

Seems Like Old Times For Environmental Law: The Supreme Court's Conservative Turn In 2008–09

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Introduction

During the 2008–09 Term, the Supreme Court issued five decidedly unfavorable decisions in the environmental area. The Court invoked a variety of doctrines, among them constitutional standing,¹ *Chevron* deference,² and the standards of review for preliminary injunctions.³ These doctrines impacted a range of major federal environmental statutes, including the National Environmental Policy Act (“NEPA”),⁴ the Clean Water Act (“CWA”),⁵ and the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA” or “Superfund”).⁶ Five Justices—Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito—voted against the environmental protection interests in all five cases.⁷ This bloc of conservative Justices

was joined by Justices Stevens, Souter, and Breyer, each in at least one case, leaving only Justice Ginsburg to favor the environmental protection interests in all five cases.⁸ In one case, Justice Ginsburg published a solitary dissent.⁹ It was not a good year at the nation's high court for environmental protection advocates. In addition, the fact that these five decisions followed the landmark environmental victory in *Massachusetts v. EPA*¹⁰ carries some foreboding implications for environmental protection advocates.

It appears not only that *Massachusetts v. EPA* may be the last pro-environment decision to emerge from the current Supreme Court, but the 2008–09 Term also makes clear that fundamental questions over whether and how environmental injuries may be redressed by the judicial branch are far from resolved. For example, a majority of the Court's current

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1. See generally *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009) (holding that plaintiff environmental organizations lacked standing to challenge a new U.S. Forest Service policy allowing salvage timber sales from national forests to proceed without public input).
2. See *Entergy, Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009) (holding that the Clean Water Act allowed the use of cost-benefit analysis in setting performance-based standards for water discharges from existing cooling water intake structures); *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870 (2009) (holding that arranger liability under the Comprehensive Environmental Response, Compensation, and Liability Act required the government to show that the defendant intended to dispose of hazardous substances); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458 (2009) (holding that the Clean Water Act authorized discharges of fill into waters of the United States without triggering performance standards requiring a permit for new discharges of pollutants).
3. See *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 381–82 (2008) (lifting a preliminary injunction that required the U.S. Navy to adhere to mitigation measures designed to protect marine mammals while the Navy continued to conduct sonar training exercises).
4. National Environmental Policy Act, 42 U.S.C. §§ 4321–4370f (2006).
5. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006).
6. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2006).
7. See *Winter*, 129 S. Ct. at 369 (Roberts, C.J., joined by Scalia, Kennedy, Thomas & Alito, JJ. delivered the opinion of the Court); *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1146 (2009) (Scalia, J., joined by Roberts, C.J., and Kennedy, Thomas & Alito, JJ., delivered the opinion of the Court, and Ken-

8. See *Winter*, 129 S. Ct. at 382, 386 (Breyer, J., joined in part by Stevens, J., concurring on the issue of vacating the preliminary injunction imposed by the district court against the Navy to the extent that the Navy challenged it); *id.* at 387 (Ginsburg, J., joined by Souter, J., dissenting); *Summers*, 129 S. Ct. at 1153 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting); *Entergy*, 129 S. Ct. at 1512 (Breyer, J., concurring on the issue of whether the CWA's language allows the comparison of costs and benefits when calculating the performance standards under review, but dissenting from the holding); *id.* at 1516 (Stevens, J., joined by Souter & Ginsburg, JJ., dissenting); *Burlington N.*, 129 S. Ct. at 1884 (Ginsburg, J., dissenting); *Coeur Alaska*, 129 S. Ct. at 2477 (Breyer, J., concurring); *id.* at 2480 (Ginsburg, J., joined by Stevens & Souter, JJ., dissenting).
9. See *Burlington N.*, 129 S. Ct. at 1884.
10. *Massachusetts v. EPA*, 549 U.S. 497, 498 (2007) (holding that the Commonwealth of Massachusetts had standing to sue EPA for its decision against regulating greenhouse gas emission under the CAA). Justice Stevens wrote the majority opinion, joined by Justices Kennedy, Souter, Breyer and Ginsburg. *Id.* at 502. Chief Justice Roberts dissented on the issue of standing, joined by Justices Scalia, Thomas, and Alito. *Id.* at 535. Justice Scalia dissented on the issue of standing and on the question of whether the CAA authorized EPA to regulate mobile source emissions due to their contribution to global warming. *Id.* at 549.

Justices appear energized to reinvigorate debate over how and when an individual or organization may frame an environmental harm as a justiciable claim.¹¹ The more recently appointed conservative Justices have joined their seasoned colleagues in questioning the value of earth's species, the public's interest in exercising stewardship over natural resources, and the possibility that any branch of government or private group might obtain judicial assistance in their efforts to protect the environment.¹²

This Article analyzes the five Supreme Court environmental cases from the 2008–09 Term collectively, individually, and from a historical context. Part I discusses each case in sequence, focusing on the logic, language, and impact of the decisions.¹³ Through this examination, Part I offers observations about the contradictions and consistencies among the cases as well as indications about the majority's overall perspective on environmental law and the judiciary's role in that field. Part II considers each of the 2008–09 Term decisions in its broader historical context and discusses their significant commonalities with high-profile environmental cases from past decades.¹⁴ Ultimately, this Article aims to offer a sense of the tenacity and openness with which the ideologically conservative majority of the Supreme Court seeks to minimize the reach and effect of environmental law.

I. Five Environmental Cases, Five Environmental Losses

The Supreme Court enjoys near-total discretion in selecting cases to hear each Term, which means that any Term's decisions can deliver messages about the personal beliefs and politics of the Justices.¹⁵ The variety of motivations that underlie the Court's acceptance or denial of certiorari on any given

case should not be underestimated.¹⁶ Nevertheless, when the Court issues five environmental losses in such rapid succession as the Supreme Court did this past Term, it can be stated fairly that the five Justices who joined the majority's holding in all five cases have invited speculation about their proclivities and prejudices in the environmental arena.

This Part introduces the five cases, both in broad terms and in terms of their logic, style and internal consistency. It offers primary impressions of the decisions and thoughts on the Justices' motivations in deciding each case.

A. *Winter Chill*—Launching the Term with a Blow to NEPA

*Winter v. Natural Resources Defense Council, Inc.*¹⁷ earns a place among the Supreme Court's opinions that reveal hostility among its conservative members toward environmental protection. The case centered on whether and how a court might exercise equitable powers to respond to the U.S. Navy's inattention to NEPA as the Navy conducted sonar training exercises in waters inhabited by marine mammals.¹⁸ Nowhere in his majority opinion did Chief Justice Roberts comment upon the Navy obtaining permission from the Council on Environmental Quality ("CEQ") to violate the preliminary injunction issued by the district court and approved by the Ninth Circuit Court of Appeals, despite the separation of powers problems this creates, supposedly a prime concern of the conservative bench.¹⁹ Indeed, nowhere did the majority opinion express even a passing concern that the Navy's attempt to avoid NEPA's Environmental Impact Statement ("EIS") requirement subverted a longstanding mandate that agencies fully consider the potential detrimental environmental consequences of their activities before implementing those activities.²⁰ Perhaps more telling, the Court's decision

11. See, e.g., *Summers*, 129 S. Ct. at 1148–51.

12. See *Winter*, 129 S. Ct. at 377–78 (questioning the value of protecting marine species through properly conducted environmental impact review). Hostility to species protection may also be perceived in decisions such as *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 567 (1992) (rejecting arguments that a party might have a sufficient interest in endangered species to bear a cognizable injury when endangered species or their habitats are threatened). *Summers*, 129 S. Ct. at 1147, questions whether a citizen may bear an interest in public land preservation, which echoes *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) (refusing to recognize that a citizen might bear an interest in public land preservation except where the citizen has particular plans to hike). The standing issue addressed in *Summers* built on principles established in one of the Supreme Court's earliest significant environmental decisions in the modern environmental regulatory era, *Sierra Club v. Morton*, 405 U.S. 727 (1972). In *Morton*, the majority denied standing on the basis of an inadequate claim of injury-in-fact where the Sierra Club, a longstanding environmental organization whose members regularly used the federal lands in jeopardy, challenged the U.S. Department of Interior for its failure to prevent the development. See *id.* at 741.

13. See *infra* Part I.

14. See *infra* Part II.

15. See generally Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L. Q. 389, 389 (2004) (discussing the Supreme Court's plenary authority over case selection and the massive influence that the Justices' choices have on U.S. politics and society).

16. See *id.* (identifying a variety of administrative, ideological, and personal motivations that influence various Justices in their decisions on which cases to accept before the Court).

17. *Winter*, 129 S. Ct. at 365.

18. *Id.* at 374–75. The Navy had appealed the Ninth Circuit's affirmation of the district court's denial of the Navy's motion to vacate the district court's injunction. The Navy argued that an executive branch determination that the Navy faced emergency circumstances allowing it to implement alternative arrangements to full NEPA compliance overrode the mitigation measures that had been imposed under the district court's injunction. See *id.* at 373–74, 388–89 (Ginsburg, J., dissenting).

19. See generally *id.* at 370–82. The CEQ is an executive branch advisory board. Chief Justice Roberts presented the Navy's tactic in turning to the CEQ in neutral terms. See *id.* at 373–74. In contrast, Justice Ginsburg detailed the Navy's tactics to avoid a full-fledged NEPA review. See *id.* at 390–91 (Ginsburg, J., dissenting). After pointing out that the district court review had been far more thorough than the CEQ's "hasty decision on a one-sided record," Justice Ginsburg concluded this section of her dissent with the observation, "If the Navy sought to avoid its NEPA obligations, its remedy lay in the Legislative Branch. The Navy's alternative course—rapid, self-serving resort to an office in the White House—is surely not what Congress had in mind when it instructed agencies to comply with NEPA 'to the fullest extent possible.'" *Id.* at 391.

20. See *id.* at 387. It was left to Justice Ginsburg's dissent to point out the obvious, "If the Navy had completed the EIS before taking action, as NEPA instructs, the parties and the public could have benefited from the environmental

is based primarily upon the barely examined but staunchly asserted presumption that the public's interest in having the Navy conduct sonar training exercises off the coast of California without interruption overwhelmingly outweighed the survival and comfort of countless marine species.²¹

Underscoring the activism of the Court's opinion is the Court's conclusory assertion, which flew in the face of the thorough analysis by the district court that the Navy did not need to observe certain mitigation measures as it continued its training exercises.²² The Court dismissed the lower courts' analyses of the Navy's ability to continue its training exercises while adhering to temporary mitigation measures designed to protect the marine species.²³ Although the Navy itself had agreed to four of the mitigation measures imposed by the district court, the majority swept aside those measures in deciding that the lower courts had inappropriately imposed a preliminary injunction.²⁴ In these ways, the majority presented itself consciously and overtly as determined to exercise its equitable discretion to favor national security interests over protection of marine species.²⁵

I. The *Winter* Opinion

As noted above, the ultimate issue in *Winter* was weighing the public's interest in allowing the Navy to use mid-frequency active sonar during training exercises in the waters off southern California without interruption against the public's interest in protecting the multiple marine species inhabiting those waters from death or injury.²⁶ This highly

subjective comparison of two dissimilar public interests arose out of the majority's predominant focus on the final element of the preliminary injunction analysis, which requires a court to grant an injunction only when doing so would be in the public interest.²⁷ Although the majority opinion places much emphasis on this public interest element in its deliberation, it never actually explains why the public's interest in the Navy's uninhibited sonar training trumps the public's interest in protecting marine species.²⁸ Indeed, the majority opinion never discusses the concept of public interest itself, and, perhaps more tellingly, the Court never precisely articulates the public interest that the environmental organizations hoped to vindicate.²⁹ The majority nonetheless assures readers that it, unlike either lower court, gave the public interest issue "proper consideration."³⁰ In contrast, the Court readily defines the public interest advanced by the Navy in its broadest, simplest terms: national security.³¹

If the Court's cursory comparison of national security and species protection is accepted, then the public interest in allowing the U.S. armed forces to conduct training exercises for the purpose of wartime preparedness trumps any public interest in environmental protection to such a degree that Navy training exercises must be conducted uninterrupted and uninhibited by any conditions designed to protect the environment. By foregoing any meaningful discussion on this issue, the majority opinion presents the prioritization of national defense over environmental stewardship as self-evident.³² Apparently, no definition of the environmental interest or even of the concept of public interest was warranted because the disparity was so massive and obvious.

analysis—and the Navy's training could have proceeded without interruption. Instead, the Navy acted first, and thus thwarted the very purpose an EIS is intended to serve." *Id.*; see also William S. Eubanks II, *Damage Done? The Status of NEPA after Winter v. NRDC and Answers to Lingering Questions Left Open by the Court*, 33 VT. L. REV. 649, 649 (2009) ("[T]he majority ultimately viewed *Winter* more as a national security case and less as a substantive environmental case since its analysis focused predominantly on potential hardships to the Navy under the facts.").

21. The majority stated its unsupported presumption three times. See *Winter*, 129 S. Ct. at 376 ("[E]ven if plaintiffs have shown irreparable injury from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors."); *id.* at 378 ("The public interest in conducting training exercises with active sonar under realistic conditions plainly outweighs the interests advanced by the plaintiffs. . . . In this case . . . the proper determination of where the public interest lies does not strike us as a close question."); *id.* at 382 ("We do not discount the importance of plaintiffs' ecological, scientific, and recreational interests in marine mammals. Those interests, however, are plainly outweighed by the Navy's need to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines.").
22. See *id.* at 388–89 (Ginsburg, J., dissenting) (detailing the efforts of both lower courts to thoroughly understand the Navy's activities in order to craft mitigation measures that would allow the Navy to both continue its training and comply with NEPA).
23. *Id.* at 377 ("In this case, the [d]istrict [c]ourt and the Ninth Circuit significantly understated the burden the preliminary injunction would impose on the Navy's ability to conduct realistic training exercises.").
24. See *id.* at 381 n.5 (rejecting Justice Breyer's argument that the Court should leave intact the mitigation measures that the Navy admitted it could tolerate).
25. See *id.* at 382 ("We do not discount the importance of plaintiffs' ecological, scientific, and recreational interests in marine mammals. Those interests, however, are plainly outweighed by the Navy's need to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines.").
26. *Id.* at 376–82. The Court first identified the Navy's interest as the uninterrupted continuation of its then-current training exercises, but it readily broadened that interest to include the safety of the U.S. fleet and national security. See *id.*

at 378 ("[F]orcing the Navy to deploy an inadequately trained antisubmarine force jeopardizes the safety of the fleet. . . . [T]he President—the Commander in Chief—has determined that training with active sonar is 'essential to national security.'").

