Taking Back Eden

Eight Environmental Cases that Changed the World

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Prologue

In the early 1960s, I found myself landing in New York City too late to make the connecting flight home. I called a friend from college with whom I had dreamed about writing the great American novel. Instead, I'd joined the Army and he had become a lawyer. He said to come on over, he had a couch.

I arrived after midnight. Al's wife had gone to bed, but he was up and as disheveled as I'd remembered, his shirt tails hanging like a nightgown and a hairstyle from Morgus the Magnificent. One light was on in a tiny study, and spread over the desk were sheets of yellow paper covered with his meticulous handwriting. The notepad showed a series of sentences begun and crossed out a half a dozen times. He had just started his next try. He was composing a brief, he told me. I had been in transit for nearly thirty hours, but I felt too keyed up to go to bed. And so, moving the cat to sit down on a low chair, I asked him about the case.

In his low, understated voice Al began telling me about a complicated proceeding before the Federal Power Commission, whatever that was. I started to yawn. His clients opposed the construction of a power plant on top of a mountain. Apparently they didn't like the look of the thing, and there was something else in there about fish. The more he talked, the more abstract it seemed. Al, I

thought, they are at each other's throats in Korea and you are worried about what? Instead, I tried to follow him through the difficulties of getting a court to hear his case in the first place. His clients didn't deal in power and they didn't own the mountain. So what business did they have contesting a power license? At which point the long trip must have caught up with me because I next remember waking up in the morning to the cat on my stomach and the smell of coffee.

When I walked out of the bathroom and into Al's office, he was already back in there writing. He hadn't shaved yet. He had moved a few pages past the sentences that had been giving him trouble, and looked to be on a roll. We talked about the case again, which was clearly weighing him down. It seems that the fish were called striped bass, and people who tried to catch them cared a great deal about them. I don't remember much more, except leaving later that day and thinking, poor Al, he seems to have gotten stuck in a rut.

A few years following, with a law degree now and a turn as a federal prosecutor behind me, I fell into the natural world. The move was completely fortuitous, but environmental protection became the pole star of my life. Slowly, over time, it dawned on me that much of what I was doing and that the entire field of environmental law was doing had been jump-started by the sentences on the yellow pad on Al's desk in his apartment in New York City those many years before. It was like being present at The Creation. Al was writing the briefs in a case called *Storm King Mountain*, which opened the courthouse doors to a new kind of lawsuit and shook the pillars of government and industry. A revolution that, having swept the United States, is now traveling the globe.

This book is about that phenomenon.

Oliver A. Houck
October 2008

Contents

INTRODUCTION

The Awakening

In no other political or social movement has litigation played such an important and dominant role. Not even close.

David Sive, 1988

WHERE DID it come from?

Growing up in the late 1940s, we all knew how the world was going to end. First came the big flash, then the roar of the bomb, and we disappeared into thin air. Unless of course we took refuge under our school desks as government films told us to do. Those drills seemed a little questionable to those of us who sat in the back row, but we did them anyway. Talking among ourselves, asking around, few were confident that we would live to old age.

Two decades later along came news of a poisoned landscape, the death of Lake Erie, rivers that caught fire and smogs that killed people in London and then shut down Pittsburgh for weeks at a stretch. The bald eagle was on the brink of extinction. Pesticides had eliminated Louisiana's state symbol, the

brown pelican, two separate times. Oil coated the beaches of Santa Barbara, and barrels of old chemicals were turning up near where deformed newborns were beginning to die. There seemed to be a new kind of end game coming, and it would not require a bomb after all. You could see it in the paper and smell it from the front door. All we had to do was to keep on trucking.

And then, on a bright weekend day in April 1970, as if by magic, a half a million people appeared on the National Mall in Washington, D.C. They came alone and in families, regular Fourth of July Americans who had never protested a thing in their lives, men wearing Bermudas, mothers pushing strollers, women old enough to be *their* mothers, hippies and straights, the committed and the curious, until they were a sea of faces and homemade signs stretching from the Washington Monument to the far end of the reflecting pool saying that they were fed up with what was happening to the world around them, and they wanted it to stop. The government was asleep at the wheel.

Earth Day caught everyone by surprise. The FBI, certain that the demonstration was inspired by communists, went around the Mall taking names. Similar protests, however, were rising all around the country, which was already reeling from riots over civil rights and the Vietnam War. American youngsters coined a new word, *ecotage*, and set out looking for likely targets. It could have become ugly here too, all over again.

