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Clear The Air: The Road Taken: A Reflection on Michael C. Blumm & William Warnock's Roads Not Taken: EPA vs. Clean Water

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CLEAR THE AIR

The Road Taken: A Reflection on Michael C. Blumm & William Warnock's *Roads Not Taken: EPA vs. Clean Water*, by Clifford J. Villa*

Dear Editorial Staff,

As a fan of *Environmental Law* and the federal Clean Water Act,¹ it was with great interest that I received the symposium issue, *The Clean Water Act Turns 30: Celebrating Its Past, Predicting Its Future*.² Unfortunately, in the articles that followed, celebrating and predicting appeared mighty scarce.³ To be sure, there is much cause for celebrating the gains in water quality since the modern Clean Water Act was passed in 1972.⁴ To be equally sure, the Clean Water Act has fallen short of the lofty goals that Congress originally set for it.⁵ Seeing only the failure,⁶ however, Michael C. Blumm

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¹ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2000).

² 33 ENVTL. L. 27 (2003).

³ For a true—if virtual—celebration of the Clean Water Act, see U.S. ENVTL. PROT. AGENCY, 2002–2003: THE YEAR OF CLEAN WATER, at <http://www.epa.gov/water/yearofcleanwater> (last visited July 11, 2004) (containing links to documents such as the presidential proclamation of 2002–2003 as the “Year of Clean Water” and a list of celebratory events across the country).

⁴ See OLIVER A. HOUCK, THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY, AND IMPLEMENTATION 3 (1999) (noting that the technology standards of the 1972 amendments to the Clean Water Act clearly worked). Professor Houck states that “[i]ndustrial pollution plummeted; rates of wetland loss slowed, and in some regions even reversed; and municipal loadings . . . dropped by nearly 50 percent while their populations served were doubling in size.” *Id.* (citations omitted). See also *id.* at 7 n.6 (citing statistics of dramatic reduction in water pollution, including a drop of direct toxic discharges from 417 to 197 million pounds per year just between 1987 and 1990).

⁵ Among other aspirations, the Clean Water Act set a “national goal that the discharge of pollutants into the navigable waters be eliminated by 1985,” and that water quality provide for the “protection and propagation of fish, shellfish, and wildlife and . . . for recreation in and on the water . . . by July 1, 1983.” 33 U.S.C. § 1251(a)(1)–(2) (2000).

⁶ See HOUCK, *supra* note 4, at 4 (attributing the lack of clean water to water pollution sources across the country, including clearcuts, chickens, dairy farms, and subdivision

and William Warnock set out to pin the blame on one agency with their symposium contribution *Roads Not Taken: EPA vs. Clean Water*.⁷ This Letter is not offered as a full response to Blumm and Warnock. Backed by the editors of *Environmental Law*,⁸ the authors may be trusted with their summaries of cases and points of fact. Rather, this Letter reflects on some of the unsupported conclusions of Blumm and Warnock that may detract, in my opinion, from what I take as the common goal of achieving clean water.

EPA vs. Clean Water presents case studies of the ostensible failure of the United States Environmental Protection Agency (EPA) to implement the Clean Water Act in three principal areas: water quality impacts from dam operations,⁹ state water quality certification for nonpoint source discharges,¹⁰ and antidegradation requirements for nonpoint sources.¹¹ As an EPA attorney, I have had no involvement with any of those areas of the Clean Water Act, and cannot comment usefully upon the facts or policies underlying the three case studies.¹² However, as an interested reader, I noticed that the authors admit EPA was not even involved in the state certification case.¹³ In that case, environmental groups sued the United States Forest Service (Forest Service), alleging the Forest Service violated the Clean Water Act by failing to obtain water quality certification from the state of Oregon before issuing federal grazing permits. Despite these alleged failures by the Forest Service and perhaps the state of Oregon, the authors point the finger at EPA. In their own words: "We maintain that EPA, expressly entrusted by Congress with the administration of the Clean Water Act, 33 U.S.C. § 1251(d), bears responsibility for allowing the Forest Service's interpretation to become the government interpretation put before the courts."¹⁴

It is here where *EPA vs. Clean Water* may fall farthest from reality, failing to recognize the autonomy of federal entities and the constant struggles among them.¹⁵ From a law student, this assertion might indicate a

developments; and noting that fertilizers and other wastes entering the Mississippi hundreds of miles away caused a die-off of marine life in the Gulf of Mexico).

