What could we expect from Neil Gorsuch as a Supreme Court Justice in environmental and energy cases? After reading all the opinions I could find, I'd say the best news is this: He doesn't seem to have any particular agenda in the area. That distinguishes him from some past appointees such as Clarence Thomas, who had made his hostility to environmental protection clear as a court of appeals judge. He also doesn't give the impression of being particularly pro-industry. Perhaps of particular relevance, given the current situation, he seems sympathetic to pro-environmental state laws. Of course, it's possible that the small number of environmental cases to date are misleading and that he'll campaign against environmental regulation as a Justice. But his record to date doesn't really show that.

I've broken down the opinions into a few groups. There aren't a lot of opinions. Still, they're instructive. It's not inconceivable that I've missed something — please let me know if there are cases I should add.

Federalism and the Environment

Energy and Env. Legal Institute. This is Gorsuch's best known opinion in the regulatory area. The case involved an attack on Colorado's renewable energy mandate on the grounds that it interfered with interstate commerce. Specifically the argument was that Colorado had in effect regulated energy generation in other states by favoring renewables. Gorsuch upheld the Colorado law. Ann Carlson (*here*) and I have both written previously about it, so I won't go into detail here. When the case first came out, I had never heard of Gorsuch. In a blog post at the time, I praised the opinion for its clarity and use of an interesting analogy to some doctrines in antitrust law, winding up with a statement that Gorsuch was "definitely someone to keep an eye on." For once, one of my predictions was correct.

Cook v. Rockwell International Corp. This was a preemption case. The plaintiffs had filed a class action on behalf of local residents against the operators of a nuclear weapons production facility that had leaked radioactive materials (sometimes just dumped them). The case was originally brought under the federal Price-Anderson Act, a federal statute providing for liability after "nuclear incidents." The plaintiffs brought a state law tort claim for nuisance and a claim under the federal law. The jury awarded roughly $1 billion in damages. In an earlier round of the protracted litigation, the U.S Circuit Court had ruled that the statute did not apply. The reason was that the case did not involve an "Incident," defined as involving harm to people or property. The plaintiffs had been exposed to low doses

of radiation and their property values had crashed, but there was no evidence of physical illness or property damage. Thus, this was only an "occurrence," not covered by the statute. The case was then returned to the trial court. The trial court entered judgement for the defendants, and the plaintiffs appealed. On appeal, there was a technical procedural question about what issues remained open after the earlier Tenth Circuit opinion, which I won't go into here. But the main issue was whether federal laws governing nuclear energy, including the Price-Anderson Act, preempted state tort law.

Gorsuch ruled against preemption and directed the trial court to enter judgment in favor of the plaintiffs. He observed that preemption is disfavored when state law deals with public health or safety. He found nothing in the text of the statute to indicate that it meant to sweep away state tort law. Notably, his position was in conflict with a Fifth Circuit decision, an indication that he could readily have gone the other way if he has chosen to do so.

Federal Regulatory Cases

Hydro Resources v. EPA. This was a dispute about whether a facility was in "Indian country," meaning the EPA would issue the permit under the federal Safe Water Drinking Act, as opposed to the state permit the facility had already received. An EPA regulation defined Indian country in terms of a non-environmental criminal law governing crimes committed in Indian country. On behalf of an en banc court, Gorsuch concluded that the facility was not in Indian country for purposes of the criminal law, based on the most recent applicable Supreme Court ruling. Indian law is a complex field unto itself, so I won't try to assess the debate between Gorsuch and the dissenters over that issue. For our purposes, the most interest aspect of the opinion is at the very end. There, he observes that underground water sources don't follow neat survey lines, so that the ruling would complicate EPA's regulatory task. But that, he says, is because EPA decided to tether itself to a criminal statute, which is designed to regulate activities on land rather than to regulate authority over aquifers. There's at least a strong hint in the opinion that EPA might be able to obtain more sensible results in future cases if it revised the regulation.

Scherer v. U.S. Forest Service. The plaintiff challenged a fee charge by the forest serve as a violation of a federal statute limiting such fees. Gorsuch rejected the challenge. Because the plaintiff challenged the regulation on its face, he could win only by showing that every application of the regulation was illegal, and that clearly wasn't true. It may be worth noting some asides about the forests. The first

sentence of the opinion is “Everyone enjoys a trip to the mountains in the summertime.” A bit later, he remarks that “As a general rule Congress has decreed that anyone may enter this country’s great national forests free of charge.” There’s a welcome tone of appreciation of nature that was quite lacking in Justice Scalia’s opinions.

