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The Biggest Energy Rulings Of 2018: Midyear Report

By **Keith Goldberg**

Law360 (June 20, 2018, 9:30 PM EDT) -- The first half of 2018 saw courts take a broad view of energy companies' potential liability, whether the matter hinged on climate change, groundwater pollution or even a business partner's bankruptcy. Here are five court decisions that raised energy attorneys' eyebrows.

Judge Breathes New Life Into Federal Climate Torts

When a California federal judge decided that suits by Oakland and San Francisco seeking to hold Big Oil liable for climate change-related infrastructure damage belonged in federal, not state court, he reopened a courtroom door many thought had been slammed shut by the U.S. Supreme Court and the Ninth Circuit.

U.S. District Judge William H. Alsup said Feb. 27 that the cities' nuisance claims against BP PLC, Chevron Corp., ConocoPhillips Co., Exxon Mobil Corp. and Royal Dutch Shell PLC weren't precluded on the federal level by the Clean Air Act despite the Supreme Court's 2011 ruling in American Electric Power Co. Inc. v. Connecticut and the Ninth Circuit's 2012 ruling in Native Village of Kivalina et al. v. Exxon Mobil Corp. et al. Those rulings addressed only greenhouse gas emitters, not producers of products that emit greenhouse gases such as the oil companies named in the cities' suits, the judge said.

The AEP and Kivalina decisions, which were silent on whether state common law nuisance claims over climate change could be sustained in court, shifted the climate tort battlefield to state courts, leading to suits like the ones lodged by San Francisco and Oakland last year.

Judge Alsup still hasn't ruled on whether the cities' claims can be sustained under federal law. And one of his Northern District of California colleagues, U.S. District Judge Vince Chhabria, has remanded climate suits lodged by a trio of other California municipalities to state court, saying their claims can't be sustained under federal law.

But with states, cities and other localities looking to the courts to tackle climate change amid a retreat on the issue by the Trump administration, Judge Alsup's determination has stakes that extend well beyond Oakland and San Francisco's suits, Hogan Lovells appellate partner Jessica Ellsworth said.

"There's a lot of coastline in the U.S., a lot of places that are vulnerable to climate change-related impacts," Ellsworth said. "If there is a mechanism for states and localities to seek damages from energy companies, that's a big deal."

The cases are California Acting by and through Oakland City Attorney Barbara J. Parker v. BP PLC et al., case number 3:17-cv-06011, and California Acting by and Through San Francisco City Attorney Dennis J. Herrera v. BP PLC et al., case number 3:17-cv-06012, in the U.S. District Court for the Northern District of California.

Judges Quash Exxon Bids to Derail AG Climate Probes

ExxonMobil has been fighting investigations by the attorneys general of New York and Massachusetts into whether the company concealed its climate change knowledge from investors and the public ever since former New York AG Eric T. Schneiderman lodged his first subpoena in 2015. But the oil giant suffered a pair of court defeats this spring in its efforts to quash the probes.

On March 29, a New York federal judge threw out Exxon's suit claiming that Schneiderman and Massachusetts AG Maura Healey conspired with like-minded attorneys general and environmental groups to suppress the company's free speech rights on climate change. U.S. District Judge Valerie E. Caproni called Exxon's constitutional claims "implausible" and said they relied on "extremely thin allegations and speculative inferences."

A little more than two weeks later, the Massachusetts Supreme Judicial Court rejected Exxon's bid to quash a civil investigative demand issued by Healey, saying the state's consumer protection laws grant the attorney general broad investigative and discovery powers, and Exxon hasn't shown that any of Healey's requests for information were overbroad or overly burdensome.

Exxon has appealed the federal court ruling to the Second Circuit.

The federal case is Exxon Mobil Corp. v. Healey et al., case number 1:17-cv-02301, in the U.S. District Court for the Southern District of New York.

The appellate case is Exxon Mobil Corp. v. Healey et al., case number 18-1170, in the U.S. Court of Appeals for the Second Circuit.

The state case is Exxon Mobil Corp. v. Office of the Attorney General of the Commonwealth of Massachusetts, case number SJC-12376, in the Commonwealth of Massachusetts Supreme Judicial Court.

Ninth, Fourth Circuits Broaden Reach of CWA Pollution Liability

The scope of potential Clean Water Act liability for energy companies got wider thanks to a pair of U.S. appeals court rulings concluding that pollution that reaches navigable U.S. waters via groundwater is subject to the law's permitting requirements

The Ninth Circuit held Feb. 1 that injections from wastewater injection wells owned by Maui, Hawaii, constituted "point source" discharges that were subject to the U.S. Environmental Protection Agency's National Pollutant Discharge Elimination System permitting requirements even though the wells didn't discharge pollutants directly into the Pacific Ocean.

The Fourth Circuit reached a similar conclusion April 12 in reviving a suit over a Kinder Morgan Energy Partners LP subsidiary's gasoline pipeline spill in South Carolina.

