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# **Third Annual Lloyd K. Garrison Lecture on Environmental Law**

## **Defeating Environmental Law: The Geology of Legal Advantage**

WILLIAM H. RODGERS, JR.\*

It is a singular honor to discuss issues of environmental law at the Pace University School of Law. Lloyd K. Garrison, in whose honor this lecture is named, was one of the great lawyers of his time. Your Dean, Richard Ottinger, as a young member of Congress a quarter century ago, was one of the first to raise issues of environmental law. My immediate predecessor on this podium, David Sive, is the most respected environmental lawyer in the country. My debts to him are too numerous to mention. Your faculty has also instructed me in many ways. To mention but two outstanding individuals, no one working in the field can escape the influence of Nicholas A. Robinson on the National Environmental Policy Act or Jeffrey Miller on Clean Water Act enforcement.

My talk today will: (1) introduce the metaphor of geology, (2) suggest to you that complexity has “gainers” as well as “losers,” and (3) show you how environmental laws can be defeated by these twin engines of complexity and clever human adversaries.

### **I. The Metaphor of Geology**

Complexity is the first word students and practitioners of environmental law learn. The primary reason for this is that envi-

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\* William H. Rodgers, Jr., University of Washington School of Law. Appreciation for editing is expressed to Shelley Pellegrino, 3L, University of Washington School of Law. Appreciation for comments on an earlier draft is expressed to E. Donald Elliott, Esq., students of the Environmental Research Workshop Series, Professor Richard Lazarus, Georgetown University Law Center and the Environmental & Experimental Economic Forum, Professor Ronald G. Cummings, Georgia State University School of Policy Studies.

ronmental law is the result of an additive process where layer upon layer is added to the preexisting strata as if guided by the laws of geology. There are occasional reductions in this cumulative mass (for example, the repealers that are featured in high school civics classes), but they are far outnumbered by the additions, accretions, faults, folds, and fractures that mar the surface and shape the deep content of this legal world. Graphic 1<sup>1</sup> in the Appendix provides a small id of the roster of law that has piled up in Columbia River law offices as fishing has declined. A similar picture could be drawn for the Hudson River. Graphics of this sort, however do not begin to reveal the displacements, seams, reversals, and exceptions that are buried in this law.

To elaborate further on this geological metaphor, Graphic 2<sup>2</sup> is a picture of the "Erosional History of the Appalachian Mountains." It conveys nicely, the ridges, valleys, and fronts that can develop due to uneven accumulations of geology. Graphic 3<sup>3</sup> depicts "Devonian Sedimentary Rocks of New York State." It clearly demonstrates how deposit upon deposit from different ages make up the whole.

## II. The Practice of Advantage

In nature, social burdens are the unwelcome by-product of activities that offer individual advantage. Nobody enjoys the complexity of environmental laws, yet many gain from it.

It is not difficult to discern the primary beneficiaries of this mass of complexity called environmental law. They are the lawyers who use their guile to trace a satisfactory path down the seam of Law A to its intersection with Law B, just below the surface of Law C. They are the judges who impart their wisdom to discern when Law 26 is impliedly repealed by Law 49. They are the lawmakers who reap the benefits of cleaning up a river not once, not twice, but three times with three different laws, and who later reap the benefits of fashioning exemptions that permit escape from the collective repression they created.

These environmental law people need not even be thankful to the hand that feeds them. Environmental law itself, and the mostly anonymous process that produces it, is a better scapegoat than the Corps of Engineers. These fine lawyers can sneer at the

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ambiguities while they seek to widen them, and these wise judges can condemn the complexity while they add yet another layer to it.

Lawyers thrive on the complexity they pretend to despise because complexity multiplies opportunities for legal objection and contention. It creates niches of advantage where unwelcome laws can be ambushed, stifled, and avoided. It creates cracks and seams into which fine legal differences can flow. The environmental laws have been damaged gravely by these predations. Several legal tactics used to defeat these laws are defined in Attachment 1: (1) neglect, (2) diversion, (3) acquisition and sale, (4) abandonment, (5) process transformation, (6) exception, (7) pretense, and (8) marginalization. I will draw on examples from across the environmental field but will focus primarily on the Pacific Northwest where the great salmon have come under the "protection" of environmental laws.

### III. Tactics

#### A. Neglect: Law as Joke

Environmental literature is filled with references to legal directions not taken, legal opportunities not exploited, and legal commitments not remembered.<sup>4</sup> Agencies, for example, are empowered to choose the laws they will enforce. They can chart their own course through the jumbled legal geologies erected in their paths. But the power to choose also includes the discretion to disregard. In the environmental field, this body of disregarded law is so conspicuous that it has been given a name—"sleeper"—meaning a law or rule that is forgotten, buried or ignored.<sup>5</sup> A conspicuous reason for sleepers is that the responsible agency puts them to bed as unworthy of attention. Sleepers are forever in danger of

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4. See, e.g., Michael C. Blumm & Andy Simrin, *The Unraveling of the Parity Promise: Hydropower, Salmon, and Endangered Species in the Columbia Basin*, 21 ENVTL. L. 657, 669-70 (1991) (Northwest Power Act); THE NORTHWEST SALMON CRISIS: A DOCUMENTARY HISTORY 111-15 (Joseph Cone & Sandy Ridlington eds., 1996) [hereinafter 1996 DOCUMENTARY HISTORY]; J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamic Law-and-Society System: A Wake-Up Call for Legal Revolution and the Modern Administrative State*, 45 DUKE L.J. 849 (1996); Peter Schuck, *Legal Complexity: Some Causes, Consequences and Cures*, 42 DUKE L.J. 1 (1992).

5. See William H. Rodgers, Jr., *Where Environmental Law and Biology Meet: Of Pandas' Thumbs, Statutory Sleepers, and Effective Law*, 65 U. COLO. L. REV. 25 (1993); William H. Rodgers, Jr., *The Lessons of the Red Squirrel: Consensus and Betrayal in the Environmental Statutes*, 5 J. CONTEMP. HEALTH L. & POL'Y 161 (1989); William H. Rodgers, Jr., *The Lesson of the Owl and the Crows: The Role of Deception in the Evolution of the Environmental Statutes*, 4 FLA. J. LAND USE & ENVTL. L. 377 (1989).

slipping beneath the radar because there is little in them that promises administrative advantage, and there is much in them that creates discomfort. Some legal rules are not worth knowing from the agency's perspective.

The Corps of Engineers has always selectively interpreted the law. The Corps' most celebrated neglect in the environmental field was its startlingly narrow reading of its power to forbid discharges of refuse under the Rivers and Harbors Act of 1899.<sup>6</sup> The Corps understood this law as ruling out only discharges that *in and of themselves* obstructed navigation.

For three generations, into the Nixon Administration, dischargers could pollute with impunity and destroy fish and ruin spawning grounds. The only things they could not do, in the Corps' view, was fill up the waterways with flammables that might deter navigation. When this 1899 law was uncovered as an anti-pollution weapon in the 1970s, it was described as a great "sleeper" and was condemned for the surprises it contained. The Corps of Engineers had administered the anesthesia.

Another unnoticed environmental law, effective since 1965, is section 401 of the Clean Water Act, which affords considerable legal leverage over dams by inviting states to determine whether a project complies with state water quality standards.<sup>7</sup> These water quality standards contain a number of provisions (e.g., minimum-flow requirements, rapid fluctuation constraints) that are designed to be "fish-friendly."<sup>8</sup> A state's power to certify is the power to say "no" to a project, which makes the law extremely valuable as currency, even to those who are disposed more to selling it than enforcing it. But this law was not sold; it was scrupulously ignored even though it offered glory and fulfillment to lawyers driven by ambition.

The legal dormancy of section 401 lasted for almost thirty years, which is about as long as it takes for a generation of lawyers who know nothing about environmental law to pass from the scene.<sup>9</sup> For whatever reason, legal entrepreneurs eventually discovered section 401. It was thrust further into prominence by a

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6. See 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR & WATER § 4.11 (1986).

