INTRODUCTION

Karin P. Sheldon*

The Environmental Law Center is honored that the *Vermont Law Review* has joined in the celebration of our 25th Anniversary by dedicating this special edition to a discussion of environmental law. The articles included illustrate the lessons learned in our first quarter century and show the range of environmental law issues facing lawyers, environmental professionals, and communities today.

Twenty-five years ago, a group of visionaries, including Thomas Debevoise, dean of Vermont Law School, and Judge Franklin Billings, a member of the Board of Trustees, saw that the law school needed a specialty, something to make the world take notice of this spunky, young institution tucked away in the beautiful green hills of Vermont. For advice on what kind of program to offer, Dean Debevoise turned to Norman Williams, a native Vermonter, noted land use scholar, and then professor of law at Rutgers University. With his customary Yankee directness, Professor Williams replied:

> If there should be a field of specialization in Vermont, this clearly should be in land use and environmental law. The reasons for this are obvious—the pre-eminent importance of the problems involved, both in this region and nationally, and the availability of a working laboratory all around us.

Dean Debevoise took Professor Williams's advice and established the Environmental Law Center (ELC), recruiting Richard O. Brooks, a professor of law and planning, as its first director. Professor Brooks understood that good environmental policy is formed at the intersection of science, economics, politics, and cultural and social values, and so designed a multi-disciplinary, ethically oriented curriculum. He recognized that knowledge of environmental law was critical to a wide variety of professions. To address this need he created our unique Master of Studies in Environmental Law (M.S.E.L.), still the only law-based environmental graduate program in the country.

The founding of Vermont Law School's environmental law program coincided with a remarkable period in American history. Events such as the publication of *Silent Spring*, oil washing up on Santa Barbara's beaches, the combustion of the Cuyahoga River, Lake Erie's obituary, and the report

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* Professor of Law, Associate Dean for the Environmental Program, and Director of the Environmental Law Center, Vermont Law School; J.D. 1970, University of Washington, Seattle; A.B. 1967, Vassar College.

from the Apollo 10 astronauts that they could see the brown smudge of Los Angeles smog from 25,000 miles in space galvanized the attention of the American people. Environmental problems went from local concerns to national issues. Congress responded to the call for legislative solutions and in rapid succession enacted the National Environmental Policy Act (NEPA), the Clean Air Act, the Clean Water Act, the Endangered Species Act, and a number of other environmental laws. NEPA made concern for the environment part of the mandate of every federal agency. The Clean Air and Water Acts established national standards to achieve ambitious goals for cleaning up the nation's air and water. The Endangered Species Act, Marine Mammal Protection Act, and other wildlife statutes acknowledged the impacts of human activities on wildlife and expressed a commitment to preventing or ameliorating those effects. The National Forest Management Act and the Federal Land Policy and Management Act incorporated the recommendations of scientists and recognized new, multiple uses and values of public lands, well beyond the commodities of timber, forage, and minerals.

The judiciary was engaged as well. The Supreme Court ruled in *Sierra Club v. Morton*[1] that citizens have standing to bring claims of injury to environmental interests and concerns. Lawyers for environmental organizations and community groups used the new citizen suit mechanisms included in many environmental statutes to bring the concerns of these groups into the courtroom. Far sighted and eloquent judges played a critical role in fleshing out statutory directives. In *Calvert Cliffs Coordinating Committee v. AEC*, his seminal opinion on the National Environmental Policy Act, Judge Skelly Wright spoke of the "duty" of the courts to assure that "important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."[2] By the early 1980s, a body of environmental law existed where there had been virtually none.

