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Environmental Policy in the Courts

Rosemary O'Leary

In 1966, in one of her frequent trips to a family cabin in rural upstate New York, Carol Yannacone was shocked to find hundreds of dead fish floating on the surface of Yaphank Lake, where she had spent her summers as a child. After discovering that the county had sprayed the foliage surrounding the lake with DDT to kill mosquitoes immediately prior to the fish kill, Yannacone persuaded her lawyer husband to file suit on her behalf against the county mosquito control commission. The suit requested an injunction to halt the spraying of pesticides containing DDT around the lake.

Although the Yannacones initially were able to win only a one-year injunction, they set in motion a chain of events that would permanently change environmental policy in the courts. It was through this lawsuit that a group of environmentalists and scientists formed the Environmental Defense Fund (EDF), a nonprofit group dedicated to promoting change in environmental policy through legal action. After eight years of protracted litigation, EDF won a court battle against the U.S. Environmental Protection Agency (EPA) that Judge David Bazelon heralded as the beginning of "a new era in the ... long and fruitful collaboration of administrative agencies and reviewing courts." That judicial decision triggered a permanent suspension of the registration of pesticides containing DDT in the United States.

Fast forward to 2001. Within nine months of taking office, the administration of newly elected president George W. Bush was fully immersed in the concept of environmental policymaking in the courts. Environmental leaders were waging an all-out attack in the courts in an effort to challenge the president's attempted change of environmental policies.

On March 28, 2001, for example, President Bush announced that the United States would walk away from the Kyoto Protocol on global warming even though a growing body of scientific evidence concluded that greenhouse gases were warming the planet and posing serious risks to human health and the environment. By that summer, a group of environmental lawyers was exploring the use of class-action lawsuits to force the United States to reduce emissions of heat-trapping greenhouse gases.

In July 2001 the Natural Resources Defense Council (NRDC) filed a lawsuit challenging the Bush administration's decision to withdraw a Clinton EPA rule lowering the arsenic standard in drinking water from a maximum of 50 parts per billion to 10 parts per billion. Previously the administration had been sued by the American Wood Preservers Institute asking the court to overturn the new standards. NRDC charged that the Bush EPA was
violating the Safe Drinking Water Act. In response, EPA administrator Christine Todd Whitman countered that the rule was not based on adequate scientific evidence and that a new approach would be announced in 2002 while the lawsuit was pending.

In August 2001 a group of environmental organizations filed a lawsuit concerning President Bush’s missile defense program. Among the plaintiffs were NRDC, Greenpeace, Physicians for Social Responsibility, and the Alaska Public Interest Research Group. The suit asked the U.S. district court to order the Pentagon to carry out a detailed analysis of the environmental impact of missile testing on Alaska, California, Hawaii, and other places in the proposed test range. The Pentagon had announced plans to begin construction in early 2002.4

These are just a few current examples of the role of courts in environmental policymaking. In chapter 1, Kraft and Vig described and analyzed the policymaking process. The courts are often an integral part of this process.

One important aspect of environmental conflicts, however, is that multiple forums exist for decision making. Litigation is by no means the only way to resolve environmental disputes. In fact, approximately 50 percent of environmental court cases are settled out of court. Discussion and debate are informal ways of resolving environmental conflict. Enactment is another way to deal with environmental conflict. Alternative dispute resolution (ADR) techniques and processes, such as mediation (where a third-party go-between is used) and arbitration (where a private judge is used), are becoming more common in environmental conflict resolution.

The focus of this chapter, however, is environmental policy in the courts. First, a brief historical perspective is offered, followed by a profile of the U.S. court system. Next, the focus changes to how courts shape environmental policy, with ten in-depth case analyses provided. The chapter concludes with a view to the future including an emphasis on the new Bush administration.

Historical Perspectives

The first 120 years of government within the United States saw few major environmental statutes enacted. If an environmental case was brought to court, it was most likely a trespass case. The first major U.S. pollution control law, the Refuse Act, was promulgated in 1899 as a means of keeping navigable waters clear of refuse that might block ships. Nearly fifty years later, the second major environmental statute, the Water Pollution Control Act (WPCA) of 1948, became law.

The 1950s brought the enactment of two more important environmental laws: the Air Pollution Control Act of 1955 and the 1956 amendments to the WPCA. Beginning in the late 1960s the tide of environmental laws began to swell. Eleven major federal environmental laws were enacted in the 1960s, and seventeen were enacted in the 1970s.

The EPA was created in 1970, with the initial support of many industry officials who wanted one federal regulator, not several, establish-

ing pollution control standards. The first administrator of the EPA, former Department of Justice attorney William Ruckelshaus, brought with him a preference for aggressive enforcement of environmental laws through the courts. The agency attorneys were initially on the offensive and deliberately sought to win court victories to send a message to polluters and to the general public. At first, industry officials were reluctant to challenge the EPA, fearing that they might generate a negative public image. But as the agency matured and the financial stakes involved in pollution control increased, the EPA found its actions challenged more frequently in court by industry officials claiming that the agency often overstepped its bounds and by environmental groups maintaining that the agency was not being aggressive enough.

As reviewed in chapter 1, the 1980s were dominated by President Reagan’s efforts to roll back environmental regulation. Reagan’s secretary of the interior, James Watt, and his first EPA administrator, Anne Gorsuch Burford, sought zealously to dismantle many of the environmental gains of the 1970s. They were far more inclined to listen to industry groups than to environmental organizations. In response to the Reagan agenda, however, Congress produced a flood of new and revised environmental statutes; an amazing forty-eight environmental bills became law during the decade. Among the most powerful weapons in the arsenals of environmentalists was litigation, and they did not hesitate to use this weapon against the Reagan administration. Lawsuits were filed weekly in efforts to curtail the actions of a seemingly anti-environmental administration.

