Justice Kennedy's fairness could be a boon to environmentalists

By Ken Bogdan

The confirmation of United States Supreme Court nominee Anthony Kennedy could have a positive impact on environmental concerns.

As a circuit judge on the Ninth Circuit Court of Appeals, Kennedy has participated in more than 50 decisions addressing various environmental issues. The outcome of these decisions indicates Kennedy is not a strict environmentalist, but neither is he pro-development. President Reagan's latest selection to replace Justice Lewis Powell on the Supreme Court appears to be impartial to both conservationists and conservatives.

Anthony Kennedy is the President's third nominee, but he is by no means a "second-best" judge. While on the Ninth Circuit, Kennedy has built up a respectable list of decisions which evidence both clarity and fairness in reasoning. The United States Supreme Court has indicated its respect for Kennedy's legal interpretations by following his unique decision in Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 103 S.Ct. 2764 (1983), by finding unconstitutional a federal statute authorizing a one-house veto of the Attorney General's decision to allow a particular deportable alien to remain in the United States.

Kennedy's view on the environmental is one limited by his perceptions of the role of Congress. In adjudicating concerns over federal and state agency performance, Judge Kennedy's Ninth Circuit decisions do not focus on specific issues as much as they focus on an underlying concern towards agency regulation. He uses the language of the congressional acts and agency-empowering statutes as the tenet for his view of correct agency procedure.

In numerous cases, Kennedy has limited agency action to strict adherence to federal legislation protecting the environment. In Coalition for Canyon Preservation v. Bowers, 631 F.2d 774 (1980), Kennedy struck down an Environmental Impact Statement for a Department of Transportation highway construction project. The EIS was found inadequate because it did not substantially comply with the formal requirements of the National Environmental Policy Act. He held this inadequacy was sufficient "to be the basis in overturning the Department's decision [to proceed with the

project] ... although substantial resources have been spent on the project and environmental changes have occurred."

Writing for the Ninth Circuit in Association of Pacific Fisheries v. Environmental Protection Agency, 615 F.2d 794 (1980), Kennedy upheld EPA's varying residual disposal regulations which distinguished restrictions between processing plants in populated areas and those in remote areas. Kennedy held that since the agency was acting within its legitimate jurisdiction, the court's task was only to "insure that the agency has accumulated sufficient material upon which to make a reasoned decision." He found that the agency did not have to quantify environmental benefits in monetary terms as to a specific manufacturer's ability to comply with promulgated regulations. The EPA only was required to consider cost of compliance which was reasonably economically achievable.

Then legislation has not been specific or has not included a full amount of authority to sufficiently empower an agency to efficiently regulate, Kennedy's method of interpreting issues can have a detrimental effect on environmentally sensitive areas.

While Kennedy looks to require federal agencies to adhere to environmental regulations, he will not invent new "regulations" to force those agencies to go further than the letter of the law.

In Pactra Industries v. Consumer Product Safety Commission, 555 F.2d 677 (1977), Kennedy agreed with an industrial manufacturer's objections, striking down the commission's ban on the production of item's containing vinyl chloride. Although commission studies had concluded there is no established safe level of the carcinogen, Kennedy held that the federal Food, Drug and Cosmetic Act requires the commission to hold a public hearing on the proposed regulations since the manufacturer objected to them. Kennedy said the commission has "no discretion" to rule on the quality or validity of objections to regulations, as long as those objections were raised in "good faith."

In refusing to hold an offshore oil transfer facility to stricter regulation by reclassifying it as a "deepwater port," Kennedy construct the Outer Continental Shell Lands Act as governing this type of structure, and he held that Congress did not intend the Deepwater Port Act of 1974 to have jurisdiction over this type of facility. Get Oil Out! Inc. v. Exxon Corp., 586 F.2d 726 (1978).

Kennedy's dissenting opinion in Libby Rod and Gun Club v. Poteat, 594 F.2d 742 (1979), argued that the Ninth Circuit's affirmation of an injunction to stop a dam project was unwarranted. The majority had found that although Congress had passed a bill appropriating funds for the project, explicit Congressional consent

for the construction of the dam was still required under the Flood Control Act of 1950. Kennedy advocated that the act allowed authorization for the construction by Congress' appropriation of funds for the project. He felt the court should not police congressional acts; that it is a matter for Congress not the courts to question the project when appropriate of money has been given to a project without formal authorization.

