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BLOG

Environmental Cases at the Supreme Court: October Term 2020

JULY 15, 2021

During the recently concluded October Term 2020, the Supreme Court decided a number of cases significant to environmental practitioners. Several of the Court's decisions may have far-reaching implications. Below we provide a brief synopsis of each decision.

Biden v. Sierra Club

In a dispute over funding for President Trump's border wall, the Sierra Club alleged, among other things, that the wall would have adverse environmental impacts. The U.S. District Court for the Northern District of California held that it was unlawful for President Trump to use his emergency powers to divert billions of dollars in military construction funds to finance the border wall. The Ninth Circuit affirmed the district court's decision, and the Trump administration sought review by the Supreme Court. The case had been set for oral argument on February 22, 2021.

After his inauguration, President Biden barred the use of certain funds to build the wall and directed the federal government to stop construction. Acting Solicitor General Elizabeth Prelogar then asked the Court to remove the case from the argument calendar. The Court granted the motion on February 3, 2021. The Acting Solicitor General then filed a motion to vacate and remand on June 11, 2021, on the basis that the underlying controversy no longer exists. On July 2, 2021, the Court granted the motion to vacate and remanded the case to the U.S. Court of Appeals for the Ninth Circuit, with instructions to direct the District Court to vacate its judgments.

BP P.L.C. v. Mayor and City Council of Baltimore

The underlying case involves allegations by the City of Baltimore 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. This is just one of more than a dozen such cases currently pending across the country. The city filed its lawsuit in Maryland state court, but the defendants removed the case to federal district court. Defendants argued, among other things, that removal was appropriate under the federal officer removal statute. The district court later remanded the case back to Maryland state court, which the defendants appealed. The U.S. Court of Appeals for the Fourth Circuit held it could review only whether removal was appropriate under the federal office removal statute. Under that statute, the Fourth Circuit held removal was not appropriate.

Before the Court was 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. On May 17, 2021, the Court held that when a remand order is appealable under 28 U.S.C. § 1447(d). Therefore, the court of appeals may review the *entire* remand order, not just the grounds for removal giving rise to the order's appealability. The Court then remanded the case to the Fourth Circuit to consider the merits of the defendants' removal arguments.

Justice Gorsuch delivered the opinion of the Court, in which Chief Justice Roberts and Justices Thomas, Breyer, Kagan, Kavanaugh, and Barrett joined. Justice Alito took no part in the decision due to his significant holdings of oil company stocks. Justice Sotomayor dissented and would have upheld the Fourth Circuit's decision.

The Court's decision now gives the defendants another opportunity to sustain removal of the case to federal court. The Court's decision has ramifications on the other climate change tort lawsuits brought against oil companies by states and municipalities that are bouncing between state and federal courts nationwide. With the expanded basis for appellate review of orders remanding previously removed cases back to federal court, these cases may be further delayed pending the outcome of venue litigation. Defendants hope that the circuit courts will find at least one basis for federal jurisdiction with the scope of appellate review now broadened, which could then lead to a dismissal of the cases under federal law.

Meanwhile, litigation in similar state law climate change cases asserted by states and municipalities against the oil industry remains ongoing. , In *Chevron v. City of Oakland*, the U.S. Court of Appeals for the Ninth Circuit reversed a district court's denial of remand the case to state court. On June 14, 2021, the Supreme Court refused to review the reversal without commenting on the merits of the case. And in *City of New York v. Chevron*, the U.S. Court of Appeals for the Second Circuit held on April 1, 2021 that climate change presents a "uniquely international problem of national concern" and thus are "not well suited to the application of state law." The Second Circuit found that federal common law displaced City's state-law public nuisance, private nuisance, and trespass claims, and that the federal common law was in turb displaced by the Clean Air Act. The Second Circuit therefore affirmed the dismissal of the case.

Cedar Point Nursery v. Hassid

On June 23, 2021, the Supreme Court decided *Cedar Point Nursery v. Hassid*, an employment case which has broad implications for property rights. This case involved a California regulation that requires employers to allow union organizers to enter their property to solicit members. In a 6-3 ruling, the Court stood with property owners and held the unwanted intrusions constituted a "taking" under the Takings Clause of the Fifth Amendment. The ruling affirmed that the government cannot force landowners to allow third parties to enter on their property without just compensation.

The central issue in *Cedar Point Nursery* was the constitutionality of a California "access regulation." That required farm owners to allow union organizers to access their property in order to "solicit support for unionization." The regulation provides that union organizers can access an employer's property for up to three hours a day on 120 days per year. The farmers claimed the regulation amounted to the government taking their property without compensation, which is a violation of the Fifth Amendment.