The 1980s also brought the path-breaking Supreme Court decision Chevron U.S.A., Inc. v. Natural Resources Defense Council.5 This decision attempted to clarify the relationship of courts and administrative agencies. The case involved the construction of environmental statutes and gave administrative agencies the lead in construing ambiguous regulatory laws. As such, it is often thought of as making it more difficult for courts to overrule agency interpretations.

In 1990 Congress passed significant amendments to the Clean Air Act as well as amendments to the Clean Water Act. With the 1990s, however, came the Republican “Contract with America” and more talk of slowing and reversing environmental policy. Particularly on Capitol Hill, one could find serious consideration given to repealing the new Clean Air Act and exempting states from compliance with the Clean Water Act. As discussed in chapter 6, these ideas never came to fruition. It was nonetheless instructive that industry lobbyists were allowed to sit in on legislative drafting sessions of key congressional committees. Their participation indicated how high the stakes had become.6

As environmental litigation continued to increase, the concept of environmental ADR became more accepted. At the heart of ADR is the following question: Why does conflict persist when disputing parties could make themselves better off by cooperating? The EPA became an early pioneer in the use of ADR as applied to environmental disputes.7
Although the total number of environmental lawsuits filed peaked in 1992, by the year 2000, criminal prosecution of violators of environmental laws had increased fifteen times over the previous decade. The EPA had a strong enforcement year in 2000, referring 368 civil judicial cases and 236 criminal cases to the U.S. Department of Justice. This was in addition to other enforcement lawsuits handled by EPA attorneys themselves.

The use of courts as forums for environmental policymaking is prevalent for several reasons. First, many of the major environmental statutes give citizens, businesses, and interest groups the right to sue federal, state, or local public agencies, as well as polluters themselves, to enforce environmental laws. Many statutes have provisions for the reimbursement of attorneys' fees and other expenses of successful plaintiffs and even for punitive damages for especially egregious offenses. Second, the courts are a preferred forum for many interest groups and citizens because of the judicial precedent set when a case is decided. Finally, some interest groups believe that informal modes of environmental policymaking, including ADR, are a sellout that weaken their organization's position and stature, diminishing the importance of environmental issues. For them, environmental policymaking via the courts is the best way to advance their cause.

The Organization and Operation of the U.S. Court System

To understand environmental policy in the courts, a brief primer on the U.S. court system is essential. The United States has a dual court system, with different cases starting both in federal courts and in state or county courts. Keeping in mind that most legal disputes never go to court (they are resolved through one of the informal methods discussed earlier in this chapter), this section describes the organization of the U.S. court system (Figure 7-1).

When legal disputes do go to court, most are resolved in state courts. Many of these disputes are criminal or domestic controversies. They usually start in trial courts and are heard by a judge and sometimes a jury. If the case is lost at the trial court level, appeal to an intermediate court of appeals is possible. At this level, the appeals court usually will review only questions of law, not fact. If a party to a case is not satisfied with the outcome at the intermediate level, the party may appeal to the state supreme court. In cases involving federal questions, final appeal to the U.S. Supreme Court is possible, but the Court has wide discretion as to which cases it will review.

Most of the environmental cases reviewed in this chapter began in the federal court system because they concern interpretations of federal statutes or the Constitution. Cases that begin in the federal court system usually begin in the federal district courts. There are eighty-nine federal district courts staffed by 649 judges. (There are also so-called specialty courts such as the U.S. bankruptcy courts, the U.S. court of appeals for the armed forces, and the U.S. court of federal claims.)

Some statutes, however, provide for appeal of decisions of federal regulatory agencies directly to the federal courts of appeals, rather than through district courts. These cases, coupled with appeals from federal district courts make for a full docket for the federal courts of appeals. There are thirteen federal circuit courts of appeals with 179 judges in total. Here, judges sit in groups of three when deciding cases. When there are conflicting opinions among the lower federal district courts within a circuit, all the judges of the circuit will sit together and hear a case.

An unsatisfactory outcome in a circuit court can be appealed to the U.S. Supreme Court. Less than 10 percent of the requests for Supreme Court review usually are granted.

Sources of Law

The decisions of appellate courts are considered precedent. Precedent is judge-made law that serves to guide and inform subsequent court decisions involving similar or analogous situations. But precedent is only one of several sources of environmental law. The major sources of environmental law are as follows:

- Constitutions (federal and state)
- Statutes (federal, state, and local)
- Administrative regulations (promulgated by administrative agencies)
- Treaties (signed by the president and ratified by the Senate)
- Executive orders (proclamations issued by presidents or governors)
- Appellate court decisions
How Courts Shape Environmental Policy

Courts shape environmental policy in many ways. One primary way is by determining who does or does not have standing, or the right to sue. Although many environmental statutes give citizens, broadly defined, the right to sue polluters or regulators, procedural hurdles must still be jumped in order to gain access to the courts. Plaintiffs usually must demonstrate injury in fact, which is often not clear-cut and is subject to interpretation by judges. By controlling who may sue, courts affect the environmental policy agenda.

Related to this power, courts shape environmental policy by deciding which cases are ripe, or ready for review. For a case to be justiciable, an actual controversy must exist. The alleged wrong must be more than merely anticipated. Deciding which cases are ripe and which are not makes the courts powerful gatekeepers.

A third way that courts shape environmental policy is by their choice of standard of review. Will the court, for example, take a hard look at the actions of public environmental officials, or will it defer to the administrative expertise of the agency? Under what conditions will government environmental experts be deemed to have exceeded their legislative or constitutional authority? To what standards will polluters be held?

A fourth way that courts shape environmental policy is by interpreting environmental laws. Courts interpret statutes, administrative rules and regulations, executive orders, treaties, constitutions, and prior court decisions. Often these laws are ambiguous and vague. Situations may arise that the laws’ drafters did not anticipate. Hence, judicial interpretation becomes a necessity of paramount importance. And given the precedent-setting nature of court orders, a judicial interpretation made today may determine not only current environmental policy but also that of the future.

