CASE COMMENTS: U.S. SUPREME COURT ENVIRONMENTAL CASES, OCTOBER 2003 TERM

Introduction

Though it remains relatively young, environmental law is not the revolutionary field it was when the core U.S. environmental statutes were adopted in the 1970s. Richard Lazarus has commented that as the field enters its fourth decade, environmental law is "beginning to lose some of its color and its passion."[1] The Congress of 2004 seems exceedingly unlikely to add substantially to our basic corpus of environmental law. If history is any guide, opponents of environmental regulation are equally unlikely to succeed in diluting the foundational American environmental statutes in any significant way.[2]

Despite this relative stasis, nearly ten percent of the docket of the October 2003 term in the U.S. Supreme Court was occupied by environmental cases with important implications both within the field and beyond. The case comments that follow describe and analyze seven of these eight cases.[3] As this issue goes to print, three of these seven remain undecided; the authors of these three case comments have outlined the disputes at issue and discussed the implications of alternative outcomes that may arise.

The cases include two Clean Air Act disputes, *Alaska Department of Environmental Conservation v. E.P.A.* and *Engine Manufacturers Assoc. v. South Coast Air Quality Management District*. These two CAA conflicts share a focus on the rights and powers of the states under the CAA's cooperative federalism regime. Perhaps surprisingly given the make-up of the current Court, both cases were resolved in favor of the federal interest at stake and against the states.

South Florida Water Management District v. Miccosukee Tribe of Indians is a Clean Water Act dispute, but because it pits an Indian tribe against a suburban water management agency, the case has interesting overtones of environmental justice. *Miccosukee* also resolves an important statutory question about the CWA. The essentially unanimous Court found in favor of the tribe, holding that pumping dirty water from one

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[1] Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law*, 20 Va. Envtl. L.J. 75, 105 (2001)

[2] *Id.* at 95 (discussing the failure between 1970 and 2000 of three major political efforts to dismantle environmental law).

[3] The eighth case is *Virginia v. Maryland*, 124 S.Ct. 1127 (2004), which found that Virginia has the right to draw water from the Potomac River. *Virginia v. Maryland* was heard in the Court's original jurisdiction and revolved around the Court's interpretation of charters and treaties from the seventeenth and eighteenth centuries. The case is especially notable for the trends it illustrates: our increasingly scarce water resources and the rise of eastern water disputes that mirror those which historically arose only in the arid western states.

water body to another, even if no pollution is added during the pumping, requires a CWA permit.

BedRoc Ltd. v. United States is another statutory interpretation case, this time exploring the meaning of "valuable minerals" reserved to the federal government in an old land grant statute. The extent of minerals reserved to the federal government, and especially the Court's approach to interpreting land grant statutes, have ramifications for the preservation of vast tracks of primarily western land.

Two cases yet to be decided at this writing address nationally prominent environmental disputes. *United States Department of Transportation v. Public Citizen* asks whether environmental laws apply to President Bush's decision to allow Mexican trucks onto U.S. roads. *Cheney v. United States District Court for the District of Columbia* will resolve whether citizen groups may discover documents from the controversial National Energy Task Force. While environmental policy is central to both cases, these two opinions may be remembered more for their political overtones and their reflection upon the constitutional separation of powers than for their environmental holdings.

At the risk of making an ill-advised prediction, *Norton v. Southern Utah Wilderness Alliance* seems likely to be the case with the most lasting import in both environmental law and beyond. *SUWA* addresses a critical question in administrative law: the extent to which courts may hear lawsuits which challenge not agency action, but the alleged failure of an agency to act. In an era where environmental statutes are relatively unchanging, administrative agencies play the most critical role in determining how—and whether—environmental law is enforced. The ability to challenge agencies when they entirely shirk their statutory duties buffers environmental law against executive erosion. On the other hand, affording critics with the right to challenge agencies not only for things they do, but for things they do not do, is itself highly problematic. The line drawn by the Court in *SUWA* could affect profoundly the role of the judiciary in overseeing environmental regulation.

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