, *supra* note 41, at 24. The description of the settlement terms that follows is taken from this account.

53. *Id.*

54. Suzanne DeChillo, *Battler for a Clean Hudson*, N.Y. TIMES, Feb. 15, 1981, § 22, at 6.

55. *Id.* at 1.

56. See the citizen suit provisions of the Clean Air Act, 42 U.S.C. § 7604 (1994), the Clean Water Act, 33 U.S.C § 1365 (1994), and the Resources Conservation and Recovery Act, 42 U.S.C. § 6972 (1994).

57. *See* 42 U.S.C. § 4332(2)(c) (1994).

58. *Compare* Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971) ("[The Atomic Energy Commission's] responsibility is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage.") *with supra* note 30 and accompanying text (stating that the Federal Power Commission could not merely "act as umpire blandly calling balls and strikes").

rights movement—as part of a larger educational and political process. Stephen Duggan went on, during the proceedings, to form the Natural Resources Defense Council, a premier public interest law firm to this day.[59] Scenic Hudson went on to play the lead role in protecting the Hudson River Valley, with land acquisition and conservation programs that are today creating the Hudson River Valley Greenway, a 150-mile-long uninterrupted corridor of recreational and natural areas from Albany to New York City.[60] Albert Butzel, who became lead counsel for Scenic Hudson, was then approached by New York citizens opposed to a major new highway project, the Westway, carrying the usual promise of free federal dollars and the support of every politician in the State of New York. Butzel went to court and won again, twice, after the United States Army Corps of Engineers was caught suppressing, twice, information concerning the impacts of the project on, of all things, the striped bass.[61] The lower Westway is now being developed, with the support of the governor and the city mayor, as an urban park.[62]

The Hudson River Foundation for Science and Environmental Research, originally funded by the *Storm King* settlement and now funded at more than double its original size, has spearheaded Hudson fisheries and pollution control research for twenty years.[63] The Hudson River Fisherman's Association continues to play its own brand of blue-collar-cum-science hardball with such high-profile and difficult issues as General Electric's legacy of PCB contamination on the Hudson[64] that has closed the commercial fishery, limited the recreational fishery, and remained buried in cleanup negotiations for more

59. CRONIN & KENNEDY, JR., *supra* note 8, at 39; *Living on Earth*, *supra* note 11.

60. For a full description of Scenic Hudson's achievements, see Scenic Hudson, *at* http://www.scenichudson.org/about/history.htm (last visited Mar. 5, 2002).

61. *See* Sierra Club v. United States Army Corps of Eng'r, 772 F.2d 1043 (2d Cir. 1985); Sierra Club v. United States Army Corps of Eng'r, 701 F.2d 1011 (2d Cir. 1983).

62. *See* Jan Hoffman, *Persistence (and Striped Bass!) Wins a Park*, N.Y. TIMES, June 7, 2000, at B2.

63. Suzanne DeChillo, *The Hudson Endowment: Research on the River*, N.Y. TIMES, Aug. 14, 1983, at 11WC-1.

64. *See* CRONIN & KENNEDY, JR., *supra* note 8, at 58–63. From the 1940s to 1977, General Electric discharged 1.3 million pounds of polychlorinated biphenyls (PCBs) directly into the Hudson River. *See* Press Release, Environmental Protection Agency, EPA Proposes Comprehensive Plan to Clean Up Hudson River PCBs (Dec. 6, 2000), *available at* http://www.epa.gov/r02earth/news/2000/00218.htm.

than a decade.[65] To carry the fight further, the Fisherman's Association spun off the concept of a Hudson Riverkeeper, a motor-patrol pollution control watch, with violators prosecuted by a new environmental law clinic at Pace Law School.[66] The ripples keep on spreading.

As early as 1986, the Hudson River, even at the latitude of New York City, was "cleaner and more inviting, its fisheries more productive," than it had been in memory.[67] Long stretches of the river, reaching as far south at Yonkers, have since been reopened for swimming.[68] On weekends, sailboats dot the estuary under the Tappan Zee Bridge in numbers that look from a distance like the migration of butterflies. The striped bass numbers are up and steady; there is talk of resuming a limited commercial fishery.[69] The fish are still tainted with PCBs, and there are still some heavy actors who have yet to face the music, but the Hudson River is winning.

II. CALVERT CLIFFS: *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*[70]

Calvert Cliffs was the site of a proposed nuclear power plant on the shore of the Chesapeake Bay. On petition for review of the plant's licensing process, the District of Columbia Circuit's interpretation of the NEPA sent that statute, the responsibilities of its implementing agencies, and the authority of reviewing courts into an orbit from which they have yet to descend. Meanwhile, there was the question of the Calvert Cliffs plant itself, of more than one hundred other nuclear plants coming on line, and of an industry long on promises, high on

65. Elizabeth Kolbert, *The River*, NEW YORKER, Dec. 4, 2000, at 56. On February 1, 2002, the Environmental Protection Agency announced its approval of a cleanup plan for the most PCB-contaminated stretch of the Hudson River. Press Release, United States Environmental Protection Agency, EPA Signs Final Cleanup Plan for Hudson River, Makes Public Involvement a Top Priority (Feb. 1, 2002), *available at* http://www.yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/714611ed42c9a54d85256b5300695938?OpenDocument.

66. *See* CRONIN & KENNEDY, JR., *supra* note 8, at 69, 119. For the work of the Pace clinic, see http://www.pace.edu/lawschool/envclinic/ (last visited Feb. 20, 2002).

67. Rimer, *supra* note 6, at B1.

68. *Id.*

69. *Id.*; *see also* Report from the Hudson River Estuary Management Advisory Committee to John P. Cahill, Commissioner, New York State Department of Environmental Conservation, on Reopening a Hudson River Striped Bass Commercial Fishery (Sept. 1999) (unpublished report on file with author).

70. 449 F.2d 1109 (D.C. Cir. 1971).

costs, and heavily dependent on government support. These questions remain.

> Ma'am, there's considerably less radiation from such a [nuclear] plant than from the radium on the dial of your wristwatch![71]
>
> —Baltimore Gas and Electric Company
> *The Atom, Electricity and You!*, 1968

> I keep getting the distinct impression that you are headed for trouble, despite my very best efforts to turn you around. I don't want us to get into a conflict that we don't need to . . . .[72]
>
> —Congressman John Dingell
> to James T. Ramey, Commissioner,
> United States Atomic Energy Commission, 1970

This story begins with World War II and its transformation of atomic energy from an abstraction to a force capable of blowing up the world. A force also capable, however, of producing, in the words of the first Chairman of the AEC, electricity "too cheap to meter."[73] To this end, in 1946, the war barely over, Congress passed the Atomic Energy Act,[74] transferring the atom from military to civilian control, and the vision of peaceful atomic energy "arose like the mythic phoenix from the ashes of destruction."[75]

The mission of the AEC was to promote atomic energy,[76] and it did so through a range of federal research laboratories, feasibility studies, demonstration projects, professional sympo-

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71. Jess W. Malcolm, *A Treatise on the Proposed Calvert Cliffs Nuclear Power Plant*, Chesapeake Rep. (Chesapeake Bay Foundation, Inc., Annapolis, Md.), June 27, 1969, at 1 (citing BALTIMORE GAS & ELEC. CO., THE ATOM, ELECTRICITY AND YOU! (1968)).

72. *Fed. Agency Compliances with S. 102(2)(C) and S. 103 of the Nat. Env. Policy Act of 1969: Hearings Before the House Subcomm. on Fisheries and Wildlife Conservation of the Comm. on Merchant Marine and Fisheries*, 91st Cong., 2d Sess. 200 (1970) [hereinafter *Hearings on Fed. Agency Compliance*].

73. DANIEL FORD, THE CULT OF THE ATOM 50 (1982).

74. 42 U.S.C. §§ 2011–2297 (1994).

75. Dan W. Reicher, *Nuclear Energy and Weapons*, *in* ENVIRONMENTAL LAW: FROM RESOURCES TO RECOVERY 568 (Celia Campbell Mohn et al. eds., 1993) (citing Diane Carter Maleson, *The Historical Roots of the Legal System's Response to Nuclear Power*, 55 S. CAL. L. REV. 597 (1982)).

76. *See* 42 U.S.C. §§ 2011–2297 (1994).

sia, meetings with potential manufacturers and utilities, educational brochures, movies, and public relations campaigns.[77] When a government study revealed that a reactor accident could lead to 3,400 Americans dead, 43,000 injured and $7 billion in property losses, Congress promptly capped off liability for damages from such an accident at $500 million.[78] Were this not enough, the Commission adopted the tactic of characterizing new reactors as "research" facilities rather than as commercial reactors, avoiding anti-trust consequences.[79] And were this not enough (and for many years it was not enough) the AEC conducted its review of civilian reactors—a review to ensure that a license would not be "inimical to the common defense and security or to the health and safety of the public"[80]—in two separate stages. This bifurcation allowed the construction, enormously costly, to proceed to conclusion before, at the licensing stage, the AEC determined whether the reactor could be operated safely.[81] At this point, of course, the plant was a *fait accompli*.

The industry finally took the bait and, in the 1960s, led by Westinghouse and General Electric, began investing in major commercial facilities.[82] In 1966, utilities placed orders for

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77. The author remembers one such movie from his childhood, shown in the public schools, featuring a father coming home from the neighborhood nuclear plant and greeted by his daughter, but daddy washed the radioactivity safely from his hands with soap before he picked her up.

78. Reicher, *supra* note 75, at 573. A vice-president of Liberty Mutual Insurance Company testified before the Joint Committee on Atomic Energy of the United States Congress:

> We have heard estimates of catastrophe running not merely into millions or tens of millions but into hundreds of millions and billions of dollars. It is a reasonable question as to whether a hazard of this magnitude should be permitted, if it actually exists. Obviously there is no principle of insurance that can be applied to a single location where the potential loss approaches such astronomical proportions.... Even if insurance could be found, there is a serious question whether the amount of damage to persons and property would be worth the possible benefit accruing from atomic development.

JOHN G. FULLER, WE ALMOST LOST DETROIT 36–37 (1975) (emphasis omitted).

79. Reicher, *supra* note 75, at 574.

80. 42 USC § 2133(d) (1994).

81. This process, invalidated by the District of Columbia Circuit in *Int'l Union of Elec., Radio and Mach. Workers, AFL-CIO v. United States*, 280 F.2d 645 (D.C. Cir. 1960), was approved and reinstated by the Supreme Court in *Power Reactor Dev. Co. v. Int'l Union of Elec., Radio and Mach. Workers, AFL-CIO*, 367 U.S. 396 (1961).

82. Reicher, *supra* note 75, at 573–74.

twenty new plants; in 1967, for thirty-one more.[83] By 1969, the AEC had issued thirty-eight construction permits and by March 1970, seventeen plants were in operation, forty-nine under construction, thirty-seven more on order, and at least seven more in planning.[84] The utilities were catching the wave, and promoting more with such consumption-oriented slogans as "live better-electrically" and "convert to clean, modern electrical heat."[85] The AEC was projecting rapid, indeed exponential, growth in electricity consumption, and that nuclear energy would meet fifty percent of the new demand by the year 2000.[86]

On December 20, 1969, the United States Congress passed NEPA.[87] It was signed by President Nixon on January 1, 1970. Two large movements were about to collide.

Beneath the surface, all was not at ease in the nuclear community. The photographs from Hiroshima and the prospect of a yet more powerful bomb had led some leading physicists to renounce the nuclear enterprise.[88] In 1966, an accident that neared meltdown at the Fermi demonstration reactor in downtown Detroit, followed by chronic problems that led to its shutdown, threw a new light on reactor safety and the high demands of ensuring it.[89] Worries from within the government and the industry over radiation exposure, accident containment, and waste disposal began to surface in the press.[90] We had struck a Faustian bargain, some said. A March 1969 article in *Natural History* entitled "The Myth of the Peaceful Atom" characterized nuclear reactors as "saturated with hazards and unknowns," in effect, "gigantic nuclear experiments."[91] In a July 1969 letter to the *New York Times*, the first chairman of the AEC wrote: "Once a bright hope, shared by all mankind, including myself, the rash proliferation of atomic

83. *Id.* at 574–75.

84. *Id.*

85. Malcolm, *supra* note 71, at 4.

86. Reicher, *supra* note 75, at 575.

87. *See* 42 U.S.C. §§ 4331–4335 (1994).

88. *See* PETER GOODCHILD, J. ROBERT OPPENHEIMER, 'SHATTERER OF WORLDS' 174 (1980). Dr. Oppenheimer, who was instrumental in the development of the atomic bomb, stated: "In some sort of crude sense, which no vulgarity, no humour, no overstatement can quite extinguish, the physicists have known sin, and this is a knowledge which they cannot use." *Id.*

89. *See* FULLER, *supra* note 78, at 14–18.

90. *See* Malcolm, *supra* note 71, at 11–12.

91. Richard Curtis & Elizabeth Hogan, *The Myth of the Peaceful Atom*, NATURAL HISTORY, Mar. 1969, at 6.

power plants has become one of the ugliest clouds overhanging America."[92] Two years later, however, incoming AEC Chairman James Schlesinger remained upbeat on nuclear power.[93] We would send nuclear wastes by rocket to the moon, he joked.[94]

Questions about nuclear safety and environmental impacts reached Congress as well, prompting a series of hearings on radiation exposure, accident safeguards, and water quality.[95] Oversight of the program was vested exclusively in the Joint Committee on Atomic Energy, long a sinecure for the AEC and the industry. Commissioner James Ramey had been staff director of the Joint Committee[96] and was a particularly hard case. To Ramey and the Committee Chair, the physicists who were raising these issues were "kooks,"[97] and environmentalists "professional stirrer-uppers."[98] Confident in its support by the Joint Committee, the Commission was going to continue full steam ahead.

Calvert Cliffs was located in farming country along the Chesapeake Bay, about forty-five miles southeast of Washington D.C. By 1969, the Commission, although unwilling to require nuclear plants to be built underground in order to minimize their risk—as suggested even by such proponents of nuclear power as Dr. Edmund Teller[99]—was recommending

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92. Letter from David Lilienthal, Chairman of the Atomic Energy Commission, to the New York Times (July 20, 1969) (on file with author).

93. *See* Carroll Kilpatrick, *Nixon Chooses New AEC Chairman*, WASH. POST, July 22, 1971, at A2. ("Schlesinger believes that the production of electric energy from nuclear power will consume some $300 billion to $400 billion in new investment by the end of the century and an investment on the order of $40 billion in this decade.").

94. Telephone interview with Lewellyn King (Mar. 21, 2002), recalling remarks made to the press by Dr. Schlesinger in 1972. Mr. King was a writer and editor for *Nucleonics Week* at the time, and he remembers the remarks as made in jest, but with confidence that the nuclear waste disposal problem would be resolved.

95. For descriptions of the hearings in the 1960s, see generally *Hearings on Fed. Agency Compliance*, *supra* note 70; FULLER, *supra* note 78; JOHN W. GOFMAN & ARTHUR R. TAMPLIN, POISONED POWER: THE CASE AGAINST NUCLEAR POWER BEFORE AND AFTER THREE MILE ISLAND (1979); H. PETER METZGER, THE ATOMIC ESTABLISHMENT (1972); ERNEST J. STERNGLASS, LOW LEVEL RADIATION (1973).

96. METZGER, *supra* note 95, at 39.

97. *Id.* at 16, 38.

98. *Id.* at 38.

99. "In principle, nuclear reactors are dangerous. . . . By being careful, and also by good luck, we have so far avoided all serious nuclear accidents . . . . In my mind, nuclear reactors do not belong on the surface of the earth. Nuclear reactors

remote, rural locations. For Baltimore Gas and Electric, the Calvert Cliffs site made perfect sense. For the Chesapeake Environmental Protection Association—a small, ad-hoc group of scientists, fisheries biologists, and residents concerned both about radiation and the effects of thermal discharges on the Bay—there were too many unanswered questions.[100] They noted that the Calvert Cliffs reactors were capable of producing the radioactive isotope Strontium-90 at levels equivalent to at least 1520 times the Hiroshima bomb, every six months.[101] They estimated that the reactors would use five thousand cubic feet per second of Chesapeake Bay water to cool the condensers, discharging about 15.4 square mile-feet of water per day at temperatures between ten to twenty degrees hotter than the receiving water.[102] The greatest concentration of "young-of-the-year" blue crabs in the Bay was adjacent to the Calvert Cliffs site.[103]

As scary as radioactivity may have been and as important the soft-shelled crab to the economy and image of the State of Maryland, these concerns made little dent on the AEC licensing board and less of a dent under Maryland regulatory law, which the Commission viewed as inapplicable.[104] There appeared to be no effective way to impact the proceeding. On a chance, the Association called the National Wildlife Federation in Washington, D.C. for help and landed on Ed Chaney, a biologist who, while living in Oregon, had gone through a thermal discharge battle over the Trojan nuclear plant not long before.[105] By further coincidence, Chaney had just received a press release from the AEC stating that it would not be conducting NEPA reviews of plants then under construction,

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belong underground." Malcolm, *supra* note 71, at 12 (quoting Dr. Teller, "Father of the H-bomb").

100. *See* Memorandum from Ed Chaney, National Wildlife Federation, to Lou Clapper (Aug. 6, 1969) (on file with author); Interview with Ed Chaney, in Eagle, Idaho (June 2000). The group included fisheries experts, an oceanographer, and scientists from Johns Hopkins University and the University of Maryland.

101. Malcolm, *supra* note 71, at 10.

102. *See id.* at 13.

103. *See id.* at 14.

104. *See id.* at 3. The Commission took the position, apparently, that Maryland law did not apply because construction on the plant had begun prior to the law's enactment.

105. *See* Memorandum from Ed Chaney, Chinook Northwest, Inc., to Oliver Houck, Professor, Tulane Law School (Jan. 24, 2000) (on file with author).

which it viewed as only "experimental."[106] Thinking the release was a hoax by a friend of his in the industry, Chaney called to find out. It was not a hoax.[107]

Energized by the press release, Chaney enlisted the Federation and the Sierra Club and began shopping for an attorney capable of handling such a case.[108] Tony Roisman, of a new, boutique environmental firm in the city, was recommended. Roisman had been working with scientists and other lawyers on a suite of nuclear issues, and had intervened in the Midland and Indian Point proceedings then pending before the Commission.[109] For him, Calvert Cliffs came along at exactly the right time to test the requirements of NEPA.[110]

The Calvert Cliffs Coordinating Committee was an amalgam of the Chesapeake Environmental Protection Association and the newly interested national environmental groups. The Committee, joined by the nationals, filed two appeals to the District of Columbia Circuit Court. One was a rifle shot, challenging the application of the AEC's NEPA rules to the Baltimore Gas and Electric's proposed reactor.[111] The other was a broad, facial challenge to the AEC's rules themselves.[112] The court would accept the broader challenge, lock, stock, and barrel.

