

✘ Sometimes environmental litigation becomes strikingly divorced from the underlying facts that give rise to it. And sometimes the hardest fought litigation seems to have the least impact on what the parties are ostensibly fighting about. When that litigation creates bad precedents that are difficult to reverse, you have to wonder whether anything of value has come out of the process.

Take, for example, the litigation that produced the Supreme Court decision in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004) (available [here](#), with the rest of that volume of the U.S. reports). The litigation challenged the failure of the Department of Transportation to produce an Environmental Impact Statement before issuing two rules, one setting out a form for the operators of Mexican trucks to apply for permission to operate in the United States and the other establishing a safety inspection regime for those trucks. The Department prepared an Environmental Assessment, but decided that the rules would not have any significant environmental impact. That decision was based on the Department's belief that its rules would not be responsible for increased Mexican truck traffic in the United States because Mexican trucks were still barred by a presidential moratorium.

Public Citizen disagreed with that interpretation. The Department's rules made it possible, indirectly, for Mexican trucks to operate in the United States. In 1992, when it entered into NAFTA, the United States had agreed to end its moratorium on Mexican trucks by 2000. Citing concerns about the safety of Mexican trucks, however, President Bill Clinton refused to lift a moratorium on their entry. Mexico successfully challenged that decision under NAFTA, and in February 2001, newly inaugurated President George W. Bush promised to lift the moratorium once safety regulations were in place. And in fact, once the Department certified to the President that it was ready to assure the safety of Mexican trucks, he lifted the moratorium on cross-border trucking.

Even before that point, Public Citizen (later joined by other environmental groups) challenged the Department's rules under NEPA, asserting that the environmental analysis had to consider the impacts of increased cross-border truck traffic. The legal claim was not implausible — the moratorium wasn't going to be lifted without those rules, and the president had said he would lift it once they were issued. The Ninth Circuit agreed with the plaintiffs that an EIS was required, because the lifting of the moratorium was a wholly foreseeable "indirect effect" of the rules.

The Supreme Court, however, reversed. In a unanimous decision authored by Justice Thomas, it ruled that the Department of Transportation did not have to produce an EIS because it was not the legal cause of cross-border trucking. Only the president could authorize (or not authorize) the entry of Mexican trucks. The Court's decision has caused a

lot of confusion about the extent to which NEPA requires consideration of “indirect,” predictable but not immediate, effects, and encouraged agencies to argue that although an impact cannot happen absent their action they are nevertheless not responsible for it. It’s a thorn in the side of NEPA plaintiffs.

Although Public Citizen’s interpretation of NEPA was plausible (and I like it better than the Court’s), it was also not hard to predict that if the case got to the Court it would go against plaintiffs. The Supreme Court has never liked NEPA, to the point that it has never ruled in favor of NEPA plaintiffs. Plaintiffs weren’t to blame for the case getting to the Court, since they won in the Ninth Circuit. But given the combination of the Bush administration’s general hostility to NEPA and its commitment to lifting the moratorium, a request that the Court hear the case was quite predictable.

I may be missing something, but it’s not clear to me that the litigation served any environmental purpose. Assuming the plaintiffs were right that Mexican trucks are notably more polluting than U.S.-operated trucks (I have not seen solid data one way or the other on that assumption), Congress has been a more effective avenue than the courts for opponents of Mexican trucks. It has continued to block cross-border trucking, with a temporary exception for a small pilot program. That program was ended last week by a provision in the omnibus spending bill.

So today, Mexican trucks are still barred from the interior of the U.S., Mexico has imposed tariffs on a variety of U.S. goods in retaliation for that ban, and environmentalists seeking to enforce NEPA face one more bad Supreme Court decision. There are always risks in litigation, of course, and fear of bad outcomes should not inhibit environmental advocates to the point that they allow protective laws to become a dead letter. But if there’s a political route to the outcome sought (as there apparently was in this case) and it’s predictable that if the case reaches the high court it will produce an unhappy precedent (as I think it was here), perhaps discretion becomes the better part of valor.