4   An Introduction to U.S. Environmental Law and Policy by Nancy K. Kubasek, Professor of Legal Studies, Bowling Green State University. Professor Kubasek looks at the evolution of U.S. environmental policy, from Rachel Carson, burning rivers, to today.

7   International Environmental Law by David Hunter, assistant professor of law and director, Program on International and Comparative Environmental Law, American University Washington College of Law. Professor Hunter explores how a 1972 environmental summit in Stockholm led to the United Nations Environmental Program, now leading a global crusade for environmental cooperation.


12  Standing: Who Can Sue to Protect the Environment? by Marisa A. Martin, associate attorney with the Chicago office of Baker & McKenzie. Martin analyzes how legal standing often stands in the way of lawsuits to protect the environment.


18  Students in Action “Youth Harness the Power to Advocate for Green Legislation” by Colleen Danz, Feature on Power Shift 2007, “first national youth summit to solve the climate crisis.”


22  Teaching with the News The Washington Post: “Carmakers Defeated On Emissions Rules,” September 13, 2007. States may set environmental emissions standards, says a judge. What does this mean for carmakers?

Directors Note

Environmental issues are increasingly at the forefront of policy debates. Global warming has become the preeminent environmental issue of our time. Air and water pollution, as well as the control of chemicals and toxic substances, continue to be major areas of concern in the United States and globally. Furthermore, the balance between environmental protection and energy development is being reexamined and debated in political forums, as the price of oil escalates.

Insights explores a wide range of environmental issues through the lens of law and government regulation. Nancy K. Kubasek begins the discussion by identifying the need for government regulation of the environment, the key environmental laws passed by Congress, and market-based alternatives to regulation. Richard J. Lazarus and Sara Zdeb trace the political history of environmental law, focusing on how and why it has remained a success story even as the once-bipartisan consensus over environmental protection was replaced by partisan gridlock in Congress. David Hunter moves the examination of environmental law to the international arena, analyzing the key global environmental agreements in such areas as climate change, ozone depletion, and the regulation of chemicals and waste.

The features in this issue explore some of the diverse and often less well-known stories of environmental law and policy. In Perspectives, environmental experts from the Pacific Legal Foundation and the Defenders of Wildlife debate whether the Western Great Lakes and Northern Rocky Mountain gray wolf populations—recently removed from the federal list of endangered species—still deserve federal protection under the Endangered Species Act of 1973. The issue of judicial standing in environmental law—whether groups or individuals have a sufficient interest to bring a lawsuit in environmental disputes—is discussed by Marisa A. Martin and complemented by a teaching activity from James Landman in Learning Gateways. Robert Abrams analyzes the authority of the EPA to control greenhouse gas emissions from cars and trucks in Law Review, and Teaching with the News complements this discussion with a useful teaching moment on federalism—what responsibility for environmental protection the states may preserve for themselves in light of federal leadership in this area.

The environment is a relatively new and exciting subject of inquiry for government and social studies teachers. Students are naturally drawn to the topic, as Colleen Danz illustrates in Students in Action. A legal perspective has much to offer textbook and classroom discussions about the growth of environmental protection. For more resources, visit Insights online at www.insightsmagazine.org.

Mabel McKinney-Browning
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As we move toward the presidential election, one of the issues that Americans may consider is what sort of environmental policies each of the candidates supports. Having an understanding of the framework of our current system of environmental laws may enable voters to make a better evaluation of the various candidates’ platforms with respect to environmental issues.

The Need for Environmental Regulation

Prior to 1970, the United States did not have any serious environmental policy; in fact, we did not even recognize the need for such a policy. We looked up in the sky and saw billowing clouds of black smoke pouring out of factory smokestacks and did not see environmental devastation. Instead, we saw the signs of a productive economy. Stimulated to a large extent by Rachel Carson’s *Silent Spring*, the massive oil spill in Santa Barbara in 1969, and the now legendary Cuyahoga River fire, the United States Congress enacted a comprehensive set of environmental laws during the 1970s, which were designed to protect and improve the quality of the environment. Congress also created a federal administrative agency, the Environmental Protection Agency (EPA), to oversee the implementation and enforcement of environmental standards. Clearly, the strongest evidence that we needed environmental regulations is that, prior to their enactment, we were on a course to destroy our environment, an environment that is crucial to the survival of our species.

There are, however, other justifications for environmental regulations. One significant justification is the “free rider” problem. When you have a public good—i.e., a good that is freely accessible to everyone once it is provided—and the person who pays for its creation cannot keep it for his or her exclusive use, no one wants to pay for the creation of the good. Everyone else wants to be a

“The laws [from the 1970s] led to significant improvements in the quality of our air, water, and land.”

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“free rider,” a person who gets to use the public good without paying for it. As everyone tries to shift to becoming a free rider, the production of the public good diminishes. Environmental goods, such as clean air and clean water, are public goods. Everyone wants the air and water to be clean, but they do not want to pay the associated costs; they would prefer to breathe the air and swim in the water that someone else has paid to clean. Without some sort of government regulation, everyone will want to be a free rider. No one will want to pay to clean the air and water, and as a result these natural resources will degrade.

Another oft-cited reason for environmental regulation is the ethical argument that we are the dominant species on the planet, the only species that has the ability to either preserve and enhance or destroy our ecosystem and therefore determine the life or death of every species on the planet. With that ability and power comes a responsibility to protect and preserve the ecosystem. We can only fulfill that responsibility by establishing and enforcing stringent environmental laws.

The Structure of Environmental Law

For all of the aforementioned reasons, the United States became one of the first in the world to establish a comprehensive set of environmental laws. Environmental law is a branch of administrative law, which means that these laws are overseen by a governmental body known as an administrative agency. Administrative agencies have the power to create regulations, as well as enforce them, and they are staffed by individuals with expertise in the area they are responsible for regulating.

Two primary agencies are responsible for environmental law and policy in the United States—the Environmental Protection Agency (EPA), and the U.S. Fish and Wildlife Service (FWS). The EPA is one of the largest federal agencies, employing over 17,000 people in its headquarters in Washington, D.C., and its ten regional offices across the country. Over half of these employees are engineers, scientists, and policy analysts. In addition to developing and enforcing regulations, the EPA undertakes and provides funding for research and conducts educational programs.

The second, slightly less well known, agency is the U.S. Fish and Wildlife Service. FWS is the agency responsible for safeguarding our nation’s resources. This agency manages the 93 million acres of our national wildlife refuge, enforces federal wildlife laws, and protects endangered species.

Several other federal agencies also play a role in helping to enforce our environmental policies. These agencies include, among others, the Army Corps of Engineers, the U.S. Geological Survey, the Food and Drug Administration, the National Institute for Occupational Safety and Health, the Office of Hazardous Materials, the National Oceanic and Atmospheric Administration, and the Nuclear Energy Commission. Many of these agencies’ primary responsibilities are outside of the environmental area, but they still play a contributing role in environmental protection.

Under our system of government that is based upon the principles of federalism, protection of the environment is shared between the federal and state governments. Historically, however, the federal government has played the leading role. The federal foundations for our current system of environmental law were established from 1969 through 1980, when Congress passed 27 federal environmental statutes and hundreds of administrative regulations designed to implement these statutes were enacted (see sidebar box on page 6). These laws led to significant improvements in the quality of our air, water, and land, even though many of the goals initially established by these laws were not fully attained. Subsequent amendments to many of these acts, passed by Congress in the last several decades, have generally strengthened these laws. For example, the Clean Air Act was amended in 1990 and, among other provisions, strengthened the Act by adding criminal penalties for violations.

In enacting these laws, Congress gave broad responsibility to the appropriate federal agency to adopt the necessary environmental regulations to protect our environment. However, these laws typically included provisions that gave the states equal or primary enforcement powers and encouraged states to establish their own more stringent standards. In some instances the statutes gave the states responsibility for determining how the federal stan-
Direct regulation consists of the setting of standards and the imposition of criminal and civil penalties for failure to comply. Standards may be set in different ways, depending on the problem being addressed. For example, standards may be set in terms of levels of technology that must be used or total emissions that will be allowed from a source.

Because direct regulation may be inflexible and not necessarily the most efficient approach, Congress and the EPA are increasingly trying to use “market-based” approaches. Two key market-based approaches are subsidies and marketable emissions permits. Subsidies are grants or tax credits given to companies to help offset the costs of installing new environmentally-friendly technology. For example, New York’s Green Building Tax Credit program provides a tax credit of 10 percent of the expense associated with installing an EPA-approved air conditioner, among other credits.

Establishing a marketable emissions permit trading program involves giving companies pollution allowances that enable them to emit a given amount of a pollutant over the course of a year. Then, if they can reduce their emissions so that they do not need all of their allowances, they may sell their leftover allowances to other companies that cannot reduce their emissions as cheaply. By continually reducing the number of allowances issued each year, the overall amount of pollution is reduced. In theory, this is much more efficient because those companies for whom reduction is the cheapest will choose to reduce their emissions and then sell their unneeded allowances to those companies for whom emissions reduction would be excessively costly.

Another approach that has been used in a number of other countries but not in the United States is green taxes. These are taxes placed on environmentally harmful behaviors. For example, some environmentalists have discussed the possibility of the United States establishing a green tax of $1,000 on the sales of new cars with a fuel economy of less than 15 miles per gallon. Such proposals, however, have not progressed beyond the discussion stage.

