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

The Biggest Environmental Law Decisions Of 2020

By **Juan Carlos Rodriguez**

Law360 (December 21, 2020, 5:37 PM EST) -- The U.S. Supreme Court issued a groundbreaking decision on the Clean Water Act's reach, chemicals manufacturer Arkema defeated criminal charges over toxic releases in Texas related to Hurricane Harvey, and the Ninth Circuit delivered a big loss to youth plaintiffs that were seeking to hold the federal government accountable for climate change.

The high court this year also cleared up a gray area in Superfund law about how state laws may be used by plaintiffs in conjunction with federally approved cleanups. A Montana federal judge made waves when he completely vacated a nationwide permit used for infrastructure projects like oil and gas pipelines, and while his initial order was scaled back, the fallout continues at the Ninth Circuit. And the Trump administration failed in its challenge to California's cap-and-trade program.

Here, Law360 breaks down six of the biggest environmental law decisions of the year.

High Court Finds Clean Water Act Can Cover Groundwater

In finding that Clean Water Act permits can sometimes be required for pollution discharges that travel through groundwater before they enter federally regulated bodies of water, the high court expanded the statute's reach beyond what had been understood previously — and by extension expanded the power of the U.S. Environmental Protection Agency, which handles those types of permits, said Noah Perch-Ahern, a partner at Greenberg Glusker Fields Claman & Machtinger LLP.

"By regulating groundwater discharges, the EPA's jurisdiction is confirmed and bolstered," he said. "Interestingly, the court was willing to articulate its own test and let the lower courts grapple based on fact-specific circumstances."

The new test identified by the 6-3 majority in April says that 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."

Several courts are already considering how the test should affect litigation before them, and in December the EPA issued draft guidance on how to implement the ruling that takes a narrow view of new permitting that might be required.

The case is County of Maui v. Hawaii Wildlife Fund et al., case number 18-260, in the Supreme Court of

the United States.

Arkema Cleared in Hurricane Harvey Cases

In October, a Texas state judge **threw out** criminal charges against Arkema Inc. and the former manager of a plant accused of recklessly releasing toxic chemicals during Hurricane Harvey. The judge cut short a trial that had been peppered with accusations of prosecutorial misconduct and found that no evidence in the record supported the felony charges.

State prosecutors had alleged Arkema knew Harvey was approaching and decided not to move its organic peroxide out of harm's way. The historic storm dropped more than 50 inches of rain on parts of the Houston area, and subsequent power outages caused the volatile product to combust. The fire burned for days, caused the evacuation of nearby residents and injured some first responders.

Arkema contended the storm was an act of God that far exceeded meteorologists' predictions for flooding.

"The case is notable not only for the outcome — directed verdict in an environmental prosecution — but also because it tested the limits of both corporate and senior manager liability for major accidents and essentially criminalized a natural disaster," said Nadira Clarke, a partner at Baker Botts LLP.

Lily Chinn, another Baker Botts partner, said the trend of criminalizing major accidents will persist, particularly given the Biden administration's stated support of the Worker Safety Initiative, an Obama era initiative that directs OSHA inspectors to work directly with U.S. Attorney's offices to pursue criminal prosecutions.

The cases are Texas v. Arkema, case numbers 1600310 and 1627625; Texas v. Richard P. Rowe, case number 1600311; Texas v. Leslie Comardelle, case number 1600312; and Texas v. Michael P. Keough, case number 1627626, in the 339th District Court of Harris County, Texas.

Justices Say Superfund Deal Doesn't Block State Law Claims

In April, the high court held that the Comprehensive Environmental Response, Compensation and Liability Act does not preclude Montana landowners' right to assert state law claims like nuisance and trespass that don't arise under the act.

The residents sued Atlantic Richfield Co. under state law for money to clean up their properties on a Superfund site that's already covered by a settlement agreement with the EPA.

Arco, a BP America Ltd. subsidiary, had asked the high court to overturn the Montana Supreme Court's finding that the landowners can sue the company for trespass, nuisance and strict liability claims under state common law and potentially be awarded restoration damages over pollution from the Anaconda Smelter Superfund site, despite the company's settlement with the EPA. The EPA took Arco's side in the case.

