



By Richard Lazarus

## Environmentalists Lose Every Case

You win some. You lose some. The green community, however, was not so fortunate in the Supreme Court during its last term. They won none and they lost them all. It was their worst term ever.

Environmentalists have never considered the High Court their champion. Just the opposite. But, notwithstanding their general skepticism, environmental concerns have actually not fared so poorly. The record is mixed. Environmentalists have lost some significant cases, to be sure, but they have also won many. Although the Court's grant of jurisdiction has been overwhelmingly tilted in favor of government when aligned with business concerns, the Court's subsequent rulings on the merits are far more balanced.

Until the 2008–09 term, that is. Environmentalists have won some big cases in recent years: Clean Air Act cases like *Massachusetts v. EPA*, and *Environmental Defense Fund v. Duke Energy Corp.*; Clean Water Act cases like *S.D. Warren v. Maine Dept. of Environmental Protection* and *Friends of the Earth v. Laidlaw Environmental Services*; and regulatory taking cases like *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.

In the term that began last October, by contrast, they lost every case. That has never happened before. And the cases covered the gamut of envi-

ronmental issues. The string of losses began with a case arising under the National Environmental Policy Act, *Winter v. Natural Resources Defense Council, Inc.* In *Winter*, the Navy persuaded the Court to overturn a Ninth Circuit ruling that had imposed conditions on the military's use of active sonar during training exercises, and NRDC believed the conditions were necessary to protect marine mammals. *Winter*, however, could be viewed as just the latest in an unblemished record of environmentalist NEPA defeats extending back to 1973.

The next loss, *Summers v. Earth Island Institute*, was more significant. Here again, the Court reversed a Ninth Circuit ruling favorable to environmentalists, this time involving a challenge to Forest Service planning rules, on the grounds that the environmental plaintiffs lacked Article III standing. Justice Antonin Scalia's opinion for the Court reinvigorated some of the limitations on environmental citizen standing that Scalia first erected in opinions for the Court in *Lujan v. National Wildlife Federation* (1990) and *Lujan v. Defenders of Wildlife* (1992), which had been weakened by the Court's later rulings in *Friends of the Earth v. Laidlaw* (2000) and *Massachusetts v. EPA* (2006).

Next were two Clean Water Act cases, *Entergy Corp. v. Riverkeeper* and *Coeur d'Alaska v. Southeast Alaska Conservation Council*. (Please note that I represented environmental respondents in *Entergy*). At first glance, each case involves a fairly narrow issue of statutory construction. The question presented in *Entergy* concerned EPA's authority to compare costs and benefits in regulating cooling water intake structures and at issue in *Coeur d'Alaska* was whether EPA is required by Section 402 to regulate slurry discharges from mining operations that the Army Corps of Engineers was already regulating under Section 404. But, the reach of the en-

vironmental plaintiffs losses may not be so confined. The Court's reasoning in rejecting the environmental claims in both *Entergy* and *Coeur d'Alaska* are susceptible to industry arguments that they should be applied more broadly throughout the Water Act. Whether they are successful will likely depend on how President Obama's EPA chooses to respond to the rulings on remand, because the Court in both cases upheld EPA's authority to read the federal law narrowly rather than mandating such a reading.

Environmentalists were not formally parties in the final two consolidated environmental cases of the term, *Shell Oil v. United States* and *Burlington Northern v. United States*, but that distinction is more rather than less foreboding. The Court sharply cut back on decades of lower court precedent that had broadly construed the liability provisions of the Comprehensive Environmental Response, Compensation, and Liability Act.

The Court narrowed the scope of arranger liability and embraced a tougher test regarding the applicability of joint and several liability.

Absent *Shell Oil* and *Burlington Northern*, one might fairly characterize the federal government rather than business interests as the big winner in the environmental cases decided by the Court in the 2008–09 term. But, with them, only the business community swept the table.

Environmentalists can, however, cheer something about the Court's next session. The Court has already granted review in 46 cases to be heard in the upcoming term, more than any other term in recent memory. Yet, the number of environmental cases granted so far? Only one: *Stop the Beach Nourishment v. Florida Dept of Environmental Protection*.

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*The business community sweeps the table in the Supreme Court's 2008–09 term*