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Environmental Cases To Watch In 2014

By **Sean McLernon**

Law360, New York (January 01, 2014, 10:08 AM ET) -- Federal and state regulators are under fire from all sides in 2014 in several critical ongoing environmental cases, including challenges to the Environmental Protection Agency's authority to regulate air emissions, protect permit holders from lawsuits and even resolve Superfund cleanup liability.

Industry groups are upset about the regulatory scheme for greenhouse gas emissions from the EPA and the state of California. Environmental organizations are fighting to hold mining companies responsible for pollution not covered in federal permits and demanding more detailed review of drilling applications.

It all means that government officials will be spending plenty of time defending their policies in court in 2014, with the most eagerly anticipated case coming before theU.S. Supreme Court for oral arguments in February.

Greenhouse Gas Rule Challenges

Six of the nine petitions for writ of certiorari appealing a 2012 D.C. Circuit decision were accepted and consolidated by the Supreme Court, which agreed to consider whether the EPA's greenhouse gas rules for motor vehicles triggered similar permitting requirements for stationary sources.

A positive ruling for the industry challengers could force the EPA to backtrack on current and planned rules covering carbon pollution, including emissions standards for new and existing facilities such as coal-fired power plants.

“This has to be the case that garners the most attention from environmental attorneys,” said McKenna Long & Aldridge LLP partner Peter L. Gray, who heads the firm's environment, energy and product regulation department. “If the rulemaking is vacated, efforts to curb greenhouse gases suffer a significant setback.”

The EPA has required major stationary sources to apply for greenhouse gas emissions permits since the motor vehicle standards became effective, but the industry challengers say they have no such authority under the Clean Air Act.

Though the Supreme Court declined to revisit the EPA's finding that greenhouse gases pose a potential threat to human health and the environment, which the D.C. Circuit upheld, it will examine if the EPA went too far by determining that a pollutant that poses an endangerment under Title II of the CAA is

also a threat under other sections of the law.

The petitioners are represented by F. William Brownell of Hunton & Williams LLP, Peter D. Keisler of Sidley Austin LLP and Robert R. Gasaway of Kirkland & Ellis LLP, among others.

The cases are Utility Air Regulatory Group v. EPA, case number 12-1146; American Chemistry Council et al. v. EPA et al., case number 12-1248; Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation et al. v. EPA et al., case number 12-1254; Southeastern Legal Foundation Inc. et al. v. EPA et al., case number 12-1268; Texas et al. v. EPA et al., case number 12-1269 and Chamber of Commerce of the U.S. et al. v. EPA et al., case number 12-1272, all before the Supreme Court of the United States.

California Low Carbon Fuel Standard Litigation

The Ninth Circuit has upheld California's own high-profile attempt to dramatically reduce greenhouse gas emissions, but industry challengers have continued their fight by seeking a rehearing of the divided panel's decision and preparing for a Supreme Court challenge, if necessary.

The state's Low Carbon Fuels Standard considers where fuel comes from when it applies its carbon intensity analysis, counting distribution and transportation costs against manufacturers. That process illegally discriminates against out-of-state producers, according to trade associations and energy lobbyists challenging the law.

The appeals court said that the LCFS provisions in question were not facially discriminatory and that the standard was not an impermissible extraterritorial regulation, but the challengers are claiming that the panel should have required the state to show it had legitimate reasons for discriminating against non-California fuels and feedstocks that couldn't be adequately served by reasonable alternatives

The LCFS could serve as a model for other parts of the country that could be interested in similar carbon regulation, giving the case national consequence, according toKatten Muchin Rosenman LLP's air quality and climate change practice head Shannon S. Broome, who represents one of the industry challengers.

“It's important because there are other states looking at similar types of regulations, which means it has implications in other states as well,” Broome said.

The Rocky Mountain Farmers Union appellees are represented by Shannon S. Broome and Charles H. Knauss of Katten Muchin Rosenman LLP, among others. The American Fuel and Petrochemical Manufacturers appellees are represented by Peter D. Keisler and Roger R. Martella Jr. of Sidley Austin LLP, among others

The case is Rocky Mountain Farmers Union et al. v. Richard W. Corey et al., case number 12:15131, in the U.S. Court of Appeals for the Ninth Circuit.

Fracking Permit Fights

California regulators are also facing litigation from environmental groups disputing the state's policy of quickly approving hydraulic fracturing permits without requiring a California Environmental Quality Act review or properly supervising the practice.

The Center for Biological Diversity is the lead plaintiff in a pair of suits in state court demanding that

California officials take a closer look at fracking in the state, which is illegally exempting permits from CEQA analysis, according to the suit.

