



BNA, INC.

DAILY ENVIRONMENT



REPORT

Reproduced with permission from Daily Environment Report, 171 DEN B-1, 09/08/2009. Copyright © 2009 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

U.S. SUPREME COURT

The author of this article says the last term of the U.S. Supreme Court was in many respects like no other in modern environmental law. During the 2008-2009 term, the Supreme Court ruled on novel and important questions concerning preliminary injunctions under the National Environmental Policy Act; cost-benefit analyses and permitting under the Clean Water Act; arranger and joint and several liability under the Comprehensive Environmental Response, Compensation, and Liability Act; and environmental standing. At no turn, says the author, did the court favor the environment over other interests. He says the court even reached down to reverse decisions in two cases the Bush administration did not appeal, intimating a degree of anti-environmental activism. The author says this does not bode well for the near future of environmental law.

U.S. Supreme Court Environmental Cases 2008-2009: A Year Like No Other

By JAMES R. MAY

For the second time in three terms under Chief Justice John Roberts, environmental and resource law cases comprised a significant portion of cases decided. It was in many respects a year like no other in modern environmental law. During the 2008-2009 term, the Supreme Court ruled on novel and important questions concerning preliminary injunctions under the National Environmental Policy Act, cost-benefit analyses and permitting under the Clean Water Act, arranger and joint and several liability under the Comprehensive Environmental Response, Compensation, and Liability Act, and environmental standing. The court decided

against the pro-environment position at each turn. It even reached down to reverse decisions in two cases that the Bush administration did not appeal, intimating a degree of anti-environmental activism.

No Injunction to Stop Navy's Use of Sonar

In *Winter v. NRDC*,¹ the court reversed the U.S. Court of Appeals for the Ninth Circuit and ruled 5-4 that the U.S. Navy's interests in security and military preparedness outweighs the respondent's interest in pro-

¹ 129 S. Ct. 365, 67 ERC 1225 (2008).

tecting whales and other marine mammals from acoustic harm caused by submarine seeking sonar devices.

In *Winter*, the court voted to lift a “narrowly tailored” preliminary injunction to enjoin the U.S. Navy’s use of mid-frequency active sonar off of the southern California coast, known as the “SOCAL exercise.”² The Navy regards mid-frequency active sonar as the sole effective means for detecting and tracking enemy diesel-electric submarines. The Navy’s sonar, however, also disrupts marine mammals that rely upon their own sonar.

The Natural Resources Defense Council challenged the Navy’s failure to perform an environmental impact statement under NEPA and attached other claims under the Coastal Zone Management Act (CZMA) and the Endangered Species Act.

Finding the “possibility” of causing irreparable environmental harm, the district court issued a preliminary injunction requiring, *inter alia*, the Navy to “power down” (1) completely if marine mammals were spotted within 2,200-yards of Navy vessels ships or (2) by 75 percent in the presence of other significant “surface ducting” conditions.

Following the initial grant of preliminary injunction the Bush administration then identified the SOCAL exercise to be of “paramount interest to the United States” and granted the Navy a waiver from the CZMA. Correspondingly, the White House Council on Environmental Quality granted the Navy’s request for “alternative arrangements for compliance with” NEPA due to national “emergency.”

Thereafter, the Navy appealed the lower court’s injunction to the Ninth Circuit. Rather than lift the injunction, the Ninth Circuit remanded to have the district court weigh the exemption’s impacts on the injunction.

On remand the lower court threw out the “emergency” premise behind the Council on Environmental Quality’s “alternative arrangements” decision. While finding it “constitutionally suspicious,” the lower court did not rule on the legality of the waiver of CZMA requirements. The Ninth Circuit affirmed, finding the lower court had not abused its discretion in issuing the limited preliminary injunction.³ The Ninth Circuit stayed the injunction’s “power down” provisions, however, allowing the Navy to appeal the case to the Supreme Court. The Navy still would be subject to the injunction’s four less restrictive conditions that the Navy did not appeal, including a 12 nautical-mile no-sonar zone along the California coast and enhanced monitoring requirements.

Writing for the majority, Roberts reversed the Ninth Circuit 5-4 and vacated the injunction and its “power down” requirements on two grounds. First, the majority held that the lower courts’ preliminary injunction analysis applied an incorrect standard that did not require a sufficient showing of harm. It held that the lower court should have asked whether the SOCAL exercise would result in the “likelihood” rather than the “possibility” of irreparable harm, because the “possibility” standard is “too lenient.”⁴ Second, it determined the lower courts had given short shrift to the Navy’s interests in security and preparedness.