A final major way that courts shape environmental policy is through the remedies they choose. Will the court, for example, order a punitive fine for polluters, or probation? Judges have great discretion in their choice of remedy, thus affecting environmental policy.

The Supreme Court, the final arbiter of many precedent-setting environmental cases, shapes environmental policy primarily through the selection of cases it chooses to hear, the limits it places on other branches of government, and the limits it places on the states. Justices’ values, ideological backgrounds, and policy preferences at times influence the outcome of environmental court decisions.

A study examining the impact of over 2,000 federal court decisions on the EPA’s policies and administration found that from an agency-wide perspective, compliance with court orders has become one of the EPA’s top priorities, at times overtaking congressional mandates. The courts have dictated which issues get attention at the EPA. In an atmosphere of limited resources, coupled with unrealistic and numerous statutory mandates, the EPA has been forced to make decisions among competing priorities. With few exceptions, court orders have been the winners in this competition. Thus the implications of courts shaping environmental policy are formidable. The cases discussed in the sections that follow paint a vivid portrait of environmental policymaking in the courts.

Standing and Citizen Suits:
The Case of Water Pollution

As alluded to earlier in this chapter, to have standing, or the right to sue, the Supreme Court consistently has ruled that a party must demonstrate injury in fact, “a concrete and particularized, actual or imminent invasion of a legally protected interest.” In federal cases, this requirement arises out of the U.S. Constitution’s “case or controversy” requirement. The case of Friends of the Earth, Inc. v. Laidlaw Environmental Services is a good illustration of both of these requirements.

In 1986 Laidlaw Environmental Services (Laidlaw) bought a hazardous waste incinerator facility in Roebuck, South Carolina, that included a wastewater treatment plant. Soon thereafter, the South Carolina Department of Health and Environmental Control (DHEC) granted Laidlaw a National Pollution Discharge Elimination System (NPDES) permit authorizing the company to discharge treated water into the North Tyger River. With the permit came limits on Laidlaw’s discharge of several pollutants, including mercury.

Laidlaw repeatedly violated the conditions of its permit, discharging pollutants numerous times into the river. In particular, Laidlaw consistently failed to meet the permit standard for daily average limit on mercury discharges. In response to Laidlaw’s illegal activity, on April 10, 1992, a consortium of environmental groups, including Friends of the Earth, Citizens Local Environmental Action Network, and the Sierra Club, sent a letter to Laidlaw notifying the company of its intention to sue. The Clean Water Act allows citizen suits against polluters after a mandatory 60-day notice period. If victorious in court, possible remedies include an injunction to halt the polluting activity and payment of actual damages, punitive damages, and attorneys’ fees.

In an effort to block the lawsuit by the environmentalists, and figuring that it could negotiate a better deal with the government, Laidlaw’s lawyer responded by asking DHEC to file a lawsuit against the company. DHEC agreed to file the lawsuit. Laidlaw’s lawyer then wrote the complaint for DHEC and paid the fee for filing the lawsuit in court.

On June 9, 1992, the last day before the environmentalists’ sixty-day notice period expired, DHEC and Laidlaw announced a settlement of the lawsuit, which required Laidlaw to pay $100,000 in civil penalties and to make “every effort” to comply with its permit obligations. The environmentalists were livid and continued to pursue their own lawsuit.

On June 12 the environmental consortium filed its citizen suit against Laidlaw, alleging noncompliance with the requirements of the NPDES permit and seeking an injunction to halt the pollution as well as civil penalties. Laidlaw immediately countered, arguing that there was no injury in fact to the
environmentalists and that there was no case or controversy as is required by Article III of the U.S. Constitution. Therefore, Laidlaw maintained, the environmentalists lacked standing—the legal right to sue.

Nearly five years later, on January 22, 1997, a federal district court issued a judgment in favor of the environmentalists and against Laidlaw. Although it found that Laidlaw had enjoyed a total economic benefit of $1,092,581 by violating its NPDES permit, the court concluded that a lesser civil penalty of $405,800 was appropriate, taking into account the judgment’s "total deterrent effect." The environmental consortium appealed the decision to the court of appeals, arguing that the penalty was inadequate. In its suit, the environmental group cited new evidence that Laidlaw’s violation of pollution standards had continued even after its deal with DHEC. Laidlaw also appealed the decision, arguing again that the environmentalists lacked standing to sue.

On July 16, 1998, the U.S. Court of Appeals for the Fourth Circuit issued its judgment, reversing the lower court and finding on behalf of Laidlaw. The case had become moot when Laidlaw came into compliance with its NPDES permit, the court reasoned, and so the environmentalists did not have standing to sue. The court remanded the case to the lower court with instructions to dismiss the action and not to grant the environmentalists’ requests for attorneys’ fees.

Undaunted, the environmental group appealed to the U.S. Supreme Court. In a 7–2 decision, the Supreme Court found in favor of the environmentalists and against Laidlaw, reversing the court of appeals. The Court reasoned, first, that the environmentalists had standing, given that they had demonstrated that individual members of their groups lived by the plant and the river and were affected by the pollution. Further, the environmental consortium had demonstrated that the civil penalties it sought carried with them a deterrent effect that would most likely address its members’ injuries and prevent future injuries.

Second, the Court reasoned that the matter was not moot. There were very real disputed factual matters for the lower courts to grapple with: whether Laidlaw now was truly in compliance with its NPDES permit, whether it was absolutely clear that Laidlaw’s permit violations could not reasonably be expected to recur, and the prospect of future Laidlaw violations. The Supreme Court remanded the case to the court of appeals to reconsider the issue of penalties, and to the district court to reconsider the issue of attorneys’ fees. The court of appeals promptly responded by remanding its portion of the case to the district court. As of this writing, the district court had not yet issued its response to the remands, but it is expected to support the Supreme Court’s affirmation of the environmentalists’ claims.

