Environmental Law in the Supreme Court: Highlights from the October 2020 Term

By Garrett S. Kral

Environmental Law & Property Rights Practice Group

About the Author:

Garrett Kral is an Associate Member of the Executive Committee of the Federalist Society's Environmental Law & Property Rights Practice Group.

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Other Views:

• David Fotouhi, *Environmental Cases to Watch in the U.S. Supreme Court for 2021*, Gibson Dunn, (Mar. 18, 2021), https://www.gibsondunn.com/environmental-cases-to-watch-in-the-us-supreme-court-for-2021/.

• Jonathan Kidwell, *The Biggest Environmental Rulings of 2021: Midyear Report*, Kirkland & Ellis, (July 9, 2021), https://www.kirkland.com/news/in-the-news/2021/07/the-biggest-environmental-rulings-of-2021_midyear.

The Supreme Court decided nine important environmental law cases during its October 2020 term. This article discusses four of the most significant cases.[1] These cases are important because they may affect how climate change litigation proceeds through the federal courts, how and when deliberative process privilege is asserted by the federal government, and other important matters relating to environmental and administrative law. As the Court begins its October 2021 term, it is worth reviewing the environmental law cases from the previous term to consider how the Court has recently approached and analyzed environmental issues.

I. Federal Removal Law in a Climate Change Case

In *BP P.L.C. v. Mayor and City Council of Baltimore*, the Court held 7-1 (Justice Samuel Alito took no part in considering the case) that the Fourth Circuit erred in concluding that it lacked jurisdiction to consider all of the defendant energy companies' grounds for removal under Section 1447(d).[2]

The case began in the Circuit Court for Baltimore City.[3] The Mayor and City Council of Baltimore sued 26 energy companies on eight causes of action, including public and private nuisance, failure to warn, and consumer protection claims stating the energy companies concealed the environmental impacts of the fossil fuels they promoted.[4] Two defendants filed a notice of removal from state court to the United States District Court for the District of Maryland, invoking a number of grounds for federal jurisdiction.[5] One of those grounds was based on the Removal Clarification Act, which provides for federal officer removal.[6] To support this

1 Other cases from the Court's October 2020 term could also be discussed. For example, the Court decided three cases on eminent domain, an issue that is important to environmental and property law practitioners. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021); PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 155 (2020); Pakdel v. City and Cnty. of San Francisco, California, 141 S. Ct. 2226 (2021). Further, the Court also decided two important interstate water compact cases. *See* Florida v. Georgia, 141 S. Ct. 1175 (2021); Texas v. New Mexico, 141 S. Ct. 509 (2020).

2 141 S. Ct. 1543 (2021).

3 *See id.* at 1546 (Sotomayor, J., dissenting).

4 *See* Pl.'s Compl. i-v (Cir. Ct. Balt. City), *available at* https://www.law.nyu.edu/sites/default/files/Baltimore%20Lawsuit.pdf. *See id.* at 49 (alleging that the "[d]efendants' extraction, sale, and promotion of their fossil fuel products are responsible for substantial increases in ambient (surface) temperature, ocean temperature, sea level, droughts, extreme precipitation events, heat waves" which will all affect Baltimore).

5 Joint Appendix at 187, *available at* https://www.supremecourt.gov/DocketPDF/19/19-1189/160816/20201116134752162_19-1189_ja.pdf (last visited Aug. 20, 2021).

6 28 U.S.C. § 1442(a)(1) (promising a federal forum for actions against an "officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office"). The history of this

ground for removal under Section 1442, defendants alleged their energy extraction efforts were pursuant to government mandates and contracts, performed functions for the U.S. military, and engaged in activities on federal lands pursuant to federal leases.[7] The district court reviewed each of the defendants' cited bases for removal, and it agreed with the city and remanded the case to Maryland state court.[8]

While such an order denying jurisdiction typically ends the removal battle, 28 U.S.C. Section 1447(d) permits appellate review of a remand order when removal is sought under Section 1442 (federal officer removal statute) or Section 1443 (civil rights removal statute):

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that *an order* remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.[9]

Based on this exception to the general bar on appellate review of remand orders, the defendants appealed.[10]

The Fourth Circuit concluded that it only had jurisdiction to review defendants' Section 1442 ground for removal—the only one that permitted their appeal of the remand order—not their other claims for federal jurisdiction such as those based on admiralty and bankruptcy.[11] Finding defendants' Section 1442 claim insufficient to establish grounds for removal, the Fourth Circuit affirmed the district court's order granting the city's motion to remand.[12] Defendants then sought certiorari in the United States Supreme Court, which the Court granted.[13]

The scope of the Court's review was narrow, excluding the merits of defendants' claims and the issue of climate change.[14] The Court granted review to resolve the circuit split on the question: "Does 28 U.S.C. Section 1447(d) permit a court of appeals to review any issue in a district court order remanding a case to state court where the defendant premised removal in part on the federal officer removal statute, § 1442, or the civil rights removal statute, § 1443?"[15] In an opinion authored by Justice Neil Gorsuch, the Court concluded that Section 1447(d) *does* permit a court of appeals to review multiple grounds for removal in such a case, and that it does not limit review to the grounds that allowed for an exception to the no-appeal rule. Justice Sonia Sotomayor dissented.

