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## Restating Environmental Law

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## Time for a Restatement

*After a quarter century of statutory stagnation, the American Law Institute needs to address environmental laws, regulations, and judicial decisions to clarify and solidify the consensus to date and the need for evolution to address emerging threats*

Despite its importance and economic impact, in many ways U.S. environmental law is a conflicted mess. Congress's inability to take major legislative action has led to a statutory paralysis in environmental law that has lasted for 25 years, and the growing expansion of executive regulations to fill the gap has forced federal and state courts to interpret statutory authority in situations that Congress could never have foreseen. When overlaid with cooperative federalism structures to encourage experimentation at the state level, the notorious complexity of current regulatory requirements, and the establishment of environmental programs in multiple, overlapping laws in distinct subject areas rather than one unifying statute, U.S. environmental law seems designed to generate confusion and overlapping obligations and liabilities.

Yet the preeminent entity in the United States for the formulation and clarification of law — the American Law Institute — has so far declined to speak. While the ALI's "restatements" and "projects" have helped crystallize core U.S. legal doctrines, molded emerging fields of law, and explored complex international and administrative topics, the organization has not undertaken any major programs dedicated to environmental, natural resource, or energy law (even as some restatements and projects on other topics have included collateral environmental provisions). The ALI's restraint may arise from several historical and policy factors, but they should not dissuade it from clarifying environmental and natural resource laws in the future.

What is a restatement of law? And what are ALI projects? Restatements are distillations of a particular field's case law, statutes, and regulations into a coherent set of principles and rules. While they are not binding authority, restatements carry strong persuasive effect



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because the ALI's painstaking and collaborative process creates a reliable consensus of the U.S. legal community on what the law is, or should be, in a particular area.

After preparing its initial restatements in 1944 and 1952, the ALI began drafting its set of third restatements in 1987 and started work on its fourth restatement (on the foreign relations law of the United States) in 2013. Its latest restatements have expanded beyond traditional common law practice areas to include a broad array of topics: American Indian law, election law, employment law, non-profit governance, information privacy principles, and unfair competition law.

The ALI has expanded its practices into a second type of legal tool called "projects" to help clarify new areas of law. Specifically, the ALI has prepared "statements of principles" in legal areas that might need reform or modification.

These principles projects typically result from intense legal analysis and debate, and convey in-depth recommendations for changes in that field. Such projects have dealt with relatively non-traditional legal fields outside core common law practice areas such as aggregate litigation, family dissolution, transnational insolvency, and software contracts. In addition to principles projects, ALI engages in lesser projects to address narrower aspects of law that need clarification.

**W**e believe U.S. environmental law needs either a restatement or a principles project that would offer a comprehensive analysis, and we briefly outline some possible reasons why the ALI has not yet undertaken such an endeavor. An ongoing informal effort by a workgroup of ALI members to define a potential environmental project has now begun and might offer the best opportunity for clarification or reform. This workgroup of nearly fifty ALI members includes leading practitioners and academics, and it has proposed two carefully defined and limited projects in the environmental area.

But even if the ALI initially undertakes one of these more focused efforts, it should still look to develop a broader principles of environmental law project or a full restatement in the near future. While some may

fear that any comprehensive encapsulation might freeze environmental and natural resource law at a point where it still needs fundamental reform, the need for clarity and opportunities for measured improvement outweigh those risks.

Before embarking on a restatement or project on environmental law, the drafters will need to make threshold choices on key tools and concepts. They will then face the important hurdle of defining which statutes, regulations, and common law principles constitute environmental law. This definitional prerequisite could pose difficult practical and doctrinal challenges. Many fields of law overlap with environmental interests, which constituted broadly includes natural resource and energy law, and as a result any credible assessment of environmental law principles and doctrine will need

to include some examination of important related concepts in tort law, property law, foreign relations law, conflicts of law, remedies, and other fields. The ALI, of course, has already spoken in all of these areas.

While the ALI has not promulgated explicit official criteria for the selection of restatements or projects, some aspects of U.S. environmental law will likely trigger objections from ALI members

who believe that the subject is not a good fit with the its practices and capabilities. These objections likely include that U.S. environmental law is largely statutory and regulatory in nature, and consequently would benefit more from model legislation or other legislative avenues rather than a restatement. U.S. environmental laws and regulations are also highly specialized and complex, and the ALI purportedly does not have environmental experts who can contribute to a restatement. U.S. environmental laws — particularly climate change regulations and endangered species protections — involve highly politicized and controversial topics that can polarize practitioners and therefore lack the consensus needed to support a restatement or principles project.

