

Two Cases Counter Trend of Less Importance to Environmental Law

The justices seem less interested in environmental law these days. Perhaps that's a good thing. The past decade or so has certainly witnessed far fewer significant environmental cases than in earlier years. When I first began writing this column, in the mid 1990s, the Supreme Court would decide as many as nine major environmental cases in a single term. The justices now decide on the merits only half as many.

The most recently completed term is emblematic. The Court decided no case arising under any of the nation's most important pollution control statutes, which were once the bread and butter of the Court's environmental docket. The most we can muster from the last term as "environmental law" was

Weyerhaeuser Co. v. U.S. Fish and Wildlife Service, a case raising a fairly insignificant question under the Endangered Species Act, and *Sturgeon v. Frost*,

an even more narrowly focused case addressing whether a river in Alaska is "public land" within the meaning of the Alaska National Interest Lands Conservation Act.

The more important two cases from the last term bore a less direct relationship to environmental law. The first, *Virginia Uranium, Inc. v. Warren*, ruled that the federal government's exclusive authority to license nuclear power plants did not preempt a state prohibition on uranium mining. And, the second, *Knick v. Township of Scott*, held that property owners can bring regulatory takings claims against state and local governments in federal court in the first instance without first exhausting state court remedies.

The term that opened this fall is similarly unlikely to be a blockbuster

for environmental law, but it already boasts two potentially significant environmental law cases, one arising under the Clean Water Act and the other under the Comprehensive Environmental Response, Compensation, and Liability Act.

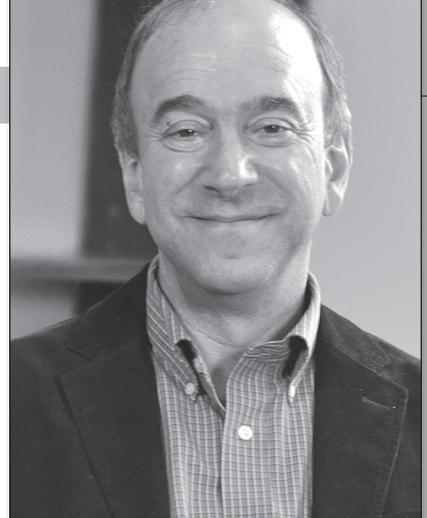
In *County of Maui v. Hawai'i Wildlife Fund*, to be argued in early November, at issue is the jurisdictional reach of the Clean Water Act's requirement that all point source discharges into navigable waters of the United States are unlawful absent a permit. *Maui* asks whether a conveyance of pollutants escapes the act's permit requirement when the pollutants reach navigable waters only after first being transmitted through groundwater. The county injects millions of gallons of contaminated effluent every day into wells that then directly reach the ocean through an aquifer.

The district court and the court of appeals both agreed with the Hawai'i Wildlife Fund that the Water Act's permit requirements

apply to the county's activities.

Underscoring the potential significance of the decision, 29 amicus briefs have been filed in the case. One of those, in support of the county, was filed by the solicitor general on behalf of the Environmental Protection Agency. The SG's participation is, by itself, not surprising. What is more unusual is that the federal government's position had previously favored the environmental plaintiffs when this same case was before the lower courts. With a change in presidential administrations in 2017, however, came a change in position.

The outcome in *Maui*, given the current makeup of the Court, will likely be decided by the conservative textualists, especially Justice Neil Gorsuch. If Gorsuch can be persuaded that the text offers no wiggle room to allow an evasion of the Water Act's requirements,



Richard Lazarus is the Howard J. and Katherine W. Aibel Professor of Law at Harvard University. He can be reached at lazarus@law.harvard.edu.

the environmentalists might be able to secure a win before a Court that otherwise rarely rules in their favor.

The second environmental case already on the Court's docket, *Atlantic Richfield Co. v. Christian*, is a sleeper that could prove to be the more significant of the two, with long tentacles. The precise issue in *Atlantic Richfield* is whether CERCLA bars a state common law claim in state court for restoration cleanup of a Superfund hazardous waste site because of its potential interference with EPA-ordered cleanup remedies. Here, too, the outcome of the case is likely to turn on the votes of some of the Court's most conservative members, particularly Justice Clarence Thomas. Thomas has previously expressed skepticism about the kind of broader federal "conflict preemption" theories relied upon by *Atlantic Richfield*.

But the case's greatest significance may be the Court's treatment of CERCLA's general provision that expressly saves from preemption state pollution control laws. Both *Atlantic Richfield* and the SG in a brief supporting petitioner offer a narrow reading of CERCLA's savings clause. If adopted by the Court, such a reading might affect anticipated Air Act litigation in which industry argues that state laws that fill regulatory gaps left by a retreating Trump Administration are preempted notwithstanding a similar savings clause in the statute.

Two cases to watch.

Underscoring its significance, 29 amicus briefs have been filed in one case