The Environment in the Supreme Court:
How State and Local Officials Are Shaping the Law

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It is no exaggeration to say that the Supreme Court's October 2006 term was a momentous one for environmental law, and on balance a good one for the environment.

The case that made the front-page headlines was *Massachusetts v. EPA*,[1] easily the most important environmental ruling in the last decade. The court sided with IMLA and many other local officials who supported Massachusetts in its effort to roust the U.S. Environmental Protection Agency from its slumber on global warming.

A second case had profound implications for federal officials, as well as the management of public lands in the West. In *Wilkie v. Robbins*,[2] the court held that officials in the federal Bureau of Land Management cannot be held personally liable under *Bivens*[3] or the federal racketeering laws for actions taken as part of their official government duties in overseeing federal lands.

Another ruling last term, *National Ass'n of Home Builders v. Defenders of Wildlife*,[4] clarified the standards EPA must use when it approves a State permit program for pollution discharges under the federal Clean Water Act. The court concluded that EPA need not consult with the U.S. Fish and Wildlife Service under the federal Endangered Species Act prior to approval, thereby making it easier for States to play a larger role in the protection of their lakes, rivers, and streams.

The court also resolved several other important environmental issues last term.[5] This article examines *Massachusetts*, *Wilkie*, and *Defenders* to highlight the impact State and local officials are having in shaping the law, and to explore how the rulings might affect future State and local initiatives.

The Court Tackles Global Warming

Municipal officials are leading our nation's efforts to reduce greenhouse gases and mitigate the harm caused by global warming. In 2005, Seattle Mayor Greg Nickels launched the U.S. Mayors Climate Protection Agreement, pledging to reduce greenhouse pollution by seven percent from 1990 levels by 2012. The U.S. Conference of Mayors endorsed the agreement, and to date more than 600 mayors have signed on. State and local officials are using smart-growth land use policies,

green building codes, hybrid vehicle fleet programs, and countless other initiatives to reduce greenhouse pollution.[6]

These State and local initiatives should come as no surprise. Local officials are the first responders for much of the harm caused by global warming, including more intense hurricanes and storm surges, more frequent floods, deadly heat waves, droughts and reduced snowmelt that deplete local water supplies, more smog, and widespread wildfires.

What did surprise many State and local officials was the recalcitrance of the federal government. The federal position on greenhouse pollution from new cars and trucks was especially exasperating. EPA contended it lacked authority to regulate vehicular greenhouse emissions under the federal Clean Air Act,[7] while the U.S. Department of Transportation argued that federal law prohibits States from doing so, and prohibits DOT from considering global warming threats in setting fuel efficiency standards.[8] Thus, according to the federal government, no level of government could limit vehicular emissions to help prevent global warming.

Massachusetts and its allies sued EPA to challenge the agency's refusal to regulate greenhouse emissions from cars and trucks. Local officials played a key role both as parties in the case (New York City, Baltimore, and the District of Columbia) and as *amici*. The local government *amicus* coalition included IMLA, the U.S. Conference of Mayors, the National Association of Counties, and several individual cities.[9] They stressed that while State and local officials are leading the way with innovative programs to reduce greenhouse emissions, they cannot do the job alone and need the federal government to set minimum reduction standards.

In an opinion written by Justice John Paul Stevens, the court ruled 5-4 that EPA has authority to regulate greenhouse gas pollution under the Clean Air Act. The court addressed three main issues.

First, the majority rejected arguments that Massachusetts lacked standing to challenge EPA's refusal to regulate. In language that could prove to be very helpful to the States in future cases, the court ruled that sovereign States should be given "special solicitude" in standing analysis.[10] The court concluded Massachusetts had standing because it has suffered and will continue to suffer real injury due to global warming, including the loss of coastland from rising sea levels. Although the regulation of cars and trucks would not, by itself, significantly reduce this harm, the court emphasized that agencies "do not generally resolve massive problems in one fell regulatory swoop," but instead "whittle away at them over time."[11] This incremental approach does not defeat standing merely because other action would be required to address the injury more completely.

