

## Biggest Enviro Law Cases To Watch In The 2nd Half Of 2019

By **Juan Carlos Rodriguez**

*Law360 (July 19, 2019, 8:55 PM EDT)* -- A battle over how groundwater is treated under the Clean Water Act will come to a head this fall in the U.S. Supreme Court, which will also consider a Superfund case that could alter the landscape of who pays to clean up environmental damages.

The Ninth Circuit is teed up to decide the fate of a groundbreaking climate change lawsuit that seeks to hold the federal government responsible for pro-fossil fuel policies, and a dispute over President Donald Trump's authority to shrink national monuments designed by his predecessors will give the D.C. federal court a chance to weigh in on presidential power struggles.

Here, Law360 looks ahead at some of the biggest environmental cases to watch in the second half of 2019.

### **Clean Water Case Could Clear Up Conflicts On Groundwater**

On Nov. 6, the Supreme Court is scheduled to hear oral arguments in Maui County, Hawaii's challenge of a Ninth Circuit holding that Clean Water Act permits may be required for pollution sources that discharge contaminants via groundwater.

Environmental groups sued Maui County in 2012, accusing it of violating the act by not obtaining a National Pollution Discharge Elimination System permit for sewage wastewater injection wells that discharged pollution into the Pacific Ocean via groundwater. That suit led to the Ninth Circuit's decision. Following that ruling, the Fourth Circuit agreed with the Ninth Circuit in a similar case, and then the Sixth Circuit split from both of those courts, finding the act does not cover discharges made through groundwater.

Maui County has told the justices that the CWA clearly gives states sole permitting authority over those sources, and asserted that if the circuit court's ruling is allowed to stand, it would result in a vast expansion of federal power contrary to the act's intent.

The green groups, meanwhile, say Congress clearly intended the act to cover unpermitted pollution discharges that "actually and foreseeably" reach navigable surface waters.

Jeffrey R. Porter, a partner at Mintz Levin Cohn Ferris Glovsky and Popeo PC and chair of the firm's environmental practice, said he expects the high court to reverse the Ninth Circuit.

"The Supreme Court's decision and the Trump Administration's waters of the United States rule anticipated later this summer could finally prompt congressional action to answer once and for all the question of what is a water of the United States, a question that has been at the center of four Supreme Court cases and countless rule makings going back to the Clinton administration," Porter said.

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

### **Montana Superfund Case Could Limit Private Suits**

The justices will break new ground when they review a Montana Supreme Court's decision that state residents can sue BP America Ltd. unit Atlantic Richfield Co. for costs related to cleaning up their properties, even though the company already settled with the EPA over the site. The case tees up the question of whether the residents' claims are preempted by the Comprehensive Environmental Response, Compensation and Liability Act.

Three issues from the Montana Supreme Court ruling will be reviewed by the justices, including Arco's argument the claims are preempted. Arco wants the court to block the case from going to trial.

The residents' "restoration damages" claims are intended under Montana law to compensate parties if other settlements don't provide "full compensation" for their losses. Not every state permits restoration damages claims, and as the U.S. Office of the Solicitor General noted in its amicus brief, no federal court of appeals or other state court of last resort has addressed whether CERCLA preempts that specific type of claim, so the high court will be breaking ground on the question.

The court's ruling could disrupt the legal certainty parties get when agreeing to a cleanup plan with the EPA under CERCLA and expand landowner liability, according to Jennifer Adams, a partner at Hogan Lovells US LLP.

"If the Montana opinion stands, EPA may no longer have final approval on remediation plans, and the gate will open for parties to seek additional relief from the potentially responsible parties," Adams said.

The case is *Atlantic Richfield Co. v. Gregory A. Christian et al.*, case number 17-1498, in the Supreme Court of the United States.

### **Monument Case Tests Duration Of Presidential Designations**

Environmental groups and Native American tribes have sued in D.C. federal court to reverse President Donald Trump's decision to shrink the Bears Ears and Grand Staircase-Escalante national monuments, arguing the 1906 Antiquities Act only gives presidents the power to create monuments, not reduce them.

In December 2017, Trump issued two presidential proclamations modifying the Grand Staircase-Escalante and Bears Ears national monuments, which were designated by former Presidents Bill Clinton and Barack Obama, respectively.

