By Richard Lazarus

40 Years Without Scoring a Win

My first essay in this space, published 15 years ago this spring, had a title that could be used again for this column: “A Lean Green Docket This Term.” Then, as now, the Supreme Court followed up a term that was marked by a disproportionately large number of environmental cases with a term with almost none. On April 27, the second to last oral argument day, the Court will have heard argument in Monsanto v. Geertson Seed Farms, which is the one and only classic “environmental law” case that the Court will be hearing during the entire term. (Disclosure: I am serving as co-counsel for the environmental respondents.)

At issue in Monsanto is the award of a permanent injunction based on a violation of the National Environmental Policy Act. Greens, led by the Center for Food Safety, challenged the federal Animal Plant Health and Inspection Service’s decision to deregulate genetically altered alfalfa seeds without first preparing an environmental impact statement. The district court agreed that the federal agency had violated NEPA, and both vacated APHIS’s decision and issued a permanent injunction. Neither the federal agency nor industry appealed the merits of the NEPA ruling or the vacatur, and instead challenged only the validity of the permanent injunction.

If history were to repeat itself in Monsanto, there is not much doubt where Las Vegas oddsmakers would be establishing the betting lines. The Supreme Court has previously decided 16 NEPA cases on the merits since President Richard Nixon signed the law 40 years ago. Environmentalists have been the respondents in each of those cases, having won in the lower courts, and therefore they had everything to lose in the High Court. And, that is precisely what has happened. They have lost all 16 cases. And, adding insult to injury, environmentalists did not receive the vote of a single justice between 1976, when the Court decided Kleppe v. Sierra Club, and November 2008, when the Court decided Winter v. Natural Resources Defense Council.

Now, that’s quite a streak. It reminds me of the Uni High School basketball team’s losing streak of 96 games between February 1974 and November 1979—a streak that I prefer not to recollect because I was not good enough to play on the Uni team. But even Uni High did not lose all those games without scoring a single basket.

Nor does the appellate court of origin, standing alone, suggest a different outcome. The Monsanto case hails from the Ninth Circuit, and the Supreme Court in recent decades has seemed almost to take extra pleasure at reversing Ninth Circuit rulings favorable to environmentalists. Making matters even worse, the environmental respondents in Monsanto will not have the potential support of Justice Stephen Breyer, who while on the First Circuit wrote favorably about the availability of injunctive relief for NEPA violations. Justice Breyer is not participating in the case because his brother, Charles Breyer, was the district court judge who ruled in favor of the environmental plaintiffs and awarded them permanent injunctive relief.

Differences between the Monsanto case and prior High Court NEPA cases, however, offer the possibility of a different outcome this time. First, one reason given for the federal government’s perfect record in NEPA cases is the care that the solicitor general has taken to seek Supreme Court review only in cases that are not only important, but also winnable. In Monsanto, however, the SG did not seek certiorari on behalf of the federal agency, which had lost below. Industry intervenors filed the only cert petition, which the government opposed. To be sure, the SG agreed with industry intervenors that the lower courts had erred, and now joins industry in the briefing on the merits. But the federal government’s opposition at the jurisdictional stage may also say something about its views of the strength of petitioners’ legal arguments.

Another advantage enjoyed by environmental respondents in Monsanto is expert Supreme Court counsel (present company excluded). The environmental respondents retained as pro bono counsel for the preparation of the merits brief and the presentation of oral argument Larry Robbins, who is the lead partner of a small D.C. boutique law firm that specializes in appellate and Supreme Court advocacy. As I have reported in prior columns, the federal government has long enjoyed the advantage of being represented in the Court by the SG, and industry has in recent years increasingly retained expert private sector counsel to their significant advantage in environmental cases. In Monsanto, the playing field will be evened some.

The Court will likely decide the case during the final weeks in June, just before recessing for the summer. Then we will learn whether environmentalists lose No. 17 or instead make history.

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