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Environmental Law in the Supreme Court in the 21st Century

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Environmental Decisions During the Supreme Court's 2006 Term

Decisions of the U.S. Supreme Court interpreting the environmental statutes and articulating principles of constitutional and administrative law continue to have a profound effect on the development of environmental law in the United States. In its just-completed 2006 Term, the U.S. Supreme Court marched decidedly to the right with decisions weakening abortion rights, cutting back on affirmative action, invalidating campaign finance regulations, and making it more difficult for victims of employment discrimination to seek redress. Yet the Court ruled in favor of environmental interests in four of the five environmental cases it decided.[1]

The cases decided this Term illustrate the three general types of issues that the Court decides that are particularly relevant for the field of environmental law: (1) questions of statutory interpretation, (2) principles of constitutional law, and (3) principles of administrative law. Issues of statutory interpretation governed the Court's decisions in United States v. Atlantic Research (interpreting the Comprehensive Environmental Response, Compensation and Liability Act), Environmental Defense v. Duke Energy (the Clean Air Act's new source review provisions), and National Association of Homebuilders v. Defenders of Wildlife (the effect of the Endangered Species Act on the Clean Water Act's delegation provisions). In United Haulers Association, Inc. v. Oneida-Hermiker Solid Waste Management Authority, the Court decided a constitutional question when it held that a flow control ordinance directing that garbage be processed at a facility owned by a municipality does not violates the dormant commerce clause.

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[1] The four cases in which "environmental interests" prevailed were Environmental Defense v. Duke Energy Corp., 127 S.Ct. 1423 (2007); Massachusetts v. EPA, 127 S.Ct. 1438 (2007); United States v. Atlantic Research Corp., 127 S.Ct. 2331 (2007); and United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Authority, 127 S.Ct. 1786 (2007). Environmental interests were on the losing side in National Ass'n of Homebuilders v. Defenders of Wildlife, 127 S.Ct. 2518 (2007).

All three sets of issues were present in the Court's most surprising decision: Massachusetts v. EPA, 127 S.Ct. 1438 (2007). In the course of deciding to reverse EPA's decision not to regulate emissions of greenhouse gases under the Clean Air Act, the Court addressed constitutional principles of standing to sue, interpreted the Clean Air Act, and applied principles of administrative law to reject EPA's rationale for failing to act as arbitrary and capricious. By a vote of 5-4 the Court held: (1) that the harm projected from global warming and climate change gives Massachusetts standing to sue even if the harm is widely shared and EPA can do little to alleviate most of it, (2) that the Clean Air Act gives EPA the authority to regulate greenhouse gas emissions, and (3) that EPA is required to regulate such emissions unless it determines that they do not contribute to climate change or the agency provides a reasonable explanation of why it cannot or will not determine whether they do.

Professor Jon Cannon of the University of Virginia School of Law, who served as EPA general counsel during the Clinton Administration, has hailed *Massachusetts v. EPA* as being "as close as we will come" to having a "*Brown v. Board of Education* for the environment."[2] By contrast, former Dean Ronald Cass opines that "the Justices stretch, twist, and torture administrative law doctrines to avoid the inconvenient truth that this is not a matter in which judges have any real role to play."[3]

At one level the result in *Massachusetts v. EPA* is easy to understand: Justice Kennedy, the only "swing" Justice now on the Court sided with the four liberal/moderate Justices (Stevens, Souter, Ginsburg and Breyer) instead of the four conservatives (Scalia, Thomas, C.J. Roberts and Alito).[4] More than one-third of all the Court's decisions in its 2006 Term were the product of 5-4 votes and Justice Kennedy was in the majority in *all 24* of these cases. Justice Stevens' majority opinion in the case shows signs of an attempt to court Justice Kennedy by quoting some of Kennedy's previous opinions.