Then another unusual thing happened. Instead of calling out more troops, the country came up with a different answer. It allowed the very people who were protesting pollution to take their government to court. They were the ones with the most at stake. Ordinary people, anyone on the Mall that day, would be able to go toe to toe with the most powerful forces in America to protect the environment by legal process. The idea was revolutionary.

There was precedent here, but very little. Legal aid societies and the NAACP had sued government agencies on behalf of their clients, and more recently urban homeowners were beginning to challenge highways that bulldozed through their neighborhoods. Even federal prosecutors were getting into the act, filing actions against polluters in New York City and Washington, D.C. Things were beginning to perk. But the idea that everyday citizens could sue to protect the

environment that none of them owned but that they all shared was startlingly new. Within a wink, new litigating groups such as the Environmental Defense Fund and the Natural Resources Defense Council sprang up to represent them. And they started winning.

The government and its allies in industry were as shocked by these developments as they had been by Earth Day. Major monies were on the line. The prestige of institutions as powerful as the Atomic Energy Commission and the Army Corps of Engineers was at stake as well, to say nothing of the politicians who backed them. And so in the fall of that same year, without prior warning, and with whatever prompting, the secretary of the treasury proposed to eliminate the charitable status of groups that brought environmental lawsuits. It was a bold move. Without tax exempt contributions, these groups would dry up, and, with them, the nascent environmental docket. The groups fought back. They found allies in Congress. New York's Senator Javits declared that these lawsuits, the ability of citizens to sue for the public good, were the nation's answer to "those kids out there in the streets who had little avenue for protest beyond tearing things down." The secretary backed down.

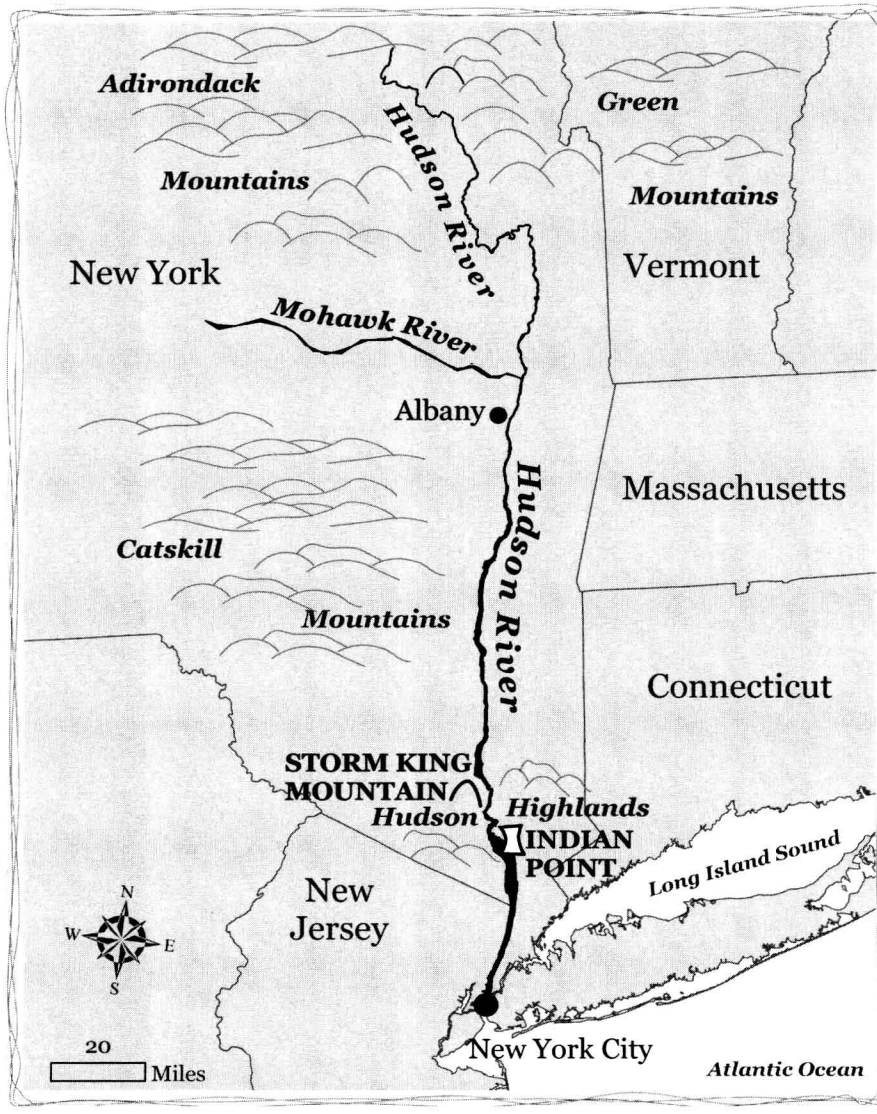
Looking back, environmental litigation was by no means preordained. To begin with, you couldn't go to court. In the early 1960s, when all of this began to break, most people had no right to sue the government, and that included all those people on the Washington Mall who felt this new kind of injury from a wasted and diminishing world. Until finally, in 1965, a court ruled otherwise. They too could file. That case starts this book, Storm King. Then an even more unusual thing happened. Storm King started traveling abroad.

