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Environmental Cases To Watch In The 2nd Half Of 2016

By **Juan Carlos Rodriguez**

Law360, New York (June 13, 2016, 6:11 PM ET) -- Courts are poised to issue rulings that could change the environmental law landscape over the next six months in several high-stakes cases, including the sprawling legal battle over the EPA's Clean Water Rule, a bevy of cases over the Flint, Michigan, drinking water crisis, and the Obama administration's controversial climate change plan.

Here are a few cases to keep an eye on:

Waters of the United States Litigation

The U.S. Environmental Protection Agency and Army Corps of Engineers' Clean Water Rule, published in June 2015, defines what bodies qualify as "waters of the United States" under the Clean Water Act for permitting purposes and, according to detractors, improperly gives the EPA and Corps broad new authority.

States including Ohio and North Dakota and industry groups such as the Utility Water Act Group and Murray Energy Corp. challenged the rule in both federal district and circuit courts but told the Sixth Circuit the fight belongs at the district court level. The EPA and Corps argued that the act gives circuit courts exclusive jurisdiction over the question, and in February a panel ruled in favor of the agencies. The case now proceeds toward merits briefing.

Separately, in the Eleventh Circuit, another group of states is attempting to convince a panel to ignore the Sixth Circuit's ruling and send their challenges back to district court. The panel has not ruled yet.

John Martin, a partner at Crowell & Moring LLP, said the Supreme Court's ruling earlier this month in Army Corps of Engineers v. Hawkes, which held that Corps jurisdictional determinations are subject to Clean Water Act authority, contained language that may come into play in the Sixth Circuit case, particularly that the high court may not be receptive to expansive federal authority under the act.

"Justice Kennedy, who many believe will be inclined to amplify CWA authority, in a concurring opinion joined by Justices Thomas and Alito, emphasized the justices' concern with vagueness and 'systemic consequences' of the CWA. Justice Kennedy explained that the act 'continues to raise troubling questions regarding the government's power to cast doubt on the full use and enjoyment of private property throughout the nation,'" Martin said. "This language may well have alerted the courts of appeals to the very fundamental issues to be resolved in the WOTUS litigation and may foretell the Supreme Court's inclination to address the limits of the act."

The cases are Murray Energy Corp. v. EPA et al., case number 15-3751, in the U.S. Court of Appeals for the Sixth Circuit; and State of Georgia et al. v. McCarthy et al., case number 15-14035, in the U.S. Court of Appeals for the Eleventh Circuit.

Clean Power Plan Litigation

Since the EPA published the Clean Power Plan in August, it has been assailed by states, coal companies and some industry groups in the D.C. Circuit and the U.S. Supreme Court as a power grab that would cause severe economic damage. The Supreme Court surprised the legal world when in February it stayed the rule pending completion of the litigation.

The landmark case has returned to the D.C. Circuit for merits briefing, and in another twist, the court decided that rather than proceed with oral arguments before a three-judge panel this month, litigants will argue before the full court in September. En banc oral arguments at the D.C. Circuit are exceedingly rare, happening only a handful of times in the last 40 years.

Kathy Beckett, a partner at Steptoe & Johnson PLLC, said the legal battle over the CPP will yield important insight into how far the high court will let the EPA go in pursuit of its climate change objectives.

"The U.S. Supreme Court Clean Power Plan litigation will be another opportunity for the nation, our next president and our dysfunctional Congress to learn the limits of the Clean Air Act relative to energy policy. These are important times that will lead us to a more refined path forcing change," Beckett said.

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

EPA Water Transfer Rule Litigation

The EPA in December asked the Second Circuit to reverse a lower court's decision to strike down a rule that would exempt some water transfers from Clean Water Act review, arguing unclear language in the law necessitates the agency be given latitude for its own interpretation of the law.

A number of states, including New York, Michigan and Washington, along with some conservation groups, sued the EPA over its 2008 National Pollutant Water Transfer Rule, and in March 2014, a New York federal judge decided it was unlawful. The rule allows water to be transferred between basins without a permit, even if the water is contaminated.

The rule provides that a discharge permit is not required for the conveyance of water from one body of water to another when there has been intervening use that has discharged a pollutant.

The EPA rule was challenged in the Eleventh Circuit in Friends of the Everglades v. South Florida Water Management District. In that 2009 case, the Eleventh Circuit upheld the EPA's position that a National Pollutant Discharge Elimination System permit is not required for the mere transfer of water.

In 2014, however, the Southern District of New York ruled in Catskill Mountains that the act is ambiguous on that question and that the EPA failed to adequately explain its rationale for exempting water transfers from NPDES permitting.

The case is Catskills Mountains Chapter of Trout Unlimited et al. v. Environmental Protection Agency, case number 14-1823, in the U.S. Court of Appeals for the Second Circuit.

Flint Lead-Tainted Drinking Water Litigation

Flint, Michigan, residents have had to contend with a contaminated water supply since April 2014, when their drinking water source was switched from Lake Huron to the Flint River without proper purity controls. The drinking water has since been resourced to the Lake Huron supply, but concerns over quality linger and Flint residents are contending with the health and environmental impacts accrued during the months they were provided unhealthy water.

