

**Forgotten Paths to NEPA: A Historical Analysis
of the Early Environmental Law
in the 1960s United States¹**
(忘れられた国家環境政策法への道程：
1960年代アメリカ合衆国における
初期環境法の歴史的考察)

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SUMMARY IN JAPANESE: 本論の目的は、アメリカ合衆国(以下「アメリカ」と略す)における初期環境法について、1960年代という時代的文脈のなかにおいて考察するものである。一般的にアメリカ環境法が生まれたのは1970年であり、1970年代が『環境の時代』である、という認識が定着している。また、1960年代と環境問題を結びつける数少ない論考においても、レイチェル・カーソンの『沈黙の春』(1962)から一足飛びに1970年の国家環境政策法(NEPA)やアースデイに議論が飛躍する傾向が見られる。しかし、実情はより複雑である。そこで、第二次世界大戦後のアメリカにおいて、経済的豊かさや社会的運動や事件、さらには法制度など多様な要因が絡まるようにして、環境法が生まれてきたことを、本論では整理していく。

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“I now teach and write about ppb and manure management. We never thought thirty seven years ago [in 1970] that we would be involved in an environmental law that has matured, become hybrid in strategy, be so technical—and perhaps for many less exciting. Perhaps the technical nature of domestic law explains in some part the growing interest in international environmental law. . . . I am not an historian, but I am a relic of environmental law, or put more kindly, a source of oral history about this law.”²

I

The purpose of this paper is to locate the emergence of environmental law in the United States within the historical context of the 1960s and beyond. It is important to do so because many believe that federal regulation of environmental quality did not exist prior to 1970. “U.S. environmental policy prior to 1970 included over seven decades of experience in managing the environment as a natural resource base, but almost none in the regulation of environmental quality,” leading environmental policy analyst Richard Andrews points out. “Federal management of public lands and waters was well established, as was the federal role in funding major public infrastructure. . . . In contrast, federal authority to protect public health, safety, and environmental quality was limited.”³

This paper will first set the historical context of post-WWII American society, and secondly sort out the legal factors by examining how law professors have discussed the historical emergence of environmental laws. After trying to relate the legal factors with other broader socio-cultural factors, the paper will conclude that various environment-related events, issues, and factors in the 1960s contributed to the birth of environmental law. Indeed, there is a long-standing journalistic tendency to locate environmentalism’s beginning with the publication of *Silent Spring* and with Earth Day but to see nothing between 1962 and 1970. Although a limited number of works counter this tendency stressing its longer term roots, they fail to examine the relationship between socio-cultural events in the 1960s and the early emergence of environmental law.

II

The year 1970 has been widely considered as a great watershed in the history of the United States as well as of environmentalism. The year was marked by a variety of important events, including the National Environmental Policy Act (NEPA),⁴ the birth of academic programs focused on bringing interdisciplinary knowledge to national needs (e.g. the Social Ecology Program at the University of California, Irvine), and the first Earth Day,⁵ just to name a few. Indeed, many consider the 1970s as the environmental decade and the year 1970 as the great beginning.

However, many questions remain unanswered. For instance, while NEPA is now considered to be the most sweeping environmental law ever passed by the United States Congress, as A. Clay Schoenfeld points out, nearly every major U.S. newspaper at the time failed to report the passage of the act. Why was there such media inattention?⁶

Another question is: what prompted the dramatic transformation from public inattention to hyper attention? In fact, then as well as now, many wondered how and why such historical changes occurred. For example, as early as 1970, Barry Commoner commented that the “swift” emergence of environmental problems “astonished” most of the American public:

The sudden public concern with the environment has taken many people by surprise. After all, garbage, foul air, putrid water, and mindless noise are nothing new; the sights, smells, and sounds of pollution have become an accustomed burden of life. To be sure, the mess has worsened and spread in the last decade, but not at a rate to match the dramatic, nearly universal reaction to it that has hit the country in the past year.⁷

While pollution clearly demanded action, Commoner argued, it was not so clear how the environmental issues and movement came about.

Not only social commentators but also legal scholars noticed a sudden change in historical currents. For instance, Richard Lazarus, a law professor at Georgetown University, looks back to 1970 and comments that in “a relative blink of an eye for the lawmaking process in most moments of history, the legal landscape transformed completely.” While a few isolated states were making some efforts and common law property and tort doctrines were invoked on behalf of environmen-

tal concerns, he argues, “prior to 1970, environmental protection law in the United States was essentially nonexistent . . . there was nothing even remotely resembling a comprehensive legal regime for regulating pollution of the air, water, or land.” Lazarus sees no historical precedence in the 1960s:

There was no national clean air legislation, no federal clean water act program, no hazardous waste or toxic substance laws. There was not even a federal environmental protection agency prior to the 1970s (and virtually no state agency analogues). The federal pollution control authorities that did exist were greatly fragmented amongst several agencies, and they possessed relatively weak statutory powers, much of which consisted of little more than providing financial and technical assistance to state and local governments.⁸

In theory, Lazarus continues, environmental law should never have happened, partly because politicians gain little by enacting laws that ask people to pay for benefits they may not experience. In addition, there was a high probability that environmental law might contribute to economic decline.⁹

Meanwhile, a few historians of the 1960s have recently come to lament the fact that people have not thus far done enough to place this seemingly abrupt emergence of environmentalism in the context of the times. While the historical work on the 1960s generally trivializes the environmental movement, the literature on environmentalism ignores the political, social, and cultural history of the sixties. For instance, Adam Rome, a historian at Pennsylvania State University, points out that some “histories of the decade fail even to mention Rachel Carson’s *Silent Spring*—a best seller in 1962.” He attributes the reason to the historians’ framework of analysis. The concerns of the New Left, Rome argues, have determined the basic framework of analysis for most historians of the sixties:

Although scholars have begun to incorporate the rise of the New Left into the narrative of the period, the issues that preoccupied the decade’s radicals still receive the most space. Because relatively few new leftists cared about the environment until 1969 or 1970, the literature on the sixties overlooks the growing concern about environmental issues before then.¹⁰

He concludes that “No history of the sixties considers in detail what the environ-

mental movement shared with the antiwar movement, the civil rights movement, or the feminist movement.”¹¹

However, there are a few exceptional attempts to integrate environmentalism into the story of the 1960s. Yet the works typify the above stated problem because they emphasize that environmentalism “stood out as a legacy of the reform spirit of the 1960s” but devote only a handful, out of nearly 800 pages, to environmental issues. There is then a missing link between the 1960s and environmentalism, which is the subject of inquiry of this short article.¹² Our attempt is to locate the emergence of environmental law as an academic field within the context of the 1960s and ultimately with broader historical currents.

While there have been a limited number of such inquiries, there is some speculation on the question of how dramatic transformation came about. For example, Lazarus looks into the judicial factors in explaining the emergence of environmental law in the latter half of the 1960s.¹³ Another legal scholar, Joseph L. Sax of the University of California at Berkeley, speculates with the following three legal factors: inadequacy of the common law, lack of judicial oversight, and the disparity of “standing.”¹⁴ When Sax began his legal career at the University of Colorado Law School in 1962 where he taught water, mining, oil and gas law, they were all private law subjects. In other words, as the following pages will make clear, they concerned the property rights and contractual relationships of those involved with the relevant resource. And those who sought to protect natural resources had little access to the courts. This so-called “standing disparity” initiated his pursuit of public trust doctrine in the 1960s: placing limits on the private use of certain public natural resources.¹⁵

III

It was during the preceding decade, the 1950s, when the Cold War, the dawn of the nuclear era, and the Sputnik-initiated space age pushed science and technology to the forefront of public policy. But popular protests over fallout from atomic-bomb tests combined with outrage over the destruction of wildlife by pesticide poisoning, and a growing awareness of an exploding worldwide population, sparked a major environmental movement in the 1960s. These historical trends ultimately helped give birth to the new academic field of environmental law.

Environmental historians have argued that the post-war era marked a major shift from “conservation” to “environmentalism.”¹⁶ For example, after 1960, Roderick Nash points out, old-style utilitarian or resource-oriented conservation decreased in importance relative to environmental quality. In the United States the focus expanded to include not only scenic and recreational amenities but also the health of the habitat. As an indicator of this change, the term conservation lost favor to environmentalism. Along with environmentalism, “ecology” became a household word. Few could define it correctly as the study of the interrelationships between organisms and their environment, but many associated it with “sacred” connotations.¹⁷

Why the elevation of environment and/or ecology to sacred status in American thought? According to Nash, one dynamic was the broad questioning of traditional ideals and priorities known as the “counterculture.” If traditional Americanism stressed growth, competition, and affluence, the new one emphasized stability, community, and simplicity.¹⁸

Another force was fear. It was not the pre-WWII fear of running out of useful resources that had inspired the utilitarian conservationists of the Progressive and New Deal eras of the early twentieth century. Neither was it the fear of making the world ugly that played a major role in aesthetic conservation, preservation, and the early calls for environmental quality. The new fear developed from an understanding of ecology.¹⁹

Critical understanding was initiated by one revolutionary work. Rachel Carson published *Silent Spring* and the contemporary environmental movement exploded. Carson eloquently narrated a warning:

There was a strange stillness. The birds, for example—where had they gone? Many people spoke of them, puzzled and disturbed. The feeding stations in the backyards were deserted. The few birds seen anywhere were moribund; they trembled violently and could not fly. It was a spring without voices. On the mornings that had once throbbed with the dawn chorus of robins, catbirds, doves, jays, wrens, and scores of other bird voices there was now no sound; only silence lay over the fields and woods and marsh.²⁰

Carson graphically described the transformation of life after the introduction of radioactive fallout from atomic-bomb testing and as a result of the widespread use of pesticides such as DDT, totally new to biologic experience:

The rapidity of change and the speed with which new situations are created follow the impetuous and heedless pace of man rather than the deliberate pace of nature. Radiation is no longer merely the background radiation of rocks, the bombardment of cosmic rays, the ultraviolet of the sun that have existed before there was any life on earth; radiation is now the unnatural creation of man's tampering with the atom. The chemicals to which life is asked to make its adjustment are no longer merely the calcium and silica and copper and all the rest of the minerals washed out of the rocks and carried in rivers to the sea; they are the synthetic creations of man's inventive mind, brewed in his laboratories, and having no counterparts in nature.²¹

In the following year, President John F. Kennedy helped to alert Americans to the environmental crisis through his persuasive introduction to Stewart Udall's important book *The Quiet Crisis*:

The history of America is, more than that of most nations, the history of man confronted by nature. Our story has been peculiarly the story of man and the land, man and the forests, man and the plains, man and water, man and resources. It has been the story of rich and varied natural heritage shaping American institutions and American values; and it has been equally the story of Americans seizing, using, squandering and, belatedly, protecting and developing that heritage. In telling this story and giving this central theme of American history its proper emphasis and dignity, Secretary [of the Interior Stewart] Udall puts us all in his debt.²²

Kennedy's assessment pointed to declining environmental standards and stressed the need for an expansion of the concept of conservation to meet the crisis:

The modern American record in conservation has been brilliant and distinguished. It has inspired comparable efforts all around the earth. But it came just in time in our own land. And, as Mr. Udall's vivid narrative makes clear, the race between education and erosion, between wisdom and waste, has not run its course. . . . The crisis may be quiet, but it is urgent. We must do in our own day what Theodore Roosevelt did sixty years ago and Franklin Roosevelt thirty years ago: we must expand the concept of conservation to meet the imperious problems of the new age. We must develop new instru-

ments of foresight and protection and nurture in order to recover the relationship between man and nature and to make sure that the national estate we pass on to our multiplying descendants is green and flourishing.²³

Furthermore, examining the way a series of news media events, capturing the attention of the American public in the 1960s, played out can partially explain the dramatic transformation which led to the birth of environmental law. They ultimately culminated in the enactment of NEPA in January 1970 as well as the first Earth Day three months later. Certainly to be included in those triggering events are, Lazarus argues, the above mentioned publication of Carson's *Silent Spring*, the "burning" of the Cuyahoga River in Ohio, and the 1969 Santa Barbara oil spill off the California coast, all subjects of considerable news coverage.²⁴

The heavily polluted Cuyahoga River in Cleveland, Ohio, caught fire on June 22, 1969. While this river had historically caught fire many times since at least 1868, few had paid any attention partly because rivers, canals, and harbors in various places in the United States, including Buffalo, Baltimore, Houston, and Detroit, also regularly caught fire. Furthermore, when the fires were covered in the newspapers, as media historian Mark Neuzil points out, "the news frame was not one of a dirty river, but inadequate fire protection services." The lunch time blaze in 1969 was treated as routine by the authorities and local media. The Cleveland fire chief was not called, and the regular crew had the fire under control in less than half an hour. Photographers from the Cleveland Plain Dealer and the Cleveland Press arrived after the fire was out. After all, there was no loss of life or injuries. That might as well have been the end of the news coverage.²⁵

A month later, however, *Time* magazine ran a story on the fire. With a photo from a 1952 fire, it declared "Some river! Chocolate-brown, oily, bubbling with subsurface gases, it oozes rather than flows."²⁶ Another national publication, *National Geographic*, matched the story from *Time* in a news frame with earlier reporting about pollution in Lake Erie, into which the Cuyahoga River fed, as well as other national environmental news of the day, particularly the January oil spill near Santa Barbara, California.²⁷ Only weeks before the fire, as Neuzil points out, Congress had debated the National Environmental Policy Act and politicians were in the middle of a debate over what would become the Clean Water Act. "In sum, a coalescence of interests created media attention where little had existed before. In this instance, the media played a critical role in setting the tempo at which policy formation took place."²⁸

Many credit the 1969 Santa Barbara oil spill with igniting the environmental movement. Over eleven days, 200,000 gallons of crude oil spilled into the channel from a disabled oil rig. In the aftermath, 3,600 birds were dead along with ten seals and dolphins and countless fish and marine invertebrates. Critics pointed to the inadequacy of federal regulations and focused on a government unresponsive to the needs of nature. A local activist environmental law organization quickly formed: Get Oil Out (GOO). The founder called for the public to reduce its driving, to destroy credit cards from oil companies, and to boycott gas stations associated with offshore drilling companies. Some 100,000 signatures were gathered for a petition to ban offshore oil drilling.

In response to these warnings, during the 1960s and 1970s, numerous environmental laws were passed. They regulated pesticides, set standards for clean air and water, preserved wilderness, marine mammals, and endangered species, and established procedures for waste disposal. One of the most sweeping of the new laws, NEPA, was signed into law on New Year's Day 1970 by President Richard Nixon.

Although the preamble sets out goals designed to ensure a safe, healthful environment, NEPA's most significant requirement is the mandating of an environmental impact statement (EIS) for every proposed major federal action that would significantly affect the quality of the human environment. Duplicated by state legislatures throughout the country, these procedures and reports have altered or mitigated many proposed local and federal development projects. With a new recognition of a threatening population bomb, urbanization, industrial expansion, resource exploitation, and technological advances, the environmental movement was born and ultimately the field of environmental law was given birth.

IV

How do law professors examine the historical emergence of environmental laws? "Law schools' professional presentism . . . impedes historical analysis," argues a former U.S. Supreme Court Fellow, Karl Brooks, now associate professor of history at the University of Kansas. He adds, "Employed to teach (usually) the law as it is or (occasionally) might be, but rarely the law as it came to be, legal academics privileged the contemporary at the expense of the historic." Brooks

cites John-Mark Stensvaag's law textbook which reads "In 1969, scarcely anyone perceived that a separate body of law even existed" and thus "a law school course in the subject of environmental law would have been most unusual."²⁹

It was this type of "unusual" course that was first taught in 1969 by then University of Michigan Law School professor Joseph Sax. Looking back at the year when environmental law was in its infancy, Sax recalls, "there was at least one thing that everyone understood." That was the fact that "the traditional common law remedies were utterly inadequate to deal with contemporary environmental problems, and a whole new body of law—indeed a new conception of law—was needed."³⁰

Here he lists the three legal factors which led to the emergence of environmental law. The first problem was the inadequacy of tort, one of the common law principles. While environmental threats had to be addressed prior to their doing harm, tort law dealt with after-the-fact remediation of harm. Sax argues that such hazards as pesticides threatened public resources like wildlife populations, while actions such as private nuisance and trespass protected private property rights. Also, while pollution was caused by many actors over many decades, tort remedies demanded proof of causation. This prevailing attitude toward private property rights was indeed a substantial obstacle to environmental progress. That was why he sought ways to solve the problems by initiating environmental law teaching at Michigan.³¹

The second problem was the inadequacy of judicial oversight to ensure both legislative and executive branches complied with environmental demands. For example, the United States Army Corps of Engineers or the Bureau of Reclamation had caused many of the environmental problems that needed to be addressed. They included over-building of massive dams and water-conveyance systems without considering the ecologically negative effects. Meanwhile, existing regulatory laws lacked substance. For instance, as Sax lists, "pesticides were regulated only for the accuracy of their labels. Automobile emissions were uncontrolled. Public lands were dominantly given over to industrial activities such as mining, cattle grazing, and timber harvesting." He also points to the problem of urban transportation cutting through parks and residences as the cheapest way to meet increased demand.³²