There was no grand strategy. There was no plan at all. Instead, a few deeply committed individuals in Canada, Russia, the Far East, and as far south as Tierra del Fuego began to advance this same notion, that citizens could sue to protect the environment. They had no expectations of getting paid. The money was on the other side. They had even less law to work with than their American counterparts, and they faced real-world repercussions as well. Some had already been arrested for promoting civil rights. A brilliant advocate in Moscow would be put out of business. One attorney featured in this book raided a renegade logging

ship at sea to document a complaint. A few years later one of his closest colleagues was assassinated on the doorstep of his home. These are not ordinary challenges.

This book, then, is in part their story. It is also the story of how environmental protection came to some of the most unexpected venues on Earth. It begins with Storm King, a power plant on the Hudson Highlands that ushered in the field. It then goes to Japan where, shortly thereafter, the defenders of ancient trees at a sacred shrine were challenging an invincible construction machine, and from there to the Philippines and Minors Oposa, one man, his children, and the disappearing rain forest. It moves next to Canada where a trio of water projects, each one an agony, established federal authority to protect the environment, then to India and the Taj Mahal, to Russia and Lenin's Trees, and Greece, with its horns still locked over the fate of the Acheloos River. The journey ends in Chile with the case of Trillium and the most unlikely venue yet, a forest at the end of the world.

I have chosen to tell the stories of these cases because they opened the way, and because they involved extraordinary places and things. But I am also writing to celebrate their actors who had the courage to speak truth to power and then to take it on, for pieces of our natural world whose adequate description is difficult and whose value is beyond measure. After them, there is no turning back.


Adirondack
Mountains
Hudson River
Green
Mountains
New York
Vermont
Mohawk River
Albany
Massachusetts
Catskill
Mountains
Hudson River
Connecticut
STORM KING
MOUNTAIN
Highlands
Hudson
INDIAN
POINT
Long Island Sound
New
Jersey
N
W
E
S
20
Miles
New York City
Atlantic Ocean

CHAPTER ONE

Storm King

To those who know it, the Hudson River is the most beautiful, messed up, productive, ignored, and surprising piece of water on the face of the earth. There is no other river quite like it, and for some persons, myself included, no other river will do. The Hudson is the river.

Robert Boyle, Founder, Hudson River Fisherman's Association

IN THE EARLY 1960s, Consolidated Edison of New York City, the most powerful utility company in America, announced its intention to build the world's largest pump storage power plant on Storm King Mountain. It would run into opposition from residents who loved the Hudson River Highlands, and from others for whom fishing the Hudson River was a reason to live. That those two parties got together at all was something of an only-in-America miracle. That they could win was unthinkable.

THE HUDSON River rises in the northern Adirondacks and runs more than three hundred miles to the island of Manhattan and the sea. Halfway through this journey it emerges from the mountains near Albany, already level with the ocean, creating a 150-mile estuary above New York Harbor and one of the great inland waterways of the world. For two centuries, the Hudson marked the route of commerce for the American colonies and their principal line of defense. British and American armies would fight, fortify, and attack the length of it, and the very mention of Hudson River names—White Plains, Saratoga, Ticonderoga, and the treason of Benedict Arnold at West Point—is to recount much of the Revolutionary War. Dutch family dynasties as imposing as the Van Cortlands and the Schuylers settled along the Hudson and marked society with their order. In 1825, the Erie Canal finally connected the Hudson to the Great Lakes and Ohio, routing trade through New York City to every continent on the globe. There are larger rivers in America than this one, but none was so present at its birth.

There has always been more to the Hudson, however, than commerce. Ninety miles below Albany it sweeps by Storm King Mountain, guarding the entrance to the Hudson Highlands and one of the most spectacular vistas in the world. Here the river twists through a series of wide gorges flanked by bluffs and ridges that turn green in summer and gold and red with fall, backed by rolling country as far as the eye can see. Early European travelers recorded the scene in wonder. To the German globe-trotter Baedeker, it was "grander and more inspiring than the Rhine." It gave birth to its own movement in painting, whose lead artists, Cole and Church, made raw nature the principal of the play. Humans, where they appeared at all, were tiny and off to the side, marveling at the scenery as if they were seeing the life hereafter.

