In late 1970, Richard Nixon (bless his soul!) did two really good things. He invoked the Reorganization Act of 1959 (now long since lapsed) to create two new federal agencies, cobbled together from bits and pieces of existing departments and agencies: the Environmental Protection Agency (EPA) and the National Oceanic and Atmospheric Administration (NOAA). (I did not imagine at the time that I would become a division director of the first, and, later, general counsel of the second.) I was then a third-year associate at a rapidly-growing Washington law firm, and had been told I could expect to become a partner as soon as I became eligible – *but* that I would have to choose an area of specialization within the firms existing practice groups. I was not enthusiastic about that sort of commitment, and so I began scanning the horizon.

I distinctly recall seeing the piece in the Washington Post about EPA: Nixon had appointed William D. Ruckelshaus, the young former speaker of the Indiana House of Representatives (and the losing GOP senatorial candidate to Birch Bayh), to head up the new agency. I recall thinking that this new enterprise might be a really exciting place to work, but also thinking, realistically, that getting a job there would be tough. After all, the reorganization plan that created EPA brought together elements from the Interior, Agriculture and HEW Departments, plus the old Atomic Energy Commission, all of which brought existing employees to the new entity. Plus, I figured lots of idealistic young lawyers would be seeking this opportunity. I was not very hopeful.

My first step, probably in late December, was to speak with Tom Charlton, a Yale grad a couple of years my senior (and, as a member of the 1956 Yale crew, the only Olympic Gold Medalist I have ever known). Tom was a non-lawyer employee of the Federal Water Pollution Control Administration at the Interior Department. He gave me the address of the "right guy to write." Which I did.

A few weeks later, I received a purple mimeographed form letter rejection, assuring me that I should not feel too bad, as the new agency had received many, many applications from highly qualified individuals, etc., etc. I inferred (correctly) that nobody in the General Counsel's Office had seen my résumé. Shortly afterwards, I learned that my law firm colleague Dick Denny had also approached EPA, and had secured an interview with the Deputy General Counsel,

Alan Kirk. I quickly wrote Kirk, enclosing my résumé, and I received a prompt reply asking me to come in for an interview. The new agency's temporary headquarters were in a nondescript brown office building at 1626 K Street, NW (long since demolished and replaced), about two blocks from my law firm. Alan was (and still is, at 94) cheerful, preppy and bow-tied, then with blond athletic good looks; a graduate of Hotchkiss and Princeton with a pipe rack on his credenza. He offered me a cigarette, but I declined and asked if I could light up my pipe instead.

Sometime in late January or early February, Alan called to offer me a slot as his special assistant, as a GS-13, Step 4, thereby matching my law firm salary of about $19,500. Years later, he told me – presumably in jest, but you never know – that he had thought the Agency needed more pipe smokers. I also heard later that the Office of General Counsel (OGC) had received directly about 200 resumes. Dick Denny also got a job, as counsel to the radiation programs office. All told, my law firm contributed five lawyers to the fledgling EPA.

A few days before my departure from the firm in February, 1971, I was asked to meet with several of the partners with whom I had worked, plus the senior partner. They said they were sorry to see me go, but they also acknowledged that each of them had also spent time in the federal government, and hoped I would learn a lot at EPA. They also suggested that I return to the firm in eighteen months or so. I was open to that.

About two weeks later, after I was installed on K Street, one of my former colleagues called me to say that the firm was splitting up. Two of the partners with whom I had worked closely had announced formation of a new firm, taking many partners and associates with them – an unfriendly surprise move. The firm, it seemed, was splitting pretty much down the middle, and desired associates were courted by both factions. (I soon got calls from both.) A year or so after that, two of the other partners I had somehow impressed, plus a few other litigators, split off to join another firm. I stayed at EPA for almost eight years.

At the outset, Alan Kirk had made clear that the special assistant's slot I was to occupy was for a limited term only, and that he expected me to rotate out to one of the divisions after a year or so. But for the time being, as it soon became clear, I had blundered into a remarkably fortunate spot. EPA's original charter provided for five "advice-and-consent" senior positions. One of these, the assistant administrator for enforcement and general counsel, was a slot whose incumbent wore two hats. That incumbent, John Quarles, had decided to focus on enforcement; it would not be an overstatement to say that Alan Kirk was the *de facto* general counsel of EPA. And I was his sole special assistant. As of January 1, 1971, when EPA officially sprang into existence, it was blind and feeble, with few statutory authorities and no legal infrastructure other than the warm bodies passed on to it from its predecessor departments. There was much to be done, and I was central to much of its doing – not only because of my position, but also because EPA's legal staff, even including those from predecessor organizations, was minuscule. There were three or four water lawyers, and a similar number in divisions dealing respectively with contracts, air and radiation, and pesticides. There were only two or three lawyers in each of ten regional offices. Thus, as the agency picked up steam, appropriations and new hires, urgent legal matters arose with nobody in particular assigned to them. Many problems drifted into OGC, and I was the utility infielder. As a result, my assignments were unpredictable and eclectic.

For instance: Section 169 of the internal Revenue Code provided for rapid amortization of "certified pollution control facilities" – whatever that meant – in only five years. One of my early assignments was to write implementing regulations for adoption by the IRS. I was teamed with one of the air lawyers, and we tried to puzzle out what Congress had intended, and then to devise some rational system for awarding a tax benefit on the basis of environmental enhancements adopted by industry. With reference to the statute and its legislative history, and perhaps some discretion on our part, a program emerged. The central notion was that the qualifying facility had to be retrofitted on an existing (dirty) source; the paradigm was a "baghouse" attached to a smokestack. Construction of a new facility – let's say, a nuclear power plant – did not qualify simply because it replaced a dirty coal-burning power plant. Application was to be made on an EPA

form to be developed – in effect, by me and the air lawyer. The requisite "certification" was to come from the appropriate state agency. Denials of certifications could be appealed to the EPA general counsel – in effect, me, subject to approval by Kirk and Quarles.

