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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

The Biggest Environmental Rulings Of 2017: Midyear Report

By **Juan Carlos Rodriguez**

Law360, New York (June 9, 2017, 4:57 PM EDT) -- From courts putting the brakes on legal battles over Obama-era regulations to an affirmation of California's cap-and-trade program to a settlement in a closely watched suit over a proposed Alaska copper mine, the first half of 2017 saw several significant decisions in environmental cases.

Here, Law360 examines six developments in environmental litigation that have raised eyebrows so far this year.

Delays in Litigation Over Regulations

Since President Donald Trump was inaugurated on Jan. 20, his administration, in particular the U.S. Environmental Protection Agency under the leadership of Administrator Scott Pruitt, has sought to halt several lawsuits challenging various rules put in place during the Obama administration.

Rules that are the subject of litigation that has been placed in abeyance include the Clean Power Plan, ozone emissions standards, mercury and air toxins emissions standards, heavy duty truck greenhouse gas emissions standards, and standards for wastewater from power plants.

Tom Lorenzen, a partner at Crowell & Moring LLP who served in the U.S. Department of Justice during two presidential transitions, from Bill Clinton to George W. Bush and then Bush to Barack Obama, said there's nothing unusual about a new administration asking courts to put litigation over regulations on hold while it determines how it wants to proceed.

"I think what is notable here is the number of cases that have been put on hold," Lorenzen said. "This is a much broader revisitation of the prior administration's rules than we saw the last time."

The exception is litigation pending at the Supreme Court over whether the proper venue to decide challenges to the EPA's Clean Water Rule is a federal appeals court or the district court level. The agency had asked the high court to pause that case, but was denied. The EPA is still proceeding with plans to review and possibly revise that rule, however.

The CPP case is West Virginia et al. v. Environmental Protection Agency et al., case number 15-1363, in the U.S. Court of Appeals for the District of Columbia Circuit.

EPA Farm Pollution Rule Struck Down

The D.C. Circuit in April vacated an EPA rule exempting some farms from pollution reporting requirements, finding that the reports are much more useful than the EPA had characterized them as being.

Environmental groups had challenged the 2008 rule, which exempted all animal-feeding operations from the Comprehensive Environmental Response, Liability and Compensation Act's hazardous substance reporting requirements, and all but the largest operations from state and local reporting requirements under the Emergency Planning and Community Right-to-Know Act.

The EPA had argued the animal-waste reports are "unnecessary," but the D.C. Circuit disagreed.

"We find that those reports aren't nearly as useless as the EPA makes them out to be," the court said in its opinion.

The National Pork Producers Council and United States Poultry and Egg Association have asked for a panel rehearing.

The case is Waterkeeper Alliance et al. v. U.S. Environmental Protection Agency, case number 09-1017, in the U.S. Court of Appeals for the District of Columbia.

California Cap-And-Trade Program Upheld

A California appeals court in April upheld the state's greenhouse gas cap-and-trade program. The program, which took effect in early 2012, has been held back by legal uncertainty and an emissions allowance auction market filled with more supply than demand and wary participants. The Third Appellate District panel in a 2-1 opinion answered the biggest legal question that could have sunk the scheme, finding auction revenues are not taxes under the state Constitution.

Had the revenues been found to be taxes, the program would have been invalidated because tax increases must be passed with a two-thirds majority of the state Legislature, and the current program didn't have those numbers when it passed.

Alex Jackson, the legal director of the Natural Resources Defense Council's California Climate Project, said the decision established that requiring the purchase of emissions allowances is a cost that may properly be imposed.

"The decision stabilized the operation of California's signature climate-change policy," Jackson said. "It provides a much needed measure of certainty, but it is has not resolved the program's footing entirely."

The California Chamber of Commerce, the National Association of Manufacturers and a group of companies including Morning Star Packing Co. have asked the state Supreme Court to review the ruling. The court has not decided whether to take the case yet.

And the state Legislature is currently wrestling with a plan to extend the program beyond 2020.

That appeal is California Chamber of Commerce v. State Air Resources Board, case S241948 at the California Supreme Court.

