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Biggest Environmental Law Decisions Of 2021

By **Juan Carlos Rodriguez**

Law360 (December 17, 2021, 5:19 PM EST) -- Courts across the U.S. continued to advance understanding of key environmental laws in 2021, from a D.C. Circuit opinion that gave a broad interpretation of the federal government's power to regulate under the Clean Air Act to a U.S. Supreme Court decision that will have a lasting impact on how states treat shared water sources.

Other big decisions in 2021 include the high court narrowing the ways the federal government can avoid liability in Superfund lawsuits, and federal appeals courts issuing important rulings on laws passed in a few Midwest states that aimed to reduce activists' ability to film in agricultural facilities.

Federal district judges also struck down important Trump-era Clean Water Act rules and for the first time implemented an important high court water decision.

Here are some of the biggest environmental court decisions of 2021.

DC Circuit Takes Broad View of Clean Air Act

The D.C. Circuit in January made headlines by striking down the Trump administration's rollback of Obama-era greenhouse gas emission standards for existing power plants and the rule intended to replace them.

In a 2-1 ruling, U.S. Circuit Judges Patricia Millett and Cornelia Pillard said the Trump administration had read the Clean Air Act too narrowly and incorrectly concluded that the law only allowed the U.S. Environmental Protection Agency to control GHG emissions at existing power plants by imposing at-the-source measures.

The decision, issued just before President Joe Biden took office, was initially seen as giving the new administration a clean slate to draw up its own regulations. Since then, the Supreme Court has agreed to review the case, casting some uncertainty on the appeals court's ruling.

Tom Lorenzen, a partner at Crowell & Moring LLP, said it appeared the Trump administration failed to make a key argument that could have swung the judges to its side.

"A federal agency acts at its legal peril when it asserts that a statute's plain language limits its authority in a particular way, without a backup argument that, even if the statute is ambiguous, the agency's interpretation of that statutory language is reasonable, supported by sound policy choices, and

therefore entitled to deference," Lorenzen said.

He said that if the EPA had asserted such an argument, the Trump administration's Affordable Clean Energy Rule, which was intended to replace the Obama-era Clean Power Plan, might have survived judicial review as being based on "a reasonable interpretation of ambiguous statutory language."

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.

EPA Loses Superfund Defense Suit

In a unanimous May decision, the high court held that a 2004 Clean Water Act settlement between Guam and the federal government did not bar the territory's 2017 claims under the Comprehensive Environmental Response, Compensation and Liability Act for the Navy to contribute to pollution cleanup costs.

The Navy had argued that the 2004 deal started the clock on a three-year statute of limitations for certain "contribution claims" under CERCLA and, therefore, foreclosed the island's lawsuit. But the justices said the CWA settlement was narrow enough that it didn't bar future claims under CERCLA.

The Supreme Court held that the D.C. Circuit had read CERCLA's time limit provision too broadly, and had departed from Congress' intent by interpreting the provision to include things like Clean Water Act settlements.

The ruling upended precedents in four federal circuit courts that other environmental laws can trigger the CERCLA statute of limitations.

The case is Government of Guam v. U.S., case number 20-382, in the U.S. Supreme Court.

Trump-Era Clean Water Act Rules Tossed

Two widely impactful water rules promulgated by the Trump administration were overturned by federal courts in 2021.

First, an Arizona federal judge in August sided with several Native American tribes and vacated the EPA and Army Corps of Engineers' 2020 Navigable Waters Protection Rule, which took a narrow view of federal authority under the Clean Water Act.

The rule defined the CWA term "waters of the U.S.," which is a major factor in determining whether a project needs a permit under the law. The Biden administration has moved to officially rescind the Trump rule and is planning to issue its own definition in the future.

Then in October, a California judge vacated an EPA rule that had restricted state and tribal authority to deny permits under the Clean Water Act.

The Section 401 certification rule was finalized by the Trump administration in June 2020 in an attempt to "help accelerate and promote the construction of important energy infrastructure across the United States," the agency said at the time, and restricted the ways in which states and tribes could deny permits under Section 401 of the Clean Water Act.

Numerous lawsuits challenging the rule followed. The Biden administration has also said it is reviewing the rule and may replace it with one of its own.

Both rulings have been appealed.

The cases are Pasqua Yaqui Tribe et al. v. United States Environmental Protection Agency et al., case number 4:20-cv-00266, in the U.S. District Court for the District of Arizona, and In re: Clean Water Act Rulemaking, case number 3:20-cv-04636, in the U.S. District Court for the Northern District of California.