Greenberg Traurig LLP shareholder Libby Stennes said the decision left a number of unanswered practical questions around settlement of CERCLA liability, including whether settlements will carry finality and whether landowners could more readily engage with EPA around remedies.

"The dissent by Justice [Neil] Gorsuch, joined by Justice [Clarence] Thomas, also highlighted a divide in the court based on textualist interpretation that is sure to continue with the appointment of Justice Amy Coney Barrett," Stennes said.

The case is Atlantic Richfield Co. v. Christian et al., case number 17-1498, in the U.S. Supreme Court.

9th Circ. Says No Standing for Kids in Climate Case

A Ninth Circuit panel in January shut down a group of youth plaintiffs' lawsuit alleging the federal government helps fuel climate change, finding their case couldn't go to trial because courts don't have the power to change the government's policies.

In a 2-1 decision, the panel said the legislative and executive branches of government are the only ones with the authority to redress the kids' alleged injuries.

The majority said that the kids presented compelling evidence about their alleged injuries, such as being forced to move because of a lack of drinking water and having to evacuate because of coastal flooding, and the judges said there's also evidence that the government's policies are a "substantial factor" in causing the injuries the kids claimed. But the panel drew the line at whether a court could give the kids the relief they were seeking.

The kids asked for en banc rehearing in March, but the appeals court has not yet ruled on that petition. The youths said the majority erred in finding that the legislative and executive branches of government are the only ones with the power to redress the kids' alleged injuries and improperly deprived the plaintiffs of their right to try their claims in federal district court.

The case is Juliana et al. v. the United States of America et al., case number 18-36082, in the U.S. Court of Appeals for the Ninth Circuit.

Judge Won't Flinch on 'Disruptive' Nationwide Permit Order

U.S. District Judge Brian Morris in April vacated Nationwide Permit 12, which provides an expedited route for projects like oil and gas pipelines to achieve compliance with the Clean Water Act, citing Endangered Species Act concerns. The ruling came in a lawsuit environmentalists filed to stop TC Energy's Keystone XL pipeline project.

The following month, Judge Morris narrowed the ruling to just cover oil and gas pipeline projects, and in July, the U.S. Supreme Court further limited the order to just Keystone.

The Ninth Circuit is currently considering appeals filed by the U.S. Army Corps of Engineers and TC Energy, who have been joined by a slew of business interests.

Amanda Shafer Berman, counsel at Crowell & Moring LLP, said Judge Morris' decision represents the confluence of two different lines of authority: cases striking down pipeline-related actions, and cases giving close scrutiny to agency permitting decisions.

"The Corps will have to think hard going forward about how it approaches nationwide permits, not just in regard to whether it engages in consultation under the Endangered Species Act, but as to the scope and impact of those permits, as courts are increasingly mistrustful of and unwilling to defer to the Corps'

assessment," she said.

The case is Northern Plains Resource Council et al. v. U.S. Army Corps of Engineers et al., number 4:19-cv-00044, in the U.S. District Court for the District of Montana.

Trump Admin. Loses Challenge to Calif.'s Cap-and-Trade Deal

In July, a California federal judge squashed the Trump administration's challenge to California's cap-and-trade program with the Canadian province of Quebec, rejecting allegations that it improperly infringes on the federal government's exclusive power to set foreign policy.

U.S. District Judge William B. Shubb rejected the federal government's claim that the state's agreement with Quebec linking their respective cap-and-trade programs violates the Foreign Affairs Doctrine. California's program isn't preempted by any specific federal policy, nor does it infringe on the federal government's broad power to set foreign policy, according to the order.

The order handed a full victory to the state after Judge Shubb tossed allegations involving the U.S. Constitution's treaty and compact clauses in March.

The federal government sued the state in October 2019 over its agreement, saying California has no right to pursue "an independent foreign policy" about the control of greenhouse gas emissions. But Judge Shubb dumped the federal government's treaty and compact clause claims on March 12, saying the agreement doesn't rise to the level of a "treaty" or "compact" as the Constitution envisions.

The government has appealed to the Ninth Circuit.

The case is U.S. v. California et al., case number 2:19-cv-02142, in the U.S. District Court for the Eastern District of California.

--Additional reporting by Michelle Casady, Dave Simpson and Michael Phillis. Editing by Alanna Weissman.