Last but not least, Sax saw the most significant problem in a legal system which further victimized an already victimized public who were threatened "with long-term health risks from hazardous air emissions, polluted rivers, and leaking

waste dumps, and with the diminution of biological diversity, and destruction of recreational opportunities.” They were blocked from taking any legal actions themselves because “(unlike the polluters) they had no conventional legal interests such as a property or contract right that the law was accustomed to protecting.” Sax provides a couple of examples:

To assert a legal interest in protecting the survival of the peregrine falcon or the grizzly bear was to be seen as a busybody. To complain about contamination was to be dismissed as a scientific naïf. And if by some near miracle one did get a foothold in a court or an administrative proceeding, the response was a tidal wave of motions, objections, depositions, and all other legal techniques of the war-of-attrition.³³

The urgent need to take a preventive stance as to environmental hazards, the need to equip the public agencies to do the work, and the difficulties and costs of obtaining information were the three major obstacles that helped to initiate “far-reaching and fundamental legal reform,” concludes Sax, which “led to the enactment of the National Environmental Policy Act.” “The notion that ordinary citizens could go to court,” he continues, “even though they did not have ownership of the resources they were trying to protect, was embodied in a variety of so-called citizen suit provisions.”³⁴

Indeed, Sax had a huge influence on the law. His writing has been cited by the Supreme Court nine times, by federal appellate courts seven times, and by thirty state supreme courts. His scholarship not only identified the obstacles to environmental protection law but also historical common law traditions to be used to address these concerns. Furthermore, he participated in the meetings that led to the creation of the Environmental Law Institute, the launch of the *Environmental Law Reporter*, and the legislative proposal that would eventually become NEPA in 1969. Thus, in short, Sax was said to have helped launch the “environmental decade.” The task of environmental law scholars today, Lazarus of the Georgetown Law Center urged, is to safeguard the legal architecture that legal scholar Sax’s work helped inspire.

In response to the above stated problems, the judicial branch played a critical role in solving them. The courts had indeed a crucial function and acted in collaboration with or sometimes independent of Congress. According to Lazarus, many judges viewed environmental lawsuits as akin to the civil rights suits:

. . . proper occasions for heightened judicial attention on behalf of societal concerns likely to be given short shrift in the democratic process. Those judges, accordingly, sought to relax “standing” barriers that might otherwise restrict judicial access for environmental citizen suits. They sought to apply more exacting standards of judicial review to ensure that environmental concerns were not ignored by executive and legislative branch policymakers. In addition, they frequently read more into the meaning of the statutes than many lawmakers likely had specifically contemplated when voting in favor of their passage.³⁵

The courts issued many sweeping pro environment opinions. In so doing, they resurrected the Rivers and Harbors Act of 1899, transforming it into a modern tool for pollution control. For example, the Standard Oil Company was indicted for discharging 100-octane aviation gasoline into navigable waters, St. Johns River, in violation of the proscription in Section 13 of the Rivers and Harbors Act against discharge therein of “any refuse matter of any kind or description.” The District Court dismissed the indictment on the ground that “refuse matter” does not include commercially valuable material. In *United States v. Standard Oil Co.*, the Supreme Court concluded that the discharge of commercially valuable gasoline into navigable waters is encompassed by Section 13 of the Act:³⁶

- (a) Petroleum products, whether useable or not, when discharged into navigable waters constitute a menace to navigation and pollute rivers and harbors.³⁷
- (b) The Rivers and Harbors Act of 1899 was a consolidation of prior acts which enumerated various pollutants and impediments to navigation, drawing no distinction between valuable and valueless substances; the term “refuse matter” in the present Act is a shorthand substitute for the exhaustive list of substances found in the earlier Acts.³⁸
- (c) The word “refuse” includes all foreign substances and pollutants except, as provided in 13, those “flowing from streets and sewers and passing therefrom in a liquid state” into the watercourse.³⁹

The courts also created out of a single sentence of NEPA a judicially enforceable strict procedural requirement that has transformed governmental decision making

affecting the natural environment. They also seized upon incidental statutory preamble language of the Clean Air Act to justify a comprehensive program for the prevention of significant deterioration of air quality. The courts likewise read long overlooked statutory terms in the Forest Service Organic Act of 1897 to conclude that most clearcutting of national forests was unlawful, thereby prodding Congress to enact comprehensive and far more environmentally favorable national forest management legislation. These judicial rulings also had the practical effect of providing the environmental community with political leverage, argues Lazarus.⁴⁰

However, many environmentally minded groups were frustrated because they were “unable to move the system, to make it respond, to force environmental protection,” as co-founder of the Environmental Defense Fund (EDF) Charles Wurster pointed out.⁴¹ A groundswell was building in response to Rachel Carson’s writing, augmented by public revulsion at the calamities of the 1960s. Thus, it was natural that, in 1967, three scientists living on Long Island and a fourth in Michigan, who were as alarmed as Carson had been by the effects of DDT on wildlife, conceived of a new way to put these concerns into motion. They formed EDF, joined with an attorney, and became the first group to take scientific evidence into the courts to achieve environmental goals. With support from the Ford Foundation through National Audubon’s Rachel Carson Memorial Fund, EDF’s founders brought case after case seeking to replace DDT with pest control methods less dangerous to wildlife. Before they were through, their efforts would lead to the nationwide banning of DDT and to the first established precedents of environmental law.⁴²

