

Sean H. Donahue
Vermont Law & Graduate School
Summer 2023 – Term 2 (June 20-29)
Email: sdonahue@vermontlaw.edu
Phone: 202-277-7075
May 29, 2023 (version 1)

Environmental Appeals: Syllabus

In this course we'll examine aspects of environmental appellate law and practice – focusing on two significant pending cases involving regulation of vehicular greenhouse gas emissions from motor vehicles, *Texas v. EPA*, D.C. Cir. No. 22-1031 and *Ohio v. EPA*, D.C. Cir. No. 22-1081. Our study of these cases will help us to understand the procedural framework for judicial review of nationally applicable Clean Air Act rules, look at the Environmental Protection Agency actions at issue in the two cases, explore the perspectives and tactical choices of various parties in the litigation, consider the judges' decisional process, and learn some substantive law bearing on our national government's efforts to limit what is now the largest source of greenhouse gas emissions. We'll also consider the influence of significant judicial trends (particularly at the Supreme Court) reflecting skepticism about federal regulation and administrative agencies' role.

In the first week, we'll first study some rudiments of general appellate procedure, including and some specific issues that tend to loom especially large in environmental case. Because a large part of environmental law consists of litigation over the actions (and inactions) of administrative agencies, our overview will include judicial review of agency action – review that may take place in a trial court (as in review under the Administrative Procedure Act) or a court of appeals (as in many kinds of cases under the Clean Air Act cases). Even when review takes place in a court of first instance (such as a federal district court) judicial review of agency action shares key characteristics of classically “appellate” practice (e.g., review based on a “closed” factual record).

Our first-week overview will also look at aspects of the jurisdiction and remedial powers of appellate courts; the typical procedural phases of an appeal; and different standards of review (including a glimpse at shifting approaches to judicial review of agencies' interpretation of statutes and regulations). We will also look briefly at the EPA actions that are the subject of the *Texas* and *Ohio* cases to be examined in the second week.

During the second week, we'll focus on two major cases: *Center for Biological Diversity v. EPA*, a Clean Air Act petition for review proceeding involving EPA's (allegedly inadequate) greenhouse gas emissions standards for aircraft, and *Sackett v. EPA*, a major Clean Water Act case that will be argued as the Supreme Court's very first argument session in October (and that may well result in a significant narrowing of the Clean Water Act's coverage). We'll look at how the cases came to take their current shape, examine the legal and factual issues presented in each, and discuss some of the key choices faced by the advocates for the parties. Note that the subject matter of the last half of the last class will be determined democratically.

The course requirements will consist of (1) completing the readings and participating actively in class discussions, (2) a brief short-answer “micro-midterm” at the end of the third class covering the background topics covered during the first three sessions, and (3) short written and oral exercises arising from the materials we’ll examine during the second week (as described in the assignments for classes 5-8 below).

The readings may be found in the Reading Packet on the course website and on online materials linked below – please let me know ASAP if you have any difficulty accessing any of them.

Feel free to reach out to me (including before the course begins) if you have any questions about the course, assignments, logistics, etc. In addition to the email above, feel free to call or text me at (202) 277-7085.

Class 1: Introduction/Overview; Appellate Courts and their Powers

A. Introduction and Introductions

- Course overview: organization and objectives
- What is distinctive about appellate practice, and about *environmental* appeals?

B. Some Concepts and Distinctions

- Appeals of Lower Court Decisions v. Judicial Review of Agency Action
- Appeal as of Right; Appeal by Permission; Discretionary Review; Certification

C. Constitutional Bases for Federal and State Appellate Courts

Reading:

U.S. Constitution, Art. III (Reading Packet (“RP”) p. 1)

D. Appellate courts as institutions

Topics for Consideration:

- Why have appellate courts?
- Why have multimember panels?
- US federal appellate system: geographic and subject-matter divisions
- Judges: selection, tenure, culture
- Exclusive jurisdiction, specialization, generalism
- Support: law clerks, clerk’s office; staff attorneys

E. Subject Matter Jurisdiction: Statutory Appellate Jurisdiction

1. Appellate Review of District Court Decisions

Readings:

