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Environmental Law in the "New" Supreme Court

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Environmental Law in the “New” Supreme Court

by Robert Abrams

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PREVIEW of *United States Supreme Court Cases*, pages 444–454. © 2007 American Bar Association.

In the 2006 term the United States Supreme Court issued plenary decisions in four environmental cases. As is usually the case, all four environmental cases that reached the Supreme Court presented nuanced questions of statutory interpretation, most of which were intertwined with administrative law issues. The decisions this term are of unusual importance, as all have significant aspects, either practical, precedential, or attitudinal. Additionally, two of the cases exhibit the 5-4 cleavage, so common in this term's decisions, in which Justice Kennedy is the outcome-determinative swing voter. Not surprisingly, of the four environmental decisions issued this term, the two higher visibility cases fit that voting pattern, with Justice Kennedy joining the respective groups of four (Justices Scalia, Thomas, Roberts, and Alito on the right hand, and Justices Stevens, Souter, Ginsburg, and Breyer on the left hand) once each. Finally, on unusual occasions there are environmental cases decided by the Supreme Court that are of broader societal interest, and this term saw the decision of one such case.

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Environmental Cases in the Term

CLEAN AIR ACT

Environmental Defense v. Duke Energy, 127 S.Ct. 1423 (April 2, 2007)

Massachusetts v. Environmental Protection Agency, 127 S.Ct. 1438 (April 2, 2007)

CERCLA/SUPERFUND

United States v. Atlantic Research Corp., 127 U.S. 2331 (June 11, 2007)

ENDANGERED SPECIES ACT

National Association of Home Builders v. Defenders of Wildlife, 127 S.Ct. 2518 (June 25, 2007)

THE “EASY” CASES

Of the four cases, the most straightforward decision is *United States v. Atlantic Research*, No. 06-562 (June 11, 2007). The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is the statute enacted to procure the cleanup of releases of hazardous substances into the environment. CERCLA contemplates both government-led and private-party-led cleanup activities. It has as one of its organizing precepts, the “Polluter Pay Principle.” CERCLA effectuates that principle by making those responsible for the contamination strictly, jointly, and severally liable for the cost of proper site cleanup. The statute uses the term “potentially responsible parties” (PRPs) to describe the class of persons having statutory liability for these cleanups. PRPs include owners and operators of the facility at which the hazardous release occurred, generators of the hazardous materials released into the environment, and persons who transported the waste to the site. Given the variety of parties that fall



into the PRP class, it is a very unusual site that has only one PRP. Thus, because modern tort law principles (and CERCLA) allow for equitable

contribution among tortfeasors, a major part of CERCLA litigation has been directed toward allocating the loss among the PRPs.

OVERVIEW OF THE CASES

Case	Subject Matter	Primary Legal Rulings	Alignment/Author Dissent(s)
<i>Duke Energy</i>	Clean Air Act	Upheld differing agency definitions of “modification” in NSPS and PSD programs	Really 8-1 Souter (Thomas concurred in the result, but it is a dissent on a statutory issue)
<i>Massachusetts v. EPA</i>	Clean Air Act	CAA authorizes EPA to regulate new auto emissions of GHG; MA had standing to raise issue	5-4 Stevens Roberts (Scalia, Thomas, Alito); Scalia (Thomas, Roberts, Alito)
<i>Atlantic Research</i>	CERCLA (Superfund)	§ 107 can be used to seek contribution	9-0 Thomas
<i>Defenders of Wildlife</i>	Clean Water Act & Endangered Species Act	Allowed delegation to state for water permit program without ESA requirement	5-4 Alito Stevens (Souter, Ginsburg, Breyer); Breyer

The particular problem in the *Atlantic Research* case involved the ability of a PRP who had voluntarily cleaned up a site without the intervention of the EPA to recover contribution, or its equivalent, from other PRPs. Atlantic Research had done a voluntary cleanup of a federally owned site (a portion of the Shumaker Naval Ammunition Depot) that had become contaminated when Atlantic Research removed propellant and other hazardous materials from rocket motors belonging to the United States using a pressurized water spray. Atlantic Research sought to obtain contribution from the United States which, under the statute, is very clearly a PRP in relation to this site. The complicating factor in this case was how the relevant statutory provisions were written. CERCLA does have a provision, § 113(f), that expressly permits contribution actions. In a 2004 decision, *Cooper Industries v. Aviall Services*, 543 U.S. 157, Justice Thomas, writing for a seven-member majority, had accepted a linguistic argument that interpreted that section to require a PRP to have settled liability issues with EPA prior to bringing a

contribution action. This had the immediate result of undermining a PRP’s incentive to do a voluntary cleanup without EPA intervention because statutory § 113(f) contribution from other PRPs would be unavailable.

