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NOT AT ALL:

ENVIRONMENTAL SUSTAINABILITY IN THE SUPREME COURT

by James R. May*

INTRODUCTION

The principle of “sustainability” is soon to mark its 40th anniversary. It is a concept that has experienced both evolution and stasis. It has shaken the legal foundation, often engaged, recited, and even revered by policymakers, lawmakers, and academics worldwide. This essay assesses the extent to which sustainability registers on the scales of the United States Supreme Court, particularly during the tenure of Chief Justice John Roberts.

Sustainability entered the general public conscience in 1972 with the Stockholm Declaration on the Human Environment.¹ In 1987 it secured center stage when the World Commission on Environment and Development released its pioneering study, *Our Common Future*,² which defines “sustainable development” as “development . . . that . . . meets the needs of the present without compromising the ability of future generations to meet their own needs.”³ In 1992 the Earth Summit’s *Rio Declaration* declared that sustainable development must “respect the interests of all and protect the integrity of the global environmental and developmental system.”⁴ The Rio Declaration’s blueprint document, Agenda 21, provides that sustainable development must coincidentally raise living standards while preserving the environment: “[I]ntegration of environment and development concerns . . . will lead to the fulfillment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future.”⁵ The unmistakable thread that runs through threshold definitions of sustainability is the interconnectedness of living things, opportunity, and hope.

Recognition of the importance of sustainability has grown exponentially since the Earth Summit.⁶ Since then, the concept of sustainability has been regularly recognized in international accords,⁷ by nations in constitutional, legislative and regulatory reform,⁸ by States, municipalities and localities in everything from policy statements to building codes,⁹ and in corporate mission statements and practices worldwide.¹⁰ Sustainability principles are shape-shifters, adaptive to most environmental decision making, including water and air quality, species conservation, and national environmental policy in the U.S. and around the globe.¹¹ Furthermore, it has entered the bloodstream of courts around the globe as a guiding principle of judicial discretion in environmental cases.¹²

There remains one notable bastion still indifferent about if not immune to sustainability. A situs where the word “sustainability” is never uttered, nor written, nor argued, nor acknowledged: the United States Supreme Court. Forty years on, it seems reasonable to expect that at least one member of the most

influential juridical body on the planet would have found a case or a cause or a controversy befitting a mention of what many behold as the common denominator in environmental law and policy, a field well represented before the Court.¹³ Yet, this hasn’t happened. In the roughly 4,000 or so cases the court has decided during the era of modern environmental law, it has seen fit to decide about 300 “environmental” cases (those involving pollution control, natural resources and property management, and energy).¹⁴ More than one-half of these cases involve either State’s or individual property rights, or disposition of the West’s mineral, land, and water resources, or both. This is a testament to the southwest-tinged and Barry Goldwater influenced ideals of Chief Justice William Rehnquist and Justice Sandra Day O’Connor, both of whom were raised in Arizona, and who together served the court for nearly sixty years. When Rehnquist and O’Connor left the court in 2005 to their successor urban brethren from the Northeast, Chief Justice John G. Roberts and Justice Samuel Alito, fair money was that the court’s interest in environmental cases would wane, diminishing opportunity to have the Supreme Court engage sustainability.¹⁵

Yet the Roberts’ Court has shown more than a passing interest in environmental cases. Chief Justice Roberts’ Court-issued opinions had something to rejoice or revile for nearly every sustainability enthusiast. The Court decided cases across the environmental spectrum: endangered species, cost recovery, climate change, air and water pollution, the intersection between two of environmental law’s most venerated statutes, and the overlap between local solid waste control efforts and the U.S. Constitution. The Court ruled on the profound, such as whether the Clean Air Act gives the Environmental Protection Agency (“EPA”) authority to regulate new vehicle emissions of greenhouse gases that alter the Earth’s climate (yes), and the practical, including whether it is appropriate to issue a preliminary injunction under the National Environmental Policy Act to ameliorate the impact of the Navy’s use of submarine detecting sonar (no), whether EPA may use cost-benefit analyses when deciding how to protect aquatic life from intake structures (yes), whether an Army Corps of Engineers’ permit obviates the need to comply with EPA’s technology based standards under the Clean Water Act (it

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does), whether intent is a qualifying condition for liability as an “arranger” under the Comprehensive Environmental Response, Compensation, and Liability Act (it is), and whether plaintiffs have standing to challenge a national regulation that authorizes salvage timber sales (they don’t). Each environmental case saw a different justice write the majority (and in one case, plurality) opinion, with opinions by Justice John Paul Stevens, Chief Justice Roberts, and Justice Anthony Kennedy ascendant. Yet, at no time does anyone mention sustainability.

None of the environmental cases decided thus far during the tenure of Chief Justice Roberts engage sustainability. The word “sustainability” does not appear to exist before the Court. It does not appear in any majority, concurring, or dissenting opinion. While the Court seems to be agnostic about the idea of sustainability as a governing norm, strong astringent reveals that with some counterexamples the extent to which decisions before the Roberts’ Court regarding biodiversity, land use, air pollutant emissions, and cleanup standards implicate sustainability, they do so negatively, as discussed below. I conclude that factors having little or nothing to do with sustainability per se are at the heart of these results. Yet unless and until parties amass the courage of their conviction and infuse “sustainability” into litigative lexicon and strategy, sustainability will continue to matter to the U.S. Supreme Court not at all.

PROMOTING BIODIVERSITY

If at all, sustainability most likely should influence jurisprudence involving biodiversity, which often engenders related notions of sustainable and optimum yields, minimizing adverse environmental effects, species conservation, and even cost-benefit analysis. Yet the Supreme Court has yet to consider sustainability per se in reaching decision in a dispute involving biodiversity. To be sure, decisions during the tenure of Chief Justice Roberts involving biodiversity seem contrary to sustainability principles. By way of example, the Court has been unconcerned about sustainability in evaluating impacts on marine mammals, fish stocks, aquatic habitat, and forest management, discussed below.

MARINE MAMMALS

In *Winter v. Natural Resources Defense Council* (“NRDC”),¹⁶ the Court reversed the U.S. Court of Appeals for the Ninth Circuit and ruled 5-4 that the U.S. Navy’s interests in security and military preparedness outweighs the respondent’s interest in protecting whales and other marine mammals from acoustic harm caused by submarine seeking sonar devices.

In *Winter*, the Court voted to lift a “narrowly tailored” preliminary injunction to enjoin the U.S. Navy’s use of mid-frequency active sonar off of the southern California coast, known as the “SOCAL exercise.”¹⁷ The Navy regards mid-frequency active sonar as the sole effective means for detecting and tracking enemy diesel-electric submarines. The Navy’s sonar, however, also disrupts marine mammals that rely upon their own sonar.

The NRDC challenged the Navy’s failure to perform an environmental impact statement under the National

Environmental Policy Act (“NEPA”) and attached other claims under the Coastal Zone Management Act (“CZMA”) and the Endangered Species Act.

Finding the “possibility” of causing irreparable environmental harm, the district court issued a preliminary injunction requiring, *inter alia*, the Navy to “power down” (1) completely if marine mammals were spotted within 2,200 yards of Navy vessels or (2) by seventy-five percent in the presence of other significant “surface ducting” conditions.

