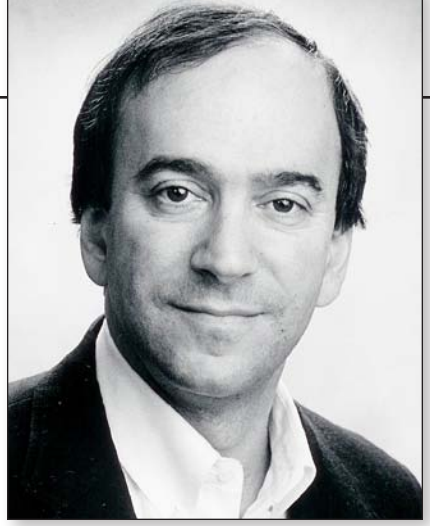

By Richard Lazarus

A Court Shifting To Environment Cases

For Supreme Court watchers these days, the big news has been the remarkably small number of cases on the docket. As of early December, the Court had granted 40 percent fewer cases for review this term than in recent years. For environmental lawyers, however, this term may well be one of the most significant ever.

The Court has already heard oral argument in two important Clean Air Act cases (*Environmental Defense v. Duke Energy* and *Massachusetts v. EPA*) and one False Claims Act case involving alleged violations of the Resource Conservation and Recovery Act (*Rockwell International v. U.S.*). The Court also heard a case involving a claim that a municipal "flow-control ordinance," which requires solid waste to be delivered to a publicly owned processing facility, imposes an undue burden on interstate commerce (*United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*). Finally, in March, the Court will hear a racketeering and constitutional damages action brought against Bureau of Land Management officials who sought to secure rights of way across private land intermingled with public land (*Wilkie v. Robbins*).

But what is truly remarkable is that the Court may grant review in as many as six more significant environmental law cases that present a host of hotly disputed questions arising under the Endangered Species Act, Comprehensive Environmental Response Compensation, and Liability Act, National Environmental Policy Act, National Forest Management Act, and under the CAA. The solicitor general filed the petition in four of these cases, and has acquiesced in petitions filed in two others. The Court normally grants review in about 80-90 percent of the cases when the SG supports review.

The ESA case is *EPA v. Defenders of Wildlife*, which concerns the extent to which ESA Section 7 modifies the discretionary authority that a federal agency otherwise possesses under other federal laws. Section 7 requires each federal agency to insure that its actions do not jeopardize the existence of an endangered or threatened species or destroy its critical habitat. Its impact on an agency's discretionary authority is central to the ESA's effectiveness.

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The CERCLA case is *U.S. v. Atlantic Research Corp.*, which presents the question left open by the Court's 2004 ruling in *Cooper Industries v. Aviall Services*: Whether a party that is potentially responsible for cleanup of property contaminated by hazardous substances under CERCLA, but not eligible to bring a contribution action under Section 113(f), may bring an action against another potentially responsible party under Section 107(a). Because the Court in *Cooper Industries* barred potentially responsible parties who voluntarily clean up a site from seeking contribution under Section 113(f), those who undertake such voluntary cleanups are entirely dependent on the availability of Section 107(a) for recovery of their expenses from other responsible parties.

In a second CERCLA case raising the same legal issue, *E.I. DuPont de Nemours & Co. v. U.S.*, the SG recently filed an acquiescence, recommending that the Court grant the petition. The SG advises the Court either to grant both the *DuPont* and the *Atlantic Research* cases, or grant only *DuPont* and hold *Atlantic Research* for disposition in light of its decision in the former case.

Seeking review of two other Ninth Circuit decisions are the SG's petition in *U.S. Forest Service v. Earth Island Institute* and the SG's acquiescence in *Mineral County v. Ecology Center, Inc*. Both involve NEPA and NFMA challenges to Forest Service projects. In the former, the SG challenges the Court's application of standards for preliminary injunctive relief under the Administrative Procedure Act. In the latter, the SG contends that the court failed to apply proper APA standards of judicial review in evaluating whether the Forest Service complied with NEPA and NFMA.

Finally, the CAA case is *EPA v. New York*. Here, the SG seeks review of the D.C. Circuit's rejection of the Bush administration's central effort to reform the CAA's New Source Review program. The court invalidated a 2003 EPA rule that made it much easier for an existing stationary source to replace major equipment without being deemed to have "modified" the facility and thereby to have triggered the act's tougher emissions requirements.

The SG's filing of these petitions and acquiescences is striking because none is compelling and a couple are marginal. Yet, if the Court adheres to its normal practice of deferring to the SG, the Court's environmental docket may well be dramatically increasing at the same time that the Court's overall docket is paradoxically shrinking.

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