Second, the court ruled that greenhouse gases are "air pollutants" under the definition of that term in the Clean Air Act, and thus subject to EPA's regulatory authority. The court relied on a straightforward reading of what it called the Act's "capacious" and unambiguous definition, and it viewed other provisions calling for research on global warming as fully consistent with the conferral of regulatory authority to EPA.[12]

Third, the court held that EPA's decision whether to regulate greenhouse gas emissions from cars and trucks must be based on whether they might endanger public health or welfare, which is the statutory trigger for regulation under section 202 of the Act. The agency may not decline to regulate based on the other considerations invoked by EPA, such as its preference for voluntary measures, or the potential impact of regulation on international negotiations. The court remanded the proceeding to EPA with a stern admonition to "ground its reasons for action or inaction in the statute," rather than extraneous policy considerations.[13]

Some have suggested the ruling lacks practical impact because it requires only that EPA reconsider its decision. But don't be fooled. It is a momentous ruling, and it already is making its presence felt in several ways.

First, the court's holding that greenhouse gases are "air pollutants" under the Clean Air Act paves the way for this or future administrations to regulate greenhouse pollution not only from new cars and trucks, but also power plants and other sources. There are strong signals in the majority opinion that the court would view with suspicion any finding that greenhouse emissions do not endanger public health or welfare, or any conclusion that EPA has better things to do with its resources.

Second, the ruling has added significant momentum to congressional efforts to enact comprehensive global warming legislation. Even the automobile industry, no fan of greenhouse gas regulation, is calling for federal legislation that covers all industries.

Third, the ruling is especially good news California and other States that want to implement California's tailpipe controls on greenhouse pollution. The federal Clean Air Act generally preempts State regulation of vehicular emissions, but it allows California to enact its own rules, subject to EPA approval, and it enables other States to adopt the California program. The ruling in *Massachusetts v. EPA* gives California strong arguments that EPA should approve California's limits on greenhouse gases from cars and trucks. Although the auto industry argues that the federal energy laws preempt the California rules, the Supreme Court concluded that these laws operate independently from, and consistently with, the Clean Air Act. Just weeks ago, a federal district court relied on this discussion in rejecting a preemption challenge to Vermont's rules that adopt the California program.[14]

Of course, the significance of the ruling depends in large part on the significance of global warming. The scientific community has reached a near-unanimous consensus on three key points: global warming is occurring, the primary cause is fossil fuel consumption, and if we do not act immediately to reduce greenhouse gas emissions, global warming will worsen significantly. Every major scientific organization in the country whose expertise bears on climate change agrees with this consensus, including the National Academy of Sciences, the American Meteorological Society, and the American Association for the Advancement of Science. By helping to secure the ruling in *Massachusetts v. EPA*, local officials assisted the nation in taking the critical first steps toward significant federal limits on greenhouse gases.

Personal Liability for Government Actions?

In January 2006, the U.S. Court of Appeals for the Tenth Circuit issued a ruling that sent shivers down the spines of federal officials across the country. It held that a disgruntled landowner could bring racketeering and other claims against federal officials in their individual capacities for actions taken as part of their official duties. The suit threatened not only to disrupt management of federal and State-owned land, but also to make people think twice about becoming public employees.

Thankfully, in a 7-2 ruling in *Wilkie v. Robbins*,[15] the court held that the landowner may not proceed with his claims.

The suit arose out of a contentious land management dispute concerning the High Island Ranch, a commercial "dude ranch" resort in Wyoming. As is true of much of the land in the American West, the ranch is fragmented, comprising disconnected land parcels stretching across some forty miles. This land is intermingled with many other parcels owned by the federal government, the State, and other private landowners.