Following the initial grant of preliminary injunction, the Bush administration then identified the SOCAL exercise to be of “paramount interest to the United States” and granted the Navy a waiver from the CZMA. Correspondingly, the White House Council on Environmental Quality granted the Navy’s request for “alternative arrangements for compliance with” NEPA due to a national “emergency.”

Thereafter, the Navy appealed the lower court’s injunction to the Ninth Circuit. Rather than lift the injunction, the Ninth Circuit remanded to have the district court weigh the exemption’s impacts on the injunction.

On remand the lower court threw out the “emergency” premise behind the Council on Environmental Quality’s “alternative arrangements” decision. While finding it “constitutionally suspicious,” the lower court did not rule on the legality of the waiver of CZMA requirements. The Ninth Circuit affirmed, finding the lower court had not abused its discretion in issuing the limited preliminary injunction.¹⁸ The Ninth Circuit stayed the injunction’s “power down” provisions, however, allowing the Navy to appeal the case to the Supreme Court. The Navy still would be subject to the injunction’s four less restrictive conditions that the Navy did not appeal, including a twelve nautical-mile no-sonar zone along the California coast and enhanced monitoring requirements.

Writing for the majority, Roberts reversed the Ninth Circuit 5-4 and vacated the injunction and its “power down” requirements on two grounds. First, the majority held that the lower courts’ preliminary injunction analysis applied an incorrect standard that did not require a sufficient showing of harm. It held that the lower court should have asked whether the SOCAL exercise would result in the “likelihood” rather than the “possibility” of irreparable harm, because the “possibility” standard is “too lenient.”¹⁹ Second, it determined the lower courts had given short shrift to the Navy’s interests in security and preparedness.

Turning to the merits, the Court held first that respondents had not met their burden of showing irreparable harm. The Court reached this conclusion notwithstanding the Navy’s own countervailing data, which while both lower courts found to be “cursory, unsupported by evidence [and] unconvincing,” still revealed that sonar training had resulted in 564 physical injuries and 170,000 behavioral disturbances of marine mammals.²⁰ The environmental respondents also argued that countless other reported and undetected mass strandings of marine animals had been “associated” with sonar training.²¹ Instead, the Court concluded that the Navy had been conducting sonar training for forty years without documented cases of irreparable harm.²²

Next, the majority concluded that, properly balanced, the Navy's military interests far outweighed respondents' interest in protecting and observing marine mammals. It reasoned that balancing the public interest supporting the Navy's national security and military preparedness against NRDC's public interest in protecting marine mammals for observation and education "does not strike us as a close question."²³ Disagreeing with the lower courts, the majority found the equities tipped strongly in the Navy's favor: "To be prepared for war is one of the most effectual means of preserving peace."²⁴ The majority noted that the president deemed active sonar as "essential to national security" because adversaries possess 300 submarines. Mid-frequency active sonar, the Navy argued, is "the most effective technology" for "antisubmarine warfare, a top war-fighting priority for the Pacific Fleet."²⁵ Citing senior naval officers, the majority observed the importance of training ship crews with all possible war stressors occurring simultaneously, thus making mid-frequency active sonar "mission critical" for training.²⁶ The imposition of the mitigating regulations would require the Navy "to deploy an inadequately trained submarine force," which would in turn jeopardize the safety of the fleet.²⁷ Imposition of other mitigating factors, the majority held, could decrease the overall effectiveness of sonar training generally.²⁸ On the other hand, "[f]or the plaintiffs, the most serious possible injury would be harm to an unknown number of the marine mammals that they study and observe..." in contrast, forcing the Navy to deploy an inadequately trained antisubmarine force jeopardizes the safety of the fleet.²⁹ The majority concluded that the "public interest in conducting training exercises with active sonar under realistic conditions plainly outweighs the interests advanced by the plaintiffs."³⁰

Thus the majority found the district court had applied the incorrect standard and abused its discretion on the merits. Finding in favor of the Navy, the Court reversed the decisions below and did not impose the lower court's "power down" requirements.³¹

While the majority did not engage sustainability principles at all, the dissent concerned itself with just how the SOCAL exercise affected marine mammals. Justice Ruth Bader Ginsburg, joined by Justice David Souter, dissented: "In light of the likely, substantial harm to the environment, NRDC's almost inevitable success on the merits of its claim that NEPA required the Navy to prepare an EIS, the history of this litigation, and the public interest, I cannot agree that the mitigation measures the district court imposed signal an abuse of discretion."³²

In particular, Ginsburg had no trouble finding irreparable harm, and thus, diminution of sustainability. She was dismayed

about how the Court could overlook "170,000 behavioral disturbances, including 8,000 instances of temporary hearing loss; and 564 Level A harms, including 436 injuries to a beaked whale population numbering only 1,121." She also observed that, "sonar is linked to mass strandings of marine mammals, hemorrhaging around the brain and ears, acute spongiotic changes in the central nervous system, and lesions in vital organs."³³ On balancing the competing interests of the parties, Ginsburg concluded that these injuries "cannot be lightly dismissed, even in the face of an alleged risk to the effectiveness of the [Navy's training exercises]."³⁴

Charting a more solicitous course, Justice John Paul Stevens, joining Justice Stephen G. Breyer, concurred in part and dissented in part. They would have found that neither court below adequately explained why the balance of equities favored

the two specific mitigation measures being challenged over the Navy's assertions that it could not effectively conduct its exercises subject to the conditions. They would have remanded for a more narrowly tailored injunction, but continued the Ninth Circuit's stay conditions as the status quo until the completion of the SOCAL exercise, thus promoting sustainability to some extent.³⁵

The postscript is that the Navy concluded its SOCAL exercise and completed its

NEPA environmental impact statement for the SOCAL exercise in January 2009.

FISH STOCKS

In *Entergy v. Riverkeeper*,³⁶ the Supreme Court reversed the U.S. Court of Appeals for the Second Circuit and ruled 5-1-3 that the EPA may conduct a cost-benefit analysis in regulating the substantial adverse impacts of "cooling water intake structures" under Section 316(b) of the Clean Water Act.³⁷ Section 316(b) of the act requires that any standards established for existing discharge sources ensure that the "design, location, construction and capacity" of any such intake structures "reflect the best technology available for minimizing adverse environmental impact."³⁸

Some thirty years after the enactment of the Clean Water Act, EPA issued rules applying Section 316(b) to existing dischargers. The rules allow, but do not require, the use of a cost-benefit analysis before setting performance-based best technology available standards and in deciding whether to grant site-specific variances. Cost-benefit analysis is invariably at odds with sustainability, as it is skewed heavily in favor of industrial and power producing interests over those in providing access to sustainable fisheries for future generations.

None of the environmental cases decided thus far during the tenure of Chief Justice Roberts engage sustainability.

The Second Circuit, in an opinion by then judge and now Justice Sonia Sotomayor, ruled that the language, structure, and history of Section 316(b) do not permit cost-benefit analysis. It then remanded the case to EPA to explain the role, if any, cost-benefit analysis played in EPA's regulations for existing intake structures.

