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The Supreme Court Takes Five Environmental Cases for Its 2006-2007 Term

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Summary

The Supreme Court has accepted five environmental cases for argument during its 2006-2007 term, a significant proportion of the 72 cases it will hear during the term. Two cases involve the Clean Air Act: one asking whether the act allows EPA to regulate vehicle emissions based on their global warming impacts; the other, whether an hourly or annual test must be used in determining whether a modification of a stationary source makes it a "new source" requiring a permit. A third case asks whether an EPA decision to delegate the Clean Water Act discharge permitting program to a state is subject to Fish and Wildlife Service consultation under the Endangered Species Act. The fourth case deals with whether a liable party under the Superfund Act may seek contribution under one section of the act even though barred from doing so under another section because no EPA civil actions have been filed at the site. And the fifth case addresses whether county "flow control" ordinances evade the strict scrutiny test for compliance with the dormant commerce clause or indeed evade the clause entirely, owing to the fact that the designated collection facility is publicly rather than privately owned.

The Supreme Court in recent years has accepted for argument only about 70 to 80 cases each term, so it is a matter of some note when several of them fall into a single area. Such is the situation in the Court's 2006-2007 term, with the Court having accepted five environmental cases out of the 72 it will hear altogether. This interest in environmental cases continues a pattern of several years' duration; indeed, the Court also decided five environmental cases in its 2003-2004 term. Here we summarize each case that has been or will be argued (and likely decided) during the current term and speculate on the issues likely to concern the Court.

The Clean Air Act and Greenhouse Gas Emissions from New Motor Vehicles: *Commonwealth of Massachusetts v. EPA*

Procedural history:[1] Commonwealth of Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005), *rehearing en banc denied*, 433 F.3d 66 (D.C. Cir. 2005), *pet. for cert. granted*, 126 S. Ct. 2960 (June 26, 2006) (No. 05-1120). Argued Nov. 29, 2006.

This case marks the debut of global warming in the Supreme Court. It arose as a challenge by 12 states and several environmental groups to EPA's denial of a petition under the Clean Air Act (CAA). The petition, filed in 1999, asked the agency to regulate emissions from new motor vehicles on a hitherto novel ground: their impact on global warming. In 2003, EPA denied the petition, arguing principally that CAA section 202 does not authorize EPA to regulate vehicle emissions on that basis.

In 2005, the D.C. Circuit rejected the challenge to EPA's denial by split (2-1) decision. The two judges voting to reject did so for different reasons, however. One judge agreed with EPA that section 202 allows the agency to inject policy considerations — for example, the Administration's preference for economic incentives over regulatory mandates — into its decision whether to regulate motor vehicle emissions. The other judge held that petitioners had not suffered the injury requisite for federal-court standing, a ubiquitous issue in global warming litigation.

There are three issues before the Supreme Court. First, do petitioners have standing? Second, does CAA section 202 confer authority on EPA to regulate emissions from new motor vehicles based on their potential global warming impacts? Third, if so, may EPA inject policy considerations into its decision whether to proceed against such emissions? Note that these issues are of a threshold nature. That is, the Court, even if it rules for the petitioners, is not likely to order EPA to regulate greenhouse gas emissions from vehicles, or even to initiate a proceeding to determine whether such rules are required. Rather, a ruling for petitioners would at most require EPA to decide whether it must initiate such a proceeding, given the clarified legal basis provided by the Court as to section 202 authority and the relevance of policy considerations.

Notwithstanding the preliminary nature of the issues before the Court, the decision could be significant beyond the four corners of mobile-source emission regulation. Most immediately, it could affect the viability of arguments as to whether EPA has authority under the CAA to regulate greenhouse gas emissions from *stationary* sources of emissions (factories, power plants, etc.) The Court's decision could also affect resolution of the standing issue in pending global warming litigation under non-CAA theories such as nuisance or the National Environmental Policy Act.

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[1] The "procedural history" provided for this and following cases in this report is only that contained in *reported* court decisions.

The Clean Air Act and New Source Review: *Environmental Defense v. Duke Energy Corp*.

Procedural history: United States v. Duke Energy Corp., 278 F. Supp. 2d 619 (M.D.N.C. 2003), *affirmed*, 411 F.3d 539 (4th Cir. 2005), *pet. for cert. granted*, 126 S. Ct. 2019 (May 15, 2006) (No. 05-848). Argued Nov. 1, 2006.

This case arises from a CAA enforcement action brought by EPA against Duke Energy, charging it with carrying out 29 "modifications" to its coal-fired powerplants without obtaining Prevention of Significant Deterioration (PSD) permits required for "new sources" under the Act. Environmental Defense intervened as a plaintiff. The dispute centers on how to measure the emissions from a stationary source so as to determine whether a physical or operational change in that source "increases the amount" of pollution emitted, in the words of the statute. Such a pollution increase is pivotal, since it brands the physical or operational change as a "modification" and the modified source, in turn, as a "new source," requiring a PSD permit and state of the art pollution controls.

