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April 12, 2008

Give a Hoot, Don't Pollute: The Roberts Court and the Environment

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Give a Hoot, Don't Pollute: The Roberts Court and the Environment

David Schultz¹

Introduction

Analysis and predictions on the jurisprudential direction of the Roberts Court have thus far produced articles examining its possible impact on several areas of law including education,² the right to privacy,³ property rights,⁴ substantive due process,⁵ business,⁶ election law,⁷ administrative law,⁸ campaign finance,⁹ and sentencing policy.¹⁰ There was even an overall

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² William E. Thro, *An Essay: the Roberts Court at Dawn: Clarity, Humility, and the Future of Education Law*, 222 ED. LAW REP. 491 (2007).

³ John D. Castiglione, *Hudson and Samson: the Roberts Court Confronts Privacy, Dignity, and the Fourth Amendment*, 68 LA. L. REV. 63 (2007).

⁴ Steven J. Eagle, *The Roberts Court and Property Rights: a Look into the Crystal Ball*, SM040 ALI-ABA 111 (2007).

⁵ John F. Basiak, Jr., *The Roberts Court and the Future of Substantive Due Process: the Demise of "Split-the-difference" Jurisprudence*, 28 WHITTIER L. REV. 861 (2007).

⁶ Kenneth W. Starr, *The Roberts Court Gets down to Business: the Business Cases*, 34 PEPP. L. REV. 599 (2007).

⁷ Edward B. Foley, *Election Law and the Roberts Court: an Introduction*, 68 OHIO ST. L.J. 733 (2007).

⁸ Ann Graham, *Searching for Chevron in Muddy Waters: The Roberts Court and Judicial Review of Agency Regulations*, 60 ADMIN. L. REV. 229 (2008).

⁹ David Schultz, *Buckley v. Valeo, Randall v. Sorrell, and the Future of Campaign*

assessment of the first year of the Roberts Court.¹¹ All of these articles suggested that the Robert's Court would move off in directions different from the Rehnquist Court, although the limited case law thus far made it difficult to make definitive predictions. However, with the exception of articles examining one watershed regulation decision¹² (and both of which emphasized the Commerce Clause issues in *Rapanos v. United States*¹³), and a cursory summary of 2006 term decisions,¹⁴ environmental law under the Roberts Court has thus far been ignored. Yet even with this one decision, one author speculated that the Robert's Court would perhaps adopt a pro-business tilt in its environmental jurisprudence.¹⁵

The 2006 term the Court decided five major cases,¹⁶ yielding four wins for the

Financing on the Roberts Court, 12 NEXUS 153 (2007).

¹⁰ David A. Moran, *The End of the Exclusionary Rule, among Other Things: the Roberts Court Takes on the Fourth Amendment*, 2006 CATO SUP. CT. REV. 283 (2006).

¹¹ Lori A. Ringhand, *The Roberts Court: Year 1*, 73 TENN. L. REV. 607 (2006).

¹² See: Patrick J. Paul, *Clean Water Act Regulation in the Roberts Court*, 22-FALL NAT. RESOURCES & ENV'T 52 (2007) and Bill Currie, *Opening the Floodgates: the Roberts Court's Decision in Rapanos v. United States Spells Trouble for the Future of the Waters of the United States*, 18 VILL. ENVTL. L.J. 209 (2007).

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¹³ 126 S. Ct. 2208 (2006).

¹⁴ Julie M. Cheslik, Andrea McMurtry, and Kristin Underwood, *Supreme Court Report 2006-2007: Closing of the Courthouse Doors?* 39 URBAN LAWYER, 741, 807-820 (2007) (reviewing *inter alia*, the five 2006 term environmental cases).

¹⁵ Paul at 53.

¹⁶ *Massachusetts v Environmental Protection Agency*, 127 S.Ct. 1438 (2007); *United States v. Atlantic Research Corporation*, 127 S.Ct. 2331 (2007); *Environmental Defense v. Duke Energy Corporation*, 127 S.Ct. 1423 (2007); *National Association of Homebuilders v. Defenders of Wildlife*, 127 S.Ct. 2518 (2007); and *United Haulers Association v. Oneida-Herkimer Solid*

environment, two for business, and three for the Bush Administration. These decisions, along with the two 2005 term decisions which yielded one win each for the environment, business, and the Bush administration,¹⁷ provide an opportunity to assess where the Roberts Court may be headed in this area of law and what it may bode for environmental regulation in the near future with the Supreme Court. This Article reviews these seven decisions, concluding that based on them there is no discernable pro-business bias thus far. However, among the Justices aligned in the conservative block, their skepticism towards the causes of some environmental problems and narrow viewing of standing demonstrated in other opinions,¹⁸ may limit the value of the Court as an environmentally-friendly institution.

I. The Roberts Court Environmental Decisions

A. The 2005 Environmental Docket

The 2005 term had one major and one minor case that addressed environmental issues.¹⁹ Thus, the 2005 term initially left minimal clues to where the Roberts Court stood

Waste Management Authority, 127 S.Ct. 1786 (2007).

¹⁷ *Rapanos v. United States*, 547 U.S. 715 (2006); *S.D. Warren Company v. Maine Board of Environmental Protection*, 547 U.S. 370 (2007).

¹⁸ See generally Julie M. Cheslik, Andrea McMurtry, and Kristin Underwood, *Supreme Court Report 2006-2007: Closing of the Courthouse Doors*, 39 URBAN LAWYER, 741 (2007) (discussing the decreasing docket and limiting of standing in Roberts' Court decisions.)

¹⁹ *Rapanos v. United States*, 547 U.S. 715 (2006); *S.D. Warren Company v. Maine*

environmentally.

1. *Rapanos v. United States*

*Rapanos v. United States*²⁰ was a split 4-1-4 decision that remanded a case back to the lower courts regarding the authority of the Army Corps of Engineers (“Corps”) to regulate wetlands under the Clean Water Act (“CWA”). Some characterize the opinion as a pro-business decision, but with a remand it is difficult to really reach that claim given that a final disposition in the case was not reached.²¹

John A. Rapanos sought to backfill some wetlands on his property that were located 11 to 20 miles away from navigable water in the United States.²² However, the waters in the wetlands eventually did drain into these navigable waters.²³ When sought to fill his wetlands he was informed by the Corps that he would need a permit to do this.²⁴ He contested the requirement of the permit, contending that the Corps lacked jurisdiction over his wetland. The legal issue here surrounded the scope of the authority of the Corps under the Clean Water Act (“CWA”) to regulate his wetland. Writing for the Court, Justice Scalia vacated the lower court decisions

Board of Environmental Protection, 547 U.S. 370 (2007).