Chief Justice John Roberts, writing for the majority, explained that allowing unions to freely come onto privately held land was a violation of property owners' constitutional rights, even if unions "only" had fleeting access to the land. The Fifth Amendment prohibits property from being "taken for public use, without just compensation." The Court ruled that the California access regulation is a taking because it forces farmers to give union organizers physical access to their property. The Court explained that any regulation that physically "invades" a person's property automatically counts as a taking;, however, the opinion distinguished regulatory inspections to protect health and safety overseen by state workers.

Although this case involved a unique California law on labor organizing, the logic of the Supreme Court's decision could apply to other situations. A law that grants third parties a right to physically enter into or use the property of a private landowner may be challenged as requiring payment of just compensation.

Florida v. Georgia

In the first of two interstate waters disputes before the Court this term, the Court was asked to address whether

Florida was entitled to equitable apportionment of the waters of the Apalachicola-Chattahoochee-Flint River Basin and provide injunctive relief against Georgia to sustain an adequate flow of fresh water into the Apalachicola Region. Florida contended that Georgia's exponentially increasing use of water for irrigation has had a deleterious impact on oyster fisheries in Apalachicola Bay. Georgia argued that reducing its water usage would have significant negative economic impacts for Georgia, with little benefit for Florida.

On April 1, 2021, the Court dismissed the case in a unanimous opinion. The Court held that Florida failed to establish by clear and convincing evidence that Georgia's alleged overconsumption of water caused the destruction of oyster fisheries in Apalachicola Bay or harmed the Apalachicola River ecosystem. In an opinion by Justice Barrett, the Court reasoned that based on expert testimony, a prolonged drought and overharvesting of the fisheries caused their collapse. Georgia's consumption of water played only a trivial role at most. The Court also held that Florida did not proffer sufficient evidence of actual or threatened harm to species in the Apalachicola River. The Court's dismissal of the case brings the long-running litigation to an end, although Florida may file a new equitable apportionment suit against Georgia in the future if circumstances change.

Guam v. U.S.

The dispute between Guam and the United States under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) has roots that date back to the Spanish-American War, when the United States acquired Guam in 1898 under the Treaty of Paris. The United States then placed Guam under control of the Navy, which treated it as a ship—the "USS Guam"—and governed it under military rule. Aside from the period between December 1941 and July 1944 when the Japanese military occupied the island during WWII, the Navy exercised exclusive control over Guam until Congress passed the Organic Act of Guam in 1950. The Organic Act transferred power from the military to a civilian government and granted U.S. citizenship to Guam's residents. Today, Guam remains an unincorporated territory of the United States and is home to a Naval base and an Air Force base, with a Marine Corps base under construction.

The Navy allegedly began disposing of military and municipal waste in the Ordot Dump on Guam, including DDT and Agent Orange, in the 1940s. The dump was transferred to the local government in 1950, but Guam alleges the military continued to dump waste there until the 1970s. The municipal dump eventually became 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 question presented for the Court was 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.

The U.S. Court of Appeals for the D.C. Circuit held that § 113(f)(3)(B) can reach non-CERCLA settlements. The Clean Water Act consent decree therefore triggered Guam's right to pursue a contribution action under § 113(f)(3)(B). Because more than 3 years has passed since the entry of the consent decree, the D.C. Circuit held that Guam's claim was time-barred.

On May 24, 2021, the Supreme Court unanimously reversed the D.C. Circuit's decision and remanded the case for further proceedings. The Court held that a settlement of environmental liabilities must resolve a CERCLA-specific liability to give rise to a contribution action under CERCLA § 113(f)(3)(B). Because the liability at issue stemmed from the settlement of a Clean Water Act enforcement action rather than a CERCLA claim, the Court held that the Clean Water Act consent decree did not trigger Guam's contribution claim. As a result of the Court's decision, Guam will be able to pursue a cost recovery claim against the United States for costs related to the cleanup of the Ordot Dump under CERCLA § 107(a).

HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Association

The Clean Air Act's Renewable Fuel Program requires most domestic refineries to blend a certain amount of ethanol and other renewable fuels into the transportation fuels they produce. The Clean Air Act initially provided a temporary exemption from the mandate to comply with Renewable Fuels Program obligations for all small refineries through 2010. It then provided for small refineries to seek to extend this exemption where compliance would pose "a disproportionate economic hardship" on a given small refinery. EPA has granted these hardship exemptions to

certain small refineries every year since 2010, with some small refineries receiving exemptions in some years, yet not in others.