In addition, there were early inroads for the federal framework. They included laws governing transportation and historical preservation. Section 4(f) of the 1966 Department of Transportation Act declared a national policy that special effort should be made to preserve the environment. Section 4(f) covered land consisting in part, of publicly owned parks, recreational areas, wildlife and waterfowl refuges, and all historic sites:

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public parks and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretar-

ies of the Interior, Housing and Urban Development, and Agriculture, and with the states in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed.⁴³

It continues, “After August 1968, the secretary (of transportation) could not approve any program or project that required the use of affected publicly owned lands ‘unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm.’” Two years later, the Federal Aid Highway Act of 1968 declared again a national policy of preservation of natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.⁴⁴

Examining these legal precedents, one may conclude that the term “environmental law” was recent but that very little new law existed in this new field. Between 10 and 11 September 1969, for instance, over seventy-five practicing lawyers, law professors, conservation-groups, and law-makers gathered in Warrenton, Virginia, for a two-day conference on law and environment. This “Airlie House” conference did not assume environmental law as a newcomer and most of its participants presumed the field already existed, Brooks argues. “None of the law faculty defined an environmental law problem that needed their solution as the absence of law to be taught and analyzed,” Brooks concludes, “By the dawn of the ‘environmental decade,’ citizen litigants and their attorneys had already realized courts’ potential to halt both public and private projects that threatened environmental quality.”⁴⁵

That law is for lawyers, however, is a popular misconception. Admitting the important historical role the judicial branch and legal professionals played, as legal historian William Hurst argues, law was a product of society not simply of lawyers. Explaining how and why American environmental law emerged in the postwar years, as Brooks argues, encourages J. Willard Hurst’s fundamental explanatory principle: “a genuine history of law must interpret the civic, commercial, and cultural life of the people who made the law to be used.” Thus, the following pages will sort out the process of law entering a period of rapid change, as the beneficiary of growing public interest.⁴⁶

V

Public concern, during the 1940s, about the techno-military effects fused with those of organized nature-preservation groups and with more general public demand for outdoor recreation to form a mass movement of great strength and political diversity. The simultaneous revolutions in atomic energy and organic chemical technologies were first welcomed as “modern” benefits, but then they ignited an unparalleled backlash of public outrage against their risks to ecological processes, living species, and human health. Therefore, by the end of the 1960s, a diverse range of constituencies representing previously separate aspects of environmental protection—such as pollution abatement, radiation and pesticide control, nature preservation, and protection of national parks and other areas of natural beauty—coalesced into a broad movement demanding changes in both the substance and the process of environmental policy.

The postwar years were a time of unprecedented expansion of industrial production, mass consumption, and suburbanization, and the rise of general affluence. In turn, these forces produced powerful and conflicting political pressures, as demand rose both for material goods and for environmental amenities threatened by their production. On the one hand, both military and consumer demand reinforced the economic power and political influence of the resource extraction, manufacturing, and construction industries. On the other hand, their expansionary success galvanized opposition from a public that now sought to enjoy environmental amenities as well as consumer products.⁴⁷

This conflict intensified with the concurrent rise of several separate sets of political forces which ultimately converged into the broader alliance of the modern environmental movement. One force was the revitalization and political mobilization of the landscape preservation groups, most notably the Sierra Club but also the National Audubon Society, the Izaak Walton League, and others. A second force was the emergence of a far broader mass demand for outdoor recreation and tourism, and of specific economic interest groups. They were the American Automobile Association, recreational vehicle equipment manufacturers and outfitters, and park concessionaires, among others. A third force was the increasing influence of booming suburban governments, which sought federal financial assistance to pay the rapidly rising costs of infrastructure to serve urban revitalization and suburban growth, including roads, schools, housing, water and sewer services, public transportation, and other needs. To these forces were soon

added others, particularly a new public outrage at industrial pollution and toxic and radioactive contamination. All of these forces would ultimately come together, when an unprecedented nationwide mass movement coalesced and demanded federal leadership to protect the environment.⁴⁸

The “environmental era” started within the context of a broader and deeper unrest in American society. The values and attitudes that lay behind environmental problems also produced social discontent and international disorder. Environmentalism of the 1960s, as Nash argues, must be seen as drawing part of its force from a more general cultural questioning. Indeed, it was a time for conversion and diversion in public values.⁴⁹

For example, Commoner draws the connections between the environmental movement and other troubling issues of the 1960s such as war, racial inequality, and poverty. At the University of Michigan, the largest environmental teach-in took place from the 11th to the 14th of March, 1970 attended by 15,000 students; it attracted divergent elements of American society. Michigan Governor William Milliken and a number of municipal, state, and federal officials were present. Speakers included scientists from the fields of biology, ecology, engineering, sociology, urban analysis, and public health. Industry was represented by officials from Detroit Edison, Ford, and Dow Chemical; and labor was represented by the United Automobile Workers. Commoner observes that the teach-in epitomized the convergence around the environmental issue of a number of earlier, separate concerns. Environmental quality touched all the following separate facets of the crisis of American society:

. . . conservation, scientists’ responsibility for the social consequences of science and technology, the consumer movement, the young generation’s concern for a more humane life-style, businessman’s worries about the impact on industrial profits, the problem of the ghetto and urban decay, the antiwar movement, and student activism against the nation’s social and economic system.⁵⁰

Why did students on American campuses support environmental action? One very popular view was that student interest in the environment was “apolitical” and that, as P. R. Janssen summarizes, “the new eco-activists cut across old traditional social and political lines, bringing together such strange barricade-fellows as short-haired athletes and long-maned hippies, the reactionary right and

the revolutionary left.”⁵¹ This comforting view implies that ecology was truly an issue which could unite the nation, bringing together those who had been bitterly divided on the issues of civil rights and Vietnam.

