WILMERHALE

Energy Sector Alert Series: Supreme Court Cases to Watch

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In this eight-week alert series, we are providing a broad look at current and emerging issues facing the energy sector. Lawyers from across the firm are discussing issues ranging from cybersecurity, antitrust and intellectual property to the impact of both Brexit and the upcoming presidential election on the energy industry. Read our recent publications, including articles from a previous alert series published earlier this year.

A. Overview of Term

The Supreme Court began its new term on Monday, October 3, with only eight justices instead of the full complement of nine. One apparent effect of the vacancy caused by the death of Justice Antonin Scalia is a smaller docket. As of October 11, there were 45 cases on the Court's docket (to be heard in 40 oral arguments). By comparison, at the beginning of the 2015, 2014, and 2013 terms, the Court had accepted 45, 49, and 54 cases, respectively.[1] Another effect of the presence of only eight justices appears to be greater caution in taking controversial cases likely to divide the justices evenly. When the Court splits 4-4, the lower court decision under review remains in place.

Perhaps in part as a result of its desire to avoid controversial cases, the Court has accepted fewer matters involving environmental, energy and natural resources issues. The Court earlier this week, for example, denied two petitions for certiorari in cases raising procedural issues that often figure prominently in these types of cases, including standing, ripeness, and the availability of judicial review of administrative actions. There are, however, three pending petitions worth watching. One concerns which federal courts have jurisdiction to review challenges to an administrative rule regarding the scope of the Clean Water Act. The other two have the potential to affect the scope of judicial deference to agency determinations.

Arguably the most high-profile litigation in this space—the challenge to the Obama Administration's Clean Power Plan—was argued before an *en banc* panel of the DC Circuit last month, and it is unlikely to reach the Supreme Court before the term that begins in October 2017.

B. On the Docket

Of the cases currently on the Court's docket, the two most notable from an environmental, natural

resources, and energy industry perspective concern regulatory takings and the President's power to fill vacancies.

1. Regulatory Takings

Murr v. Wisconsin is a dispute over how to define the relevant piece of property for purposes of a regulatory takings analysis.

The Murrs own two contiguous parcels of land along the St. Croix River in Troy, Wisconsin. A city ordinance precluded development on one of the lots, which the Murrs claimed constituted a regulatory taking because it deprived them of substantially all of the property's value. The Wisconsin Court of Appeals disagreed, applying a *per se* rule that contiguous parcels of land must be considered jointly for takings purposes. Looking at both parcels together, the court found that the Murrs retained significant value in the combined property because only half of it was affected by the ordinance. The Murrs petitioned the Supreme Court for review, arguing that their two lots should not have been aggregated for purposes of the takings analysis.

The question the Supreme Court will address is whether the “parcel as a whole” concept in regulatory takings law establishes a rule that two legally distinct but commonly owned contiguous parcels must be combined in a takings analysis. The answer is likely to have far-reaching consequences because regulatory takings cases often turn on how the relevant piece of property is defined—sometimes referred to as the “denominator question.” In general, the smaller the parcel, the more concentrated and severe the regulation's impact, and the more likely a court will be to find a taking. As a result, property owners tend to advocate for a narrow definition of the property, while the government typically favors a more expansive approach.

The Solicitor General, representing the United States, submitted an amicus brief agreeing with Wisconsin that the lots constitute one parcel. Notably, however, the Solicitor General adopted a different rationale than the state. Rather than advocate a per se rule, the Solicitor General focused on spatial, functional, and temporal considerations to argue that the lots should be treated as one property for takings purposes. The Court in prior takings decisions has counseled against per se rules, which could lead to a reversal of the state court. The Solicitor General's more flexible approach, however, may offer the justices an appealing middle ground if they want to affirm.

Reflecting the widespread interest in the outcome of this case, more than twenty other amicus briefs have been filed on both sides of the issue, including from other states, industry trade associations, and academics. Although the petition for certiorari was granted in January 2016, the Court has yet to schedule oral argument, which could be a sign that the Court hopes to delay consideration of the case until a ninth justice is appointed.[2]

2. Presidential Appointments

In *National Labor Relations Board v. SW General Inc.*, the Court will consider when the President may appoint someone to a high-level federal office in a temporary capacity. Under one subsection of the Federal Vacancies Reform Act of 1998, 5 U.S.C. § 3345, when an Executive Branch post requiring Senate confirmation becomes vacant, the President may designate one of three persons

to temporarily fill that role in an “acting” capacity: (1) the “first assistant” to the vacant post; (2) a Senate-confirmed official occupying another office in the Executive Branch; or (3) a senior official in the same agency.[3] The very next subsection, however, establishes an additional limitation: “Notwithstanding subsection (a)(1),” a person who is nominated to fill a vacant position subject to the Act may not serve in an acting capacity “under this section” unless the person served as first assistant to that position for at least 90 days in the year preceding the vacancy and had not been nominated to occupy the post for which the person was serving in an acting capacity.[4]

