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ENVIRONMENTAL CASES TO WATCH IN THE U.S. SUPREME COURT FOR 2021

To Our Clients and Friends:

The U.S. Supreme Court's current docket is filled with high-profile cases presenting challenging questions on an array of hot-button issues, including voting rights, freedom of speech, and immigration. Among the Court's caseload are several disputes raising critical environmental law questions, the resolution of which is certain to have significant and lasting effects across a range of industries. Below, we highlight the central issues raised by two key environmental cases pending before the Court and provide expert analysis on the potential implications of the Supreme Court's review, along with other cases to watch raising important environmental considerations.

***Guam v. United States*, No. 20-382 (cert. granted Jan. 8, 2021; set for argument Apr. 26, 2021)**

Background

This case involves a dispute between Guam and the United States over who will bear financial responsibility for the cleanup of a hazardous waste site—the Ordot Dump—established by the Navy on the island of Guam. The governing statute is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which contains two separate provisions allowing persons who clean up contaminated sites to recover some or all of their response costs from other parties. The first provision, Section 107(a), authorizes a person to recover cleanup costs from responsible parties within *six* years after the cleanup effort begins.[1] The second provision, Section 113(f)(3)(B), allows "a person who has resolved its liability to the United States … in an administrative or judicially approved settlement" to seek contribution from responsible parties for the cleanup costs in complying with that settlement, no later than *three* years after settlement is entered.[2]

In this case, filed in March 2017, Guam sued the United States under CERCLA Section 107(a) to recover money it spent remediating the Ordot Dump, an effort that began in 2013.[3] The United States moved to dismiss on the theory that Guam's suit could only proceed as a Section 113(f)(3)(B) contribution claim, since Guam's cleanup around the Ordot Dump was part of its obligations under a 2004 consent decree between Guam and EPA for violations of the Clean Water Act—making Guam's CERCLA claim time-barred under the three-year limitations period for Section 113(f)(3)(B).[4] The consent decree resolved only Clean Water Act claims and neither mentioned CERCLA nor involved any CERCLA claims.

The district court rejected this argument,[5] but on interlocutory appeal from the denial of the United States' motion to dismiss, the D.C. Circuit reversed. It concluded that Guam could not circumvent Section 113(f)(3)(B)'s statute of limitations by choosing to pursue cleanup costs under Section 107(a)

instead, because the 2004 consent decree gave rise to, and started the clock for, a claim under Section 113(f)(3)(B)—the "harsh" result being that "Guam cannot now seek recoupment from the United States … because its cause of action for contribution expired in 2007."[6]

In reaching this conclusion, the D.C. Circuit made two key findings, now the basis of Guam's challenge before the Supreme Court. First, it held that a settlement agreement that "never mentions CERCLA" and involves no CERCLA claims can nonetheless trigger the applicability of Section 113(f)(3)(B).[7] This is because Section 113(f)(3)(B), unlike neighboring provisions, "contains no [] CERCLA-specific language" to suggest that *only* settlements under CERCLA can create a contribution right.[8] Second, notwithstanding certain language in the 2004 consent decree—including a disclaimer against "any finding or admission of liability against or by the Government of Guam"—the consent decree in fact "resolve[d] [Guam's] liability to the United States" within the meaning of Section 113(f)(3)(B).[9] On the court's view, Guam's refusal to admit liability could not "overcome the Consent Decree's substantive provisions," which required Guam to engage in specific remedial conduct that was otherwise "consistent with a finding of liability."[10]

Analysis

On January 8, 2021, the Supreme Court granted certiorari on exactly these two questions: (1) whether a settlement reached outside of the CERCLA context can nevertheless trigger Section 113(f)(3)(B), and (2) whether a settlement agreement that disclaims liability and leaves the settling party exposed to future liability can create a Section 113(f)(3)(B) right. Both are questions with which the lower courts have wrestled since CERCLA was first amended, in 1986, to include the Section 113(f) contribution provision[11]—with most courts choosing to foreclose access to cost recovery under Section 107(a) whenever a party has satisfied any one of Section 113(f)'s triggers.[12] When paired with the courts' increasingly broad interpretations of what those triggers require,[13] the net effect has been to funnel more parties to Section 113, while reserving Section 107 (and its more forgiving limitations period) for parties that cannot be read as meeting Section 113(f)'s now-expansive requirements.

