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# Environmental Cases To Watch In 2015

By **Juan Carlos Rodriguez**

*Law360, New York (January 02, 2015, 5:29 PM ET)* -- The U.S. Supreme Court in 2015 will consider whether the Environmental Protection Agency should weigh costs to companies and consumers in drafting an air quality rule, the highlight of a year that could also include legal challenges to several of President Barack Obama's legacy environmental initiatives.

Here are a few cases to watch in 2015:

**Mercury and Air Toxics Standards**

In November, the U.S. Supreme Court agreed to review the EPA's rule limiting mercury and other toxic emissions from power plants, granting requests from 23 states and industry groups that have argued the rule would drive up electricity prices and harm the coal industry.

In cert petitions filed with the high court in July, the states, the National Mining Association and the Utility Air Regulatory Group argued that a D.C. Circuit ruling upholding the new regulations should be overturned because the lower court had failed to adequately consider the costs associated with implementing the EPA's new mercury and air toxic standards, or MATS.

Timothy S. Bishop, a partner at Mayer Brown LLP, said many attorneys were surprised the high court chose to consider the case, as it had been thought to be settled that the EPA doesn't have to consider costs.

"It could be they were just ready to look at it again given the enormous costs of some of these Clean Air Act regulations," Bishop said. "We're talking about a $10 billion-a-year cost of implementation, and you're seeing that in regulation after regulation after regulation, all of which are going to be passed on to consumers."

Bishop said the court has said in previous cases that there has to be some direct statement by Congress that costs have to be weighed, but by taking the case, the justices suggest a willingness to rethink that.

"It seems unlikely the court would have set out down this path if it was simply going to say, 'Our precedent is clear and costs don't have to be considered,' " Bishop said.

The cases are State of Michigan et al. v. EPA, case number 14-46, Utility Air Regulatory Group v. EPA,

case number 14-47, and National Mining Association v. EPA, case number 14-49, in the U.S. Supreme Court.

**Greenhouse Gas Rules**

The D.C. Circuit is still hammering out the high court's June decision scaling back the EPA's authority to regulate greenhouse gases from stationary sources. The agency has argued it's in the best position to work out the issues left by the high court's decision, while industry groups and states have said the court should send the EPA back to the drawing board completely.

In the Supreme Court's decision, it said the agency violated the Clean Air Act when it expanded the CAA's Title V and prevention of significant deterioration, or PSD, programs to include carbon dioxide emissions.

"If industry wins, EPA would at least have to go back and basically repromulgate a rule that is consistent with the Supreme Court's decision," said Shannon Broome, managing partner at Katten Muchin Rosenman LLP. "In the meantime, there should be no best available control technology or PSD permitting at all for greenhouse gases. All of the Title V stuff should be withdrawn and EPA should withdraw the state implementation plans that it has approved — then all those things could be litigated again."

Separately, but along the same lines, when the EPA unveiled its plan to cut carbon emissions from existing power plants in June, it was immediately met with a challenge from Murray Energy Corp. and shortly thereafter by a group of states led by West Virginia.

Murray has argued that Section 111(d) of the CAA, under which the EPA has claimed its authority for the proposed rule, prohibits the agency from mandating state-by-state standards for existing sources that are already subject to a national standard.

The company pointed out that the D.C. Circuit has already determined that the EPA may issue nationwide hazardous air pollutant standards at existing power plants under Section 112 of the act. The company said the EPA's authority to regulate greenhouse gases is therefore limited to creating standards that are not from a source category regulated under Section 112.

The EPA, in its response to Murray's petition for a writ of prohibition, said the rule is valid because two versions of Section 111(d) were enacted into law in the 1990 CAA amendments, thus making the section ambiguous and open to the agency's interpretation.

The cases are is Coalition for Responsible Regulation et al. v. U.S. Environmental Protection Agency et al., case number 09-1322; State of Texas et al. v. Environmental Protection Agency, case number 10-1425; Murray Energy Corp. v. U.S. EPA, numbers 14-1112 and 14-1151; and West Virginia et al. v. U.S. Environmental Protection Agency, case number 14-1146, all in the U.S. Court of Appeals for the District of Columbia Circuit.

