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Supreme Court Round-up: Environmental Cases Figure Big on this Year's Docket

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Four environmental law cases are currently pending before the United States Supreme Court. The outcome of these closely watched cases will have far-reaching implications for various interested parties, including the energy and building industries, regulators, and environmentalists.

Massachusetts v. Environmental Protection Agency

In *Massachusetts v. Environmental Protection Agency*, twelve states, three cities, and several environmental organizations sued in the D.C. Circuit Court of Appeals, seeking an injunction requiring the United States Environmental Protection Agency (EPA) to regulate carbon dioxide emissions from new motor vehicles. At issue in the case is section 202(a)(1) of the Clean Air Act (CAA), which directs the EPA to regulate air pollutants from new motor vehicles "which in [the administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." The plaintiffs argue that greenhouse gases such as carbon dioxide constitute such pollutants covered by the Act. In response, the EPA has argued that it does not have the statutory authority to regulate greenhouse gases, and that it would not do so even if it did.

In addition to the fundamental issue of whether the CAA authorizes regulation to address global climate change, the case presents the complicated and politically charged question of whether, if the CAA authorizes such regulation, the EPA administrator may decline to issue emission standards for motor vehicles based on policy considerations outside of section 202(a)(1), such as scientific uncertainty, potential foreign policy implications, and the President's climate change policy.

With all of the attention focused on climate change right now, *Massachusetts v. EPA* has become one of the most anticipated environmental decisions from the Court in years. If the Court addresses whether greenhouse gases do, or do not, fall within the scope of the Clean Air Act, this case may fundamentally re-shape the evolving and hotly debated issue of global warming regulation at the national, state, and local levels.

Environmental Defense v. Duke Energy Corp.

This second Clean Air Act case pending before the Court involves an enforcement action against Duke Energy for failing to obtain permits under the Act's Prevention of Significant Deterioration (PSD) provision for modifications made to its coal-fired power generation units. These modifications did not change the units' hourly output of emissions, but allowed the units to run for more hours each day. With an increase in daily operations, total annual emissions for each unit also increased. Under the PSD program a permit must be obtained each time a physical change or modification is made which results in a significant net emissions increase. While the New Source Performance Standards (NSPS) provision of the Act defines "modifications" based on *hourly* emissions, the EPA's regulations under the PSD program look to *annual* increases in emissions.

Duke Energy argued that the EPA did not have authority to define PSD modifications based on annual emissions, and that the plant's modifications were not subject to PSD provisions. The Fourth Circuit agreed, holding that the EPA could not interpret the statutory term "modification" under the PSD differently because Congress had directly spoken to that precise issue in mandating that the PSD definition of "modification" be identical to the NSPS definition of "modification."

By requiring "modification" to be interpreted as a physical change in operations that increases hourly emissions rather than annual emissions, facilities can increase the operating hours of older equipment without triggering New Source Review—an option that can offer tremendous cost savings to industry but potentially lead to significant increases in the total emissions generated by facilities. The Fourth Circuit's decision drew criticism from environmental groups and praise from industry groups.

This case is being closely followed for two reasons. First, there is the substantive issue of whether the EPA must interpret the statutory term "modification" in its NSPS regulations consistent with the definition of the term in the Act's PSD provision. Second, this case has a critical procedural element. On appeal to the Supreme Court, intervenor Environmental Defense has alleged that the Fourth Circuit did not have jurisdiction to hear the case, arguing that under section 307(b) of the CAA, nationally applicable regulations issued by the EPA must be challenged only through properly filed petitions for review brought in the D.C. Circuit, and may not be challenged in an enforcement action.

