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Alito Record Shows Mixed Rulings On Environmental Laws

By Manu Raju

Judge Samuel Alito, in his 15 years sitting on the U.S. Court of Appeals for the 3rd Circuit, has ruled against both activists and industry in various environment-related cases, but legal experts and a key Republican senator say his judicial philosophy on hot-button constitutional issues and interpretations of federal environmental laws remain unclear.

Both critics and supporters of Alito say [the handful of opinions](#) he wrote in environment-related cases and the rulings he joined and dissented from do not yet suggest any clear trend on whether he would be more likely to side with industry or environmentalists' interpretations of the law.

But Alito, who President Bush nominated this week to fill the seat of retiring Supreme Court Justice Sandra Day O'Connor, has already prompted strong concerns from environmentalists based on his dissenting opinion in a case addressing the Commerce Clause, which allows EPA to enforce environmental laws across state lines.

In addition, environmentalists are raising concerns over a 1997 ruling in *Public Interest Research Group v. Magnesium Elektron*, where he joined a 2-1 decision restricting citizens' right to sue under the Clean Water Act. The ruling was effectively overturned by the Supreme Court in the 2000 *Friends of the Earth, Inc. v. Laidlaw* case.

"Earthjustice is extremely concerned that Judge Alito has repeatedly sought to go even farther than the current Supreme Court majority in restricting Congress' authority to allow Americans to protect their rights in court, and to enact laws that protect our health and environment," the environmental group said in a statement.

But some legal experts note that those decisions reflected Supreme Court precedent at the time.

For instance, Senate Judiciary Committee Chairman Arlen Specter (R-PA) says Alito's dissent in the 1996 *U.S. v. Rybar* Commerce Clause case, where the majority upheld a conviction under federal law prohibiting the possession of machine guns, was within the parameters of the Supreme Court's 1995 decision in *U.S. v. Lopez*. The *Lopez* decision, which limited federal power under the clause, was later overturned by the court.

Specter, who is a strong supporter of broad federal power under the Commerce Clause, suggested that Judiciary Committee hearings would probe Alito's views on this issue.

"He had a sound legal basis for that [dissent]. He based that on *Lopez* that had just come down," Specter told *Inside EPA* on Nov. 1. "But you need to get him up there [in committee hearings]. You need to ask him questions. You really can't decide that in the corridor, walking to a meeting."

But a source with the Washington Legal Foundation, a conservative group, agrees with the environmentalists, saying that based on the *Rybar* case, Alito may take a more limited view of the Commerce Clause's scope. "I can see why [environmentalists] are concerned," the source says. "It would seem to me based on *Rybar*, he would be a vote on our side." Conservative groups say a limited scope of federal power under the Commerce Clause is necessary to ensure that states' rights are protected.

A Specter aide says Judiciary Committee hearings on the Alito nomination will probably not occur before Thanksgiving, when Congress is likely to adjourn for the year.

Alito has authored a handful of opinions in environmental cases, but lawyers familiar with those cases say they do not indicate much about his judicial reasoning. "The few authored environmental opinions we've found so far don't seem to be noteworthy: routine applications of federal law, applications of Pennsylvania state law, and short orders reviewing or tweaking the orders of the lower courts," an environmental legal expert vetting the nomination says.

The Washington Legal Foundation source agrees, saying these rulings are "cut and dried" but indicate "he sticks to the letter of the statute he looks at."

Alito also has a mixed environmental record in decisions he has joined. In the 2001 *W.R. Grace v. EPA* case, Alito joined a 2-1 decision that granted an industry petition vacating an EPA emergency order. That order required the fertilizer plant owner to conduct a long-term cleanup of an aquifer by installing extraction wells or equivalent technology.

But in the 1995 *Pennsylvania Coal Association v. Bruce Babbitt, et. al* case, Alito joined a majority opinion that deferred to the Interior Department (DOI) and rejected an industry group's suit alleging DOI had acted arbitrarily and capriciously under the Surface Mining Control & Reclamation Act.

In the 2002 *Sultan Chemists, Inc. v. EPA* case, Alito joined a majority opinion denying an industry challenge to an agency enforcement action under the Federal Insecticide, Fungicide & Rodenticide Act.

But Alito joined a 2-1 2004 decision in *U.S. v. Allegheny Ludlum Corporation* that accepted industry arguments that laboratory error is an acceptable defense to mitigate Clean Water Act penalties in cases where the error resulted in dischargers over-reporting actual pollutant levels.

Despite this mixed record, environmentalists say the Alito nomination raises more initial concerns than Bush's nomination of John Roberts as chief justice and the failed nomination of Harriet Miers to replace O'Connor.

The Community Rights Counsel, an environmental group that scrutinizes judicial nominees, says on the issue of legal standing and access to courts, Alito's position resembles that of Justice Antonin Scalia, one of the most conservative members of the court, pointing to Alito's vote in the *Magnesium Elektron* case. Alito's supporters say the ruling was within Supreme Court precedent from the 1992 *Lujan v. Defenders of Wildlife* decision, which Scalia authored and raised the bar for proving standing, by saying plaintiffs must show the environment has been harmed. The *Laidlaw* ruling, which Scalia dissented from, lowered the bar for proving standing by saying plaintiffs must show harm to themselves.

"But in one critical area of environmental law -- standing and access to courts -- the similarity between the views of Judge Alito and Justice Scalia is both very real and disturbing," the group said in a statement.

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