27. See *id.* at 378. The Court identifies the four elements of a litigant's argument for a preliminary injunction as the need to "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 374. In its analysis, the Court merges the final two elements. See *id.* at 378 ("[W]e conclude that the balance of equities and consideration of the overall public interest in this case tips strongly in favor of the Navy.").
28. Throughout its discussion, the Court uses conclusory or opinionated language to state its view. See, e.g., *id.* at 378 (arguing that the Navy's interest "plainly outweighs" the environmental interests); *id.* ("The proper determination of where the public interest lies does not strike us as a close question."); *id.* at 382 (arguing that the plaintiffs' interests are "plainly outweighed" by the Navy's interests).
29. See *id.* at 376 ("A proper consideration of [the balance of equities and public interests] alone requires denial of the requested injunctive relief.").
30. See *id.* at 378 ("[T]he [d]istrict [c]ourt addressed these considerations in only a cursory fashion."); *id.* at 379 ("The lower courts did not give sufficient weight to the views of several top Navy officers.").
31. See, e.g., *id.* at 378 ("President [Bush]—the Commander in Chief—has determined that training with active sonar is 'essential to national security.'" (quoting Pet. App. 232a)).
32. *Id.* at 378 ("The public interest in conducting training exercises with active sonar under realistic conditions plainly outweighs the interests advanced by the plaintiffs."); *id.* at 382 (describing the plaintiffs' interests as "plainly outweighed" by the Navy's interests).

2. *Winter's* Impact

Paradoxically, the conclusion in *Winter* that national security interests trump environmental protection interests actually may comfort those who count environmental stewardship as a basic moral responsibility and a core public interest. After all, few interests can be imagined that would presumptively prevail over all others as readily as that of a nation's security and, as a corollary to that, the physical safety of its armed forces.³³

The language of the *Winter* majority opinion, however, suggests that environmental protection interests would not carry significant weight in the majority's eyes under circumstances less dramatic than those present in this case. First, the majority opinion tends to characterize the environmentalists and their interests as frivolous.³⁴ Jean-Michel Cousteau, the explorer, prolific writer, and founder of the Ocean Futures Society, is identified as "an environmental enthusiast and filmmaker."³⁵ The scant identification of environmental interests included references to whale-watchers and photographers.³⁶ The majority characterizes the environmental interests three times as "recreational," and four times the majority describes the plaintiff's desire to merely "observe" animals.³⁷ These subtle verbal jabs take on more significance when the deciding issue for the majority is a highly subjective prioritization of public interests.³⁸

The majority's fourteen paragraph discussion on the urgency of military training compared to only two sentences acknowledging the "seriousness" of the environmental interests at stake is also striking.³⁹ Perhaps the opinion is crafted in this way to emphasize the contrast between the two public interests at stake. The Navy's interests may be unassailably weightier than those of the environmentalists, but the Court could have better supported its conclusion by offering a dispassionate, equivalent consideration of each.

More troubling than the opinion's scant references to the environmental interests at stake is the Court's open-mindedness in considering claims advanced by the Navy that are similar to claims rejected by the Court when advanced by

environmental protection advocates in this and other cases.⁴⁰ For example, the Court accepted without examining the Navy's arguments relating to concreteness and imminence.⁴¹ The Navy claimed that its uninterrupted sonar training was necessary and urgent due to the threat of attack by enemy submarines.⁴² The majority never questioned the imminence of submarine attacks by enemy nations; nor did the majority question the relative increase of the threat to national security presented by a slower training regime or one conducted in a less populated marine habitat.⁴³ Indeed, at one point in the opinion the majority evokes a melodramatic tone about the perils that threaten U.S. national security in the form of submarine attacks, noting that an injunction against Navy sonar training could force the Navy to seek the injunction's dissolution, but "[b]y then it may be too late."⁴⁴ This relaxed examination of the threat to national security sharply contrasts the Court's strict examination of concreteness and imminence arguments that have been advanced by environmental petitioners over the years.⁴⁵

The Navy effectively argued that the particular type of training exercise under dispute was of tremendous importance to naval security because all naval training is part of an integrated whole; an ineffective sonar training program conducted off the coast of California in 2008 could degrade other elements of naval warfare preparedness.⁴⁶ Although the Court could reasonably accept this argument at face value, its doing so reinforces the majority's bias against environmental protection interests. Theories about the potential for environmental harms, including those presented in the *Winter* case and in others, have been routinely met with skepticism by the *Winter* majority Justices.⁴⁷ This skepticism concerning potential harms to species resembles conservative Jus-

33. See *id.* at 382. Indeed, at one point the Court points out that the ultimate dispute in the case is not whether the Navy may be enjoined from harming the marine species inhabiting southern California waters, but only whether the Navy needed to prepare an EIS studying the issue. *Id.* at 381.

34. See *id.* at 377–78.

35. *Id.* at 371.

36. *Id.* at 377.

37. See *id.* at 375, 377, 378, 382. The Court does admit that environmental interests also include scientific and ecological interests, but the Court never elaborates on these interests or even explains them.

38. The majority opinion begins and ends by quoting Presidents George Washington and Theodore Roosevelt, which might be interpreted as an attempt by the majority to inspire patriotic sentiments. See *id.* at 370 (quoting George Washington's first annual address to Congress with the words "[T]o be prepared for war is one of the most effectual means of preserving peace."); *id.* at 382 (quoting Theodore Roosevelt's 1907 address to Congress with the words "[T]he only way in which a navy can ever be made efficient is by practice at sea, under all the conditions which would have to be met if war existed.");

39. *Id.* at 377 ("[The Navy's] interests must be weighed against the possible harm to the ecological, scientific, and recreational interests that are legitimately before this Court."); *Id.* at 382 ("We do not discount the importance of plaintiffs' ecological, scientific, and recreational interests in marine mammals.");

40. See *infra* notes 61–63 and accompanying text (discussing the requirement that both specific times and places where a plaintiff will encounter injury in context of standing for environmental plaintiffs).

41. See *Winter*, 129 S. Ct. at 377–78.

42. See *id.* at 370 ("Antisubmarine warfare is currently the Pacific Fleet's top war-fighting priority. Modern diesel-electric submarines pose a significant threat to Navy vessels. . . . Potential adversaries of the United States possess at least 300 of these submarines."); *id.* at 378 ("[F]orcing the Navy to deploy an inadequately trained antisubmarine force jeopardizes the safety of the fleet."); *id.* at 380–81 ("Unlike the Ninth Circuit, we do not think the Navy is required to wait until the injunction 'actually result[s] in an inability to train . . . sufficient naval force for the national defense' before seeking its dissolution. By then it may be too late."); *id.* at 382 ("[The environmental interests] are plainly outweighed by the Navy's need to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines.");

43. See *id.*

44. *Id.* at 381.

45. For evidence of the Court majority's approach when an environmentalist must establish imminence, see, e.g., discussion relating to *Summers*, *infra* notes 57–63 and accompanying text (requiring specificity about both times and places where a plaintiff will encounter injury).

46. See *Winter*, 129 S. Ct. at 377 (quoting a declaration by Admiral Gary Roughead, Chief of Naval Operations, who stated, "It is important to stress the ship crews in all dimensions of warfare simultaneously. If one of these training elements were impacted—for example, if effective sonar training were not possible—the training value of the other elements would also be degraded.");

47. In *Winter*, the majority several times questions the validity of claims that sonar training may be linked to marine mammal injuries. See *id.* at 371 (stressing the lack of proof that mass strandings of marine mammals may be linked to the use of active sonar); *id.* at 378 (minimizing the plaintiffs' interests by casting them as vague and unquantifiable "the most serious possible injury would be harm to an unknown number of the marine mammals.");

tices' skepticism about the interdependent nature of earth's environment.⁴⁸

In the end, *Winter* is a study in judicial activism. The majority offers unproven conclusions as undeniable truth. *Winter* may be dismissed as unremarkable when placed among the Court's long line of anti-NEPA decisions. In the context of the 2008–09 Term, however, the decision is an ominous harbinger of the decisions to come.

B. Blistering Summers—Reasserting the Hostility Toward Environmental Standing

Following on the heels of *Winter*, *Summers v. Earth Island Institute*⁴⁹ stands as a second judicial blow to the principle that government decisionmaking should include regularized, publicly accessible consideration of environmental impacts.⁵⁰ The case arose out of a U.S. Forest Service decision to exempt certain public lands projects from notice and comment.⁵¹ NEPA was implicated because the Forest Service's rationale for the exemptions was that these projects had already been categorically exempted from the EIS process, and the Forest Service reasoned that such projects could be safely presumed to have too minor an impact on the environment to warrant individualized public process.⁵²

The Court majority could have used *Summers* as a second opportunity to air its skepticism about the value of environmental impact review, but did not. Instead, *Summers* provided Justice Scalia an opportunity to revive his arguments against environmental standing, which may have seemed a worthwhile, if not urgent, pursuit by the conservative mem-

bers of the Court in the wake of *Massachusetts v. EPA*.⁵³ The Court held that the Earth Island Institute lacked standing because the Institute's members' plans to hike in the federal lands scheduled for timber sales were insufficiently specific.⁵⁴

I. The *Summers* Opinion

Justice Scalia asserted that the member-hikers' affidavits were insufficiently specific because they allowed for conjecture about whether and when they might hike on a tract of federal land that was about to be subjected to a salvage timber sale.⁵⁵ The consequence of Justice Scalia's opinion was that the hikers' opportunity to participate in notice and comment under the new Forest Service policy was stripped away.⁵⁶ Justice Scalia justifies his decision to reject the hikers' affidavits primarily on two bases—Court precedents and the Court's constitutional obligation to limit itself to cases or controversies.⁵⁷ The tone of the opinion is doctrinaire, as if Justice Scalia considers it irresponsible for the dissenting Justices to break with precedents and escape the constitutional limits of judicial authority by admitting factual probabilities into the calculus of what constitutes a concrete or imminent injury.⁵⁸ Following a pattern he established in past cases, Justice Scalia pounces on any non-specificity in an affiant's statement and rejects out of hand the overwhelming likelihood that a longstanding organization's numerous members will continue to behave as they had before.⁵⁹ In so doing, Justice Scalia revives his previously established signature theme—that public interest advocates must monitor environmental agencies' infraction by infraction rather than programmatically.⁶⁰

In his dissent, Justice Breyer disagrees with the majority over the level of temporal and geographical specificity

48. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555–56 (1992) (Scalia, J.) (“[R]espondents propose a series of novel standing theories. The first, inelegantly styled ‘ecosystem nexus,’ proposes that any person who uses any part of a ‘contiguous ecosystem’ adversely affected by a funded activity has standing even if the activity is located a great distance away . . . Respondents’ other theories are called, alas, the ‘animal nexus’ approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the ‘vocational nexus’ approach, under which anyone with a professional interest in such animals can sue. Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of the Agency for International Development (AID) did not consult with the Secretary regarding the AID-funded project in Sri Lanka. This is beyond all reason.”).

49. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009).

50. Both *Winter* and *Summers* were argued on October 8, 2008, with *Winter* issued on November 12, 2008 and *Summers* on March 3, 2009. See *Winter*, 129 S. Ct. at 365; *Summers*, 129 S. Ct. at 1142.

51. See *Summers*, 129 S. Ct. at 1147. The Forest Service is required to “establish a notice, comment, and appeal process for ‘proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974.’” Forest Service Decisionmaking and Appeals Reform, Pub. L. No. 102–381, § 322, 106 Stat. 1419 (1993). The regulations allowing certain Forest Service activities to be categorically excluded from the public process are codified at 36 C.F.R. §§ 215.4(a), 215.12(f) (2009). The new regulations under dispute identify particular fire rehabilitation and salvage timber sale activities as categorically excused from public process. Notice of Final National Environmental Policy Act Implementing Procedures, 68 Fed. Reg. 33,824 (June 5, 2003) (Forest Service Handbook 1909.15, ch. 30, § 31.2(11)); Notice of Final Interim Directive, 68 Fed. Reg. 44,607 (Forest Service Handbook 1909.15, ch. 30, § 31.2(13)).

52. See *Summers*, 129 S. Ct. at 1147.

53. Chief Justice Roberts authored the dissent that addressed standing in *Massachusetts v. EPA*, 549 U.S. 497, 535–48 (2007).

54. See *Summers*, 129 S. Ct. at 1150–51 (criticizing the Institute's members' affidavit for its lack of specificity).

55. *Id.* The majority faults the hikers generally for neglecting to identify particular timber sales that would impede the affiant's specific plans to enjoy the National Forests. Where the affidavit did refer to a specific series of Forest Service plans for a particular national forest, the majority faulted it for failing to assert a definite intention to visit the location.

56. See *id.* at 1151.

57. See *id.* at 1149–52 (stressing that the Court's stern reading of affidavits submitted by individuals seeking injunctions against the government is in keeping with precedents); *id.* at 1148 (framing the analysis by opening with references to the Court's obligation to maintain the proper balance of powers by confining itself to cases or controversies).

