

3 Times Ginsburg Led The Way On Environmental Law

By Juan Carlos Rodriguez

Law360 (September 21, 2020, 8:31 PM EDT) -- U.S. Supreme Court Justice Ruth Bader Ginsburg will be best remembered for her fierce support of gender equality and civil rights, but she made her mark on environmental law as well, authoring opinions that established citizens' right to sue polluters under the Clean Water Act and the government's right to regulate cross-state air pollution.

Justice Ginsburg wasn't necessarily a leader on the high court in regard to environmental law, but green groups knew that she would be a sympathetic ear and a fairly reliable vote, according to Jody Freeman, a professor at Harvard Law School and director of its Environmental and Energy Law Program.

"She appreciated the challenges agencies like EPA face when trying to execute their duties," Freeman said, referring to the U.S. Environmental Protection Agency. "She read statutes with an eye to their purpose, and she respected agency expertise."

Timothy Bishop, a partner at Mayer Brown LLP, said that although Justice Ginsburg didn't take the lead on many environmental cases, she reliably recognized the government's right to regulate on environmental issues. He cited *Massachusetts v. U.S. Environmental Protection Agency*, which established carbon dioxide as a pollutant eligible for federal regulation, and *Rapanos v. EPA*, in which the court's four liberal justices took a broad view of the government's regulatory authority under the Clean Water Act.

"Her environmental record is fairly slim for so long a tenure in the court, and you do not get the impression that she had the passion for environmental issues that, say, Justice [John Paul] Stevens had, compared to her record on civil rights issues, on which her liberal icon status is based," Bishop said.

Here are three of the most important environmental law opinions Justice Ginsburg authored.

High Court Revives EPA's Cross-State Air Rule

In 2014, Justice Ginsburg wrote a 6-2 opinion upholding the EPA's Clean Air Act rule requiring 28 states to cut power plant emissions that cross their borders, also known as the Cross-State Air Pollution Rule. The ruling reversed a D.C. Circuit opinion authored by then-Circuit Judge Brett Kavanaugh, who is now on the Supreme Court.

Justice Ginsburg faulted Judge Kavanaugh's criticism of a rule provision he said would improperly require upwind states to cut more pollution than needed to meet air quality standards by basing reductions on cost rather than the amount of pollution.

"The practical difficulties cited by the court of appeals do not justify departure from the act's plain text," Justice Ginsburg wrote for the majority. "When Congress elected to make EPA's input a prerequisite to state action under the act, it did so expressly."

Justice Ginsburg's opinion got to the problem EPA was trying to solve, demonstrating her understanding of the important role regulation can play in ensuring air quality across the country, said Amanda Shafer Berman, counsel at Crowell & Moring LLP.

"Ginsburg ... often emphasized that deference is due to EPA and other agencies when they act to fulfill their statutory responsibilities — a principle long adhered to by justices across the political spectrum, including [the late Justice Antonin] Scalia, that may now be in danger," Berman said.

The case is U.S. Environmental Protection Agency et al., v. EME Homer City Generation LP et al., case number 11-1282, in the Supreme Court of the United States.

Environmental Groups' Right to Sue

In 2000, Justice Ginsburg wrote for a 7-2 majority that environmentalists had standing to sue for civil penalties under the Clean Water Act. Friends of the Earth alleged that discharges of mercury and other toxic pollutants violated a hazardous waste disposal company's National Pollutant Discharge Elimination System permit and argued that the lawsuit was not moot simply because the business had come into compliance since the case was filed.

The high court's ruling overturned the Fourth Circuit's decision to toss the green group's case and established that even when a federal agency decides not to enforce the Clean Water Act, there are still avenues available for citizens groups.

"This case has become the textbook case on mootness and is also frequently cited when discussing standing," Berman said. "It demonstrates Ginsburg's commitment to ensuring that citizens could advocate for their right to a safe and healthy environment in court."

Bishop said Justice Ginsburg's opinion is also noteworthy for holding that citizen plaintiffs have standing to seek civil penalties based on their recreational and aesthetic injuries.

The case is Friends of the Earth Inc. v. Laidlaw Environmental Services Inc., case number 98-822, in the Supreme Court of the United States.

State Claims on Greenhouse Gases

Justice Ginsburg didn't always deliver big wins for environmental groups, however.

In 2011, she and her colleagues unanimously reversed the Second Circuit and held that state and land trusts' public nuisance claims under federal law over greenhouse gas emissions were preempted by the Clean Air Act in a case against American Electric Power Co.

The ruling was a blow to environmental plaintiffs, but the justices issued a narrow opinion that did not decide whether the parties could bring public nuisance claims under state law, leaving that issue open on remand.

The impact of the high court's silence on that question has lately become more important as cities and counties sue energy companies in state courts for costs related to damages incurred by the effects of climate change.

Several federal courts of appeal have supported district courts that rejected the companies' efforts to drag the lawsuits into federal court.

The case is American Electric Power Co. Inc. v. Connecticut et al., case number 10-174, in the Supreme Court of the United States.

--Additional reporting by Keith Goldberg. Editing by Jill Coffey and Emily Kokoll.