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Environmental Law Cases To Watch In The 2nd Half Of 2018

By **Juan Carlos Rodriguez**

Law360 (July 3, 2018, 1:17 PM EDT) -- Questions around water law dominate several of the cases environmental law attorneys will be closely following in the second half of 2018, including whether groundwater is subject to permitting and how litigation over the Clean Water Rule will play out, while other important cases touch on the Endangered Species Act and climate change issues.

Here are several cases environmental law attorneys will be keeping a close eye on.

High Court Tackles ESA Habitat

Weyerhaeuser Co. and other forest landowners in April asked the U.S. Supreme Court to overturn a Fifth Circuit ruling upholding the U.S. Fish and Wildlife Service's decision to declare 1,500 acres of private property in Louisiana as protected habitat for the endangered dusky gopher frog.

The timber giant is arguing that the Endangered Species Act requires "critical habitat" to be actually habitable for the species in question, and that the area reserved for the frog by the FWS cannot sustain the amphibian. The federal government argued that even though the frog isn't currently found in the area that FWS designated as critical habitat, the unique ecosystem there is one of few where it could prosper.

Don Baur, a partner at Perkins Coie LLP, noted that several amicus briefs have been filed in support of Weyerhaeuser, including by 19 states, and that a strong showing is also expected from amici in support of the FWS' position.

"The case will be important because, at a minimum, it will resolve a long-standing debate over the scope of critical habitat for areas not actually used by listed species," Baur said. "However, considering that traditional indicators for Supreme Court review, such as a circuit split, are not present, it is possible that the court's interest in this case focuses on the scope and use of the agency deference principles from the Chevron doctrine."

Karimah Schoenhut, an attorney at the Sierra Club, said the Fifth Circuit's ruling is important because it preserves the authority of the FWS to protect areas of potential habitat necessary to restore species that are endangered or threatened due to habitat destruction.

“If the Supreme Court overturns the decision below, the [FWS] might not be able to prevent federally authorized projects from destroying areas with fragile and irreplaceable natural features that provide the last and best chance for such habitat-limited species to recover,” Schoenhut said.

Groundwater Cases

Attorneys are watching several cases related to whether the federal government may require permits related to pollution discharges to groundwater.

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. The Hawaii county on the losing end of the Ninth Circuit decision and Kinder Morgan may ask the high court to review those rulings.

Meanwhile, the Sixth Circuit is considering two more cases related to groundwater. In one case, the Tennessee Valley Authority is appealing a judge’s order that it move coal ash waste to a lined impoundment area, arguing the ruling wrongly expands the CWA’s reach to cover migration of pollutants through groundwater to U.S. waters.

In the other case, green groups are appealing the dismissal of their suit claiming Kentucky Utilities’ unpermitted discharge of pollutants like selenium, arsenic and lead into bodies of water through groundwater violates the Clean Water Act.

David Chung, a partner at Crowell & Moring LLP, said the appeals court will have to decide the same question answered by the Ninth and Fourth Circuits.

“Should the Sixth Circuit reach the opposite conclusion, that helps set the stage for Supreme Court review,” he said. “To add to the confusion, EPA solicited comment back in February on whether it should take some sort of administrative action to ‘clarify’ previous statements on this issue.”

And John Sheehan, a partner at Michael Best & Friedrich LLP, said industry groups are split on how best to approach the controversy — whether to urge the EPA to issue a memorandum, guidance or rulemaking or to urge the Supreme Court to review and reverse the Maui decision.

“This issue has major ramifications for many industries," Sheehan said. "Activities that have long been thought to be outside the CWA permitting and liability schemes could soon be subject to the CWA’s authorities."

Monument Lawsuits

President Donald Trump’s decision to shrink some national monuments created by his predecessors presents a novel issue to courts handling lawsuits challenging his actions: whether Congress gave the president authority to modify or eliminate, not just designate, such monuments.

In December, Trump issued two presidential proclamations modifying the Grand Staircase-Escalante and Bears Ears national monuments, which were designated by Presidents Bill Clinton and Barack Obama, respectively. One proclamation divided the Grand Staircase-Escalante monument into three

new areas and reduced it from 1.7 million acres to about 1 million acres. The other divided Bears Ears into two areas and reduced it from 1.35 million acres to about 200,000 acres.

Environmental and tribal groups have sued the administration over the issue, and legal experts will be watching to see how the courts answer the question.

The cases have attracted the attention of Democratic lawmakers as well. In April, 17 U.S. senators submitted a letter to U.S. Department of Interior Secretary Ryan Zinke urging the Bureau of Land Management to stop developing management plans for national monuments in Utah until courts have considered President Donald Trump's decision to reduce the size of the parks.

Clean Water Rule Lawsuits

Lawsuits challenging the Clean Water Rule, an Obama-era effort to define the federal government's permitting jurisdiction under the Clean Water Act, are back in action in a slew of federal district courts after the Supreme Court ruled that is where they belong.

Chung said the U.S. Department of Justice should be filing its brief in mid-July in defense of the rule.

"What exactly DOJ argues in defense of the 2015 rule could have profound implications for EPA's and the Corps' repeal and replacement efforts, both of which remain pending at this time," he said.

Environmental groups and states that support the rule have sued to stop the Trump administration's efforts to delay its implementation until February 2020. They have argued the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers ran afoul of federal environmental laws in doing so. Cases on the question are pending in California, New York, South Carolina and Washington.

Meredith Weinberg, a partner at Perkins Coie, said none of the lawsuits are likely to resolve the decadeslong uncertainty concerning the jurisdictional reach of the Clean Water Act.

"Instead, their outcome may eventually be irrelevant, because the Trump administration has proposed repeal of the Clean Water Rule and plans the release of a completely new rule defining waters of the U.S.," she said. "Both of these regulatory actions inevitably will be the subject of additional lawsuits in which litigants continue seeking to put to bed the question of what 'waters' are subject to the federal government's regulatory authority."

--Additional reporting by Keith Goldberg, Danielle Nichole Smith and Darcy Reddan. Editing by Rebecca Flanagan and Jack Karp.
