Two Very, Very Big Losses For Greens

With the Supreme Court's unanimous rulings in Department of Transportation v. Public Citizen and Norton v. Southern Utah Wilderness Alliance, both decided in June, the solicitor general has extended his perfect record in National Environmental Policy Act cases in the High Court. They were environmental plaintiffs' 13th and 14th NEPA losses.

Public Citizen is the more significant NEPA decision. Justice Thomas's opinion for the Court ruled that the Federal Motor Carrier Safety Administration had not violated NEPA in promulgating safety regulations applicable to entry into the United States of Mexican trucks. The FMCSA promulgated the regulations after the president lifted a moratorium that categorically excluded the carriers from cross-border operations and Congress passed a bill providing that the moratorium could not be lifted until after the FMCSA issued safety regulations. The Ninth Circuit had ruled that the agency erred by failing to consider the environmental effects of the increased traffic from Mexico and by confining its environmental assessment instead only to those emissions increases that might result during the times Mexican trucks were stopped for safety inspections.

Much of the Court's opinion reversing the Ninth Circuit is unremarkable and appears to be little more than a case-specific application of the settled notion that agencies need not undertake environmental impact statements regarding agency actions over which they lack any substantive decisionmaking discretion. Courts have for years ruled that if Congress expressly instructs an agency precisely where, when, and how to undertake a particular activity, then that same agency need not prepare an EIS on that activity. Applying this principle in Public Citizen, the Court concluded that the "critical feature" of the case, overlooked by the Ninth Circuit, was that "FMCSA has no ability to countermand the president's lifting of the moratorium or otherwise categorically to exclude Mexican motor carriers from operating within the United States."

The soft tissue in the Court's reasoning is that it was only able to conclude that the agency lacked any relevant rulemaking discretion that might trigger a broader NEPA analysis by relying on plaintiffs' apparent procedural misstep. The Court ruled that because plaintiffs had failed in their comments on the rulemaking to identify possible alternative rules "that would mitigate the environmental impact of the authorization of cross-border operations by Mexican motor carriers," they had "forfeited any objection" to the FMCSA's analysis on that ground. Of course, that same procedural quirk offers a potential basis for the lower federal courts to read Public Citizen quite narrowly.

The Court's opinion is susceptible, however, to a far more unsettling reading. In particular, the decision could undermine two longstanding, central tenets of NEPA law. First, a federal agency's responsibility under NEPA to consider the environmental consequences of its proposed action is not limited to instances when it statutorily provided decisionmaking criteria already extend to environmental factors. Second, NEPA does not exclude from the scope of an agency's NEPA analysis the environmental consequences of actions independently taken by third parties other than the agency itself where those third party actions were reasonably foreseeable and proximate consequences of the agency's proposed action.

In Southern Utah Wilderness Alliance, Justice Scalia's unanimous opinion makes short shrift of the environmentalists' claim that BLM violated NEPA by failing to prepare a supplemental environmental impact statement in light of new information that the amount of offroad vehicle use in wilderness study areas is far greater than contemplated when the original impact statement was prepared. The Court ruled that such NEPA supplementation is required only when there is ongoing federal agency action. Here, the Court found, the relevant agency action that triggered NEPA at the outset was the preparation of a land use plan, which was now completed. The Court's ruling ignored an amicus brief filed on behalf of every former chair and general counsel of the Council on Environmental Quality, now living, which urged the Court to construe NEPA differently.

Remarkably, however, the Court's discussion of NEPA in both Public Citizen and Southern Utah may well be the least significant aspects of its rulings. Also at issue in Public Citizen was the reach of the Clean Air Act's so-called conformity requirement, established in Section 176(c)(1), which provides that a federal agency may not "support in any way... any activity" that violates an air quality state implementation plan. Reversing the Ninth Circuit, the Court endorsed a narrow reading of Section 176(c)(1), which could limit the reach of a mandate environmentalists had been increasingly relying on in recent years to influence federal transportation planning.

But the most sweeping ruling of all is likely the Court's decision in Southern Utah that environmentalists cannot obtain judicial review of their claims that a federal agency is failing to take action to comply either with a statutory mandate to not impair wilderness study areas or with a specific land use plan requirement. According to the Court, "general deficiencies in compliance... lack the specificity required for agency action" and "a land use plan is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them."

The practical effect may be to insulate from meaningful judicial review federal agency failures to take legally mandated actions necessary to protect the natural environment.

All in all, two big wins for executive officials seeking to immunize themselves from judicial oversight. For environmentalists, however, two very, very big losses.

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