THE PAST AND FUTURE OF ENVIRONMENTAL LAW

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Environmental law lies at the intersection of science, law and public policy. Although it is now an established and recognised field, environmental law continues to evolve. Much has occurred in the 45 years since the US Environmental Protection Agency (EPA) was created in 1970. However, given the critical problem of global climate change, energy, the environment and other challenges, the next 45 years will make it an equally exciting time to be an environmental lawyer and to be involved in the forging of public policy and law on these issues. Recently, someone asked me how I came to practise environmental law at Covington. The short answer is: serendipity.

I came to Washington intending a short stay, serving as a Supreme Court law clerk to Chief Justice Warren Burger. When my clerkship was ending, I told the Chief that I liked Washington and was planning to join a firm here. He replied, "Then you should go to Covington & Burling." I followed that advice, wisely, and Covington has been my professional home ever since.

I entered Yale College thinking of a career in science or engineering, having been fascinated with transistors and rockets in high school. At Yale, I enjoyed courses such as "great experiments in physics," where we measured the speed of light and weighed the electron. However, I made a left turn in the middle of my college career and went to law school, after putting aside thoughts of business or medical school. But my personal interest in science remained and it has been an important part of my professional life.

As an environmental lawyer, I spend a great deal of time with engineers and scientists, assessing how the statutory and regulatory framework meshes with technical issues and the client's business objectives. I have explored offshore oil platforms, chemical and automobile manufacturing plants; and I have worked on air and groundwater modelling and wetlands mitigation plans, finding them all important and gratifying to learn. A lawyer needs to understand enough of the science and engineering to ask probing questions, to make sure that the client's position is well founded, and to explain it simply and clearly to agency officials and/or the courts.

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When I attended law school, there was no course in environmental law. It was not yet a field of law. That is not to say there were no antecedents. There were important writings, for example, those by Henry Thoreau, John Muir and Rachel Carson, that inspired and presaged the emergence of the environmental movement. And there were some early federal and state laws dealing with the environment, such as the 1899 federal Rivers and Harbors Act. But there was no broad environmental movement and no systematic, comprehensive body of federal environmental statutory law, implementing regulations, corresponding state plans and laws, and judicial decisions that we now know as US environmental law.

That was about to change. The first Earth Day took place on 22 April 1970. That moment marks what many consider the birth of the modern environmental movement. On that first occasion, 20 million Americans took to the streets to demonstrate for a clean environment in coast-to-coast rallies.

Earth Day 1970 achieved a rare political alignment: support from both Republicans and Democrats. As a result, Congress passed the Clean Air Act and Clean Water Act in 1970 and 1972. Not sitting on its environmental laurels, Congress followed up by passing the Endangered Species Act of 1973, the Safe Drinking Water Act of 1974, the Resource Conservation and Recovery Act of 1976, and the Toxic Substances Control Act of 1976. This spate of legislation culminated with the enactment in 1980 of the Superfund law.

Clients began coming to us for advice and assistance on these matters. I was fortunate to be involved in some significant and successful early lawsuits under the Water and Air Acts. So as a new partner at Covington, I became the firm's environmental expert.

Issues that are considered obvious and settled now were uncharted territory in the 1970s. For example, we were involved in some of the first cases challenging EPA approval of the first state plans implementing the Clean Air Act. Once approved by the EPA, state implementation plans became subject to enforcement by the Agency as well as

citizens bringing suits in federal court. On behalf of Appalachian Power Company, we took the position that, given these enforcement consequences, the EPA's action to approve or disapprove a state plan should be subject to public notice and comment under the Administrative Procedure Act. The courts of appeals agreed, and such public procedures are now considered routine.

Environmental issues are important to the public at large. And they are important to our clients, who need assistance on compliance, transactions, and enforcement matters. I have had the opportunity to work on major federal and state environmental matters in the US and also on environmental matters abroad. Practising environmental law involves a continual learning experience and challenge, which makes it most interesting and satisfying.

The EPA occasionally struggles to deal with issues that do not neatly fit within the statutes granting the EPA authority. One example relates to the EPA regulation of spills of hazardous substances under Section 311 of the Clean Water Act. The Act gave the EPA authority to establish regulations establishing quantities of substances that would be harmful if spilled or discharged to waters of the US. The EPA's initial regulations divided hazardous substances into five categories, based on relative hazard, and established quantities for each category. The problem was that the rules did not assess the differences in harm resulting from discharges into different kinds and sizes of water bodies, and some of the quantities were below the limits allowed in the Clean Water Act discharge permits that companies had received from the EPA or states – thereby creating a conflict and potential enforcement liabilities. We challenged these rules, and the US District Court in Louisiana ruled that the spill regulations were arbitrary and issued an injunction against enforcement. The EPA filed a notice of appeal, but our discussions with the Agency gave rise to an innovated solution: the hazardous quantity regulations would stand but an exemption would be created for releases subject to Clean Water Act discharge permits. A statutory amendment was proposed by the EPA and passed as a rider to an appropriations bill, with the client's support. The "Federally Permitted Release" exemption became law under the Clean Water Act and was later incorporated into the Superfund law. Needless to say, this was a gratifying experience.