Until now, the Supreme Court has been reluctant to weigh in, having addressed the relationship between Section 107(a) and Section 113(f) only twice before.[14] The Court's decision in *Guam* may provide much-needed clarity on CERCLA's complex web of limitations periods, and ultimately on the question of which section of the Superfund law—the cost-recovery provision of Section 107(a), or the contribution provision of Section 113(f)(3)(B)—parties must use when seeking to recover cleanup costs. Depending on how the Court rules, its decision could affect whether and which PRPs can bring contribution actions related to sites currently being assessed for further remediation, and those that may be examined for additional remedial activity in the future.

***HollyFrontier Cheyenne Ref. v. Renewable Fuels Ass'n*, No. 20-472 (cert. granted Jan. 8, 2021; set for argument Apr. 27, 2021)**

Background

At issue in this case is whether small refineries are eligible to seek a hardship exemption from the Clean Air Act's renewable fuel standard (RFS) program if they do not have a continuous, unbroken history of

prior RFS exemptions. Created in the mid-2000s, the RFS program requires refineries and other obligated parties to blend increasing amounts of renewable fuels into the transportation fuel they produce each year.[15] Regulated parties demonstrate their compliance with these requirements by retiring a certain number of "Renewable Identification Numbers" (RINs) annually, with each RIN representing a gallon of renewable fuel.[16] Parties can also satisfy their RFS obligations by retiring RINs they have purchased from others, allowing a party that itself blends less renewable fuel than the amount required under the RFS program to still meet its renewable volume obligation (RVO) for the compliance year.[17] However, parties that choose to buy RINs in the credit-based market created by Congress may be subject to substantial fluctuation in RIN prices from year to year, depending on supply and demand. In years marked by especially high RIN prices, parties seeking to offset their inability to generate sufficient RINs on their own by purchasing and retiring RINs generated by others may face difficulty in meeting their RFS obligations.

The RFS program and the variable nature of RIN prices could impose a particular burden on small refineries (defined as refineries with an annual throughput not exceeding 75,000 barrels). Congress thus granted such refineries a blanket exemption from the RFS program until 2011, and directed EPA to extend that exemption for an additional two years conditioned on a study by the Department of Energy (DOE).[18] In its initial study in 2009, DOE concluded that small refineries did *not* need an additional extension, because their ability to buy RINs from third parties effectively counterweighed the economic hardship they otherwise faced.[19] After members of Congress, disagreeing, asked DOE to "reassess,"[20] DOE issued a new report in 2011, reversing some of its earlier conclusions and ultimately finding that RFS compliance costs can lead to economic hardship for small refineries.[21] In the statutory provision at issue here, Congress also authorized small refineries to petition EPA "at any time" for "an extension of the exemption under subparagraph (A)" if they can show "disproportionate economic hardship" from complying with the RFS mandate.[22]

In this case, EPA granted a hardship waiver to three small refineries for compliance years 2016 or 2017 under the RFS exemption provision.[23] Although none of them had continuously received exemptions in prior years, EPA determined that these refineries were nonetheless eligible for exemptions, consistent with EPA's longstanding statutory interpretation. A trade association representing renewable fuel producers challenged these waivers, arguing that the Clean Air Act permits only the "extension" of a small refinery exemption, and therefore only small refineries that had received exemptions in all prior years were eligible for exemptions.[24] The Tenth Circuit agreed, holding that "EPA exceeded its statutory authority" in issuing exemptions for small refineries that did not previously receive an RFS exemption "because there was nothing for the agency to 'extend.'"[25] In short, without a predicate exemption "to prolong, enlarge, or add to," the refineries could not qualify for a hardship waiver under RFS exemption provision.[26]