While the green groups and tribes have said Trump used authority that rightfully belongs to Congress, his administration has argued Trump has authority under the Antiquities Act to designate national

monuments in the smallest size he deems appropriate to protect natural and cultural assets, and there is nothing in the act that says he can't modify a previous president's designations.

Environmentalists have countered that allowing presidents to exercise such power would strip national monuments of the protections Congress intended them to have and leave them vulnerable in every change of administration.

"These cases will add to a growing body of case law about the authority of one president to review, reconsider and modify a prior president's actions," said Jeff Wood, a partner at Baker Botts LLP and former acting head of the U.S. Department of Justice's environmental division for the first two years of the Trump administration.

The first set of consolidated cases is *The Wilderness Society et al. v. Donald J. Trump et al.*, case number 1:17-cv-02587, and *Grand Staircase Escalante Partners et al. v. Donald J. Trump et al.*, case number 1:17-cv-02591, in the U.S. District Court for the District of Columbia.

The second set of consolidated cases is *Hopi Tribe et al. v. Donald J. Trump et al.*, case number 1:17-cv-02590, *Utah Diné Bikéyah et al. v. Donald J. Trump et al.*, case number 1:17-cv-02605, and *Natural Resources Defense Council et al. v. Donald J. Trump et al.*, case number 1:17-cv-02606, in the U.S. District Court for the District of Columbia.

### **Ninth Circuit To Decide Fate Of Kids' Climate Case**

In June, the Ninth Circuit heard oral arguments in a novel climate change lawsuit lodged by a group of kids against the federal government. The appeals court is weighing whether the plaintiffs have standing to pursue their claim, given that they're asserting unique constitutional claims that they have a right to a clean environment and that the federal government has actively infringed on that right by promoting pro-fossil fuel policies that contribute to climate change.

The plaintiffs allege their constitutional rights are being violated because the federal government has helped proliferate the use of fossil fuels and pursued other actions that exacerbate climate change, but the government says they can't connect those policies to a specific injury and haven't been able to show a court could provide a remedy.

Assistant Attorney General Jeffrey Bossert Clark, who leads the DOJ's Environment and Natural Resources Division, argued the case for the government at the Ninth Circuit and also argued that the government does not believe there's any constitutional right to a healthy environment. He compared the plaintiffs' argument unfavorably to the Supreme Court's recognition of same-sex marriage in *Obergefell v. Hodges*.

Thomas A. Lorenzen, a partner at Crowell & Moring LLP and vice chair of the firm's environment and natural resources group, said he is surprised the case hasn't been dismissed yet under the political question and separation-of-powers doctrines.

"A win by the plaintiffs there would almost certainly send the case to the Supreme Court," Lorenzen said.

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.

## **Pork Co. Seeking To Dodge Stench Suits**

Murphy-Brown LLC, a subsidiary of China-based WH Group Ltd's U.S.-based pork producer Smithfield Foods, is attempting to convince the Fourth Circuit to overturn a \$3.25 million judgment in favor of North Carolina residents who lived near hog waste lagoons, arguing the outcome is a threat to the entire hog farm industry and should be reversed.

Murphy-Brown has been hit with 26 similar nuisance lawsuits, in what it has characterized as a coordinated legal assault on the agriculture industry in the state.

The company wants the award reduced for several reasons, including that its hog farm contractor, Kinlaw Farms LLC, was in compliance with all relevant regulations.

According to the residents, the jury was right to have decided that Murphy-Brown "substantially interfered with the use and enjoyment of their homes."

Rather than suing Kinlaw Farm, the residents in 2014 went after Murphy-Brown itself. The company says it can't be held liable for its contractors' practices, and said the district court should not have instructed the jury that it could be.

Murphy-Brown has argued its conduct was never "willful or wanton" and therefore punitive damages was not warranted. The farm's neighbors had not complained and regulators had not stepped in, it said.

The suit claims living near the farms caused neighbors to suffer from noxious odors as well as "onslaughts of flies and pests, nausea, burning and watery eyes, stress, anger, worry, loss of use and enjoyment of their property" and a host of other issues.

The case is Joyce McKiver et al. v. Murphy-Brown LLC, case number 19-1019, in the U.S. Court of Appeals for the Fourth Circuit.

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