Vermont Law School responded to this outpouring of concern for the environment. The law school saw the need and the opportunity to train lawyers and environmental professionals to create good environmental law and policy at all levels of government, to represent citizens in court, and to assist corporations and other business organizations in complying with environmental regulations. By 1990, the program had grown from two Master's degree candidates to a class of thirty, and the number of environmental courses from twenty to thirty-seven. Summer Session

1. Sierra Club v. Morton, 405 U.S. 727, 734 (1972).

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

expanded from no courses to fifteen. Over the next fifteen years the program has steadily continued to blossom. Highlights of this ongoing development include: the additions of an LL.M. in Environmental Law in 1999; the Environmental Tax Policy Institute in 2000; and a dual-degree program with the Yale School of Forestry and Environmental Studies in 2001. The ELC received the American Bar Association's Award for Distinguished Achievement in Environmental Law and Policy in 2002 and a grant from the Henry Luce Foundation to establish the Environmental and Natural Resources Law Clinic in 2003. In 2004, the M.S.E.L. class numbered thirty-nine; the LL.M. class, eleven. By graduation of 2005, more than 1100 students had earned both the J.D. and the M.S.E.L. as Joint Degree students.

Today, our environmental law curriculum is the most extensive of any law school in the nation; more than sixty courses in the full range of subjects from pollution control to natural resources protection. It is multi-disciplinary, featuring Ecology and Environmental Science, Ecological Economics, and Culture and the Environment. It is also ethically oriented and offers courses in environmental justice and animal rights law. Summer Session attracts faculty from all over the world to teach courses at the leading edge of environmental law—Environmental Law in Developing Countries, Global Impacts of Energy Use, Fisheries and the Oceans, and Strategic Planning for Sustainable Development. Students may apply classroom theory to real-world environmental problems in the Environmental and Natural Resources Clinic or in a semester-long externship in a law firm, government agency, or environmental organization. Still there is much to be done.

The 25th Anniversary of the ELC is a beginning, as well as a milestone, marking the advent of a second generation of environmental law. The lessons of the first twenty-five years have set the course for this new era. The command-and-control mechanisms of 1970s statutes such as the Clean Water Act and the Clean Air Act made great progress on technologically solvable pollution problems such as point source discharges. These statutes also helped change the prevailing view of the environment as a free good or dumping ground. We learned, however, that their top-down, one-size-fits-all approach is not satisfactory in all applications, particularly where local variations in conditions call for environmentally tailored mechanisms.

We learned that dividing the environment into specific media—air, water, land—and creating statutory regimes to deal separately with each aspect ignored John Muir's rule that "everything in the universe is connected to everything else" and left us with gaps in regulatory coverage.

The water quality of a river is an expression of the landscape through which it travels and the air currents that flow over it. Mercury in fish in Vermont comes from power-plant emissions in the Ohio Valley; DDT in Lake Superior is deposited by winds that circle the globe.

We now know that ecosystems are not static. We cannot describe the perfect state of nature and legislate to fix that condition like a photograph, immutable and unchanging. Ecosystems are dynamic, sensitive, and unpredictable. To be effective, environmental law and policy must be based on an accurate understanding of how the world works.

We overlooked important partners in the protection effort. These include communities of color which have been disproportionately affected by polluting facilities and Native American tribes, ignored in environmental statutes until recently although they are sovereign nations and manage a significant land base. Congress has now recognized the authority of tribes to act as states under the Clean Water Act, the Safe Drinking Water Act and the Clean Air Act. These communities and tribes bring a different cultural perspective to the regulatory effort and a different relationship to the natural world. They have much to teach us.

When our grandmother environmental laws were passed in the 1970s, the rest of the world seemed a long way away. In the past twenty-five years, our fragile planet has shrunk while the global nature of environmental problems has grown. These problems call for new kinds of institutions and legal frameworks, and compel new attitudes about our role in the community of nations.

The new generation of environmental challenges is characterized by a shift in goals from the prevention and remediation of pollution to the preservation of biodiversity and sustainable development, goals requiring different, more holistic regulatory approaches. Watershed management explicitly recognizes the relationship between activities on land and impacts on water; ecosystem management calls for flexibility and integration of multiple aspects of the natural order into our regulatory systems. At the international level, the crafting of principles and regulatory frameworks appropriate to address global environmental questions will be one of the most significant tasks for the environmental lawyers of tomorrow.