This landmark case illustrates how courts shape environmental policy by determining who has standing pursuant to citizen suit provisions of environmental laws. Without the citizen suit provision of the Clean Water Act, the environmentalists most likely would not have sued Laidlaw and the violations of the statute most likely would have continued. Without a finding by the Supreme Court that the environmentalists had standing, they would not have had the legal authority to sue. This combined citizen suit/standing decision delivered a one-two punch that strengthened the role of citizens and environmentalists in environmental policy.

Ripeness and Standard of Review: The Case of Timber Cutting

The national forest system in the United States is vast. It includes 155 national forests, 20 national grasslands, 8 land utilization projects, and other lands that together occupy nearly 300,000 square miles of land located in forty-four states, Puerto Rico, and the Virgin Islands. To manage those lands, the National Forest Service, housed in the U.S. Department of Agriculture, develops land and resource management plans, as mandated by the National Forest Management Act (NFMA) of 1976. In developing the plans, the Forest Service must take into account both environmental and commercial goals.

In the late 1980s the Forest Service developed a plan for the Wayne National Forest located in southern Ohio. When the plan was proposed, several environmental groups, including the Sierra Club and the Citizens Council on Conservation and Environmental Control, protested in administrative hearings that the plan was unlawful in part because it allowed below-cost timber sales and so encouraged clear-cutting. Opposing the environmental groups was the Ohio Forestry Association.

When the plan was not changed, the Sierra Club brought suit in federal court against the Forest Service and the secretary of agriculture. Among its requests to the district court, the Sierra Club asked for a declaration that the plan was unlawful because it authorizes below-cost timber cutting. The Sierra Club also asked for an injunction to halt below-cost timber harvesting.

The district court granted summary judgment for the Forest Service, deciding that the agency had acted lawfully. The Sierra Club appealed. The U.S. Court of Appeals for the Sixth Circuit held that the case was justiciable, finding both that the Sierra Club had standing to bring suit and that since the suit was ripe for review, there was no need to wait until a site-specific action occurred. The court of appeals reversed the lower court, finding that the plan improperly favored clear-cutting and therefore violated the NFMA.

The Ohio Forestry Association appealed the case to the U.S. Supreme Court maintaining, first, that the dispute about the plan presented a controversy that was not justiciable because no clear-cutting had taken place and, second, that the plan conformed to the statutory and regulatory requirements of the NFMA. In a unanimous decision, in the 1998 case of Ohio Forestry Association, Inc. v. Sierra Club, the Supreme Court ruled in favor of the Ohio Forestry Association and against the Sierra Club.

In its rationale, the Court said that the case was not ripe for review because it concerned abstract disagreements over administrative policies. Immediate judicial intervention would require the Court to second-guess thousands of technical decisions made by scientists and other forestry experts.
and might hinder the Forest Service’s efforts to refine its policies, the Court said. Further, delayed judicial review would not cause significant hardship for the parties. Additional factual development of the issues presented was needed in order to aid the Court in dealing with the legal issues presented. Finally, the Court found that Congress has not provided for preimplementation judicial review of forest plans.

This case is a good example of how courts shape environmental policy by applying the concepts of standard of review and ripeness. Notable is the Court’s reluctance to second-guess the judgments of government scientists and other technical analysts. In a case where there is no showing of arbitrary or capricious government action, the Court will give great deference to experts in its review. Also notable is the Court’s reluctance to review a plan that had not yet been implemented. Because no clear-cutting or timber sales had occurred, there was not yet a case or controversy, and so the case was not ripe for review. Regrettably, however, this means that concrete damage to the environment is needed before the court will act. While wise from a legal perspective, this approach may be short-sighted from an environmental perspective when applied to future environmental challenges (for example, climate change) for which proactive policy actions are needed now.

Standard of Review: The Case of Air Quality

The Clean Air Act mandates that the administrator of the U.S. EPA promulgate National Ambient Air Quality Standards (NAAQS) for each air pollutant for which air quality criteria have been issued. Once a standard has been promulgated, the administrator must review the standard, and the criteria on which it is based, every five years and revise the standard if necessary. On July 18, 1997, the administrator of the EPA revised the NAAQS for particulate matter and ozone. Because ozone and particulate matter are both nonthreshold pollutants—that is, any amount harms the public health—the EPA set stringent standards that would cost hundreds of millions of dollars to implement nationwide.

The American Trucking Association, as well as other business groups and the states of Michigan, Ohio, and West Virginia, challenged the new standards in the U.S. Court of Appeals for the District of Columbia Circuit and then in the U.S. Supreme Court. Among other things, the plaintiffs argued that the statute that delegated the authority to the EPA to set the standards was unconstitutionally vague. They also argued that the EPA should perform a cost-benefit analysis when setting national air quality standards in order to keep costs in check.

In a unanimous decision, in the case of Whittman v. American Trucking Association, the Supreme Court mostly upheld the EPA and its new regulations.22 The statute, while ambiguous, was not overly vague, wrote the Court, reversing the court of appeals. Furthermore, no cost-benefit analysis was needed. The EPA, based on the information about health effects contained in the technical documents it compiled, is to identify the maximum airborne concentration of a pollutant that public health can tolerate, decrease the concentration to provide an adequate margin of safety, and set the standard at that level. Nowhere are the costs of achieving such a standard made part of that initial calculation, according to the Court.

Concerning the appropriate standard of review, the Court invoked the rule that if a statute is silent or ambiguous with respect to an issue, then a court must defer to a reasonable interpretation made by the agency administrator. The key words for understanding the concept of standard of review are ambiguous, reasonable, and defer. The statute must be silent or ambiguous, the agency’s actions must be judged by the court to be reasonable, and then the court will defer to the agency.