Analysis

On January 8, 2021, the Supreme Court granted certiorari on the question of whether small refineries that have not received continuous prior exemptions under the RFS program can be eligible for a hardship waiver. As noted by the refineries that petitioned for review, the Tenth Circuit's ruling effectively precludes almost all small refineries from obtaining an exemption (regardless of their economic

hardship), because it requires that they show an uninterrupted line of exemptions stretching back to 2011, when the initial blanket exemption ended. For its part, EPA has all but stopped issuing waivers in light of the Tenth Circuit's ruling, and recently announced that it no longer agrees with its longstanding interpretation described in its brief below, and that it now supports the Tenth Circuit's statutory interpretation.[27] If the Supreme Court were to affirm the Tenth Circuit's decision, nearly all small refineries will no longer be eligible for exemptions from their RFS obligations. Additionally, EPA may need to revisit the 2020 RVO, which it adjusted upward based on a projection of previously granted small refinery exemptions and anticipated small refinery exemptions for the 2019 compliance year.[28] And under this scenario, refineries and other stakeholders likely will re-urge EPA to use its general waiver authority to reduce RFS volumes or seek a legislative change. If, on the other hand, the Court were to reverse the Tenth Circuit's decision, biofuels stakeholders likely will urge EPA to strictly interpret that portion of the Tenth Circuit's decision addressing severe economic hardship (which is not before the Supreme Court) to limit the number of small refinery exemptions and to further increase future RVOs to account for any granted exemptions.

The case comes before the Court at a tumultuous time for the RFS program. EPA has not yet proposed (let alone finalized) an RVO for 2021. EPA has proposed, but not yet finalized, an extension of RFS compliance deadlines for the 2019 and 2020 compliance years.[29] Meanwhile, nearly 50 small refinery exemption petitions for compliance years 2019 and 2020 are awaiting decision before the Agency,[30] which has announced that it will not take action on these petitions until after the Supreme Court has issued a decision in *HollyFrontier*.[31] EPA has also opened a public comment period on several petitions for a waiver of the 2019 and 2020 volume requirements submitted by various refineries and the governors of several states (arguing that the RFS volumes will result in "severe economic harm") and the National Wildlife Federation (arguing that the RFS volumes will result in "severe environmental harm").[32] EPA has also proposed, but not yet finalized, a rule to modify or remove EPA's label requirement for E15 fuel dispensers.[33] And the Biden administration will have an opportunity to shape the future of the RFS program through the so-called "Set Rule." CAA Section 211(o)(2)(B) provides statutory volumes for renewable fuel only through 2022, after which EPA must employ statutory criteria to set new annual volumes.[34]

The Supreme Court's decision could affect a number of other RFS-related cases pending in the Circuit Courts, including a consolidated challenge to EPA's decisions to grant certain small refinery exemptions for compliance year 2018 and to deny other exemption petitions for that year;[35] these cases were held in abeyance on February 17, 2021 pending the Supreme Court's disposition of *HollyFrontier*.[36] Also pending are challenges to EPA's RVO for 2019,[37] EPA's RVO for 2020,[38] and EPA's rule allowing for the use of E15 blend transportation fuel year-round.[39]

Other Cases to Watch

Several of the Court's other pending cases touch upon environmental issues and should be watched closely for further developments:

- ***Cedar Point Nursery v. Hassid*, No. 20-107 (set for argument Mar. 22, 2021)** – Petitioners, a strawberry nursery, challenge a California regulation that allows union organizers limited access

rights to agricultural growers' property. They argue that a "continual, but time-limited easement" like the one created by the regulation is a physical invasion of property that, if not compensated, qualifies as an unconstitutional taking of private property under the Fifth Amendment to the U.S. Constitution. The case could have significant property rights implications, including in the environmental context, as it relates to access rights for federal and state environmental inspections and for EPA's entry and access rights to facilities under CERCLA. However, the extent of the impact of the case is difficult to predict, as the Court could opt to take a narrow path in reaching its decision limited to the unique aspects of the California regulation at issue.

