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4 High Court Cases Enviro Attys Should Watch This Term

By **Juan Carlos Rodriguez**

Law360 (October 4, 2019, 8:38 PM EDT) -- The U.S. Supreme Court is set to decide several important cases of interest to environmental attorneys this term, beginning with a hotly contested battle over whether the Clean Water Act covers pollution that travels through groundwater.

The justices will also hear arguments over whether Montana residents can use a state law to sue parties involved in a Superfund cleanup for damages in excess of agreements reached with the U.S. Environmental Protection Agency.

Three Citgo units are asking the high court to reverse a Third Circuit decision holding them responsible for a $140 million oil spill off the coast of Delaware.

And while not an environmental case, the Trump administration's defense of its decision to rescind the Deferred Action for Childhood Arrivals program could have broader administrative law impacts that would affect environmental matters.

Here are four environmental-related cases on the Supreme Court's docket to watch.

Groundwater Pollution and the Clean Water Act

A closely watched case over whether facilities that pollute to waters of the U.S. via groundwater are subject to National Pollution Discharge Elimination System permits hangs in the balance as the Maui County Council and mayor are in a standoff over settling the case brought by environmentalists.

The council recently voted to settle Maui's high court appeal of the Ninth Circuit's decision that NPDES permits may be required for such discharges, but the mayor has resisted, saying he's the only one who can do so. There's been no resolution yet, and it's unclear how the power struggle will end.

Attorneys for the county and for the environmental groups have sent letters to the Supreme Court clerk alerting him to the dispute. "This case has not settled," counsel for the county asserted.

Even if the Maui case is settled and falls off the high court's docket, there's a very similar decision from the Fourth Circuit that's being challenged that could take its place. The Fourth Circuit found that the Clean Water Act allows environmentalists to pursue claims that a Kinder Morgan Energy Partners LP unit's gasoline spill contaminated nearby creeks and wetlands after traveling through groundwater.

The Kinder Morgan case would require the court to determine if the Fourth Circuit was correct to find that the plaintiffs had properly alleged "an ongoing violation" sufficient to confer "'jurisdiction' over a CWA citizen suit," so conceivably the court could resolve that question without ever resolving the groundwater question — a point raised by the U.S. Solicitor General's Office, which recommended the justices take the Maui case instead.

But Tim Bishop, a partner at Mayer Brown LLP, said the justices still may be persuaded to take that case if Maui falls through.

"The question of a continuing violation, which is what you have to have for a citizen suit, is intimately tied up with the basic groundwater question," Bishop said. "So I don't think the court would see that as a barrier to granting cert, because it's just so causally connected to the principal question of how groundwater is treated under the Clean Water Act. I think they'd have no problem answering both questions together."

Oral arguments in the Maui case are set for Nov. 6.

The cases are County of Maui, Hawaii v. Hawaii Wildlife Fund et al., case number 18-260, and Kinder Morgan Energy Partners LP et al. v. Upstate Forever et al., case number 18-268.

The Limits of Superfund Liability

Atlantic Richfield Co. has asked the U.S. Supreme Court to overturn the Montana Supreme Court's finding that state residents can sue the company for cleanup costs related to pollution from a Superfund site despite the company's settlement with the EPA.

Arco, a BP America Ltd. subsidiary, says the Montana high court's decision runs counter to the EPA's sole authority to prescribe how a site should be restored under the Comprehensive Environmental Response Compensation and Liability Act. The federal government has taken Arco's side in the matter.

The Montana high court rejected Arco's assertion that residents have no right to file claims for restoration damages, which under state law can be sought when a few conditions are met, including if ordinary damages don't provide "full compensation."

Karl Karg, a partner at Latham & Watkins LLP, said CERCLA practitioners are watching the case to see if the justices decide that state law can impose stricter requirements on a potentially responsible party notwithstanding any remedy that was selected by EPA under the Superfund program.

"If there's a limit on state authority for those types of sites, parties can take more comfort in EPA's selected remedy," Karg said. "If, on the other hand, the EPA selected remedy is only one part of the puzzle and a group of landowners ... can assert additional state law claims, that obviously exposes potentially responsible parties to a larger scope of liability."

He said that will add uncertainty to any cleanup and create more variables in any potential settlements, which would lead to more complex and difficult negotiations.

Oral arguments are scheduled for Dec. 3.

The case is Atlantic Richfield Co. v. Gregory A. Christian et al., case number 17-1498.

Who Pays for a $140M Oil Spill?

Three Citgo units have urged the Supreme Court to overturn a Third Circuit ruling holding them financially responsible for a 2004 oil spill in Delaware.

Citgo Asphalt Refining Co., Citgo Petroleum Corp. and Citgo East Coast Oil Corp. have argued that a safe berth clause in a contract for a tanker Citgo had chartered did not mean it faced strict liability for an accident caused by an anchor that it had no idea was under the surface. Strict liability was wrong and the high court should reverse the Third Circuit's hefty judgment against it, Citgo said.

But Frescati Shipping Co. Ltd. has said the Third Circuit got it right, arguing the contract for the shipment required Citgo to ensure that Frescati's ship was pulling into a safe harbor.

Frescati says that case law and maritime custom is clear that the safe-port clause in the charter the companies signed requires the owner of the port, Citgo, to monitor the conditions in the area around the port and to clear obstacles.

The case stems from a 2004 oil spill in which Frescati's Athos I tanker was bringing crude oil to a Citgo refinery, when the ship hit an abandoned anchor and spilled its cargo into the water. After the cleanup, Frescati sued Citgo for liability, saying it was the refiner's responsibility to keep the way clear.

The accident at issue poured more than 260,000 gallons of crude oil into the Delaware River near Philadelphia after the abandoned anchor that lay hidden 990 feet from the boundary of Citgo's terminal in Paulsboro, New Jersey, gouged open the single-hulled oil tanker. Who was responsible for that anchor is a mystery.

Oral argument is set for Nov. 5.

The case is Citgo Asphalt Refining Co. et al. v. Frescati Shipping Co. Ltd. et al., case number 18-565.

An Immigration Battle with Larger Implications

The high court will be deciding whether lower courts have been right to find that the Trump administration's rescission of the Obama-era Deferred Action for Childhood Arrivals program violates the Administrative Procedure Act because it did not go through a public notice and comment process.

The administration announced it would begin rolling back DACA less than a year after President Donald Trump took office, justifying the decision in a September 2017 memo written by former acting Department of Homeland Security Secretary Elaine Duke explaining that the administration believed DACA was illegal and would be vulnerable to legal challenges.

In May, the Fourth Circuit concluded the rescission was "arbitrary and capricious" in violation of the APA. The Ninth and Second circuits have upheld injunctions on the rescission as well.

The administration has told the justices that DHS has the discretion to set its own immigration enforcement priorities, and that the department's decision to roll back the DACA program represented a mere shift in those priorities and thus is not subject to APA review.

Sambhav Sankar, senior vice president of programs at Earthjustice, said the case is important because the vast majority of environmental law involves regulations and rulemaking, the topic at the heart of the DACA case.

"The court's really going to be examining, and certainly hopefully laying down, some principles on what the government can and can't do without a full-blown rulemaking," Sankar said.

The consolidated cases are Department of Homeland Security et al., Petitioners v. Regents of the University of California et al., case number 18-587, Donald J. Trump, President of the United States, et al., Petitioners v. National Association for the Advancement of Colored People et al., case number 18-588, and Kevin K. McAleenan, Acting Secretary of Homeland Security et al., Petitioners v. Martin Jonathan Batalla Vidal et al., case number 18-589.

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