Tronox Tort Plaintiffs Stymied

In April, the Second Circuit shut down a lawsuit filed by 4,300 people trying to sue former Tronox parent Kerr-McGee Corp. for injuries they blame on toxic emissions from a Pennsylvania industrial plant, saying it had no jurisdiction.

Although the panel unanimously held the case was improperly before it, it also said it had discussed the merits of the plaintiffs' appeal and found that New York U.S. District Judge Katherine Forrest had correctly ruled that their Pennsylvania state court lawsuit is barred by a no-suit injunction that is part of the $5 billion Tronox bankruptcy settlement, and lifted a stay on the the judge's order directing the plaintiffs to dismiss their lawsuit with prejudice.

The dispute concerns whether the plaintiffs' remedy must come from proceeds of a $600 million litigation trust established as part of Tronox's plan of reorganization, or whether they may seek to supplement their recovery by pursuing claims against Kerr-McGee.

Before its bankruptcy, chemical company Tronox was spun off by Kerr-McGee. The plaintiffs say Kerr-McGree bears responsibility for their injuries independently of the hard-fought 2014 Chapter 11 settlement.

The case is In Re: Tronox Inc., case number 16-343, in the U.S. Court of Appeals for the Second Circuit.

Settlement Solves Pebble Mine Impasse

In May, the EPA reached a settlement agreement with Northern Dynasty Minerals Ltd.-owned Pebble Limited Partnership, which has proposed a massive copper mine in Alaska, to allow the project to move forward.

The Obama administration had blocked the issuance of any permits for the Pebble Mine project while it reviewed environmental impacts, but after a review by Trump administration officials, the EPA agreed to allow the company to apply for a Clean Water Act permit from the U.S. Army Corps of Engineers.

The agreement said that if the developers file a CWA permit application with the Corps within 30 months, the EPA's regional administrator can sign off on a recommendation for the project and submit it to agency headquarters as soon as a notice of a final environmental impact statement appears in the Federal Register and not later than 48 months from the date of the settlement. If the company takes longer than 30 months to file with the Corps, the regional administrator can make a recommendation at any time thereafter. If the Corps decides no environmental impact statement is necessary, the EPA doesn't have to take any action, according to the agreement.

In exchange, the company agreed to drop all pending litigation against the agency and will not file any more Freedom of Information Act requests during that 48-month period.

But the path for Pebble won't be completely clear. Tom Waldo, an attorney at Earthjustice, said the mine would imperil Bristol Bay's salmon fishery, which sustains both Native Americans and a commercial fishing industry.

"We will make every effort to ensure that the science prevails and Bristol Bay is protected from this mine in the process ahead," Waldo said.

The cases are Pebble Limited Partnership v. Environmental Protection Agency et al., case numbers 3:14-cv-00171 and 3:14-cv-00199, in the U.S. District Court for the District of Alaska.

EPA Gets Second Wind in DTE Coal Plant Battle

The Sixth Circuit in January revived the EPA and the Sierra Club's lawsuits alleging DTE Energy Co. increased air pollution by illegally modifying Michigan's largest coal-fired power plant.

A federal district court judge in 2014 granted DTE summary judgment based on its contention that post-construction pollution and customer usage data could be used to show that the facility overhaul was not a "major modification" as defined under the Clean Air Act's New Source Review program. The EPA appealed, saying the company should have obtained a preconstruction permit and installed pollution controls.

A split three-judge panel found U.S. District Judge Bernard A. Friedman erred in that decision, and pointed to a previous panel ruling in the case that held post-construction data may not be used the way DTE did.

"Apparently, it is necessary to reiterate that the applicability of NSR must be determined before construction commences and that liability can attach if an operator proceeds to construction without complying with the preconstruction requirements in the regulations," U.S. Circuit Judge Martha C. Daughtrey said in the opinion.

DTE in May said it will petition the Supreme Court to review the case.

The case is United States of America v. DTE Energy Co. et al., case numbers 14-2274 and 14-2275, in the U.S. Court of Appeals for the Sixth Circuit.

— Additional reporting by Keith Goldberg and Melissa Daniels. Editing by Ben Guilfoy and Sarah Golin.

Update: This story has been updated to include case information.