We believe, however, that the ALI can surmount these challenges. While U.S. environmental law undoubtedly has strong ties to federal statutes and rules, it also has deep historical roots in common law tort that shape core aspects of its legislative and regulatory framework. For example, environmental law includes



well-developed notions of nuisance, trespass, and negligence that operate in concert with statutory and rule-making claims to provide broader avenues of redress for environmental injury.

The ALI has tackled other areas of law that spring from heavily statutory sources, and its work has yielded important restatements and elaborations of principles. And even common law fields of practice that the ALI has explored in the past are now dominated or heavily shaped by statutes and regulations. The presence of a legislative voice — especially if it is inconsistent in different areas and varies substantially over time — may actually increase the need for an authoritative distillation of the appropriate fundamental concepts that should drive future legislative and legal development.

While U.S. environmental law has admittedly earned a well-deserved reputation for complexity, it also relies on areas of litigation and common law principles that should ring familiar to all lawyers whatever their area of practice. As the self-identification of nearly fifty ALI members for the workgroup attests, the ALI already has the level of expertise needed to navigate the complexities of environmental law. And the controversies surrounding U.S. environmental law do not exceed the storms and disagreements over other legal fields that have received restatements or principles projects, including labor law, family law, and international intellectual property.

If a full restatement of environmental law poses conceptual and logistical challenges, the ALI has a broad and sophisticated palette of alternative tools to help crystallize core U.S. environmental legal concepts. The ALI typically pursues principles projects when it also seeks to produce recommendations for changes to the law in the field. Because of the wider latitude offered by this approach, the ALI has prepared (or is currently working on) statements of principles in emerging or controversial fields of law including election law, aggregate litigation, nonprofit organizations, and transnational insolvency.

Statements of principles present a promising middle path by offering a normative or aspirational vision of a legal subject rather than an authoritative restatement of its full body. Rather than attempting to capture the complex and shifting universe of federal and state environmental laws and regulations, a statement of principles would allow the ALI to focus on distill-

ing that complexity into coherent sets of guidelines for interpretation and implementation of specific environmental legal requirements. A statement of principles might also allow the ALI to avoid ensconcing outdated or harmful environmental legal concepts into a full restatement by instead pointing out normative goals that environmental law should seek.

Against this backdrop, the ALI member workgroup concluded that beginning with a full restatement would pose significant difficulties and resource demands. Accordingly, the body suggested that an initial effort by the ALI in environmental law should focus on a manageable subtopic.

The workgroup identified over 30 different potential projects, discussed and ranked each suggestion, and evaluated the entire array of concepts under consistent criteria. Following this process and several additional discussions, the group identified two areas within environmental law as best suited for a project: the law of environmental assessment (which would include environmental impact statements and might encompass international elements), or a project on the principles of environmental enforcement and remedies. The ALI

recently declined the workgroup's proposals for immediate work, but it has not ruled out a future effort on environmental law.

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**W**hile the discussion within the ALI of a restatement of environmental law arose only recently, some scholars have already raised objections to the enterprise. Their concerns, as outlined by Professor Dan Tarlock in a recent article in the *Brooklyn Law Review* — see **SIDEBAR** — fall into four general categories.

*The ALI hasn't done it that way historically.* The first critique points to the ALI's preference for subject areas with a strong body of judge-made law. At heart, this objection highlights the ALI's original choices for restatements, which consisted of core common law subjects with roots in Roman law. While the ALI has since evolved to include complex and novel subjects that fall outside this traditional agenda, the disjuncture with the ALI's practice and current preferences offers some difficult but surmountable difficulties.

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## No Restatement, Please!

**T**he American Law Institute should not prepare a *Restatement (First) of Environmental Law*. We must look forward rather than backward. Humans have traditionally viewed the Earth as a treasure chest to be exploited to sustain welfare irrespective of the social costs and limits of the natural resource base.

The conclusion that we students of environmental protection have drawn from history is that to reverse this story of exploitation, we must develop a new relationship between humans and our rapidly degrading natural capital. The law needs to be rethought, re-imagined, and adapted to the preservation and enhancement of our stressed planetary life support systems.

I thus offer four reasons why the restatement process is not a good vehicle to pursue this maddeningly frustrating objective.

First, a restatement of environmental law is too far from the ALI's core mission of summarizing, cleaning up, and modestly reforming the common or quasi-common law. It is true that the ALI has often strayed from its mission, but the nub of the problem for an environmental restatement remains that the area is neither a common law subject nor does it have a set of substantive principles. Thus, there is very little to restate. There is no common law or any constitutional or quasi-constitutional environmental law jurisprudence. At its root, U.S. environmental law is primarily procedural.

Further, the many federal appellate and Supreme Court cases construing the various statutes have failed to produce a set of coherent environmental law principles that could be summarized. A restatement would add little to the existing law and might stifle necessary reform.

