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Environmental Law

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ENVIRONMENTAL LAW

Judge Leon Lazer:

There are two environmental law cases[1] that the Supreme Court has decided that are of some interest, more in the area of how the Supreme Court views citizen lawsuits than on the substance of environmental law.

One of the lawsuits, I would say the one of somewhat lesser interest to us, is *Lujan v. National Wildlife Federation.*[2] Lujan was the Secretary of the Interior. The Department of the Interior is the regulatory body that maintains and manages federal lands[3] and utilizes a classification procedure for withdrawing,[4] disposing of,[5] and granting permits for mining and other uses of public lands.[6]

The National Wildlife Federation brought an action attacking the reclassification of certain lands on the grounds that they would, by virtue of the reclassification, be opened up to mining thereby destroying their natural beauty.[7] The action started in the district court,[8] moved up to the court of appeals,[9]

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1. Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990); Hallstrom v. Tillamook, 110 S. Ct. 761 (1990).

2. 110 S. Ct. 3177 (1990).

3. Federal Land Policy and Management Act of 1976, § 102, 43 U.S.C. § 1701 (1988).

4. *Id.* § 1714.

5. *Id.* § 1713.

6. *Id.* § 1732(b).

> In managing the public lands, the Secretary shall . . . regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands, . . . to permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns[.]

Id.

7. *Lujan*, 110 S. Ct. at 3183-84.

8. National Wildlife Fed'n v. Burford, 676 F. Supp. 271 (D.D.C. 1985). The court granted the respondents' request for an injunction prohibiting petitioners from "[m]odifying, terminating, or altering any withdrawal, classification or other designation governing the protection of lands in the public domain . . . and from . . . [t]aking any action inconsistent with any such withdrawal, classification, or designation. *See id.* at 277-79. In a subsequent order, the district court denied the respon-

and then moved back to the district court.[10] While in the district court for the second time,[11] the Department of the Interior moved for summary judgment to dismiss the action on the ground that the respondents had no standing to seek judicial review.[12]

The Federation's standing argument relied on two similar affidavits.[13] The first affidavit, the Peterson affidavit,[14] stated that her recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of South Pass-Green Mountain, Wyoming, had been and continued to be adversely affected[15] and that the unlawful actions of the Bureau of Land Management and the Department of Interior, in the South Pass-Green Mountain area, had opened the lands to the staking of mining claims and oil and gas leasing, an action which threatened the aesthetic beauty and potential wildlife habitat of these lands.[16] The second affidavit, the Erman's affidavit, was substantially similar to the Peterson affidavit with respect to all the concerns except it also included additional areas.[17]

In its summary judgment motion, the Department of the Interior argued that the Peterson affidavit was not sufficient to support the action.[18] While considering the motion, the district court requested briefs from both parties on the issues con-

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dents' motion to dismiss the complaint for failure to demonstrate standing. *Id.* at 280.

9. National Wildlife Fed'n v. Burford, 835 F.2d 325 (D.C. Cir. 1987). The court of appeals affirmed both orders of the district court and found sufficient grounds that the respondents used the environmental resources that would be damaged and such use was sufficient to support their standing. *Id.*

10. National Wildlife Fed'n v. Burford, 699 F. Supp. 327 (D.D.C. 1988).

11. *Id.*

12. *Id.* at 328.

13. *Id.* Plaintiff rested its entire standing argument on the affidavits of two persons, Peggy Peterson and Richard Erman, who were members of the environmental organization. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 331-32. The Erman affidavit addressed the use of land in the vicinity of the Grand Canyon National Park, the Arizona Strip (Kanab Plateau), and the Kaibab National Forest. *Id.*

18. National Wildlife Fed'n v. Burford, 699 F. Supp. 327, 328 (D.D.C. 1988).

cerned.[19] In addition to its brief, the National Wildlife Federation submitted four more affidavits to support its standing. The affidavits were rejected by the court.[20]