Reciprocal easements allow the landowners to access their respective tracts, and to make use of adjacent parcels. The federal Bureau of Land Management (BLM) is authorized to require any applicant for a federal right-of-way on public land to provide the United States with a reciprocal easement.

The previous owner of the High Island Ranch granted the United States an easement for a road in return for rights-of-way over public lands needed to conduct cattle drives for ranch guests. Due to an administrative oversight, however, the easement was not recorded, and Robbins took title to the ranch free of the easement. When it learned of its error, BLM demanded that Robbins grant the easement, but Robbins refused.

Robbins alleges that BLM officials then retaliated with a campaign of harassment to coerce him into granting the easement. The intimidation allegedly included cancellation of Robbins's rights-of-way, trespass, assault, harassment of ranch visitors and guests, unjustified administrative and criminal enforcement actions, breaking into the guest lodge, and vindictive disputes over his federal permits.

In 1998, Robbins filed suit against the BLM officials contending that their conduct violated his rights under the Fifth Amendment because they tried to obtain an easement without just compensation through intimidation. He sought damages under *Bivens*[16] and the federal racketeering statute, the Racketeer Influenced and Corrupt Organizations Act (RICO).[17] After limited discovery, the BLM officials moved for summary judgment, and the district court denied the motion. The Tenth Circuit affirmed, rejecting arguments based on qualified immunity and other defenses.[18]

In an opinion written by Justice David Souter, the Supreme Court reversed. The court first addressed the claims under *Bivens*, which recognizes a private cause of action for violations of the Fourth Amendment, and which the Court has extended to other constitutional violations. The *Robbins* court refused, however, to establish a

Bivens cause of action on the facts of this case. Although the court assumed all of Robbins's allegations to be true, it concluded that Robbins had other administrative and judicial remedies for most of his charges.[19] More significantly, the court concluded that defining a workable cause of action would be too difficult for the court and risk chilling legitimate actions by government officials on behalf of the public.

The court made short work of the RICO claim, which was based on allegations that the BLM employees violated the Hobbs Act by interfering with interstate commerce through extortion. The court rejected this claim, however, because the Hobbs Act applies only to private gain and not to actions taken as part of one's official duties to benefit the public or the federal government.[20]

The court basically passed the ball back to the Congress. If Congress decides to establish a statutory cause of action for these kinds of cases, it should provide appropriate boundaries to ensure that federal, state, and local officials can protect the public interest without the threat of individual liability arising from the land use disputes that inevitably arise when public and private lands are intermingled.

State Water Pollution Programs

Forty-five States have delegated authority from EPA to administer a permit program for the discharge of pollutants under the federal Clean Water Act. The State of Arizona applied for authorization of its program in February 2002. After more than two years of effort and over $1 million invested by the State in resources and staff time, EPA approved the program, an approval that gave rise to another environmental case that made it to the high court last term.

The dispute in *National Ass'n of Home Builders v. Defenders of Wildlife* [21] concerned the criteria EPA must apply when it approves a State permit program for discharges of pollutants into our nation's waters. As Justice Stevens put it in dissent, the case presented "a problem of conflicting 'shalls.'"[22] Under section 402(b) of the Clean Water Act, EPA "shall" approve a State permitting program if it meets nine designated criteria, all of which concern whether State law provides the State with adequate authority to meet the Act's requirements.[23] But under section 7(a)(2) of the Endangered Species Act of 1973, each federal agency "shall" consult with the Department of the Interior to insure its actions do not jeopardize endangered species.[24]

The issue before the court was whether EPA must consider the impact on species in approving a State water permit program, even though that program meets the nine criteria set forth in the Clean Water Act. In other words, does section 7(a)(2) serve, in effect, as a tenth criterion EPA must consider prior to approving a State permitting program?