Second, a restatement is not possible because the science of environmental protection, which drives the law, is dynamic. Our view of nature is radically changing. For example, originally, it was assumed that nature was perfect and that as much of it as possible should be fenced off from human intervention. This view has been eroded by the emergence of more sophisticated theories of ecosystem behavior, which recognize their dynamic nature.

The original concept of resilience as a near-equilibrium steady state has been replaced, and ecologists try to measure resilience, according to H. Gunderson and C. S. Holling, "By the magnitude of disturbance that can be absorbed before the system changes its structure by changing the variables and processes that control behavior."

We also know more about the causes of cancer. The "one hit" exposure theory on which much of the regulation of pesticides, hazardous pollutants, and toxic substances was based no longer holds. Environmental law was once dynamic, responding to new scientific knowledge. Sadly, environmental law is now stagnant. We are trying to adapt decades-old statutes to problems which were not foreseen when they were enacted.

Third, in light of what we have learned since the 1960s, we would draft very different statutes today than we did forty years ago, just as almost all of us are not trying to buy the type of shiny gas guzzling cars Detroit was then churning out. A new National Environmental Policy Act would recognize this means that all attempts to manage nature are experiments; each experiment will have different targets and protocols; and that all resources have

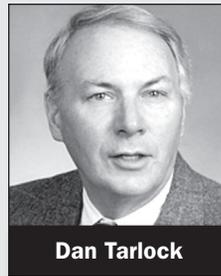
to be managed adaptively.

In short, a restatement of environmental law would by necessity enshrine the existing regulatory structure and fragmented judicial glosses on it, thus fossilizing the whole setup.

A restatement would also enshrine the Supreme Court's environmental jurisprudence, such as it is, most of which should be repudiated rather than restated. The law of standing is a case in point. At the beginning of the environmental movement academics such as Louis Jaffe of Harvard presented a liberal theory of standing fully compatible with Article III of the Constitution. But the Supreme Court has created a crabbed and confusing, indeed baroque, standing jurisprudence.

Fourth, now is not the right time to restate environmental law. The treasure-chest view, which is once again in the ascendancy, must be replaced with a science-based stewardship. Environmental law had a charmed birth in the late 1960s and 1970s. A national consensus developed that we had to address a number of threats to the environment, and Congress responded swiftly. Because the issues were seen as technical and scientific, the myth arose that environmentalism was a nonpartisan issue and would remain so.

Today, the very idea of effective environmental protection is contested, and a restatement project would plunge the drafters into the situations that the ALI tries to avoid: a deep, partisan political divide and thus no consensus on basic principles.



Dan Tarlock

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*Environmental law pursues goals at odds with core common law precepts.* According to this critique, the positivist nature of environmental law requires it to use a forward-looking perspective to avoid damage. This central quality of environmental law allegedly poses a fundamental problem for the entire enterprise of restating it: the principles of environmental law are, according to Tarlock, “Profoundly antithetical to both the function of the common law and to the restatement tradition.”

In essence, this position contends that environmental statutes respond to the shortfalls of prior common law doctrines and allocations of property entitlements that allowed the use of air, water, and soil as dumping grounds. In addition, environmental law seeks to both protect functioning ecosystems and wildlife that common law historically has tended to destroy as well as to protect them against a constellation of future or emerging risks. Common law doctrines and concepts of due process, by contrast, require proof of “but for” causation and linkages between specific conduct by defendants and identifiable consequences to plaintiffs, and as a result the courts have struggled with crafting effective legal responses to risks of future harm that have not yet materialized.

*The courts have not created a true quasi-constitutional environmental body of law that would support a restatement.* Moving to environmental case law, the third argument attacks the feasibility of distilling U.S. environmental decisions into a restatement on the ground that those rulings lack a developed core of foundational principles that a restatement could readily capture. As an outgrowth of positive law created predominantly by federal statutes, environmental judicial law purportedly has failed to coalesce around the type of judge-made principles that underlie other areas where the ALI has focused its efforts. In contrast to the forward-looking, positivist nature of environmental statutory law, environmental common law based in tort seeks to administer corrective justice by compensating victims for their injuries — and restating the principles from those cases would necessarily require a backward-looking perspective incompatible with principles from the statutes.

*There is no substantive environmental law at all.* This final line of objection climaxes with a startling claim: because current environmental laws result from the

messy intersection of rational responses to novel and emerging problems with the raw jostling of interest-based politics, any attempt to identify common fundamental legal principles from them strains to discern a coherent set of axioms that simply don’t exist. At heart, this view of environmental law concludes that there isn’t a “there” there to restate. This position has been advanced by Tarlock in an article in the *Land Use and Environmental Law Review*. Because environmental statutes offer a positivist response to fast-moving problems and developing science through the lens of current political expediencies and dysfunctions, they essentially must resort to procedural solutions that assure fairness without providing a substantive core. These types of procedural fields of law, according to the critique, necessarily offer poor grist for the restatement process.