As I recall, this was all put together in remarkably short order, and within a few months, I could see words that I, personally, had written enshrined in Title 26 of the Code of Federal Regulations. (I can't imagine how long this exercise would take today, as successive administrations and Congresses have imposed layer upon layer of bureaucratic requirements on regulatory agencies, lest the dead hand of government come to weigh too heavily on America's entrepreneurial spirit.) Perhaps the relative speed of this process derived from the fact that industry seemed anxious – and perhaps desperate – for the finalization of these processes. This surprised me: How important could a five-year tax write-off be, compared with whatever amortization period would apply absent section 169? But it seems that whenever a tax break is provided by Congress, swarms of engineers and accountants turn their energies to getting a piece of the action, however marginal its impact on their bottom lines.

On another day, I wrote the administrative determination to cancel the registration of a pesticide pursuant to the Federal Insecticide, Fungicide and Rodenticide Act. I don't even recall what the pesticide was, but the scientists who had come over from the Agriculture Department had finally agreed that the product's carcinogenic nature was no longer acceptable. Alan told me that the draft determination for Ruckelshaus's signature was close to hopeless. He told me to make it intelligible. I believe I did.

I also dabbled in trial-type litigation, where documents and witnesses were presented before administrative tribunals. The first of these was the case I lost, a bizarre adventure in a place far from environmental law. Non-supervisory federal employees are allowed to form labor unions, but federal statutes like the Wagner Act and Taft-Hartley do not apply. Instead, an executive order provided remedies to federal unions and their members in cases where management was determined to have engaged in "unfair labor practices." An EPA management team, and one supervisor in particular, had been charged with unfair labor practices; specifically,

in taking punitive actions against the president of the local union, allegedly as a result of "anti-union animus." As I have said, I was the utility infielder in the General Counsel's office at the time. Accordingly, I was dispatched in August, 1971, to steamy Coral Gables, Florida, home of the Perrine Primate Research Laboratory, a facility engrafted onto EPA from the Ag Department. Its mission was to test pesticides on primates; as it turned out, on monkeys too. I had two days to meet with witnesses and prepare for a hearing before an administrative law judge from the Labor Department. There was no pre-trial discovery – which was just as well, because I knew almost nothing about discovery procedures.

What I most recall from this experience was the bizarre tribalism that infected this absurd facility far from civilization at the margin of the Everglades, and the strange characters who staffed it. I met the accused supervisor, a forty-something Ph.D. toxicologist, Morris Crandall, with swept-back dark hair and big square glasses. His favorite color was plaid. I thought from our discussions that Crandall was likely to be a stickler in a supervisory capacity, perhaps a trifle anal – a useful attribute in a research scientist, maybe, but in a supervisor of low-ranking non-scientists, not so much.

Crandall gave me a tour of the lab building, largely devoted to cages occupied by generally placid baboons and Rhesus monkeys. (I don't recall any primates, but there may have been some.) The inmates looked much like those in any zoo, but for the disconcerting fact that most of them had metal devices, looking like electrodes of some sort, protruding from their skulls, à la Frankenstein. There were attendants in jumpsuits of some sort, the "animal handlers," all Black. I learned that the union was composed entirely of these fellows, plus Crandall's secretary – the only White member of the union, and its president. That was how, as it turned out, she came to be Crandall's primary accuser.

I don't recall her name, but I met and interviewed her in the presence of union counsel – in theory, in the hope of negotiating some sort of settlement. She was a very large, fat woman of middle age, extremely voluble about her troubles with her overbearing boss. She was a single mother and a cancer patient undergoing chemo. Crandall had taken to charging her with a day of annual leave

each time she came in a few minutes late, and he took some similarly disproportionate action whenever she was late returning from lunch, or from chemo. And so on.

For his part, Crandall was unapologetic. Rules were rules, and his secretary was not above them simply because she happened to be president of the union; according to him, this was a card she played to excuse deviations from her schedule. There was some other grievance, too, that I can't recall – something having to do with moving files around to thwart him, or perhaps hiding his coffee cup, things that might have been viewed by others as Captain Queeg-ish. In any case, it was clear that these two antagonists were a perfect mismatch. The obvious settlement would have involved a reassignment to some other secretarial slot, but for some reason this was impossible or unacceptable. That said, I didn't really think this case had anything at all to do with "anti-union animus," the critical element under the executive order. Crandall came from a union household, and I thought he could testify credibly that he supported unions in general, and that none of his complaints about his secretary had anything to do with her activities as union president.

I interviewed other witnesses, said to have some knowledge about Crandall and his secretary and the status of the union at Perrine. The lab director was a slight, mild-mannered professor type with sparse hair that reminded me, somehow, of an Asian elephant's pate. He supported Crandall, of course, and believed strongly that the differences between Crandall and his secretary had nothing whatever to do with labor unions.

I interviewed the director's executive secretary, Ruby, whom I recall fifty years later as the most dramatically alluring woman I ever met. Although probably in her late forties, she had flawless ivory skin. A creamy décolletage and cleavage blossomed from the top of her very tight black silk sheath, which revealed long, toned arms and legs. Her face was conventionally beautiful, but with an element of flinty resolve, and her black hair was pulled back in a prim bun. She wore very dark red lipstick. I'm thinking Lola in "Damn Yankees." Her manner and conversation, however, were completely normal and professional, which seemed to me incongruous, just as it seemed bizarre that this exotic creature

was working a few yards away from a bunch of caged monkeys with electrodes sticking out of their skulls.

I interviewed another senior secretary, a pleasant if retiring matronly type. She had valuable evidence, based on conversations with the principals that, I thought, would have been close to fatal to any claim of anti-union animus, and supportive of the notion that the unfair labor practice charge was advanced in bad faith. I don't recall the substance of her expected testimony, but I thought she would be a credible and valuable witness.

