

Kennedy's Exit Puts Climate Change Regulations On Thin Ice

By **Keith Goldberg**

Law360 (June 28, 2018, 7:07 PM EDT) -- The retirement of U.S. Supreme Court Justice Anthony Kennedy throws the future of federal climate change action into doubt, as experts say a more conservative high court could not only undo or neuter its landmark decision that greenhouse gases are pollutants, but also scuttle legal challenges of governmental decisions to regulate climate change and other environmental hazards.

Justice Kennedy, who announced Wednesday that he would step down July 31, cast the deciding vote in the 2007 case *Massachusetts v. EPA*, in which the Supreme Court held by a 5-4 vote that GHGs are pollutants under the Clean Air Act and subject to U.S. Environmental Protection Agency regulation. Twelve states, several cities and environmental groups had sued the EPA seeking to force it to regulate GHGs.

Two of the dissenters, Justices Samuel Alito and Clarence Thomas, have said in subsequent high court decisions that *Massachusetts v. EPA* should be overturned. A Kennedy replacement in their mold by President Donald Trump could make that a reality if a fresh challenge is launched against either the EPA's GHG regulatory authority as it exists or the push by the Trump administration to roll back that authority, experts say.

"It is certainly possible that there might not be a majority that says the EPA has the authority to regulate greenhouse gases," said Crowell & Moring LLP partner Tom Lorenzen, who represented the government in *Massachusetts v. EPA* while at the U.S. Department of Justice's Environment and Natural Resources Division. "*Massachusetts v. EPA* — it certainly could face increased risk."

University of Maryland environmental law professor Robert Percival said another far-reaching impact of undoing *Massachusetts v. EPA* would be overturning the majority's conclusion that the states that brought the case had standing to challenge the federal government's inaction on GHGs.

"The reason that is so significant is that it would effectively shut the courthouse door on states and environmentalists on the EPA's failure to act on greenhouse gases, on constitutional grounds that couldn't be overturned by any act of Congress," Percival said.

Not everyone is sold on a reconstituted Supreme Court overturning *Massachusetts v. EPA*, even if a Kennedy replacement pulls the court further to the right. UCLA environmental law professor Ann

Carlson said it's more likely that the court's conservative majority would look to render the decision irrelevant by taking a much narrower view of the EPA's CAA authority to regulate greenhouse gases.

She pointed to the court's 2014 decision in *Utility Air Regulatory Group v. EPA*, where it ruled 5-4 that the agency flouted the CAA when it expanded the law's Title V and Prevention of Significant Deterioration permitting programs to include GHGs.

"I think you'd see the court eviscerating the EPA's authority to regulate," Carlson said.

Lorenzen noted that the majority opinion in the UARG case penned by late Justice Antonin Scalia relied on the so-called clear statement rule which holds that courts can't interpret a statute to reach significant results unless it's clear that Congress intended for such results to be reached.

"If Congress has to be very clear, one could see the court significantly cutting back on the areas within the Clean Air Act that the EPA could regulate for climate purposes without saying it has no authority to regulate whatsoever," Lorenzen said.

Experts say overturning *Massachusetts v. EPA* could have unintended consequences as well, such as throwing open the door to federal climate change torts that the Supreme Court largely shut in the 2011 case *American Electric Power Co. Inc. v. Connecticut*. In that case, the court said federal common law GHG-related claims were displaced by the EPA's CAA authority to regulate them.

"If EPA's authority to regulate GHGs is revoked, then that displacement argument disappears," said Michael B. Gerrard, director of Columbia Law School's Sabin Center for Climate Change Law. "It gives new life to the federal common law nuisance cases and it might weaken any argument that any state common-law cases are preempted."

However, the issue of whether states and environmental groups have standing to sue stretches back years before *Massachusetts v. EPA*, and Justice Kennedy has taken a more flexible view on standing issues than his more conservative colleagues, Carlson said.

"In *Massachusetts v. EPA*, the entire standing analysis was a way to get Kennedy's vote on the case," Carlson said. "I think it's fairly easy to imagine a more conservative justice casting doubt on standing on many climate cases and other cases as well."

That has the environmental community on edge.

"Whether the courthouse doors are open is the biggest structural question with the biggest structural impacts," said incoming Earthjustice President Abigail Dillen, who currently leads the group's climate and energy litigation program.

The impact of Justice Kennedy's retirement will also be felt in Clean Water Act regulation. It was the justice's concurrence in the 2006 case *Rapanos v. U.S.* that wetlands that have a "significant nexus" to navigable U.S. waterways are subject to CWA jurisdiction that led to the 2015 Obama-era rule defining waters subject to U.S. jurisdiction.

The Trump administration is rescinding and rewriting the rule, with the intent of following a more limited view of CWA jurisdiction championed by Justice Scalia in *Rapanos*. If Justice Kennedy were to remain on the bench, such a proposal would likely not survive Supreme Court review, Carlson said.

“He’s already opined on what the jurisdiction of the Clean Water Act is,” Carlson said. “If you get a more conservative justice, and also one who’s not bound by the Rapanos decision, then I think they would uphold a much narrower reading of jurisdiction.”

Experts say a Kennedy replacement could also push the court further toward a more restrictive view on regulatory takings, as well as limiting or eliminating so-called Chevron deference in which courts defer to federal agencies’ readings of ambiguous statutory language.

In such an environment, experts say Chief Justice John Roberts could replace Justice Kennedy as the new swing vote on environmental and energy cases, though he’s still to the right of Justice Kennedy on the ideological spectrum.

Percival points to the Supreme Court’s 2014 decision in *EPA v. Homer EME Generation LP et al.*, in which Justices Roberts and Kennedy joined the court’s four liberal justices in reviving the EPA’s Cross-State Air Pollution Rule and overturning the D.C. Circuit’s invalidation of the rule.

“The D.C. Circuit split opinion authored by [Circuit Judge] Brett Kavanaugh would have effectively made it impossible to regulate transboundary pollution, and that was too much for Kennedy and Roberts to stomach,” Percival said. “So, occasionally, some of the conservative efforts to rein in environmental regulation are too much even for Roberts.”

Still, experts say the prospect of another conservative justice on the court in the mold of Trump’s initial Supreme Court pick, Justice Neil Gorsuch, will encourage deregulatory advocates to push cases up the appellate chain more aggressively, while environmental groups and other pro-regulatory stakeholders will be increasingly wary.

Lorenzen expects industry groups and red states to file more high court petitions in cases whose decisions have been dictated by judicial precedent stretching back at least a decade. That could cover climate change, cases where lower courts have backed a broad reading of environmental statutes that expand an agency’s authority, and even cases involving federalism issues under the CAA, CWA and other environmental laws.

“People will feel emboldened to raise some issues that with Kennedy on the court they would not raise for fear of not capturing a majority,” Lorenzen said. “This may change that.”

--Editing by Pamela Wilkinson and Breda Lund.