Greenwire

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## *SUPREME COURT: 3 enviro, energy cases on docket as fall term begins (10/05/2009)*

***Jennifer Koons, E&E reporter***

The Supreme Court reconvenes today for a new term with fewer environmental cases on the docket, which may suit left-leaning advocacy groups that view the majority of justices on the court as hostile to their interests.

"Last term, the court had before it five environmental law cases and in each case, environmental protection lost," said James May, a professor of law at Widener University. "In 40 years, the court has rendered a bit more than 300 environmental law cases. Environmental protection typically only wins about 20 percent of the time, but there's never been a shutout like this."

May added, "All but one of those decisions was rendered by a bare majority with the same five justices voting in favor of the less environmentally protective results, which suggests a hostility from these members of the court to basic notions of environmental protection" (*Greenwire*, June 25).

So far, the Supreme Court has accepted three cases with an environmental theme for review.

"This is a lighter term than last term for us, no question," said Jay Austin, senior attorney with the Environmental Law Institute. "Last year was one of those blockbuster terms that seem to come in cycles -- four to six to even eight cases at a time, and then things settle down for a while."

The first case, originally scheduled to kick off the court's term today, concerns the high-stakes water war between North and South Carolina.

On the 2009-2010 docket, so far

*South Carolina v. North Carolina* Granted: March 30, 2009 Oral arguments: unscheduled Appealed from: Supreme Court original jurisdiction

*NRG Power Marketing LLC, et al., v. Maine Public Utilities Commission* Granted: April 27, 2009 Oral arguments: Nov. 3, 2009 Appealed from: 4th U.S. Circuit Court of Appeals

*Stop the Beach Renourishment v. Florida Department of Environmental Protection* Granted: June 15, 2009 Oral arguments: Dec. 2, 2009 Appealed from: Supreme Court of Florida

*-- Jennifer Koons*

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In a rare move, the Supreme Court yesterday announced that oral arguments would be rescheduled due to a "family illness" that left Eric Miller, assistant to the U.S. solicitor general, unable to argue in the case.

At issue in *South Carolina v. North Carolina* is whether Duke Energy Corp., the city of Charlotte and the Catawba River Water Supply Project should be allowed to intervene in South Carolina's lawsuit against North Carolina over rights to water from the Catawba.

"This case involves important questions of who has a right to participate in court cases that decide water supply issues that affect more than one state," said Glenn Sugameli, a staff attorney with Defenders of Wildlife.

### Utility contract challenge

Next month, the court will hear an appeal from a power company arguing that third parties should not be allowed to meet a lower standard for challenging electricity contracts than what contracting parties must meet.

The case, *NRG Power Marketing v. Maine Public Utilities Commission*, challenges a March 2008 ruling by a three-judge panel on the U.S. Ciruit Court of Appeals for the District of Columbia, which found that third parties may challenge electricity prices based on the "just and reasonable" standard of review.

Contracting parties must meet a higher standard, known as Mobile-Sierra, which presumes that they will arrive at a just and reasonable rate and allows only one of the contracting parties to later challenge it under extraordinary circumstances of public interest -- if, for example, the deal would force the utility out of business.

The lower court's ruling involved a long-term deal that created New England's forward capacity market. Several parties involved in the contract are subject to the Mobile-Sierra doctrine, the panel ruled, but not the downstream purchasers who were not a party to the contract and objected to it.

"When a rate challenge is brought by a non-contracting third party, the Mobile-Sierra doctrine simply does not apply," the court held. "The proper standard of review remains the 'just and reasonable' standard."

In its petition for *certiorari*, NRG contends the appeals court ruling "overturns decades of settled understanding and eliminates the stability and certainty that are critical to the maintenance and development of energy infrastructure."

The Maine Public Utilities Commission and others disagreed. "The court correctly found that the settlement's opponents did not waive or otherwise lose their rights to challenge the future prices under the ordinary application of the just-and-reasonable standard," they said in a brief.



