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Environmental Cases To Watch In 2013

By **Sean McLernon**

Law360, New York (January 01, 2013, 3:18 PM ET) -- The threat of increased cost burdens and government regulations loom large in a pair of environmental permitting disputes before the U.S. Supreme Court addressing how stormwater discharges must be monitored, two of a handful of cases environmental lawyers will be keeping tabs on during the next few months.

Attorneys will also be following a constitutional challenge to California's low-carbon fuel standard that will shape the future of environmental policy at the state level, a dispute over divisibility of remediation requirements at Superfund sites determining when companies can walk away from lengthy cleanups, and a battle over the U.S. Environmental Protection Agency's ability to stop major modifications to power plants that will have a significant impact on energy producers.

Here are some of the cases environmental attorneys will be watching closely in 2013.

Los Angeles County Flood District v. Natural Resources Defense Council

A broad decision by the U.S. Supreme Court in favor of Natural Resources Defense Council Inc. and other environmental groups in this stormwater runoff regulation case could lead to a costly burden on cities and towns, forcing places like Los Angeles to apply for hundreds of additional permits or completely overhaul its system, according to Morris Polich & Purdy LLP partner Steven L. Hoch.

“If you have to have an NPDES [National Pollutant Discharge Elimination System] permit for every outfall, forget it,” Hoch said. “It will be just a complete nightmare.”

The Ninth Circuit held in 2011 that the Los Angeles River and San Gabriel River lost their designation as navigable waters when they were channelized for flood control, and were then transformed back into navigable waters when flowing into “naturally occurring” portions of the rivers.

If the court of appeals is correct, there are large amounts of urban runoff that would need a permit that historically has not required one, according to Ray Ludwiszewski of Gibson Dunn & Crutcher LLP.

“It would fall under the regulation of the U.S. Environmental Protection Agency, and there is a potential for a huge burden on both the agency and on urban areas,” Ludwiszewski said.

A ruling is expected as early as late February.

The flood control district is represented by Timothy T. Coates of Greines Martin Stein & Richland LLP, by Howard Gest and David W. Burhenn of Burhenn & Gest LLP and by its own counsel.

The environmental groups are represented by Aaron Colangelo of the NRDC.

The case is Los Angeles County Flood Control District v. Natural Resources Defense Council et al., case number 11-460, in the U.S. Supreme Court.

Decker v. Northwest Environmental Defense Center

Tackling a similar stormwater runoff issue for logging roads, the nation's high court is reviewing the Ninth Circuit's rejection of an EPA rule allowing states to regulate the runoff. Upholding that decision will deal a major blow to industry, according to Hoch, limiting the ability to access resources and interrupt delivery services.

“I've heard suggestions that if the Ninth Circuit ruling is upheld it will cripple the industry,” Hoch said. “You never know if that's true or not true, but it will certainly require an increase in the cost of wood, at least in the short term.”

The high court heard oral arguments on the case in December, and a ruling is expected in early 2013.

The industry groups are represented by Timothy S. Bishop, Richard F. Bulger, Chad Clamage, Michael B. Kimberly and Jeffrey W. Sarles of Mayer Brown LLP and by Per A. Ramfjord, Leonard J. Feldman and Jason T. Morgan of Stoel Rives LLP.

The Northwest Environmental Defense Center is represented by Jeffrey L. Fisher, Pamela S. Karlan and Deborah A. Sivas of Stanford Law School Supreme Court Litigation Clinic, by Paul A. Kampmeier of the Washington Forest Law Center and by Christopher Winter of Cascade Resources Advocacy Group.

The cases are Decker et al. v. Northwest Environmental Defense Center, case number 11-338; and Georgia-Pacific West Inc. et al. v. Northwest Environmental Defense Center, case number 11-347; both in the U.S. Supreme Court.

Rocky Mountain Farmers Union v. Goldstene et al.

California's low-carbon fuel standard is facing a serious constitutional challenge in the Ninth Circuit, which is reviewing a district court ruling in 2011 that the state violates the commerce clause by imposing excessive burdens on interstate commerce.

If the challenge brought by trade associations and energy lobbyists succeeds, California's entire program to cut greenhouse gas emissions will be in danger, as will the future of any state-level efforts to fight climate change, according to Sheppard Mullin Richter & Hampton LLP partner Randolph Visser.