There was one other thing. Crandall had been interviewed by a union official, from the national union or its regional affiliate. The ostensible purpose of this interview had been to smooth things over, if at all possible. In the course of this interview, Crandall, by his own admission, became frustrated at the union rep's insistence that his disagreements with his secretary were based on his assumed resentment that she was the local union's president. "No," he said, or words to like effect, "It has nothing to do with this Mickey Mouse union business." Plus, there was yet one more thing: the Administrative Law Judge was from the Labor Department

The hearing was in the federal courthouse in downtown Miami, a very tall but outmoded building that looked, as I recall, like the University of Moscow. The union lawyer of course called the complainant, who did a good job projecting a sense of grievance. He also called the union rep to testify about Crandall's mention of "this Mickey Mouse union business." I don't recall my cross-exam, but it was constrained by something I recalled from – of all places – the trial tactics class at Naval Justice School, years before I had even applied to law school: "Don't ever ask a question of a witness if you don't know the answer." Rules are made to be broken, and I have often thought that I might have gotten something good had I asked the witness questions to bring out that he was, in fact, an *agent provocateur*, his assigned task being to provoke accused managers into some outburst which could be characterized as displaying "anti-union animus." But I didn't.

I called Crandall and the lab director, as well as the pleasant, matronly retiring senior secretary, who would, I thought, give the lie to the charge of anti-

union animus, based on hearsay statements from one or more of the petitioner's witnesses. (Hearsay was admissible in this forum, at the discretion.) No such luck: No, she had never discussed this case with the other witnesses. No, she didn't recall telling me otherwise when I interviewed her, and so on. In other words, someone had gotten to her, and it would not surprise me at all had it turned out that she was subjected to physical threats made by, or imputed to, the Black animal handlers.

No matter: I had put forward my defense, and there were post-trial briefs to be submitted. In mine, I was able to cite a Supreme Court case that established with crystal clarity that anti-union animus had to be shown by credible evidence, and not some off-hand wisecrack. It was on all fours with my case. And yet, a few weeks later, I received the adverse determination from the ALJ, finding anti-union animus on Crandall's part and ignoring any discussion of the Supreme Court case I had confidently cited. I don't recall what the remedy was, but it really didn't matter: the point of these proceedings was to castigate management. As I rationalized my loss at the time, the Labor Department ALJ understood the law perfectly well, but he judged that this corpulent, single-mom cancer patient was tormented by a rigid manager with a clashing personality, and that the path to rough justice led through a finding of "anti-union animus."

During those action-packed years at EPA, I also became involved in a case of historic significance: significant not just on account of the issues, but also on account of some of the personalities involved. The central issue involved the plan of the old Atomic Energy Commission to detonate a five-megaton thermonuclear device far underground on Amchitka Island in the Aleutians, in late 1971. This project, known as the "Cannikin Shot," evoked wide-spread fear and loathing, especially in Alaska, which was still gun-shy after a catastrophic earthquake in 1964. Nobody knew whether an underground explosion of such force could or would trigger a similar event. There was a public Environmental Impact Statement (of course), but there was also a classified report to the president from the so-called "Under Secretaries' Committee," including various classified attachments. One of these consisted of Bill Ruckelshaus's

comments on the EIS, and those comments were classified "Top Secret." A congeries of plaintiff environmental organizations had assembled to seek an injunction against the Cannikin Shot, and a congeries of congresspersons, nominally led by Hawaii's Patsy Mink, sought access to all the classified decisional materials, including Ruck's memo.

One afternoon around Hallowe'en, Quarles dragooned me to attend a meeting in the Old Executive Office Building. The purpose was to discuss the administration's strategy for ensuring that the Cannikin Shot preceded as scheduled on November 6, 1971, and to make last-minute preparations for the extraordinary emergency hearing the Supreme Court had scheduled for the following Sunday[1] to consider the motion of a the environmental groups [2] for a temporary injunction pending a further hearing on the merits.

The meeting was held in the palatial office of John Dean, counsel to the president. Dean, of course, was to become world-famous (or infamous, depending on one's outlook) a few years later for his turncoat testimony to the Senate Watergate Committee and his revelation that he had warned President Nixon of "a cancer growing on the presidency." Like many front-rank offices in the OEOB, Dean's had a working fireplace, and its towering windows, on the building's east façade, looked directly across West Executive Avenue to the arched window of the president's living quarters. There were at least twenty lawyers in the room, and many bureaucratic currents and cross-currents. What I best recall from the meeting was Dean's remarkably cool demeanor and his ability to project complete control over a roomful of senior officials, most of them a good deal older than Dean, then 33.

A female admirer of our crook vice president, Spiro Agnew, once paid him a compliment that stuck with me: "Up close, he is just so *clean*," she gushed. "I felt like if I rubbed him, it would squeak." Dean struck me like that, with a flawless complexion, and not one of his sandy blond hairs out of place. He presided over this tense meeting in starched shirtsleeves and suspenders, from behind a desk big enough for ping-pong. His voice was mellow, something like an

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1 Only the second in the twentieth century, I was told at the time.

2 Including the newly-formed Greenpeace, in its first litigation ever.

oboe, and his speech was unhalting and authoritative, as he recognized the leading participants, or cut them off, guiding the meeting to its preordained conclusion.

At the end, it was decided, among other things, that Ruck would submit an affidavit to be attached to the administration's motion papers in the Supreme Court, and Quarles assigned me the task of somehow getting it finalized and signed by Ruck at his home that evening. I don't recall exactly what it said, but it had generally to do with the nature of his still-classified comment on the Under Secretaries' Report, and was designed to persuade the Court that whatever those comments on the environmental risks of the Cannikin Shot might be, they should not substantially affect the outcome of the emergency proceeding.

Later that evening, Carl Eardley – a crusty Justice Department veteran with a shock of snow-white hair and a rep for being at the forefront of the Kennedy administration's efforts to protect Black schoolchildren during the various school integration flare-ups – and I drove out to Ruck's house in Montgomery County and got his signature on the affidavit. Within a week, the Supreme Court decided not to disturb the non-action of the D.C. Circuit, and the Cannikin Shot went off with all deliberate speed on Amchitka Island. It generated a shock wave of 7.0 on the Richter scale, but Anchorage was not destroyed by another earthquake. A brand-new large lake appeared on the island, and a thousand sea otters were said to have died.