7. See *id.*, § 4.16 at 252-54.

8. See Debra L. Donohue, *The Untapped Power of the Clean Water Act Section 401*, 23 *ECOLOGY L.Q.* 201 (1996); Katherine Ransel, *The Sleeping Giant Awakens: PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, 25 *ENVTL. L.* 255 (1995).

9. See T.S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed., 1970).

1994 Supreme Court decision.<sup>10</sup> Thus, section 401 is now back on the legal monitor and part of sharply-contested territory. It is threatened now not by desuetude but by an explicit repealer by an antagonistic Congress.<sup>11</sup>

## B. Diversion: Law as Specialty

The cracks and fissures of environmental laws enable law managers to use their specialty and exploit the fissures to defeat otherwise good intentions. The Columbia River salmon, for example, have been destroyed by state water laws that are immune from federal environmental laws and strategically placed to defeat Indian treaty fishing rights. The crown jewel in this legal strategy is the McCarren Amendment of 1953,<sup>12</sup> which allows suits against the United States (and by extension the tribes) in state courts "for the adjudication of rights to the use of water of a river system."<sup>13</sup> On the Yakima River, a tributary to the Columbia, this law produced a grotesque rule for in-stream salmon protection known as the bare minimum standard; it ensures that the fish have enough water to maintain a precarious existence.<sup>14</sup>

Another legal offshoot on the Columbia River is the cleanup of the Hanford Nuclear Reservation, described in legislative documents as the "largest civil works project ever undertaken."<sup>15</sup> Pol-

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10. See PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700 (1994).

11. Section 401 was seriously damaged in the House-passed version of the Clean Water Amendments of 1995, H.R. 961, 104th Cong. (1995) (colloquially known as the "dirty water" bill). See BILL GHENT, ENVTL. & ENERGY INST., SPEC. STATUS REP., AWAITED SENATE CLEAN WATER BILL EXPECTED TO DIFFER FROM HOUSE VERSION 29 (1995).

12. 43 U.S.C.A. § 666 (1994), construed in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

13. Compare Panel on Conjunctive Management: Idaho Water Policy in the Wake of Musser, Northwest Water Law & Policy Project, Water Policy & Sustainability in the Columbia Basin, (May 19, 20, 1995), with DAVID H. GETCHES, WATER LAW IN A NUTSHELL 334-38 (3d ed. 1990) (elaborating on the McCarran Amendment).

14. See Order of the trial court in the Aquavella General Adjudication (Nov. 29, 1990); see *id.*, the Flushing Flow Order (April 13, 1995); *In re* State of Washington Dep't of Ecology v. Yakima Reservation Irrigation Dist., 850 P. 2d 1306, 1310, 1325 (1993) (justifying loss of fishing rights by the payment of an Indian Claims Commission judgment; the measure of the right "is the minimum in-stream flow necessary to maintain anadromous fish life in the river, according to annual prevailing conditions").

15. STEVEN M. BLUSH & THOMAS H. HEITMAN, TRAIN WRECK ALONG THE RIVER OF MONEY: AN EVALUATION OF THE HANFORD CLEANUP 1-1 (1995) (report prepared for the U.S. Senate Committee on Energy and Natural Resources) [hereinafter 1995 TRAIN WRECK STUDY ON HANFORD].

luted soils and groundwater at Hanford are measured in cubic miles. Many have written about this reservoir of pollution from the bombmaking years, the magnitude and severity of which is without planetary precedent.<sup>16</sup>

The Indian tribes have an interest in this cleanup. The landscape, 560 square miles of it, is a source of game. It is also extraordinarily rich in archaeological treasures and Indian artifacts. Fish have thrived in the last free-flowing stretch of the river that abuts the reservation.<sup>17</sup> However, leaking groundwater and looming tanks (approximately 177 apartment buildings in size) hold the future of the river hostage. Protecting Indian fishing was not the principal business at Hanford, and it is not the chief aim of the cleanup.<sup>18</sup> The immediate problem is whether the cleanup will come to resemble fenced-off permanent pollution zones. Some areas of Hanford cannot possibly be upgraded to meet the requirements for future residential or commercial use. The Department of Energy thus is promoting a recreational use standard that would limit fishermen to river access fifty-five days of the year.

The diversion point that consigns challenges to the Hanford cleanup to some legally distant Pluto is section 113(h) of the

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16. See, e.g., M. D'ANTONIO, *ATOMIC HARVEST: HANFORD AND THE LEGAL TOLL OF AMERICA'S NUCLEAR ARSENAL* (1993); Paul Wilson, "Cold War Legacy - Hanford," in *Natural Resources Law Institute, Northwestern, School of Law*, 5 *NRLI News* 1, 4 (June 1994) (nearly two-thirds of the nation's high-level radioactive waste is found at Hanford; in the period of peak operation (mid-50s to mid-60s), Hanford was running eight single-pass nuclear reactors whose sole job was to convert uranium to plutonium; altogether, the government produced 53,000 kilograms of plutonium for the weapons program at Hanford).

17. See Shauna Whidden Study Paper, *The Hanford Reach: Protecting the Columbia's Last Safe Haven for Salmon*, (*Northwest Water Law & Policy Project*), Nw. SCH. L. OF LEWIS & CLARK COLLEGE, (1995).

18. The risk-assessments that are being done by the Department of Energy are nine-parts deception. See 1995 TRAIN WRECK STUDY ON HANFORD, *supra* note 15, at 8-9. This is before any correction is made for the embarrassing fact that the Indians along the river consume fish at a rate 6-8-10 times that of the norm used in EPA risk assessments. See COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, Press Release, Oct. 7, 1994, Study Reveals Columbia River Tribal Members May Be Exposed to Higher Levels of Dioxin and Other Toxics. This disparity between Indian and non-Indian fish consumption is so well known that it received mention in President Clinton's 1994 Executive Order on Environmental Justice. See Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994) ("Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations"). Few expect that abstractions such as the health of Indians will greatly influence cleanup budgets measured in the billions of dollars.

On the work of the Department of Energy, see BLAINE HARDEN, *A RIVER LOST: THE LIFE AND DEATH OF THE COLUMBIA* ch. 8 (1996) ("Wild and Scenic Atomic River"); Gerald F. Hess, *Hanford: Cleaning Up the Most Contaminated Place in the United States*, 38 *ARIZ. L. REV.* 105 (1996).

Superfund law.<sup>19</sup> Section 113(h) declares lawsuits that deal with disputes over cleanups must await completion of construction activities. In the case of Hanford, this eagerly anticipated date, barring extensions, might be: 2018, when some units are supposed to be cleaned up; 2055, when reactor cores are supposed to be removed; or it might be 2118, 121 years from the present, when unrestricted use of land and groundwater is to be achieved.<sup>20</sup>

In effect, tribes must wait fifty or sixty years before they are permitted to go before a judge to argue about a risk assessment, which is mostly a figment of scientific imagination, to obtain relief that consists merely of rearranging future and law of this sort and pure farce.

### C. Acquisitions and Sale: Law as Currency

#### 1. Selling Salmon Protection

There was nothing inherently wrong with Washington's pre-statehood salmon-protection laws dating 1881. They required fishways or other means of passage to overcome obstructions in streams used by anadromous fish. The wrong came when the authorities presumed to sell or trade this power to say "no." This ready disposition to make fish-protection negotiable was facilitated by the win-win ideologies of the day. It was underwritten by the convenient fiction that hatcheries were a satisfactory recompense for natural stocks. But the law made these transactions stick, not by encouraging the *de facto* sales of natural fish runs, but by declaring that the buyer who succeeded in corrupting the process acquired a property right that could not be taken back.