The Future
As we head into the 2008 elections, the federal government has failed to take the lead on what many believe is the key environmental policy issue currently facing the nation: global warming. The
International Environmental Law

by David Hunter

In this article, legal scholar David Hunter discusses the scope, goals, and key principles of international environmental law. He also explores multilateral treaties that address such issues as climate change, ozone depletion, and the regulation of chemicals and waste.

International environmental law is the set of agreements and principles that bind the world’s nations in a collective effort to resolve our most serious environmental problems. In general, the law seeks to achieve sustainable development—i.e., development that allows people to have a high quality of life today without sacrificing the quality of life of future generations. International environmental law is thus a critical tool both for addressing specific environmental threats, such as climate change and ozone depletion, and for integrating long-term environmental protection into the global economy.

But not all environmental threats are appropriate for international (as opposed to national or local) response. For countries to sacrifice some sovereignty and agree to cooperate internationally, some advantage must be gained in addressing the problem. Typically, environmental treaties are appropriate where (1) the impacts are transboundary (such as pollution into the Great Lakes) or global (such as climate change); (2) the causes relate to some international activity, typically international trade (for example, the trade in endangered species); or (3) international cooperation is necessary to provide financial or technical support to developing countries (for example, for the conservation of biological diversity). In these circumstances, international cooperation is necessary for an effective response to the environmental challenge.

Throughout most of the last century, international environmental law primarily reflected bilateral or regional disputes over shared resources, such as rivers or lakes that cut across national boundaries. These transboundary environmental issues led to diplomatic tensions that either resulted in an international legal case or were settled through relatively narrow regional or bilateral treaties. The most famous and important of these disputes was the Trail Smelter Arbitration.

Although bilateral disputes such as the Trail Smelter still exist, the more important core of international environmental law today is the effort to manage...
complex, global environmental problems. This shift in international environmental law is generally considered to have started in 1972—when over 100 countries met at the United Nations Conference on the Human Environment in Stockholm. Environmentalism had emerged domestically in the late 1960s in both the United States and Europe, but environmental protection was neither part of the United Nations Charter nor a significant field of international law.

The Stockholm conference highlighted the international aspects of emerging environmental challenges and legitimized the environment as an area for international cooperation. Perhaps most importantly, the Stockholm conference created the United Nations Environment Programme (UNEP)—an institutional home for environmental protection in the United Nations. Headquartered in Nairobi, Kenya, UNEP continues today to be a leading catalyst for global environmental cooperation.

Once environmental protection was viewed as a legitimate international issue, countries embarked on an ambitious program for negotiating new international environmental law treaties. In the ensuing decades, treaties were negotiated to regulate the trade in endangered species, to prohibit the hunting of whales, to control shipments of hazardous wastes, and to prohibit the production of chlorofluorocarbons (CFCs) and other substances that destroy the ozone layer. Together, these treaties comprised a substantial achievement in international cooperation, and signalled a major shift in the breadth and impact of international environmental law.

Global Environmental Agreements

Today, the core of international environmental law is found in about a dozen global environmental treaties. These can be grouped into several categories: (1) climate change; (2) ozone depletion; (3) conservation of nature and biological diversity; (4) conservation of the marine environment; and (5) regulation of chemicals and wastes (for further information, see the U.S. Department of State, 1998).

Addressing climate change. At least since the 1980s, many scientists have been concerned that increasing concentrations of carbon dioxide and other greenhouse gases are warming the earth’s atmosphere and changing the climate. At the 1992 Earth Summit, over 150 countries signed the United Nations Framework Convention on Climate Change, recognizing climate change as “a common concern of humankind” and pledging to take action to avoid harmful impacts. The convention set an informal goal to reduce emission levels of greenhouse gases to 1990 levels by the year 2000, but it did not impose any binding targets or timetables on any country. Industrialized countries were required to adopt national plans to reduce greenhouse gases, and all countries were required to cooperate in monitoring and reporting emissions of greenhouse gases and related information.

Because the Framework Convention was not sufficient to avoid harmful climate impacts, the industrialized countries subsequently agreed to negotiate binding commitments to reduce greenhouse gases. After several years of intense negotiations, the countries agreed to the Kyoto Protocol to the United Nations Convention on Climate Change. Under the Protocol, 38 industrialized countries agreed to reduce their overall emissions to approximately 5 percent below 1990 levels by the year 2012. Having agreed to cap emissions, the countries also established elaborate procedures for trading the rights to pollute. The Kyoto Protocol’s “cap-and-trade” approach thus created a global market for reducing carbon dioxide and other greenhouse gases. The United States first signed the Protocol in 1998 but rejected it three years later after President Bush took office. The United States complained (somewhat disingenuously) that the Protocol was too expensive and would not work because developing countries had not committed to any reductions. Yet, the United States offered no alternative proposals for controlling greenhouse gases. Nonetheless, in December 2007 all of the countries in the world, including the United States, agreed to negotiate further commitments for addressing climate change in the post-Kyoto period (after 2012).

Reversing ozone depletion. Beginning in the late 1970s it became clear that certain widely used chemicals could
be depleting the earth’s protective stratospheric ozone layer. In response, countries first negotiated the 1985 Vienna Convention for the Protection of the Ozone Layer and two years later the Montreal Protocol on Substances that Deplete the Ozone Layer. The Montreal Protocol has subsequently been revised every two or three years, resulting in an agreement to phase out most chlorofluorocarbons (CFCs), halons, and other ozone-depleting substances. Nearly every country in the world has joined the Montreal Protocol, which is widely considered the most effective of all environmental treaties. Indeed, because of the Montreal Protocol, the use of ozone-depleting substances has plummeted, and the depletion of the ozone layer has slowed significantly.

Conserving nature. The leading global treaties for conserving nature are the Convention on Biological Diversity and the Convention on International Trade in Endangered Species (CITES). The Biodiversity Convention was signed at the 1992 Earth Summit, with the goal of conserving the planet’s biological diversity. The convention has few binding commitments but sets an international framework to support domestic conservation efforts. CITES, on the other hand, establishes binding controls on international trade in rare species of animals and plants. For example, CITES prohibits all commercial trade in tigers, rhinoceroses, gorillas, and thousands of other plants and animals. Other nature conservation treaties protect internationally important wetlands, natural heritage sites, and certain migratory wildlife species.

Protecting the marine environment. The UN Convention on the Law of the Sea sets forth rules for managing the oceans, including marine conservation.

### Key Principles in International Environmental Law

**State Sovereignty.** Countries have the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies.

**Common Concern.** The global environment is a common concern of humanity.

**Duty Not to Cause Environmental Harm.** Countries have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other countries or of areas beyond the limits of national jurisdiction.

**Common but Differentiated Responsibilities.** In view of the different contributions to global environmental degradation, countries have common but differentiated responsibilities.

**The “Polluter Pays” Principle.** National authorities should promote the internalization of environmental costs, reflecting the approach that the polluter should bear the cost of pollution. Under the regime, coastal states are responsible for protecting the marine environment within 200 miles of their coasts, and flag states (i.e., the countries that license a particular vessel) are responsible for controlling activities in the high seas beyond 200 miles. More specific treaties limit marine pollution from ships and regulate fishing on the high seas.

**Regulating chemicals and wastes.** Three major global treaties regulate the production and trade in hazardous chemicals and wastes. The Rotterdam Prior Informed Consent Convention requires that countries exporting chemicals into other countries ensure that the receiving countries have provided their prior, informed consent. This is designed to ensure that importing governments have the opportunity to manage the environmental and public health risks inherent to hazardous chemicals. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal imposes similar consent requirements for shipments of hazardous wastes and requires parties to ensure that such wastes are managed in an environmentally sound manner. Finally, the Stockholm Convention on Persistent Organic Pollutants prohibits or significantly restricts the production and use of some of the world’s most environmentally harmful chemicals, including dioxins, PCBs, and DDT.
In 2007, the environment—in particular, global warming—burst into the public consciousness. Former Vice President Al Gore won the Nobel Peace Prize and saw his film, “An Inconvenient Truth,” win an Oscar and become the fourth highest-grossing documentary of all time. International leaders gathered in Bali at the close of the year to launch a new round of climate change negotiations. And here at home, the United States Congress took up varying proposals to combat global warming while the Supreme Court issued a landmark ruling on the issue.

Global warming may represent the newest frontier in environmental law, but the lawmaking institutions working to address it have more than 30 years of history on which to build. This history has been tumultuous, but throughout it environmental law has grown, overcoming challenges and demonstrating a surprising resilience. Whether tackling global warming, water pollution, or the protection of endangered species, environmental lawmaking is uniquely and inherently difficult. As such, its persistence over the past three decades is even more remarkable.

Making environmental law is difficult in part because the environment itself is so complex. Ecological systems are complicated and dynamic, as are the factors that contribute to environmental change. Environmental law must take this complexity into account. For example, when setting standards limiting the amount of a particular air pollutant, the Environmental Protection Agency (EPA) must consider ecological factors including temperature, atmospheric pressure, and wind.

“Early federal regulation … favored private economic exploitation.”

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The EPA also must take into account the many sources that contribute the pollutant into the air. Finally, the agency must consider how all these factors relate to human health—a measure by which it sets standards under the Clean Air Act.

