Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Biggest Enviro Law Cases To Watch In The Rest Of 2020

By **Juan Carlos Rodriguez**

Law360 (July 8, 2020, 3:35 PM EDT) -- The second half of 2020 could bring decisions in a host of important environmental law cases, including a series of challenges to the Trump administration's new rule defining the scope of the Clean Water Act, lawsuits targeting the president's efforts to roll back Obama-era national monuments, and a groundbreaking trial over whether the government should ban fluoride in drinking water.

With the publication of the new federal Navigable Waters Protection Rule in April, challenges were filed in federal district courts, raising the possibility that permitting will soon be handled differently in some parts of the country depending on judges' rulings.

Native American tribes and environmental groups will continue their efforts to undo President Donald Trump's actions shrinking two national monuments in Utah. Environmentalists have also sued over the president's decision to lift fishing restrictions that former President Barack Obama imposed within the boundaries of an Atlantic Ocean marine monument.

And in California, a federal district judge is faced with deciding whether to side with citizens who want the Environmental Protection Agency to ban the addition of fluoride to drinking water and the agency, which wants to continue allowing it.

Here are five environmental cases to watch in the second half of 2020.

Water Act Narrowing Could Bring Regulatory Patchwork

The joint EPA-Army Corps of Engineers' Navigable Waters Protection rule narrows which waters qualify as navigable waters of the United States and are under Clean Water Act jurisdiction, replacing a broader Obama-era version.

Under the new rule, the CWA will be considered to cover territorial seas and traditional navigable waters; tributaries that flow into jurisdictional waters; wetlands that are directly adjacent to jurisdictional waters; and lakes, ponds and impoundments of jurisdictional waters.

Environmental groups and states have challenged the rule in several federal district courts for being too lax, saying it eliminates protection for some streams, wetlands and other types of water that have traditionally been covered under the law. Meanwhile, a ranching group is fighting it for being too strict.

A Colorado federal judge has blocked the rule from being implemented in that state, while a California judge has rejected requests that it be blocked there as well.

The litigation is likely to create a regulatory patchwork like the one that existed while the 2015 version was being hashed out in federal courts; roughly half of the states were exempt from that rule after injunctions were issued.

Christine Jochim, a Denver-based shareholder at Brownstein Hyatt Farber Schreck LLP, noted that the Colorado Legislature is considering a law that would create new permitting programs for certain activities in certain waters that wouldn't be subject to federal permitting, a tactic that other states opposed to the Trump administration rule could employ as well.

"It's going to be interesting, if they do decide to pick that up, how they implement it," Jochim said. "In Colorado we have a very aggressive permitting program."

The cases are State of California et al. v. Andrew R. Wheeler, case number 3:20-cv-03005, in the U.S. District Court for the Northern District of California, and State of Colorado v. U.S. Environmental Protection Agency et al., case number 1:20-cv-01461, in the U.S. District Court for the District of Colorado.

Monuments Tug-of-War Continues

Trump has made waves with his executive actions shrinking national monuments and rolling back protections created by his predecessors.

In Utah, Trump shrank the borders of the Bears Ears and Grand Staircase-Escalante national monuments, prompting two lawsuits from Native American tribes and environmental groups. That litigation is well under way in D.C. federal district court.

Separately, Trump recently eliminated a ban on commercial fishing off the East Coast that Obama imposed when he created the Northeast Canyons and Seamounts Marine National Monument, a nearly 5,000-square-mile area about 130 miles off the coast of Cape Cod. Environmentalists have challenged that move as well.

In all three lawsuits, the plaintiffs argue that the Antiquities Act gives the president the authority to create national monuments and impose restrictions in those areas, but not to undo those actions.

The cases are The Wilderness Society et al. v. Donald J. Trump et al., case number 1:17-cv-02587, Hopi Tribe et al. v. Donald J. Trump et al., case number 1:17-cv-02590, and Conservation Law Foundation et al. v. Donald J. Trump et al., number 1:20-cv-01589, all in the U.S. District Court for the District of Columbia.