This power of the transaction to rechannel evolutionary histories and to penetrate into the distant future is being played out today on the Elwha River.<sup>21</sup> Thus, politicians sit in solemn judgment to decide whether \$29.5 million should be paid to beneficiaries of the current dam owners.<sup>22</sup> It made no sense to sell these

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19. See 42 U.S.C.A. § 9613(h) (1994). See also, 4 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: HAZARDOUS WASTE & SUBSTANCES § 8.3, at 509-11 (1992).

20. See 1995 TRAIN WRECK STUDY ON HANFORD, *supra* note 15, at 1-19, 1-45, 46; See *id.* at 125 ("the EPA and Ecology have adopted a schedule of cleanup for the 100 areas that is at least a hundred years *longer* than the schedule in the [Tripartite Agreement] for cleanup of all operable units at the site") (emphasis added). See *id.*

21. See BRUCE BROWN, MOUNTAIN IN THE CLOUDS: A SEARCH FOR THE WILD SALMON ch. 6 (1982).

22. The payments are to be made to the "beneficiaries" because it is not even known who is the "owner" of the Elwha Dam. This is claimed to be "confidential." Interview with Russ Busch, Seattle attorney, (Jan. 1997). Compare Elwha River



great fish runs in 1910. It made no sense to protect the intrusion in 1992 by promising extravagant compensation by law as if it were some inescapable constitutional obligation. The only outcome that makes less sense would be to leave the dams in the river because the constitutional duty contrived by lawyers has become too expensive.

This problem of purchased law is no small or parochial thing. The licensing process of the Federal Energy Regulatory Commission (FERC) has left many bargained-for properties in the rivers with fifty-year licenses being the legal norm. Firm properties also have been erected under the tolerant auspices of FERC. The worst giveaways are protected into the distant future because the law transforms bureaucratic trepidation into constitutionally protected property.

### Selling the Protection of Endangered Species

The latest law for sale is frequently referred to as the strongest environmental law in the United States. Section 9 of the Endangered Species Act (Act) makes it a crime to "take" any protected species.<sup>23</sup> This statute is powerful because it is possible to "take" with the weapons of environmental damage, and it applies to private as well as public owners. The most impressive visual image of Section 9 is the picture of the famous owl circles on the Plum Creek Timber property in the mid-Cascades (Graphic 4, "Owl Circles on Plum Creek Timber Proper").<sup>24</sup> These circles represent all of the places that cannot be logged.

Section 9 finds itself for sale and auction because Section 10 of the Act permits the "incidental" taking of protected species if the landowner is committed to a "habitat conservation plan" that of-

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Ecosystem and Fisheries Restoration Act, Pub. Law No. 102-495, 106 Stat. 3173 (Oct. 24, 1992) with Letter to the Editor from Senator Slade Gorton, *There are other National Parks Projects That Need Federal Money*, SEATTLE POST-INTELLIGENCER, Feb. 16, 1997, at C2 ("Before we can remove the Elwha dams, we must acquire them. To acquire them will cost \$29.5 million. To spend that amount of money in a single year means that the Elwha dams nation's park land acquisition. . . . [This would be] unfair to other states [and explains why] I have appropriated \$4 million [in each of the last two years] toward the acquisition of the Elwha dams."). *Id.*

23. See 16 U.S.C.A. § 1538(a)(1)(A)-(G), § 9(a)(1)(A)-(G) (1994). See also WILLIAM H. RODGERS, JR., *HORNBOOK ON ENVIRONMENTAL LAW* 1016-21 (2d ed., 1994) [hereinafter 1994 *HORNBOOK ON ENVIRONMENTAL LAW*].

24. See James A. Kraft, Plum Creek Timber Co., "Large Landowner: Plum Creek HCP," Law Seminars International, Program on the Endangered Species Act, Jan. 30-31, 1997 (Meydenbauer Center, Bellevue, Wash.). Copy of Graphic 4 on file with Pace Environmental Law Review.

fers some protection for a listed species.<sup>25</sup> Like the FERC lawyers before them, who perfected a variety of hatchery fictions to justify their "incidental" intrusions, attorneys for the timber companies now proudly come forth with imaginative sustainable practices that will protect the owls and the fish into the distant future if made part of an acceptable deal.<sup>26</sup> Like the FERC attorneys before them, these attorneys justify their predictions on their own satisfaction with state-of-the-art modeling and impressive graphics. Like the FERC lawyers before them, these attorneys insist that there can be no deals without the certainty afforded by long-term properties, meaning that habitat conservation plans can extend for 100 to 150 years.<sup>27</sup> Like the FERC lawyers before them, this new generation of attorneys who write habitat conservation plans is confident that changed attitudes, goodwill and modern education can defeat any small limitations in anticipating the needs of the fish in the creative documents they write.

However, the negotiators who specialize in habitat conservation plans for endangered species have one bargaining chip that the FERC licensees lack. They are empowered to destroy habitat and limit the options for the fish while negotiations proceed. They can do this because they already own the habitat that is an issue, whereas the dam makers only *hope* to own it. Routinely, these landowners say that business necessities counsel the avoidance of an infestation by endangered species. Landowners search for endangered species, not to protect them but to find places where they are *not*. This is the land that then can be harvested, modified, or transformed.

Nevertheless, it is the prevailing view that habitat conservation plans are one of the great hopes for saving the salmon, just as FERC licenses were previously thought to be. They embody a spirit of tolerance extended to kills that are merely incidental, create nonnegotiable properties projected into a distant future, and are sustained by a win-win ideology. Finally, they are justified by optimism that protecting the fish requires only marginal improve-

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25. See 16 U.S.C.A. § 1539(a)(1)(B) (1994). See also, 1994 HORNBOOK ON ENVIRONMENTAL LAW, *supra* note 23, at 1020-21.

26. See Law Seminars International, Program on the Endangered Species Act (Jan. 30-31 1997) (Meydenbauer Center, Bellevue, Wash.) (presentations of Jeffrey B. Van Duzer, Esq., Davis Wright Tremaine, Curt Smith, U.S. Fish & Wildlife Service, James A. Kraft, Esq., Plum Creek Timber Co., Jan Pauw, Esq., Weyerhaeuser Co.).

27. Jan Pauw, Senior Legal Counsel, Weyerhaeuser Co., ESA Litigation Risks: How Do They Affect Landowner Behavior and How Can They Best Be Managed? Program on the Endangered Species Act.

ments in caution. We will not know until well into the twenty-first century whether this wave of optimism proves to be so firmly grounded.

#### D. Abandonment: Law as Liability

It is intuitively difficult to explain why an agency might opt for trading or abandoning a powerful law while cherishing or honoring a weak one. But one reason why this abandonment occurs is that enforcing powerful laws such as the no-take provision of the Endangered Species Act can inspire resistance and backlash. Such costs can more than offset the gains in jurisdictional authority.

One strong salmon-protector in the legal arsenal that the flow of events quietly shelved is the Washington Hydraulics Law, first enacted in 1943.<sup>28</sup> Fortuitously, perhaps, this law had a substantial advantage over later (1972) amendments to the federal Clean Water Act. It focused on the key parameters of hydrological continuity and stream bed integrity, not just water quality.<sup>29</sup>

Those who believe that weak statutes have killed salmon should peruse the hydraulics law. It says that those who propose to "divert" or "change" the "natural flow or bed" of any river or stream must win the endorsement of the fisheries authorities. They must extend "written approval" of "the adequacy" of the means outlined for the "protection of fish life." Violators are guilty of a gross misdemeanor. Their illegal projects are declared "public nuisances" subject to abatement.

Courageous fish and game staffers fought hundreds of battles in Washington State under the hydraulics law. They challenged violators and counseled cooperators who planned their work around the return of the salmon. They won a few prosecutors to the cause. They flexed this legal weapon like none other in the pre-fisheries arsenal, and they won some of their battles.