The Court looked first to the text, specifically the term "order."[16] The Court found that, at the time of Section 1447(d)'s adoption and amendment, the word meant the same thing it means now: a "written direction or command delivered by . . . a court or judge."[17] An order remanding a case is a formal command from a district court returning a case to state court.[18] Therefore, the Court stated that Section 1447(d) "allows courts of appeals to examine the whole of a district court's 'order,' not just some of its parts or pieces."[19] Thus, the district court did not have discretionary authority to remand the case until it determined that it lacks *any* authority to entertain defendants' suit.[20] And when a district court's removal order rejects all of a defendant's grounds for removal, Section 1447(d) authorizes the court of appeals to review every one of them.[21]

The Court's 1996 decision in *Yamaha*, which the *Baltimore* Court relied on, offers further guidance on how the Court reads Section 1447(d).[22] In *Yamaha*, the Court was asked to resolve a dispute about the meaning of 28 U.S.C. Section 1292(b).[23] This statute allowed a district court to certify "an order" to the court of appeals if it "involves a controlling question of law as to which there is substantial ground for difference of opinion," and if "an immediate appeal *from the order* may materially advance the ultimate termination of the litigation."[24] In a unanimous opinion delivered by Justice Ruth Bader Ginsburg, the Court held that "[a]s the text of § 1292(b) indicates, appellate jurisdiction applies to the order certified to the court of appeals, and is not tied to the particular question formulated by the district court."[25] Applying *Yamaha*, the Court in *Baltimore* stated "appellate courts . . . 'may address any issue fairly included within the certified order because it is the *order* that is appealable, and not the controlling question

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statute is rather intriguing. During Reconstruction, state officers would often arrest federal officers (especially tax collectors) and seize their property. Section 1442(a)(1) would allow cases like this to be removed to federal court where they could be dismissed. *See* Josh Blackman, *BP v. Baltimore Provides a Lengthy Escape Hatch From State Court*, The Volokh Conspiracy, May 18, 2021, https://reason.com/volokh/2021/05/18/bp-v-baltimore-provides-a-lengthy-escape-hatch-from-state-court/ (last visited Aug. 20, 2021).

7 Joint Appendix at 225.

8 Mayor and City Council of Balt. v. BP P.L.C., 388 F. Supp. 3d 538, 574 (D. Md. 2019).

9 28 U.S.C. § 1447(d) (emphasis added).

10 *Baltimore*, 141 S. Ct. at 1537.

11 *See* Mayor and City Council of Balt. v. BP P.L.C., 952 F.3d 452, 457 (4th Cir. 2020).

12 *Id.* at 471.

13 *Baltimore*, 952 F.3d 452 (4th Cir. 2020), *cert. granted*, (No. 19-1644), *available at* https://www.supremecourt.gov/qp/19-01189qp.pdf (last visited Aug. 20, 2021).

14 *Baltimore*, 141 S. Ct. at 1535-36.

15 *Id.* at 1536.

16 *Id.* at 1537. *See also id.* (noting that "when called upon to interpret a statute, this Court generally seeks to discern and apply the ordinary meaning of its terms at the time of their adoption") (citing Niz-Chavez v. Garland, 141 S. Ct. 1474, 1479-80 (2021)).

17 *Id.* at 1537; *see also id.* at 1547 n.1 with accompanying text.

18 *Id.* at 1537.

19 *Id.* at 1538.

20 *Id.* at 1537 (citing Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 356 (1988).

21 *Id.* at 1538.

22 *Id.* at 1539 (citing Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 204 (1996)).

23 *Id.*

24 *Id.*

25 *Id.* at 1540 (citing *Yamaha*, 516 U.S. at 205).

identified by the district court."[26] The Court held that the Fourth Circuit erred in considering only defendants' Section 1442 claims in its review of the district court's remand order.[27] The Court vacated the judgment below and remanded with instructions that the Fourth Circuit consider all grounds for removal raised by the defendants.[28]

Justice Sotomayor, dissenting alone, argued that the Court's interpretation of Section 1447(d) allows defendants to sidestep the removal statute's bar on appellate review by "shoehorning" a Section 1442 or Section 1443 argument into their case for removal, and that the Court's interpretation of Section 1447(d) "lets the exception[s] swallow the rule."[29] Originally, there were no exceptions to Section 1447(d)'s bar on appellate review of remand orders, but in 1964, as part of the Civil Rights Act, Congress carved out two exceptions.[30] During the first several decades in which those exceptions were in effect, every court of appeals to consider the issue adopted the view that appellate review encompassed only Section 1442 and Section 1443 claims.[31] Congress legislated against this backdrop in 2011, when it amended Section 1447(d) to cover not only Section 1443 but also Section 1442.[32] The Court has stated that "'[i]f a word or phrase has been given a uniform interpretation by inferior courts, a later version of that act perpetuating the wording is presumed to carry forward that interpretation.'"[33] Justice Sotomayor concluded that the fact that "Congress did not disturb the prevailing interpretation of Section 1447(d) is a compelling reason this Court should not either."[34] She also raised the policy concern that the Court's opinion "opens a back door to appellate review that would otherwise be closed" to defendants, increasing judicial caseloads for borderline frivolous arguments.[35]

The Court's majority pushed back, stating that "even the most formidable" policy arguments cannot "overcome" a clear statutory directive like that seen in Section 1447(d).[36] The Court focused its analysis on the language Congress used in Section 1447(d), especially the word "order," which it found means the order, the whole order, and nothing but the order.