Our constitutional system itself poses additional hurdles. Lawmaking institutions are divided vertically between the federal government and states, as well as horizontally among Congress, executive branch agencies, and the courts. This deliberately fragmented system makes any type of lawmaking difficult and incremental. Enacting environmental laws is particularly difficult, because the injuries they seek to prevent are often far-off and diffuse, while their economic impact may be immediate. In addition, the Constitution limits the powers of Congress to an enumerated list that does not expressly mention the environment. As a result, legislators must hitch federal environmental laws to authority Congress does possess, such as the ability to regulate economic activity under the Constitution’s Commerce Clause.

The Road to Environmental Law

Despite these obstacles, the seeds of environmental law germinated several decades ago, and by 1970 its roots were firmly planted. While the term “environmental law” was not formally coined until 1969, numerous natural resource and pollution control laws were on the books far beforehand. Early federal regulation of forests, minerals, and other resources favored private economic exploitation. Beginning in the early to mid-20th century, Congress enacted a set of natural resource laws that gradually jettisoned this one-sided approach and began embracing the goals of preservation and conservation. Early laws such as the Antiquities Act of 1935 set the stage for a series of even more protective ones in the 1960s, culminating with the Wilderness Act of 1964 and the Wild and Scenic Rivers Act of 1968. At the same time, Congress passed a number of clean air and water laws in the 1960s that served as precedents for even more ambitious lawmaking to come.

Public consciousness of environmental issues was also growing. Publications such as Silent Spring—Rachel Carson’s 1962 missive against pesticide use—captured the nation’s attention. So did highly visible environmental disasters later in the decade, including the 1969 oil spill off the Santa Barbara coast and, famously, the burning of the polluted Cuyahoga River. By 1970 the stage had been set: a diffuse body of environmental law already existed, and the public supported more.

The 1970s was a seminal decade for environmental protection. Its first year saw three major accomplishments: the National Environmental Policy Act (NEPA), the Clean Air Act, and the creation of the EPA. NEPA alone was groundbreaking. Often called the “Magna Carta of environmental law,” it articulated a broad declaration of national policy to protect the environment. NEPA’s action-forcing requirements were even more significant than its aspirational policy statements. The law required federal agencies to assess the environmental impacts of their actions and to identify alternatives less likely to harm the environment. This “look-before-you-leap” approach changed the way the federal bureaucracy operated and proved—along with the law’s information disclosure requirements—NEPA’s most enduring legacy.

Congress enacted nearly two dozen environmental laws over the course of the decade, and it did so with overwhelming bipartisan majorities. The federal environmental laws of the 1970s were dramatic, sweeping, and uncompromising. In addition to NEPA, there were public health and pollution control laws such as the Clean Air Act and Clean Water Act. There were also natural resources laws such as the Endangered Species Act, Natural Forest Management Act, and Marine Mammal Protection Act. The natural resources laws of the 1970s were particularly noteworthy for the balance they struck in favor of conservation and against exploitation. The most sweeping—the Endangered Species Act—went even farther, making the prevention of extinction its overriding policy objective.

The 1970s also witnessed the emergence of the criticism and controversy that face environmental law to this day. Ironically, President Nixon began the decade as one of environmental law’s biggest supporters but ended his term a skeptic of the very laws he initially

continued on page 28
Environmental lawsuits range from the highly local to the global. A plaintiff may file a lawsuit challenging the pollution of a nearby stream, the threats facing polar bears in the Arctic, or the increase in global warming due to unregulated greenhouse gas emissions. Whether alleging a global or local concern, parties bringing claims in federal court must satisfy the same hurdles before the merits of their particular case can be heard. One such hurdle is known as “standing,” which requires the parties bringing the lawsuit to demonstrate that they are the appropriate parties to bring the case in front of a court.

The basic idea behind “standing”—that only parties that have an interest in the case can bring the lawsuit—is relatively straightforward. In practice, however, developing a principled basis upon which standing can be demonstrated has proven to be extremely difficult, especially for those cases involving environmental issues. This article outlines the basic requirements for constitutional standing and how standing can be demonstrated in environmental cases. The article also discusses the Supreme Court’s recent standing analysis in *Massachusetts v. EPA*, which involved claims related to global warming and greenhouse gas emissions.

**Background**

The principle of standing is premised on the U.S. Constitution. Under Article III of the Constitution, judicial power extends over “cases” and “controversies.” In simplified terms, this has been interpreted to mean that only lawsuits alleging an injury to the plaintiff can be heard by the federal courts. The Supreme Court has noted that notwithstanding how many persons have been injured by the challenged action, the plaintiff bringing the lawsuit must demonstrate that the action injures him or her in a personal way. The requirement of standing ensures that the action brought is an adversarial one, which tends to sharpen the issues in front of the court.

Economic harm has been the traditional means by which to show a plaintiff suffered an injury. However, many environmental harms—such as polluted water,
species in threat of extinction, and contaminated air—may not translate into an economic injury to a particular plaintiff. In the 1970s, the Supreme Court held that noneconomic injuries such as harm to recreational, conservation, and aesthetic interests can represent an “injury-in-fact” so long as the plaintiff is among the injured.

Decades later, in the 1990s, the Supreme Court more fully elaborated Article III standing requirements as applied to an environmental case. In Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), environmental plaintiffs challenged a new rule by the Department of Interior, which interpreted a section of the Endangered Species Act as not applicable to actions in foreign nations. Plaintiffs included individuals who had visited Egypt in order to view the Nile crocodile and Sri Lanka to view the Asian elephant and Asian leopard. Plaintiffs alleged that the Department of Interior’s rule would negatively affect their future ability to view these species in their natural habitat.

The Lujan Court delineated three elements that must be met to demonstrate the constitutional minimum of standing to sue. First, a plaintiff must show an “injury-in-fact.” The “injury-in-fact” must be “concrete and particularized” and “actual or imminent,” not conjectural or hypothetical. The Court has noted that “particularized” means that the injury must affect the plaintiff in a personal and individual way. Second, the plaintiff must demonstrate a “causal connection between the injury and the conduct complained of.” The injury must be “fairly traceable” to the defendant’s challenged actions. Third, the plaintiff’s injury must be one that is likely to be redressed by a favorable decision in the case.

Applying this test, the Court determined that the plaintiffs did not have standing to sue because it found no “imminent” injury to the plaintiffs. The Court noted that the members of the Defenders of Wildlife who had visited Egypt and Sri Lanka only expressed an “intent” to return to these places and did not have concrete plans. The Court found these “some day” intentions were insufficient for the purposes of showing an “actual and imminent” injury.

The Court noted that the plaintiffs failed to show that a favorable decision would redress the harm because a change in regulation would not necessarily affect the species and the agencies only provided a portion of funds for the projects at issue.

The Court in Lujan also rejected the argument that Congress waived Article III standing requirements in enacting the Endangered Species Act’s citizen-suit provision. The Court stated that Congress has the power to define injuries and provide for chains of causation that give rise to a case or controversy where none previously existed, but held that Congress could not exceed the limitations on standing set forth in Article III.

The Court’s decision in Lujan highlighted a shift in the Court toward a stricter interpretation of standing in both environmental cases and other areas of the law. But the trend toward a more restrictive interpretation of standing was mitigated to some extent in 2000. In Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167 (2000), plaintiffs brought a suit against a corporation discharging pollutants in violation of the Clean Water Act. Members of Friends of the Earth alleged injuries to their recreational, economic, and aesthetic interests and stated that the river “looked and smelled polluted.” The Court recognized that plaintiffs held “reasonable concerns” about the alleged Clean Water Act violations that directly affected their interests. The Court stated that injury to the environment was not necessary to show Article III standing so long as injury to the plaintiffs was shown. Applying the Lujan three-part test, the Court found that the plaintiffs had standing to bring the suit.

Justice Scalia, who authored the Lujan decision, dissented in Friends of the Earth. In his dissenting opinion, continued on page 21
On March 12, 2007, the Western Great Lakes Gray Wolf was removed from protection under the federal Endangered Species Act (ESA), and the Northern Rocky Mountain Gray Wolf was removed from federal protection on March 28, 2008—after more than thirty years of intense disagreements among ranchers, environmentalists, and other groups. These government actions occurred under the administrative authority of the U.S. Fish and Wildlife Service (FWS). The FWS issued its decisions based upon wolf management and protection laws and plans developed by the states in the affected regions. Subsequently, environmental groups announced that they planned to challenge these FWS decisions in federal court. In the following essays, the authors debate whether the “delisting” of these gray wolf populations from the ESA is warranted at this time.

Yes: Federal Protection Is No Longer Needed
by Diana Kirchheim and Graham Owen

The decision to remove the Western Great Lakes and Northern Rocky Mountain gray wolf populations was based on extensive scientific data, which established that these populations are thriving and are no longer in danger of extinction. Because the gray wolf populations have successfully recovered their numbers, they were properly removed from the federal list of endangered species.

The Endangered Species Act (ESA) was not intended to be a perpetual protection act. Instead, the ESA was designed to prevent extinction. Once the goal of preventing extinction has been successfully achieved, protection under the law is no longer necessary and the federal government is required to remove the species from the list of protected species.