But the strength and the breadth of the hydraulics law was its own undoing. Agency staffers gradually found themselves awash in a sea of salmon crime. They learned the same lesson as the administrators of the no-discharge provisions of the Refuse

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28. 1943 WASH. LAWS 40; see also Howard Latin, *Regulatory Failure, Administrative Incentives, and the New Clean Air Act*, 21 ENVTL. L. 1647 (1991).

29. See, e.g., Janet N. Abramowitz, *Sustaining Freshwater Ecosystems*, World-watch Institute, State of the World Report 60 (1996); see also Center for Streamside Studies, College for Forest Resources, College of Ocean & Fishery Sciences, University of Washington, *7th Annual Review* (Jan. 30 1997).

Act and the enforcers of the no-take provisions of the Endangered Species Act. They discovered that when violations mount, when offenders are one's neighbors, and when crime becomes the norm, the problem is not with the behavior. The problem is with the law.

One study by the Washington Department of Fisheries (Department) in 1975 catalogued over 10,000 streams in the Puget Sound area alone, with this fish habitat covering almost one quarter of the land area of Washington State. The study warned that "salmon production habitat is being lost at an accelerating rate."<sup>30</sup> If this trend is not changed in the near future, the natural salmon populations will decline faster than they can be replaced by artificially produced fish."<sup>31</sup> The causes for the hydraulics law nullification were the common culprits of benign ignorance and rank favoritism. Thus, said the Department, one of the biggest problems in administering the law "is a lack of awareness on part of private individual[s], private corporations, and public agencies. Most are not aware that a permit is required to work in a stream. Most are unfamiliar with the types of restrictions that are placed on hydraulics projects, and many don't even know if fish use occurs in the stream involved."<sup>32</sup> As for prosecutions, said the Department, a reoccurring problem is the attitude of the local courts when the Department attempts to prosecute a hydraulics violation. Convictions are rarely obtained. When they are, the penalties are usually so low that they provide little if any deterrent to future violations.<sup>33</sup>

But the problems run deeper than ignorance and indifference. State legislators constantly harped on hydraulics law enforcement, which touched their constituents. The law was amended frequently to accommodate those whose inconveniences carried legislative weight. Enforcement often came up against their sister agencies, such as the Department of Transportation, that made a business of disrupting culverts and modifying streams. Indeed, hydraulics law enforcement became an issue within the Departments of Fisheries and Game themselves as the hatchery folks and stream rehabilitation types when about the business of rendering the streams more congenial to their ambitions.

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30. WASHINGTON DEPT. OF FISHERIES, A CATALOG OF WASHINGTON STREAMS (1975)

31. *See id.*

32. *Id.* at 2.

33. *See id.* at 1-2.

No date can be marked as the moment hydraulics law enforcement was abandoned to the vandals who were bringing civilization down upon the salmon. State enforcers, though, like Indians who wanted to save the fish, gradually were overcome by forces that never relaxed. The hydraulics law enforcers gave way before the cumulative effort of the gravel removers, water diverters, pipeline builders, and culvert designers.

The hydraulics law was no unwelcome sleeper. It was no rude intruder into the mission of fish-protecting agencies. There was a will to enforce, but no way to do it. Regulation never works in the face of massive resistance. Those who are called upon to do the job will abandon the effort when the pain becomes too great, leaving a law that is false and hollow.

#### E. Process Transformation: Law as Attrition

The National Environmental Policy Act (NEPA)<sup>34</sup> is commonly regarded as the most significant environmental law on the planet. It has been copied worldwide, and its inspiration is said to extend to the laws of 150 nations.<sup>35</sup> NEPA has a strong process component. It requires federal agencies to study the effects of their actions, alternatives, and mitigation measures. But nobody ever said that NEPA was concerned *solely* with process. At least, nobody said that until the Supreme Court put its stamp on the law.

In a series of twelve decisions in the 1970s and '80s, the high court slowly squeezed the life out of this law. These decisions covered twenty-two separate legal issues.<sup>36</sup> The effort culminated in a unanimous 1989 decision announcing that the United States Forest Service could approve a new town-sized ski resort at Sandy Butte in the Methow Valley within the Columbia River watershed. This project could go ahead even if the result was total destruction of a herd of 30,000 mule deer that frequented the area. "In this case," said the Court, "it would not have violated NEPA if the Forest Service, after complying with the Act's procedural requirements, had decided that the benefits to be derived from downhill skiing at Sandy Butte justified the issuance of a special use per-

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34. 42 U.S.C.A. § 4321 (1969).

35. Interview with Nicholas A. Robinson, Professor at Pace University School of Law (Apr. 1997).

36. See William H. Rodgers, Jr., *NEPA at Twenty: Mimickry and Recruitment in Environmental Law*, 20 ENVTL. L. 495 (1990).

mit, notwithstanding the loss of fifteen percent, fifty percent, or even one-hundred percent of the mule deer herd.”<sup>37</sup>

A high court content with the destruction of deer might be similarly content with the destruction of fish. But there is more to this tale than the obvious inference that the Supreme Court is careless about its own form-over-substance ruminations. The agencies and the lawyers that served them worked hard to make NEPA compatible in their ways. The cases brought to the Supreme Court were tactically and serially aligned to produce a law that became all process and no substance. The justices themselves are closely attuned to—indeed they are selected for—an ideology of judicial restraint that finds satisfaction in the superficialities of process. Legal academics have claimed that justice is process, and nothing else,<sup>38</sup> while the law business thrives on this bumper crop of legal motion.

NEPA has generated industries of impact assessment. But the process is so thoroughly neutral and so completely oblivious to result that those who resort to its use are not the protectors of the fish, but fish despoilers who say their rights were insufficiently weighed. Indeed, the one dam in the entire Northwest that has been mostly thoroughly studied under NEPA is not one of the fish-killers at Bonneville, or at Umatilla. It is on the Elwha River where the action challenged is not the deed that removed the better part of ten separate runs of these great fish from the face of the Earth. This hard and relentless process has come down on the proposal to *remove* the dams and *restore* the fish if that can be done.<sup>39</sup>

#### F. Exception: Law as Contingency

The Clean Water Act (CWA)<sup>40</sup> is considered one of the success stories of environmental law, but it has not been immune from the historical accidents that send law into empty orbits from which there is no escape. The CWA drew a distinction between “point

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37. *Robertson v. Methow Valley Citizen Council*, 490 U.S. 332, 350 (1989).

38. *See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

39. *Compare Oregon Natural Resources Council*, 15 *Damnable Dams* (1994) (discussing the region’s most destructive dams), *with* U.S. Department of Interior, National Park Service, *Elwha River Ecosystem Restoration Implementation* (Draft EIS April, 1996) (for the best studied dam) *and* Final Environmental Impact Statement (Nov. 1996).

40. FEDERAL WATER POLLUTION CONTROL ACT §§ 101-607, U.S.C. §§ 1251-1387 (1995) [hereinafter CWA].

sources" that were strongly regulated and "nonpoint sources" that were primarily overlooked. In the CWA's major rewrite of 1972, a few powerful interests—irrigators among them—succeeded in getting their particular conveyances of pollution excluded from the category of "point source."<sup>41</sup> The dam builders and dam operators followed a more circuitous route.

In 1973, Alan G. Kirk, then the Environmental Protection Agency's (EPA) Acting Assistant Administrator for Enforcement and General Counsel, wrote a letter announcing that dams were not "point sources."<sup>42</sup> He had fired the first round in a ten-year legal campaign that would confirm his conviction that dams should not be brought under the stringent supervision of the permit process.

