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IN MEMORIAM
WILLIAM O. DOUGLAS

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For generations of conservationists, Justice Douglas served as our spokesman on the Supreme Court. He vacationed in the forests and mountains of the Washington Cascades, walked the Chesapeake and Ohio Canal, strolled the beaches of the Olympic Peninsula, and traveled the wild regions of the world. He experienced the values of wilderness and understood the need for legal protection of those values. He spoke and wrote frequently about his travels and the country through which he journeyed, taking occasion to warn of the increasing pressures on the environment arising from hydroelectric development, lumbering, pollution, and many other causes. While his fellow justices struggled to keep up with the cases assigned them, Douglas, who claimed he could handle his workload in a four day week, maintained a parallel career as an explorer and environmental writer in the tradition of John Muir.

As a justice, Douglas led the court to recognize that the public interest in land and its uses goes beyond the traditional considerations of economics, safety, and morality. In *Berman v. Parker*, he established the principle that public welfare is a broad concept: "The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." Although this case con-

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2. *Id.* at 33.
cerned the scope of the power of eminent domain, Douglas’ language has become accepted as defining also the authority of the state to regulate land usage under the police power. It is the foundation which sustains the constitutionality of most environmental legislation.

More often, however, when Justice Douglas spoke out in favor of environmental values, he spoke in dissent. The most celebrated example is his dissent in *Sierra Club v. Morton.* Observing that ships and corporations have standing as legal entities to contest governmental action, he asserted:

So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction.

In his dissents, Douglas also defended the role of the National Environmental Protection Act of 1969 (NEPA). That Act, he asserted, “is more than a technical statute of administrative procedure. It is a commitment to the preservation of our natural environment.” Thus agencies should not be permitted to avoid NEPA’s requirements by pleading their inexperience in environmental analysis: “[o]ne purpose of NEPA was to force agencies to acquire expertise in environmental matters, even if attention to parochial matters in the past had not demanded this capability.” Douglas also decried the common practice of agencies “to decide first what they want to do and then prepare an impact statement as an *apologia* for what they have done.” Finally, Douglas also questioned judicial deference to agency decisions: “the Act requires that bureaucrats not only listen to protests, but also avoid projects that have imprudent environmental impacts. There is no burden of proof for the objector to overcome.”

4. *Id.* at 743.
7. *Id.*
Justice Douglas expressed particular concern about the tendency of agencies to delegate preparation of the environmental impact statement—and thus the study, analysis, and evaluation of the impact of a project—to the developer or a firm in its employ. Douglas denounced this practice in an eloquent dissent from the Court's ruling vacating his stay order in *Life of the Land v. Brinegar*: 10

It seems to me, a total frustration of the entire purpose of NEPA to entrust evaluation of the environmental factors to a firm with a multi-million dollar stake in the approval of this project. NEPA embodies the belated national recognition that we have been "brought to the brink" by myopic pursuit of technological progress and by a decision-making mechanism resting largely on the advice of vested interest groups. . . . We have listened as the manufacturing-industrial complex advised us on the desirability of fueling 'progress' by stripping our land and using our rivers, lakes and atmosphere as technological sewers. We have allowed commercial recreational interests to determine the advisability of 'developing' our dwindling wilderness. . . . [T]hose who measure national advancement by GNP and the Dow Jones industrial average . . . are not advocates of the interests of mountains, forests, streams, rivers, oceans, and coral beds, or of the wildlife that inhabit them, or the people who enjoy them. They are not useful when it comes to appraising the values of an unspoiled meadow or glacier or reef. . . . [T]he final say on these environmental matters should not be under the direct or indirect control of those who plan to make millions out of their destruction. 11

This brief review of his decisions shows that when Justice Douglas spoke out to protect the environment, he spoke most often in dissent. Indeed, his opinions frequently objected to the denial of certiorari in a case which his colleagues decided did not even warrant a hearing. His was a unique voice, with a unique sensitivity to environmental values.

The cases themselves involved narrow procedural issues, for under present laws such as NEPA, technical and procedural issues are often the only issues available to force reconsideration of a potentially harmful project. The delaying tactics of the environmentalists exemplified by these cases are not a matter of choice. They would rather debate the environmental merits of projects, but current law bars judicial review of that matter. The result is that an agency which touches every base and fulfills every technicality can proceed with a project even though it is conceded that the project is an ecological disaster.

What is needed, I think, is a different view of environmental law. It is not enough for trees to have standing; they must have rights—rights that can be abridged if the public interest requires, but that nevertheless have weight, and enter into the balance when a decision af-

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11. *Id.*
fecting the environment is called into question. The impact of the project, not the mechanics of the project report, should be the issue before the court. In such a legal framework, the state and federal courts could address those concerns which underlie the decisions of Justice Douglas and could play an effective role in the protection of the environment.