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Law

by David H. Getches

Environmental law: it all began in 1970. The National Environmental Policy Act was signed into law, the Clean Air Act was passed, the first Earth Day was celebrated, and NRDC was founded. In the twenty-five years since then, environmental laws have multiplied and matured. NRDC has become an integral and indispensable part of this field of law, enforcing its provisions, guiding its development, and literally writing its content.

But unlike its adversaries, NRDC has no material self-interest to further. Rather, its goal is to enhance and enforce environmental law itself. To be sure, NRDC's members—and all citizens—have a deep interest in the protection of the nation's resources and in enjoying a safe and healthy environment. But NRDC attorneys need not simply take cases as they come. NRDC chases down and corrects the most egregious environmental abuses—the cases in which violations of the law are most serious. And the fruits of its success are shared widely, in most cases by all Americans. By careful case selection, NRDC has not only used its resources carefully to target the most significant abuses, but it has also been able to carry out a strategy for improving environmental law.

In our system, much of the law is made in the courts, through legal cases that decide how laws will be interpreted in practice. And deficiencies in existing laws identified through litigation draw congressional attention and provoke new reforms. Thus, NRDC's lawyers have literally written the laws that protect the environment. David Sive, who deserves to be called the father of environmental law and was one of NRDC's founders, has observed that "In no other political and social movement has litigation played such an important and dominant role. Not even close."

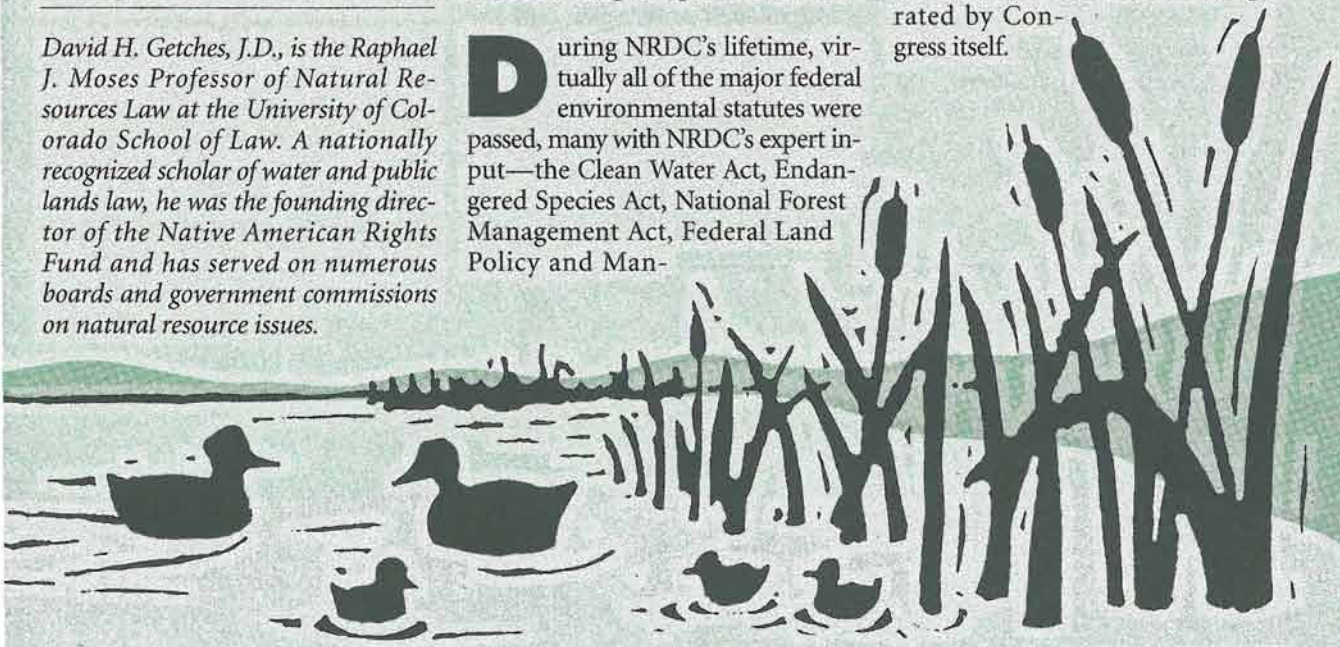
The hundreds of lawsuits brought by NRDC attorneys since 1970 have had enormous impacts. Look in the books we use to teach environmental law. You will find at least seven major cases NRDC took to the United States Supreme Court, as well as landmark cases in every branch of environmental law litigated in all the federal and state courts. If a law student is asked in a class discussion of almost any environmental law issue, "What case established that principle?" he or she would be wise to guess, "Um, I think it was the *NRDC* case." In the leading law school environmental law treatise, there are fifty-five cases named *"NRDC"* that are listed for one principle or another.