It was difficult for the EPA to let the dams go free. The key to a legal understanding of a point source is that somebody is responsible, and that something can be done to avoid the damage. The dams were good candidates on this score. The formal definition of a point source includes any "pipe, ditch, channel, tunnel, conduit."<sup>43</sup> These dams were teeming with penstocks, pipes, channels, and ditches that brought unhappiness to the fish.<sup>44</sup> The law said that point sources must be responsible for the *addition* of pollutants to navigable waters. Gas bubble disease looked suspiciously like water passing over a structure where it takes on atmospheric gases that work their damage when added to the pools below. The EPA staffers knew in the 1970s that gas bubble disease was responsible for the largest fish kill in Missouri history: 421,000 fish. It happened below the Corps-built Harry S. Truman Dam on the Osage River. The EPA staffers were told that the Columbia River, the dams, if kept immune from law, would kill two million salmon and steelhead between 1976 and 2000.<sup>45</sup>

But the law overcame all of these troubling signs for dam owners. The environmental law experts for the Justice Depart-

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41. Presently exempted from the definition of "point source" are "agricultural stormwater discharges and return flows from irrigated agriculture." CWA § 502 (14), 33 U.S.C.A. § 1362(14) (1994). Some materials, including well injections in oil and gas operations, are exempted from the definition of "pollutant." *See id.* § 1362(6).

42. Quoted in Brief for Federal Appellant 35, *National Wildlife Federation v. Gorsuch*, U.S. Court of Appeals for the District of Columbia Circuit, June 1981.

43. CWA § 502(14), 33 U.S.C. § 1362(14).

44. *See supra* note 41, § 1362(14).

45. *See, e.g., National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).

ment argued<sup>46</sup> that the two million dams would represent a 28-fold increase in the number of facilities regulated. They said that the dams did not discharge anything, reasoning that navigable water cannot discharge pollutants into itself.<sup>47</sup> They declared that the pollution from these dams was a natural phenomenon.<sup>48</sup> They demanded that great deference be accorded to this expert agency—an agency that soon had several members of its executive team in prison or under investigation for corruption.<sup>49</sup>

Judge Patricia Wald wrote the judicial opinion that made these wishes come true.<sup>50</sup> The strongest environmentalist to sit on the D.C. Circuit in the last twenty years, Judge Wald wrote a beautiful essay on why courts should defer to the EPA. Her opinion is a famous monument in the history of environmental law, and its elegant expressions grace law school casebooks. But it did not help the fish. It did not help the Indians. Still, it was a fine and memorable legal moment.

In law, as in other human endeavors, there is frequently no turning back. The courts said that dams were *not* point sources. This triggered the contingency that soon became frozen into certainty. The prospect that dams are point sources will not be revisited. No informed lawyer today believes otherwise.

Those who think wistfully of these legal might-have-beens can renourish their regrets when they read the 1993 Snake River Salmon Recovery Plan. Found there are the generic fishway criteria that *might have been applied* and enforced against the dams.<sup>51</sup> These criteria include rules on elevation between the pools, water level differentials between adjacent weirs, fishway channel velocities, and debris conditions at ladder exits. Inspections by the Corps biologists show “out-of-criteria” conditions for the following percentages of inspections at the eight mainstream dams on the Columbia River: Bonneville, 65%; the Dalles, 30%; John Day, 33%; McNary, 41%; Ice Harbor 52%; Lower Monumental, 86%; Little Goose, 100%; and Lower Granite, 44%.<sup>52</sup> These gross violations *might have been avoided* by a permit. Fish will die in these condi-

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46. See *supra* text accompanying note 42.

47. See *Gorsuch*, 693 F.2d at 175.

48. See *id.* at 178.

49. See 3 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: PESTICIDE & TOXIC SUBSTANCES, § 7.2 at 532-33 (1988).

50. See *Gorsuch*, 693 F.2d at 175.

51. See Snake River Recovery Team, Recommendation Prepared for Peer Review XI-6 (Oct. 1993).

52. See *id.*, at XI-7 (weekly inspections by COE biologists in 1988).



tions. But we know with legal certitude that they will not die from the "addition" of "pollutants: from a "point source."

#### G. Pretense: Law as Pontification and Mythology

Environmental laws are filled with empty threat. Some of these are designed to be mere postulations. Others had emptiness thrust upon them. Law serves nicely as a source of moral pronouncement. It serves, too, as the resting place for the self-deceptions and hopes that accumulate in this written record of social ambition.

Congress made its most famous moral pronouncement in the Clean Water Act in 1972 when it said that all discharges into navigable waters shall cease by 1985.<sup>53</sup> The lawmakers meant by this not that all pollution shall cease by 1985 but that those deliberately dumping poisons into the water—that is, the point sources—would have thirteen years to stop.<sup>54</sup> Some courts read this "no discharge" pronouncement as an indication that less pollution should be preferred to more.<sup>55</sup>

But this form of mild accommodation is insufficient for the angry ideologies lightly trained in economics who now populate the federal appellate courts. It was to this constituency that Judge Patricia Wald spoke in her decision excusing the dams from their point-source burdens. Of the "no-discharge" goal, she explained that Congress thought it was unenforceable. It was not based on refined cost estimates. It was quite possibly "beyond the ability of the American people to absorb the cost."<sup>56</sup>

Congress frequently says that costs and benefits should be carefully weighed when saving the fish.<sup>57</sup> When Congress speaks, courts do not rush forth to brush aside the advise as morally bankrupt or ecologically unacceptable. Judge Wald's remarks are a small aside and long forgotten. But they serve as a reminder that the courts are the keepers of legal myths. They choose to tell us that subscribers to the myth of no-pollution must be exposed as

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53. See CWA § 101(a)(1), 33 U.S.C. § 1251(a)(1). ("It is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985"); John Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY L.Q.* 233 (1990).

54. See 1 WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW: AIR & WATER* § 1.3, at 19-21 (1986).

55. See *id.*

56. *Gorsuch*, 693 F.2d at 181.

57. William H. Rodgers, Jr., *Benefits, Costs, and Risks: Oversight of Health and Environmental Decisionmaking*, 4 *HARV. ENVTL. L. REV.* 191 (1980).

hypocrites. But the myth of cost-benefit analysis is a prerogative of Congress.

In another illustration, the CWA declares that the discharge of pollutants from sewage treatment plants shall achieve secondary treatment by July 1, 1977.<sup>58</sup> But raw sewage overflows make regular appearances without legal consequence if (as they frequently are) combined with stormwater. These are called combined stormwater overflow (CSO) events. This practice appeared to be legally vulnerable when the City of Portland received its discharge permit requiring that the city maintain water quality standards. It is not possible to have a CSO event without violating the water quality standard for fecal coliform.<sup>59</sup> But to the rescue came the judges, reviving a twenty-year-old technicality in the law, who announced that citizens could not enforce this obligation because it was a "water quality standard" and not an "effluent limitation."<sup>60</sup> This small product judicial sabotage may yet be overcome,<sup>61</sup> and the moment celebrated as a great environmental victory. But the loss is entirely self-inflicted and fully the product of a point of view that sheds no tears over empty law. Our legal system expends effort daily on a litany of occult methodology of no discernable benefit to the fish or the people who rely on them.

International environmental law is pathetically bereft of enforcement, but most law students do not know this when they study the famous *Trail Smelter*<sup>62</sup> case that announces the intuitively satisfying rule that states "must answer for environmental harm" to people of other nations caused by activities within the territories.<sup>63</sup> The *Trail Smelter* case, which went ahead in the 1930s and '40s, allowed recovery in an arbitration proceeding for damage to Washington residents from smelter fumes originating in Canada. But the practical problem is that forums to press

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58. See CWA § 301(b)(1)(A). The deadline was extended later to July 1988. PERCIVAL ET. AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY* 888 (2d ed., 1986).

59. *Northwest Environmental Advocates v. City of Portland*, 11 F.3d 900, 906-911 (9th Cir. 1993), *withdrawn and vacated on rehearing* 56 F.3d 979 (9th Cir. 1995).

60. *Id.*

61. See *id.*

62. *Trail Smelter (U.S. v. Can.)*, 3 R.I.A.A. 1911 (1941).