58. See, e.g., *id.* at 1151 (accusing the dissent of attempting to make “a mockery of our prior cases”); *id.* at 1152 (defending the practice of requiring individual parties to allege particular injuries by concluding that the requirement “has never been dispensed with in light of statistical probabilities”); *id.* (pointing to a court's inherent obligation to assure itself that standing exists before concluding that “[w]hile it is certainly possible—perhaps even likely—that one individual will meet all of [the standing] criteria, that speculation does not suffice”).

59. See, e.g., *id.* at 1151 (“Such ‘some day’ 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.”)(quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)).

60. See *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990). Interestingly, the *Summers* majority never cites *National Wildlife Federation*, the case that is most factually analogous, and the case in which Justice Scalia first and most clearly warned environmentalists that the Court could not be used by public interest advocates to attain programmatic relief. *Id.* at 894.

required of a plaintiff attempting to establish standing.⁶¹ Responding to the majority's predominant focus on the imminency requirement, the dissent points out that the proper question in the context of a standing analysis is whether the plaintiff has established that he is vulnerable to a realistic threat of future harm.⁶² Thus, the dissent argues, the focus should be less on the temporal element of imminence and more on whether the claimed future threat is conjectural.⁶³ Related to this, the dissent highlights that, in an evaluation of a claim of imminent harm, the claimant's statements about past actions are pertinent, as they may establish a pattern of behavior to support claims about future behavior.⁶⁴ The majority dismisses these statements about past harms as completely immaterial.⁶⁵

Addressing the majority's asserted reliance on precedent, the dissent reminds the majority that the Court had recently accepted state petitioners' standing in *Massachusetts v. EPA*, where the harm arising out of the federal government's inaction might not occur for decades.⁶⁶ The hiker's affidavit analyzed by the *Summers* majority, the dissent insists, presents adequate specificity for standing.⁶⁷ "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,"⁶⁸ Justice Breyer observes.

Throughout his opinion, Justice Breyer's tone is chiding, argumentative, and in some places even indignant, as where he notes that "a threat of future harm may be realistic even where the plaintiff cannot specify precise times, dates, and GPS coordinates."⁶⁹ Justice Breyer challenges the majority with question after question, as if to suggest disbelief that logic underlies the majority's dogged adherence to such a narrow construction of standing.⁷⁰ The dissent underscores that

the *Summers* majority is far less humble in its references to judicial duty and precedents than it is selective in both its choice of facts and reliance on previous case law.⁷¹ Justice Breyer concludes his dissent with the observation that "[m] any years ago the Ninth Circuit warned that a court should not 'be blind to what must be necessarily known to every intelligent person.'" ⁷² Granting that the majority Justices are indeed intelligent, it is fair to conclude that *Summers* is the work of a result-oriented Court.

2. *Summers*' Impact

As a standing decision, *Summers* adds nothing to the view of constitutional standing expressed in a string of prior cases, most notably the pair authored by Justice Scalia in the early 1990s. *Lujan v. National Wildlife Federation* and *Lujan v. Defenders of Wildlife* together stand for the general proposition that the case or controversy requirement of the U.S. Constitution's Article III places severe constraints on both the scope of injury that an environmental plaintiff may claim to have suffered and the factual circumstances under which an imminent injury will be judicially cognizable.⁷³ The level of particularization that the majority demanded in the plaintiff's affidavit under review in *Summers* reflects the same level of scrutiny exhibited in these prior environmental standing cases.⁷⁴

As the Court's environmental standing decision following environmental plaintiffs' success in *Massachusetts v. EPA*, *Summers* sends a message to environmental plaintiffs that they should not expect similar success in standing claims in the future. Apparently, the level of scrutiny and the selective reading that Justice Scalia applies to environmental plaintiffs' affidavits is as appealing to the current majority of the Court as it was to the conservative majority of the early 1990s.⁷⁵ The current majority has regrouped to render the recent victory in *Massachusetts v. EPA* an exception to the longstanding Court view that environmental organizations

61. See *Summers*, 129 S. Ct. at 1156 (Breyer, J., dissenting) ("[A] threat of future harm may be realistic even where the plaintiff cannot specify precise times, dates, and GPS coordinates.")

62. *Id.* at 1155–56 (arguing that the question of imminence in the context of a standing analysis is meant to focus courts on "where, as here, a plaintiff has already been subject to the injury it wishes to challenge, the Court has asked whether there is a realistic likelihood that the challenged future conduct will, in fact, recur and harm the plaintiff.")

63. *Id.* at 1155 (explaining that the proper application of imminence in a standing analysis is "to emphasize that the harm in question—the harm that was not 'imminent'—was merely 'conjectural' or 'hypothetical' or otherwise speculative")

64. See *id.* at 1156.

65. See *id.* Without considering the possibility that statements about past actions are offered to establish a pattern of behavior, the majority rejects those statements as immaterial. See *id.* at 1150.

66. See *id.* at 1156 (finding standing where the plaintiff state admitted that the injuries it would suffer due to global warming are indistinct in scope and timing).

67. See *id.* at 1157–58 (addressing the affidavit in the context of the affidavit of the plaintiff whose claim settled, the statement of the Forest Service, and the standing determination in *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

68. *Summers*, 129 S. Ct. at 1157.

69. *Id.* at 1156; see also *id.* at 1154 (Breyer, J., closes the opening paragraph of his dissent, which summarizes the majority position, with the observation that "[n]othing in the record or the law justifies this counterintuitive conclusion.")

70. See *id.* at 1155 ("How can the majority credibly claim that salvage-timber sales, and similar projects, are unlikely to harm the asserted interests of the members of these environmental groups?"); *id.* at 1156 ("How could the Court impose a stricter criterion [on imminence than it did in *Los Angeles v. Lyons*, 461 U.S. 95 (1983)]?"); *id.* at 1157 ("Why describe this perfectly sensible response to the settlement of some of the Complaint's claims [that is, the submission of additional affidavits after the individual claims of one member were settled] as

a 'retroactiv[e]' attempt to 'me[et] the challenge to their standing at the time of judgment?')

71. See *id.* at 1157 (identifying details in the surviving affidavit that support a finding that it is adequately concrete to establish standing).

72. *Id.* at 1158 (quoting *In re Wo Lee*, 26 F. 471, 475 (1886)).

73. See *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990) (holding that hiker-members failed to allege with adequate specificity that a federal program to encourage mining, oil and gas leases on federal lands threatened their recreational and aesthetic interests in those lands); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that member-animal observers' affidavits failed to allege with adequate specificity that their plans to travel overseas to observe certain endangered species would be detrimentally impacted by a federal decision to exempt U.S. funding of construction projects on foreign soil from a statutory consultation requirement designed to protect endangered species and their habitats).

74. Indeed, Justice Scalia worries that the dissent's approach "would make a mockery of our prior cases, which have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm." *Summers*, 129 S. Ct. at 1151.

75. See *Nat'l Wildlife Fed'n*, 497 U.S. at 874. In 1990, of the current Justices who presided over *Summers*, only Justices Scalia, Kennedy, and Stevens were members of the Court. By 1992, Justices Souter and Thomas had joined the Court. See *Defenders of Wildlife*, 504 U.S. at 556–57. Thus, Chief Justice Roberts and Justice Alito are the "new" members of the conservative majority in environmental standing decisions.

presumptively lack standing because their members' harms are insufficiently imminent and concrete.⁷⁶

C. Riverkeeper Adrift—Reading Cost-Benefit Analysis into the Clean Water Act

Entergy Corp. v. Riverkeeper, Inc. introduced the trio of statutory interpretation cases that complete the string of losses suffered by environmental protection advocates in the 2008–09 Term.⁷⁷ These cases all deal with issues of judicial deference; their differences and commonalities suggest a propensity among the majority of Justices to defer to federal environmental agencies selectively. In *Burlington Northern & Santa Fe Railway Co. v. United States*, eight Justices joined the majority and the opinion was authored by Justice Stevens,⁷⁸ a Justice who cannot fairly be accused of bias against environmental plaintiffs.⁷⁹ This suggests that the three cases warrant individual evaluation.

Entergy involved a dispute over the performance standards for certain cooling water intake structures.⁸⁰ Under the CWA, these standards must incorporate “the best technology available for minimizing adverse environmental impact” (“Best Technology Available” or “BTA”).⁸¹ Riverkeeper claimed that Environmental Protection Agency (“EPA”) had developed its BTA standards through cost-benefit analysis, and that the CWA does not permit cost-benefit analysis under the BTA standard, even though the CWA does allow cost-benefit analysis under the BTA.⁸² The Second Circuit agreed, and remanded the case to EPA with instructions to explain how its standard was not the product of a cost-benefit analysis.⁸³ The Supreme Court reversed, concluding that the CWA gave EPA the discretion to develop BTA standards through cost-benefit analysis.⁸⁴

I. The *Entergy* Opinion

Writing for the majority, Justice Scalia offered only a murky notion of what cost-benefit analysis entails⁸⁵ and failed to acknowledge the widely known problems its application can cause in environmental standard setting.⁸⁶ Cost-benefit analysis appears barely distinguishable in Justice Scalia's majority opinion from other analyses through which cost may influence environmental standard-setting.⁸⁷ Likewise, the majority purported to discern no significant difference between standards in the CWA that make economics a central consideration and those that prioritize pollution control.⁸⁸ This oversight led the majority to reject any implication from the BTA provision's silence on cost-benefit analysis that Congress did not intend cost-benefit analysis to be used with the BTA standard.⁸⁹

A fundamental distinction between the majority and dissenting opinions in *Entergy* is their method of applying the *Chevron* doctrine;⁹⁰ each opinion is logically sound but reaches opposite conclusions. Justice Scalia's majority opinion launches its statutory analysis with a summary of EPA's interpretation of the BTA standard, followed by the assertion that “[the EPA's] view governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation.”⁹¹ From this starting point, the majority opinion predominantly defends and justifies EPA's preferred statutory reading.⁹²

In contrast, Justice Stevens' dissent begins with a discussion of cost-benefit analysis as a lens through which to analyze the CWA, and concludes that the statute is clear on its face, thus obviating any need for the dissent to consider whether EPA's interpretation of the BTA provision is reasonable.⁹³ In a footnote, the dissent takes the majority to task for skipping *Chevron's* first step and simply applying *Chevron* deference.⁹⁴ The majority responds, also in a footnote, that an agency interpretation that contradicts the letter of a statute cannot survive the second step of a *Chevron* analysis

76. Environmental plaintiffs may also have misperceived *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000) as evidence that a majority of the Court had come to more readily find standing in environmental cases.

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

78. *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1873–74 (2009). Justice Stevens was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Souter, Thomas, Breyer, & Alito; Justice Ginsburg filed a dissent.

79. Justice Stevens wrote the majority opinion in *Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding Massachusetts had standing to bring suit based on alleged injury due to global warming and rejecting the contention that the state did not have the authority to regulate greenhouse gas emissions from mobile sources).

80. See *Entergy*, 129 S. Ct. at 1502–05 (detailing the history of the regulations).

81. See 33 U.S.C. § 1326(b) (2006) (“Any standard established pursuant to § 1311 of this title [the CWA section mandating that all effluent discharges comply with the Act] or § 1316 of this title [the CWA section addressing thermal discharges] and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.”).

82. *Entergy*, 129 S. Ct. at 1505. Congress created the BPT standard for discharging facilities already in existence at the time that the CWA was originally introduced, reasoning that these facilities could not absorb the substantial financial burden associated with the more ambitious technologies required for new facilities. See *id.* at 1519 (Stevens, J., dissenting) (discussing the reasoning behind the BPT standard and stating that the CWA's scheme imposes a system under which standards move away from this “temporary and exceptional” standard).

83. See *Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 114 (2d Cir. 2007).

84. See *Entergy*, 129 S. Ct. at 1510 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The majority opinion, however,

acknowledges that it collapses the two-step *Chevron* analysis into a single step. See *Entergy*, 129 S. Ct. at 1505 n.4.

85. See *id.* at 1509.

86. In contrast, see Justice Stevens' dissent, *id.* at 1516 (reviewing the dangers of environmental harms or benefits being monetized).

87. *Id.* at 1509–10 (reviewing various settings in which EPA includes costs in its calculus and considers the benefits derived from technologies bearing various costs, ultimately concluding that Riverkeeper having acknowledged in its brief that the CWA would not require billions of dollars to be spent to save one fish is tantamount to Riverkeeper conceding that the CWA authorizes cost-benefit analysis generally).

88. *Id.* at 1507 (expressing doubt about the assertion that certain CWA tests preclude cost-benefit analysis).

89. See *id.* at 1506–08 (reviewing standards and denying that the BTA test must conform). It may be that Justice Scalia used *Chevron* deference to avoid the technical complexities of the CWA's varying standards.

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

91. See *Entergy*, 129 S. Ct. at 1505 (citing *Chevron*, 467 U.S. at 843–44).

92. See *id.* at 1506–10.

93. *Id.* at 1516–22 (concluding that, under *Chevron*, the agency's past practices are “irrelevant”); *id.* at 1521 n.13.

94. *Id.* at 1518 n.5 (finding it “puzzling” that the majority sets forth the second step of *Chevron* at the outset of its opinion).

because such an interpretation would be unreasonable.⁹⁵ To take the majority's rationale to its logical conclusion would allow courts to skip straight to *Chevron's* second step.

The majority opinion touches on a number of statutory terms so that a Court-led reading of the BTA provision may almost be pieced together from various paragraphs in the opinion.⁹⁶ For example, the Court presents dictionary definitions and a comparative analysis of how certain words are used in various CWA provisions.⁹⁷ The Court's focus throughout this brief exercise, however, is on finding fault with the Second Circuit's or Riverkeeper's reading of the statute's terms.⁹⁸ By merging the two steps of its analysis, the majority opinion is able to discern ambiguity in every element of the BTA provision.