During NRDC's lifetime, virtually all of the major federal environmental statutes were passed, many with NRDC's expert input—the Clean Water Act, Endangered Species Act, National Forest Management Act, Federal Land Policy and Management Act, and a dozen more laws to control pollution, guide natural resources management, and regulate waste disposal. These statutes injected a new level of scientific sophistication into U.S. law. They also assumed the existence of a large and technically competent government staff to carry out this bewildering array of complex regulatory statutes. Recognizing that government could or would not always be able to set all the standards and enforce all the details, Congress included a role for independent citizen watchdogs to make sure the laws were enforced.

One court said: "Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcome participants in the vindication of environmental interests." Environmental lawyer and editor of the *Environmental Law Reporter* Adam Babich recently wrote that these laws "do more than merely supplement agency enforcement. As the teeth in public participation, they enhance the democratic character of environmental decisionmaking."

NRDC is the master of the citizen suit. Indeed, it has won court decisions upholding the constitutionality of laws giving citizens these legal enforcement powers. Furthermore, theories it has put forward in litigation have been adopted by courts and then considered and often incorporated by Congress itself.

David H. Getches, J.D., is the Raphael J. Moses Professor of Natural Resources Law at the University of Colorado School of Law. A nationally recognized scholar of water and public lands law, he was the founding director of the Native American Rights Fund and has served on numerous boards and government commissions on natural resource issues.



The fact that NRDC employs as many scientists, economists, and policy analysts as lawyers helps explain why it is so incredibly successful when it goes to court. Because they have the benefit of this staff, the lawyers of NRDC are among the best prepared in the nation. Former Interior Secretary Stewart Udall, who has noted that groups like "NRDC not only have a powerful voice when new laws are written, but when they monitor and guide the enforcement and implementation of the nation's environmental laws," credits much of NRDC's success to its style of "interdisciplinary litigation."

From the first, NRDC has followed a pattern in its litigation. It has identified the most serious breaches of the law's letter or purpose, documented the health and environmental consequences, plotted a scientifically feasible path of compliance, and insisted—doggedly and unrelentingly—on following and, where necessary, expanding the law.

An outstanding example is the 1972 Clean Water Act. Its ambitious goal was to end all discharges of pollutants into the nation's waters, except those allowed under a rigorous permitting system. Today, we see a remarkable difference in rivers and lakes because of the Act. But the impressive improvement did not take place because Congress declared noble goals and outlawed pollution. In reality, enforcement lagged far behind the rhetoric of Congress and still does. It took the courts, prompted and informed by lawyers and scientists, to insist that the nation begin the work of fulfilling the Act.