63. *U.S. v. Canada*, 3 U.N. Rep. Int. Arb. Awards 1911 (1941). Compare R. Pisillo-Mazzeschi, *Forms of International Responsibility for Environmental Harm*, in *INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM* 15 (F. Francioni & T. Scovazzi eds., 1991), *quoted in* L.D. GURUSWAMY, *SIR JEFFREY ORDER: A PROBLEM-ORIENTED COURSEBOOK* 332, 333 (West Publishing Co., 1994) *with Trail Smelter Arbitration (U.S. v. Can.)*, 3 R.I.A.A. 1911, 1963-81 (1941).

these claims are generally unavailable. Law students who believe what they read about the *Trail Smelter* case should go to the Colville Reservation, and travel by boat around Lake Roosevelt, where they will observe miles of curious black sand hugging the shoreline. These images represent the sludge discharges from the same smelter that was the subject of the pro-environmental rulings in the 1940s. Students will hear of the toxins slowly accumulating in the fish that were made permanent residents by the Grand Coulee Dam. These residues are the products of the smelter at Trail and of the pulp mill at Sellgard, B.C. that pour their wastes into the lake below from which there is no escape.

The Colville Tribe is a proud people. Their lawyers are second to none. They do not fear lawsuits. They know what is at stake. They understand what the law promises them. They are helpless, because this law exists only in the minds of reporters.

The last example of environmental law that is missing in practice on the Columbia River is section 303(d) of the CWA. Since 1972, this law has required states to identify so-called water quality limited segments—stream stretches where point source controls are insufficient to protect water quality.<sup>64</sup> These are streams ruined by the logging, mining, grazing, agriculture, irrigation and damming of which many studies speak.<sup>65</sup> The 1972 law anticipated that the listings would be followed by the development of state plans to limit the contributions of the responsible parties (called “total maximum daily loads”)<sup>66</sup> so that compliance could be achieved.

But none of this happened until the nullification was brought to a halt by a series of court orders in the early 1990s requiring the EPA to take over the listing duties.<sup>67</sup> Thus, while the offend-

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64. See 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR & WATER, § 4.18 at 281-85 (1986).

65. See, e.g., Independent Scientific Group, Return to the River: Restoration of Salmonid Fisheries in the Columbia River Ecosystem, *passim* (Sept. 10, 1996) (Development of an Alternative Conceptual Foundation and Review and Synthesis of Science Underlying the Columbia River Basin Fish & Wildlife Program); 1996 NRC Upstream Study; 1997 Study on Pacific Salmon & Their Ecosystems.

66. See Idaho Sportmen's Coalition v. Browner, 951 F. Supp. 962, 965 (W.D. Wash. Sept. 26, 1996).

67. See Rodgers, *supra* note 64, at 281-85; see also Idaho Sportsmen's Coalition v. Browner, 43 FRC 1289, 1996 WL 710883 (W.D. Wash. Sept. 26, 1996), (Dwyer J.) (taking up enforcement of TMDLs for the streams in Idaho; this case explains that Idaho submitted no water quality limited segment list to the EPA until 1989, seventeen years after enactment of the 1972 Amendments, and ten years after the statutory due date; in this case, the EPA is proposing a schedule to develop all necessary TMDLs by 2021, which an intervening industry group “Clean Water for Idaho,” chal-

ers merely stand by awaiting their legal fate, the waterbodies they destroy are placed upon a rapidly-growing casualty list. In 1993-94, the EPA had listed no more than 100 stream segments in the Northwest states; in early 1997, the numbers have ballooned to 2500-3000 streams in trouble.<sup>68</sup> The listing, of course, is but preparation for some distant day of legal reckoning, although many fear the fish will not be here to celebrate it.

There are many reasons why law does not happen. The fish do not understand these reasons. Only human satisfaction blinks on or shuts down when these laws come alive or go inert. Laws that do not deliver benefits directly to the fish do not deserve to be called environmental laws. They should be called pretended law.

## H. Marginization: Law as Scapegoat

### 1. Individually Identifiable Pinnipeds

No better example of environmental law gone bad, can be found than the six dense pages of the 1994 Marine Mammal Protection Act.<sup>69</sup> This law makes exceptions to the general protection of marine mammals. It invites a state to apply to the Secretary of Commerce to authorize "the intentional lethal taking" of "individually identifiable pinnipeds" that have a "significant negative impact" on certain salmonid fishery stocks.<sup>70</sup> The fisheries stocks protected are those that are endangered or threatened or those that "migrate through the Ballard Locks at Seattle, Washington."<sup>71</sup>

This law has all the trappings of modern environmental law. It includes particularized public notice and input requirements,<sup>72</sup> and scrapes of cost-benefit analysis. There must be a "detailed description of the problem of interaction and expected benefits of the taking."<sup>73</sup> This law also has a splendid advisory mechanism

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lenges as unreasonably hasty; the court disapproved this casual quarter-century allocated to development of the *tool* for compliance (which is not the same thing as compliance; it holds that the year 2021 was capricious as too slow, and remands for the choice of another date while recommending five years as reasonable).

68. See Chuck Clarke, Regional Administrator, EPA, Region X, "Can we integrate the ESA and the Clean Water Act?" Law Seminars International, Conference on the Endangered Species Act, Jan. 30-31, 1997 Bellevue, Wash.

69. 16 U.S.C. §§ 1361-1407 (1988).

70. *Id.*

71. *Id.* at § 120(b)(1).

72. Applications to take are to include "a means of identifying the individual pinniped or pinnipeds." *Id.* at § 120(b)(2).

73. *Id.*

that would satisfy the most demanding of political scientists. It establishes a Pinniped-Fishery Interaction Task Force that includes representation from every conceivable interest group including the Indian treaty tribes, conservation and fishing groups.<sup>74</sup>

This law expects the very best of science. It calls for scientific representation of the Task Force.<sup>75</sup> It specifies scientific factors to be written into the legal criteria; decisionmakers are to weigh "the extent to which such pinnipeds are causing undue injury or impact to, or imbalance with, other species in the ecosystem, including fish populations."<sup>76</sup> It requires the use of scientific methodology, including non-lethal alternatives, to be evaluated after implementation in accordance with the wise dictates of adaptive management.<sup>77</sup>

There is considerable biology bound up in this "nuisance pinniped" law. Much of it is inattentive to Darwin. The fish-run foremost in the minds of these lawmakers is the steelhead run that passes through the Corps-managed Ballard Locks that connect freshwater Lake Washington on the eastern side of Seattle with saltwater Puget Sound on the west. Historically, the Locks did not exist. Nor did the steelhead run now passing through it. No one knows precisely the pedigree of the fish, although suspicions have been raised by genetic tests showing traces of stocks originating in the McCloud River, California. This is where Livingston Stone established his first West Coast hatchery. The reason this law undertook to protect the fish that "migrate through the Ballard Locks" in Seattle is that these fish were thought to lack the biological significance that would justify listing and protection under the Endangered Species Act.

A second curious feature of this "nuisance pinniped" law is its focus on "individually identifiable pinnipeds" that were perceived to be making life difficult for the steelhead at the Locks. This bad-actor or deviancy theory may have some credence for humans trapped in unpromising environments.<sup>78</sup> But who could imagine that a predation strategy that worked for sea lion A would not be

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74. *See id.*

75. *See id.* at § 120(c)(2).

76. *Id.* at § 120(d)(3).

77. *See id.* at § 120(c)(5).

78. *See* ROBERT WRIGHT, *THE MORAL ANIMAL—WHY WE ARE THE WAY WE ARE: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* 222 (1994) (pointing out that Martin Daly and Margo Wilson have argued that the "short time horizons" for which criminals are famous may be an "adaptive response to the predictive information

immediately exploited by sea lion B if the opportunity arose? Who could presume that the cornering of steelhead was a specialized knowledge of a sea lion underworld? Only staffers and members of Congress who know nothing of Darwin, but who prefer to believe that pinniped extirpation is but a selective removal operation akin to taking a few criminals off the streets.