Precautionary v. Reactive Approaches to Regulation

The 5-4 split that often occurs in these cases reflects fundamental differences in the Justices' attitudes toward precautionary regulation. One group of Justices (Stevens, Souter, Ginsburg & Breyer) is inclined to interpret the environmental statutes to facilitate achievement of their precautionary purposes by upholding regulation of activities believed to contribute to environmental harm. These Justices are more tolerant of regulatory decisions founded on assessments of risk at the wholesale level. Another group of Justices (Scalia,

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[2] Jonathan Z. Cannon, The Significance of *Massachusetts v. EPA,* Virginia Law Review In Brief (www.virginialawreview.org/inbrief), May 21, 2007

[3] Ronald A. Cass, *Massachusetts v. EPA:* The Inconvenient Truth About Precedent, Virginia Law Review In Brief (www.virginialawreview.org/inbrief), May 21, 2007.

[4] Voting records of the Justices in environmental cases during the period from the beginning of the 1999 Term to the end of the 2006 Term are provided in Appendix A. The definition of what constitutes an "environmental case" is unavoidably somewhat arbitrary. The cases included in this database are listed in Appendix C. For a historical look at the voting records of Supreme Court Justices in environmental cases from 1967-1993 see Robert V. Percival, Environmental Law in the Supreme Court: Highlights from the Marshall Papers, 23 Env. L. Rep. 10606,10625 (1993).

Thomas, C.J. Roberts and Alito) is profoundly skeptical of precautionary regulation and concerned about its cost and fairness. Even though regulatory legislation was adopted in response to the perceived inadequacies of the common law (particularly its demand for individualized proof of causal injury), these Justices insist on more demanding, and more individualized, factual showings of causal injury before federal regulations are upheld or enforced. Their approach is evident in a wide range of decisions concerning who has standing to sue in environmental cases, the scope of federal regulatory authority, and what constitutes a regulatory taking.

Justice Kennedy has his feet planted firmly in both camps. He demands a greater showing of causal injury to justify regulation than the more precautionary group of Justices, but he also recognizes that "the common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society."[5] While Justices Scalia and Thomas seek to keep environmental plaintiffs out of court on constitutional grounds, questioning whether citizen suits violate separation of powers principles, Justice Kennedy opines that the purchase of a plane ticket to visit foreign endangered species would have been enough to give an environmental group standing in Lujan v. Defenders of Wildlife.[6] While rejecting Justice Scalia's disdainfully narrow interpretation of the scope of the Clean Water Act in Rapanos v. United States,[7] Justice Kennedy still insists on the government showing a "significant nexus" between wetlands it seeks to regulate and navigable waters. This produced a 4-1-4 split in *Rapanos* that has caused considerable confusion concerning the scope of federal authority under the Clean Water Act because "Justice Kennedy's view of the applicable law now appears to be controlling even though it was rejected by all eight of the other Justices."[8]

In *Massachusetts v. EPA*, Justice Kennedy resisted the impulse to straddle both groups of Justices. He joined in full Justice Stevens' majority opinion, which spawned strident dissents from Chief Justice Roberts and Justice Scalia, both of which were joined by all four dissenting Justices. The Chief Justice argues that the effects of global warming are too generalized, too uncertain and too unlikely to be effectively redressed by domestic regulation to provide any plaintiff with standing to sue. Justice Scalia argues for deference to EPA's convoluted decision that it has no authority to regulate greenhouse gases and that it wouldn't want to exercise such authority if it had it. He endorses the notion that greenhouse gases are not covered by the text of the Clean Air Act because "pollutants" are only substances that foul the air near the surface of the earth. Justice Stevens in his majority opinion concludes that states have a special interest in protecting their land and citizens from environmental harm and that it is not necessary for EPA regulations to redress most of the harm for a state to have standing. He concludes that the Clean Air Act was meant to be a comprehensive regulatory scheme that requires EPA to control air pollutants that pose significant risks to the environment.

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[5] Lucas v. South Carolina Coastal Commission, 505 U.S. 1003, 1035 (1992).
[6] 504 U.S. 555 (1992) (Kennedy, J., concurring in part and concurring in the judgment).
[7] 126 S.Ct. 2208, 2248 (2006),
[8] Testimony of Robert V. Percival before the U.S. House of Representatives Committee on Transportation and Infrastructure, July 17, 2007, at 18, available online at: (http://transportation.house.gov/Media/File/water/20070717/Percival%20Testimony.pdf).