The gray wolf populations are an example of a success story under the ESA since they have not only fulfilled their recovery goals but exceeded them. The Western Great Lakes population currently has over 4,000 wolves, and the Northern Rocky Mountain population has more than 1,500. This represents a dramatic turnaround since the species was given protection under the ESA in 1974. The two growing populations ensure that the species as a whole will not become extinct within the foreseeable future. Peer-reviewed scientific studies confirm that the populations are prospering, and the Fish and Wildlife Service (FWS) has generated voluminous reports concluding that they are not in danger of extinction. Moreover, any gray wolves roaming outside of the Rockies and Great Lakes regions—including a third wolf population in the Southwest—are not affected and will retain federal protection under the ESA.

It is pointless and wasteful to protect animals that do not need protecting. For example, most rabbits and turkeys do not need stringent regulatory protections because they are relatively common; so also is the gray wolf within the delisted ranges. Lifting the protections of the ESA, once a species has recovered, frees up money and other resources to spend on species that are in actual danger of extinction.

Although the gray wolf populations in the Western Great Lakes and Northern Rocky Mountains have been removed from federal protection under the ESA, the wolves will continue to be protected and managed by state conservation programs.
Not Yet: Current State Wolf Plans Are a Recipe for Disaster
by Jason C. Rylander

The removal of the gray wolf from the federal list of endangered species in the northern Rockies should be a cause for celebration. Forty years ago, no known wolf packs could be found in the region. Now, thanks to the successful reintroduction of 66 wolves to central Idaho and Yellowstone National Park in 1995 and 1996, and sound federal wolf management under the Endangered Species Act (ESA), wolves number more than 1,500 across Idaho, Montana, and Wyoming.

Unfortunately, while we hail the return of the wolf, we cannot share in celebrating its premature removal from the endangered species list. Before a species can be delisted, the U.S. Fish and Wildlife Service (FWS) must determine that it does not face continued threats that could undermine the species’ continued existence. In fact, several factors still threaten wolves in the Northern Rockies, making delisting at this time risky and unwise. This rush to remove federal protections does not bode well for the long-term recovery of the wolf in the northern Rockies or throughout the West.

Consider the environment wolves face in the post-delisting world. Wyoming’s Democratic Governor Dave Freudenthal is clear on his state’s goals: “In terms of reducing the packs, that’s always been a state objective from the outset,” and Idaho’s Governor C.L. “Butch” Otter, a Republican, colorfully vowed to “bid for that first ticket to shoot a wolf myself” (The Washington Post, March 28, 2008).

Both states, along with Montana, have adopted management plans that allow for the trophy hunting and trapping of wolves. Idaho’s state plan references approvingly House Joint Memorial Resolution 5, passed in 2001, which calls for the removal of all wolves from Idaho by “whatever means necessary.” What’s more, the state plans authorize lethal control of wolves to address real or perceived threats to livestock, deer, and elk. Taken together, the state plans would allow wolf populations to be cut in half across the region.

Wolf opponents are even promoting a 2008 ballot initiative in Idaho that, if successful, would overturn the Idaho wolf management plan and eliminate the state’s role in wolf management altogether. Ironically, passage of the referendum could force the federal government to intercede and relist the wolf.

In 1987, the FWS first identified a minimum recovery target for wolves in the northern Rockies as ten breeding pairs in three recovery areas for three consecutive years, for a total of 30 breeding pairs (approximately 300 wolves). Once these numbers were achieved, the FWS could reconsider whether wolves should be reclassified under the ESA or removed from the list. Although wolf numbers now far surpass these original goals, the target was never intended to be an indicator of a fully recovered and secure population.

Yet inexplicably, state management plans appear poised to use this initial recovery marker as a ceiling as well as a floor. On March 28, 2008, the day wolves were delisted from federal protection, Idaho Governor Otter signed a bill into law allowing anyone to kill any wolves believed to be “worrying,” “annoying,” “disturbing,” “persecuting,” “lying in wait for,” “on the trail of,” or guilty of a wide number of other perceived irritations to pets or livestock. This broad grant of authority to kill wolves for almost any reason leaves the future of wolves in Idaho in serious doubt.

Inadequate state management plans ensure that wolves will always hover on the brink of relisting. The small victories that wolves have made in expanding into their historic habitats in Utah, Colorado, and Oregon will also be lost if their populations in the Northern Rockies are reduced as dramatically as the state plans would allow.

The latest scientific research indicates that wolf populations simply must be

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higher than the floor set by the original recovery target in order to remain viable over the long term. The original recovery goals assumed that populations in the three states and Canada would be interconnected. Biologists believe the present lack of gene flow between these populations is a potential threat to the long-term health and survival of wolves in the region, particularly for wolves in Yellowstone, many of which descend from the first few dozen wolves reintroduced in the mid-1990s.

The North American Society for Conservation Biology recently concluded that “managing for a population of wolves in the hundreds instead of thousands, as envisioned in the Idaho and Wyoming state plans, may increase the risk of rapid population declines and loss of connectivity between populations.” The society maintains that a smaller wolf population would be more vulnerable to disease, genetic bottlenecks, and other threats that would “threaten the future viability of wolves” in the northern Rockies.

Population viability is not the only measure of recovery. In a recent edition of the journal Science, scientists wrote that “another objective—often overlooked—should be to restore and maintain the ecological functionality of the species in its ecosystem.” Even assuming a few hundred wolves can persist indefinitely, are they sufficiently abundant to fulfill their assigned role in the ecosystem?

Wolves occupy an important niche in the northern Rockies ecosystem. Impacts of their recovery are being seen in Yellowstone National Park and increasingly across the northern Rockies. According to recent scientific studies, wolves have begun to restore natural balance to reoccupied areas by checking populations of coyotes and other abundant carnivores and by culling weak and diseased elk, deer, and other prey. By dispersing elk from sensitive wetlands and meadows where they were overbrowsing, wolves can actually help restore vegetation and counter some of the effects of climate change. According to this research, “Conservation plans for predators should take this broader view of ecological roles into account instead of focusing solely on a species’ viability by numbers.”

In time, perhaps, states will manage wolves like other species. In Idaho alone, there are 3,000 mountain lions, 20,000 black bears, and more than 50,000 coyotes. Montana boasts 1,800 mountain lions and 15,500 black bear. Ungulate populations (horses, cattle, sheep, deer, and the like) across the three states run into the hundreds of thousands. Why manage the wolf population down to just a few hundred animals? If we can live with bears, cougars, and coyotes, we can learn to live with wolves.

Indeed, the negative impacts of wolves are often overstated. Some worry that wolves threaten elk populations, but those populations are well above management targets in most of the region and are more than sufficient to meet hunter demands. Ranchers are successfully learning to reduce the limited but inevitable wolf predation on livestock to manageable levels, and they are compensated for most losses that do occur by Defenders of Wildlife or their state compensation program. Wolf-related tourism in the Yellowstone region has generated more than $35 million annually for local communities in recent years.

There are a few bright spots. Idaho’s Department of Fish and Game recently announced that it would strive to manage for between 500 and 700 wolves in the state, which is closer to the number of wolves needed there. And wolf packs have now been confirmed in Oregon and Utah, which suggests that wolves have reached the point where continued recovery throughout their range is a real possibility.

Ultimately, state management of wolves is a worthy goal, but serious questions remain about the states’ commitment to wolf recovery. Until those questions are answered and until state wolf management plans and elected officials demonstrate their willingness to live with wolves, the future of wolves in the region remains at risk.

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programs that have been approved by the federal government. The state management plans should ensure the populations’ continued viability, especially given the federal government’s obligation to monitor the status of these populations. Should the number of gray wolves in these populations decline below acceptable levels, the populations can be relisted.

The removal of the gray wolf populations from the list of protected species is welcome news for property owners and livestock owners who will be freed from unneeded and oppressive regulations. When a species is afforded protection under the ESA, onerous restrictions are placed on the conduct of private property owners and government entities who may own property designated as a critical habitat for the endangered species. Owners of land designated as a critical habitat cannot develop it—not even with one single family home—without government approval. To understand just how serious a federal listing is and how much it can limit human activity, the United States Supreme Court has interpreted the Endangered Species Act to protect listed species “whatever the cost.” For example, in California, a critical habitat designation was proposed for certain vernal pools. After extensive analysis indicated that the economic impact of the proposed designation would be nearly one billion dollars, the proposal was reduced but still imposed hundreds of millions of dollars in costs.

Ranchers and pet owners also have reason to celebrate the decision to lift the federal protection of the fully recovered gray wolf populations. Formerly, chasing a wolf away from livestock was illegal, even if it repeatedly preyed upon the same group of animals. Federal agents could help with problem wolves, but the bureaucratic formalities were cumbersome. The time it took to summon assistance allowed wolves to prey upon livestock and disappear before help arrived, much to the frustration of ranchers. Now that the populations have been removed from the list of endangered species, ranchers can chase off stalking wolves and may even be able to eradicate problem wolves in certain situations under state conservation laws.

Despite the proven recovery of the wolf populations, environmental groups have brought a lawsuit challenging the decision to delist the Western Great Lakes gray wolf population and will likely challenge the more recent decision to delist the Northern Rockies population. The challenge to the delisting has no merit under the ESA. Protection under the ESA is no longer needed to protect an already recovered species.

Moreover, public policy does not support imposing extreme measures and stifling regulations when animal populations are as healthy as the two delisted gray wolf populations.