The question presented is the scope of this limitation. The DC Circuit took a broad view, ruling that the limitation applies to all three categories of individuals who can be appointed in an acting capacity. SW General advocates that position before the Supreme Court. The government, on the other hand, contends that the limitation applies only to the first category—i.e., the first assistant to the office in question. It argues that the DC Circuit's expansive interpretation threatens to upend the “settled understanding” of who can serve in an acting capacity by reducing the pool of eligible individuals, including those who may be the most qualified.

This case has broad ramifications for all regulated industries, including the energy and natural resources sectors. Under the DC Circuit's interpretation, a number of past acting appointments of Department of Energy and Environmental Protection Agency officials—across both Democratic and Republican administrations—would arguably have been unlawful.

The case also places the status of two senior EPA officials currently serving in an acting capacity—A. Stanley Meiburg (Acting Deputy Administrator) and Karl Brooks (Acting Assistant Administrator, Office of Administration and Resources Management)—under scrutiny. President Obama has nominated Mr. Meiburg and Mr. Brooks to serve in those respective roles permanently, but the Senate has not confirmed them. If the Supreme Court agrees with the DC Circuit, that could raise questions about the legitimacy of the actions these officials have taken while serving in an acting capacity. Senator Inhofe, Chair of the Senate Environment and Public Works Committee, cited the DC Circuit's decision in a March 2016 letter to EPA Administrator Gina McCarthy questioning whether Mr. Meiburg had the legal authority to remain acting on the job since he had been nominated to permanently fill the post.[5]

The Court will hear arguments in the case on November 7, 2016.

C. Petitions Denied

The Court on October 11, 2016, denied two petitions involving the Endangered Species Act (ESA) that raised important threshold issues of jurisdiction and justiciability. The Court's denials leave the lower court decisions in place.

U.S. Forest Service v. Cottonwood Environmental Law Center concerned habitat protections for the Canada lynx, which the US Fish and Wildlife Service (FWS) listed as a threatened species under the ESA in 2000. Cottonwood Environmental Law Center brought suit alleging that the Forest Service violated the ESA when it failed to reinitiate consultation with FWS, pursuant to Section 7 of the ESA, after FWS expanded the lynx's critical habitat to include national forest lands in the northern Rocky Mountains. The District Court and the Ninth Circuit agreed with Cottonwood, finding that the ESA

required the Forest Service to reinitiate consultation.

The crux of the petition before the Supreme Court, however, concerned the threshold issues of standing and ripeness. The government argued that Cottonwood lacks standing because it could not "identify any member who has suffered or will suffer a concrete injury as a result" of the Forest Service's failure to reinitiate consultation.[6] Cottonwood responded by pointing to three specific timber management projects it said will harm its members' aesthetic, conservation, and recreational interests.[7]

The government also maintained that the case was not ripe for review because Cottonwood had not challenged "any site-specific project authorized under the amended plan provisions."[8] Cottonwood countered that its procedural challenge was ripe because the Forest Service had in fact approved site-specific projects implementing the amended plans.

As a result of the Court's denial of certiorari, the Ninth Circuit's holdings, both on the threshold issues of standing and ripeness as well as on the merits, remain intact.

The Court also denied certiorari in another case from the Ninth Circuit concerning the ESA. At issue in Building Industry Association of the *Bay Area v. Department of Commerce* was the judicial reviewability of critical habitat designations, as well as the extent to which agencies must consider economic impacts when designating critical habitat for endangered or threatened species.

The case involved a challenge by property owners and developers to the National Marine Fisheries Service's (NMFS) designation of critical habitat for the green sturgeon, a threatened species under the ESA. The plaintiffs argued that NMFS failed to adequately consider the economic impacts of the designation.