Pipelines and Endangered Species

Montana U.S. District Judge Brian Morris in May said Nationwide Permit 12, which provides a fast track to permitting projects under the CWA, may not be used for new oil and gas pipeline projects because the Army Corps neglected to properly study the Endangered Species Act impacts of the permit when it renewed it in 2017. The U.S. Supreme Court narrowed the ruling with a stay order, but the case still could have important ramifications for project permitting.

Environmentalists had challenged the permit in conjunction with TC Energy's Keystone XL pipeline project, and won a victory they hadn't even asked for when the judge vacated the entire permit, meaning it could not be used for anything. Upon review, Judge Morris limited the ban to new oil and gas pipelines, and the high court on Monday further narrowed the order, saying Judge Morris' order is stayed — except with respect to the Keystone XL pipeline — until the Ninth Circuit finishes weighing an appeal of the order brought by the Army Corps and TC Energy.

"Judge Morris' decision is important because there's this process that the agency not only has to follow under the law but knew it had to follow and didn't," said Jared Margolis, an attorney at the Center for Biological Diversity who's working on the case.

He said Judge Morris' ruling could spur challenges to other nationwide permits that plaintiffs feel haven't been adequately vetted.

The case is Northern Plains Resource Council et al. v. U.S. Army Corps of Engineers et al., case number 20-35412, in the U.S. Court of Appeals for the Ninth Circuit.

Fluoride on Trial

A California federal judge recently concluded a trial over whether the addition of fluoride to drinking water constitutes a big enough risk that the EPA should take action, including possibly banning the practice.

Using the Toxic Substances Control Act's citizen suit provision, the nonprofit group Food & Water Watch has asked the court to overturn the EPA's rejection of their 2016 petition to ban fluoride in drinking water and order the agency to act.

The case is a test of citizens' and nongovernmental organizations' power to force the agency to regulate chemicals it has deemed safe based on how a judge assesses the scientific studies and expert testimony that both sides will present at trial.

If the plaintiffs are successful, it could embolden others to attempt similar litigation.

The first phase of the trial focused on whether fluoride poses an unreasonable risk to people who drink water that contains it. If U.S. District Judge Edward Chen finds that it does, the trial will move to a second phase in which he'll determine a remedy — which could come in the form of anything up to and including a complete ban.

The case is Food & Water Watch Inc. et al. v. EPA et al., case number 3:17-cv-02162, in the U.S. District Court for the Northern District of California.

Mercury Rule Faces a Test

In May, the EPA published its finding that compliance costs for 2012 mercury air pollution rules were far higher than their health benefits and rescinded its finding that the standards are "appropriate and necessary." But despite that finding, the agency kept the standards since they've already been largely implemented.

The agency is now being challenged at the D.C. Circuit on its decision to wipe out the justification for existing mercury emissions standards while still keeping the limits intact.

Environmental and public health groups have targeted the agency's finding, while coal companies have begun a legal assault on the standards themselves.

Amanda Shafer Berman, counsel at Crowell & Moring LLP, said it will be a hotly contested and "weird" litigation because of the unusual nature of what the EPA did.

"I think it is unlikely the D.C. Circuit would strike down the standards," she said. "I think it is more likely that the D.C. Circuit would have issues with some of the reasoning and analysis underlying reversal of the 'appropriate and necessary' finding."

Berman said that if the case goes this far, there's a chance the Supreme Court might be more open to arguments about statutory interpretation that are likely to come from the coal companies, mainly that in the absence of the "appropriate and necessary" finding, the agency simply doesn't have the right to regulate.

The case is American Academy of Pediatrics et al. v. Andrew Wheeler, case number 20-1160, in the U.S. Court of Appeals for the D.C. Circuit.

--Additional reporting by Michael Phillis, Morgan Conley, Kelly Zegers, Mike LaSusa, Keith Goldberg and Hannah Albarazi. Editing by Alanna Weissman.