

EDMUND S. MUSKIE: A MAN WITH A VISION

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At Senator Muskie's funeral I noted that I had been on his staff for fifteen years, but had worked for him for thirty. In a way I am still working for him, or at least, *because* of him. This fall my colleague and minority counsel, Tom Jorling, and I are team-teaching a course entitled "Origins of Environmental Law" at Columbia University.

Preparing for that course, reading old memos to the Senator, re-reading his floor statements, interrogatories, and speeches and going back to the transcripts of Subcommittee discussion has been revealing, inspiring, and refreshing. I am not sure that, at the time, I fully appreciated what it was to sit in the shadow of greatness. Edmund S. Muskie was indeed a great statesman, legislator, and thinker.

While many thought him the "moderate," especially when compared to his George McGovern/Gene McCarthy colleagues, he was actually a radical thinker. The difference was one of style and perception. Ed Muskie wanted to get things done and he knew how to advantage the situation to extract the most progress with the least controversy.

I need not mention that the Clean Air Act¹ and the Clean Water Act²—targets for vehement opposition and negative characterization today—were reported from Committee and passed the Senate of the United States unanimously. I probably do need to mention some of the provisions of those laws that were precedential and, by today's standards, radical.

It was Ed Muskie who shepherded through the Congress of the United States and into law, with and without presidential approval, concepts like mandatory agency action,³ statutory deadlines,⁴ open decisions, openly arrived at and enforced through mandatory public participation not only in rulemaking, but also in judicial review;⁵ private attorneys general through citizen suits,⁶ statutory standards;⁷ non-

* Served as chief of staff to Senator and Secretary of State Edmund S. Muskie. He served as staff director of the Senate environment subcommittee from 1966-78 where he had primary staff responsibility for drafting the Clean Air Act, the Clean Water Act, the Resource Recovery Act, the Noise Pollution Control Act, and various amendments to those laws. In the 1982 election cycle he served as Executive Director of the Democratic Senatorial Campaign Committee and served from 1991 to 2003 as a Member of the Maryland House of Delegates. Mr. Billings served as President of the Edmund S. Muskie Foundation and as President of the Clean Air Trust co-chaired by Senator Muskie and former Vermont Senator Robert Stafford. Mr. Billings was an adjunct professor at the Unruh Institute of Politics at the University of Southern California from 1981 to 1995 and more recently as an adjunct professor at Columbia University where he co-taught a course on The Origins of Environmental Law with former subcommittee Minority Counsel, Thomas C. Jorling. In 1995 Mr. Billings was a founder of the National Caucus of Environmental Legislators which serves more than 1,000 "green" legislators nationwide. Mr. Billings and his wife, Cherry, live in Bethany Beach, Delaware.

1. 42 U.S.C. §§ 7401-7671 (2000).

2. 33 U.S.C. §§ 1251-1387 (2000).

3. *See generally* Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

4. *Id.*

5. Clean Air Amendments of 1970, Pub. L. No. 91-604, §§ 211, 307, 84 Stat. 1676, 1699, 1707 (1970).

6. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 307, 84 Stat. 1676, 1706-07 (1970).

7. *See supra* note 3.

degradation (often referred to as prevention of significant deterioration),⁸ and, perhaps most important, a politically unassailable objective of protection of public health and biological integrity in the air we breathe and the water we consume.

He did not do this alone. He had willing, helpful, and assertive colleagues like Senators Howard Baker (R-TN.), Tom Eagleton (D-MO.), John Sherman Cooper (R-KY.), Birch Bayh (D-IN.), J. Caleb Boggs (R-DE.), Jennings Randolph (D-W. VA.) and Bob Dole (R-KS.).

He did this through insistence on consensus, on a defensible political, scientific and constitutional record of information, and with patience that would frustrate the most difficult of opponents, not to mention staff.

I want to give you just one set of statistics, quoting from a statement by Senator Muskie on the twentieth anniversary of the Clean Water Act:

In the period that led to enactment of the Clean Water Act, this Committee [referring to the Senate Committee on Environment and Public Works] held 33 days of hearings, listened to 171 witnesses, received 470 statements, compiled 6400 pages of testimony, and conducted 45 subcommittee and full committee markup sessions. Subsequently, the House and Senate conferees met 39 times.⁹

As Tom and I have learned over these last nine weeks at Columbia, just reconstructing the Clean Air Act's precedential and controversial provisions took twice as many classes as we suggested in our syllabus. So I am not even going to try to touch on those.

I do want to mention two provisions of law that, because of Senator Muskie's leadership, foresight, and willingness to look to the future when offered the opportunity to make seminal change, are critical to environmental progress and protection today.