However, some did not share this view. For example, those on the right tended to view the environmental movement as dominated by “radicals” who had simply taken up a new cause. April 22, Earth Day, was also Lenin’s birthday and this prompted some to argue that leading environmentalists were attempting to make the Green Revolution part of the Red Revolution. At the other end of the political spectrum, the Left viewed the government-endorsed Earth Day with suspicion, seeing it as an attempt to draw attention away from Indochina, racism, poverty and other social problems. In short, there were a number of conflicting images of the basis of the campus environmental movement.⁵²

The 1960s has often been portrayed as a time of social protest and upheaval, a time when things fell apart. This was a time of questioning and confrontation. New issues and movements crowded the national agenda: the demand for civil rights, the youth rebellion, and resurgent feminism, among many. Why did these demands for political and social change occur when they did? Historians have argued that demographic and cultural shifts were partly responsible. In the late 1960s, Christopher Sellers argues, “environmentalist’s suddenly became a political shibboleth.” He continues, “By the first Earth Day in 1970, it included all those concerned with the preservation of the environment (from pollution, etc.), from those manning new or expanding regulatory agencies, to those driving the proliferation of local and national ‘environmental’ groups, to those voicing worry about threats from ‘pollution, etc.’ in their own backyards.”⁵³

Examining the convergence of divergent forces crystallizing in environmentalism, many ask why the ambitious agendas for social change proposed in this period were never fully realized. Explanations are complex but one is clear; even at the height of the protest movements, the people demanding changes in American society were always outnumbered by those who preferred the status quo. It can be argued that all the protest movements shared their roots in structural and demographic changes and shifting cultural values. And these protest movements followed a similar pattern of progression. At first, efforts centered on the political and judicial front. Early successes led to heightened expectations, but the next stage—changing people’s attitudes and winning social and economic justice—proved more difficult. They ultimately produced a backlash from those who thought change had gone far enough, though not before lasting alterations had been

made in American society.

Thus, the 1960s was not only a confrontational and divisive decade but also conservatism and the sense of status quo. In other words, some see the sixties as a radical time but others counter it as fairly middle-of-the-road. Indeed, the historiography of the decade follows this framework of reference. For example, Rome argues, instead of characterizing the decade as a radical era, scholars have begun to write about the period as a polarized decade when the nation divided along ideological lines. Yet, he continues, the history of the environmental movement suggests that America in the 1960s did not just divide into Left and Right. “Though some grass-roots activists were liberal Democrats or fiery young radicals, others were Republicans. . . . In many respects the environmental movement was part of the Left—in others, however, it had more in common with conservatism.”⁵⁴

It is understandable that environmentalists were often attacked as a privileged class seeking to defend their privilege while the environmental movement challenged the rights of property owners and the prerogatives of corporate management. Though liberal Democrats argued for environmental protection throughout the 1960s, the cause attracted Republicans, including Nelson Rockefeller, too. Environmentalist and antiwar activists often shared a sense of what was wrong with the nation, yet the environmental movement had a more ambiguous relationship to the other major reform efforts of the period. Though environmentalists sometimes argued for the “right” to a beautiful and healthy environment, the movement was scorned by many civil rights leaders. Few environmentalists in the 1960s spoke with passion about the problem a later generation would call “environmental justice.”⁵⁵

This essay has argued that the year 1970, when not only NEPA and the first Earth Day but also other environmentally important events occurred, needs to be understood in relation to the foregoing decade. These events stemmed not from the sudden concerns about pollution and other environmental problems as many made us believe, but from broader historical trends of the 1960s. This essay, then, looks beyond 1970 to consider the wider assemblage of events that emerged during the preceding period. When situated within the broader context of environmental history and politics, the once seemingly fragmented events of the 1960s can be conceived as indeed related to each other.

Chronology

Food and Drug Act, 1960 (Color Additive Amendment), 21 U.S.C. S376(b)(5)(B)

Multiple Use-Sustained Yield Act of 1960

World Wildlife Fund, 1961

Water Pollution Control Act Amendments, 87th Cong., 1st Sess., 1961

Rachel Carson, *Silent Spring*, 1962

Clean Air Act of 1963

Lynton Caldwell, "Environment," *Public Administration Review* 22 (1963): 132-39.

Wilderness Act of 1964

In re Pacific Northwest Power Company/Washington Public Power Supply System, 31 FPC. 247, rehearing denied, 31 FPC. 1951 (1964), affirmed as *Washington Public Power Supply System v. Federal Power Commission*, 358 F.2d 840 (D.C. Cir. 1966), affirmed in part and revised in part as *Udall v. Federal Power Commission*, 387 U.S. 428 (1967)

Land and Water Conservation Fund Act of 1965

Water Quality Control Act of 1965

Noise Control Act of 1965

Solid Waste Disposal Act of 1965

Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (2d Cir. 1965), cert. Denied, 384 U.S. 941 (1966)

Department of Transportation Act of 1966

Land and Water Conservation Act of 1966

National Historic Preservation Act of 1966

U.S. Supreme Court, *United States v. Standard Oil Co.*, 384 U.S. 224 (1966)

Office of Communication of United Church of Christ v. Federal Communications Commission, 359 F.2d 994 (D.C. Cir. 1966)

Environmental Defense Fund, 1967

Lynn White, "Historical roots of our ecological crisis," *Science* 155 (1967): 1203-07.

