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

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Summary

The Supreme Court 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 and have now been decided: one decision ruled that the act allows EPA to regulate vehicle emissions based on their global warming impacts; the other, that EPA regulations validly impose an annual, as opposed to hourly, emissions change test in determining whether a modification of a stationary source makes it a "new source" requiring a permit. The remaining cases have not yet been decided. The first 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 second 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 third 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. This report summarizes each of the five cases: the two that have been argued and decided, and the three that have been argued but not yet decided. As to the undecided cases, the report speculates 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: 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), *reversed*, 127 S. Ct. 1438 (Apr. 2, 2007)

This case marks the debut of global warming in the Supreme Court. It arose from a petition, filed in 1999, asking EPA to regulate emissions from new motor vehicles under the Clean Air Act (CAA) on a hitherto novel ground: their status as greenhouse gases (GHGs) promoting 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. Twelve states and several environmental groups then challenged the denial in the D.C. Circuit.

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

The Supreme Court decided 5-4 in favor of the petitioner states and environmental groups, reversing the court below. At the outset, the majority opinion by Justice Stevens held that petitioners had standing, explaining that the required "injury in fact" for standing was provided by the likely future loss of Massachusetts shoreland through global-warming-induced sea level rise, and that sovereign states seeking to establish standing in federal court are entitled to "special solicitude." On the merits, the Court held that CAA section 202 empowers EPA to regulate emissions from new motor vehicles based on their global warming impacts, the statute being "unambiguous" on this score. In addition, EPA may not inject policy considerations into its decision to reject regulating such emissions, as the agency had done. The statutory phrase "in his judgment" was not "a roving license to ignore the statutory text." Rather, EPA's judgment must relate to whether an air pollutant might endanger public health and welfare. In two four-justice dissents, Chief Justice Roberts rejected standing and Justice Scalia denied that EPA had the requisite authority under the CAA.

The Court's ruling is likely to have several effects. It may make it difficult for EPA to avoid having to regulate, at least to some extent, GHGs from new vehicles. Section 202 says that once EPA makes the "judgment" that a pollutant might endanger public health or welfare, it *must* issue regulations. According to the Court, "EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion." Beyond the implications for GHG emissions from new vehicles, the Court's decision arguably exerts pressure on EPA to move against GHG emissions from stationary sources, under Title I of the CAA. (Indeed, a lawsuit seeking to compel just that was stayed by the D.C. Circuit pending the Supreme Court's decision in *Commonwealth of Massachusetts*.) The decision also could influence Congress to act on global warming, partly because the default regulatory structure of the CAA does not easily accommodate a global phenomenon like climate change. In the courts, the decision

could affect the outcomes of the many GHG-related cases now pending, as by supporting a finding of standing, and could encourage new suits to be brought.

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), *vacated*, 127 S. Ct. 1423 (Apr. 2, 2007).

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 groups, including Environmental Defense, intervened as plaintiffs. The dispute centers on how to measure the emissions from a stationary source of emissions so as to determine whether a physical or operational change in that source "increases the amount," in the CAA's words, of emissions. The existence of such an emissions 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 aging plants would allow them to operate more of the time, resulting in increases in *annual emissions* and triggering, under EPA's PSD regulations, new source requirements. However, the district court held that those regulations impose an *hourly* standard. Under an hourly standard, a project modification allowing a plant to operate for more hours but without increasing emissions per hour, as Duke Energy had done, would not count as an increase in emissions, and so would not trigger new source requirements. The Fourth Circuit affirmed, explaining that since the CAA states that "modification" for PSD purposes means the same as for New Source Performance Standards (NSPS) purposes, EPA regulations elaborating on the statutory definitions also had to be the same. Thus, it read the agency's PSD regulations as turning on hourly emissions, just as the earlier-promulgated NSPS regulations had done.

Environmental Defense — but not EPA — filed a petition for certiorari. Indeed, the United States *opposed* the petition, presumably because EPA had adopted the hourly standard in 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.

As with its global warming decision handed down the same day, the Supreme Court ruled for the "environmental" side — this time unanimously. The Court concluded that just because the CAA states that "modification" under PSD means the same as under NSPS does not require that EPA *regulations*, in elaborating on the statutory definition, also have to be identical. Thus the Fourth Circuit's effort to stretch the meaning of the the PSD rules to conform them with the earlier NSPS rule was misguided. The wording of the PSD rule, said the Supreme Court, does not support an hourly-rate reading. Accordingly, the Court vacated the Fourth Circuit decision and remanded the case to the Circuit.

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 Apr. 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 Apr. 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.