In a prior post, I talked a little about proposed changes to Canadian environmental laws that would roll back significant protections and procedural requirements. I also talked about some of the differences between Canada and the United States that might be the basis for very different histories of environmental law in the two countries. But there are two additional differences that I actually think are even more critical. I'll tackle one of them here.

US environmental law is much more generous in allowing for judicial review of decisionmaking by government agencies that is alleged to violate relevant environmental laws. It is also much more generous in allowing private parties to enforce environmental laws against other private parties who are alleged to have committed violations. The extreme example of this is the US Endangered Species Act which (and I am only slightly exaggerating here) essentially allows any one to sue any one else (including any government agency) for violating the law. Many of these statutes (again, especially the ESA) have provisions that set tight deadlines for agency decisionmaking and allow private parties to sue agencies to compel them to act within those deadlines.

Why does this matter? It means that it is much, much harder for government agencies – whether they are directly implementing the law in terms of management or regulatory decisions, or whether they are making decisions about whether to enforce the law against private parties – to use their discretion to overlook violations, or to interpret the law in ways that exempts their own behavior from the law, or even to simply delay in implementing the law. In other words, it means substantive standards are much more likely to be met in practice, rather than just exist as words on paper.

One good example from Canada helps illustrate the point – and here, I'm drawing on an excellent senior thesis that just got completed by an undergraduate political science major (Robert Shaffer) I advised here at Berkeley. Canada enacted a stringent federal species at risk statute in the late 1990s (more than 20 years after the US enacted the ESA). The provisions of the statute sound great on paper, but there is little remedy for citizens seeking to sue government agencies to force them to meet deadlines or otherwise act to implement or enforce the statute. For instance, in the case of listing species, if a governmental advisory body calls for the listing of the species, the minister in charge has to make a decision within a certain time frame, or the species is automatically listed. Yet when that advisory body called for the polar bear to be listed in 2008, the relevant minister evaded the deadlines by claiming that they did not technically "receive" the report until 2011. In the US, when the Fish and Wildlife Service missed deadlines to respond to petitions to list the polar bear, environmental groups sued and won to force a timely decision.

That doesn't mean that stringent judicial review and citizen suit provisions are always a good idea. There may be good reasons we don't always want the law enforced to the letter (think of speeding!). Litigation is costly and time-consuming, and might displace cooperative or collaborative efforts to resolve problems that might be cheaper and quicker. (Though it appears that in the case of the polar bear, the US process worked as quickly or quicker than Canada's because litigation prevented administrative and political foot dragging.) But if you think there is a serious risk of political pressure causing unwarranted underenforcement and weak implementation of environmental laws, then stringent judicial review and citizen suit provisions might well be a good idea.