Turning to the merits, the court held first that respondents had not met their burden of showing irreparable

harm. The court reached this conclusion notwithstanding the Navy’s own countervailing data, which while both lower courts found to be “ cursory, unsupported by evidence [and] unconvincing,” still revealed that sonar training had resulted in 564 physical injuries and 170,000 behavioral disturbances of marine mammals.⁵ The environmental respondents also argued that countless other reported and undetected mass strandings of marine animals had been “associated” with sonar training.⁶ Instead, the court concluded that the Navy had been conducting sonar training for 40 years without documented cases of irreparable harm.⁷

Next, the majority concluded that, properly balanced, the Navy’s military interests far outweighed respondents’ interest in protecting and observing marine mammals. It reasoned that balancing the public interest supporting the Navy’s national security and military preparedness against NRDC’s public interest in protecting marine mammals for observation and education “does not strike us as a close question.”⁸ Disagreeing with the lower courts, the majority found the equities tipped strongly in the Navy’s favor: “To be prepared for war is one of the most effectual means of preserving peace.”⁹ The majority noted that the president deemed active sonar as “essential to national security” because adversaries possess 300 submarines. Mid-frequency active sonar, the Navy argued, is “the most effective technology” for “antisubmarine warfare, a top war-fighting priority for the Pacific Fleet.”¹⁰ Citing senior naval officers, the majority observed the importance of training ship crews with all possible war stressors occurring simultaneously, thus making mid-frequency active sonar “mission critical” for training.¹¹ The imposition of the mitigating regulations would require the Navy “to deploy an inadequately trained submarine force,” which would in turn jeopardize the safety of the fleet.¹² Imposition of other mitigating factors, the majority held, could decrease the overall effectiveness of sonar training generally.¹³ On the other hand, “[f]or the plaintiffs, the most serious possible injury would be harm to an unknown number of the marine mammals that they study and observe. . .” in contrast, forcing the Navy to deploy an inadequately trained antisubmarine force jeopardizes the safety of the fleet.¹⁴ The majority concluded that the “public interest in conducting training exercises with active sonar under realistic conditions plainly outweighs the interests advanced by the plaintiffs.”¹⁵

Thus the majority found the district court had applied the incorrect standard and abused its discretion on the merits. Finding in favor of the Navy, the court reversed the decisions below and did not impose the lower court’s “power down” requirements.¹⁶

Justice Ruth Bader Ginsburg, joined by Justice David Souter, dissented: “In light of the likely, substantial

⁵ *Id.* at 374.

⁶ *Id.* at 380.

⁷ *Id.* at 381.

⁸ *Id.* at 379.

⁹ *Id.* at 370.

¹⁰ *Id.* at 370.

¹¹ *Id.* at 371.

¹² *Id.* at 378-79.

¹³ *Id.* at 380.

¹⁴ *Id.* at 370, 378.

¹⁵ *Id.*

¹⁶ *Id.* at 374.

² 219 DEN A-6, 11/13/08.

³ *NRDC v. Winter*, 518 F.3d 658, 66 ERC 1517 (9th Cir. 2008).

⁴ *Id.* at 375.

harm to the environment, NRDC's almost inevitable success on the merits of its claim that NEPA required the Navy to prepare an EIS, the history of this litigation, and the public interest, I cannot agree that the mitigation measures the District Court imposed signal an abuse of discretion." In particular, Ginsburg had no trouble finding irreparable harm, pointing to "170,000 behavioral disturbances, including 8,000 instances of temporary hearing loss; and 564 Level A harms, including 436 injuries to a beaked whale population numbering only 1,121." The dissent also noted that "sonar is linked to mass strandings of marine mammals, hemorrhaging around the brain and ears, acute spongiotic changes in the central nervous system, and lesions in vital organs."¹⁷ On balancing the competing interests of the parties, Ginsburg concluded that these injuries "cannot be lightly dismissed, even in the face an alleged risk to the effectiveness of the [Navy's training exercises.]"¹⁸

Charting a more solicitous course, Justice John Paul Stevens, joining Justice Stephen G. Breyer, concurred in part and dissented in part. They would have found that neither court below adequately explained why the balance of equities favored the two specific mitigation measures being challenged over the Navy's assertions that it could not effectively conduct its exercises subject to the conditions. They would have remanded for a more narrowly tailored injunction, but continued the Ninth Circuit's stay conditions as the status quo until the completion of the SOCAL exercise. Indeed, the Navy concluded its SOCAL exercise and completed its NEPA environmental impact statement for the SOCAL exercise in January 2009.