Writing for the Court, Justice Antonin Scalia reversed, reasoning that Section 316(b), when read together with other performance-based provisions of the act, gives EPA discretion to base BTA on a cost-benefit analysis. Scalia relied upon a traditional *Chevron* two-part analysis. First, he held that Section 316(b) does not contain a plain meaning with regard to cost-benefit analysis. To be sure, he held that the word "best" invites many meanings, including that which "most efficiently produces some good," even if the "good" is of a lower quality than other options.³⁹ He also wrote that "minimize" has many meanings, and "is a term that necessarily admits of degree [but] is not necessarily used to refer exclusively to the greatest possible reduction."⁴⁰ Scalia then found that EPA's interpretation of Section 316(b) was reasonable because while the provision "does not expressly authorize cost-benefit analysis," it does not show "an intent to forbid its use."⁴¹ Thus, he wrote, it is "eminently reasonable" to conclude that Congress' silence on the use of cost-benefit analysis in cooling tower regulatory cases "is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree."⁴²

Justice Stevens dissented, joined by Souter and Ginsburg, advocating a result more consistent with principles of sustainability. Stevens asserted that the court had "misinterpreted" Section 316(b)'s plain language, and that the majority "unsettles the scheme Congress established."⁴³ According to this view, either the absence of plain language authorizing cost-benefit analysis, or congressional silence on the matter, is conclusive, especially in light of the fact that Congress expressly authorized the use of cost-benefit analysis with powerplant regulations in other contexts.⁴⁴ This, Stevens argued, is "powerful evidence" of Congress' decision not to authorize cost-benefit analysis in Section 316(b).⁴⁵ In Stevens' view, the Court "should not treat a provision's silence as an implicit source of cost-benefit authority."⁴⁶ Indeed, quoting Justice Scalia verbatim from another case, he noted that Congress does not draft fundamental regulatory plans in "vague terms or ancillary provisions," and "hide elephants in mouseholes."⁴⁷

Stevens viewed EPA's interpretation as unreasonable and outcome determinative: "[I]n the environmental context, in

which a regulation's financial costs are often more obvious and easier to quantify than its environmental benefits . . . cost-benefit analysis often, if not always, yields a result that does not maximize environmental protection."⁴⁸

Breyer concurred and presented a middle ground for sustainability, observing that "those who sponsored the legislation intended the law's text to be read as restricting, though not forbidding, the use of cost-benefit comparisons."⁴⁹ He would have found that the Clean Water Act's extensive history demonstrates Congress' intent to limit cost-benefit analysis. Quoting the act's principal sponsor, Senator Edmund Muskie, Breyer wrote that, "while cost should be a factor in the Administrator's judgment, no balancing test will be required."⁵⁰ Formal cost-benefit analysis, he feared, would induce extensive delays and a distorted emphasis on easily quantifiable factors, running in contrast to the goal of promoting cheaper, more effective cleanup technology.⁵¹

THREATENED AND ENDANGERED SPECIES

In a case that both pits two of the nation's more venerated environmental statutes crosswise, and runs counter to sustainability, the Court decided by a 5-4 majority that EPA's

delegation to a State of an environmental permitting program under the Clean Water Act does not trigger "consultation" under the Endangered Species Act ("ESA"). In *National Ass'n of Home Builders v. Defenders of Wildlife*,⁵² an environmental organization challenged EPA's decision that it is not authorized to conduct "consultation" with federal wildlife agencies to "insure" conservation of threatened and endangered species before delegating Clean Water Act permit authority to a State. Section 402(b) of the Clean Water Act lists criteria that if satisfied dictate that EPA "shall approve" the State's authority

to issue permits under the Act.⁵³ These criteria do not include effects on threatened and endangered species. On the other hand the ESA impels that federal agencies "shall" "consult" with federal wildlife agencies prior to conducting any "agency action" "authorized, funded or carried out" by the agency.

Writing for the majority, Justice Samuel Alito upheld EPA's "expert interpretation" (and one it changed from an earlier interpretation) that the ESA must yield to the CWA's permitting authority: "the transfer of permitting authority to state authorities—who will exercise that authority under continuing federal oversight to ensure compliance with relevant mandates of the Endangered Species Act and other federal environmental protection statutes—was proper."⁵⁴ Curiously, the Court held that Section 7 of the Endangered Species Act only applies to

Two cases decided by the Roberts' Court look to future and past application of the Clean Air Act and reach results that promote sustainability to some degree.

agency actions that are “discretionary.” Because Section 402(b) is nondiscretionary, Section 7 does not apply, thus diminishing sustainability.

In so doing, the Court rejected the U.S. Court of Appeals for the Ninth Circuit’s conclusions (1) that the ESA, as an independent source of legal authority, trumps the CWA, (2) applying *Department of Transportation v. Public Citizen*,⁵⁵ in concluding that EPA’s approval of Arizona’s National Pollutant Discharge Elimination System (“NPDES”) permitting program was the legally relevant cause of impacts to threatened and endangered species resulting from future private land-use activities, and (3) EPA’s application of the act is arbitrary and capricious.

Stevens, writing for himself and Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer dissented, advocating a position consistent with sustainability. For that conclusion, the dissenters relied principally on ESA Section 7’s express application to “all federal agencies” for all “actions authorized, funded or carried out by them,” and the broad reading of the statute dating back to *Tennessee Valley Authority v. Hill*.⁵⁶

HABITAT

In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*,⁵⁷ the Supreme Court reversed the Ninth Circuit and held 5-1-3 that when the U.S. Army Corps of Engineers issues a Section 404 permit under the Clean Water Act it displaces otherwise applicable new source performance standards that EPA applies to pollutant discharges subject to a Section 402 permit.⁵⁸ This has the effect of eliminating freshwater lake habitat, and diminishing sustainability.

Coeur Alaska, Inc. sought to open a new gold mine about forty-five miles north of Juneau, dubbed the “Kensington Gold Mine,” adjacent to Lower Slate Lake, a “water of the U.S.” in the Tongass National Forest. The Kensington Mine would use the froth flotation process, producing over the life of the project about one million ounces of gold and 4.5 million tons of waste tailings in the form of waste mill slurry. Coeur Alaska hoped to discharge the slurry into Lower Slate Lake, the most economically advantageous option. The slurry would consist of about 45 percent water and 55 percent froth flotation mill tailings. Eventually the mine would produce enough slurry to fill the more than 50-foot depth of Lower Slate Lake, thus converting the 23 acre lake into a 60 acre impoundment. It was undisputed that this would “destroy the lake’s small population of common fish ...” and other plant and animal life.⁵⁹

Upholding the Corps’ and petitioner’s less environmentally protective interpretation, the Court ruled that pollutants that have the effect of changing the bottom elevation of a body of water may be regulated as “fill material” instead of “pollutant discharges” subject to new source performance standards. Consequently, the Court held that EPA has jurisdiction to issue Section 402 permits for discharges into waters except to the extent that the Corps regulates the permits to constitute a disposal of “dredge or fill material” under Section 404.

Coeur Alaska pits the Clean Water Act’s two principal permitting provisions against one another. On the one hand, the act

prohibits the “discharge of any pollutant” except in compliance with a permit issued under Section 402, including new source performance standards for categories and classes of pollutant discharges such as “froth flotation mills” here. Froth flotation is a process in which raw ore material is ground into fine gravel and mixed in slurry with chemicals whereby pebbles of desired metal float to the surface for capture and processing. The polluted “waste mill tailings,” laden with mercury, lead, and other hazardous heavy metals, however, sink to the bottom, destined for disposal on land, or as in this case, in a nearby body of water. EPA’s new source performance standards prohibit discharges from froth flotation mills.