“The whole theory behind this kind of sub-global climate action is if California does it, other states will adopt similar measures,” Visser said. “But if the low-carbon fuel standard gets knocked down on the commerce clause theory, and cap and trade follows, the only type of program possible will be a federal program.”

The low-carbon fuel standard is one of the pillars of California's 2006 California Global Warming Solutions Act, also known as A.B. 32, which directs the state to cut greenhouse gas emissions to 1990 levels by 2020. The law considers where fuel comes from in applying its carbon intensity analysis, counting distribution and transportation costs against manufacturers.

The Ninth Circuit in April issued a temporary stay of the district court's injunction and heard oral arguments in October, but a ruling isn't expected until the second half of 2013.

The plaintiffs are represented in this matter by Timothy Jones and John Patrick Kinsey of Wanger Jones Helsley PC and by John O'Quinn of Kirkland & Ellis LLP, among others.

The case is Rocky Mountain Farmers Union et al. v. James Goldstene et al., case number 12-15131, in the U.S. Court of Appeals for the Ninth Circuit.

U.S. et al. v. NCR Corp. et al.

A battle over the apportionment and divisibility of environmental remediation costs under the Comprehensive Environmental Response, Compensation and Liability Act before a district court in Wisconsin is poised to establish a standard for when responsible parties can walk away from clean-up efforts, according to Edwards Wildman Palmer LLP partner Anthony Hopp.

The Seventh Circuit in August shot down NCR Corp.'s attempts to escape $70 million in additional cleanup of polychlorinate biphenyl-contaminated sediment in Wisconsin's Lower Fox River.

The case is now before the district court on remand, and NCR is arguing that the $1 billion remediation at the Superfund site is divisible under the standard set by the Seventh Circuit in its August decision, No matter how the district court rules, the Seventh Circuit will likely hear the issue on a more developed record, according to Hopp.

"The NCR case is the one that's going to drive the law on this issue," Hopp said.

The Seventh Circuit is the first to give the issue of divisibility a "hard look" since the U.S. Supreme Court's 2009 ruling in Burlington Northern & Santa Fe Railway Co. v. United States, Hopp said.

That decision, which allows for divisibility when the responsibility of separate parties can be proved with a reasonable amount of certainty, led many attorneys to expect courts to frequently grant divisibility, but the courts have "soundly rejected" almost all divisibility arguments since then, according to Hopp.

NCR, which submitted its pretrial brief to the district court in November, is represented by Evan Chesler and Darin McAtee of Cravath Swaine & Moore LLP.

The case is United States of America et al. v. NCR Corp. et al., case number 1:10-cv-00910 in the U.S. District Court for the Eastern District of Wisconsin.

United States v. DTE Energy et al.

The ability of energy companies to avoid obtaining a New Source Review permit before making changes to its facilities is at stake in a case of first impression before the Sixth Circuit that will influence how willing operators will be to make major modifications at their plants.

DTE Energy Co. in Michigan federal court successfully blocked a preliminary injunction request from the EPA over renovations on electric utility steam generating units at its Monroe, Mich., power plant. The district court found that the EPA's NSR rules allow DTE and other operators to avoid obtaining a permit before making changes as long as it accepts the risk of an enforcement action later if an emissions increase occurs, and the EPA appealed.

“This is a vitally important case,” Baker & Hostetler LLP partner Christopher H. Marraro said. “A decision requiring an emissions increase actually to actually be present before enforcement action gives sources more certainty.”

If the appeals court upholds DTE's power to make that decision, the EPA will no longer be able to rely solely on projections to determine facility modifications, according to Mayer Brown LLP partner Richard F. Bulger.

“This has been one of the most significant areas of enforcement for EPA,” Bulger said. “The EPA goes after the utilities hard, and there are high dollar issues at play here.”

Oral argument took place in November, with a decision expected sometime in early 2013.

DTE is represented by F. William Brownell, Mark B. Bierbower, Makram Bassam Jaber, Harry Margerum Johnson III and George Peter Sibley II of Hunton & Williams LLP and in-house counsel Michael J. Solo Jr.

The case is United States v. DTE Energy et al., case number 11-2328 in the U.S. Court of Appeals for the Sixth Circuit.

--Additional reporting by Erin Coe and Lana Birbrair. Editing by Rebecca Flanagan.