

2015's Biggest Environmental Policy Moves

By **Juan Carlos Rodriguez**

Law360, New York (December 9, 2015, 11:51 AM ET) -- There were some huge developments in environmental legislation and regulation in 2015, including the finalization of the Obama administration's landmark climate change regulations and its Clean Water Act jurisdiction rule, a decision not to offer endangered species protection to an iconic Western bird, and progress in Congress on updating an outdated chemical safety law.

Here, Law360 looks at the most important environmental legislation and regulation of 2015:

Clean Power Plan

In August, President Barack Obama unveiled the final version of the Clean Power Plan, the centerpiece of his administration's efforts to make progress on reducing greenhouse gas emissions in the U.S. and combat climate change. The rule is the most controversial policy move the U.S. Environmental Protection Agency made this year.

Several states and industry groups have filed challenges to the rule in the D.C. Circuit, which has consolidated them. Other states and environmental organizations have lined up there to defend the plan.

Under the rule, states must submit a final compliance plan or an initial submission with an extension request by late 2016 and start showing emission cuts by 2022. The overall goal is for existing power plants to slash their greenhouse gas emissions by 32 percent from 2005 levels by 2030.

"The rule aims to effect a major shift in the sources of domestic power generation to lower greenhouse gas emissions, but does so using a rarely employed Clean Air Act provision. The rule seems an extraordinary stretch of EPA's authority, and the court battles over it in the coming year promise to be among the most important environmental cases in decades," said Thomas Lorenzen, a partner at Crowell & Moring LLP.

Waters of the United States Rule

In May, the EPA and Army Corps of Engineers published the final version of their attempt to clarify exactly which American waterways are subject to federal jurisdiction, a controversial effort that seeks to make permitting decisions easier and bring regulations up to date with U.S. Supreme Court opinions.

The so-called Waters of the United States rule has caused considerable angst in agricultural states where some saw the effort as a power grab by the federal government, and has been the focus of several congressional hearings as well as the target of legislation designed to block its implementation.

The EPA and Corps, however, said the rule is intended to fix uncertainty and actually gives them less authority than they had before.

The effort, also dubbed the Clean Water Rule, redefines the scope of waters protected under the CWA, determinations the agencies claim have been confusing and complex after Supreme Court decisions caused them to evaluate jurisdiction on a case-by-case basis. The agencies for the first time defined which features constitute riparian areas, where regulated waters meet land, as well as floodplains and tributaries, among other important terms.

A federal judge in North Dakota has stayed implementation of the law in several states that challenged it in that court, and the Sixth Circuit is currently considering whether it or the federal district courts have jurisdiction to hear a multitude of other challenges.

Sage-Grouse Endangered Species Act Listing

The U.S. Fish and Wildlife Service said in September that the greater sage-grouse does not require protection under the Endangered Species Act across its 11-state range, a win for the energy industry, ranchers and other landowners in the West.

U.S. Department of the Interior Secretary Sally Jewell said in a statement that thanks to an "unprecedented" conservation effort by dozens of partners across the 11-state range of the unique bird, a listing of threatened or endangered under the ESA is not required.

In 2010, the FWS determined the greater sage-grouse warranted protection, but said there were higher priorities and held off on a final action. In the intervening years, the agency has worked with private landowners on conservation plans to help preserve habitats and encourage the species' survival.

The decision whether to list the sage-grouse was a political flash point, and some in Congress pushed to stymie the service's efforts if it had found a listing to be warranted. Energy and ranching interests opposed a listing, saying it would have a negative effect on their businesses and the economy.

Environmentalists have expressed skepticism about the FWS' decision to forgo a formal listing in lieu of the public-private conservation plans that convinced the service it wasn't necessary.

Ozone Standard

The EPA in October finalized a tightening of its ozone standard to 70 parts per billion, down from 75 parts per billion, a change the agency says better protects children, people with lung diseases like asthma, and others.

The rule is under fire over concerns it could impede economic growth and doesn't adequately address background ozone levels. The Clean Air Act requires the EPA to periodically review air quality criteria, the science upon which the standards are based, as well the standards themselves, which was last done in 2008.

The new standard is well below the ozone level shown to cause the widest range of respiratory effects — 80 parts per billion — and just below the lowest ozone level shown to cause both decreased lung function and increased respiratory problems — 72 parts per billion — according to the EPA.