II. FOIA Exemptions and Endangered Species

In Justice Amy Coney Barrett's first majority opinion for the Court, the Court held 7-2 that the Freedom of Information Act's (FOIA) deliberative process privilege protects from disclosure draft biological opinions that are both predecisional and deliberative, even if such in-house drafts are an agency's last view discussing a proposal.[37] Justice Stephen Breyer dissented from the majority opinion, joined by Justice Sotomayor.

U.S. Fish & Wildlife Service v. Sierra Club began in the U.S. District Court for the Northern District of California.[38] The Sierra Club submitted a FOIA request seeking draft biological opinions of the U.S. Fish & Wildlife Service and National Marine Fisheries Service's evaluation of a proposed EPA rule.[39] The Services refused to provide these documents to Sierra Club, claiming they were exempt from production, and Sierra Club sued.[40] The District Court agreed with Sierra Club that the requested documents were not exempt from FOIA production.[41] The Ninth Circuit affirmed in part, holding that the draft biological opinions and several other draft documents which accompanied them were not exempt from FOIA because they represented the Services' final opinion on the proposed EPA rule.[42]

In 2011, the EPA proposed a rule on the design and operation of cooling water intake structures that withdraw large volumes of water from various sources to cool industrial equipment.[43] In writing this rule, the EPA's stated goal was to require such industrial facilities to use the best available technology to minimize adverse environmental impacts.[44] Such adverse impacts might include fish and other organisms being sucked into a water intake system and killed.[45]

The Endangered Species Act (ESA) requires consultation with the Services when a proposed rule threatens endangered species.[46] The purpose of such inter-agency consultation is to allow the Services to gather information, prepare a draft biological opinion, and, when necessary, issue a final biological opinion on a proposed rule's potential adverse impact on an endangered

26 *Id.* (quoting *Yamaha*, 516 U.S. at 205).

27 *See id.* at 1543.

28 *Id.*

29 *Id.* (Sotomayor, J., dissenting).

30 *Id.*

31 *Id.* at 1545. *See also id.* at 1544 ("Section 1447(d) contains neither kind of clarifying language, leaving uncertain how the provision applies to cases that are not removed under § 1442 or § 1443 alone.") (citing Board of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 965 F.3d 792, 805 (10th Cir. 2020)).

32 *Id.* at 1545.

33 *Id.* (quoting Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc., 576 U.S. 519, 536 (2015) (quoting Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 322 (2012) (ellipses omitted))).

34 *Baltimore*, 141 S. Ct. at 1545.

35 *Id.* at 1547.

36 *Id.* at 1542 (citing Kloeckner v. Solis, 568 U.S. 41, 56 n.4 (2012)).

37 United States Fish & Wildlife Serv., et al. v. Sierra Club, Inc., 141 S. Ct. 777, 783 (2021); *see also id.* at 785 (deliberative process privilege shields "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency") (citing 5 U.S.C. § 552(b)(5)).

38 Sierra Club, Inc. v. Nat'l Marine Fisheries Services and United States Fish & Wildlife Serv., Case No. 3: 15-cv-05872-EDL (Mar. 22, 2015).

39 *Sierra Club,* 141 S. Ct. at 784-85.

40 *Id.* at 785.

41 *Id.*

42 Sierra Club, Inc. v. U.S. Fish & Wildlife Serv., 925 F.3d 1000, 1018 (9th Cir. 2019); *see also Sierra Club*, 141 S. Ct. at 785.

43 *Sierra Club*, 141 S. Ct. at 783 (citing 76 Fed. Reg. 22174 (2011)).

44 *See generally* 76 Fed. Reg. 22174 (2011).

45 *Sierra Club*, 141 S. Ct. at 783 (citing 16 U.S.C. § 1531 et seq.).

46 *Id.* at 784-85 (citing 16 U.S.C. § 1536(a)(2)).

species.[47] These biological opinions classify agency action as either "no jeopardy" (where they will not seriously harm protected species) or "jeopardy" (where they will seriously harm protected species).[48] If the Services make a "jeopardy" finding, the agency may suggest reasonable and prudent alternatives to its proposed action to avoid harming threatened species, seek an exemption from the Services' Endangered Species Committee, or terminate the proposed action altogether.[49]

The inter-agency consultation process on the cooling water intake rule worked as it should: the Services and the EPA consulted on how the proposed rule would affect aquatic wildlife, and the EPA settled on an approach it said would not jeopardize protected species.[50] Staff at the Services completed their draft biological opinions on the EPA's rule in December 2013.[51] These draft biological opinions were sent to the relevant decisionmakers at the Services, but those decisionmakers neither approved the drafts nor sent them to the EPA.[52] Instead, they concluded "'more work needed to be done,'" and they "decided to continue discussions with the EPA" because "EPA was still engaged in an internal debate about key elements of the rule."[53] Over the next several months, the EPA and the Services continued their consultation on the rule, and in March 2014, the EPA sent the Services a proposed rule that differed significantly from the 2013 version.[54] The Services—satisfied that the revised rule was unlikely to harm protected species—issued a joint final "no jeopardy" biological opinion, and the EPA issued its final rule that same day.[55] Sierra Club agreed with this result, but it nevertheless sued the Services under FOIA for release of their draft biological opinions.[56]

FOIA allows members of the public to sue federal agencies for access to information, but it exempts from disclosure information protected by the deliberative process privilege.[57] This is an executive branch privilege akin to the attorney-client and attorney work-product privileges in civil litigation.[58] The purpose of the deliberative process privilege—like that of attorney-client and attorney work-product privileges—is to allow federal officials to communicate candidly among themselves when drafting agency policy without fear that "each remark is a potential item of discovery and front-page news."[59] The privilege shields in-house documents generated during an agency's deliberations about a policy.[60] However, documents that embody or explain the adopted agency policy are not privileged.[61]

