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SECTION OF ENVIRONMENT ENERGY AND RESOURCES

Constitutional Law Task Force Newsletter

Vol. 1, No.1 **July 2005**

LETTER FROM THE CHAIR

Jim May
Widener University School of Law

I have the pleasure of serving as the chair of the Constitutional Law Task Force, a recently created task force of the ABA Section of Environment, Energy, and Resources. This is our inaugural newsletter. I hope you'll keep reading.

Why? As Professor Robin Craig's terrific companion essay amply demonstrates, the Task Force seeks to examine the most significant, cutting-edge issues at the intersection of constitutional and environmental law, and explain why it matters to practitioners.

Among the topics we'll explore are the extent to which Congress can regulate activities that are historically or arguably intrastate in nature (Commerce Clause), delegate congressional prerogatives (Separation of Powers and the Non-delegation Doctrine), impel states and state officials to follow federal environmental policies (Fedealism and the Preemption, Property and Spending Clauses, and the 10th and 11th Amendments), compensate for conversion of private property for public use (Private Property Rights and the 5th Amendment), and search and seize (4th Amendment). Constitutional environmental law is also emerging in practice at the state and local levels, and influences other fields of law, including administrative, tort, land use, civil procedure, tax and international law.

Now is a good time to be an active member of the Task Force. The Constitution is having an increasingly forceful impact on environmental law, land use and natural resources law. In the Supreme Court's 2003-04 term, five of the nine environmental cases involved constitutional law. In the latest term, the Court decided three 5th Amendment cases, which were showcased in a Quick Teleconference that we co-hosted on July 6, 2005. At the appellate level, one in two environmental cases has constitutional issues. Remarkably, on average two in three of all federal environmental decision has at least one constitutional issue (last year it was three in four). In short, it's a good bet that a random case in environmental law will decide or be decided on a principle of constitutional law, thus making it an essential field to practitioners.

Justice O'Connor's retirement is likely to make the field all the more dynamic. In particular, the Court is poised to continue to define the relationship between modern environmental law and traditional notions of federalism and related constitutional principles.

You don't need to be a member of the Task Force to enjoy our services. But it's a whole lot more fun if you are. To join, simply go to www.abanet.org/environ/committees/signup.html where you can fill out and submit the Committee Preference Form. Alternatively, you can complete a Section Committee Preference Form and fax it to the ABA Section of Environment, Energy, and Resources at (312) 988-5572. You must be a member of the Section to join the Committee.

Constitutional Law
Task Force Newsletter
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Jim May, Editor

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To learn more about the Section of Environment, Energy, and Resources, visit www.abanet.org/environ.

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I hope you'll join us for the 2005-06 year. I welcome your comments, questions and ideas. I look forward to working with you over the coming year.

OVERVIEW OF CONSTITUTIONAL ISSUES IN ENVIRONMENTAL LAW

Robin Kundis Craig

Thirty years ago, constitutional doctrines were rarely decisive in environmental, energy or natural resources litigation. Today, more than one-half of all federal environmental cases involve constitutional issues, and many cases turn on them. As a result, constitutional law has become essential component of environmental, energy and natural resources law, and lawyers in these areas cannot afford to ignore the constitutional issues that arise in their environmental and natural resources practices. As I recently summarized elsewhere,

> As a matter of legal structure, the place of environmental law in the U.S. legal system must begin with the U.S. Constitution, the document that structures that system. Without being overly simplistic, the Constitution performs three main functions: (1) it establishes the structure and powers of the federal government; (2) it preserves and outlines the relationship between the United States and the states; and (3) it identifies and preserves the most basic and "inalienable" rights of individual Americans. To date, the interactions between the CWA [Clean Water Act; the same is true for the other federal environmental statutes] and the Constitution have occurred almost exclusively within the first two of these constitutional functions.

> The reason for this structural emphasis in environmental constitutional jurisprudence also lies within the Constitution: nowhere does the United States' foundational document mention the environment, and hence it establishes no "rights" to any particular kind of environment. At the risk of overstating the obvious, environmental regulation per se – unlike, for example, speech or abortion regulation – is not a Constitution-level legal issue. Were it not for the fact that federal environmental statutes keep rubbing up, so to speak, against the Constitution, repeatedly prompting the Supreme Court to discuss the constitional boundaries of environmental regulation, the title of this book would describe a nonexistent issue in American law.
>
> But environmental law *does* keep rubbing up against the Constitution, repeatedly and with increasing frequency. The variety of constitutional issues raised in environmental litigation suggests that ecological goals and environmental law structure fit only uncomfortably into contemporary constitutional jurisprudence.