In retrospect, the most important thing I ever did at EPA seemed unremarkable at the time, but it was an important aspect of the growing body of law under the 1967 Freedom of Information Act. If some federal agency had previously dealt with the issue we faced, we were unaware of it. Also, it gave rise to what I later learned was a felony on my part, although committed in accordance with what I considered the essence of public transparency and the noble cause of environmental protection. The issue arose under the so-called "Exemption 4" of FOIA, which exempts from mandatory public disclosure "(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . ." At the time, the Clean Air Act required manufacturers of "fuel additives" to report on the composition of their products, the idea being to

permit assessment of the health and environmental effects, if any, of the stuff Big Oil was releasing to the air via combustion.

Sometime in 1971, Alan Kirk told me that he had learned that FOIA required every federal agency to issue regulations setting forth its procedures for implementation of the Act. As I've said, EPA was blind and enfeebled at the outset, having none of the statutory and regulatory infrastructure that characterize federal agencies, and the requirement of FOIA seemed to have escaped anyone's attention until well after the agency's creation. Being the utility infielder, I was assigned the task of generating a body of agency regulation from scratch. This was easier than it might sound, since there were of course numerous examples in the Code of Federal Regulations which I was free to copy, and I am sure I did so liberally. Once again, my work product appeared in the Federal Register with remarkable speed.

Shortly after this body of work appeared, EPA received one of its first FOIA requests: Public Citizen Health Research Group, one of Ralph Nader's organizations, requested disclosure of the fuel additive reports the agency had received under the Clean Air Act. The issue, of course, was whether this material was exempt from disclosure under Exemption 4, but there were two sub-issues: (1) What qualified as a "trade secret'? and (2) What information *other* than trade secrets was somehow "privileged or confidential"? In this instance, most if not all of the fuel additive reports had been marked "confidential" by their manufacturers, and someone in the air programs office had notified Public Citizen to that effect. In due course, the issue was shuttled to the General Counsel's Office, then to me. I no longer recall the sequence in which things happened, but I certainly had direct contact with Dr. Sidney Wolfe of the Health Research Group, a Ph. D. chemist and the most prominent scientist in the Nader organization at the time. Predictably, he claimed that none of this information was entitled to protection as "trade secrets," because it could easily be reverse engineered; he was right about the law, but I had no idea whether he was right about the facts. It also seemed to me that if the agency accepted his arguments and granted Public Citizen's request, we could be accused of a "taking" of private property without due process of law.

After a while, I suggested a solution to this dilemma, and the solution resulted in what was, as far as I know, the first "reverse FOIA" proceeding undertaken by the federal government, as well as an amendment to the regulations which, as modified over the years, remains in effect. The general idea was in two parts. First, bona fide trade secrets were entitled to protection, and if a member of the public requested their disclosure, the agency would notify the party asserting trade secrecy and invite him to substantiate his claim, which would be deemed waived in cases of non-response. Second, "commercial or financial information" was not, by definition, "privileged or confidential," if the agency was able to demand its submission by statute; if, on the other hand, the agency had no legal right to demand information which a person submitted voluntarily, he was entitled to extract in return a pledge of confidential treatment, no matter what information he had submitted.

As for the original FOIA request that stimulated all of this, I can't recall exactly how it finally fizzled out, which it did. But I do recall several conversations with Wolfe, whom I was prepared to assume was on the side of truth and justice. He told me he was confident there was no real trade secrecy involved. Long story short, I agreed to leak to him copies of the several dozen reports in question. There is a small triangular public park formed by the intersections of M Street, 18th Street and Connecticut Avenue, NW. I met Wolfe there at lunchtime one day and delivered the documents. I really had no notion that my unauthorized disclosure was important or would do any serious harm to anyone's legitimate interests, and soon afterwards, Wolfe called to thank me and to assure me that there were in fact no trade secrets involved. The real secret, he told me, was that none of these off-the-shelf chemicals could have any appreciable effect on mileage or performance, and probably none on public health.

It was not until many years had passed, long after I had left EPA, that I learned about 18 U.S.C. §1905, which makes it a felony for any federal employee to wrongfully disclose information that ". . . concerns or relates to the trade secrets, processes, operations, style of work . . ." of any person.

In every life there are inflection points, but we may not see them at the time for what they are. In the summer of 1972, I received a call from "Pep" (*née* Irving) Fuller, of EPA's Office of International Affairs, as it was then ineptly named. He wanted to meet and discuss the possibility of my being assigned to a special international project for a few weeks that November. Pep was (and remains) a cheerful fellow, with pink, freckled skin and thinning blond hair. I learned that he was a 1950s graduate of the University of Mississippi (to me, a suspicious credential) and of UVA Law School, but he made clear that his position at EPA was not a legal one, and that the agency had been asked to designate someone from its legal staff to work with the State Department and others. The project in question was negotiation of the Ocean Dumping Convention[3] in London. The President's Council on Environmental Quality (CEQ) had recently produced a report on the problem of ocean dumping. (It was entitled "Ocean Dumping: A National Policy," which I thought might give people the wrong idea.) At the dawn of the environmental era, this practice had sparked outrage. Plus, it was low-hanging fruit: nobody could really defend the wanton disposal of hazardous wastes, like heavy metals and radioactive materials into the seas. Domestic legislation was in the works, and the United States sought to ensure that other countries would be brought along. As it turned out, Pep's boss had pre-cooked this idea with Kirk, and I realized that I would soon spend two weeks in London at government expense, unless I had some objection to that. I didn't.

Thus began my first exposure to international environmental law and to a subject matter that was central to my career. Unfortunately, my trip also began right after an annoying injury: the week before leaving for London, I severely sprained my left ankle while jogging in Glover-Archbold Park. It was lucky I was able to limp painfully back to my home on Q Street in Foxhall Village, because by the next morning it was excruciating to place any weight at all on my left foot. And I couldn't drive. The orthopedist I somehow got to had nothing but bad news: a severe sprain can take longer than a fracture to heal, and the tenderness was likely to persist indefinitely. He put me in a walking cast, prescribed a cane and off I went to Europe for the first time since 1960.