With § 113(f) unavailable to it, Atlantic Research instead sued the United States under CERCLA’s primary liability section, § 107. That section provides that PRPs, in addition to properly incurred response costs of EPA, are liable for “other necessary response costs incurred by any other party.” A unanimous Court, noting the breadth of the phrase “any other party” and looking at the “statute as a whole” and the particular structure of the provision involved, held that language in § 107 permitted the action in this case. The case is important because it reenergizes the voluntary cleanup process, a process that reduces health threats but carries significant cost—many billions of dollars have been spent on these cleanups, and more will follow. The ability to allocate the loss more equitably improves the statute’s operation, even in the

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eyes of those who think CERCLA's liability scheme is ill-conceived. The decision "repairs" the problem created by the rather crabbed reading given to § 113(f) in *Cooper Industries* without requiring a statutory amendment.

The second "easy" case was *Environmental Defense v. Duke Energy*, No. 05-848 (April 2, 2007). The case is easy to understand both factually and in regard to legal principles applied by the Court, but the statutory and regulatory context is very complicated. Over a period of years, Duke Energy had totally replaced the steam boiler tubes that drove the turbines in 30 of its older power plants placed in service between 1940 and 1975 so that those plants could run more hours per day than was possible under the previous design. The change in steam tubes both extended the life and expanded the generating capacity of the plants, all of which were large, heavily emitting coal-fired power plants. Concurrently, since no improvements were made to the pollution control systems, the plants that were now operating many more hours each year were also emitting hundreds of thousands of tons more pollutants each year than was previously the case.

The 1977 amendments to the Clean Air Act (CAA) added, among other things, the Prevention of Significant Deterioration (PSD) program that applies in all areas of the country where the air is meeting the National Ambient Air Quality Standards (NAAQS). (As a rough guide, having air quality that just barely meets the NAAQS means that the air is clean enough to breathe "safely"—when safety is defined as an acceptable level of increased mortality or morbidity. Thus, even in so-called attainment areas (synonymous with PSD areas), there is considerable room for the air to be cleaner and health risks lower.)

A key part of the 1977 amendment requires that major emitting facilities in PSD areas of the nation obtain revised operating permits that limit emissions to the level achieved through application of best available technology to the plant's emissions. PSD "modification" was statutorily defined after the fact by a technical amendment that cross-referenced a pre-existing definition of modification that was in place for the New Source Performance Standard (NSPS) program of CAA § 111. PSD modifications were subsequently further defined in 1980 by a duly promulgated EPA administrative rule. That rule defined the

statutory term "modification" to include situations that involved an increase in overall emissions.

The complicating factor was that the EPA definition of "modification" for NSPS purposes was different than the PSD definition. The NSPS definition was not linked to increases in overall emission, but to the *rate* of emissions. Thus, under the NSPS rule, the changes made by Duke Energy would not trigger review as a modified source.

Eight members of the Court found this to be a relatively routine administrative law case. Relying on the methodology developed in *Chevron USA v. NRDC* (1984), the majority looked first at the statute itself and found that did not fully define "modification" and, therefore, the case was one in which the courts should defer to the agency interpretation so long as that interpretation is "permissible." On that basis, the Court found it "permissible" in the context of administering a program aimed at preventing deterioration in air quality to make an increase in emissions a part of a definition of an important operational term. In his concurring opinion, Justice Thomas noted that he felt the case was controlled by the other initial phase of *Chevron* under which courts determine statutory matters *de novo* when the statute is clear. He believed the statutory definition of "modification" in the PSD portion was clear because the cross-reference to NSPS imported the identical definition, leaving no room for the 1980 PSD rule to vary from the rate of emissions definition used in the pre-existing NSPS rule.

An interesting aspect of this case was its political context, because as the case went through the appeals process, it was one that might fracture the current Supreme Court along its by-now familiar right/left cleavage, leaving Justice Kennedy as the swing voter. EPA had never been very aggressive in enforcing this part of the PSD program that is sometimes referred to as "New Source Review" (NSR). In 2000, the soon-to-be-departing Clinton Administration EPA filed this suit against Duke Energy and several other suits against other power companies. All of these lawsuits targeted heavily polluting facilities that had undergone similar major modifications that increased emissions in PSD areas without seeking revised permits or coming up to best available-technology emission control standards. Following the 2000 election, the Bush Administration EPA inherited



those pending cases and did little or nothing to prosecute them. Instead, EPA appeared almost eager to lose them. For example, EPA declined to appeal when Duke Energy won summary judgment in the district court. It was actually the intervening environmental groups that took the appeal and moved the case forward. When Duke Energy again prevailed in the Fourth Circuit, the EPA aligned itself with the power companies and opposed a grant of certiorari. Only after the Court agreed to hear the case did EPA defend application of the existing PSD rule. As a respondent, EPA filed a perfunctory brief in support of the environmental intervenor-petitioners arguing for *Chevron* deference to its PSD definition of major modification. (See 2006 WL 2066660.) Thus, there was room for a politically motivated Court to side with a conservative, antiregulatory position and adopt either of the decisions below and their regulation-limiting result. The Court did not do so. Instead, both wings honored *Chevron* deference to the PSD rule as drawn and reached a near-unanimous result.

