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### Environmental Cases Decided by the Supreme Court During its Recent Term

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Although the Supreme Court's decisions regarding the Voting Rights Act, affirmative action, and gay marriage earned most of the attention during the 2012-2013 term, a number of significant decisions with regard to environmental law involving preemption, regulation of storm water run off, and the taking of property through environmental regulations were handed down by the Court. Below are the environmental cases decided by the Supreme Court during its recent term.

1. ***Deckert, Oregon State Forester v. Northwest Environmental Defense Center***

The Supreme Court determined that the Clean Water Act, and the implementing regulations, did not require permits before channeled storm water run off from logging roads can be discharged to navigable waters of the United States. The Supreme Court held that the Environmental Protection Agency ("EPA") had broad discretion to regulate storm water run off and the EPA's interpretation of its own regulations must be deferred to "unless the interpretation is plainly erroneous or inconsistent with the regulation." Accordingly, the Supreme Court upheld the EPA's interpretation that logging roads were not related to manufacturing or processing of raw materials at an industrial plant so as to require a permit before the logging company defendant could allow storm water run off from those roads.

2. ***Los Angeles County Flood Control District v. Natural Resources Defense Counsel***

The Supreme Court determined that a municipal flood control district was not required to obtain a permit under the Clean Water Act for flow of water out of a concrete channel within a river. The Court relied on its prior decision in *South Fla. Water Management Dist. v. Miccosukee Tribe*, 541 U.S. 95 (2004) which held that the pumping of polluted water from one part of a water body into another part of the same body is not a discharge of pollutants under the Clean Water Act. The Supreme Court reversed the Ninth Circuit and held that the flow of water from an improved portion of a navigable waterway into an unimproved portion does not qualify as a discharge of pollutants so as to require a permit.

3. ***Arkansas Game and Fish Commission v. United States***

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For additional information on this or any environmental related issue, please contact ***E. Christopher Murray***, chair of Ruskin Moscou Faltischek's Environmental Law Practice Group.

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The Arkansas Game and Fish Commission ("Commission") is the owner of the Dave Donaldson Black River Wildlife Management Area ("Management Area"), and operates the Management Area as a wildlife and hunting preserve, and also uses it as a timber resource, conducting regular harvest of timber as part of its forest management efforts. In 1948, the United States Army Corps of Engineers constructed the Clearwater Dam located 115 miles upstream from the Management Area. In 1993, the Corps began releasing water from the dam at a slower rate at the request of area farmers, but this slower release required a longer period of time in which the water would be discharged from the dam causing flooding in the Management Area during the tree growing season.

As a result, the Management Area's tree growing ability was severely harmed, and the Commission brought suit against the United States contending that the flooding constituted a taking of the Commission's property without compensation.

The Federal Circuit dismissed the action. The Federal Circuit acknowledged that temporary government action may give rise to a taking claim, but the government's flooding can only give rise to a taking claim if the flooding is "permanent or inevitable recurring".

Accordingly, the Federal Circuit determined that the flooding from the dam to the Management Area could not support a taking claim.

The Supreme Court reversed holding that the government induced flooding constituted taking of property even if it is not permanent or inevitable recurring, and government induced flooding of a limited duration may be compensable. The Supreme Court then remanded the action back to the trial court for factual findings to determine whether a taking had occurred.

With the ever-evolving world of digital media and e-commerce, it is imperative that businesses consult with competent counsel who is well-versed in these arenas to ensure that their web-based agreements are enforceable. As the cases above illustrate, failure to proactively address these issues may cost a business substantially more in the future when forced to litigate enforceability in an unfamiliar forum.

#### 4. ***Koontz v. St. John's River Water Management District***

Coy Koontz, Sr. sought permits to develop a section of his property from the St. John's River Water Management District ("District"), which, consistent with Florida law, requires permit applicants wishing to build on wetlands to offset the resulting environmental damage. The District denied the permits and stated it would only approve construction if the size of the development was reduced, and contractors were hired to make improvements to District owned wetlands several miles away. Koontz refused and filed suit seeking money damages for the taking of his property without compensation. After being successful in the trial court, Koontz's recovery was reversed by the Florida State Supreme Court holding that the case was not controlled by *Nollan v. California Coastal Commission*, 483 U.S. 825 and *Dolan v. City of Tigard*, 512 U.S. 374, because in this case the permit was denied, while in *Nollan* and *Dolan* the permit was granted with conditions.

The United States Supreme Court reversed, holding that it does not matter whether the conditions being imposed result in the denial of the permit, or whether a permit was granted. In either case, the Supreme Court held that the monetary concessions such as being imposed on Koontz had to be roughly proportional to the effect of the development on the property, and there had to be some nexus between the requirements imposed by the government and the proposed development. Accordingly, the United States Supreme Court reversed the Florida Supreme Court and remanded the matter back to the State Court.

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## 5. *American Trucking Association, Inc. v. City of Los Angeles*

In order to garner support for the expansion of the Port of Los Angeles, Los Angeles' Board of Harbor Commissioners adopted a Clean Truck Program. The Clean Truck Program required any short haul truck company that wanted to move cargo in and out of the Port to sign a standard form concession agreement which, inter alia, required any truck entering the Port to affix a placard on each truck with the phone number for reporting environmental or safety concerns, and submit a plan listing off street parking locations for each truck when not in service.

The American Trucking Association, Inc. ("ATA") challenged the concession agreement, as well as the enforcement penalties, as being in violation of the Federal Aviation Administration Authorization Act ("FAAAA"). The FAAAA expressly preempts any state or local law relating to price, route or service of any motor carrier.

The Supreme Court struck down the concession agreement requirements that were challenged by the ATA, and rejected Los Angeles' argument that the concession agreement was not a law but a contract. The Supreme Court declined to address the issue regarding enforcement, since no enforcement actions had been taken. The Supreme Court decision interpreted a preemption clause in a federal statute in a broad sense to prohibit state or local regulations.

## 6. *Tarrant Regional Water District v. Herrmann*

The Tarrant Regional Water District ("Tarrant"), a Texas state agency responsible for providing water to north central Texas and its rapidly growing population, challenged certain laws adopted by the State of Oklahoma which effectively prohibited Tarrant from purchasing water contained within the portion of the Red River basin located in Oklahoma. Tarrant contended that Oklahoma violated both the federal Red River Compact and the United States Constitution. The Supreme Court determined that since the Red River Compact was silent as to whether a state was precluded from adopting laws prohibiting one state from purchasing water from another state, and since the Red River Compact permitted Oklahoma to allocate the use of the water subject to certain restrictions, the Oklahoma statutes were enforceable. Accordingly, unlike in *American Trucking Association, Inc.*, the federal statute - the Red River Compact - contained no express preemption provision, and the Supreme Court refused to read one into the applicable law and permitted Oklahoma to govern the use of the water within its borders.