Specifically, the environmental groups contend that the gray wolf has not fully recovered because it is not present throughout the entire geographic range that it inhabited prior to European settlement (i.e., almost the entire United States) and argue that, consequently, the delisted populations still need ESA protection. The argument is extreme and unpersuasive for a number of reasons. First, it is impossible to restore the gray wolf to its entire precolonial range. Wolves and humans cannot live in close quarters, and the current United States population is too large to exist without limiting the wolves’ historic range to some extent. Concrete examples illustrate the ridiculousness of the argument. It would be laughable to claim that an otherwise healthy wolf population, or even the species as a whole, could not be delisted merely because it had not been reintroduced in Minneapolis or Salt Lake City—even if those areas were previously a significant part of the wolf’s range. Furthermore, the gray wolf as a species can survive and even thrive without being restored throughout the entire United States.

Finally, this argument fails to distinguish between the health of a species and the health of a population. Congress intended to give the FWS the flexibility to address varying levels of threats to an animal in different areas of the country by allowing populations and species to be listed and delisted separately. In fact, Congress discussed an identical scenario when adopting the Endangered Species Act—that of the American alligator. Because the alligator was overpopulated in Louisiana but on the verge of extinction in Florida, Congress wanted to allow the FWS to protect it in one area but not the other. The FWS used just such a common sense approach with the gray wolf, delisting healthy populations but retaining protections for the species as a whole.

In sum, scientists have determined that the gray wolf populations are fully recovered and not threatened or endangered by extinction. The goal of the ESA has been achieved for these populations. Therefore, the removal of these populations from the federal list of endangered species was warranted and lawful.

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There are many issues that strike a chord with the youth of today, but few are more capable of creating a nationwide movement among young people than the environment. Urging action on environmental policy, younger activists are organizing their collective efforts at both the local and national levels.

Exemplifying today’s environmental activism was the group of committed young people who recently gathered for Power Shift 2007, “the first national youth summit to solve the climate crisis.” Event organizers convened nearly 6,000 youth in College Park, Maryland, to discuss environmental issues, attend panels on issues from climate science to faith-based activism and listen to guest speakers such as Bill McKibben (author, \textit{Deep Economy}), Van Jones (founder, Ella Baker Center for Human Rights) and Ted Nordhaus and Michael Shellenberger (essayists, \textit{The Death of Environmentalism}).

Organized by Energy Action, a coalition of more than 40 organizations from across the U.S. and Canada, founded and led by youth themselves to help support and strengthen the student and youth clean energy movement in North America, Power Shift 2007 showcased a growing environmental grassroots movement among students.

The purpose of Power Shift 2007 was to educate and provide resources to student activists with a consistent and unified message so that they could return to their communities and educate their peers.

“As youth of the Pacific Northwest, we recognize that the climate crisis we currently face presents the defining challenge of our generation. Solving it is our greatest opportunity.”

—Preamble to the \textit{Cascade Climate Declaration}

Power Shift 2007 culminated on Monday, November 5, 2007, with “Lobby Day,” when young people rallied on Capitol Hill and met with their congressional representatives to make their case for their goals; to create five million new green jobs, initiate 80 percent reductions by 2050—with 30 percent reductions by 2020, and no new coal plants. Originally outlined by the 1Sky Campaign, these goals espoused by the participants of Power Shift are an essential platform for all of their lobbying efforts.

Empowered through breakout sessions and lobby training at Power Shift 2007, students were encouraged to articulate their personal experiences with current environmental policy to their legislators. Rep. Edward Markey (D-MA) chaired the Select Committee on Energy Independence and Global Warming hearing on “Youth Leadership for Clean Energy and Healthy Climate,” in which student witnesses demanded policy changes.

“It was a really positive, great experience for students,” stated Ragini Kapadia, Field Director of Energy Action, adding that the follow-up communication with representatives was a key success to Power Shift. “A
lot of momentum and excitement came out of Power Shift 2007, and a lot of continued education on the energy bill.”

Aside from seeking legislative change, the training and sessions available at Power Shift 2007 provided young people with new skills and various networking connections to train them as an army of young political activists.

**Shifting Power to the Local Level**

While Power Shift 2007 demonstrated youth activism and advocacy on a larger scale, it is the connections, networks and state-run grassroots efforts that organizers hope are the lasting results of this advocacy conference. State breakout sessions during Power Shift enabled students within the same geographic network to combine forces or strengthen existing networks.

“The creation of really vibrant state networks was an exciting part [of Power Shift 2007],” stated Altemose. “Power Shift made these first connections.”

Recent localized Power Shifts include events held on both the East and West coasts. While the events have different formats, the emphasis on interaction with legislators is an essential element to all future events.

In February 2008 the Cascade Power Shift '08: Mobilizing Youth for Climate Justice convened youth in the Pacific Northwest to discuss solutions to climate change. The event culminated with the Cascade Climate Network Citizen Action Days in Salem and Olympia to help push for climate policy in the state legislatures of Oregon and Washington. In addition, the youth at the Cascade Power Shift '08 created the Cascade Climate Declaration, an online document spelling out their desires as the youth of the Pacific Northwest for solving the climate crisis through sustainable and just means.

In addition, the participants of Mass Power Shift, April 11-14, 2008, in Boston are lobbying their State House to pass the *Global Warming Solutions Act* and set Massachusetts as a national and global model by reducing Massachusetts’s greenhouse gas emissions.

State groups are also coordinating Power Shifts around the 2008 congressional elections, building the capacity of the national movement by strengthening support at the local level. The Virginia Power Shift 2008 in October will reflect the upcoming election with *Power Vote*, a youth-focused campaign on voting for clean and just energy.

**Power Shifts Focus on the Future**

The impact of the Power Shift movement has not gone unnoticed. Following the national event, Power Shift received media attention from *The New York Times*, C-SPAN, the Discovery Channel, and MSNBC’s “Hardball”. As youth voting rates increase and with the 2008 presidential election on the horizon, Power Shift organizers took the opportunity to affect the election by emphasizing that young voters want the incoming president to make climate change policy a priority.

While Generation Now has sometimes been criticized as not being politically engaged, the young people involved in Power Shift 2007 and subsequent efforts have demonstrated that, when it comes to environmental advocacy, they are indeed “Students in Action.”

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Learning Gateways

by James Landman

Teaching Activity: Standing and Environmental Law

In this activity, students will review the Court's current position on standing in environmental cases and debate how standing rules might apply in a hypothetical case.

Step One
Share with students the three-part requirement for standing outlined in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). Students can either read the description of Lujan in the article, “Standing: Who Can Sue to Protect the Environment?” by Marisa Martin in this issue, or you can write the three elements, listed below, on the board:

1. The plaintiff must show an “injury-in-fact” that is “concrete and particularized” and “actual or imminent,” not conjectural or hypothetical.
2. The plaintiff must demonstrate a “causal connection between the injury and the conduct complained of” (i.e., the injury must be “fairly traceable” to the defendant’s challenged actions).
3. The plaintiff’s injury must be one that is likely to be redressed by a favorable decision in the case.

Make sure that students understand that the “injury-in-fact” suffered by the plaintiff does not have to be an economic injury. Injuries to a recreational or aesthetic interest, for example, can also satisfy the “injury-in-fact” requirement. Also point out that, in Massachusetts v. EPA, the Court gave “special solicitude” to a state that was seeking standing to challenge an action by the Environmental Protection Agency.

Step Two
Share with students the following scenario:

Pleasant Lake lies along the border of two states. The lake’s shoreline in State A lies along the edge of a state park and is largely undeveloped; only a few small structures (outhouses and a shower) for a rustic campground in the state park have been built near the shoreline. More development, primarily private single-family vacation homes, has occurred along the shoreline in State B. A public access boat landing is also on the State B shoreline.

Getaway Resorts, a private company, has proposed a major resort development on one of the last remaining tracts of undeveloped land along the shoreline in State B. The edge of this tract lies along the border with State A. It is zoned for single-family residences. Getaway Resorts has applied for a zoning variance.

An environmental assessment of the proposed development has identified what might result if the property is developed as a resort instead of as single-family residences. Possible consequences: increased traffic from motorboats and other recreational watercraft on the lake and a slight increase in runoff of lawn fertilizers in the proposed resort development. In addition, the resort will border the state park in State A and may disrupt wildlife populations at the edge of the park.

A number of parties have challenged Getaway Resorts’ application for a zoning variance.

Using the three standing requirements outlined in Lujan v. Defenders of Wildlife and the “special solicitude” ruling in Massachusetts v. EPA, ask students to debate whether any of the following parties should have standing to sue. You may want to divide the students into small groups to discuss standing of the parties. Then have small groups share their conclusions and discuss them with the class as a whole.

1. A group of owners of lakeside private residences in State B argues that the presence of a large resort property will diminish the economic value of their properties.
2. A group of individuals who use the public access boat landing for recreational fishing argues that increased runoff of fertilizers into the lake will have a negative impact on fish populations and diminish recreational enjoyment of the lake.
3. A family who vacations every year at the state park campsite argues that increased traffic on the lake will diminish their sense of solitude they experience when camping in the state park.
4. State A challenges the resort project, citing its interest in conserving wild places for its citizens to enjoy.

