

ENVIRONMENTAL ALERT

A COMING WAVE OF ENVIRONMENTAL CASES?



The Supreme Court has already heard argument in two significant environmental cases this Term: *Massachusetts v. EPA*, 05-1120 (EPA's authority to regulate carbon dioxide emissions) and *Environmental Defense v. Duke Energy*, 05-848 (emissions increase test for new source review). In the next two weeks, the Court will consider whether to grant cert petitions in four additional significant environmental cases, with even more to follow in the upcoming months. We believe that several of the cert petitions stand good chances of being granted.

These decisions could come as early as Friday, January 5. The issues before the Court (discussed in greater detail below) include the right of PRPs to bring cost recovery actions under CERCLA, the duty of the NRC to consider the threat of terrorist attacks in licensing nuclear power plants, and the stringency of an agency's duties in discharging its obligations under NEPA. Set out below are brief summaries of the cases being considered by the Court, along with links to all of the relevant cert briefs.

If certiorari is granted, merits briefing for granted cases will likely proceed very quickly, with arguments being heard as soon as March. To help determine whether to prepare amicus briefs in any of the pending cases for which cert is granted, we will be hosting a conference call on Friday, January 12, at 2:00 p.m. EST, during which we will discuss the cases and answer questions. We encourage you to participate in this call regarding these important cases.

PROSPECTIVE ENVIRONMENTAL CASES

See SCOTUSblog post at

http://www.scotusblog.com/movabletype/archives/2006/12/a_coming_wave_o.html.

See cert papers at <http://extranet.accessakingump.com/SupremeCourt/EnviroCases.html>.

MINERAL COUNTY, MONTANA, ET AL. V. ECOLOGY CENTER, INC., (NO. 06-344)

This case involves a challenge to the U.S. Forest Service's decision to permit limited commercial logging and burning of small-diameter trees in old-growth stands as a means of preserving old-growth forests in the aftermath of a series of wildfires in the Lolo National

Forest in Montana. Respondent Ecology Center filed suit against the federal respondents, arguing that the administrative record underlying the Forest Service's decision did not support the agency's conclusion that the forest thinning would provide environmental benefits. Petitioner Mineral County and several other local government bodies intervened as defendants. The district court upheld the Forest Service's decision and awarded summary judgment to the federal respondents and petitioners. A divided panel of the 9th Circuit reversed, concluding that the Forest Service's decision was arbitrary and capricious because it was based on an "unverified hypothesis," did not consider the effect of salvaging on the black-backed woodpecker's viability, and did not directly observe the soil conditions in the affected area.

Mineral County asserts three reasons for granting the petition. First, it argues that the 9th Circuit erroneously concluded that two governing statutes, the National Environmental Policy Act (NEPA) and National Forest Management Act (NFMA), impose a procedural requirement that federal agencies complete on-the-ground research in support of natural resource management decisions before taking action. Second, Mineral County argues that the 9th Circuit erroneously imposed procedural and substantive soil verification requirements not found in NEPA. Third, it argues that the 9th Circuit erred in concluding that NFMA contains a "wildlife viability" mandate, and that the court's conclusion conflicts with a decision of the 7th Circuit.

The solicitor general acquiesced to certiorari, arguing that the 9th Circuit's decision erroneously imposed a more stringent standard of review than the arbitrary and capricious standard under the APA. The solicitor general generally agreed with Mineral County's reasons for granting the petition, and asserted several additional and related reasons. Both Mineral County and the solicitor general agree that the 9th Circuit's decision has significant negative implications for the implementation of federal land-management programs. The 9th Circuit encompasses 122.2 million of the 192.7 million acres of National Forest System lands, and an additional 197.3 million acres of public lands under the jurisdiction of the BLM. If the 9th Circuit decision stands, Forest Service decisions to allow thinning activities as a means of fire prevention could require significantly greater factual support, delaying or preventing the agency from taking such actions.

PACIFIC GAS & ELECTRIC CO. V. SAN LUIS OBISPO MOTHERS FOR PEACE (NO. 06-466)

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 et seq., requires federal agencies to provide "a detailed statement . . . on . . . the environmental impact of [any major] proposed action." This evaluation must consider all environmental effects in which there is a "'reasonably close causal relationship' between the environmental effect and the alleged cause [i.e., the proposed federal action]." *DOT v. Public Citizen*, 541 U.S. 752, 767 (2004). In this case, PG&E applied to the Nuclear Regulatory Commission (NRC) for a license to construct a nuclear waste storage facility. At various administrative hearings, Mothers for Peace argued that the NRC could not issue a license without first evaluating the potential environmental impact of a terrorist attack on the facility. The NRC rejected this argument on the ground that an environmental review was not "the appropriate forum for the consideration of terrorist acts"; other procedures implemented by the NRC had already considered this problem. The question in this case is whether NEPA requires the NRC to conduct an evaluation of the environmental impact of potential terrorist attacks.