⁷ Michael C. Blumm & William Warnock, *Roads Not Taken: EPA vs. Clean Water*, 33 ENVTL. L. 79 (2003). One of the stated purposes of Blumm and Warnock's article is to prove that the "Clean Water Act has been unable to achieve [its] ambitious goals . . . in some significant part because EPA has chosen not to try." *Id.* at 81.

⁸ The present author served as a member and Articles Editor for these esteemed pages from 1991 to 1993.

⁹ Blumm & Warnock, *supra* note 7, at 83-94 (discussing Nat'l Wildlife Fed'n v. Gorsuch, 530 F. Supp. 1291 (D.D.C. 1982), *rev'd* 693 F.2d 156 (D.C. Cir. 1982), and related cases).

¹⁰ *Id.* at 94-104 (discussing Or. Natural Desert Ass'n v. Dombeck, 940 F. Supp. 1534 (D. Or. 1996), *rev'd* 172 F.3d 1092 (9th Cir. 1998), and related cases).

¹¹ *Id.* at 104-09 (discussing Am. Wildlands v. Browner, 260 F.3d 1192 (10th Cir. 2001)).

¹² Most of my practice for EPA has involved the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675 (2000), better known as Superfund. For a summary of major CERCLA efforts over the last several years, see Clifford J. Villa, *Superfund vs. Mega-Sites: The Coeur d'Alene River Basin Story*, 28 COLUM. J. ENVTL. L. 255 (2003).

¹³ Blumm & Warnock, *supra* note 7, at 95.

¹⁴ *Id.* at n.97.

¹⁵ If other federal agencies simply acquiesced in EPA's interpretation of environmental laws

dire need for a federal externship. From the distinguished Professor Blumm, however, it is quite another matter. For a quarter century, Professor Blumm's students have been privileged with his lectures and office hours,¹⁶ and his vigorous pen upon our floundering student papers.¹⁷ Over this same time period, legions of scholars and other readers of Professor Blumm's prodigious writings have come to recognize his "truly monumental body of scholarship."¹⁸ So how then should we account for the errant fingerpointing of *EPA vs. Clean Water*?

Hints appear in the introduction where Blumm and Warnock cast their article within a "project" of storytelling.¹⁹ Given two stories involving EPA, they tuck in one other, and fashion a common antagonist to tie the three together. Unable to supply any happy endings, they strive at least to avoid despair. They therefore share their "hope . . . that one day Congress" will provide some unstated legislative fix.²⁰ Or, better yet, one day we will find a superhero, "a 21st century Secretary Udall,"²¹ to lead EPA to the light and reverse three decades of Clean Water Act policy and case law.

To succeed in this mission, their superhero must wield amazing powers. In the earthly realm, however, the limitations of the U.S. Constitution, federal statutes, local rules, case law, regulations, administrative authority, political will, media scrutiny, community concerns, technical feasibility, time, resources, and other factors must be considered. As an EPA attorney, my enforcement options against private parties are typically constrained by the limits of applicable statutes,²² in addition to the facts of the case and the concerns of my agency clients. My options concerning other federal agencies are further checked by additional constraints including sovereign immunity

such as the Clean Water Act, one might expect greater compliance and less contention than traditionally noted, and no need for legal authority and a designated office within EPA to ensure federal facility compliance. See generally Steven A. Herman, *Environmental Cleanup and Compliance at Federal Facilities: An EPA Perspective*, 24 ENVTL. L. 1097, 1100, 1103, 1105 (1994) (discussing the Federal Facility Compliance Act of 1992, 42 U.S.C. §§ 6908, 6939c-6939e, 6965 (2000), EPA's Federal Facilities Enforcement Office, and the role of EPA in federal facility enforcement, cleanup, and compliance assistance).

¹⁶ Among other bits of shared wisdom, Professor Blumm suggested I apply for my first legal internship with the federal Bonneville Power Administration and encouraged me to accept EPA's offer of an attorney position following graduation.