The case is history, and its language castigating the Commission—e.g., whose "crabbed interpretation of NEPA makes a mockery of the Act"—an indelible piece of environmental law.[113] The actual issues of the case—the Commission's attempt to "grandfather" plants already under construction from NEPA[114] and its refusal to evaluate water quality impacts[115]—are barely remembered. The opinion was all the more remarkable be-

106. *See id.* at 1.
107. *See id.* at 2.
108. *See id.*
109. Interview with Tony Roisman, Tulane University, in New Orleans, La. (Jan. 28, 2000).
110. *Id.*
111. Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1109 n.14 (D.C. Cir. 1971).
112. *Id.*
113. *Id.* at 1117. For highlights of the language of the opinion, the remarkable circumstances of its author, Judge J. Skelly Wright, and its aftershocks on NEPA and environmental law, see Houck, *supra* note 1, at 466–71, and sources cited therein.
114. *See Calvert Cliffs' Coordinating Comm., Inc.*, 449 F.2d at 1127.
115. *See id.* at 1122.

cause the Commission, in contrast to other federal agencies at this early time, had adopted environmental impact assessment rules and was applying them with at least some degree of conscientiousness. Indeed, a member of the President's Council on Environmental Quality characterized the AEC's compliance, compared to that of other federal agencies, as "exemplary."[116]

Nonetheless, the Commission was refusing to reopen construction permits to consider environmental effects, was circumscribing its review at the later licensing stage as well, and was deferring completely to state agencies on such issues as thermal effects, entrainment, and fisheries. Hearings that same year before the House of Representatives had failed to budge the Commission on these issues despite clear warnings from Congressman Dingell, who had played a large role in the enactment of NEPA, that these were issues of "great concern"[117] and that the Commission's position was flat wrong. The District of Columbia Circuit agreed with Dingell.

The AEC could have appealed to the United States Supreme Court. The high court was already of a more conservative mindset, and indeed was at war with many District of Columbia Circuit rulings.[118] But James Schlesinger had taken the helm at the Commission and, while firmly committed to nuclear power, was also an avid outdoorsman and birdwatcher and sensitive to the thrust of the new environmental laws.[119]

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116. *Implementation of the National Environmental Policy Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation, House Comm. on Merchant Marine and Fisheries*, 91st Cong., 2d Sess. (1970) (statement of Commissioner James T. Ramey, Atomic Energy Commission) (transcript on file with author). Commissioner Ramey quoted remarks made by Dr. Gordon J. MacDonald at a meeting of the Atomic Industrial Forum and the American Nuclear Society. "AEC has by far the best record of any federal agency in submitting environmental reports under NEPA. The AEC reports are the most complete, best thought-out, and the most sophisticated of any agency." *Id.*

117. *Hearings on Fed. Agency Compliance*, *supra* note 72, at 272.

118. *See* David Pike, *The D.C. Supercircuit*, NAT'L L.J., Mar. 30, 1981, at 1.

119. Richard D. Lyons, *New A.E.C. Chief Pledges Discussions on Hazards*, N.Y. TIMES, Aug. 20, 1971, at 10. Dr. Schlesinger's approach can be contrasted with that of his predecessor, Glenn Seaborg:

> Seaborg's answer to those who are fearful of the effects of radiation from the nuclear plants, the thermal effect on adjacent waters or the blot on the countryside: "the environment of a city whose life's energy has been cut, whose transportation and communications are dead, in which medical and police help cannot be had, and where food spoils and people stifle or shiver while imprisoned in stalled subways or darkened skyscrapers—all this also represents a dangerous environment that we must anticipate and work to avoid."

The Commission would comply with the *Calvert Cliffs* ruling. Within days, it had issued a press release and sent "interim guidance" letters to its utility and commercial constituents stating that it would redo its environmental reviews in all pending proceedings, conduct new reviews for construction already permitted, and issue regulations "as soon as possible" to comply with other aspects of the court decision.[120] These rules would affect sixty-one license applications involving eighty-eight nuclear power reactors, some eighty million kilowatts of generating capacity out of the approximately 340 kilowatts then being generated in the United States from all power sources.[121]

Standing alone, even these reviews would have had small impact on an industry that could already anticipate ten years of lead-time and several hundred million dollars of investment before bringing a new plant on line. They did not, however, stand alone. The same scientists and attorneys involved in *Calvert Cliffs* had launched a far broader offensive to address what they and their clients perceived to be the high risks of nuclear power. In individual license proceedings and in petitions for new AEC rules they challenged the permissible standards for low-level radiation releases,[122] requirements for emergency core cooling systems,[123] requirements for closed system treatment of cooling water,[124] and short term management and long-term custody of nuclear wastes,[125] . . . all unresolved issues from the darker side of the nuclear equation. They challenged as well the companion program for nuclear "breeder" reactors that would produce their own fissionable nuclear materials, but

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Conservationists Stall Power Effort, May 1, 1970 (news clipping from unidentified newspaper, on file with author).

120. Press Release, Atomic Energy Commission, Statement by the Atomic Energy Commission on Court of Appeals Decision in *Calvert Cliffs* Litigation (Aug. 4, 1971) (on file with author); Letter from Harold L. Price, Director of Regulation, United States Atomic Energy Commission, to various utility companies (1971) (on file with author).

121. *See* Press Release, Atomic Energy Commission, *supra* note 120, at 2.

122. *See* RALPH NADER & JOHN ABBOTS, THE MENACE OF ATOMIC ENERGY 75–77 (1977).

123. *See* Reicher, *supra* note 75, at 902.

124. *See* Vermont Yankee Nuclear Power Co. v. Natural Res. Dev. Council, 435 U.S. 519 (1978); *supra* text accompanying note 41 (discussing closed system cooling requirements at Indian Point nuclear reactor).

125. Reicher, *supra* note 75, at 905–08; Heather Dewar, *Get Over Nuclear Plant Fear, U.S. Urged*, BALT. SUN, May 26, 2001, at 1A (describing continuing search, and expenditures of up to $14.8 billion, for a permanent waste site).

that finessed, once again, nagging questions of safety and waste.[126] They even filed suit claiming that the AEC, by combining both promotional and public safety mandates in the same agency, violated constitutional rights of due process.[127] The suit prompted Congress to split the agency in two, with promotional functions going to the new Department of Energy and the regulatory functions vested in the Nuclear Regulatory Commission[128]—the government construct today.

In combination, these challenges forced the atomic establishment to confront some very difficult science, management issues, and politics. The Commission greatly increased its training and monitoring requirements for the nuclear industry, and the rigor of its own staff reviews.[129] It required redundancy as a fall-back in basic safety systems. It reduced permissible levels for low-level radiation by a factor of ten.[130] It tightened emergency core cooling system requirements on all light-water reactors,[131] requirements that have in all likelihood averted a reactor meltdown in the United States.[132] It required

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126. *See* Scientists' Inst. for Pub. Info. v. Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973).

127. Conservation Soc'y of S. Vt. v. Atomic Energy Comm'n, No. 19-72 (D.D.C. Apr. 17, 1975), *cited in* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 74 (1978). The case was part of the larger strategy described *supra* text accompanying notes 120–24 and survived a motion to dismiss before Judge William Bryant of the United States District Court for the District of Columbia. After plaintiffs entered into discovery, the case was placed on hold pending congressional action that resulted in splitting the agency and separating its promotional and regulatory functions. E-mails from Harvey Carter, to author (Mar. 14, 2002, Apr. 2, 2002) (on file with author). Mr. Carter represented the Conservation Society of Southern Vermont in these proceedings. Other observers credit the breakup of the AEC to frictions between the Commission and its congressional oversight committee. There is, of course, more than one cause for most events in life. Telephone interview with Lewellyn King, *supra* note 94.

128. Reicher, *supra* note 75, at 902–03.

129. *See id.* at 904.

130. Pike, *supra* note 118, at 1.

131. Reicher, *supra* note 75, at 902.

132. A breach of these requirements led to a near-catastrophe with a nuclear reactor at Three Mile Island, a few miles from Philadelphia. Bernard Weinraub, *Indictment Is Seen Over 3 Mile Island*, N.Y. TIMES, Oct. 7, 1983, at A14 ("According to a transcript that was made available here, Mr. Hartman told investigators in May 1979 that leak rate test results 'had to be fudged every time we got, just about every time we got it, we had to do something to make it right.'"). The coordinator of the United State Senate Investigation of Three Mile Island accident has recently written:

> The nuclear industry's safety and security claims are often misleading.... They don't acknowledge that the core at the Three Mile Island plant was within hours of an uncontrolled melt—with Chernobyl-like

neutralization and containment of nuclear wastes at "temporary" storage facilities while the government groped for an ultimate answer, an answer that has yet to be found.[133]

Compliance with these safety requirements, however, was a daily challenge for nuclear plant employees and regulators. Operating reactors, even the best of them, went off-line regularly for leaky valves, tests gone wrong, maintenance, upgrades, and repairs.[134] And not all reactors were the best.[135] A presidential commission following the Three Mile Island accident warned that "[u]nless portions of the industry and its regulatory agency undergo fundamental changes, they will over time totally destroy public confidence and, hence, they will be responsible for the elimination of nuclear power as a viable source of energy."[136]

Public health and environmental concerns undoubtedly made nuclear energy safer. They also made it more expensive.

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consequences—when a new shift supervisor came on duty in a panicked control room and finally figured out that thousands of gallons of cooling water had poured undetected from a valve that was stuck open. Advanced designs for presumably safer light water reactors and simpler pebble-bed reactors still have not made it off the drawing boards.

Paul L. Leventhal, *More Nuclear Power Means More Risk*, N.Y. TIMES, May 17, 2000, at A25.

133. *See* John M. Biers, *Nuclear Waste Debate Stirs Engineers*, TIMES PICAYUNE (New Orleans, La.), Mar. 13, 2002, at C1 ("A proposal to send the nation's nuclear waste to a permanent repository in Nevada touched off a heated debate at an industry conference Tuesday.").

134. *See id.*

135. For an account of safety practices at one nuclear facility:

The way the employees tell it, the Paducah Gaseous Diffusion Plant sometimes operated as if Homer Simpson were running the place. Except that what happened there wasn't funny.

Workers used to wipe "green salt" off the plant lunch tables, fully aware it was a radioactive byproduct of the plant's main task, enriching uranium for use as fuel in nuclear reactors.

They would bury truckloads of uranium shavings that ignited and burned upon being exposed to the air. They would dump thousands of barrels filled with radioactive contaminants into ponds and bury them in the ground. All the while, they were told they were working with materials that were "safe enough to eat."

Now the employees and many other in Paducah fear they are dying because of what happened at the 47-year-old plant, McCracken County's biggest source of jobs.

James Pritchard, *Kentucky Residents Fear Plant Will Hasten Death*, TIMES PICAYUNE (New Orleans, La.), Sept. 24, 1999, at A14.

136. Reicher, *supra* note 75, at 903 (citing the President's commission on the Accident and Three Mile Island, "The Need for Change").

At the same time, other phenomena were eroding the momentum toward nuclear power. Caught in the inflation of the late 1970s, construction and operating costs soared beyond anyone's projection.[137] Even more dramatic was the effect of energy conservation—through changes in rate structure, insulation, transmission, and appliances—on energy demand. In 1970, the outgoing Chairman of the AEC, Glen Seaborg, had announced that power needs would grow by eight hundred percent in the next thirty years.[138] There was no such growth, nor anything close. By the 1990s, relatively modest conservation measures had reduced energy consumption by more than the combined total of all new energy production under the Nixon, Ford, Carter, and Reagan administrations.[139] Suddenly the industry was faced with paying for a huge number of extraordinarily expensive white elephants, and facing public service commissions increasingly unwilling to pass these costs on to ratepayers as "prudent" investments.[140] The Carter administration cut the nuclear breeder reactor program; the Reagan administration stalled it; the Congress eliminated it.

Then came Chernobyl. On April 26, 1986, a reactor in southern Russia failed, overheated, and released one hundred times the amount of radiation produced by the bombs at Hiroshima and Nagasaki.[141] Five years later more than four thousand emergency response and cleanup workers had died.[142]

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137. Reicher, *supra* note 75, at 881–82.

138. *Conservationists Stall Power Effort*, *supra* note 119 ("Glenn T. Seaborg, chairman of the Atomic Energy Commission, estimates that power needs by the end of the 20th century will be 800 per cent greater than at present. He believes the need can be met only through atomic power.").

139. *Morning Edition* (National Public Radio Broadcast, May 22, 2001) (on file with author). During the broadcast, Mr. John Holdren, Kennedy School, Harvard stated:

> If you asked how much energy was actually saved by all of these improvements, it amounts to far more energy than was added by expansion in all United States' sources of energy supply combined. That is, if you look at the growth of oil, natural gas, coal, nuclear energy, hydropower and renewables over the same period, conservation saved much more energy than expansion of sources provided.

Id.

140. *See* Alliance for Affordable Energy v. Council of New Orleans, 578 So. 2d 949 (La. Ct. App. 1991) ("[A]ffirm[ing] a decision of the New Orleans city council finding that approximately $476 million of costs related to construction of a nuclear power plant had been imprudently incurred."), *vacated by consent decree.*

141. Reicher, *supra* note 75, at 905.

142. *Id.*

An estimated seventy thousand more Europeans would die from radiation exposure that reached as far south as the Mediterranean Sea.[143] What public confidence remained in the United States for the nuclear industry dipped below the radar. Controversial new reactors were cancelled.[144] Old reactors, particularly those with troubled histories, were mothballed and pulled off-line.[145]

By the year 2000, nuclear energy had plateaued at some 111 operating plants in the United States producing about twenty percent of the electricity budget.[146] Vendors were busy, instead, attempting to sell new reactors in Korea, India, China and Japan. Then came a new administration with a different interpretation of history. The signals became positive. The incoming Secretary of the Treasury stated, "If you put aside Three Mile Island and Chernobyl, the safety record of nuclear is really very good."[147]

As for Baltimore Gas and Electric's Calvert Cliffs plant, it was built, licensed in the mid 1970s, and is still operating today.[148] Ranked in 1981 by the Nuclear Regulatory Commission as "above average"[149] and in 1988 as one of the ten "worst-managed" nuclear facilities,[150] it has experienced what appears to be a typical rollercoaster ride of compliance problems with radiation exceedences, emergency core containment system

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143. *Id.*

144. *Id.*

145. *Illinois Utility to Close Nuclear Plant*, TIMES-PICAYUNE (New Orleans, La.), Jan. 16, 1998, at C3.

146. Reicher, *supra* note 75, at 878.

147. Gail Collins, *Dr. Pangloss, I Presume?*, N.Y. TIMES, June 12, 2001, at A33 (quoting Treasury Secretary Paul O'Neill). The Secretary's remarks were presaged by the nuclear industry more than a decade earlier, "If there is a Chernobyl-scale accident in this country, no one will die. We shall merely suffer some degree of life-shortening." A. Barrett, *The Tolerability of Risk from Nuclear Power Studies*, Health & Safety Executive, *cited in* PUNCH, Mar. 31, 1989, at 9.

148. Dewar, *supra* note 125, at 1A. According to its web site, the plant supplies about half of the electricity for the utilities service area, sufficient for 450,000 homes. *Calvert Cliffs Nuclear Power Plant, at* http://www.calvertcliffs.com/ccnpp/reliable.htm (last visited Feb. 11, 2000).

149. Ben A. Franklin, *15 Nuclear Plants Rated Below Average*, N.Y. TIMES, Sept. 13, 1981, at A48. At the same time, the Commission rated 30% of opting atomic reactors as performing "below-average." *Id.* Three days earlier, however, the Calvert Cliffs reactor had been listed as one of the eight most vulnerable to degradation of its containment shell and the risk of radioactive release. *8 Nuclear Plants Warned on Reactor Hazard*, N.Y. TIMES, Sept. 10, 1981, at A26.

150. Matthew Wald, *3 Reactors in Northeast Among 10 Worst-Managed*, N.Y. TIMES, Dec. 23, 1988, at A20.

problems, gas leaks, fuel management, and operator errors that led the Commission at one time to place it under "close surveillance."[151] Par for the course, apparently, in the world of nuclear power. In 1999, the company applied for a renewal of its licenses on both reactor units, which were not due to expire until 2014 and beyond.[152] A spokesperson explained, "We didn't want to wait until the last minute. It hadn't been done before, and we expected to encounter unknowns."[153]

In May 2001, the incoming Secretary of the Department of Energy stated that "Americans need to get over their mistrust of nuclear power."[154] The new administration would "streamline" nuclear plant permitting, including the "rapid relicensing" of existing plants.[155] The statement was made during a tour of Calvert Cliffs.[156]

III. OVERTON PARK: *Citizens to Preserve Overton Park v. Volpe*[157]

Overton Park, like Lexington and Concord, is one of those chance encounters that becomes a turning point in American history. For most if its history, Overton Park was a quiet recreational area in midtown Memphis, Tennessee. In the 1960's, it became the intended link for an interstate highway system cutting across the midsection of the country, through Tennessee, and through Memphis. Ten years later it became, instead, the United States Supreme Court's first and strongest

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151. A partial list of reported problems includes: an accidental shutdown, for two weeks, of its emergency core cooling system in 1979, *1975 Baltimore Nuclear Mistake Called Similar to Pennsylvania's,* N.Y. TIMES, Apr, 8, 1979, at 28; two radioactive gas leaks in one week, in 1980, *2 Leaks Reported at Maryland Reactor,* N.Y. TIMES, Feb. 14, 1980, at A20; fines for regulatory violations and for improper operation of two emergency systems in 1988, *NRC Staff Proposes Baltimore Gas Pay Penalty of $150,000,* WALL ST. J., Sept. 22, 1988, at 46; failure of backup power systems in 1992, *Twin Nuclear Reactors Are Shut by Baltimore Gas & Electric Co.,* WALL ST. J., Mar. 23, 1992, at A5D; electrical outage in 1996, *Eyewitness News Morning Edition* (CBS television broadcast, WJZ, Baltimore, Feb. 29, 1996); and handling of spent fuel rods and radiation expense during repairs in 1997, *Greenwire: Across the Nation, State Lines: MD* (American Political Network Inc., June 10, 1997).

