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Supreme Court Sticks to the Narrow Issues on Environmental Cases

By Norman A. Dupont

The U.S. Supreme Court's 2008 term included five environmental cases. Three of those cases turned not on momentous issues of constitutional law or deference to legislative or administrative decisions, but rather on narrow issues of evidence. In these three cases, the Roberts court stuck to its general mantra of "decide what's immediately before you, no more, no less."

In *Winters v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365 (2008), the court was confronted with a classic battle between the Bush administration's executive branch and the legislative branch. Congress had long ago declared in the National Environmental Policy Act that a federal agency must consider the environmental impacts of a proposed federal course of action. For decades, the U.S. Navy tested the military readiness of its submariners by conducting sonar testing off the coast of California. This testing involved the use of "active sonar," the transmitting of a loud sound from the tracking submarine to search for potential enemy submarines in the adjacent seas. Environmental groups challenged the Navy's plan to undertake 14 such active sonar tests, arguing that the loud noises impacted the environment of marine mammals, particularly beaked whales. Therefore, the environmentalists claimed that the U.S. Navy violated Congress' longstanding law that the environmental impacts of federal actions be evaluated before any testing. Both the district court and the 9th Circuit agreed that the Navy had likely violated the act, but the Court of Appeals remanded the case for further consideration of the exact scope of the remedy. While the case was pending after remand, the Navy appealed to the executive branch and obtained a declaration from the Council on Environmental Quality that its sonar training exercises were exempted from the normal rules of the National Environmental Policy Act in light of "emergency circumstances." The district court and the 9th Circuit were unmoved by at least the second executive assertion, and continued to impose conditions on the Navy's submarine training program.

As it arrived at the Supreme Court, *Winters* involved a classic legislative-executive tussle. Could the executive branch essentially conduct an "end-run" on a decades-old law by terming something an "emergency circumstance"? Did national security concerns trump laws regarding the protection of the environment?

But, Chief Justice John Roberts, who penned the majority opinion, crafted a very narrow opinion that turned on evidentiary issues. The Court held only that the district court (and the 9th Circuit in affirming) misweighed the evidence, particularly in weighing the public interest in allowing such sonar testing to proceed. For the majority, the evidentiary weight of the affidavits of various Navy admirals and other senior officers was simply improperly overlooked by the district court. The Chief Justice's opinion recited the "declarations from some of the Navy's most senior officers" about the public interest in having this type of sonar drills. Roberts also cited various portions of the appellate record in detail to demonstrate the importance of detecting otherwise quite diesel-electric submarines and why "active sonar" is a particularly effective tool in tracking such potential enemy vessels.

While one might disagree with the extreme deference the court accorded to the somewhat self-serving declarations of senior Navy officers, one cannot disagree that this case has no larger legal

implication other than requiring future courts to carefully consider such declarations. Indeed, the Supreme Court cautioned that: "Of course, military interests do not always trump other considerations, and we have not held that they do. In this case, however, the proper determination of where the public interest lies does not strike us as a close question."

In *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009), the court reviewed Congress' 1992 enactment of the Forest Service Decision-making and Appeals Reform Act, which provided that the Forest Service must establish a notice-comment and appeal review process for its land management plans. The Forest Service implemented regulations in 2003 to exclude from the scope of this procedure any salvage-timber sale of less than 250 acres. In 2002, a fire swept through Sequoia National Forest and left at least 238 acres of trees damaged and subject to sale under the salvage timber program. Conveniently for the Forest Service, 238 acres was just within its 250-acres or less cutoff, and it attempted to implement the sale without affording the public any notice-and-comment opportunity. The district court enjoined the immediate proposed sale, and the Forest Service entered a settlement with the environmental advocacy groups concerning that specific sale. But, the environmental groups now wished to continue to litigate their larger "facial" challenge to the Forest Service's overall regulation excluding from public scrutiny all salvage-timber sales anywhere in the National Forest system that were less than 250-acres.

After losing part of the challenged regulations before the 9th Circuit, the government obtained Supreme Court review on some potentially substantial Constitutional defenses. The government asserted three Constitutional defenses. First, it argued that a challenge to any such regulation "on its face" was not "ripe," and therefore the environmental groups could never challenge the regulation unless there was a particular application of the regulation (an "as applied" attack) . Second, it alleged that once the environmental groups settled their specific dispute that the entire case was moot. Third, the government argued that the environmental groups lacked standing because the environmentalists' affidavits did not show a sufficient probability that a member of the group would in fact have visited or otherwise been involved with another National Forest where this regulation might conceivably be applied in the future.

The Supreme Court ruled in favor of the government, but only on the narrowest of the three possible grounds—the evidentiary sufficiency of the group's affidavits to show "standing to challenge the larger regulations." The Court majority found that the environmental groups' affidavits suggesting that members "might" visit a National Forest that was the subject of a future salvage timber sale did not establish the requirement of an "actual or imminent" injury necessary to allow standing to sue under Article III. The court's ruling in Summers may well be required reading for upcoming environmental advocates, but perhaps only as a manual on how to draft a more convincing affidavit establishing standing in the next case.

In *Burlington Northern & Santa Fe Railway Co. v. U.S.*, 129 S. Ct. 1870 (2009), the court was again confronted with broad arguments over the extent of the so-called Superfund statute, 42 U.S.C. Section 9601. The 9th Circuit had held that three corporations were liable for the entirety of the U.S. government's cleanup costs of a former pesticide distributor located just outside of Bakersfield. The pesticide distributor had long ago disappeared into bankruptcy, and the government, facing a bill well over $8 million, sought to proceed against the proverbial deep pockets, Shell Oil Company, which had delivered the pesticide to the particular site for usage by the distributor, and two railroads that had owned a portion of the property that the distributor once used.

Once again, this case, with potentially far-reaching impacts on the scope of Superfund liability and apportionment of that liability, turned largely on a relatively narrow evidentiary ground. The court, in an opinion by Justice John Paul Stevens, avoided making significant new pronouncements on the scope of liability, generally adopting the 1983 district court opinion suggesting that in many cases "joint and several liability" might be appropriate, but that in some cases individual apportionment might be proper. In this case, the court found that the evidence of the railroads' limited ownership of just a portion of the overall property on which the pesticide distributor operated and the limited time for which it leased that small parcel as sufficient to allow a specific apportionment. Does this mean that in all future Superfund cases one can quickly assess the portion of liability based on the percentage of land leased to a particular environmental polluter or the time period of that lease? No. The Court carefully qualified: "[W]e conclude that the facts contained in the record reasonably supported the apportionment of liability." Thus, the lesson from *Burlington Northern* may only be that based on that specific record, an apportionment based on the portion of the property leased was appropriate.

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