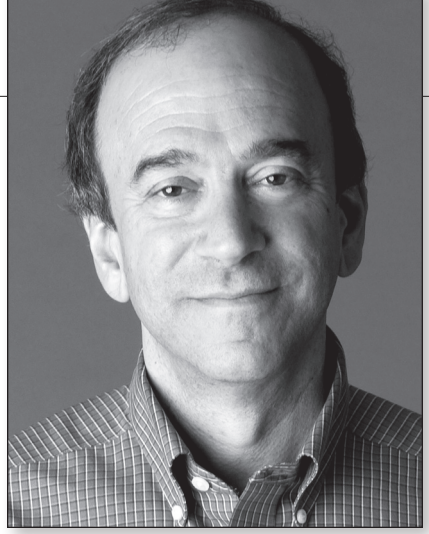

By Richard Lazarus

This Term, It's All About Air Pollution

Last year's Supreme Court term was dominated by water. As described in Samuel Taylor Coleridge's famous poem *The Rime of the Ancient Mariner*, there was "water, water every where." Stormwater in *LA County Flood Control District* v. *Natural Resources Defense Council* and *Decker v. Northwest Environmental Defense Center.* Destructive floods in *Arkansas Fish and Game v. United States.* And wetlands development in *Koontz v. St. Johns River Water Management District*.

This term, by contrast, is all about air. The Court has granted multiple petitions in two sets of Clean Air Act cases. Each, standing alone, could generate blockbuster rulings. And together, they could produce the most significant term ever for the Clean Air Act. The cases are also revealing. They underscore the topsy-turvy nature of environmental litigation. And they make clear the importance for federal environmental law of one particular judge on the U.S. Court of Appeals for the D.C. Circuit.

The first set of cases, argued this past December, is captioned *EPA v. EME Homer County* and concerns EPA's authority to address interstate air pollution. EPA sought the Court's review after being stung by a series of adverse D.C. Circuit rulings that denied EPA the discretionary authority that the agency asserts is necessary to construct a program capable of preventing upwind states from degrading a downwind state's air quality. EPA faults the lower court for mandating a degree of numerical precision incompatible with the scientific complexities and by limiting the agency's ability to consider control costs. EPA also challenges the court's ruling that it failed to allow states to develop their own approaches to addressing the interstate pollution problem before imposing a federal plan.

The second set of cases consists of six different petitions, led by *Utility Air Regulatory Group v. EPA*, that challenges agency rulemakings on remand from the Court's 2007 ruling in *Massachusetts v. EPA* that the Clean Air Act authorizes the agency to regulate greenhouse gas emissions from new motor vehicles. Based on that ruling, EPA promulgated restrictions on vehicular emissions as well as on emissions from new stationary sources subject to the act's program for the Prevention of Significant Deterioration. According to the agency, the act mandated the latter set of restrictions once EPA regulated greenhouse gas emissions from motor vehicles.

While denying review of the broadest issues raised by the industry petitions, the Court granted review on whether EPA correctly concluded that the act required the agency to regulate stationary source greenhouse gas emissions under the PSD program once it regulated motor vehicle emissions. Were the Court to reject EPA's view, the ruling's significance will very much turn on the Court's rationale. A ruling that limits *Massachusetts v. EPA* by agreeing with petitioners that greenhouse gas emissions, although "air pollutants" when emitted by motor vehicles, are somehow not "air pollutants" when emitted by PSD stationary sources, could be significant. By contrast, a ruling against EPA on the far narrower ground that a stationary source's emissions of greenhouse gas emissions do not trigger the PSD program, but are covered by it, would most likely have little practical effect on longer term agency authority.

Could this be the most important Supreme Court term ever for the Clean Air Act?

Whatever the outcome in both cases, the litigation itself is already striking because of the extent to which the arguments of both industry and environmentalists defy assumed stereotypes. In *EME Homer*, industry argues that the Clean Air Act denies EPA broad authority to consider control costs in determining how much sources must reduce their levels of pollutants. And it is the *environmentalists* who come to the agency's defense by arguing that the statutory language is capacious enough to allow for such consideration.

No less upside-down have been their opposing arguments in *UARG.* In the lower court, industry argued that EPA lacked authority to decline to regulate all new stationary sources that emit more than 250 tons per year. And it was here too the environmentalists who endorsed EPA's inherent authority to regulate far *fewer* sources based on administrative impracticality.

Have no worries. Neither industry nor environmental advocates have lost their adversarial marbles. But the willingness of each to abandon their traditional postures makes clear the high practical stakes each perceives to be raised in the two cases.

Finally, both cases leave little doubt of the special significance of Judge Brett Kavanaugh of the D.C. Circuit for federal environmental law. Years ago, D.C. Circuit Judge Skelly Wright could fairly boast of that mantle, followed by Judges David Bazelon and Harold Leventhal. Today, it is Kavanaugh. Whether in the majority (*EME Homer*) or in the dissent (*UARG*), he writes with authority and the justices listen. It may not hurt in the latter respect that 20 of his clerks have gone on to clerk for a justice, at a remarkable average rate of more than three per term.

Next term? Wildlife?

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