

Environmental Cases to Watch in the Supreme Court

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There are a number of noteworthy environmental cases on its agenda as the Supreme Court heads into the oral arguments for the spring session. Given the new makeup of the Court, we will be watching closely because these cases present a common theme of challenges to the scope of the federal government's regulatory authority and its relationship with the states. We highlight below a few of those cases, as well as a recent petition the Court declined to hear.

County of Maui v. Hawaii Wildlife Fund

In a highly watched case involving the scope of the Clean Water Act's (CWA) jurisdiction over groundwater that acts merely as a conduit to navigable waters, the Supreme Court granted review of *County of Maui, Hawaii v. Hawaii Wildlife Fund* from the Ninth Circuit in February 2019. We [previously discussed](#) the briefing earlier this year, when the Supreme Court asked the Solicitor General for input on the matter. The Ninth Circuit's decision took a broad view of the CWA, holding that discharges subject to permitting include those that "are fairly traceable from the point source to a navigable water." *County of Maui* reached the Supreme Court amid a Circuit Court split from similar cases in the Fourth and Sixth Circuits. Earlier this year, the Sixth Circuit declined to extend federal jurisdiction over arsenic discharges through groundwater via coal ash seeps, while the Fourth Circuit determined discharges from a petroleum pipeline that reach navigable water through groundwater were subject to the CWA. The ultimate decision in *County of Maui* could have a broad and lasting effect on the respective roles of federal and state regulatory authorities in administering water quality protection programs.

Kisor v. Wilkie

While the dispute in *Kisor* does not involve an environmental program, the outcome of this case over veterans' benefits could impact environmental enforcement actions and permitting decisions by federal agencies. With oral argument set for this spring, at issue is whether the Supreme Court should overturn the judicial standard known as *Auer* deference, which directs courts to defer to an agency's reasonable interpretation of its own ambiguous regulation. Distinct from the principle of *Chevron* deference that compels courts to defer to an agency's interpretation of its own ambiguous statute, *Auer* deference upholds an agency interpretation of its own regulation,

so long as the interpretation is not plainly erroneous or inconsistent with the regulation. Critics of *Auer* deference have argued that it encourages ambiguous writing of regulations to maximize agency control over a later interpretation. Overturning *Auer* deference would likely increase judicial scrutiny of an agency's interpretation and application of its own rules under the Administrative Procedure Act, which may result in fewer final regulations that leave room for interpretation.

Atlantic Richfield v. Christian

The petition by Atlantic Richfield to hear a Montana State Supreme Court decision allowing a state common lawsuit regarding the Anaconda Smelter site to proceed is currently pending before the Supreme Court. At the state level, private landowners sued under Montana common law seeking additional restoration beyond what EPA prescribed, which Atlantic Richfield argued was in conflict with EPA's federally mandated cleanup and therefore barred by CERCLA Section 113(h). Relying on the savings clauses in CERCLA Sections 114(a) and 302(d), the Montana Supreme Court held that private landowners seeking a different remedy than selected by EPA is not a "challenge" to EPA's cleanup unless it "would stop, delay, or change the work EPA is doing," and "any restoration will be performed by the Property Owners themselves and will not seek to force the EPA to do, or refrain from doing, anything at the Site."

In its petition to the U.S. Supreme Court, Atlantic Richfield asked the Court to determine whether (1) landowners may pursue common law claims that conflict with EPA-ordered cleanups at the sites, (2) whether a landowner of a Superfund site is a responsible party that must seek EPA's approval under CERCLA § 122(e)(6) before engaging in remedial action, even if EPA has never ordered the landowner to pay for a cleanup, and (3) whether CERCLA preempts common law claims for restoration that seek cleanup remedies that conflict with EPA-ordered remedies. The Supreme Court invited the Solicitor General to weigh in with its opinion in October 2018. The case tests EPA's expert role in CERCLA cleanups and could broaden the exposure of responsible parties already performing an EPA-selected remedy.

Marquette County Road Commission v. EPA

Last week, the Supreme Court declined the petition of the Marquette County Road Commission (MCRC) to hear a Michigan case from the Sixth Circuit involving the finality of EPA's authority over wetlands permitting. In this case, MCRC sought a federal wetlands permit to construct a mining road that would require 25 acres of wetlands to be filled with material from the road construction. MCRC worked with the Michigan Department of Environmental Quality (MDEQ) to develop a permit application for EPA approval, but EPA objected to issuance of the permit on the grounds that MCRC had not provided "adequate plans to minimize impacts" or a "comprehensive mitigation plan that would sufficiently compensate for unavoidable impacts." Subsequently, MDEQ was unable to issue a permit that satisfied EPA's objections within the time provided by regulation. Frustrated with the process, MCRC declined to tender a new application for review to the U.S. Army Corp of Engineers, and instead challenged as arbitrary and capricious EPA's decision not to issue the permit. The Sixth Circuit affirmed the District Court decision that neither EPA's refusal to issue the permit nor the Army Corp's requirement that a new application be submitted were final agency actions subject to review. The rejection by the Supreme Court leaves in place a ruling that EPA's permit objections are not subject to judicial scrutiny by the courts and preserves federal discretion over wetland permitting.

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