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Garland Could Be Agency Ally In Energy, Enviro Rule Fights

By **Keith Goldberg**

Law360, New York (March 16, 2016, 7:22 PM ET) -- The willingness of D.C. Circuit Chief Judge Merrick B. Garland, President Barack Obama's nominee for the U.S. Supreme Court, to defer to the judgment of federal regulators will likely aid the government in its defense of controversial energy-related regulations such as the U.S. Environmental Protection Agency's Clean Power Plan, experts say.

Judge Garland, whom Obama tabbed Wednesday to fill the seat on the high court vacated by the unexpected death of Justice Antonin Scalia, has sided with the EPA in several challenges to its regulations. That includes upholding the agency's landmark rule limiting mercury and other toxic emissions from power plants, as well as the regulations imposing new source performance standards on particulates from certain steam-generating boiler units.

Those rulings don't necessarily reveal an environmentalist streak, experts say. Rather, they reveal Judge Garland's faithfulness to the standard established by the Supreme Court in the 1984 case Chevron USA Inc. v. Natural Resources Defense Council Inc., which grants significant deference to federal agencies in interpreting ambiguous laws.

“I definitely view Judge Garland as a centrist and someone that is governed by a careful reading of statutory text but also believes in the Chevron doctrine,” said Crowell & Moring LLP partner Tom Lorenzen, who appeared before Judge Garland while serving in the U.S. Department of Justice's environmental division. “It is hard to imagine he has the same views of the law as Justice Scalia. He's not a strict textualist the way that Justice Scalia was.”

Judge Garland's more moderate view of how the EPA or another federal agency exercises its authority could be especially important in environmental cases, which frequently boil down to whether the EPA has the discretion to craft its rules, according to Dorsey & Whitney LLP partner Jim Rubin, another former member of the DOJ's environmental division.

“It's not surprising that he comes out more in favor of the agency than not,” Rubin said. “At the end of the day, I would see that he probably is more likely to give the EPA substantial deference where they deserve it more than other members of the court.”

Judge Garland was part of the D.C. Circuit majority that upheld the EPA's Mercury and Air Toxics Standards rule in April 2014. In concluding that the agency had the authority under Section 112 of the Clean Air Act to craft the rule, the majority said that Congress gave the agency the authority to confirm

the nature of public health hazards from power plants and left it up to the agency to determine whether to regulate those hazards.

The Supreme Court nixed the rule in June, with Justice Scalia writing for a 5-4 majority that the agency should have considered the rule's billion-dollar compliance costs first. But upon remand back to the D.C. Circuit, Judge Garland was part of the same panel that refused a bid by several states and industry groups to scrap the rule entirely while the EPA revised it to reflect the Supreme Court's decision. The EPA argued that vacating the rule would adversely affect public health and the environment.

That decision can't be underestimated, according to Lorenzen.

"The [judicial] conservatives tend to be of the view that when you set aside a rule, that requires its vacatur in all circumstances," Lorenzen said. "Garland, as evidenced in the MATS decision, appears to be comfortable in the opinion that where it would result in the loss of environmental protections, and it's likely the agency will promulgate similar regulations after remand, it doesn't make sense to vacate the rule and lose those protections in the interim."

Judge Garland's willingness to defer to the EPA's authority was also on display when he penned the March 2014 opinion rejecting the Utility Air Regulatory Group's claims that the agency's rule requiring operators of certain older steam boiler units to periodically check the opacity of emissions coming from those boilers and ensure compliance with a 20 percent maximum opacity standard was arbitrary and unreasonable because it was imposed without adequate explanation or notice.

Not only did the judge write that the EPA sufficiently explained why the opacity check was necessary and considered the burden the requirement would place on the industry, but he also rejected the UARG's contention that the industry had been blindsided by the opacity check requirement because the EPA only put it in place in the final version of the rule.

Basically, according to Lorenzen, Judge Garland's opinion holds that if you have an argument that is based on lack of an opportunity to comment on an aspect of the rule, you must first take that issue back to the agency for reconsideration before bringing it up in court. That's something that could loom large as courts review the EPA's Clean Power Plan, which mandates that existing power plants slash their carbon emissions by 32 percent from 2005 levels by 2030, he said.

"In the Clean Power Plan case, there's arguments about whether the final rule is so untethered from the proposal that reconsideration provision doesn't even apply," Lorenzen said. "The question will be whether that UARG decision is distinguishable, or it applies across the board. It's a significant issue and a significant case for the Clean Power Plan case."

Challengers of the Clean Power Plan argue the EPA doesn't have the CAA authority to craft the rule. While the dispute is currently in the D.C. Circuit, it's a virtual lock to eventually wind up before the Supreme Court.

If Judge Garland is confirmed to the high court, that would likely boost the Clean Power Plan's survival chances, experts say.

"He might be a voice for upholding the Clean Power Plan because it is the agency's considered solution to a difficult problem that has proved intractable for many years," University of Richmond law professor Joel Eisen said. "His tendency to defer to agencies' construction of their authority would prompt him to

look favorably at a major undertaking like the Clean Power Plan."

However, Case Western Reserve University law professor Jonathan Adler says the Supreme Court also offers Judge Garland the opportunity to put his personal stamp on issues such as how much deference federal agencies get from the courts.

"The Supreme Court isn't bound by its own precedent," Adler said.

But no matter whether they're challenging or defending regulations from the EPA or federal agencies, lawyers better be on their toes if Judge Garland lands on the Supreme Court, experts say. They describe him as a "brilliant jurist" who reads briefings closely and isn't afraid to challenge private or government attorneys on their views of administrative law during oral arguments.

"He has taken me to pieces on issues such as exhaustion of administrative remedies before seeking judicial review," Lorenzen said. "He is a tough questioner, and he is equally hard on both sides during questioning."

--Editing by Christine Chun and Kelly Duncan.