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[3] Actually, the "Convention on the Prevention of Pollution of the Sea by Dumping of Waste and Other Matter." Really.

Carrying a newly-issued maroon-jacketed Official Passport, hobbling on my cast and cane and toting a heavy olive green briefcase, I left late on an October evening in a Boeing 747 – my first ride ever on one. Back then, you could smoke on the plane and drinks were about a dollar. I was too excited to sleep much, if at all, and arrived at Heathrow in a gray light. Out my window, I could see throngs of people behind police barriers, with many big banners welcoming the Jackson Five to England. Who knew they had been on my flight all along, in first class? Perhaps partly as the result of fatigue, the moment gave rise to a powerful emotion that made me mist up. It's a feeling I have had a few times after that morning, and it's hard to explain – something to do with the vastness of the world and how grateful I am to have seen more of it than most ever do.

With most of the US delegation to the conference, I was booked into the Hotel Europa on Grosvenor Square, just a long block from the brutalist architecture of the US Embassy – which was a good thing for my ankle, because after breakfast every morning I had to get to the delegation meeting in the Embassy. In the weeks before the trip, I had met with many of my new colleagues, most from the State Department and many with whom I was to work for years; in the ensuing two weeks, they slowly indoctrinated me into the world of international conferences, a world I came to know well. Some things you remember forever, and one of them occurred at a preliminary meeting of the US delegation. The general idea of the draft treaty before the conference was that ships departing a port in a country that was a party to the treaty would have to get a permit from that country, if it intended to dispose of waste "transported to sea for the purpose of disposal." Also, all parties pledged to adopt domestic legislation consistent with the proposed treaty and to enforce it, even against non-parties, "within the limits of national jurisdiction." I asked at one point exactly what this formula meant, and why the draft didn't just say "territorial sea." I clearly remember Mike Matheson, a young lawyer in the Office of the Legal Adviser answering me: "Oh, we're leaving that to Law of the Sea."

"What's that?" I asked, innocently.

What it was, I soon found out, was the Third United Nations Conference on the Law of the Sea, planned to convene at UN Headquarters in 1973 pursuant to a

General Assembly Resolution, and intended to supplant the four 1958 Geneva Conventions. Those, and a failed sequel conference in 1966, had never reached agreement on the breadth of the "territorial sea," in which a state exercises total sovereignty. In the view of the US and most other maritime states, it was three nautical miles – once upon a time, the assumed range of a cannon. Anything beyond that would, in our view, constitute the dread "creeping jurisdiction" of coastal states, like the South American countries which claimed a 200-mile limit. Central to the US position was the fear that anything broader than three miles would render some 25 international straits, like Gibraltar and Hormuz, completely blocked by territorial seas, within which the coastal states might impose all sorts of restrictions, and where vessels in transit would be subject to the regime of "innocent passage." Among other things, "innocent passage" required submarines to transit on the surface, with flags flying. Fifty years later, it's hard to imagine this was a practical problem, but it was, central to operations of our Polaris fleet and thus to our nuclear deterrent. Ironically, the Soviet Union agreed with us on this issue. At the time, I thought the US and the USSR were sort of like two bitter chess rivals resisting any change to the number of squares on the board.

The negotiations were held in Lancaster House, a UK government facility near the Mall and St. James Street. (Thanks to my walking cast, I was privileged to be ferried there every morning in the limo the Embassy made available to the USDel.) It is a splendid relic of the Eighteenth Century, its interior space organized around a vast central hall with a frescoed ceiling of ethereal Renaissance art. Two enormous symmetrical marble stairways, lushly carpeted in red, led to the second floor conference rooms, including the main one, which was basically a grand ballroom with soaring ceilings and chandeliers. A separate gallery spanned the entire south side of the building, with plump leather chairs and views of the Mall through towering plum-draped windows. Lancaster House reminded me of the formal settings in Marx Brothers movies, where Groucho might insult Margaret Dumont and numerous bearded stuffed shirts in tails; its central hall once appeared unmistakably in one of the "Raiders of the Lost Ark" sequels, and much of the building later served as a stand-in for Buckingham Palace in the Netflix series "The Crown."

The entire two weeks pivoted upon the intractable issue of the reach of coastal state jurisdiction – an issue that had marginal relevance, if any, to the meat of the ocean dumping treaty. The emerging treaty identified three classes of wastes, each identified in amendable annexes. Those "blacklisted" could never be dumped at sea, and most of the rest required a "special permit" issued in accordance with criteria also set forth in an annex. Everything else could be handled by "general permits" – in practical terms, regulations of general applicability. Permits were to be issued by the state from which the dumper departed. I don't recall how much ocean dumping was actually going on in 1972, but I'm sure that not very much of it involved dumping off someone else's coast – and that was the only situation in which the breadth of coastal state control made any practical difference at all. As I learned in London that fall, the biggest enemy of the US (and USSR) on this issue was Canada, which regarded its Arctic waters as requiring special environmental protection, and therefore resisted anything less than total control over foreign ships in its Arctic waters. This issue came close to aborting the entire conference and emerging treaty, and the two warring sides (roughly, the "coastal states" and the "maritime states") played chicken until the final day of scheduled meetings. At that time, the host government announced an extension was out of the question because Lancaster House was scheduled for something else, and a compromise was grudgingly accepted by both sides. The extent of coastal state authority remained imprecise, "left to Law of the Sea."