152. Steve Vogel, *Relicensing of Calvert Cliffs Urged,* WASH. POST, Oct. 15, 1999, at B4.

153. *Id.*

154. Dewar, *supra* note 125, at 1A (quoting Energy Secretary Spencer Abraham).

155. *Id.*

156. *Id.*

157. 401 U.S. 402 (1971).

pronouncement on the protection of environmental values through law. The Overton Park decision, however, neither decided the fate of the highway nor the park. It would take twelve more years for the proposal to die. If, in fact, it has.

> [R]egardless of what type of surface design is followed there won't be much in the way of a wooded park left in Overton Park after an interstate Highway is routed through it.[158]
>
> —Comments of the United States Department of the Interior to the United States Department of Transportation, late 1960s

> [The *Overton Park* decision is] such a monumental mistake that the people who know anything about it aren't going to forget it. Every time I go home on Poplar and the traffic is backed up from East Parkway to Cooper, I think about it.[159]
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> —J. Alan "Skip" Hanover, state defendant's attorney in Overton Park, 1998

In the early 1800s General Andrew Jackson drove the Chickasaw and Cherokee Indians out of western Tennessee.[160] A few years before, he and John Overton, a retired chief justice of the Tennessee Supreme Court, had quietly bought land in Indian territory along the Mississippi River on speculation. The native occupants had no sooner been evicted than John Overton was on the Chickasaw bluffs mapping out the town of Memphis and advertising it as a city of destiny. Shortly thereafter, Jackson sold his interest for "a neat profit."[161] The

158. Citizens to Pres. Overton Park v. Volpe, 432 F.2d 1307, 1317 (6th Cir. 1976) (Celebrezze, J., dissenting).

159. Wayne Risher, *I-40 vs. the Park: Who Was Right?*, COM. APPEAL (Memphis, Tenn.), June 28, 1998, at A1.

160. GERALD M. CAPERS, THE BIOGRAPHY OF A RIVER TOWN: MEMPHIS, ITS HEROIC AGE 22–23 (1966); STANLEY J. FOLMSBEE ET AL., TENNESSEE: A SHORT HISTORY 149–50 (1969). The description of the founding of Memphis is taken from these sources. General Jackson's victory was part military, part intimidation, and part sharp-dealing; in the end he negotiated "Jackson's Treaty," a withdrawal by the Chickasaw and Cherokee tribes from their ancestral guards at a bargain price. CAPERS, *supra* note 160, at 22–23.

161. FOLMSBEE ET AL., *supra* note 160, at 150.

"brains of the operation,"[162] however, was Justice Overton. He would go on to become bank president, planter, slave owner, land trader, and "the wealthiest man in Tennessee."[163] A century later the first park in Memphis would carry his name.

Early Memphis, described by one historian as a "tough and uninviting hole overrun by the scum of the river,"[164] was probably no worse than its neighbors, which have been similarly described, and experienced the same boom and bust years of the steamboat, the railroad, and the cotton trade. The arrival of telephones and electric lights in the 1880s brought in the trappings of civilization[165] and the first inklings of what would today be called urban environmental planning. By the end of the century, however, many of the lands and promenades originally laid out for parks and public spaces had been sold to private interests. After a "decade of constant agitation" by another judge, one L. B. McFarland, the city created a parks commission and, in 1900, purchased eight hundred acres of land for Riverside and Overton Parks.[166]

There are open spaces, and there are parks. There are places where kids practice baseball, and there are other places so woven into the fabric of a city that they are part of its mindset. Not all cities have them. But the cities that do have them know the difference. Overton Park, at 342 acres, was not unusually large by urban standards.[167] Half a century after its founding it held a modest collection of amenities, a nature trail, a small zoo, and an even smaller nine-hole golf course.[168] It

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162. CAPERS, *supra* note 160, at 23. A third partner in the venture, James Winchester, had been a fellow General with Jackson in the War of 1812. *Id.*

163. FOLMSBEE ET AL., *supra* note 160, at 165.

164. CAPERS, *supra* note 160, at 44. It should be noted, however, that during its early years, Memphis bested its local rival Randolph in a life-and-death struggle and put itself in a position to profit fully from the technological development in transportation that was soon to reach its height. Within three decades, Memphis was the acknowledged mistress of the Mississippi between New Orleans and St. Louis. *Id.* at 44–45.

165. *Id.* at 212.

166. *Id.* at 213–14.

167. Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 406 (1971). By way of comparison, New York City's Central Park comprises 843 acres, *see* http://www.centralparknyc.org/cp-then-now.html; Brooklyn's Prospect Park 526 acres, *see* http://www.pps.org/gps/list?type_id=1; and New Orleans City Park 1,500 acres, *see* http://www.neworleanscitypark.com. None of this is to suggest that Overton Park is not significant in size but, rather, that the park is not significant simply because of its size.

168. *Id.*

also held a 170-acre forest of trees dating back to before the time of the Europeans on the continent, trees that Hernando de Soto would have seen if, as some insist, his last and fatal expedition took him that far north.[169] Overton Park meant many things to different people in Memphis, but its trees were something, a history, that they all had in common. Peter Taylor's famous short novel, *The Old Forest*, is set against these trees, which, by story's end, become a metaphor for freedom.[170] In 2001, a Seventh Day Adventist minister would write, "I remember Overton Park as a magical place. On Sabbath afternoons we'd go for walks in the woods there. We'd explore paths that meandered among the great oaks and hickories . . . ."[171] These are places people will fight extraordinary fights to preserve.

Environmental litigation arose in the 1950s out of exactly such fights.[172] The lawsuits began before news of the Santa Barbara oil spill, the smog-outs in Pittsburgh, and dead lakes the size of Lake Erie;[173] they predated NEPA and the advent of complex regulatory programs for air, water, and waste. They began with ordinary, law-abiding Americans who had never opposed anything in their lives suddenly faced with the destruction of their neighborhoods for interstate highways. Small groups of determined residents organized in Boston, Chicago, Washington, New Orleans, San Francisco, and San Antonio went to court to defend *their* downtowns, their homes, and

169. *See* Memphis Shelby County Public Library and Information Center, *Memphis History: A Chronology*, *at* http://www.memphislibrary.lib.tn.us/history/memphis2.htm (last visited June 18, 2001) ("c[irca] 1541 Indians living near present-day Shelby County encounter the Hernando de Soto expedition") [hereinafter *Memphis History*].

170. PETER TAYLOR, THE OLD FOREST AND OTHER STORIES 31–89 (1985).

171. John McLarty, *A Park in Time: How Much Do We Value the Treasure of the Sabbath?*, ADVENTIST REV., *at* http://www.adventistreview.org/2001-1518/story1.html (last visited May 30, 2001).

172. The literature of the time, *see* BEN KELLEY, THE PAVERS AND THE PAVED (1971); HELEN LEAVITT, SUPERHIGHWAY–SUPERHOAX (1971); A.Q. MOWBRAY, ROAD TO RUIN (1969); KENNETH SCHNEIDER, AUTOKIND V. MANKIND (1971), reflected the strong feelings that drove conservative, old-line, law-abiding Americans into the fight against what they perceived to be a highway juggernaut.

173. For a description of these and other environmental problems in the United States pre-1970, see ENVIRONMENTAL QUALITY, FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 5–18 (1970); *see also* SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, S. REP. NO. 296 (1969).

their parks.[174] The Overton Park fight was not unique. It was commonplace. It was happening all over.

The odds were, by any objective measure, hopeless. On the one hand was the largest and most popular civil works program in the history of the world, the federal interstate highway system. The brainchild of Secretary of Defense Charles Wilson, the former Chief Executive Officer of General Motors, it was sold to President Eisenhower and the Congress on grounds of national defense.[175] Construction contractors, automakers, and producers of everything from limestone to structural steel quickly saw the program as much more—a windfall amounting to $215 billion over the next thirty-five years.[176] To General Motors, it meant not having to pay for roadbeds, which were the major expense of private railroads, its chief transportation rival. To the Portland Cement Company, it would require pavement to cover four hundred square miles and enough sand, gravel, and stone to "build a wall around the world fifty feet wide and nine feet high."[177] More than three decades later, Birmingham Steel would be advertising "spending needs of $1.65 trillion to raise U.S. bridges and interstate highways to acceptable standards."[178] To manufacturers everywhere, it meant promoting a product that, in the words of one enthusiast, "doubles the malleable iron consumption, triples the plate glass consumption, and quadruples the use of rubber. . . . [A]s

174. For a description of one such effort, strikingly similar to that in Memphis, see RICHARD O. BAUMBACH, JR. & WILLIAM E. BORAH, THE SECOND BATTLE OF NEW ORLEANS: A HISTORY OF THE VIEUX CARRE RIVERFRONT-EXPRESSWAY CONTROVERSY (1981).

175. TOM LEWIS, DIVIDED HIGHWAYS: BUILDING THE INTERSTATE HIGHWAYS, TRANSFORMING AMERICAN LIFE 106–07 (1997). Secretary Wilson is best remembered today for his assertion, "What is good for General Motors is good for the nation." *Id.*

176. Monies for the federal-aid highway system are provided primarily by the Federal Highway Trust Fund, fueled by taxes on gasoline, motor vehicles, and automotive parts. NAT'L WILDLIFE FEDERATION, THE END OF THE ROAD: A CITIZEN'S GUIDE TO TRANSPORTATION PROBLEM SOLVING 33 (1977). In 1974, as a sample year, these receipts amounted to $3.8 billion from gasoline taxes and another $2.3 billion from automobiles and parts, or $6.1 billion in all. *Id.* Averaging these expenditures over the thirty-five year period from 1956 to 1991, we have a $215 billion federal subsidy for highway construction.

177. *Id.* at 16.

178. *Helping Rebuild America*, WALL ST. J., Feb. 14, 1991, at A-14 (advertisement for Birmingham Steel Corp).

a consumer of raw materials, the automobile has no equal in the history of the modern world."[179]

With this type of support, and financed through a trust fund independent of the federal budget,[180] the interstate highway program took on a life of its own. As its announced goals were achieved, they would be expanded.[181] In the process, whatever rationale existed for limiting it to defense needs, or even to interstate needs, disappeared. It became increasingly an automobile commuter system, not just between cities, but through them. Local governments, fueled by the prospect of ninety percent funding from the federal government, vied for the honor of destroying their existing trolley and transit systems and replacing them with buses and cars.[182] One of the earliest federal-aid highways out of the box was Interstate 40 from the East Coast to California, across the midsection of the United States, through Memphis, Tennessee.

Memphis was all for it. At least, political and commercial Memphis was. Like New Orleans, Miami, Nashville, and other southern cities, it was anxious to appear modern and progressive. In 1955, anticipating the new federal interstate monies, the city fathers hired a consulting firm to draw up plans for a Memphis expressway system.[183] The plan was ambitious, with

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179. NAT'L WILDLIFE FEDERATION, *supra* note 176, at 16.

180. Gary T. Schwartz, *Urban Freeways and the Interstate System*, 49 S. CAL. L. REV. 406, 457 (1976). President Eisenhower opted for the establishment of the Trust Fund primarily out of concern with appearances. Trust funds, at the time, did not appear in the official federal budget. Thus, President Eisenhower was able to fund this massive public works project while appearing to hold down the federal budget. *Id.*

181. *See* William A. Thomas, Comment, *The Road to* Overton Park*: "Parklands Statutes" in Federal Highway Legislation*, 39 TENN. L. REV. 433, 438 (1972).

> It was a virtual Möbius strip of money: The more cars traveled, the more gas they consumed; more gas meant more money for the fund; more money in the fund meant more money to build more miles of highways; which allowed more cars to travel more miles and consume more gas.

LEWIS, *supra* note 175, at 127.

182. *See* United States v. National City Lines, 186 F.2d 562 (7th Cir. 1951). General Motors, Firestone Tires, Standard Oil of California, and other beneficiaries of the federal highway program were convicted of a criminal conspiracy to violate antitrust laws, for their part in destroying urban, trolley-based transit systems. *Id.* at 564. The corporations were fined $5,000 each. Their Chief Executives were fined $1 each. Andrew Kimball, *Car Culture: Driving Ourselves Crazy*, WASH. POST, Sept. 3, 1989, at C3.

183. *See* Peter L. Strauss, *Revisiting* Overton Park*: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1293 (1992); Risher, *supra* note 159, at A1.

a full, circumferential interstate loop through areas described as of "limited population . . . predominantly black," a north-south interior freeway along the riverfront, an east-west interior freeway as well, both connected by a huge cloverleaf in the center of town.[184] The east-west highway would go through Overton Park.

The public got its first notice of the plan in April 1957, when maps including the east-west route were published in the local newspaper.[185] The proposed route bordered the forest and severed the zoo from the park. The response was quick and angry. About three hundred protesters attended a meeting with the state highway department;[186] others besieged the City Council.[187] A nucleus of residents organized the Citizens to Preserve Overton Park, a group never large in number, but which hit enough of a responsive chord to gather ten thousand local signatures against the project.[188] The Chamber of Commerce rose to defend the highway, necessary in its view to prevent the flight of business to the suburbs.[189] It hardly needed to. The plan was going forward.

Through the 1960s, the east-west route through Overton Park remained on simmer, boiling over from time to time in the Memphis press and in various council meetings and political campaigns.[190] Meanwhile, the state Department of Transportation was busy constructing the outer loop, configured to tie into the east-west axis, and acquiring rights-of-way for the east-west route, right up to the border of Overton Park.[191] Some 2,200 people were removed from the east-west corridor as the state bulldozed 408 single-family homes, 84 duplexes, 266 apartments, 44 businesses, 5 churches, and a fire station in an-

184. Strauss, *supra* note 183, at 1291; *see* Risher, *supra* note 159, at A1.

185. Risher, *supra* note 159, at A1.

186. *Id.*

187. Strauss, *supra* note 183, at 1294.

188. Risher, *supra* note 159, at A1.

189. *Id.*

190. *See* Strauss, *supra* note 183, at 1296–1307. One such example occurred in 1961, when the state highway commissioner came to Memphis to conduct the federally prescribed hearing for the segment of the east-west route including Overton Park. In light of the controversy surrounding the project, the Commissioner himself decided to preside over the hearing. Several hundred people crowded into the auditorium to ask primarily one question: "[W]hat we can do to stop you from going through the park." *Id.* at 1296.

191. *Id.* at 1296–1307.

ticipation of federal approval.[192] Then came an unexpected development—a new law.

Ten years of urban strife over the impacts of the interstate highway program were beginning to make their mark. In 1965, the White House organized a conference on natural beauty in which three of its fifteen panels dealt with federal-aid highways.[193] Announcing the conference to the Congress, President Johnson observed that "a modern highway may wipe out the equivalent of a 50-acre park with every mile."[194] The observation was not hypothetical. As one commentator has noted:

> The attraction of parklands to the highway establishment is even more seductive: parklands are already owned by government. If Tennessee contributes 26 acres of parkland to the highway project, it gets to value that parkland as if it were a cash contribution based on its fair market value, the value of 26 acres of downtown urban land.[195]

For this reason, parks were, and remain, a cheap way for the state to pay its share of the bill.

The strife reached Congress as well. For several years lawmakers had been tinkering with the highway statutes to provide greater public notice and federal review.[196] Then, in 1968, they went a step further to declare, in section 4(f) of the Department of Transportation Act, that public recreational areas were to be the locations of last resort in highway planning, to be approved only upon a finding that there was "no feasible

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192. Risher, *supra* note 159, at A1.

193. Thomas, *supra* note 181, at 438. The three panels were entitled Design of the Highway, Scenic Roads and Parkways, and Roadside Control. One panel chairman's report is particularly illustrative:

> It was the consensus of the panel that the need to protect parks, open spaces, scenic, recreational, historic, and cultural features of the urban areas should be given greatly increased emphasis in highway planning. New techniques must be developed that will give greater weight to these factors, as contrasted to the traditional factors of traffic service and initial cost.

Id.

194. *Id.*

195. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY 396 (2d ed. 1998).

196. *See* Thomas, *supra* note 181, at 435–37 (citing requirements for a public hearing and for a "coordinated" planning process).

and prudent alternative" to the use of these lands.[197] It remained to be seen what those words meant. *Overton Park* would be the vehicle and the messenger.

Back in Memphis, a long and contentious political process had resolved, to no one's surprise, in approval of the final east-west link through the park: six lanes of traffic with an additional forty-foot median strip. As a concession to its opponents the state would depress portions of the road below the ground level[198] and fund the purchase of 160 acres for a new recreational area.[199] Alternatives had been hashed and rehashed; this was the cheapest, straightest, and least disruptive route.[200] Construction had begun on approaches to the park from both the east and the west. By the time the case reached the Supreme Court, up-ramps had been completed and were suspended in air at both ends, waiting.

After the passage of the new section 4(f), the federal government took a final look at the Overton Park route and approved.[201] The Citizens to Preserve Overton Park had run their string with state and federal agencies. In alliance with the national Sierra Club and Audubon Society, which had lobbied

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197. 49 U.S.C. § 1653f (1968) (current version at 49 U.S.C. § 303 (1994)); the former reads in full:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

198. Strauss, *supra* note 183, at 1314.

199. Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 407 n.15 (1971) (the funds came from the state's payment to the City for the right of way through Overton Park).

200. *See* Strauss, *supra* note 183, at 1293–1314.

201. *Id.* at 1311.

hard in favor of the enactment of the new statute, they enlisted a local lawyer, Charles Newman, and a Washington D.C. lawyer with experience in other highway cases, Jack Vardaman, and went to court.[202] They would make history. But not easily.

In February 1970, a federal district court granted summary judgment against the plaintiffs,[203] finding that section 4(f) was not a "mandatory prohibition" against the use of parkland but, rather, a "discretionary authority" to be guided by "wisdom and reason"[204]—music to the ears of the state and federal defendants who were, of course, confident in both their wisdom and reason. In September of that same year the Sixth Circuit Court of Appeals affirmed,[205] in a split decision, finding that the approval was reasonable,[206] particularly in light of the relocation, site acquisition, and construction that had already taken place. In a strongly-worded dissent, Judge Celebrezze argued that, whatever the merits, there were significant issues of fact present that at least deserved trial on the merits.[207] His argument lost, but he would return years later for a final say.[208] Plaintiffs petitioned for certiorari to the Supreme Court.

The Supreme Court's ruling, in 1971,[209] is by now a cornerstone of contemporary administrative law, the most cited opinion in the field.[210] It is less cited, but perhaps equally powerful, for the ride it gave to section 4(f) and to then-nascent environmental law. In the Court's view, the statute, the first of its kind, did not say that parks were to be protected from highways whenever the Highway Administration thought it "reasonable"; the statute said, rather, that parks were to be protected from highways unless there were no feasible and

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202. *Volpe,* 401 U.S. at 403; *see also* Houck, *supra* note 1, at 481 n.26 (describing Jack Vardaman's background). In fact, Mr. Vardaman had a difficult time maintaining the support of his law firm, Covington and Burling, as the demands of the case, handled on a *pro bono* basis, increased through trial and appeal. Of course, when the Supreme Court ruled strongly in his favor, all was well. Interview with Jack Vardaman, in Washington, D.C. (Nov. 1981).

