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The Biggest Environmental Law Decisions Of 2022

By **Juan Carlos Rodriguez**

Law360 (December 22, 2022, 6:40 PM EST) -- The U.S. Supreme Court broke important ground in 2022 with a long-awaited decision limiting the federal government's power to regulate greenhouse gases from power plants, a jury in Michigan failed to decide whether public officials were liable for a lead-contaminated drinking water crisis, and a federal appeals court upheld the Biden administration's authority to craft greenhouse gas cost metrics.

Other notable rulings from 2022 include the First Circuit's expansive interpretation of the Clean Water Act's citizen suit provision and the Ninth Circuit's decision to reinstate a series of measures that the Trump administration took to weaken the Endangered Species Act

The Ninth Circuit also ordered the U.S. Environmental Protection Agency to reevaluate its determination that the active ingredient in Monsanto's weedkiller Roundup was not likely to cause cancer.

Here, Law360 breaks down five of the most significant environmental-related court decisions from 2022.

Supreme Court Reins in EPA

The EPA was dealt a setback in its efforts to regulate carbon dioxide from existing power plants when the nation's highest court said in June that the agency exceeded its authority under the Clean Air Act when it allowed states to issue regulations aimed at increasing the use of cleaner sources of electricity generation.

The regulations had been promulgated during the Obama administration, were undone by the Trump administration and then resurrected by the D.C. Circuit, which oversaw litigation over the competing approaches to GHG regulation.

The Supreme Court's decision to overturn the D.C. Circuit won't be the last word on the matter, though, as the Biden administration has said it too plans to take a crack at new power plant air emission regulations.

Thomas Lorenzen, a partner at Crowell & Moring LLP who filed an amicus brief for the Edison Electric Institute and the National Association of Clean Water Agencies, said the ruling is one of the most consequential administrative law cases — let alone environmental cases — of the past 30 years, and marks a fundamental shift in the way the Supreme Court approaches review of regulations.

"Rather than deferring to reasonable agency interpretation of statutory ambiguities, from now on, analysis proceeds under a new regime," Lorenzen said. "The court asks whether the regulation is a big deal. If it is, it requires clear congressional approval. The question is: What's a big deal? Litigation over that next decade will help determine that."

He added that after the Supreme Court showed its willingness to consider arguments relying on the major questions doctrine — which posits that Congress would not delegate great powers to administrative agencies in vague or minor statutory provisions — any entity challenging any regulation "would be almost foolhardy" not to raise it.

The case is West Virginia et al. v. EPA et al., case number 20-1530, in the Supreme Court of the United States.

Mich. Jurors Can't Complete Contamination Trial

In a six-month trial over claims filed by four Flint, Michigan, children who say they were poisoned by lead following a change in drinking water sources in 2014 and 2015, an Ann Arbor jury deliberated for approximately six days before telling a judge in August that they could not reach a decision over who was liable.

According to the kids, the process of changing water sources resulted in lead leaching from pipes and flowing into homes and schools. They alleged that water engineers Veolia North America LLC and Lockwood Andrews & Newnam fell short of their professional standard of care. The companies countered that grossly negligent public officials from all levels of government were solely to blame.

But after six days of deliberations, the jurors said their mental and physical health had reached a breaking point, and U.S. Magistrate Judge David Grand declared a mistrial.

This was the first of three scheduled bellwether trials against Veolia and LAN, with the next one scheduled for early 2024. There is also a class action with a certified class headed to trial in October 2023.

LAN has since settled with the plaintiffs in the first bellwether case, but Veolia has not.

The case is Walters et al. v. Flint et al., case number 5:17-cv-10164, in the U.S. District Court for the Eastern District of Michigan.

8th Circ. Upholds Carbon Cost Metric

In October, the Eighth Circuit ruled that the Biden administration's cost estimates for greenhouse gas pollution are legitimate, rejecting a challenge filed by a coalition of red states. The court found that the states must wait until specific regulations that utilize the metric are finalized before they can sue again.