In spite of my ankle sprain, I had a great time in London. As the days passed, I stretched the capacity of my ankle to hobble around the neighborhood of Lancaster House, up St. James Street to Piccadilly Circus. After a week or so, I could actually hop on my one good foot all the way up the ultra-wide red-carpeted stairways to the second floor. One day, with Terry Leitzell, another young lawyer from the Legal Adviser's Office, I made it from the hotel up to the Irish House in Oxford Street and I bought the bulky white Arran sweater I wear to this day, for about thirty-two dollars. Another day, the negotiations recessed so we could all walk (or hobble) over to the Mall and watch the queen pass in her gilded carriage with the white horses, en route to the annual ritual opening of Parliament. I greatly enjoyed my new colleagues and friends on the US delegation, mostly young lawyers (all male, of course) from State. In the evenings, many of us

congregated at the Barley Mow, a typical dark, cozy English pub next door to the Europa. (It was still there in 2017.) Often, we would eat pub food, or fish & chips at Audley House, behind the Embassy. Many of our conversations were shop talk and chit-chat about the world of public international law, maritime commerce, super tankers and nuclear deterrence. It all seemed like pretty heady stuff compared to the talk back at EPA of secondary treatment at sewage plants under the new Clean Water Act.

Back in Washington, I turned to writing implementing regulations for the new Marine Protection, Research and Sanctuaries Act. As a logical off-shoot, I was assigned to handle an inquiry from the Regional Counsel in EPA's Region IX, dealing with burials at sea, and the applicability, if any, of the ocean dumping statute. A fair question, to be sure, and one that gave rise to what turned out to be my most lasting contribution to EPA's annals. Attachment 1 is my poem in reply to the inquiry.[4] (Years later, a former EPA General Counsel assured me it was still in circulation.)

In the evenings at home, in addition to Attachment 1, I wrote an article about the treaty and submitted it to *Oceans* magazine. Soon, I received a phone call from its editor, Donald Greame Kelley, whose enthusiasm for the importance of my work surely exceeded my own. Not only did he want to publish my piece, but he intended to do so in a special section of the magazine, on light blue stock, which he thought would stress the significance of the treaty and of my article. That was my first publication about the marine environment.

While my job at EPA focused on water pollution generally and marine pollution in particular, my leisure interests were proceeding on a parallel track. Ever since my first vacation to Grand Cayman in 1968, I had become more and more entranced with the underwater world. In ensuing summers, I had learned to breath-hold dive down to about forty feet, and had bought a Nikonos II underwater 35mm camera. With my first wife Laurie and our young son John, I had made snorkeling vacations back to Grand Cayman, later

[4] The serious answer, eventually, was a "general permit" under the treaty and statute, basically incorporating Navy Department protocols.

to Tobago, Grenada and St. Croix. In the summer of 1972, shortly before the ocean dumping trip, Alan Kirk had fed me a plum assignment: to substitute for him as a speaker at an environmental law symposium during the ABA's annual convention in San Francisco. That was a heady experience in itself; at the symposium, my amiable neighbor on the dais was Dick Lamm, future governor of Colorado, and at the ceremonial dinner in the Bank of America penthouse suite looking out at the Golden Gate, I sat with senior execs of the Sierra Club. But I took advantage of a free ticket to the coast to combine it with a family vacation in Hawaii, and a week or so before departure, I arranged private lessons and a scuba certification from the dive shop in Silver Spring. My first three ocean dives were off the Kona Coast on the Big Island. It was only natural that, back at EPA, I gravitated to legal issues that complemented my growing passion for clean, clear ocean waters.

And opportunity soon arose. Almost exactly a year after the ocean dumping conference, a similar but larger conference was convened by what was then named the Intergovernmental Maritime Consultative Organization (IMCO), the specialized agency of the UN charged with the development of international standards for ocean-going shipping – the rules of the road, for example. A number of highly-publicized tanker accidents causing massive coastal damage had occurred in the preceding years, like the infamous wrecks of the *Argo Merchant* and the *Torrey Canyon*, and public interest was focused on international standards to prevent or mitigate such disasters, as well as the chronic, if less dramatic, problem of oily beaches caused by routine tanker operations. (When tankers unload their cargo, they must fill their cargo tanks with ballast water, which they later discharge at sea before taking on the next cargo. That's why you used to find lots of "tar balls" on beaches.) A number of international treaties addressed some of these problems, and in 1973 IMCO's membership turned its attention to standards for the control of "operating discharges" from crude oil tankers, as well as those from refined product carriers and all discharges of vessel sewage and garbage.

By then, I was working in the Water Quality Division of OGC, in Crystal City, but I was again dragooned by Pep Fuller and the international affairs office to join the six-man EPA contingent on the US delegation for a full month in

London. This conference, now known as "MARPOL 73" after the treaty it produced, was a much larger enterprise than the ocean dumping conference had been, with many more technical experts from around the world, too large for Lancaster House. Instead, IMCO was able to borrow the facilities in the Dean's Yard adjoining Westminster Abbey, and the large oak-paneled amphitheater that was our conference room for a month was the one usually used for synods (or whatever they call them) of the Church of England.

If London had been exciting the previous year, it was much better with two healthy ankles. At Pep's initiative, we six from EPA arranged to let a spacious apartment in Dover Street, just a few steps off Piccadilly and a short walk from St. James Park and Buckingham Palace. Life in London was good. The stately Dean's Yard was a delightful and exotic work environment, and I was able to spend a few lunch hours idly wandering into and around the neighboring Westminster Abbey. There were probably about three dozen members of the USDel, all told. Besides my six EPA colleagues, most of them oil and chemical experts, the USDel included the State Department lawyers I had gotten to know the year before, several Coast Guard officers and a squad of national security types from the Defense Department, the latter single-mindedly focused on ensuring that nothing in the treaty under discussion could possibly act to the detriment of our Polaris nuclear deterrent. I bonded with Dave Cook, my counterpart from CEQ, with whom I would later work closely for years.

Diversions were plentiful. Groups of us went to the theater in the evenings, and to ethnic restaurants. There were weekends, mostly free time, for the Tower of London and a three-day excursion with the EPA guys to Salisbury and Stonehenge. I explored Portobello Road one Saturday, and bought the seminal fish prints of the collection now on our dining room wall. I well recall having a gentlemanly afternoon tea in the lounge of Brown's Hotel with Pep Fuller when we learned of Nixon's infamous "Saturday Night Massacre," when he serially fired Elliot Richardson and Ruckelshaus for refusing to fire the Watergate special counsel, thereby making Solicitor General Robert Bork, my antitrust prof at Yale, acting attorney general of the United States. In a similar vein, I recall returning to the Embassy late one afternoon to be told by the Marine guard at the door that Vice President Agnew had resigned, pleading guilty to federal corruption charges.