²⁰ 547 U.S. 715 (2006).

²¹ Paul at 53. *See also*: Ann Graham, *Searching for Chevron in Muddy Waters: The Roberts Court and Judicial Review of Agency Regulations*, 60 ADMIN. L. REV. 229, 245 (2008).

²² 547 at 719-720.

²³ *Id.* at 729.

which had ruled in favor of the Corps and remanded the case back to the lower court.

Justice Scalia began his opinion with an analysis of the CWA. Under the CWA, it is illegal for any party to bring about the “discharge of any pollutant”²⁵ into any “navigable waters” of the United States.²⁶ The CWA created some exceptions to the discharge ban, providing conditions for when a permit may be issued to allow disposal of some fill materials.²⁷ If in fact the wetland on Rapanos’ property was considered a navigable water of the United States, then it was under the CWA and subject to the Corps’ regulatory authority. Historically, navigable waters included only waters that were “navigable in fact,”²⁸ but the Corps adopted broad rules that extended their authority under the CWA to include even wetlands.²⁹

According to Scalia, this expansive reading was incorrect.³⁰ He specifically keys in on the phrase “the waters” in the CWA,³¹ arguing that it does not refer to waters in general but to a specific type. In drawing upon dictionary definitions, he contends that waters must refer “more narrowly to water ‘[a]s found in streams and bodies forming geographical features such as

²⁴ *Id.*

²⁵ 33 U.S.C. § 1311(a).

²⁶ 33 U.S.C. § 1362(7).

²⁷ 547 U.S. at 723.

²⁸ *Id.*

²⁹ 33 CFR § 328.3(a)(7).

³⁰ 547 U.S. at 731-2.

³¹ *Id.* (citing 33 U.S.C. § 1362(7)).

oceans, rivers, [and] lakes,’ or ‘the flowing or moving masses, as of waves or floods, making up such streams or bodies.’³² These are all types of waters that are more permanent than found in a wetland.³³ Thus, because “waters” refers to permanent or flowing hydrology, waters occasionally found in a wetland do not fit these characteristics, and they would be beyond the scope of the plain language of the CWA.³⁴

In addition to joining the plurality opinion, Chief Justice Roberts also wrote a separate concurrent opinion, mostly bemoaning that it was unfortunate that there was no majority consensus in this case deciding the scope of the authority of the Corps to regulate navigable waters under the CWA.³⁵ Justice Kennedy also filed a concurrence, contending that the case should have been remanded back to the lower courts to decide under the “significant nexus” test articulated in *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*³⁶ whether the waters in question in this case could be constituted navigable.³⁷ Thus, unlike the Scalia plurality which rejected the expansive definition of navigable water outright and therefore restricted Corps jurisdiction and authority, Kennedy was unwilling to rule out that the waters

³² 547 U.S. at 732.

³³ *Id.*

³⁴ *Id.* at 734.

³⁵ 547 U.S. at 758.

³⁶ 531 U.S. 159 (2001).

were beyond the scope of federal regulatory authority. However, because he concurred in the holding to vacate and remand, his fifth vote decided the outcome of the case.

In dissent, Stevens, Ginsburg, Souter and Breyer used a *Chevron*³⁸ analysis to decide if they should defer to the Corps' definition of navigable waters. They found that the statutory definition of navigable waters was unclear, and under *Chevron* were willing to defer to the Corps' construction of the term.³⁹

2. *S.D. Warren Company v. Maine Board of Environmental Protection*

*S.D. Warren Company v. Maine Board of Environmental Protection*⁴⁰ was the other environmental case that the Roberts Court ruled on during the 2005 term. *S.D. Warren Company* was a relatively minor case addressing the definition of "discharge" under the Clean Water Act.

At issue in *S.D. Warren Company* was a determination by the Maine Environmental Protection Agency that S.D. Warren Company needed a permit to discharge water into the Presumpscot River. Specifically, the company operated several hydroelectric plants along the

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Presumpscot River. These plants were licensed by the Federal Energy Regulatory Commission

³⁷ 547 U.S. at 759.

³⁸ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. (1984).

³⁹ 547 U.S. at 788.

⁴⁰ 547 U.S. 370 (2007).

(FERC) to operate these facilities pursuant to the requirements of the Federal Power Act.⁴¹ The Federal Power Act, as subsequently codified in the CWA, mandated that a license was required when it made a “discharge” into navigable waters.⁴² S.D. Warren Company applied for a license renewal under protest, claiming that because it added nothing to the water when it returned it to the Presumpscot River it was not “discharging” within the meaning of the CWA.⁴³ As a condition of securing its license it had to meet several requirements imposed upon it by the Maine EPA.⁴⁴ Warren appealed the Maine EPA decision first through the state’s administrative process and then to the Supreme Court, losing all along the way. It then filed cert. with the U.S. Supreme Court which affirmed the Maine Supreme Court’s decision.⁴⁵

Justice Souter wrote for a unanimous court. He noted that the issue in the case revolved around the meaning of “discharge” in the CWA.⁴⁶ Warren’s argument essentially was that the word “discharge” required that it add something to the water for it to come within the meaning of the statute.⁴⁷ Souter rejected this definition of the term.⁴⁸ Instead, Souter turns to what he sees

⁴¹ *Id.* at 374.

⁴² *Id.* (citing 33 U.S.C. § 1341). 8

⁴³ 547 U.S. at 374.

⁴⁴ *Id.* at 375.

⁴⁵ 547 U.S. at 375.

⁴⁶ 547 U.S. at 375-6.

⁴⁷ *Id.* at 379.

⁴⁸ *Id.* at 378-80.

as an ordinary dictionary definition of the term “discharge” meaning “flowing or issuing out.”⁴⁹ This understanding of the term does not require that something be added to the water beyond simply discharging or emptying back into navigable waters. This conception of discharge was also the meaning accepted by the Court in its only other case seeking to construct Section 401 of the CWA.⁵⁰ Because Warren was unable to offer an alternative definition of discharge that demonstrated that the dictionary construction of the term was invalid, the Court upheld the Maine EPA and FERC licensing requirements.

B. The 2006 Environmental Docket

While the 2005 had only two environmental cases, the 2006 had five, including several major ones. These cases gave the Roberts Court an opportunity to imprint its views on several major issues, including the regulation of greenhouse gas emissions.