While regulatory legislation to protect the environment was adopted largely in response to the inadequacies of the common law, the transition from the common law to the administrative state has not been smooth. Despite some early successes, the common law of nuisance proved to be woefully inadequate to combat chronic, multi-source pollution problems because of the difficulty of satisfying its demands for individualized proof of causal injury. A common thread that runs through much of the criticism of contemporary environmental regulation is concern that it is unfair to make people take precautions without proof that their activities have caused significant harm to identifiable victims. Much of the recent ferment over environmental policy can be viewed as the product of clashes between two competing worldviews: a precautionary approach that seeks to prevent harm to health or the environment by regulating activities believed to contribute to such harm, and a reactive approach that seeks to forestall precautionary measures until detailed evidence proves that significant harm is occurring to specific victims that cannot be attributed to other causes.

These two worldviews can be illustrated by examining their influence on contemporary controversies in environmental law. These controversies increasingly have played out in the courts as legislative gridlock has prevented Congress from adopting substantial amendments to the environmental laws. They include the reach of federal jurisdiction to protect the environment, regulatory takings issues, standing to sue in environmental cases, and the debate over what decision rules should govern regulatory policy. For each set of issues, the reactive approach insists on more demanding, and more individualized, factual showings of causal connections before federal regulations are upheld or enforced, while the precautionary approach is more tolerant of regulatory decisions founded on assessments of risk at the wholesale level.

Constitutional Limits on the Federal Commerce Power

Controversy over federal authority to protect the environment has been inspired by the Supreme Court's revival of constitutional limits on Congress's power to regulate commerce.[9] Various industry groups have pressed the lower federal courts to declare unconstitutional the Superfund legislation,[10] the Endangered Species Act,[11] the Clean Water Act,[12] and the Safe Drinking Water Act.[13] In each of these cases business interests argued that the laws unconstitutionally regulated purely intrastate activities that could not be shown to have a substantial effect on interstate commerce. In another case industry groups sought to have the Clean Air Act declared unconstitutional under the long-dormant non-delegation doctrine.[14] As a fallback position, plaintiffs in these cases also argued that the courts, to avoid difficult constitutional issues, should interpret the jurisdictional reach of the environmental statutes more narrowly to limit the scope of federal regulation.

9 United States v. Lopez, 514 U.S. 549 (1995).
10 United States v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997).
11 Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000); GDF Realty Inv., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003).
12 Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001).
13 Nebraska v. EPA, 331 F.3d 995 (D.C. Cir. 2003).
14 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

Aside from a few lower court judgments that were reversed on appeal,[15] courts have rejected virtually every constitutional challenge to the federal environmental laws.[16] In doing so, they have relied on generalized judgments made by Congress concerning the importance of national regulatory programs to prevent harm to the environment. This has confirmed the constitutional propriety of an administrative state in which Congress authorizes agencies to exercise substantial discretion in implementing sweeping regulatory schemes. By contrast, the reactive approach insists on more demanding, individualized showings of substantial effects on interstate commerce before federal environmental regulations constitutionally can be applied. This approach is illustrated by a dissenting judge who argued that the Endangered Species Act could not be constitutionally applied to protect the last remaining members of an endangered fly species that lives entirely in California.

> [B]ecause of some undetermined and indeed undeterminable possibility that the fly might produce something at some undefined and undeterminable future time which might have some undefined and undeterminable medical value, which in turn might affect interstate commerce at the imagined future point, Congress can today regulate anything which might advance the pace at which the endangered species becomes extinct.[17]

The dissenter's approach would leave federal constitutional power to protect endangered species at its weakest precisely when it is needed most – the more imperiled a species is, the less likely that it could be demonstrated to have substantial effects on interstate commerce. Moreover, species could be harmed without federal recourse if the activities that caused the harm could not be shown to have a sufficiently significant impact on interstate commerce. The U.S. Supreme Court has, at least implicitly, rejected such an approach because it has declared that even purely intrastate activity can constitutionally be regulated by Congress when necessary to preserve the integrity of a larger regulatory scheme.[18]