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Shortly after the appeals court's decision, the Supreme Court affirmed the Mobile-Sierra doctrine in a separate case involving California utilities. In that case, *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1*, the court did not address third parties.

### 'Wild card case'

On Dec. 2, the justices will hear oral arguments in *Stop the Beach Renourishment v. Florida*, which hinges on whether Florida's Supreme Court violated the Constitution's takings clause when it upheld a plan to create a state-owned public beach between private waterfront land and the Gulf of Mexico.

The justices' decision to review the case caught many court watchers by surprise.

"This case was on nobody's radar, which is disturbing in that sense," Sugameli said. "To find a taking, the majority would have to say that somehow the state Supreme Court illegally defined their own law of what is property. It's a real wild-card case."

This will be the first taking case to come before the newest members of the court, Chief Justice John Roberts and Associate Justices Sonia Sotomayor and Samuel Alito.

The case arose in 2004, when property owners filed a lawsuit to halt the planned restoration of beaches in Walton County along the northwest Florida Panhandle.

Under the state's Beach and Shore Preservation Act, counties and cities can restore beaches eroded by hurricanes and storms by adding sand beyond a state-designated erosion control line -- separating private property from the state's property. After they have done so, the new sand becomes public beach because the projects are funded with state and federal dollars.

A Florida district court ruled in 2006 that the state's restoration effort constituted an uncompensated taking, depriving property owners of their right to maintain contact with the water and their "right to accretion," which is the gradual accumulation of land by natural forces.

Last September, the Florida Supreme Court reversed the lower court order.

"Without the beach renourishment provided for under the act, the public would lose vital economic and natural resources," the court held. "As for the upland owners, the beach renourishment protects their property from future storm damage and erosion while preserving their littoral rights to access, use, and view. Consequently, just as with the common law, the act facially achieves a reasonable balance of interests and rights to uniquely valuable and volatile property interests."

Meanwhile, many other cases on the court's docket could also have significant implications for environmental law.

"There are a lot of cases that are very important to environmental law that are not environmental cases," Sugameli said. "For example, cases that involve access to courts, standing, ripeness, all of



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these type of issues are generally decided on constitutional or other basis that apply across the board and could erect new barriers for environmentalists."

## Petitions to watch

The potential case generating the most buzz arose late last month and has special significance for the court's newest justice.

In *Connecticut v. AEP*, the 2nd U.S. Circuit Court of Appeals' panel sided with a coalition of eight states, New York City and environmental groups that had filed a public nuisance lawsuit against the nation's largest coal-burning utilities (*Greenwire*, Sept. 29).

"There are a lot of different ways that the fallout from the AEP case could play out," Austin said. "This was a bombshell decision about litigation, EPA putting regulations on the table and the draft bills. They are all kind of linked," he said. "What happens in one arena could very much influence what goes on in the other."

Austin and other court watchers expect the electric utilities in the case to appeal the ruling. Attorneys for the power companies declined to specify their legal strategy, but they have until Nov. 5 to seek a rehearing by the full appeals court.

They could also petition for Supreme Court review, although it is far from certain whether the justices will agree to take up a decision from a two-judge panel on a lone circuit court.

"They may wait for it to percolate a bit," Sugameli said.

The case generated controversy during the confirmation hearings for Sotomayor, who originally sat on the panel that heard oral arguments in the case.

Republicans on the Senate Judiciary Committee pressed Sotomayor for an explanation as to why the complex climate lawsuit remained among the unfinished business on the 2nd Circuit's docket.

Since she did not take part in the final decision, legal experts doubt she will recuse herself if the appeal does reach the Supreme Court.

"Even though she heard oral arguments and read the briefs in the case, there does not seem to be a reason to recuse herself because she did not decide the outcome," Sugameli said.

### *Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers*

In August, a coalition of environmental organizations asked the Supreme Court to overturn an appeals court decision upholding the Army Corps of Engineers' authority to issue Clean Water Act permits to operators of mountaintop-removal mines.