The key word for understanding the essence of this specific case is reasonable, for in one ambiguous instance in this case the Court found the EPA’s actions reasonable, while in another ambiguous instance in the same case the Court found the EPA’s actions unreasonable. Specifically the EPA’s actions concerning cost-benefit analysis were found to be reasonable. Contrasted to this, the EPA’s interpretation concerning the implementation of the act in another ambiguous section was found to be unreasonable. In the second instance, the EPA read the statute in a way that completely nullified text meant to limit the agency’s discretion. This, the Court said, was unlawful.

Once again we have a case that is a clear example of how courts shape environmental policy—here by choosing and applying a standard of review. What is an appropriate standard of review can, and should, change from case to case. In addition, reasonable judges can differ as to their view of what constitutes an appropriate standard of review. Further, once a standard of review is selected, the application of that standard becomes important. Crucial in this case were judgments concerning whether the administrator of the EPA acted reasonably. Hence, when judges are selected, an examination of their judicial philosophies and predispositions becomes important.

Interpretation of Environmental Laws

Judges shape environmental policy in how they interpret laws. Environmental laws are often broad and vague. Circumstances arise that the drafters of the law did not foresee. Different stakeholders interpret mandates contrarily. The cases analyzed in this section are exciting examples of how courts shape environmental policy through judicial interpretation of law.

Interpreting Statutes: The Case of the Endangered Species Act

The Endangered Species Act (ESA) of 1973 contains a variety of protections designed to save from extinction species that the secretary of the interior designates as endangered or threatened.23 Section 9 of the act makes it unlawful for any person to “take” any endangered or threatened species.
Take is defined by the law as “harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing or collecting any of the protected wildlife.” In the early 1990s the secretary promulgated a regulation that defined the statute’s prohibition on takings to include “significant habitat modification or degradation where it actually kills or injures wildlife.”

A group calling itself Sweet Home Chapter of Communities for a Great Oregon filed suit alleging that the secretary of the interior exceeded his authority under the ESA by promulgating that regulation. The plaintiff group comprised small landowners, logging companies, and families dependent on the forest products industries of the Pacific Northwest. They argued that the legislative history of the ESA demonstrated that Congress considered, and rejected, such a broad definition. Further, they argued that the regulation as applied to the habitat of the northern spotted owl and the red-cockaded woodpecker had injured them economically, because there were now vast areas of land that could not be logged. If the secretary wanted to protect the habitat of these endangered species, they maintained, the secretary would have to buy their land.

The district court entered summary judgment for the secretary of the interior, finding that the regulation was a reasonable interpretation of congressional intent. In the U.S. Court of Appeals for the District of Columbia, a divided panel first affirmed the judgment of the lower court. After granting a rehearing, however, the panel reversed the lower court. The confusion, and final decision, centered on how to interpret the word \textit{harm} in the ESA, looking at the totality of the act.

The secretary of the interior appealed to the U.S. Supreme Court. In a 6–3 decision, in the case of \textit{Babbitt v. Sweet Home Chapter of Communities for a Great Oregon}, the Supreme Court reversed the court of appeals and upheld the Department of the Interior’s regulation. Examining the legislative history of the ESA, and applying rules of statutory construction, the majority of the Court concluded that the secretary’s definition of \textit{harm} was reasonable. Further, the Court concluded that the writing of this technical and science-based regulation involved a complex policy choice. Congress entrusted the secretary with broad discretion in these matters, and the Court expressed a reluctance to substitute its views of wise policy for those of the secretary.

This path-breaking endangered species case demonstrates how courts shape environmental policy by the way they interpret statutes. Different judges at different stages of review in this case interpreted the statutory word \textit{harm} differently. The protection of endangered species hinged on these interpretations. Tied in with this is the important notion of which rules of statutory construction courts choose to apply and how they apply them. Further, this case is another example of how courts are hesitant to substitute a showing of arbitrary or capricious action, or obvious error. The final Supreme Court decision set a precedent that strengthened endangered species policy throughout the United States.

Limiting Branches of Government by Interpreting the Constitution: The Case of Solid Waste Flow Control

In the 1994 Supreme Court case of \textit{C & A Carbone, Inc. et al. v. Clarkstown, New York}, the town of Clarkstown, New York, agreed to allow a private contractor to construct a solid waste transfer station within the town limits and to operate the facility for five years. At the end of the five years, the town planned to buy the facility for one dollar. To finance the transfer station’s cost, the town guaranteed a minimum waste flow to the facility, for which the contractor charged a tipping (disposal) fee. In turn, and in order to meet the waste-flow guarantee, the town adopted a flow-control ordinance requiring that all nonhazardous solid wastes within the town be deposited at the transfer station. Forbidden was the shipping of nonrecyclable wastes out of the city’s limits to locations charging a lesser tipping fee.

After discovering that Carbone and other haulers were shipping their wastes to out-of-state locations, Clarkstown filed suit in state court. The city sought an injunction requiring Carbone to ship its wastes to the town’s transfer station. The lower court granted summary judgment in favor of the town, and the appellate court affirmed. Carbone and other haulers appealed to the U.S. Supreme Court, arguing, among other things, that the flow-control ordinance violated the commerce clause of the U.S. Constitution. The commerce clause allows Congress to “regulate Commerce with foreign nations, and among the several States, and with the Indian tribes.” Where nonfederal law resembles regulation of interstate commerce, or is discriminatory in effect, the local or state government may have violated the commerce clause, which by its mere presence in the Constitution grants exclusive power over regulation to Congress. If so, courts must strike down the competing law.

In a 6–3 decision, the Supreme Court reversed the lower courts, holding that the ordinance did violate the commerce clause. The Court reasoned that although the ordinance was a local one, its economic effects were interstate in nature. The justices also reasoned that the article of commerce involved was not so much the waste itself but the service of processing and disposing of it. Moreover, they found that the ordinance unfairly favored certain operators who provided these services, disfavored others, and squelched competition. Finally, the Court maintained that the town had other avenues to address its local interests. For example, it could issue health and safety regulations to address environmental safety concerns. Alternatively, taxes or municipal bonds could subsidize the costs of the facility.