Some industry groups have challenged the rule at the D.C. Circuit, and some health groups have asked to intervene on the EPA's behalf.

Power Plant Wastewater Discharge Guidelines

In September, the EPA finalized a rule that sets the first federal limits on the levels of toxic metals such as mercury, lead and selenium in wastewater that can be discharged from power plants.

The current regulations for the industry were last updated in 1982, and the EPA said they do not adequately address toxic metal discharges because they focused on settling out particulates rather than treating dissolved pollutants. There are approximately 1,080 steam electric power plants in the U.S., and 134 of those will have to make new investments to meet the requirements of the steam electric effluent limitation guidelines, according to the agency.

New technologies for generating electric power and the widespread implementation of air pollution controls over the last 30 years have altered existing wastewater streams or created new wastewater streams at many power plants, particularly coal-fired plants, and the 2015 rule addresses those changes in the industry, the EPA said when the rule was finalized.

The new requirements do not apply to plants that are oil-fired or smaller than 50 megawatts.

"Environmentalists saw the new ELGs for steam plants as a clear win, with industry surprised that EPA adopted an approach that it had included in the original proposal but not viewed as a preferred option," said Adam Sowatzka, a partner at King & Spalding LLP.

Toxic Substances Control Act

After many years of trying, Congress made progress in 2015 on its mission to revamp the Toxic Substances Control Act. A version of the bill cleared the Senate Environment and Public Works Committee, and another version cleared the U.S. House of Representatives.

Many lawmakers have said the TSCA in its current form is outdated and fails to offer necessary protections against certain harmful chemicals. Those supporting the overhaul seek to better protect public health and safety and reduce confusion for manufacturers.

However, the U.S. Senate has become bogged down at the end of the session and it looks like it may not make to the floor before the winter break, much to the chagrin of industry groups and environmental organization alike that have thrown their weight behind it.

"Stakeholders have been waiting for TSCA reform or modernization for years. There's broad consensus that it's needed, and there's bipartisan support for the two primary bills, but we still don't have it. We're falling behind much of the world," said Joe Eisert, a partner at King & Spalding LLP. "TSCA modernization is a bellwether for other environmental bills. If this can't be enacted, what can?"

Land and Water Conservation Fund

A bill that would permanently authorize an imperiled program that funds parks and conservation efforts with offshore oil and gas royalties sailed through the Senate Energy and Natural Resources Committee in late November.

The Sportsmen's Act of 2015 reauthorizes the Land and Water Conservation Fund, which expired in September. The program has been stuck in limbo as supporters have not been able to gather enough momentum to pass a permanent reauthorization.

In the House of Representatives, Natural Resources Committee Chairman Rob Bishop, R-Utah, has proposed overhauling the act by slashing funding for federal land acquisitions. Bishop has floated the Protecting America's Recreation and Conservation Act, which would hamper federal acquisitions but keep LWCF funding at \$900 million.

Arctic Drilling Leases

In October, the U.S. Department of the Interior canceled two potential Arctic offshore lease sales following Royal Dutch Shell PLC's September decision to halt plans to drill in the Arctic Ocean, saying the leases didn't make sense in light of dwindling industry interest.

The leases had been slated for 2016 and 2017 for sites in the Chukchi and Beaufort seas, respectively, according to the DOI. The Bureau of Ocean Energy Management had begun gauging interest in the Chukchi Sea site in 2013 but did not receive any inquiries, and only received one response when it began to solicit inquiries on the Beaufort Sea site in 2014.

That raised initial concerns about the competitiveness of any such lease sale, the DOI said. Then, Shell announced in September it had determined that its Burger J site in the Chukchi Sea didn't warrant further exploration.

Earthjustice attorney Erik Grafe praised the DOI's move.

"The world's scientists tell us that we cannot burn the vast majority of known fossil fuels if we hope to avoid the worst consequences of climate change," Grafe said. "The Arctic Ocean is the place to start saying no to risky and dead-end drilling. It is home to irreplaceable wildlife, already under stress from the most rapid climate change on the planet. There is no way to clean up an oil spill there, and the government says there is a 75 percent chance of one or more major spills if oil is developed there."

--Editing by Katherine Rautenberg and Kelly Duncan.