The unanimous three-judge panel upheld a Missouri federal judge's ruling that the states don't have standing to challenge the government's effort to use the so-called social cost of greenhouse gas metrics in federal regulations. The states can't proceed because they can't prove they've suffered any injury, the court found.

The ruling ensured that President Joe Biden's administration can proceed with its plans to integrate the

social cost of greenhouse gasses into federal rulemakings.

The states — Missouri, Alaska, Arizona, Arkansas, Indiana, Kansas, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee and Utah — had argued, among other things, that they suffered harm because the metrics make costs higher than they should be and will result in more regulation, which will stress businesses and increase costs.

But the panel said the states' argument amounts to an effort to bind the Biden administration to the policies of the Trump administration, which used lower cost estimates in its metric.

The states have asked for the full Eighth Circuit to reconsider the case.

Separately, the Fifth Circuit is considering the same question in litigation initiated by a different group of red states after the U.S. Supreme Court declined to interfere in the matter.

The case is Missouri et al. v. Joseph R. Biden Jr. et al., case number 21-3013, in the U.S. Court of Appeals for the Eighth Circuit.

1st Circ. Expands CWA Citizen Suit Rights

Plaintiffs suing under the Clean Water Act's citizen suit provision got some breathing room in the First Circuit when the appeals court held in April that government enforcement of the law doesn't bar citizens from filing their own suits against polluters, so long as the civil actions aren't seeking monetary relief.

The en banc ruling supported the Biden administration's and the Commonwealth of Massachusetts' interpretation of the scope of a CWA limitation on citizen suits.

The court's opinion said the statute's limitation on citizens filing lawsuits after a polluter has already faced an enforcement action by the state or federal government for the activity doesn't apply to citizens' requests for injunctions or declaratory relief.

Environmental nonprofit Blackstone Headwaters Coalition Inc. had sued construction firm Gallo Builders Inc. and the Arboretum Village apartment complex, which argued that because Massachusetts had already cited the development for the stormwater violations and settled with the companies, the group's claims were doomed.

The First Circuit's updated interpretation of the cornerstone environmental law brought it in line with a 2005 Tenth Circuit opinion that found that the CWA's limitation on citizen suits doesn't apply to equitable remedies.

The case is Blackstone Headwaters Coal. v. Gallo Builders Inc. et al., case number 19-2095, in the U.S. Court of Appeals for the First Circuit.

9th Circ. Revives Trump-Era ESA Rollbacks

The Ninth Circuit in September found that a California federal judge "clearly erred" in voiding a series of Trump-era measures weakening the Endangered Species Act by not weighing their legal merits before granting environmental groups' request to vacate the regulations.

One of the measures repealed a long-standing U.S. Fish and Wildlife Service regulation, known as Blanket 4(d) Rule, that automatically extended some ESA protections to threatened plant and animal species. The other rules also altered the criteria for protecting species and their habitats under the ESA, allowing federal agencies to weigh economic factors against conservation interests and changing interagency collaboration procedures.

The appellate panel said the 2019 rules would be restored until U.S. District Judge Jon S. Tigar ruled on two competing petitions seeking to amend his July vacatur decision. The panel said Judge Tigar vacated the rules before adequately assessing their legal validity first.

In November, Judge Tigar reversed himself and decided to keep the FWS and National Marine Fisheries Service rules in place, at least until the federal government decides whether it will revise them.

Kristen Boyles, the managing attorney of Earthjustice's Northwest regional office who is representing the conservation groups challenging the rules, said the Biden administration's timetable will keep the Trump-era rules around for two more years.

"Despite earnest-sounding pledges to revisit these rules early in the administration, the Biden wildlife agencies stopped work on proposed rules, and now that the courts have kept the harmful rules alive, we're left with a far too lengthy schedule for unknown revisions in the midst of a biodiversity crisis," Boyles told Law360. "The lack of urgency is astounding,"

The cases are In re: Washington Cattlemen's Association, et al. v. USDC-CAOAK, case number 22-70194, in the U.S. Court of Appeals for the Ninth Circuit; and State of California et al. v. Bernhardt et al., case number 4:19-cv-06013, in the U.S. District Court for the Northern District of California.

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