On the other hand, the Clean Water Act also prohibits the “discharge of dredge or fill material” except in compliance with a permit issued under Section 404. The Corps administers and issues permits under Section 404 in most States, including Alaska. In 2002, EPA and the Corps issued joint regulations defining “fill material” as that which “has the effect of changing the bottom elevation” of a water of the U.S., including mining slurry.⁶⁰ “Fill material” includes “slurry, or tailings, or similar mining-related materials.”⁶¹ Thus, the requirements of the act’s two permitting schemes potentially converge if discharge of a pollutant, such as waste slurry mill tailings, also has the effect of raising the bottom elevation of an affected water body.

Because the slurry would have the “effect of raising the bottom elevation” of Lower Slate Lake, Coeur Alaska sought a Section 404 permit from the Corps. The Corps accepted jurisdiction, finding that the slurry would be “fill material” instead of a prohibited “pollutant discharge” from froth flotation mills under EPA’s New Source Performance Standards (“NSPS”) rules. It then issued the Section 404 permit, determining that discharging the tailings into Lower Slate Lake and eventually converting it into an impoundment, was the least environmentally damaging disposal option and was a preferable environmental alternative to filling adjacent wetlands. Contending that all this constituted an end run around Section 402 and the applicable zero discharge NSPS, Southeast Alaska Conservation Council sued to enjoin the Corps from issuing the Section 404 permit.

The Federal District Court in Alaska rejected the Southeast Alaska Conservation Council’s position. It held that unlike with Section 402 permits, new source performance standards do not explicitly apply to Section 404 permits. Therefore, EPA’s rule barring froth flotation discharges did not apply once the Corps assumed jurisdiction.

The Ninth Circuit reversed, holding that “§ 404’s silence regarding the explicit and detailed requirements [that apply to § 402] cannot create an exception to those sections’ strongly worded blanket prohibitions.”⁶²

Notwithstanding the United States’ opposition, the Supreme Court granted Coeur Alaska’s writ of *certiorari*. The United States then joined as a petitioner.

The Supreme Court reversed the Ninth Circuit 5-1-3. Kennedy, writing for the Court, upheld the Corps’ interpretation of the Clean Water Act. First, instead of reviewing the Corps’ interpretation under *Chevron*,⁶³ Kennedy applied the more searching

*Mead*⁶⁴ standard of review because, he found, the Corps' interpretation was not intended to be formal. Nonetheless, Kennedy upheld the Corps' interpretation of the Clean Water Act, finding persuasive the argument that it does not unambiguously apply NSPS to permits issued under Section 404.

Second, Justice Kennedy held that the Corps properly issued the Section 404 permit. He observed that "if the tailings did not go into the lake, they would be placed on nearby wetlands [and] . . . would destroy dozens of acres of wetlands."⁶⁵ Moreover, the Section 404 permit required Coeur Alaska to cover what used to be Lower Slate Lake with about four inches of "native material," thereby in his view improving the local environment for wildlife habitat and repopulation.⁶⁶

Justice Ginsburg dissented, joined by Stevens and Souter, reasoning that the majority's reading of the statute "strained credulity" and creates a "loophole" to NSPS: "A discharge of a pollutant, otherwise prohibited by firm statutory command, becomes lawful if it contains sufficient solid matter to raise the bottom of a water body, transformed into a waste disposal facility. Whole categories of regulated industries can thereby gain immunity from a variety of pollution-control standards."⁶⁷

Justice Ginsburg's dissent conjured principles of sustainability, observing that it was undisputed that the Section 404 permit, if granted, would "kill all the fish and wildlife" of the lake, possibly permanently as repopulation was "uncertain."⁶⁸

Justice Breyer concurred in the judgment, believing that too literal an application of NSPS or too narrow an interpretation of "fill" or "dredge material" would undermine the purpose of the statute, and with it, some degree of sustainability.⁶⁹

NATIONAL FORESTS

In *Summers v. Earth Island Institute*,⁷⁰ the Supreme Court reversed the Ninth Circuit and held 5-4 that plaintiffs must establish, with affidavits, knowledge of future injuries to use of specific tracks of soon to be harvested national forest land to demonstrate sufficient "concrete and particularized" injury so as to satisfy constitutional standing under Article III,⁷¹ thus having the effect of diminishing sustainability.

The Decision Making and Appeals Reform Act requires the U.S. Forest Service to provide advance notice and an opportunity for comment and appeals processes regarding land and timber management decisions for national forests under the Forest and Rangeland Renewable Resource Planning Act.⁷² The Forest Service issued rules that provide a "categorical exclusion" for activities that in the aggregate do not significantly affect the quality of the human environment and do not trigger the need for either an environmental assessment or an environmental impact statement under NEPA.⁷³

The Forest Service subsequently determined that "fire rehabilitation" timber efforts involving less than 4,200 acres, or "timber salvage" involving less than 250 acres, fall within this categorical exclusion, including a timber salvage sale of 238 acres in the Burnt River Project, an area affected by large fires that swept through the Sequoia National Forest in California in 2002.⁷⁴

Earth Island challenged both the timber salvage sale for the Burnt Ridge Project in particular and the Forest Service's categorical exemption rule in general. The parties subsequently settled the action challenging the Burnt Ridge Project, but pressed ahead on the legality of the underlying rule as applied nationwide to "many thousands of small parcels."⁷⁵ Siding with Earth Island, the district court blocked the application of the rule.⁷⁶

The Ninth Circuit affirmed, ruling that the Forest Service must allow the public to contest internal administrative decisions on small timber-clearing projects such as the Burnt Ridge timber sale.⁷⁷

Without reaching the merits, the Supreme Court held by another bare majority that Earth Island lacked standing to challenge the application of the rule nationwide, and dismissed the case.

Writing for the majority, Justice Scalia held that Earth Island did not possess any injury in fact because it had voluntarily settled the portion of the lawsuit pertaining to its only member who suffered any injury that was "concrete and particularized."⁷⁸ The settlement agreement already fully addressed the procedural injury alleged by one member who had visited the project site with plans to return: "[W]e know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action."⁷⁹ The majority explained that Earth Island "identified no other application of the invalidated regulations that threatens imminent and concrete harm" to any of its members who planned to visit sites where the rules were to be applied.⁸⁰

Justice Scalia also rejected standing for another affiant who stated that he had been a long time visitor of Forest Service sites and would continue to visit sites, some of which would be subject to the rule. He wrote that the "vague desire to return is insufficient to satisfy the requirement of imminent injury: Such someday intentions—without any description of concrete plans, or indeed any specification of when the someday will be—do not support a finding of the actual or imminent injury that our cases require."⁸¹

Justice Breyer dissented, joined by Stevens, Souter, and Ginsburg, arguing in favor of a position more consistent with sustainability. He noted that the majority's conclusion is "counterintuitive" because a programmatic failure to provide notice, opportunity for comment, and appeal would eventually and inevitably cause members to suffer concrete injury.⁸² "To know, virtually for certain, that snow will fall in New England this winter is not to know the name of each particular town where it is bound to arrive," Justice Breyer wrote.⁸³ "The law of standing does not require the latter kind of specificity. How could it?"⁸⁴ In particular, he noted that a "threat of future harm may be realistic even where the plaintiff cannot specify precise times, dates and GPS coordinates."⁸⁵

Justice Breyer also questioned whether the result is consistent with precedent respecting standing for future harm in the global warming context: "[W]e recently held that Massachusetts has *standing* to complain of a procedural failing, namely, EPA's

failure properly to determine whether to restrict carbon dioxide emissions, even though that failing would create Massachusetts-based harm which (though likely to occur) might not occur for several decades.”⁸⁶

CLEANING UP TOXIC SITES

In *Burlington Northern v. United States*,⁸⁷ the Court reversed the Ninth Circuit and held 8-1 that liability as an “arranger” under the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”) requires more than knowledge of chemical spillage; one must intend or plan to arrange for the disposal at issue. In addition, it held that CERCLA does not impose joint and several liability when there is a “reasonable basis” to apportion liability.⁸⁸ Neither result promotes sustainability.

