New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 265—NO. 26
WEDNESDAY, MARCH 17, 2021

PERSPECTIVE

A Time To Reflect: Justice Ruth Bader Ginsburg's Impact On Environmental Law

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As we begin considering the judicial nominations President Biden will make and how they could impact decisions about environmental law and climate change, it is worth taking a moment to reflect on the late Justice Ruth Bader Ginsburg's environmental legacy and the indelible mark she left on the field. Although Ginsburg was known primarily for her devotion to advancing gender parity and social equality, she also played a critical role in many significant environmental decisions. Despite the fact that many viewed Ginsburg as a liberal, she actually had a pro-business reputation (which is one of the reasons she was so easily confirmed by a vote of 96-3). While she retained this reputation throughout her career as a justice, she approached environmental law in a nuanced way, often prioritizing the environment when interpreting the laws or regulations before the court. Ginsburg's environmental jurisprudence on the Clean Air Act, Clean Water Act, and the nation's hazardous waste cleanup laws struck a fascinating balance between the practical and the idealistic.

The Clean Air Act and Climate Change: Supporting the Federal Government's Authority To Regulate. Climate change is very much at the forefront of the Biden administration's priorities, and Ginsburg helped to build the foundation for federal climate change regulation. In 2007 she was part of a five-justice majority in *Massachusetts v. EPA* that ruled the Clean Air Act gives the U.S. Environmental Protection Agency (EPA) not only the authority to regulate greenhouse gases from automobile tailpipes, but essentially a mandate to do so. That ruling led directly to the Obama administration in 2009 beginning to regulate carbon dioxide emitted from cars and trucks for the first time at the federal level. Then, perhaps more significantly, Ginsburg authored the 2011 unanimous opinion in *AEP v. Connecticut*, holding that the Clean Air Act displaces common law rights to sue over greenhouse gases from power plants. Although many criticized this decision as foreclosing the opportunity for states and individuals to sue power companies over greenhouse gases under federal common law (which is interesting, given her support of Massachusetts' standing to sue EPA in *Massachusetts v. EPA*), it also demonstrates Ginsburg's nuanced approach to interpreting environmental laws and differentiating between states' rights and the federal government's under the Clean Air Act. The opinion confirms her deference to the environmental statutory rights Congress created and Ginsburg's practical approach to solving environmental issues impacting individuals and businesses alike.

Photo: Photo: Carmen Natale/ALM

U.S. Supreme Court Justice Ruth Bader Ginsburg speaks at New York Law School.

Prior to these landmark climate change opinions, in 2001 Ginsburg joined Justice Scalia's unanimous *Whitman v. American Trucking Associations* opinion holding that the Clean Air Act did not allow EPA to consider implementation costs in setting national ambient air quality standards (NAAQS) and confirming EPA's authority to revise the Act's ozone standards regulations as required to protect public health (by upholding Congress' delegation of quasi-legislative powers to EPA on this issue). NAAQS are viewed as the primary ambient air quality standards, and the court's decision was an important step forward for Clean Air Act policy and its impact on public health measures.

Ginsburg also authored the 2014 *EPA v. EME Homer City Generation* decision (6-2), in which the court upheld the Obama administration's efforts to regulate air pollution that drifts across state lines through the "Transport Rule" (overturning a D.C. Circuit Court opinion written by now-Justice Kavanaugh), finding that that the Clean Air Act supports EPA's contention that if a state implementation plan is determined to be insufficient, then EPA has an absolute mandate to create and enforce a federal implementation plan. Ginsburg also wrote the 2003 majority opinion (5-4) in *Alaska Department of Conservation v. EPA*, concluding that EPA could trump a state's issuance of a construction permit under the Clean Air Act if EPA determines the state acted unreasonably in issuing the permit. This decision affirmed EPA's significant authority to overrule state decisions regarding what constitutes "best available controlling technology" for operating facilities in their jurisdiction. Both of these opinions demonstrate Ginsburg's commitment to ensuring the Clean Air Act lived up to what she viewed as its intended purposes and making sure the federal government has ultimate authority to enforce it.