EPA Has Discretion to Use Cost-Benefit Analysis

In *Entergy v. Riverkeeper*,¹⁹ the Supreme Court reversed the U.S. Court of Appeals for the Second Circuit and ruled 5-1-3 that the Environmental Protection Agency may conduct a cost-benefit analysis in regulating the substantial adverse impacts of "cooling water intake structures" under Section 316(b) of the Clean Water Act.²⁰ Section 316(b) of the act requires that any standards established for existing discharge sources ensure that the "design, location, construction and capacity" of any such intake structures "reflect best technology available [BTA] for minimizing adverse environmental impact."

Some 30 years after the enactment of the Clean Water Act, EPA issued rules applying Section 316(b) to existing dischargers. The rules allow but do not require the use of a cost-benefit analysis before setting performance-based BTA standards and in deciding whether to grant site-specific variances.

The Second Circuit, in an opinion by then judge and now Justice Sonia Sotomayor, ruled that the language, structure, and history of Section 316(b) do not permit cost-benefit analysis. It then remanded the case to EPA to explain the role, if any, cost-benefit analysis played in EPA's regulations for existing intake structures.

The Supreme Court reversed. Writing for the court, Justice Antonin Scalia reasoned that Section 316(b), when read together with other performance-based pro-

visions of the act, gives EPA discretion to base BTA on a cost-benefit analysis.

Scalia relied upon traditional *Chevron* two-part analysis. First, he held that Section 316(b) does not admit of plain meaning with regard to cost-benefit analysis. To be sure, he held that the word "best" invites many meanings, including that which "most efficiently produces some good," even if the "good" is of a lower quality than other options.²¹ He also wrote that "minimize" has many meanings, and "is a term that necessarily admits of degree [but] is not necessarily used to refer exclusively to the greatest possible reduction."²² Scalia then found that EPA's interpretation of Section 316(b) was reasonable because while the provision "does not expressly authorize cost-benefit analysis," it does not show "an intent to forbid its use."²³ Thus, he wrote, it is "eminently reasonable" to conclude that Congress' silence on use of cost-benefit analysis in cooling tower regulatory cases "is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree."²⁴

Stevens dissented, joined by Souter and Ginsburg. Stevens asserted that the court had "misinterpreted" Section 316(b)'s plain language, and that the majority "unsettles the scheme Congress established."²⁵ According to this view, either the absence of plain language authorizing cost-benefit analysis, or congressional silence on the matter, is conclusive, especially in light of the fact that Congress expressly authorized the use of cost-benefit analysis with powerplant regulations in other contexts.²⁶ This, Stevens argued, is "powerful evidence" of Congress' decision not to authorize cost-benefit analysis in Section 316(b).²⁷ In Stevens' view, the court "should not treat a provision's silence as an implicit source of cost-benefit authority."²⁸ Indeed, quoting Justice Scalia verbatim from another case, he noted that Congress does not resort fundamental regulatory plans in "vague terms or ancillary provisions," and "hide elephants in mouseholes."²⁹

Regardless, Stevens viewed EPA's interpretation as unreasonable and outcome determinative: "[I]n the environmental context, in which a regulation's financial costs are often more obvious and easier to quantify than its environmental benefits. . . cost-benefit analysis often, if not always, yields a result that does not maximize environmental protection."³⁰

Breyer concurred and presented a middle ground, observing that "those who sponsored the legislation intended the law's text to be read as restricting, though not forbidding, the use of cost-benefit comparisons."³¹ He would have found that the Clean Water Act's extensive history demonstrate Congress' intent to limit cost-benefit analysis. Quoting the act's principal sponsor Sen. Edmund Muskie, Breyer wrote that "while cost

²¹ *Id.* at 1505-06.

²² *Id.* at 1506.

²³ *Id.* at 1508

²⁴ *Id.*

²⁵ *Id.* at 1516. (Stevens, J., dissenting).

²⁶ *Id.* at 1517.