In *Burlington Northern*, a now defunct company called Brown & Bryant (“B&B”) once owned and operated a plant that stored and distributed agricultural chemicals on land owned in part by predecessors to petitioners Burlington Northern and Union Pacific Railroad (“railroads”). B&B obtained some of its chemicals, including D-D pesticide, from the Shell Oil Company (“Shell”). Shell would deliver the chemicals by truck for transfer into large storage tanks onsite. Spills sometimes occurred during delivery, and the tanks leaked, leading to substantial soil and groundwater contamination.

Eventually EPA and the State of California investigated, responded, and then filed suit under CERCLA Section 107(a) against B&B, Shell, and the railroads as “potentially responsible parties” for the costs of feasibility studies and response action.

The district court found the railroads liable as owners “at the time of disposal,” and Shell liable as a “person who . . . arranged for disposal.” The Court, however, declined to hold the parties subject to joint and several liability. Instead, it found liability to be subject to equitable apportionment and set the railroads’ and Shell’s liability at nine and six percent, respectively, which had the effect of limiting the government’s recovery by about eighty-five percent.

The Ninth Circuit affirmed on liability but reversed on apportionment. First, it held that although Shell did not qualify as a “traditional arranger,” it could still be held liable under a “broader category” if the disposal was a known or foreseeable by-product of the transaction.⁸⁹ Second, it reversed the lower court’s apportionment of liability. The Ninth Circuit instead held that CERCLA intends for the government to recover full response costs against targeted parties, envisioning subsequent civil actions by them against additional potentially responsible parties for contribution.⁹⁰

The Supreme Court reversed the Ninth Circuit 8-1 at both turns, finding Shell had not “arranged for disposal,” and that

joint and several liability is not required when it is practicable to apportion liability. Writing for the Court, Justice Stevens maintained that “it is . . . clear that an entity could not be held liable as an arranger merely for selling a new and useful product if the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination.”⁹¹ In other words, “arrange” implies action directed to a specific purpose. Thus, under the statute, “an entity may qualify as an arranger . . . when it takes intentional steps to dispose of a hazardous substance.”⁹² Arranging for disposal must involve the purpose of discarding a “used and no longer useful hazardous substance.”⁹³ Stevens acknowledged that determining the

arranger’s purpose could involve a “fact-intensive inquiry.”⁹⁴

Rejecting the Ninth Circuit’s analysis, the Court found Shell had not arranged for disposal: “. . . Shell must have entered into the sale of D-D with the intention that at least a portion of the product to be disposed of during the transfer process by one or more of the methods described.”⁹⁵ Thus, Justice Stevens concluded, Shell was

not liable as an arranger under CERCLA because it did not “intend” for its chemicals to be released into the environment, even though it knew it was delivering its product to a sloppy operator.⁹⁶

The Court also held that joint and several liability does not apply when reasonable apportionment is practicable and upheld the district court’s initial allocation of liability.⁹⁷

Justice Ginsburg again urged a position more consistent with sustainability. She argued in dissent that Shell had arranged for disposal because it exercised “the control rein” over delivery of the D-D pesticide, specifying transportation and storage features that resulted in “inevitable” spills and leaks.⁹⁸ Indeed, Justice Ginsburg observed, “[t]he deliveries, Shell was well aware, directly and routinely resulted in disposals of hazardous substances through spills and leaks for more than [twenty years].”⁹⁹ Shell arranged to have its chemicals shipped by bulk tank truckload stored in bulk storage facilities instead of shipping drums.¹⁰⁰ Shell knew that spills occurred during every delivery.¹⁰¹ It also knew about “numerous tank failures and spills as the chemical rusted tanks and eroded valves.”¹⁰²

Justice Ginsburg was troubled by the blind eye arrangers may now turn to chemical transport and storage, emboldened by the court’s decision: “The sales of useful substances [does not] exonerate Shell from liability, for the sales necessarily and immediately resulted in the leakage of hazardous substances.”¹⁰³ She questioned the Court’s dismissal of joint and several liability, noting that the lower court “undertook an heroic labor” by apportioning costs without the benefit of briefing—indeed, without even a request to apportion—by the parties.¹⁰⁴

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On the other hand, the Court has issued recent opinions in this context that seem more consistent with sustainability. In *United States v. Atlantic Research Corp.*,¹⁰⁵ the Court unanimously ruled that under CERCLA Section 107(a) private parties not subject to an enforcement action who incurred “other necessary response costs” may seek cost recovery claims against “any other person,” including the Federal Government. At issue in *Atlantic Research* was whether such a Potentially Responsible Party (“PRP”) may recover costs from other PRPs under CERCLA Section 107(a) instead of 113(f).¹⁰⁶ Likewise, in *Cooper Industries, Inc. v. Aviall Services, Inc.*, the Court held CERCLA does not allow private parties who have voluntarily cleaned up contaminated property but who have not been the subject of an EPA enforcement action to recover “contribution” costs from other responsible parties under CERCLA Section 113(f).¹⁰⁷

WASTE FLOW CONTROL

The Court recently revisited its dormant commerce clause jurisprudence in a way that is more consistent with sustainability. It upheld a county flow control ordinance that requires all solid waste generated within the county to be delivered to a publicly owned county waste processing facility. In *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*,¹⁰⁸ the Court decided that a county’s flow control ordinance does not violate the dormant commerce clause. Chief Justice Roberts, for a plurality, applied the *Pike* balancing test and determined that the ordinance does not violate the dormant commerce clause because it creates at least “minimal” local benefits that outweigh whatever “insubstantial” differential burden it may place on interstate commerce: “[W]e uphold these ordinances because any incidental burden they may have on interstate commerce does not outweigh the benefits they confer on the citizens of Oneida and Herkimer counties.”¹⁰⁹ The Court rejected the interstate waste hauling companies’ argument that the ordinance is per se invalid as economically protectionist under *Philadelphia v. New Jersey*.¹¹⁰ The companies argued that under *C & A Carbone, Inc. v. Town of Clarkstown*,¹¹¹ government instrumentalities may not “hoard wastes” regardless of whether the “preferred processing facility” is owned by a public entity arguably within the “market participant exception” to the dormant commerce clause. The plurality disagreed, finding the public/private distinction is “constitutionally significant.” Breathing judicial restraint the Court observed: “there is no reason to step in and hand local businesses a victory they could not obtain through the political process.”¹¹²

POLLUTION EMISSIONS

Two cases decided by the Roberts’ Court look to future and past application of the Clean Air Act and reach results that promote sustainability to some degree.