Statutory Interpretation and the Scope of Federal Authority to Protect the Environment

The contrast between the precautionary and reactive approaches surfaces even more clearly in battles over the scope of federal *statutory* authority. While reluctant to set *constitutional* limits on federal regulatory authority to protect the environment, the U.S. Supreme Court has been more

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15 *See, e.g.*, Am. Trucking Ass'ns v. EPA, 195 F.3d 4 (D.C. Cir. 1999), *rev'd in part*, 531 U.S. 457 (2001); United States v. Olin Corp., 927 F. Supp. 1502 (S.D. Ala. 1502), *rev'd*, 107 F.3d 1506 (11th Cir. 1997).

16 The only exception appears to be New York v. United States, 505 U.S. 144 (1992), where the Supreme Court struck down, as a violation of states' Tenth Amendment rights, a provision in the Low-Level Radioactive Waste Policy Act that required states that failed to make arrangements for disposal of low-level radioactive waste generated within their borders to "take title" to it after a certain date. *See also* ACORN v. Edwards, 81 F.3d 1387 (5th Cir. 1996) (invalidating a provision in the Safe Drinking Water Act that gave states no choice in requiring them to set up programs to find and remove lead-contaminated water supplies in schools).

17 Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1064 (D.C. Cir. 1997) (Sentelle, J., dissenting).

18 *See* Gonzalez v. Raich, 545 U.S. 1 (2005) (holding that Congress has the power to regulate cultivation of marijuana for legal, personal medical use because it had a rational basis for concluding that failure to do so could substantially undermine implementation of a comprehensive scheme of federal drug regulation).

receptive to arguments for construing federal *statutory* authority more narrowly. In 2001 the Court held by a 5-4 vote that the Clean Water Act does not extend federal authority to wetlands whose only connection with interstate commerce is their potential to attract migratory birds.[19] The majority was unimpressed by the federal government's claims that it was ecologically important to protect such wetlands and it justified its narrow construction of federal jurisdiction by stating that it was necessary to avoid difficult constitutional questions that would arise if Congress intruded on state and local authority to regulate land use.

The Court's most recent decision on the scope of federal jurisdiction under the Clean Water Act, handed down in June 2006, illustrates the stark divide between competing approaches to regulatory policy judgments. In *Rapanos v. United States* the Court split 4-1-4 in deciding whether federal Clean Water Act jurisdiction extends to wetlands adjacent to non-navigable tributaries of navigable waters. Four Justices agreed that the Clean Water Act provides such authority, deferring to the federal agency's conclusion that "wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow."[20] Four other Justices sharply disagreed, arguing that this approach "would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land—an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board."[21] The Justice in the middle – Justice Kennedy – understood the importance of broadly protecting wetlands, but concluded that the government must show that "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable'." He noted that if the effects are only "speculative or insubstantial" the wetlands will not be subject to federal jurisdiction, but he concluded that a "reasonable inference of ecological interconnection" can be drawn for wetlands adjacent to navigable waters and that he would defer to "regulations defining for what wetlands adjacent to non-navigable tributaries of navigable waters such inferences reasonably can be made."[22]

The *Rapanos* decision starkly highlights the differences between a precautionary approach to regulatory policy and a reactive one. The four Justices who voted to uphold federal regulation in the case were willing to defer to the judgment of a federal agency that it is essential to regulate wetlands adjacent to tributaries of navigable waters in order to prevent degradation of water quality. The four Justices who voted against the government were skeptical that such regulation would prevent ecological harm, but also fearful that this approach would allow federal agencies to regulate virtually anything. The influence of common law notions of causation is apparent in Justice Kennedy's concurrence in the judgment. While acknowledging the importance of a precautionary approach, Justice Kennedy alone insisted on some factual demonstration that regulated activities were connected to substantial environmental harm.