ROBIN KUNDIS CRAIG, THE CLEAN WATER ACT AND THE CONSTITUTION: LEGAL STRUCTURE AND THE PUBLIC'S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT 3 (2004). Nor is mine the only voice to notice these issues and discuss them at length. To mention only one more of the recent book-length publications on these issues, several authors explored the various federalism issues in environmental law in DOUGLAS T. KENDALL, ED., REDEFINING FEDERALISM: LISTENING TO THE STATES IN SHAPING "OUR FEDERALISM" (2004).

This Constitutional Law Task Force exists to acknowledge and explore the constitutional issues that can arise in environmental litigation. The ABA Section on Environment, Energy, and Resources (Section) convened this Task Force in recognition of the prominent role that constitutional law now plays in environmental law and litigation. For example, between Jan. 1, 2004 and mid-March 2005, the federal courts had issued approximately 290 opinions in Clean Air Act, Clean Water Act, RCRA, CERCLA, Endangered Species Act, NEPA and EPCRA cases. In 159 of these, constitutional issues arose. Thus, on average, the federal courts are deciding a constitutional issue in at least every other environmental law case that they hear.

These 159 cases involve a wide range of constitutional issues. As you might have guessed, the issue litigated most frequently is standing (37 times), followed closely by the related issue of mootness (28 times). Would you have guessed, however, that the next most common environmental constitutional issue was due process (24 times)? Or that 18 different kinds of constitutional issues have been decided in environmental cases since Jan. 1, 2004? One of the more unusual constellation of constitutional issues, for example, arose in the U.S. District Court for the District of Utah's decision in *Utah Association of Counties v. Bush*, 316 F. Supp. 2d 1172 (D. Utah 2004), which challenged President Bush's designation of national monuments in part on the grounds that the Antiquities Act violates the nondelegation doctrine (a separation-of-powers challenge), the Property Clause and the Spending Clause.

While a number of constitutional issues can arise in environmental litigation, in federal law the most significant of these tend to derive either from the complex relationships between the state and federal governments that exist under most federal environmental statutes (arrangements known as "cooperative federalism") or from federal environmental law's somewhat unusual procedural enforcement mechanism, the environmental citizen suit. Relationships between the federal government and the states can give rise to Supremacy Clause and preemption issues; interstate regulatory authority issues; issues related to federal sovereign immunity from state regulation; Commerce Clause, dormant Commerce Clause and Tenth Amendment federalism issues; and issues involving regulatory "takings" of private property in violation of the Fifth Amendment. Citizen suits, in turn, raise Article III-based standing issues, federal sovereign immunity issues, issues related to states' Eleventh Amendment immunity and Article II-based separation of powers issues.

Although rights-based constitutional environmental issues are less prominent, they do arise. Most obviously, civil and criminal investigations of violators, civil penalty assessments and criminal prosecutions of environmental violations are subject to the same panoply of constitutional protections as any other government investigation, administrative proceeding or prosecution. These rights include due process protections, Fourth Amendment protections from unreasonable searches and seizures, a Fifth Amendment right not to testify against oneself and prohibition on double jeopardy, a Sixth Amendment right to a speedy trial, and, in criminal cases at least, the Seventh Amendment right to a jury trial. However, such issues are often qualitatively different than other more common structural constitutional challenges, because they usually focus on the constitutionality of an individual proceeding rather than on the constitutionality of the statutory scheme for entire classes of cases or defendants.

Constitutional environmental claims often draw inspiration from Supreme Court decisions that are not directly related to environmental law. Probably the most famous (or infamous) of these inspirational decisions was the Court's 1995 Commerce Clause decision in *United States v. Lopez*, 514 U.S. 549 (1995), in which the Court invalidated the Gun-Free School Zones Act of 1990, 18 U.S.C. § 992(q)(1)(A) (Supp. II. 1990), on grounds that it violated the Commerce Clause. The decision was the first such Commerce Clause invalidation of a federal statute in almost 60 years, and it inspired challenges to several environmental statutes, most notably the federal Endangered Species Act and the federal Clean Water Act.

