

## **SUPREME COURT: Souter departs with solid environmental legacy**

By Jennifer Koons, E&E reporter

When Justice David Souter retires from the Supreme Court today, environmental interests will lose one of their most dependable votes.

"Over his tenure on the court, he evolved from a justice with a pro-business philosophy to a solid vote for the environment on the court in his later years," said Richard Frank, executive director of the Center for Law, Energy & the Environment at the University of California, Berkeley's law school.

President George H.W. Bush tapped Souter for the high court in 1990, but the little-known New Hampshire jurist surprised Bush and other Republicans by becoming a moderate justice who regularly joined the court's three more liberal members.

But in early environmental cases, Souter sided with the court's conservatives.

In the 1992 *Lujan v. Defenders of Wildlife*, Justice Antonin Scalia -- writing for the majority -- limited the standing of environmental plaintiffs by denying advocacy groups and some of their members the right to challenge an interpretation of the Endangered Species Act by the Fish and Wildlife Service.

Souter joined Justice Anthony Kennedy's concurring opinion in the case, in which Kennedy wrote that he would have allowed a somewhat broader standing than Scalia -- who has long been a critic of lenient rules of standing for environmental groups seeking to challenge federal agency decisions.

Souter declined to join the dissent in the high-profile case, in which then-Justice Harry Blackmun accused Scalia and his fellow justices in the majority of conducting a "slash and burn expedition through the law of environmental standing."

*Lujan* has been limited and clarified in Supreme Court decisions that followed, including the 2001 *Friends of the Earth v. Laidlaw*, in which Souter joined the majority decision holding that a "reasonable concern" about environmental harms could confer standing.

In the landmark 2007 *Massachusetts v. EPA*, the court took Kennedy's concurring language in *Lujan* and made it official.

Souter joined the 5-4 majority decision in that case, which opened the door for U.S. EPA to regulate carbon dioxide emissions.

Also in 2007, Souter wrote the unanimous opinion in *Environmental Defense v. Duke Energy Corp.*, which found that Duke violated the Clean Air Act by modernizing coal-burning power plants without installing better pollution-reduction equipment.

The year before, Souter joined the dissent in the closely followed wetlands-regulation case, *Rapanos v. United States*, in which a 4-1-4 Supreme Court offered a splintered decision on the scope of the Clean Water Act.

**"In general, Souter has come to vote strongly in favor of environmental interests, but there were cases where a different justice could have been more strict in enforcing environmental law," said Glenn Sugameli, senior counsel for Earthjustice.**

In the sole environmental case of the 2008 term, Souter wrote the majority opinion in *Exxon Shipping Co. v. Baker*, which sharply cut a \$2.5 billion judgment against Exxon Mobil Corp. for the 1989 Exxon Valdez oil spill.

Souter found the punitive damages excessive and cut them to \$507.7 million, arguing that a 1-1 ratio of punitive to compensatory damages was appropriate in maritime cases. The ruling, however, did not go entirely the oil giant's way. Souter, joined by Chief Justice John Roberts and Justices Clarence Thomas, Scalia and Kennedy, rejected multiple arguments from Exxon, including the company's claim that the Clean Water Act penalties pre-empt punitive damages in such maritime cases.

The term ending today included five high-profile environmental-themed cases.

"Justice Souter decided in favor of the environment in every instance except the CERCLA cases," said Robert Fischman, an environmental law professor at Indiana University's Maurer School of Law. "The only justice this term who was on the environmental side more than Souter was Justice [Ruth Bader] Ginsburg."

In the consolidated CERCLA cases, the court ruled 8-1 -- with Ginsburg dissenting -- that the 9th U.S. Circuit Court of Appeals erred in finding Shell Oil Co. and Burlington Northern Santa Fe Corp. jointly responsible for Superfund cleanup costs at a chemical distribution plant near Bakersfield, Calif.

### **'Very vocal' at oral arguments**

One area in which Souter won near-universal praise from environmental court watchers has been his dogged questioning during oral arguments.

"He is a favorite among environmentalists, even though they would not have applauded every decision," said Georgetown University law professor Richard Lazarus. "Most of the time, Souter did fall on the side of environmental interests, and no less important, he was a very vocal participant at oral arguments."

Lazarus, who has represented more than 40 clients in environmental cases before the court, noted that Souter provided a "very effective counterpoint" to Justice Scalia -- who is well-known for vigorous and quick-witted questioning during arguments before the court.

**Earthjustice's Sugameli also emphasized Souter's role as a foil for his fellow justices.**

**"He could often be a very active questioner, and that's important when you have other justices on the right, especially Justice Scalia, who can be extremely aggressive and really dominate the questioning during oral arguments," Sugameli said.**

**If confirmed, Souter's replacement -- Judge Sonia Sotomayor -- will likely continue his practice as an active participant during oral arguments, Sugameli added.**

**"She really has a reputation as a tough questioner -- which is fine, because you want a hot bench," he said. "You want the justices to ask you questions, because this is your only opportunity to address their concerns."**

**Sugameli continued, "Earthjustice and many other environmental organizations are supporting Judge Sotomayor because we think she will be a fair jurist -- who may not always rule in our favor but will be thoughtful and inquisitive in the same manner as Justice Souter."**

## Souter's role as a questioner

Environmentalists have long praised Supreme Court Justice David Souter for his assiduous questioning during oral arguments. Click on links below to listen to his active participation in several high-profile arguments:

### ***Coeur Alaska Inc. v. Southeast Alaska***

***Conservation Council*** (07-984):\*

Oral arguments: Jan. 12, 2009

Decided: June 22, 2009

Vote: 6-3

[Transcript](#)

***Massachusetts v. EPA*** (05-1120):

Oral arguments: Nov. 29, 2006

Decided: April 2, 2007

Vote: 5-4

[Transcript](#)

***Environmental Defense v. Duke Energy Corp.***

(05-848):

Oral arguments: Nov. 1, 2006

Decided: April 2, 2007

Vote: 9-0

[Transcript](#)

***Rapanos v. U.S.*** (04-1034):

Oral arguments: Feb. 21, 2006

Decided: June 19, 2006

Vote: 4-1-4

[Transcript](#)

\*Audio of oral arguments not yet available.

-- *Jennifer Koons*

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