CLIMATE CHANGE

In the Court’s initial foray into the global climate change imbroglio, the Court decided in *Massachusetts v. EPA*,¹¹³ that Title II of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles that “endanger” public health or welfare, thereby promoting sustainable air emissions and energy policy. In this case, the Commonwealth of Massachusetts and a litany of mostly downwind “blue” States and environmental organizations contended that EPA improperly exercised its discretion in denying petition by several States calling for rulemaking to regulate carbon dioxide and three other

greenhouse gas emissions—methane, nitrous oxide, and hydrofluorocarbons—from new motor vehicles under Title II of the Clean Air Act. Section 202(a)(1) of the Act directs EPA to regulate tailpipe emissions that (1) “in his judgment” (2) “may reasonably be anticipated to endanger public health or welfare.” Massachusetts et al. maintained both prongs had been met. EPA argued that the Clean Air Act does not authorize it to regulate emissions to address global climate change and that it has discretion not to regulate based on policy considerations, including foreign policy.¹¹⁴

The Court decided three issues. First, that petitioners (namely, Massachusetts) demonstrated standing under Article III of the U.S. Constitution to challenge EPA’s inaction. The Court held that States enjoy “special solicitude” in demonstrating standing. Second, the Court held that greenhouse gas emissions constituted an “air pollutant” under the Clean Air Act’s “capacious definition of air pollutant.” Last, it held that EPA “offered no reasoned explanation” and that it was arbitrary and capricious for the agency to refuse to decide whether these emissions “endanger public health and welfare” due to policy considerations not listed in the Clean Air Act, mainly foreign policy.¹¹⁵

In dissent, Roberts questioned Stevens’ “state solicitude” standard as an “implicit concession that petitioners cannot establish standing on traditional terms.” Scalia thought the Court should have deferred to EPA in what he says is a “straightforward administrative-law case,” and that it had “. . . no business substituting its own desired outcome for the reasoned judgment of the [EPA].”¹¹⁶

So perhaps the reason sustainability doesn't exist in the U.S. Supreme Court is the simplest: it has yet to be presented to the Court.

NEW SOURCE REVIEW

In the other Clean Air Act case decided the same day, *Environmental Defense v. Duke Energy Corp.*,¹¹⁷ the Court unanimously held that EPA by regulation could define the word “modification” differently for different parts of the Clean Air Act, thereby potentially reducing pollutant emissions and promoting sustainability. The case asks whether the term as applied to an existing Major Emitting Facility under the Prevention of Significant Deterioration (“PSD”) aspect of the Clean Air Act refers to “increases” in emission *annual quantity* or *hourly rates*. For the Court, Souter wrote that EPA does not need to harmonize the two regulatory interpretations of the same term. He said it was reasonable for EPA to interpret the term “modification” differently in different parts of the statute.¹¹⁸

EPA initially had interpreted the term “modification” to require New Source Review for any operational or facility changes that result in “increases” in net annual emissions. Duke Energy contended instead that “modification” under the PSD program requires an “increase” in hourly emission rates—as EPA interprets the term under the New Source Performance Standards aspect of the Act—but does not reach increased hours of operation and increased annual emissions, and the U.S. Court of Appeals for the Fourth Circuit agreed. Along the way, EPA aligned with Duke Energy’s interpretation.

Interestingly, only intervenor Environmental Defense sought review. Ironically, EPA initially opposed review, only to rejoin Environmental Defense after the Court granted *certiorari*, then joining Duke Energy’s interpretation of the Clean Air Act as applied to future rulemaking. Environmental Defense agreed with EPA’s initial interpretation of the Clean Air Act. *Duke Energy* is notable insofar as it marks the first time since *Sierra Club v. Morton*¹¹⁹ that the Court granted review over the Federal Government’s opposition, at the exclusive request of an environmental organization who does not enjoy support from a State, as in *Massachusetts v. EPA*. In the vast majority of environmental cases the Court grants review at the behest of State or industrial petitioners who argue for more constrained application or interpretation of an environmental law. Moreover, past experience demonstrates that when the Court grants *certiorari* in a case with an environmental group, it nearly always rules against the group. *Duke Energy* also is perhaps the only case where EPA opposed a parties’ petition for review only to rejoin it after the Court granted *certiorari*, but then only to stake a legal position opposing its original legal position (“increase” in amount, not rate) and that of co-plaintiff (Environmental Defense), the petitioner.

DISCUSSION

The Court’s environmental cases do not engage sustainability. If anything, they reveal more about its jurisprudential ideologies than any environmental jurisprudence and invite five observations. First, the surfeit of sustainability tinged cases does not necessarily reveal anything about judicial receptiveness to the concept of sustainability. Rather, these cases are a surrogate for the jurisprudential ideologies of the Court’s conservative wing to curtail federal power, promote State’s rights, and protect

private property rights. If anything, Chief Justice Roberts, and Justices Alito, Scalia, and Thomas seem to reject principles of sustainability, except when it becomes a matter of State’s rights. Yet curiously when the State’s interest is to protect rather than develop land and environment, such as shoreline loss due to global climate change, these same justices wonder aloud how it can be that the State has a sufficient interest to protect. All this seems counterintuitive because sustainability is a quintessentially “conservative” position insofar as it counsels conservation and careful consideration of externalized social costs.

Justices Ginsburg and Stevens seem to be much more receptive to notions of sustainability. They argue in favor of greater consideration of the environmental consequences. Justice Sotomayor may be cut from the same cloth, having written the opinion while sitting on the Second Circuit that the Supreme Court later reversed in *Entergy*.

Nonetheless, as Justice Kennedy’s decisions go in cases implicating sustainability, so goes the Court. Justice Kennedy voted with the majority—or perhaps more accurately the majority voted with him—in each case that implicates sustainability. Justice Kennedy almost always votes in a manner that does not promote sustainability.

Second, the Court may just consider the concept of sustainability to be unworkable. The United States lacks “sustainability law” *per se*, so it is not surprising that the Court has failed to engage sustainability law *per se*. “Sustainability” does not invite facile definition or judicially cognizable guidelines. In some ways, sustainability seems consigned to the elected branches. Indeed, most of the environmental cases that arguably invoke sustainability place a premium on arguments cloaked in statutory “plain meaning.” In *Atlantic Research*, the Court unanimously found that CERCLA Section 107’s reference to “any other person,” allows cost recovery, indeed, by other PRPs. This is likely to allow courts to turn to the merits in myriad CERCLA private cost recovery actions working their way through the federal system. The same plain meaning thread weaves its way through *Duke Energy*, in which the Court gave EPA wide latitude to interpret “modification.” *Duke Energy*’s ripple effect looms large, as it potentially subjects more than 100 of the nation’s largest and eldest coal-fired power plants, and hundreds of other existing major emitting facilities, including cement kiln plants, coke ovens, minerals and metals processors, and petrochemical processors, located in Prevention of Significant Deterioration areas, to New Source Review.

Likewise, plain meaning ruled, although only by the slimmest of margin, in both *Massachusetts v. EPA* and *National Ass’n of Home Builders*. In *Massachusetts v. EPA*, the Court promoted the plain meaning of “air pollutant” to include climate changing gases and that EPA does not have discretion to refuse to regulate pollutants that “*may reasonably be anticipated to endanger public health or welfare.*”

In *National Ass’n of Home Builders*, the Court used plain meaning in support of elevating the Clean Water Act’s meaning over that of the Endangered Species Act. Section 402(b) of the Clean Water Act provides “[EPA] *shall approve* a [state’s

NPDES program] *unless he determines that adequate authority does not exist.*” The Court was divided 5-4, however, about whether the language at issue in these cases is in fact “plain.” Indeed, Justice Alito’s opinion in *National Ass’n of Home Builders* arguably ignores the “plain meaning” of a provision of a more specific and subsequently enacted statutory provision. Section 7(b) of the ESA provides that: “[e]ach Federal agency shall, in consultation with [federal wildlife agencies] insure that any [agency action] authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species [or their habitat].”

