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Environmental Litigation To Watch This Year

Law360, New York (February 24, 2014, 1:06 PM ET) -- Plaintiff organizations continue to fight the energy and hydrocarbon industries head-on, using arguments based on climate change theories, effects on wildlife, and localized environmental impact.

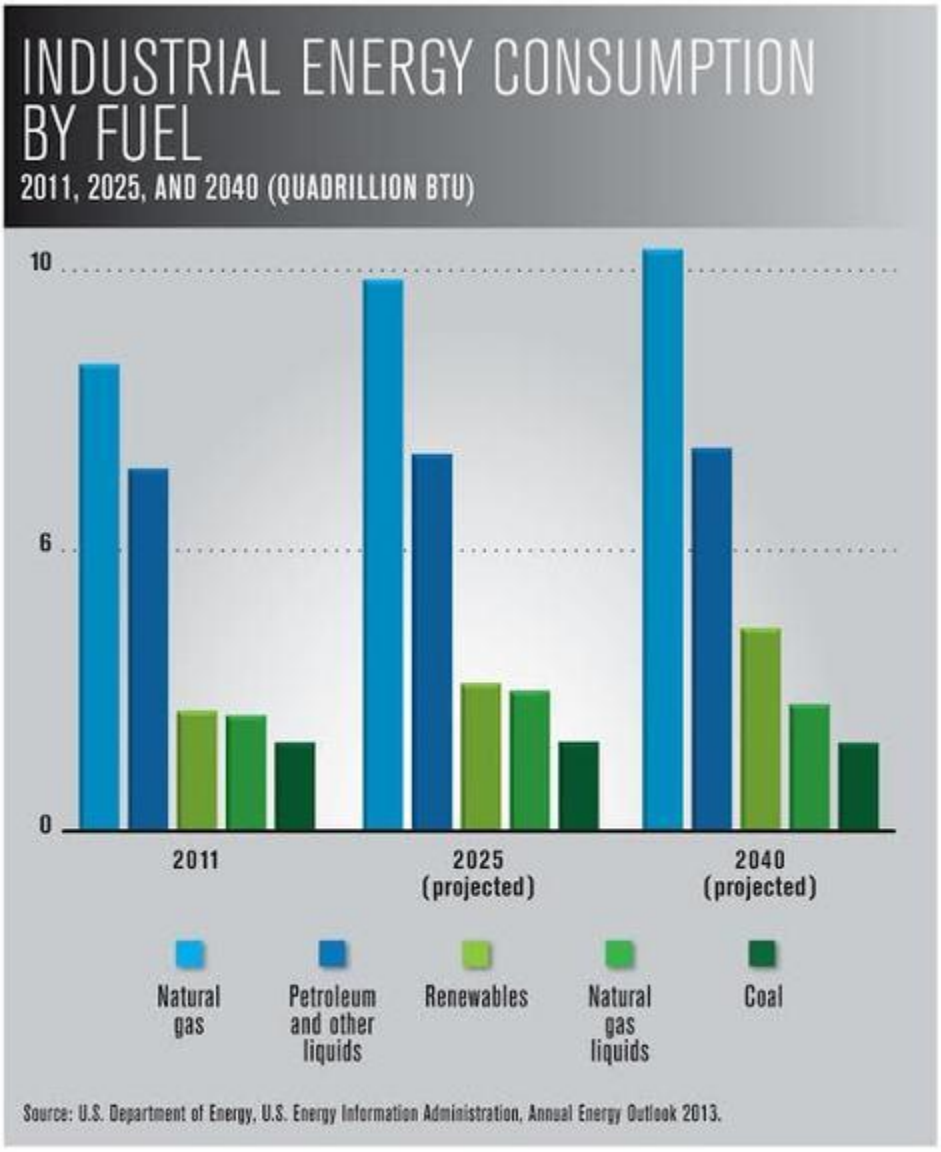
At the same time, they are litigating via indirect attacks against those who supply and regulate the industries. In the coal industry, for example, well-funded plaintiffs are not only taking coal-producing companies to court, they are also pursuing multiclaim litigation against proposed coal export terminals, federal coal-leasing decisions, and even the transport of coal.

In Alaska Community Action on Toxics v. AES LLC, an action currently on appeal to the Ninth Circuit, a coal-loading terminal operator and the Alaska Railroad fended off claims that coal dust and particles that made their way into the nearby bay violated the Clean Water Act, and in Sierra Club v. BNSF, a suit pending in two federal courts in Washington state, the plaintiffs have sued a railroad to impose Clean Water Act penalties because of the coal dust that falls off trains as they travel.

There is also a growing number of cases that aim to stop the development of industrial projects, especially those related to natural resource extraction and energy generation. A common tactic: Rather than try to derail projects outright, delay them for as long as possible using the National Environmental Policy Act.