Step Three (Optional)

Sierra Club v. Morton, 405 U.S. 727 (1972), an early Supreme Court decision on standing in an environmental case, included a dissenting opinion by Justice William O. Douglas, a well-known conservationist. Justice Douglas proposed a federal rule “that would allow environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage.”

Have your students read Justice Douglas’s dissent. Ask them to consider how the standing rule proposed by Justice Douglas would work in the Pleasant Lake scenario described above. What arguments could be made on behalf of Pleasant Lake? Which of the parties described above would be best suited to speak for the lake? Would Pleasant Lake, as a party, be able to meet the three requirements of standing defined in Lujan v. Defenders of Wildlife?

James Landman is associate director of the American Bar Association Division for Public Education in Chicago.

Standing: Who Can Sue to Protect the Environment?

Justice Scalia stated that by accepting plaintiffs’ vague concerns about the environment even in the face of evidence that the environment was not harmed, the majority made the “injury-in-fact requirement a sham.”

The Global Warming Case—Massachusetts v. EPA

The cases described above illustrate the contentious nature of standing in environmental litigation and the lack of a consistent approach to standing in environmental cases. Standing analysis has been further challenged by lawsuits alleging global environmental problems like global warming. Unlike other air pollutants that have health and environmental impacts on the ground, greenhouse gases interfere with our climate high in the Earth’s atmosphere. As a result, most people do not experience direct harm from the emission of greenhouse gases.

The United States has not ratified the Kyoto Protocol, which is the international treaty that mandates greenhouse gas reduction targets for developed countries and creates incentives for the transfer of cleaner, lower-carbon technologies to developing countries. Nor has it implemented any greenhouse gas controls on the national level. This lack of regulation has led to legal challenges by environmental groups and others based on existing environmental statutes such as the Clean Air Act or common law nuisance claims.

A significant obstacle in these types of cases is the ability of the plaintiffs to meet standing requirements. In part, the difficulty relates to the scientific basis underlying climate change. While the majority of mainstream scientists agree that carbon dioxide and other greenhouse gases cause increased global temperatures, there is less agreement about the effects of global warming. Without certainty about the effects of global warming, plaintiffs have a harder time proving that they will suffer an injury as a result of increased greenhouse gas emissions. The redressability element of standing is also problematic because greenhouse gases are emitted around the world and halting the greenhouse gas emissions of one particular country is not likely to reverse or stop climate change on its own.

The Supreme Court recently affirmed standing in a global warming case, Massachusetts v. Environmental Protection Agency, 549 U.S. 497 (2007). This landmark case held that the Environmental Protection Agency (“EPA”) had the authority to regulate carbon dioxide, which was contrary to the EPA’s position that it lacked such authority. The Court also provided some guidance on standing in global warming cases.

The actions leading up to the Supreme Court’s decision in Massachusetts vs. EPA began in 1999 when a group of 19 private organizations submitted a petition for rule-making to the EPA request-
A federal judge in Vermont yesterday rejected an attempt by automakers to block individual states from adopting their own standards for limiting greenhouse gas emissions from cars and trucks.

Judge William Sessions III of U.S. District Court in Burlington ruled that state action to limit greenhouse gas emissions from new vehicles—standards that originated in California in 2002 and have since been adopted by Vermont and at least 10 other states—was not preempted by federal rules on vehicle fuel economy. The decision follows a Supreme Court ruling in April that the Environmental Protection Agency violated the Clean Air Act by declining to regulate greenhouse gas emissions from vehicles. It also comes as automakers are confronted with growing public demand and governmental pressure to build more fuel-efficient vehicles.

In finding that federal fuel-economy rules did not overrule those adopted by the states, Sessions wrote that Congress, through federal law, had designated California the “proving ground for innovation in emissions control regulations.”

Environmentalists are pressing the Bush administration to grant California a waiver from the EPA that it needs before its emissions standards can take effect. If California is granted the waiver, Vermont and other states, including Maryland, New Jersey and Connecticut, would be allowed under the federal Clean Air Act to adopt standards identical to California’s.

If California is denied a waiver, the Vermont rules are invalid, Sessions wrote. Dave McCurdy, president of the Alliance of Automobile Manufacturers, said automakers support improving fuel economy standards nationally rather than piecemeal. McCurdy, in a statement, said the alliance was considering an appeal.

What was the ruling by Judge Sessions in the case discussed in the article?

What is the position of the auto industry regarding state standards to reduce greenhouse gas emissions from cars and trucks? What is the position of environmental groups?

Why is California seeking a waiver from the Environmental Protection Agency? Do you think it should be granted a waiver?

What is the status of legislation in Congress on whether states can set their own standards to regulate greenhouse gas emissions from new motor vehicles?
Standing: Who Can Sue to Protect the Environment? continued from page 21

The alliance has argued that California’s emissions rules are so strict that they would require extensive design changes to vehicles, driving up prices and crippling sales. Industry lawyers have said the carmakers have to take into account safety, performance, and cargo space in combination with improvements in fuel economy.

David Doniger, senior attorney at the Natural Resources Defense Council, said yesterday that the auto industry should reevaluate its legal strategy of fighting the global-warming rules, given yesterday’s setback.

“This should finally be the wake-up call that car companies can’t ignore global warming,” said Doniger, who helped argue the Vermont case. “Up until now, there’s been a lot of green talk at auto shows. But they are fighting tooth and nail in the courts to block any real standards, and today they lost.”

Plaintiffs then sought review of the case by the Supreme Court, which was granted. The Court first addressed the question of standing and focused on the special position of the state of Massachusetts. The Court emphasized that the fact the state of Massachusetts is a sovereign state and not a private party like in Lujan is of “considerable relevance” and that Massachusetts was given “special solicitude” in the standing analysis. However, exactly how this “special solicitude” affected the standing analysis was not clear from the Court’s opinion.

With respect to the injury element of standing, the Court found that Massachusetts adequately demonstrated that rising global sea levels have already swallowed some of the state’s coastal land and that if sea levels continue to rise as predicted, the state’s injury will become more severe over time. As an owner of significant coastal property, the Court found that Massachusetts’ injury was “actual” and “imminent.”

With respect to causation, the Court noted that a substantial percentage of greenhouse gases are emitted by motor vehicles and that 6% of worldwide carbon dioxide emissions can be attributed to the transportation sector in the U.S. Thus, the Court found that the regulation of greenhouse gases from motor vehicles would make a meaningful contribution to reducing greenhouse gas concentrations.

Petitioners requested review of the EPA’s denial of the rule-making petition by the U.S. Court of Appeals for the D.C. Circuit, which denied the petitions, although the judges each wrote separate opinions.

Judge Randolph announced the decision of the court. He avoided a definitive ruling on standing and assumed for the sake of argument that the EPA had authority under the Act to regulate greenhouse gas emissions from new motor vehicles. He found that the EPA properly declined to exercise that authority and could take into account scientific evidence as well as policy judgments when determining whether regulation is advisable.

Judge Sentelle wrote separately and determined the petitioners lacked standing because global warming is harmful to humanity at large, and thus petitioners’ grievances were too generalized to support standing. However, Judge Sentelle joined Judge Randolph’s decision to ensure a majority of the panel could agree on the disposition of the case.

In a 38-page dissent, Judge Tatel determined that the State of Massachusetts had demonstrated all three elements of Article III standing— injury, causation, and redressability. With respect to injury, Tatel stated that there was a “substantial probability” that global warming would result in sea level rise, which would threaten Massachusetts’s coastline and coastal property. Tatel found that the plaintiffs adequately showed that EPA’s failure to regulate greenhouse gases contributed to global warming, which caused projected sea level rise. With respect to redressability, Tatel decided that plaintiffs’ expert testimony established that reductions of greenhouse gases from motor vehicles would delay and moderate many of the adverse impacts of global warming. Turning to the merits, Judge Tatel determined that the EPA possessed statutory authority to regulate greenhouse gas emissions and that the policy considerations identified by the EPA fell outside its range of discretion.

continued on page 27
Massachusetts v. EPA is one of the rare cases that by itself can set a Supreme Court term apart and make it special. Decided in April 2007, it is, in fact, the most memorable environmental decision since 1976 when Hill v. TVA decided that the Endangered Species Act barred federal agency actions that would jeopardize species.

Interestingly, however, the biggest impact of this case is unlikely to be the Court’s resolution of the technical environmental law issues. Instead, this case is likely to be remembered for its effect on the public debate over greenhouse gas emissions, global warming, and the consequences of climate change.

By putting the Supreme Court’s imprimatur on the science linking greenhouse gas emissions to global warming and measurable environmental effects, it is almost as if the Court took the uncertainty and dithering out of the global warming debate. A spate of legislation addressing greenhouse gas emissions, global warming, and climate change is already beginning to appear at every level of government.

The actual questions presented to the Supreme Court for decision in this case involved the proper administrative implementation of federal environmental laws. The case also raised the question of whether the plaintiffs had the necessary legal “standing” to sue the Environmental Protection Agency (EPA).