Less noteworthy Supreme Court decisions, however, have also become fodder for constitutional environmental challenges. For example, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Supreme Court invalidated a retroactive application of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722, on due process grounds. The decision immediately inspired constitutional challenges to the retroactive application of the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), necessitating constitutional re-evaluations of CERCLA's widely accepted retroactive reach in three circuits. *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189-90 (2d Cir. 2003); *United States v. Dico, Inc*., 266 F.3d 864, 880 (8th Cir. 2001); *Franklin County Convention Facilities Authority v. American Premier Underwriters, Inc.*, 240 F.3d 534, 550-53 (6th Cir. 2001); *see also United States v. Olin*, 107 F.3d 1506 (11th Cir. 1997) (evaluating the constitutionality of CERCLA's retroactive application in light of the Supreme Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244, 257-65 (1994), which invalidated retroactive application of the Civil Rights Act of 1991). The fact that all four of these circuits upheld CERCLA's constitutionality does not alter the import of the constitutional challenges made, especially given that at least one federal district court found CERCLA's retroactive application constitutionally suspect. *See generally United States v. Olin*, 927 F. Supp. 1502 (S.D. Ala. 1996).

The rest of this article provides a brief overview of some of the most recent developments in five of the more common constitutional issues that can arise in environmental litigation: standing under Article III, the Commerce Clause, the Supremacy Clause, the Takings Clauses and the Due Process Clauses. It is the goal of the Constitutional Law Task Force to explore these and other environmental constitutional issues in more detail in future issues of this newsletter. We welcome contributions from our members and other interested readers.

Standing and Mootness

The constitutional ***standing*** requirement, as most environmental practitioners know, grows out of the fact that Article III of the U.S. Constitution limits the jurisdiction of the federal courts to "Cases" and "Controversies." To ensure that plaintiffs have sufficient connection to the litigation to ensure that a constitutionally proper case or controversy existed, the U.S. Supreme Court has announced three elements of constitutional standing: (1) injury in fact, (2) that is "fairly traceable" to the events at issue, and (3) that the federal court is likely to be able to redress. Standing

as an issue fairly frequently in ***environmental citizen suits*** because of the sometimes attenuated relationship between environmental plaintiffs and the alleged wrongs they seek to correct.

Mootness is closely related to standing – indeed, the Supreme Court has occasionally characterized mootness as standing carried through time – and grows out of the same Article III jurisdictional limitation to "Cases" and "Controversies." The mootness doctrine demands that a live controversy remain throughout the litigation. In environmental law, the most recent mootness issue at the Supreme Court involved the question of whether civil penalties can keep an environmental citizen suit alive even after the violator has come into compliance. The Supreme Court split fairly evenly on this issue, leaving the field with two difficult-to-reconcile (at least philosophically) decisions: *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998), in which the Supreme Court held that citizen suit plaintiffs did not have standing in an EPCRA suit for wholly past violations of the act, despite their claims for civil penalties, because civil penalties paid to the /U.S. Treasury could not redress their injuries; and *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), which held that civil penalties could redress the citizen plaintiffs' injuries and hence prevented the court from dismissing a lawsuit as moot when the defendant came into compliance with the Clean Water Act *after* the plaintiffs filed their complaint.

Commerce Clause

Congress enacted most of the federal environmental statutes pursuant to its Commerce Clause authority, and at the time it enacted most of those statutes (1970 to 1980, roughly), the U.S. Supreme Court had not invalidated legislation on Commerce Clause grounds in decades. However, as noted above, in 1995 the Court decided *United States v. Lopez*, 514 U.S. 549 (1995), invalidating the Gun-Free School Zones Act of 1990 on Commerce Clause grounds. Commerce Clause challenges to federal environmental statutes were not long in coming; most commonly, they are leveled at regulatory actions under the Clean Water Act and the Endangered Species Act. In 2001, the U.S. Supreme Court refused to decide a Commerce Clause challenge to the Clean Water Act's jurisdictional reach, deciding instead on statutory grounds that federal jurisdiction under the act could not extend isolated, intrastate waters solely on the basis that migratory birds used those waters. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

Dormant Commerce Clause issues have also arisen in environmental litigation, most prominently in the context of waste disposal regulation. Beginning with *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), the Supreme Court imposed stringent limitations on states attempting to bar or otherwise regulate trash coming into the state from elsewhere.

Supremacy Clause

The Supremacy Clause of the U.S. Constitution ensures that that the Constitution, federal laws and federal treaties will pre-empt any conflicting state constitutional, statutory or regulatory provisions. Supremacy Clause and preemption issues have arisen in a variety of contexts, ranging from whether the Endangered Species Act's implementation of the Convention on International Trade in Endangered Species (CITES) preempted a state ban on the importation on African elephant ivory, *Mah Hing Ivory & Imports, Inc. v. Deukmejian*, 702 F.2d 760 (9th Cir. 1983); to the question of whether Congress's 1972 enactment of the Clean Water Act preempted interstate nuisance claims, *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), *International Paper Co. v. Ouelette*, 479 U.S. 481 (1987); to, most recently, the question of whether the Clean Air Act preempts California's Fleet Rules, *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 124 S. Ct. 1756 (2004).