1. *Massachusetts v Environmental Protection Agency*

Massachusetts v Environmental Protection Agency by far was the headline blockbuster

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environmental law case for the Supreme Court’s 2006 docket. In this 5-4 opinion the Court ruled that contrary to assertions by the Bush Administration, the Environmental Protection Agency (EPA) did have the authority under the Clean Air Act to regulate greenhouse gas

⁴⁹ 547 U.S. at 376.

⁵⁰ *Id.* at 376 (citing *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology*, 511

emissions from new motor vehicles and that is failure to do so was arbitrary and capricious.

At issue in this case was Section 202(a)(1) of the Clean Air Act which states that: “The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare”⁵¹ On October 20, 1999, 19 private organizations filed a petition with the EPA asking it to regulate “greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act.”⁵² In 1998 and during the Clinton Administration, Jonathan Z. Cannon, then EPA's General Counsel, issued an opinion concluding that “CO₂ emissions are within the scope of EPA's authority to regulate,” even though it had thus far not done so.⁵³ Gary S. Guzy, who replaced Cannon, reaffirmed that opinion before a congressional committee just two weeks before the rulemaking petition was filed.⁵⁴

However, when George Bush became president, the legal opinion regarding EPA

U.S. 700, (1994)).

⁵¹ Pub.L. 89-272, § 101(8), 79 Stat. 992, and as amended by, *inter alia*, 84 Stat. 1690 and 91 Stat. 791, 42 U.S.C. § 7521(a)(1).

⁵² 127 S.Ct. at 1449.

⁵³ 127 S.Ct. at 1449 (*citing* memorandum to Carol M. Browner, Administrator (Apr. 10, 1998)).

⁵⁴ 127 S.Ct. at 1449.

authority changed. On September 8, 2003, the EPA entered an order denying the rulemaking petition.⁵⁵ It offered two reasons for its decision. First it argued that the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change.⁵⁶ Second, it argued that even if the agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time.⁵⁷ No reason was offered to explain why it would be unwise. In support of the claim that the EPA lacked statutory authority to act, the agency that Congress “was well aware of the global climate change issue when it last comprehensively amended the [Clean Air Act] in 1990,” yet it declined to adopt a proposed amendment establishing binding emissions limitations.⁵⁸ The opinion noted also that the lack of authority to act could be seen in how Congress instead opted for further investigation into climate change, as evidenced by its 1990 enactment of a comprehensive scheme to regulate pollutants that depleted the ozone layer.⁵⁹

As a result of the decision by the EPA, the original 19 petitioners, now joined by States and local governments, sought review of EPA's order in the United States Court of Appeals for

⁵⁵ *Id.* at 1450.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

the District of Columbia Circuit which affirmed the decision of the EPA to deny the petition for rule making.⁶⁰ The Supreme Court granted cert., and reversed.

Massachusetts v. E.P.A. was one of the 24 5-4 decisions the Court reached during the 2006 term, and one of only six majority opinions that Justice Stevens wrote. As with all of the 24 5-4 opinions, Justice Kennedy was the critical swing vote, voting 100% of the time in the majority in these decisions. In *Massachusetts v. E.P.A.* Stevens first had to address the issue of standing, inquiring into whether any of the litigants had an Article III case and controversy that would allow them to challenge this action in court.⁶¹ Surviving this initial threshold was important since the Roberts' Court apparently use standing in an aggressive fashion to avoid addressing cases.⁶² Referencing *Lujan v. Defenders of Wildlife*,⁶³ Stevens stated that: "[A] litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury."⁶⁴ In this case, only one of the plaintiffs needed to

⁶⁰ *Massachusetts v. E.P.A.*, 415 F.3d 50 (D.C. Cir. 2005).

⁶¹ 127 S.Ct. at 1452.

⁶² *See, e.g.*: *Hein v. Freedom from Religion Foundation*, 127 S.Ct. 2553 (2007) and *Lance v Coffman*, 127 S.Ct. 1194 (2007). *See also*: Jess Bravin, *Court Under Roberts Limits Judicial Power*, Wall Street J. (July 2, 2007) at A2.

⁶³ 504 U.S. 555 (1992).

establish standing for the Court to hear the case.⁶⁵ Justice Stevens found the concrete and particularized injury with the State of Massachusetts.

States, for the majority, are not normal litigants for the purposes of invoking federal jurisdiction.⁶⁶ The Court noted here that Massachusetts was filing suit as a *quasi*-sovereign, acting on behalf of its citizens to protect the land and air in the state.⁶⁷ More specifically, the Court saw the State being injured as a landowner of 53 coastal parks facing a threat as a result as a result of global warming.⁶⁸ According to the Court:

These rising seas have already begun to swallow Massachusetts' coastal land. Because the Commonwealth "owns a substantial portion of the state's coastal property," it has alleged a particularized injury in its capacity as a landowner. The severity of that injury will only increase over the course of the next century: If sea levels continue to rise as predicted, one Massachusetts official believes that a significant fraction of coastal property will be "either permanently lost through inundation or temporarily lost through periodic storm surge and flooding events." Remediation costs alone, petitioners allege, could run well into the hundreds of millions of dollars.⁶⁹

Given this injury, and the fact that the EPA conceded that there might be a connection between

⁶⁴ 127 S.Ct. at 1453 (*citing* 504 U.S. 560-561).

⁶⁵ 127 S.Ct. at 1453-4.

⁶⁶ 127 S.Ct. at 1455.

⁶⁷ *Id.*

⁶⁸ 127 S.Ct. at 1456, fn. 19.

connection between man-made greenhouse gas emissions and global warming,⁷⁰ the Court concluded that the failure of the latter to act may be contributing to Massachusetts' injuries.⁷¹ Thus, standing was established.

Having established standing the Court turned to the claim by the EPA that it lacked authority under Section 202(a)(1) of the Clean Air Act to regulate the greenhouse gas emissions from new motor vehicles. Stevens, citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,⁷² indicated that the Court would normally give agencies broad discretion when interpreting statutes and in decisions not to bring an enforcement action.⁷³ In supporting its decision not to regulate greenhouse gases, the EPA “concluded in its denial of the petition for rulemaking that it lacked authority under 42 U.S.C. § 7521(a)(1) to regulate new vehicle emissions because carbon dioxide is not an “air pollutant” as that term is defined in § 7602.”⁷⁴

However, *Chevron* deference to agency construction of statutes applies only when they are unclear.⁷⁵ The Court rejected EPA contentions that the language under the Clean Air Act was ambiguous. First, the Court noted that the definition of “air pollutant” was sufficiently

⁶⁹ 127 S.Ct. at 1456 (citations omitted).¹⁴

⁷⁰ 127 S.Ct. at 1457.