The Court had to determine whether the Services' draft biological opinions were "predecisional" or "deliberative" or both. If so, the FOIA exemption for deliberative process privilege would apply and the documents would not be subject to release under FOIA; if not, the exemption would not apply, and Sierra Club would be entitled to compel release of the draft biological opinions under FOIA.[62] The majority stated documents are "predecisional" if they are generated before the agency's final decision, and they are "deliberative" if they are prepared to help the agency formulate a policy position.[63] The Court noted that in determining whether the exemption applies, "[w]hat matters, then, is not whether a document is last in line, but whether it communicates a policy on which the agency has settled."[64] In making this functional, non-formal inquiry, courts "must consider whether the agency treats the document as its final view on the matter."[65] The Court stated that the last document compiled by an agency on a matter might not be last because it is "final"; instead, it might be last because the issue "died on the vine," proceeding no further.[66]

The dissenters agreed with the majority on two issues. First, Justice Breyer stated that he agreed with the Court's inquiry into whether a document is "final" or "deliberative," and that this inquiry hinges on the document's "function" in an agency's decision-making process.[67] Second, Justice Breyer stated that it is unclear whether the documents at issue in the case are draft

47 *Id.* at 784 (citing 50 CFR § 402.14(g)(4)). A biological opinion contains within it scientific data; it is not just a policy document.

48 *Id.* (citing 50 CFR § 402.14(h)(1)(iv), as amended, 84 Fed. Reg. 45017 (2019)). As Justice Breyer noted in his dissent, a finding of jeopardy is exceedingly rare; the Services have made this finding only twice out of 6,829 total consultations between 2008 and 2015. *Id.* at 790 (Breyer, J., dissenting) (citing Brief Amici Curiae of the Center for Biological Diversity et al. at 22–23).

49 *Id.* at 784 (citing 16 U.S.C. § 1536(b)(3)(A)).

50 *Id.* (citing 16 U.S.C. §§ 1536(b)(4), (g), 1538(a)).

51 *See id.*

52 *Id.*

53 *Id.* (citing Joint Appendix at 37, 58-59).

54 *Id.*

55 *Id.*

56 Sierra Club was pleased with the final rule produced by EPA because it resulted in less endangered species take, but it sued the federal government anyway. *See* Oral Argument at 57:09-57:14, *available at* https://www.oyez.org/cases/2020/19-547.

57 *See Sierra Club*, 141 S. Ct. at 783.

58 *See id.*

59 *Id.* at 785 (citing Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001)).

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.* (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-152 (1975) and Renegotiation Bd. v. Grumman, 421 U.S. 168, 184-86 (1975)).

64 *Id.* at 786. The Court also rejected formalism by making it clear that the label "draft" is not determinative. In other words, an agency cannot shelter in the deliberative process privilege exemption by simply watermarking a document "draft," for this would put form over substance. *Id.*

65 *Id.* (citing *Sears*, 421 U.S. at 161). Furthermore, if an agency makes implicit judgments that are not memorialized in a written document, those too can be considered an agency's final view on the matter, which would remove such judgments from the scope of FOIA's deliberative process privilege exemption. *See id.* at 788.

66 *Id.* (citing *Sears*, 421 U.S. at 151 n.18 ("'[C]ourts should be wary of interfering" with drafts that "do not ripen into agency decisions.")).

67 *Id.* at 789; *see also Sears*, 421 U.S. at 138 ("'[T]he function of the documents' and 'the context of the administrative process which

biological opinions or *drafts of* draft biological opinions, and that the lower courts should determine whether some of the documents are the latter in a "segregability analysis" on remand.[68]

But Justice Breyer's dissent disagreed with the Court's decision that the Services' draft biological opinions did not reflect final agency decisions regarding jeopardy.[69] He argued that "[a] Draft Biological Opinion differs from a Final Biological Opinion in only one way that matters. The Services must make the Draft Biological Opinion available to the EPA before issuing a Final Biological Opinion."[70] He said that after a draft biological opinion issues, the Services continue their inter-agency consultation with the EPA but do not look to change their own analyses or conclusions.[71] Instead, inter-agency efforts are focused on minimizing the projected impact on endangered species.[72] In turn, the agency may publicly adopt the Services' proposed alternatives, and this process will culminate in a final biological opinion.[73] Therefore, he argued, a draft biological opinion finding jeopardy functions exactly like a final biological opinion finding jeopardy, and it should be treated the same way under FOIA.[74]

The *Sierra Club* decision further clarified the scope of FOIA's deliberative process privilege exemption for draft biological opinions under the ESA, and it could have some broader effects. Indeed, the majority stated in footnote 3 that "the logic applied to these drafts also applies to the other draft documents."[75]

III. Renewable Fuel Standards

In *HollyFrontier Cheyenne Refining LLC v. Renewable Fuels Association*, Justice Gorsuch wrote for a 6-3 majority holding that a small refinery which had previously received a hardship exemption may obtain an "extension" under the Renewable Fuels Program (RFP) even if it had a lapse in exemption coverage in a previous year.[76] Justice Barrett wrote a dissenting opinion, which Justices Sotomayor and Kagan joined.[77]