**Cooling Water Intake System Rule**

In May, the EPA finalized a long-delayed cooling water-intake rule for more than 1,000 power plants and factories, requiring facilities to minimize damage to aquatic life caused by sucking in water from lakes and rivers to lower machinery temperatures.

Entergy Corp., the American Petroleum Institute and others also have petitioned for review of the rule, arguing the regulations will burden them with hundreds of millions of dollars in additional costs. The Sierra Club and other environmental groups have argued the regulations are not sufficiently protective to meet the requirements of the Clean Water Act and must be strengthened.

Under the rule, existing facilities that bring in at least 25 percent of their water from an adjacent lake or river will have to reduce fish impingement through one of seven options, including operating a closed-cycle recirculating system, installing an offshore velocity cap or using a modified traveling screen. Another option allows the facility to choose a different method, which must then be approved by the state permitting agency.

Larger plants that withdraw more than 125 million gallons per day will have to conduct studies open to public comment to determine how to reduce the number of fish or their eggs pulled in or trapped by the plant's cooling system. New units on an existing plant must reduce intake flow or install other control measures that minimize fish harm.

The various petitions for review have been transferred to the Second Circuit for hearings.

The lead case is Cooling Water Intake Structure v. United States Environmental Protection Agency, number 14-4645 in the U.S. Court of Appeals for the Second Circuit.

**Water Transfer Rule**

In March, a New York federal judge decided the EPA's rule exempting certain water transfers from Clean Water Act permitting requirements is unlawful in two cases brought by conservation groups and a number of states against the agency.

The EPA had contended that the rule gives states more flexibility to protect water quality without obtaining federal permits and that it had lawfully interpreted the CWA in implementing the rule, but U.S. District Judge Kenneth M. Karas found that the agency had failed to provide a reasoned explanation for its interpretation of the law. The judge accordingly remanded the rule to give the EPA a chance to re-examine and re-evaluate some new ideas, he said.

The case was filed against the EPA by the National Wildlife Federation and several other organizations in 2008, fewer than two weeks after the signing of the National Pollutant Water Transfers Rule, which allows water to be transferred between basins without a permit, even if the water is contaminated.

The EPA, states and other parties have all appealed the decision.

The case is Catskills Mountains Chapter of Trout Unlimited et al. v. U.S. Environmental Protection Agency, number 14-1823, in the U.S. Court of Appeals for the Second Circuit.

**Litigation Yet to Come**

Roger Martella, a partner at Sidley Austin LLP and a former general counsel at the EPA, said even though there are going to be some big cases decided this year, 2015 will also be a big year of initiating litigation.

"There are a number of rules that are among the landmark, legacy rules for the Obama EPA that all will

be finalized in 2015," Martella said. "Those are the suite of greenhouse gas regulations for utilities, the **ozone** National Ambient Air Quality Standards, and the Waters of the United States, although there's no set date for the water rule."

He said industry will want to dive right into litigation on those because the costs associated with them are already piling up, and the government will be motivated because the Obama administration will want to be in court to defend the rules before another president takes office.

Aside from the big federal issues, Martella said, a growing area for litigation is going to be in challenges to certain state laws and regulation, such as California's low carbon fuel standard. Other states may be in play in that area too, such as Oregon and Washington.

And he said there is increased activity in state nuisance claims addressing environmental issues. While the U.S. Supreme Court declined to hear one of those cases this year, leaving intact an Iowa Supreme Court decision validating a group of citizens' nuisance suit against a grain company, Martella said it's very likely the U.S. high court will eventually take up the issue.

"I think 2015 is going to be a 'set the table' year for litigation that will unfold over the next couple of years," Martella said.

--Additional reporting by Keith Goldberg and Sean McLernon. Editing by Jeremy Barker and Patricia K. Cole.

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