203. Citizens to Pres. Overton Park v. Volpe, 309 F. Supp. 1189, 1195 (W.D. Tenn. 1970).

204. *Id.* at 1194.

205. Citizens to Pres. Overton Park v. Volpe, 432 F.2d 1307, 1315 (6th Cir. 1976).

206. *Id.* at 1312.

207. *Id.* at 1316.

208. *See infra* text accompanying notes 226–27.

209. Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402 (1971).

210. Strauss, *supra* note 183, at 1261.

prudent alternatives.[211] "Feasible" meant engineeringly possible, even if difficult;[212] "prudent" meant financially possible, even if more expensive.[213] No such findings had been made. Remand.[214]

The *Overton Park* holding has been described and debated by able scholars many times.[215] Meanwhile, the finger, having writ, moved on. The Supreme Court's job was done. If new administrative findings under section 4(f) were required, the person making them would be John Volpe of Volpe Construction Inc., the largest construction company in the State of Massachusetts, an open enthusiast of the federal-aid interstate highway system and now Secretary of Transportation in the Nixon Administration. The east-west project through Overton Park was still very much alive. Indeed, it was looking pretty good.

On remand, the district court held a twenty-seven day hearing to determine whether the Secretary of Transportation had approved the Overton Park route under a proper understanding of section 4(f), and, if so, whether on the evidence presented he could have properly concluded that no feasible and prudent alternative existed.[216] The record was a mess.[217] It became apparent, however, that in ratifying the route, the Secretary had done little more than find earlier federal approvals "reasonable."[218] The statute required more. The court remanded the matter to the Secretary for a new decision.[219]

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211. *Volpe*, 401 U.S. at 411.

212. *Id.*

213. *Id.*

214. *Id.* at 421.

215. *See* Zygmunt J.B. Plater, *From the Beginning, A Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 LOY. L.A. L. REV. 981 (1994); Strauss, *supra* note 183, at 1251. To some commentators, the opinion is an unwarranted stretch of judicial authority into what should be, essentially, political decisions. *See* Strauss, *supra* note 183, at 1260 (whose use of quotation marks when referring to the "public interest" litigants may reflect his service in the Office of Solicitor General at the time of the Overton Park decision). To others, the opinion is an indispensable exercise of judicial authority to see that statutory goals are accomplished. *See* Plater, *supra* note 215, at 1005. Professor Plater, of course, represented the plaintiffs in *TVA v. Hill*, *see infra* Part V. These two opposing paradigms are the ying and yang of public administrative law.

216. Thomas, *supra* note 181, at 452.

217. *Id.*

218. *Id.*

219. Citizens to Pres. Overton Park, Inc. v. Volpe, 335 F. Supp. 873, 885 (W.D. Tenn. 1972).

Convinced that there were no alternatives and thoroughly committed to the Overton Park route, the State of Tennessee made its case, once again, to the Secretary of Transportation. Secretary Volpe took his time.[220] This was not the only park-versus-interstate issue on his desk, and the cases were not aberrations; serious people, pillars of the community, some of them leading Republicans from New Orleans, San Antonio, and other cities of importance, were pleading the case for urban parks.[221] Volpe held more hearings in Memphis. Finally, in 1973, he determined, without specifying any particular alternative route, that he could not find that no feasible and prudent alternative existed.[222]

Shocked, disappointed, and confident that it could disprove any alternative route offered by the Secretary, the State of Tennessee petitioned the district court for a simple demand: show us the alternative.[223] The court agreed, invalidated the Secretary's decision, and ordered him either to approve the route or specify his alternative.[224] The Secretary and Citizens to Preserve Overton Park, this time on the same side of the issue, took the case once again to the Sixth Circuit.[225] The legal issue was technical, but it was clearly framed, and was an issue at the heart of many environmental controversies to come: when the facts are in doubt, who bears the burden of proof? On murky questions of science, technology, and engineering, whoever has the burden usually loses. In the *Overton Park* case, if the Secretary had the burden, the state was prepared to take whatever route he proposed and blow it full of holes.

And so, in 1974, Overton Park made its sixth and last appearance in federal court. With Circuit Judge Celebrezze writing for the majority this time, the appeals court held that "[t]he burden of choosing the route does not, as the District Court

220. Strauss, *supra* note 183, at 1315.

221. One such leading Republican was Mrs. Bonnie Wisdom, wife of Judge John Minor Wisdom of the Fifth Circuit Court of Appeals, who, with other local leaders, met personally with Secretary Volpe in Washington, D.C. to oppose the Vieux Carre Expressway through New Orleans, Louisiana. Interview with Bonnie Wisdom, in New Orleans, La. (Apr. 1994). *See generally* BAUMBACH, JR. & BORAH, *supra* note 174.

222. Citizens to Pres. Overton Park, Inc. v. Volpe, 357 F. Supp. 846, 849 (W.D. Tenn. 1973).

223. *Id.* at 850.

224. *Id.* at 851–52.

225. Citizens to Pres. Overton Park v. Brinegar, 494 F.2d 1212 (6th Cir. 1974).

held, lie with the Secretary."[226] Rather he stated, under section 4(f) the state chooses a route and the Secretary simply approves it, or not. If disapproved, the state can submit another.[227] Which is then what the state proceeded to do.

The next three years saw a fruitless struggle to obtain federal approval for various design amendments for Interstate 40 through Overton Park.[228] When its open-cut design met with disfavor, the state proposed a tunnel. A new Secretary of Transportation then suggested a two-tiered tunnel. Afraid of the costs of maintaining a tunnel out of its own pocket, the state held the line for a combined, partial tunnel and open cut. It was disapproved. Time passed. Projected costs soared.

Meanwhile, President Carter was offering funds from an Interstate Substitution Program to encourage states toward less controversial transportation projects;[229] $300 million would be freed up for Memphis by abandoning the Overton Park route.[230] President Carter, however, was on his way out of office, and incoming President Reagan had announced his intention to kill the substitution funding as a waste of taxpayer money.[231] With the project no nearer approval than it had been ten years before and the clock running out on the availability of monies for alternatives, the state took the money.[232] On January 16, 1981, at the request of the governor of Tennessee, after twenty-six years on the drawing board, the Overton Park segment was removed from the federal-aid interstate highway system.[233] In 1987, the state returned ownership of the park to the City of Memphis.[234]

The ripples from *Overton Park* reach many shores. Its precedent in administrative law aside, its impact on highway

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226. *Id.* at 1215.

227. *Id.* at 1216.

228. Strauss, *supra* note 183, at 1315–16. The description of the proposals that follow is taken from this article.

229. Risher, *supra* note 159, at A1. In the end, substitute funds did not wind up paying for projects designed to correct the problems left by the uncompleted Overton Park expressway. The anticipated remedies—the extension of Sam Cooper Boulevard and rebuilding of the Midtown and East Memphis interchanges of I-40 and I-240—have taken so long to design that there is not sufficient substitute funds to pay for them. *Id.*

230. *Id.*

231. *Id.*

232. Strauss, *supra* note 183, at 1316.

233. *Id.*; Risher, *supra* note 159, at A1.

234. Strauss, *supra* note 183, at 1316.

planning was to invigorate opposition to urban interstates and, in conjunction with NEPA, to provide new hope and a new handle.[235] The great majority of early NEPA section 4(f) cases rose out of urban highway planning.[236] The extent to which these laws have actually served to protect parks and green space is harder to determine. One detailed study of section 4(f) decisions since *Overton Park* showed little evidence of changed minds.[237] On the other hand, recorded 4(f) approvals may not be the right measuring stick; the major effect of the statute, as with other natural resources laws, is to deflect proposals from sensitive environmental areas in the first place, an effect for which no complete record is possible. It can be said with more confidence that the section 4(f) mechanism as interpreted in the *Overton Park* opinion—"no feasible and prudent alternative"—has been since used by Congress and federal agencies to strengthen a wide range of programs designed to limit development in wetlands,[238] floodplains,[239] the coastal zone,[240] and

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235. One example of these impacts is the fight against the San Antonio Freeway, which was revived from the dead by Section 4(f) in Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013 (5th Cir. 1971). *See generally* Thomas, *supra* note 181, at 454–56.

236. RICHARD A. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH 34 (1976) (noting that from 1966 through 1971, highway location litigation increased from one lawsuit to twenty-seven lawsuits, and that in 1972, the number of such lawsuits increased to forty-eight).

237. Clifford Olsen, *Overton Park* Revisited 2 (1987) (unpublished manuscript), *cited in* Oliver A. Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. COLO. L. REV. 773, 822 n.392 (1989).

> It is possible that there has [sic] been better than three thousand (3,000) Section 4(f) statements prepared over the last twenty (20) years. Of that sum, the number of Section 4(f) statements prepared for park/recreation area takings was approximately eighteen hundred (1,800) which represents about sixty (60%) of all Section 4(f) takings during the same time period. Of the eighteen hundred (1,800) or so possible park/recreation area takings, I was only able to identify about fifty (50) reported district and appellate court decisions which addressed those actions. Of the fifty (50) or so reported cases, the United States Department of Transportation was faced with remand on only ten (10) or so occasions, and finally, of the ten (10) or so remands, it is very possible that only one (1) Park was ever totally saved. Welcome to Overton Park.

Id.

238. *See* 40 C.F.R. § 230.10(a) (1993) (EPA wetlands regulations providing "no discharge of dredge or fill material shall be permitted if there is a practicable alternative").

239. *See* Floodplain Management Exec. Order No. 11,988, 3 C.F.R. § 117 (1978), *reprinted as amended in* 42 U.S.C. § 4321 (1994) (allowing federal devel-

endangered species habitat.[241] It is a tough but, where necessary, flexible standard. It works.[242]

One pernicious effect of the *Overton Park* decision has been to shift the burden of interstate highways even further onto low-income and minority communities. When, after section 4(f) review, the ill-conceived Vieux Carre Expressway was finally abandoned in the City of New Orleans—a project that would have put six lanes of traffic across historic Jackson Square—the State of Louisiana re-routed the project down the middle of an established African American neighborhood, destroying the public trolley line and green space containing more than two hundred, towering live-oak trees.[243] Local businesses fled, neighboring houses were boarded up, and the area is still, thirty years later, a wasteland.[244] It was the same story in Nashville and Chicago.[245] It was the same in Miami and Los Angeles, only the victims there were Latino.[246] Every city in America sports at least one major, six, eight, or ten-lane, federal-aid highway complete with ten-foot barriers and cyclone fences and crossed with the only-occasional pedestrian over-

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opment only where no alternative to floodplain exists); *see also* 33 U.S.C. § 1314 (1994); 42 U.S.C. § 7412 (1994) (identifying technology standards under the Clean Air Act and the Clean Water Act, which are, at bottom, based on alternatives).

240. *See* 15 C.F.R. § 930.121(d) (1993) (National Oceanic and Atmospheric Administration regulations requiring "no reasonable alternative" for activity inconsistent with state coastal management program).

241. See 16 U.S.C. § 1536(h)(1)(A)(i) (1994) (Endangered Species Act exemption requirements allowing no exemption absent a showing of "no reasonable and prudent alternatives").

242. For a discussion of this standard in other natural resources laws, see Oliver A. Houck, *Of Bats, Birds, and B-A-T: The Convergent Evolution of Environmental Law*, 63 MISS. L.J. 403 (1994). For a discussion of its flexibility in action, see Oliver A. Houck, *The Endangered Species Act and Its Implementation by the Department of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1994).

243. Rick Raber, *Ruin's Road: I-10 Killed N. Claiborne*, TIMES-PICAYUNE (New Orleans, La.), Feb. 19, 1984, at 40.

244. *See id.*; Ronette King, *Shifting Landscape*, TIMES PICAYUNE (New Orleans, La.), Mar. 26, 2001, at A8.

245. For a discussion of the events in these cities and others, see generally KELLEY, *supra* note 172; LEAVITT, *supra* note 172; LEWIS, *supra* note 175; ALAN LUPO ET AL., RITES OF WAY: THE POLITICS OF TRANSPORTATION IN BOSTON AND THE U.S. CITY (1971); MOWBRAY, *supra* note 172.

246. John McQuaid, *Standing Their Ground*, TIMES PICAYUNE (New Orleans, La.), May 24, 2000, at A6 (reporting an interview with Jesse Granados, President, El Sereno Neighborhood Organizing Committee, "We have five or six freeways coming through East L.A. anyway—it's no surprise where they put them. That's what they do across the country, put them in low-income neighborhoods.").

pass—and cutting through communities that are always low-income and usually African American.[247] The wall of noise, the smell of exhaust, the elevated levels of lead poisoning and hypertension, and the separation of residents from their schools and churches, customers from their grocery stores, and neighbors from neighbors, are all commonplace costs paid by the urban poor for the convenience of the non-urban, non-poor, speeding by. Section 4(f) protects parks; there is no comparable statute for low-income, urban residents. It is no secret, in any city, where the big highways are and where the new ones will and will not run.

Meanwhile, back in Memphis, the Overton Park story is still unfolding. The midtown neighborhoods surrounding the park are alive and intact, and an estimated $30 million worth of single-family homes is re-occupying the Interstate 40 right-of-way.[248] Downtown Memphis has experienced a commercial and residential awakening along the river; a downtown trolley built with some of the funds received in exchange for the Overton Park segment is now in service,[249] the Park itself has seen major improvements, and new parks have been acquired with additional, released federal funds. On the other hand, automobile commuters to downtown Memphis and through-drivers on the interstate compete for the existing lanes with mounting frustration,[250] apparently convinced that the *Overton Park* decision wrongfully sealed their doom,[251] and that their problem would be solved by just one more highway.

All of which has given rise to a phoenix from the ashes of Overton Park—a new freeway through an even larger natural area in East Memphis called Shelby Farms.[252] Opponents have

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247. *See supra* notes 244–46 and accompanying text; *see also supra* note 172 and accompanying text.

248. Risher, *supra* note 159, at A1. The descriptions that follow are taken from this source.

249. *Id.*; *Memphis History*, *supra* note 169 (summarizing construction of trolley in downtown Memphis).

250. *See Gridlock: Traffic Won't Abate During Shelby Farms Suit*, COM. APPEAL (Memphis, Tenn.), July 26, 1999, at A6 [hereinafter *Gridlock*]; Risher, *supra* note 159, at A1; Cindy Wolff, *4-Year Highway Project to Clear Interstate Clog*, COM. APPEAL (Memphis, Tenn.), May 16, 1999, at A1.

251. *See* Risher, *supra* note 159, at A1 (quoting attorney Hanover, "We were caught at a time of environmental panic that seemed to take hold of everybody and cloud their vision. I think the city, the county, and the country lost.").

252. Wayne Risher, *Extension of Kirby Sparks Up A Familiar Old Debate*, COM. APPEAL (Memphis, Tenn.), June 28, 1998, at A17.

organized the Friends of Shelby Farms.[253] They are joined by Charles Newman, who represented the Citizens to Preserve Overton Park thirty years ago.[254] He is mentioning section 4(f) of the Department of Transportation Act, hoping to head off a court fight.[255] The state refuses to acknowledge Shelby Farms, formerly state prison grounds, as a park; a county engineer states that it is "county-owned land," not "park land," whatever that means.[256] Newman points out that the county's own brochures refer to Shelby Farms as a recreational area, with signs advertising kite-flying and a bike trail.[257] The stage is being set for Overton Park II and, with a new federal judiciary, the outcome is anyone's guess.

Stories like this should have an ending, but they rarely do. We love our parks, but we love highways, too. The money to build highways is there, more every year, and the traffic keeps on coming, and it has fewer and fewer feasible and prudent places to go.

IV. MINERAL KING: *Sierra Club v. Morton*[258]

Sierra Club v. Morton began as a challenge to a ski resort planned for the Mineral King Valley in southern California. The lawsuit wound its way to the Supreme Court, which, in now-famous dicta, ruled that environmental groups could establish standing to sue the government by alleging injury to the aesthetic and recreational interests of their members. The ruling locked citizen standing into American jurisprudence and the daily operation of American environmental law. After the decision was rendered, however, there was still the matter of the ski resort, promoted by America's favorite developer, Walt Disney, and the larger question of what national parks and forests are for.

> And from the eastern boundary of this vast golden flowerbed rose the mighty Sierra, miles in height, and so gloriously colored and so radiant, it seemed not clothed with

253. *See Gridlock, supra* note 250, at A6.
254. *Id.*
255. *See* Risher, *supra* note 252, at A17.
256. *Id.*
257. *Id.*
258. 405 U.S. 727 (1972).

> light, but wholly composed of it, like the wall of some celestial city. [259]
>
> —John Muir
> The Yosemite, 1912

> On the site of the old, decaying mining town of Mineral King will rise a new self-contained village bearing the same name .... [T]his carefully planned development will create one of the world's major outdoor recreation facilities in a spectacular valley of the California Sierras. [260]
>
> —United States Forest Service, 1969

> There isn't going to be any ski resort in Mineral King. [261]
>
> —James Moorman
> Sierra Club Legal Defense Fund, 1972

Mineral King Valley is tucked into the southern end of the Sierra Nevada range, a long meadow of streams and alpine flowers flanked by conifers and, on three sides, by snow and granite peaks twelve thousand feet high.[262] The discovery of silver in the valley in 1873 led to a fever of prospecting and, by the end of the decade, a regular traffic in mining claims, storefronts, stock trails, and lumber, a scene that was playing out all over the American West. In most cases the scenes played out quickly as the boom towns went bust, and so it was with the Mineral King Mining District, which was defeated by poor quality metals and the rigors of long, high-altitude winters. The miners left the valley to a handful of summer cabins and campers willing to make the long trek up a twenty-five-mile

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259. THE AMERICAN WILDERNESS IN THE WORDS OF JOHN MUIR 159 (Michael P. Dineen et al. eds., 1973) [hereinafter AMERICAN WILDERNESS].

260. TOM TURNER, SIERRA CLUB, WILD BY LAW 16 (1990) (quoting an announcement made by the United States Forest Service on January 21, 1969, approving a Disney proposal for the Mineral King ski resort development). Chapter One of Tom Turner's book, WILD BY LAW, describes the Mineral King proposal and the legal strategy of the Sierra Club in opposing it. *Id.* at 3–23.

