

## Reflections on the EPA at 50

By: Brian F. Mannix | October 1, 2020

### In brief...

At 50 years old, the EPA is the focus of some bitter controversies, but the nature of its mission should be something that unites us far more than it divides us. Brian Mannix reflects on the papers from a symposium on the agency held last year at Case Western Reserve University, and suggests some of the ways that strident advocacy in the public arena can distort our thinking about how best to solve problems.

The first Presidential debate of 2020 took place at Case Western Reserve University (CWRU) in Cleveland, Ohio; but don't hold it against them. Last year CWRU hosted a very fine symposium on the 50<sup>th</sup> anniversary of the creation of the Environmental Protection Agency (EPA), and it recently published a symposium volume in the CWRU Law Review. My own [contribution](#) was to urge EPA to focus on its public interest mission, and resist the temptation to align itself with rent-seeking interests – from coal producers to ethanol refiners – who seek to tilt the regulatory landscape in their favor. Other contributors emphasized different aspects of the agency's history. Here I want to offer some general impressions after reading these different perspectives.



The CWRU Law Review Vol. 70 Iss. 4 (2020) first became available [online](#) three weeks ago, on September 8. It bears noting that the first article in the volume, which to date has been downloaded more times than all of the other articles put together, is the 2019 Sumner Canary Memorial Lecture, "[Assorted Canards of Contemporary Legal Analysis: Redux](#)," by the Honorable [Amy Coney Barrett](#), now nominated to the Supreme Court. Her article was not a part of the EPA symposium, and I won't be discussing it here; but there's the link if you're curious.

### In the Beginning . . .

1970 was a seminal year for environmental policy. The first Earth Day, April 22, enjoyed widespread public participation and press coverage, and Washington noticed. President Nixon used his reorganization authority to create the National Oceanographic and Atmospheric Administration at the Commerce

Department, and EPA as a freestanding (although not “independent” in the legal sense) executive agency, effective on September 9. EPA was initially assembled from existing offices drawn from several cabinet departments, but on December 15 Nixon signed the Clean Air Act of 1970, giving the new agency powerful new regulatory authority.

## Administrator Andrew Wheeler's Keynote Address

Andrew Wheeler, himself a graduate of CRWU, is the fifteenth Senate-confirmed EPA administrator. He gave keynote [remarks](#) at the symposium, reviewing the agency’s accomplishments in its first half-century, and outlining some of the challenges for the next. Wheeler emphasized management reforms that he has undertaken to make the agency more effective. These include efforts to break down the agency’s notorious “silos” – the Air Office, Water Office, and so forth – that fragment the agency and its regulatory policies, and a recent reorganization of EPA’s ten Regional Offices to correspond more closely with headquarters.

Wheeler also talked about EPA’s [relationship](#) with the states. Environmental federalism has always been a key feature of EPA’s legal authority, because so many environmental problems are local in nature and the best solutions will often involve powers – like land-use planning – that are reserved to the states. Today most of the enforcement of federal environmental laws is done by states, using delegated federal authority as well as their own authority. At the same time, states and localities are often the target of EPA enforcement actions when they fail to comply with federal requirements. Wheeler reviewed the long history of such enforcement and the controversy that it entails. EPA’s partnership with the states has mostly been successful, but it is something that needs constant attention.

The administrator also described his efforts to improve EPA’s management of human resources, to implement [lean management](#) practices across the agency, and to install a tracking system for EPA permits. Wheeler is not the first to pay attention to agency management – Bill Ruckelshaus and Russ Train did so in the early years, as did Assistant Administrators Al Alm and Bill Drayton and, later, Deputy Administrator Marcus Peacock – but his efforts on this front should be applauded.

## Professor Jonathan Adler's Introduction and Summary

Jonathan H. Adler is the Johan Verheij Memorial Professor of Law and the Director of the Coleman P. Burke Center for Environmental Law at CWRU School of Law, and was the host of the EPA symposium. His [introduction](#) to the symposium volume describes the founding of EPA and its early history.

Bill Ruckelshaus served as EPA’s first administrator (and also as its fifth), and his initial emphasis was on aggressive enforcement, in order to establish the agency’s credibility. Adler describes the debate within the Nixon administration about whether EPA’s mission should be to advocate for environmental protection or, alternatively, to balance environmental concerns with economic growth. Ruckelshaus clearly chose to cast the agency as a powerful advocate; it has retained that culture, if not always that posture, ever since.

Adler goes on to summarize the contributions from other distinguished authors; I won’t attempt to do that here. A table of contents appears below; read Adler’s [article](#) for the summary. But a review of all the

papers left me with a strong impression of the continuing tension between the role of EPA as an advocate, and EPA as a balancer of competing public interests.

## Thoughts on Law, Public Policy, and the Public Interest

The making of law is a cooperative endeavor. Beginning with the Constitution, “We the People” agree upon the rules that will govern our relations with one another – the terms of the “social contract” we all must live by. Statutory laws are enacted by our elected representatives who (ideally, if now rarely) are statesmen and stateswomen who take the task seriously. And, in the modern administrative state, regulations are adopted by agencies with suitable expertise, pursuant to a clearly circumscribed authority delegated from the legislature.

But the enforcement of those regulations is, like almost all litigation, unavoidably adversarial. That adversarial culture has come to predominate, not only in private disputes, but also in the administration of public laws. It stands in contrast to an alternative “balancing” approach that is evident in many of the CWRU symposium papers: economists, and many economically trained lawyers, tend to look at regulatory policymaking as involving difficult tradeoffs. Both the benefits and costs are borne broadly by the general public, and benefit-cost analysis can be used to try to maximize the public welfare. Many commentators, regardless of political orientation, use this framework to structure their arguments.

Yet some environmental lawyers, including many at EPA, tend to view themselves as one-sided advocates for the public *benefits* of environmental protection, and to express contempt for those who would oppose them. This is understandable for, say, an attorney in EPA’s enforcement office. There are, indeed, bad guys out there, who violate laws and cause public harm in an attempt to make *private* profit. Vigorous prosecution is often warranted in such cases. Indeed, my GW colleague and wife, Susan Dudley, wrote the EPA’s first [BEN Model](#) – a tool to calculate the cost savings that accrue to companies that fail to comply with regulatory requirements. Federal and state enforcement authorities use this tool to calculate civil penalties that effectively confiscate those ill-gotten gains from the perpetrators.

An entirely different mindset is required, however, when deciding how strict an environmental standard to set in the first place. In that context, the prospective costs of compliance are not ill-gotten gains; indeed they typically will not be borne by the directly regulated entities. Instead those costs will be passed through to the general public, just like the benefits. It is typically a mistake to treat the process of making regulatory policy as an adversarial process. An official who approaches rulemaking with the mindset of a one-sided advocate cannot be acting in the public interest.

Throughout EPA’s history, its internal deliberations have been roiled by the tension between these two roles – the judicious policymaker, and the tenacious advocate. This tension also affects EPA’s relations with other federal agencies and with state and local governments, and colors the broader public debate about environmental policy. And, indeed, strident advocacy seems to have taken over our political discourse. At EPA and elsewhere, we could use more stateswomen and statesmen.

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