²⁷ *Id.* at 1519.

²⁸ *Id.* at 1516.

²⁹ *Id.*, quoting *Whitman v. American Trucking Assn's*, 531 U.S. 457, 51 ERC 2089 (2001) (Scalia, J.).

³⁰ *Id.* at 1516.

³¹ *Id.* at 1512 (Breyer, J., concurring).

¹⁷ *Id.* at 392.

¹⁸ *Id.* at 393.

¹⁹ 129 S. Ct. 1498, 68 ERC 1001 (2009).

²⁰ 61 DEN A-11, 4/2/09.

should be a factor in the Administrator's judgment, no balancing test will be required."³² Formal cost-benefit analysis, he feared, would induce extensive delays and an distorted emphasis on easily quantifiable factors, running in contrast to the goal of promoting cheaper, more effective cleanup technology.³³

NSPS Do Not Apply to Section 404 Permit

In *Coeur Alaska Inc. v. Southeast Alaska Conservation Council*,³⁴ the Supreme Court reversed the Ninth Circuit and held 5-1-3 that when the U.S. Army Corps of Engineers issues a Section 404 permit under the Clean Water Act it displaces otherwise applicable new source performance standards that EPA applies to pollutant discharges subject to a Section 402 permit.³⁵

Upholding the Corps' and petitioner's less environmentally protective interpretation, the court ruled that pollutants that have the effect of changing the bottom elevation of a body of water may be regulated as "fill material" instead of "pollutant discharges" subject to new source performance standards. Consequently, the court held that EPA has jurisdiction to issue Section 402 permits for discharges into waters except to the extent that the Corps regulates them to constitute a disposal of "dredge or fill material" under Section 404.

Coeur Alaska pits the Clean Water Act's two principal permitting provisions against one another. On the one hand, the act prohibits the "discharge of any pollutant" except in compliance with a permit issued under Section 402, including new source performance standards for categories and classes of pollutant discharges such as "froth flotation mills" here. Froth flotation is a process in which raw ore material is ground into fine gravel and mixed in slurry with chemicals whereby pebbles of desired metal float to the surface for capture and processing. The polluted "waste mill tailings," laden with mercury, lead, and other hazardous heavy metals, however, sink to the bottom, destined for disposal on land, or as in this case, in a nearby body of water. EPA's new source performance standards prohibit discharges from froth flotation mills.

On the other hand, the Clean Water Act also prohibits the "discharge of dredge or fill material" except in compliance with a permit issued under Section 404. The Corps administers and issues permits under Section 404 in most states, including Alaska. In 2002, EPA and the Corps issued joint regulations defining "fill material" as that which "has the effect of changing the bottom elevation" of a water of the U.S., including mining slurry.³⁶ "Fill material" includes "slurry, or tailings, or similar mining-related materials."³⁷ Thus, the requirements of the act's two permitting schemes potentially converge if discharge of a pollutant, such as waste slurry mill tailings, also has the effect of raising the bottom elevation of an affected water body.

Coeur Alaska Inc. sought to open a new gold mine about 45 miles north of Juneau, dubbed the "Kensington Gold Mine," adjacent to Lower Slate Lake, a "water of the U.S." in the Tongass National Forest. The Kensington Mine would use the froth flotation process, pro-

ducing over the life of the project about one million ounces of gold and 4.5 million tons of waste tailings in the form of waste mill slurry. *Coeur Alaska* hoped to discharge the slurry into Lower Slate Lake, the most economically advantageous option. The slurry would consist of about 45 percent water and 55 percent froth flotation mill tailings. Eventually the mine would produce enough slurry to fill the more than 50-foot depth of Lower Slate Lake, thus converting the 23 acre lake into a 60 acre impoundment. It was undisputed that this would "destroy the lake's small population of common fish . . ." and other plant and animal life.³⁸

Because the slurry would have the "effect of raising the bottom elevation" of Lower Slate Lake, *Coeur Alaska* sought a Section 404 permit from the Corps. The Corps accepted jurisdiction, finding that the slurry would be "fill material" instead of a prohibited "pollutant discharge" from froth flotation mills under EPA's new source performance standards rules. It then issued the Section 404 permit, determining that discharging the tailings into Lower Slate Lake and eventually converting it into an impoundment was the least environmentally damaging disposal option and was a preferable environmental alternative to filling adjacent wetlands. Contending all this constituted an end run around Section 402 and the applicable zero discharge NSPS, *Southeast Alaska Conservation Council* sued to enjoin the Corps from issuing the Section 404 permit.