- ***Florida v. Georgia*, No. 22o142 (argued Feb. 22, 2021)** – In this long-running dispute between Florida and Georgia, the Court will evaluate whether Georgia should be required to cap its water use in the Apalachicola River system in order to allow greater flow of water downstream into Florida. The procedural bearing of the case is unusual—not only is it presented as a matter of the Court's original jurisdiction, as a dispute between two states, but it is also being heard on objections to the findings of two different court-appointed special masters. While the unique posture of the case raises questions as to the scope of its potential impact, the resolution of the dispute is, at a minimum, certain to affect the communities and the environment in and around the Apalachicola River system.

- ***Montana v. Washington*, No. 22o152 (bill of complaint filed Jan. 21, 2020)** – In a second case invoking the Court's rarely used original jurisdiction, Montana and Wyoming challenge a decision by Washington state denying a water quality certification under Clean Water Act (CWA) Section 401 for a proposed coal export facility on the Columbia River, which would have provided port access to ship coal mined in Montana and Wyoming to foreign markets. Montana and Wyoming argue that Washington's denial effectively amounts to a regulation of the coal export industry, and prevents the two coal-producing states from getting their coal to market, in violation of the foreign and dormant commerce clause. For its part, Washington argues not only that Montana and Wyoming's challenge is, essentially, a challenge involving a private project that is the subject of litigation brought by the project proponent—making it an inappropriate matter for the Court's original jurisdiction—but also that Washington is authorized to deny certificates when the discharge from a proposed activity will not comply with the applicable sections of the CWA and appropriate requirements of state law. In October 2020, the Supreme Court asked for the federal government's views on the case, but has not yet decided whether it will exercise its jurisdiction over the challenge. This case is the latest in a years-long battle between coastal and coal-producing states over the construction of proposed terminals that would enable U.S. coal to reach overseas markets.

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[1] 42 U.S.C. § 9607(a)(4)(B).

[2] *Id.* § 9613(f)(3)(B).

[3] *Guam v. United States*, 341 F. Supp. 3d 74, 80 (D.D.C. 2018), *rev'd*, 950 F.3d 104 (D.C. Cir. 2020).

[4] *Id.*

[5] *Id.*

[6] *Guam*, 950 F.3d at 247.

[7] *Id.* at 243.

[8] *Id.*

[9] *Id.* at 246.

[10] *Id.*

[11] *See* Superfund Amendments & Reauthorization Act of 1986, 42 U.S.C. § 9601 et seq.

[12] *See, e.g.*, *Whittaker Corp. v. United States*, 825 F.3d 1002, 1007 (9th Cir. 2016) ("[A] party who *may* bring a contribution action for certain expenses *must* use the contribution action, even if a cost recovery action would otherwise be available."); *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 691 (7th Cir. 2014) ("[T]his court—like our sister circuits—restricts plaintiffs to Section 113 contribution actions when they are available."); *Hobart Corp. v. Waste Mgmt. of Ohio Inc.*, 758 F.3d 757, 767 (6th Cir. 2014) ("PRPs must proceed under Section 113(f) if they meet one of that section's statutory triggers."); *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230, 1237 (11th Cir. 2012) ("deny[ing] the availability of a § 107(a) remedy under these circumstances," where the parties were "subject to a consent decree" under Section 113).

[13] *See, e.g.*, *Refined Metals Corp. v. NL Indus. Inc.*, 937 F.3d 928, 932 (7th Cir. 2019) (declining to adopt "an interpretation of section 113(f)(3)(B)" that "limit[s] covered settlements to those that specifically mention CERCLA"); *Asarco LLC v. Atl. Richfield Co.*, 866 F.3d 1108, 1120–21 (9th Cir. 2017) (same).

