

# Daily Journal

Daily Journal

May 29, 2009

Article

## Nominee Looks Moderate on Environment

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WASHINGTON - When the U.S. Supreme Court decided one of the most important environmental cases of the term less than two months ago, Justice David H. Souter signaled his approval of the woman now likely to replace him.

He voted to affirm a 2nd U.S. Circuit Court of Appeals decision that was authored by Judge Sonia Sotomayor, whom President Barack Obama nominated to the high court Tuesday.

On this occasion, Souter and two of his liberal colleagues were outvoted as the court reversed Sotomayor 6-3. *Entergy v. Riverkeeper*, 2009 DJDAR 4885.

For experts on environmental law, the case, which focused on how to interpret parts of the Clean Water Act relating to water-intake mechanisms in power plants, highlights how Sotomayor could be expected to vote like Souter when it comes to deciding such environmental issues. Her record in other environmental cases, however, may give environmentalists reason to pause.

Souter, who intends to retire at the end of June, is generally regarded as a relatively reliable vote for environmental causes.

Beyond the *Riverkeeper* case, however, Sotomayor's role in other environmental cases suggests a slightly more middle-of-the road approach. Aside from *Riverkeeper*, she has only written two other opinions on environmental issues, according to environmental law experts.

In the days since Tuesday's announcement, interest groups tracking the nomination have identified eight other environmental cases in which she participated on a panel but didn't write the opinion.

In some she found for the environmental groups but in others she didn't. Several were disputes between businesses over who had to pay clean up costs for pollution.

Perhaps the most politically sensitive environmental case she has been involved with is one the 2nd Circuit has yet to issue a ruling on, despite hearing the oral arguments in June 2006.

It's a global warming dispute in which eight states, including California, sued power plant operators, arguing that the emission of greenhouse gases constituted a public nuisance. *Connecticut v. American Electric Power Company*, 05-5104.

Initially, the 2nd Circuit waited for the Supreme Court to rule in another global warming related case concerning whether the U.S. Environmental Protection Agency could regulate greenhouse emissions, but that case was decided more than two years ago. *Massachusetts v. EPA*, 549 U.S. 497.

"It beats the hell out of me" why the 2nd Circuit has yet to take any action, said Richard Frank, executive director of the Center for Law, Energy and the Environment at UC Berkeley School of Law.

Despite the confusion over that particular delay, environmentalists have generally welcomed the nomination.

Business groups, such as the U.S. Chamber of Commerce, are currently keeping their own counsel on Sotomayor.

For environmentalists, the main source of their approval is the *Riverkeeper* opinion.

**It's "a good indication of her careful attention and understanding of the environmental statutes," said Glenn Sugameli, the senior judicial counsel at Earthjustice, an environmental group.**

Sotomayor ruled in favor of several environmental groups that questioned the Bush administration's decision to use cost-benefit analysis in deciding what upgrades energy companies are required to make to their water-intake mechanisms under the Clean Water Act. *Riverkeeper v. EPA*, 475 F.3d 83.

She concluded that utilities had to meet high environmental standards regardless of the cost.

The ruling does not "bode well" for business interests that believe courts should give the government the discretion to interpret environmental statutes more loosely, said Jim Burling, an attorney for the Pacific Legal Foundation, a Sacramento-based conservative legal group. Her reasoning showed that she was "trying to minimize the flexibility of the EPA" in adopting a cost-benefit analysis," he added.

But one of her other opinions suggests that she won't always be a reliable vote against business interests.

She concluded in the August 2006 ruling that the state of New York could not seek cleanup damages from National Service Industries Inc., a company that supplies and cleans worker uniforms for other businesses, for pollution caused by a company it had taken over. *New York v. National Service Industries*, 460 F.3d 201.

The only other environmental opinion she has written that has been identified so far involved a dispute between an insurance company and a manufacturer over who had to foot the bill for environmental cleanup costs. Sotomayor found that the insurance company did not have to pay. *Maska v. Kansas General Insurance*. 198 F.3d 74.

Several cases in which Sotomayor did not write the opinion but was part of the panel also hint at an evenhanded stance on environmental issues.

In a 2004 case in which Sotomayor was part of a three-judge panel, the 2nd Circuit ruled against an environmental group that challenged the EPA's approval of New York State's plan to comply with the Clean Air Act. *Environmental Defense v. EPA*, 369 F.3d 193.

The panel, in an opinion by Judge Richard Cardamone, held that the EPA had not violated the statute while revising the state's plan for improving air quality standards.

But in another 2004 case, a panel featuring Sotomayor found in favor of environmental groups and several states, including California, which had complained about a new U.S. Department of Energy rule setting energy efficiency standards for air conditioners. *NRDC v. Abraham*, 355 F.3d 179. Upon taking office in 2001, the Bush administration stopped a proposed new Clinton administration rule on air conditioners from going into effect and replaced it with a less stringent one without following the necessary procedures, the court held in an opinion by Judge James Oakes.

According to a National Resources Defense Council statement at the time of the ruling, it was "the first court decision to directly reverse a Bush administration rollback of a Clinton administration environmental rule."

California's counsel of record in that case was UC Berkeley's Frank.

It was a "big deal for California," he recalled, but was "frankly a relatively easy decision" for the 2nd Circuit because the Bush administration didn't have the law on its side.

Taken with the other cases she either wrote or voted on, Frank added, the decision indicates she is "a moderate judge who takes each of these environmental cases as she finds them."

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