The differences between the precautionary and reactive approaches to regulation also were

19 Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001).
20 Rapanos v. United States, 126 S.Ct. 2208, 2252 (Stevens, J., dissenting).
21 *Id.* at 2224 (Scalia, J., plurality opinion).
22 *Id.* at 2248 (Kennedy, J., concurring in the judgment).

highlighted a decade ago in a controversy over the Endangered Species Act that reached the U.S. Supreme Court. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,*[23] a lower court reinterpreted the Endangered Species Act's prohibition on harming endangered species to prohibit only the direct physical application of force to them. The Supreme Court reversed, upholding regulations that also barred the destruction of the species' critical habitat if it caused harm to their members. Justice Kennedy, who joined the majority, noted at oral argument that actions that foreseeably kill a person would give rise to common law criminal liability even if the harm was caused by means other than direct physical application of force. Justice O'Connor, also in the majority, thought it important to temper the Court's endorsement of precautionary regulation by authoring a concurring opinion expressing concern about the potential unfairness of holding a person strictly liable for harm caused directly or indirectly to a species.[24] Thus, she emphasized her view that the statute did not alter normal principles of proximate cause that require the harm to an endangered species to be foreseeable before liability could be imposed.

Constitutional Issues: Regulatory Takings and Standing

Decisions involving regulatory takings claims have illustrated the continuing influence of common law notions. In *Lucas v. South Carolina Coastal Commission,*[25] the Supreme Court insisted that legislative findings that regulation is necessary to prevent environmental harm are insufficient in themselves to preclude takings liability. Instead the Court held that only regulations forbidding activities that were common law nuisances at the time the Constitution was adopted could qualify for the nuisance exception to takings liability. In a significant concurring opinion, Justice Kennedy expressed his discomfort with this approach and concluded that "nuisance prevention" is not the "sole source of state authority to impose severe restrictions" given the state's interest in "enacting new regulatory initiatives in response to changing conditions . . . ."[26] In takings cases involving regulatory exactions, the Supreme Court has held that it is not enough for local officials to demonstrate a nexus between the environmental effects of a proposed development and the exaction sought as a condition of permit approval. Instead, local officials must quantify the effects to prove that requested exactions are "roughly proportional" to the environmental harm the development would produce.[27] This represents another instance in which the Court has required more demanding proof of causal harm to justify regulatory action.

Judges unsympathetic to citizen suits to enforce environmental regulations also have sought to import common law requirements for proving causal injury into such suits through restrictive interpretations of standing doctrine. In a series of decisions in the 1990s, the Supreme Court restricted the standing of environmental plaintiffs by demanding that they demonstrate that they recreated on specific parcels of public lands subject to development or that they were directly harmed by agency regulatory changes.[28] These decisions reflected the influence of traditional

23 515 U.S. 687 (1997)
24 *Id.* at 708-09.
25 505 U.S. 1003 (1992).
26 *Id.*
27 Dolan v. City of Tigard, 512 U.S. 374 (1994).
28 Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990).

common law notions of standing,[29] which initially would have barred the beneficiaries of regulation from having standing while providing regulated entities access to the courts. The Supreme Court halted this trend in *Friends of the Earth, Inc., v. Laidlaw Environmental Services, Inc.*, where it declared that insisting on plaintiffs demonstrating "injury to the environment" would "raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with [a Clean Water Act] permit."[30] The Court rejected this approach and endorsed standing for plaintiffs with reasonable concerns about the effect of environmental violations on the environment in areas where they live or recreate.[31] The majority's broad view of environmental standing in Massachusetts v. EPA reinforces this approach by emphasizing that the redressability prong of standing doctrine does not bar citizen suits even if the relief they seek will be less than adequate to remove the bulk of their injury.

