

# Bush Administration's Environmental Team on Losing Streak in Courts

By Chris Bowman

Federal courts appear to have done what relentless green lobbying could not in more than seven years: rein in what critics call a de facto deregulation of the environment by President Bush's administration.

The courts by and large have rejected Bush's bid to significantly rewrite America's bedrock conservation laws, particularly the Clean Air Act.

The latest rejection came last week when a three-judge panel of the 9th U.S. Circuit Court of Appeals ordered a halt to three proposed logging projects in the northern Sierra. The ruling repudiated the administration's approach to forest management: selling large trees to loggers to finance removal of smaller trees in the name of fire protection.

"It appears to be the worst losing percentage of any administration over the past three decades," said Patrick Parenteau, senior attorney at Vermont Law School's Environmental and Natural Resources Law Clinic.

Jonathan Adler, an environmental law expert and frequent commentator for the conservative National Review Online, didn't paint a better score card. "We can say they have a poor record in court. I'm not sure we can say they had the worst record," said Adler, director of the Center for Business Law & Regulation at Case Western Reserve University in Cleveland.

The Bush team's environmental rules and decisions have had a better survival rate in the Supreme Court than in the lower courts.

All nine justices sided with the president in tossing a lower court order that limited older, higher-polluting Mexican trucks to within 20 miles inside the border in California and the Southwest. The court also unanimously rejected a lawsuit that accused the Interior Department of allowing off-road vehicles to run amok in Western wilderness areas.

Legal victories for Bush's environmental team, however, have been few, particularly in disputes over fish and wildlife.

Kieran Suckling, executive director of the Center for Biological Diversity in Tucson, Ariz., said he was astonished by a tally his legal staff compiled at The Bee's request on outcomes of Endangered Species Act cases.

Of 78 federal court rulings and settlements in species cases resolved since January 2001, the Bush administration won just one: Judges agreed that western gray squirrels in the Pacific Northwest did not warrant protection, according to the center, which filed most of the challenges.

"I asked lawyers around the country, 'Are there any other cases? Have I missed something?' and everyone seems to agree that this is correct," Suckling said.

Rep. Henry Waxman, D-Los Angeles, was troubled by the Environmental Protection Agency's string of overturned rules. As chairman of the House Committee on Oversight and Government Reform, he asked the agency to add up time and money spent to develop and defend every rule or decision that has been legally challenged since Bush took office in 2001.

"The consequences of such losses are substantial delays in environmental protection, waste of government resources, and confusion and costs for regulated entities," Waxman wrote in his request.

"In almost all cases," Waxman added, "the EPA rules and decisions overturned by the courts benefited polluting industries at the expense of human health and the environment."

In response, Roger Martella, the EPA's chief lawyer at the time, disagreed that the agency takes positions mostly aligned with industry. He acknowledged that the EPA has "suffered some significant adverse decisions," but said those "are not representative of our overall litigation results" in air pollution cases.

President Clinton's EPA also had its rules thrown out of court time and again, winning outright only one-third of the time, noted National Review Online's Adler. Among notable defeats, judges struck down a requirement for the sale of non-polluting cars in Eastern states and a minimum ethanol content in gasoline.

What's unusual under Bush, several legal experts said, is not just a high percentage of court losses. It's also that so many judges have scolded the administration over its legal tactics and what they said was disregard for the law and science.

In one case, judges on a panel of the U.S. Court of Appeals for the District of Columbia Circuit quoted the Lord's Prayer in underscoring the "absurdity" of the EPA's interpretation of the word "daily." Lawyers for the agency had argued that Congress did not literally mean "daily" in establishing a cap on "total maximum daily loads" of pollutants flowing into rivers.

"The law says 'daily,' " wrote Judge David S. Tatel in the court's 2006 opinion rejecting the EPA's policy of requiring only annual or seasonal pollution caps in the Anacosta River. "We see nothing ambiguous about this command. 'Daily' connotes 'every day'... . No one thinks of 'give us this day our daily bread' as a prayer for sustenance on a seasonal or annual basis."

That same year, before the same appellate court, the EPA rested its defense on the meaning of the word "any" in a Clean Air Act rule requiring older power plants and industrial works to install modern pollution controls if they make "any physical change" that increases emissions.

In voiding the EPA policy, the judges stated: "Only in a Humpty Dumpty world would Congress be required to use superfluous words while an agency could ignore an expansive word that Congress did use. We decline to adopt such a world view."

Zygmunt J.B. Plater, a professor at Boston College Law School, said that in the Bush years there has been a pattern of federal judges departing from customary deference granted to federal agencies on scientific and technical issues.

"When they sense that political appointees are overriding the agency's own scientists, then they don't defer. They open the door to challengers," Plater said.

Such was the case when the U.S. District Court in San Francisco rejected then-Commerce Secretary Donald Evans' finding that "intentional deployment on or encirclement of dolphins with purse seine nets is not having a significant adverse effect on any depleted dolphin stock."

In his 2004 ruling voiding Evans' finding, Judge Thelton E. Henderson said: "This Court has never, in its 24 years, reviewed a record of agency action that contained such a compelling portrait of political meddling."