Kennedy has been unwilling to expand the scope of a NEPA-required EIS beyond a project's physical effects which were "ascertainable and definable within NEPA." In Goodman Group, Inc. v. Dishroom, 679 F.2d 784 (1979), Kennedy upheld the constitutionality of the federal Airborne Hunting Act of 1971, allowing the federal government to fine someone for shooting coyotes from a plane. He stated that the state's control over its own resources — air rights — did not prohibit the federal government from regulating private conduct where "the federal power to regulate is complete and valid ... to the extent that it rests upon the Commerce Clause."

Yet, when the state is regulating its water resources, Kennedy has said that "the United States may not justify its demands simply as a raw exercise of superior authority." The federal government must instead "consult state process and weigh state substantive law in shaping and defining water policy." In United States v. California State Water Resources Control Board, 694 F.2d 1171 (1982), there was an environmentally-beneficial result, as Kennedy allowed California's conditions on a federal dam project to stand absent a showing by the federal government that the conditions were inconsistent with congressional intent. But in United States v. Alpine Land and Reservoir Company, 697 F.2d 851 (1983), the result was less than favorable to environmental concerns. Kennedy allowed Nevada's water distribution formula to stand, even though it did not include in-stream use protection in a national forest or recreation and fishing use allocations. Again, Kennedy upheld the state law in drawing his conclusion.

As a Supreme Court Justice, Kennedy could significantly affect environmental issues. He is not a judicial activist and will not extend a law beyond what it says or what it is intended to accomplish. The effect could be a gain for environmentalists, if legislators and agency rulemakers have put sufficient teeth in legislation for preserving natural resources. In this situation, Judge Kennedy would probably uphold those methods of preservation.

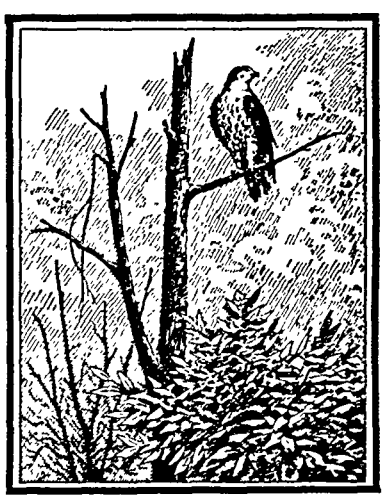
The effect could be a setback to environmentalists if such legislation is weak. Here, Kennedy will not look beyond the stated requirements of compliance.

In Kennedy's view, the answer to

environmental issues does not lie with the judges in the judicial system, but instead with the elected officials in our legislature and what they put in the legislation.

As a Supreme Court Justice, Kennedy will not make new law, but he will enforce existing statutes and regulations, which by itself could be a step forward.

Ken Bogdan is a second year student at King Hall and a graduate of Cook College, Rutgers University, where he majored in environmental management. He worked with Rutgers' Department of Environmental Resources on land use effects of Mount Laurel II, and with the New Jersey Department of Agriculture on an agland preservation project.



First English and Nollan: The takings hot seat has turned out lukewarm

By Cynthia Patton

Prominent environmentalist David Brower reacted, "Hang the flags at half-mast for the environment." Duane Garrett, attorney and California Coastal Commission member, stated, "Potentially, [Nollan] is a pit bull at the throat of the Coastal Act."

These statements demonstrate the initial shock resulting from First English and Nollan. Environmentalists and planners were stunned. After years of skirting the issue, the Supreme Court had altered, drastically it seemed, the balance between government regulation and private property rights. Many feared the balance had severely shifted in favor of the landowner.

Issued last July by the U.S. Supreme Court, First English Evangelical Luthern Church of Glendale v County of Los Angeles, __ U.S. __, 107 S.Ct. 2378 (1987) and Nollan v California Coastal Commission, __ U.S. __, 107 S.Ct. 3141 (1987), deal with the Takings Clause of the Constitution. These opinions were hailed as the most important property cases of the past 50 years. The message to land use planners was that a revolution in land use control had occurred and the era of private property rights had begun.

What really happened, however, is not nearly so drastic as many originally thought. Neither case is a land use bombshell and both were overrated in initial reports. First English changes the law on regulatory takings somewhat, but its practical impact will be minimal. Nollan does little