THE DIVIDED CASES

Defenders of Wildlife

- 1972 enactment CWA § 402
 - 9 factors that state must satisfy to obtain delegation/transfer of permitting authority
 - If EPA finds factors (related to state ability to properly carry out the program) are all met, it “shall” approve the delegation/transfer
- 1973 enactment ESA § 7(a)(1), (2)
 - All agencies of the federal government “shall”...“utilize their authorities”...“to insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize ... any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.”

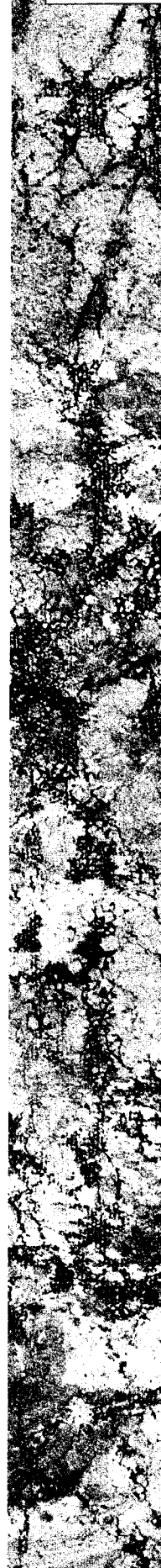
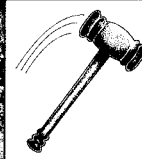
In comparison to these two “easy” cases, which resulted in unanimous or near-unanimous opinions, this term the Court also ruled on two very closely divided cases, both of which focused on more controversial subject matter. *National Association for Home Builders v. Defenders of Wildlife*, No. 06-340 (June 25, 2007), finds the Court closely divided on questions of statutory

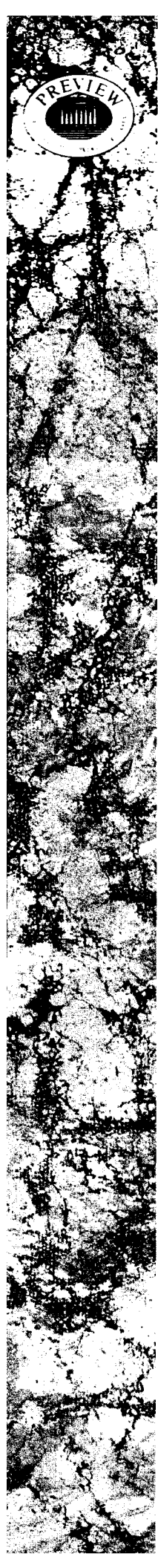
interpretation in a way that reflects the ideological cleavage of the justices on matters of federalism and on the reach of the Endangered Species Act. Justice Kennedy voted with the majority to limit the federal role under the Endangered Species and Clean Water Acts. *Massachusetts v. EPA*, No. 05-1120 (April 2, 2007), finds the Court closely divided on both standing and on the permissibility of an EPA action (the nonregulation of mobile source greenhouse gas (GHG) emissions) under the Clean Air Act. In that case, the ideological issues splitting the Court are of the utmost importance, touching on nothing less fundamental than the respective roles of the three branches of government in facing one of the most pressing problems of the coming century—regulation of GHG emissions. In that case Justice Kennedy again voted with the majority, but this time with the liberal four. The result was a holding that curbed executive branch discretion when there was a pressing problem that Congress had brought within the purview of the Clean Air Act.

The *Defenders of Wildlife* case sits at the intersection of the Clean Water Act (CWA) and the Endangered Species Act (ESA). For each statute there is a separate implementing agency: EPA and the Fish and Wildlife Service (FWS) of the Department of Interior, respectively. Quite importantly, the specific statutory provisions involved both use the mandatory verb “shall” in relation to agency action. Additionally, on at least one reading of the statutes, the two provisions make inconsistent commands.

This case arose in relation to a state’s request that it be delegated authority (which the court refers to as a “transfer” of authority) to issue permits allowing discharges into the nation’s waters. The CWA § 402 allows EPA to make such transfers, meaning that statutorily the EPA may delegate this authority to individual states. Since 1972, when the CWA took its present form including this type of permitting program and delegation, 44 states have sought and received delegation/transfer of pollution discharge permitting. The CWA § 402 lists nine criteria that a state must meet to obtain transfer. Those factors address the state’s ability to operate the program consistently with the statutory requirements Congress has erected. EPA, if it finds all nine factors are met, “shall” transfer authority. In this case, Arizona applied for transfer after satisfying the nine factors.

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In reviewing the Arizona request, EPA also took a mandatory action required of it by the ESA § 7(a). This Section requires that EPA consult with FWS to “insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize ... any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.” (Emphasis added.) (N.B.—You may recall the broad reading given to the word “all” by a unanimous Court in the *Atlantic Research* case and thus might expect the broad word “any,” when read in conjunction with the strong verb “insure,” to be treated similarly, but that did not happen.) When EPA consulted with the regional FWS office, it got a mixed answer: (1) letting Arizona take primacy over the program would not jeopardize species as a result of decreases in water quality, and (2) once primacy was granted, Arizona was likely to be asked to grant permits that would support land development that would adversely affect the critical habitat of several listed terrestrial species. FWS then reasoned that because Arizona, unlike EPA, is not subject to the ESA § 7 consultation requirement, Arizona might issue permits that did not consider or mitigate habitat impacts, an omission that would not be allowed if EPA were still running the program.

