Complex Laws Can’t Spell Judicial Respect

The late Rodney Dangerfield famously complained, “I get no respect.” Environmental law and environmental lawyers seem increasingly to be suffering from the same fate these days, at least in the courts. Long gone are those days when judges actually welcomed the opportunity to hear an environmental law claim and spoke of legal protections in uplifting, aspirational terms. Today, judges are more likely to perceive such cases as burdensome and dull.

In the early 1970s, many courts embraced the new wave of environmental litigation promised by then recently enacted laws. Judge Skelly Wright of the D.C. Circuit in Calvert Cliffs Coordinating Comm’n v. U.S. Atomic Energy Comm’n described the “judicial role” as ensuring that the “promise of this legislation will become a reality.” He declared the court’s “duty” as seeing that “important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.”

By the mid-1980s, however, Judge Kenneth Starr, writing for that same court, was far less sympathetic in his characterization of environmental law’s nature and the judicial task in its interpretation. In American Mining Congress v. EPA, Starr described reading the Resource Conservation and Recovery Act as a “mind-numbing journey.” Nor was he alone in holding such views. Published federal court rulings in environmental law cases are replete with disparaging comments about environmental law’s technical nature and its heavy reliance on acronyms and jargon. While a few have used sympathetic depictions, such as Seventh Circuit Judge Richard Posner’s reference to environmental law’s “symphony of acronyms,” most courts have disparaged environmental law because of its sheer technicality.

The Fifth, Seventh, and Ninth Circuits have described environmental law’s acronyms as an “alphabet soup,” “a feast of officialese,” and the “preferred lexicon of environmental law.” Ninth Circuit opinions have mockingly included footnotes deliberately laden with acronyms — e.g., “this case involves the FWS, that is, the CWA, and particularly ICSs, issued pursuant to 40 CFR 209, which may affect the NPDES permits issued to WTPs” — to underscore environmental law’s absurdity.

The D.C. Circuit has gone so far as to admonish environmental litigants not to forget “the first rule of advocacy: ‘to make your argument understandable.’” In a per curiam opinion joined by Judges Douglas Ginsburg, David Sentelle, and Raymond Randolph in American Iron & Steel Institute v. EPA, the court faulted counsel for using legal prose understandable only to those, unlike the judges, “thoroughly versed in the intricacies of the Clean Water Act, in its regulatory jargon, in mathematics, in toxicology, in biology, oncology and so on.”

This fall, however, in Citizens Coal Council and Kentucky Research Council v. EPA, the Sixth Circuit introduced a new judicial term of art — “environmentalise,” which the court pointedly contrasted with “English.” According to the court, the Clean Water Act is a “legislative labyrinth” and “an enigmatical piece of legislation” the “intricacies” of which are “virtually indecipherable.” The act is “filled with more sesqui-pedalian jargon than a year’s subscription to any trade journal and a byzantine system of cross references.”

The apparently deadening effect of environmental law’s technical complexity appears to have reached even the chambers of the justices at the Supreme Court. The papers of Justice Harry Blackmun, released to the public last spring, reveal that the clerks referred to then-pending petitions for writs of certiorari in the Clean Water Act interstate water pollution case Arkansas v. Oklahoma as “those horrible EPA cases.”

Blackmun’s handwritten notes taken during oral argument in another Clean Water Act case, Chemical Manufacturer’s Association v. Natural Resources Defense Council, Inc., suggest that the justice may have found less than scintillating the question whether certain various effluent limitations otherwise applicable were allowed from technology-based point source discharges of toxic pollutants. “What a dull case” appeared prominently on Blackmun’s oral argument notes, although it is not clear whether he wrote those words himself or they were instead added by another justice sitting next to him.

As early as 1980, then-License Commissioner Rehnquist warned against the tendency of the justices not to review environmental cases because of their inordinate technical complexity. In dissenting from the Court’s denial of review in United States Steel Corporation v. EPA, Rehnquist admonished his colleagues that “the fact that the requirements of the Clean Air Amendments virtually swim before one’s eyes is not a rational basis, under these circumstances, for refusing to excise our discretionary jurisdiction.”

Environmental law’s increasing complexity, therefore, has proven costly. The extraordinary nature of the aspirations reflected in modern environmental protection laws has been obscured as judges have lost sight of their corresponding judicial function. There should be nothing either “mind numbing” or “dull” about courts ensuring against the misdirection of laws that seek to protect the health and welfare of current and future generations of Americans and safeguard endangered species and wilderness areas. Yet, in the administrative morass, even the best of judicial minds can easily forget the broader legal context.

The challenge for today’s environmental lawyers appearing in federal and state courts is to place the particular environmental legal issues raised in a case, no matter how technical or fascinating they may seem, in that broader social context. Their reward will be better judicial decisions and, perhaps, even a return of the special respect environmental law once enjoyed in the courts.

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