With this approach, the plaintiffs sue the government agency providing the environmental analysis for the permit, questioning the process behind the analysis rather than the actual findings. This results in delays and additional expense to the regulatory piece of the project. If the courts rule that the agency's analysis didn't properly consider all the right factors, the agency has to go back and do it all again.

NEPA is not a new law, but it has traditionally been used in a fairly localized way — largely in "not in my backyard" efforts against highways, airports, and plants. Now it's being used on a broader scale and with a greater diversity of projects, even including wind and solar projects. NEPA litigation has become very prolific. In the future, it is likely to play a role in the time it takes to build coal-exporting facilities in the Northwest and in fighting the northern portion of the Keystone XL pipeline project, if and when that is approved. It's reaching the point where companies planning major projects that involve federal permitting almost have to build these delays into their schedules right from the start.



As natural gas plays a greater role in the industrial energy mix, environmentalists will likely increase their anti-hydraulic fracturing efforts—aided, perhaps, by evolving government regulations.

Awaiting Word on Hydraulic Fracturing

Plaintiff organizations and the energy industry are keeping an eye on potential litigation related to hydraulic fracturing, a method used to extract natural gas. This method has led to extensive drilling in several areas of the U.S., made the practice a high-profile issue, and led to speculation that it is related to problems such as earthquakes and chemical exposure.

In spite of the media attention given to hydraulic fracturing, the practice has so far led to relatively little high-profile litigation. Cases have tended to be local, often involving individual property owners objecting to the intrusion or to the perceived environmental effects on them and their property. But this may well be the calm before the storm. This is an area where the plaintiffs' bar's attention is clearly

focused, and stakeholders are watching for the launch of high-value, large-scale cases in the future.

A key — and expected — development in this area will be actions taken by federal regulatory agencies. Before long, for example, the U.S. Environmental Protection Agencymay issue guidelines on the use of diesel under the Safe Drinking Water Act or attempt to regulate aspects of hydraulic fracturing under the Toxic Substances Control Act or other authority. If the EPA declares that hydraulic fracturing is causing certain conditions in groundwater, plaintiffs will gear up and be prepared to attack whatever environmental or health impacts are purported to come from those conditions.

One of the more critical regulatory changes may come from the Occupational Safety and Health Administration. That agency has proposed a rule setting standards for worker exposure to silica, which is found in the sand used in hydraulic fracturing, in addition to other industrial uses, and that may become a firm regulation in the coming year.
These are regulatory developments that are closely tied to litigation risk. Once there are more definitive federal standards, the industry will be facing more litigation from both the tort side and the plaintiff organizations that oppose the development they are pursuing.

The industry is also keeping an eye on a case involving Lone Pine orders, which could shape scope and strategy in future tort litigation. With a Lone Pine order, the court essentially requires toxic tort plaintiffs to provide clear, upfront proof of their claim before a case can progress — and before the defendant has to undertake costly discovery.

In July, the Colorado Court of Appeals overturned a lower court's use of a Lone Pine order in a case involving hydraulic fracturing and possible well contamination, holding that, as a general matter, such orders are not permitted under Colorado law. It bears watching whether other jurisdictions will follow Colorado's lead, which will likely drive up litigation costs for companies involved in hydraulic fracturing cases.

Emerging Risks From Vapor Intrusion

As environmental remediation technology continues to advance, it also identifies new forms of environmental contamination and risk. An emerging area revolves around vapor intrusion — air contamination of interior spaces that results from vapors that move from contaminated groundwater up through the soil and into buildings.

The EPA is developing a regulatory approach for vapor intrusion, issuing draft guidance documents in 2013, while more than 35 states have developed their own standards to regulate detection and cleanup. The discovery of vapor intrusion contamination could reopen cleanup obligations — and associated litigation — at many sites that were thought to be long closed and resolved.

The fears of indoor air pollution have launched tort litigation as well. In a recent case in New Jersey, residential homeowner plaintiffs, claiming loss in property value, emotional distress and injury to three children in the home, successfully survived a motion to dismiss. Plaintiffs' attorneys have also worked around statute-of-limitation issues, successfully arguing that the injuries are latent and that they did not have a claim until they were aware of the vapor intrusion threat. Thus, even though the contamination might have occurred years or even decades ago, companies might still face litigation risk today from these newly identified forms of contamination and potential injury.

Cases to Watch

In the coming months, decisions in the following cases will have a significant impact on environmental litigation:

Mingo Logan Coal Co. v. EPA

The issue is whether the EPA can veto a Clean Water Act Section 404 permit after it has been issued; a petition was filed with the U.S. Supreme Court in November 2013.

Bell v. Cheswick Generating Station

In late August, the U.S. Court of Appeals for the Third Circuit held that the Clean Air Act did not preempt the tort claims of property owners who alleged that air emissions from a neighboring power plant diminished their property values. This decision, a case of first impression, has the potential to spark similar tort lawsuits. The power plant defendant requested an extension to late January 2014 to file a petition with the U.S. Supreme Court.

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This article was adapted from the firm's "Litigation Forecast 2014."