⁷¹ 127 S.Ct. at 1457-8.

⁷² 467 U.S. 837 (1984).

⁷³ 127 S.Ct. at 1459-60.

⁷⁴ 127 S.Ct. at 1459.

⁷⁵ *Id.* at 1459-60.

broad, encompassing “any air pollution agent or combination of such agents, including any physical, chemical ... substance or matter which is emitted into or otherwise enters the ambient air.”⁷⁶ This definition for the Court was broad enough to encompass any airborne compound, including those which are the source of greenhouse gas emissions.⁷⁷ Second, the Ct chides the EPA for creating false confusion by citing post-enactment congressional deliberations, yet these actions did not alter the basic definition.⁷⁸ Lastly, the Court turns to the third questions: Did the EPA offer reasons consistent with the Clean Air Act to justify its refusal to regulate these emissions? The Court rejects EPA claims that regulation of these gases would preempt the authority Congress gave to the Department of Transportation to regulate gas mileage for vehicles.⁷⁹ This assertion is simply rejected stating that the authority of the DOT to regulate mileage does not preempt EPA authority in this matter.⁸⁰ The Court also rejects claims by the EPA that being required to act on the rulemaking judgement and enforce the law constrains its administrative judgment. The Court states that yes, EPA’s judgment is constrained, that is the purpose of the statute.⁸¹ Thus, the decision not to enforce the law was arbitrary and capricious,

⁷⁶ 127 S. Ct. at 1460 (*quoting* the Clean Air Act) (italics in the Supreme Court opinion).

⁷⁷ 127 S. Ct. at 1460.

⁷⁸ *Id.*

⁷⁹ 127 S. Ct. at 1462.

⁸⁰ *Id.*

and not entitle to deference and it must ground its reasons for acting or not within the requirements of the Clean Air Act.⁸²

The Chief Justice, writing for Scalia, Thomas, and Alito, ruled that the dispute was nonjusticiable.⁸³ While initially conceding that global warming and greenhouse gases may be a problem,⁸⁴ they quickly retreat from this concession. First, the dissenters reject the notion that states as public litigants should be viewed differently than private parties, they are no different than any other private landowners.⁸⁵ Thus, the state cannot assert an injury to on behalf of its citizens. Ignored by the dissenters is claim by the majority that the State can also be viewed as a private owner who is suffering an injury to its own park and coastal property no different than any owner would face.

But even if Massachusetts can be treated as a property owner in its own right, the dissenters assert that the rise in coastal waters will affect a broad class of individuals, indicating that the injury to the State is not a direct and particularized injury.⁸⁶ Second, the Court questions whether there is in fact a rise in coastal waters that is either occurring or which can be attributed

⁸¹ *Id.* at 1462.

⁸² *Id.* at 1463.

⁸³ 127 S. Ct. at 1464.

⁸⁴ *Id.* at 1463-4.

⁸⁵ 127 S. Ct. at 1465.

to greenhouse gases.⁸⁷ Third, a potential future rise in coastal waters is too remote to constitute a concrete injury.⁸⁸ Fourth, the question the causal link between greenhouse gases and flooding.⁸⁹ They do so by ignoring the concession by the EPA that there refusal to act may be contributing to the rise in sea waters. Overall, they question the causal connection between EPA inaction to regulate greenhouse gases and the damage to the Massachusetts coastal properties.⁹⁰ Failure to establish a clear and concrete injury thus becomes the basis to deny standing. Finally even if the EPA were to act, the Court notes that over 80% of the greenhouse gas emissions are located outside the United States, questioning th extent to which EPA regulation will affect the putative injury to Massachusetts.⁹¹

Overall, the dissenters engage in an odd assortment of accepting some facts about global warming while at the same time denying its reality, it causes, and whether in fact EPA regulation will do anything to stop the rise of coastal waters. In effect, even if Massachusetts faced a concrete injury EPA regulation would be futile.

⁸⁶ 127 S. Ct. at 1467.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1468.

⁸⁹ 127 S. Ct. at 1467-8.

⁹⁰ 127 S. Ct. at 1468.

2. *National Association of Homebuilders v. Defenders of Wildlife*

National Association of Homebuilders v. Defenders of Wildlife was the other 5-4 environmental law decision in the 2006 docket. Here, Justice Alito wrote the majority opinion holding that the EPA did not have to consider § 7(a)(2) of the Endangered Species Act (ESA) when making a decision to transfer permitting authority to a state under the National Pollution Discharge Elimination System (NPDES). This decision represented the one clear loss to environmental advocates.

The Clean Water Act of 1972 (CWA), established a National Pollution Discharge Elimination System (NPDES) designed to prevent harmful discharges into the water.⁹² The Environmental EPA administers the NPDES permitting system for each State, but the latter may apply for a transfer of permitting authority to their officials. According to the CWA, the EPA “shall approve each submitted program” for transfer of permitting authority to a State “unless [it] determines that adequate authority does not exist” to ensure that nine specified criteria are satisfied.⁹³

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One of the purposes of the ESA is to protect and conserve endangered and threatened species and their habitats. Specifically, § 7(a)(2) provides that “[e]ach Federal agency shall, in

⁹¹ *Id.*

⁹² 127 S.Ct. at 2526-27.

⁹³ *Id.* at 2525 (citing § 402(b) of the CWA).

consultation with and with the assistance of the Secretary [of Commerce or the Interior], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an ‘agency action’) is not likely to jeopardize the continued existence of any endangered species or threatened species.”⁹⁴

Arizona sought approval from the EPA in February 2002, to administer that State's NPDES program. The EPA initiated consultation with the Fish and Wildlife Service (FWS) to determine whether the transfer of permitting authority would adversely affect any listed species.⁹⁵ A FWS regional office concluded that the transfer of authority would not cause any direct impact on water quality that would adversely affect listed species.⁹⁶ Yet this office was concerned that the transfer could result in the issuance of more discharge permits.⁹⁷ More permits meant more development, and that could have an indirect adverse effect on the habitat of certain upland species it identified, such as the cactus ferruginous pygmy-owl and the Pima pineapple cactus.⁹⁸ The EPA disagreed, maintaining that “its approval action, which is an administrative transfer of authority, [would not be] the cause of future non-discharge-related

⁹⁴ 127 S.Ct. at 2526 (*quoting* § 7(a)(2)).

⁹⁵ 127 S.Ct. at 2526-7.

⁹⁶ *Id.* at 2527.

⁹⁷ *Id.*

⁹⁸ *Id.*

impacts on endangered species from projects requiring State NPDES permits.”⁹⁹ The EPA thus allowed the transfer of the approving authority.