EPA wanted to move forward despite the FWS opinion and followed procedures set out in a Memorandum of Understanding of EPA and Interior that referred the matter to the Washington, D.C., headquarters of the agencies for review and resolution. FWS modified its position and issued a biological opinion finding no jeopardy to species. The key conclusion was that any potential threatened loss of habitat would not even indirectly be a result of agency (EPA) action. FWS further noted that EPA’s continuing CWA oversight of Arizona’s actions could adequately protect species. This protection came from the statutory authority that allows the EPA to object to the individual permitting actions of a delegated state’s program. With the no jeopardy biological opinion in hand, and the nine factors of CWA § 402 satisfied, EPA transferred authority to Arizona.

Under a special CWA provision that channeled § 402 appeals directly to the circuit court level, the case was appealed to the Ninth Circuit by Defenders of Wildlife. That court issued a 2-1

decision vacating EPA’s transfer ruling. Several issues and arguments became the fulcrum of that decision and its subsequent reversal by a 5-4 majority of the United States Supreme Court. First and foremost was a statutory argument that the nine CWA § 402 factors are an exclusive list of the criteria that may be considered by EPA in deciding on transfer/delegation, and the ESA is a tenth factor that Congress excluded from consideration. Second was an argument based upon an administrative rule promulgated by the Department of Interior implementing the ESA (see 50 CFR § 402.03, which reads, “Section 7 ... [applies] to all actions in which there is discretionary Federal involvement or control.”). The administrative law argument relying on that portion of the rule first notes that the “shall” language in § 402 means that EPA had no discretion to exercise in ruling on transfer requests. The second part of the argument joins to the “mandatory” nature of the action involved in this case the negative implication of the administrative rule—that is, since the rule applies ESA to cases in which there is agency discretion, and since there is no discretion to be exercised under the CWA, the rule removes this decision from ESA review. This latter reading of the administrative rule effectively rewrites the rule to add the word “only” between the verb “applies” and the object of the verb, which is discretionary actions of the agency.

Writing for the Court majority that included the right-hand four and Justice Kennedy, Justice Alito agreed with both of those arguments. They are, in effect, alternate grounds of decision because either one would be sufficient to reinstate EPA’s decision to approve the permitting transfer/delegation to Arizona.

The left-hand four dissented vigorously on both counts, with Justice Stevens writing their opinion. The dissent argued that on the statutory issue there is no doubt that ESA was intended to be superimposed on “all” agency actions. That was clear in the statutory language and statutory structure of ESA. It would have been almost impossible for Congress to go provision by provision to every occurrence of the word “shall” or otherwise indicated mandatory statutory duty of an agency and spell out which required ESA consultation and which were free of it. The nature of what was being legislated—an overarching



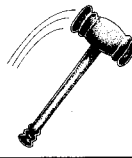
requirement—makes it rather plain in the eyes of the dissenting justices that the controlling provision is that of ESA § 7 and that focusing on CWA § 402 inverts the statutory intent of Congress.

Justice Stevens's explanation of the proper interpretation of the administrative provision is also quite forceful. First, he argues that reading in a wholesale limitation that excludes actions that are not entrusted to discretion is inconsistent with section 7, which the rule claims to be interpreting. Second, the rule does not have the exclusionary language that would deny it application to mandatory actions. Third, in the rulemaking itself, the language changed from "all actions" in the draft rule circulated for comment to "discretionary actions" in the final rule with no explanation of the change, which implies that there was not a substantive change intended. In addition, Justice Stevens notes that the limitation is inconsistent with other sections of the same rule that describe section 7 as applying to all actions of an agency, including in one place a list of types of actions that include mandatory actions. Finally, Justice Stevens finds it inapposite to give *Chevron* deference to EPA's view of a Department of Interior rule. It was only outside this litigation and well after this litigation began and consultation had taken place that Interior, for the first time ever, stated, by issuing a letter of "clarification," its view that consultation was not required in this setting.