The 9th Circuit, 449 F.3d 1016, held that it does, for two reasons. First, a terrorist attack is not so “remote and highly speculative” as to preclude an evaluation of its environmental impact. In support of this holding, the court noted that the NRC’s efforts to combat terrorism, including an exhaustive security review, were inconsistent with its contention that an act of terrorism was merely speculative. Second, the court rejected the NRC’s argument that the risk of a terrorist attack was unquantifiable, noting that the NRC often conducted *qualitative* analyses of the environmental consequences of equally unpredictable events, such as earthquakes or sabotage.

PG&E challenges both of these reasons in its cert petition. First, PG&E argues that the 9th Circuit’s “remote and highly speculative” standard is contrary to Supreme Court precedent — specifically, *Public Citizen and Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983). Second, it contends that the 9th Circuit’s rejection of the NRC’s unquantifiability argument is contrary to regulations. PG&E also notes circuit splits on both questions.

The solicitor general’s brief agrees with PG&E that the 9th Circuit erred in applying a “remote and highly speculative” standard. The relevant test, the brief argues, is whether the agency’s proposed action would be (roughly speaking) a proximate cause of a given environmental consequence. Under this test, the NRC’s licensing decision would not be causally related to a terrorist act’s environmental impact. Nevertheless, the brief recommends denying cert: it concludes (probably correctly) that there is no square circuit conflict, and it suggests that on remand the NRC may still have considerable flexibility in its proceedings. (The solicitor general does not think that PG&E’s second argument is cert-worthy.)

U.S. EPA V. DEFENDERS OF WILDLIFE (NO. 06-549)

The Clean Water Act (CWA) authorizes the Environmental Protection Agency (EPA) to issue permits for the discharge of pollutants into navigable waters. However, states may apply to the EPA to administer this permitting program for waters within their borders; to date, 44 states have done so. Separately, Section 7(a)(2) of the Endangered Species Act (ESA) requires “each Federal agency” to “insure” that their actions do not threaten endangered species. Section 7(a)(2) does not apply to states administering the CWA permitting program. Environmental advocates contend that, as a result, the CWA’s permitting provisions weaken protection of endangered species. The question in this case, which arises from this concern, is whether Section 7(a)(2) applies to the EPA’s initial decision to transfer permitting authority to a state.

The 9th Circuit held that it does, on the ground that Section 7 of the ESA imposes an obligation on agencies “*in addition* to those created by the agencies’ own governing statute.” Although the panel majority found support for its position in the 1st and 8th Circuits, it acknowledged a square circuit conflict with the 5th and D.C. Circuits. The court also held that the EPA had adopted legally contradictory positions during the administrative process with regard to the applicability of Section 7(a)(2).

The solicitor general’s cert petition argues that Section 7(a)(2) only requires federal agencies “to ensure that the species is not jeopardized by actions attributable to the agency itself.” Here, however, the CWA *requires* the EPA to transfer permitting authority to a state if the state meets one of nine statutory criteria. Any harm to endangered species under this statutory scheme is properly attributed to *Congress’* refusal to extend Section 7(a)(2) to the states, not to the EPA’s approval. Thus, the EPA’s approval of a state is not the kind of discretionary action that is governed by Section 7(a)(2). The solicitor general’s petition also disputes the 9th Circuit’s holding that the EPA adopted legally contradictory

positions; it contends that any seeming contradiction was the result of the EPA's permissible consultation with the Fish and Wildlife Service, which administers the ESA.

UNITED STATES V. ATLANTIC RESEARCH CORP. (NO. 06-562)

Two terms ago, in *Cooper v. Aviall Services*, the Supreme Court ruled that potentially responsible parties (PRPs) facing liability for cleaning up Superfund sites could not bring contribution actions, authorized under Section 113(f) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, aka Superfund), against other PRPs until they were actually held liable for cleanup following an enforcement action by the government. This ruling dismayed both environmentalists and property owners and developers, since it foreclosed a method by which property owners trying to clean up contaminated land could compel other PRPs responsible for the contamination to share the cost of the cleanup unless the EPA got around to bringing an enforcement action against them. Given the large number of Superfund sites in the country, EPA enforcement can take years or even decades. Given the enormous cost of many cleanups, property owners or developers are often unable or unwilling to clean up "Brownfields" sites unless they can compel other PRPs to share the cost.

The Court's decision in *Cooper v. Aviall* left open the possibility that PRPs can bring actions for cost recovery under Section 107(a) of CERCLA. Section 107(a) authorizes "any other person" to pursue joint and several liability, without EPA enforcement, on four categories of PRPs: current owners and operators, owners and operators at the time of disposal, generators of waste, and certain waste transporters. The 2nd and 8th Circuits have ruled that PRPs may bring such Section 107(a) actions; the 3rd Circuit has ruled that PRPs may not bring such actions.