261. Ron Taylor, *Sierra Club Vows Mineral King Fight*, SACRAMENTO BEE, Apr. 19, 1972 (on file with author).

262. *See* TURNER, *supra* note 260, at 3; U.S. DEP'T OF THE INTERIOR, W. REGION, NAT'L PARK SERV., FEASIBILITY REPORT, MINERAL KING, CALIFORNIA (1977) [hereinafter MINERAL KING FEASIBILITY REPORT].

dirt road. The next chapter would be written by one of the most extraordinary figures in American history: John Muir.

John Muir was tough, daring, poetic, and relentless in his crusade to save the high mountains of California.[263] Raised on a Wisconsin farm under conditions that would kill nine out of ten Americans living today,[264] young Muir was working in a carriage shop when an accident temporarily blinded him;[265] as near-death catastrophes sometimes do, it opened his mind. He later wrote: "As soon as I got into heaven's light, . . . I bade adieu to mechanical inventions, determined to devote my life to the study of the inventions of God,"[266] by which Muir meant of course, nature.

Muir embarked on a thousand mile "botanical walk" to the Gulf of Mexico, shipped on to Cuba, then Panama, and then to California.[267] He took one look at the Sierra Nevada and knew that he had found his place. One of the first of his many newspaper articles was entitled "God's First Temple: How Shall We Preserve Our Forests?"[268] The word "preserve" was as new to the America of his day as the word "environment" would be a century later. Muir's doctrine of preservation would change the way America thought about what it was, and what it possessed. It took on its new meaning in the high mountains of California.

Within three years of his arrival, Muir was launching a campaign to save the Yosemite range. The "bearded zealot who preached a mountain gospel with John the Baptist fervor"[269] persuaded first President Harrison, then President Theodore Roosevelt, and then the California legislature to protect the whole of Yosemite in a newly-created national park.[270] At the

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263. *See* STEWART L. UDALL, THE QUIET CRISIS 109–25 (1963).

264. JOHN MUIR, THE STORY OF MY BOYHOOD YOUTH 90–136 (1913). Muir's biography was written, nonetheless, with energy and joy, and utterly without self-pity. *Id.*

265. AMERICAN WILDERNESS, *supra* note 259, at 146.

266. *Id.* at 9.

267. *Id.*

268. John Muir, Sacramento Record-Union, Feb. 9, 1876, *cited in* UDALL, *supra* note 263, at 114.

269. UDALL, *supra* note 263, at 117.

270. *See* AMERICAN WILDERNESS, *supra* note 259, at 9; UDALL, *supra* note 263, at 114–20. Portions of the Yosemite were already under protection, but Muir sought protections for the whole of the ecosystem, and won. UDALL, *supra* note 263, at 114–20. He would take the same, save-it-all approach south to the Sierra National Forest and Mineral King Valley.

same time, Muir was converting a group of hiking companions—the photos show young men and women in knickers and long dresses below ten thousand foot glacial cirques—into the nation's first conservation organization, appropriately, the Sierra Club.[271] Muir became its president. The Club's first success, in 1893, was the creation of a vast Sierra Forest Preserve in southern California that included the Mineral King Valley.

In the early 1900s, Mineral King came under the jurisdiction of the newly-created Forest Service, which espoused a "multiple use" philosophy that Muir flatly opposed.[272] The Sierra Club mounted a two-decade-long campaign to convert the Sierra Forest Preserve into Sequoia National Park, which largely succeeded but which, at the end of the day, excluded the Mineral King Valley because of its mining history and low-level, residual habitation.[273] Instead, and in compromise, the Forest Service would manage the area as the Mineral King Game Refuge.[274] And so it remained, until propelled out of its slumber by a proposal from, of all sectors, the Sierra Club.

As World War II ended, the outdoor and recreation-oriented Sierra Club began looking to expand skiing opportunities in the California highlands.[275] The Sierra Club itself managed a small ski tow on Donner Pass,[276] but it and the other re-

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271. TURNER, *supra* note 260, at 5. Muir would write of his hiking companions soon to be the nucleus of the Sierra Club: "John the Baptist was not more eager to get all his fellow sinners into the Jordan than I to baptize all of mine in the beauty of God's mountains." AMERICAN WILDERNESS, *supra* note 259, at 3.

272. The United States Forest Service was the brainchild of Gifford Pinchot, whose management philosophy was multiple use: "the ax should be regulated, not stopped in mid-air." *See* UDALL, *supra* note 263, at 102. Originally allies in America's first movement towards conservation, Muir and Pinchot parted ways over sheep grazing on forest lands, *id.* at 120, and with finality in a bitter fight over a dam in the Hetch Hetchy Valley of Yosemite National Park. To Pinchot, the dam was a wise use of water power; to Muir, it was a sacrilege: "Dam Hetch Hetchy! As well dam for water tanks the people's cathedrals and churches, for no holier temple has ever been consecrated by the heart of man." *Id.* at 121. After a decade of struggle, the dam was authorized by Congress. Muir died within the year. He would write, at the end, "They will see what I meant in time." *Id.* at 122.

273. MINERAL KING FEASIBILITY REPORT, *supra* note 262, at 9–11.

274. *Id.* at 11.

275. TURNER, *supra* note 260, at 5, 9. The description of Sierra Club and Forest Service initiatives that follows is taken from this source.

276. Telephone interview with James Moorman, Executive Director, Sierra Club Legal Defense Fund (Mar. 23, 2000). Mr. Moorman represented the Sierra Club in later stages of the case. *See infra* notes 314–15, 326 and accompanying text.

sorts of the time were in the northern Sierra; no ski areas existed within an eight-hour drive of Los Angeles. After an extensive survey, the Sierra Club found the best site to be a remote valley in the Sierra National Forest, Mineral King. Its finding coincided with that of the Forest Service, which in 1949 called for bids for a modest facility with a one-hundred-person hotel, a small lift, and access in some "over the snow" fashion. The Sierra Club had no objection.[277] But the proposal received no bids.

Walt Disney entered the picture in the 1950s. An avid downhill skier and outdoorsman, Disney had been named an "honorary life member" of the Sierra Club for his wildlife films.[278] His developments at Disneyland and Disney World were at the same time achieving wide acclaim for their innovative solutions to waste treatment, transportation, and environmental management.[279] Disney had also helped stage the Winter Olympics at Squaw Valley in 1960, and knew a growth sport when he saw one.[280] Quietly, he began negotiating with the Forest Service over Mineral King.

In 1965, the Forest Service let the cat out of the bag with a new prospectus calling for a ski resort investment in the Mineral King Valley of at least $3 million.[281] Forest Service officials had "no idea what they had touched off."[282] Big skiing's time had come. One bidder "brought plans for his $50 million scheme into [the Forest Service headquarters] in a 55-foot long house trailer."[283] The Disney bid came in at $35 million.[284] As finally approved, it would include twenty-seven chairlifts with a capacity of 11,400 skiers an hour, overnight accommodations for six thousand people, ten restaurants and snack bars, a gas station, theatre, chapel, skating rink, and a ten-story parking garage for 3,600 vehicles—one of the largest ski resorts in the

277. TURNER, *supra* note 260, at 9.

278. *Id.* at 3, 9.

279. *See* BETH E. LACHMAN ET AL., INTEGRATED FACILITY ENVIRONMENTAL MANAGEMENT APPROACHES: LESSONS FROM INDUSTRY FOR DEPARTMENT OF DEFENSE FACILITIES, App. B Walt Disney World Resort Environmental Management Case Study (2001), *available at* www.rand.org/publications/MR/MR1343/MR1343.appb.pdf (last visited Apr. 8, 2001).

280. TURNER, *supra* note 260, at 9.

281. *Id.*

282. *Service Action on Mineral King Set Off Long Controversy*, SACRAMENTO BEE, Apr. 20, 1972 (on file with author).

283. *Id.*

284. *Id.*

world.[285] The Disney Corporation won the bid. It also persuaded the State of California to finance a $30 million access road up the valley[286] with a peak capacity of 1,200 vehicles per hour,[287] and the United States Department of the Interior to allow the road to cross eight miles of the Sequoia National Park.[288] The Sierra Club was left to debate what it had wrought, and to oppose.[289]

In June of 1969, the Sierra Club filed suit to prevent the Disney development in Mineral King. It challenged the amount of acreage leased, the road across national parkland, and the compatibility of the resort with the forest game reserve.[290] It asserted that for many years it had "exhibited a special interest" in the management of parks, game refuges, and forests; that one of its "principal purposes" was to "protect and conserve the national resources of the Sierra Nevada Mountains"; and that these interests would be "vitally affected" and "aggrieved" by the resort approval.[291] The point seemed axiomatic. It was the Sierra Club and these were the Sierras; if it could not be heard to complain, asked the Club in its trial brief, "then who speaks for the future generations for whose benefit Congress intended the fragile sierra bowls and valleys to be preserved?"[292] The District Court found the allegations sufficient, the law violated, and enjoined the project.[293] On appeal, however, a majority of the Ninth Circuit found that allegations of "concern," without a showing of a "more direct interest," were an inadequate basis upon which to sue in federal

285. *See* Sierra Club v. Morton, 405 U.S. 727, 729, 743–44 n.5, 758 (1972) (describing approved project); MINERAL KING FEASIBILITY REPORT, *supra* note 262, at 12; TURNER, *supra* note 260, at 9. Apparently, another private developer was planning a subsidiary resort on an additional 160-acre panel next to the Disney complex. *Sierra Club*, 405 U.S. at 743–44 n.5.

286. TURNER, *supra* note 260, at 9.

287. *See Sierra Club*, 405 U.S. at 758; TURNER, *supra* note 260, at 9.

288. TURNER, *supra* note 260, at 13.

289. *Id.* at 9 (describing a "rather rancorous year of internal argument" within the Sierra Club).

290. *See Sierra Club*, 405 U.S. at 730 n.2 (summarizing complaint).

291. *Id.* at 735 n.8 (reciting the Sierra Club's statement of interest).

292. TURNER, *supra* note 260, at 16. The Sierra Club felt so strongly about its legal position that it refused to amend its pleadings, on invitation, to allege injury to an individual member. *Sierra Club*, 405 U.S. at 735–36 n.8.

293. Sierra Club v. Hickel, 1 ENVTL. L. REP. (Envtl. L. Inst.) 20,010, 20,014 (N.D. Cal. July 23, 1969).

court.[294] It would leave the injunction in place, however, while the Sierra Club petitioned the United States Supreme Court.

The Supreme Court's ruling on standing was, in the words of one commentator, a "massive victory, disguised as a defeat."[295] Long forgotten is the fact that the Sierra Club, although barely, was found without standing and lost the case.[296] Long remembered, and echoed down to the present day in more opinions on standing than any other,[297] is the unanimous dicta that opened the federal courts to interests that "may reflect aesthetic, conservational, and recreational as well as economic values."[298] Also remembered, like the second movement of a concerto, is the emotional dissent of Justice Douglas advocating standing "in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage."[299] With more lines in its footnotes than its text, reciting a litany of federal agencies captured by industry,[300] and presaging a concern for biological diversity and the loss of species that has since moved to the forefront of conservation,[301] the Douglas opinion established at that early date the rationale for public interest environmental litigation.

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294. Sierra Club v. Hickel, 433 F.2d 24, 33 (9th Cir. 1970).

295. TURNER, *supra* note 260, at 21.

296. With two vacancies on the Supreme Court, the case was decided by four votes to three, the dissenters finding sufficient allegations for standing. *Sierra Club*, 405 U.S. at 741 (Douglas, J., dissenting); 405 U.S. at 755 (Brennan & Blackmun, JJ., dissenting).

297. *See Sierra Club*, 405 U.S. at 727 (citing history includes more than 2000 cases).

298. *Id.* at 738 (citing Data Processing Serv. v. Camp, 397 U.S. 150, 154 (1970)).

299. *Id.* at 741. The thesis of the dissent was taken largely from a law review article sent to Justice Douglas in draft from its author, *see* TURNER, *supra* note 260, at 19, 20, and appearing in final form as Christopher D. Stone, *Should Trees Have Standing? Towards Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

300. *See Sierra Club*, 405 U.S. at 744–49.

301. *See id.* at 750–51 n.8:

> A teaspoon of living earth contains 5 million bacteria, 20 million fungi, one million protozoa, and 200,000 algae. No living human can predict what vital miracles may be locked in this dab of life, this stupendous reservoir of genetic materials that have evolved continuously since the dawn of the earth. . . . When a species is gone, it is gone forever. Nature's genetic chain, billions of years in the making, is broken for all time.

Nothing short of a legal war has followed over the extent of these "conservational" interests and standing to sue in particular cases. The vagaries of the United States' doctrine of standing are best left to other scholars.[302] In part, these wars reflect conflicting views on the role of courts in a democracy;[303] at the same time, and in no smaller part, they reflect conflicting views on whether economic interests should trump public and environmental interests in the judicial system.[304] Suffice it to say that one of the strongest thrusts of the neo-conservative legal movement has been to limit, if not indeed to repeal, *Sierra Club v. Morton*.[305] On the other hand, and somewhat surprisingly, one of the strongest thrusts in international public law has been the adoption of liberalized rules of environmental

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302. *See* LOUIS L. JAFFEE & NATHANIEL L. NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS 803–45 (4th ed. 1976); RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 5.4 (1985); BERNARD SCHWARTZ, ADMINISTRATIVE LAW 459–80 (2d ed. 1983). Perhaps the most unarguable conclusion about standing to sue that can be drawn from the cases and commentaries is that it has, in practice, proven to be a highly pliable doctrine often applied according to the sentiments of judges on the merits of the case. *See* Richard J. Pierce, *Standing: Law or Politics?*, 77 N.C. L. REV. 1741, 1743 (1999). At bottom, if a court favors the case or wants to decide it on the merits in order to establish precedent, it finds standing. *See* Bennett v. Spear, 520 U.S. 154 (1997) (standing by landowner to challenge critical habitat designation under the Endangered Species Act, despite absence of injury); Duke Power Co. v. Carolina Envtl. Group. Inc, 438 U.S. 59 (1978) (standing by citizen group to challenge limitation of liability for nuclear power plants, despite the absence of injury, in order to declare the limitation constitutional). If a court does not like the case, it denies standing even to directly aggrieved parties. *See* Simon v. Kentucky Welfare Rights Org., 426 U.S. 26 (1976) (standing denied despite refusal of health services to low income patients); Warth v. Seldin, 422 U.S. 490 (1975) (standing for minority plaintiffs despite racially exclusive zoning).

303. *Compare* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) (citizen—but not economic—standing violates the separation of powers doctrine), *with* George Van Cleve, *Congressional Power to Confer Broad Citizen Standing in Environmental Cases*, 29 ENVTL. L. REP. (Envtl. Law Inst.) 10,028 (Jan. 1999) ("[t]he Supreme Court's recent decisions limit[ing]. . . standing . . . are based on an unfounded view of the meaning of Articles II and III of the Constitution . . . .").

304. One effect of disallowing environmental standing is, of course, to reserve the judiciary exclusively for plaintiffs with economic interests, e.g., private developers, property owners, and industry.

305. *See* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); John Echevarria & Jan Zieilder, *Barely Standing: The Erosion of Citizen 'Standing' to Sue to Enforce Federal Environmental Law*, Environmental Policy Project, Georgetown University Law Center, 1999, *available at* http://www.law.Georgetown.edu/gelpi/papers/barely.htm (last visited Mar. 29, 2002).

standing, some even exceeding those announced in *Sierra Club v. Morton*, by what are now a majority of countries in Europe and Latin America.[306] The current is going in both directions.

The Douglas opinion, meanwhile, advocating standing in the name of inanimate objects, has gone more to the heart than to changes in legal theory. It is hard to see how the thesis would affect requirements for standing, as courts would still be faced with the question of deciding exactly who could speak for these inanimate objects, returning to the initial question of standing. To be sure, as even the most severe critics of liberalized standing acknowledge,[307] it would be less artificial for a group such as the Sierra Club to sue in its own name rather than in the name of an affected member. As a practical matter, however, environmental groups maintain the action anyway and, with the exception of recent, hyper-technical decisions plainly hostile to environmental standing in any form,[308] the need for a Sierra Club member as plaintiff creates more of a nuisance in pleading than an obstacle.

The moral impact of the natural object as plaintiff—Mineral King Valley or the spotted owl, for example—is another question, and perhaps a sufficient one for Justice Douglas. Several environmental groups, most notably the Sierra Club Legal Defense Fund, have kept the Douglas flame alive and brought suits in the names of affected species, such as the Palila, and the Northern Spotted Owl.[309] Then again, they are careful to add human plaintiffs as well.[310]

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306. *See* JOSE M. BORREO NAVIA, LOS DERECHOS AMBIENTALES: UNA VISION DESDE EL SUR (1994) (discussing environmental standing in Latin America); *see also* ISABEL MARTINEZ, EL ACCESO A LA JUSTICIA AMBIENTAL EN ARGENTINA, BRASIL, COLOMBIA, MEXICO Y VENEZUELA DURANTE LA DECADA DE 1990 (2000) (rise in environmental standing in four Latin American countries); SVEN DEIMANN & BERNARD DYSSIM, ENVIRONMENTAL RIGHTS: LAW, LITIGATION AND ACCESS TO JUSTICE (1995) (recent developments in citizen standing in Europe, Eastern Europe, and Canada).

307. *See* Scalia, *supra* note 303, at 891.

308. *See supra* note 305. *But see* Friends of the Earth v. Laidlaw, 528 U.S. 167 (2000) (according standing to environmental plaintiff and distinguishing recent precedent to the contrary).

309. *See* Palila v. Haw. Dep't of Land & Natural Res., 639 F.2d 495 (9th Cir. 1981); N. Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988). Indeed, a stuffed palila owl was featured at plaintiff's table throughout its several trials and appeals under the Endangered Species Act. Telephone Interview with Michael R. Sherwood, Earth Justice Legal Defense Fund, San Francisco, Cal. (June 2001).

310. *See* sources cited, *supra* note 309.

In practice, the liberalized standing rule of the *Sierra Club v. Morton* dictum has not paralyzed the federal government, as feared by the Solicitor General in his argument to the Court.[311] To be sure, it has led to a steady run of litigation on behalf of environmental organizations, large and small, enforcing statutory deadlines, environmental impact reviews, permit conditions, endangered species, fisheries management, and many other federal mandates.[312] Whether these lawsuits are bad or good is somewhat in the eye of the beholder, but there is no gainsaying that, without them, many of the very difficult statutory requirements passed by Congress in contemporary environmental legislation would go ignored.[313] At the same time, these lawsuits are matched in number and in firepower by suits from regulated industry and the development community challenging federal regulations, pollution standards, permit conditions and, more recently, entire federal programs.[314] While it is certainly true, therefore, that, as the Solicitor warned, few federal administrators rule without the threat of a legal challenge by a disappointed party,[315] the result of *Sierra v. Morton* is simply that they face the threat from both sides of the equation—with a corresponding and obvious impact on environmental decision-making.[316]

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311. 405 U.S. 727, 753 (1972) (App. to Douglas, J., dissenting).

