

Energy Cases To Watch In 2021

By **Keith Goldberg**

Law360 (January 3, 2021, 12:02 PM EST) -- Climate change once again dominates the list of court cases that the energy industry will be closely watching in the new year.

The U.S. Supreme Court will wade into the fight over the future of climate change lawsuits against fossil fuel companies. Meanwhile, court battles are also being waged over the Trump administration's efforts to roll back Obama-era greenhouse gas emissions rules for vehicles and power plants, though climate moves by President-elect Joe Biden may ultimately halt those cases.

Here are five significant energy-related cases to watch in 2021.

Climate Change Torts Against Fossil Fuel Companies

A decade after slamming the door on federal climate torts in 2011's *American Electric Power Inc. v. Connecticut*, the Supreme Court has agreed to review the Fourth Circuit's decision that Baltimore could seek to make fossil fuel companies pay for climate-related infrastructure damages in state court.

Oral arguments are scheduled for Jan. 19. But it appears the legal question the Supreme Court is poised to answer is narrow: What is the scope of appellate review of remand orders?

In affirming a lower court's order remanding Baltimore's suit to state court, the Fourth Circuit said in March it could only review a remand order on "federal officer removal" grounds because the energy companies at times worked at the federal government's behest. Other circuit courts have reached similar conclusions, but in their Supreme Court petition, the energy companies cited the Seventh Circuit's 2015 ruling in *Lu Junhong v. Boeing* that an entire remand order is appealable, arguing the split warranted the high court's review.

However, now that the high court has taken the case, energy companies want the justices to go even further and determine that climate torts belong in federal, not state court. Given that more than 20 such suits have been launched by state and local governments, attorneys will closely watch how far the justices stretch their review.

"I would suspect they will focus on the narrow issue at hand and be very diligent about [not] making any broader judgments about things they don't have to," Stoel Rives LLP energy partner Seth Hilton said. "But ... climate change has become a significant enough legal issue that now you see legal challenges

wending their way all the way up to the Supreme Court and the Supreme Court having to decide how we're going to resolve these challenges."

ExxonMobil Corp. and Canadian oil giant Suncor Energy Inc. in December petitioned the Supreme Court to review the Tenth Circuit's ruling that rejected their bid to keep Boulder, Colorado's climate suit in federal court.

The case is BP PLC et al. v. Mayor and City Council of Baltimore, case number 19-1189, in the Supreme Court of the United States.

Power Plant GHG Litigation

The D.C. Circuit is poised to rule on the Trump administration's revocation of a landmark Obama-era rule limiting greenhouse gas emissions from existing power plants and its replacement rule that is less stringent.

Both the 2015 Clean Power Plan and 2019 Affordable Clean Energy rule crafted by the U.S. Environmental Protection Agency establish GHG emissions standards for power plants, but the ACE rule eliminates the CPP's option for states to push out fossil fuels in favor of renewable energy sources and to participate in emissions credit-trading programs. At bottom, it's a disagreement over the scope of the EPA's Clean Air Act authority.

The D.C. Circuit in October heard nine-plus hours of oral arguments on both the Trump EPA's rescission of the CPP and release of the ACE rule. But attorneys wonder if a decision will ever be made with Biden — who has pledged major action on climate change — poised to take office.

It's worth remembering that the D.C. Circuit never ruled on the legality of the CPP before President Donald Trump took office and pursued a rollback.

"It'll be interesting to see if the case goes forward under a Biden administration, but if it does, you may get a ruling of the scope of the EPA's authority, which is always going to be interesting," Selendy & Gay PLLC partner Josh Margolin said. "The broader mandate a Biden EPA has, the more effective it might be."

The case is American Lung Association et al. v. U.S. Environmental Protection Agency et al., case number 19-1140, in the U.S. Court of Appeals for the District of Columbia Circuit.

Vehicle GHG Litigation

One can't talk about the legal fight over power plant GHG emissions standards without discussing the companion battle taking place in the D.C. Circuit over vehicle emissions standards, a battle underscored by a bitter feud between the Trump administration and California.