Respondents challenged the transfer in the Ninth Circuit.¹⁰⁰ The Ninth Circuit ruled that the EPA “fail[ed] to understand its own authority under section 7(a)(2) to act on behalf of listed species and their habitat,” because “the two propositions that underlie the EPA’s action—that (1) it must, under the [ESA], consult concerning transfers of CWA permitting authority, but (2) it is not permitted, as a matter of law, to take into account the impact on listed species in making the transfer decision—cannot both be true.”¹⁰¹ The court ruled that it was required to “remand to the agency for a plausible explanation of its decision, based on a single, coherent interpretation of the statute.”¹⁰² Writing for the Supreme Court, Justice Alito ruled that the EPA was not required to consider ESA § 7(a)(2) when making a decision to transfer permitting authority under NPDES to a state.

According to Alito, § 7(a)(2)’s no-jeopardy duty covers only discretionary agency actions, it does not attach to actions that an agency is required by statute to undertake once

⁹⁹ *Id.* at 2527.

¹⁰⁰ *Defenders of Wildlife v. EPA*, 420 F.3d. 946 (9th Cir. 2005).

¹⁰¹ *Id.* at 961-2.

¹⁰² *Id.*

certain specified triggering events have occurred.¹⁰³ Here, in stating that “repeals by implication are not favored,”¹⁰⁴ the Ninth Circuit's reading of § 7(a)(2) would effectively repeal § 402(b)'s mandate that the EPA “shall” issue a permit whenever all nine exclusive statutory prerequisites are met.¹⁰⁵ Here, given the mandatory nature of the language, the majority deferred to the EPA construction of the statute and ruled that it did not have discretion to consider the EPA requirements.¹⁰⁶

This time Justice Stevens wrote for the dissenters, including Souter, Ginsburg, and Breyer. The saw this as a case of seeking to reconcile two “shalls,” one in the ESA and the other in the NPDES. The trick in undertaking the reconciliation is to give full effect, if possible to both statutes.¹⁰⁷ Once the Court demonstrated that a statutory reconciliation was problematic,¹⁰⁸ it offers two more pragmatic ways of doing that. First, it noted that § 7(a)(2) includes a provision that allows agency heads to consult with the Secretary of the Interior to ensure that endangered species are protected as a result of actions by agencies.¹⁰⁹ The dissenters see this type of consulting process as capable of reconciling the two shalls in a way that endangered

¹⁰³ *Id.* at 2531.

¹⁰⁴ 127 S.Ct. at 2532.

¹⁰⁵ *Id.*

¹⁰⁶ 127 S.Ct. at 2535-6.

¹⁰⁷ 127 S.Ct. at 2538.

¹⁰⁸ *Id.* at 2544.

¹⁰⁹ 127 S. Ct. at 2544-45.

species could be protected.¹¹⁰ The other mechanism advocated was to use the congressionally created Endangered Species Committee to grant exemption from the ESA under § 7(a)(2).¹¹¹ In effect, what the dissenters seem to argue is that the two statutes cannot be reconciled but that there is language within them that permit for an administrative solution to accommodate the ESA and NPDES. The disagreement with the majority seems to be that the former believes it can use rules of statutory construction to address the conflicts, while the dissenters opt for a way for the regulatory agencies to harmonize.

3. *Environmental Defense v. Duke Energy Corporation*

Unlike the two EPA cases, the Court's other environmental cases produced less disagreement among the Justices. In *Environmental Defense v. Duke Energy Corporation* the Court ruled in a 8-1 that EPA was not required to interpret the word "modification" the same way

In the 1970s, Congress added two air pollution control requirements to the Clean Air

Act.¹¹² The first was New Source Performance Standards (NSPS) and it required operators of

¹¹⁰ *Id.* at 2545.

¹¹¹ *Id.*

¹¹² 127 S. Ct. at 1428.

stationary air pollution to use the best technology available to abate discharges.¹¹³ The other requirement was the Prevention of Significant Deterioration (PSD) and it permits for major new facilities before they could discharge pollutants.¹¹⁴ Each of these provisions covering modified, as well as new, stationary sources of air pollution.¹¹⁵ The amendments dealing with NSPS authorized EPA to mandate operators of stationary sources of air pollutants to use the best technology for limiting pollution both in newly constructed sources and those undergoing “modification.”¹¹⁶ In the EPA’s 1975 regulations implementing NSPS, they provided generally that “any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of [S]ection 111.”¹¹⁷

In 1980, EPA issued PSD regulations, which “limited the application of [PSD] review” of modified sources to instances of “ ‘major’ modificatio[n],” which was defined as “any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.”¹¹⁸ The

¹¹³ 42 U.S.C. § 7411(a)(2) and 127 S. Ct. at 1428.

¹¹⁴ 42 U.S.C. § 7479(2) (c) and 127 S. Ct. at 1429.

¹¹⁵ 127 S. Ct. at 1429.

¹¹⁶ *Id.*

¹¹⁷ 40 CFR § 60.14(a) (1976).

NSPS provisions defined “modification” of such a source as a physical change to it, or a change in the method of its operation, that increases the amount of a pollutant discharged or emits a new one.¹¹⁹ The PSD provisions also required a permit before a “major emitting facility” can be “constructed,”¹²⁰ and they defined “construction” to include a “modification as defined in NSPS.”¹²¹ However, even though the same definition appeared to apply to both, the EPA interpreted “modification” one way for NSPS but differently for PSD. The critical difference was that the NSPS regulations required a polluting source to use the best available pollution-limiting technology when a modification would increase the discharge of pollutants measured in kilograms per hour.¹²² The 1980 PSD regulations required a permit for a modification only when it was a “major” one,¹²³ and only then when it would result in an increase in the actual annual emission of a pollutant above an actual average for the two prior years. It was this dispute over how to define modification that was at the center of the dispute in this case.

Duke Energy Corporation operated 30 coal-fired electric generating units at eight plants in North and South Carolina.¹²⁴ Between 1988 and 2000, Duke replaced or redesigned 29 tube

¹¹⁸ 40 CFR § 51.166(b)(2)(i) (1987). ²⁴

¹¹⁹ 42 U.S.C. § 7411(a)(4).

¹²⁰ 42 U.S.C. § 7475(a).

¹²¹ 42 U.S.C. § 7479(2)(C).

¹²² 40 CFR § 60.14(a).