National Wild and Scenic Rivers System, 1968

Federal Aid Highway Act of 1968

Paul Ehrlich, *The Population Bomb*, 1968

National Trails System Act of 1968

Santa Barbara Oil Spill, 1969

National Environmental Policy Act of 1969, 42 U.S.C., Chapter 55

Federal Coal Mine Health and Safety Act of 1969

Citizens Committee for the *Hudson Valley v. Volpe*, 302 F. Supp. 1083 (S.D.N.Y. 1969), affirmed, 425 F.2d 97 (2d Cir. 1970)

Friends of the Earth, 1969

Environmental Protection Agency, 1970

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Earth Day, 1970

Clean Air Act of 1970

Natural Resources Defense Council, 1970

Notes

- 1 This paper is a revised and combined version of two papers: Joseph DiMento, "Environmental Law: Its Roots, the 1960s, in the USA and . . ." Sophia University (November, 2007) and Kazuto Oshio, "Environmental Law Schools: A Japan/US Comparison" American Society of Environmental History, Annual Conference (13 March 2010), and financially supported by both the Grants-in-Aid for Scientific Research Basic Research (A) Project, "Comprehensive Studies on the Cultural Transformation and Border-transgression of the 1960s United States," (Daizaburo Yui, 2007-2010) and a grant from the Institute of American and Canadian Studies, Sophia University.
- 2 DiMento, "Environmental Law."
- 3 Richard Andrews, *Managing the Environment, Managing Ourselves* (New Haven: Yale University Press, 1999), 227.
- 4 The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. Pub. Law No. 91-190, 83 Stat. 852 (1970) codified at 42 U.S.C. Section 4331 (1982). See also Linda Luther, *The National Environmental Policy Act (NEPA): Background and Implementation* (Washington, D.C.: Congressional Research Service, 2008).
- 5 The first Earth Day was attended by approximately twenty million Americans. Described as the largest protest in the United States, Finis Dunaway argues it "signaled the emergence of a new form of environmentalism, one that emphasized the dynamic connections between human society and the natural world." While scholars have frequently noted the importance of Earth Day in popularizing the environmental message and establishing a legislative agenda for the new decade, he goes on to state, "they have tended to ignore the larger symbolic meaning of the event." Finis Dunaway "Gas Masks, Pogo, and the Ecological Indian: Earth Day and the Visual Politics of American Environmentalism," *American Quarterly*, 60 (1980): 67.
- 6 A. Clay Schoenfeld "The Press and NEPA: The Case of the Missing Agenda," *Journalism Quarterly*, 56 (1979): 577-87. "NEPA set a national policy of protection of environmental resources. Not fully understood at the time of its enactment, it was to cause an unparalleled change in decision-

- making in the federal government. It required that agencies use a systematic interdisciplinary approach to environmental planning and evaluation in decision-making that might have an impact on the environment. For major federal actions significantly affecting the quality of the human environment an Environmental Impact Statement (EIS) was mandated. State versions of NEPA followed and both sets of laws covered many actions by the government, including of energy and highway agencies.” DiMento, “Environmental Law.”
- 7 Barry Commoner, “Beyond the Teach-In,” *Saturday Review*, 53 (1970): 50.
 - 8 Richard Lazarus, “The Greening of America and the Graying of Environmental Law,” *Virginia Environmental Law*, 20 (2001): 76-77.
 - 9 Richard Lazarus, “The Making of Environmental Law,” paper presented at Woodrow Wilson Center, 28 September 2004.
 - 10 Rome lists the following works on the decade as those giving little or no attention to environmental issues: Howard Brick, *Age of Contradiction: American Thoughts and Culture in the 1960s* (New York: Twayne of Macmillan, 1998); David Burner, *Making Peace with the 60s* (Princeton: Princeton University Press, 1996); Dominick Cavallo, *A Fiction of the Past: The Sixties in American History* (New York: St. Martin’s, 1999); David Chalmers, *And the Crooked Places Made Straight: The Struggle for Social Change in the 1960s* (Baltimore: The Johns Hopkins University Press, 1996); David Farber, *The Age of Great Dreams: America in the 1960s* (New York: Hill and Wang, 1994); Todd Gitlin, *The Sixties: Years of Hope, Days of Rage* (New York: Bantam Books, 1987); Maurice Isserman and Michael Kazin, *America Divided: The Civil War of the 1960s* (New York: Oxford University Press, 2000); and David Steigerwald, *The Sixties and the End of Modern America* (New York: St. Martin’s, 1995).
 - 11 Adam Rome, “‘Give Earth a Chance’,” *Journal of American History* 90 (2003): 525-26.
 - 12 Rome, “‘Give Earth a Chance’,” 526. According to Rome, they include: Terry H. Anderson, *The Movement and the Sixties* (New York: Oxford University Press, 1995); Edward P. Morgan, *The 60s Experience: Hard Lessons about Modern America* (Philadelphia: Temple University Press, 1991); and James T. Patterson, *Grand Expectations: The United States, 1945-1974* (New York: Oxford University Press, 1996).
 - 13 Lazarus, “The Greening of America and the Graying of Environmental Law,” 79-82.
 - 14 Joseph L. Sax, “Preface” *Creative Common Law Strategies for Protecting the Environment*, ed. Clifford Rechtschaffen and Denise Antolini (Washington, D.C.: Environmental Law Institute, 2007), xvii-xviii.
 - 15 Citizens’ right to be heard before government agencies transformed the natural world was secured by a landmark 1965 federal court ruling, *Scenic Hudson Preservation Conference v. FPC. Brooks, Karl B., Before Earth Day: The Origins of American Environmental Law, 1945-1970* (Lawrence: University of Kansas Press, 2009), 149.
 - 16 Samuel P. Hays and Robert Gottlieb tell us much about environmentalism’s origins in earlier movements for conservation and urban and factory reform of the late 19th century and early 20th century. These works, Sellers argues, “as well as Thomas Dunlap’s more focused history of DDT, seek the roots of ‘environmentalism’ by tracing back into the past those concerns about particular

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issues that we accept today as environmentalist.” Their search for continuities tends to skim over the more recent and rapid process by which “environmentalist” acquired its modern meaning, as a cluster of long-simmering but disparate issues suddenly coalesced into an “environmental” framework and political agenda. Christopher Sellers “Body, Place and the State: The Making of an ‘Environmental’ Imaginary in the Post-World War II U.S.,” *Radical History Review*, 74 (1999): 32; Samuel P. Hays, *Beauty, Health and Permanence: Environmental Politics in the United States, 1955-1985* (Cambridge: Cambridge University Press, 1987); Robert Gottlieb, *Forcing the Spring: The Transformation of the American Environmental Movement* (Washington D.C.: Island Press, 1993); and Thomas Dunlap, *DDT: Scientists, Citizens and Public Policy* (Princeton: Princeton University Press, 1982).

