Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

2013's Big Enviro Decisions Tip In Favor Of Private Sector

By **Sean McLernon**

Law360, New York (July 02, 2013, 9:07 PM ET) -- Water issues have seized the judicial spotlight during the first half of 2013, with the nation's highest court handing down critical decisions upholding wastewater discharge requirements, making it easier for developers to challenge land use permits and establishing strong state resource management sovereignty.

A Texas federal court decision on water availability for endangered species has also caught the attention of environmental attorneys, as has a recent Fifth Circuit decision spelling the likely end of climate change tort litigation.

The key rulings before the U.S. Supreme Court have been largely positive for the regulated community. Even the controversial decision in Texas requiring the state to provide more water for a dwindling whooping crane population has been stayed on appeal, making the first half of 2013 a generally good six months for the private sector.

Decker v. Northwest Environmental Defense Center

The Supreme Court in March signed off on the government's decision that stormwater runoff from logging roads does not require a Clean Water Act permit, overturning a Ninth Circuit finding that the runoff qualifies as a point-source discharge.

The justices deferred to the U.S. Environmental Protection Agency's interpretation of the rule, shooting down arguments from the Northwest Environmental Defense Center that the CWA requires National Pollutant Discharge Elimination System permits for all discharges from point sources, including any pipe, ditch or channel.

Avoiding the point-source runoff classification is important for several industries in addition to the timber groups involved in the case, according to Morgan Lewis & Bockius LLP's environmental and climate change co-chairman Ronald J. Tenpas.

"It was a significant victory to have EPA's view accepted, not only for logging, but for any industry having to do temporary road construction and have some amount of stormwater runoff as a result," Tenpas said.

The high court reiterated its longstanding position that agencies should be given wide deference in interpreting their own statutes, according to Mayer Brown LLP partner Timothy S. Bishop, who represented the industry groups in the case.

“There's absolutely no basis whatsoever to think that environmental groups and the Ninth Circuit have a better sense of when regulation is required than the agency,” Bishop said. “That sort of substitution is really inexplicable.”

The surprise dissenter in the 7-1 decision, Justice Antonin Scalia, said the court has gone too far in applying that deference. Chief Justice John Roberts and Justice Samuel Alito issued a concurring opinion saying the court should give the deference issue a fresh look in a future case.

“When you have several justices signaling that they are prepared to revisit that principal, someone is likely to grab on to it,” Tenpas said. “There are a lot of talented lawyers out there and a lot of areas of administrative law, and you can expect it to come back to the court within the next couple of years.”

The industry groups are represented by Timothy S. Bishop, Richard Bulger, Chad Clamage, Michael B. Kimberly and Jeffrey W. Sarles of Mayer Brown LLP as well as 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, Paul A. Kampmeier of the Washington Forest Law Center and Christopher Winter of Cascade Resources Advocacy Group.

The case is Decker et al. v. Northwest Environmental Defense Center, case number 11-338, in the U.S. Supreme Court.

Koontz v. St. John's River Water Management

The high court delivered another big land use victory late last month, ruling 5-4 that a water management district had gone too far when it required off-site wetlands mitigation as a condition for developing commercial property.

Municipal authorities no longer can demand concessions that go far beyond the actual impact of the project, as the high court found that permit conditions had to be roughly proportional to the impact of the proposed development, even in cases in which the government extracts no actual land.

The decision applies in the environmental context for any permit approval from the EPA or the U.S. Army Corps of Engineers, but also covers every sort of government approval for land use, according to Latham & Watkins LLP partner Christopher W. Garrett.

“Anytime a developer seeks government approval, there are conditions and restrictions,” Garrett said. “Now under Koontz, the agency has to think about those conditions and restrictions and can't ask for something beyond rough proportionality.”

Permitting agencies will have to answer for their demands in a way they haven't needed to previously, according to Pillsbury Winthrop Shaw Pittman LLP partner Wayne M. Whitlock.

“It makes government agencies more accountable for how they develop and impose actual mitigation requirements in permitting processes where powerful government regulatory agencies have the potential to overreach,” Whitlock said.

Landowner Coy A. Koontz Sr. is represented by Paul J. Beard II of the Pacific Legal Foundation.

St. Johns River Water Management District is represented by Paul R.Q. Wolfson of WilmerHale.

