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SUPREME COURT NOMINEE FACING QUESTIONS OVER ENVIRONMENTAL RECORD

By Manu Raju

President Bush's choice to fill the vacant Supreme Court slot with conservative appellate court judge John Roberts is facing questions from liberal interest groups over his environmental record and opinions about the application of the Commerce Clause, which is used to justify the interstate implementation of a slew of federal environmental laws.

While his record on the environment is unlikely to rise to the level of issues like abortion, the groups say Roberts has amassed a record on key environmental policies that senators should question in his confirmation hearings, which will begin after Labor Day. Roberts currently sits on the DC Circuit Court of Appeals, was a corporate attorney with the law firm Hogan & Hartson and served as solicitor general in the administration of George H.W. Bush.

But conservative supporters say Roberts has followed precedent in the handful of environmental cases he has decided and has put aside his personal views from the time he has been an attorney to a judge on the DC Circuit, where he has served since 2003.

Immediately after Bush's July 19 nomination announcement, some liberal groups denounced the choice, saying Roberts' previous views on a range of issues, including the environment, show he might be influenced by industry and the religious wing of the Republican base.

"As expressed in one case where he would have invalidated a provision of the Endangered Species Act, his exceedingly restrictive view of federal law-making authority -- more restrictive than the current Supreme Court's -- could threaten a wide swath of workplace, civil rights, public safety and environmental protections," says the liberal group Alliance for Justice.

The groups People for the American Way and Earthjustice are also raising concerns over the nomination, asking senators to probe his record on the environment closely.

For instance, Roberts wrote a dissenting opinion from the DC Circuit's 2003 decision not to reconsider a ruling over the constitutionality of the Endangered Species Act (ESA), in *Rancho Viejo, LLC v. Norton (Inside EPA,* July 8, p1). The case involved real estate developers' claims that applying the ESA to the Southwestern toad in California was an unconstitutional exercise under the Commerce Clause.

While Roberts did not express his views regarding the constitutionality of the ESA, critics say his dissent suggests he would take a narrow view of the Commerce Clause, which grants EPA the authority to regulate certain activities that are interpreted as

having an interstate impact, such as industrial actions that could harm the environment.

"Roberts's arguments advanced a distorted view of Congressional power that could threaten to undermine a wide swath of environmental protections, including the Clean Air Act and the Clean Water Act," Buck Parker, executive director of Earthjustice, said in a statement.

During Roberts' 2003 confirmation proceedings for a spot on the DC Circuit, Sen. Ted Kennedy (D-MA), in written correspondence, said he was concerned that Roberts would interpret federal powers under the Commerce Clause narrowly, based on a 1999 interview Roberts gave *National Public Radio*.

Roberts said in the interview, "What these cases say is, just because Congress has the power to tell individuals and companies that this is what you're going to do, and if you don't do it, people can sue you, that doesn't mean they can treat the states the same way." He added, "The fact of the matter is, conditions are different in different states and state laws can be more relevant is I think exactly the right term -- more attuned to the different situations in New York as opposed to Minnesota. And that's what the federal system is based on."

Roberts said in his response to Kennedy that he would follow Supreme Court precedent to determine the breadth of federal powers to regulate state activities.

Liberal groups are also pointing to Roberts' work as a corporate attorney, such as his involvement in a mountaintop mining case where he filed an *amicus* brief for the National Mining Association in *Bragg v. West Virginia*. In that case, the 4th Circuit Court of Appeals limited citizens' suits by ruling that after states have approved a plan to implement a statute, the federal government could no longer be involved. Also, he co-authored a government brief in a key Supreme Court case, *Lujan v. Defenders of Wildlife*, which limited environmentalists' standing to sue.

But Roberts was also involved in cases upholding environmental protection efforts and EPA's interpretation of the Superfund law. Roberts argued a successful 2002 case before the Supreme Court over the Takings Clause in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* that ruled in favor of the planning agency, which Roberts represented. The ruling said the planning agency's ban on development to preserve Lake Tahoe did not constitute a taking of property.

Last January, Roberts sat on a three-judge panel that upheld EPA's interpretation of a regulation used to determine whether contaminated sites qualify for listing on Superfund's National Priorities List (NPL). In *Carus Chemical v. EPA,* Carus Chemical had challenged EPA's 2003 decision to add a contaminated site in Illinois to the NPL, charging the agency had misapplied the Superfund hazard ranking system used to assess contamination levels because EPA had considered an exposure pathway that was not present at the site.

The DC Circuit on Jan. 11 declined to review Carus' petition, saying it would defer to EPA's interpretation of its regulation.

But Roberts also authored a January 2004 decision rejecting environmentalists' petition in *Sierra Club v. EPA* to challenge EPA Clean Air Act rules governing hazardous air pollutant emissions from primary copper smelters. Roberts, in the court's opinion, said the regulations were not "arbitrary and capricious," as the environmentalists contended.