The Court also limits its analysis of the BTA standard by resisting contextual analysis and ignoring legislative history.⁹⁹ When the Court broadens its scope of analysis to encompass additional CWA standards, it declines to accept that the statute is designed to move cost considerations out of the core calculus of standard-setting for facilities other than those to which the BPT standard applies.¹⁰⁰ Further, the Court refuses to accept that BTA is even part of the dynamic movement among the statutory standards through which cost-consideration was intended to be marginalized over time.¹⁰¹

While it is true that the statute's various standards may baffle the novice, and it is also true that cooling water intake structures do not fit readily into a hierarchy of polluting sources that includes old and new point sources as well as nontoxic and toxic discharges, the Supreme Court is not a novice at reading statutes and the legislative history of the CWA could have helped the Court crack any supposed code.¹⁰² By conflating *Chevron's* two steps and ignoring the statute's legislative history, the Court avoids acknowledging that the dissent's legislative history analysis offers strong support for its reading of the statute.¹⁰³ Repeatedly finding very

little that is definite or instructive about the CWA,¹⁰⁴ the opinion concludes weakly that agency discretion to use cost-benefit analysis under the BTA standard is acceptable.¹⁰⁵

2. *Entergy's* Impact

The *Entergy* decision carries several implications beyond its impact on BTA under the CWA. First, the system and language of standard-setting under the CWA is not unique to that statute. The Clean Air Act ("CAA"), for example, also tasks EPA with setting various performance standards, some allowing a relaxed, cost-sensitive standard, and others requiring diminished emissions at greater expense.¹⁰⁶ *Entergy* may be read as inviting a more confused, conservative reading of the various standards in such environmental statutes.

Second, and perhaps more significantly, the *Entergy* majority took the concept of *Chevron* deference to a new level, as Justice Scalia bypassed the first step of the analysis, instead skipping directly to a discussion of whether EPA's reading of the BTA standard constituted a permissible construct of the statute.¹⁰⁷ As a response to the dissent's protest at this maneuver, Justice Scalia offered no more than a footnote explaining that an agency interpretation of a statute that is not reasonable could not possibly comport with its clear meaning, so that the two steps of *Chevron* may be conflated without compromising the doctrine.¹⁰⁸ It is difficult to believe that Justice Scalia intended for other courts to emulate his condensed version of the *Chevron* test, as he has made a point of defending the *Chevron* test on grounds of its clarity.¹⁰⁹

D. Superfund Railroaded—Robbing CERCLA of Cleanup Liability

Burlington Northern invites comparison with *Entergy* in that both cases involved challenges to an agency's interpretation of a federal statute under its jurisdiction.¹¹⁰ Contrasting

95. *Id.* at 1505 n.4 (invoking the idea that through a step-two analysis in which an agency's statutory interpretation is determined to have been unreasonable, a court will discover whether a step-one analysis is necessary).

96. *Id.* at 1505–06 (focusing on the terms "best" and "minimizing").

97. *Id.* at 1506 (referencing WEBSTER'S NEW INTERNATIONAL DICTIONARY to find the meaning of "best" to be ambiguous, and various sections of the CWA to agree with EPA that "minimizing adverse environmental impacts" does not prioritize environmental impacts over cost).

98. *Id.* at 1505–06 (accepting the plausibility of both parties' arguments, and thus concluding that the agency reading is "not ambiguously preclude[d]").

99. *Id.* at 1506–09 (launching the discussion with a lament—"alas"—at the supposed complexity of Riverkeeper's contextual analysis).

100. *Id.* at 1507 (denying that the Act precludes cost-benefit analysis under all but the BPT standard).

101. *Id.* at 1507–08.

102. *Cf.* *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). See, e.g., *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 467 (2001) (concluding that the CAA provision under dispute precluded cost from factoring into air quality standards). The *Entergy* dissent points to *Whitman* as an analogous case in which the Court understood that a statutory provision's silence on cost evidences a congressional intent to bar cost-benefit analysis. *Entergy*, 129 S. Ct. at 1517–18. The *Entergy* majority attempts to minimize *Whitman*, noting that the case "stands for the rather unremarkable proposition that sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion." *Id.* at 1508.

103. Both the *Entergy* dissent and concurrence conclude that the CWA legislative history verifies that Congress intended that cost play a central role in standard setting only under the BPT standard. *Id.* at 1512–14 (Breyer, J., concurring); *id.* at 1519–20 (Stevens, J., dissenting). Justice Breyer, however, concludes that

nothing in the legislative history precludes EPA's use of cost-benefit analysis when setting BTA. *Id.* at 1514. Justice Breyer also concludes that EPA's process for determining BTA does not constitute a cost-benefit analysis of the nature that would be appropriate for setting BPT. *Id.* at 1514–15.

104. *See id.* at 1506, 1508.

105. *See id.* at 1510 (concluding that "the EPA permissibly relied on cost-benefit analysis in setting the national performance standards and in providing for cost-benefit variances from those standards as part of the Phase II regulations").

106. *See, e.g., Whitman*, 531 U.S. at 471 (discussing the CAA by identifying standards set forth in CAA § 109, 42 U.S.C. § 7409 (2006) as disallowing cost consideration).

107. *Entergy*, 129 S. Ct. at 1505 (launching the analysis section of the opinion with a description of EPA's position and the observation that "[t]hat view governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed most reasonable by the courts" and citing to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984)).

108. *Entergy*, 129 S. Ct. at 1505 n.4 (noting that "surely if Congress had directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable").

109. *See United States v. Mead*, 533 U.S. 218, 240 (2001). (Scalia, J., dissenting) (criticizing the majority opinion for applying the *Skidmore* standard instead of the more deferential *Chevron* standard)).

110. *See Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870 (2009). Unlike *Entergy*, *Burlington Northern* does not involve an agency constructing a statute through a gap-filling mechanism such as regulations, and thus *Burlington Northern* does not invoke the *Chevron* doctrine. *Burlington N.*, 129 S.

Entergy markedly, however, the *Burlington Northern* majority gave no deference to the agency's argument or past interpretations.¹¹¹ *Burlington Northern* also contrasted *Entergy* in that the Court construed the CERCLA provision under dispute in *Burlington Northern* narrowly,¹¹² while it found much leeway in the CWA standard under consideration in *Entergy*.¹¹³ A third notable distinction between the cases is that Justice Stevens authored the dissent in *Entergy*,¹¹⁴ but authored the majority opinion in *Burlington Northern*.¹¹⁵ Indeed, as an initial impression it may appear that the only consistency between the two cases is that in both of them the environmental petitioners lost.

I. The *Burlington Northern* Opinion

Just as in *Entergy*, the majority opinion in *Burlington Northern* presents a statutory discussion that is selective in its analysis, which could lead to the conclusion that the Court was oriented toward a preferred result.¹¹⁶ The primary issue was whether Shell was liable under CERCLA for having arranged a chemical transfer operation in which chemicals were spilled.¹¹⁷ CERCLA applies a system of strict liability applicable to parties who arrange for disposal of hazardous substances that later necessitate remediation.¹¹⁸ To find that Shell falls outside the scope of arranger liability, the majority ignored the statutory definition of "disposal," which it did without explanation after acknowledging the problem that the inclusion of the terms "spilling" and "leaking" in the definition presented for Shell's argument on the degree of intent required for a party to have arranged for disposal of hazardous substances.¹¹⁹ In this way, the opinion lays its emphasis on a narrow reading of the term "arranged" to determine that Congress could not have intended for a party centrally involved in the handling of hazardous substances at a site to be liable for the cleanup of those substances at that site.¹²⁰

The Stevens opinion acknowledges its reading of CERCLA turns a blind eye to the statutory definition of "disposal."¹²¹

This selective reading of CERCLA is further underscored in Justice Ginsburg's dissent.¹²² Justice Ginsburg concludes that control over an operation that inevitably will cause hazardous substance spills, coupled with knowledge of those spills, constitutes arranging for such spills.¹²³ Although Justice Ginsburg admits that she considered the case a close one,¹²⁴ she alone adopts a reading that accommodates all the implicated statutory terminology.

In addition to ignoring statutory language to reach its decision, the *Burlington Northern* majority opinion needed to ignore a primary principle of CERCLA's liability scheme, which is that liability for hazardous substance cleanup should be borne by those who control and profit from the use of hazardous substances.¹²⁵ Although never stated expressly in CERCLA's text, the statute's goal of prioritizing cleanup over fault-finding is made clear from a number of its provisions. First, CERCLA imposes strict, joint and several liability upon the parties listed in § 107 of the Act.¹²⁶ These parties are listed without reference to fault, and the affirmative defenses provided describe only several unlikely circumstances under which such parties may escape liability.¹²⁷ When CERCLA expressly limits liability, as it does for certain lenders, trustees, and other so-called innocent landowners, the statute specifies in great detail the requirements for a party to avail itself of such liability protection.¹²⁸ In keeping with CERCLA's broad strict-liability provision, the statute also creates a means through which liable parties may participate in contribution actions so as to allocate cleanup cost more fairly among the various contributors to a Superfund site.¹²⁹ All of these features of CERCLA attest to both the statute's intent for all parties involved in the hazardous substance industry to participate in cleanup of pollution occurring through the operation of that industry and its intent to prioritize cleanup over fault-finding.

Ct. at 1877 (framing the issue as one of statutory analysis based on an agency finding of liability, as opposed to agency standard-setting).

111. *See id.* at 1878–82.

112. *See id.* at 1878–80.

113. *See Entergy*, 129 S. Ct. at 1505–10.

114. *See id.* at 1516.

115. *See Burlington N.*, 129 S. Ct. at 1874.

116. *See supra* notes 82–89 and accompanying text for discussion of the Court's seeming naivety about cost-benefit analysis and also about Congress' intent when using terms like "practicable" and "available" in the CWA.

117. *See Burlington N.*, 129 S. Ct. at 1874–75.

118. Comprehensive Environmental Response, Compensation, and Liability Act, § 107(a)(2)(3), 42 U.S.C. § 9607(a)(2)(3) (2006).

119. *See Burlington N.*, 129 S. Ct. at 1879–80 (acknowledging the Government's argument about how the inclusion of unintentional acts such as "spilling" in the definition of "disposal" opens up the definition of "arranged for" to include unintended but foreseen spills occurring during activities arranged by the party, then simply insisting that Shell needed to have "taken intentional steps" to spill the hazardous substances to qualify as an arranger).

120. *See id.* at 1880 (concluding that "Shell's mere knowledge" about the spills "is insufficient grounds for concluding that Shell 'arranged for' the disposal of [hazardous substances] within the meaning of [CERCLA] § 9607(a)(3)"). The case also addresses the issue of whether the district court's apportionment of liability is supported by the statute, concluding that it is. *Id.* at 1880–84. Because this Article primarily focuses on issues where commonalities and distinctions among the five 2008–09 Supreme Court environmental opinions are readily apparent, this Article does not address the apportionment issue in *Burlington Northern*.

121. *Id.* at 1879–80.

122. *See id.* at 1884–85 n.1 (Ginsburg, J., dissenting).

123. *See id.* at 1885 (stressing that Shell changed its method of delivery to a process that "directly and routinely" caused the spills, because it was more "economically advantageous" than its previous mode of delivery, which had ensured against spillage).

124. *See id.* at 1884.

125. *See id.* at 1885 (identifying "CERCLA's objective—to place the cost of remediation on persons whose activities contributed to the contamination rather than on the tax-paying public").

126. CERCLA § 107(a), 42 U.S.C. § 9607(a) (2006), assigns liability, without regard to fault, to parties who bear the following statuses in connection with a site requiring cleanup: owner, operator, party who arranged for disposal of hazardous substances at the site, and party who transported hazardous substances to the site. Such parties are deemed "potentially liable parties" under the Act, and they may be compelled to fund response actions at the site prior to and as a separate matter from the determination of their liability.

127. CERCLA § 107(b), 42 U.S.C. § 9607(b) (2006), allows parties to assert the affirmative defenses that the contamination of the site with which they are connected was an act of God, an act of war, or an act of a third party with whom they have no contractual relationship.

128. *See* CERCLA § 101(20)(E), 42 U.S.C. § 9601(20)(E) (2006) (excluding lenders who do not participate in site management from ownership status); CERCLA §§ 107(b)(3), 107(n), 42 U.S.C. §§ 9607(b)(3), 9607(n) (addressing the innocent landowner defense and establishing limits on fiduciary liability).

129. CERCLA § 113, 42 U.S.C. § 9613(f) (2006), addresses the contribution action.

An interpretation of arranger liability that allows a company to escape liability when the company controlled, handled, and profited from commerce in hazardous substances over many years during which spills occurred is simply not in keeping with the statute's goals. Indeed, the majority's emphasis on the fact that Shell took steps to reduce the spillage its arrangements caused at the transfer site appears to disregard the statute's strict liability scheme.¹³⁰

2. *Burlington Northern's Impact*

Burlington Northern resembles *Entergy* in more than their holdings against environmental petitioners. The two decisions present similar styles of argumentation. Most significantly, neither majority was inclined to base its decision on the overriding principle underlying each of the statutes. CERCLA's underlying principle is that private parties that profit from the production, handling, and use of hazardous substances should bear the costs of remediation when those substances pollute.¹³¹ The dissenters acknowledged this, and thus were guided by more than dictionary definitions and so-called ordinary meanings in their reading of the liability provisions.¹³² To the dissent, arranging should be loosely construed to encompass parties who devise and control the method for handling a hazardous substance through which inevitable spills occur over a long period.¹³³

The majority preferred to focus almost exclusively on the plain meaning of the word "arranged," as if the most important consideration of how the term is read in CERCLA is that it should be consistent with the term's use when discussing the planning of a party or the placing of flowers in a vase.¹³⁴ Because it is difficult to accept that the majority was unaware of CERCLA's aim to cast liability widely so as to include all who participate in the hazardous substance industry, it appears that the Court meant to send a message through *Burlington Northern* that it finds the broad liability scheme unpalatable.