While we were spending a month having tea and biscuits in the Dean's Yard, it seemed that Washington was going crazy.

Details of the marine pollution treaty negotiated that year would be too eye-glazing to detail here. (I did detail them at the time, though, for my second lengthy article published in Oceans Magazine.) Far more important to the narrative were events relating to my future, both within and without the IMCO conference. In the first place, the USDel that year was chaired by Russell Train, the chairman of CEQ, but just nominated by Nixon to head EPA after the resignation of Ruckelshaus to become deputy attorney general under Elliot Richardson. Russ was a lawyer (formerly a judge on the US Tax Court before becoming Deputy Secretary of the Interior), and looked to me to help bring him up to speed on the international legal issues presented by the conference, and their relation to EPA's domestic regulatory agenda. I wouldn't say "I got to know him" in that month, but at least he knew who I was.

Had I simply returned after the conference to EPA, to the water quality division of OGC, I might have aspired to eventual promotion to head of the office – and perhaps, in time, to something loftier within the agency. But by then the role of a yeoman government lawyer had lost its appeal; maybe chalk it up to the "wanderlust" I've mentioned. But you might also chalk it up to what I call – only half in jest – "the worst day I ever spent in government."

Aside from the heady delights of public international law conferences in London, my more mundane activities, like those of my colleagues, centered upon implementation of the Federal Water Pollution Control Act Amendments of 1972, renaming what is still the Clean Water Act. This was passed over Nixon's veto (a "budget-buster," he complained, due to the massive grants authority it contained for building "secondary treatment" plants for municipal sewage). Of far greater relevance to the Agency's lawyers, though, was the massive undertaking of designing a permit program for virtually all "point sources" of effluents into "the waters of the United States," and devising standards under section 301, in accordance with which state environmental agencies would issue discharge permits under section 402.

Those standards were supposed to incorporate "best practicable control technology," industry by industry. What is "practicable," of course, depends in part on economics, and the Agency had assembled a constellation of working groups to generate the section 301 standards for each of dozens of industry categories. Each working group had an OGC lawyer assigned to monitor its deliberations, and each focused on a report prepared by an outside consultant – no doubt at extravagant expense. One of the working groups to which I was assigned was the Frozen French Fried Potato Industry Working Group. I am not making this up.

And so, there came a time when I reported to a conference room in the Office of Water Programs, located in to the eastern tower of the Agency's then-new headquarters building in Waterside Mall at 401 M Street, SW – "Turkey Tower," we lawyers called it. A consultant's report on the technology available to the makers of frozen French fries – think Ore-Ida, for example – centered our deliberations. You might not think that frozen French fry makers were big polluters, but that would only be because you are unaware of the environmental insult known as "biochemical oxygen demand," or "BOD." It seems that organic materials – relatively benign in themselves – when discharged to waterways suck oxygen out of the water, giving rise to a process known as eutrophication, which is inimical to healthy organisms like fish.[5] The makers of frozen French fries, it turns out, were big generators of BOD – think potato peelings and their sludge. The massive report lying on the conference room table in Turkey Tower dealt at length with the technology for peeling, slicing and dicing potatoes, all with a view to analyzing the technology available for the mitigation of the resulting effluents from French fries plants.

But there was a hitch. You know those "crinkle-cut" French fries? It turns out that the machinery used to make those crinkles was arguably less amenable to BOD-minimizing technology than the machinery for making the ordinary straight-sided French fries. Exactly how much less amenable was a matter of spirited debate between the authors of the consultant's report and the industry titans

[5] The danger of eutrophication is why, for instance, molasses was designated as a "hazardous substance" under the Clean Water Act. A spill of molasses from, say, a derailed tank car could effectively destroy a substantial body of water for years.

necessarily engaged in its preparation. In terms of the 301 standards, the legal issue was whether the limits of practicability applicable to those straight-sided fries could also be fairly applied to the crinkle-cut ones. Debate on this point occupied much of the morning in Turkey Tower, and the debate raged on after lunch – assuming, that is, that such a debate can ever be said to "rage."

In due course, I became numbed. As the lawyer assigned to the exercise, I had little concern, since the central question under the Administrative Procedure Act, then as now, would be whether the Agency's decision, whatever it was, could be defended as something other than "arbitrary and capricious." Legal niceties aside, it seemed to me any possible outcome of the straight v. crinkled issue could not possibly be arbitrary and/or capricious if it had been debated for much of a day by about a dozen bureaucrats and consultants. In any case, that endless day affected me. It took something out of me. It dulled the bright-eyed idealism of a young lawyer in the vanguard of the environmental law movement. It made him realize that the legislative goal of making the nation's rivers and lakes all fishable and swimmable would require a thousand tedious decisions, one by one, potato by potato.

* * *

Four years later, following my attendance at substantive sessions of the LOS Conference in Caracas, Geneva and New York – plus separation form my first wife – I had negotiated a return to a remnant of my former law firm on the understanding I would open its office Saudi Arabia, and I had announced my planned resignation from government service. But my last stint as a diplomat awaited, as head of the USDel to the second Annual Meeting of the Parties to the Ocean Dumping Convention, in September, 1977, in the now-familiar ambience of official London and the headquarters of IMCO, the treaty's depositary and secretariat. These meetings were stilted and generally boring, and after a while one's ears tended to become sore from the cheap plastic earphones tuned to the translators. But the only significant issue I can recall from either of my two forays

as head of a USDel arose at this meeting. The issue, as mentioned previously here, was the definition of "high-level nuclear waste." It was in connection with that issue that I experienced my only case of the jitters, ever, in the course of representing my country and my agency at international meetings.