Justices Clarify Interstate Water Law

In November, the Supreme Court rejected Misssissippi's bid to stop Tennessee from pumping groundwater out of an aquifer that sits beneath those and several other states.

The nine justices unanimously tossed Mississippi's claims that Tennessee and the city of Memphis are illegally using pumps to suck out groundwater that's on Mississippi's side of the border. The court, for the first time, established that the doctrine of equitable apportionment applies to interstate aquifers like the one at issue in this case.

Robin Craig, a law professor at the University of Southern California, said the case effectively brings all interstate sources of water under the equitable apportionment doctrine, allowing both the Supreme Court and the states to think about how to best share interstate water from a conjunctive management perspective that considers both surface water and groundwater.

"While equitable apportionment in the Supreme Court is often not a satisfactory remedy, given the high burden of proof to show injury, states facing shared groundwater management issues and shortages now know that they can bargain through interstate compacts in the shadow of the equitable apportionment doctrine," Craig said.

Craig said that may become important to the future of overdrafted multistate aquifers such as the High Plains Aquifer underlying the states from South Dakota down to Texas.

The case is State of Mississippi v. State of Tennessee et al., case number 22o143, in the U.S. Supreme Court.

High Court Groundwater Ruling Gets First Test

Maui County, Hawaii, has decided not to appeal to the Ninth Circuit a federal judge's July decision requiring it to obtain Clean Water Act permits for wastewater wells that seep into the Pacific Ocean.

The case is a milestone because on a previous appeal, the Supreme Court sided with green groups that were seeking to force the county to get the permits and ruled that sources of pollution that discharge into groundwater may be required to get permits in some circumstances.

A new seven-factor test identified by the majority of justices says a permit is required "when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge."

The Maui case was the first one to implement that decision.

Pat Parenteau, a professor at Vermont Law School and senior counsel at the school's Environmental Advocacy Clinic, said U.S. District Judge Susan Oki Mollway's decision on remand is important because in addition to using the seven factors laid out by the high court, which include distance traveled and time, she looked at the volume of the discharge — something other judges could decide to use as well.

"Maui's decision not to appeal brings that case to an end," Parenteau said. "But there are many more cases to come that will test the temporal and spatial boundaries of the functional equivalent test."

The case is Hawaii Wildlife Fund et al. v. County of Maui, case number 1:12-cv-00198, in the U.S. District Court for the District of Hawaii.

Mixed Rulings on Midwest Ag-Gag Laws

The Eighth and Tenth Circuits issued three rulings in 2021 on three states' laws intended to prohibit activists' filming and exposure of certain agricultural practices.

In August, the Eighth Circuit revived a lawsuit by animal rights organizations and a green group that seeks to overturn an Arkansas law that punishes whistleblowers at industrial agricultural facilities.

In a 2-1 decision, a panel of judges overturned an Arkansas federal judge's ruling that the advocacy groups failed to assert a concrete injury that a court could remedy. While the district court found that alleged injury too speculative, the panel majority said the groups have a right to proceed in court with their claims that the law violates their right to free speech.

The Eighth Circuit also partially revived an Iowa state law intended to criminalize undercover investigations into animal cruelty at factory farms, upholding a provision prohibiting the accessing of agricultural production facilities under "false pretenses."

A federal district court had found that provision and another that criminalized making false statements as part of an employment application to an agricultural production facility violated the First Amendment and struck down the law. A unanimous three-judge panel agreed with the lower court about the job application provision but said the access provision should stand.

Also in August, the Tenth Circuit upheld a Kansas federal court's ruling partially blocking a Kansas law aimed at punishing undercover animal cruelty investigations at factory farms, holding that the statute's provisions banning recording and entering the facilities without the owners' consent are unconstitutional.

The three-judge panel upheld a permanent injunction barring enforcement of three subsections of the Kansas Farm Animal and Field Crop and Research Facilities Protection Act. Those provisions forbid recording without the facility's consent and trespassing on or acquiring control of a facility without effective consent of the owner and with the intent to damage the enterprise.

The cases are Animal Legal Defense Fund et al. v. Jonathan Vaught et al., case number 20-1538, and Animal Legal Defense Fund et al. v. Kimberly Reynolds et al., case number 19-1364, in the U.S. Court of Appeals for the Eighth Circuit, and Animal Legal Defense Fund et al. v. Kelly et al., case number 20-3082, in the U.S. Court of Appeals for the Tenth Circuit.

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