Fifth Amendment and Fourteenth Amendment "Takings" of Private Property

Some of the most notorious cases in environmental law involve property owners' claims that governmental environmental regulation has violated the Constitution's

prohibitions on governmental takings of property without just compensation. In fact, these so-called "regulatory takings" arguments rarely succeed, but they often serve as rallying points for opposition to environmental regulation generally. Two aspects of federal environmental regulation are particularly likely to raise constitutional "takings" claims: Endangered Species Act listings and critical habitat requirements, and section 404 "dredge and fill" permit denials under the Clean Water Act.

In the first half of 2005, the Supreme Court issued three takings decisions that might affect subsequent environmental regulatory takings claims. First, in *Lingle v. Chevron U.S.A. Inc.*, — U.S. —, 125 S. Ct. 2074 (May 23, 2005), the Court fairly clearly laid out the proper regulatory takings analysis as a three-step inquiry. First, has a physical occupation of the property by the government occurred? If so, the Constitution is implicated (physical takings). Second, if not, has the government deprived the owner of the property of all economic use of that property? If so, the Constitution is implicated (*Lucas* takings). Finally, if neither of the *per se* takings rules apply, then the court must engage in a *Penn Central* balancing of factors to determine whether the regulation amounts to a taking of private property requiring compensation.

In contrast, *San Remo Hotel L.P. v. City & County of San Francisco, Cal.*, — U.S. —, 125 S. Ct. 2491 (June 20, 2005), involved the procedural aspects of asserting constitutional takings claims. In this case, the plaintiff attempted to litigate unripe takings claims based on California state law through the California courts, then pursue its federal takings claims in the federal courts, based on the same facts. Unfortunately for the plaintiff, the California courts ostensibly decided the federal as well as state legal claims, and evaluated the legal import of the facts at issue. As a result, the U.S. Supreme Court determined that the federal full faith and credit statute, 28 U.S.C. § 1738, precluded further litigation of the plaintiffs' takings claims in federal court.

Finally, in an eminent domain context, the Supreme Court explored the limits of the Fifth and Fourteenth Amendments' "public use" requirement in *Kelo v. City of New London, Conn.*, — U.S. —, 125 S. Ct. —, 2005 WL 1469529 (June 23, 2005). Specifically, the Court upheld New London's condemnation of private property as part of a waterfront redevelopment plan, even though the condemned properties would end up in private hands.

(This Task Force co-sponsored an ABA brown bag presentation on these cases on July 6, 2005. Look for other such programs as decisions warrant.)

Due Process

Due process challenges to environmental statutes and environmental enforcement are the most wide-ranging constitutional challenges that arise in environmental law. At one extreme, for example, plaintiffs often tack nearly meritless substantive due process claims on to their Fifth or Fourteenth Amendment regulatory takings claims. Such tacking of constitutional claims may decrease in light of the U.S. Supreme Court's recent distinguishing of the due process and takings analyses in *Lingle*. Specifically, the Court determined that any formula that asks whether a government regulation of private property "substantially advances" a legitimate state interest is a due process inquiry, not a regulatory takings analysis. *Lingle*, 125 S. Ct. at 2082-83.

At the other extreme, however, due process challenges have ensured basic procedural protections in environmental law and litigation. Perhaps most dramatic was the Eleventh Circuit's declaration that the administrative compliance order (ACO) provision of the Clean Air Act, 42 U.S.C. § 7413, was unconstitutional under both due process and separation of powers principles. *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236, 1258-60 (11th Cir. 2003). Under this statutory provision, noncompliance with ACOs triggers civil and criminal liability, even though the EPA can issue the ACO on the basis of "any information" – no adjudicatory determination of an actual violation of the Clean Air Act is necessary. As the Eleventh Circuit emphasized, however, due process requires that "[b]efore the Government can impose severe civil and criminal penalties, the defendant is entitled to a full and fair hearing before an impartial tribunal." *Id.* at 1258. Because the Clean Air Act

does not allow the EPA to engage in full-blown administrative adjudication of the validity of the ACO, and because judicial review of the underlying merits of the ACO is never available, "[t]he Clean Air Act is unconstitutional to the extent that mere noncompliance with the terms of an ACO can be the sole basis for the imposition of severe civil and criminal penalties." *Id.* at 1260. *See also General Electric Co. v. EPA*, 360 F.3d 188, 191 (D.C. Cir. 2004) (holding that the federal courts had jurisdiction to determine whether CERCLA's unilateral administrative order regime facially violated constitutional due process requirements).

