Last Term's High Court Decisions Hint at an Incremental Strategy

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As the new Supreme Court terms begins, environmental professionals are waiting to see if the justices, one third of them recent appointments, will take more aggressive steps in this area than they did last term. Reading the tea leaves, there *could* be monumental changes, but it is not obvious that the right case has been brought — yet.

At press time, there is only one dispute on the Court's docket that is squarely environmental. It concerns the use of the Middle Claiborne Aquifer. Mississippi has challenged Tennessee's use of the water, arguing that the former should receive an injunction and damages. Tennessee argues that the aquifer flows between the states and is subject to equitable apportionment, the doctrine governing interstate waters. That would require a federal court to divide the output in a way that is fair, in light of factors such as established use and the benefits of use.

Two decisions chip away at standing, but another upholds agency deference

The United States and a coalition of states filed amicus briefs in the case, agreeing with Tennessee that Mississippi cannot receive damages or an injunction without a compact or a decision on equitable apportionment. They argue that a damages claim that skips equitable apportionment for shared waters such as the aquifer would be a vast departure from established law.

There are two other categories of cases from this past term that might provide more hints of the Court's direction. The justices decided multiple standing cases. That doctrine requires a plaintiff to show an injury that is fairly traceable to the challenged conduct and seek a remedy that is likely to redress the injury.

The doctrine can have a huge impact on the types of environmental cases that can be brought. The need to avoid threatened harm is crucial to many environmental cases. Traditionally, standing doctrine allowed claims of imminent threatened injury, rather than requiring a plaintiff to have already suffered injury. Two decisions could be a sign that the Court is chipping away at that doctrine.

In *Trump v. New York*, the Court issued a per curiam decision holding that a coalition including states and individuals challenging the Trump administration's plan to "exclude aliens without lawful status from the apportionment base" of the census, had not shown standing because the claimed harm was too conjectural. The challenge had rested on the president's words, but it was unclear whether in practice he would be able to actually exclude aliens and, if so, how many.

In *TransUnion LLC v. Ramirez*, the credit reporting company had offered a service to third parties to compare the person's name against a list maintained by the Office of Foreign Assets Control of terrorists, drug traffickers, and other serious criminals. Because TransUnion did not pull in any information other than the names when flagging those people, the list of individuals that "matched" the OFAC list was vastly misleading. In a 5-4 decision, the Court found that any plaintiffs whose records had not actually been requested during the specified class period could not show a concrete risk of injury.

If the injury already happened, on the other hand, another case helps to solidify the right to bring a claim. In *Uzuegbunam v. Preczewski,* the Court allowed plaintiffs to bring a First Amendment claim, even though the challenged policy no longer exists. With eight justices in the majority, and Chief Justice John Roberts dissenting, the Court found that plaintiffs could show redressability even though the Court could do nothing about the policy, because plaintiffs had requested "nominal damages" (which they did not specify any further in the complaint).

General administrative law doctrines were also at play last term. On the reasoned explanation requirement, in *Federal Communications Commission v. Prometheus Radio Project,* the Court upheld the agency's decision to eliminate rules which were meant to boost minority and female ownership levels in the media. The Court deferred to the agency's prediction that the rollback would not harm those levels, finding that the agency's decision to dismiss studies showing harm was simply a decision to interpret the studies differently.

Another administrative law principle that can affect agency decision-making is the amount of deference a court should give an agency when interpreting a statute under the *Chevron* doctrine. The Court has granted certiorari in *American Hospital Association v. Becerra*, a case where petitioners challenge the agency's decision on reimbursement rates and argue that the court of appeals improperly failed to find statutory ambiguity before applying *Chevron* deference.

With the Biden administration's determination to tackle the climate crisis through an all-of-government approach, it will be crucial to keep an eye on the doctrines governing who can sue and how agencies make decisions.