"Once you get past the easy part to indicate if there's a direct [groundwater] connection, then the question is going to be come a fact-finding matter, which is going to be arduous, given that it's a battle of experts," said McGuireWoods LLP partner Scott Oostdyk. "It's a new world."

And it's a world that covers a range of energy-related activities, from coal ash pond leaks to pipeline spills. While the enforcement risks are increased, attorneys say the bigger headache for companies could be the permitting process.

"This doesn't strike me as straightforward analysis, proving whether you need a permit," Holland & Knight LLP partner Rafe Petersen said. "How do you permit that? Are you looking to effluent limitations? It'll probably lead to really expensive and time-consuming permitting."

Some clarity could come from the EPA, which recently asked for public comment on whether pollutant discharges that reach "waters of the United States" via groundwater may be subject to CWA regulation and require National Pollutant Discharge Elimination System permits.

But attorneys are also watching the Sixth Circuit, which is wrestling with a pair of groundwater liability cases. A potential circuit split would certainly pique the interest of the U.S. Supreme Court, they say.

The cases are Hawaii Wildlife Fund et al. v. County of Maui, case number 15-17447, in the U.S. Court of Appeals for the Ninth Circuit, and Upstate Forever et al. v. Kinder Morgan Energy Partners LP et al., case number 17-1640, in the U.S. Court of Appeals for the Fourth Circuit.

Ninth Circuit Keeps Alive Kids' Climate Suit Against Feds

The Ninth Circuit in March preserved a green light for 21 children to sue the U.S. government for allegedly endangering them and future generations with policies that contribute to climate change. The decision came when the appellate court refused to reverse an Oregon federal judge's ruling that rejected the government's dismissal bid.

The appeals court said March 7 that the government hadn't made a sufficient case to warrant granting its petition for writ of mandamus that sought to undo U.S. District Judge Ann L. Aiken's refusal to dismiss the suit that asserts violations of the plaintiffs' constitutional rights. The arguments raised by the government would be best addressed first by the district court, according to the three-judge panel, which fretted that granting the petition before the plaintiffs even lodged a discovery motion would spark a deluge of new dismissal motion appeals.

Barring any summary judgment rulings or other intermediate actions by the lower court, the trial is set to start Oct. 29. Judge Aiken has already rejected bids by the government to halt pretrial discovery, the latest coming last Thursday.

The case is In re: USA, case number 17-71692, in the U.S. Court of Appeals for the Ninth Circuit.

Second Circuit Backs Bankrupt Driller's Bid to Shed Contracts

The Second Circuit's May 25 conclusion that Sabine Oil & Gas Corp. could reject gas-gathering contracts after filing for bankruptcy further solidifies a 2-year-old ruling that roiled the midstream oil and gas industry.

The appeals court affirmed a New York federal judge's ruling that Sabine could reject contracts it inked with Nordheim Eagle Ford Gathering LLC and HPIP Gonzales Holdings LLC because the contracts were "personal obligations" and not "covenants that run with the land," as interpreted under Texas law. Like U.S. District Judge Jed S. Rakoff before them, a Second Circuit panel said that Texas law requires parties to have "horizontal privity" with one another for a contract to be one that "runs with the land" and that the gas-gathering contracts didn't establish horizontal privity.

The ruling backed U.S. Bankruptcy Judge Shelley C. Chapman's original 2016 decision to allow Sabine to terminate the contracts during its Chapter 11 case. That ruling, which was issued during the oil price slump that drove Sabine and dozens of other oil and gas producers into bankruptcy, sent ripples throughout the midstream industry as other drillers looked to shed their own midstream contracts or renegotiate them.

A few things could limit the immediate impact of the Second Circuit's ruling, attorneys say. The decision came via a summary order, so it has no precedential effect. Midstream companies have also had time to absorb Judge Chapman's original ruling and renegotiate their contracts with drillers accordingly. And with oil prices having recovered somewhat, bankruptcy fears have eased.

But when the next oil price slump hits, bankrupt drillers now have some case law in their pocket that has the backing of a U.S. appeals court, Mayer Brown LLP litigation partner Mike Lennon said.

"If all of a sudden ... oil prices tumble back down below $50 [a barrel], then we'll see more bankruptcies and this issue is going to creep up again," Lennon said. "It makes the Southern District of New York an attractive place for companies to file for bankruptcy because of this decision."

Nordheim has urged the Second Circuit to reconsider the decision and ask the Texas Supreme Court to decide whether such contracts are linked with drilling lands under state law, saying it "will affect many future disputes, whether they involve the hundreds of other, similar multimillion-dollar agreements between producers and midstream companies, or the numerous more personal disputes over the enforceability of covenants that may arise in various contexts."

The case is In re: Sabine Oil & Gas Corp., case number 17-1026, in the U.S. Court of Appeals for the Second Circuit.

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