



By Richard Lazarus

## Lawyer: It's Raining Cert Petitions!

The biggest environmental law news from the Supreme Court last term may well not have been the Court's rulings in two high profile Clean Air Act cases. To be sure, both *EPA v. EME Homer City Generation* and *Utility Air Regulatory Group v. EPA* were true blockbusters. *EME Homer*, which upheld EPA's ambitious rulemaking to combat interstate air pollution, was plainly a huge victory for the Environmental Protection Agency.

But, potentially more important, yet largely unnoticed and unreported, were the Court's repeated denials last spring of a series of petitions filed by business interests seeking the Court's review of a series of adverse appellate rulings. At one point the deluge of such petitions led one lawyer, who frequently represents environmental groups, to remark gamely, "It's raining cert petitions!"

The reason for the onslaught is clear. The business community has in recent years enjoyed considerable success in persuading the justices to grant review in environmental cases that otherwise seemed to lack the obvious trappings of a cert-worthy case, lacking clear conflicts in the federal courts of appeals. Cases in which the potential for further agency action made unclear the actual, practical significance of the appellate court's ruling. And even cases in which the solicitor general, after being invited by the High Court to express its

views concerning whether review was warranted, recommended against.

In short, the Court often appeared to be operating on a hair trigger in considering business claims that the lower courts had endorsed overreaching of federal environmental laws. But this spring, the Court repeatedly said no, leaving industry lawyers a bit baffled by the Court's sudden betrayal.

Four times business interests embraced what had heretofore been a winning strategy. They hired the best Supreme Court lawyers — the ones who know the Court best, and even more important, the ones the justices and their law clerks know the best and therefore might be more likely to give weight to their views. Former Solicitor General Paul Clement. Sidley & Austin's Peter Keisler. And Stanford law professor and former federal appellate judge Mike McConnell. The business petitioners recruited legions of amicus curiae to file briefs in support of the Court's granting review. These briefs would invariably describe the "crippling," "severe," "intolerable," "deterious," "crushing," and "staggering" consequences to the nation's economy if the Court left standing these adverse lower court rulings.

No one was better, however, than the Chamber of Commerce in describing the economic havoc and destruction that would occur absent the Court's review. In each of the successive cases, the chamber's predictions grew more dire.

Although candidly acknowledging that it would be "difficult to overstate the importance" of the lower court's ruling for business, the chamber did not shy away from doing its best to do just that. It described in one case how the "crippling uncertainty and costs" would "exacerbate[e] existing energy shortages" because "power plants faced with a new onslaught of tort liability may choose to cease operations." In another, the lower court's ruling "will undermine the proper functioning of

the nation's integrated national market in transportation fuels."

Not to be outdone by its competing predictions of economic cataclysm, the chamber contended in yet another case that a Second Circuit decision "would transform every public drinking water supply in this country — indeed every future supply — into a ready-made multi-million-dollar lawsuit." It "would open the floodgates to claims against virtually every manner of human enterprise" and the "consequences could extend to all corners of our economy."

Finally, the chamber described the "staggering" economic consequences of the D.C. Circuit's upholding of EPA's authority to override a Clean Water Act permit previously issued by the Army Corps of Engineers. That ruling placed at risk "over \$220 billion of investment annually," that in turn the chamber calculated generated \$660 billion of downstream economic activity, or almost four percent of the nation's Gross Domestic Product.

The Court nonetheless denied review all four times: first in *Mingo Logan Coal Co. v. EPA* in March; then *Exxon v. City of New York* in April, and twice in June, *Gen-On Power Midwest v. Bell*, at the beginning of the month, and finally in *Rocky Mountain Farmers Union v. Corey*, just before adjourning for the summer. No justice dissented.

There is, of course, a useful lesson here. Zealous advocacy is to be expected. But exaggerated advocacy is counterproductive, especially in the High Court when, by spring time, the justices' law clerks are more seasoned and can more readily tell the difference between the two.

And, most happily, the chamber's prophecies have not (yet) borne out. Whew!

**Richard Lazarus** is the Howard J. and Katherine W. Aibel Professor of Law at Harvard University and can be reached at [lazarus@law.harvard.edu](mailto:lazarus@law.harvard.edu).