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High Court Environmental Cases To Watch

By **Juan Carlos Rodriguez**

Law360, New York (November 9, 2015, 7:27 PM ET) -- From a fierce battle over how the federal government may exercise its permitting powers under the Clean Water Act to whether provisions of the Endangered Species Act can displace those of the National Environmental Policy Act, the U.S. Supreme Court could decide some hot button environmental cases this term.

Here are a few cases to keep an eye on:

Corps v. Hawkes, Kent Recycling v. Corps

Environmental attorneys are watching closely to see if the high court will take one or both of these cases that could resolve a circuit split about whether the U.S. Army Corps of Engineers' jurisdictional determinations of which water bodies are subject to its authority are subject to judicial review.

The Fifth and Eighth circuits have split on the question, with the Fifth Circuit finding such determinations are not reviewable, and the Eighth ruling they are. Timothy Bishop, a partner at Mayer Brown LLP, said he expects the court to hear the cases.

"There is a direct circuit conflict in those cases that the court needs to resolve. And, especially in light of the U.S. Environmental Protection Agency's and Corps' recent efforts to vastly to expand the meaning of 'waters of the United States' under the Clean Water Act, the question whether a landowner can get immediate review of an agency determination to take jurisdiction is of extreme practical importance," Bishop said.

He said once an agency determines that water is jurisdictional under the CWA, a landowner cannot do anything with the land without risking substantial civil and criminal penalties for Clean Water Act violations. The economic effect of a jurisdictional determination is "immediate and acute," and means that a landowner has to go to the expense and delay of seeking a permit before any productive use can be made of the area deemed "waters of the United States," he said.

Fred Wagner, a principal at Beveridge & Diamond PC, said he thinks there's a good chance the court will take the case, and come down on the side of the property owners.

"There have been a couple of other decisions in the past year where the courts have really gotten very upset at agency delay in permitting rulings," he said. "Courts are upset that property owners and project proponents are really put to this really impossible test."

The Corps is represented by Donald B. Verrilli Jr., John C. Cruden, Malcolm L. Stewart, Ginger D. Anders, Jennifer Scheller Neumann and Robert J. Lundman of the U.S. Department of Justice.

Hawkes and Kent are represented by M. Reed Hopper and Mark Miller of the Pacific Legal Foundation.

The cases are U.S. Army Corps of Engineers v. Hawkes Co. Inc. et al., case number 15-290; and Kent Recycling Services LLC v. U.S. Army Corps of Engineers, case number 14-493; both in the U.S. Supreme Court.

Sturgeon v. Masica

The Supreme Court has agreed to weigh in on whether the National Park Service can apply federal laws to nonfederal lands inside parks, a ruling that Alaska Native corporations worry could adversely affect their ability to use their native lands.

The decision comes after petitioner John Sturgeon argued that the Ninth Circuit had misinterpreted the Alaska National Interest Lands Conservation Act in a ruling that increased federal regulations on tribal, state and private lands. The NPS had urged the court in early August to pass on reviewing the decision.

Several Alaska Native corporations and the state of Alaska are urging the high court to overturn the ruling, worried that the circuit court's interpretation of the Alaska National Interest Lands Conservation Act could vastly expand federal regulation of their lands within national park boundaries.

Some attorneys have said the high court might seize the opportunity to redefine "public lands" under the law — an issue that was considered settled in a previous Ninth Circuit case brought by Native fisherwoman Katie John — which could create tension between the interests of the for-profit Alaska Native corporations that want to avoid federal regulation and rural Alaska Natives whose hunting and fishing livelihoods benefit from federal regulation over public lands.

Sturgeon is represented by William S. Consovoy, Thomas R. McCarthy and J. Michael Connolly of Consovoy McCarthy Park PLLC, Douglas Pope of Pope & Katcher and Matthew T. Findley and Eva R. Gardner of Ashburn & Mason PC.

The National Park Service is represented by Dean Keith Dunsmore, Elizabeth Ann Peterson and Vivian Wang of the U.S. Department of Justice.

The state of Alaska is represented by Attorney General Craig W. Richards, Ruth Botstein and Janell Hafner.

Arctic Slope Regional Corp. is represented by Jahna M. Lindemuth and Katherine Demarest of Dorsey & Whitney LLP.

The case is John Sturgeon v. Sue Masica et al., case number 14-1209, in the U.S. Supreme Court.

Bear Valley v. Jewell

Several California cities and water agencies have urged the high court to take up a dispute rooted in a rule that doubled the size of the habitat of the Santa Ana sucker, a threatened fish unique to a Southern California river.

The group argued in its Sept. 22 petition that the U.S. Fish and Wildlife Service ran afoul of the National Environmental Policy Act through its failure to properly examine the environmental impact of the 2010 rule on issues such as water rights, water supplies and flood control efforts along the Santa Ana River.

