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Supreme Court Denies 3 High-Profile Environmental Cases

In its first set of orders since returning from a month long recess, the Supreme Court declined yesterday to consider three separate industry challenges to federal environmental regulations.

Environmentalists hailed the court's decision not to review a year-old ruling requiring farmers to secure Clean Water Act approval for the use of pesticides already permitted under the Federal Insecticide, Fungicide and Rodenticide Act. U.S. EPA is now reviewing the National Pollutant Discharge Elimination System to devise a permitting system that complies with the ruling.

While the agency had claimed that FIFRA approval incorporated compliance with the Clean Water Act, the 6th U.S. Circuit Court of Appeals ruled last year that the government was obligated to ensure that farmers using pesticides were subject to both regulations. The appeals court agreed to stay the decision for two years, until April 2011, while EPA revises its permitting process.

"We're obviously ecstatic, and we think the Supreme Court made the right call," said Joe Mann, a staff attorney for the National Environmental Law Center.

"Industry has really been trying to play this as unique in history as an unparalleled expansion of regulatory power, but if you look at the history of the Clean Water Act, a lot of industrial sectors have already been regulated and EPA has been slapped down for trying to exempt other sectors."

But agriculture groups and conservatives criticized the Supreme Court's decision not to review the circuit court decision in *National Cotton Council v. EPA*, saying it would create redundant bureaucracy and hamper agricultural production by forcing farmers to decide between not applying pesticides and risking legal and enforcement actions for discharging without a permit. Two petitions for review were filed by CropLife America and the American Farm Bureau Federation, a pair of trade groups.

"All farmers know they must use chemicals properly. They also know the label on each chemical they use is the law of the land," said Bob Stallman, president of the American Farm Bureau Federation, in a statement. "Going through redundant bureaucratic red tape for a duplicate permit to apply a safe product is preposterous. That kind of regulatory overkill will not improve food safety or the environment."

Sen. James Inhofe (R-Okla.) issued a statement saying the 6th U.S. Circuit Court of Appeals' ruling in *Croplife America v. Baykeeper* will eventually "stifle job creation in rural America." He was one of about 40 members of Congress, most of them from agricultural states, who signed a friend-of-the-court brief urging the Supreme Court to accept the case.

"EPA will now have to process 5.6 million new pesticide applications per year, which will hinder farm operations and add significant costs to both producers and consumers of agriculture," said Inhofe, the ranking member of the Senate Environment and Public Works Committee.

CropLife said it would work to "contain" the court's ruling, noting that other federal courts have supported treating pesticides as nonpoint-source applications, which would allow for exemptions. The group also plans to work with EPA as it develops its revised permitting process.

Development and conservation

Another case denied review was *Texas Water Development Board v. Department of Interior*, which weighed prospective future development against environmental conservation. The decision not to review the case derails plans by Dallas-area officials to someday build the proposed Lake Fastrill reservoir along the Neches River.

In that case, a three-judge panel on the 5th U.S. Circuit Court of Appeals had unanimously upheld a lower court's decision that the Fish and Wildlife Service did not violate the National Environmental Policy Act by designating 25,000 acres of east Texas wetlands as the Neches River National Wildlife Refuge in 2006. Local governments said they would likely need to build the reservoir by 2050 to accommodate increased water demand ([Greenwire](#), Oct. 8, 2009).

"The city and TWDB never committed to constructing the reservoir and may never have done so, or may have constructed a reservoir at another site," Judge Kurt Engelhardt wrote in the court's opinion last March. "Further, the effects of establishing the refuge, and thus precluding the reservoir, are highly speculative and cannot be shown to be the proximate cause of future water shortages in Dallas."

Local environmental groups declared victory after the Supreme Court declined to take the case, saying the wildlife refuge protects rare bottomland hardwood habitat and the migratory birds that rely upon it.

"We heartily endorse the Court's decision," said Janice Bezanson, executive director of the **Texas Conservation Alliance**, in a statement. "There is enough water in existing reservoirs for Dallas to have all the water it needs for future growth."

Agricultural contamination

The court also declined to review *Rose Acre Farms Inc. v. United States*, a case in which an egg farm sued the federal government for damages after the government cracked down on potential contamination by harmful bacteria. After an outbreak of salmonella that caused hundreds of illnesses was traced back to the farm, the Department of Agriculture destroyed some of the farm's eggs and required the company to sell others on the less-lucrative market for liquid, pasteurized eggs.

Rose Acre sued USDA, claiming the company was entitled to recoup lost revenue because the government response constituted a "regulatory taking," as defined by the 5th Amendment of the Constitution. The Court of Federal Claims awarded the company \$5.4 million in damages but that award was overturned last March by the U.S. Court of Appeals for the Federal Circuit.

Environmentalists worried that a reversal of the appeals court's decision could discourage the government from enforcing regulations.

In its petition for review, Rose Acre Farms argued that the government responded to contamination fears in a way that focused the economic impact "narrowly and devastatingly, upon egg producers generally and Rose Acre specifically."

The Supreme Court's decision to pass on the case leaves the Federal Circuit's decision as the precedent for future takings cases involving federal agencies. Because that court is the destination for nearly all appeals on federal claims cases, the ruling carries substantial weight, said Glenn Sugameli, a staff attorney with Defenders of Wildlife.

"A decision at that level is normally final right now, absent Supreme Court review," Sugameli said. If the Supreme Court had stepped in and sided with Rose Acre Farms on the takings claim, he added, "you could end up with all levels of government always erring on the side of not protecting public health."

Reporter Sara Goodman contributed.

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