All of this is a preface to praise the articles in this volume of the *Vermont Law Review*. These pieces, the work of perceptive and thoughtful environmental lawyers, attest to the complexity of the questions that continue to arise in the sphere of environmental law and policy.

Professor Richard Brooks's essay *Speaking (Vermont) Truth to (Washington) Power*, originally given as a lecture to honor both Professor Norman Williams and the ELC's 25th Anniversary, is a good overview.

The essay reflects on a number of the subjects considered by the other authors in this volume. Professor Brooks writes of the problem of segregating humans and nature, and the increasingly important role of the law as a tool to insure inclusive and sustainable communities.

Professor Brooks points out that environmentalists have some "interesting" obstacles ahead. He urges us not to ignore the very real costs of environmental protection, or the impacts of regulations on the poor, minorities, and average citizens. He cautions us to rely less on the federal government for help in resolving environmental problems, and to look to the states to fashion their own approaches to environmental protection. Finally he reminds us that economic and market tools are an important part of environmental policy, ones we must learn to wield effectively.

George P. Smith's article, *Re-validating the Doctrine of Anticipatory Nuisance*, demonstrates the enduring utility of some old doctrines and their imaginative application to modern circumstances. Environmental law began with the creative use of nuisance and trespass. These doctrines are being called into service again. As Smith states, "For the past century, society has accepted environmental externalities as the price of technological advancement."[3] That view is changing with the recognition of the economic value of environmental resources. Smith suggests that the doctrine of anticipatory nuisance could be applied to compel users of land to internalize environmental costs, and thereby prevent unreasonable uses of land, before the uses actually occur.

Jessica Jay writes about conservation easements, innovative land use control mechanisms available to protect private lands and promote conservation uses. Her piece, *Third-Party Enforcement of Conservation Easements*, is a thorough examination of the issues involved with third-party enforcement of such easements. It demonstrates that the federal government is not the only source of help in addressing environmental protection efforts. Ample authority for land use controls of various kinds exists in cities, towns, counties, and special districts.

Federal law continues to play a major role in environmental protection, particularly in the management of western federal lands and natural resources. Assumptions about the value and best uses of these lands have changed in the past thirty years, away from the dominance of commodity development toward recreation, wildlife habitat, and preservation of wilderness qualities. In *Daybreak on the Land*, Roger Flynn describes the coming of age of the Federal Land Policy and Management Act, which was

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3. George P. Smith, *Re-validating the Doctrine of Anticipatory Nuisance*, 29 VT. L. REV. 687, 731 (2005).

designed to give the Bureau of Land Management an organic act to replace a long list of old statutes directing the agency's management activities and to reflect the changing needs and desires of western communities and the users of western public lands.

A key feature of modern environmental law has been the emphasis on public participation in decision-making processes previously reserved for agency managers. The National Environmental Policy Act, the National Forest Management Act and the Federal Land Policy and Management Act provide the public with opportunities to comment on environmental impact statements and proposed regulations and policy guidance, and to appeal agency decisions in administrative review processes. These statutes encourage citizens to express their opinions about agency actions affecting the environment and the direction of federal land management.

Unfortunately, some federal agencies have not welcomed public involvement in their internal decision-making processes. Public participation takes time, and requires agencies to be more transparent about the factors used to justify their actions. The Forest Service, in particular, has sought to blame administrative appeals and NEPA review for delays in meeting timber harvest goals. Eric Huber's article, *Environmental Litigation and the Healthy Forests Initiative*, documents how the Forest Service has undermined public participation and environmental review in order to carry out timber sales.