U.S. v. Magnesium Corp. This case involved the application of RCRA, the federal statute dealing with waste disposal, to a magnesium ore processing facility. The issue was whether, under a prior regulation, the facility’s discharges were treated as ordinary waste or as toxic waste. The facility owner argued that EPA had previously interpreted the regulation to exempt the discharges from being classified as toxic waste. If the agency wanted to change that interpretation, the owner argued, it would need to engage in a rule making procedure, using notice and comment, which it had not done. The Supreme Court has since rejected the premise of the argument about the need for the rule making procedure. Gorsuch, however, didn’t have to rule on that issue, because he concluded that the earlier EPA interpretation was only tentative. The most appealing aspect of the opinion is his effort to decide the case on narrow grounds. The least appealing aspect is that, as he goes through the issues that *aren’t* presented, he can’t seem to resist chatting about all of them, some at length. But this seems to be mostly because he finds them interesting, rather than because of any strong views about them.

Standing

Gorsuch has only lightly touched on standing issues. In *Cook v. Rockwell Int’l*, he finds standing for the owner on the grounds that it has already paid for the process of getting a state permit and will now have to pay to go through the process again for a federal permit. In *Backcountry Hunters & Anglers v. U.S. Forest Service*, he holds that a group opposed to motorized vehicles in the park can’t object to a regulation allowing motorcycles because striking down that regulation would leave an earlier regulation in effect, and that regulation allowed all motorized vehicles. The best thing about these cases is that Gorsuch doesn’t seem terribly interested in standing law, unlike Scalia, who led a lifelong campaign to use restrictions on standing to keep federal courts from hearing environmental cases. [Addendum: Grist has a post arguing that these cases have ominous implications. I disagree:*Cook* wouldn’t prevent environmental groups from intervening to defend Obama Administration regulations if the Trump Administration went the other way. *Backcountry Hunters* seems to have been poor litigated — the group should have requested relief other than setting aside the regulation such as further

consideration of a complete repeal of the older regulation.]

Conclusion

As Ann Carlson pointed out in the blog post mentioned above, there are some reasons to be concerned about how Gorsuch would rule in environmental cases. As she notes, he took a swipe at the *Chevron* doctrine in a recent non-environmental case, adopting the critical stance popular among conservatives during the Obama Administration. That seems to be a recent concern on his part; there's no sign of any particularly strong views about deference to administrative agencies in the opinions I read. Still, as a conservative, it's not likely that he's going to go into decisions with any predisposition toward environmental regulation. But the cases I've read suggest that he doesn't have particularly strong feelings the other way. In this category of cases, at least, my general sense is that he could be a potentially "gettable" vote in favor of regulation, and that in any event he is likely to rule on narrow grounds rather than using cases as opportunities to lay down sweeping precepts as was Scalia's wont.

ADDENDUM. A long-time reader sent information about an additional example, though it didn't result in a reported opinion. This was the denial of a stay when Gorsuch sat on a motion panel:

Order filed by Judges O'Brien and Gorsuch denying petitioners' motion for stay filed by Susana Martinez, the New Mexico Environment Department, and Public Service Company of New Mexico. Served on 03/01/2012. [11-9552, 11-9557, 11-9567]

Of course, this could have more to do with his views and philosophy on the movant's burdens rather than anything about the substance of the rule or the haze program. But it does draw a contrast with other haze cases (Oklahoma soon after, or Texas in the 5th Circuit, or as compared to the Supreme Court with the Clean Power Plan) where motions judges *did* impose stays.

ADDENDUM 2. A second reader brought to my attention an unpublished opinion in which Gorsuch dissented from a grant of intervention to an environmental organization. He argued that the case was controlled by a precedent denying intervention on what he considered similar facts because the intervener's interests were sufficiently represented by the government. The majority disagreed and found that precedent distinguishable. Today, the issue is likely to be the ability of interveners to defend regulations when the government has abandoned their defense. Gorsuch's very brief dissent sheds no light on this issue. It does seem to

indicate an attachment to following precedent so that “like cases are decided alike.”