The federal district court in Alaska rejected the *Southeast Alaska Conservation Council's* position. It held that unlike with Section 402 permits, new source performance standards do not explicitly apply to Section 404 permits. Therefore, EPA's rule barring froth flotation discharges did not apply once the Corps assumed jurisdiction.

The Ninth Circuit reversed, holding that "§ 404's silence regarding the explicit and detailed requirements [that apply to § 402] cannot create an exception to those sections' strongly worded blanket prohibitions."³⁹

Notwithstanding the United States' opposition, the Supreme Court granted *Coeur Alaska's* writ of certiorari. The United States then joined as a petitioner.

The Supreme Court reversed the Ninth Circuit 5-1-3. Kennedy writing for the court upheld the Corps' interpretation of the Clean Water Act. First, instead of reviewing the Corps' interpretation under *Chevron*,⁴⁰ Kennedy applied the more searching *Mead*⁴¹ standard of review because, he found, the Corps' interpretation was not intended to be formal. Nonetheless, Kennedy upheld the Corps' interpretation of the Clean Water Act, finding persuasive the argument that it does not unambiguously apply NSPS to permits issued under Section 404.

Second, Kennedy found that the Corps properly issued the Section 404 permit. He observed that "if the tailings did not go into the lake, they would be placed on nearby wetlands [and] . . . would destroy dozens of acres of wetlands."⁴² Moreover, the Section 404 permit required *Coeur Alaska* to cover what used to be Lower

³² *Id.* at 1513.

³³ *Id.*

³⁴ 129 S. Ct. 2458, 68 ERC 1513, 2009 WL 1738643 (2009).

³⁵ 118 DEN A-9, 6/23/09.

³⁶ See 40 C.F.R. § 440.104(b)(1); 33 C.F.R. § 323.2(e).

³⁷ 40 C.F.R. § 232.2.

³⁸ *Coeur Alaska*, at 2009 WL at *6.

³⁹ *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, 486 F.3d 638, 64 ERC 1581 (9th Cir. 2007); 100 DEN A-2, 5/24/07.

⁴⁰ *Chevron, U.S.A. Inc. v. NRDC Inc.*, 467 U.S. 837, 21 ERC 1049 (1984).

⁴¹ *United States v. Mead Corp.*, 533 U.S. 218 (2001).

⁴² *Coeur Alaska*, at 2009 WL 1738643 at *6.

Slate Lake with about four inches of “native material,” thereby in his view improving the local environment for wildlife habitat and repopulation.⁴³

Ginsburg dissented, joined by Stevens and Souter, reasoning that the majority’s reading of the statute “strained credulity” and creates a “loophole” to NSPS: “A discharge of a pollutant, otherwise prohibited by firm statutory command, becomes lawful if it contains sufficient solid matter to raise the bottom of a water body, transformed into a waste disposal facility. Whole categories of regulated industries can thereby gain immunity from a variety of pollution-control standards.”⁴⁴ She also disagreed with the applied outcome because she asserted that it was undisputed that the Section 404 permit, if granted, would “kill all the fish and wildlife” of the lake, possibly permanently as repopulation was “uncertain.”⁴⁵

Breyer concurred in the judgment, believing that too literal an application of NSPS or too narrow an interpretation of “fill” or “dredge material” would undermine the purpose of the statute.⁴⁶

Arrangers Must Intend Disposal Under Superfund

In *Burlington Northern v. United States*,⁴⁷ the court reversed the Ninth Circuit and held 8-1 that liability as an “arranger” under CERCLA requires more than knowledge of chemical spillage; one must intend or plan to arrange for the disposal at issue. In addition, it held that CERCLA does not impose joint and several liability when there is a “reasonable basis” to apportion liability.⁴⁸

In *Burlington Northern*, a now defunct company called Brown & Bryant (B&B) once owned and operated a plant that stored and distributed agricultural chemicals on land owned in part by predecessors to petitioners Burlington Northern and Union Pacific Railroad (railroads). B&B obtained some of its chemicals, including D-D pesticide, from the Shell Oil Company. Shell would deliver the chemicals by truck for transfer into large storage tanks onsite. Spills sometimes occurred during delivery, and the tanks leaked, leading to substantial soil and groundwater contamination.

