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ENVIRONMENTAL UPDATE

US Supreme Court Hears Several Cases With Environmental Law Implications

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In recent years, the US Supreme Court has heard an increasing number of cases involving environmental issues with potentially significant impacts on industry. That trend continues with the Court's 2008-2009 term.

On November 12, 2008, the US Supreme Court issued its opinion in *Winters v. NRDC*, the first decision of its Fall term, in which it struck down an injunction that restricted the Navy's use of sonar in training exercises off the California coast.

Winters is the first of several key environmental cases that will be decided by the Court this term. These cases raise important questions involving the Clean Water Act, the Comprehensive Environmental Response, Compensation, and Liability Act, and US Forest Service regulations under the Appeals Reform Act.

Entergy v. EPA

Power plants use billions of gallons of water every day from the nation's waterways to cool their facilities, sometimes trapping fish and other aquatic organisms in the process. Section 316(b) of the Clean Water Act, 33 U.S.C. § 1326(b), requires that "the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." The question presented in *Entergy v. EPA*, as framed by the Court, is whether § 316(b) authorizes the United States Environmental Protection Agency (EPA) "to compare costs with benefits" in determining the best technology available.

In 2004, EPA issued rules under § 316(b) for existing large power plants. The rules allowed existing plants to consider a range of technologies to minimize trapping and capture of fish and other aquatic organisms. The rules also allowed for site-specific determinations of the "best technology available" where the cost of retrofitting a facility would be "significantly greater" than the environmental benefits.

The US Court of Appeals for the Second Circuit struck down that part of the rule. It held that "facilities must adopt the best technology available and that cost-benefit analysis cannot be justified." It explained that § 316(b) "expressly requires a technology-driven result, not one driven by cost considerations or an assessment of the desirability of reducing adverse environmental impacts in light of the cost of doing so."

The Supreme Court agreed to review the case after petitioners argued that the Second Circuit's ruling would result in $40 billion in costs to retrofit existing power plants — threatening their very existence with little or no environmental benefit. The case was argued on December 2. The Court's ruling could impact EPA's discretion to use a cost-benefit approach in a wide variety of regulatory contexts.

BNSF v. United States and *Shell Oil Co. v. United States*

On October 1, 2008, the Supreme Court granted two petitions for *certiorari* arising out of the same decision by the US Court of Appeals for the Ninth Circuit: *BNSF v. United States* (No. 07-1601) and *Shell Oil Co. v. United States* (No. 07-1607). Both petitions seek review of questions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Court has consolidated them.

The *BNSF* case involved the cleanup of contamination at a facility in Arvin, California, where hazardous substances had been stored and distributed. The Arvin facility had been owned and operated by Brown & Bryant, Inc. (B&B), a company that was bankrupt and judgment-proof at the time of the lawsuit. Small portions of the property on which the facility was located were owned by railroads, including BNSF. Some of the chemicals stored and distributed at the Arvin facility had been supplied and delivered to the facility by Shell.

EPA and the California Department of Toxic Substances Control paid for a significant cleanup at the facility. Generally speaking, CERCLA permits the government to recover cleanup costs jointly and severally from past or present owners or operators of a facility, as well as any party who arranged for the disposal of hazardous substances at the facility or transported hazardous substances to the facility. Unable to recover against then-bankrupt B&B, the primary owner and operator of the facility, the government agencies sought to recover all of their cleanup costs from BNSF, Shell, and another railroad defendant.

The Ninth Circuit concluded that even though the railroad defendants had owned relatively small parcels of land for less than half the time that B&B had operated the facility, their liability was not divisible from that of the other defendants. Accordingly, the panel ruled that the railroads were jointly and severally liable for the entirety of cleanup costs under CERCLA. The Supreme Court granted BNSF's petition for *certiorari* to address the question of when division of damages among defendants is appropriate under CERCLA.

In the *Shell* case, the Ninth Circuit concluded that Shell was jointly and severally liable for all cleanup costs at the facility even though the chemicals at the facility that had been manufactured by Shell were originally sold as useful products. The panel reasoned that so long as "disposal of hazardous wastes is a foreseeable byproduct" of a sale, the manufacturer may be held liable as someone who "arranged for" the disposal. The Supreme Court granted Shell's petition for *certiorari* to address the Ninth Circuit's interpretation of "arranger" liability.

