

Environmental Cases at the Supreme Court: October Term 2020

MARCH 25, 2021

The Supreme Court's docket this term includes eight environmental cases some of which have already been decided and some of which have not yet been argued. Below we provide a brief synopsis of these cases, which are expected to be decided by June 2021. We note that one of these cases (*Biden v. Sierra Club*) has been removed from the Court's argument calendar following the change in Administration.

- *BP P.L.C. v. Mayor and City Council of Baltimore* – The underlying case involves allegations that BP and other oil companies violated the Maryland Consumer Protection Act in connection with various statements regarding fossil fuels and climate change, among other tort claims, and is just one of dozens of such cases currently pending across the country. Before the Court is the narrow question of whether 28 U.S.C. 1447(d) permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court when the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. § 1442, or the civil-rights removal statute, 28 U.S.C. § 1443. Argument was held in the case on January 19, 2021, with Justice Alito recusing himself due to his significant holdings of oil company stocks. This case has garnered significant attention from politicians, constitutional law scholars, regulated industry, and non-governmental organizations and will have broad ramifications on pending climate change litigation and federal officer removal doctrine.
- *Florida v. Georgia* – In the first of two interstate waters disputes before the Court this term, the Court will decide whether Florida is entitled to equitable apportionment of the waters of the Apalachicola-Chattahoochee-Flint River Basin and appropriate injunctive relief against Georgia to sustain an adequate flow of fresh water into the Apalachicola Region. Florida contends that Georgia's exponentially increasing use of water for irrigation has had a deleterious impact on oyster fisheries in Apalachicola Bay, while Georgia contends that requiring it to reduce its water usage would have significant negative economic impacts for Georgia, with little benefit for Florida. This is the second time the states' long-running dispute has been heard at the Supreme Court. The case was argued on February 22, 2021.
- *Guam v. U.S.* – The Navy began disposing of military and municipal waste in the Ordot Dump on Guam, including DDT and Agent Orange, in the 1940s, with the dump eventually becoming a 280-foot mountain of waste before it was closed in 2011. In a Clean Water Act enforcement action, EPA and Guam entered into a consent decree in 2004 requiring Guam to close and remediate the Ordot Dump, which is estimated to cost \$160 million. Guam brought a CERCLA 107 cost recovery case against the United States in 2017, with an alternative contribution claim under CERCLA § 113. The case presents the question of whether a non-CERCLA settlement, such as Guam's

Clean Water Act settlement, can trigger a contribution claim under CERCLA § 113(f)(3)(B), and if so, whether Guam's CERCLA claim is time-barred. If the Court agrees with the D.C. Circuit that § 113(f)(3)(B) can reach non-CERCLA settlements, then the case will turn on the specifics of Guam's 2004 consent decree with EPA. The case is set for argument on April 26, 2021.

- *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Association* – In a case involving the small refinery exemption under the Renewable Fuels Standards, the Court will decide whether, in order to qualify for a hardship exemption under 7545(o)(9)(B)(i) of the Renewable Fuel Standards, a small refinery needs to receive uninterrupted, continuous hardship exemptions for every year since 2011. This statutory interpretation case will turn on the intention of Congress in exempting certain small refineries from Renewable Fuel Standard requirements. A backdrop to this case is the Biden Administration's intention to scale back the availability of exemptions from biofuel blending requirements.
- *PennEast Pipeline Co. v. New Jersey* – In connection with a pipeline proposed to be built to transport Marcellus shale natural gas, PennEast obtained a Certificate of Conveyance from FERC. PennEast then initiated *in rem* actions to condemn properties along the pipeline route, which actions were challenged by the State of New Jersey. The Third Circuit held that the Natural Gas Act delegated eminent domain power to FERC certificate-holders but did not delegate the federal government's exemption from state sovereign immunity under the Eleventh Amendment, and therefore PennEast's condemnation actions were barred by New Jersey's sovereign immunity. The issues for the Court are (1) whether the Natural Gas Act delegates to FERC certificate-holders the authority to exercise the federal government's eminent-domain power to condemn land in which a state claims an interest; and (2) whether the U.S. Court of Appeals for the Third Circuit properly exercised jurisdiction over the case. The case is set for argument on April 28, 2021.
- *Texas v. New Mexico* – In an interstate waters dispute that dates back to the 1970s, the Court appointed a special master to address Texas's claim that New Mexico was overusing the Pecos River and delivering too little water at the border. Acting pursuant to a 1988 decree issued in the case, Pecos River Master determined how the states should bear evaporation losses related to the storage of water from Tropical Storm Odile in 2014. In a 7-1 decision written by Justice Kavanaugh issued on December 14, 2020, the Court upheld the Pecos River Master's determination, with Justice Alito concurring in part and dissenting in part, and Justice Barrett not participating in the case, which was argued prior to her confirmation.
- *Trump v. Sierra Club* (now *Biden v. Sierra Club*) – In a dispute over funding for former President Trump's border wall, the Sierra Club alleged, among other things, that the wall would have adverse environmental impacts. The case had been set for oral argument on February 22, 2021, but following the election, President Biden's Acting Solicitor General, Elizabeth Prelogar, asked the Court to remove the case from the argument calendar, after President Biden barred the use of taxpayer funds to build the wall and directed the federal government to stop construction. The Court granted the motion on February 3, 2021, and briefing for the case, which has not yet been completed, is currently being held in abeyance. Given the policy changes with the Biden Administration, the case appears to be moot.
- *U.S. Fish and Wildlife Service v. Sierra Club* – The Sierra Club's second case before the Court this term centers around Freedom of Information Act (FOIA) requests for draft biological opinions prepared pursuant to Section 7 of the Endangered Species Act in connection with EPA's rulemakings under Section 316(b) of the Clean Water Act concerning cooling water intake structures at existing industrial facilities. In Justice Barrett's first majority opinion since joining the Court, the Court held that the deliberative process privilege protects from disclosure under FOIA in-house draft biological opinions that are both pre-decisional and deliberative. Justices Breyer issued a dissenting opinion, which Justice Sotomayor joined.

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