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High Court Leans Left on Environmental Issues

By Norman A. Dupont

The conventional wisdom that the current Supreme Court has taken a "conservative" direction does not apply to the Court's position in the environmental law field. Given that the Court issued five written opinions on environmental matters, or almost 10 percent of its entire written opinions, businesses should be warned that judging the new Robert's Court's ideological trend on the basis of a few highly publicized rulings on school desegregation, campaign finance, or partial-birth abortion procedures may result in an entirely wrong conclusion in the field of environmental law.

The Five Environmental Cases Decided in the Court's 2006 Term

The Supreme Court issued written opinions in five environmental cases in the 2006 to 2007 term. The "blockbuster" opinion was a solid antibusiness, pro-environment decision in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), in which a 5-4 majority held that EPA was dead wrong in declining to regulate greenhouse gases as a form of air pollution. Significantly for those who watch individual members of the Court, it was Justice Kennedy, the "swing vote" on the Court, who supplied the key precedent cited by the majority to conclude that states (such as Massachusetts) have a unique role as a "sovereign" to seek redress for environmental policies that impacted the entire state. The clear losers in this major environmental case are EPA, which tried to assert the Bush administration's "go slow" policy on regulating climate control, and the automobile industry, which advocated a similar position. For the auto industry, the key question was whether EPA would regulate greenhouse gas emissions by controlling automobile exhaust, one of the primary sources of carbon dioxide emissions. The auto industry lost this case.

Four other environmental cases might be deemed less than blockbuster in terms of long-term implications, but in at least two of them, the "loser" was clearly industry. In *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 127 S. Ct. 1786 (2007), the Court rejected the free enterprise claims of private waste haulers who sought to introduce lower-priced garbage removal services in two upstate New York counties. Rather, a majority of the new Robert's Court, including the Chief Justice himself, sided with the local counties and found that "public" ownership of waste disposal facilities allowed those counties to regulate and control the flow of municipal wastes without interference from the so-called "dormant" Commerce Clause. (Article 1, Section 8, of the Constitution, in part, gives Congress the power to regulate commerce among the states (the interstate commerce clause). This has historically been construed to mean that states and local governments cannot place impediments on interstate commerce.) This decision was in effect a reversal of a prior Supreme Court case decided in the mid-1990s by the Rehnquist Court that struck down a very similar "flow-control" ordinance that directly benefited a local private enterprise over competitive out-of-region waste haulers *(C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994). The most interesting warning sign to business about this otherwise unremarkable case was the way in which the dissent carefully observed that state-regulation of economic areas was often unhealthy in terms of economic growth

and policy. Indeed, Justice Alito, joined by Justices Kennedy and Stevens, pointed out that the Chinese government was very heavily involved in regulating its economy and favoring local enterprises, with predictably economic protectionist effects. This free-trade argument, however, simply did not matter to the majority of the Court, which decided this case on a 6-3 vote.

In a direct loss for at least a portion of the utility industry, the new "conservative" Supreme Court rejected Duke Energy's efforts to characterize EPA's regulations of a portion of the Clean Air Act as both inconsistent with the statutory scheme and simply inconsistent how EPA applied those regulations over the years. In a 9-0 decision, the Court sided with both EPA and the Environmental Defense Group over Duke Energy (*Environmental Defense Fund v. Duke Energy Corp*, 127 S. Ct. 1423 (2007)).

At issue were the efforts of EPA to regulate a "modification" of a utility plant differently under one portion of the Clean Air Act than another portion of the Clean Air Act, which also used the same word, "modification." Duke Energy had "retrofitted" a certain number of its older power plants and claimed that these upgrades were not within the Clean Air Act's definition of a plant "modification" that triggered additional environmental requirements. Indeed, at oral argument, Duke Energy's counsel told the Court that it was the understanding of "everyone in the industry" that EPA's regulations under the Clean Air Act simply did not apply to this type of retrofitting of power plants. Moreover, Duke Energy argued that EPA's efforts to impose additional requirements and liabilities on the company were simply inconsistent with the statute, claiming that the Agency could not use the term "modification" to mean one thing under one regulation implementing part of the statute and something quite different under a separate regulation implementing a slightly different part of the same statute. Although one might have expected the "conservative" Court to treat such claims with some sympathy, in the end, Duke Energy lost in a decisive 9-0 vote. While Justice Thomas concurred in the majority opinion, his concurrence was a highly technical one related to legal issues in statutory construction of the Clean Air Act. Even the Thomas concurring opinion offered no solace to an industry trying to find comfort in a new "conservative" court.