## 2. The Biology of Scapegoats

The strongest biology in this “nuisance pinniped” law is human behavior. It is also the least admirable. Since 1980, triggermen of one sort or another have shot 254 seals and sea lions in the waters of the Puget Sound.<sup>79</sup> We do not know but can only suspect that most of the damage was done not by honest fishermen but by poachers and vandals who find gratification in the pain they inflict. Only the 255th execution on this list was authorized by law, and the motivation for this act was not to punish a pinniped but to save the steelhead run that pass through the Ballard Locks.

It takes a highly selective thinker to believe that sea lion predation is the key to survival of the winter steelhead run at the Ballard Locks, which is the subject to the usual confounding forces that besiege all anadromous fish on land at sea. *See* Graphic 5,<sup>80</sup> “What Are the Influences on Decline of Winter Steelhead Run at the Ballard Locks?” But a scapegoat frequently emerges in human affairs because it fulfills precisely this purpose of selective focus, and of assigning blame and exacting retribution.<sup>81</sup> The scapegoat serves as an imagined solution to a real problem.

This brings the bad-actor theory of the “nuisance pinniped” law into better focus. The California sea lions that brought attention to the steelhead at the Ballard Locks were excellent scapegoats. They had recently arrived in the Puget Sound area—a legal by-product, some said, of the pro-pinniped sentiments bound up in the Marine Mammal Protection Act of 1970. They were na-

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about one's prospects for longevity and eventual success”), *citing* M. Daly & M. Wilson, *Homicide* (1988).

79. *See* data presented at Conference on Pacific Salmon & Their Ecosystems: Status and Future Options, Jan. 10-12, 1994.

80. Copy on file with Pace Environmental Law Review.

81. *See, e.g.,* MICHAEL SHERMER, *WHY PEOPLE BELIEVE WEIRD THINGS: PSEUDOSCIENCE, SUPERSTITION, AND OTHER CONFUSIONS OF OUR TIME* ch. 7 (1997) (“Epidemics of Accusations: Medieval and Modern Witch Craze”). Among the editorial for execution, *see* Don Hannula, *A Foul Wind of California Hypocrisy Over Sea Lions*, *SEATTLE TIMES*, March 28, 1996, at B4.

tive to California, which counts for two strikes in Washington. They were all male, another debit that made most of them biologically superfluous.<sup>82</sup> And they ate fish in plain view, which stripped them of the pretense of innocence enjoyed by other offenders who did their steelhead malefactions in the anonymity of the high seas. It was easy enough for public opinion to saddle these proven killers with rumors of wrongs unconfirmed. These sea lions, it was believed, preferred heads, not the fillets of the fish. These wanton connoisseurs were suspected of killing eight or ten instead of one fully consumed.

If the "nuisance pinniped" law was not designed to be a scapegoat law, it soon became one. These troublesome sea lions who gathered at the Ballard Locks were given a name—"Hershel" was the moniker. In the early days, "Hershel" was a generic name applied to several of the sea lions who enjoyed the steelhead diet available at the Locks. But one "Hershel" soon emerged as the leader of the Hershels. He secured his reputation in the winter of 1993-94 when observers blamed him for consuming 60% of the dwindling steelhead run. He was given a name—Hondo, No. 17 by a biologist and longtime Boston Celtics fan and admirer of a great player from an earlier era, John Havlicek. Like the Havlicek of old, sea lion No.17 overwhelmed the defense set before him. Stopping him became a personal thing.

Eventually, Hondo, No. 17, would take the blame for the decline in the Ballard Locks Winter Steelhead Run. He would be the 255th victim in the war against pinnipeds that is now being waged in the name of the salmon. But he would be given every legal chance. He would enjoy the finest due process environmental law has to offer. He would hear the best of science brought to bear on his case. He would be the beneficiary of an exacting exercise in adaptive management.

### 3. NEPA's Due Process

The National Environment Policy Act (NEPA) was one of the first laws brought to bear to Hondo's advantage. It required carefully assessing the effects and evaluating the alternatives before undertaking a major action such sea lion removal. The National Marine Fisheries Service (NMFS) wrote a meticulous and balanced document explaining why removing sea lions would help

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82. On animals "superfluous" to breeding, see COLIN TUDGE, *LAST ANIMALS AT THE ZOO: HOW MASS EXTINCTION CAN BE STOPPED* 1, 84 (1992).

the steelhead.<sup>83</sup> The NFMS sea lion predators, such as killer whales, sharks, and polar bears, into the Ballard Locks area of urban Seattle.

There is a multitude of problems with this measure. Besides the legal (Marine Mammal Protection Act and NEPA) and logistical problems with the capture and survival of the predators, it would not be feasible to keep such predators in the area. If they did stay, they would likely also prey on steelhead thereby exacerbating the predation problem. Large sharks, if they survived capture and transfer to the Locks, could jeopardize public safety. Given the problems with this measure, it does not warrant further consideration.<sup>84</sup>

The "hormonal injection" alternative, like the polar bear option mentioned above, was turned down, but in a reasoned and convincing way. This measure would involve stimulating the sea lions to begin their southward migration several months earlier by changing the sea lions' hormonal balance through the use of reproductive hormones. The hormones would alter the animal's physiological state, thereby stimulating the animal's preparation for the breeding season. Use of hormones on wild sea lions is untested and is uncertain whether it would result in the desired behavioral change, NMFS declared. This technique also could be combined with a relocation program whereby the sea lion's hormonal balance would be changed to increase the probability that the animal would migrate back to their breeding area in Southern California. Testing with captive animals would be necessary before this technique is applied to wild animals. This measure could also raise concerns in California due to the early return of sea lions.<sup>85</sup>

Hondo never lived to see the hormone experiment. He surely did not regret missing his opportunity to test the tolerance of Californians with an early and untimely return. Throughout his life, Hondo received ample due process from the fractious group of twenty-one people that NMFS convened as its Pinniped-Fishery Interaction Task Force. In the middle of this was Seattle District Engineer Colonel Tim Wynn, operator of the Ballard Locks, who endured the indignities of these proceedings with the weary resig-

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83. Compare National Marine Fisheries Service, Washington Department of Fish and Wildlife, Environmental Assessment on Protecting Winter-run Wild Steelhead from Predation by California Sea Lions ( Jan. 1995) [hereinafter 1995 SEA LION-STEELHEAD ASSESSMENT], *with id.* at 76.

84. See TUDGE at 75-76.

85. See *id.*



nation of a man born 100 years too late. Here was a figure temperamentally suited to ride the Palouse with Colonel George Wright and grapple with Indians like the ferocious Qulchen—a “tiger” of a man—it took six men to subdue.<sup>86</sup> Yet, here he was in the late twentieth century, presiding at the trial of a sea lion; and being assailed, no less, with sassy questions from environmentalists about the dysfunctions of the Corps’ own Locks and the failings of the fish ladders that had served as a model for the great engineering success at Bonneville.

#### 4. Adaptive Mismanagement

The NMFS staffers and their partners systematically rolled through the options that would save the fish and keep the sea lions alive. The sea lions defeated every strategy aimed their way. They strengthened the admiration of their defenders while they reinforced the resentments of their detractors. In the process, they gave us an excellent case study in how adaptive management can be applied adroitly to questions that never should have been asked (See Graphic 6,<sup>87</sup> “Adaptive Management and Sea Lions”).

With the problem defined as sea lions preying on steelhead at the Locks, adaptive management thus was let loose. The managers attempted to deter the sea lions with “seal bombs.” But the clever respondents learned to dive to depth when the missiles entered the water. All that resulted from the failed experiment was the sea lions returning to the surface and picking up the struggling fish “incidentally” stunned by the “seal bombs.”