Thus, *Burlington Northern* is similar to *Entergy* in that the Court reads a statutory term so as to undermine the spirit of the statute. The *Northern Burlington* decision strikes a more ominous chord than its predecessor, however, in two ways. First, eight of the nine Justices joined the *Northern Burlington* majority despite Justice Ginsburg's dissent, which both reminded the majority of Congress' intent in creating CERCLA liability and also read the liability and definitional

provisions harmoniously.¹³⁵ Second, *Burlington Northern* is the only environmental case of the 2008–09 Term in which the Supreme Court's reading of a statutory provision led to a conclusion contrary to that argued by the implementing agency.¹³⁶ This observation is meaningful because *Burlington Northern* is the only case in the Term where the government favored a statutory reading that would produce a more environmentally benign outcome.

E. *Iced in Alaska—Carving a Hole in the Clean Water Act*

Coeur Alaska is the final of the five environmental decisions emerging from the 2008–09 Term, and is the decision that may contribute the most to a perception that the Court's majority is hostile to environmental protection interests.¹³⁷ The case asked whether the U.S. Army Corps of Engineers ("Army Corps") was authorized to issue a fill permit allowing Coeur Alaska to dump slurry wastes into a navigable lake when a CWA regulation expressly prohibits the discharge of process wastes from the type of mine that Coeur Alaska operated.¹³⁸

The Court concluded that the CWA did not require the EPA to subject the Army Corps permit program to effluent discharge limitations, and that discharges qualifying for an Army Corps fill permit were not subject to discharge bans that would otherwise be imposed under the CWA.¹³⁹

I. *The Coeur Alaska Opinion*

Justice Kennedy's opinion begins with a scant examination of the statutory phrase that the government claimed was key to understanding the relationship between § 402 of the CWA,¹⁴⁰ the provision that creates the statute's core pollution discharge permit program, and § 404 of the CWA, the provision that authorizes the Army Corps fill discharge permit program.¹⁴¹ The opinion admits that the Southeast Alaska Conservation Council ("SEACC") offered a cognizable interpretation of the interplay between these programs, but instead follows the agencies' preferred interpretation.¹⁴²

130. *Burlington N.*, 129 S. Ct. at 1880 (concluding that Shell's "mere knowledge" of the spills cannot serve as grounds to conclude that it arranged for such spills).

131. See *Burlington N.*, 129 S. Ct. at 1885 (identifying CERCLA's primary objective as placing "the cost of remediation on persons whose activities contributed to the contamination rather than on the taxpaying public").

132. See *id.*

133. See *id.* (pointing out that Shell found it "economically advantageous, in lieu of shipping in drums, to require" bulk shipments and storage, and also that Shell's "control rein" over the delivery and transfer process rightly cast Shell as an arranger).

134. See *id.* at 1879–80 (introducing the "ordinary meaning" approach and then concluding that to qualify as an arranger Shell needed to have entered the transaction with Brown & Bryant with the intent that the pesticide be discarded during transfer).

135. See *id.* at 1885 n.1 (citing the definition of "disposal" and including "spilling" and "leaking").

136. Compare *id.* at 1879–80, with *Entergy, Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1510 (2009) (conforming to EPA reading of the CWA), and *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2478 (2009) (conforming to EPA and Army Corps of Engineers reading of CWA).

137. *Coeur Alaska*, 129 S. Ct. at 2458.

138. *Id.* at 2463. The opinion explains that the lake in question, Lower Slate Lake, is twenty-three acres in size and is thus small, but it constitutes a navigable water and thus falls under CWA jurisdiction. Coeur Alaska planned to dump 4.5 million tons of debris into the lake, raising its bed to its current surface level, with the result that the surface of the lake would spread to sixty acres, requiring a dam at its downstream shore that would render it an isolated water body. *Id.* at 2464.

139. *Id.* at 2475–77 (concluding that EPA's practice of barring application of the § 306 standards from discharges qualifying as fill under the § 404 program warrants deference).

140. 33 U.S.C. § 1342 (2006).

141. 33 U.S.C. § 1344 (2006).

142. See *Coeur Alaska*, 129 S. Ct. at 2467–68 (acknowledging SEACC's assertion that the agency reading of § 402 is grammatically incorrect, but rejecting the SEACC's alternative reading in favor of the government position that the

While conceding that the *Chevron* standard is inapplicable,¹⁴³ the Court adopts agency deference as its guide to understanding the CWA, and the remainder of its discussion does little more than verify that the agency position finds adequate support in the CWA and the agencies' own regulations.¹⁴⁴

To the question of whether the new source performance standards authorized under § 306 of the CWA may bar discharges otherwise qualifying for a § 404 fill permit, the majority considers the applicability of the *Chevron* doctrine.¹⁴⁵ Although both the statute and the agency standards are silent on the question of whether the new source performance program's regulatory bans on designated industry discharges prohibit those industries from obtaining a fill permit, the majority appears inclined to favor an interpretation of those silences under which Congress and EPA failed to address the applicability of § 306 of the CWA to discharges qualifying as fill because both legislators and regulators presumed that the fact that § 404 of the CWA fill permits would not be subject to new source performance standards under § 306 is so obvious that it need not be expressed in the statute.¹⁴⁶ Nevertheless, the majority concedes that neither statute nor regulations unambiguously resolve how § 306 and § 404 may be reconciled, so the Court resorts to applying a deferential reading of an EPA memorandum addressing the topic.¹⁴⁷ The remainder of the majority opinion lauds the EPA memorandum and, primarily on this basis, concludes that fill permits are available for new sources of the type of wastes at issue even though such wastes are expressly banned under the EPA's § 306 regulations.¹⁴⁸

It is left to Justice Ginsburg's dissent to consider the supposedly incompatible programs in light of the structure, core

commands, and priorities of the CWA.¹⁴⁹ Unlike the majority opinion, the dissent launches its analysis with a review of the CWA's key programs through which Congress charged the EPA with meeting the statute's principal goal of restoring and maintaining the integrity of U.S. waters.¹⁵⁰ These key programs included both the § 402 permitting system and the new source performance standards developed under § 306.¹⁵¹ This overview of the CWA and its pertinent history presages Justice Ginsburg's main point, which is that a reviewing court's statutory analysis of so-called clashing CWA programs cannot properly turn on the supposed ambiguity or silences of select provisions before courts take refuge in non-regulatory agency statements.¹⁵²

Indeed, after providing her brief review of the priorities expressed in the CWA, Justice Ginsburg easily concludes that the outcome desired by both agency and industry in the case appears to contradict the clear intent of the statute and the longstanding regulations.¹⁵³ Her opinion begins its analysis of §§ 306 and 404 with the goal of harmonizing those sections with the statute as a whole.¹⁵⁴ Guided by the statute's overriding principles, Justice Ginsburg offers a reading that is true to the statutory language and consistent with the overall statutory structure.¹⁵⁵ After all, § 306 states its prescription against new discharges of wastewater from froth-filtration processes as being universally applicable.¹⁵⁶ Section 404's authorization of the Army Corps to issue fill permits, on the other hand, contains no such assertion of universality.¹⁵⁷ Thus, under a straightforward reading of the statute, discharges banned under § 306 are not eligible to apply for permits under § 404.¹⁵⁸

phrase in question is meant to shield all discharges qualifying as fill under § 404 from the § 402 discharge program).

143. *See id.* at 2469–70 (“We look first to the agency regulations, which are entitled to deference if they resolve the ambiguity in a reasonable manner. But the regulations, too, are ambiguous, so we next turn to the agencies’ subsequent interpretation of those regulations.”).

144. *See id.* at 2468–69 (framing the analysis as one under which the applicability of § 404 precludes the applicability of § 402).

145. *Id.* at 2469.

146. *See id.* at 2471 (concluding that § 404 omitting to protect the permit holder from suit alleging a violation of § 306, while § 404 does protect the permit holder from suit under other CWA programs, demonstrates that Congress never conceived of § 306 as applying where § 404 applied, rather than concluding that the omission means that Congress did not intend to protect fill permit holders from suit for breaching § 306); *see also id.* at 2472–73 (reaching a similar conclusion about the silence on § 306 in the EPA guidelines for § 404).

147. *See id.* at 2472–77 (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001)); *Auer v. Robbins*, 519 U.S. 452 (1997) (noting the general proposition that agency interpretations issued in forms other than rulemaking are entitled to deference if not plainly erroneous). Justice Scalia, in a concurrence, takes exception to this element of the majority opinion, arguing that the various non-*Chevron* tests that the courts have spawned after *Mead* actually amount to applications of *Chevron*, and concludes by asserting that, “I favor overruling *Mead*. Failing that, I am pleased to join an opinion that effectively ignores it.” *Id.* at 2480 (Scalia, J., concurring).

148. *See id.* at 2473–74 (lauding the EPA interpretation because (1) it confines the § 404 exemption from § 306 to closed bodies of water; (2) it does not exempt incidental filling effects; (3) it reminds readers that, in administering the § 404 program, the Army Corps must determine that fill discharges are in the public's interest; (4) toxic pollutants are not included in the § 306 exemption; and (5) the Court finds EPA's reasoning sensible and consistent with the EPA's regulatory scheme).

149. *See id.* at 2480–81 (framing the discussion in terms of the original intent of the CWA and its core command to ban discharges of pollution to waters of the United States except under EPA permit).

150. *See Coeur Alaska*, 129 S. Ct. at 2480–82 (identifying the key means through which Congress planned for the CWA to reduce water pollution, including the presumption that discharges of pollution to waters of the United States are prohibited, the development of technology-based, pollution-control standards, increasingly strict limitations on effluent discharges from identified categories of dischargers, and the heightened requirements applicable to new discharge sources).

151. *Coeur Alaska*, 129 S. Ct. at 2482 (identifying the § 402 program, dubbed the National Pollution Discharge Elimination System, as the “lynchpin” of the Act).

152. *See id.* at 2483–84.

153. *Id.* at 2482 (noting that *Coeur Alaska*'s claim to a § 404 permit “carries weighty implications”).

154. *See id.* (opining that “[n]o part of the statutory scheme, in my view, calls into question the governance of EPA's performance standard”).

155. *Id.* at 2482–83 (noting that the text of CWA § 306 contains the word “any” in three places, and the regulations contain the words “there shall be no discharge,” while the text of § 404 simply states that the Army Corps “may” issue fill permits). CWA § 404(a), 33 U.S.C. § 1344(a) (2006) (the Army Corps “may issue permits” for the discharge of “dredged or fill material”).

156. *See CWA* § 306(e), 33 U.S.C. § 1316(e) (2006) (“[I]t shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.”). *See also* 40 C.F.R. § 440.104(b)(1) (2009) (“[T]here shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process . . .”).

157. CWA § 404(a), 33 U.S.C. § 1344(a) (2006) (stating that the Army Corps “may issue permits . . . for the discharge of dredged or fill material . . .”).

158. *Coeur Alaska*, 129 S. Ct. at 2482–83 (explaining how this reading comports with the CWA's structure and objectives).

2. *Coeur Alaska's Impact*

The *Coeur Alaska* decision's impact on the administration of the CWA is obvious. Unless Congress or EPA exercises legislative or administrative means to reassert the priorities of the Act, the fill permit program may ignore the discharge elimination program to the detriment of U.S. waters.

As a decision based primarily on the Court's reading of one or two statutory provisions, *Coeur Alaska* underscores some of the tactics of the conservative Justices. As in *Entergy*, for example, the *Coeur Alaska* majority appeared determined to discern no overriding principle in the CWA that would warrant a reading of two seemingly contradictory provisions to favor pollution control.¹⁵⁹ As in *Burlington Northern*, the majority's reading of the statute's language is selective, so that certain words must simply be ignored for the Court to reach its conclusion.¹⁶⁰ And, as with the two prior cases, the *Coeur Alaska* dissent makes clear that the majority's reading both undermines the statute's core principle and necessitates ignoring some of the statute's language.¹⁶¹

Perhaps the most significant impact of the *Coeur Alaska* decision is the openness with which the majority expresses its personal views on environmental protection laws. Justice Kennedy expresses concern that the environmental petitioners' reading of the CWA would inhibit would-be industrial dischargers from obtaining fill permits.¹⁶² The majority also relies heavily on a memorandum produced by EPA.¹⁶³

II. Echoes from Past Supreme Court Environmental Opinions

Accusations of bias in the Supreme Court's 2008–09 Term environmental law decisions may be tempered when each case is placed in historical context. For example, *Winter* joins an unbroken history of Supreme Court NEPA-losses for environmental protection advocates.¹⁶⁴ Similarly, as a standing case, *Summers* revisits a long-time Achilles' heel of environmental petitioners, with the majority adding little to the opinions denying standing that emerged from the Court

through the 1990s.¹⁶⁵ The three remaining 2008–09 environmental cases all turn on the level of deference the Court gives an agency in interpreting its statutory directives.¹⁶⁶ As such, they might be viewed as doing little more than confirming that these principles of statutory interpretation do not constrain the Court's activist agenda.¹⁶⁷ In sum, the five environmental cases of the Court's 2008–09 Term may offer few surprises when considered in the context of certain trends and prior opinions.

Nevertheless, the five cases do present several unprecedented disappointments. Perhaps the most significant is that the *Summers* standing decision follows the landmark *Massachusetts v. EPA* decision, in which Court held that evidence of the link between shoreline attrition and global warming allowed the Commonwealth of Massachusetts to maintain its claim against EPA for EPA's decision against regulating carbon dioxide emissions under the CAA.¹⁶⁸ *Massachusetts v. EPA* stood as a stunning break from the nearly unbroken line of environmental standing losses coming out of the Supreme Court over the decades.¹⁶⁹ Adding to the environmental community's optimism over *Massachusetts v. EPA* was the Supreme Court's environmental standing decision preceding it in *Friends of the Earth v. Laidlaw Environmental Services*, another environmental petitioners' victory that appeared to signal a change in the Court's comfort with environmental litigation.¹⁷⁰ This year, the Court dispelled any such signal.