Summers v. Earth Island Institute

The Appeals Reform Act (ARA) requires the US Forest Service to incorporate notice and comment procedures and an administrative appeal process for land and resource management plans. In 2003, the Forest Service promulgated new regulations exempting certain projects from these procedures. The Forest Service applied the exemptions when it approved the Burnt Ridge Project, a logging plan in the Sequoia National Forest.

Environmental groups challenged the exemptions, both facially and as applied to the Burnt Ridge Project. After the district court granted a preliminary injunction, the parties entered into a settlement in which the Forest Service agreed to conduct an Environmental Impact Statement and to allow for notice and comment and appeals procedures. The environmental groups dismissed their as-applied claims, but not their facial claims. The district court invalidated five of nine challenged provisions and issued a nationwide injunction preventing the Forest Service from applying the exemptions.

The Forest Service appealed the district court's decision, and the environmental groups cross-appealed. The Ninth Circuit upheld the nationwide injunction with respect to two of the regulatory provisions at issue, rejected the government's claim that the environmental groups lacked standing, and held that the Forest Service's regulations conflicted with the plain language of the ARA and were therefore not entitled to deference.

The Supreme Court granted *certiorari* to address four questions: (i) whether the Forest Service's promulgation of regulations was final agency action ripe for review under the Administrative Procedure Act, (ii) whether the facial challenge to the regulations remained ripe and was otherwise judicially cognizable after a settlement between the parties, (iii) whether the environmental groups had standing to bring the suit, and (iv) whether the Ninth Circuit erred in affirming the district court's decision to set aside the challenged regulations nationwide. The case was argued on October 8, 2008.

Coeur Alaska v. Southeast Alaska Conservation Council

The Clean Water Act provides two distinct permitting programs. Under Section 404, the Army Corps of Engineers issues permits for "fill material." Under Section 402, EPA issues National Pollution Discharge Elimination System (NPDES) permits for the discharge of other pollutants, subject to the effluent limitations prescribed by Sections 301 and 306. A discharge is not subject to both programs. Thus, over time, the Corps and EPA have addressed and defined the dividing line between the programs. The question presented in *Coeur Alaska v. Southeast Alaska Conservation Council* is whether the Corps improperly issued a Section 404 fill material permit where an effluent limitation would have precluded the issuance of a permit under EPA's Section 402 program.

Coeur Alaska sought to extract gold from a mine in Alaska by using a "froth-flotation" process to separate gold from the rest of the rock removed from the mine. After the completion of that process, Coeur Alaska proposed placing the remaining rock, known as mine tailings, at the bottom of a nearby lake.

The Corps, with EPA's sign-off, approved the plan and issued a Section 404 permit treating the mine tailings as "fill material." By joint regulation, the Corps and EPA define "fill material" as any material that has the effect of raising the bottom elevation of a water of the United States, including "slurry, or tailings or similar mining-related materials." There is little doubt the Coeur Alaska's proposed discharge meets this definition.

The Southeast Alaska Conservation Council (SEACC) maintains that the Section 404 permit is invalid based on a separate effluent limitation that would normally apply to NPDES permits. A 1982 EPA regulation prohibits the discharge of process wastewater from mills that use the froth-flotation process. The district court rejected SEACC's challenge and upheld the Section 404 permit. The Ninth Circuit reversed. The Supreme Court's ruling will address this fundamental structural issue under the Clean Water Act—whether effluent limitations issued under Sections 301 and 306 constrain the Corps' ability to permit discharges of "fill material" under Section 404. The case is set for oral argument on January 12, 2008.

For more information about any of the matters raised in this Client Update, please contact the Mayer Brown lawyer with whom you normally communicate, or one of the following attorneys.

John C. Berghoff, Jr.
+1 312 701 7315
jberghoff@mayerbrown.com

Susan E. Brice
+1 312 701 8424
sbrice@mayerbrown.com

John S. Hahn
+1 202 263 3346
jhahn@mayerbrown.com

Kathryn Kusske Floyd
+1 202 263 3223
kkusskefloyd@mayerbrown.com

Thomas V. Skinner
+1 312 701 8590
tskinner@mayerbrown.com

Mark R. Ter Molen
+1 312 701 7307
mtermolen@mayerbrown.com

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