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Earthjustice, the Appalachian Center for the Economy & the Environment and others filed a petition for *writ of certiorari* that raises the question of whether the Army Corps "lawfully may grant permits for the permanent burial of Appalachian streams under waste from mountaintop removal coal mining operations without first determining any effect such burial will have on the 'function of the aquatic ecosystem and organisms' of those streams."

A divided three-judge panel on the 4th U.S. Circuit Court of Appeals in Richmond, Va., ruled in February that U.S. District Court Judge Robert Chambers in the Southern District of West Virginia should have deferred to the Army Corps' interpretation of its responsibilities under the Clean Water Act when he issued a 2007 injunction against four corps permits for Massey Energy Co. subsidiaries.

In late May, a divided appeals court declined to reconsider its decision, prompting the environmental groups' appeal to the high court.

"We're hopeful," said Earthjustice attorney Stephen Roady, who represents the environmental groups. "We do believe this case is profoundly important both for the Clean Water Act, the Appalachian region and the nation."

But not everyone thinks the environmental groups were wise to seek Supreme Court review.

"The Obama appointees to the agencies and the lower courts will inevitably come out where the environmentalists want," said E. Donald Elliott, a professor at Georgetown University Law Center and partner with Willkie Farr & Gallagher. "Whereas if they take the case to the Supreme Court now, bad things could happen from their perspective -- as happened last term in *Burlington Northern*, *Entergy*, *Winter* and several others."

### *Edison Electric v. Piedmont Environmental Council*

Last month, a coalition of power companies, renewable energy companies and transmission organizations petitioned the Supreme Court to review a lower court ruling that weakened federal authority over sitings of electric transmission lines.

The petition, filed Sept. 17, requests a review of a 4th U.S. Circuit Court of Appeals ruling that prohibits federal energy regulators from overruling state rejections of transmission projects.

The coalition includes the Edison Electric Institute, the American Public Power Association, the National Rural Electric Cooperative Association, the American Wind Energy Association, Allegheny Power, Trans-Allegheny Interstate Line Co. and San Diego Gas & Electric Co.

At issue is a provision in the 2005 Energy Policy Act that allows the Federal Energy Regulatory Commission to allow transmission projects deemed in the "national interest" to proceed if state regulators either fail to act on such projects within a year or reject them.



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In a 2-1 decision, a three-judge panel on the 4th Circuit held that FERC interpreted the 2005 law too broadly. The panel wrote that the law allows FERC to intervene only if a state fails to act on a proposal, not if it rejects a project.

In asking the high court to take the case, the coalition argues that the "backstop" provision is "an integral part of major federal legislation aimed at addressing an urgent issue of national significance," and the 4th Circuit misinterpreted Congress' intentions.

### *U.S. v. Apex Oil*

In August, a unanimous three-judge panel on the 7th U.S. Circuit Court of Appeals affirmed an injunction sought by U.S. EPA requiring Apex Oil Co. to clean up a former refinery site in Hartford, Ill.

The panel upheld a previous ruling by the U.S. District Court in Southern Illinois that found Apex obligated to clean up a "hydrocarbon plume" trapped underground that was emitting fumes and contaminating groundwater around Hartford-area homes.

Apex had argued that it sold the Hartford refinery and was no longer in that business, and subsequently reorganized the company through a bankruptcy. Apex officials argued that since the company was no longer in the refining business, it would have to hire outside help to handle the cleanup work at a cost of $150 million.

Attorneys for Apex have not yet made a decision on whether to seek Supreme Court review, but court watchers point out that a circuit split on the issue could make the case a likely candidate for acceptance by the justices.

"There is a conflict in circuits over how to treat orders to companies to clean up property after the company goes through bankruptcy," Elliott said.

## Justices won't hear Interior royalty case

This morning, the court announced it would not review an appeals court decision that blocked the Interior Department from collecting as much as $10 billion in oil fees (*see related story*).

In January, the 5th U.S. Circuit Court of Appeals upheld a lower-court ruling that the government could not collect royalties from eight production leases held by Anadarko Petroleum Corp.

The Obama administration had petitioned the court to rehear the case in July.

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