Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Energy Cases To Watch In 2014

By **Keith Goldberg**

Law360, New York (January 01, 2014, 10:08 AM ET) -- Between the battles on how far the U.S. Environmental Protection Agency and Federal Energy Regulatory Commission can stretch their authority to fights about who has authority over hydraulic fracturing, energy attorneys are spoiled for choice when it comes to compelling cases in the new year.

Here are the cases energy attorneys will be watching closely in 2014:

Challenges to EPA's Greenhouse Gas Authority

The U.S. Supreme Court in October accepted and consolidated six of the nine petitions challenging the EPA's carbon rulemaking powers, but narrowed the challenge to a single question: When the agency crafted greenhouse gas rules governing tailpipe emissions from new motor vehicles, did that trigger permitting requirements under the Clean Air Act for stationary sources, such as power plants, that emit greenhouse gases?

Meanwhile, the high court refused to accept petitions seeking to challenge the EPA's 2009 finding that greenhouse gases threaten human health and welfare, which came two years after the Supreme Court ruled in Massachusetts v. EPA that greenhouse gases are air pollutants under the CAA.

"It takes maybe a handful of the teeth out [of the case], but it doesn't take all the teeth out," DLA Piper partner Robert Alessi said. "This has the potential to have a pervasive effect on the economy; namely through GHG emissions, the EPA will have great power and authority over a great portion of the economy."

The case will center around the EPA's expansion of its Prevention of Significant Deterioration and Title V permitting programs to include greenhouse gases from certain new and modified stationary sources triggered by the release of the tailpipe rule, which the D.C. Circuit upheld in 2012.

Taken together, the regulations could add up to hundreds of billions of dollars in compliance costs, and McGuireWoods LLP partner Scott Oostdyk questions whether the Supreme Court will back such an expansion of the EPA's authority under the CAA.

"Everybody down to the smallest dry cleaner is going to have to have a comprehensive plan to regulate carbon if the Supreme Court doesn't stop this expansion," Oostdyk said. "I think the court's going to say, 'You need a legislative mandate to do this. You can't land this 747 on this tiny sailboat, you need an

aircraft carrier, and Congress needs to give you this aircraft carrier.'"

Oral arguments are scheduled for Feb. 24.

The petitioners are represented by F. William Brownell of Hunton & Williams LLP, Peter D. Keisler of Sidley Austin LLP and Robert R. Gasaway of Kirkland & Ellis LLP, among others.

The cases are Utility Air Regulatory Group v. EPA, case number 12-1146; American Chemistry Council et al. v. EPA et al., case number 12-1248; Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation et al. v. EPA et al., case number 12-1254; Southeastern Legal Foundation Inc. et al. v. EPA et al., case number 12-1268; Texas et al. v. EPA et al., case number 12-1269; and Chamber of Commerce of the U.S. et al. v. EPA et al., case number 12-1272, all before the Supreme Court of the United States.

EPA et al. v. EME Homer City Generation LP et al.

Also on the Supreme Court's plate is the government's appeal of a D.C. Circuit decision striking down the EPA's cross-state air pollution rule, also known as CSAPR, which forces states to reduce emissions from power plants that travel across borders.

In vacating the rule in August 2012, the D.C. Circuit said the EPA had run afoul of the CAA by forcing states to reduce more pollution than necessary and denying them the opportunity to set up their own plans.

If the Supreme Court restores CSAPR, facilities in upwind states, particularly coal-fired power plants, may have to install additional, expensive pollution controls. If the high court upholds the D.C. Circuit's ruling, that could lead to more stringent air pollution regulation in downwind states.

"It's a really fascinating conflict between upwind states and downwind states, and there's also a split in the industry," McDermott Will & Emery LLP partner and former EPA official Jacob Hollinger said. "The big electric utilities, they oppose the rule, but there are two companies in the power generation sector that support the rule."

Oral arguments took place on Dec. 10.

The respondents are represented by Peter D. Keisler of Sidley Austin LLP, Norman W. Fichthorn of Hunton & Williams LLP and Brendan K. Collins of Ballard Spahr LLP, among others.

The cases are EPA et al. v. EME Homer City Generation LP et al., case number 12-1182; and American Lung Association et al. v. EME Homer City Generation LP et al., case number 12-1183, in the Supreme Court of the United States.