Fourth, the Court’s judicial capacity does not invite consideration of sustainability. Article III of the U.S. Constitution grants federal courts authority to resolve “cases” and “controversies” involving the Constitution, laws of the United States, or treaties. Sustainability falls into none of these categories. Sustainability is a guiding principle, not a constitutionally enshrined doctrine. No U.S. law requires or even recognizes sustainability. And, the United States has not ratified an international treaty that does so either. Moreover, no member of the Court studied environmental law. None of them have much if any practical experience with environmental law in general, and sustainability in particular. And while some members have regulatory experience, none of the current members have held elected political office, often the crucible for implementing sustainability. So to the members of the Court, sustainability is unnoticed.

Finally, and surprisingly, sustainability—even as a governing principle—isn’t the subject of advocacy before the Court. Supreme Court litigants of every persuasion—government, private, public interest, whomever—ignore sustainability too. As far as I can tell, no party in any environmental (or any other case for that matter) has bothered to invoke “sustainability” in a pleading, brief, or argument.¹²⁰ Even *amici*, with much wider latitude to advocate policy positions not at issue in any claim, defense or “Question Presented,” have yet to argue that the Court consider sustainability.¹²¹ So perhaps the reason sustainability doesn’t exist in the U.S. Supreme Court is the simplest: it has yet to be presented to the Court.

Thus, sustainability remains a concept in search of law subject to review by the U.S. Supreme Court. Without a plain

meaning foothold, therefore, sustainability does not seem to exist.

CONCLUSION

Early returns suggest that environmental cases hold interest for the Roberts Court. It already has decided about a dozen core environmental cases in three years, almost three times the rate during the Burger and Rehnquist Courts. Yet, sustainability seems to matter not at all. The Court accepted the business/industry position in *Entergy*, *Coeur Alaska*, and *Burlington Northern*, and the government’s less environmentally protective position in *Summers* and *Winter*. In *Home Builders*, it held that EPA’s delegation to a State of an environmental permitting program under the Clean Water Act does not trigger “consultation” under the Endangered Species Act.

The Court seems to be especially interested in reversing sustainability reinforcing decisions out of the Ninth Circuit. Indeed, it reversed each of the four cases from that circuit for which it granted review, cases where the Ninth Circuit arguably agreed with the pro-sustainable result. It also reversed a Second Circuit opinion that arguably produced an outcome more consistent with sustainability.

There are some counterexamples. In *Massachusetts v. EPA*, the Court held that Title II of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles that “endanger” public health or welfare. In *Duke Energy*, it held that EPA by regulation could define the word “modification” differently, and more stringently, in different parts of the Clean Air Act. In *Oneida*, a plurality concluded that a county’s flow control ordinance—requiring that all solid waste generated within the county to be delivered to the county’s publicly owned solid waste processing facility—does not violate the dormant commerce clause. In *Atlantic*, it found that under CERCLA Section 107(a) private parties not subject to an enforcement action who incur “other necessary response costs” may seek cost recovery claims against “any other person,” including the Federal Government. Each result arguably promotes sustainability.

In sum, the Court seems at worst hostile to, at best agnostic about, and most likely ignorant of sustainability as a governing principle. 

Endnotes: Not at All: Environmental Sustainability in the Supreme Court

¹ United Nations Conference on the Human Environment, *Declaration on the Human Environment*, U.N. Doc. A/CONF.48/14 Corr. 1 (June 16, 1972).

² World Commission on Environment and Development, *Our Common Future*, U.N. Doc. A/42/427 (1987).

³ *Id.* at 8.

⁴ United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/5/Rev. 1 (June 5-16, 1992), [hereinafter *Rio Declaration*].

⁵ United Nations Conference on Environment and Development, *Agenda 21*, U.N. Doc. A/CONF.151/PC/100/Add. 1 (June 14, 1992) [hereinafter *Agenda 21*].

⁶ See AGENDA FOR A SUSTAINABLE AMERICA 2-3 (John C. Dernbach ed., *Env’tl. L. Inst.* 2009).

⁷ See, e.g., RANEE K.L. PANJABI, *THE EARTH SUMMIT AT RIO: POLITICS, ECONOMICS, AND THE ENVIRONMENT* 17 (Northeastern Univ. Press 1997) (describing how the Earth Summit in Rio led to a new global consciousness of sustainability in treaty making).

Endnotes: Not at All: Environmental Sustainability in the Supreme Court *continued on page 81*

⁸ See, e.g., Mike Berry & Anitra Nelson, *Steering Sustainability: What, When, and Why*, in *STEERING SUSTAINABILITY IN AN URBANIZING WORLD: POLICY PRACTICE AND PERFORMANCE* 1, 2-3 (Anitra Nelson ed., 2007) (explaining the national policy and reform considerations behind urban sustainability); James R. May, *The North American Symposium on the Judiciary and Environmental Law: Constituting Fundamental Environmental Rights Worldwide*, 23 *PACE ENVTL. L. REV.* 113, APPENDIX B (2005/2006) (listing countries that have constitutionally entrenched environmental policies as governing principles, some including sustainability).

⁹ See, e.g., Virginia MacLaren et al., *Engaging Local Communities in Environmental Protection with Competitiveness: Community Advisory Panels in Canada and the United States*, in *SUSTAINABILITY, CIVIL SOCIETY AND INTERNATIONAL GOVERNANCE* 31, 36 (John J. Kirton & Peter I. Hajnal eds., 2006) (examining examples of Community Advisory Panels in the United States and Canada and how they affect sustainability in the communities).

¹⁰ See, e.g., Isabelle Biagiotti, *Emerging Corporate Actors in Environment and Trade Governance: New Vision and Challenge for Norm-setting Processes*, in *PARTICIPATION FOR SUSTAINABILITY IN TRADE* 121, 122 (Sophie Thoyer & Benoit Martimort-Asso eds., 2007) (describing how global corporations are focusing more on environmental sustainability).

¹¹ See generally James R. May, *Of Development, daVinci and Domestic Legislation: The Prospects for Sustainable Development in Asia and its Untapped Potential in the United States*, 3 *WIDENER L. SYMP. J.* 197 (1998).

¹² See Roslyn Higgins, *Natural Resources in the Case Law of the International Court*, in *INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT* 87, 111 (Alan Boyle & David Freestone, eds., 1999) (using the International Court of Justice to highlight environmental sustainability in international courts and other arenas).

¹³ See generally James R. May, *U.S. Supreme Court Environmental Cases 2008-2009: A Year Like No Other*, 40 *Env't Rep.* (BNA), No. 36, at 2154 (Sept. 11, 2009); James R. May, *U.S. Supreme Court Decisions: Review for 2006-2007 and Outlook*, 38 *Env't Rep.* (BNA), No. 34, at 1851 (Aug. 24, 2007). See also, *Constitutional Law: 2008 Annual Report*, in *ENVIRONMENT, ENERGY, AND RESOURCES LAW: THE YEAR IN REVIEW 2008* 349 (ABA Section of Env't, Energy & Resources 2009) (survey of environmental cases); James R. May, *Constitutional Law: 2007 Annual Report*, in *ENVIRONMENT, ENERGY, AND RESOURCES LAW: THE YEAR IN REVIEW 2008* 349 (ABA Sec. of Env't, Energy & Resources 2008).