According to Arizona, invalidation of its permit program threatened to halt or delay many business activities, including those operating under the several thousand storm-water-discharge construction permits issued by the State every year. Nevertheless, the Ninth Circuit held that EPA's approval of Arizona's permit

program is an agency action that requires compliance with the consultation procedures set forth in section 7(a)(2) of the ESA.[25]

The Supreme Court sided with Arizona and reversed in 5-4 decision, ruling that section 7(a)(2) of the ESA cannot be used to deny approval to a State program that meets the criteria set forth in the Clean Water Act. While acknowledging that a later enacted statute like the ESA can sometimes amend or repeal an earlier statutory provision, the court stressed that repeals by implication are disfavored and will not be presumed absent a clear and manifest congressional intention to repeal.[26] The court gave considerable deference to the Interior Department's reading of the ESA, which limits the requirements of section 7(a)(2) to agency actions that are discretionary, and does not apply to nondiscretionary statutory mandates such as EPA approval under the Clean Water Act.[27] The court also observed that even after EPA approval, State permit programs under the Clean Water Act operate with continuing federal oversight to ensure compliance with federal species protections and other environmental protections.

Four justices dissented. In an opinion written by Justice Stevens, the dissenters relied heavily on the landmark "snail darter case" -- *Tennessee Valley Authority v. Hill* [28] -- for the proposition that section 7 of the ESA "admits of no exceptions."[29] In their view, federal species protections have "'first priority' over all other federal action."[30]

Looking Ahead

So far in the October 2007 term, the Supreme Court has not yet granted review in a major environmental law case. But there are several important cases in the lower courts that could end up on the high court docket, including the cases mentioned above concerning preemption of California's limits on vehicular emissions of greenhouse gases. We can rest assured that State and local officials will continue to make their voices heard on these important issues.

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[1] 127 S. Ct. 1438 (2007).
[2] 127 S. Ct. 2588 (2007).
[3] In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the court recognized a private cause of action for damages for certain constitutional violations by federal officials.
[4] 127 S. Ct. 2518 (2007).
[5] *E.g.*, *United Haulers Assoc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786 (2007) (upholding municipal ordinance requiring locally generated waste to be processed at a publicly owned transfer facility); *Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423 (2007) (addressing power plant modifications under the Clean Air Act); *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331 (2007) (ruling that the federal Superfund law allows third-party cost-recovery lawsuits by those who voluntarily clean up a waste site).
[6] For more on this agreement, go to http://www.ci.seattle.wa.us/mayor/climate

[7] 68 Fed. Reg. 52922 (2003).
[8] 71 Fed. Reg. 17566 (2006).
[9] Brief of the U.S. Conference of Mayors, et al. as *Amici Curiae* in Support of Petitioners, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), 2006 U.S. S. Ct. Briefs LEXIS 785.
[10] 127 S. Ct. at 1455.
[11] *Id.* at 1457.
[12] *Id.* at 1462.
[13] *Id.* at 1463.
[14] *See Green Mt. Chrysler Plymouth Dodge Jeep v. Crombie,* Case No. 2:05-cv-302, 2007 U.S. Dist. LEXIS 67617 (D. Vt., Sept. 12, 2007).
[15] 127 S. Ct. 2588 (2007).
[16] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (recognizing a private cause of action for fourth amendment violations by federal officials).
[17] 18 U.S.C. §§1961-1968.
[18] 438 F.3d 1074 (10th Cir. 2006).
[19] *Robbins*, 127 S. Ct. at 2598-2601.
[20] *Id.* at 2605-08.
[21] 127 S. Ct. 2518 (2007).
[22] *Id*. at 2538.
[23] 33 U.S.C. § 1342(b).
[24] 16 U.S.C. § 1536(a)(2).
[25] *Defenders of Wildlife v. Flowers*, 420 F.3d 946, 962-71 (9th Cir. 2005).
[26] 127 S. Ct. at 2532.
[27] *Id.* at 2533-34.
[28] 437 U.S. 153 (1978).
[29] *Defenders*, 127 S. Ct. at 2539 (quoting *Hill*).
[30] *Id.* at 2541 (quoting *Hill*).