Board of Commissioners of the Southeast Louisiana Flood Protection Authority-East et al. v. Tennessee Gas Pipeline Company LLC et al.

In a case attorneys say is just as compelling politically as it is legally, a Louisiana levee board has launched a multi-billion-dollar suit against dozens of major energy companies, claiming that decades of oil and gas drilling activity have undermined the state's coastal ecosystem, which leaves it more vulnerable to flooding and severe weather.

The Southeast Louisiana Flood Protection Authority-East originally filed its suit in state court, but it was removed to federal court in September. In a state that's heavily tied to the energy industry, the case pits the levee board against energy giants such as BP PLC and ConocoPhillips Co., as well as Louisiana Gov. Bobby Jindal, who accused the board of overstepping its authority and refused to reappoint a board member who led the litigation charge.

"There's been as much going on behind the scenes as there has been in the courtroom," Ken Klemm, a New Orleans-based shareholder at Baker Donelson Bearman Caldwell & Berkowitz PC, said. "It'll be interesting to see if the suits move past the preliminary motions stage."

The authority is represented by Jones Swanson Huddell & Garrison LLC, Fishman Haygood Phelps Walmsley Willis & Swanson LLP and Veron Bice Palermo & Wilson LLC.

The defendants are represented by King & Spalding LLP and Liskow & Lewis, among others.

The case is Board of Commissioners of the Southeast Louisiana Flood Protection Authority-East et al. v. Tennessee Gas Pipeline Company LLC et al., case number 2:13-cv-05410, in the U.S. District Court for the Eastern District of Louisiana

In re: Western States Wholesale Natural Gas Antitrust Litigation

Several natural gas companies, including Shell Energy North America LP and others, have urged the Supreme Court to review a Ninth Circuit decision that revived state-law claims in the multidistrict litigation alleging the companies fixed natural gas prices, arguing that the Natural Gas Act preempts the state law allegations.

Essentially, the dispute boils down to whether the retail gas transactions affect wholesale gas markets, which are the exclusive jurisdiction of FERC under the NGA.

"If you allow states to get into this area of retail gas transactions, it has an indirect and substantial effect on wholesale gas prices, Alessi said. "The petitioners are saying ... that will wreak havoc throughout the entire gas industry because companies will have to figure out how to comply with 50 different state laws. That's exactly what the NGA was enacted to prevent. It is a huge piece of litigation."

Figuring out which cases the Supreme Court will take can be a fool's errand, but Alessi said the high court has been active in NGA preemption, so they'll at least seriously consider the companies' petition.

The petitioners are represented by Neal Kumar Katyal, Robert B. Wolinsky, Dominic F. Perella, Elizabeth B. Prelogar and Sean Marotta of Hogan Lovells.

The case is In re: Western States Wholesale Natural Gas Antitrust Litigation, case number 13-271, in the Supreme Court of the United States.

South Carolina Public Service Authority v. FERC

It's the marquee case involving the electric industry: a coalition of utilities and state utility regulators **challenging** FERC's controversial Order No. 1,000, a transmission planning rule meant to spark new transmission investment by requiring utilities to create regional plans and a framework for cost allocation, which is how they recoup project expenses.

The commission adopted the order in 2011 and affirmed it in 2012 over widespread industry objections.

Among the claims raised by the challengers in the D.C. Circuit is that FERC is stepping on the toes of state regulators and violating the Federal Power Act. In a September brief, FERC contended that Order No. 1,000 does not intrude on state authority and that it has the authority under the FPA to require utilities to participate in a regional transmission planning process.

"At the highest level, it's about FERC's authority to require a certain degree of planning and certain way of determining under what circumstances can transmission be built," Crowell & Moring LLP partner Larry Eisenstat said. "To some extent, it's another state-federal issue, and to some extent, it's a new [generation] entry issue."

Oral arguments haven't been scheduled in the case yet.

The utilities are represented by Stinson Morrison Hecker LLP, Balch & Bingham LLP, Alston & Bird LLP, The Alabama Public Service Commission, Sheridan Energy & Environmental Consulting LLC, Allegheny Energy Inc., Venable LLP, Wright & Talisman PC, Midcontinent Independent System Operator Inc., Jones Day, Skadden Arps Slate Meagher & Flom LLP, PSEG Services Corp., the Florida Public Service Commission, and Sutherland Asbill & Brennan LLP.