Eventually EPA and the state of California investigated, responded, and then filed suit under CERCLA Section 107(a) against B&B, Shell, and the railroads as “potentially responsible parties” for the costs of feasibility studies and response action.

The district court found the railroads liable as owners “at the time of disposal,” and Shell liable as a “person who . . . arranged for disposal.” The court, however, declined to hold the parties subject to joint and several liability. Instead, it found liability to be subject to equitable apportionment and set the railroads’ and Shell’s liability at 9 and 6 percent, respectively, which had the effect of limiting the government’s recovery by about 85 percent.

The Ninth Circuit affirmed on liability but reversed on apportionment. First, it held that although Shell did not qualify as a “traditional arranger,” it could still be held liable under a “broader category” if the disposal

was a known or foreseeable by-product of the transaction.⁴⁹ Second, it reversed the lower court’s apportionment of liability. The Ninth Circuit instead held that CERCLA intends for the government to recover full response costs against targeted parties, envisioning subsequent civil actions by them against additional potentially responsible parties for contribution.⁵⁰

The Supreme Court reversed the Ninth Circuit 8-1 at both turns, finding Shell had not “arranged for disposal” and that joint and several liability is not required when it is practicable to apportion liability.

Writing for the court, Stevens maintained that “it is clear that an entity could not be held liable as an arranger merely for selling a new and useful product if the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination.”⁵¹ In other words, “‘arrange’ implies action directed to a specific purpose. Thus, under [the statute], an entity may qualify as an arranger. . . when it takes intentional steps to dispose of a hazardous substance.”⁵² Arranging for disposal must involve the purpose of discarding a “used and no longer useful hazardous substance.”⁵³ Stevens acknowledged that determining the arranger’s purpose could involve a “fact intensive inquiry.”⁵⁴ Rejecting the Ninth Circuit’s analysis, the court found Shell had not arranged for disposal: “[T]o qualify as an arranger, Shell must have entered into [sales of its chemical product] with the intent that at least a portion of the product be disposed during the transfer process by one or more of [the statute’s] methods.”⁵⁵ Thus, Stevens concluded, Shell was not liable as an arranger under CERCLA because it did not “intend” for its chemicals to be released into the environment, even though it knew it was delivering its product to a “sloppy operator.”

The court also held that joint and several liability does not apply when reasonable apportionment is practicable and upheld the district court’s initial allocation of liability.⁵⁶

Ginsburg argued in dissent that Shell had arranged for disposal because it exercised “the control rein” over delivery of the D-D pesticide, specifying transportation and storage features that resulted in “inevitable” spills and leaks.⁵⁷ Indeed, Ginsburg observed, “[t]he deliveries, Shell was well aware, resulted directly and routinely resulted in disposals of hazardous substances through spills and leaks for more than [twenty years].”⁵⁸ Shell arranged to have its chemicals shipped by bulk tank truckload stored in bulk storage facilities instead of shipping drums.⁵⁹ Shell knew that spills occurred during every delivery.⁶⁰ It also knew about “numerous tank failures and spills as the chemical rusted tanks and eroded valves.”⁶¹

⁴⁹ 129 S. Ct. at 1876.

⁵⁰ *Id.*

⁵¹ *Id.* at 1870.

⁵² *Id.* at 1879.

⁵³ 129 S. Ct. at 1878.

⁵⁴ *Id.*

⁵⁵ *Id.* at 1878-80.

⁵⁶ *Id.* at 1883.

⁵⁷ *Id.* at 1884 (Ginsburg, J. dissenting).

⁵⁸ *Id.* at 1885.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1886.

⁶¹ *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 25.

⁴⁵ *Id.* at 22.

⁴⁶ *Id.* at 19.

⁴⁷ 129 S. Ct. 1870, 68 ERC 1161 (2009).

⁴⁸ 84 DEN A-1, 5/5/09.