Judicial Review of Regulatory Decisions

Even as environmental law has been transformed from its common law roots into a system of comprehensive regulatory programs implemented by federal and state agencies, common law notions continue to influence judicial oversight of regulatory decisions. The administrative state is here to stay, but fear of agency overreaching has led the judiciary to re-import common law concepts into decisions reviewing agency actions. The result has been the creation of a kind of "regulatory common law" that endorses precautionary regulation[32] and purports to defer to agency expertise,[33] while insisting that agencies convince reviewing courts that the risks they seek to control are significant and can be appreciably reduced by regulation.[34] Although efforts to persuade courts to rewrite the environmental laws to require rigid adherence to a particular decision rule, such as the use of cost-benefit analysis, have been roundly rejected,[35] the aggressive use of regulatory review programs by the executive[36] has greatly increased the analytical burden on agencies, contributing to ossification of the regulatory process.

Conclusion

The Supreme Court has played, and will continue to play, a major role in the development of U.S. environmental law. During the first four decades of the twentieth century, fierce disputes

29 *See* Robert V. Percival & Joanna B. Goger, *Escaping the Common Law's Shadow: Standing in the Light of* Laidlaw, 12 DUKE ENVT'L. L. & POL'Y F. 119 (2001).

30 Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc., 528 U.S. 167, 181 (2000).

31 *Id.* at 181-89.

32 Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976) (en banc) ("Where a statute is precautionary in nature, the evidence difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge, the regulations designed to protect public health, and the decision that of an expert administrator, we will not demand rigorous step-by-step proof of cause and effect. Such proof may be impossible to obtain if the precautionary purpose of the statute is to be served.").

33 Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

34 Industrial Union Dept., v. Am. Petroleum Inst., 448 U.S. 607 (1980).

35 *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 464-72 (2001) ("Were it not for the hundreds of pages of briefing respondents have submitted on the issue, one would have thought it fairly clear that [the] text [of the Clean Air Act] does not permit the EPA to consider costs in setting the standards.").

36 *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

between states over transboundary pollution were brought before the U.S. Supreme Court. The Court, exercising its original jurisdiction to hear disputes between states, issued injunctions restricting air pollution from copper smelters,[37] requiring New York City to stop ocean dumping of its garbage,[38] and requiring the City of Chicago to treat its sewage to reduce the amount of Lake Michigan water needed to flush its effluent away.[39] In each case the Court's action helped spur the development of better pollution control technology and forced other institutions to come to grips with the problems the Court addressed.[40] With its decision in *Massachusetts v. EPA* the Court returns in part to the role it played in the early twentieth century by forcing action, at the behest of a state, when no other federal institution was responding to a serious environmental problem.

Yet *Massachusetts v. EPA* probably does not herald any new age of judicial activism to protect the environment. The sharp dissents on standing and the merits joined by the four dissenting Justices are a reminder that the Supreme Court remains as sharply divided as humanly possible on many issues of environmental law. By joining the dissenting Justices in *Massachusetts v. EPA* and the plurality in *Rapanos* the two newest members of the Court, Chief Justice Roberts and Justice Alito, confirm that they, along with Justices Scalia and Thomas, are highly skeptical of federal environmental regulation. Their views on standing to sue in environmental cases clearly represent a shift in a more restrictive direction away from the views of the *Laidlaw* majority that included both of their predecessors, Chief Justice Rehnquist and Justice O'Connor. While there will continue to be environmental cases like *Duke Energy* and *Atlantic Research* where the Court unanimously clarifies the meaning of statutory terms on which the lower courts have divided, for now the fate of most environmental litigants before the Court remains firmly in the hands of a single Justice – Justice Kennedy. While Justice Kennedy seems determined to try to strike a balance between the other four-Justice blocs, any change in the Court's membership could have a most profound effect on the future direction of environmental law.

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37 Georgia v. Tenn. Copper Co., 237 U.S. 474, 477-78 (1915).

38 New Jersey v. City of New York, 284 U.S. 585, 586 (1931).

39 Wisconsin v. Illinois, 281 U.S. 696, 697-98 (1930).

40 See Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 ALA. L. REV. 717 (2004); Robert V. Percival, *Resolucion de Conflictos Ambientales: Lecciones Aprendidas de la Historia de la Contaminacion de las Fundiciones de Minerales, in* PREVENCION Y SOLUCION DE CONFLICTOS AMBIENTALES: VIAS ADMINISTRATIVAS, JURISDICCIONALES Y ALTERNATIVAS 399, 407-17 (Lexis Nexis 2004).