The case is Koontz v. St. Johns River Water Management, case number 11-1447, in the U.S. Supreme Court.

Tarrant Regional Water District v. Rudolf John Hermann

Granting Oklahoma the power to restrict water exports from its state, the high court last month prevented the Tarrant Regional Water District from drawing water from the Red River into Texas when it ruled that a water-sharing compact between Texas, Oklahoma, Arkansas and Louisiana did not preempt state laws limiting the amount of water allowed to exit the state.

The unanimous decision was decided on relatively narrow grounds, but it spoke in strong terms about the sovereign powers of states over water within its borders, Tenpas said.

“It seems to me in a world where water resources are increasingly important and are to some degree fought over, language like that is likely to be cited and to be relied upon by jurisdictions that are relatively water abundant to try to come up with ways of protecting those resources and essentially holding those resources within their own boundaries,” Tenpas said.

The TRWD is represented by Charles Rothfeld of Mayer Brown LLP, Kevin Patrick and Scott Miller of Patrick Miller Kropf & Noto PC, and Clyde Muchmore, Harvey Ellis and L. Mark Walker of Crowe & Dunlevy.

The Oklahoma defendants are represented by Lisa S. Blatt of Arnold & Porter LLP and Charles DuMars of Law & Resource Planning Associates.

The case is Tarrant Regional Water District v. Rudolf John Hermann et al., case number 11-889, in the U.S. Supreme Court.

The Aransas Project v. Shaw et al.

Another notable water use decision in Texas was handed down in March when U.S. District Judge Janis Graham Jack ruled that state regulators violated the Endangered Species Act when it failed to ensure enough reservoir water reached endangered whooping cranes living in a wildlife refuge.

The judge sided with The Aransas Project, an environmental group that said the Texas Commission on Environmental Quality's actions led to the death of at least 23 whooping cranes of a worldwide population of approximately 300.

The Fifth Circuit has issued a stay on the lower court ruling and is hearing an expedited appeal of the case, which King & Spalding LLP's environmental practice head Patricia T. Barmeyer said goes to the heart of water management issues.

Texas has state requirements mandating water flow and granting farmers access to the resource, but Judge Jack's 124-page opinion said federal law must prevail.

“The court said you have to make the water available for whooping cranes because that trumps all the other existing requirements,” Barmeyer said.

With water in Texas so highly regulated and valuable, Whitlock said the issue won't be going away anytime soon.

“There is going to be a continued debate about the proper balance in the face of competing demands for water, and there will likely be more and more of these cases,” Whitlock said.

The Aransas Project is represented by James B. Blackburn Jr., Mary B. Conner and Charles William Irvine of Blackburn Carter PC.

The case is The Aransas Project v. Shaw et al., case number 13-40317, in the Fifth Circuit.

Comer at al. v. Murphy Oil USA et al.

The Fifth Circuit also shut down what could be the last of the climate change tort suits seeking damages for global warming and extreme weather, as the appeals court in May affirmed the dismissal of a proposed class action accusing Shell Oil Co. and other companies of intensifying Hurricane Katrina and causing property damage.

The ruling likely signifies the end of lawsuits trying to blame energy companies for damages from climate change, according to Barmeyer.

“It was a flash in the pan,” Barmeyer said. “Plaintiffs' lawyers were really excited, but now it's over.”

The Supreme Court declined in May to take up a similar suit brought by an Alaskan village against Exxon Mobil Corp. and others. The village had argued that greenhouse gas emissions released by the companies made their area of the state uninhabitable.

Any industry sector that had any effect on global warming, potentially even chemical companies, could have had to pay for global warming if any of the cases succeeded, according to Barmeyer, but potentially impacted companies can rest easier now.

The plaintiffs are represented by F. Gerald Maples of F. Gerald Maples PA.

The companies are represented by Munger Tolles & Olson LLP, Johnson Gray McNamara LLC, Hortman Harlow Bassi Robinson & McDaniel PLLC, Jeffery P. Reynolds PA and Sidley Austin LLP, among others.

The case is Comer et al. v. Murphy Oil USA, et al., case number 12-60291, in the U.S. Court of Appeals for the Fifth Circuit.

--Editing by John Quinn and Richard McVay.