It is not necessary to embrace either of Justice Alito's lines of argument to reverse the result barring the transfer. Moreover, it is also possible, even likely, that after a remand with proper instructions, EPA will still be able to grant the transfer. Recalling how the case proceeded, the two statutory "shalls"—both that of the CWA and that of the ESA—received their due. EPA consulted and fulfilled its ESA obligations when it eventually obtained the "no jeopardy" biological opinion from FWS. EPA then fulfilled its § 402 obligation by transferring authority to Arizona when it found the nine factors were met. A party that had standing could and did challenge the decision on its merits, but the real crux of the case should have had nothing to do with the relationship of ESA to CWA or even with the meaning of the ESA administrative rule. The issues for appellate decision are the rectitude of EPA's findings that the nine factors were satisfied and the rectitude of the FWS

no-jeopardy biological opinion. Both of those issues arise in the non-*Chevron* context of challenges to agency actions brought under the Administrative Procedure Act and would be resolved under the arbitrary and capricious standard of § 706(2)(A). On the facts as they seem to appear, with a tenuous link between the transfer and any habitat loss, the actions of both EPA finding the nine factors met and FWS issuing the no-jeopardy biological opinion would be sustained by a reviewing court. Stated somewhat differently, there was no need to take a big bite out of the ESA to decide this case, but the Court majority seems to have reached out to do so.

Thus, while Justice Stevens's dissent concludes that Justice Alito's opinion is wrong on both points (statutory interpretation and interpretation and application of the FWS administrative rule), at a minimum Justice Alito's opinion can be criticized as unnecessarily broad. The likely effect of that breadth is that this case will be cited as a precedent for the proposition that ESA never applies to any mandatory agency action or that ESA does not apply when the word "shall" appears in a statute. In that manner, the *Defenders* case, if its broad approach is followed in subsequent cases, will be one of the ways in which the "new" members of the Court are changing the Court's approach in the environmental field. This apparent effort to orchestrate a change in direction should not come as a surprise. Both Justice Alito and especially Chief Justice Roberts expressed a very hostile attitude toward the ESA during their time on the court of appeals. Within the remainder of the right-hand bloc, Justices Scalia and Thomas have previously expressed concerns about the reach of the ESA and dissented in critical cases involving its application, such as *Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995). Trying to single out what is motivating the swing voter, Justice Kennedy, is quite difficult. He has not shown the same hostility to ESA in the past, as exemplified, for example, by his vote in *Sweet Home* joining Justice Stevens's majority that upheld a broad administrative definition of the term "harm" in a Section 9 case that applied ESA in its most intrusive setting, an application to private activities occurring on private land.



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Massachusetts v. EPA: CAA

- CAA § 202 regulation of mobile source emissions:
The Administrator of EPA “shall by regulation prescribe ... standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”
- EPA argued both **lack of authority** to regulate GHG emissions from mobile sources and **discretion to decline** to do so.

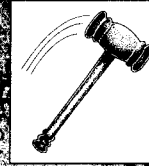
The other closely divided environmental case decided in the 2006 term was *Massachusetts v. Environmental Protection Agency*. *Massachusetts v. EPA* is the rare environmental case that by itself sets this term apart and makes it special. It is the most memorable environmental decision since *Hill v. TVA* was decided in 1976 holding that the Endangered Species Act, in accordance with its statutory language, was a roadblock that barred federal agency actions that would jeopardize species. The element that sets this case apart has very little to do with the environmental law issue actually decided by the Court, another statutory interpretation question posed with an administrative law overlay. The real impact of the case is on the public debate over GHG emissions, global warming, and the consequences of climate change. For those old enough to turn back the clock and remember the galvanizing effect of the first Earth Day and the spate of environmental laws passed in its wake, *Massachusetts v. EPA* is a similar watershed event. By putting the Supreme Court’s imprimatur on the scientific linkage of GHG emissions to warming and measurable environmental effects, it is almost as if the Court has taken uncertainty and dithering out of the public debate in this country and replaced them with a unified will to act to address the problem. A spate of legislation addressing GHG emissions, global warming, and climate change seems certain to follow and is already beginning to appear at every level of government.

The case itself presented for decision issues of statutory construction and administrative implementation together with a major standing issue. The CAA empowers EPA to regulate mobile

sources, here, automobiles and light trucks. Concerned about the serious effects of global warming, a group of 12 states, including most of the Northeast as well as California, Washington, and Illinois, joined with local governments and a number of private organizations to petition EPA to engage in rulemaking and regulate automobile emissions of GHGs under § 202 of the CAA. After receiving an extraordinary number of public comments (more than 50,000) related to the petition, EPA issued an order declining to engage in regulatory rulemaking on this matter. See 68 Fed. Reg. 52922 (2003). As described by Justice Scalia’s dissent, the EPA decision rested on two conclusions: “(1) contrary to the opinions of its former general counsels, the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change, see *id.*, at 52925-52929; and (2) that even if the agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time, *id.*, at 52929-52931.” 127 U.S.1438, 1474 (2007).

For ease of discussion, these two issues can be termed “authority” (whether the EPA has the authority to make such regulations), and “discretion” (whether the EPA can exercise discretion in deciding whether or when to make such regulations).