The underlying litigation was brought by a group of renewable fuel producers against a group of small refineries, seeking to invalidate the exemptions they received from EPA. The renewable fuels producers argued that the small refineries exemptions had lapses for a period of years, and so these small refiners were statutorily ineligible to have exemptions extended from EPA in 2017 or 2018. The question presented for the Supreme Court's review was whether a small refinery must continuously demonstrate an inability to comply with renewable fuel mandates and receive hardship exemptions in order to receive such an extension in any future year. On June 25, 2021, the Court held in a 6-3 decision that a small refinery that previously received a hardship exemption may obtain an extension under 42 U.S.C. § 7545(o)(9)(B)(i), even if it saw a lapse in exemption coverage in a previous year.

In a majority opinion by Justice Gorsuch, the Court reasoned that in the absence of a statutory definition or clear indicia of legislative intent as to the word "extension," the Court could only rely on the statute's text. Gorsuch wrote that it is "entirely natural" and "consistent with ordinary usage" to seek an "extension" even after a deadline has lapsed. Justice Gorsuch likened the small refineries to a forgetful student who asks for an extension on a term paper after the deadline. He referenced several examples in federal law where individuals may obtain extensions even after a deadline has passed. Justice Barrett dissented, joined by Justices Kagan and Sotomayor. She reasoned that the more natural reading of the word "extension" requires continuity. As an example, Justice Barrett noted that it would make little sense to "extend" a newspaper subscription years after letting it lapse; this would be a renewal.

This decision preserves the small refinery exemption component of the Renewable Fuel Program. Under the Tenth Circuit's reasoning, the program otherwise would have been limited to the small number of applicants who have continuously received hardship exemptions since 2010. It is significant, however, that EPA and the Acting Solicitor General flipped the legal position of the United States after the change in administration. While the *HollyFrontier* decision means that EPA still has discretion to grant small refinery exemptions, EPA may be less willing to do so in the future.

PennEast Pipeline Co. v. New Jersey

PennEast Pipeline Co. plans to build a 116-mile pipeline that would bring Marcellus shale natural gas from northeastern Pennsylvania to western New Jersey. After receiving a certificate of public convenience and necessity from the Federal Energy Regulatory Commission (FERC), PennEast initiated various actions in New Jersey federal court under § 717f(h) of the Natural Gas Act. These sought to condemn properties along the pipeline route, including parcels of land in which New Jersey asserts a property interest. New Jersey moved to dismiss the condemnation actions on sovereign immunity grounds. The district court denied the motion and granted PennEast's requests for a condemnation order and preliminary injunctive relief. The U.S. Court of Appeals for the Third Circuit reversed. It concluded that because § 717f(h) did not clearly delegate to certificate holders the federal government's ability to sue nonconsenting states, PennEast was not authorized to condemn New Jersey's property.

In a 5-4 decision by Chief Justice Roberts issued on June 29, 2021, the Court held that § 717f(h) authorizes FERC certificate holders to condemn all necessary rights-of-way, whether owned by private parties or States. "Although nonconsenting States are generally immune from suit, they surrendered their immunity from the exercise of the federal eminent domain power when they ratified the Constitution," Roberts wrote. "That power carries with it the ability to condemn property in court. Because the Natural Gas Act delegates the federal eminent domain power to private parties, those parties can initiate condemnation proceedings, including against state-owned property."

Justices Breyer, Alito, Sotomayor and Kavanaugh joined Roberts' majority opinion. Justice Gorsuch filed a dissent that was joined by Justice Thomas. Justice Barrett filed a separate dissent that was joined by Thomas, Gorsuch and Justice Kagan. Following the Court's decision, challenges filed by New Jersey and others in the U.S. Court of Appeals for the D.C. Circuit against the FERC order will now proceed. Those were held in abeyance pending the Supreme Court's decision.

Texas v. New Mexico

In an interstate waters dispute that dates back to the 1970s, the Supreme 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. The Court held that New Mexico is entitled to a delivery credit for evaporated water stored at the request of a Texas official. Justice Alito concurred in part and dissenting in part. Justice Barrett did not participate in the case, which was argued prior to her confirmation.

U.S. Fish and Wildlife Service v. Sierra Club
The Sierra Club's second case before the Court this term centered around the Freedom of Information Act (FOIA). Plaintiffs requested 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. This rule concerned cooling water intake structures at existing industrial facilities. The case presented the question of whether the government's statutory deliberative process privilege allows it to withhold FIOA-requested documents drafted and exchanged, but not yet approved as final by agency officials, during an interagency consultation process between the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the EPA.

In Justice Barrett's first majority opinion since joining the Court, the Court held that the deliberative process privilege protects in-house draft biological opinions from disclosure under FOIA that are both pre-decisional and deliberative. Justices Breyer issued a dissenting opinion, which Justice Sotomayor joined.

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