



Community
Rights
Counsel

Community Rights Report

CRC's Monthly Newsletter

April 2007
Vol. VII, No. 4

Community Rights Counsel

1301 Connecticut Avenue, NW, Suite 502, Washington, DC 20036; www.communityrights.org

FEATURE CASE

Victory in Massachusetts v. EPA

On April 2nd, the Supreme Court gave state and local governments - and the environment - a big victory in *Massachusetts v. EPA* (127 S.Ct. 1438 (2007)). The Court found that "greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant,'" that "EPA has the statutory authority to regulate the emission of such gases from new motor vehicles," and remanded the case to EPA with a stern warning to "ground its reasons for action or inaction" on tailpipe global warming pollution "in the statute" rather than in extraneous policy considerations.

This is an important win for state and local governments for several reasons. Local governments are on the front lines of global warming, responsible for the people and places who will be hit by the cataclysms and new daily challenges of a warmer world. Massachusetts has already lost some of its coastal land because of rising sea levels; Chicago and New York are devoting significant resources to saving people during deadly summer heat waves.

State and local governments have been at the forefront of developing policy responses to global warming, and the ruling gives important support to their efforts. For example, California and 11 other states have adopted laws that will reduce greenhouse gas emissions from new cars sold in those states, but before these laws take effect, EPA has to grant California a waiver for its standards (which will free the other 11 states to implement them). The Court's ruling that greenhouse gases are pollutants within the scope of the Clean Air Act cuts off one of EPA's objections to granting the waiver.

The decision also disentangles the arguments about environmental protection and fuel economy that automakers have combined in their lawsuits against the state clean car laws. Automakers have said that the only way to cut greenhouse gases is to improve fuel economy. States are preempted by federal law from regulating fuel economy, ergo, their greenhouse gas emissions laws are preempted. Not so fast, said the Court, which noted that EPA's duties under the Clean Air Act were "wholly independent" of the Department of Transportation's responsibility to regulate fuel efficiency, and that "there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."

Placing greenhouse gases firmly within the scope of the Clean Air Act also should give a boost to other lawsuits pushing for more federal regulation of greenhouse gases from stationary sources like power plants. And the ruling also adds momentum to efforts in Congress to write new laws to address global warming. The automobile industry, no fan of greenhouse gas regulations, is now quite eager to make sure that a federal solution to the problem includes all industries, not just theirs.

Finally, the Court sensibly articulated its standing doctrine. State plaintiffs, certainly, should cheer the Court's idea that states have "special solicitude in our standing analysis." But all future environmental plaintiffs have reason to take heart. In *Massachusetts v. EPA*, the Court hewed to a reasonable precedent, which says that the fact that harm is widespread does not mean that it's out of the realm of federal courts. It also held that a plaintiff seeking a partial remedy to a problem is not barred from federal court. Given that many environmental problems involve widespread harms, and that the best that our politics and science can yield are incremental improvements, *Mass. v. EPA* was right on the money.

Kudos go to Massachusetts Assistant Attorney General Jim Milkey for his terrific oral argument, Georgetown University Law Professor Lisa Heinzerling for her magnificent briefing (with help from many others), and the 19 groups led by the International Center for Technology Assessment that filed the original rulemaking petition that started this case back in 1999.

CRC'S NEW BLOG!

This month, Community Rights Counsel launched a new blog called Warming Law, which monitors developments in the courts as they relate to global warming. So far, the blog has been a tremendous success. It has attracted thousands of visitors and been favorably mentioned in the Christian Science Monitor, Slate, widely read legal blogs like SCOTUSblog (the premiere resource for commentary on Supreme Court cases), BLT (the blog of the Legal Times newspaper), and activist blogs like Gristmill! Check it out at www.warminglaw.com.

IN MEMORIAM
Daniel J. Curtin (1933-2006)

On November 30, 2006, local officials and planners lost a dear friend and mentor, the legendary Daniel J. Curtin, who died at age 73 of natural causes. A longtime partner with the law firm of Bingham McCutchen LLP, Dan was the “Dean” of land use planning and local government law in California and nationwide. He was the author of several frequently cited treatises, including *Curtin’s California Land Use and Planning Law*, as well as countless articles. And through the ABA’s Central and Eastern European Law Initiative and the World Jurist Association, Dan shared his vast experience and expertise with emerging democracies across the globe.

For seventeen years, Dan served as City Attorney of Walnut Creek, California. IMLA awarded Dan its Charles S. Rhyne Award for Lifetime Achievement in Municipal Law, and the American Planning Association honored him with its Distinguished Leadership Award.

Those who knew him best, however, remember not only his extraordinary professional accomplishments, but also his warm and gentle manner, his unlimited generosity, and his cheerful willingness to teach and encourage new members of the legal profession. We at Community Rights Counsel frequently crossed paths with Dan at conferences and elsewhere, and he unfailingly provided valuable advice and many kind words. He will be greatly missed.

To honor his memory, Dan’s friends and colleagues have established a scholarship fund at his alma mater, the University of San Francisco School of Law, to benefit students interested in land use law. Contributions (tax deductible) may be sent to the USF School of Law, Attn: Janice Vela, Director of Development, 2130 Fulton Street, San Francisco CA 94117, with “Daniel J. Curtin, Jr. Fund” written on the comment line.

EYE ON WASHINGTON
Good News from the Claims Court:
Tulare Lake is No More

Back in January 2005, we expressed our astonishment at the failure of the U.S. Department of Justice to file an appeal in *Tulare Lake v. United States*, in which the U.S. Court of Federal Claims ruled that a *physical* taking occurred when federal protections for endangered salmon and other fish led to reductions (ranging from 8 to 22 percent) of the water available to certain farmers under their contracts with California. The ruling’s highly dubious physical takings theory forced federal taxpayers to pay \$16.7 million to a small handful of farmers and their lawyers, Roger and Nancie Marzulla.

We are happy to report that on March 29, the same judge who wrote *Tulare Lake* changed his position and denied relief to a new set of Marzulla clients who advanced the same physical taking theory. In *Casitas Municipal Water District v. United States*, No. 05-168L, Senior Judge John Paul Wiese rejected a takings challenge to federal fish habitat protections and expressly repudiated *Tulare Lakes’* the physical taking theory. In so ruling, Judge Wiese relied on *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (U.S. 2002), particularly *Tahoe-Sierra’s* discussion of the longstanding distinction between physical and regulatory takings.

Since we slammed DOJ for failing to appeal *Tulare Lake*, it is only fair and fitting to credit DOJ for successfully challenging that ruling in *Casitas*. Kudos to the DOJ and Interior Department attorneys who achieved this victory, and to the Georgetown Environmental Law and Policy Institute and the State of California, which provided amicus support.

In more good news, on March 16 the same court rejected breach of contract claims after having previously denied takings claims for temporary reductions of water from the Klamath Basin imposed in response to a near-record drought. In *Klamath Irrigation Dist. v. United States*, No. 01-591, Judge Francis Allegra ruled that the “sovereign acts doctrine” provides a defense to the contract claims. More information is available at Earthjustice: <http://www.earthjustice.org/news/press/007/klamath-irrigators-contract-claim-rejected.html>

[Community Rights Report Disclaimer](#)

This newsletter is provided for general information only and is not offered or intended as legal advice. *Community Rights Report* is best viewed in PDF format. To receive it in color and PDF format via e-mail, please contact Community Rights Counsel at crc@communityrights.org or at 202-296-6889. Back issues of the newsletter are available at www.communityrights.org/communityrightsreportnewsletter/newsletter.asp.