



By Richard Lazarus

Judging Appointee's Green Record

Everyone these days is curious about the significance of Judge Sonia Sotomayor's replacing Supreme Court Justice David Souter. Environmental lawyers are no exception. The tea leaves, however, are few and hard to read. Prior to joining the bench, Judge Sotomayor worked first as a city prosecutor and then as a law firm litigation partner. In neither job was environmental law even remotely part of her practice. And, her published rulings as a federal trial judge were similarly far afield. Judge Sotomayor is credited for having "saved baseball," but not for saving either the environment or business from environmental regulation.

The environmental case garnering immediate attention is her opinion for the Second Circuit in *Entergy v. Riverkeeper*, the Clean Water Act case recently reversed by the Supreme Court. (This is also the case in which I represented the environmental respondents before the High Court). Based on her opinion, environmentalists are likely cheered by her nomination and some in industry a bit concerned. After all, her Second Circuit opinion rejected virtually every industry challenge to EPA's Clean Water Act Section 316(b) regulations and embraced most of those advanced by environmental and state respondents.

What Sotomayor's *Entergy* opinion reveals, however, is what her rulings evidence generally: rigorous attention to precedent and to the factual record. She

displays no clear tendency to rule for or against certain kinds of plaintiffs or defendants. There are no sweeping pronouncements or rhetorical flourishes in her opinions. In *Entergy*, much of her reasoning was based on dictum found in Supreme Court precedent interpreting related parts of the Clean Water Act. It is not surprising that an appellate judge would place significant weight on such dictum, or that the justices would feel free not to do so.

Whatever one's view of the relative persuasiveness of the Second Circuit and Supreme Court *Entergy* rulings, what should be clear is the mere fact that the Supreme Court reversed says nothing about Judge Sotomayor's qualifications to serve on the Court. That is, after all, what the Supreme Court does these days: the Court reverses approximately 74 percent of the time. And, Sotomayor's reversal rate is neither especially high nor is it based on the Court's having granted review in a large number of her cases.

Entergy also effectively underscores the meaninglessness of reversal rates as a measure of judicial prowess. Judge Sotomayor's 80-page opinion addressed as many as 15 different legal issues. The Supreme Court granted only one issue, leaving intact the vast majority of her panel's rulings. And, although the Court reversed on that one ground, its opinion did little to discredit her legal reasoning or analysis. The six-justice majority agreed that her opinion's reading of the Clean Water Act was reasonable, and held only that there was sufficient statutory ambiguity to allow EPA to embrace an alternative, also reasonable interpretation.

There are, however, two environmental cases that have not yet received significant attention but are likely to do so during the confirmation process. The first is the per curiam 2006 opinion Judge Sotomayor joined in *Didden v. City of Port Chester*, which upheld a municipality's exercise of eminent domain authority in support of a redevelop-

ment project. The harsh facts alleged in the *Didden* complaint implicate the personal liberty and private property concerns that generated a political firestorm in response to the Supreme Court's ruling in *Kelo v. City of New London*, including retaliatory efforts to condemn Justice Souter's home because he joined the *Kelo* majority. Property rights advocates are a potent political force and can be expected to be very disturbed by *Didden's* cursory dismissal of the property owner's complaint.

The second environmental case is one that is remarkable not because of the Second Circuit's opinion, but because of its absence. In June 2006, the Second Circuit, with Judge Sotomayor presiding, heard oral argument in *Connecticut v. American Electric Power*, an ambitious global warming nuisance claim brought by environmentalists and several states against power plants based on their greenhouse gas emissions, which the district court dismissed on "political question" grounds. Judge Sotomayor was extremely active at argument, asking more than 70 questions, almost four times the number asked by the two other judges combined.

Three years later, the appellate court has still not ruled. Some delay is understandable. The court sought supplemental briefing after the Supreme Court's decision in *Massachusetts v. EPA*. But that was more than two years ago. And, while any one of the three judges on the panel that heard the appeal could be the cause of the delay, the extraordinary length of delay in such a high profile case is likely to prompt questions during the confirmation process.

Justice White declared that changing just one justice changes the Court. The speculation on how a Justice Sotomayor would change the Court and environmental law has only just begun.

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The speculation on how Justice Sotomayor might change the High Court has only begun