- 17 Nash, *American Environmentalism*, 187.
- 18 Ibid.
- 19 Ibid., 188.
- 20 Rachel L. Carson, *Silent Spring* (Boston: Houghton Mifflin, 1962), 2.
- 21 Ibid, 7.
- 22 John Kennedy, “Introduction,” in Steward Udall, *The Quiet Crisis* (Avon Books, 1963), xi-xiii, quoted in Nash, *American Environmentalism*, 192.
- 23 Ibid.
- 24 Lazarus, “The Greening of America and the Graying of Environmental Law,” 79.
- 25 Mark Neuzil, *The Environment and the Press: From Adventure Writing to Advocacy* (Evanston, IL: Northwestern University Press, 2008), 192-93.
- 26 “The Cities: The Price of Optimism,” *Time*, 1 August 1969, 41.
- 27 “Sad, Soiled Waters: The Cuyahoga River and Lake Erie,” *National Geographic*, December 1970, 743-44.
- 28 Neuzil, 194-95.
- 29 Brooks, 9, n.22.
- 30 Sax “Preface,” xvii.
- 31 Ibid.
- 32 Ibid. DiMento argues that “Central to the city outcome was the convergence, before and relatively early in the evolution of environmental and preservation law and policy, of the city planning goals of ‘slum clearance’ and redevelopment (later, urban renewal), on the one hand, and the transportation goals of eliminating congestion and improving vehicle mobility, on the other.” Joseph F. C. DiMento, “Stent (or Dagger?) in the Hearth of Town: Urban Freeways in Syracuse, 1944-1967,” *Journal of Planning History*, 8 (2009): 133.
- 33 Sax, xviii.
- 34 Ibid.
- 35 Lazarus, “The Greenings of American and the Graying of Environmental Law,” 80.
- 36 384 U.S. 224 (1966), 225-30.
- 37 384 U.S. 224 (1966), 226.
- 38 384 U.S. 224 (1966), 226-29.

- 39 384 U.S. 224 (1966), 230.
- 40 Lazarus, "Human Nature, the Laws of Nature, and the Nature of Environmental Law."
- 41 Some of the above mentioned frustration had to do with the newness of such legal action. For example, environmental plaintiffs initially spoke of what they were doing as "ecological jurisprudence." But in the course of their first trial, one of the opposing lawyers complained to the judge that he did not know where to look up precedents for the plaintiffs' cause of action in the legal literature. In many instances, plaintiffs themselves were effectively blocked from taking any actions. Sellers "Body, Place and the State," 55.
- 42 The EDF essentially consisted of the core group within the Bookhaven Town Natural Resources Committee who had been involved in the trial, Christopher Sellers points out. It included: the Yannocanones; Wurster; a handful of other scientists; a publicity officer from nearby Brookhaven National Laboratory; a state game official; one other lawyer; and Arthur Cooley, the high school biology teacher who had orchestrated the meetings of the BTNRC. Interestingly Sellers points out that "[a]bsent at these founding meetings were the black as well as white high school students whom Cooley had recruited into BTNRC activities, as well as the housewives who had actively participated, with the exception of 'Recording Secretary' Carol Yannacone." In short, he is critical of the nature of "almost uniformly white, male, and well-to-do . . . [which] reversed the sense of frustration that the founders remembered from their days with the BTNRC." Sellers "Body, Place and the State," 55. See also, *The Birth of Environmentalism* by Robert Taylor.
- 43 Joseph F. C. DiMento, "Stent (or Dagger?) in the Heart of Town," 139.
- 44 Ibid.
- 45 Brooks, 182-84.
- 46 Ibid., 11, 183-84; J. Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* (Cambridge: Harvard University Press, 1964); Robert W. Gordon, "J. Willard Hurst and the Common Law Tradition in American Legal Historiography" *Law and Society*, 10 (1975): 9-55.
- 47 Andrews, 199.
- 48 Ibid.
- 49 Nash, 206.
- 50 Commoner, 51, quoted in Nash, 208.
- 51 P. R. Janssen, "The Age of Ecology," *Ecotactics: The Sierra Club Handbook for Environmental Activists*, ed. J.G. Mitchell and C. L. Stallings (New York: Pocket Books, 1970), 53-54.
- 52 For research on student major concerns in the late 1960s and the early 1970s, see Riley E. Dunlap and Richard P. Gale, "Politics and Ecology: A Political Profile of Student Eco-Activists" *Youth and Society*, 2 (June 1972): 379-97; and Bayer and Dutton, "Trends in Attitudes on Political Social, and Collegiate Issues Among College Students: Mid 1960s to Mid 1970s," *Journal of Higher Education* (March-April 1976): 159-71.
- 53 Sellers "Body, Place and the State," 31.
- 54 Rome, 553. The following works see the sixties as a decade of polarization: Leo Ribuffo, "Why Is There So Much Conservatism in the United States and Why Do So Few Historians Know Anything about It?" *American Historical Review*, 99 (1994) and Rebecca Klatch, *A Generation Divided: The*

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New Left, the New Right, and the 1960s (Berkeley: University of California Press, 1999).
55 Rome, 553-54.

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