The managers then sought to isolate the fish mingling at the mouth of the Locks with variously designed “entanglement nets.” These were brushed aside by various “over, under and through” strategies that required little exertion from these 500-800 pound marine acrobats. The managers also ran “test aversion” experiments with chemically contaminated steelhead. The sea lions quickly learned to reject the proffer of dead fish from people in yellow suits.

The managers introduced a ten-inch mesh “sea lion barrier” that would allow the steelhead to pass, but not the sea lions. Unfortunately the steelhead did not *know* about this advantage; no one could make them aware of it, so they shied away from the ten-

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86. See WILLIAM COMPTON BROWN, *THE INDIAN SIDE OF THE STORY* 292, 302 (1961).

87. Copy on file with Pace Environmental Law Review.

inch mesh as they might from a one-inch mesh. They were trapped there by the sea lions as efficiently as they could have been against a fine brick wall.

Increases in the degrees of violence made no difference. The managers turned to sea lion “anesthetics,” and killed a few. However, the managers soon learned that dose-response rates derived from bears do not apply to marine mammals on a weight-for-weight basis. They turned to trapping the sea lions, putting them in trucks, and removing them to the Pacific Coast, only to learn that the animals returned rapidly to the Ballard Locks. One of the returnees was Rapid Rudy, whose feats received immediate consideration for North American marine mammal speed records.

Next came a serious removal strategy. It was aimed, as all effective removals are, not at individually identifiable candidates but at those who could be found and captured. Six of the animals were trapped at the Locks, trucked to southern California in the face of objections under the Coastal Zone Management Act, and released some 2000 miles from the forbidden waters of Puget Sound. Even this sea lion version of the Oklahoma territory was not sufficiently distant. Three sea lions returned in a matter of months. Two disappeared. One compromised by taking up residence in the Columbia River.<sup>88</sup>

The sea lions at the Locks were attacked with “Bear Stingers” shot from crossbows. The sea lions met this strategy with hasty dives that created wicked ricochets as missiles glanced off the surface of the water. Lawyers, with recurring nightmares of wounded schoolchildren “incidentally” caught in the crossfire at the Locks, called off the campaign.

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88. Compare 1995 SEA-LION-STEELHEAD ASSESSMENT at 63 (“Of the thirty-seven sea lions captured between February 17, 1989 and April 19, 1989 and released on the outer coast, twenty-nine were subsequently observed back in Puget Sound in about fifteen days. Twelve of the returning animals were recaptured one or more times and were relocated each time to the outer Washington Coast;” of the six California sea lions marked and transported to southern California in 1990, return did not occur until thirty to forty-five days following release; in April of 1994, three sea lions were returned to the Channel Islands, never to be seen again; ed. a successful relocation program?), *with id.* at 65 (“relocation would not provide a total resolution to the problem”), and *id.* at 95 (explaining why the removal and transport of six “problem” sea lions in 1990 did not solve the predation problem: “this increase in predation was not due to replacement by new animals, it was because not all of the ‘problem’ sea lions that had been observed eating steelhead during the season were captured”). Thus the “best available science” is made to work: When the bad-actor hypothesis is contradicted by empirical evidence, the problem is redefined by expanding the definition of the bad actor.

Then came the 220 decibels of sound in the hearing range of the sea lions—truly painful to the ones not already deaf. But more painful yet to the managers was the sight of Hondo, returning to the scene. Although obviously distressed by the noise, he succeeded in defeating it by the simple tactic of staying in turbulent water.

### 5. Protective Custody

In the spring of 1995, Hondo was physically captured and detained for two months in a facility near Tacoma. To avoid imprinting, he had no human contact, a deprivation he did not noticeably regret. He was fed by remote control. The NMFS took pictures of him with mouth agape, beneath the chute of herring being refueled like a great tanker. He gained 120 pounds during captivity, and grew into what staffers describe as the most awesome sea lion they had ever seen. The literature speaks of monster California sea lions, weighing in at 800 to 900 pounds. Hondo tipped the scales at a svelte 1100 pounds.

Hondo had one jail break to his credit. He broke through the fence in a school yard and added to his legend with a forceful display of defiance. Hondo fought for his life and freedom tirelessly and with great tenacity. He deserves to be admired.

### 6. Life Without Parole

The adaptive management options ran out for Hondo in the spring of 1996 with the steelhead at an all-time low and official patience nearly expired. The state got its permit to kill five of these “identifiable” pinnipeds. But nobody shot Hondo. This is the age of win-win compromise. Even vindictive judgments are cautiously executed.

So Hondo was captured once again, together with Bob and Big Frank. He was placed aboard a Federal Express cargo jet for a new home at Sea World of Florida in Orlando. A Sea World manager said this was a lovely spot: “It has a large body of water and rock work the animals can haul out on and there is a wave generating machine.”<sup>89</sup>

Removal is always a better strategy than murder. It is cleaner, every bit as effective, and history takes responsibility. Oregon’s first Governor, Joseph Lane, knew this when he pushed

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89. Darrell Glover, *See You at Sea World: Sea lions jet to new home today*, SEATTLE POST-INTELLIGENCER, May 29 1996, at B1.

for removing the Indians from the Willamette Valley. The fish authorities knew this when they won their small removal victory at the Ballard Locks.

Within a year, Hondo was dead at Sea World, unsustained even by the wave machine. But he had the best of care. No scientist could say that he died for want of freedom. And he certainly did not die in vain. The fish mangers already see signs of recovery in the Ballard steelhead run,<sup>90</sup> although the reasons for improvement remain unknown. It might have been the underwater transmitters, or a fake plastic orca brought into the area, or the removals, but fish passage at the Locks is no longer exploited by opportunistic sea lions. Many see this as validation of the "bad actor" sea lion theory.

This "Hershel Law" is no ancient and misshapen thing. It is no dead hand of past that constrains the better judgments of contemporaries. It is thoroughly modern—in its focus on symptoms, in its substitution of technique for judgment, in its service to the darker instincts that blame-fixing requires.

#### IV. Conclusion

Reading the geology of environmental law is not an easy task. Truths can be hidden, buried, accreted over, and twisted under. Illusions can be pushed to the surface, strengthened by transformation, and revealed by accident, but the process is run by lawyers. There is always room for their self-deceptions and rationalizations. However, there is room, too, for their creative rushes and constructive innovations.

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90. See Dee Norton, *Fewer Sea Lions Mean More Trout at Locks*, SEATTLE TIMES, Feb. 18, 1997, at B1; see also Scott Sunde, *Steelhead Run Looks Good at the Locks*, SEATTLE POST-INTELLIGENCER, Feb. 17, 1997, at B1.

## Attachment 1. Strategies for Defeating Environmental Laws

<i>Neglect.</i>	The practice of agencies to disregard or ignore laws or regulations that promise no contemporary advantage.
<i>Diversion.</i>	The tendency of lawmakers to create islands of specialty that are immune from generally applicable laws and operate independently of customary oversight mechanism.
<i>Acquisition and Sale.</i>	The practice of agencies to trade legal advantage for an asset that is valued more highly or is susceptible to characterization as affording sufficient restitution for the loss.
<i>Abandonment.</i>	The practice of agencies to relinquish enforcement of laws shown by experience to be excessively costly in terms of resource allocation, political retaliation, or staff or public disaffection.
<i>Process Transformation.</i>	The tendency of courts and agencies to read environmental laws as prescribing decision processes rather than outcomes. This practice is fed by win-win ideologies and slows adaptive legislation responses that would ensue if clear winners were identified.
<i>Exception.</i>	The exclusion of a particular regime from a generally applicable law. Occasions for exception are greatly enhanced by incremental, duplicitous, and fractured lawmaking that multiplies the legal margins where choice of inclusion and exclusion are made.
<i>Pretense.</i>	The practice of lawmakers to announce goals, profess principles and proclaim outcomes that are without adequate means of implementation.
<i>Marginalization.</i>	The practice of lawmakers to focus on symptoms rather than causes and to prescribe elaborate legal regimes for addressing the symptoms.