Ginsburg was troubled by the blind eye arrangers who may now turn to chemical transport and storage, emboldened by the court's decision: "The sales of useful substances [does not] exonerate Shell from liability, for the sales necessarily and immediately resulted in the leakage of hazardous substances.⁶² She questioned the court's dismissal of joint and several liability, noting that the lower court "undertook an heroic labor" by apportioning costs without the benefit of briefing—indeed, without even a request to apportion—by the parties.⁶³

Future Injuries Must Be Concrete, Particularized

In *Summers v. Earth Island Institute*,⁶⁴ the Supreme Court reversed the Ninth Circuit and held 5-4 that plaintiffs must establish with affidavits knowledge of future injuries to demonstrate sufficient "concrete and particularized" injury so as to satisfy constitutional standing under Article III.⁶⁵

The Decision Making and Appeals Reform Act requires the U.S. Forest Service to provide advance notice and an opportunity for comment and appeals processes regarding land and timber management decisions for national forests under the Forest and Rangeland Renewable Resource Planning Act. The Forest Service issued rules that provide a "categorical exclusion" for activities that in the aggregate do not significantly affect the quality of the human environment and do not trigger the need for either an environmental assessment or an environmental impact statement under NEPA.

The Forest Service subsequently determined that "fire rehabilitation" timber efforts involving less than 4,200 acres, or "timber salvage" involving less than 250 acres, fall within this categorical exclusion, including a timber salvage sale of 238 acres in the Burnt River Project, an area affected by large fires that swept through the Sequoia National Forest in California in 2002.

Earth Island challenged both the timber salvage sale for the Burnt Ridge Project in particular and the Forest Service's categorical exemption rule in general. The parties subsequently settled the action challenging the Burnt Ridge Project, but pressed ahead on the legality of the underlying rule as applied nationwide to "many thousands of small parcels."

Siding with Earth Island, the district court blocked the application of the rule.⁶⁶

The Ninth Circuit affirmed, ruling that the Forest Service must allow the public to contest internal administrative decisions on small timber-clearing projects such as the Burnt Ridge timber sale.⁶⁷

Without reaching the merits, the Supreme Court held by another bare majority that Earth Island lacked standing to challenge the application of the rule nationwide, and dismissed.

Writing for the majority, Scalia held that Earth Island did not possess any injury in fact because it had voluntarily settled the portion of the lawsuit pertaining to its only member who suffered any injury that was "con-

crete and particularized." The settlement agreement already fully addressed the procedural injury alleged by one member who had visited the project site with plans to return: "we know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action."⁶⁸ The majority explained that Earth Island "identified no other application of the invalidated regulations that threatens imminent and concrete harm" to any of its members who planned to visit sites where the rules were to be applied.

Scalia also rejected standing for another affiant who stated that he had been a long time visitor of Forest Service sites and would continue to visit sites, some of which would be subject to the rule. He wrote that the "vague desire to return is insufficient to satisfy the requirement of imminent injury: Such someday intentions—without any description of concrete plans, or indeed any specification of when the some day will be—do not support a finding of the actual or imminent injury that our cases require."⁶⁹

Breyer dissented, joined by Stevens, Souter, and Ginsburg. He noted that the majority's conclusion is "counterintuitive" because a programmatic failure to provide notice, opportunity for comment and appeal would eventually and inevitably cause members to suffer concrete injury.⁷⁰ "To know, virtually for certain, that snow will fall in New England this winter is not to know the name of each particular town where it is bound to arrive," Breyer wrote.⁷¹ "The law of standing does not require the latter kind of specificity. How could it?"⁷² In particular, he noted that a "threat of future harm may be realistic even where the plaintiff cannot specify precise times, dates and GPS coordinates."⁷³

Breyer also questioned whether the result is consistent with precedent respecting standing for future harm in the global warming context: "[W]e recently held that Massachusetts has standing to complain of a procedural failing, namely, EPA's failure properly to determine whether to restrict carbon dioxide emissions, even though that failing would create Massachusetts-based harm which (though likely to occur) might not occur for several decades."⁷⁴

Bonus Quasi-Environmental Decisions

The court issued two other decisions involving environmental matters.

First, in a case with environmental issues as backdrop, the court delineated when due process requires recusal. In *Caperton v. A.T. Massey Coal Co.*,⁷⁵ the Supreme Court ruled 5-4 that a state supreme court justice who had received \$3 million in campaign contributions from a litigant prior to reversing a \$50 million judgment had "direct, personal, substantial, pecuniary interest," such that failure to recuse violated procedural due process. Due process requires recusal when "under a realistic appraisal of psychological tendencies and human

⁶² *Id.* at 1885.

⁶³ *Id.*

⁶⁴ 129 S. Ct. 1142, 67 ERC 1961 (2009).