During George W. Bush's presidency, Congress passed and the president signed the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007 in response to profound concerns about the nation's dependence on foreign oil.[78] These statutes required, among other things, the addition of renewable fuel into the nation's fuel supply.[79] To that end, Congress mandated that 1) transportation fuel sold in the United States (e.g., gasoline and diesel) contain specified quantities of certain renewable fuel typically derived from agricultural products made in the United States and 2) the total amount of renewable fuels used grow from 4 billion gallons in 2006 to 36 billion gallons in 2022.[80]

One way the EPA reaches these goals is by managing a market-based system of credits called Renewable Identification Numbers (RINs). Refiners may generate RINs by blending their fuel; however, if a refinery cannot blend enough fuel to generate sufficient RINs, refiners may cover by purchasing other refineries' RINs. As such, RINs are subject to economic scarcity and vary in price annually. This policy may lead to economic hardship for small refineries. To increase the amount of renewables without negatively impacting small refineries, Congress created within the RFP[81] the Renewable Fuels Standard (RFS).[82] In the RFS, Congress offered protection to "small" refineries.[83] The RFS defines small refineries as those with an "average aggregate daily crude oil throughput" of 75,000 barrels per day or less each calendar year.[84]

Further, under subsection (A), Congress provided an initial temporary exemption that relieved all small refineries of any obligations under the RFP from its enactment until 2011; this initial exemption could be extended for an additional two years if the U.S. Department of Energy determined that a refiner's RFP obligations would pose a "disproportionate economic hardship."[85] In subsection (B), Congress provided that small refiners may petition the EPA "at any time" for an extension of subparagraph (A)'s two-year extension (from 2011-2013) when there is "disproportionate economic hardship."[86] The program expanded over time, from eight small refinery exemptions in 2013 to 31 in 2018.[87]

HollyFrontier concerned three small refineries that initially received an exemption, let it lapse for a period, and then petitioned the EPA for an extension of the exemption under subparagraph

generated them" is '[c]rucial' to understanding whether the deliberative process privilege applies.").

68 *Sierra Club*, 141 S. Ct. at 792; *see also id*. at page 792 n.5 (stating "[w]e agree with the parties that the District Court must determine on remand whether any parts of the documents at issue are segregable").

69 *Id*. at 790 (Breyer, J., dissenting).

70 *Id.* at 791 (citing 50 CFR § 402.14(g)(5)).

71 *Id*. at 790.

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id*. at 786 n.3.

76 141 S. Ct. 2172 (2021).

77 *Id.* at 2183 (Barrett, J., dissenting).

78 *See* Br. for Federal Resp't at 4.

79 Energy Policy Act of 2005, 42 U.S.C. § 13201 et seq. (2005); Energy Independence and Security Act of 2007 (EISA), 42 U.S.C. § 17001 et seq. (2007).

80 *HollyFrontier*, 141 S. Ct. at 2175.

81 42 U.S.C. § 7545(o)(2)(A)(i).

82 42 U.S.C. §§ 7545(o)(2)(B)(i)-(ii).

83 *HollyFrontier*, 141 S. Ct. at 2176.

84 *Id.* (citing 42 U.S.C. § 7545(o)(1)(K)). Small refineries include businesses ranging from small mom-and-pop shops to Fortune 500 companies. Whether a refinery is "small" turns on its crude oil throughput, not its actual size or parent company.

85 42 U.S.C. § 7545(o)(9)(A)(ii).

86 *HollyFrontier*, 141 S. Ct. at 2176 (citing 42 U.S.C. § 7546(o)(9)(B)(i)).

87 *Id. See also* U.S. EPA, *RFS Small Refinery Exemptions*, https://www.epa.gov/fuelsregistration-reporting-and-compliance-help/rfs-small-refineryexemptios (last visited Aug. 20, 2021).

(B)(i); the EPA granted the petitions.[88] A group of renewable fuel producers objected and petitioned for review of the EPA's decision in the Tenth Circuit, arguing that the EPA had acted "in excess of statutory jurisdiction, authority or limitation" by granting these waivers.[89] The Tenth Circuit vacated the EPA's decisions and concluded that the refineries were ineligible for an extension because the refiners had allowed their exemptions to lapse at some point in the past.[90] The Supreme Court granted review to decide "whether a small refinery that manages to comply with renewable fuel mandates in one year is forever forbidden from applying for an 'extension' in any future year."[91]

The Court answered this question in the negative, finding that missing one or more years of hardship exemption does not disqualify a refinery from again receiving the exemption.[92] In reaching this conclusion, the Court examined several subparagraphs of the RFS; however, the key provision at the heart of this case is found in Section 7545(o)(9)(B)(i), which says "[a] small refinery may at any time petition [the EPA] for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship."[93]

Congress failed to define "extension" in subsection (B)(i).[94] Although the EPA had argued—alongside the refineries—that the Tenth Circuit should defer to its interpretation of "extension" under *Chevron*, it did not make the same argument in the Supreme Court, perhaps due to the change in administrations; thus, the Court "declin[ed] to consider whether any deference might be due" in the case.[95] Thus, the Court had to determine the definition of extension, and it patiently explained the tools of statutory interpretation it used to reach its holding.[96] The dissent employed a similar tack, although it reached the opposite conclusion.[97] In examining this provision of the RFS and seeking to define the word extension, both the Court majority and the dissent relied heavily on dictionaries; the majority cited three dictionaries,[98] while the dissent cited seven.[99]