The decision considered CAA § 202(a)(1), the text of which is set forth above. Justice Stevens’s five-member majority examined and rejected the reasons cited by the EPA for finding lack of authority to regulate GHG emissions from mobile sources. Principal among EPA’s lack of authority arguments was EPA’s conclusion that carbon dioxide was not a pollutant. Congress defined the term “air pollutant” as including “any air pollution agent or combination of such agents, including any physical, chemical ... substance or matter which is emitted into or otherwise enters the ambient air. ...” (127 S.Ct. at 1460, quoting the statutory “Definitions” section, CAA § 302(g), emphasis supplied by Justice Stevens.) Describing that statutory definition as “sweeping,” Justice Stevens found the EPA determination that carbon dioxide was not a pollutant to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” which was the standard of review erected by the CAA § 307(d)(9)(A) for cases of this particular type. Justice Scalia’s dissent points out that § 302(g) begins with words



omitted by Justice Stevens that refer first to air pollutants as being “any air pollution agent.” Although the opinion is not very clear, it may be implying that “air pollution agents” constitute a narrower class than the majority’s expansive view of “air pollutants.” Justice Scalia then argues that in § 302(g), when it uses the word “including” in the definition of “air pollutant,” Congress is using the word in its permissive (rather than definitional) sense, so that whatever follows the word “including” in the statutory definition *may* be an air pollutant, but it also may not be an air pollutant. From there, he argues that deference is due to EPA’s view about which chemical substances are air pollution agents or air pollutants and which are not.

The more contested statutory issue revolved around the discretion vested in EPA under the statute. The statute facially limits the *obligation* of the administrator of EPA to promulgate mobile source emission standards to those air pollutants “which *in [the administrator’s] judgment* cause, or contribute to” the pollution that endangers health or welfare. EPA, initially, in line with the Bush Administration view, “judged” the predicate causal linkage between mobile source GHG emissions and climate change as either missing or too uncertain to justify action. EPA, in its order rejecting the petition for rulemaking and in its brief to the Supreme Court, gave great importance to a passage in a 2001 National Research Council report (NRC) on climate change that EPA characterized as stating that a causal link between GHG emissions and climate change “cannot be unequivocally established.”

That particular EPA argument proved problematic for two main reasons. First, it was not in accord with the great weight of scientific studies on the subject. Second, it was not supported by the very NRC report from which it was taken. In a brief submitted on behalf of several of the authors of that same NRC report, those scientists stated unequivocally that the phrase was taken totally out of context and described in considerable detail the numerous ways in which the NRC report said exactly the opposite of what EPA claimed. The equivocal language was inserted specifically to respond to the way in which the request for the NRC report had come from President Bush. His request had explicitly asked for a delineation of what was considered settled science and what was still uncertain in the sci-

ence. EPA cherry-picked the language from the discussion of what was still, in scientific terms, uncertain and treated the quoted language as if it applied to all of the areas of scientific inquiry reviewed by the NRC report. That language was not applicable to the great majority of the science canvassed by the report, which unequivocally found that anthropogenic GHG emissions have caused and are continuing to exacerbate global warming and that the amount of warming is directly correlated to the concentration of GHG gases in the atmosphere.

The tenor of the scientists’ brief is not particularly argumentative, but it is quite firm. For example, the brief’s first section is titled as follows: “The Science of Climate Change Indicates that It Is Virtually Certain that Greenhouse Gas Emissions from Human Activities Cause Global Climate Changes, Endangering Human Health and Welfare.” The level of certitude could hardly be described more forcefully, when the greenhouse effect is stated to be “as certain as any phenomena in planetary sciences.”

Oral argument made it plain that at least Justice Stevens was prepared to accept the soundness of the science linking GHG emissions (which his majority opinion considered to be air pollutants per § 202) to global warming and injury to welfare. Mr. Garre, representing EPA, was engaged in a colloquy with Justice Breyer in which Mr. Garre mentioned EPA’s reliance on the NRC report as a reason supporting its exercise of discretion.

Justice Stevens cut in saying first:

I find it interesting that the scientists who worked on that report said there were a good many omissions that would have indicated that there wasn’t nearly the uncertainty that the agency described.

And then, after a reply from Mr. Garre:

But in their selective quotations, [EPA] left out parts that indicated there was far less uncertainty than the agency purported to find.

Reliance on the scientific position actually set forth in the NRC report is the keynote of the majority opinion. The very first words of the majority opinion recite those most certain of all the GHG propositions:

A well-documented rise in global temperatures has coincided with a significant

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increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species—the most important species—of a greenhouse gas. 127 S.Ct. at 1446.

With that view in place, the majority could disagree with the EPA despite the usual role of *Chevron* deference—there was no “permissible” room for a judgment that mobile source emissions of carbon dioxide did not contribute to pollution that endangered public welfare.