¹⁴ See Richard Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 *UCLA L. REV.* 703, 708 (2000) (estimating the Court decided more than 240 environmental law cases between 1969 and 2000); see also, James R. May, *The Intersection of Constitutional Law and Environmental Litigation*, in *ENVIRONMENTAL LITIGATION: LAW AND STRATEGY* 359 (Cary R. Perlman ed., ABA 2009) (number approaching 300); James R. May & Robert L. Glicksman, *Justice Rehnquist and the Dismantling of Environmental Law*, 36 *Envtl. L. Rep.* 10585 (2006).

¹⁵ In 2009, Associate Justice Sonia Sotomayor replaced David Souter.
¹⁶ *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008).

¹⁷ *Id.* at 367.

¹⁸ *Natural Res. Def. Council v. Winter*, 518 F.3d 658 (9th Cir. 2008).

¹⁹ *Winter*, 129 S. Ct. at 375.

²⁰ *Id.* at 374.

²¹ *Id.* at 380.

²² *Id.* at 381.

²³ *Id.* at 378.

²⁴ *Id.* at 370.

²⁵ *Id.*

²⁶ *Id.* at 371.

²⁷ *Id.* at 378.

²⁸ *Id.* at 380.

²⁹ *Id.* at 370, 378.

³⁰ *Id.* at 378.

³¹ *Id.* at 374.

³² *Id.* at 393 (Ginsberg, J., dissenting).

³³ *Id.* at 392.

³⁴ *Id.* at 393.

³⁵ *Id.* at 386-87 (Breyer, J., concurring in part and dissenting in part).

³⁶ *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009).

³⁷ *Id.* at 1510.

³⁸ 33 U.S.C. § 1326(b).

³⁹ 129 S. Ct. at 1505-06.

⁴⁰ *Id.* at 1506.

⁴¹ *Id.* at 1508.

⁴² *Id.*

⁴³ *Id.* at 1516 (Stevens, J., dissenting).

⁴⁴ *Id.* at 1517-18.

⁴⁵ *Id.* at 1519.

⁴⁶ *Id.* at 1517.

⁴⁷ *Id.* (quoting *Whitman v. Am. Trucking Assn's*, 531 U.S. 457, 467-68 (2001) (Scalia, J.)).

⁴⁸ See *Id.* at 1516.

⁴⁹ *Id.* at 1512 (Breyer, J., concurring).

⁵⁰ *Id.* at 1513 (quoting 118 Cong. Rec. 33693 (1972)).

⁵¹ See *Id.*

⁵² *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007).

⁵³ *Id.* at 649.

⁵⁴ *Id.*

⁵⁵ *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004).

⁵⁶ *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).

⁵⁷ *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458 (2009).

⁵⁸ *Id.* at 2463.

⁵⁹ *Id.* at 2463-64.
⁶⁰ See 40 C.F.R. § 440.104(b)(1); 33 C.F.R. § 323.2(e).
⁶¹ 40 C.F.R. § 232.2.
⁶² See *Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 647 (9th Cir. 2007).
⁶³ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
⁶⁴ *United States v. Mead Corp.*, 533 U.S. 218 (2001).
⁶⁵ 129 S. Ct. at 2465.
⁶⁶ *Id.*
⁶⁷ *Id.* at 2483.
⁶⁸ *Id.* at 2480, n.1.
⁶⁹ See *Id.* at 2477-78.
⁷⁰ *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009).
⁷¹ *Id.* at 1149-53.
⁷² *Id.* at 1147.
⁷³ *Id.*
⁷⁴ *Id.* at 1147-48.
⁷⁵ *Id.* at 1148.
⁷⁶ *Earth Island Inst. v. Pengilly*, 376 F. Supp.2d 994 (E.D. Cal. 2005).
⁷⁷ *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 697-98 (9th Cir. 2007).
⁷⁸ 129 S. Ct. at 1149-50.
⁷⁹ *Id.*
⁸⁰ *Id.* at 1150.
⁸¹ *Id.* at 1150-51.
⁸² *Id.* at 1154.
⁸³ *Id.* at 1157.
⁸⁴ *Id.*
⁸⁵ *Id.* at 1156.
⁸⁶ *Id.* (citing *Massachusetts v. EPA*, 549 U.S. 497, 522-23 (2007)) (emphasis in original).
⁸⁷ *BNSF Ry. Co. v. United States*, 129 S. Ct. 1870 (2009).
⁸⁸ *Id.* at 1881.
⁸⁹ *Id.* at 1877.
⁹⁰ *Id.*
⁹¹ *Id.* at 1878.
⁹² *Id.* at 1879.
⁹³ *Id.* at 1878.
⁹⁴ *Id.* at 1879.
⁹⁵ *Id.* at 1880.
⁹⁶ *Id.* at 1878-79.
⁹⁷ *Id.* at 1882-83.

⁹⁸ *Id.* at 1885 (Ginsberg, J., dissenting).
⁹⁹ *Id.*
¹⁰⁰ *Id.*
¹⁰¹ *Id.*
¹⁰² *Id.*
¹⁰³ *Id.*
¹⁰⁴ *Id.*
¹⁰⁵ *United States v. Atl. Research Corp.*, 127 S. Ct. 2331 (2007).
¹⁰⁶ See also *E.I. du Pont de Nemours & Co. v. United States*, 551 U.S. 1129 (2007).
¹⁰⁷ *Cooper Indus. v. Aviall Servs.*, 543 U.S. 157 (2004).
¹⁰⁸ *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007).
¹⁰⁹ *Id.* at 334.
¹¹⁰ *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).
¹¹¹ *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).
¹¹² 550 U.S. 330 at 332.
¹¹³ *Massachusetts v. EPA*, 549 U.S. 497 (2007).
¹¹⁴ *Id.* at 533, 534.
¹¹⁵ *Id.* at 501.
¹¹⁶ *Id.* at 560.
¹¹⁷ *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007).
¹¹⁸ *Id.* at 576.
¹¹⁹ *Sierra Club v. Morton*, 405 U.S. 727 (1972).
¹²⁰ Based on the author's search of cases, briefs, and transcripts of the search terms "sustainability," "sustainable development," and "ecologically sustainable development," on Westlaw (last searched Nov. 9, 2009), and on the U.S. Supreme Court database, <http://www.supremecourtus.gov/> (last visited Nov. 9, 2009).
¹²¹ One amicus brief makes a passing reference to "sustainability." Brief of economists Frank Ackerman, et al. as Amici Curiae in Support of Respondents at 14, *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009) (Nos. 07-588, 07-589, 07-597) ("When such goals are recognized as politically- or normatively-imposed constraints, economic theory evaluates them under frameworks that are analytically distinct from conventional cost-benefit optimization. For instance, an extensive economic literature exists analyzing environmental and natural resource decisionmaking under "sustainability" or "safe minimum standard"). Other than incorporation of the word "sustainable" in corporate titles or mission statements in briefs filed before the Court, this is the sole tenable reference found to the word "sustainability," "sustainable development," "ecologically sustainable development," and like phrases.