The Ninth Circuit disagreed, upholding NMFS's designation after finding that the agency did consider economic impacts, "but ultimately determined that the [habitat] areas were critical to the recovery" of the sturgeon "and could not be excluded from designation."[9]

Before the Supreme Court, petitioners argued that decisions on whether to exclude areas from critical habitat should not be immune from review, in light of the Administrative Procedure Act's "strong presumption in favor of judicial review of final agency action."[10] The government contended that the ESA vests NMFS with discretion *not* to exclude areas from critical habitat as long as it adequately considers economic and other impacts from the designation. The decision was thus "committed to agency discretion by law" within the meaning of § 701(a)(2) of the Administrative Procedure Act, largely precluding judicial review.[11]

Again, the Court's decision not to hear the case means the Ninth Circuit's decision remains in place, with potentially sweeping consequences for property owners, developers, and others in the West—especially given that millions of acres have already been designated as critical habitat for hundreds of endangered or threatened species.

D. Petitions to Watch

1. Waters of the United States

The Clean Water Act (CWA) defines “navigable waters” as “the waters of the United States.”[12] In June 2015, the EPA and Army Corps of Engineers promulgated a final rule redefining the term “waters of the United States,” thereby significantly revising the CWA's scope. That rule has since been challenged by scores of public and private plaintiffs. None of these challenges has been decided, however, because of disagreement over where in the federal judiciary the challenges should be heard in the first place: the district courts or the courts of appeals.

National Association of Manufacturers v. Department of Defense—a consolidation of challenges originating in the appellate courts—seeks to resolve this dispute, which revolves around the CWA's judicial review provision.[13] The Sixth Circuit—in a 1-1-1 split decision—held that this provision provides the federal courts of appeal with original and exclusive jurisdiction over the challenges. In reaching this conclusion, the Sixth Circuit relied on the provision's subsection stating that “review … may be had … in the [geographically relevant] Circuit Court of Appeals of the United States” for “the Administrator's action … in issuing or denying any permit under section 1342 of this title.”[14]

Notably, none of the three judges thought that the plain meaning of the provision provided jurisdiction. Instead, one judge thought the result was dictated by controlling Supreme Court and Sixth Circuit precedent; another judge thought the result was dictated by Sixth Circuit precedent only, which he felt was wrongly decided but was nevertheless bound to follow; and the last judge dissented.

The petition for certiorari emphasizes this internal disagreement, and it urges the Supreme Court to take the case on the basis that the Sixth Circuit's decision creates a circuit split on a question that has engendered enormous uncertainty and long-delayed resolution of the underlying challenges to the rule.

The brief in opposition to the petition for certiorari is due November 7, 2016.

2. Agency Deference

Whether agency action is upheld or invalidated often depends on the level of deference the court applies. The outcome of two pending petitions questioning the appropriate scope of judicial deference to agency action could thus have substantial real-world consequences for regulated companies, including those in the natural resources and energy sector.

Foster v. Vilsack seeks to resolve a circuit split over whether courts should defer to agencies' constructions of interpretative documents. In contrast to ordinary “*Auer* deference,” in which courts defer to agencies' interpretations of their own regulations, typically expressed in guidance documents of one kind or another,[15] so-called “second level” *Auer* deference involves agency statements construing the agency interpretative guidance documents. The Sixth and Eighth Circuits have applied second level *Auer* deference,[16] while the Fifth Circuit has found such deference unwarranted.[17]

In *Foster*, the US Department of Agriculture's National Resources Conservation Service (NRCS) determined that the Fosters' South Dakota farm contains wetlands, based on analysis of another

site approximately 33 miles away that supported wetlands vegetation. Upholding NRCS' designation, the District Court and the Eighth Circuit deferred to the agency's construction of certain interpretative manuals to equate “local area” with “major land resource area.” The Fosters argue that this construction is neither justified nor entitled to deference—noting that the major land resource area encompasses 11,000 square miles. The government's brief in opposition to the petition for certiorari is due November 14.

A second pending petition, *Hyosung D&P Co., Ltd. v. United States*, goes further than Foster. It directly asks the court to consider overruling *Auer*.[18]

The case involves an antidumping investigation by the Department of Commerce. The Federal Circuit applied Auer deference to an interpretation of an ambiguous regulation made by agency counsel in the litigation.

The petition seizes on recent statements by Chief Justice Roberts and Justices Alito and Thomas that they may be willing to reconsider *Auer* deference.[19] Justice Scalia was also vocal in his opposition to *Auer*'s continuing validity,[20] but in his absence, it is less clear whether there are enough votes to revisit *Auer*. The brief in opposition to the petition for certiorari is due October 31, 2016.

Even if it does accept the case, the Court could take a more minimalist approach: rather than eliminating *Auer* deference altogether, it could simply curtail its use in the specific situation where the agency's interpretation of an ambiguous regulation is offered by counsel during litigation in which the agency is a party.