There are several legal proceedings in state and federal courts associated with the water crisis, including actions against state and city officials and a $220 million administrative complaint against the EPA filed by group of 513 plaintiffs who allege they've suffered health problems and property damage as a result of the the agency's negligence.

In one case, a Michigan federal judge disqualified himself after state officials raised concerns that his consumption of Flint's contaminated water could theoretically make him a class action plaintiff.

And in April, two Michigan Department of Environmental Quality water officials and one from the city of Flint were charged with felonies ranging from misconduct in office to tampering with evidence in relation to their roles in the drinking water crisis. The Flint official has since pled guilty and promised to cooperate with prosecutors in the matter.

Concerns over lead in drinking water have spread throughout the U.S., with lawsuits following in municipalities like Philadelphia.

Power Plant Effluent Limitation Rule Litigation

Environmentalists, energy industry groups and the EPA are set to square off in the Fifth Circuit over the agency's September rule that sets the first federal limits on the levels of toxic metals such 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.

The case is Southwestern Electric Power Co. et al. v. U.S. Environmental Protection Agency et al., case number 15-60821, in the U.S. Court of Appeals for the Fifth Circuit.

Cooling Water Intake Structure Rule Litigation

The EPA's May 2014 Cooling Water Intake Structure Rule finalized regulations requiring power plants and manufacturing facilities to minimize damage to aquatic life caused by pulling in water from lakes and rivers. Industry petitioners have targeted specific provisions in the rule, and environmental groups argue the rule is fundamentally flawed, in part because the EPA picked the wrong standard for the "best technology available" to reduce wildlife deaths at existing facilities.

In opening briefs, industry groups called for the Second Circuit to strike down portions of the rule that give the U.S. Fish and Wildlife Service and the National Marine Fisheries Service a voice in the process for issuing National Pollutant Discharge Elimination System permits.

Environmental groups have asked the court to vacate the rule and instruct the EPA on remand to make existing facilities comply with a wildlife preservation standard equivalent to closed-loop systems that recycle water, rather than a "modified traveling screen" system, arguing that the closed-loop system presents the best technology available.

The rule has a long history dating back to 1976, but has been wrapped up in litigation or otherwise administratively stalled since then.

The case is Cooling Water Intake Structure v. United States Environmental Protection Agency, case number 14-4645, in the U.S. Court of Appeals for the Second Circuit.

California Cap-and-Trade Litigation

A California appellate court is considering consolidated appeals that seek to invalidate regulations promulgated under California's cap-and-trade program that permit the California Air Resources Board to auction greenhouse gas allowances, according to Michael Romey, a partner at Latham & Watkins LLP.

The appellants, which include the California Chamber of Commerce, the National Association of Manufacturers and the Morning Star Packing Co., claim that the regulations exceed the scope of CARB's authority under the Global Warming Solutions Act of 2006, otherwise known as AB32. The appellants are also arguing that AB32 cannot authorize auctions because the revenue generated by the auctions constitutes a "tax" and AB32 was passed with less than the two-thirds supermajority vote required to pass a tax under the California Constitution, Romey said.

Both challenges were unsuccessful in the trial court. Romey said briefing in the Court of Appeal had been completed for almost a year when in April the court requested supplemental briefing asking the parties to answer eight questions concerning the issue of whether the auction proceeds were an unauthorized tax and, if so, what the remedy should be. The court has also given the cases a calendar preference, indicating that it intends to hear oral arguments and render a decision in the coming months, Romey said.

"The outcome of the case is tremendously important for those who are subject to the cap-and-trade program, those who are participants in the ongoing multibillion-dollar auction market, the state of California and the environmental community. Given the stakes for all parties, whoever loses in the Court of Appeal will inevitably seek review by the California Supreme Court," Romey said.

The cases are California Chamber of Commerce v. California Air Resources Board, case number C075930; and Morning Star Packing v. California Air Resources Board, number C075954; both in the California Court of Appeal, Third Appellate District.

Mercury and Air Toxics Standards Rule Litigation

Murray Energy and the Anthracite Region Independent Power Producers Association have filed petitions for review in the D.C. Circuit of the EPA's analysis of the costs associated with its Mercury and Air Toxics Standards Rule.

In April, the EPA said the benefits of regulations limiting mercury and other toxic emissions from power plants outweigh the costs, resolving the U.S. Supreme Court's June 2015 ruling that the agency didn't properly consider costs when it created the rule. The high court had sent the EPA's Mercury and Air Toxics Standards — which regulate the emissions of mercury, nickel, arsenic and other material from power plants — back to the D.C. Circuit with orders that the agency update the rule to reflect cost considerations.

In a final supplemental finding, the EPA said it evaluated the rule's cost to the power sector in several ways, but none of them are so great as to force a reconsideration of the rule in general. According to the EPA's finding, the cost of complying with the MATS rule — compared to historical annual revenues, annual capital expenditures and impacts on retail electricity prices — is "well within the range of historical variability" for the power sector.

The cases are Murray Energy v. U.S. Environmental Protection Agency, case number 16-1127; and ARIPPA v. U.S. Environmental Protection Agency, case number 16-1175; both in the U.S. Court of Appeals for the District of Columbia Circuit.

--Editing by Katherine Rautenberg and Philip Shea.