

SUPREME COURT: Specter questions Sotomayor on power-plant case (07/16/2009)

By Jennifer Koons, E&E Reporter

On her final day of testimony before the Senate Judiciary Committee, Supreme Court nominee Sonia Sotomayor again addressed concerns about the preservation of key environmental protections, specifically the Clean Water Act.

In the judge's 2007 opinion in *Riverkeeper v. EPA*, she held that the law precluded U.S. EPA from using cost-benefit analysis to determine the best technology available to protect fish from power plant water intakes. In April, the Supreme Court reversed that decision in a 6-3 opinion by Justice Antonin Scalia.

Sen. Arlen Specter (D-Pa.), a former Republican who chaired the committee during past Supreme Court nomination hearings, asked Sotomayor about her views on *Riverkeeper*, "which involved the question which is very important to matters now being considered by Congress on climate control and global warming."

Noting that the Supreme Court reversed her decision, Specter asked: "Could we expect you to stand by your interpretation of the Clean Water Act when, if confirmed, you get to the Supreme Court and could make that kind of a judgment because you're not bound by precedent?"

Sotomayor reiterated her adherence to "precedent to the extent that all precedents is entitled to the respect it -- to respect under the doctrine of *stare decisis*."

"And to the extent that the Supreme Court has addressed this issue of cost-benefit and its permissibility under the Clean Water Act, that's the holding I would apply to any new case that came," Sotomayor said, adding: "The framework it established is the framework I would employ to new cases."

Earthjustice senior counsel Glenn Sugameli suggested Specter intended to encourage Sotomayor to stand behind her Clean Water Act interpretation "in cases where she is not bound by precedent."

"She implicitly said that the result she would reach would depend on the language of whatever specific Clean Water Act or other statutory provision was involved," Sugameli said.

Proponents of the Supreme Court reversal also interpreted Sotomayor's comments as suggesting she might not fall in line with the majority way of thinking.

"Judge Sotomayor noted that she'd follow Supreme Court precedent -- on this and other matters - - if confirmed, but the reality is that once on the court, she'll not be so bound and she'll have latitude to vote and author opinions and dissents furthering her evident opposition to cost-benefit analysis in environmental rule-making," said Pacific Legal Foundation attorney Steven Geoffrey Gieseler, who submitted a friend-of-the-court brief in the case that advocated for a greater use of cost-benefit analysis.

The panel intends to conclude the hearings today with witness testimony. Judiciary Chairman Patrick Leahy (D-Vt.) said he plans to call a committee vote as early as Tuesday.

Meanwhile, Sen. Jeff Sessions of Alabama, the top Republican on the committee, told the nominee this morning that his party would not try to filibuster her nomination.

"We all need to take our time and think it through and cast it honestly," he said. "But I look forward to you getting that vote before we recess in August."

(The consolidated cases before the Supreme Court included *Entergy v. EPA*, 07-588; *PSEG Fossil LLC v. Riverkeeper Inc.*, 07- 589; and *Utility Water Act Group v. Riverkeeper Inc.*, 07-597.)

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