National Association of Homebuilders v. Defenders of Wildlife
Environmental Protection Agency v. Defenders of Wildlife

These consolidated cases present issues at the intersection of the Clean Water Act and the Endangered Species Act (ESA). The EPA transferred authority over the Clean Water Act National Pollutant Discharge Elimination System (NPDES) permitting program in Arizona to the state. In doing so, the EPA did not consider the impact of this transfer on listed species and their habitat under the ESA. Rather, the EPA relied on a Biological Opinion prepared by the United States Fish and Wildlife Service which opined that although the transfer of authority would have a negative impact on protection of species, the EPA lacked authority to take this into consideration.

The Ninth Circuit held that the EPA did have authority—and in fact a statutory duty—to consider jeopardy to listed species through "consultation" mandated by section 7 of the ESA in making the transfer decision. The court held that even if a state applicant complies with all of the prerequisites for taking over a Clean Water Act permitting program, the EPA must still comply with requirements under the Endangered Species Act. As a result, the court concluded the EPA's decision was arbitrary and capricious, and vacated the EPA's approval of Arizona's transfer application.

The outcome of this Supreme Court case has potentially far-reaching ramifications for a wide variety of interests, including other states seeking delegation of authority under the Clean Water Act, and perhaps even under other regulatory schemes. Finally, this case will determine the extent of the federal government's authority to protect endangered species—an issue that has been highly contentious since enactment of the Endangered Species Act.

United States v. Atlantic Research Corp.

The final environmental case before the Supreme Court this term may resolve the problems created by the Court in 2004 in *Cooper Industries, Inc. v. Aviall Services, Inc.*, regarding a party's right to contribution under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

Under section 113(f) of CERCLA, "[a]ny person may seek contribution from any other person who is liable or potentially liable … during or following any civil action under Section 9606 of this title or under Section 9607(a) of this title." In *Aviall*, the Supreme Court held a party could only attempt to obtain Section 113(f) contribution "during or following" a section 106 or 107(a) CERCLA civil action. Thus, if a party had not previously been sued for clean-up of a site or for cost recovery under CERCLA, it could not sue for contribution under section 113(f). However, the Court did not decide whether a party could recover under CERCLA section 107, which provides for recovery "of any other necessary costs of response incurred by any other person consistent with the national contingency plan."

In the present case, Atlantic Research Corp. polluted the soil and groundwater of its Arkansas

facility for several years when it retrofitted rocket motors for the United States. The company voluntarily cleaned up the contamination, then sought to recover a portion of its costs from the United States. The interpretation of CERCLA in *Aviall*, however, effectively prevented Atlantic Research Corp.—who had not been subject to an enforcement action—from initiating actions for contribution against other responsible parties.

The Eighth Circuit concluded that the broad language of section 107 supports an implied right to contribution, in addition to the right of cost recovery. Therefore a private party that voluntarily undertakes cleanup for which it may be held liable, and is barred from seeking contribution under section 113, may pursue an action for direct recovery or contribution against another liable party under section 107. The court reasoned that otherwise the United States could escape liability through a loophole in the law, by declining to bring an enforcement action against a party, and therefore preventing it from seeking contribution when the United States is responsible for the pollution.

The outcome of this case will resolve a three-to-one circuit split, and is crucial to parties who currently own or are interested in purchasing such polluted sites. Without legal protection and assurance that they can seek contribution from those responsible for the pollution, including the United States, such parties will be hesitant to initiate clean-up. It is also important for surrounding communities that suffer from the presence of unremediated hazardous sites.

Citations:

Massachusetts v. Envtl. Prot. Agency, 415 F.3d 50 (D.C. Cir. 2005)

Envtl. Defense v. Duke Energy Corp., 411 F.3d 539 (4th Cir. 2005)

Defenders of Wildlife v. Envtl. Prot. Agency, 420 F.3d 946 (9th Cir. 2005)

United States v. Atl. Research Corp., 459 F.3d 827 (8th Cir. 2006)

Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004)

42 U.S.C. §§ 7521(a)(1), 7607(b), 7470-92, 7411

33 U.S.C. § 1342(b)

16 U.S.C. § 1536(a)(2)

42 U.S.C. §§ 9613(f), 9606, 9607(a)