⁶⁵ 125 DEN A-4, 7/2/09.

⁶⁶ *Earth Island Institute v. Pengilly*, 376 F. Supp.2d 994 (E.D. Cal. 2005).

⁶⁷ *Earth Island Institute v. Ruthenbeck*, 490 F.3d 687 (9th Cir. 2007).

⁶⁸ 129 S. Ct. 1142 at 1149.

⁶⁹ *Id.* at 1150.

⁷⁰ *Id.* at 1154.

⁷¹ *Id.* at 1157.

⁷² *Id.*

⁷³ *Id.* at 1156.

⁷⁴ *Id.* (citing *Massachusetts v. EPA*, 549 U.S. 497, 63 ERC 2057 (2007)).

⁷⁵ 129 S. Ct. 2252 (2009).

weakness,” a jurist’s interest pose “a risk of actual bias.”

Second, the high court decided when the U.S. government is subject to suit by tribes for failing to increase mining royalties on Indian land. In *United States v. Navajo Nation*,⁷⁶ the Supreme Court reversed the U.S. Court of Appeals for the Federal Circuit’s decision upholding Navajo Nation’s \$600 million claim against the Department of the Interior for its failure to raise coal mining lease royalties on Native American land.

Both cases seem sufficiently idiosyncratic as not to foretell much in particular about the court’s environmental bent.

Discussion

Early returns suggest that environmental cases hold interest for the Roberts court. It already has decided about a dozen core environmental cases in three years, almost three times the rate during the Burger and Rehnquist courts.

During the 2006-2007 term the court decided that Title II of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles that “endanger” public health or welfare;⁷⁷ EPA by regulation could define the word “modification” differently, and more stringently, in different parts of the Clean Air Act;⁷⁸ a county’s flow control ordinance—requiring that all solid waste generated within the county to be delivered to the county’s publicly owned solid waste processing facility—does not violate the dormant commerce clause;⁷⁹ under CERCLA Section 107(a) private parties not subject to an enforcement action who incur “other necessary response costs” may seek cost recovery claims against other “any other person,” including the federal government;⁸⁰ and EPA’s delegation to a state of an environmental permitting program under the Clean Water Act does not trigger “consultation” under

⁷⁶ 129 S. Ct. 1547 (2009).

⁷⁷ *Massachusetts v. EPA*, 127 S. Ct. 1438, 63 ERC 2057 (2007).

⁷⁸ *Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423, 63 ERC 2088 (2007).

⁷⁹ *United Haulers Ass’n Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 64 ERC 1129 (2007).

⁸⁰ *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331, 64 ERC 1385 (2007).

the Endangered Species Act.⁸¹ Except for the last of these, the balance of the court’s opinions during the first two terms of the Roberts court produced at least marginally favorable results for the environment, although opinions differ on this point.

I wrote two year ago: “[t]his all begs the question as to whether the court’s current lineup is somehow more ‘environmental’ than predecessors have been. The jury is out, but most likely the answer is ‘no.’”⁸² The 2008-2009 term seems to confirm “no,” wherein the environmentally favorable result was shut out, 5-0.

Conclusion

Unfortunately for environment and resources enthusiasts, the court accepted the business/industry position in *Entergy*, *Coeur Alaska*, and *Burlington Northern*, and the government’s less environmentally protective position in *Summers* and *Winter*. The court seems to be especially interested in reversing environmentally protective decisions out of the Ninth Circuit. Indeed, it reversed each of the four cases from that circuit for which it granted review, cases wherein the Ninth Circuit arguable agreed with the pro-environmental result. It also reversed a Second Circuit opinion that arguably produced a better environmental outcome. The common denominator is that at no turn did the court favor the environment over other interests. This does not bode well for the near future of modern environmental law.

James R. May is a professor of law and graduate engineering (adjunct), and the H. Albert Young Fellow in Constitutional Law at Widener University. He is a former Council Member of the American Bar Association’s Section of Environment, Energy, and Resources; Chair of the SEER Annual Conference on Environmental Law; and Chair of the SEER Task Force on Constitutional Law. The assistance of Neela Swaminathan is noted with gratitude. May can be reached at jrmay@widener.edu.

The opinions expressed here do not represent those of BNA, which welcomes other points of view.

⁸¹ *National Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 64 ERC 1613 (2007).

⁸² 165 DEN B-1, 8/27/07.