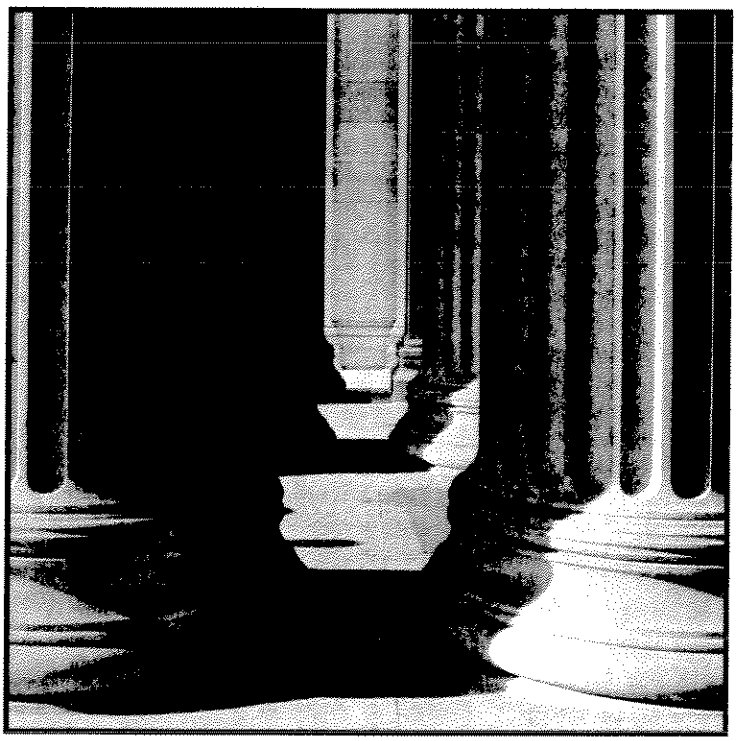
Supreme Court preview

By Channing J. Martin

The 2007–08 term of the U.S. Supreme Court was a bust for environmental law. The Court did not decide a single, significant environmental case. The 2008–09 term, however, is different. The Court's docket includes at least five important environmental cases. These cases include a range of issues under the Clean Water Act (CWA), the National Environmental Policy Act (NEPA), regulations promulgated by the U.S. Forest Service (Forest Service), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Petitions for certiorari are pending in three other environmental cases, meaning this term is likely to produce a cornucopia of environmental case law.



The first two cases heard this fall were—ironically—*Summers* and *Winter*. Both cases were argued on Oct. 8. In *Summers v. Earth Island Institute*, No. 07-463, the marquee issue is the circumstances under which a regulation can be challenged under the Administrative Procedure Act (APA). The case arose when the Forest Service issued regulations establishing categorical exclusions from NEPA for certain fire rehabilitation activities and salvage timber sales. The regulations excluded projects subject to those exclusions from notice, comment, and appeal procedures. The Forest Service then applied the regulations to the Burnt Ridge Project in California and determined that its decision approving the sale of fire-damaged timber from the project was not subject to appeal. Earth Island and others filed suit challenging the legality of the project and alleging that the regulations were contrary to the governing statute. The Forest Service then withdrew the project, and the parties signed a settlement agreement resolving all claims applicable to the project. Plaintiffs then pursued the remaining counts of the complaint as a facial challenge to the regulations themselves.

The district court sided with plaintiffs. It found the underlying statute clearly required the Forest Service to provide public participation and appeal rights under the regulations. The court invalidated five of the challenged regulations and upheld four of them. It also issued a nationwide injunction against enforcement of the invalidated regulations.

On appeal, the Ninth Circuit held that only the challenge concerning the two regulations applied in the context of the Burnt Ridge Project was ripe for judicial decision. *See Earth Island Institute v. Ruthenbeck*, 490 F.3d 687 (9th Cir. 2007). It said the challenge to the other regulations was not ripe because the regulations' effects were speculative and the record was incomplete. The court then found that even though the dispute concerning the project had been settled, it still had jurisdiction to consider the challenge to the two regulations. It affirmed the district court's decision, including issuance of the nationwide injunction, and the Forest Service appealed.

Interestingly, the solicitor general did not contend on appeal that the Ninth Circuit erred in invalidating the regulations. Instead, he argued that by decoupling the challenge to the regulations from the challenge to the project, the Ninth Circuit's decision will bring about "dramatic changes in the timing, context and venue for challenges to administrative action under the APA, as well as a dramatic expansion of the relief that may be awarded in a successful suit." *Opening Br.* at 14. Calling the Ninth Circuit's conclusions "mystifying," the solicitor general argued that the challenge was initially justiciable only because the project provided a reviewable "agency action." He said the project, including application of the regulations to the project, was the reviewable agency action, not promulgation of the regulations themselves. He argued that once the project was withdrawn, there was no longer any agency action capable of being reviewed. Respondents contended otherwise.

A second issue in the case is whether plaintiffs had standing. The Ninth Circuit held plaintiffs had representational standing because a member alleged his enjoyment of the national forests could be diminished by his preclusion from the appeals process. The solicitor general disputed that the "procedural injury" alleged by plaintiffs provides an adequate basis for standing.

Finally, the propriety of issuing a nationwide injunction against enforcement of the regulations is at issue. The Ninth Circuit held that issuance of a nationwide injunction was "compelled by the text" of the APA once the regulation was found to be invalid. 490 F.3d at 696. The solicitor general disagreed and argued that entry of nationwide injunctions in this and similar cases prevents the government from relitigating disputed legal issues in different circuits. That, he said, impedes the usual process by which the law is developed by circuit courts and then resolved by the Supreme Court.