In the district court, the United States argued that Duke's refurbishment of its plants would allow aging facilities to operate more of the time, resulting in increases in *annual emissions* and triggering of new source requirements. However, the district court agreed with Duke's argument that the CAA, in using the same definition of "modification" for the PSD program as used elsewhere in the act in connection with New Source Performance Standards (NSPSs), intended an *hourly emissions* rate test. Under this hourly standard, a project modification allowing a plant to operate for more hours but without increasing the emissions rate would not count as an increase in emissions, and thus would not trigger new source requirements. The Fourth Circuit affirmed, explaining that EPA could not construe its PSD definition of "modification" differently than its NSPS definition of the same term, which imposed an hourly test.

Environmental Defense — but not EPA — filed a petition for certiorari. Indeed, the United States *opposed* the petition, presumably because EPA had adopted the Fourth Circuit ruling in its new PSD regulations (70 Fed. Reg. 61081). Then, too, the Bush Administration had long been unenthusiastic about the PSD enforcement effort against utilities set in motion in the prior administration. In any event, the Supreme Court took the case over the United States' opposition, one of the very few times the Court has accepted a case solely at the request of an environmental group.

In the Supreme Court, two issues are presented. The first has been at the heart of the case since the beginning: does the CAA definition of "modification," which turns on whether there is an "increase" in emissions, allow EPA to define emission increases for PSD purposes by reference to actual, annual emissions? The second issue is raised in the case for the first time and asks whether the Fourth Circuit had jurisdiction. The CAA says that nationally applicable regulations under the act, like those at issue here, may be challenged only in the D.C. Circuit within 60 days of their promulgation and that CAA regulations may not be reviewed in enforcement proceedings. The underlying question: was the Fourth Circuit addressing a challenge to an EPA regulation subject to this jurisdictional rule or merely to an EPA *interpretation* of its rules.

The Clean Water Act/Endangered Species Act Relationship: *National Association of Home Builders v. Defenders of Wildlife*

Procedural history: Defenders of Wildlife v. U.S. EPA, 420 F.3d 946 (9th Cir. 2005), *rehearing en banc denied*, 450 F.3d 394 (9th Cir. 2006), *pet. for cert. granted*, 127 S. Ct. 852 (Jan. 5, 2007) (No. 06-340). To be argued April 17, 2007.

This case addresses the relationship between Clean Water Act (CWA) section 402 and Endangered Species Act (ESA) section 7. CWA section 402 establishes the permitting program for point-source discharges into waters of the United States that lies at the heart of the CWA. EPA "shall approve" delegation of the program to a state, says the act, if the state applies therefor and satisfies nine criteria stated in section 402, none of which mentions endangered species. ESA section 7 requires federal agencies to consult with the Fish and Wildlife Service (or, for marine species, NOAA Fisheries) before taking actions that may jeopardize endangered and threatened species or adversely affect designated critical habitat.

The case here arose when Arizona applied to EPA for delegation of the permitting program to that state (the 45th state to do so). In deciding whether to approve the request, EPA initiated consultation with the Fish and Wildlife Service — because once a state takes over the program, section 7 consultations no longer occur, with potential consequences for listed species. EPA took the seemingly inconsistent position, however, that it is not permitted under CWA section 402 to take into account the impact on listed species in making its transfer decision. The Ninth Circuit thus remanded the transfer decision to EPA for a "single, coherent interpretation of the statute." More controversially, it held that EPA's ESA section 7 duty to ensure that its actions are not likely to jeopardize listed species is *in addition to* its authority under CWA section 402. That is, even though it was undisputed that Arizona met all the CWA criteria for approval of a transfer decision, EPA could deny transfer based on the agency's ESA section 7 duty. A petition for rehearing en banc was denied by the Circuit, prompting a strong dissent by six of the circuit's judges.

The National Association of Home Builders and the United States filed separate petitions for certiorari; both were granted. The key question presented to the Court is whether ESA section 7 constitutes an independent source of authority, requiring federal agencies to comply with its consultation and "no jeopardy" requirements even though the program statute states that the agency "shall" act when enumerated criteria are satisfied.

The Superfund Act and Contribution Suits: *United States v. Atlantic Research Corp.*

Procedural history: Atlantic Research Corp. v United States, 459 F.3d 827 (8th Cir. 2006), *pet. for cert. granted*, 127 S. Ct. 1144 (Jan. 19, 2007) (No. 06-562). To be argued April 23, 2007.