Robert Blomquist's article, *Against Sustainable Development Grand Theory: A Plea for Pragmatism in Resolving Disputes Involving International Trade and the Environment*, warns that "the frenetic pace of global growth in international trade" has prompted international legal theorists to construct elaborate regulatory architecture to encompass all possible international trade conflicts.[4] Blomquist argues against this tendency and recommends "eco-pragmatism" instead. He contends that treaties and other international arrangements, indeed, all law, is a human creation reflecting different perspectives and producing complex, uncertain, and sometimes inconsistent results. Consequently, he asserts, we should "trade top-down, unified, foundational tendencies of grand theory in favor of bottom-up, fact-intensive, intelligent problem solving."

Similar themes are found in commentary about U.S. domestic environmental law. Legal scholars speak of the need to move away from unitary, national regulation to practical problem solving approaches that include incentives and flexibility in reaching protection goals. Blomquist

4. Robert F. Blomquist, *Against Sustainable Development Grand Theory: A Plea for Pragmatism in Resolving Disputes Involving International Trade and the Environment*, 29 VT. L. REV. 733, 733 (2005).

quotes Charlotte Streck's apt observation at the World Summit on Sustainable Development about the possible future of environmental law, at home as well as abroad.

> [T]his Summit will be remembered not for the treaties, the commitments, or the declarations it produced, but for the first stirrings of a new way of governing the global commons—the beginnings of a shift from the stiff formal waltz of traditional diplomacy to the jazzier dance of improvisational solution-oriented partnerships that may include non-government organizations, willing governments and other stakeholders.[5]

The benefits of re-framing an issue from an economic to an environmental concern is illustrated by Stephanie Showalter's article, *The United States and Rising Shrimp Imports from Asia and Central America: An Economic or Environmental Issue?* Showalter explains the advantages for domestic producers of differentiating products in order to effectively compete in a market that is both increasingly global and increasingly green. She describes as a model the success of companies faced with intense competition from foreign shrimp imports that are fighting back by capitalizing on U.S. consumer interest in products that are free of chemicals, antibiotics, and hormones and raised in an environmentally sustainable way. An "eco-friendly" shrimp industry is not only an economic boon, but an environmental one as well. Examples such as these point the way to further imagination and creativity in integrating economic and environmental concerns in world trade.

All of the articles in this 25th Anniversary volume speak to the vitality and critical importance of environmental law in today's world. Vermont Law School's environmental law program was born at a time when concern for the environment captured the American conscience and a bi-partisan group in Congress responded with brave and creative legislation. Now the pendulum appears to be swinging in the opposite direction. In the face of accumulating and irrefutable evidence of climate change, mass extinction of species, and an American and European energy consumption binge, environmentalism has been pronounced dead.[6]

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5. Charlotte Streck, *The World Summit on Sustainable Development: Partnerships as New Tools in Environmental Governance*, *in* 13 Yearbook of International Environmental Law 63, 65 (2002) (quoting Press Release, World Resources Institute, WRI Expresses Disappointment over Many WSSD Outcomes (Sept. 4, 2002)).

6. Michael Shellenberger & Ted Nordhaus, *Death of Environmentalism: Global Warming Politics in a Post-Environmental World* (Sept. 29, 2004), *available at* http://www.thebreakthrough.org/images/Death_of_Environmentalism.pdf.

Nothing could be more off the mark. Environmentalism and environmental law has changed and continues to change. It has become more diffuse, spreading through our economic, political, and social fabric. It is also more sophisticated and complex, which is appropriate given the nature of the questions being addressed.

Twenty-five years after its founding, the ELC's environmental law program continues to prepare students for the environmental challenges of tomorrow. Our courses and approaches may change, but our core values and mission remain constant. We still educate for stewardship. We offer a multi-disciplinary program in law, policy, science, and ethics to lawyers, law and graduate students, government officials, teachers, scientists, and citizen activists. The program addresses the need for environmental leaders who are skilled in working with environmental and public policy issues within the framework of legal systems—here and around the world.