

No Big News Yet From a Changed Court's Environmental Docket

With the addition of Justice Amy Coney Barrett to the Supreme Court this term, environmental advocates are alert for inklings of how the Court's new makeup will affect their work. What is notable is just how little has changed so far. Decisions this term show continued respect for states' rights and a refusal to inject the Court into policy disputes.

Several cases settled disputes between states, in a way that emphasized the Court's special solicitude toward state sovereignty and illustrated the heightened impact of climate change. In *Florida v. Georgia*, the two states argued over whether Georgia as the upstream state overused water from the Apalachicola River, causing the collapse of Florida's downstream oyster fishery. The Court emphasized Florida's high burden, given the "competing sovereign issues" in the case, and ultimately

held that Florida had not carried its burden, given other significant causes for the collapse, including climatic factors such as seasonal rainfall changes.

In another case, New Mexico and Texas disputed implementation of their Pecos River Compact, after a tropical storm caused heavy rains. Texas had asked New Mexico to store water upstream to avoid flooding in Texas, but a significant amount of the water evaporated while stored. New Mexico then wanted credit for the evaporated water. Placing a strong emphasis on the agreement between the states, the Court gave New Mexico the credit.

With more severe storms and changing weather patterns a reality now, the Court's natural resources docket is likely to continue to include more state-versus-state cases like these.

PennEast Pipeline Co. v. New Jersey also directly implicates states' rights. The case is about whether a pipeline

company can use delegated eminent domain authority under the Natural Gas Act to seize state land without the state's permission. New Jersey has argued that the statute lacks a clear statement abrogating state sovereign immunity. Undecided at press time, the case is interesting because it pits gas interests against a state's right to protect its parkland.

In another set of cases, the Court has so far declined the invitation to decide policy issues that are not squarely presented — or to rock the boat too much in general.

BP P.L.C. v. Mayor and City Council of Baltimore is one of many cases where a state or municipality alleges that oil and gas companies concealed environmental harms of fossil fuels, and defendants have removed the case from state to federal court. Ordinarily, a remand order is not appealable. But in 2011, a federal statute made

remand decisions reviewable when the defendants relied on federal officer removal authority in the U.S. Code. In this case, after a remand order, the court of appeals held that reviewability applied only to the federal officer removal issue. But the Supreme Court reversed, holding that all the removal grounds could be reviewed. The companies had also asked the High Court to settle whether the case should be heard in state or federal court. The Court ducked that contentious issue though, deciding only the extent of appellate review.

Similarly, in *Fish and Wildlife Service v. Sierra Club*, the Court issued a Freedom of Information Act decision with the potential to affect environmental advocacy, but the ultimate holding will likely lessen its impact. FOIA requests are a significant source of pressure for environmental advocates. For example, Sierra Club FOIA requests

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uncovered former EPA administrator Scott Pruitt's travel boondoggles and decision to enlist an aide to attempt to obtain a Chick-fil-A franchise for his wife, leading to ethics investigations and likely contributing to his mid-2018 resignation.

In this year's case, the Sierra Club sought disclosure of a Department of the Interior analysis finding that a proposed EPA rule would jeopardize certain fish species. The Court held that the analysis was protected by the deliberative-process privilege because it was treated as a draft and concerned an option that "died on the vine." Because EPA ultimately finalized a different rule, the Court analogized the analysis to an email or memorandum about a draft rule. Though advocates worried the case would allow agencies to withhold anything stamped "draft," the decision is not likely to meaningfully extend the privilege.

Several petitions for certiorari that are pending seek review of the D.C. Circuit's decision vacating the Trump administration's Affordable Clean Energy Rule. Petitioners are asking the Court to settle how the Clean Air Act applies to greenhouse gases from existing power plants. But the Biden administration is still considering how to interpret the statute. Given the approach that this Court has taken so far to policy disputes, the bedrock rule that courts wait for an agency to take a position before ruling is unlikely to be thrown out anytime soon.