The case is South Carolina Public Service Authority v. FERC, case number 12-1232, in the U.S. Court of Appeals for the District of Columbia Circuit.

Local Fracking Moratorium Litigation

The battle over the use of fracking has pitted several states against local municipalities seeking to regulate fracking within their borders or ban it outright, but experts say the most high-profile dispute is taking place in New York, which sits atop the Marcellus Shale, a poster child for the U.S. gas boom that has been fueled by advances in fracking.

While a statewide fracking moratorium remains in effect, the state's top court has agreed to consider **claims** by natural gas exploration company Norse Energy Corp. that New York's Oil Gas and Solution Mining Law, amended in 1981 to include a preemption clause, took precedence over local action such as the fracking ban enacted by the town of Dryden, N.Y. A midlevel appeals court unanimously held in May that the law can't be invoked to nullify local bans.

INorse Energy is represented by Thomas S. West of the West Firm PLLC.

The town of Dryden is represented by attorney Deborah Goldberg of Earthjustice.

The case is Norse Energy Corp. v. Town of Dryden, case number APL-2013-00245, in the Court of Appeals of the State of New York.

North Dakota Natural Gas Flaring Litigation

A lack of infrastructure in the Bakken Shale has led many energy companies to simply flare natural gas, which is worth far less than the oil and other liquids they also produce. That's led to litigation — not over environmental concerns, but over money.

North Dakota landowners launched proposed class actions against 10 oil and gas companies including Marathon Oil Corp. and ExxonMobil Corp. unit XTO Energy Inc. in October, claiming they're being stiffed out of royalties for the flared natural gas.

"It's going to be an interesting thing to see how courts deal with flaring gas because you're trying to produce but are stymied because the gas isn't economical," Akin Gump Strauss Hauer & Feld LLP partner Brian Antweil said. "This notion of waste ... everyone wants to tie up properties and drill wells, but the market isn't there for gas right now."

The plaintiffs are represented by Baumstark Braaten Law Partners, Murdock Law Firm PC, The Monts Firm, Balzer Law Firm PC, and Tarlow Stonecipher & Steele PLLC.

The oil companies are represented by Fredrikson & Byron PA and Crowley Fleck PLLP, among others.

Among the cases are Vogel v. Marathon Oil Corp., case number 31-2013-CV-00163, and Wisdahl v. XTO Energy Inc., case number 53-2013-CV-01188, both in the District Court of the Northwest Judicial District of the State of North Dakota; as well as Singer v. Statoil Oil & Gas LP, case number 4:13-cv-00138, in the U.S. District Court for the District of North Dakota.

In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010, and Chevron Corp. v. Donziger et al.

For two of the most high-profile energy trials of 2013, it's all over but for the waiting. BP is waiting to see how much a Louisiana federal judge will make it fork over in Clean Water Act penalties for its role in the 2010 Deepwater Horizon disaster and how blame for the oil spill will be allocated between the company and its drilling partners,Transocean Ltd. and Halliburton Co.

Meanwhile, Chevron Corp. is waiting for a New York federal judge's decision in its racketeering suit over a $9.5 billion Ecuadorian pollution judgment that the company accuses attorney Steven Donziger of engineering through fraud.

In the Deepwater Horizon case, the class is represented by Herman Herman & Katz LLC, Domengeaux Wright Roy & Edwards LLC, Levin Papantonio Thomas Mitchell Rafferty & Proctor PA, Lundy Lundy Soileau & South LLP and Weitz & Luxenberg PC, among others; while BP is represented by Covington & Burling LLP, Liskow & Lewis, Kirkland & Ellis LLP, Arnold & Porter LLP, Dentons, and in-house counsel.

In the Chevron case, Chevron is represented by Gibson Dunn & Crutcher LLP, while Donziger is represented by Friedman Rubin and Littlepage Booth.

The cases are In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010, case number 2:10-md-02179, in the U.S. District Court for the Eastern District of Louisiana; and Chevron Corp. v. Donziger et al., case number 1:11-cv-00691, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Sindhu Sundar, Sean McLernon, Gavin Broady and David McAfee. Editing by Edrienne Su.