The Superfund Act — more formally, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) — imposes liability for cleanup costs on a wide range of persons connected with a contaminated site. Two scenarios may occur. In the first, a liable party (such as the site owner) waits for the government to clean up the site and then seek reimbursement from the liable party, or the government may order the liable party to do the cleanup itself. In either case, the liable party, if made to pay more than its fair share, may turn around and sue other parties made liable by CERCLA in a "contribution" action. In the second scenario, the liable party cleans up voluntarily — that

is, without waiting for a government cleanup order or cost-recovery effort — and then seeks contribution from other CERCLA-liable parties.

Two provisions of CERCLA authorize, or arguably authorize, such contribution actions, and their relationship has been heavily litigated. CERCLA section 113(f)(1) authorizes liable parties to seek contribution from other liable parties "during or following" an EPA action seeking a cleanup or reimbursement order. CERCLA section 107(a)(B) makes liable parties responsible for necessary costs of response incurred by private entities. The majority view in the lower-court decisions is that liable parties may invoke only section 113(f)(1), while innocent parties must use section 107(a)(B).

In *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), the Supreme Court held that contribution actions by liable parties under section 113(f)(1) may be brought *only when EPA has filed the requisite civil action against the liable party (ordering cleanup or seeking reimbursement).* However, the Court expressly reserved the question whether a liable party, such as one barred from using 113(f)(1), may sue instead under section 107(a)(B). The question is fundamental to the Superfund program: obviously owners of contaminated sites will be more willing to clean up without waiting for EPA attention (which, given the large number of contaminated sites, often never comes) if they can get reimbursement for cleanup costs beyond their fair share.

The Eighth Circuit decision squarely presents the Supreme Court with this section 107(a)(B) question, holding as it did that a private party that voluntarily undertakes a cleanup for which it may be held liable under CERCLA, thus barring it from seeking contribution under section 113(f)(1), may seek contribution from another liable party under section 107(a)(B).

Solid Waste "Flow Control": ***United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*****.**

Procedural history: United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Auth.,261 F.3d 245 (2d Cir. 2001), *on appeal from remand,* 438 F.3d 150 (2d Cir. 2006), *pet. for cert. granted,* 127 S. Ct. 35 (Sept. 26, 2006) (No. 05-1345). Argued Jan. 8, 2007.

The interstate flow of municipal solid waste has long interested the courts, which have repeatedly struck down state and local efforts to restrict this flow as incompatible with the "dormant commerce clause." The dormant commerce clause, held to be implicit in the Constitution's Commerce Clause, bars states and localities from imposing undue burdens on interstate commerce. The interstate-waste court rulings, including no fewer than five by the Supreme Court, have involved both state/local restrictions on import of solid waste from other states and typically local requirements, called "flow control," that all waste generated within the jurisdiction be disposed of at a designated solid waste facility.

United Haulers concerns flow control. In 1994, the Supreme Court struck down a county flow control ordinance, applying the "strict scrutiny" test under which explicit discriminations against interstate commerce are almost always found to violate the dormant commerce clause. *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). The designated transfer facility in *Carbone* was privately owned, however, while

the designated facilities in the present case are public. The question is, does this public-private distinction make a difference to the dormant commerce clause analysis?

The district court found the flow control laws unconstitutional under *Carbone*. However, the Second Circuit reversed, finding the public-private distinction to be dispositive. First, said the circuit court, the public nature of the designated facility here meant that no in-state private facility was favored over an out-of-state private facility. This, it concluded, meant that the strict scrutiny used in *Carbone* must give way here to the much laxer balancing test used when the state/local impact on interstate commerce is only incidental. Under that test, the impacts on interstate commerce are constitutional unless "clearly excessive" in relation to the putative local benefits. The court found the clearly excessive standard not met here and upheld the flow control ordinances. Second, given that the balancing test was satisfied, there was no need to address the "market participant exemption" to the dormant commerce clause. Under this well-settled exemption, a government regulation does not implicate the dormant commerce clause if the government, instead of regulating the market, is itself a participant in it. The rationale is simple enough: because private actors may choose to discriminate against interstate commerce, the government when participating in a market as a private actor (arguably the county-owned waste collection facilities) may do the same.

What might the Supreme Court do? Looking to the past, each of the Supreme Court's five decisions in the waste-flow restriction area struck down the restriction on dormant commerce clause grounds, each time applying strict scrutiny. This suggests that the Court in the present case will be interested in whether heightened scrutiny applies notwithstanding the public ownership of the designated facility, perhaps on the ground that haulers of curbside trash in the affected counties are still locked out of the interstate market in selecting a receiving facility. If the ordinances are held to fail the applicable constitutional test, the Court likely will pursue whether the market participant exemption applies. The argument against application of the exemption is that although a private owner of a trash collection facility could freely discriminate among *recipients* of the processed waste, it could not demand that haulers collecting the waste curbside bring it to that facility. Thus, this argument concludes, neither can a public owner of a collection facility under the market participant exemption.