¹²³ 40 CFR § 51.166(b)(2)(I)

¹²⁴ 127 S. Ct. at 1430.

assemblies in order to extend the life of the units and allow them to run longer each day.¹²⁵ The United States government claimed that Duke violated the PSD provisions by doing this work without permits since it in fact constituted a modification of their facilities because of the increase they would produce in average annual emissions.¹²⁶ Several groups, including Environmental Defense, North Carolina Sierra Club, and North Carolina Public Interest Research Group Citizen Lobby/Education Fund intervened as plaintiffs and filed a complaint charging similar violations.¹²⁷ Duke moved for summary judgment, arguing that none of its projects constituted a “major modification” requiring a PSD permit because none increased hourly rates of emissions. The district court entered summary judgment for Duke¹²⁸ and the Fourth Circuit affirmed,¹²⁹ both of them ruling that Congress's decision to create identical statutory definitions of “modification” in the Act's NSPS and PSD required that this term be interpreted identically in the regulations promulgated under those provisions.¹³⁰ The Supreme Court granted cert., and Souter, writing for the majority, ruled that modification did not have to be interpreted the same by the EPA in the NSPS and PSD.

¹²⁵ 127 S. Ct. at 1431.

¹²⁶ 127 S. Ct. at 1430.

¹²⁷ *Id.*

¹²⁸ *United States v. Duke Energy Corporation*, 278 F.Supp.2d 619 (D.N.C. 2003).

¹²⁹ *United States v. Duke Energy Corporation*, 411 F.3d 539 (4th Cir. 2005).

According to Souter, in applying the 1980 PSD regulations to Duke's conduct, the principles of statutory construction are not so rigid that the term “modification” must be interpreted the identically in its NSPS and PSD provisions, even though the statutory language seemed to suggest the contrary.¹³¹ For Souter: “[W]ords have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.”¹³² Given that words can take on unique meanings in different statutory contexts, the EPA is not required to interpret major modification the same way in both the NSPS and PSD.¹³³ In fact, Souter, notes, it has applied this practice in previous rulings where the same term is used in different parts of a statute, such as with “employee” in the 1964 Civil Rights Act¹³⁴ and for “wages paid” in seeking to interpret tax obligations.¹³⁵ Thus, the Fourth Circuit's construction of the 1980 PSD regulations to conform them to their NSPS counterparts was not a permissible reading of their terms given that the PSD regulations clearly do not define a “major modification” in terms of an

¹³⁰ 278 F.Supp.2d at 641-2 ; 411 F.3d at 547.

¹³¹ 127 S. Ct. at 1432.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ 127 S. Ct. at 1432-3 (*citing* Robinson v. Shell Oil Co., 519 U.S. 337 (1997)).

¹³⁵ 127 S. Ct. at 1433 (*citing* United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001)).

increase in the “hourly emissions rate.”¹³⁶

In a separate but brief concurrence, Justice Thomas rejected Souter’s reasoning. Essentially, he argued that the use of “modification” in both parts of the statute compels similar construction when interpreting the term.¹³⁷ Yet despite this argument which would appear to compel ruling for Duke Energy, Thomas votes to support the EPA, offering no reasons for his holding.

4. *United States v. Atlantic Research Corporation*

In *United States v. Atlantic Research Corporation* Justice Thomas wrote for an unanimous Court in ruling that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)¹³⁸ allowed some polluters to recover expenses associated with cleaning up contaminated sites. Unlike his dissent in *Duke Energy*, here he offered reasons for his holding for the Court.

In this case Atlantic Research leased property at the Shumaker Naval Ammunition Depot, a facility operated by the Department of Defense.²⁷¹³⁹ At this site Atlantic deployed a high-pressure water spray to remove pieces of propellant from the motors and then it burned the

¹³⁶ 127 S. Ct. at 1434-36.

¹³⁷ 127 S. Ct. at 1437-8.

¹³⁸ 42 U.S.C. §§ 9607(a), 9613(f).

propellant pieces, resulting in some soil and groundwater pollution.¹⁴⁰ . As a result, Atlantic became a potentially responsible party (PRP) under CERCLA. Atlantic Research subsequently cleaned the site at its own expense and then sought to recover some of its costs by suing the United States under both CERCLA § 107(a) and § 113(f).¹⁴¹ The United States refused to reimburse Atlantic, contending that under CERCLA §§ 107(a), it could not recover clean up costs for a cite. The basis for the Government’s reasoning was that Atlantic was a potentially responsible party (PRP) under CERCLA. A PRP was defined under CERCLA to include:

- (1) the owner and operator of a vessel or a facility,
- “(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- “(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- “(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for [various costs].¹⁴²

¹³⁹ 127 S. Ct. at 2335.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² 127 S. Ct. at 2336 (*citing* 42 U.S.C. §§ 9607(a)(1)-(4)).

CERCLA made PRPs responsible for all remedial clean up costs to sites they polluted.¹⁴³

Atlantic sued the United States government to recover some of its clean up costs, citing § 9607(a)(4)(A)-(B) which permitted recovery suits for “(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; [and] “(B) any other necessary costs of response incurred by *any other person* consistent with the national contingency plan.”¹⁴⁴ Under this language the Eighth Circuit¹⁴⁵ held that Atlantic could recover at least some of its clean-up costs even though it was a PRP since it was “any other person”. Writing for a unanimous Court, Justice Thomas affirmed the Eighth Circuit.

According to Thomas, the dispute in the case was over who constituted “other person[s]” under § 107(a)(4)(B).¹⁴⁶ The United States government argues that “any other person” refers to any person not identified as a PRP in §§ 107(a)(1)-(4).¹⁴⁷ In other words, the Government’s contention is that subparagraph (B) permits suit only by non-PRPs and thus bars Atlantic Research's claim. Declaring that statutes must “be read as a whole”¹⁴⁸ such that different parts of

¹⁴³ §§ 107(a)(4)(A)-(B).

¹⁴⁴ Emphasis added.

¹⁴⁵ *Atlantic Research Corporation v. United States*, 459 F.3d. 827 (8th Cir. 2006).

¹⁴⁶ 127 S. Ct at 2336.

¹⁴⁷ *Id.*

the law must be presumed to fit together, Thomas employs this interpretative tool to the language of subparagraph (B), which he argued can only be understood only with reference to subparagraph (A).¹⁴⁹ The phrase “any other person” means any other person and nowhere in the statute does it preclude PRPs as defined in §§ 107(a)(1)-(4) from recovering. Consequently, the plain language of subparagraph (B) authorizes cost-recovery actions by any private party, including PRPs. If, according to the Court, “PRPs do not qualify as “any other person” for purposes of § 107(a)(4)(B), it is unclear what private party would.”¹⁵⁰ In fact, for Thomas, the language of CERCLA is so broad that it allows almost any party to collect for clean up costs.¹⁵¹ Accepting the Government’s reading of the law would render § 107(a)(4)(B) almost meaningless. Thus, because the plain terms of § 107(a)(4)(B) allow a PRP to recover costs the statute provides Atlantic Research with a cause of action against the Government.¹⁵²

5. *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*

At issue in *United Haulers Association v. Oneida-Herkimer Solid Waste Management*

¹⁴⁸ 127 S. Ct. at 2336.