Now a few words about the future. Environmental law is in flux because new issues arise. They arise because scientists, regulatory agencies and/or legislators find impacts on human health and the environment that were previously unknown, are more serious than previously thought or occur at lower concentrations than previously thought. They may also arise because new and better regulatory and/or technical solutions are needed and available.

For example, a major increase in oil and gas production has occurred in the United States due to the development and use of hydraulic fracturing as a technique for producing more oil and gas from shale formations. This technological development has implications for both energy and the environment. From an energy perspective, increased production of low-cost natural gas has resulted in a shift from coal to natural gas, with corresponding implications for air quality and climate change. However, low oil prices could have an impact on US shale production. From an environmental perspective, hydraulic fracturing has resulted in a debate concerning the need for more regulation and the respective role of states and the federal governments as well as the authority of local jurisdictions to ban or restrict such development. Low oil and gas prices could also make energy efficiency, renewable energy projects and nuclear power plants less economical.

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Uncertainty also results from ambiguity and debate concerning legal issues. For example, although the modern version of the Clean Water Act statute has been on the books since 1972, there continues to be debate and uncertainty over what waters are "waters of the United States" subject to the Act's regulatory provisions for permits, standards and enforcement. In *Rapanos v United States* (2006), Mr Rapanos was sued by the government for filling in wetlands without a permit, and the Supreme Court was confronted with issues concerning the scope of jurisdiction over non-navigable tributaries and adjacent wetlands. No view of the scope of Clean Water Act jurisdiction commanded a majority of the Supreme Court. The plurality opinion by four justices would extend jurisdiction only to relatively permanent bodies of water draining to traditionally navigable waters and wetlands with a continuous surface connection to such water bodies. Justice Kennedy provided a fifth vote and expressed the view that jurisdiction extends to non-navigable waters and adjacent wetlands that have a "significant nexus" to traditionally

navigable waters. In May 2015, the EPA promulgated its final rule defining "waters of the US" that is intended to clarify which farming, development and other practices are subjected to regulation. Some representatives in Congress are concerned that the rule could halt virtually all development near water and cover streams with limited flow. A number of lawsuits have been filed challenging the rule. It remains to be seen how actions by Congress and/or the Court will affect the resolution of this important issue.

When I first started practising environmental law, America was the leader in the field. Since then, virtually every nation has its own evolving body of environmental law governing air, water and waste.

We live in a global economy. Multinational companies manufacture and sell products around the world. They need counsel that understand the legal and business implications of the national and international legal landscape. Environmental risks are complex because they result from a combination of physical and scientific facts and legal uncertainties in permits, standards, enforcement and litigation that may vary with the jurisdiction in question. A lawyer providing advice needs to understand the risks so that an informed business decision can be made by the client.

How should a transaction be structured to allocate environmental liability? How much due diligence is the right amount? Are there financial incentives for redevelopment through tax credits, grants or loans? Are restrictive covenants, deed restrictions or other institutional controls in place or available to address and limit exposure to contamination? What are the options for tax treatment of remediation costs? Are energy tax incentives available? Are there disclosure requirements under environmental or securities laws? Are there insurance policies available that insure against environmental risks? For investments in volatile markets, what are the options for structuring transactions to take advantage of investment treaties and favourable tax treatment?

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Companies that sell products in Europe need to understand European Community (EC) environmental regulations that may govern their products. The European Union's Regulation on the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH) requires the European Chemicals Agency to identify Substances of Very High Concern (SVHCs) and to list them in a Candidate List. The listed SVHCs are subject to stringent information and notification requirements that apply to the substances and to products containing them. The EC has also issued a directive aimed at limiting the production of packaging waste and promoting recycling, reuse and other forms of waste recovery, a directive on environmental liability, a recommendation for minimum criteria for environmental inspections and a directive on the protection of the environment through criminal law. These are just some of the environmental regulatory measures that affect companies doing business in the EC.

China has had an economic boon accompanied by challenging environmental issues. China is regarded as the world's largest consumer of coal and the largest source of greenhouse gas emissions. In 2013 China's National Development and Reform Commission announced a climate change plan, and the government has required thousands of factories to publicly report their air and water releases. China has also invested in renewable energy and has become the world's largest manufacturer of solar panels.

There are similar issues to understand and address in other parts of the world, including Africa, Asia, India, Latin America, the Middle East, Russia and Eurasia.

The need for international cooperation has never been more apparent or urgent. Such cooperation has accomplished victories in the battle against the Ebola virus, and the United States and its allies are working hard to engender coordinated international efforts and cooperation against global terrorism. Climate change, ocean pollution and other significant problems that cross national borders have highlighted the need for cooperative international attention to environmental issues.

In 2014 the United States and China jointly announced climate change goals. The United States set a new target to reduce its emissions of heat-trapping gases by 26 per cent to 28 per cent by 2025, compared with 2005 levels. China established a target for emissions to peak by 2030 and to increase the amount of energy from sources other than fossil fuels. There is hope that the December 2015 Paris Conference will produce progress on climate change, particularly in light of the agreement between the United States and China.

In short, these are exciting times to be an environmental lawyer.