By interpreting both the ordinance and the U.S. Constitution in this fashion, the Court greatly affected national solid waste policy, as the implications of Carbone are widespread and profound. Hundreds of local governments had entered into similar arrangements. At the time of the Court decision, municipalities had issued more than $10 billion in bonds to finance trash-burning plants throughout the country, and over half of the states had enacted laws allowing flow-control ordinances. Many haulers used the
Court’s decision to obtain releases from prior agreements. Most county officials, of course, contend that the agreements are contract based, not ordinance based. But local haulers maintain that the contracts were coercive in nature. Moreover, the end product—a violation of the commerce clause—is the same. Every year since the Carbone case, local government associations have tried to persuade Congress to overturn the Supreme Court decision, but with no success to date.

Interpreting Statutes and the Constitution: The Case of Wetlands and Waste Disposal

The Solid Waste Agency of Northern Cook County (SWANCC) is a consortium of twenty-three suburban Chicago cities and counties in Cook County, Illinois, representing 700,000 residents. SWANCC needed a new landfill for nonhazardous solid waste. The Chicago Gravel Company informed SWANCC of the availability of a 533-acre parcel that had been the site of a sand and gravel pit mining operation until 1960. SWANCC purchased the land, which contained several small ponds and gravel pits left over from mining operations.

During the period in which SWANCC was seeking various permits to open the new landfill, the U.S. Army Corps of Engineers initially said it had no jurisdiction over the site. The Corps changed its mind, however, after being informed by the Illinois Nature Preserves Commission that migratory birds were observed on the site. One hundred twenty-one species of birds, including several migratory species, were counted at the proposed project. The parcel also provided breeding habitat for more than fifty species, including a few bird species listed as endangered or threatened under Illinois law.

SWANCC filed a permit pursuant to Section 404 of the Clean Water Act. The Corps denied the permit in July 1994. SWANCC filed suit. The district court held for the Corps, and the court of appeals affirmed. SWANCC appealed to the U.S. Supreme Court.

In Solid Waste Agency v. U.S. Army Corps of Engineers, a 5–4 opinion split along ideological lines, and the Supreme Court overruled the lower courts and found in favor of SWANCC. The statutory meaning of the navigable waters that the Corps is to protect pursuant to the Clean Water Act cannot be stretched to include rain-filled gravel pits, the Court majority said. Moreover, the regulation of land use is traditionally performed by local governments. In order to allow an encroachment on such traditional state powers, a clear indication of congressional intent is required. No such intent is manifested either in the statute or in the legislative history of the act, posing grave constitutional concerns, the five justices wrote.

The controversial issue in this case was whether to expand the regulatory powers of the Corps, something that Republican-appointed justices traditionally have been reluctant to do. Without an obvious showing of congressional intent, the conservative majority of the Court (Rehnquist, O’Connor, Scalia, Kennedy, and Thomas) was hesitant to take such action. Acknow-
edging past cases in which the court deferred to the interpretation of a statute by a federal agency, the court said that this case was different because it affected the federal-state balance. “This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority,” they wrote.

The dissent (Stevens, Souter, Ginsburg, and Breyer), drawing on the original intent of the Clean Water Act, countered that a broad statutory interpretation posed no serious constitutional question because the Corps was regulating an intrastate activity (the filling of a pond with landfill waste) that substantially affects interstate commerce. Reasonable people could disagree on the interpretation of the Clean Water Act in this case as well as the application of the Constitution, they said. Neither the statute nor the precedent was clear. If reasonable people could disagree, deference should be paid to the expert interpretation of the federal agency and the broad intent of the act, which was to protect the environment.

This close case is an excellent example of how justices’ values and policy preferences affect environmental policy through court decisions. It demonstrates the importance of Supreme Court appointments and why the stakes are so high. It also helps us understand why so many people are waiting to see if any justices retire soon, and with whom President Bush will replace them.

Interpreting Statutes and the Constitution: The Cases of Regulatory Takings and Land Use

A relatively new area in environmental policy that is driven by judicial decisions is the issue of regulatory takings. The three decisions reviewed in this section, while narrowly drafted, have implications for the future of all U.S. environmental and natural resource laws. As such, they deserve more detailed treatment than the previous cases.

Lucas v. South Carolina Coastal Council. On June 29, 1992, the U.S. Supreme Court announced its decision in the case of Lucas v. South Carolina Coastal Council. The pivotal issue was whether implementing the South Carolina Beachfront Management Act (BMA) was a regulatory taking of property. David H. Lucas, the petitioner, purchased two vacant oceanfront lots on the Isle of Palms in Charleston County, South Carolina, for $975,000. He intended to build single-family residences on the lots, but in 1988 the South Carolina Legislature enacted the BMA. In Lucas’s case, this act prohibited him from constructing any permanent structure (including a dwelling) except for a small deck or walkway on the property. Lucas filed suit in the court of common pleas, asserting that the restrictions on the use of his lots amounted to government taking his property without justly compensating him. The lower court agreed with Lucas, maintaining that the BMA rendered the land valueless, and awarded him over $1.2 million for the regulatory taking. Upon appeal, the Supreme Court of South Carolina reversed the lower court’s decision. The judges maintained that the
regulation under attack prevented a use seriously harming the public. Consequently, they argued, no regulatory taking occurred.38

The U.S. Supreme Court, however, in a 6–3 decision, reversed the holding of the highest court in South Carolina and remanded the case to it for further action. In its decision, the Court articulated several pivotal principles that constitute a test for takings. First, the justices emphasized that regulations denying a property owner all "economically viable use of his land" require compensation, regardless of the public interest advanced in support of the restraint. As such, even when a regulation addresses or prevents a "harmful or noxious use," government must compensate owners when their property is rendered economically useless to them.