¹⁴⁹ 127 S. Ct. at 2336.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 2339.

*Authority*¹⁵³ was the constitutionality of a county flow control ordinance that required trash haulers to deliver all of their garbage to a single public benefit corporation which would be responsible for the processing, sorting, and final disposal of the material.¹⁵⁴ Specifically, trash haulers objected to the imposition of “tipping fees” upon the delivery of trash to one of the Oneida-Herkimer facilities.¹⁵⁵

Tipping fees are “disposal charges levied against collectors who drop off waste at a processing facility.”¹⁵⁶ Haulers claimed that but for the tipping fee of at least \$86 per ton and the flow control ordinance mandating that they had to deposit their load at a Oneida-Herkimer facility, they could deliver the trash to an out-of-state landfill for about half that price.¹⁵⁷ Thus, citing *C & A Carbone, Inc. v. Clarkstown*,¹⁵⁸ where the Supreme Court struck down under the Commerce Clause a flow control ordinance that forced haulers to deliver waste to a private processing facility, plaintiffs in this case challenged the Oneida-Herkimer ordinance as a violation of the dormant Commerce clause because it discriminated against out-of-state haulers.¹⁵⁹ Writing for a unanimous court, the Chief Justice ruled that the flow control ordinance

¹⁵³ 127 S.Ct. 1786 (2007).

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¹⁵⁴ 127 S.Ct. at 1791.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at fn. 1.

¹⁵⁷ 127 S.Ct. at 1792.

¹⁵⁸ 511 U.S. 383 (1994).

¹⁵⁹ 127 S.Ct. at 1792.

was constitutional.

Chief Justice Roberts began his analysis by first expounding upon what the dormant Commerce clause prohibits. Specifically, he noted that it barred “ □discrimination□ [which] simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”¹⁶⁰ Thus, the clause prohibits simple economic protectionism.¹⁶¹ Next, Roberts sought to clarify its *Carbone* decision, indicating that the plaintiffs seemed to incorrectly read the decision as a per se ban on all flow control ordinances.¹⁶² Instead, citing to the dissent in *Carbone* where they seemed to suggest that flow control ordinances mandating delivery to a public facility would not be unconstitutional (and a silence on part of the majority to address this distinction),¹⁶³ the Chief Justice ruled that this precedent was narrowly applied only to ordinances benefitting private facilities.¹⁶⁴

Thus, the ordinance in *Carbone* was a violation of the dormant Commerce Clause because it was simply another example of a state protectionist law aimed at helping a private in-state business.¹⁶⁵ For the Court: “The flow control ordinances in this case benefit a clearly

¹⁶⁰ *Id.* at 1793 (*citing* Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon, 511 U.S. 93, 99 (1994)).

¹⁶¹ *Id.*

¹⁶² *Id.* at 1793.

¹⁶³ *Id.* at 1793-4 (*citing* 511 U.S. at 419).

¹⁶⁴ 127 S.Ct. at 1794.

¹⁶⁵ *Id.*

public facility, while treating all private companies exactly the same. Because the question is now squarely presented on the facts of the case before us, we decide that such flow control ordinances do not discriminate against interstate commerce for purposes of the dormant Commerce Clause.”¹⁶⁶ In support of treating private and public facilities differently, Roberts cites to the police power authority of states to protect the health safety, and welfare of it people and the historical leeway the Court has given governments to perform this function,¹⁶⁷ and also to the goal of the Oneida-Herkimer to encourage its residents to sort and recycle their own trash.¹⁶⁸ Encouraging recycling and decreasing the amount of trash landfilled overall is a benefit that does not outweigh the burdens imposed upon interstate commerce, thereby rendering the flow control ordinance permissible under the balancing test articulated in *Pike v. Bruce Church, Inc.*¹⁶⁹

Finally, writing separate concurrences, both Justices Scalia and Thomas join in the majority holding and much of its analysis. Both however, write separately ruling to indicate their objection to the use of the negative or dormant Commerce clause analysis employed by the

¹⁶⁶ 127 S.Ct. at 1795.

¹⁶⁷ *Id.* at 1795.

¹⁶⁸ 127 S.Ct. at 1798.

¹⁶⁹ *Id.* at 1797 (*citing* 397 U.S. 137(1970)).

majority.¹⁷⁰

II. Assessing the 2006 Roberts Court on the Environment

If the 2005 decisions provided few clues regarding where the Roberts Court was headed on the environment, they and the 2006 holdings together offer only marginal more clarification.

First, as Tables I, II, and III reveal, of the seven environment cases decided in the 2005-2006 terms, five could be characterized as pro-environment, four as supporting the Bush Administration, and three as pro-business. Two decisions, *Massachusetts* and *National Association of Homebuilders* were split decisions but the other two cases produced unanimous and nearly unanimous decisions. Even though *Atlantic Research* can be classified as a pro-business and anti-Bush administration decision, it still potentially constitutes a pro-environment holding in that it encourages clean up under CERCLA. If however, *Massachusetts* is viewed as a case upholding federal authority to regulate, then all of the of the cases except for *Rapanos* sustained national authority to protect the environment. But given the split nature of *Rapanos*

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and Kennedy's refusal to go along with the plurality rejecting the Corp's jurisdiction over wetlands, no Roberts' court decisions have clearly limited federal authority to regulate the environment. Based on the sample of cases thus far in the 2005 and 2006 terms, there is no clear pro-business bias as Paul claimed, and the environment does not seem to be losing before

¹⁷⁰ 127 S.Ct. at 1798-99 (Scalia concur.) and 127 S.Ct. at 1799 (Thomas concur.).

the Roberts Court.

