

What's Next?

Looking Back on the Environmental Era

By G. Tracy Mehan III

THE nation is observing and reflecting on the serial golden anniversaries of the significant environmental laws passed from 1969 through 1986, from the National Environmental Policy Act to the Emergency Planning and Community Right-to-Know Act. The Clean Water Act's 50th anniversary was just celebrated in the year past. In 2023 it is the Endangered Species Act, and on deck next year is the Safe Drinking Water Act.

There was nothing quite like this wave of legislation, which permanently transformed American culture and society, mostly for the better, while allowing the economy to flourish. That said, the future of this environmental regime is uncertain, given the plateau on which federal programs seem to have arrived. William D. Ruckelshaus, the very first administrator of the new U.S. Environmental Protection Agency, has reportedly said, on environmental matters the American people are philosophically liberal but operationally conservative. But that two-minded attitude has hardened into political deadlock.

Another challenge to the current system of environmental protection, largely federalized, is that “only two in ten Americans say they trust the government in Washington to do what is right ‘just about always’ (2 percent) or ‘most of the time’ (19 percent)” according to the Pew Research Center last spring. In 1958, “about three-quarters of Americans trusted the federal government to do the right thing

almost always or most of the time.”

Environmental regulation now reaches down to individual citizens and their livelihoods more directly than, say, in the 1980s, when the focus was on big industrial facilities, wastewater treatment plants, and legacy waste sites. Today, for instance, ESA regulations reducing water for irrigation or introducing wolves into ranching country; rules protecting wetlands that puts limits on develop-

Melville's Mistake: Essays in Defense of the Natural World. By Michael J. Bean. Texas A&M University Press.

Fifty Years at the US Environmental Protection Agency: Progress, Retrenchment and Opportunities. A. James Barnes, John D. Graham, David M. Konisky, Editors. Rowman & Littlefield.

Advanced Introduction to U.S. Environmental Law. By E. Donald Elliott and Daniel C. Esty. Edward Elgar.

ers, many of them small operators; and, of course, the cost to drivers at the gas pump—all are all caused, in part, by environmental regulation

We now have several thoughtful commentaries by experts who have actively participated in the passing era and hope to envision the new one to come.

In *Melville's Mistake: Essays in Defense of the Natural World*, Michael J. Bean relates a story, both personal and professional, of his life dedicated to protecting the living things of this world. Growing up near the Mississippi River, he developed a love for small, crawling and flying things, a love that stayed with him his whole life. He is passionate about biodi-

versity, a term not mentioned in the ESA but, operationally, its primary focus. I have discussed this idea in a previous review, “Biodiversity: A Passion for Science, Politics, or Both” (May/June 2008). According to Timothy J. Farnham, the concept was first formally defined in 1980 by Robert McManus and Elliott Norse in a publication for the White House Council on Environmental Quality. Biodiversity now encompasses genetic, species, and ecosystem diversity.

Bean's book title refers to the writer Herman Melville's thought that whales were never going to go extinct because of their mobility and ability to retreat to “polar citadels.” These are “two firm fortresses, which, in all human probability, will forever remain impregnable.”

Bean is a realist regarding the ESA: “I am willing to frankly acknowledge the shortcomings in the manner in which the Endangered Species Act pursue that goal,” meaning biodiversity. Many of these “shortcomings” are explored in another review of mine, “The Ark Reposes in Dry Dock,” (January/February 2012), reviewing possible reforms of the ESA in a volume edited by Jonathan Adler.

Rectifying these problems is the focus of the latter part of *Melville's Mistake*.

Bean's is a story of how his avocation became a vocation, from a big law firm to the Environmental Defense Fund and a lifetime of supporting and adapting the ESA to the benefit of endangered and threatened species and the private property owners who own most of the nation's land. These folks must be incentivized to protect such species, as argued by Aldo Leopold decades ago. Bean fully comprehends the law of unintended consequences, of the ESA driving property owners to manage their lands to avoid the advent of a listed species.