In the one clear "win" for industry in this Term's environmental opinions, the Court, in a 9-0 decision, agreed with Atlantic Research Corporation and allowed it to proceed with a claim for contribution against the federal government under the federal Superfund statute, also known as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). *U.S. v. Atlantic Research Corp.*, 127 S. Ct. 2331 (2007). Some 3 years earlier, in 2004, the Supreme Court had rejected a private industry's effort to seek contribution against a third party for environmental cleanup costs under one portion of the Superfund statute (*Aviall Services, Inc. v. Cooper Industries, Inc.*, 543 U.S. 147 (2004)). Now, within 3 years, the Court essentially gave back to private industry what it had taken away 3 years before by holding that actions to recover such environmental cleanup costs by a "voluntary" private party could proceed under another provision of the Superfund statute. Indeed, at the time of briefing in the Aviall case, a number of major industries warned the Court that a decision against Aviall could lead to unfortunate results. Those industries that filed amicus briefs included Lockheed Martin Corporation, Atlantic Richfield Company, and Concoco/Phillips Company. The Supreme Court rejected industry's plea in 2004, but gave them back a fair amount of what they had lost in its 2007 decision in *Atlantic Research*. Thus, while no one can question that industry "won" a case in 2007, in the broader view, the Court's determination in that case merely reset federal law to a position that it had been before the Court's earlier 2004. The playing field was leveled, but it was hardly dramatically improved for the business participant in Superfund litigation claims.

The fifth and last environmental opinion issued by the Court technically involved an intermural fight between two federal environmental agencies, EPA and the Fish & Wildlife

Service (FWS) in its capacity as the legal caretaker of the Endangered Species Act. The Endangered Species Act is the basis for the famous decision by the "liberal" Court under then-Chief Justice Berger to stop a federal dam project in order to protect the endangered "snail darter." (*TVA v. Hill*, 437 U.S. 153 (1978)). In *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007), a 5-4 majority of the Court trimmed back the primacy of the Endangered Species Act, at least as applied to a decision by EPA to delegate certain permitting decisions under the Clean Water Act to the state of Arizona. This case appears as a second clear "win" by industry—it features the group of four conservative justices (Roberts, Scalia, Thomas, and Alito), along with Justice Kennedy, the fifth "swing" vote in the majority against a dissent by the four "liberal" justices, Stevens, Souter, Ginsburg, and Breyer. The title of the case—National Association of Home Builders against the "Defenders of Wildlife"—also suggests a classic "industry versus environmental" battle in which the Home Builders Association came out on top. But, a careful businessman will pause before trying to read too much into this particular case. First, the Court's majority opinion, written by Justice Alito, dispenses with a challenge to EPA's determination to delegate certain powers to Arizona because EPA's decision was "internally inconsistent" with certain preliminary memoranda during the earlier portion of the decision-making process. Although this ruling "helped" an industry "win," it is particularly troublesome for those who face EPA (or any other similar environmental agency) and seek to argue that the Agency had adopted earlier inconsistent positions. This is a common phenomenon, but now, per the new "conservative" court, reiterated language from a 1974 case treating environmental agencies with deference—"We will, however, 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" 127 S. Ct. at 2530 (quoting, *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)). The notion that this new conservative Court is "pro-business" by citing mid-1970s cases granting federal agencies with considerable discretion is at best a problematic "win" for industry. Moreover, much of the Court's opinion involves a legal tussle between two different statutory commands—the command of the Clean Water Act that EPA "shall" delegate authority to states to issue permits under the Clean Water Act once certain limited criteria are established, and the separate command of the Endangered Species Act that federal actions must take into account impacts of various species. As Justice Alito for the Court put it, the substantive issue was: "a question that requires us to mediate a clash of seemingly categorical—and, at first glance, irreconcilable—legislative commands." While the "conservative" majority came out in favor of one statute, the Clean Water Act, over the Endangered Species Act, this is hardly the legal equivalent of issuing a "get out of jail free card" for those developers facing a potential endangered species issue. Indeed, even the conservative majority emphasized that the particular EPA transfer of permitting authority to Arizona officials would have "no adverse water quality related impact on any listed species." (emphasis added).

The Final Tally for Business of 2006 Term Environmental Cases

A critical observer with a pro-industry perspective might well score the Supreme Court's five decisions as 1-1-3, with one clear "win" in the 9-0 decision in *Atlantic Research*, a "tie" in the Court's *National Ass'n of Home Builders* case that has a somewhat favorable result with some very disturbing language about the broad scope of an environmental agency's discretion, and three losses—*Massachusetts v. EPA, Duke Energy, and United Haulers*. Even as to the clear "win" in *Atlantic Research*, what business "won" is best seen as a restoration of a legal right to sue that industry "lost" 3 years before in an earlier case. In the biggest environmental case of the year, *Massachusetts v. EPA*, both the auto industry and the Bush administration and its "go slow" policy on climate control were major losers. Thus, when viewed in this perspective, the new "conservative" Court's environmental record is less than overwhelming, and indeed relatively "liberal" in some environmental circles. A careful observer would conclude that despite the temptation to label the Supreme Court as

"conservative" or "liberal" in the environmental field, what appears to matter most are the facts and the legal statutes or regulations—something that one would expect from either a "conservative" or a "liberal" panel of jurists.

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