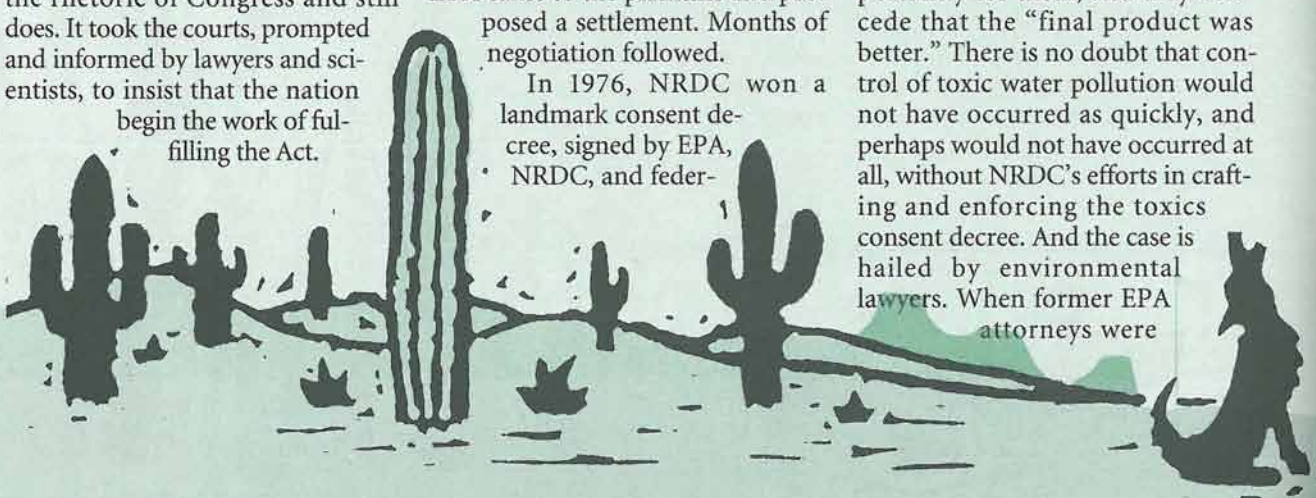
Consider the saga of NRDC's battle to get toxic chemicals out of the nation's waters. A provision of the Clean Water Act prohibits "the discharge of toxic pollutants in toxic amounts" into the waters of the United States. But it was up to EPA to make rules that defined which chemicals were toxic and in what amounts, by certain deadlines in the Act. By June 1973, EPA had missed fourteen deadlines and NRDC sued to force it to obey the law. A new deadline was set—which resulted in EPA's decision to regulate only nine chemicals as "toxic." NRDC sued again, arguing that the list was ridiculously short and that the agency's scientific processes did not match the law's requirements. EPA promised to do better, and the judge dismissed the case.

NRDC was not satisfied. It appealed, and succeeded in convincing the appeals court that EPA had withheld records from the lower court. Under new court orders to justify its actions, EPA—astonishingly—succumbed to industry objections and dropped every one of the nine standards it had proposed. By 1975, toxic water pollutants were still completely unregulated. A determined NRDC responded by filing two more lawsuits, citing a litany of mandatory duties that the government had violated. This time, EPA came to the plaintiffs and proposed a settlement. Months of negotiation followed.

In 1976, NRDC won a landmark consent decree, signed by EPA, NRDC, and federal district court Judge Thomas J. Flannery—over vehement industry objections. The sweeping decree literally rewrote the agency's approach to regulating toxics. EPA had objected that Congress's mandate was unworkable and unrealistic; NRDC insisted that toxic pollutants be broadly and strictly controlled, as Congress had intended. And the two parties developed a way to achieve that mandate. The consent decree laid out the policy and procedures, and listed sixty-five chemicals to be controlled and twenty-one industry groups that would be regulated. Not surprisingly, industry appealed.

But while industry's objections were being litigated, Congress amended the Clean Water Act, and literally codified the toxics consent decree into law. The new approach to controlling toxic water pollution —the list of sixty-five chemicals, the idea of regulating specific industries, everything devised by the NRDC lawyers and EPA—became law. The battle was to continue for years, with missed deadlines, industry objections, and hearings, and it was not until 1987 that EPA finally promulgated regulations for the last of the substances in the 1976 consent decree. And the effort continues: in 1992, a second major NRDC suit brought about the second generation of toxic water pollution controls.