Three Tables go about here

While generally the Roberts Court does not seem hostile to the environment, the future may change. As in other areas of its jurisprudence, some members of Court are using injury and standing as way to limit access to the courts. The four conservatives—Roberts, Scalia, Thomas, and Alito—in *Massachusetts* would have denied standing to the plaintiffs, finding none of them suffering the appropriate injury to raise their claim in court. Similar to their approach in cases such as *Hein v. Freedom from Religion Foundation*¹⁷¹ and *Lance v Coffman*,¹⁷² the four dissenters in *Massachusetts* would close the door to many environmental plaintiffs. In looking at their particular votes, Roberts, Scalia Thomas and Kennedy each voted for business four times, Alito five times. This compares to Stevens twice and Souter, Bryer, and Ginsburg once. Conversely, Roberts, Scalia, Thomas, and Kennedy voted for the environment four times, and

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Alito three times, with Stevens voting pro-environment six times and Souter, Ginsburg, and Breyer voting seven times (unanimous). If the four conservative Justices can convince Kennedy to go with them in future cases, or if Bush or a future president has the opportunity to replace one

¹⁷¹ 127 S.Ct. 2553 (2007).

¹⁷² 127 S.Ct. 1194 (2007).

of the more liberal Justices, the federal courts may be a more difficult place to bring environmental claims.

Second, the *Massachusetts* case reveals a skepticism on the part of Court's more conservative members regarding environmental damages arising from greenhouse gases. This skepticism may suggest a bias among some on the Court that may affect future decisions, especially in those cases where questions regarding the sufficiency of evidence for decisions of administrative agencies are implicated. Here, the Court may be willing to second guess the EPA or other enforcement agencies when it comes to environmental regulations. In fact, as some contend, the *Chevron* deference that has dominated the Court's jurisprudence of late may be cracking, portending less willingness to go along with agency determinations in the future not just in environmental but other areas of law too.¹⁷³

Conclusion

The 2005-2006 Roberts Court environmental law cases do not demonstrate a pro-

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business or anti-government bias. Instead, on some issues they demonstrate a Court divided on some hot button issues, but also a Court unwilling as of yet to reject or trim back the power of the federal government to protect the environment. This, of course, may change with the appointment of new Justices, but for now the Roberts Court overall is not revealing a clear

¹⁷³ Ann Graham, *Searching for Chevron in Muddy Waters: The Roberts Court and*

pattern of anti-environment or pro-business bias some feared, although among its newest members—Roberts and Alito—this is not necessarily true.

Table I
Pro-Environment Voting in the 2005- 2006 Supreme Court Term

| Justice | <i>Rapanos v. United States</i> | <i>S.D. Warren Company v. Maine Board of Environmental Protection</i> | <i>Massachusetts v EPA</i> | <i>National Association of Homebuilders v. Defenders of Wildlife</i> | <i>Environmental Defense v. Duke Energy Corporation</i> | <i>United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority</i> | <i>United States v. Atlantic Research Corporation</i> |
|----------------|--|--|-----------------------------------|---|--|--|--|
| | | | | | | | |

| | | | | | | | |
|---------|---|---|---|---|---|---|---|
| Roberts | | ✓ | | | ✓ | ✓ | ✓ |
| Stevens | ✓ | ✓ | ✓ | ✓ | ✓ | | ✓ |

| | | | | | | | |
|---------|--|---|---|--|---|---|---|
| Kennedy | | ✓ | ✓ | | ✓ | | ✓ |
| Scalia | | ✓ | | | ✓ | ✓ | ✓ |

| | | | | | | | |
|--------|---|---|---|---|---|---|---|
| Souter | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Thomas | | ✓ | | | ✓ | ✓ | ✓ |

| | | | | | | | |
|----------|---|---|---|---|---|---|---|
| Ginsburg | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Breyer | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |

| | | | | | | | |
|-------|--|---|--|--|---|--|---|
| Alito | | ✓ | | | ✓ | | ✓ |
|-------|--|---|--|--|---|--|---|

Table II
Pro Bush Administration Voting in the 2005-2006 Supreme Court Environmental Cases

| | | | | | | | |
|----------------|--|--|-----------------------------------|---|--|--|--|
| Justice | <i>Rapanos v. United States</i> | <i>S.D. Warren Company v. Maine Board of Environmental Protection</i> | <i>Massachusetts v EPA</i> | <i>National Association of Homebuilders v. Defenders of Wildlife</i> | <i>Environmental Defense v. Duke Energy Corporation</i> | <i>United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority</i> | <i>United States v. Atlantic Research Corporation</i> |
| Roberts | | ✓ | ✓ | ✓ | ✓ | Not applicable | |

| | | | | | | | |
|---------|---|---|--|---|---|----------------|--|
| Stevens | ✓ | ✓ | | | ✓ | Not applicable | |
| Kennedy | | ✓ | | ✓ | ✓ | Not applicable | |

| | | | | | | | |
|--------|---|---|---|---|---|----------------|--|
| Scalia | | ✓ | ✓ | ✓ | ✓ | Not applicable | |
| Souter | ✓ | ✓ | | | ✓ | Not applicable | |

| | | | | | | | |
|----------|---|---|---|---|---|----------------|--|
| Thomas | | ✓ | ✓ | ✓ | ✓ | Not applicable | |
| Ginsburg | ✓ | ✓ | | | ✓ | Not applicable | |

| | | | | | | | |
|--------|---|---|---|---|---|----------------|--|
| Breyer | ✓ | ✓ | | | ✓ | Not applicable | |
| Alito | | ✓ | ✓ | ✓ | ✓ | Not applicable | |

Table III
Pro Business Voting in the 2005- 2006 Supreme Court Environmental Cases

| Justice | <i>Rapanos v. United States</i> | <i>S.D. Warren Company v. Maine Board of Environmental Protection</i> | <i>Massachusetts v EPA</i> | <i>National Association of Homebuilders v. Defenders of Wildlife</i> | <i>Environmental Defense v. Duke Energy Corporation</i> | <i>United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority</i> | <i>United States v. Atlantic Research Corporation</i> |
|----------------|--|--|-----------------------------------|---|--|--|--|
| Roberts | ✓ | | ✓ | ✓ | | | ✓ |

| | | | | | | | |
|---------|---|--|--|---|--|---|---|
| Stevens | | | | | | ✓ | ✓ |
| Kennedy | ✓ | | | ✓ | | ✓ | ✓ |

| | | | | | | | |
|--------|---|--|---|---|--|--|---|
| Scalia | ✓ | | ✓ | ✓ | | | ✓ |
| Souter | | | | | | | ✓ |

| | | | | | | | |
|----------|---|--|---|---|--|--|---|
| Thomas | ✓ | | ✓ | ✓ | | | ✓ |
| Ginsburg | | | | | | | ✓ |

| | | | | | | | |
|--------|---|--|---|---|--|---|---|
| Breyer | | | | | | | ✓ |
| Alito | ✓ | | ✓ | ✓ | | ✓ | ✓ |