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The Clean Water Act: Providing Broad Protection for Waters of the United States. Ginsburg's most liberal environmental decisions may be those relating to the Clean Water Act. She joined the dissent in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps*, arguing for a very broad interpretation of Waters of the U.S. (the waters regulated by the federal government), and Justice Stevens' minority opinion in *Rapanos v. U.S.*, which likewise argued for sweeping federal jurisdiction over Waters

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of the U.S. The expansive definition of federally regulated waters promoted in both cases perhaps served as fodder for President Obama's comprehensive version of the Waters of the U.S. Rule, the 2015 Clean Water Rule (which may be at least partially revived as President Biden attempts to reverse President Trump's Navigable Waters Protection Rule, and which may live to see another day in court as a result).

Ginsburg also joined the landmark 2018 majority opinion (6-3) in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, holding that discharges to groundwater viewed as the "functional equivalent" of a direct discharge to Waters of the U.S. are protected by the Clean Water Act and the federal government.

Ginsburg's most notable Clean Water Act ruling, and perhaps her most significant environmental decision, is the majority opinion she authored in the 2000 *Friends of the Earth v. Laidlaw Environmental* decision (7-2). In *Friends of the Earth*, the court held that a Clean Water Act citizen suit could be maintained for an NPDES violation against an entity that had

since come into compliance with its permit. Ginsburg explained that the current state of compliance did not moot the penalties Friends of the Earth sought for past violations, which were intended to prevent the company from violating its permit in the future. One of the most impactful portions of her opinion confirmed that Friends of the Earth had standing to sue on behalf of its members because they had "reasonable concerns" about the discharges impacting their "recreational, aesthetic, and economic interests." This ruling established broad support for environmental groups' standing to sue in citizen suits, opening the gateway for these suits under a variety of regulatory schemes.

CERCLA: Interesting Dissents That Would Further Broaden Liability. Ginsburg also presented a broad viewpoint of liability for cleanup costs in some key Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) decisions. She authored a dissenting opinion in the 2004 *Cooper Industries v. Aviall* decision, explaining that the Supreme Court's prior *Key Tronic* decision stands for the proposition that CERCLA contains an implied right of contribution in §107 (typically known as the cost recovery provision), a position that would allow the statute to support even broader recovery of cleanup costs. Similarly, in 2009 Ginsburg penned a dissenting opinion in *Burlington Northern*, arguing for an incredibly broad definition of "arranger" liability. She contended that if a company knew that some amount of its product (not even waste) would be spilled during transport and delivery and that it had some control over the means of such transport and delivery, the company should be considered an arranger under CERCLA and liable for a portion of the cleanup costs associated with its spilled product. While these dissents have not modified CERCLA's application, they highlight Ginsburg's desire to ensure environmental statutes lived up to the purposes for which she felt they were enacted. She also believed that "[d]issents speak to a future age … So the dissenter's hope is they are writing not for today, but for tomorrow." It will be interesting to see if there is any future shift in this direction for CERCLA as Ginsburg hoped, but so far, while CERCLA remains an incredibly broad liability-imposing and cleanup statute, it has not reached the level Ginsburg envisioned over 15 years ago.

Ginsburg's Legacy and Its Potential Impact on the Future of Environmental Law. During Ginsburg's 27-year tenure on the highest court, she issued and joined decisions that are foundational to the application of the Clean Air Act and Clean Water Act and provided support for climate change regulation and citizen groups' ability to enforce environmental laws. You can expect that the Supreme Court may be asked to revisit some of these key findings in the near future, especially with regard to the Clean Water Act and climate change; yet the court will be forced to contend with Ginsburg's environmental legacy before they can attempt to shift major tenets of environmental law.

The next time you see that lace collar, think about Ginsburg's impact on environmental law in addition to the rest of her incredible legacy.

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