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Biggest Environmental Law Rulings Of 2018

By **Juan Carlos Rodriguez**

Law360 (December 13, 2018, 12:23 PM EST) -- A trio of circuit courts in 2018 showed deep divisions on the question of whether pollution that travels through groundwater can be regulated under the Clean Water Act, attracting attention from the U.S. Supreme Court, while litigation over the CWA's definition of "Waters of the United States" limited the rule to apply in less than half of the states.

The Supreme Court also stepped into a water fight between Georgia and Florida, giving Florida another chance to limit how much water its northern neighbor can pull from a river basin that divides the states.

And outside of water fights, the Sixth Circuit made it easier to get class certification in litigation over pollution, and the Ninth Circuit upheld Oregon's low-carbon fuel standards against a challenge from industry groups that said they were being discriminated against.

The Second Circuit also upheld a rule that requires power plants to minimize damage to aquatic life when they pull water from lakes, while the Supreme Court rejected a bid to require the Trump administration's planned Mexico-U.S. border wall to go through an environmental review.

Here, Law360 looks back at some of the biggest environmental decisions of 2018.

CWA Groundwater Circuit Split

In February, the Ninth Circuit said that wastewater injections whose pollution reaches navigable U.S. waters via groundwater are subject to CWA permitting requirements. And in April, the Fourth Circuit made a similar finding that the statute 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.

But in September, the Sixth Circuit reached the opposite conclusion in two cases related to coal ash pond pollution, and called out the Fourth and Ninth Circuits for getting the answer wrong on the question.

Maui County, Hawaii, the defendant in the Ninth Circuit case, and Kinder Morgan have filed petitions for writs of certiorari at the high court, hoping to obtain reversals. While no cert petitions have been filed out of the Sixth Circuit cases yet, the Supreme Court won't be able to ignore them.

And the high court, signaling interest in the matter, has asked the U.S. solicitor general to weigh in.

“This is tailor-made for Supreme Court review,” said Crowell & Moring LLP partner David Chung. “And it’s fascinating because all three circuits appear to be taking the stance that the statute is clear and yet they drew opposite conclusions.”

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; 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; and Kentucky Waterways Alliance et al. v. Kentucky Utilities Co., case number 18-5115, and Tennessee Clean Water Network et al. v. Tennessee Valley Authority, case number 17-6155, both in the U.S. Court of Appeals for the Sixth Circuit.

Waters of the United States Litigation

After the high court in January held that the proper venue for challenges to an Obama-era rule defining the federal government's jurisdiction under the Clean Water Act is at the district rather than appellate court level, cases at the lower levels that had been stayed pending resolution of that question restarted.

One major issue for the U.S. Environmental Protection Agency and Army Corps of Engineers, which co-authored the rule, was that some courts had issued stays of the rule pending the outcome of those cases, so in some states the rule was in effect and in others it was not.

The Trump administration tried to get a handle on the problem by delaying the effective date of the rule until 2020, but in August, South Carolina U.S. District Judge David Norton said the delay rule was invalid, meaning the patchwork of states in which the rule applies would continue.

In early December, Judge Norton clarified that his ruling was intended to apply nationwide and denied the government’s request that he stay the effect of his ruling until an appeal can run its course.

“This continues the uncertainty and confusion for the regulated community, as the substance of the 2015 [Waters of the United States] rule continues to be litigated and as U.S. EPA looks to permanently repeal the 2015 [Waters of the United States] rule,” said Karen Winters, a partner at Squire Patton Boggs LLP.

The case is South Carolina Coastal Conservation League et al. v. Pruitt et al., case number 2:18-cv-00330, in the U.S. District Court for the District of South Carolina.

Florida Gets Another Chance to Cap Georgia Water Use

The U.S. Supreme Court in June rejected a special master’s report that denied Florida’s request to cap Georgia’s water usage from a Southeastern river basin, ruling that Florida had sufficiently shown that a remedy is possible and sending the case back to the special master.

Special master Ralph Lancaster Jr. of Pierce Atwood LLP said the court is powerless to cap Georgia’s water use from the Apalachicola-Chattahoochee-Flint River basin because the water levels largely depend on dams run by the U.S. Army Corps of Engineers, which, as a nonparty, can’t be bound by a court order and hasn’t said whether it would change its operation protocols in response to a cap.

But in a 5-4 decision authored by Justice Stephen Breyer, the Supreme Court said the special master

applied too strict a standard when he determined that. The majority said Lancaster has not yet determined several key remedy-related matters, including how much water needs to flow into the Apalachicola River for Florida to see any improvements downstream at its depleted oyster fisheries.

The case is State of Florida v. State of Georgia, case number 22O142, in the Supreme Court of the United States.

EPA Cooling Water Intake System Rule Upheld

The Second Circuit in July upheld the U.S. Environmental Protection Agency's rule requiring power plants and manufacturers to minimize damage to aquatic life caused by pulling in water from lakes, rejecting challenges from power industry and environmental groups.