These criticisms understate work by other scholars that points to the link between environmental statutes and prior common law principles. But more fundamentally, this argument goes to the heart of the debate over whether the ALI should pursue a restatement or project. While modern U.S. environmental law springs from statutory sources and suffers from conflicting goals and processes, it undeniably exists. A vast array of treatises, textbooks, articles, and scholarly advice has already created a deep body of work on the heart of environmental law precepts, and the fact of those writings strongly implies that critical facets of environmental law can be captured in a systematic form through a restatement or principles project. These

materials should also considerably smooth the transition of those core principles into work by the ALI.

To the extent that environmental law also includes procedural elements as a surrogate for substantive goals that elude political consensus, a restatement or principles project could note that interaction and — more importantly — identify the limits where even a properly followed procedural path typically will not intrude on a substantive goal. For example, the National Environmental Policy Act imposes a procedural requirement that federal agencies rigorously assess the potential environmental impacts of their major actions without setting substantive limits on actions after that review. This simple formulation, however, fails to

*The criticisms of the possibility of a restatement understate work that points to the link between environmental statutes and prior common law principles*

account for the critical role that this procedural process plays in invoking and buttressing substantive limits on judicial decisions on arbitrary and capricious final agency action under other federal statutes (including environmental laws). Claiming that it is impossible to restate or capture the principles of environmental law — like many a historical pronouncement that a task simply cannot be done — only highlights the need to actually make the attempt.

**T**hese objections also minimize the ALI's capacity and flexibility to tackle areas of law that lie outside traditional common law spheres. The ALI has already produced groundbreaking work in disparate topics as far flung as software contracts, international commercial arbitration, and family dissolution. While the ALI's early efforts undeniably focused on traditional common law fields, nothing about the ALI's current deliberative approach and consensus-based process makes it unfit for other fields of law that arise from statutory roots. The core prerequisites — richness of case law, complexity of issues, and need for clarity — apply equally to code-driven law that has spurred the development of its own dense case law and regulatory framework.

More importantly, the ALI can expressly mold its approach to reflect the novelty or lack of doctrinal development within a legal subject. If the ALI believes that the area needs substantial reform or normative analysis, it can choose to adapt its work into a project or a principles statement rather than a full-bore restatement. In fact, several members of our workgroup expressed a preference to pursue a project for these very reasons — while acknowledging that the ALI's projects have wielded less influence than its restatements. By contrast, the ALI has already successfully wrestled with some of the concerns through restatements during its *Restatement (Third) of Torts* on toxics litigation and its expanded concepts of causation in the use of probabilistic risk.

Assuming that the ALI could readily capture positivist and prospective environmental law principles in a restatement, critics question whether such an en-

deavor would do more damage than good. This position builds on the larger belief that the ALI's efforts can have the perverse effect of freezing developing fields of law in undesirable and stunted positions. Environmental law, as a response to emerging science and often fast-moving threats, is still evolving and needs the flexibility to expand and adapt to looming dangers. By attempting to capture current U.S. environmental law principles in a restatement, the ALI may unintentionally solidify current standards that are too meek or timorous to effectively address fundamental environmental challenges such as climate change, biodiversity loss, or synthetic toxic chemicals.

This bleak view of current U.S. environmental law, however, generates its own riposte. It eschews a fundamental study of environmental law to identify its most important core principles and doctrines in the hope that future developments might lead to stronger standards. But that same argument posits a lack of a current political consensus and an ability of special interests to frustrate stronger environmental standards that will likely continue for the indefinite future absent an effort to identify and address shortfalls in current law. By holding onto today's dross in hopes of future gold, such a cautious strategy might forego the opportunity to make significant progress now.

In addition, the ALI can forthrightly seek to point out future actions and doctrines to strengthen environmental law to respond to anticipated or emerging needs. Restatements have the ability to include normative directions for additional legal clarification and growth (including the healthy revision or withdrawal of obsolete or damaging outdated legal statements, such as its revisit to its prior statements on the death penalty and sentencing for sexual offenses). While the ALI typically subordinates its efforts at legal reform when it undertakes a restatement in pursuit of accurately capturing the current state of law, it can nonetheless identify areas where existing legal practices are in conflict and identify the preferred choice among them.

Environmental law needs a fresh perspective and an organizing eye. The ALI has filled this role in the past with other important legal areas. It can dispel the current doctrinal conflict and confusion in this field and provide a clear path ahead in an area of law that, by its very nature, touches us all. **TEF**

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