¹⁷ Among the countless student papers rescued by Professor Blumm over the years was one of my own, eventually selected for publication. Clifford J. Villa, *California Dreaming: Water Transfers from the Pacific Northwest*, 23 ENVTL. L. 997 (1993).

¹⁸ See, e.g., Geoffrey Wandesforde-Smith, *Of Crude Tools, Paddle Brooms, and Tempting Mules With Stones: Blumm's Sacrificing the Salmon*, 33 ENVTL. L. 483, 484 (2003) (book review in praise of Professor Blumm's scholarship including SACRIFICING THE SALMON: A LEGAL AND POLICY HISTORY OF THE DECLINE OF THE COLUMBIA BASIN SALMON (2002)).

¹⁹ Blumm & Warnock, *supra* note 7, at 81.

²⁰ *Id.* at 83.

²¹ *Id.* at 111.

²² For example, under the Beville Amendment to the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6921(b)(3)(A) (2000), mining wastes are largely excluded from the requirements for managing hazardous wastes. Similarly, under CERCLA's "petroleum exclusion," releases of petroleum and natural gas are largely excluded from the definition of "hazardous substances" which may give rise to liability for response. 42 U.S.C. § 9601(14) (2000).

doctrine²³ and “unitary executive theory.”²⁴ The existence of agency constraints is surely familiar to Professor Blumm, who intimates his own inability to influence water policy when he was, way back when, an EPA attorney.²⁵

If as staff attorneys neither I nor the young Mike Blumm could reach Blumm’s desired outcomes on the Clean Water Act, is there any level at EPA that could? Surprisingly, Professor Blumm provides proof suggesting there is not. Recounting the recollections of Fred Hansen, the authors indicate that not even the Deputy Administrator of EPA could prevail in policy specifically concerning the federal grazing permit case.²⁶ If not the Deputy, could the EPA Administrator prevail? Alas, even at the very top of the Agency hierarchy, mere mortals still might be kept from calling the shots.²⁷

While Blumm and Warnock await their Clean Water Crusader, concerned readers might seek more modest assistance from the present ranks of EPA. Deep within the EPA Regional offices in Chicago and Seattle, out in the EPA field offices from El Paso to Anchorage, or even in Portland, Oregon, they may yet find a *bodhisattva* for the benthic community. Forgoing nirvana, she will likely be laboring in the seemingly mundane: revising discharge permits, inspecting outfalls, evaluating populations of mayfly larvae, issuing orders to restore filled wetlands, developing load allocations for nonpoint sources, and building administrative records to withstand industry challenge. Keep in mind that she may be working for clean water outside the Clean Water Act as well. You may find her, for example, exercising Superfund removal authority²⁸ at remote mine sites to

²³ Arising, perhaps erroneously, from the English common law maxim that “the king can do no wrong,” the sovereign immunity doctrine provides that the government cannot be sued without its consent. *See, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 170–71 (1996) (Souter, J., dissenting) (discussing the history of the sovereign immunity doctrine). Courts in the United States have applied this notion to require that any waiver of sovereign immunity be “unequivocal” and “construed strictly in favor of the sovereign.” *U.S. Dep’t of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (denying power of states to impose punitive civil fines against federal agency for past violations of the Clean Water Act). For an excellent discussion of sovereign immunity specifically in the Clean Water Act context, see Rebecca Heintz, *Federal Sovereign Immunity and Clean Water: A Supreme Misstep*, 24 ENVTL. L. 263 (1994).

²⁴ Arising from the Article II executive authorities of the president and the Article III “case or controversy” requirement for the federal judiciary, the “unitary executive theory” provides that one arm of the executive branch cannot use the federal courts to sue another arm of the executive branch. For further analysis, see Chris M. Amantea & Stephen C. Jones, *The Growth of Environmental Issues in Government Contracting*, 43 AM. U. L. REV. 1585, 1603–05 (1994). Thus, EPA cannot sue other federal departments or agencies in U.S. district courts to enforce compliance with statutes such as the Clean Water Act, although EPA can and does file enforcement actions against other federal entities in its own administrative courts.

²⁵ *See* Blumm & Warnock, *supra* note 7, at 86 (referring to EPA’s disinclination to engage in “turf wars” over control of federal dams).