In the Literature

The author combines a narrative in real time with many of his past articles reproduced on a variety of always controversial but important topics related to the ESA. Several originated in *The Environmental Forum*, including his famous essay on Newt Gingrich's role in saving the ESA from extinction.

Bean was a strong advocate for innovations like habitat conservation plans and safe harbor agreements, which give landowners a sense of security that, under agreed upon conditions, they will not lose the economic value of their lands if they take steps to enhance habitat or conditions for the benefit of endangered species. He also presents a fair, but conflicted, analysis of the potential and pitfalls of "conservation banking," which presents difficulties of scale and non-fungibility.

SCHOLARS A. James Barnes, John D. Graham, and David Konisky of the Paul H. O'Neill School of Public and Environmental Affairs at Indiana University have edited a magnum opus on *Fifty Years at the US Environmental Protection Agency. Progress, Retrenchment, and Opportunities*, compiling essays by 15 leading practitioners and professors, many of whom worked at EPA. The editors themselves, collectively, "share a belief in both the historical and future role of the EPA in leading the US efforts to provide environmental protection." Like Michael Bean they are committed to the decades-old regime but seek to reform it and make it more relevant, effective, and efficient. A good example is the chapter on "Clean Air: Regulation of Stationary Sources," by William F. Pedersen.

Bill Pedersen served from 1972-85 as deputy general counsel and associate general counsel for air at EPA, "the government's chief Clean Air Act lawyer." He was there at the creation and was a supporter of market-based approaches to pollution

control. He provides a very useful summary of air regulation, starting with the old "smoke ordinances" up to the Trump administration.

He then assesses the successes of the law as well as the debatable and problematic. Basically, since 1970, the CAA benefit-cost ratio is fifty to one, given the tremendous health improvements it yielded. Conventional pollutant emissions declined 73 percent. However, the law's traditional command-and-control tools have been "intrusive, slow, expensive to implement, and unlikely to provide least-cost solutions" not withstanding the success of the acid rain trading program established by the 1990 amendments.

Pedersen believes greenhouse gas initiatives are a precondition for reform of the entire CAA, leading to more reductions in conventional pollutants. Generally, cap-and-trade, at scale, should replace the old scheme of criteria pollutants and state implementation plans. He writes:

"A national cap-and-trade system for large fuel-burning sources might well eliminate most to all of the multi-state problems for air pollution, such as health damage from regionally distributed PM_{2.5} or large-scale visibility impairment," argues Pedersen. "Since most of the remaining problems would be confined within a single state, what justification would remain for the pressure that the CAA puts on states to conform to federal directives?"

Two more EPA alumni, E. Donald Elliott and Daniel C. Esty, have written an elegant, compact *Advanced Introduction to U.S. Environmental Law*. It summarizes major themes along with particulars on each statute. It is an excellent, accessible reference but also an essay of sorts laced with great insights. The authors offer their assessments of the performance of each statute, both successes and limitations. Both are lawyers. Esty is also an economist.

They trace the current political gridlock over environmental issues to the 1992 presidential election in which Clinton was supported by all the national environmental organizations despite a problematic record in Arkansas and George H. W. Bush's environmental platform. "As a result, the Republican party gave up and stopped supporting ambitious new legislation. Environmental policy thus became a wedge issue in American politics-and has continued to be so through the 2020 election."

Elliott and Esty believe state law has become more important on some issues such as climate change, and that corporate America is responding to consumer and social demands conditioning their license to operate:

"With expectations for corporate legitimacy moving toward do no harm or no externalities standard, the baseline for sustainability performance continues to rise [citations omitted]. We believe that this shift will

render outdated the idea of corporate social responsibility, a framework that credited companies for good deeds (such as contributions to the hospitals, ballet, museums, or local youth sports teams in their communities) as a way to make up for the pollution or other harms for which they might otherwise be held responsible."

One still hopes to have both hospitals, the ballet, and museums, along with a healthy environment, over the next 50 years. The books reviewed here will help achieve the latter, if not the former, good things in life.

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Three books provide hundreds of years of professional experience