Justice Gorsuch began the majority opinion by noting that where Congress does not furnish a definition of its own, the Court must generally seek to afford a statutory term "its ordinary or natural meaning."[100] To this extent, the Court agreed with Respondent and the Tenth Circuit that subparagraph (B)(i) uses the word extension to refer to the lengthening of a period of time.[101] However, the Court departed from the Tenth Circuit insofar as the latter had also imposed a "continuity requirement," whereby a small refinery becomes permanently ineligible for a further extension once a current exemption lapses.[102] The majority cited examples of uses of the term extension in which the term does not necessarily imply a continuous or unbroken increase in time, such as the forgetful student who asks for an *extension* on a term paper after the deadline has passed,[103] or the recently enacted COVID-19 relief bills that provided for the *extension* of public benefits that had lapsed or been interrupted.[104] The majority argued that although "[a word's] meaning may change with time," "unless the dissent thinks the ordinary meaning of 'extension' changed in just 10 years, it's hard to understand why these enactments don't shed at least some light" on the issue at hand.[105]

88 *HollyFrontier*, 141 S. Ct. at 2176.

89 *Id.* Generally, oil industry advocates "argue[] that the EPA has the power to grant waivers to refineries," and "[b]iofuels groups say the waivers have the potential to put a significant dent in their business and run afoul of the RFS' [policy] goals." Marc Heller and Pamela King, *Justices hit biofuel blending in 'hypothetical-rich case*, E&E News, Apr. 27, 2021, *available at* https://login.politicopro.com/?redirect=https%3A%2F%2Fsubscriber.politicopro.com%2Farticle%2Feenews%2F1063731095&s=eenews (last visited Aug. 20, 2021).

90 *HollyFrontier*, 141 S. Ct. at 2176 (citing Renewable Fuels Assoc. v. U.S. EPA, 948 F.3d 1206, 1249 (10th Cir. 2020)).

91 *Id.* The Court granted review over the Trump administration's objections; under the Biden administration, the EPA joined Respondent renewable fuel producers arguing that the Tenth Circuit's decision should be upheld. *See* Br. for Federal Resp't at 14.

92 *HollyFrontier*, 141 S. Ct. at 2183.

93 *Id.* (citing § 7545(o)(9)(B)(i)).

94 *Id.* at 2187 (Barrett, J., dissenting).

95 *Id.* at 2180. This could have interesting implications for the future of *Chevron* deference. *See* Jonathan H. Adler, *Supreme Court Declines to Consider Chevron Deference Because Government Did Not Ask (Updated)*, The Volokh Conspiracy, June 25, 2021 (1:27 PM), https://reason.com/volokh/2021/06/25/supreme-court-declines-to-consider-chevron-deference-because-government-did-not-ask-it-to/ (stating that this "seems to indicate that a clear majority of the Court is on board with the idea that the federal government may waive *Chevron* deference); Aaron L. Nielson, *D.C. Circuit Review – Reviewed: More Chevron Waiver (Part Two)*, Yale J. Reg. Notice & Comment, June 25, 2021, https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-more-chevron-waiver-part-two/.

96 *See, e.g.*, *HollyFrontier*, 141 S. Ct. at 2181. The Court quoted its decision in *Baltimore* to support its analysis here, explaining that "this Court has made clear that statutory exceptions are to be read fairly, not narrowly, for they 'are no less part of Congress's work than its rules and standards—and all are worthy of a court's respect.'" *Id.* (quoting *Baltimore*, 141 S. Ct. at 1539).

97 *See id.* at 2183.

98 *Id.* at 2177-78.

99 *Id.* at 2184-86 (Barrett, J., dissenting).

100 *Id.* at 2176 (quoting FDIC v. Meyer, 510 U.S. 471, 476 (1994).

101 *Id.* at 2177.

102 *Id.*

103 *Id.* The dissent disagreed with the majority's reasoning based on this hypothetical. The dissent argued that this use of the term "extension" would either refer to an extension of the student's deadline (retaining continuity in the definition), or be a misuse of the term extension for what is in fact the start of an entirely new window for timely conduct. *HollyFrontier*, 141 S. Ct. at 2183 (Barrett, J. dissenting).

104 *HollyFrontier*, 141 S. Ct. at 2178 (citing the Consolidated Appropriations Act of 2021, Pub. L. 116–260, § 203, 134 Stat. 1182 (providing an "extension" of unemployment compensation starting on December 26, 2020, after it had lapsed on July 31, 2020); Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116–136, § 2114, 134 Stat. 281 (providing an "extension" of unemployment benefits starting in 2020, after they had lapsed in 2013)).

105 *Id.*

Not every use of the word extension must be read in the same way. For example, Congress sometimes requires extensions to be "consecutive" or "successive."[106] The Tenth Circuit had posited that such modifiers may suggest a continuity requirement.[107] But the Court disagreed, arguing that these examples do not mean that the term extension, when standing alone, encompasses such modifiers.[108] Instead, the Court concluded, "the absence of any parallel modifying language in the statute before us supplies one clue that continuity is not required here."[109] The Court also pointed out that subparagraph (B)(i)'s "at any time" language does not denote rigid continuity, but rather allows refiners to petition EPA *at any time* for the application of a RFS waiver.[110] Further, subparagraph (A)(ii) uses the term extension without a continuity requirement, and the Court stated that it did not see any "persuasive countervailing evidence that Congress meant to adopt one meaning of the term [extension] in subparagraph (A)(ii) and a different one next door in subparagraph (B)(i)."[111]