The appeal follows a Ninth Circuit decision in June that rejected claims that the FWS erred in its critical habitat designation for the Santa Ana sucker and violated the Endangered Species Act by failing to cooperate with state and local agencies on the water issues — a stance reiterated in the group's petition.

Parker Moore, a principal at Beveridge & Diamond PC, said the case is important because it pits NEPA against the ESA.

"The regulated industry is suggesting that the application of NEPA is appropriate in addition to the application of the Endangered Species Act, whereas the environmental groups — in an unusual move — are saying that NEPA is inapplicable," he said.

And he said the case raises questions about the utility of habitat conservation plans, because habitat conservation plans often are entered into with the understanding that critical habitat won't be proposed in areas that HCPs have been developed.

"The Fish and Wildlife Service used its ESA critical habitat designation authority here to basically trump a habitat conservation plan, and there was no opportunity for the potential effects on stakeholders to be taken into consideration because NEPA wasn't performed," Moore said.

The city of Riverside, Riverside County Flood Control and Water Conservation District, and Western Municipal Water District are represented by Gregory K. Wilkinson, Charity Schiller and Kira Johnson of Best Best & Krieger LLP.

The Riverside County Flood Control and Water Conservation District is also represented by Riverside County Counsel Gregory P. Priamos and Deputy County Counsel Melissa Cushman.

The case is Bear Valley Mutual Water Co. et al. v. Sally Jewell et al., number 15-367 in the U.S. Supreme Court.

Alaska v. Village of Kake

Alaska has **asked the Supreme Court** to review a Ninth Circuit decision making a major national forest off-limits to road construction and logging. The state argued that the circuit overstepped its constitutional authority by ignoring the executive branch's judgment and siding with a tribe and environmental groups.

According to the state, the Ninth Circuit got it wrong when it ruled against the U.S. Department of Agriculture's decision to withdraw the Tongass National Forest's inclusion in the so-called Roadless Rule.

The rule, signed at the end of President Bill Clinton's term in office, placed nearly 60 million acres of national forest off-limits to road construction and logging and encompassed the majority of the 16.8-million-acre Tongass in southeastern Alaska, according to the state's petition. But the administration of President George W. Bush overturned that decision, reopening Tongass to construction and logging in a 2003 settlement with Alaska.

That was the Bush administration's decision to make, Alaska said, and the Ninth Circuit cannot substitute its opinion for the executive branch's.

"If allowed to stand, the Ninth Circuit's approach to reviewing policy changes will curtail the executive branch's power to make changes that are the very point of democratic elections," the petition said.

Alaska is represented by Dario Borghesan and Thomas E. Lenhart of the Alaska Department of Law.

The Organized Village of Kake and environmental and tourism groups were represented in the Ninth Circuit by Thomas S. Waldo and Eric P. Jorgensen of Earthjustice and Nathaniel S.W. Lawrence of the Natural Resources Defense Council.

The case is Alaska v. Organized Village of Kake et al., case number 15-467 in the Supreme Court of the United States.

American Farm Bureau Federation v. EPA

The American Farm Bureau Federation has asked the high court to review the Third Circuit's upholding of the EPA's pollution restrictions for the Chesapeake Bay watershed, saying the decision takes away power from the states.

The Third Circuit had ruled in favor of the EPA in July when it concluded the agency's Total Maximum Daily Load program — a comprehensive "pollution diet" for the 64,000-square-mile watershed — passed muster. However, the Farm Bureau and a coalition of other agricultural groups said in a petition to the high court that the EPA's interpretation of the Clean Water Act as authorizing a federal regulatory scheme "micromanaging" state water quality programs bears little resemblance to the law passed by Congress.

"It upsets Congress' carefully crafted balance of power between the states and the federal government, particularly regarding land use and other nonpoint sources," the Farm Bureau said in its petition. "And it adds to confusion among the lower courts over the meaning of the phrase 'total maximum daily load' and more generally about how to approach construction of the CWA."

The Farm Bureau said the ruling opens the gates for a wide expansion of federal power over land use and water quality planning across the country and blocks states from using their own judgement about how to best manage pollution in the bay.

The petitioners are represented by Farm Bureau in-house counsel Ellen Steen and Danielle Hallcom Quist, Thomas Ward of the National Association of Home Builders, and Timothy S. Bishop and Michael B. Kimberly of Mayer Brown LLP.

The EPA is represented by John David Gunter II, Stephen R. Cerutti II and Kent E. Hanson of the U.S. Department of Justice.

The case is American Farm Bureau Federation et al. v. U.S. Environmental Protection Agency, case number not available, in the Supreme Court of the United States.

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