Of all the environmental cases this term, *Summers* is perhaps the most important. The Supreme Court's decision could impact

the circumstances under which APA challenges are ripe for adjudication and affect the ability of industry and public interest groups alike to obtain pre-enforcement review of environmental regulations. It could also limit the authority of lower courts to issue nationwide injunctions enjoining the enforcement of invalidated regulations.

In *Winter v. Natural Res. Def. Council, Inc.*, No. 07-1239, another case decided by the Ninth Circuit, the issue is whether national security trumps marine mammal protection. There, the Navy sought to use sonar in training exercises without complying with NEPA. Plaintiffs sought an injunction on the grounds that the Navy's action would cause serious harm to marine mammals. After the district court granted a preliminary injunction, the Council on Environmental Quality (CEQ) construed its own regulations and determined that "emergency circumstances" existed to warrant the Navy's use of sonar without complying with NEPA. The Navy then sought vacatur of the injunction, but the district court denied the motion, finding that CEQ's conclusion was not entitled to deference and that the words "emergency circumstances" under the regulations did not encompass the situation at hand. The Ninth Circuit affirmed. It found the Navy's "emergency" was simply a creature of its own making by failing to prepare adequate environmental documentation in a timely manner. *See Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658 (9th Cir. 2008). The issue on appeal is whether CEQ permissibly construed its own regulations in finding "emergency circumstances."

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A second issue is whether the lower courts had authority under established equitable principles to issue the injunction. The solicitor general argued that courts of equity cannot, in their discretion, reject the balance formulated by Congress in creating specific exemptions to NEPA. He said the exemption at issue gives the executive branch authority to subordinate potential harm to marine mammals to the need for military readiness, and courts cannot substitute their judgment for the reasoned judgment of Congress.

The two CWA cases before the Court focus more on substantive law than procedural issues. In *Coeur Alaska, Inc. v. Southeast Alaska Conser. Council*, No. 07-984—yet another case from the Ninth Circuit—the issue is whether Section 404 of the act trumps Section 402. The U.S. Army Corps of Engineers (Corps) in that case issued a Section 404 permit authorizing Coeur Alaska to discharge into a lake process wastewater containing mine tailings from its froth-flotation mill. Because the tailings in the discharge were projected to raise the bottom elevation of the lake by 50 feet, the Corps found the discharge met the regulatory definition of "fill material" and was properly authorized under a Section 404 permit.

Plaintiffs sued the Corps and argued the permit should not have been issued because Section 404 applies only to the discharge of dredged or fill material, not to industrial pollutants. Instead, they said any such discharge had to be authorized by a National Pollutant Discharge Elimination System (NPDES) permit issued by the Environmental Protection Agency (EPA) under Section 402. Plaintiffs also said that no NPDES permit could be issued here because (i) discharges under NPDES permits cannot be authorized unless the discharges comply with CWA Sections 301 and 306, and (ii) an existing EPA performance standard promulgated under Sections 301 and 306 prohibits discharges from froth-flotation mills to waters of the United States. The district court rejected plaintiffs' arguments and upheld issuance of the permit.

The Ninth Circuit reversed and remanded. *See Southeast Alaska Conser. Council v. Army Corps of Eng'rs*, 486 F.3d 638 (9th Cir. 2007). It held the Corps could not issue a Section 404 permit if the fill material is also subject to a Section 301 or 306 effluent limitation. It found the CWA prohibits *any* discharge that does not comply with Sections 301 and 306 and that "[n]either § 301 nor § 306 contains any exception for discharges that would otherwise qualify for regulation under § 404." *Id.* at 646. The issue on appeal is whether the Ninth Circuit erred in ruling the Corps had no authority to issue a Section 404 permit.

The fourth case on the docket is *Entergy Corporation v. EPA*, No. 07-588. The case appears to present an issue important only to the utility industry, but the implications of the Supreme Court's decision could be far reaching. The case centers on CWA regulations applicable to cooling water intake structures at large, existing power plants. The regulations require that these structures be retrofitted with the "best technology available for minimizing adverse environmental impact" to fish and other aquatic organisms, and they specify the technologies that meet this standard. Riverkeeper and other environmental organizations challenged the regulations, contending that EPA had impermissibility used a benefit-cost analysis in determining acceptable technologies. These groups argued the language of Section 316(b) of the CWA required a technology-driven result, regardless of cost considerations.

The Second Circuit found that EPA impermissibly used benefit-cost analysis in promulgating the regulations. *See Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d Cir. 2007). It found that cost can be considered by EPA under Section 316(b) only to determine what technology can be "reasonably borne" by industry and to choose a less expensive technology that achieves essentially the same result as the benchmark technology. *Id.* at 99–100.

Three questions were presented to the Supreme Court in the petitions for certiorari, but the Court will hear only one. That question is whether EPA did, in fact, have authority under Section 316(b) to compare costs with benefits in determining the "best technology available." Although the Supreme Court's decision will be applicable only to the regulations at issue, it's a safe bet many will view it as a harbinger of how the Court will decide similar cost-benefit arguments under other environmental statutes.

The fifth case is *Burlington Northern and Santa Fe Railway Co. v. United States*, No. 07-1601. There, the Ninth Circuit reversed a lower court ruling apportioning CERCLA response costs among liable parties and instead imposed joint and several liability. The issue before the Supreme Court is under what circumstances CERCLA response costs may be apportioned.

Trends will publish a *Supreme Court Wrap-Up* next summer to let you know how these cases were decided.

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