The solicitor general's office has filed a petition for writ of certiorari in the 8th Circuit case, asking that the Court reverse that decision allowing PRPs to proceed under Section 107. The solicitor general's office argues that this decision "is contrary to the text and structure of the statute and would create perverse incentives for PRPs not to enter into settlements with the government." The solicitor general argues that to the extent Section 107(a) imposes liability on PRPs, it imposes that liability only for response costs incurred by non-PRPs (because the term "any other person" describes persons other than PRPs). The solicitor general further argues that, to the extent Section 107(a) contains an implied right to contribution, contribution actions prior to enforcement would be foreclosed for the same reason they are foreclosed under Section 113(f) as held in *Cooper v. Aviall*. Finally, the solicitor general argues that Section 107(a) does not contain an implied right to contribution, because that is the work done by Section 113(f), which was added by Congress in the Superfund Amendments and Reauthorization Act of 1986 (SARA) expressly to remedy the lack of a contribution action in the Act. (Section 107 dates to the original Act.) As for the "perverse incentives," the solicitor general argues that, as the law stands, PRPs are all but forced to enter into settlements with the government once EPA initiates cleanup to both enjoy protection from a contribution action by the government (via the settlement) and to secure the ability to seek contribution from non-settling PRPs (which it cannot do until liability has attached, again via settlement). Parties supporting the decisions of the 2nd and 8th Circuits argue that preventing PRPs from pursuing voluntary cleanups on their own terms creates disincentives to voluntary remediation and the redevelopment of Brownfields properties.

EPA V. NEW YORK (NO. 06-736)

In this case, the issue is the authority of the EPA to adopt regulations that permit an owner to make physical changes to a “stationary source” of pollutants without submitting to the preconstruction permitting procedures known as “New Source Review.” The Clean Air Act “grandfathered” existing sources from any obligation to upgrade their pollution control equipment until they were “modified.” The statute further defines “modification” to occur when an owner of a stationary source makes “any physical change” to that source that causes an emissions increase. Modified sources are required to undergo New Source Review and install Best Available Control Technology. The EPA has long deemed “routine maintenance” to fall outside of the definition of “any physical change.” In 2002, in response to industry claims that EPA had unreasonably narrowed its definition of routine maintenance, EPA amended its regulations to allow sources to make physical changes as long as the changes reflected merely a functionally equivalent exchange of components and that the cost of the changes did not exceed 20 percent of the total replacement cost of the source itself. New York and several other states and environmental groups challenged the new rules, arguing that the Clean Air Act did not allow maintenance projects of that extent to avoid preconstruction permitting.

The D.C. Circuit held the new regulations invalid. Conceding that the phrase “physical change” would be subject to broad agency interpretation standing alone, the court of appeals held that Congress’ use of the word “any” before the phrase “physical change” signaled its intention to deny the agency discretion in determining what constituted a physical change. The agency’s interpretation of the phrase therefore did not merit *Chevron* deference, and the New Source Review regulations fell outside of the agency’s authority. The government now challenges this view of the import of the word “any,” arguing that the decision misinterprets the statute and imposes a new rule of statutory construction that is inconsistent with *Chevron*. The Utility Air Regulatory Group (UARG), an industry trade association, also filed for cert, arguing that EPA had discretion under the statute to define “modifications” that do not change the fundamental operation of the source. UARG further argued that an unduly narrow definition of “routine maintenance” created incentives for utility owners not to repair their units, leading to inefficiencies in burning fuel and unreliable electricity service.

U.S. FOREST SERVICE V. EARTH ISLAND INSTITUTE (NO. 06-797)

At issue in this case is a preliminary injunction against the Forest Service. (Defendant-intervenor below, Sierra Pacific Industries, Inc., a logging company, also has an interest in the case.) The injunction prohibits the Service from allowing timber collection on thousands of acres of western parkland that were burned in large forest fires in 2004. While the district court denied the injunction, the 9th Circuit reversed. Plaintiffs had challenged the logging plan on the grounds that the agency had applied faulty guidelines in estimating the amount of timber killed by the fires, had given insufficient consideration to the impact of any logging on the endangered California Spotted Owl, and had failed to compile required information about other species living in and potentially affected by the proposed logging.

The petition presents three questions related to the standard a court of appeals should apply in reviewing a district court’s decision to deny a preliminary injunction in an agency case: 1) whether the court of appeals was wrong to consider information submitted to the district court by the party seeking the injunction, where that information had not been submitted to the agency during its decisionmaking process and was therefore not in the administrative record, 2) whether the court properly reduced the burden on the movant to show irreparable harm – holding, as it did, that the movant only had to show a possibility of irreparable harm rather than substantial probability – in proportion to the

movant's perceived likelihood of success on the merits, and 3) whether the court erred in balancing the interests at stake by focusing exclusively on the potential financial harm to the Service, without taking into consideration other factors, such as protecting parkland users from falling trees, that the Service asserted had motivated its decision to allow logging. The government argues that on both the first and second points, the 9th Circuit contravened the Supreme Court's own cases and broke with established practice in other circuits.

CONTACT INFORMATION

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