312. *See* Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339 (1990).

313. *See* Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENVTL. L. & TECH. J. 55 (1989).

314. Telephone interview with William M. Cohen (Apr. 2, 2002) (Mr. Cohen was Chief of the General Litigation Section of the Environment and Natural Resources Division, United States Department of Justice from 1985 to 2000, with responsibilities for defending federal agencies in lawsuits under NEPA and natural resources management statutes); Telephone interview with Margaret Strand (Apr. 2, 2002) (Ms. Strand was Chief of the Environmental Defense Section of the Environment and Natural Resources Division of the United States Department of Justice from 1984 to 1991, with responsibilities for defending actions against the Environmental Protection Agency). While exact figures on this litigation are apparently not kept at the Department of Justice, both Mr. Cohen and Ms. Strand recall a balance of cases slightly heavier from the environmental side during the 1970s and 1980s, and more nearly equal during the 1990s. *See also* Oliver A Houck, *The Regulation of Toxic Pollutants Under the Clean Water Act,* 21 ENVTL. L. REP. (Envtl. Law Inst.) 10,528, 10,537 n.144 (Sept. 1991) (listing more than thirty separate industry lawsuits challenging Environmental Protection Agency technology standards under the Clean Water Act). In short, citizen standing has not unbalanced the applecart; rather, it has balanced it.

315. *See Sierra Club,* 405 U.S. at 754–55 (App. to Douglas, J., dissenting).

316. Administrative decision-makers, like most human beings, are risk-averse. Environmental litigation subjects them to personal and professional

Meanwhile, back at Mineral King Valley, the Disney proposal was still pending. The Supreme Court's decision merely led to a remand for the Sierra Club to establish its standing, which it did through affidavits specifying the interests of individuals, setting the pattern for pleadings to this day.[317] The Sierra Club added a count under the newly-enacted NEPA as well, which re-opened the matter for public debate.[318] Disney hung gamely on, convening a Mineral King advisory board of leading conservationists and making its case to the press,[319] but the tide was turning. For the Disney Corporation, the impact review was a nightmare: more than 4,400 individuals, fourteen federal agencies, six state agencies, seven local government agencies, and thirty-five private organizations submitted formal comments, most opposed, many "scathing."[320] At the same time, California was having second thoughts about, and then rescinding, its agreement to build the access road.[321]

For its part, the Sierra Club was mounting a counter-offensive, at long last, to add Mineral King Valley to Sequoia National Park. It was no cakewalk. The proposal was opposed by the ski industry, which pointed, persuasively, to the high and growing demand for alpine skiing in southern California.[322] It was opposed additionally by the mining, agriculture, and

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risks: accusations, questions of judgment, questions of intelligence, depositions, proofs, cross-examination, and no small extra work. If only one side to a dispute may sue, a decision-maker will favor that side if only in order to avoid the conflict. Hence, a major effect of environmental standing is its countervailing influence on the majority of administrative decisions that are never litigated.

317. Sierra Club v. Morton, 348 F. Supp. 219 (N.D. Cal. 1972).

318. *See id.*

319. Taylor, *supra* note 261 (quoting Robert Hicks, Disney's Mineral King project director, "[w]e are still committed to the development. In fact we are more convinced than ever of the need for a ski area to serve Southern California and Mineral King can best meet that need."); *see also* TURNER, *supra* note 260, at 18. The committee included a former Director of the National Park Service, the Executive Vice President of the National Wildlife Federation, and a past President of the Sierra Club. *Id.*

320. *See* TURNER, *supra* note 260, at 21.

321. *See id.* at 23.

322. *See Enlarging the Sequoia National Park: Hearing on S.88 Before the Senate Subcomm. on Parks and Recreation*, 95th Cong. 27 (1978) (statement of Sen. Hayakawa in opposition to expansion of the Sequoia Park, attaching a statement from the Committee for Multiple Use of Public Lands, including *inter alia*, the Tax Watchers of California, Fresno-Kings County Cattlemen's Association, California Cattlemen's Association, Fresno (CA) Gem and Mineral Society, Farm and Land Institute, California Women for Agriculture, Fresno County Sportsman, and Women in Timber (CA)).

grazing industries—largely on general principles; if this area became a park, then other areas might become parks,[323] a kind of domino phobia that has returned to vogue in recent years. On the other hand, the Sierra Club proposal was supported strongly by environmentalists, the Department of Interior, and even by in-holders who allied their future with protection of the valley.[324] In 1977, with the Disney project apparently expiring,[325] the district court cleared its docket and dismissed the lawsuit, without prejudice.[326] In October 1978, the Mineral King Valley was made part of the Sequoia National Park.[327]

Sierra Club v. Morton would have other impacts as well. Just as John Muir's fight for the Sierra led to a new kind of organization and a new kind of activism, so too the Sierra Club's fight for this piece of the Sierra helped breed a new kind of law firm—in this case the Sierra Club Legal Defense Fund, which was created during the Supreme Court appeal, and took over the case in its later stages, managing its successful resolution.[328] The Sierra Club Legal Defense Fund and its three national colleagues—the Environmental Defense Fund, the National Resource Defense Council, and the National Wildlife Federation—would carry the major load of public interest envi-

323. *See id.* at 34 (statement of Sen. Hayakawa, citing *Battle Lines Drawn Over Future of Multiple-Use on Public Lands*, W. LIVESTOCK J., Apr. 10, 1978) ("At the present, no livestock graze on this particular piece of 16,000 acres. But the precedent—which argues California rancher Neil Perkios, Friant, will soon apply on all public lands—must be defeated in the early stages.").

324. *See id.* at 17 (Statement of Hon. Alan Cranston); *see also* John Kirst, *Another Fight at Mineral King*, S.F. EXAMINER, Nov. 25, 1995, at A19.

325. Ron Taylor, *Disney May Cancel Mineral King Plans*, SACRAMENTO BEE, May 1972 (on file with author).

326. TURNER, *supra* note 260, at 23.

327. *Id.* Its designation as a National Park has not spared Mineral King nor the Sierra Nevada from the impacts of encroachment and pollution. *See* Tom Knudson, *The Sierra in Peril*, SACRAMENTO BEE, 1991 (on file with author).

328. *See* TURNER, *supra* note 260, at 19, 21. The Sierra Club Legal Defense Fund's first Executive Director was James Moorman, who had served in the Lands and Natural Resources Division of the United States Department of Justice and then with the newly-formed Center for Law and Social Policy in Washington, D.C., where he had brought the initial DDT and Alaska pipeline litigation. *Id.* at 18. Moorman would later go on to direct the Lands and Natural Resources Division of Justice in the Carter Administration. In 1997, the Sierra Club Legal Defense Fund changed its name to Earth Justice Legal Defense Fund. *See* Earth Justice Legal Defense Fund, *History, at* http://www.earthjustice.org/about/history.Html (last visited Apr. 21, 2002).

ronmental litigation for the next two decades.[329] The lessons for the Disney Corporation had to be learned again, twenty years later, with its proposed mega-theme-park alongside the Manassas National Battlefield in northern Virginia, just south of the nation's capitol.[330] The opposition, this time led by historians and the historic preservation community, was intense and, once again, the company gave way.[331]

Disney's ski resort for the Mineral King Valley, however, was also the opening salvo of a controversy over "industrial-scale" recreation on public lands that only increases with time.[332] Walt Disney was correct in seeing the potential for large, private ski resorts in national forests. They are, today, abundant, enormously successful, and catalysts for upscale real estate development in the American West. Whether they are appropriate uses of natural forests is another question, but one that has been all but drowned out by the market. Disney's misfortune was to have been ahead of his time. And to have run into the legacy of John Muir at Mineral King.

V. TELLICO DAM: *Tennessee Valley Authority v. Hill*[333]

In 1967, the Tennessee Valley Authority began construction of a dam at the mouth of the Little Tennessee River. Threatening prime farmland, Cherokee religious sites, and the last stretch of river in the region, the dam survived challenges under the NEPA and other laws, only to face the discovery of a small endangered fish in its path, the Snail Darter. The Darter carried the project and a surrounding media frenzy to the Supreme Court which, in an unexpectedly strong opinion, affirmed the Endangered Species Act and enjoined Tellico Dam. From here, however, the story took almost unbelievable directions involving a newly-created God Squad, angry legislators, new Darters for old, a lake for millionaires, and a "fish-stops-progress" leg-

329. By the 1990s, the bulk of environmental litigation—in number of cases filed—had shifted primarily to environmental attorneys in private practice and to local and state-based organizations.

330. *See* Spencer S. Hsu, *Disney at a Historic Crossroad*, WASH. POST, Sept. 15, 1994, at V1.

331. *See* Liz Spayd & Paul Farhi, *Eisner Ended Disney Plan: Chairman Saw Park Fight Harming Company's Image*, WASH. POST, Sept. 30, 1994, at A1.

332. *See* Jon Margolis, *The Latest 1,000-Pound Gorilla*, HIGH COUNTRY NEWS, Apr. 27, 1998, at 15 (describing rise of the recreation development industry in the American West, featuring ski resorts, marinas, and motor sports).

333. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978).

end which, in the words of one commentator, is "wrong for the wrong reasons." No story better reflects the hopes and flaws of environmental policy in the United States.

> Should a worthless, unsightly, minute, unedible minnow outweigh a possible injustice to human beings? [334]
>
> —Congressman James Duncan
> Rep., Tenn., 1978

> Here is a project that is 95 percent complete, and if one takes just the cost of finishing it against the benefits . . . it doesn't pay. [335]
>
> —Charles Schultz, Chairman
> Council of Economic Advisors, 1978

> What, for example, will archeologists make of congressional debates over Tellico Dam, where the vast majority ridiculed the dam, excoriated it, flagellated it—and then allowed it to be built? [336]
>
> —Marc Reisner, *Cadillac Desert*

> A $50,000 study paid for by TVA concludes the land taken away from farmers to form Tellico Lake should be turned into a recreation dream town for the rich . . . . "Our market analysis suggests that the resort should cater to a fairly wealthy clientele," engineer Steve Campbell, who helped compile the report, said yesterday. [337]
>
> —United Press International, 1982

If there is a picture in our minds of Real America, it would be the farm country along the Little Tennessee River with its deep, rich soils, white clapboard houses, green fields, and neatly tended homesteads, kept in the family for a century and more.[338] Before that, it was home to the Cherokee Indian Na-

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334. MARC REISNER, CADILLAC DESERT 339–40 (1986).

335. *Id.* at 339.

336. *Id.* at 109.

337. United Press Int'l, *TVA Study Indicates Dream Town Could Be a Reality at Tellico*, BIRMINGHAM POST-HERALD, Oct. 26, 1982, at B3.

338. *See* REISNER, *supra* note 334, at 336; *see also* Envtl. Defense Fund. v. Tenn. Valley Auth., 339 F. Supp. 806, 808 (E.D. Tenn. 1972).

tion, which sided loyally with the Americans in our wars against the French, and then against the British, until we moved them out on the Trail of Tears to a land that looked like the moon, Oklahoma.[339] A river ran through the Little Tennessee Valley, fast, clear, and teeming with aquatic life that was fast disappearing from the region. "[O]ne of those happy places that contains both farms and bears," wrote one visitor, "a beautiful valley."[340] Tellico dam would condemn thirty-eight thousand acres on the valley floor, evict 340 farm families, and bury thirty-three miles of the Little Tennessee under water.[341] Then the Tennessee Valley Authority (TVA) would go looking for someone to buy lakefront property.[342]

The TVA began with the best of intentions. Lower Appalachia was hard hit by the Great Depression and one of the poorest regions in the country.[343] Its natural resources had been cut over and wasted, its soils eroded, its economic base was near zero.[344] One of the first initiatives of the New Deal, the Tennessee Valley Authority Act of 1933,[345] would create, in the words of an enthusiastic President Roosevelt, "a corporation clothed with the power of government but possessed of the flexibility and initiative of private enterprise."[346] The "power of government" was indeed broad and conferred, on a largely-autonomous commission, authority to promote national defense, agriculture, industry, navigation, and flood control.[347]

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339. Three Cherokee cities had prospered in the Little Tennessee River Valley: Echota, the ancient capital, Tuskegee, birthplace of Chief Sequoyah, and Tanasee, for which the state is named. *See* Zygmunt J.B. Plater, *The Snail Darter, The Tellico Dam, and Sustainable Democracy—Lessons for the Next President from a Classic Environmental Law Controversy,* Feb. 12, 2000, *available at* www.law.mercer.edu/elaw/zygplater.html (presenting for the Univ. of Tenn. Interdisciplinary Symposium 2000). One island to be taken by the reservoir behind Tellico Dam contained the oldest site of continuous human settlement in the United States. *Id.*

340. REISNER, *supra* note 334, at 336.

341. *See Tenn. Valley Auth.*, 339 F. Supp. at 808.

342. *See supra* text accompanying note 337; *infra* text accompanying notes 471–77.

343. *See* PATRICK MCCULLY, THE ECOLOGY AND POLITICS OF LARGE DAMS 245 (1996).

344. *See id.*

345. 16 U.S.C. § 831 (1994) (originally enacted as Tenn. Valley Auth. Act of 1933, ch. 32, 48 Stat. 58).

346. Benjamin Higgins, *The American Frontier and the TVA*, 32 SOCIETY 34, 37 (1995).

347. *See* 16 U.S.C. § 831 (1994) (originally enacted as Tenn. Valley Auth. Act of 1933, ch. 32, 48 Stat. 58).

The TVA took this authority and went to work. It would build dams.

By 1936, the TVA had surveyed the entire Tennessee Valley—the fifth largest watershed in the United States—for possible dam sites, and had identified as many as seventy locations.[348] Rating the sites on feasibility and economic potential, the Little Tennessee River was at the bottom of the list. It remained there for the next fifteen years as the TVA built more than forty hydroelectric and flood control impoundments, brought seasonal flooding under control, and began to supply enviably cheap electricity to the region.[349] With locks and canals, it made the main river so navigable that Knoxville became an official port of entry to the United States.[350] With more than 2,500 miles of river converted to flat-water reservoirs, Tennessee had more shoreline than all of the Great Lakes combined.[351]

By the mid-1950s, however, the TVA had run out of its good sites, ones with natural features for dams and with justifiable hydroelectric, navigation, and flood control benefits. The agency began to look elsewhere for power production, turning first to coal and then to nuclear energy.[352] Over the next few decades, it would become the nation's largest nuclear plant operator; it would also become the nation's largest strip miner and air polluter.[353] The governor of neighboring Kentucky

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348. *See* ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 660–61 (1992).

349. *See id.*; *see also* MCCULLY, *supra* note 343, at 245; Danielle Droitsch, *T.V.A's Blighted Nuclear Romance*, NATION, June 27, 1994, at 906. The economic impact was considerable, boosting per capita income in the region from less than half of the national average in the 1930s to seventy-five percent of the national average in the 1970s. Droitsch, *supra* note 349, at 906.

350. *See* Higgins, *supra* note 346, at 24.

351. *See* Plater, *supra* note 339.

352. MCCULLY, *supra* note 343, at 245–46. By 1993, only a seventh of TVA's power would come from its hydroelectric dams. *Id.* at 45.

353. *Id.* at 245–46; *see also* REISNER, *supra* note 334, at 326:

> [T]he strip mining, besides eliminating thousands of jobs in deep-mined coal, was creating a scene of gruesome devastation. The denuded mountains seemed covered with a reddish-brown rash, and rivers that were once pristine were running with what looked like old blood. Meanwhile, the TVA's older coal-fired power plants were creating pollution traps in the valleys where they were situated, and its newer ones, with smokestacks a thousand feet high, were wafting sulfur and nitrogen oxides up to New York State and Canada, where they fell as acid rain.

Id.

would complain of "ruined hillsides, poisoned streams, dead woodlands and devastated farms, a breeding ground of mosquitoes and eradicated wild life."[354] The social costs mounted, as well, in persistent poverty and displaced families, largely poor, rural, and black.[355]

Whatever the costs, the TVA was not ready to quit the dam building business. Turning to locations farther down its list, it resorted to new justifications and benefits, among them "economic development demonstration."[356] By the early 1960s, it had more than sixty sites behind impoundments, very few sites remaining, and these were the dregs.

When the TVA reached Tellico Dam it had run out of reasons. The region was crackling with subsidized electricity, overloaded with flat-water recreation, and flooding had become a thing of the past. The agency, however, was suffering a crisis of confidence as its old projects were completed and its water program wound down.[357] For agency personnel, a new wave of dam building was a matter of survival and pride.[358] There were two sites left at the bottom of the list, each worse than the other—Columbia on the Duck River and Tellico at the mouth of the Little Tennessee.

The proposed Duck River project was a travesty. It would destroy forty-two farm homes in order to protect an alleged

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354. Christine Klein, *On Dams and Democracy*, 78 OR. L. REV. 641, 686 (1999) (quoting Higgins, *supra* note 346, at 39).

355. *Id.* at 685. "Despite the tens of billions of dollars spent by the TVA, the population of the Tennessee Basin is in many ways poorer than those living in nearby areas who did not 'benefit' from TVA development." *Id.* (quoting MCCULLY, *supra* note 343, at 17). The racial implications were also stark; the more than 50,000 people displaced by TVA dams included a disproportionate number of African Americans. MCCULLY, *supra* note 343, at 246; *see also* Melissa Walker, *African Americans and TVA Reservoir Property Removal: Race in a New Deal Program,* 72 AGRIC. HIST. 417 (1998). The "irony," notes the author, is that the TVA was dispersing some of the very persons claimed to be served by its "agricultural vision." *Id.* at 428.