²⁶ *See id.* at 95 n.97.

²⁷ *See, e.g.,* Greg Easterbrook, *Hostile Environment*, N.Y. TIMES MAG., Aug. 19, 2001, at 40 (noting that former EPA Administrator Christie Todd Whitman faced “embarrassments” over administration decisions on greenhouse gases).

²⁸ Superfund removal actions are typically timely and discrete actions to prevent or reduce exposures to hazardous substances. *See* 42 U.S.C. § 9601(23) (2000) (defining “removal”). CERCLA generally limits EPA funding for removal actions to \$2 million or 12 months in

stop the release of metals into salmon-bearing streams.²⁹ You may find her using Superfund remedial authority³⁰ to leverage millions of dollars for investigation and cleanup of contaminated sediments, helping to restore industrial waterways such as Portland Harbor,³¹ Commencement Bay,³² and broad watersheds such as the Hudson River³³ and Coeur d'Alene Basin.³⁴

As long as people have flaws, government employees and government agencies will too. And yet, as unsatisfying as it may be to look for heroes among "bureaucrats," history has shown they may be found.³⁵ The pantheon

duration. *See id.* § 9604(c)(1).

²⁹ *See, e.g.*, Memorandum from U.S. EPA Region 10 On-Scene Coordinators to the Acting Director of U.S. EPA Region 10 Environmental Cleanup Office (Sept. 13, 1999) (on file with Environmental Law) (authorizing EPA removal action to prevent piles of mine tailings, containing high levels of lead, from further eroding into the Similkameen River near Nighthawk, Washington).

³⁰ Superfund remedial actions typically require more investigation and cleanup efforts than removals, thus with greater costs. *See* 42 U.S.C. § 9601(24) (defining "remedial action"). Remedial actions are usually associated with sites designated by EPA on the National Priorities List (NPL). *See* 40 C.F.R. § 300.425(b)(1) (2003) ("Only those releases included on the NPL shall be considered eligible for Fund-financed remedial action.").

³¹ Because Portland Harbor was contaminated by a variety of sources with a variety of hazardous substances including mercury, pesticides, and polychlorinated biphenyls (PCBs), EPA added it to the NPL in December 2000. *See* REGION 10, U.S. ENVTL. PROT. AGENCY, PORTLAND HARBOR 1 (2000) (publicizing the addition of Portland Harbor to the NPL), *available at* [http://yosemite.epa.gov/R10/CLEANUP.NSF/ph/fact+sheets/\\$FILE/1200porthar.pdf](http://yosemite.epa.gov/R10/CLEANUP.NSF/ph/fact+sheets/$FILE/1200porthar.pdf). The Harbor is currently undergoing site investigation funded by potentially responsible parties. REGION 10, U.S. ENVTL. PROT. AGENCY, PORTLAND HARBOR: SUPERFUND FACT SHEET 1 (2002), *available at* [http://yosemite.epa.gov/R10/CLEANUP.NSF/ph/fact+sheets/\\$FILE/portlandharbor20020219FS.pdf](http://yosemite.epa.gov/R10/CLEANUP.NSF/ph/fact+sheets/$FILE/portlandharbor20020219FS.pdf). For further site information, including fact sheets, agreements, and technical documents, see the EPA Region 10 website for Portland Harbor, *at* <http://yosemite.epa.gov/R10/CLEANUP.NSF/webpage/Portland+Harbor,+Oregon> (last visited July 11, 2004).

³² EPA included Commencement Bay, within a heavy industrial zone of Tacoma, Washington, in the original list of NPL sites in 1983. Commencement Bay has been impacted by contaminants from over 500 identified point sources and nonpoint sources. REGION 10, U.S. ENVTL. PROT. AGENCY, COMMENCEMENT BAY, NEARSHORE/TIDEFLATS (2002), *at* <http://yosemite.epa.gov/r10/nplpad.nsf/88d393e4946e3c478825631200672c95/06e1c0cda0d11fc285256594007559fd?OpenDocument> (last modified April 2002). A number of major remedial actions have been completed—particularly to address contaminated sediments—and further efforts are ongoing. *Id.* For a wealth of site information, including site history and decision documents, see the EPA Region 10 website for Commencement Bay, <http://yosemite.epa.gov/R10/CLEANUP.NSF/webpage/Commencement+Bay-Nearshore+Tideflats> (last visited July 11, 2004).