28 USC § 1331 (RP 2)

28 USC § 1291 (RP 2)

28 U.S.C. § 1292(a) and (b) (RP 2)

2. Judicial Review of Agency Decisions

Readings:

Administrative Procedure Act, 5 U.S.C. §§ 702, 704 (RP 3)
Clean Water Act, 33 U.S.C. § 1369(b)(1), (2) (RP 4)
Clean Air Act, 42 U.S.C. § 7607(b) (RP 5)

F. “Standing” in Environmental Appellate Litigation

Reading

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (excerpts) (RP 38)

Class 2: Some Appellate Procedure Basics; Anatomy of an Appeal

We’ll start with thinking about some of the key phases of an appeal in a federal court of appeals. To that end, please skim the table of contents of the Federal Rules of Appellate Procedure, available at <https://www.law.cornell.edu/rules/frap> or <https://www.uscourts.gov/sites/default/files/rules-of-appellate-procedure.pdf>, then consider the sequence (and read the provisions) identified below:

- A. Initiating an Appeal (*read Fed. R. App. P. 3 and 15(a)*)
- B. Preparing/Defining the Record (*read Fed. R. App. P. 10(a)*)
- C. Procedural motions (*Fed. R. App. P. 18*)
- D. Briefing
- E. Oral Argument
- F. Judicial Deliberation and Opinion-Writing
- G. Decision and Judgment (*read Fed. R. App. P. 36*)
- H. Panel or En Banc Rehearing (*read Fed. R. App. P. 40 and 35*)
- I. Issuance of the Mandate (*read Fed. R. App. P. 41*)

We’ll then discuss the Supreme Court’s latest big environmental decision, *Sackett v. EPA*, Sup. Cr. 21-454 (May 25, 2023), with a focus on its procedural history, the participants’ litigation choices. and the relationship between litigation and administrative action.

Class 3: Supreme Court’s Certiorari Docket; Standards of Review

A. Supreme Court Jurisdiction; Review on Certiorari

We’ll briefly discuss Supreme Court’s certiorari jurisdiction and “emergency” docket.

Readings:

Supreme Court Jurisdictional Provisions (RP 7)

[Supreme Court Rule 10](#)

Steven Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 123-32, 160 (2019) (Intro & Part I, Conclusion)

B. Standards of review

We'll discuss an issue that's important in most appeals, especially in environmental litigation – identifying and applying the appropriate standard of review. We'll examine principal review standards that apply in appeals of district court decisions and review of agency action. We'll discuss ways in which arguments about the standard of review can shape the way appeals are argued.

Readings:

“Standard of Review Materials” (RP 7)

Coal. for Responsible Regulation v. EPA, 684 F.3d 102 (D.C. Cir. 2012) (excerpt) (RP 26)

C. Brief Micro-Exam (short answer)

This will be a short (15-20 minute) short-answer exam covering readings and class discussions through and including Class 3.

Class 4: Judicial Review of Agencies' Interpretation of Statutes and Regulations: Deference and Its [Apparent] Decline; Brief (Lecture) Intro to the *Texas v. EPA* Case

Part A

We'll discuss judicial approaches to agencies interpretation of statutory and regulatory language – issues at the core of many environmental cases and ones that are undergoing a comprehensive reexamination (to put it mildly) in the federal courts.

Readings:

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 867 (1984) (excerpts; you can skip footnotes except for footnotes 7, 9, and 11) (RP 16)

Kisor v. Wilkie, 139 S. Ct. 2400 (2019) (read whole Kagan lead opinion; whole Roberts concurrence; pp. 1-3, 13-29 of Gorsuch concurrence in judgment; and whole Kavanaugh concurrence in judgment) (RP 35)

Loper Bright Enterprises v. Raimondi: All documents filed in the Supreme Court may be found on the Court's electronic docket [here](#) – please skim the docket entries, and read the [petition for certiorari](#) (filed Nov. 10, 2022), pages i-ii (Questions Presented), pp. 1-36, and certiorari grant order (entered on docket May 1, 2023)

Questions for discussion:

1. According to the *Chevron* decision, what are the principal rationales for judicial deference to agencies' interpretations of statutes? Does they seem persuasive?