Those of you who are engaged in matters environmental surely are aware of the controversy that falls under the rubric of "waters of the United States."¹⁰ In 1972 we understood the legal limitations of the historic definition of waters subject to federal jurisdiction. We knew about "navigable waters" in the context of the Northwest Ordinance,¹¹ the Federal Power Act¹² and other precedents. We also understood the limitations, for water pollution purposes, of terms like "interstate" waters and "navigable in fact."¹³

Senator Muskie and his Senate colleagues believed that the 1899 Refuse Act¹⁴ and essential public policy led to a much broader interpretation of what indeed

8. Clean Air Amendments of 1970, Pub. L. No. 91-604, §§ 108-10, 84 Stat. 1676, 1678-83 (1970).

9. S. Doc No. 104-17, at 69 (1996).

10. *See, e.g.*, Definition of "Waters of the United States" Under the Clean Water Act, 40 C.F.R. §§ 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401, Proposed Rule (2014); 79 Fed. Reg. 22188 (2014).

11. Northwest Ordinance, Art. 4 (1787) (defining "navigable waters" as tributaries leading into the Mississippi and St. Lawrence Rivers).

12. 16 U.S.C. § 796(8) (2014).

13. *The Daniel Ball*, 77 U.S. 557, 563 (1870) ("Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted . . ."); *see also* *Rapanos v. United States*, 547 U.S. 715, 730-31 (2006); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406-08 (1940).

14. 33 U.S.C. § 407 (2014).

were waters subject to federal jurisdiction.¹⁵ Thus they adopted the amorphous definition of “navigable waters” for the purpose of clean water and wetlands, to be “waters of the United States.”¹⁶ While admittedly there are those in the advocacy community who would seek a broader definition,¹⁷ the Supreme Court has acknowledged a scope that is at least as far as we had imagined and, in my view, broader than we had reason to hope.¹⁸

Thus today, federal clean water and wetlands protection law extends to ninety-eight percent of the nation’s waters compared to as a little as forty-three percent forty years ago.

More significantly is the current controversy over the President’s climate change initiative,¹⁹ premised on one of the most obscure provisions of the 1970 Clean Air Act. Section 111(d) of the Clean Air Act, on which the initiative to cause a thirty percent reduction in carbon dioxide emissions is based,²⁰ is no accident. In fact the Senate Committee wanted to provide the legal basis for just this kind of regulatory initiative.²¹

Only Clean Air Act scholars of the caliber of Richard Lazarus are even aware of an obscure provision of the 1970 Senate version of the Clean Air Act that

15. See 92 CONG. REC. 38,836 (1971) (“In the [CWA], we codified that authority in order to reestablish a balance between State and Federal authority, so that I think, with respect to the Refuse Act of 1899, the pending legislation restores the balance that we wanted to try to establish in 1965.”) (statement of Sen. Muskie); 94 CONG. REC. 17, 346 (1975) (noting that the decision to rely on The Refuse Act in drafting the CWA was due in part to The Refuse Act’s broad definition of “navigable water”).

16. 94 CONG. REC. 17,346 (1975).

17. See e.g., CLAUDIA COPELAND, CONG. RESEARCH SERV., R43455, EPA AND THE ARMY CORPS’ PROPOSED RULE TO DEFINE “WATERS OF THE UNITED STATES” I (2014) (“Most environmental advocacy groups welcomed the proposed guidance, which would more clearly define U.S. waters that are subject to CWA protections, but some in these groups favored an even stronger document.”) (emphasis added).

18. *Appalachian Elec. Power Co.*, 311 U.S. at 426 (“In our view, it cannot properly be said that the constitutional power of the United States [in regulating pollution in water] is limited to control for navigation.”); *Rapanos*, 547 U.S. at 732-33 (finding that “waters,” within the context of the CWA, refers to any continuously present body, thereby only excluding dry channels that *sometimes* hold water); *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981) (“Congress’s intent [in enacting the CAA] was clearly to establish an all-encompassing program of water pollution regulation.”); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 176 (2001) (Stevens, J., dissenting) (“Moreover, once Congress crossed the legal watershed that separates navigable streams of commerce from marshes and inland lakes, there is no principled reason for limiting [the CWA’s] protection to those waters or wetlands that happen to lie near a navigable stream.”).

19. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34829 (proposed Jun. 18, 2014) (to be codified as 40 C.F.R. 60).

20. *Id.* at 34832 (“Under the authority of Clean Air Act (CAA) section 111(d), the EPA is proposing emission guidelines for states to follow in developing plans to address greenhouse gas (GHG) emissions from existing fossil fuel-fired electric generating units (EGUs).”).

