

# Inside EPA

---

May 1, 2009

---

## Seeking Souter's Replacement

Amid reports that Supreme Court Justice David Souter intends to retire, environmentalists are urging President Barack Obama to nominate a replacement who would continue what they say is the justice's history of upholding environmental protections for air, water and other issues.

Souter's plan to retire, reported by various news outlets, spurred Earthjustice senior legislative counsel **Glenn Sugameli** to say Obama's replacement "will likely determine the fate of basic environmental safeguards for decades to come." Sugameli said that Souter, who intends to leave the high court at the end of the current term, "has a distinguished, lasting legacy of upholding laws that safeguard our environment."

**Sugameli** May 1 said Souter was the "decisive" vote in the court's landmark 2007 *Massachusetts v. EPA* ruling that said carbon dioxide is a pollutant that EPA can regulate under the Clean Air Act. "One more vote would have blocked any state or citizen court challenge to the Bush EPA's refusal to enforce Clean Air Act global warming provisions, while allowing polluters to file lawsuits against any global warming regulatory safeguards that might cost them money," **Sugameli** said.

Whoever Obama picks could have a major influence on the balance of the court, since Souter, a George H.W. Bush nominee considered liberal-leaning in his opinions, has played a key role in several milestone environmental opinions in addition to *Massachusetts*.

Souter wrote the majority 2008 opinion in *Exxon Shipping Co., et al. v. Grant Baker, et al.* that created a first-time formula for calculating punitive damages for maritime oil spills, while rejecting arguments from energy giant Exxon Mobil and other industry officials that the water act preempts punitive damages in maritime spill cases.

Souter also authored the unanimous 2007 opinion in *Environmental Defense, et al. v. Duke Energy Corp.* that vacated a lower court's ruling that EPA should use a less-stringent, Bush Administration-imposed emissions test for its new source review program, which requires facilities to install pollution controls when making major modifications.

And he wrote the unanimous 2003 opinion in *Cook County v. United States ex rel. Chandler* that said municipalities can be held liable under the False Claims Act. Sources said at the time that the ruling could allow whistleblower suits against municipalities conducting brownfields cleanups with federal money.

Akin Gump Strauss Hauer & Feld LLP Partner Tom Goldstein says in a May 1 blog entry that Obama will likely focus on ideology over qualifications in choosing a replacement, even in the face of strong partisan pressure. "The President must pick a nominee under overhanging threats and bombast from both the left (which fears disappointment) and the right (which has no genuine influence on the process, but recognizes the great importance of the Court)," he wrote.

Goldstein suggests Obama may pick Solicitor General Elena Kagan, Michigan Governor Jennifer Granholm, or one of two U.S. Court of Appeals judges -- Sonia Sotomayor in the Second Circuit or Diane Wood in the Seventh. Cass Sunstein, Obama's nominee to head the White House Office of Information & Regulatory Affairs, also continues to be discussed as a potential high court nominee, a move that would likely be opposed by activists who fear his enthusiasm for cost-benefit tests could undermine prospects for strict regulations.

-----

This material originally appeared in INSIDE EPA [May, 1, 2009] It is reprinted here with permission of the publisher, Inside Washington

Publishers. Copyright 2001. All rights reserved.