The group also claims the state's Department of Conservation is running afoul of state law by issuing fracking permits without tracking or monitoring the controversial drilling method.

It's a smart challenge to go after the policy itself rather than the individual permits, according to Jon Welner, San Francisco-based Jeffer Mangels Butler & Mitchell LLPpartner. Requiring a detailed environmental review rather than a rubber stamp for hundreds of environmental permits per year would significantly change the energy landscape in the state.

“There are some longstanding regulatory practices in California that don't exactly match the rules,” Welner said. “If these environmental groups win, suddenly everything will come to a grinding halt.”

The Center for Biological Diversity is represented by George M. Torgun and William Rostuv of Earthjustice and by in-house counsel Vera P. Pardee, David R. Hobstetter, Kassia Rhoades Siegel and Brendan Cummings.

The cases are Center for Biological Diversity, et al. v. California Department of Conservation, Division of Oil, Gas and Geothermal Resources et al., case number RG12652054, and Center for Biological Diversity v. California Department of Conservation, Division of Oil, Gas and Geothermal Resources et al., number RG13664534, both in the Superior Court of the State of California for the City and County of Alameda.

Permit Shield Protection Challenge

The Sierra Club is also seeking greater environmental oversight, asking the Sixth Circuit to revive a citizens suit arguing that the so-called Clean Water Act permit shield does not allow coal company ICG Hazard LLC to release excessive amounts of selenium into Kentucky waters.

Appealing a district court summary judgment ruling in favor of ICG Hazard, the environmental group is arguing that the company is illegally discharging selenium. The Sierra Club says that the permit shield should not apply to its national pollution discharge elimination system permit issued by the state because that general permit requires much less scrutiny than an individual permit.

A Kentucky federal judge found that the permit shield should apply equally to both general and individual permits.

Both the government and the regulated community rely on these general permits, according to Richard F. Bulger, co-leader of Mayer Brown LLP's environmental action group. Energy companies need the predictability of the permits to avoid the uncertainty of citizen suits, and regulators can use them to avoid the administrative crush that individual permit evaluations would require, Bulger said.

“That balance would be jeopardized if these permits don't provide the shield that is contemplated,” Bulger said.

The case is Sierra Club v. ICG Hazard LLC, case number 13-5086, in the U.S. Court of Appeals for the Sixth Circuit.

EPA Utility Emissions Plan Suit

The EPA isn't completely on the defensive, however. The agency took the proactive step of suing Oklahoma Gas & Electric Co. in Oklahoma federal court in July 2013, arguing that the utility didn't properly assess future emissions from two of its coal-fired power plants when completing $60 million worth of renovation projects at the plants.

It's a direct confrontation from an agency that seems frustrated by developing case law, according to Squire Sanders LLP partner Allen A. Kacenjar Jr.

“It would essentially let EPA into the technical management team of the facilities and give EPA a sort of early second-guessing opportunity,” Kacenjar said. “That would be very troubling from the perspective of a business looking to establish its own course of operations.”

OG&E is represented by Brian J. Murray and Charles T. Wehland of Jones Day and Donald K. Shandy and Patrick R. Pearce Jr. of Ryan Whaley Coldiron Shandy PC.

The case is USA v. Oklahoma Gas & Electric Co., case number 5:13-cv-00690, in the U.S. District Court for the Western District of Oklahoma.

High Court CERCLA Liability Dispute

The federal government could also end up with fewer private parties agreeing to resolve Comprehensive Environmental Response, Compensation and Liability Act allegations.

The Supreme Court is considering an appeal from the former owners of the now-defunct Environmental Chemical & Conservation Co., who are arguing that parties such as themselves who strike deals with the government under CERCLA are protected from future contribution claims.

The Seventh Circuit said protection doesn't apply to the Enviromental Chemical owners. The company had not completed the cleanup of the site, and had therefore not yet resolved its liability with the U.S., according to the appeals panel. The property owners petitioned the Supreme Court to overturn that ruling, arguing it could hurt both industry and the environment.

“You want to know if you are going to get contribution protection and if you have a right to seek a contribution from third parties,” Peter L. Gray said. “Until those things are cleared up, it just creates a cloud of uncertainty anytime you enter a settlement agreement.”

Enviromental Chemical is represented by Robert Marc Chemers and Peter G. Syregelas of Pretzel & Stouffer Chtd.

The trustees are represented by Norman W. Bernstein of N.W. Bernstein & Associates LLC.

The case is Bankert et al. v. Bernstein et al., case number 13-568, in the Supreme Court of the United States.

--Additional reporting by Keith Goldberg. Editing by Stephen Berg.

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