2. According to Justice Kagan in *Kisor*, why should deference to agencies interpretations of agencies interpretations of regulations (sometimes) worth keeping? Why does Justice Gorsuch think such deference violates the Administrative Procedure Act?
3. Why do you think the Supreme Court granted review only on Questions Presented Number 2 in *Loper Bright*'s petition for certiorari? Why do you think counsel for *Loper Bright* phrased Question 2 as they did?

Part B:

Background on *Texas and Ohio*

1. Read text of Clean Air Act Section 202(a)(1-2), 42 U.S.C. § 7521(a)(1-2) (RP 29)
2. Read “Executive Summary” of EPA’s Final Rule, Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards, 86 Fed. Reg. 74434 (Dec. 30, 2021) and part 74435-41 (through end of Table 2) (RP 30)
3. Listen to Donahue Lecture on *Texas and Ohio* Administrative and Litigation History

Class 5: *Texas v. EPA I*

Note: all the briefs for the *Texas* and *Ohio* cases can be found at [this website](https://www.edf.org/climate/clean-car-standards-legal-resources) – full URL here, <https://www.edf.org/climate/clean-car-standards-legal-resources> -- the *Texas* ones at the tab “EPA Standards” and the *Ohio* ones at the “CA Waiver” tab”

Opening Briefs: Read [State Petitioners](#) and [Private Petitioners](#)’ Opening Briefs

Written Assignment: Select any amicus brief supporting petitioners (available at above website), and write a short (*no more than 450 words*) critical synopsis, explaining what the brief argues, what (if anything) it adds to the briefs of the party it’s supporting, and identifying any strengths or shortcomings in terms of persuasive advocacy.

Class 6: *Texas v. EPA II*

Responsive Briefs: Read [EPA brief](#) and [Joint State/NGO Respondent-Intervenor](#) brief; skip [Alliance for Automotive Innovation](#) and [Industry Respondent-Intervenors](#) briefs.

Oral Assignment: Select any intervenor or amicus brief supporting respondent EPA, and prepare to give a short (no more than 5 minutes) oral in-class presentation on the brief, its main arguments, what (if anything) it adds to the briefs of the party it’s supporting, and identify any strengths or shortcomings in terms of quality of advocacy. (Note: We’ll confer ahead of time to make sure that each presentation will address, to the extent feasible, different briefs).

Class 7: *Texas v. EPA III*

Read [State Petitioners Reply Brief](#) and [Private Petitioners Reply Brief](#).

Written Assignment: Pretend you are a law clerk for one of the judges on the three-judge D.C. Circuit panel that will hear the Texas case. The judge asks you, based upon your close study of the briefing, to draft three oral argument questions for each side for the judge's possible use at oral argument. Good questions can be about any aspect of the case – record facts, procedural issues, clarifying parties' positions on legal issues, hypothetical legal changes that test parties arguments, etc. – but they should be calculated to prompt answers that will help the judge decide the case in a proper, well-informed way. In class, we will go through some of your questions in class and discuss how you would decide them if you were an advocate.

Class 8: *Ohio v. EPA*

Readings: [State Petitioners' Opening Brief](#), pp. 1-33; [EPA Response Brief](#) pp. 1-18, 31-52; the passages relevant for your presentation issue

Oral Assignment: In class we'll all discuss the petitioners' "Equal Sovereignty" challenge to Clean Air Act Section 209(b), the provision that allows California, if it obtains a waiver of preemption from EPA, to maintain its own emission standards even though states are generally forbidden from enforcing such standards. Then, students will prepare brief assessments of the other major issues in the case, with each student taking all or part of those issues, explaining it to the class, and evaluating the strength of the arguments on both sides. (To do this, the student presenting a particular issue will need to read portions of the briefing, and potentially additional briefs) beyond the page ranges assigned above to the whole class). We'll match students and issues early during the second week of class. The issues include, among others: (1) State Petitioner Article III Standing, (2) Industry Petitioner Article III Standing, (3) EPA's authority to revoke the preemption waiver, (4) whether EPA's waiver grant was consistent with the requirements of Section 209(b), particularly whether California "needs" its own GHG standards to meet "compelling and extraordinary circumstances" in California, (5) whether California's greenhouse gas standards are preempted by EPCA, the federal fuel economy statute.