Marvel they did. The celebrated British actress Fanny Kemble, visiting the Hudson Highlands in the 1830s, wrote in her diary of "the shadow of a huge mountain, frowning over the height on which I stood." "Suddenly," she continued, "a shadow moved down its steep sunny side, threw a deep blackness over the sparkling river, and then climbed the opposite mountain on the far side," followed by a blaze of noonday sun. "I could have stretched out my arms and shouted aloud—I could have fallen on my knees and worshipped—I could have

committed any extravagance that ecstasy could suggest." She was seeing Storm King.

The experience was sublime. The Hudson's first explorers, quartered with shipmates who rarely bathed and on ships that reeked with their own wastes, were overcome by the scent of nature that Verrazano called an "exhale" of the "sweetest odors." An early Dutch traveler to Manhattan described encountering "such a sweet smell in the air that we stood still, because we did not know what it was we were meeting." They were not simply seeing the Garden, they were *in* the Garden, and it seems more than coincidence that this region would produce America's first book on gardening and its foremost landscape architect, Frederick Law Olmsted, whose basic operating principle was that of the Hudson River painters: the more natural the landscape, the better.

All of this, then, was in the genes and the mindset of those who went into the lists to oppose the power plant on Storm King Mountain. They had little law behind them, and they faced a daunting adversary.

The Cornwall Hydroelectric Project: Power and Beauty for Tomorrow!
[Consolidated Edison brochure for Storm King power plant]

THE CON ED PROPOSAL was, to its managers, logical and benign. The company supplied electricity for the New York City region, and faced soaring demands from residential growth, air conditioning, and rate schedules that charged less per unit the more one used, a recipe for consumption. Proud to provide the power that heated, cooled, and illuminated this giant megalopolis, Con Ed named its headquarters building in downtown Manhattan the Tower of Light. Rather than build a new coal plant or run the gauntlet of approvals for a new nuclear reactor, the company's answer was a pumped storage facility on Storm King Mountain.

The mechanism was simple. The company would take power from the grid at times of low demand, pump water from the river, and push it two miles up a tunnel to a storage reservoir on the mountaintop. At peak demand the stored water would rush back down the tunnel to a powerhouse that converted the

force to electricity. Three kilowatts of juice from conventional plants would be needed to provide only two kilowatts from Storm King, but the three were cheap and the two were worth real money. To Con Ed's engineers, the Hudson Highlands were an ideal location for pump storage power, and Storm King on size alone was the pick of the litter.

They anticipated little opposition. Here was a project that produced no pollution and no risk of nuclear meltdown, and it increased service for its voracious customer base. The only regulatory obstacle was the Federal Power Commission, which licensed these kinds of plants, but over the years the Commission had become indistinguishable from the utilities it was supposed to supervise. The attitude was deferential. "We're dealing with top officials in industry," a federal official said of his agency's lackluster enforcement record, "you just don't treat these people like that." The trigger for the fight to come was a sketch by a Con Ed employee of the project that showed Storm King Mountain with a bite out of one side to house an enormous powerhouse, and transmission lines spreading like tentacles from the scene. It was a perfectly sensible engineering drawing. One look at it was all it took to push Hudson Highland residents, already nervous about rumors of the proposal, over the edge.

The residents didn't see what they were in for either. It just grew. A handful of neighbors banded together as the Scenic Hudson Preservation Conference and did what they knew how to do: they hired a public relations firm. They had the means. The Highlands had harbored some of the iconic families in America, J. Pierpont Morgan, Jay Gould, William Averell Harriman, John Jacob Astor and Cornelius Vanderbilt, and John J. Rockefeller. Have we left anyone out? Before long Scenic Hudson and Con Ed began trading slogans, taunt for taunt. The company literature would announce, "Dig We Must!," and Scenic Hudson would reply, "Dig They Must Not!" The public relations firm took shots at Con Ed, in the words of *Fortune* magazine, "the company everyone loved to hate," which in turn labeled its critics "misinformed bird watchers, nature fakers, land grabbers and militant adversaries of progress." One opponent rose at a public hearing to declare himself a bird watcher but that all he saw from Con Ed was "buzzards and vultures." Insults, however, only travel so far.

Scenic Hudson also hired a lawyer. They chose well, a former federal power commissioner named Dale Doty who had since represented the utilities them-