At the same time, however, the Court threw back to the South Carolina courts the issue of whether a taking occurred in Lucas’s case. The lower courts had to examine the context of the state’s power over the “bundle of rights” Lucas acquired when he took title to his property. Put differently, the pivotal question for all state regulators today is this: Do state environmental regulations merely make explicit what already was implicit in any property title (that is, the right to regulate its use), or are they decisions that come after a person acquires title that were not originally implied? In the latter case, they are takings that governments must compensate.

Equally important in Lucas was what the Court did not discuss in its narrowly worded opinion. First, the Court did not say that Lucas was entitled to compensation. Rather, it implied that the South Carolina Supreme Court was hasty in concluding that Lucas was not entitled to recompense. Second, the Court did not address the issue of property that is merely diminished in value—a far more common occurrence. Instead, it addressed only the issue of property that was rendered totally valueless. Finally, in pushing the regulatory takings issue back onto the state, the Court did not say that state laws may never change. Indeed, the majority held that “changed circumstances or new knowledge may make what was previously permissible no longer so.” Hence, the Court left the door open for some regulation of newly discovered environmental harms after title to a property changes hands. Still, Lucas did prevail. Upon remand, the South Carolina Supreme Court reversed its earlier decision and awarded Lucas over $1.5 million.

Dolan v. Tigard. A year later, the Supreme Court continued to develop the area of regulatory takings in a local government planning and zoning case that also is having profound effects on environmental policy. In Dolan v. Tigard (1994), the owner of a plumbing and electrical supply store applied to the city of Tigard, Oregon, for a permit to redevelop a site.39 The plaintiff wanted to expand the size of her store and to pave the parking lot.

The city, pursuant to a state-required land use program, had adopted a comprehensive plan, a plan for pedestrian-and-bicycle pathways, and a master drainage plan. As such, the city’s planning commission conditioned Dolan’s permit on her doing two things. First, she had to dedicate (that is, convey title) to the city the portion of her property lying within a 100-year floodplain so that the city could improve a storm drainage system for the area. Second, she had to dedicate an additional fifteen-foot strip of land adjacent to the floodplain as a pedestrian-and-bicycle pathway. The planning commission argued that its conditions regarding the floodplain were “reasonably related” to the owner’s request to intensify use of the site, given its impervious surface. Likewise, the commission claimed that creating the pedestrian-and-bicycle pathway system could lessen or offset the increased traffic congestion that the permit would cause.

In a previous case, Nollan v. California Coastal Commission (1987), the Court had ruled that an agency must be prepared to prove in court that a “legitimate state interest” is “substantially advanced” by any regulation affecting property rights.40 Doing so required agencies to show that an “essential nexus” exists between the “end advanced” (that is, the enunciated purpose of the regulation) and the “condition imposed” by applying the regulation. However, the Court was silent about how judges should interpret these terms.

After reviewing various doctrines that state courts had used to guide such analyses, the Court in Dolan enunciated its own test of “rough proportionality.” It stated that “[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” If there is rough proportionality, then there is no taking. In this instance, the Court decided that the city had not made any such determination, and concluded that the city’s findings did not show a relationship between the floodplain easement and the owner’s proposed new building. Put more directly, the city had failed to quantify precisely how much the pedestrian-and-bicycle pathway would proportionately offset some of the demand generated.

The implications of the Court’s doctrine in this case are profound. The facts are hardly unique and represent the types of zoning decisions that local governments make daily. What is more, its logic potentially extends to all local government regulatory activities. Finally, the decision means that the courts can become even more involved than they are already in reviewing and judging the adequacy—the dissent in Dolan said the “micromanaging”—of local regulatory decisions.

Palazzolo v. Rhode Island. A similar case with a different twist is the 2001 Supreme Court case of Palazzolo v. Rhode Island.41 Anthony Palazzolo owns a waterfront parcel of land in the town of Westerly, Rhode Island. Almost all of the property is designated as coastal wetlands under Rhode Island law. After Palazzolo's development proposals were rejected by the Rhode Island Coastal Resources Management Council, he sued in state court, asserting that the council's application of its wetlands regulations took his property without compensation, in violation of the U.S. Constitution. The Supreme Court of Rhode Island rejected his claims, and Palazzolo appealed to the U.S. Supreme Court.

In a 5–4 decision, the Supreme Court held, first, that the case was ripe for review because the decision of the council denying Palazzolo's development proposals was a final government action. Next, the Court held that the
A relatively new concept being used more often in both federal and state environmental law is the establishment of "Environmental Performance Standards" (EPS). These standards are set to address environmental issues in a manner that is both flexible and effective. The EPA, for example, has issued several such EPS for various industries, such as the meatpacking industry, to address environmental impacts in a more targeted and measurable way.

One example of an EPS is the Meatpacking Industry EPS, which was developed in response to concerns about the environmental impacts of the industry, including wastewater from meatpacking plants. The EPS established specific requirements for water quality and pollution control, as well as other environmental standards, and was designed to be flexible enough to accommodate the varying needs of different plants.

A similar EPS was developed for the automotive industry, focusing on the reduction of volatile organic compounds (VOCs) emitted during the manufacturing process. The EPS set specific emission limits and required plants to implement technologies to achieve these limits.

These EPS have proven to be effective in reducing environmental impacts, and have also helped to improve the competitiveness of the industries involved. The success of these EPS has led to their adoption in other industries, and has generated interest in developing similar standards for other environmental issues.
Conclusion: A View to the Future

Judge Bazelon was right: Since 1971 administrative agencies and reviewing courts have collaborated fruitfully, especially in the area of environmental policy. The courts in the United States have become permanent players in environmental policymaking. Supporting this conclusion are dozens of Web sites concerning environmental policy in the courts. Box 7-1 lists some of the most useful of these Web sites. Although the extent of judicial involvement in environmental cases will ebb and flow over the years, the courts will always be involved in environmental policy to some degree.