When the case arrived at the Supreme Court,[21] the majority held, five-to-four,[22] that the original two affidavits, the Peterson affidavit and the Erman affidavit, were insufficient to support the National Wildlife Federation's standing.[23] The Court stated that the averments in the Peterson affidavit that the recreational use in the vicinity of South Pass-Green Mountain, Wyoming, was adversely affected by the classification of nearby land were insufficient.[24] As to the additional four affidavits submitted by the petitioners along with their briefs, the Court declared that they were insufficient and too general in nature.[25] The Court also noted that the district court had the discretion to reject the additional affidavits when they were proffered.[26]

The four dissenters[27] believed that the contents of the affidavits together with the conduct of the Department of the Interior sufficed to create an environmental issue for judicial deter-

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19. *Id.*

20. *Id.* at 328 n.3. In addition to its brief, plaintiff submitted affidavits from four of its members, which were held untimely and not considered by the court. *Id.* The court ultimately held that it lacked jurisdiction since plaintiff's standing was not established, and, therefore, it was not necessary for the court to reach the merits of plaintiff's claim for injunctive relief. *Id.* at 332. The court of appeals then held that standing had been established since injury-in-fact was demonstrated by the plaintiff. National Wildlife Fed'n v. Burford, 878 F.2d 422, 434 (D.D.C. 1989). Moreover, it was an abuse of the district court's discretion to refuse to consider the Federation's supplemental affidavits. *Id.* Therefore, the court of appeals refused to affirm the district court's granting of summary judgment against the plaintiff and remanded. *Id.*

21. Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990).

22. *Id.* at 3181. Justice Scalia delivered the opinion, in which Chief Justice Rehnquist, Justices White, O'Connor, and Kennedy joined. Justice Blackmun filed a dissenting opinion, in which Justices Brennan, Marshall and Stevens joined.

23. *Id.* at 3180.

24. *Id.* at 3187-89.

25. *Id.* at 3189-94. The Court stated that "[i]t is impossible that the affidavits would suffice, as the Court of Appeals held, to enable respondent to challenge the entirety of petitioners' so-called 'land withdrawal review program.'" *Id.* at 3189.

26. *Id.* at 3193.

27. Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3194 (Blackmun, J., dissenting). *See supra* note 22.

mination.[28] The dissenters further noted their disagreement with the majority's belief that the district court had the discretion to reject the four additional affidavits.[29]

The significance of the case is only that it leads to the belief that the Supreme Court is going to maintain a strict approach when dealing with this type of public interest or citizen lawsuits which concern environmental issues.

A more significant case from the point of view of the problems that we have locally is *Hallstrom v. Tillamook County*.[30] The case deals with problems concerning waste disposal which are similar to the ones we have in our vicinity and pose great concern here on Long Island.[31]

The Resource Conservation and Recovery Act[32] (RCRA) provision directly at issue in *Hallstrom*, relating to the citizen suits, declares that any person may commence an action against any violator who is alleged to be in violation of any regulation promulgated under the Act.[33] Given the provisions

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28. *Lugan*, 110 S. Ct. at 3194-95. The dissent stated that abundant evidence supported the National Wildlife Federation's assertion that newly opened lands used for the purpose of mining can be expected to cause severe environmental damage to such lands. *Id.* Though the affidavits were not precise, they were adequate at least to create a genuine issue of fact as to the organization's injury. *Id.* at 3195.

29. *Id.* at 3194. Justice Blackmun noted that the "District Court abused its discretion by refusing to consider supplemental affidavits filed after the hearing [and] in the parties' cross-motions for summary judgment." *Id.*

30. 110 S. Ct. 304 (1990).

31. Kass & Gerrard, *State Environmental Legislation for 1990*, N.Y.L.J. Oct. 17, 1990, at 3, col. 1 (discussion of current legislation concerning environmental issues passed in New York).

32. Resource Conservation and Recovery Act of 1976, § 1, 42 U.S.C. § 6901 (1990); Solid Waste Disposal Act, § 7002, 42 U.S.C. § 6972 (1990).

