



ELI REPORT

Endangered Laws: Panels clash on constitutional issues, implementation

Environmental professionals and members of the public and press gathered in Washington, D.C., on March 31 to discuss current challenges to the framework of environmental laws at ELI's *Environmental Law Update 2004: The Practical Impacts of This Year's Legal Struggles*. An extraordinary lineup of experts, including federal and state government officials, public interest lawyers, and private practitioners, brought a diverse array of viewpoints to three topics culled from recent headlines

The event was sponsored by ELI's Endangered Environmental Laws Program, which was launched in 2003 to stimulate discussion among the legal community, media, and citizens about the recent revival of anti-regulatory legal theories that threaten the constitutional underpinnings of federal environmental law.

Environmental regulation has never been without conflict and controversy, ELI President Leslie Carothers said in her opening remarks, "but lately the game has changed. Many of today's legal challenges go well beyond attacking agency actions or rules on grounds that they're not reasonable or proportional to the risk. Indeed, they challenge the *power* of Congress to create these frameworks as they are written and as they have long been interpreted and implemented."

The first panel covered the Endangered Species Act, a target of several recent constitutional challenges in the federal courts of appeals. Most of these challenges have focused on whether Congress has the power to protect endangered "cave species" and "flower-loving flies" under its authority to "regulate commerce . . . among the several states."

David Hayes, President Clinton's Deputy Secretary of the Interior and now an attorney at the law firm of Latham & Watkins, thought it "no



Endangered Species List: Former Deputy Interior Secretary David Hayes, Bob Irvin of the World Wildlife Fund, Reed Hopper of the Pacific Legal Foundation, Mark Rutzick of NOAA.

surprise" that the ESA has been the "focal point of some of the most interesting and important legal challenges under the Constitution," given that "there is arguably no other statute that engenders such passion on both sides of the fence."

The panelists' passions were evident as they discussed the cases. While acknowledging that "every appellate court that has looked at this has upheld the ESA," Reed Hopper of the Pacific Legal Foundation suggested that they "have done so, in every case, by modifying or distorting the [Supreme Court's] *Lopez* tests." Bob Irvin of WWF countered by predicting the imminent demise of Commerce Clause challenges to the ESA. He compared the current spate of litigation to "the 17-year cicadas that are going to emerge this summer, spend a brief time above ground, and then retreat for another 17 years." Mark Rutzick of NOAA observed that the administration is vigorously defending the challenges, and called for flexibility in its implementation.

No matter the eventual fate of the Commerce Clause cases, the panelists agreed on at least two points: failure of the Supreme Court to grant certiorari on the Fifth Circuit's *GDF Realty* case would be the likely death knell

for Commerce Clause challenges to the act, and the Takings Clause may represent "the new frontier" in constitutional challenges to the ESA. They cited pending disputes in which Fish & Wildlife Service actions taken to protect endangered fish have been challenged by land owners as infringing their alleged "property rights" to a steady water supply.

The second panel addressed current Clean Air Act issues, including state challenges to the Bush administration's New Source Review rule and the Supreme Court's *Alaska v. EPA* and *Engine Manufacturers* cases this term. Moderator Leslie Sue Ritts, a prominent Clean Air attorney at Hogan & Hartson, noted that all three "have to do with the changing landscape under the Clean Air Act of the federal and state relationship."

Jeffrey Holmstead, EPA's Assistant Administrator in the Office of Air and Radiation, opened the discussion on a light note. He acknowledged his fellow panel members, Peter Lehner of the New York Attorney General's Office and Howard Learner, Executive Director of the Environmental Law & Policy Center of the Midwest, observing, "You might think it's odd for me to appear on a panel with two of the people who are suing me on various

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issues, but you have to sort of get used to that in Washington.”

Holmstead continued by tracing the structure and history of the Clean Air Act and describing how administration initiatives, such as the Interstate Air Quality Rule, enroll local governments in an effort to reduce pollution at the lowest possible costs. These initiatives, he claimed, are part of a continuing effort to “fundamentally reexamine — at least on certain pollutants — the relationship between the states and the federal government.”

Lehner agreed that “the relationship between state and federal governments has changed,” but had a different message. In the past, he said, EPA set the floor and the states grumbled about having to achieve it. “Today instead of the federal government being the leader, they’re too often the laggard.” More troubling, said Lehner, is that EPA is now forcing the states to accept weaker standards and interfering with their own attempts to regulate.

Learner agreed, saying that “the uncertainty of federal enforcement” is creating perverse incentives and is making state-level achievement of Clean Air goals almost impossible. “We’re rewarding those who evade, stall, and delay rather than those who comply.” Holmstead responded that EPA’s proposals would result in greater air quality improvements than could be obtained through enforcement of current rules.

The final panel looked at recent incidents of mad cow disease, avian flu, and salmonella poisoning, and asked who should bear the cost of



Clean Air Actors: Leslie Sue Ritts of Hogan & Hartson, Howard Learner of Environmental Law & Policy Center of the Midwest, EPA Assistant Administrator for Air and Radiation Jeffrey Holmstead, Environmental Bureau Chief Peter Lehner in New York Attorney General’s Office.

regulations designed to protect the public from food safety risks.

Bob Hibbert, a former USDA attorney and specialist in food & drug law, and Wenonah Hauter of Public Citizen opened with a discussion of current U.S. policy. Hibbert explained that the traditional framework compensates farmers to control animal diseases, but offers no indemnification for measures taken to protect human health. New diseases like BSE (mad cow) complicate the picture, according to Hibbert, “because there is no longer a clean division between human and animal health.”

Hauter pointed out that it is industrial agriculture that has created or exacerbated these problems and that the current uncertainty should force “a larger public debate about industrial agriculture in this country.”

Doug Kendall of the Community Rights Council and Richard Samp, chief counsel at the Washington Legal Foundation, followed with a

debate of the legal issues, particularly the potential impact of takings claims against the government for the costs that new food safety regulations impose on food producers.

Citing the *Rose Acre* salmonella case pending in the Federal Circuit, Kendall argued that the Takings Clause may be “short-circuiting the policy debate,” and that its broad application could “chill government responses to emergencies and have a dramatic impact on Americans’ safety.” Samp responded that the clause “has always played a big role in ensuring fairness” and that there would be “no limit on the amount of regulation if there was no cost to the government.” Where the burden of regulation falls disproportionately on individual producers, he argued, “the political process ought to be held accountable.”

Attendees left the conference with a broader understanding of the common legal and political themes underlying a number of this year’s environmental struggles. As Carothers noted, “The simple task of our panels today is to show that these issues are not simply technicalities, but that their interpretations by the courts can make a very big difference in how, and in some cases *whether*, we protect the environment and the public health.”

ELI’s Endangered Laws Program continues to study these issues and plans to bring interested parties together at similar events in the future. Information about the program is available at www.endangeredlaws.org.

— Brad Klein



Food Safety Inspectors: Doug Kendall of Community Rights Council, Wenonah Hauter of Public Citizen, Richard Samp of Washington Legal Foundation, former USDA attorney Bob Hibbert.