The federal Clean Air Act empowers the EPA to regulate “mobile sources of pollution”—in this case, automobiles and light trucks. Concerned about the serious effects of global warming, a group of 12 states, including most of the northeastern United States as well as California, Washington, and Illinois, joined with local governments and a number of private organizations to petition the EPA to engage in rulemaking to regulate automobile emissions of greenhouse gases. After receiving an extraordinary number of public comments (more than 50,000) related to the petition, however, the EPA issued an order in which it declined to engage in rulemaking to regulate automobile emissions of greenhouse gases. After receiving an extraordinary number of public comments (more than 50,000) related to the petition, however, the EPA issued an order in which it declined to engage in rulemaking on this matter.

As described by Justice Scalia’s dissent to the Supreme Court’s decision in this case, the EPA’s order rested on two conclusions:

(1) contrary to the opinions of its former general counsels, the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change … and (2) that even if the agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time.

In deciding this case, the Supreme Court was guided by Section 202 of the Clean Air Act, which provides that the administrator of the EPA:

shall by regulation prescribe … standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

With that statutory language in mind, Justice Stevens’s opinion for the Court’s five-member majority (Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer) then examined and rejected the reasons cited by the EPA for finding that it nevertheless lacked the authority to regulate greenhouse gas emissions from mobile sources.

One of the EPA’s main arguments was that carbon dioxide is not a pollutant within the meaning of the Clean Air Act. Congress defined the term “air pollutant” as including “any air pollution agent or combination of such agents, including any physical, chemical … substance or matter which is emitted into or otherwise enters the ambient air …” Justice Stevens concluded that the EPA’s determination that carbon dioxide is not a pollutant within the meaning of that “sweeping” definition was “arbitrary, capricious, an
abuse of discretion, or otherwise not in accordance with law.”

In dissent, Justice Scalia argues that when Congress used the word “including” in the definition of “air pollutant,” it was using the word in its permissive (rather than definitional) sense, so that whatever follows the word “including” in the statutory definition may be an air pollutant, but it also may not be an air pollutant. From there, he argues that the Court owes deference to EPA’s view about which chemical substances are air pollution agents or air pollutants and which are not.

The more contested statutory issue revolved around the scope of the discretion vested in the EPA under the statute. The statute limits the obligation of the EPA administrator to promulgate mobile source emission standards, saying he or she is only required to regulate those mobile source emission standards, saying of the EPA administrator to promulgate
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The tenor of the scientists’ brief is not particularly argumentative, but it is quite firm. For example, the brief’s first section is titled: “The Science of Climate Change Indicates that It Is Virtually Certain that Greenhouse Gas Emissions from Human Activities Cause Global Climate Changes, Endangering Human Health and Welfare.” The brief goes on to state that the greenhouse effect is “as certain as any phenomenon in planetary sciences.” The scientists could hardly describe their level of certitude more forcefully.

Reliance on the scientific position actually set forth in the NRC report is the keystone of the majority opinion. The opinion’s very first words recite these most certain of all the greenhouse gas propositions:

A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species—the most important species—of a greenhouse gas.

Cognizant of this scientific consensus, Justice Stevens could disagree with the EPA despite the doctrine that courts generally should defer to an administrative agency’s interpretation of a statute within its jurisdiction. In the majority’s view, in this case there was no “permissible” room for the EPA’s judgment that mobile source emissions of carbon dioxide do not contribute to pollution that endangers public welfare.

Standing
The Constitution’s Article III “case and controversy” requirement does not authorize federal courts to issue “advisory opinions” in response to parties who simply want the court to clarify the law. Instead, before deciding a case, courts require the party bringing the suit to establish that (1) he or she has suffered an injury in fact, (2) there is a “causal nexus” between the actions of the defendant and the injury, and (3) the plaintiff’s injury can be redressed by relief that can be granted in the case. Only when the court is satisfied that all three prongs of this test have been met will the plaintiff be deemed to have “standing” to bring the suit. In this case, the justices sharply disagreed on all three aspects of this standing inquiry.

The Court’s modern standing cases also require that a plaintiff be able to demonstrate a “concrete and particularized” injury. In this case, the majority found that the state of Massachusetts (which according to uncontradicted affidavits stood to lose a “considerable” amount of public territory to higher ocean levels) had suffered a concrete, particularized injury. Justice Stevens’s opinion also recognized there could be a cognizable injury to a state that has a sovereign interest in protecting the “earth and air in its jurisdiction” as well as an interest in protecting its citizens’ interests in those resources.

Having found the requisite “injury in fact,” the majority had little difficulty in going on to find causation and redressibility. On causation, the argument resembles a syllogism.

- There is a causal connection between anthropogenic greenhouse gas emissions and the injuries that result from global warming.
The EPA refuses to regulate such anthropogenic emissions from mobile sources despite having the power and duty to do so. Therefore, the EPA is causing the injury.

Once the causal link is in place in that form, the redressibility requirement is easy to satisfy with a similar syllogistic argument:

- If the EPA regulates mobile-source greenhouse gas emissions, there will be fewer emissions than would otherwise be the case.
- If there is less greenhouse gas in the atmosphere, there will be less global warming and injury.
- Therefore, the EPA regulation of mobile-source greenhouse gas emissions will reduce/redress the injury.

The chief justice’s dissent responds by framing the causation question more narrowly. He asks what is the specific link between the EPA’s failure to regulate mobile-source greenhouse gas emissions and the ocean’s rise that is causing the loss of Massachusetts coastal land. His dissent then considers whether Massachusetts has successfully quantified just how much of its lost coastal area is attributable to EPA inaction under the Clean Air Act. Chief Justice Roberts finds that there are so many confounding causative variables that the plaintiffs cannot carry their burden on the issue of causation. That uncertainty as to causation becomes the springboard for finding a lack of redressibility. The dissent notes that it is uncertain what will happen in other countries that emit greenhouse gases. It also notes the possibility of technological change and the likelihood that other major steps will be taken to reduce greenhouse gases in the future.

One factor that may have played a role in the majority’s decision to reject the chief justice’s analysis is that if a justice believes that a very concrete yet hard-to-quantify injury is being imposed on whole populations at once, and this by an action that Congress has forbidden, it is very unsatisfying to say that no one has standing to sue for redress. It is also possible that Justice Kennedy in particular believed it important for the Court to solidify public opinion around this issue and usher in more immediate action to limit greenhouse gas emissions. Long after additional legislation has made Section 202 of the Clean Air Act a forgotten relic, Massachusetts v. United States will remain the symbol of the beginning of a new era in the battle against global warming.

U.S. Environmental Law and Policy

United States failed to sign the Kyoto Protocol, the international treaty that provided some initial steps toward addressing this environmental problem on a national level, and we have enacted no significant federal laws to address this growing environmental threat.

In response to the federal government’s failure to act on this vital environmental issue, we are seeing individual states and cities attempting to take the lead by addressing global warming on both individual and regional levels, which is unprecedented in the environmental area. Will this trend continue or will the next presidential administration and Congress decide to return the federal government to a leadership role in protecting the environment? We may know the answer sometime next year.

For Further Reading


Pew Center on Global Climate Change: www.pewclimate.org/what_s_being_done/in_the_states describes the actions of the states to combat global warming.

Standing: Who Can Sue to Protect the Environment? continued from page 23

The Court found the third element of standing—redressability—was also adequately demonstrated. The Court determined that the regulation of greenhouse gases emitted by motor vehicles would have some impact on global warming, thus reducing to some extent the harm to the state of Massachusetts.

After finding that the plaintiffs demonstrated standing, the Court addressed the merits of the case. The Court agreed with plaintiffs that greenhouse gases fall within the definition of “air pollutants” in the statute. As such, the EPA held the authority to regulate greenhouse gases from new motor vehicles under Section 202(a)(1) of the Clean Air Act. The Court found that the EPA provided no reasoned explanation for its refusal to determine whether greenhouse gases contributed to global warming and remanded the case for further proceedings.

The Court’s decision in Massachusetts v. EPA will have an impact on subsequent climate change lawsuits as well as on environmental standing and standing in general. The Court’s finding that carbon dioxide is considered a “pollutant” under the Clean Air Act has already been used to support separate litigation challenging the EPA’s failure to regulate greenhouse gases from stationary sources and other sources covered by the Clean Air Act. Also, the Court’s recognition of the injuries caused by global warming, the causation between increased greenhouse gases and global warming, and the EPA’s ability to mitigate harmful impacts of climate change will likely be used to demonstrate standing in other global warming-related cases.

The Court’s decision in Massachusetts v. EPA provides further guidance on standing analysis in environmental cases, but there are still remaining questions. The new battleground in environmental standing, post-Massachusetts, will likely focus on the Court’s recognition of Massachusetts as a sovereign state deserving of “special solicitude” in the standing analysis. The Court did not elucidate precisely how the fact that Massachusetts is a sovereign state affected its standing analysis. Nor did the Court provide guidance on how the treatment of Massachusetts with respect to standing could be translated to a private individual, or if this is even possible. Whether or not the Court’s standing analysis in Massachusetts vs. EPA is restricted to states or can be extended to private individuals will be important to determine, as many environmental lawsuits are filed by environmental organizations on behalf of their members. If the Massachusetts v. EPA standing analysis is ultimately restricted to states, there may be greater pressure on state litigants to sue on behalf of their citizens.