33. The Solid Waste Disposal Act, § 7002(a), 42 U.S.C. § 6972(a), (1990), provides:

> (a) In general. Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf —
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> (1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this Act [42 USCS §§ 6901 *et seq.*]; or
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> (B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh

of section 6972(a), the Act appears to make an attorney general out of any member of the public who is willing to advance the funds and the time to bring an action to compel violators to comply with the law. The regulations under RCRA further provide that no suit may be commenced prior to sixty days[34] after the plaintiff has given notice of the violation to the Federal Environmental Protection Agency (EPA),[35] the state,[36] and the violator.[37]

Petitioner Hallstrom owned a farm next to a sanitary landfill and gave the county notice that there was a violation of the RCRA and that he intended to sue.[38] A year later, Mr. Hallstrom filed suit against the county in the United States District Court for the District of Oregon.[39] The county moved for summary judgment arguing that since the sixty day notice to the EPA and the state's Department of Environmental Quality had not been given the court had no subject matter jurisdiction.[40]

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amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act [42 USCS §§ 6901 *et seq.*] which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought to the district court for the district in which the alleged violation occurred. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such regulation or order, or to order the Administrator to perform such act or duty as the case may be.

Id.

34. *Id.* § 6972(b)(1)(A).

35. *Id.* § 6972(b)(1)(A)(i).

36. *Id.* § 6972(b)(1)(A)(ii).

37. *Id.* § 6972(b)(1)(A)(iii).

38. Hallstrom v. Tillamook County, 110 S. Ct. 304, 307 (1990). In April 1981, petitioners believed the landfill operation violated standards established under the RCRA and sent respondent written notice of their intent to file suit. *Id.*

39. *Id.*

40. *Id. See supra* notes 34-37 and accompanying text.

The district court, in an effort not to waste judicial resources, stayed the lawsuit and instructed Mr. Hallstrom to give the required notice.[41] Mr. Hallstrom then gave the EPA and the state notice of his intent to sue. However, neither the state nor the EPA were interested in taking action against the respondents.[42] After the required sixty days the action proceeded again in the district court, which eventually found in favor of the petitioner.[43]

The respondents presented the notice issue to the court of appeals[44] and achieved dismissal. The court held that the district court lacked the necessary subject matter jurisdiction to entertain the lawsuit.[45] The Supreme Court then granted certiorari.[46]

In an opinion by Justice O'Connor, the Court held that the RCRA was clear, that the sixty day notice requirement was a condition precedent to commencing the action, and failure to meet this requirement necessitated dismissal.[47] The Court found that Mr. Hallstrom filed suit before giving the requisite notice requirement and, since he was in control of the timing of the action and no statute of limitations existed, he was not under any particular time constraints.[48] Given these facts, the Court held that Mr. Hallstrom could have given the required notice prior to filing, but had failed to do so.[49] The Court con-

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41. *Hallstrom*, 110 S. Ct. at 307-08. The district court noted that the purpose of the notice requirement was to give administrative agencies an opportunity to comply with environmental regulations. *Id.* at 308.

42. *Id.*

43. *Id.* at 305, 307-08. The district court held that the respondents violated the RCRA and ordered respondents to remedy the violation. *Id.* The court, however, refused to grant petitioners' motion for injunctive relief. *Id.*

44. Hallstrom v. Tillamook County, 844 F.2d 598 (1987).

45. *Id.* at 601.

46. Hallstrom v. Tillamook County, 109 S. Ct. 1526 (1989).

47. Hallstrom v. Tillamook County, 110 S. Ct. 304, 305-06 (1990).

48. *Id.* at 309.

> Unlike a statute of limitations, RCRA's 60-day notice provision is not triggered by the violation giving rise to the action. Rather, petitioners have full control over the timing of their suit: they need only give notice to the appropriate parties and refrain from commencing their action for at least 60 days.

Id.

49. *Id.* at 309-10. The Court noted as follows:

cluded that it would not read the statute literally as the petitioner proposed and found in favor of the respondents.[50]

Petitioner's argument that the statute should be read with a more flexible approach was well made.[51] He contended that the statute's purpose was to encourage more citizen lawsuits.[52] Even though the district court had stayed the action, the state and the EPA were not interested in pursuing the matter further.[53] Under the circumstances, the petitioner urged the Supreme Court not to dismiss the action after four years of litigation since such an act would constitute an unnecessary waste of judicial resources.[54] The majority, however, did not agree with this argument and dismissed the petitioner's arguments for a literal reading of the RCRA.[55]

> [C]itizen suits under RCRA are like any other lawsuit generally filed by trained lawyers who are presumed to be aware of statutory requirements. (Indeed, counsel for petitioners in this case admitted at oral argument that they knew of the notice provisions but inadvertently neglected to notify the state and federal agencies. . . .) Under these circumstances, it is not unfair to require strict compliance with statutory conditions precedent to suit.