Finally, when the EPA sought public comment on a regulation that would clarify what counts as a "small" refinery in 2014, some suggested that a refinery should be eligible for exemption *only if* it consistently remained "small" from 2006 onward.[112] However, the EPA expressly rejected this suggestion, which the Court saw as evidence that continuity was not required to qualify for exemptions either.[113] Thus, the Court concluded that the key provision of the text "simply does not contain the continuity requirement the court of appeals supposed."[114] Instead, the Court stated, this provision "means exactly what it says: A small refinery can apply for (if not always receive) a hardship exemption 'at any time.'"[115]

The dissent, on the other hand, argued that the "EPA cannot 'extend' an exemption that a refinery no longer has" in place.[116] According to the dissent, the majority's analysis "clashes with [the] statutory structure," "caters to an outlier meaning" of the word "extension," and "forgoes the obvious answer" in this case.[117] The dissent noted that the Court does not usually define a word according to its "outer limits" of definitional possibilities at the expense of its ordinary and common meaning.[118]

In seeking to define extension, the dissent walked through "four structural features" of the RFP, which it found cut for respondents' reading of the word extension, and it gave two reasons the majority's "structural counters are not persuasive."[119] In short, it argued that the "at any time" language in Section 7545(o)(9)(B)(i) informs *when* a refinery may file an extension request, but it does not change the *type* of request the EPA can grant.[120] The dissent concluded that even if the word extension does not require continuity, the Petitioners' argument "is otherwise overwhelmed" by the ordinary meaning of the word extension and other aspects of the RFP's structure.[121]

IV. Contribution Suits Under the Comprehensive Environmental Response, Compensation, and Liability Act

CERCLA's complex statutory scheme for responding to environmental hazards like waste management and site cleanup often raises the difficult but crucial question, "who pays?"[122] Justice Clarence Thomas wrote for a unanimous Court in *Guam v. United States* just four weeks after oral argument, holding that "CERCLA contribution requires a resolution of a CERCLA-specific liability."[123]

In the 1940s, the United States Navy constructed the Ordot Dump to dispose of military waste, some of it allegedly toxic.[124] After several decades, the United States ceded control of the Ordot Dump to Guam, which used it as a public landfill.[125] In 2002, after determining that the Ordot Dump posed an ecological hazard, the EPA sued Guam for failing to comply with the Clean Water Act (CWA) and EPA directives to remediate the dump's allegedly toxic conditions.[126] At that time, the EPA asserted Guam

106 *Id.* at 2179 (citing 8 U.S.C. § 1184(g)(8)(D); 10 U.S.C. § 2304(a)(f); 19 U.S.C. § 2432(d)(1); 28 U.S.C. §594(b)(3)(A)).

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.* (The Court "do[es] not construe subparagraph (B) as part of some sunset scheme" because "subparagraph (B)(i) expressly contemplates exemptions beyond 2013—'at any time' hardship conditions are satisfied."). *Id.* at 2180.

111 *Id.* (citing Henson v. Santander Consumer USA, Inc., 137 S. Ct. 1718, 1722-23); s*ee also id*. at 2187 (Barrett, J., dissenting) ("[A]bsent contrary evidence, this Court normally presumes consistent usage.").

112 *Id.* at 2180.

113 *Id.* (citing 40 C.F.R. § 80.1441(e)(2)(iii)). Perhaps this was because the EPA foresaw that such an interpretation would force small refiners that once attained but could not maintain compliance with RFS's requirements "to exit the market," but would permit "the least compliant [small] refiners" to continue operating. *Supreme Court Upholds Broad Eligibility for Small Refineries Seeking Hardship Exemptions From Compliance With The EPA's Renewable Fuel Standards*, Gibson Dunn, *available at* https://www.gibsondunn.com/supreme-court-upholds-broad-eligibility-for-small-refineries-seeking-hardship-exemptions-from-compliance-with-the-epas-renewable-fuel-standards/.

114 *HollyFrontier*, 141 S. Ct. at 2181.

115 *Id.* The Court did not address the Tenth Circuit's alternative ruling that the EPA may not grant an exemption based on hardship flowing from something other than compliance with the RFS's obligations, such as economic hardship caused by other factors.

116 *HollyFrontier*, 141 S. Ct. at 2183 (Barrett, J., dissenting).

117 *Id*. at 2183-84.

118 *Id.* at 2184 (citing FCC v. AT&T Inc., 562 U.S. 397, 407 (2011)).

119 *Id*. at 2188 (Barrett, J., dissenting).

120 *Id.*

121 *Id.* at 2189.

122 Guam v. United States, 141 S. Ct. 1608, 1611 (2021).

123 *Id.*

124 *Id.*

125 *Id.*

126 Press Release, U.S. EPA, *United States Settles Clean Water Act Case with Guam* (last visited Aug. 9, 2021), https://archive.epa.gov/epapages/newsroom_archive/newsreleases/b477b3704493371c852570d8005e15d4.html.

was "'discharging pollutants . . . into waters of the United States without obtaining a permit'" to do so.[127] This litigation ended in 2004 when Guam and the EPA entered into a consent decree, which required Guam to pay a civil penalty and close the Ordot Dump.[128] The parties agreed that Guam's compliance would be "'in full settlement and satisfaction of the civil judicial claims of the United States . . . as alleged in the [CWA] Complaint.'"[129] However, the agreement did not "waive any [future] rights or remedies available to [the United States] for any violation by the Government of Guam . . . except as specifically provided."[130]