356. Plater, *supra* note 339.

357. *Id.*

358. *Id.* ("To boost agency morale, Chairman Wagner eagerly grabbed onto the idea of building the Tellico Dam to start a glorious new era of TVA projects, to be built around dams even where dams were unjustifiably marginal."). *See generally* BRUCE WHEELER & MICHAEL J. MCDONALD, TVA AND THE TELLICO DAM 1936–1979: A BUREAUCRATIC CRISIS IN POST-INDUSTRIAL AMERICA (1986); STEPHEN J. RECHICHAR & MICHAEL R. FITZGERALD, THE CONSEQUENCES OF ADMINISTRATIVE DECISION: TVA'S ECONOMIC DEVELOPMENT MISSION AND INTRAGOVERNMENTAL REGULATION 1983.

twelve downstream structures from flooding;[359] a congressional investigating committee could not even locate these twelve.[360] Its only other claimed benefits were from "shoreline development," along a shoreline exposed to nearly ten thousand acres of mud flats for six months of the year, and "recreation."[361] The TVA projected a fantastic million and a half "visitor days" to this reservoir, evidently in lieu of visiting the nine other reservoirs the TVA had already built within fifty miles of the project.[362] The agricultural losses alone, at an estimated $18 million annually, were three times higher than all of the claimed benefits the TVA could muster.[363] Entangled in litigation,[364] an embarrassment to anyone who touched it, the proposed Columbia Dam would die a hard, slow, but deserving death.

Which left Tellico. Unable to find one good reason, the TVA came up with seven reasons instead, more sophisticated in appearance, even more fantastic in nature. Among them were pittance amounts, never seriously defended, for flood control (for Chattanooga, which was already protected by twenty-four flood control dams upstream), navigation (by canal from a lower dam to Tellico), electricity (although Tellico had no generators and no gradient to support them; it would pipe water to a reservoir downstream for an extra fraction of power), and water supply (to a region literally inundated with fresh water).[365] Even for the TVA, these were makeweights, old dressing for what was in fact the TVA's intended new purpose in life—Duck River-redux, recreation, and shoreline development.

Tellico Dam's claimed recreation benefits were identical to those claimed by the sixty-five other dams in the Tennessee Valley, fulfilling what must have appeared to the TVA planners to be an inexhaustible public need for flat-water motor boating.[366] The shoreline development benefits were based on

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359. *See* Duck River Pres. Ass'n, Columbia Dam Fact Sheet (Feb. 18, 1986) (on file with author).

360. *See* Klein, *supra* note 354, at 685. "A Congressional subcommittee was unable to identify the forty-three buildings listed as beneficiaries of the flood control project, finding only "numerous shack-type, abandoned, commercial structures." *Id.* at 685 (quoting MCCULLY, *supra* note 343, at 148).

361. *See* Duck River Pres. Ass'n, *supra* note 359.

362. Duck River Pres. Ass'n, *supra* note 359.

363. *Id.*

364. *See* Duck River Pres. Ass'n v. Tenn. Valley Auth., 410 F. Supp. 758, 766 (E.D. Tenn. 1974), *aff'd*, 529 F.2d 524 (6th Cir. 1976).

365. *See* Plater, *supra* note 339.

366. *Id.*

an imagined new resort community of thirty thousand people to be built by, of all interests, the Boeing Corporation and to be called "Timberlake,"[367] if—and this came on top of all the other "ifs"—Boeing received an additional $650 million in federal grants.[368] There was no empirical basis to imagine a community of five, thirty, or any other multiple of a thousand people; thirty thousand would be what was needed, however, to boost the project benefits over their anticipated costs.[369] Indeed, the name "Timberlake" was about the most certain aspect of the project, to which Boeing neither committed nor agreed.[370] Nor, ultimately, built. [371]

As speculative and outright bogus as these benefits were, they overlooked—as did nearly everyone else to view Tellico Dam—the ethical question of the proposal. Even assuming that these benefits would materialize, the idea that the federal government would condemn working farms at $330 per acre,[372] evict owners who had lived there since before the Civil War, sell the land back to Boeing or anyone else at a projected $5000 per acre,[373] and claim the resale as a "benefit," seemed to escape the notice of legal commentators and the national press then and since. These were not sacrifices necessary to accomplish a national service in transportation, energy, or public health; these were simply buyouts of the less wealthy in order to sell to the more wealthy. Two-thirds of the farmland purchased was beyond the rim of the reservoir, even when flat full.[374] On the basis of morality as well as economics, Tellico was even more of a travesty than Duck River. Except for the way it turned out.

Congress was wary of the TVA's claims for Tellico, and initially refused to fund it.[375] Even the State of Tennessee re-

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367. *Id.*; United Press Int'l, *supra* note 337, at B-3.

368. Plater, *supra* note 339.

369. At that time, TVA claimed its ratio of benefits to costs to be 1.3 to 1. Plater, *supra* note 339. Nearly ninety percent of the claimed benefits were in "shoreline development" and "recreation." *Id.*

370. United Press Int'l, *supra* note 337, at B-3.

371. *See id.* Boeing lost interest, apparently, when, not satisfied with a free, government lake, its $650 million in additional federal subsidies failed to materialize. *Id.*

372. Plater, *supra* note 339.

373. *Id.*

374. TVA condemned more than 38,000 acres for Tellico Dam, only 12,000 acres of which were to be impounded. *Id.*

375. *Id.*

belled. Its governor would later write the Chairman of the TVA's Board of Directors that "the interests of the State would be best served if TVA were to discontinue plans to impound the Little Tennessee River."[376] He might as well have been whistling Dixie. TVA was going forward. By the mid-1960s, after repeated lobbying, it received its first appropriation and began at once to condemn land.[377]

The first legal action against Tellico was brought, not surprisingly, by a local landowner and a coalition of environmental groups led by the Environmental Defense Fund.[378] The case was based on NEPA,[379] signed into law in 1970, and did not reach the courts until late 1971, at which point TVA had already spent $29 million of a then-anticipated $69 million in costs.[380] TVA argued, as it would throughout, that it was proceeding reasonably, with congressional approval, and that, besides, these new environmental laws were not intended to apply to ongoing projects.[381] The district court disagreed,[382] the appellate court affirmed,[383] and the project was enjoined pending new environmental review.

Undaunted, the agency was back in court the following year with a monster environmental impact statement, six hundred pages in three volumes that dismissed every objection, defended its still-elusive benefit calculations, and concluded that there was no option but to complete the dam.[384] The district court found the statement sufficient,[385] and the circuit court affirmed,[386] per curiam, which either means that the decision was obvious or that it was too embarrassing to sign. Whichever, the game was over.

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376. Envtl. Def. Fund v. Tenn. Valley Auth., 339 F. Supp. 806, 809 (E.D. Tenn. 1972), *aff'd,* 468 F.2d 1164 (6th Cir. 1972) (quoting Governor Winfield Dunn).

377. *See* Plater, *supra* note 339.

378. *Sacred Indian Valley Threatened,* ENVTL. DEF. FUND NEWSL. (Environmental Defense Fund, New York, N.Y.), Oct. 1971 (on file with author).

379. 43 U.S.C. § 4321 (1994).

380. *Envtl. Def. Fund,* 339 F. Supp. at 808.

381. *Id.* at 810–11.

382. *Id.* at 812.

383. Envtl. Def. Fund v. Tenn. Valley Auth., 468 F.2d 1164, 1184 (6th Cir. 1972).

384. Envtl. Def. Fund v. Tenn. Valley Auth., 371 F. Supp. 1004, 1006–07 (E.D. Tenn. 1973), *aff'd,* 492 F.2d 466 (6th Cir. 1974).

385. *Envtl. Def. Fund,* 371 F. Supp at 1015.

386. *Envtl. Def. Fund,* 492 F.2d at 468.

Then something extraordinary happened. In the summer of 1973, as the earlier injunction was about to expire, a University of Tennessee biology teacher was doing a survey with his students of the soon-to-be-impounded Little Tennessee River, near a creek called Coyote Spring.[387] Face down, wearing goggles, he captured a small fish that he had never seen before.[388] It proved new to science.[389] It fed exclusively on a type of fresh water snail in that watershed, and would be called the Snail Darter.[390] The teacher, David Etnier, is said to have told a family in the valley later that day, "I think we've got a little fish that may save your farm."[391]

The Snail Darter was not only new, it was very rare. Its rarity was not surprising. Rarity in the natural world these days comes mostly from the alteration of places where species live,[392] and the TVA, the United States Army Corps of Engineers, and the United States Soil Conservation Service had been altering the rivers of the American Southeast for almost half a century. All forms of life that had evolved in and depended on shallow, fast moving, high quality water were either in trouble, very big trouble, or already extinct.[393] They could not negotiate dams. They could not live in the dark, or smoth-

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387. Plater, *supra* note 339.

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.* (quoting Professor David Etnier).

392. For a complete discussion of the rate of habitat loss in species extinction, see RICHARD O. WILSON, THE DIVERSITY OF LIFE (1992).

393. *See* Reed F. Noss & Robert L. Peters, *Endangered Ecosystems: A Status Report on America's Vanishing Habitat and Wildlife*, DEF. OF WILDLIFE, Dec. 1995, at 61–62.

> More than 80 percent of the nation's fish communities are considered degraded because of loss or declines in native species or presence of exotic species. Invertebrates are in even worse condition. The Southeast is the center of diversity for freshwater mussels worldwide, yet we have lost one in ten of our freshwater mussel species in the last century and The Nature Conservancy considers half to three quarters of the remaining species to be imperiled or very rare. The Mobile River Basin of Alabama has 40 endemic fish species, 30 endemic mussels and 130 endemic snails. At least 18 mussel species and 32 snail species are already extinct, and 30 additional aquatic species are listed under the Endangered Species Act. These losses are symptomatic of degraded ecosystems. Today, the greatest number of high-quality streams remain in the south Atlantic states (Maryland, Delaware, West Virginia, North Carolina, South Carolina, Georgia and Florida), where streams have the least protection.

Id. (citations omitted).

ered over with sediment, or on one half of their oxygen. Of all the ecosystems in the continental United States, the southern river systems held the record, by far, for listed, endangered species; within them, the most endangered of species were freshwater snails, clams, and mollusks.[394] Testifying before Congress in support of the Endangered Species Act, Nathaniel Reed, Assistant Secretary of Interior, would say in language later found persuasive by the Supreme Court:

> I have watched in my lifetime a vast array of mollusks in southern streams totally disappear as a result of damming, channelization, and pollution. . . . I do not know whether any of us will ever have the insight to know exactly what their importance is in the total ecosystem. However, I have great trouble being party to their destruction without ever having gained such knowledge.[395]

It is not obvious from Reed's statement whether his reasons were scientific, economic, or moral. But for many Americans, they were all three and they were valid; thus, a new issue entered the story.

Four months following Etnier's discovery of the Snail Darter, Congress passed the Endangered Species Act (ESA),[396] prohibiting federal agencies from causing "jeopardy" to an endangered species or modifying its "critical habitat."[397] As tough-sounding as these words appeared, no one knew how the courts would apply them. With a $100 million project nearly completed pitted against an insignificant looking fish, Tellico Dam was going to be an acid test.

Now another extraordinary thing happened. A law student at the University of Tennessee, for whom biology was apparently at least as much fun as the law, happened to be joining David Etnier in his field work.[398] His name was Hiram Hill. He told his law professor about Etnier's discovery of the Snail Darter, and asked whether that might make an interest-

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394. *Id.*

395. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 177 n.23 (1978) (quoting *Endangered Species Act of 1973: Hearing on H.R. 37 Before the House Comm. on Merchant Marines and Fisheries,* 93d Cong. 207 (1973) (statement of Nathaniel P. Reed, Assistant Secretary of the United States Department of the Interior)).

396. 16 U.S.C. §§ 1531–1544 (1994).

397. 16 U.S.C. § 1536(a).

398. *See* Plater, *supra* note 339. The description of Hiram Hill that follows is taken from this account.

ing research project. His professor was Zygmunt J.B. Plater. From that time forward the three would be joined at the hip on Tellico Dam.

Hill, Plater, and Etnier first petitioned the Department of Interior to have the Darter listed as an endangered species.[399] The TVA, smelling real trouble, opposed the listing, asserting that there were lots of darters in other rivers, the dam would not affect them, too little was known.[400] At the same time, it began looking for darters everywhere. It also began transplanting darters to show that they could live in other places. Unfortunately for the TVA, a search of seventy other rivers turned up no snail darters;[401] it found a few downstream of the Tellico dam site, but only a few.[402] The TVA's transplants were likewise proving inconclusive, and would take years to show dispositive results.[403] The agency did not have years to wait. It had a very costly project of dubious value and shrinking political support. It did what any normal federal agency would do. It began working overtime to finish the project before the law could get in the way.[404]

In April 1975, the Department of Interior formally listed the Snail Darter as endangered, and designated the thirty-three mile stretch of the Little Tennessee River slated for Tellico as its critical habitat.[405] The dam's effect on this habitat seemed obvious. It would bury the swift, clear shallows of the Little Tennessee at Coyote Springs under forty feet of water.[406] Armed with what appeared to be an irrefutable case of both jeopardy and adverse modification of critical habitat, Hiram Hill and company sued the Tennessee Valley Authority.[407] Professor Plater would argue the case. They lost at the trial level, the court finding that, while the dam would jeopardize the darter, all of this came too late in the day, after more than eighty percent of the dam was completed, and an injunction

399. Hill v. Tenn. Valley Auth., 419 F. Supp. 753, 756 (E.D. Tenn. 1976), *rev'd,* 549 F.2d 1064 (6th Cir. 1977), *aff'd,* 437 U.S. 153 (1978).

400. *Id.* at 756–57.

401. Hill v. Tenn. Valley Auth., 549 F.2d 1064, 1068 (6th Cir. 1977), *aff'd,* 437 U.S. 153 (1978).

402. *Id.*

403. *Hill,* 419 F. Supp at 757–58.

404. Plater, *supra* note 339.

405. *Hill,* 419 F. Supp. at 756.

406. *Id.* at 756–57.

407. *Id.* at 753.

was simply not in the cards.[408] The Sixth Circuit Court of Appeals disagreed, finding that the jeopardy was obvious and that the clear language of the Act required an injunction to follow. The stage was set for the Supreme Court.

As the case came to Washington, D.C., the politics surrounding it were tumultuous. The year was 1976 and America had just elected a populist outsider, Jimmy Carter, to the presidency. President Carter had opposed dams like Tellico while Governor of Georgia,[409] and had no use for their impacts on southern rivers or their benefit-cost shenanigans. Indeed, he had—at what turned out to be great, if not fatal, political cost—taken on the whole range of federal dam building as his first initiative in office, and hung onto his opposition to the most unjustifiable projects against a firestorm from Congress and the heartburn of his staff.[410] He grossly misunderstood the psyche of Congress. The legislature had always seen these projects as its exclusive domain, and had beaten back attempts at presidential review from as far back as the days of Andrew Jackson to the more recent efforts of Harry Truman and Dwight Eisenhower.[411] Federal legislators were elected, and reelected, for the very reason of sending water project money back home.[412] For Congress, this was a pride thing, this was a

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408. *See id.* at 759, 763–64.

409. JOHN MCPHEE, *Travels in Georgia, in* PIECES OF THE FRAME 52–57 (1975).

410. *See* REISNER, *supra* note 334, at 11–13, 324–35.

411. *See generally* Michael Grunwald, *Engineers of Power: Inside the Army Corps, An Agency of Unchecked Clout,* WASH. POST, Sept. 10, 2000, at A1. A former Secretary of the Department of Interior is quoted as stating:

> President Truman . . . was strong enough to fire General Douglas MacArthur but, so far, the Army Engineers have successfully defied him. . . . A small, powerful and exclusive clique of about two hundred Army officers controls some fifty thousand civilian employees . . . . No more lawless or irresponsible Federal group than the Corps of Army Engineers has ever attempted to operate in the United States, either outside of or within the law.

Oliver Houck, *New Roles for the Old Dam Builder?,* NATIONAL WILDLIFE, Aug./Sept. 1975, at 13 (quoting Harold L. Ickes, Secretary of the Interior, 1951).

412. *See generally* REISNER, *supra* note 334, at 319–24 (recounting the effects of federal legislators to secure water project money for local beneficiaries). By way of postscript, when the Chair of the United States House of Representatives Appropriations Committee Chair, Robert Livingston of Louisiana, resigned office in 1999 amidst allegations of extramarital indiscretion, the local reaction was to lament the loss of water project money for the state. *See The Costs of Flyntism,* TIMES-PICAYUNE (New Orleans, La.), Dec. 23, 1998, at B6; Keith Darce &

turf war, this was hanging on to its prerogatives for the future, which may be the only way to explain what ultimately happened to Tellico Dam.

For the administration, the Tellico case was doubly difficult because the Department of Interior vigorously opposed the dam while the TVA was ready to defend it to the death. While such conflicts between agencies are not unknown within the government, they are usually resolved by the Attorney General's decision on the merits of a case, guided by the duty of the Attorney General and the Solicitor General, who represent the United States before the Supreme Court, to present any plausible defense on behalf of federal agencies. In short, the Justice Department was duty bound to represent the TVA, and the TVA's story was that Tellico was beyond the reach of the Endangered Species Act. To the President, however, supported by his Council on Environmental Quality and others, this representation excluded one half of the government's story; for Interior, guardian of the Endangered Species Act, Tellico was still subject to the Act's command.[413] Unusually, then, nearly without precedent, the President would resolve the matter both ways. The Department of Justice would file two briefs to the Court, a brief in chief advocating the TVA's position, and an attachment arguing that of Interior.[414] The split brief would annoy the Court[415] and weaken the argument.

Tellico was not only an agony for President Carter and the administration. It was an agony as well for the national conservation organizations that had, after hard lobbying and compromise, just achieved significant new legislation protecting endangered species.[416] To begin, the Supreme Court under the

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John Biers, *Loss of Livingston May Cost Big Bucks,* TIMES-PICAYUNE (New Orleans, La.), Dec. 22, 1998, at C1.

413. The Secretary of the Interior, formerly Governor of the State of Idaho, defended strict application of the Endangered Species Act up to and through the Supreme Court. *See* Br. for Pet'r at 54 n.35, Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978) (No. 76-1701) ("The Secretary of the Interior has differing views on this cause and presents them in the Appendix that follows.").

414. *Id.*

415. *See* Tr. of Oral Argument at 29–33, Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978) (No. 76-1701).

416. The author was General Counsel to the National Wildlife Federation in Washington, D.C. at the time, and participated with attorneys for other national environmental organizations in discussions over "what to do about" the Tellico Dam case. Eventually, the groups filed a brief of amicus curiae in support of Hiram Hill.

conservative, Republican Chief Justice Warren Burger was not a warm place for any environmental issue. Now, apparently, the first test case to the Court would involve not endangered wolves, bald eagles, or any other species to which justices might relate but, rather, an unknown, three-inch fish. Worse yet, this fish was pitted against a project all but completed, in the home base of the most powerful Republican in the Senate, Howard Baker. The media were already in full hype and howl; their news stories showed only two pictures and one headline, insignificant fish versus $100 million dollar project.[417] For the National Wildlife Federation, the Sierra Club, and others, this was a case of pick your poison: either the Supreme Court would trash the Endangered Species Act or, if by some miracle it did not, the Congress would.