California and allied states, cities, industry and green groups are fighting both halves of the two-part Safer Affordable Fuel-Efficient Vehicles rule. In the first part of the SAFE rule, the White House asserts that the Energy Policy and Conservation Act gives the U.S. Department of Transportation the right to set national fuel economy standards and preempts similar state programs. As part of the new "One National Program" created by the rule, the EPA is rescinding a CAA waiver that allows California to set its own, more stringent GHG standards and a zero emissions vehicle program, which several other states have

chosen to adopt.

The second part of the SAFE rule calls for a 1.5% annual increase in the GHG and Corporate Average Fuel Economy, or CAFE, standards for cars and light trucks for certain model years, as opposed to the 5% annual increase called for in the Obama-era rule enacted in 2012.

"There's a really interesting question of whether or not the EPA was acting arbitrarily and capriciously in terms of doing away with California's waiver," Margolin said. "It's an interesting question if the new regulations that were put in place nationally to deal with emissions really makes California's rules either at odds or unnecessary."

But again, there's the likelihood that the Biden administration looks to end the fight with California and restore or strengthen the Obama-era emissions standards. That hasn't been lost on automakers that previously sided with the Trump administration; both General Motors and Nissan have recently pulled out of the litigation.

"There's potential for action by the administration that would moot any need for the D.C. Circuit to make a decision on these cases," Mayer Brown LLP energy litigation partner Mike Lennon said.

The case is *Union of Concerned Scientists et al. v. National Highway Traffic Safety Administration et al.*, case number 19-1230, in the U.S. Court of Appeals for the District of Columbia Circuit.

PennEast Pipeline Litigation

The Supreme Court is mulling a petition appealing a Third Circuit ruling that the developers can't seize New Jersey-owned land for the controversial \$1 billion PennEast pipeline, a ruling the project's developers — with the backing of the federal government — want the justices to review and overturn.

PennEast Pipeline Co. LLC, with backing from energy industry, business and labor groups, argues that the Third Circuit's September 2019 decision that the Natural Gas Act doesn't trump the Garden State's 11th Amendment sovereign immunity from condemnation suits by private companies gives states a blanket veto over federally approved pipeline projects and routes. That will make pipelines and other energy infrastructure more difficult and expensive to build and drive up energy costs, they argue.

But New Jersey argues that the Third Circuit properly concluded that the Constitution doesn't allow private companies to sue states under the NGA, and that the NGA doesn't clearly give companies the authority to sue states.

The Supreme Court in June asked the acting U.S. solicitor general to submit briefing on the case, and on Dec. 9, the government urged the justices to grant the petition, saying the Third Circuit got it wrong.

The government argued that not only does the Third Circuit's misinterpretation of the NGA's eminent domain provision, enacted in 1947, threaten to disrupt the Federal Energy Regulatory Commission's regulation of the nation's gas pipelines, but the appeals court didn't even have jurisdiction in the first place because any challenges to PennEast and other FERC-approved pipelines belong in the D.C. Circuit.

"The court's jurisdictional error provides no reason to permit that erroneous decision to stand," the government said in its brief. "Neither does the fact that, in the more-than-70-year history of [the NGA eminent domain provision], the court below is the first appellate court to discover an unwritten

exception for state-owned property."

The case is PennEast Pipeline Co. LLC v. New Jersey et al., case number 19-1039, in the Supreme Court of the United States.

FERC Clean Energy Subsidy Litigation

The Seventh Circuit is the site of a slew of legal challenges FERC is facing from states and clean energy and consumer advocates to its order restricting the presence of state electricity programs in wholesale electricity auctions run by the nation's largest regional grid operator.

FERC's order states that state-subsidized power producers must hit a price floor to participate in electricity capacity auctions run by PJM Interconnection LLC, which oversees the grid in 13 Mid-Atlantic and Midwest states, as well as D.C.

Opponents argue that FERC is trampling state authority to determine electricity generation in violation of the Federal Power Act by directing PJM to expand its Minimum Offer Price Rule, or MOPR, to cover electricity generators that receive state subsidies. Most of those subsidies are for clean energy.

FERC's order has also prompted some states within PJM's footprint to explore pulling out of the grid operator's capacity markets where power producers are paid for supplying power to meet future demand.

However, FERC watchers say that under a Biden administration and a likely Democratic chairman, the agency may be more accommodating of state clean energy subsidies.

The lead case is Illinois Commerce Commission v. FERC, case number 20-1645, in the U.S. Court of Appeals for the Seventh Circuit.

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