159. See *supra* notes 141–43 and accompanying text; *Coeur Alaska*, 129 S. Ct. at 2475.

160. See *supra* notes 135–37 and accompanying text.

161. See *Coeur Alaska*, 129 S. Ct. at 2483; *Entergy, Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1517–18 (2009); *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1885 (2009).

162. See *Coeur Alaska*, 129 S. Ct. at 2469 (noting the “dischargers would face a more difficult problem” under the challengers' reading of the statute).

163. See Memorandum from Diane Regas, Director, Office of Wetlands, Oceans and Watershed at EPA, to Randy Smith, Director, Office of Water, Region X, at EPA, Clean Water Act Regulation of Mine Tailings 1, 1 n.1 (May 17, 2004), available at http://www.vnf.com/assets/attachments/EPAs_2004_Regas_Memo.pdf (introducing the memo by stating that it is generally applicable to mines, but responds to proposed “discharges of mine tailings from the proposed Kensington Mine.”). The memorandum clearly responds specifically to the issue at dispute in *Coeur Alaska*. See *id.*; see also *Coeur Alaska*, 129 S. Ct. at 2473–74 (discussing the EPA 2004 memorandum).

164. See Jason J. Czarnecki, *Revisiting the Tense Relationship Between the U.S. Supreme Court, Administrative Procedure, and the National Environmental Policy Act*, 25 STAN. ENVTL. L.J. 3, 10 n.43 (2006) (noting that as of 2006, environmental petitioners had lost in all fifteen of the NEPA cases the Court had decided in its history).

165. See *supra* notes 74–76. For examples of past standing decisions echoed by *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009), see *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 879, 898 (1990) (denying standing for environmental petitioners seeking to challenge a government program encouraging mining, oil and gas leases in federal lands); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 558–59, 562 (1992) (denying standing to environmental petitioners challenging a U.S. Department of Interior decision exempting federal actions impacting endangered species overseas from the Endangered Species Act consultation requirement); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 86–88, 105 (1998) (denying standing where the defendant steel manufacturer complied with the statute at issue just prior to the time petitioners filed suit).

166. See *supra* notes 78–79, 91–96, 109–13.

167. See Jason J. Czarnecki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 793, 798 (2008) (concluding that “[t]he data provide very limited evidence that Chevron step one is used strategically to achieve [the judges'] desired policy preferences [in environmental cases]”).

168. See *Massachusetts v. EPA*, 549 U.S. 497, 505 n.6 (2007); see also CAA § 202, 42 U.S.C. § 7521 (2006) (requiring EPA to regulate emissions from mobile sources that contribute to air pollution and endanger public health and welfare).

169. See, e.g., Jeffrey Rosen, *Supreme Court, Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, 38, at 74 (“On rare occasions, the Roberts Court has held that the Bush administration's deregulatory efforts circumvent the will of Congress—like the 5–4 decision [of 2007] holding that the Environmental Protection Agency acted capriciously when it adopted a rule that said it had no legal authority to regulate greenhouse gases.”); Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943, 954 (2009) (“Insofar as [three Roberts Court opinions identified as ‘significant business wins’] are ‘pro-business,’ they are all quite modest. Solid base hits, to be sure, but not home runs. Their significance pales in comparison to *Massachusetts v. EPA*, by far the most significant environmental decision decided by the Roberts Court thus far.”) (footnote omitted).

170. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181–83 (2000) (finding standing where defendant's noncompliance with its CWA discharge permit prevented members of an environmental organization from recreational use of a river, despite a district court's finding that the defendant's noncompliance had not resulted in any “demonstrable proof of harm” to the receiving waters).

This section identifies historically significant precedents that may help place the 2008–09 Supreme Court environmental decisions in context.

A. *Winter and the Evisceration of NEPA*

As a case about the Navy's NEPA responsibilities, *Winter* is reminiscent of *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, which the Court decided in 1981.¹⁷¹ In *Catholic Action*, Justice Rehnquist wrote for the Court, affirming that NEPA applies to all government actions that present a significant threat to the environment, regardless of the special circumstances under which the nation's armed forces may operate.¹⁷² Justice Rehnquist acknowledged that national security might require that an EIS produced by a branch of the armed forces be unavailable for public review.¹⁷³ Nevertheless, he explained, even where all the benefits of NEPA may not be realized, some of them will be realized when the armed forces adhere to the EIS requirement.¹⁷⁴ Those conducting the environmental review will be able to assess, and even choose among, the relative environmental impacts identified under alternative scenarios for meeting their goals, as will other government officials reviewing the EIS, such as the President.¹⁷⁵

In considering separately the dual functions of NEPA—agency guidance and public disclosure—and concluding that each serves an important function, the *Catholic Action* opinion contrasts sharply with *Winter*. In *Winter*, the majority discounts NEPA's agency guidance function, interpreting the EIS requirement as procedural and presuming that the content of an EIS may be readily ignored once the agency completes it.¹⁷⁶ Indeed, the contrast between the two cases underscores how the judicial view of NEPA changed from the statute's early days when NEPA was characterized as “action-forcing” rather than merely procedural.¹⁷⁷

In that light, *Winter* also stands as a reminder of the landmark 1989 case, *Robertson v. Methow Valley Citizens Council*, in which the Court stressed the procedural and non-coercive

nature of NEPA.¹⁷⁸ *Robertson* explored the issue of whether non-environmental considerations allow agency actors to reject the most environmentally benign options emerging from the NEPA process.¹⁷⁹ The *Winter* majority uses *Robertson* for the simple proposition that NEPA mandates no action, and that therefore the EIS process cannot outweigh Navy training as a matter of public concern.¹⁸⁰

Another historically significant NEPA case involving the Navy is the 1982 decision *Weinberger v. Romero-Barcelo*.¹⁸¹ In *Romero-Barcelo*, the Court addressed a district court injunction against the Navy for discharging ordnance into U.S. waters without a CWA permit.¹⁸² The Supreme Court concluded that neither the CWA nor the district court's equitable discretion required an injunction because it appeared that a CWA permit was likely to be issued eventually.¹⁸³ In allowing deference to the Navy to overshadow respect for environmental agency process, *Romero-Barcelo* certainly presages *Winter*. *Romero-Barcelo* differs from *Winter* significantly, however, because by finding that the Navy likely would receive the required CWA discharge permit, the *Romero-Barcelo* Court satisfied itself that the purposes of the CWA permit program would not be thwarted by allowing the Navy to continue its practices as it went through the permit process.¹⁸⁴ In addition, the Navy's practice of discharging munitions into the ocean is not a typical practice to which the CWA permit program would apply.¹⁸⁵ In contrast, the *Winter* decision thwarted one of the core purposes of NEPA when it denied injunctive relief.¹⁸⁶ The *Winter* Court's suggestion that the EIS would have no impact on the Navy's actual behavior appears to provide an apparent justification for the decision.¹⁸⁷

These cases may indicate that *Winter* should be relegated to a special class of regulatory exemptions for armed forces operations. However, *Winter* also bears some similarities to the 2004 decision, *Department of Transportation v. Public Citizen*.¹⁸⁸ In that case, Justice Thomas' majority opinion found that an agency performing a NEPA analysis did not

171. See *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139 (1981) (overturning appellate court requirement that the Navy produce a hypothetical EIS where national security interests prevented the Navy from publishing an EIS on the possible storage of nuclear weapons in a weapons storage facility being constructed at a Naval base in Hawaii).

172. See *id.* at 146 (stating that if the Navy proposed to store nuclear weapons at the site in question, it would be required under NEPA and Department of Defense Regulations to prepare an EIS).

173. See *id.* at 143, 146 (discussing the “twin aims” of NEPA, the first being “to inject environmental considerations into the federal agency's decision making process by requiring the agency to prepare an EIS,” and the second being “to inform the public that the agency has considered environmental concerns in its decision making process”).

174. See *id.* (finding that the two goals of the EIS process, decision making and disclosure, are “not [necessarily] coextensive”).

175. See *id.* at 142.

176. See *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 376 (2008) (stressing that NEPA “impose only a procedural requirements”).

177. Compare *id.*, with *Catholic Action*, 454 U.S. at 148 (Blackmun, J., concurring) (defining NEPA as “action-forcing” and emphasizing that a key goal of NEPA is to aid the federal government in planning actions and making decisions that are sensitive to environmental impacts).

178. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (“The sweeping policy goals announced in § 101 of NEPA are thus realized through a set of ‘action-forcing’ procedures that require that agencies take a ‘hard look’ at environmental consequences, and that provide for broad dissemination of relevant environmental information. Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.”) (citation omitted).

179. *Id.* (“If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.”).

180. *Winter*, 129 S. Ct. at 376.

181. *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

182. *Id.* at 306–07.

183. *Id.* at 320.

184. *Id.* (“The [d]istrict [c]ourt did not face a situation in which a permit would very likely not issue, and the requirements and objectives of the statute could therefore not be vindicated if discharges were permitted to continue.”).

185. See *id.* at 309.

186. See *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 390 (2008) (Ginsburg, J., dissenting) (“The Navy's publication of its EIS in this case, scheduled to occur after the fourteen exercises are completed, defeats NEPA's informational and participatory purposes.”).

187. See *supra* note 20; see also *Winter*, 129 S. Ct. at 381 (“Given that the ultimate legal claim is that the Navy must prepare an EIS, not that it must cease sonar training, there is no basis for enjoining such training.”).

188. *Dept of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004).

have to consider environmental impacts of its non-discretionary actions.¹⁸⁹ That is, in its EIS an agency need only consider environmental impacts that it has the authority to diminish or avoid.¹⁹⁰ In so finding, *Public Citizen* undermined an important function of the EIS, which is to document the government's impacts on the environment, rather than merely to aid government actors in their efforts to minimize the environmental impacts directly under their control.¹⁹¹ By limiting the scope of the EIS to discretionary agency decisions, *Public Citizen* is a decision by the current conservative Court majority that undermines one of NEPA's key functions. Similarly, the *Winter* decision, by casting the Navy's sonar training program as imperative to the nation's security and thus nondiscretionary, followed the trend set in *Public Citizen*. In this way, *Winter* represents another example of the majority's negative perspective on NEPA.

Winter, however, goes further than *Public Citizen*. By casting military training as a perennially urgent matter of public concern that may be neither questioned nor impeded, *Winter* may set precedent for a permanent exemption from the EIS requirement for military exercises.¹⁹² It remains to be seen whether *Winter* will be interpreted so broadly. Judging from the energy with which the current Court has applied itself to environmental cases this year, it appears quite possible that an opportunity to apply *Winter* in this manner may arise sooner rather than later.

B. Summers and the Revival of the Environmental Standing Game

In its revival of environmental standing gamesmanship from the 1990s, *Summers* does more than simply put a fresh date on stale arguments. By not discussing the two major environmental standing cases of the early 2000s, *Friends of the Earth v. Laidlaw* and *Massachusetts v. EPA*, *Summers* makes clear that these two decisions did not permanently change environmental standing doctrine.

In *Laidlaw*, the Court determined that a reasonable apprehension of pollution that causes a petitioner to abandon recreational pursuits can constitute an injury in fact even where data indicates that the pollution did not exist.¹⁹³ The

Laidlaw petitioners had abandoned their recreational use of a river when the defendant discharged pollutants in the river in excess of those allowed under its CWA permit.¹⁹⁴ The lower court found, however, that in spite of the illegal discharges, the river remained safe for recreational purposes.¹⁹⁵ This fact prompted some Justices to question whether the petitioners' claim satisfied the causation element of standing.¹⁹⁶ In an argument that one could term the "flip side" of the usual argument favored by the conservative branch of the Court (that the courts may only recognize an environmental injury linked to some injury suffered personally by a petitioner), Justice Scalia argued that no environmental petitioner's personal injury, including the present abandonment of recreational pursuits, may be recognized without being linked to some actual injury to the environment.¹⁹⁷ The majority, in an opinion authored by Justice Ginsburg, concluded that the petitioners' abandonment of the river had been reasonable under the circumstances and, thus, constituted an injury-in-fact.¹⁹⁸

Laidlaw is an unusual case in that it focuses on a link in the causation chain—the petitioners' interpretation of a set of circumstances—usually not present in a standing analysis.¹⁹⁹ Accordingly, it is a case with limited direct precedential value. The peculiar facts of *Laidlaw* also made it a case that seemed likely to be an environmental loss at the Supreme Court level. The outcome thus suggested a level of open-mindedness toward environmental claims that indicated a shift on the Court in its general acceptance of environmental protection advocates.

Similarly, *Massachusetts v. EPA* was not destined to be a broadly applicable precedent.²⁰⁰ The fourteen petitioner-states asked the Court to find standing based on the impacts of global warming suffered by them in their proprietary

that a defendant's compliance with law that removes the petitioner's injury after the petitioner has filed suit does not render the complaint moot, particularly where the defendant could conceivably resume its injurious behavior. *Id.* at 190 ("[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."). As a preliminary matter, the case addresses standing, and there it determines that a petitioner's burden is to allege injury to himself and that this requirement does not change where the case involves an allegation of harm to the environment. *Id.* at 181.

194. *Id.* at 181–83 (discussing various affiants' abandonment of the river due to concerns about the illegal discharges of mercury and other toxins).

195. *Id.* at 181.

196. *Id.* at 198 (Scalia, J., dissenting, joined by Thomas, J.).

197. *Id.* at 199 (Scalia, J., dissenting) (arguing that "a lack of a demonstrable harm to the environment will translate, as it plainly does here, into a lack of demonstrable harm to citizen petitioners").

198. *See id.* at 183–84 (explaining where the defendant's illegal discharges reasonably caused the petitioner to avoid using the receiving waters, the petitioner met the injury-in-fact requirement); *see also id.* at 184–85 ("[W]e see nothing 'improbable' about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms. The proposition is entirely reasonable . . . and that is enough for injury-in-fact.").