21. Frank B. Cross, *Section 111(d) of the Clean Air Act: A New Approach to the Control of Airborne Carcinogens*, 13 B.C. ENVTL. AFF. L. REV. 215, 233 (1986) (“Section 111(d) specifically was intended to be a ‘gap-filling’ measure for ‘pollutants which cannot be controlled through the ambient air quality standards and which are not hazardous substances.’”) (internal citations omitted); *A Legislative History of the Clean Air Act Amendments*, 93rd. Cong., 2d Session 227 (1970) (statement of Sen. Muskie); see also Leon Billings, *The Obscure 1970 Compromise That Made Obama’s Climate Rules Possible*, POLITICO MAGAZINE (Jun. 14, 2014), <http://www.politico.com/magazine/story/2014/06/the-obscure-1970-compromise-that-made-obamas-climate-rules-possible-107351.html#VOIGq0LnCSM>.

morphed into Section 111(d).²² There was, in the Senate bill, a provision entitled “selected air pollution agents.”²³ This provision was intended to provide a mechanism for regulation of air pollutants determined, at some time in the future, to be a threat to public health and the environment and thus to require application of emission controls.²⁴ In other words this was, in terms used today, the epitome of the precautionary principle.²⁵ Senator Muskie and his colleagues wanted to make sure that the EPA had the authority to deal with pollutants that, due to ignorance, absence of science, or other factors, might require regulation in the future.²⁶

The Senate passed the Clean Air Act on the eve of adjournment for the 1970 election with time to hold but one conference session with the House.²⁷ We returned in November to try to meld two very different bills with now strong opposition from the White House and polluters.²⁸ We had very little time to reach consensus much less write a final product.

It was in this environment that it became clear that “selected air pollution agents” could well end up on “the cutting room floor.” The House Committee staff and the Senate staff agreed to incorporate the substance of this provision in Section 111 which otherwise dealt with emission standards for new and modified major air pollution sources.²⁹ That agreement was reached so late at night that its purpose

22. See, e.g., Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311 (1991) (explaining and critiquing the development of the Clean Air Act, EPA, and Federal Environmental Law).

23. S. 4358, 91st Cong. § 144 (1970).

24. See S. 4358 § 114(a)(1), (b) (“[S]elected air pollution agent’ means any air pollution agent or combination of such agents which is not subject to the provisions of sections 109 and 110 or 115 of this Act, and which has or may be expected to have an adverse effect on public health and the presence of which, in the ambient air, results from emissions from categories of stationary sources as defined pursuant to the provisions of section 113 of this Act . . . The Secretary shall . . . from time to time . . . compile and publish in the Federal Register a list of selected air pollution agents or combinations of agents for which he deems that emission standards are appropriate under this section.”).

25. See Black’s Law Dictionary (10th ed. 2014) (defining precautionary principle as: “The doctrine that when there are threats of serious or irreversible damage to the environment, a lack of full scientific certainty is not a reason for postponing measures to prevent the damage.”)

26. S. REP. NO. 91-1196, at 18-20 (1970) (“The Committee recognizes that the timing of the control of such pollution agents should be left to the discretion of the Secretary. It is expected that knowledge with respect to some selected pollution agents would justify immediate application of emission standards, while knowledge with respect to others may not justify the same urgency. Therefore, the bill would establish a framework which would provide that the Secretary may initiate the development of emission standards for such selected pollution agents at any time following the date of enactment . . . It would be the Secretary’s responsibility to determine whether there are additional pollutants (including any of those expected to be subject to section 114).”)

27. 91 CONG. REC. 16,117 (1970); see also E.W. Kenworthy, *Tough New Clean-Air Bill Passed by Senate*, 73-0, N.Y. TIMES, Sept. 22, 1970.

28. See Matthew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 460-63 (comparing and contrasting the 1970 Senate and House versions of the Clean Air Act); 91 CONG. REC. 16,091-16,092 (1970) (Senate debate regarding initial version of 1970 Clean Air Act, including commentary from President Nixon); Edmund S. Muskie, *The Clean Air Act: A Commitment to Public Health*, THE ENVIRONMENTAL FORUM, Jan./Feb. 1990 (stating “when the bill was made public, the business community was outraged”).

29. See Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 111, 84 Stat. 1676, 1684 (1970) (this final version of the Clean Air Act Amendments of 1970 was enacted on December 31, 1970).

was not discussed in the conference report or in either statements by the House and Senate managers. Frankly, I am not sure we even discussed how we preserved “selected air pollution agents” with our conferees.

I need to add that I do not believe any member of the Senate or House familiar with this provision or with the Clean Air Act would have envisaged its application to carbon dioxide but I would guess that Senator Muskie, once he learned that the Supreme Court had affirmed that carbon dioxide was a pollutant, would have said something like, “Why do you think I put that provision in the law in the first place?”