



By Richard Lazarus

## Environment on the Docket Again

After essentially taking a year off, the Supreme Court is poised to be back in the environmental law business when the Court commences its 2008–09 term next fall. The 2007–08 term must have been a record of sorts. The Court did not hear even one significant environmental case. The sole arguable exception was *Exxon Shipping Co. v. Baker*, arising out of the *Exxon Valdez* oil spill. Exxon's challenge to the multi-billion dollar judgment in that case included a claim that the Clean Water Act precluded any such award based on federal maritime law. But that federal maritime law preemption issue is fairly far afield from the traditional fare of environmental lawyers.

The 2008–09 term is likely to prove quite different. The Court has already agreed to hear two potentially significant cases, and there are several more that are fully served up for the Court's consideration whether to grant review before adjourning for the summer.

The first, *Summers v. Earth Island Institute*, should have environmentalists on high alert. At the solicitor general's instigation, the Court has agreed to review the Ninth Circuit's affirmation of a nationwide injunction issued by a district court against the Forest Service's enforcement of regulations purporting to implement the Forest Service Decisionmaking and Appeals Reform Act. Ironically, the case is important precisely

because the SG is not contesting before the Court the lower courts' conclusion that the regulations are invalid.

The SG's exclusive claims are that the lower courts lacked jurisdiction to decide the case on the merits and then compounded that error by exceeding their equitable authority with the issuance of a nationwide injunction. In support, the SG proffers a narrow reading of the meaning of "agency action" in the judicial review provisions of the Administrative Procedure Act, a limited view of the kind of "procedural injury" capable of satisfying Article III standing requirements, and a sweeping condemnation of the existing practice of lower courts in issuing nationwide injunctions against regulations they deem invalid. Were the SG to prevail on one or a combination of these theories, environmental groups and some business concerns would be sharply limited in their ability both to obtain pre-enforcement review of agency regulations and to secure the nationwide injunctions that each has enjoyed in past successful challenges to environmental regulations.

The issue in the second case, *Entergy v. Riverkeeper*, would likely strike even the most hardy of environmental lawyers as obscure, but that apparent obscurity masks an inquiry central to environmental lawmaking. (Disclosure: I am serving as counsel for the environmental respondents in this case). The question formally posed by the Court itself in granting industry petitions for certiorari in *Entergy* is whether Section 316(b) of the Clean Water Act "authorizes EPA to compare costs with benefits in determining 'the best technology available for minimizing adverse environmental impact' at cooling water intake structures."

Cooling water intake structures are the facilities that provide cooling water to industrial facilities, especially power plants. A single facility can literally use billions of gallons of water per day, effectively wiping out most

aquatic organisms within those circulating waters. The Second Circuit ruled that Congress had not authorized EPA in Section 316(b) to decide that the amount of environmental protection should be reduced because the costs of protection exceeded the benefits either on a categorical basis or as applied to a particular facility.

The Supreme Court's decision in *Entergy* will be practically significant on its own terms, simply because of the ecological reach of cooling water intake structures throughout the nation. But it is the broader question concerning the role of cost-benefit analysis and the extent to which Congress authorized EPA to set environmental standards on such a basis that is most likely to attract the greatest interest. What the Court says in the context of Section 316(b) could have ramifications for other areas of environmental law.

Finally, there are several significant pending petitions for writs of certiorari that the Court will grant or deny before adjourning for its summer recess. Two cases with especially good odds are *Winter v. Natural Resources Defense Council, Inc.* and *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*.

In the former, the SG seeks review of the Ninth Circuit's enjoining the Navy from using sonar in training exercises in violation of NEPA. In the latter, the question presented concerns the extent to which EPA regulation of a discharging activity under the Clean Water Act displaces the permitting authority of the Army Corps of Engineers pursuant to that same act over the discharge of dredged or fill material. Although the SG nominally opposes review in the second case, its "opposition" makes clear that it will support petitioners on the merits should review be granted.

Could be a busy term.

**Richard Lazarus** is on the law faculty of Georgetown University. He can be reached at [lazarusr@law.georgetown.edu](mailto:lazarusr@law.georgetown.edu).

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