The NRC report was not the only basis for the EPA’s decision not to engage in rulemaking. EPA offered other, more policy-based reasons for using “judgment” to decline to act. For example, EPA felt that acting under § 202 would be a piecemeal approach to a problem that needs a comprehensive approach. Again, somewhat politically, the approach that EPA called for was the “comprehensive” approach of the President that relied on support for technological innovation, voluntary nonregulatory private control programs, stronger international controls than those currently in place under the Kyoto Protocol, and continued research into climate change mechanisms. Without denying other approaches that might also be beneficially pursued, the majority noted that all the other bases offered by EPA as the discretionary reason for declining to act rested “on reasoning divorced from the statutory text.” 127 U.S. at 1462. For the majority, the statute provided no such latitude—“the use of the word ‘judgment’ is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.” *Id.*

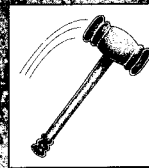
Justice Scalia’s dissent accepts that premise in part, agreeing to what is relevant in making the judgment, but his opinion insists that “the statute says *nothing at all* about the reasons for which the Administrator may defer making a judgment. . . .” *Id.* at 1473 (Emphasis in original). Scalia’s dissent, on that basis, concludes that the majority has imposed a limitation of its own making that interferes with the way in which agencies should decide whether to enter into a regulatory field.

Massachusetts v. EPA: Standing

- Standing presents a tripartite inquiry:
“A plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”
Roberts, C.J. (dissenting)
- State and its citizens whom it represents
 - Suffered loss of waterfront land to GHG warming-induced inundation from ocean’s rise
 - GHG emissions would be less if EPA acted
 - EPA action will reduce some GHG emissions in the future, lessening future warming-induced inundation

The standing issue seems more hotly debated than were the statutory and administrative law merits of the case. Through a series of interpretations of Article III’s case and controversy requirement in the last 40 to 50 years, the Court’s more conservative members have expanded the constitutional content of the standing inquiry from its roots as a ban on advisory opinions and guarantee of genuine adversariness to an elaborate jurisprudence that also includes justiciability and requires (1) injury in fact, (2) a form of causal nexus between the actions of the defendant and the injury, and (3) redressibility of the injury by relief that can be granted in the case. Chief Justice Roberts’s dissent succinctly frames those three inquires in the language set out above. See 127 S.Ct. at 1464 (Roberts, C.J., dissenting).

The five-member majority and the four-member dissent disagreed sharply on all three aspects of the standing inquiry. The Court’s modern standing cases require that a plaintiff be able to demonstrate a concrete and particularized injury. Interestingly, the case that now stands as the totem for this requirement is an ESA case, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), a case that involved extraterritorial application of ESA. In that case Justice Kennedy concurred in a finding that generalized claims of injury are insufficient. Justice Kennedy there stated his view that Congress, in the way it legislates, affects the standing analysis. He stated, “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” *Id.* at 580 (Kennedy, J., concurring). Thus, it was reasonably



clear that the swing voter, Justice Kennedy, would take a close look at the particularized injuries and statutory delineation of injury or causation, if Congress provided it.

The majority, with Justice Kennedy on board, found concrete, particularized injury to the state of Massachusetts, which according to uncontradicted affidavits stood to lose a “considerable” amount of public territory to higher ocean levels. A rise in sea level of 10 to 20 centimeters had already occurred. Justice Stevens’s opinion also recognized a cognizable injury to a state that has a sovereign interest in protecting the “earth and air in its jurisdiction” and the interests in those resources of the state’s citizens.

Chief Justice Roberts dissent for the Court’s right-hand bloc rejected both prongs of the injury-in-fact analysis, finding that the state’s claim of its own loss was not sufficiently concrete and particularized, and that the *parens patriae* “booster” is inapposite because state standing in those kinds of cases is only present if the individual citizens would have standing, which he did not believe they did. In the end, the broader view of the Chief Justice is made clear when he states, “The very concept of global warming seems inconsistent with this particularization requirement.” 127 U.S. at 1467 (Roberts, C.J., dissenting).

Returning to the tripartite standing inquiry, the majority had little difficulty in finding causation and redressibility. On causation, the argument resembles a syllogism.

- There is a causal connection between anthropogenic GHG emissions and the injuries that result from global warming.
- EPA refuses to regulate such anthropogenic GHG emissions from mobile sources despite the power and duty to do so (that are confirmed by the majority’s view of the statutory merits issues).
- Therefore, EPA is causing the injury.

Once the causal link is in place in that form, the redressibility requirement is easy to satisfy with a similar syllogistic argument:

- If EPA regulates mobile source GHG emissions, there will be fewer GHG emissions than would otherwise be the case.
- If there is less GHG in the atmosphere, there will be less global warming and injury.

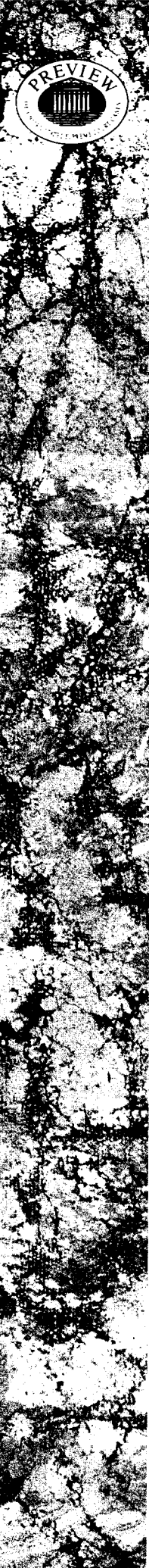
- Therefore, EPA mobile source GHG emission regulation will reduce/redress the injury.