As also mentioned here previously, the structure of the dumping treaty centered upon the requirement of each contracting party to assure that vessels flying its flag did not violate the substantive standards. These, in turn, related to three separate categories of wastes that might be dumped at sea: (1) prohibited substances, the so-called "black list" set forth in Annex I, which could never be dumped; (2) hazardous substances, which could be dumped, but only after a full permitting process taking into account the generalized and precautionary verbiage of Annex II: and (3) anything else (*e.g.*, construction rubble, dredge spoils), which could be dumped pursuant to "general permits" – in effect, regulations applicable to all, requiring no permits, and perhaps containing precautionary practices like geographical limitations on dumping zones. Annex I included "high-level nuclear wastes." Since the negotiators in 1972 had neither the expertise nor the time to pin this phrase down, the text of the Annex incorporated by reference a definition to be developed later by the International Atomic Energy Agency (IAEA, later rendered prominent by the search for Saddam Hussein's "weapons of mass destruction" prior to the War in Iraq). I'm not sure exactly what political winds were stirring at the IAEA in those years, but it did generate a definition, of sorts: it "defined" high-level wastes solely with reference to their concentration in the receiving waters! In other words, a party could permit the dumping of *any* amount of nuclear waste, of *any* level of contamination, so long as the discharge from the dumping vessel was gradual enough so as not to exceed the specified concentrations in the water. This, of course, was no limitation at all, and not really a definition.[6]

[6] In the early years of the environmental movement, a simplistic commonplace was, "Dilution of pollution is no solution!" Actually, it may be, depending. But my understanding of the science was that, in the case of the "transuranics" in nuclear waste, cumulative amounts over time truly mattered, irrespective of dilution at the point of dumping.

Back in Washington, this evasion was seen for what it was, and so the delegation I headed went off to London with instructions to take the following position (which I described at the time as "puckish"): since the IAEA work-product did not specify what "high-level" wastes were, by chemical composition; and since any amount of wastes, no matter how "high-level," could permissibly be dumped in accordance with the IAEA work-product, the blacklist item in fact remained undefined, and the prohibition therefore remained unimplemented. The IAEA's so-called "definition" was a nullity, and it would have to try again.

We knew this position would annoy the Soviet Union, which was suspected of dumping high-level wastes in the ocean. And indeed it was annoyed. Cynical as always, the Soviets reacted at the meeting with shock and horror. Ignoring the fact that the IAEA "definition" would leave the Soviet Union completely unrestrained in dumping all the nuclear waste it wanted, the Soviet delegate accused the United States of perfidy! We were accused of attempting to evade the strictures of the blacklist by arguing that the IAEA definition was not in fact a definition, and that the US therefore considered itself free to dump whatever high-level wastes it wanted. Predictably, the Soviets sought to paint themselves as the high-minded environmentalists, and the US as the enabler of a polluting nuclear navy and the evil capitalistic electric companies.

As this played out in the negotiation of the meeting's formal report, the parties were asked to take the position advanced by the US, and, in effect, to refer the matter back to the IAEA for more work on a serious definition of "high-level nuclear wastes." The Soviet delegation, led by a dapper – in fact, surprisingly preppy – head of delegation, announced that it could not possibly accept the US formulation, and that it would have to refer the matter back to Moscow for consultation and further instruction. International conferences – at least those at a relatively low level – eschew confrontation. Differences are often hidden by fig leaves like the IAEA's effort, and there was usually pressure on those who prevented consensus to accede. In this case, though, the US was not isolated, its position enjoying wide support among the delegates, many of whom came with environmental backgrounds. On the other hand, the Soviet Union was a major power, and there was a strong desire to keep it in the environmental tent if at all possible.

I well recall the day this played out. For reasons related to some other issue before the meeting, I and a colleague, the general counsel of CEQ, had arranged a lunch to lobby the head of the Spanish delegation, José Yturriaga. We invited him to the Ritz in Piccadilly, drawing down much of the modest amount allotted me for official schmoozing. Yturriaga was very familiar to me from numerous diplomatic meetings, including all the LOS sessions. He was fleshy and pink-cheeked, with a formidable pile of curly hair, partial to tweed suits. Also, he spoke at great length whenever he took the floor, and was clearly pleased with his presumed stature as a diplomat of great urbanity and eloquence. He greatly enjoyed lunch that day; my colleague and I, not so much. It was not beyond the realm of possibility that the Soviet delegation's referral to Moscow would elicit a high-level *démarche* to Washington, perhaps resulting in inquiry at very lofty levels (maybe even Secretary Vance's!) as to the low-level environmental extremists on the USDel who had contrived to infuriate the Soviet Union by advancing a puckish position to disrupt a meeting that was supposed to be uncontroversial and relatively unimportant. Congenitally both pessimistic and obsessive, I found it hard to stomach my lunch; and, of course, when the end was in sight, Sr. Yturriaga cheerfully insisted that we proceed to the Ritz's extensive and expensive dessert menu.

Back at the meeting, we were occupied with some other agenda item when I saw my urbane Soviet counterpart leave his chair with a piece of paper in his hand, and make his way behind the tables to where the USDel were seated. He leaned over to whisper to me as I removed my earphone, heart pounding. "With characteristic Soviet efficiency," he said in lightly-accented English, "My superiors in Moscow have waited until the very last minute to determine that we will not object to the Final Act of the meeting in its present form." In other words, the referral back to the IAEA would stand.

Resolution of that issue effectively concluded my EPA career. That evening, from my room in the Savoy, I concluded the negotiations by phone for the purchase of 1438 Corcoran Street, NW, a renovated rowhouse in a marginal but gentrifying neighborhood within easy walking distance of my office-to-be, planning to occupy its first floor unit and rent out the rest. That's not what happened. I did not go to Saudi Arabia, and did not eventually become a partner

in the law firm. In subsequent months, Nancy Carmichael, the young woman with whom I had gone on a blind date that September, became my fiancée, and we moved in to the house together, renting out the first floor unit. We were married January 6, 1979 – the best thing that has ever happened to me.