³³ The Hudson River is the focus of a recent CERCLA Record of Decision that calls for dredging approximately 2.65 million cubic yards of sediment contaminated with PCBs. U.S. EPA Region 2, *EPA Signs Final Cleanup Plan for Hudson River; Makes Public Involvement a Top Priority*, *at* http://www.epa.gov/epahome/headline2_020102.htm (Feb. 1, 2002). The cleanup work may come at a cost of over \$450 million. Kirk Johnson, *Dredging the Upper Hudson River, Without Slinging the Mud*, N.Y. TIMES, Apr. 21, 2002, at A1.

³⁴ *See, e.g.*, Villa, *supra* note 12, at 314 & n.355 (explaining that the selected remedy includes dredging of riverbed sediments at an estimated cost of \$360 million).

³⁵ Recent history has identified a number of heroes from the EPA ranks who waged courageous battles against opposition—both external and internal—to respond to the

of environmental heroes, including Aldo Leopold, Rachel Carson, and Edward Abbey, is filled with former civil servants.³⁶ We cannot all invent a land ethic or unleash a *Silent Spring*. But 30 years of daily labor in Clean Water Act policy and enforcement have produced results worthy of *Environmental Law's* symposium celebration. To deny these results by imagining an EPA pitted *against* clean water is to fundamentally misconstrue the role of agency employees and the reality of agency constraints. It instills the kind of myopia tending to see only adversaries where one may otherwise find a friend.

In quoting the famous lines from *The Road Not Taken*, Blumm and Warnock overlook Robert Frost's sober realization once he begins down his chosen road: "Yet knowing how way leads on to way, I doubted if I should ever come back."³⁷ For the Clean Water Act program, as it has evolved over time, there have been many ways—many roads—from which to choose. Along the way, some choices may well have missed turns toward broader statutory interpretation. But as Frost suggests, heading down the chosen road, one may doubt now we shall ever go back. Dwelling on those roads not taken, however, may only obscure the road we've taken—and make us miss the opportunities still ahead for continuing the pursuit of clean water.

Sincerely,
Clifford J. Villa

devastating health impacts of asbestos within and from Libby, Montana. See ANDREW SCHNEIDER & DAVID MCCUMBER, AN AIR THAT KILLS: HOW THE ASBESTOS POISONING OF LIBBY, MONTANA, UNCOVERED A NATIONAL SCANDAL (2004) (dedicating the book to four named EPA employees "and the other heroes" who demonstrate a daily oath to "[p]ray for the dead and fight like hell for the living" (internal citation omitted)).

³⁶ Aldo Leopold, father of the modern land ethic for conservationists, spent more than 20 years as a supervisor and director for the U.S. Forest Service. ALDO LEOPOLD, A SAND COUNTY ALMANAC 227 (1949). Rachel Carson began her career in 1935 writing radio spots for the U.S. Bureau of Fisheries, predecessor of the U.S. Fish and Wildlife Service. LINDA LEAR, RACHEL CARSON: WITNESS FOR NATURE 78 (1997). Carson continued writing press releases, field reports, and other FWS informational materials until royalties from her first two best-selling books, *Under the Sea-Wind* and *The Sea Around Us*, allowed her to resign from federal service in 1952. *Id.* at 228, 233. Carson, of course, went on to write *Silent Spring*, the eye-opening exposé on the dangers of certain pesticides, which led eventually to the banning of DDT and the furtherance of an environmental movement. Edward Abbey, perhaps best known for the fictional *Monkey Wrench Gang*, served three seasons as a park ranger with the National Park Service. EDWARD ABBEY, DESERT SOLITAIRE at xi (1968). Although famously cranky, Abbey allowed that the majority of his ranger colleagues were "capable, honest, dedicated men." *Id.*

³⁷ ROBERT FROST, *The Road Not Taken*, in THE POETRY OF ROBERT FROST 105 (Edward Connery Latham ed., 1969).