On July 1, 2015, Hawai‘i became the second state in the United States, after Vermont in 1990, to create an environmental court. This specialized court will have broad jurisdiction over civil and criminal cases affecting the environment and represents a bold experiment in environmental law by a state often viewed as an environmental paradise.

A brief history of environmental courts

As every environmental lawyer knows, environmental law took hold in the United States in the 1970s with the passage of a number of groundbreaking environmental statutes, including the Clean Water Act and the Clean Air Act. Courts have since struggled with the technical aspects of cases arising under these media-specific statutes. At the time Judge Leventhal explained, in the context of an early Clean Air Act case, that the court was approaching the issues presented with “the utmost diffidence” because “the legal issues are intermeshed with technical matters, and as yet judges have no scientific aides.” Int’l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 641 (D.C. Cir. 1973).

Given concerns about the scientific and technical complexity associated with this new field of law it is perhaps not surprising that section 9 of the Federal Water Pollution Control Act of 1972 directed the President, through the Attorney General, to study the feasibility of an environmental court system. Pub. L. No. 92-500, 86 Stat. 816 (1972). The Attorney General assigned a task force, composed primarily of attorneys from the U.S. Department of Justice Land and Natural Resources Division (now known as the “Environment and Natural Resources Division”) to perform the study. On October 11, 1973, then Attorney General Eliot Richardson submitted a report to Congress recommending against the creation of an environmental court or court system. Report of the President, Acting Through the Attorney General, On the Feasibility of Establishing an Environmental Court System (1973). Among the reasons offered by the Attorney General to oppose the court’s creation were the low numbers of environmental cases, the need for generalist courts to answer the many forthcoming “big” questions in environmental law and logistical issues, including the need to try criminal matters locally, which would make it difficult to combine civil and criminal cases. Id. at VII. Congress was apparently satisfied with this conclusion and, hence, at present there is no federal environmental court or court system.

But what of the states? Justice Brandeis famously wrote that “a state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” New State Ice Co. v. Liebmann, 285 U.S. 262 (1932). States have experimented with a range of specialized courts including drug courts, mental health courts, domestic violence courts, and “reentry” courts, which focus on easing individuals’ transition from prison to responsible citizenship. Then, in 1990, the Vermont state legislature created the Vermont Superior Court, Environmental Division. Vermont’s Environmental Division is a trial court with statewide jurisdiction. It hears appeals from state land use permit decisions, from state environmental permits and other decisions of the Agency of Natural Resources, and from municipal land use zoning and planning decisions. The court also hears municipal land use enforcement cases and enforcement actions brought by the Agency of Natural Resources and Natural Resources Board. Since then, no other state had followed Vermont’s lead until Hawai‘i in 2015.
The Hawai'i Environmental Court

The environmental court enacted by the Hawai'i legislature differs significantly from Vermont’s court. The Hawai'i Environmental Court operates within the existing structure of the state judicial system. Environmental court judges are designated in the district and circuit courts statewide. The courts will have jurisdiction over civil and criminal matters involving issues related to water, forests, streams, beaches, air, and mountains, along with terrestrial and marine life. The legislature excluded from the new Environmental Court’s jurisdiction matters of law addressed to the State Land Use Commission and shoreline setbacks. Twenty-two judges have been designated statewide by circuit. Each circuit has scheduled their environmental calendars for specific days of the month. When judges do not have environmental cases, they will hear other types of cases. Initial appearances for Environmental Court criminal cases will be placed on the regular arraignment and plea calendars in their respective districts. After the initial appearance in court, subsequent proceedings are placed appropriately on the Environmental Court calendar in their respective district and circuit courts. Ultimately, parties may appeal rulings from the respective district or circuit courts in accordance with the Hawai'i Rules of Appellate Procedure, through the Hawai'i Intermediate Court of Appeals, and finally to the Hawai'i Supreme Court.

The goal of the Environmental Court, as described by Hawai'i Supreme Court Justice Mark E. Recktenwald, “is to ensure the fair, consistent, and effective resolution of cases involving the environment.” The new Environmental Court, as presently structured by the Hawai'i legislature, seems to avoid many of the problems associated with a federal environmental court system as identified in the 1973 Attorney General's Report. By employing the existing court structure, “big” questions of environmental law are still reviewed by generalist judges and the generalist Supreme Court. Criminal environmental matters are still prosecuted through the existing localized structure, albeit before designated environmental judges. And, let’s not forget, environmental cases are no longer a rarity anywhere.

What the future holds

Notably, there are currently 350 environmental courts operating in 41 countries worldwide. Chief among them is India’s National Green Tribunal, long considered the world’s leading environmental court since it was established in 2010. Initiatives such as the creation of a new Environmental Court in Hawai'i are worthy of study. Final resolution of complex environmental problems may well benefit from such innovations. U.S. Supreme Court Justice Stephen Breyer, at the conclusion of his recent book, The Court and the World: American Law and the New Global Realities (Knopf 2015), tells us that to address problems like environmental degradation we must understand and consider legal efforts being undertaken throughout the world. Environmental attorneys might begin by looking at the ongoing efforts of America’s 50th state to better incorporate environmental law into their judicial system through their new Environmental Court. Excellent materials about the Hawai'i Environmental Courts and environmental courts worldwide are maintained by the Environmental Law Program at the University of Hawai'i, William S. Richardson School of Law.

Footnotes

Andrew C. Mergen is Deputy Section Chief, Appellate Section, Environment & Natural Resources Division, U.S. Department of Justice. Mr. Mergen has served as a visiting lecturer at the William S. Richardson School of Law, University of Hawai'i. The views expressed are solely those of the author.