A unanimous three-judge panel said the 2014 Cooling Water Intake Structure rule and an underlying biological opinion — a report that states whether something is likely to jeopardize wildlife — are based on "reasonable interpretations" of the law and "sufficiently supported by the factual record."

Environmental groups had asked the court to vacate the rule and remand it on several grounds, including that parts of it violate Section 316(b) of the Clean Water Act by failing to adequately control entrainment — when animals get past a screen and into the facility's heating and cooling mechanisms — and impingement, when animals get stuck in or on screens when water is being taken into a facility.

But the panel said that although the EPA has said closed-cycle cooling systems are the most effective for minimizing entrainment, the agency also reasonably found that "significant barriers at many existing facilities prevent retrofitting," and thus the single national standard sought by the environmentalists was not feasible.

The case is Cooling Water Intake Structure et al. v. U.S. Environmental Protection Agency et al., case number 14-4645, in the U.S. Court of Appeals for the Second Circuit.

6th Circ. Clears Way for Easier Pollution Class Actions

A group of Dayton, Ohio, residents suing four companies for groundwater pollution in July got approval from the Sixth Circuit to continue their lawsuit as a class action, a ruling that generally opened the door for easier approval of class claims in the circuit.

The unanimous three-judge panel affirmed a lower court judge's decision to allow the residents to pursue some of their claims on a classwide basis, endorsing a broad interpretation of the Federal Rules of Civil Procedure that govern class actions. The defendants in the suit, Old Carco LLC — formerly known as Chrysler LLC — in addition to Behr Dayton Thermal Products LLC, Behr America Inc. and Aramark Uniform & Career Apparel LLC, had argued for a stricter interpretation of the rules that would have prevented class treatment.

The companies have since asked the U.S. Supreme Court to review the Sixth Circuit's decision.

"The court of appeals' decision deepens a circuit conflict on the correct approach to issue classes: specifically, on whether a party can bypass the requirements of Rule 23(b)(3) by seeking class certification only as to certain issues relevant to a cause of action," the companies' October petition for writ of certiorari said.

The cases are Terry Martin et al. v. Behr Dayton Thermal Products LLC et al., case number 17-3663, in the U.S. Court of Appeals for the Sixth Circuit, and Behr Dayton Thermal Products LLC et al. v. Terry Martin et al., case number 18-472, in the Supreme Court of the United States.

Oregon Wins Challenge to Low-Carbon Fuel Standards

The Ninth Circuit in September upheld Oregon's low-carbon fuel standards, tossing a challenge from fuel industry groups that said the program unconstitutionally discriminates against out-of-state fuels.

The American Fuel and Petrochemical Manufacturers, American Trucking Associations and Consumer Energy Alliance had argued the Oregon Clean Fuels Program, which provides an economic incentive for fuels that emit less greenhouse gas over the course of their entire life cycles, violates the commerce clause by unfairly favoring in-state fuel sources. But a split Ninth Circuit panel found otherwise.

"The Oregon program distinguishes among fuels not on the basis of origin, but rather on carbon intensity," the majority opinion said. "Out-of-state fuels are not necessarily disfavored: When the complaint was filed, the program assigned twelve out-of-state ethanols, including five Midwest ethanols, lower carbon intensities than those assigned to Oregon biofuels."

The majority opinion said just because Oregon's program labels fuels by state of origin does not make the program discriminatory, since a fuel's place of origin is not the basis for any differential treatment.

"This is good news in terms of state authority," Sierra Club environmental law program director Pat Gallagher said. "I think we're going to see a lot of these constitutional claims arise in the future because you have a large set of progressive states who want to fight climate change, and one of the ways to do that is by cleaning up the fuel profile for your transportation sector. There's a lot of state authority to do so, but that's all under attack by the fossil fuel industry."

The case is American Fuel & Petrochemical et al. v. O'Keeffe et al., case number 15-35834, in the U.S. Court of Appeals for the Ninth Circuit.

Trump Border Wall Can Skip Environmental Review

The U.S. Supreme Court on Dec. 3 refused to review aspects of an immigration law that let the government skip environmental reviews related to a controversial border wall with Mexico and additionally allowed construction to move forward, denying pleas by environmental groups to strike down parts of the law.

The Animal Legal Defense Fund, Defenders of Wildlife and the Center for Biological Diversity said in an August petition for writ of certiorari that Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act violates the U.S. Constitution by allowing the secretary of homeland security to waive environmental requirements to complete the wall and protecting those waivers from judicial review.

The conservation groups argued that Section 102 of the immigration law runs afoul of the Constitution's intention to separate powers between the legislative, executive and judicial branches of government by allowing an "unelected Cabinet secretary to repeal existing laws" and shielding such waivers from appellate court review. The statute says that challenges to waivers may be brought only before federal district courts and that appeals must go straight to the nation's highest court.

The case is Animal Legal Defense Fund et al. v. U.S. Department of Homeland Security et al., case number 18-247, in the Supreme Court of the United States.

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