Then in 2017, Guam sued the United States seeking nearly $160 million for its earlier use of the dump in 1) a cost-recovery action under CERCLA Section 107(a),[131] and 2) a contribution action under CERCLA Section 113(f).[132] In 2020, the D.C. Circuit dismissed Guam's complaint. The D.C. Circuit found that Guam had had a contribution claim at some point because the remedial measures and conditional release in the CWA sufficiently resolved Guam's liability for the Ordot Dump.[133] But it also found that the 2004 consent decree had triggered the three-year statute of limitations for contribution actions—and that the statute of limitations had run—so Guam was not entitled to any relief.[134] Guam petitioned for certiorari, arguing that a settlement of CWA claims could not trigger a right of contribution under CERCLA, and therefore could not trigger the statute of limitations that had doomed its CERCLA contribution claim. The Supreme Court granted review to determine "whether a party must resolve a CERCLA-specific liability in order to trigger the right of contribution, or whether a broader array of settlements involving environmental liability will do."[135]

The Court first noted the title of subsection 113(f) of the Act: "contribution."[136] This indicated to the Court that the subsection is concerned only with the distribution of CERCLA liability for a *contribution* suit, and that it is a tool for apportioning the burdens of a predicate common liability among the responsible parties.[137] The Court then said that "the most obvious place to look" for threshold liability is CERCLA's statutory matrix of environmental duties and liabilities.[138] After all, CERCLA's very title reinforces that it is a "comprehensive" act.[139] Thus, the Court stated that remaining within the bounds of CERCLA is consistent with the familiar principle that a federal contribution action is virtually always a creature of a specific statutory regime.[140]

The Court reminded the parties that "there is no 'general federal right to contribution.'"[141] As such, subsection 113(f)(3)(B) recognizes a statutory right to contribution in the special circumstances where a party has resolved its liability via settlement, but still presumes that CERCLA liability is necessary to trigger contribution liability.[142] This is especially true, the Court stated, when the subsection is properly read in sequence as an integral part of the whole statute.[143]

The Court found that subsection 113(f)(1)'s anchor provision is especially clear on this point, allowing contribution during or following any civil action.[144] And while subsections 113(f)(2)-(3) "are not quite as explicit," their phrasing and context still presume that CERCLA liability is necessary to trigger contribution. For example, subsection 113(f)(2) explains that a settlement by one party "'does not discharge any of the other potentially liable persons unless its terms so provide," and subsection 113(f)(3)(B)'s final clause explains that contribution is available "'from any person who is not party to a settlement referred to in [subsection 113(f)(2)].'"[145]

Thus, the Court concluded that the "most natural reading" of subsection 113(f)(3)(B) is that a party may seek contribution under CERCLA only after settling CERCLA-specific liability.[146] As such, the Court reversed the judgment of the D.C. Circuit and remanded the case for further proceedings.[147]

V. Conclusion

The Supreme Court's October 2020 term saw a bevy of environmental law cases, including the first majority opinion by Justice Barrett for the Court in *U.S. Fish & Wildlife Service v. Sierra Club*. Three of the four majority opinions covered here were written by recently appointed Justices. *HollyFrontier* featured an

127 Guam v. United States, 950 F.3d 104, 109 (2020).

128 *Guam*, 141 S. Ct. at 1611.

129 *Id.* (citing *Guam,* 950 F.3d at 116).

130 *Id.* (citing App. to Pet. for Cert. 166a).

131 *See* § 107(a) (allowing for recovery of "all costs of removal or remedial action" to "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of").

132 *See* § 113(f)(3)(B) (under which a "person who has resolved its liability to the United States for some or all of a response action or for some or all of the costs of such action in [a] settlement may seek contribution from any person who is not [already] party to a [qualifying] settlement").

133 *Guam*, 141 S. Ct. at 1611 (citing *Guam*, 950 F.3d at 114-17.).

134 *Id.* (citing *Guam*, 950 F.3d at 118.); *see also* § 113(g)(3).

135 *Guam*, 141 S. Ct. at 1611.

136 *Id.*

137 *Id.*

138 *Id.* at 1613 (citing Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 610 (2009) (stating that Section 107(a)(3) of the Act may not extend beyond the limits of the statute itself)).

139 *Id.*

140 *Id.* (citing Nw. Airlines, Inc. v. Transp. Workers, 451 U.S. 77, 95-97 (1981) (noting that there is a narrow exception for admiralty cases)).

141 *Id.* at 1613; *cf.* Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Assn., 453 U.S. 1, 13–15 (1981) (refusing to "assum[e] that Congress intended to authorize by implication additional judicial remedies for private citizens suing under [two environmental statutes]")).

142 *Guam*, 141 S. Ct. at 1613.

143 *Id.* (citing New Prime Inc. v. Oliveria, 139 S. Ct. 532, 538 (2019)); *see also* Cooper Indus. Inc. v. Aviall Serv., Inc., 543 U.S. 157, 167 (2004) (looking at "the whole of § 113").

144 *Guam*, 141 S. Ct. at 1612.

145 *Id.*

146 *Id.* at 1615.

147 *Id.*

interesting debate between two textualist Justices, Gorsuch for the majority and Barrett for the dissent. Each majority opinion discussed here gives the text of the statute at issue a fairly close read and applies the law as written to the facts of the matter at hand. As the Court's October 2021 term begins, it will be interesting to see if such trends continue, and what else the Court might have in store for environmental practitioners.