# Daily Journal

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# Environmental Issues Lose in Supreme Court

## Mining Decision is Fifth to Disappoint Activists This Term

**By Lawrence Hurley**
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WASHINGTON - The U.S. Supreme Court resolved its environmental caseload this term the same way it started: By reversing the 9th U.S. Circuit Court of Appeals.

The last of the court's five environmental rulings came Monday when the justices ruled 6-3 that mining waste doesn't require the same kind of strict regulation as many other forms of solid waste discharged into the nation's waterways. *Coeur Alaska v. Southeast Alaska Conservation*, DJDAR 8998.

Marking a total defeat for environmental interests this term, the ruling means mining companies face less costly regulation when it comes to dumping waste into water.

Although the five cases focused on different issues, what several of the decisions share in common is deference to executive branch policies that were implemented by the Bush administration, environmental law experts said.

Monday's ruling allowed a mining company in Alaska to dump waste into a pristine lake. It marked the fourth time the justices have reversed the 9th Circuit in four environmental cases this term. In a fifth case, the court reversed a 2nd Circuit ruling on another section of the Clean Water Act.

The first 9th Circuit reversal came back in November, in the court's first ruling of the term, when the court voted 5-4 in favor of the U.S. Navy in a dispute over the environmental damage caused by the use of sonar off the coast of California. *Winter v. NRDC*, DJDAR 16797.

The next two 9th Circuit cases involved forest service regulations and a dispute over pollution cleanup costs.

"It's been a miserable year for the environment in the Supreme Court," said Richard Frank, executive director of the Center for Law, Energy, and the Environment at UC Berkeley School of Law.

In contrast, it was a good term for business interests and the U.S. government.

In Monday's ruling, the court relied on an internal 2004 Bush administration memorandum stating that, under the Clean Water Act, mining waste should be defined as "fill material," meaning it fell under the authority of the Army Corps of Engineers rather than the U.S. Environmental Protection Agency.

Paul S. Weiland, who heads the land use and environmental resources group at Nossaman, said the decision is "certainly helpful" for mining companies, which now know for sure which section of the Clean Water Act applies to waste material. They will also face less of a financial burden in meeting the costs of regulation, as the Army Corps of Engineers' rules are less strict.

**Addressing the mining case and others, Glenn Sugameli, an attorney with the environmental group Earthjustice, criticized the court for donning "pro-business blinders" at the expense of other interests.**

**Another example he cited was the 2nd Circuit case, in which the court reversed Judge - and likely future Supreme Court Justice - Sonia Sotomayor, who wrote the lower court opinion in favor of environmental groups. *Entergy v. Riverkeeper*, DJDAR 4885.**

In that case, the Supreme Court ruled 6-3 in April that the government can take into account economic costs when considering what kind of technology power plants should use to update their water-intake cooling mechanisms.

In doing so, the court upheld the right of the Bush administration's EPA to adopt a cost-benefit analysis when deciding what upgrades energy companies have to make under the Clean Water Act.

For Albert C. Lin, an environmental law professor at UC Davis School of Law, the outcome indicates that a majority on the court is "quite sensitive to concerns about costs and economics."

That concern is also reflected in a May Superfund ruling, he added, in which the high court let Shell Oil Co. off the hook for millions of dollars of environmental cleanup costs at a California Superfund site.

The court held in an 8-1 decision that the company was not liable simply because it delivered agricultural chemicals to the site. That was the only environmental case in which the court rejected the federal government's position. *Burlington Northern v. United States,* DJDAR 6381.

The dispute was over a 5-acre site in the town of Arvin, located in Kern County, about 15 miles southeast of Bakersfield.

The one case that didn't present a conflict involving business instead touched on another issue of concern for environmentalists: standing. It centered on a little-known dispute over a U.S. Forest Service rule exempting certain projects from public comment.

The 5-4 ruling, in which the justices barred California environmentalists from proceeding with a lawsuit challenging various regulations, echoed a line of cases decided during Chief Justice William H. Rehnquist's tenure, in which the court tightened the definition of standing, thereby making it harder for plaintiffs to file suit. *Summers v. Earth Island,* DJDAR 3035.

But as Berkeley's Frank noted, "it's too early to say" whether the ruling is a sign that the court under Chief Justice John G. Roberts Jr. will continue in that direction.

That's in part because in a key global warming case decided in 2007, the court went the other way in holding that states have standing to sue the EPA to enforce the Clean Air Act. *Massachusetts v. EPA*, 549 U.S. 497.

The forest service regulation case shares a common trait with the Navy sonar ruling of being "really helpful" to the federal government, Nossaman's Weiland said.

Both cases make it harder for private plaintiffs to challenge government actions. In the Navy sonar case, the majority announced an "almost insurmountable standard" for plaintiffs in any case involving national security, Weiland added.

**Despite the five defeats, all is not lost for environmental groups.**

**With the Bush administration out of office, environmentalists are now hoping that the Supreme Court will, as Earthjustice's Sugameli put it, "apply the same principles" of deference to the Obama administration if the EPA enacts new rules that are more pro-environment.**

**The administration and Congress could also act to reverse some of the recent decisions.**

UC Berkeley's Frank predicted that environmental groups will pressure the Obama administration to revisit some of the policy changes made by the EPA in the Bush era, like the ones upheld in the two Clean Water Act cases.

Whether or not the new administration succeeds in rolling back any of the Bush policy changes "is uncertain at best," he said.

*Staff writer Robert Iafolla contributed to this report.*

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