As this chapter has demonstrated, courts have a major influence in how environmental laws work in practice. Courts shape environmental policy in many ways. The most significant ways are by determining who has standing to sue, by deciding which cases are ripe for review, by the court's choice of standard of review, by interpreting statutes and the Constitution, by the remedies judges choose, and simply by resolving environmental conflicts.

Environmental court decisions are influenced by the state of the law, such as precedent and rules for interpreting statutes. They also are influenced by the courts' environment, such as mass public opinion, litigants and interest groups, congressional expansion or perhaps narrowing of jurisdiction, and presidential appointments. Environmental court decisions are influenced as well by justices' values: liberal, moderate, conservative, or somewhere in between. In addition, environmental court decisions are affected by group interaction on the bench, with individual justices at times influencing others.

Making predictions concerning environmental policy in the courts during the new Bush administration is risky business. The significance of court action concerning environmental policy is related not only to the specific decisions before the courts but also to how the executive branch and Congress react to these decisions. Bush presented himself during the presidential campaign as a "compassionate conservative," but his early actions concerning environmental policy have been mixed.

In July 2001, for example, in response to lawsuits by the coal industry and other parties, EPA administrator Whitman filed a motion in federal court to put on hold for eighteen months new Clean Water Act regulations concerning the total maximum daily load (TMDL) program. TMDLs quantify the loading capacity of a body of water for a given pollutant and set the relationships between pollutant sources and water quality. When the final rules were published on July 13, 2000, opponents filed suit in court to stop the promulgation of the regulation. Congress responded by barring the EPA from implementing the regulation in fall 2000 and asked the National Academy of Sciences (NAS) to evaluate the program. The NAS report, released in June 2001, recommended better data analysis and a two-step listing process. Whitman cited the NAS report in her motion to the federal court. It is too early to say what this will mean for water quality policy.

By September 2001 Bush was contemplating ordering the EPA to withdraw from pending air pollution lawsuits filed by the Clinton administration against power plants in the Midwest and the southern United States. The lawsuit charged that up to 100 power companies, which are exempt from new source performance standards, have done such extensive upgrading of older plants that those plants should meet the same standards as new plants. The utilities, however, maintain that the changes were merely routine maintenance. After the change in administrations, the utilities went to Bush appointees seeking an end-run around the new environmental policies the court was predicted to dictate. As of this writing, the case had not been resolved.

Bush's appointment of John Ashcroft as attorney general was controversial. Ashcroft, while not directly responsible for environmental policy, will play a key role, because he will be in charge of filing suits against polluters. In 2000, when he served as a U.S. senator from Missouri, Ashcroft received a zero rating from the League of Conservation Voters. Ashcroft's voting record on environmental issues, coupled with Bush's appointment of Gale Norton, a protégée of James Watt, as secretary of the interior, strikes many environmentalists as reminiscent of the Reagan administration's anti-environmental record (see chapter 5).

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**Box 7-1 The Best Web Sites Concerning Environmental Policy in the Courts**

- **Cornell Legal Information Institute - Environment**
  www.law.cornell.edu/topics/environmental.html

- **Environmental Law Net**
  www.environmentallawnet.com

- **Environmental Treaties & Resource Locators**
  http://sedac.ciesin.org/enri

- **The Federal Web Locator of The Center for Information Law and Policy**
  www.infoctr.edu/fw

- **FedWorld - Search Engine for Federal Documents**
  www.fedworld.gov

- **FindLaw - Environmental Law**
  www.findlaw.com/01topics/13environmental/index.html

- **Pace Virtual Environmental Law Library**
  www.pace.edu/lawschool/env/vei6.html
Bush’s unsuccessful April 2001 proposal to remove access to the courts for environmental groups and others who sought to affect endangered species listings also has environmental leaders on edge. The proposal was buried in the voluminous budget bill the president sent to Congress, and it barely saw the light of day. Still, it is a clue concerning what might happen in the area of environmental policy and the courts under this administration.

If Bush does follow in Reagan’s footsteps by attempting a full-fledged rollback of environmental standards, we can expect a blizzard of environmental lawsuits filed by environmental groups against the administration. We can also expect a decrease in environmental enforcement actions filed by the EPA and by the Department of Justice in court. There are already early indications that ADR may be embraced by the Bush administration in lieu of an aggressive litigation strategy. The implications of this strategy will unfold only over time.

A recent study concluded that conservative judges are part of a trend of anti-environmental judicial activism. The report, written by the Alliance for Justice, Community Rights Counsel, and NRDC, examined federal rulings from 1990 to 2000 and found that a group of highly ideological conservative judges are increasingly striking down environmental protections. Environmentalists are already issuing a preemptive strike, advocating for their judicial candidates of choice. Who Bush appoints to fill the more than 100 openings on the federal judiciary could make or break environmental policy in the United States.

The environmental policies that are developed, expanded, narrowed, and clarified in our courts affect the air we breathe, the water we drink, and the food we eat. The United States is the most litigious country in the world. Clearly environmental policy in the courts—at least in the United States—is here to stay.

Notes

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11. Six of the EPAs seven major environmental statutes have citizen suit provisions.

12. See, for example, Lettie Wenner, The Environmental Decade in Court (Bloomington: Indiana University Press, 1982).
14. For a good discussion of this requirement, see Lujan, Secretary of the Interior v. Defenders of Wildlife et al., 504 U.S. 555 (1992).
15. See U.S. Constitution, Article III, Section 2.
25. 50 C.F.R. section 17.3 (1994).
31. U.S. Constitution, Article I, Section 8, Clause 3.
35. Ibid., at 173.
42. Friends of the Earth, Inc. v. Laidlaw Environmental Services, 120 S.Ct. 693 (2000).