Looking back at the toxics case, EPA staff now confide that the pressure of NRDC's litigation created an unprecedented motivation and opportunity for them, and they concede that the "final product was better." There is no doubt that control of toxic water pollution would not have occurred as quickly, and perhaps would not have occurred at all, without NRDC's efforts in crafting and enforcing the toxics consent decree. And the case is hailed by environmental lawyers. When former EPA attorneys were



polled about what court decision has had the greatest impact on EPA's policies and administration, nearly every one of them put this case, *NRDC v. Train*, at the top of the list.

NRDC's great achievement in preventing water pollution is rivaled by its use of a similar strategy in other areas. Consider the revolutionary grazing lawsuit that the fledgling organization brought in 1973. It was to take the lid off a destructive, formerly untouchable program of lax management of 270 million acres of Bureau of Land Management (BLM) land.

NRDC was armed with studies that convinced the judge that there was "evidence from both private and governmental sources demonstrating that serious deterioration of BLM lands is taking place...." He therefore ordered 144 separate environmental impact statements under the National Environmental Policy Act (NEPA) to assess "the serious damage being wrought on the environment." So significant was this victory that public land scholars have written that "future historians may date the beginning of modern rangeland management from December 1974 when a federal district court ordered the BLM to comply with NEPA."

An NRDC lawsuit also led to a revolution in logging in National Forests. A law school textbook in public land law has observed that "intensive judicial review is a recent phenomenon in public land management." It was NRDC lawyers who broke that earlier tradition of light judicial oversight when they took up the Izaak Walton League's cause against clearcutting in the Monongahela National Forest. They found language in the law that seemed to make clearcutting timber unlawful, and a federal court agreed.

The debate that followed this litigation culminated in major reform of forestry law and enactment of the sweeping National Forest Management Act. Congress incorporated in the statute rules for timber cutting that came straight out of the court's ruling in the *Monongahela* case. Charles Wilkinson, the leading forestry law scholar, observes, "virtually every reform in public lands forestry [has since] been sparked by citizens' suits holding the Forest Service to its statutory obligations."

NRDC's accomplishments in carrying out and making new environmental law multiply every year. In just the past three years, NRDC deserves credit for securing new government standards for selling water from federal dams in the West; an end to the dumping of sewage sludge in the ocean; a court order banning cancer-causing pesticides in processed foods; a program that should reduce air pollutants from coke ovens at steel plants 94 percent by 1998; a judgment forcing the reduction of polluted runoff from highways in southern California; and dozens more improvements in the health and well-being of all Americans.

By now, we might have expected that NRDC would have worked itself out of a job. Major environmental laws have been on the books for twenty-five years, and their enforcement has improved significantly through citizen action. Industries have learned to comply and still prosper. Americans consistently respond to public opinion polls with overwhelming support for strong environmental protection.

Yet politicians have chosen to hear the voices of a few big business lobbies over the collective voice of the citizens. The 104th Congress is putting much of a quarter century of environmental progress at risk. Measures to uproot the essentials of environmental law are only a few votes from passage. NRDC executive director John Adams warns that these measures portend "the erosion of basic standards for protecting human health, and a return to a time when special interests set the rules behind closed doors and the rest of us absorbed the risks." These laws, Adams said, "are the bedrock of environmental protection, and we will not stand by as they are torn up for the benefit of a few."

Environmental advocates have their work cut out for them. Making legal and scientific sense of the welter of perverse ideas that are being rammed through Congress, and holding firm on enforcement of existing laws, may constitute the biggest challenge to citizen environmental activism of our time. This is work NRDC has done with great skill in the past—though even in the best of times, NRDC has had to deploy all its resources to keep the pressure on federal agencies to carry out environmental protections. With those agencies being stripped of budgets, staffs, and powers, the demand for NRDC to lead the citizen effort to enforce and expand environmental protection laws is greater than ever.