[14] *See United States v. Atl. Research Corp.*, 551 U.S. 128, 138 (2007); *Cooper Indus. Inc. v. Aviall Servs. Inc.*, 543 U.S. 157, 163 (2004). Neither of these cases lends much guidance to the issues faced in *Guam*. And most circuit courts to have answered the question left open in *Atlantic Research* have concluded that compelled costs of response are recoverable only under Section 113(f). *See supra* note 12.

[15] *See* 42 U.S.C. § 7545(o)(9).

[16] *See* 40 C.F.R. §§ 80.1401, 80.1425–.1426.

[17] *See* 42 U.S.C. § 7545(o)(5); 40 C.F.R. §§ 80.1427(a)(6), 80.1451(c).

[18] 42 U.S.C. § 7545(o)(9)(A).

[19] *See* Office of Policy & Int'l Affairs, Dep't of Energy, EPACT 2005 Section 1501: Small Refineries Exemption Study 13 (Jan. 2009).

[20] S. Rep. No. 111-45, at 109 (2009).

[21] *See* Office of Policy & Int'l Affairs, Dep't of Energy, Small Refinery Exemption Study 2–3 (Mar. 2011).

[22] 42 U.S.C. § 7545(o)(9)(B).

[23] *See Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206, 1214 (10th Cir. 2020).

[24] *Id.*

[25] *Id.*

[26] *Id.* at 1248–49.

[27] *See* Press Release, U.S. Envtl. Prot. Agency, EPA Signals New Position on Small Refinery Exemptions (Feb. 22, 2021) ("EPA Press Release"), https://www.epa.gov/renewable-fuel-standard-program/epa-signals-new-position-small-refinery-exemptions.

[28] Renewable Fuel Standard Program: Standards for 2020 and Biomass Based Diesel Fuel Volume for 2021 and Other Changes, 85 Fed. Reg. 7016, 7049–53 (Feb. 6, 2020).

[29] *See* Extension of 2019 and 2020 Renewable Fuel Standard Compliance and Attest Engagement Reporting Deadlines, 86 Fed. Reg. 3928 (proposed Jan. 15, 2021).

[30] *See* U.S. Envtl. Prot. Agency, RFS Small Refinery Exemptions, Table 2: Summary of Small Refinery Exemption Decisions Each Compliance Year, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (last updated Feb. 18, 2021).

[31] *See* EPA Press Release, *supra* note 27.

[32] Notice of Receipt of Petitions for a Waiver of the 2019 and 2020 Renewable Fuel Standards, 86 Fed. Reg. 5182, 5184 (Jan. 19, 2021).

[33] *See* E15 Fuel Dispense Labeling and Compatibility with Underground Storage Tanks, 86 Fed. Reg. 5094 (proposed Jan. 19, 2021).

[34] 42 U.S.C. § 7545(o)(2)(B)(ii).

[35] *See RFS Power Coal. v. EPA*, No. 20-1046 (D.C. Cir. filed Feb. 21, 2020).

[36] *See also, e.g.*, *Renewable Fuels Ass'n v. EPA*, No. 21-1032 (D.C. Cir. filed Jan. 19, 2021) (challenging the grant of three small refinery exemptions for compliance years 2018 and 2019; case held

in abeyance on February 20 pending outcome of HollyFrontier); *Kern Oil & Ref. Co.*, No. 20-1456 (D.C. Cir. filed Nov. 13, 2020) (challenging denial of small refinery exemptions for various compliance years between 2011 and 2016; case held in abeyance on January 29 pending outcome of HollyFrontier).

[37] *See Growth Energy v. EPA*, No. 19-1023 (D.C. Cir. filed Feb. 4, 2019).

[38] *See RFS Power Coal. v. EPA*, No. 20-1046 (D.C. Cir. filed Feb. 21, 2020).

[39] *See Am. Fuel & Petrochemical Mfrs. v. EPA*, No. 19-1124 (D.C. Cir. filed June 10, 2019).

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