APPENDIX A. VOTING RECORDS OF THE JUSTICES IN ENVIRONMENTAL CASES 1999-2006 SUPREME COURT TERMS

Justice	% of Cases Pro Environment	% of Cases Mixed Result	% of Cases Anti-Environment	No. of Cases
DAVID SOUTER	80.8%	--	19.2%	26
RUTH GINSBURG	80.8%	--	19.2%	26
JOHN PAUL STEVENS	69.2%	3.8%	26.9%	26
STEVEN BREYER	69.2%	--	30.8%	26
ANTHONY KENNEDY	44.0%	4.0%	52.0%	25
SANDRA O'CONNOR	36.8%	--	63.2%	19
WILLIAM REHNQUIST	26.3%	--	73.7%	19
ANTONIN SCALIA	19.2%	15.3%	65.4%	26
CLARENCE THOMAS	19.2%	11.5%	69.2%	26
JOHN ROBERTS	57.1%	--	42.9%	7
SAMUEL ALITO	42.9%	--	57.1%	7

APPENDIX B. ENVIRONMENTAL CASES DECIDED BY COURT, RESULTS OF DECISIONS, AND NUMBER OF DENIALS OF CERTIORARI (1999-2006 TERMS)

TERM	CASES DECIDED	PRO-ENV'T	ANTI-ENV'T	MIXED RESULT	DENIALS OF REVIEW
1999-2000	3	2	1	0	
2000-2001	3	1	2	0	24
2001-2002	1	1	0	0	41
2002-2003	1	1	0	0	27
2003-2004	7	1	6	0	26
2004-2005	4	3	1	0	17
2005-2006	2	1	0	1	18
2006-2007	5	4	1	0	32

APPENDIX C. ENVIRONMENTAL CASES INCLUDED IN DATABASE FOR APPENDICES A & B

1999 Term

Friends of the Earth v. Laidlaw Environmental Services, 528 U.S. 167 (2000)
Public Lands Council v. Babbitt, 529 U.S. 728 (2000)
U.S. v. Locke, 529 U.S. 89 (2000)

2000 Term

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001)
Palazollo v. Rhode Island, 533 U.S. 606 (2001)
Whitman v. American Trucking Associations, 531 U.S. 457 (2001)

2001 Term

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002)

2002 Term

Borden Ranch Partnership v. U.S. Army Corps of Engineers, 537 U.S. 99 (2002)

2003 Term

Alaska Dept. of Environmental Conservation v. EPA, 540 U.S. 461 (2004)
South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004)
Bedroc Ltd.m LLC v. United States, 541 U.S. 176 (2004)
Engine Manufacturers' Ass'n v. South Coast Air Quality Management District, 541 U.S. 246 (2004)
Department of Transportation v. Public Citizen, 541 U.S. 752 (2004)
Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004)
Cheney v. U.S. District Court for District of Columbia, 542 U.S. 367 (2004)

2004 Term

Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157 (2004)
Bates v. Dow Agrosciences, LLC, 544 U.S. 431 (2005)
Lingle v. Chevron, U.S.A., Inc., 544 U.S. 528 (2005)
Kelo v. City of New London, 125 S.Ct. 2655 (2005)

2005 Term

S.D. Warren Co. v. Maine Board of Environmental Protection, 126 S.Ct. 1843 (2006)
Rapanos v. United States, 126 S.Ct. 2208 (2006)

2006 Term

Massachusetts v. EPA, 127 S.Ct. 1438 (2007)
Environmental Defense v. Duke Energy Corp., 127 S.Ct. 1423 (2007)
United States v. Atlantic Research Corp., 127 S.Ct. 2331 (2007)
National Association of Home Builders v. Defenders of Wildlife, 127 S.Ct. 2518 (2007)
United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority, 127 S.Ct. 1786 (2007)