The Massachusetts v. EPA decision was not unanimous. Chief Justice Roberts and Justices Scalia, Thomas, and Alito strongly dissented from the decision. With respect to the majority’s standing analysis, the dissenters criticized the majority for treating Massachusetts differently from private litigants for standing purposes, stating that the Court adopted a “new theory of Article III standing for States.” Such a close division on the Court on the issue of standing portends further controversy in this area of law. While the legacy of Massachusetts vs. EPA remains to be seen, it is clear that the issue of environmental standing will continue to be a contentious one.

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FOR DISCUSSION

What is “standing”? Why is standing important in environmental litigation?

What did the Supreme Court decide in Massachusetts v. EPA? How was that decision different from the Court’s decision in Lujan v. Defenders of Wildlife?

Do state governments, such as Massachusetts, deserve “special solicitude” to file lawsuits on behalf of their residents? Does a governing agency’s relationship with its constituency meet the criteria for legal standing?

Do the rules for standing prevent important environmental issues from being resolved in the courts? Or do they protect the integrity of the courts?

Based on history, how will standing impact environmental cases for the future?

For Further Reading


championed. Controversy arose in other corners, too. Some environmentalists were dissatisfied with the pace of progress, while regulated industries argued that EPA was overreaching. By the end of the decade, the federalist and regulatory reform movements that would later flourish had begun to take shape. Nonetheless, Congress continued passing far-reaching laws, and the courts—including the Supreme Court—broadly interpreted them both in terms of their jurisdictional reach and their regulatory rigor.

The 1980s: Consensus Breaks Down

The 1980s were tumultuous years that saw numerous challenges to environmental law—but in the end confirmed its surprising persistence. President Nixon may have begun his administration as a cheerleader for environmental law and ended as a skeptic, but President Ronald Reagan left no doubt about where he stood on the body of laws enacted in the 1970s. Reagan aligned himself with the “Sagebrush Rebels,” a movement of western opponents of federal ownership of public lands. Immediately after his inauguration, he launched a cabinet-level task force on “regulatory relief” that suspended numerous pending regulations and encouraged industry to target particularly burdensome ones. Similarly, he signed an executive order requiring cost-benefit analysis of major rules and giving the Office of Management and Budget significant authority to review and shape regulations.

The heads of Reagan’s Interior Department and EPA—James Watt and Anne Gorsuch—were openly hostile toward the agencies they led. Watt described the Interior Department as “oppressive,” and Gorsuch drew fire for attempting to cut EPA’s budget by as much as one third. Both eventually left their posts with controversy in their wake (Gorsuch’s refusal to turn over documents to Congress led to an inter-branch confrontation and the ultimate perjury conviction of one of her assistants). Ironically, Watt and Gorsuch were such lightning rods that they undermined Reagan’s environmental agenda. While Watt succeeded in expanding oil, gas, and mineral leasing on public lands, he and Gorsuch failed to achieve many of the big reversals of environmental protection that Reagan supported.

Indeed, environmental law not only withstood challenges but grew and expanded during the 1980s. President Jimmy Carter ended his term in 1980 by signing two key laws. The Alaska National Interest Lands Conservation Act reaffirmed federal stewardship of public lands in Alaska. And the Comprehensive Environmental Response, Compensation, and Liability Act, enacted in response to the toxic waste crisis at Love Canal and other abandoned and inactive hazardous waste sites across the country, created a dramatic new liability program that forced polluting industries to pay for the cost of toxic waste cleanup. Congress also amended and strengthened existing laws, such as the Clean Water Act and the Resource Conservation and Recovery Act, over the course of the decade. Reflecting Congress’s dwindling trust in the executive branch, the new laws were increasingly prescriptive and less deferential to federal agency expertise; they added tough new deadlines on EPA’s implementation of new regulatory programs, and they imposed even stricter controls on industry. Finally, Congress reaffirmed the importance of information disclosure that it first embraced in NEPA, passing the Emergency Planning and Community Right to Know Act of 1986. Enacted in the wake of a chemical plant explosion in Bhopal, India, the law required industry to inform communities when it used and released dangerous substances.

The 1990s: Partisan Gridlock

The political makeup of the federal government changed dramatically in the 1990s. President George Bush, like Nixon, marked the beginning of his term with environmental accomplishments, signing the 1990 Clean Air Act amendments into law. And like Nixon, Bush ended his term a skeptic, proposing to drill for oil in Alaska’s Arctic National Wildlife Refuge and only grudgingly attending the 1992 Earth Summit in Rio. The election of President Bill Clinton changed the executive branch’s approach to environmental law, but countervailing changes in the composition of Congress and the courts led to increasing conflicts over environmental goals and policies.

In 1994, Republican congressional candidates swept into power, capturing control of the House and Senate. As part of its “Contract with America,” the 104th Congress proposed legislation to elevate the rights of landowners, require cost-benefit analysis of environmental laws, and single out environmental programs for disproportionate budget cuts. While his campaign for the presidency stressed the economy and not a green agenda, Clinton found political advantage in fighting Congress’s proposed environmental reforms—and few ultimately became law. This same partisan gridlock prevented the legislative overhauls that characterized the previous
two decades. Interior Secretary Bruce Babbitt and EPA administrator Carol Browner responded by pursuing an activist, ambitious lawmakers agenda by administrative regulation. Congress in turn sought to block new regulations by attaching “riders,” or unrelated policy provisions, to its annual spending bills.

Controversy, gridlock, and the demise of bipartisanship were hallmarks of environmental lawmaking in the 1990s. These hallmarks have continued throughout the current Bush administration, which suspended a host of Clinton-era environmental regulations immediately upon taking office. The Bush administration also drew fire for promoting energy and national forest policies that emphasized exploitation of natural resources. When Congress took up these issues, it divided largely on party lines. This continuing deterioration of bipartisanship stands in stark contrast to the broad congressional support that environmental law drew from both parties in its early decades.

The courts also underwent major changes beginning in the 1990s, as years of conservative judicial appointments by Presidents Reagan and Bush came to fruition. The courts became increasingly skeptical of the efficacy of environmental protection laws. In a series of cases narrowing Congress’s authority to regulate economic activity under the Constitution’s Commerce Clause, the Supreme Court called into question the very foundation on which laws such as the Endangered Species Act rest.

While domestic environmental law persisted, international environmental law became environmental law’s most engaging and dynamic area in the 1990s. By the end of the decade, the United Nations listed approximately 1,000 international environmental agreements of one kind or another—far greater than the 52 agreements that existed in 1970. At the same time, concern about the intersection of trade and the environment, as well as energy and the environment, arose.

The Future
The 21st century has brought new challenges, none greater than global warming. The most powerful and wealthiest nations in the world are the greatest cause of greenhouse gas emissions; by contrast, many of the poorest parts of the globe are most immediately and devastatingly threatened. Effective control of global warming, moreover, will require not only major reductions by the world’s most powerful countries but also the agreement of developing nations now caught in a bind between economic development and the environment.

In short, environmental lawmaking to address global warming will need to conquer the same kind of hurdles it has always faced, which have made environmental lawmaking so difficult and controversial. The only significant difference is that the hurdles are now much higher in light of global warming’s extraordinary spatial and temporal dimensions. Lawmaking to address global warming will require sweeping international and domestic laws, the creation of new international lawmaking institutions, and perhaps also new domestic institutions. The challenges are enormous, but so too are environmental law’s past achievements and future aspirations.

For Discussion

Under what authority does Congress pass federal laws to protect the environment?
What factors or events contributed to a bipartisan approach to environmental laws and policies?
When and why did the bipartisan consensus about environmental lawmaking eventually dissolve?
What does that mean for the future?
How has the government protected the environment in the past?
Do new challenges for the future require new protections, legislation, and methods for regulation? How might these new laws look? How might they impact society?

For Further Reading

Principles of International Environmental Law

Although the growth of international environmental treaties is an important achievement, the emphasis on treaty-making to resolve specific environmental issues gives the field an ad hoc quality. As the number and scope of environmental treaties expanded, environmentalists hoped to superimpose some order on the emerging field by placing international environmental law in a broader context. To some extent, they found that organizing framework in the concept of sustainable development, which animated the 1992 UN Conference on Environment and Development (UNCED), also known as the Rio “Earth Summit.”

At the Earth Summit, virtually every country in the world agreed to two major treaties (addressing climate change and biological diversity), a 500-page blueprint for sustainable development (known as Agenda 21), and a set of basic principles (the Rio Declaration on Environment and Development). Most importantly, Rio marked the formal acceptance of sustainable development as the goal of a modern economy and of international environmental cooperation. Indeed, since Rio the concept of sustainable development has received nearly universal acceptance among every sector of international society. Sustainable development is now incorporated into all international declarations and treaties on the environment and, increasingly, into trade and investment treaties. Some of the principles in the Rio Declaration have also emerged as key principles that bring greater coherence to international environmental law. Ten of the most important environmental principles are identified and briefly defined in the sidebar box on page 9.

The Future

International environmental law has successfully addressed many serious issues. Many harmful chemicals have been eliminated, and important wildlife species, including whale and elephant populations, are recovering because of international environmental agreements. But most other indicators of global environmental quality, such as declining fish stocks, increasing temperatures and increasing forest loss, have deteriorated in the decades since the Stockholm conference. Perhaps most urgently, today we face growing evidence that human-made climate change will cause profound impacts throughout the world if not addressed. Whether international environmental law can successfully face these new challenges is yet to be seen. But the strong record of international environmental cooperation since Stockholm provides hope for the future.

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