Given Justice Breyer's announced retirement, it seems like a good time to assess his contribution to environmental law. When Bill Clinton nominated him for the Supreme Court, there was a great deal of uneasiness among environmentalists about Justice Breyer. As an academic, he had sounded a cautious note about government regulation, calling for more deliberation and greater consideration of costs. On the Supreme Court, however, he's been a bit of a puzzle. He has generally voted on the environmental side. He also wrote a notable recent majority opinion, but otherwise his contribution has taken the form of low-key concurrences and dissents. On a rhetorical stridency scale, Justice Scalia would be on one end and Justice Breyer on the other.

The recent majority opinion was *County of Maui v. Hawaii Wildlife Fund*. The *Maui* case involved the scope of federal authority over water pollution. The county pumped about four million gallons a day of partly treated sewage into wells, from which the sewage traveled about four miles through groundwater into the Pacific. Most observers expected the Court to rule for the county. The Clean Water Act only requires a permit for discharging pollution into waterbodies, and the Trump EPA argued that discharges into groundwater are never covered by this requirement. The Court said that it "could not see how Congress could have intended to create such a large and obvious loophole in one of the key regulatory innovations of the Clean Water Act," that is, the permit requirement.

Breyer also rejected the opposite view that a permit is required any time it's possible to trace pollutants into some waterbody. Breyer argued that this view failed to respect Congress's reluctance to regulate groundwater as such. Breyer then opted for a compromise position: permits are required for the "functional equivalent" of a direct discharge in a waterbody. This ruling was not only something of a surprise, but one that may be very useful to the Biden EPA in trying to revamp the rules covering federal jurisdiction under the Clean Water Act.

None of Justice Breyer's environmental concurrences or dissents are likely to go down in history, but he did write separately in a significant number of cases. Two cases involved the issue of cost-benefit analysis, which had given environmentalists such pause at the time of his appointment.

In one case, the Court held — in an opinion by Justice Scalia no less — that the government cannot consider cost in setting national air quality standards. Justice Breyer concurred. He agreed with the result, but emphasized the general desirability of considering costs:

> "In order better to achieve regulatory goals—for example, to allocate resources so that they save more lives or produce a cleaner environment—regulators must often take account of all of a proposed regulation's adverse effects, at least where those adverse effects clearly threaten serious and disproportionate public harm. Hence, I believe that, other things being equal, we should read silences or ambiguities in the language of regulatory statutes as permitting, not forbidding, this type of rational regulation."

However, he thought that this particular law did clearly preclude consideration of cost, partly in the interest of forcing industry to innovate new pollution control technologies.

In another case, the Court held in another opinion by Scalia that EPA could consider costs in another context, setting standards to protect fish in waters used by power plants for cooling. Breyer agreed with the result but wrote separately to explain his views, which were more nuanced than Scalia's. (Of course, Scalia was never big on nuance.) Breyer said a total prohibition on considering costs "would bring about irrational results." However, he said,

> "EPA's reading of the statute would seem to permit it to describe environmental benefits in non-monetized terms and to evaluate both costs and benefits in accordance with its expert judgment and scientific knowledge. The Agency can thereby avoid lengthy formal cost-benefit proceedings and futile attempts at comprehensive monetization; take account of Congress' technology-forcing objectives; and still prevent results that are absurd or unreasonable in light of extreme disparities between costs and benefits."

He found that approach reasonable.

Two of Breyer's other opinions struck me as particularly significant, though rhetorically understated as always. The first case involved whether the lower court went too far in limiting naval exercises that posed risks to whales, given that the agency had failed to prepare an environmental impact statement required by law. The majority thought the lower court had wrongly intervened.

Breyer agreed on the result, but thought the Court's opinion took the failure to prepare an impact statement too lightly. When a decision goes forward without the "informed environmental consideration" provided by an impact statement, lack of an injunction "threatens to cause the very environmental harm" that a full impact

statement might have "led the Navy to avoid." In other words, for Breyer, Congress had an important purpose in requiring impact statements, which required greater judicial respect.

The second case involved the issue of standing to bring suit. The majority said that a dedicated outdoorsman lacked standing to challenge the government's decision to water down environmental standards on a multitude of public land tracts. The majority said he lacked standing: although he could show that he was likely to use lands that would be impacted, he couldn't say specifically which ones since that depended on later choices by the agency.

Breyer dissented. He asked why greater specificity was needed to show "a 'realistic' threat" that the project would impact land the man used. After all, Breyer said, "to know, virtually for certain, that snow will fall in New England this winter is not to know the name of each particular town where it is bound to arrive."

Justice Breyer won't go down in history as an icon of environmentalism. It's doubtful that anyone since William O. Douglas would qualify for that treatment. Breyer hasn't supported environmental safeguards because of any evident passion for the environment. Instead, he has supported them because they were reasonable policy choices. On today's Court, that pragmatic attitude puts him in the minority.

Though he has not lambasted the conservative majority as some would wish, he has been a quiet voice of reason. Perhaps that has made him effective behind the scenes in ways that are not obvious in public. In any event, though he has not been passionate in defense of the environment, neither has he been the deregulatory advocate that some environmentalists had feared. In that regard, he seems to have been a reflection of the Clinton era in which he joined the Court.

The Democratic Party has changed a lot since Bill Clinton's presidency. Any nominee by President Biden will need support from Senators Manchin and Sinema. Even so, any replacement is likely to be more liberal than Breyer. Hopefully, however, the nominee will share his keen intellect and commitment to the judicial process.

[This is an updated version of a post from Oct. 2021]