

Analytics Reveal Key Trends and Themes in Environmental Litigation

This past summer, a newly established division of Lexis-Nexis, Lex Machina, which provides legal analytics, issued its first-ever “Environmental Litigation Report” — reviewing trends during the past decade. Although I am somewhat of a skeptic when it comes to analytics, because of the hidden assumptions that inevitably underlie otherwise seemingly neutral number-crunching, the report is fascinating for environmental lawyers.

According to Lex Machina, there were 13,000 environmental cases filed between 2009 and 2018. But the vast number of those (about 7,000) arose out of the 2010 BP Deepwater Horizon oil spill in the Gulf of Mexico. If one subtracts out the BP cases, each year trended decidedly downward

from 750 to 518 cases during the 10 years surveyed — for a total decrease of 31 percent.

Cases filed under the Clean Water Act accounted for the largest percentage of new cases, numbering 172 in 2009 and 146 in 2018, but that drop masks a roller coaster of filings that reached as high as 217 in 2011 and 2012, and 214 as recently as 2016. Not surprisingly Comprehensive Environmental Response, Compensation, and Liability Act cases dropped significantly, topping off at 155 in 2009 before plummeting by one-third to 99 in 2018. Such is the necessary fate of a retroactive statute that imposes liability on past conduct rather than regulates prospectively. CERCLA’s alter-ego, the Resource Conservation and Recovery Act, which regulates prospectively solid and hazardous waste management and has never triggered much litigation, saw its already small numbers drop by more than half, from 55 to 21 cases annually.

The number of federal court cases has been dropping over the last 10 years

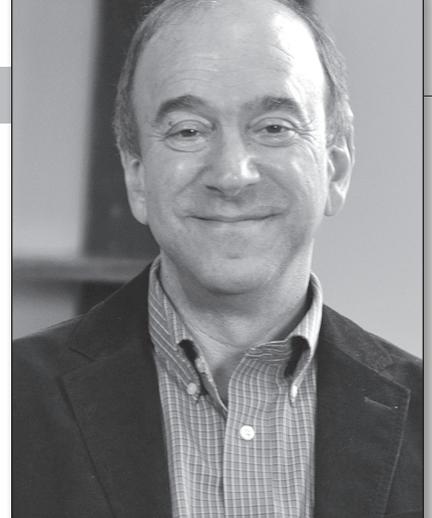
Both Endangered Species Act and Clean Air Act cases similarly witnessed precipitous drops even if not as deep as RCRA’s. The number of ESA cases fell during the decade from 117 to 69, reaching as low as 67 in two different years. And the number of Air Act cases numbered 83 in 2009 and then hit an all-time decade low of 45 in 2018, after falling off a cliff from 2013 and 2014, dropping from 73 to 38 in one year.

Perhaps not surprisingly, modern environmental law’s first statute — the National Environmental Policy Act — was the only statute to join the Clean Water Act in reaching three digit figures in newly filed cases in 2018. But even the number of new NEPA cases filed that year (113) reflected a steady decline from a high of 144 in 2009.

Drilling down a bit more deeply into the most recent four years, one learns that the federal district courts in the Central and Northern District of California account for the greatest number of new filings, with the Central District receiving a whopping 85 new Clean Water Act complaints and the Northern District receiving significant but fewer Water Act complaints (52) but far more federal endangered species (24) and air pollution (23) cases — supplying more evidence of the outsized role California has long played in environmental law.

Interestingly, in third place was the federal district court in Washington, D.C., which bested the two California federal courts in the number of new cases filed under NEPA (43) and the ESA (35) and the CAA (29) even though its total number of filings (137) was still shy of the Golden State’s.

Identification of plaintiffs responsible for filing the complaints is also revealing. Not surprisingly the United States was the most frequent, but the



Richard Lazarus is the Howard J. and Katherine W. Aibel Professor of Law at Harvard University. He can be reached at lazarus@law.harvard.edu.

number of U.S.-initiated cases was 438 during the three years early in the Obama presidency and dropped to 299 from 2016 to 2018, which includes the first two years of the Trump administration. The Center for Biological Diversity was the leading environmental plaintiff, filing 50 percent more cases (120) in 2016 to 2018 than it filed during comparable earlier periods, presumably in response to Trump’s environmental policies. Apart from the United States, the most active plaintiff law firm from 2016 to 2018 by far was Earthjustice, which had more than twice the number of new filings than any other environmental group. As many environmental groups are hiring more attorneys, we can fairly anticipate the number of environmentalist filings to increase substantially.

As suggested at the outset, there are some important caveats worth highlighting. The focus on district court filings misses extremely significant cases brought under the Clean Air and Clean Water acts in federal courts of appeals in the first instance, such as challenges to the Clean Power Plan and Waters of the United States rule — not incidental omissions. It also misses important state court litigation and state administrative filings, such as the critical work being done these days by both the Environmental Defense Fund and Earthjustice, among others, in state public utility commission proceedings to reduce the carbon footprint of the nation’s production of electricity.

All good fodder for thought.