199. *Id.* at 180 (citing *Lujan v. Defenders of Wildlife*, 540 U.S. 555, 560–61 (1992)).

200. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (limiting its analysis to that of a state's capacity to achieve standing: "It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan v. Defenders of Wildlife*, a private individual."); *see also id.* at 522 ("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.").

189. *See id.* at 770. The Court determined that because the Federal Motor Carrier Safety Administration had no discretion on the issue of whether to issue regulations pertaining to trucks that would be entered the United States from Mexico upon the President's lifting of a moratorium on Mexican trucks entering the United States, the agency did not have to address the increased pollution that the trucks would emit into U.S. air. *See id.* (addressing the discretion issue).

190. *See id.* at 768. According to the Court, the nondiscretionary nature of the agency action made it impossible for an EIS to either aid the agency in planning its actions or inform the public of the agency's decision making process so that the public can "provide input as necessary to the agency making the relevant decisions." *See id.*

191. *See Winter*, 129 S. Ct. at 389–90 (Ginsberg, J., dissenting) (noting the "larger informational role" of the EIS).

192. *See id.* at 370, 376, 381 (stressing the Navy's use of sonar training program for decades).

193. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183–84 (2000). *Laidlaw* exceeded the discharge limits allowed under its CWA permit for mercury and other toxic materials. *Id.* at 176. The case is primarily a decision on mootness, in which the Court reverses the appellate court by finding

relationship with state lands and also based on their quasi-sovereign capacity as representatives of their citizens, whose privately owned property suffered negative impacts.²⁰¹ For the causation element of standing, the petitioner-states pointed to EPA's refusal to regulate greenhouse gas emissions from mobile sources under the CAA.²⁰² The redressability element of standing, the petitioners argued, was satisfied because the Court's proper reading of the CAA would result in EPA's regulation of new motor vehicle emissions, thus slowing the pace of global warming and reducing the mounting impacts on state and private property.²⁰³ Reversing the D.C. Circuit Court of Appeals, the Supreme Court recognized standing despite a multitude of familiar arguments articulated in the several dissents, including Justice Scalia's invocation of the doctrine of agency deference.²⁰⁴ Because the injuries of global warming transcend all national boundaries, making it presumptively an issue that defies the particularity of causation and injury usually required by the Court in environmental cases,²⁰⁵ the environmental-petitioners' victory in *Massachusetts v. EPA* appeared to some to herald a sweeping reversal of the Court's historical skepticism toward environmental petitioners.²⁰⁶ Thus, more than *Laidlaw*, the 2007 decision indicated a long-awaited acceptance by a majority of the Court that environmental issues could constitute the bases of cases or controversies.

Summers negates the optimistic readings of *Laidlaw* and *Massachusetts v. EPA*. Justice Scalia's triumphant revival of decades-old skepticism toward environmental standing underscores the fact that these two previous cases do not establish that a majority of Justices may be relied upon to favor standing in environmental cases.²⁰⁷ It remains to be seen whether the two cases indicate that environmental standing issues will enjoy a more even-handed reception by the Court, or whether the two are simply aberrations from the more ingrained patterns of review in standing cases that were reestablished this year.

Perhaps of even more historical interest is the reassertion of a notion first introduced in the landmark environmen-

tal standing case *Sierra Club v. Morton*.²⁰⁸ In his *Summers* dissent, Justice Breyer argued that the Court should recognize as both concrete and imminent the fact that a newly launched agency program presenting a widespread threat of salvage timber sales occurring without public process on federal lands will inevitably impact the concrete, particularized interests of a long-established environmental organization's members who hike the nation's federal lands.²⁰⁹ In so arguing, Justice Breyer revived the argument for organizational standing first expressed by Justice Blackmun in his *Sierra Club v. Morton* dissent.²¹⁰ Justice Blackmun urged the Court to expand standing law in the environmental arena to allow organizational standing.²¹¹ As he explained, parallels existed in other areas of law, and the expansion could be controlled by utilizing existing vetting methods:

I would permit an imaginative expansion of our traditional concepts of standing in order to enable an organization such as the Sierra Club, possessed, as it is, of pertinent, bona fide, and well-recognized attributes and purposes in the area of environment, to litigate environmental issues. This incursion upon tradition need not be very extensive. Certainly it should be no cause for alarm. It is no more progressive than was the decision in *Data Processing [Service Organizations, Inc. v. Camp]*, 397 U.S. 150 (1970) itself. It need only recognize the interest of one who has a provable, sincere, dedicated, and established status. We need not fear that Pandora's box will be opened or that there will be no limit to the number of those who desire to participate in environmental litigation. The courts will exercise appropriate restraints just as they have exercised them in the past.²¹²

Justice Breyer's presentation of similar ideas three decades later, also in dissent, serves as evidence that the Supreme Court has failed to recognize environmental impacts and their consequential injuries to humankind.

C. Entergy and the Legacy of Chevron

The Court's application of the *Chevron* doctrine in *Entergy* compromised the environmental protection purpose of the CAA. A similar result occurred in the *Chevron* case itself. The dispute in *Chevron* centered on how aggressively the CAA required EPA to force industry to transition to cleaner pollution control systems.²¹³ The Act requires less up-to-date technology for older facilities than it does for new facilities, and provides EPA discretion to determine when a facility modification triggers the new source performance standards.²¹⁴ The

201. *See id.* at 519–20 (citing the standing argument of *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) to illuminate Massachusetts' argument for standing on the basis of the state's "well-founded desire to preserve its sovereign territory today"); *see also id.* at 519 ("That Massachusetts does in fact own a great deal of the 'territory alleged to be affected' only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power").

202. *Id.* at 523–25 (determining that EPA's refusal to regulate greenhouse gas emissions contributes to the global-warming related injuries to the Massachusetts coastline).

203. *See id.* at 525 (discussing that, although EPA's regulation of mobile-source emissions would not reverse the harms experienced by the petitioners, it would reduce the risks of catastrophic harm to some extent).

204. *See id.* at 549 (Scalia, J., dissenting) (stressing that the CAA standard in question hinges on the EPA Administrator's judgment, and then applying deference to the EPA's preferred reading of the term "air pollutant").

205. *See id.* at 521 (discussing injury with the observation that "[t]he harms associated with climate change are serious and well recognized"); *id.* at 522 ("That these climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation."); *id.* ("These rising seas have already begun to swallow Massachusetts' coastal land."). The Court readily acknowledged both the harm and the injury. *Id.*

206. *See, e.g.*, Robert E. Weinstock, *The Lorax State: Parens Patriae and the Provisions of Public Good*, 109 COLUM. L. REV. 798 (2009).

207. *See supra* notes 57–58 and accompanying text.

208. *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (denying standing where the petitioner had not established that either the organization or a member had suffered a personal, direct injury).

209. *See supra* notes 61–72 and accompanying text.

210. *Sierra Club*, 405 U.S. at 755 (Blackmun, J., dissenting).

211. *See generally id.* at 755–60 (Blackmun J., dissenting).

212. *Id.* at 757–58 (Blackmun, J., dissenting).

213. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 840 (1984).

214. Clean Air Act § 111, 42 U.S.C. § 7411 (2006). The substantive question before the Court was whether the CAA authorized the EPA to promulgate regulations which allowed states to treat all pollution sources within an industrial plant as if they were encased in a "bubble." This would allow a pollution source

Court deferred to EPA's view on this issue, which reduced the number of plant modifications subject to the stringent new source emission standards.²¹⁵ In upholding the EPA's interpretation of the CAA, the Court slowed the movement from old to new pollution control technologies, thereby undermining the Act's environmental protection purpose.²¹⁶

Similar to *Chevron* with the CAA, the issue in *Entergy* was how much control EPA may exercise over the pace of the movement from older to newer pollution control technologies under the CWA.²¹⁷ As in *Chevron*, the dispute in *Entergy* arose when EPA arguably employed an overly cost-conscious and less environmentally effective approach to industrial transition to cleaner technology.²¹⁸ And, like the *Chevron* majority, the *Entergy* majority deferred to EPA's interpretation of when and how aggressively the environmental statute in question required industry to move from cost-conscious to more technologically advanced pollution controls.²¹⁹

The Court in *Chevron* was faced with an ambiguous statutory term, the word "source," which is neither a term of art in the CAA nor a term whose interpretation in one case would be likely to impact how other environmental statutes are read.²²⁰ Contrasting this, the *Entergy* majority was faced with statutory language that is far more precise and the standard under examination is analogous to those in other statutes.²²¹ The Court's decision on whether a performance standard calling for the "best technology available" allows cost-benefit analysis could impact more than water discharge standards.²²²

Perhaps of even greater significance, the *Entergy* majority declined²²³ to engage in *Chevron's* step-one analysis.²²⁴ The

Entergy majority moves directly to a deferential determination of whether the agency's interpretation is within the bounds of reason, which virtually assures that the agency's action will stand.²²⁵ The Court's indifference to the Act's overall pattern of moving dischargers through phases of ever-improving technology and its lack of consideration for the problems posed by cost-benefit analysis in the environmental arena supports an inference that the *Entergy* majority wants to limit the reach of federal environmental laws.

Another application of *Chevron* that bears comparison with *Entergy* is the 2001 decision *Whitman v. American Trucking Ass'ns, Inc.*²²⁶ Although the case may be best known for its discussion of the non-delegation doctrine, the bulk of the analysis involves statutory interpretation. Interestingly, and in contrast to the findings of the *Entergy* majority, Justice Scalia's opinion for the *American Trucking* majority denies that cost considerations may be imputed into a statutory standard that is silent on the cost issue.²²⁷ It is unclear whether this radical shift is due to the language of the CAA provision under consideration in *American Trucking* or because the majority was more intent on rejecting the non-delegation argument than on injecting cost-benefit analysis into the CAA. Justice Scalia offers some clear language, however, indicating that he understands that including cost considerations in standard-setting alters the process radically.²²⁸ His opinion also includes an observation about whether cost should readily be imputed into a standard that does not include it expressly, an observation which was quoted back at the conservative Justices in two of the 2008–09 dissents²²⁹: "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions- it does not, one might say, hide elephants in mouseholes."²³⁰ Before concluding that *Entergy* represents a reversal for a Justice once sensitive to the issues inherent in environmental standard-setting, it should be noted that *American Trucking* ends by rejecting EPA's interpretation of the statute in the case, even under the deferential *Chevron* standard.²³¹

to maintain the status of existing source even where it underwent modifications and thus would be classified as a new source without the protection of the bubble. See *Chevron*, 467 U.S. at 840.

215. *Id.* at 866 ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy . . . the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones.")

216. See *id.* at 851 ("Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality.")

217. See *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1505 (2009).

218. See *id.* at 1505.

219. *Id.*

220. See *Chevron*, 467 U.S. at 862 ("We know full well that this language is not dispositive.")

221. See e.g., Wendy E. Wagner, *Congress, Science and Environmental Policy*, 1999 U. ILL. L. REV. 181, 203 (1999) (arguing that best technology standards in the CAA and CWA illustrate similar Congressional goals); Ryan J. Rasmussen, *Major D'oh: OIRA's Influence Over the EPA's Regulatory Decision Making in Riverkeeper Inc. v. EPA*, Note, 18 VILL. ENVTL. L.J. 357, 371–72 (2008) (comparing "best technology available" to similar statutory provisions).

222. See, e.g., 42 U.S.C. § 7412(i)(6) (2006) (specifying "best available control technology" within the CAA).

223. See *Entergy*, 129 S. Ct. at 1505 n.4; see also *id.* at 1518 n.5 (Stevens, J., dissenting).

224. See *Chevron*, 467 U.S. at 842–43 ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not

simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.")

225. See *id.* at 1505 n.4 (asserting that the step-two analysis would find any agency interpretation of an unambiguous term unreasonable under *Chevron*).

226. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001).

227. *Id.* at 467 ("We have . . . refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted.")

228. See *id.* at 469 ("That factor [cost] is both so indirectly related to public health and so full of potential for canceling the conclusions drawn from direct health effects that it would surely have been expressly mentioned . . . had Congress meant it to be considered.")

229. *Entergy*, 129 S. Ct. at 1517; *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2484 (2009).

230. *Entergy*, 129 S. Ct. at 1517; *Coeur Alaska*, 129 S. Ct. at 484.

231. *Whitman*, 531 U.S. at 481 ("We conclude . . . that the agency's interpretation goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear. We therefore hold the implementation policy unlawful.")

D. Burlington Northern and the Backlash against CERCLA

Traditionally, courts have read CERCLA to impose a strict liability scheme applicable to a broad set of parties playing any part in the industries whose activities led to the need for an environmental remediation effort at a Superfund site.²³² Issues such as divisibility of harm and contribution were routinely cleared from the question of liability, even where judges acknowledged that the statute pushed aside fairness and fault in favor of its intended result, which is that a large pool of parties be involved in the remediation effort.²³³ These statutory goals are reflected in the *Burlington Northern* dissent when Justice Ginsburg identifies CERCLA's objective as "to place the cost of remediation on persons whose activities contributed to the contamination rather than on the taxpaying public."²³⁴

In a relatively recent high profile case, the Supreme Court signaled that its patience with the statute had grown thin.²³⁵ In *Cooper Industries, Inc. v. Aviall Services, Inc.*, Justice Thomas wrote the majority opinion in a case that applied a *Chevron* step-one analysis to the contribution section of CERCLA.²³⁶ Justice Thomas' succinct fourteen page opinion addresses the issue of whether a private party who voluntarily incurred CERCLA cleanup response costs (under threat of suit) has a statutory cause of action for cost recovery against other contributors to the site.²³⁷ The Court read § 113(f)(1) narrowly to conclude that the statute provides that a party may avail itself of § 113 only where a civil action has been filed against it.²³⁸ That is, in order to avail themselves of § 113, parties who contributed hazardous substances to a site must resist cooperating in the cleanup until the government files suit, thus opposing the statute's goal of encouraging cleanup.²³⁹ Justice Thomas never finds it necessary to acknowledge that the Court's reading of the statute opposes its goals; his view is that the language of § 113 is so clear that the Court need not consider the purpose of CERCLA.²⁴⁰

Referenced in the *Cooper Industries* opinion is the 1994 Supreme Court CERCLA decision *Key Tronic Corp. v. United States*.²⁴¹ That case centered on whether Key Tronic could recover attorney's fees from the U.S. Air Force where the federal government had deemed both parties liable in connection with a Superfund cleanup.²⁴² The Court's primary focus,

thus, was on whether the statute should be read to include various attorney expenses as response costs.²⁴³ CERCLA uses the term "response" broadly to cover various actions invoked by the necessity to clean up Superfund sites; the Court concluded that the term does encompass certain lawyer-related expenses but not those related exclusively to litigation.²⁴⁴ In the course of its opinion, the Court acknowledged the breadth of CERCLA's liability provision.²⁴⁵ The decision may be used as a precedent favoring the acknowledgement of CERCLA as a statutory tool to encourage cleanup and prioritize it over allocation of liability.