The Supreme Court has also recognized due process limitations on environmental law enforcement. For instance, in 2001, reviewing the habeas petition of a defendant criminally convicted for operating a hazardous waste facility without a permit, the Supreme Court reversed the conviction on due process grounds, holding that a defendant who actually had a hazardous waste facility permit could not be convicted for operating without a permit on the government's novel theory that radical violations of a permit effectively nullified the permit. *Fiore v. White*, 531 U.S. 225 (2001). The Fifth Circuit, in turn, has expressed concerns in RCRA criminal prosecutions "that the statute fails to specify a timeframe within which, after hazardous waste is discovered in one's possession, that person becomes criminally liable for storing it without a permit." *United States v. Sims Brothers Construction, Inc.*, 277 F.3d 734, 740-41 (5th Cir. 2001).

Substantive due process claims have also been leveled at the environmental statutes, although less successfully. One Clean Water Act defendant, for example, argued that civil penalties of $4,018,500.00 for failure to comply with a consent decree violated his due process rights, but the Seventh Circuit disagreed, noting that the severity of the civil penalty assessment reflected the defendant's own negligence and hence was not unreasonable, "especially considering that it is but a small fraction of the maximum penalty that could have been imposed under the CWA" for the defendant's 579-day delay in complying. *United States v. Reuth Development Co.*, 335 F.3d 598, 607 (7th Cir. 2003). Another Clean Water Act defendant argued that the act's citizen suit provision violated his substantive due process rights because it "subjects Defendants to litigation that may be arbitrary or unfair." The Eastern District of North Carolina disagreed. *North Carolina Shellfish Growers Association v. Holly Ridge Associates, L.L.C.*, 200 F. Supp. 2d 551, 556-57 (E.D.N.C. 2001).

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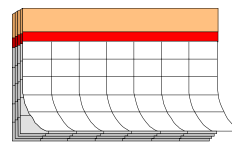
Calendar of Section Events



ABA Annual Meeting
Aug. 4-9, 2005
Chicago, Illinois

13th Section Fall Meeting
Sept. 21-25, 2005
Nashville, Tennessee

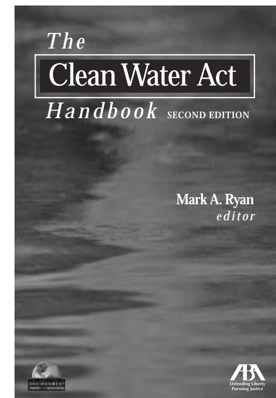
24th Annual Water Law Conference
February 23-24, 2006
San Diego, California

35th Annual Conference on Environmental Law
March 9-12, 2006
Keystone, Colorado

For more information, see the Section Web site at www.abanet.org/environ or contact the Section at 312/988-5724.

FROM ABA PUBLISHING AND THE SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

The Clean Water Act Handbook, Second Edition
Mark A. Ryan, editor



This updated guide is the definitive resource to the provisions and complexities of the federal Clean Water Act and how it continues to evolve. Recent court rulings and the change of administration have resulted in significant changes that dramatically affect practitioners working in the area. This new edition provides detailed explanations of these changes and considers the impact of recent court decisions, including the Supreme Court's decision in *SWANCC* and the Court of Appeals decisions in *American Mining Assoc.*, *Talent Irrigation*, and *Forsgren*, among others.

Beginning with an overview of the law's provisions and pertinent regulation and enforcement issues, the subsequent chapters address specific issues, such as:

- NPDES permits
- Control of publicly owned treatment works
- Requirements applicable to indirect discharges
- The regulation of wetlands and the impact of recent judicial decisions
- Oil and hazardous substance spills
- Enforcement options under Section 309
- Judicial review

Chapters begin with a section on applicability and scope. Within each fully annotated chapter, clear explanations of specific statutory and regulatory provisions and court decisions applicable to the issue are presented in the order needed for full and accurate analysis – a virtual checklist of requirements and considerations. Making this new edition more useful than ever, the authors reference URL addresses for quick, up-to-the-minute information on government documents that are often difficult to locate.

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