Id. at 310.

50. *Id.* at 311.

51. *Id.* at 310. The petitioner contended that a literal interpretation of the notice provision would defeat Congress's intent in enacting the RCRA. *Id.* In support of his argument, the petitioner cited passages from the legislative history of the first citizen suit statute, which the Court noted was misplaced. *Id.* The Court further noted that "[a]bsent a clearly expressed legislative intention to the contrary, the words of a statute are conclusive." *Id.* (citing Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). The Court held that requiring citizens to comply with the notice and delay requirements serves congressional goals in two ways; it allows government agencies to take responsibility for enforcing regulations and gives the alleged violator an opportunity to comply with the regulations and avoid unnecessary citizen lawsuits. *Id.*

Additionally, the petitioner asserted that literal notice would compel "absurd or futile results" and cause procedural anomalies. *Id.* at 310-11.

52. *Id.* at 307-08. The district court reasoned that petitioners had cured any defect in notice by formally notifying the state and federal agencies and the court noted that the purpose of the notice requirement was to give administrative agencies an opportunity to enforce environmental regulations. *Id.*

53. *See supra* notes 40-43 and accompanying text.

54. Hallstrom v. Tillamook County, 110 S. Ct. 304, 312 (1990).

55. *Id.* at 311. The Court concluded that none of the petitioner's arguments were compelling enough to disregard the plain language of section 6972(b). *Id.*

Justices Marshall and Brennan, in their dissent, cited to *Oscar Mayer and Company v. Evans*,[56] where the language of the Age Discrimination in Employment Act of 1967[57] provided that no suit could be brought under section 626 of this title before the expiration of sixty days after the proceedings had been commenced under the state law.[58] In *Oscar Mayer*, an action was commenced under the anti-discrimination regulations.[59] Oscar Mayer moved to dismiss on the grounds that the Iowa State Civil Rights Commission was empowered to remedy age discrimination in employment and that "14(b) [of the Age Discrimination Act] required resort to this state remedy prior to commencement of the federal suit."[60] The district court denied the motion. The court of appeals affirmed the district court. The Supreme Court, however, reversed and remanded the case with instructions to enter an order directing the district court to hold the respondent's suit in abeyance until respondent complied with the statute.[61] The *Hallstrom* dissenters concluded that the majority's decision flew in the face of *Oscar Mayer*.[62]

The lesson to be drawn from *Lujan v. National Wildlife Federation*[63] and *Hallstrom v. Tillamook*[64] is that the Supreme Court has taken a rather strict approach, a negative one I believe, toward the bringing of citizen lawsuits in environmental actions and will require strict statutory compliance if the action is to survive.[65] It seems apparent that the Court will not save a lawsuit which has been brought in technical violation of the regulations and the statute, even where Congres-

56. *Id.* at 313 (Marshall, J., dissenting) (citing Oscar Mayer and Co. v. Evans, 441 U.S. 750 (1979)).

57. Age Discrimination Act of 1967, § 14, 29 U.S.C. § 633 (1988).

58. Age Discrimination Act of 1967, § 14(b), 29 U.S.C. § 633(b) (1988).

59. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 753 (1979).

60. *Id.* at 765.

61. *Id.*

62. Hallstrom v. Tillamook County, 110 S. Ct. 304, 313 (1990) (Marshall, J., dissenting). "The point for present purposes, however, is simply that a violation of a mandatory precondition to suit does not *necessarily* require dismissal of the suit." *Id.*

63. 110 S. Ct. 3177 (1990).

64. 110 S. Ct. 304 (1990).

65. *See supra* notes 15-62 and accompanying text.

sional intent seems much more liberal as far as jurisdiction and standing are concerned.