Perhaps the most interesting aspect of the case for purposes of the present analysis is Justice Scalia's dissent, in which he argued in favor of reading the statute to allow the recovery of attorneys' fees in the context of both private and government-led cleanup situations.²⁴⁶ The focus of Justice Scalia's argument was on the statutory language that he claimed authorizes private parties to recover attorneys' fees in contribution actions, and in so arguing he accused the Court of requiring a "password" or "magic phrase" for such authorization, rather than simply reading the explicit language of the statute logically.²⁴⁷ In *Key Tronic*, Justice Scalia thus demonstrated his suspicion about reading into statutory silences, a suspicion notable in his *Entergy* opinion, where he refused to read a ban on cost-benefit analysis into the CWA BTA provision's silence on the issue.²⁴⁸ Indeed, Justice Scalia's *Key Tronic* dissent reinforces his preference for reading language closely and without reference to the broader goals of the environmental statute in which the language appears.²⁴⁹

In the end, *Burlington Northern* follows *Cooper Industries* as another example of the Court's impatience with CERCLA. The fact that eight Justices joined the majority opinion indicates that the decision is less a statement on the Court's environment protection biases than it is on the statute.²⁵⁰

E. Coeur Alaska and the Further Evisceration of the Clean Water Act

In his *Coeur Alaska* concurrence, Justice Scalia complained about the majority's reference to the *Mead* standard in con-

232. See, e.g., *U.S. v. Monsanto*, 858 F.2d 160, 167 (4th Cir. 1988) (agreeing with "the overwhelming body of precedent" that CERCLA is a strict liability scheme imposing liability broadly to parties).

233. See *id.* at 172.

234. *Burlington N. & Sante Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1885 (2009).

235. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004).

236. *Id.*

237. *Id.* at 160–61.

238. *Id.* at 166.

239. See *id.*

240. See *id.* at 167 ("Each side insists that the purposes of CERCLA bolsters its reading of § 113(f)(1). Given the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of CERCLA at all.")

241. *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994).

242. *Id.* at 811 (identifying the issue as whether attorney's fees are "necessary costs of response" under CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (2006)).

243. See *Key Tronic*, 511 U.S. at 814–19.

244. See *id.* at 819–20 (finding that litigation-related fees in connection with a government-initiated cleanup are not recoverable, but that legal work to identify additional liable parties may be recoverable because they are conducted in pursuit of the cleanup and not in pursuit of litigation).

245. *Id.* at 814 ("As its name implies, CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites. . . . [Government-led cleanups] typically require private parties to incur substantial costs in removing hazardous wastes and responding to hazardous conditions.")

246. *Id.* at 821–22 (Scalia, J., dissenting) (arguing for a broader reading of the term "enforcement activities" to encompass attorney fees because "[o]bviously, attorney's fees will constitute the major portion of those enforcement costs"); see also *id.* at 823–24 (refusing to accept that Congress meant to bar attorney's fees from being recovered under one type of CERCLA cost recovery action by explicitly authorizing attorney fee recovery under another type of cost recovery action).

247. *Id.* at 823.

248. See *id.* at 821–24.

249. See *id.*

250. See *Burlington N. & Sante Fe Ry. Co. v. United States*, 129 S. Ct. 1870 (2009).

nection with its discussion of an EPA memorandum that addressed the interplay between the CWA provisions and regulations at dispute in the case.²⁵¹ Justice Scalia's point was that the majority appeared to invent a new brand of deference, neither applying *Mead's* "Skidmore" deference nor *Chevron's* two-step analysis, yet giving the agencies the same level of deference accorded under *Chevron*.²⁵² Putting aside the deference standard question, Justice Scalia's concurrence underscored the high regard that Justice Kennedy's opinion accorded EPA's internal words and logic, which seems barely differentiable from that which would be enjoyed by publically vetted regulations. The majority gave five rationales for its confidence in the EPA memorandum, but in essence the majority took solace in the EPA's limiting the scope of its conclusion that fill permitting is not subject to the pollution discharge program to closed bodies of water.²⁵³ The memo explains that EPA maintains pollution control authority over discharges from the so-called closed water bodies into surrounding waters.²⁵⁴

Inherent in the Court's finding that this practice is reasonable is the notion that closed bodies of water are somehow less integral to the system of U.S. waters than those that have a surface connection with other water bodies. This notion creeps uncomfortably close to the plurality view in the notorious 2006 decision, *Rapanos v. United States*.²⁵⁵ The *Rapanos* plurality presages the 2008–09 majorities in a number of ways, including its presentation of the case facts in an almost-litigious fashion, with the landowner who illegally filled his wetlands portrayed as the victim of an overzealous federal government.²⁵⁶ Federal regulators are described as "enlightened despots."²⁵⁷ The disgust with which the opinion discusses the efforts of the Army Corps to protect wetlands is particularly striking when compared with the majority's pro-Army Corps opinion in *Coeur Alaska*.²⁵⁸ In *Rapanos*, the Court describes the "immense expansion of federal regula-

tion of land use that has occurred under the Clean Water Act" and even identifies "half of Alaska" as part of the area of "swampy land" over which the Corps has asserted jurisdiction in its three-decade power-grab.²⁵⁹ Indeed, the *Rapanos* plurality is written as if the Justices would prefer reading the term "navigable waters" in the CWA literally, and thus limit regulation of wetlands to those that abut such waters.²⁶⁰ Casting its statutory analysis as a *Chevron* review, the Court concludes that the Army Corps' interpretation of CWA jurisdiction is impermissible.²⁶¹ As the *Rapanos* dissent points out, the plurality's approach to the statute and agency's interpretation appears far more aggressive than *Chevron* would have it be.²⁶²

One might presume that the Court producing the *Rapanos* plurality would be bent on limiting CWA jurisdiction to the regulation of pollution discharges to flowing waters, with perhaps an equal desire to limit severely the regulatory protection of wetlands, but *Coeur Alaska* proves that presumption incorrect. In *Coeur Alaska*, the majority justifies its decision, in part, by twice referencing the fact that, if the Army Corps is not allowed to sacrifice the lake in question, it would instead sacrifice a wetland,²⁶³ thus appearing as if the conservative Justices now reverse the wetlands that they declined to protect in *Rapanos*.²⁶⁴ To be fair, it must be noted that Justice Kennedy, the author of *Coeur Alaska*, concurred in *Rapanos*, at least in part on the basis of his disagreement with the plurality's denigration of wetlands.²⁶⁵ Justice Kennedy rejected the plurality's simplistic argument for surface contiguity as the test for CWA jurisdiction, arguing instead for a case-by-case analysis of wetlands to determine their hydrological connection to traditional waters of the United States.²⁶⁶

In addition to containing echoes of *Rapanos* that indicate a result-oriented approach to environmental cases on the part of the conservative members of the Court, the *Coeur Alaska* majority opinion echoes two of the opinions issued earlier in the 2008–09 Term. It echoes *Entergy* in that the Court is highly deferential toward an environmentally unfriendly agency reading of the CWA.²⁶⁷ As in *Entergy*, the Court relies far more on agency interpretations of the statutory provision under dispute than it does on its own reading of

251. See *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2479 (2009) (Scalia, J., concurring) (noting that the Court is adding another type of deference, applicable to agency positions that clarify ambiguous statutes and regulations, that is identical to *Chevron* deference but does not call itself that).

252. See *id.* at 2479–80 (Justice Scalia noting that "if we must not call that practice *Chevron* deference, then we have to rechristen the rose").

253. *Id.* at 2473–74 (determining that the memorandum's prioritization of fill permitting over pollution discharge regulatory bans (1) preserves a role for EPA's performance standard; (2) does not allow dischargers to evade the performance standards; (3) preserves the Army Corps' authority to determine whether a discharge is in the public interest; (4) does not apply to toxic pollutants; and (5) reconciles the three statutory provisions and the regulations implementing them).

254. *Id.* at 2473 (observing, as the first reason that the Court identifies to explain its deference to the EPA memorandum, that it "confines the Memorandum's scope to closed bodies of water. . . . [While] the EPA's performance standard retains an important role in regulating the discharge [from such closed bodies] into surrounding waters").

255. *Rapanos v. United States*, 547 U.S. 715 (2006).

256. Compare *id.* at 719–21 (discussing "[t]he burden of federal regulation on those who would deposit fill material in locations denominated 'waters of the United States'" as "not trivial"), with *id.* at 788 (Stevens, J., dissenting) (pointing out that the landowner "filled large areas of wetlands without permits, despite being on full notice of the Corps' regulatory requirements" and noting that "[b]ecause the plurality gives short shrift to the facts of this case . . . I shall discuss them at some length").

257. *Id.* at 721.

258. See *Coeur Alaska*, 129 S. Ct. at 2472–77.

259. See *Rapanos*, 547 U.S. at 722.

260. See *id.* at 724–25 (discussing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)); *id.* at 731 (admitting that the term "navigable waters" was not intended to be read literally, but insisting that "the qualifier 'navigable' is not devoid of significance").

261. *Id.* at 739–42 (defining CWA jurisdiction to not include intermittent waterways or wetlands not abutting navigable waters).

262. See *id.* at 805–06 (pointing out that "the proper question is not how the plurality would define 'adjacent,' but whether the Corps' definition is reasonable," then going on to explain how the Corps' definition warrants deference).

263. *Coeur Alaska*, 129 S. Ct. at 2465, 2478.

264. See *Rapanos*, 547 U.S. at 742 (finding only those wetlands with a connection to other bodies of water protected under the CWA).

265. *Id.* at 761 (arguing against the plurality's description of wetlands as "moist patches of earth").

266. *Id.* at 782 (asserting that the Army Corps "must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries").

267. Compare *Coeur Alaska*, 129 S. Ct. at 2473, with *Entergy, Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1505 (2009).

the provisions.²⁶⁸ The Court also follows both *Entergy* and *Burlington Northern* by neglecting to consider the core thrust of the statute when conflicting interpretations of individual provisions are at issue.²⁶⁹ In all three cases, it is left to the dissent to remind the Justices that environmental laws strive, first and foremost, to meet environmental goals.²⁷⁰

Conclusion

*“Conservatives finally got their Court”*²⁷¹

It is a tricky proposition to accuse a group of Justices of sharing a social agenda or political ideology that motivates the group to select and decide cases in a result-oriented manner. After all, such an accusation can be dismissed quite readily as having been motivated by the very politics that the Justices are accused of attempting to undermine. In an article responding to the “pro-business” reputation of the Roberts Court, for example, Professor Jonathan Adler characterizes eight of the Court’s sixteen environmental cases decided between 2006 and early 2009 as having yielded pro-business outcomes.²⁷² In addition, Professor Adler makes the valid point that *Massachusetts v. EPA*, one of the pro-environment decisions emerging from the Roberts Court, has thus far eclipsed any of its fellow Roberts Court environmental decisions in significance.²⁷³

Thus, Court defenders may scoff at the idea that a single Term’s cases can reveal anything of significance about either particular Justices or a collective agenda that some of them may share. But regardless of patterns among decisions and their comparative significances, individual opinions can reveal the predispositions and even the prejudices of those who write and join them. In that light, the five decisions discussed in this Article indicate that the majority of the Supreme Court remains uncomfortable with the idea of environmental values as the subject of a case or controversy. The analysis also indicates that at least some of these Justices are willing to stretch both law and logic to ensure that environmental petitioners continue to encounter the difficulties in accessing the courts that they have traditionally—and some

would say unfairly—encountered since the beginning of the modern environmental era.

In one of his final opinions, the late Justice Blackmun professed “difficulty imagining this Court applying its rigid principles of geographic formalism anywhere outside the context of environmental claims.”²⁷⁴ This observation, penned nearly two decades ago, would have been a fitting close to the dissent in any one of the Court’s environmental opinions from the 2008–2009 Term.

268. See *supra* at notes 77–105 and accompanying text.

269. See *supra* at notes 77–105 and accompanying text.

270. See *Rapanos*, 547 U.S. at 799, 804; *Entergy*, 129 S. Ct. at 1518–21; see *Burlington N.*, 129 S. Ct. at 1885.

271. See Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 423, 423 (2007). The article surveys recent cases to illustrate the pro-business cohesiveness of the Court’s conservative bloc. Professor Chemerinsky’s observations focused on abortion, school desegregation, speech, taxpayer standing, criminal appeals, and a variety of cases protecting business interests. In fact, the only environmental case he cites is *Massachusetts v. EPA*, which he includes as a rare exception to the string of conservative victories.

272. Adler, *supra* note 169, at 954–55. The article predates the Court’s decisions in *Burlington Northern & Santa Fe Railway Co. v. United States* 129 S. Ct. 1870 (2009) and *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009).

273. Adler, *supra* note 169, at 954–55.

274. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 595 (1992) (Blackmun, J., dissenting).