The oral argument gave Hiram Hill et al. little reason for optimism. Attorney General Bell, his very presence as counsel for the government in lieu of the Solicitor General highlighting the importance of the case, characterized the dam as a *fait accompli* and the Darter as something on the order of an aquatic cockroach.[418] He stood on the Supreme Court steps showing the media a small vial with a dead Snail Darter inside; this insignificant thing is what this case is about, he said.[419] Justice Powell picked up on the Attorney General's theme during his examination of Professor Plater. What good were "these little darters," he asked.[420] Were they "used for food?"[421] Were they "suitable for bait?"[422] He was a bass fisherman, the Justice went on to explain.[423] He did not need to explain that bass live

417. *See* REISNER, *supra* note 334, at 337 ("[H]alf the newspapers in the country seemed to run the story on page one, under some variation of the same headline, 'Hundred-Million-Dollar-Dam Stopped by Three-Inch Fish.'").

418. *Hill*, 437 U.S. at 196 n.1 (quoting the Attorney General: "The dam itself is finished . . . it is completed"); *id.* at 204 (ridiculing the ESA for protecting "a newly-discovered species of water spider or amoeba").

419. Interview with Zygmunt Plater, Professor of Law, Boston College, in Washington, D.C. (May 1994).

420. Tr. of Oral Argument at 43, Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978) (No. 76-1701).

421. *Id.*

422. *Id.*

423. The exchange between Professor Plater and Justice Powell reads, in part, as follows:

QUESTION: [J. Powell]: Mr. Plater?

MR. PLATER: Yes.

QUESTION: May I interrupt you right there?

in flat-water reservoirs; that's where bass tournaments are held.

The Supreme Court's opinion some months later shook the roof.[424] It was written by no less than the Chief Justice, although there is evidence that, having argued among his colleagues in favor of TVA, he counted the votes against him and decided to author the majority himself.[425] Whatever his inner feelings, however, Justice Burger's opinion would declare that the Endangered Species Act's protection "admits of no exception,"[426] to the point of compelling an injunction to fulfill its goals.[427] Stopping just short of an open invitation, he stated that it would be up to Congress if it wished to provide relief for Tellico Dam.[428]

The press went wild—darter stops dam. The Congress went wild—we have to change the Act. The most direct proposal was simply to exempt Tellico, but the Senate, twice, refused to go along.[429] A senator from Idaho proposed to legislate between species that deserved protection and others, like the Darter, that obviously did not.[430] A congressman from Tennes-

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> Apart from the biological interest, which I said we do not challenge, what purpose is served, if any, by these little darters? Are they used for food?
> MR. PLATER: No, Your Honor.
> . . . .
> QUESTION [J. Powell]: Mr. Plater?
> MR. PLATER: Yes, Your Honor.
> QUESTION: Are they suitable for bait?
> MR. PLATER: Your Honor, they are not—
> QUESTION: I'm a bass fisherman.
> MR. PLATER: Your Honor, the Little Tennessee River has a fine bass population in its lower stretches, both small mouth and large mouth; but they don't appear to be interested in the snail darter, which perhaps is why the snail darter has survived also.

Tr. of Oral Argument at 43–45, Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978) (No. 76-1701).

424. *Hill*, 437 U.S. at 153.

425. Robert V. Percival, *Environmental Law in the Supreme Court: Highlights From the Marshall Papers*, 23 ENVTL. L. REP. (Envtl. L. Inst.) 10,606, 10,611 (Oct. 1993).

426. *Hill*, 437 U.S. at 173.

427. *Id.* at 193–95.

428. *Id.* at 194–95.

429. Ward Sinclair, *Senate Again Defeats Tenn. Snail Darter Dam*, WASH. POST, July 18, 1979, at A17.

430. Telephone interview with Michael Bean, Wildlife Program Director, Environmental Defense Fund (Apr. 3, 2002) (Mr. Bean, the de-facto dean of the Washington, D.C. wildlife law community, filed an amicus brief in the *Tellico* case and took an active part in the legislative activity following the Supreme Court de-

see proposed to go down the endangered species list right there on the floor and strike unwanted species, one by one.[431] Senator Baker, also of Tennessee, finally offered a statesman-like solution, a committee of agency heads to determine on a case-by-case basis between projects and species.[432] The committee would be loaded, of course, with agencies like Transportation and the Corps of Engineers that, like the TVA, built public works projects.[433] The House of Representatives, in total chaos, the session ending, agreed on a cut-and-paste series of amendments that included Baker's exemption process. The exemption committee, with the power of life and death over an entire species, would be dubbed the God Squad.[434] Its first mandate was to review Tellico Dam.

Lost in this shuffle was the new Chairman of the Tennessee Valley Authority, S. David Freeman. He came to Washington at the President's urging and went door to door on Capitol Hill. He testified that there were alternatives to closing Tellico Dam that could provide more regional development and still preserve the Little Tennessee Valley.[435] To Congress, or at least to its Tennessee delegation, this message was the very last thing they wanted to hear. At this juncture, the project was even out of the hands of the TVA.

The God Squad met in 1979. With a panel composed in the majority of federal construction agencies and chaired by the President's chief economic advisor, no one was taking bets on the Darter. On the other hand, with an independent review for the first time of Tellico's inflated economic benefits, the Darter

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cision in that case); Telephone interview with Patrick Parenteau, Vermont Law School (Apr. 3, 2002) (Mr. Parenteau was counsel for the National Wildlife Federation at the time, and took an active role in the subsequent exemption hearings on Tellico Dam and the legislative fallout). Both Mr. Bean and Mr. Parenteau recall a barrage of legislative proposals to amend the Endangered Species Act, including one to exclude invertebrates from the Endangered Species Act's protections and others to reduce the list of covered species.

431. *See* sources cited *supra* note 430.

432. REISNER, *supra* note 334, at 339.

433. *See* 16 U.S.C. § 1536(e)(3) (1994). The Committee includes the Secretaries of Agriculture and Interior, the Administrator of EPA and NOAA, and the Chair of the Council on Economic Advisors; a decision to exempt requires the vote of five members. *Id.* § 1536(h).

434. REISNER, *supra* note 334, at 339.

435. Bill Richards, *TVA May Be Softening Position in Snail Darter Dam Dispute*, WASH. POST, Aug. 11, 1978, at A4.

became a side issue to the decision.[436] At the close of its deliberations, the Chair asked if anyone would move to exempt Tellico Dam. A long and telling silence followed.[437] The Chairman of the President's Council on Economic Advisors then noted "the interesting phenomenon" that, even if one were to count only those costs remaining to complete the project against its benefits, the project "doesn't pay," which, he went on, "says something about its original design."[438] Tellico was bad economics.[439]

Which should have ended the matter. Impartial experts, indeed experts partial to what the TVA did for a living, had ruled that the dam should be abandoned. But the matter was not ended. The TVA's pride was no longer at issue, but congressional pride was. Senator Baker was furious at the committee's decision, declaring, "If that's all the good the committee process can do, to put us right back where we started from, we might as well save the time and expense."[440] Baker had but one option left. He tried again, in the open, to get the Senate to exempt the Tellico Dam, and lost.[441] Then, in June 1979, on a day with few members in the House of Representatives present, Tennessee Congressman Duncan approached the Speaker "waving a piece of paper" and announcing that he had an amendment to the appropriations bill for public works.[442] A colleague stated that he had seen the amendment and that it was "a good one."[443] No mention was made of the TVA or the Tellico

436. REISNER, *supra* note 334, at 339 ("In doing so, the committee skipped over metaphysics, transcendentalism, and evolutionary philosophy and ruled solely on the basis of economics.").

437. *Nobody Really Wanted to Make the Motion to Kill the Tellico Dam and Save the Snail Darter*, WASH. POST, Feb. 5, 1979, at A3 [hereinafter *Nobody Really Wanted*].

438. *Id.*; Plater, *supra* note 339.

439. Committee Chairman Andrus stated that he hated to see the snail darter "get the credit" for scrapping a project that was "ill-conceived and uneconomic in the first place." Margaret Hornblower, *Panel Junks TVA Dam; Cites Cost, Not Snail Darter*, WASH. POST, Jan. 24, 1979, at A12. In the same vein, he said that he was pleased that the President's Chief Economic Advisor had made the motion to kill Tellico, because "Charlie Schultze is no flaming environmentalist." *Nobody Really Wanted*, *supra* note 437, at A3.

440. Ward Sinclair, *Review Panel May Itself Face Extinction*, WASH. POST, May 7, 1979, at A4.

441. PLATER ET AL., *supra* note 348, at 684.

442. REISNER, *supra* note 334, at 340.

443. *Id.*

project. There was no discussion. The amendment passed in forty-two seconds, an exemption for Tellico Dam.[444]

The Senate agreement to exempt Tellico was more contested. In the end, facing a threat from the House that, without the exception, it would kill the entire $10.8 billion energy and water project bill—carrying all of that money for constituents back home—the Senate approved, by two votes.[445] Opponents were not really worried, however. That slim a majority could never override a presidential veto, and President Carter was an outspoken opponent of the dam.[446] For President Carter, however, Tellico was a Moment of Truth. The veto decision could not have come at a worse time. He needed Senate votes, including the vote of Tennessee's Howard Baker, on other issues, including one he saw in terms of overriding human rights, the fate of the Panama Canal. He could veto Tellico, or he could succeed in returning the American-held canal to the people of Panama.[447] The night President Carter signed the bill exempting Tellico Dam he called up Hiram Hill's attorney and apologized.[448]

The Cherokee Indian Nation took one last shot at the Tellico dam. It brought a claim under the Constitution claiming that the inundation of its sacred sites violated Native American religious rights.[449] Ultimately, the Sixth Circuit rejected the claim, two votes to one.[450] The Supreme Court, wanting nothing to do with opening up an issue of these dimensions and, perhaps, feeling that it had already spent enough time on Tellico, denied certiorari.[451] Bury my heart at Tanassee.[452]

The fallout from Tellico has been extensive and mixed. The case did change the ESA, but in ways that have proven over time to be sensible and workable.[453] In the next two decades the God Squad was resorted to only twice: once, contemporaneously with Tellico, to allow an exemption for a Rural

444. PLATER ET AL., *supra* note 348, at 684.
445. Richard L. Lyons, *On Capitol Hill*, WASH. POST, Sept. 11, 1979, at A5.
446. REISNER, *supra* note 334, at 340.
447. *Id.* at 340–41.
448. *Id.* at 341.
449. Sequoyah v. Tenn. Valley Auth., 480 F. Supp. 608 (E.D. Tenn. 1979).
450. Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159 (6th Cir. 1980).
451. Sequoyah v. Tenn. Valley Auth., 449 U.S. 953 (1980).
452. *See supra* note 339.
453. *See* MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 242–44 (3d ed. 1997) (describing 1978 amendments to the ESA).

Electric Association dam,[454] but only after significant modifications that guaranteed water flows for the Whooping Crane; and another, more recently, to exempt thirteen timber sales, from more than forty exemptions requested, to protect the Northern Spotted Owl.[455] As noted by this author and others, the Act has evolved into a tough—but workable—permit system[456] and has had considerable success, where other laws and policies have failed, in moving federal programs toward sustainable development.[457]

Federal water projects, on the other hand, survived the public shellacking, embarrassment, and litigation brought to them by Tellico, Columbia, and other dams in the late 1970s, and have remained the playthings of the Congress to this day.[458] In-depth and documented reports of Tellico-like cost-benefit manipulations, false reporting, employees terminated for honesty, and humiliating servility to whatever Congress wants funded appear regularly in the media, most recently in a devastating, four-part series by the *Washington Post*,[459] with little effect. Immune from the president and in large part from the courts,[460] the same impulses that brought about Tellico continue to bring these projects forward from the Bureau of Reclamation and the Army Corps of Engineers, and there is no reason, fiscal, environmental, or otherwise, that appears able to stop them.[461] To many regions of the country, and in particular the American South, they are considered an entitlement.

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454. *Id.* at 264–65, 337.

455. *Id.*

456. *See* Oliver Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993) (showing the overwhelming number of consultations under the Act in which conflicts with species were avoided by reasonable, in some cases laughably minimal, measures).

457. *See* Oliver Houck, *On the Law of Biological Diversity*, 8 MINN. L. REV. 869 (1997) (showing the impact of the Endangered Species Act on federal timber, grazing, and water management).

458. *See* REISNER, *supra* note 334, at 318–94.

459. *See* Grunwald, *supra* note 411, at A1; *see also* Michael Grunwald, *In Everglades, a Chance for Redemption*, WASH. POST, Sept. 14, 2000, at A1; Michael Grunwald, *Reluctant Regulator on Alaska's North Slope*, WASH. POST, Sept. 13, 2000, at A1; Michael Grunwald, *A Race to the Bottom*, WASH. POST, Sept. 12, 2000, at A1; Michael Grunwald, *Working to Please Hill Commanders*, WASH. POST, Sept. 11, 2000, at A1.

460. *See* Oklahoma v. Atkinson, 313 U.S. 508 (1941) (congressionally-approved benefits for the Corps of Engineers project not subject to judicial review).

461. Grunwald, *supra* note 411, at A1.

The East gets its subsidies in transportation; the West gets them in grazing, minerals, and timber; these are Our Share. It's only fair.

The TVA was not so lucky. It finally won its Tellico dam, but in the winning it lost its reputation in the water development trade. Tellico was to be its last dam.[462] Professor Plater was not so lucky either. The University of Tennessee was not a hospitable place for a state public servant to be suing a Tennessee project, and he is now teaching law in Boston.[463] Hiram Hill is still in Tennessee, no more repentant over what he did than the first day he did it, and in close touch still with David Etnier and the people remaining along the Little Tennessee.[464]

For its part, the Snail Darter is neither extinct nor out of the woods. Tellico Dam wiped out its main habitat lock, stock, and barrel. One year after the gates closed, the estimated numbers of Darters in the Little Tennessee dropped from an estimated fifteen to thirty thousand, to five hundred.[465] On the other hand, a transplanted colony was reproducing in the Hiawassee River, and other, natural populations were being discovered in relic reaches of southeastern streams.[466] In 1984, the Department of Interior down-listed the Darter from "endangered" to "threatened,"[467] but its numbers have suffered continuing declines in the past few years.[468] According to Etnier, they still "exhibit an inordinately high rate of 'imperilment.'"[469] On the other hand, to those who thought the whole

462. Douglas C. Lyons, *After 50 Years, TVA Is Still in Hot Water*, U.S. NEWS & WORLD REP., May 23, 1983, at 63.

463. Plater is a Professor of Law at Boston College.

464. Interview with Zygmunt Plater, Professor of Law, Boston College (June 8, 2001). Indeed, there is apparently an annual reunion of those involved in the controversy. *Id.*

465. Eileen Keerdoja, *Darter and the Dam*, NEWSWEEK, Nov. 13, 1978, at 24; Bill Richards, *TVA May Be Softening Position in Snail Darter Dam Dispute*, WASH. POST, Aug. 11, 1978, at A4.

466. *See* Department of Interior, Endangered and Threatened Wildlife and Plants, 49 Fed. Reg. 27,510 (July 5, 1984) ("The Snail Darter is presently known from only six Tennessee River tributaries and from the main stem of the Tennessee River near the mouth of three tributaries.").

467. *Id.* at 27,512.

468. *Declining Darter Populations Indicate Ill Health of River Ecosystems*, AUDUBON, July/Aug. 1996, at 84 [hereinafter *Declining Darter*]; Pam Fuller & Tom Brandt, *Exotic Snail and Trematode Affecting Endangered Fish*, American Fisheries Society Texas Chapter Newsletters, *at* http://www.sdafs.org/tcafs/news/97vol23/news23_3/ 23_3_14.htm (last visited Feb. 18, 2002).

469. *Declining Darter*, *supra* note 468, at 84.

episode ridiculous, the fact that Snail Darters exist elsewhere, no matter how thinly spread, only proves the misguidedness of the Endangered Species Act.[470] One sees what one wants to see.

The Tellico Dam case, however, was never really about the Snail Darter. From the outset it was about people who had lived in the Little Tennessee River Valley for decades, and in the case of the Cherokee for millennia, trying to hold onto their farmsteads and their heritage. These were the people who brought suit, long before they had ever heard of a Darter, and when the Darter was found the first instinct of its discoverer was to say to them, "it may save your farm."[471]

In November 1982, after several years without takers on real estate development around Tellico Lake, the TVA sold the farmland it had condemned to the Tellico Reservoir Development Agency for $13.8 million.[472] The former landowners "probably did not qualify" to buy back their lands, according to TVA officials, because "the agency required the land to be sold in one piece to make development easier."[473] A seventy-eight year-old resident, who had had to be taken off of her farm by federal marshals, called it a highway robbery.[474] A TVA attorney assured the press that the profits from the sale would be used for "economic development or fertilizer programs."[475]

The TVA pronounces subsequent developments at Tellico a "success story," one attributable to its "original vision, expertise, and the required oversight," while having the "wisdom" of allowing the Tellico Reservoir Development Agency to "work with the private sector to turn TVA's Congressional promise into a reality."[476] The Tennessee Reservoir Development Agency sold the land to Cooper Communities, whose name may be recalled from its involvement in the White River develop-

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470. Charles C. Mann & Mark L. Plummer, *The Butterfly Problem*, ATLANTIC, Jan. 1992, at 47, 51; *The One That Got Away*, ENGINEERING NEWS-REC., May 14, 1981, at 80.

471. *See supra* text accompanying note 391.

472. United Press Int'l, *TVA Sells Shore to Developer: Angry Former Owners Ask to Buy Land Back*, BIRMINGHAM POST-HERALD, Nov. 27, 1982, at B-7. The description of the sale which follows is taken from this source.

473. *Id.*

474. *Id.*

475. *Id.*

476. *See* Tennessee Green, *Background Information on the Tellico Research Development Agency*, *at* http://www.tngreen.com/land/News/telpart2.html (last visited Feb. 18, 2002).

ment scandal in neighboring Arkansas.[477] Cooper has built and sold several pods of high-end residences on Tellico Lake, with Native American names like Echota and Toqua. There is a small industrial park. There is even a small Cherokee Indian museum called Sequoya, near where Chief Sequoya's birthplace, Tuskegee, lies buried under several feet of water and mud.[478]

Lake Tellico is a shallow lake, and the silos of the condemned farms stick up out of the water like large gravestones. A law student from Tennessee once told this author that the local sport was to go out on Saturday evening with a motorboat and a cooler of beers and jump off of the silos. Recreational benefits, one would have to concede.

477. *See* Plater, *supra* note 339.
478. *Id.* (describing the Tellico development, including photographs).