In further support of its position, the majority cites precedents that hold a remedy need not completely redress the problem to satisfy that prong of the standing inquiry.

The Chief Justice’s dissent responds by framing the causation question more narrowly, asking what is the specific link between the EPA failure to regulate mobile source GHG emissions and the ocean’s rise that is causing the loss of Massachusetts coastal land. The opinion then considers whether Massachusetts has successfully quantified just how much of its lost coastal area is attributable to EPA inaction under CAA § 202. Chief Justice Roberts finds that there are so many confounding causative variables that the plaintiffs cannot carry their burden on the issue of causation. That uncertainty as to causation becomes the springboard for finding a lack of redressibility. Here, the dissent points at the great uncertainty of what will happen in the rest of the emitting world that accounts for most GHG emissions. The dissent also notes the possibility of technological change and the likelihood that other major steps will be taken to reduce GHGs in the future. Cumulating those factors, the dissent concludes those larger movements are the ones likely to redress Massachusetts complaints, not § 202 regulation of mobile source GHG emissions.

Justice Kennedy joins the left-hand bloc in finding standing and an obligation to prescribe pollution control standards for GHG emissions of mobile sources. One colloquy during oral argument suggested that this might occur, at least on the critical issue of injury. In particular, the portion of the majority opinion giving special solicitude to states suing for natural resource injuries suffered by its citizens appears to have originated with Justice Kennedy. During the oral argument, Chief Justice Roberts was in the process of questioning Mr. Milkey, the attorney for Massachusetts, about the state’s claim of lost land. Mr. Milkey was having a hard time quantifying the extent of state land being lost to the ocean’s rise and the portion of the rise attributable to mobile source nonregulation. Chief Justice Roberts then asked what precedents best supported Mr. Milkey’s claim of standing. Mr. Milkey suggested a case with a special citizen suit provision that was not particularly pertinent because this lawsuit did not arise under that

(Continued on Page 454)



statute. At that point, Justice Kennedy joined in the discussion and asked whether states had special standing rights beyond their own interest in state land. Moments later Justice Kennedy suggested that he viewed the century-old public nuisance case of *Georgia v. Tennessee Copper*, 206 U.S. 230 (1907), as the strongest precedent that would give the state a special interest in raising the legally protected interests of its citizens that would constitute injury sufficient to support standing. None of the many, many briefs in the case on either side had addressed this possibility or cited that case.

When the majority opinion was issued, Justice Stevens adopted the *Tennessee Copper* rubric as the leading ground for establishing injury in fact, finding that seeking redress for widespread damage to its territory constitutes a “suit by a State for an injury to it in its *quasi-sovereign* capacity” and an interest “independent of and behind the titles of its citizens.” 127 U.S. at 1454. In what is a most interesting aspect of this argument, Justice Stevens’s opinion goes back to the rationale of Justice Holmes that permeated *Tennessee Copper* and other cases from that era when state resource interests were affected—the right of states joining the nation to be treated specially when they sued asserting sovereign interests was a *quid pro quo* for surrendering their rights as independent sovereigns to respond to injuries to their resources with force.

Even if it is true that Justice Kennedy was the source of the *Tennessee Copper* argument for state standing, that fact does not fully explain why the argument would be attractive to him. Somewhat speculatively, it is possible to find common ground between the majority opinion here and Justice Kennedy’s *Lujan* concurrence. Justice Kennedy is clearly on record as recognizing a role for Congress in shaping the standing analysis in a particular case. In this case, while there is not a standing-affecting statute, as a member of the merits majority he believes that Congress, on these facts, legislated a duty to regulate that is going unmet and causing widespread, perceptible harm. Under the view propounded by the Chief Justice in dissent, harm as widespread as that caused by global warming results in a preemptive conclusion that no one has an injury sufficient to create standing to challenge governmental action or inaction. In the event that Justice Kennedy (or any other jurist) believes that a very concrete yet

hard-to-quantify injury is being imposed on whole populations at once, by an action that Congress does not allow, it is very unsatisfying to say that no one has standing. The *Tennessee Copper* approach cumulates those interests in a *prima facie* appropriate suitor, the state, and avoids the dilemma of governmental lawlessness that cannot be challenged without opening a floodgate of litigation.

There also is a possibility that looking at the longer term, Justice Kennedy believed that it was simply important for the Court to solidify public opinion around the science on this issue and usher in an era of more immediate action to limit GHG emissions. Whether that motivated Justice Kennedy or not, that is the way this case will be remembered. *Massachusetts v. United States* will be the symbol that announced an era of effort to address global warming long after reams of additional legislation and administrative rules have made § 202 of the Clean Air Act a forgotten relic. *Massachusetts v. United States* on its own is a case of vast importance to the environmental world and to Americans at large. But given its place as one of four significant environmental cases decided this term, it only partially reflects the changing dynamics of the “new” Court and the possible implications this change may have on environmental law for years to come.