E. Clean Power Plan Update

Finally, although not yet before the Supreme Court, the ongoing litigation over the Obama Administration's Clean Power Plan should be on everyone's radar, as its resolution has the potential to alter fundamentally the nation's energy landscape.

The litigation stems from the EPA's issuance in October 2015 of a new rule seeking to reduce dramatically carbon-dioxide emissions from existing power plants. The rule spawned hundreds of legal challenges from states, utilities, unions, industry groups, and advocacy organizations, with a similar array of groups lining up in support of the rule.

All the petitions were consolidated at the DC Circuit, which in January 2016 denied petitioners' motion to stay the rule's implementation. But the Supreme Court—in a very rare move—stepped in and granted a stay, halting the rule's implementation until the conclusion of the DC Circuit appeal and any subsequent review by the Supreme Court.

In another unusual move, the DC Circuit announced that it would hear the case in an *en banc* sitting before ten judges, rather than the standard three-judge panel.[21] The court held a marathon oral argument session—totaling nearly seven hours—on September 27, 2016. The court's decision is not expected until next year, but regardless of the outcome there is little doubt that the dispute will ultimately end up in the Supreme Court. One open question is whether the Court will have a ninth

justice by then. If not, there is the extraordinary, if remote, possibility that the rule could be left in place as a result of a 5-5 split of the *en banc* DC Circuit and a 4-4 tie at the Supreme Court.

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[1] *See* Kedar Bhatia, *Final October Term 2015 Stat Pack*, SCOTUSBLOG (Jun. 29, 2016).

[2] A petition for certiorari in another takings case is pending before the Court: in *Lost Tree Village Corp. v. United States*, the Federal Circuit found a taking where the government denied a real estate company permits to fill wetlands. The Obama administration has asked the Court to hear this case in conjunction with *Murr* given the overlap in legal issues.

[3] *Id*. § 3345(a).

[4] *Id*. § 3345(b).

[5] Letter from James M. Inhofe, U.S. Senator, to Gina McCarthy, Administrator, U.S. EPA (Mar. 8, 2016).

[6] Petition for Writ of Certiorari, *U.S. Forest Serv. v. Cottonwood Envtl. Law Ctr.*, No. 15-1387 (May 13, 2016).

[7] Brief of Respondent in Opposition to Petition for Writ of Certiorari, *U.S. Forest Serv. v. Cottonwood Envtl. Law Ctr.*, No. 15-1387 (Aug. 8, 2016).

[8] Petition for Writ of Certiorari, *U.S. Forest Serv. v. Cottonwood Envtl. Law Ctr.*, No. 15-1387 (May 13, 2016).

[9] *Bldg. Indus. Ass'n of the Bay Area v. Dep't of Commerce*, 792 F.3d 1027 (9th Cir. 2015).

[10] Petition for Writ of Certiorari, *Bldg. Indus. Ass'n of the Bay Area v. Dep't of Commerce*, No. 15-1350 (May 3, 2016).

[11] Brief of Respondent in Opposition to Petition for Writ of Certiorari, *Bldg. Indus. Ass'n of the Bay Area v. Dep't of Commerce*, No. 15-1350 (Aug. 5, 2016).

[12] 33 U.S.C. § 1362(7).

[13] 33 U.S.C. § 1369(b).

[14] *Id*. § 1369(b)(1)(F).

[15] *Auer v. Robbins*, 519 U.S. 452 (1997).

[16] *Atrium Medical Ctr. v. U.S. Dep't of Health & Human Servs.*, 766 F.3d 560 (6th Cir. 2014); *Foster v. Vilsack*, 820 F.3d 330 (8th Cir. 2016).

[17] *Elgin Nursing and Rehabilitation Ctr. v. U.S. Dep't of Health & Human Servs.*, 718 F.3d 488 (5th Cir. 2013).

[18] The doctrine commonly known as *Auer* deference originated in an earlier decision, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). The *Hyosung* petition proposes overturning *Bowles* as well.

[19] *See, e.g., Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338-39 (2013) (Roberts, C.J., concurring) ("It may be appropriate to reconsider [Auer deference] in an appropriate case."); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210-11 (2015) (Alito, J., concurring in part) (judicial deference to agency interpretation of regulations ripe for Supreme Court review); *id*. at 1213-25 (Thomas, J., concurring in judgment) (judicial deference to agency interpretation of regulations violates separation of powers and should be revisited in an appropriate case).

[20] *See Perez*, 135 S. Ct. at 1213 (Scalia, J., concurring in the judgment).

[21] Chief Judge Garland did not participate, given his pending nomination to the Supreme Court.

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