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Environmental Cases To Watch In 2012

By **Derek Hawkins**

Law360, New York (January 01, 2012, 12:00 AM ET) -- Court cases challenging the U.S. Environmental Protection Agency's authority to more aggressively regulate air quality, land use and other issues will take center stage in the coming year, with a potentially game-changing U.S. Supreme Court case topping the bill, attorneys say.

A host of recent EPA rules governing greenhouse gas emissions face legal battles in the D.C. Circuit, as does the EPA's decision to use a rare regulatory move against a major mining company. The Supreme Court will also rule on a landowner's fight against the EPA's attempt to block construction of a house on a wetland area.

Here are some of the cases environmental attorneys will be watching closely in 2012.

Sackett v. EPA

In the second week of January, the Supreme Court will hear arguments on whether landowners can seek judicial review of an administrative compliance order issued by the EPA if the agency hasn't taken them to court to enforce it. The court will rule on whether preventing landowners from doing so violates their due process rights.

"The EPA likes to compel immediate action by administrative order," said Jeff Porter, head of the environmental section at Mintz Levin Cohn Ferris Glovsky & Popeo PC. "If that tool is taken away, it could change the way the EPA does business pretty substantially."

Plaintiffs Chantell and Michael Sackett owned slightly more than half an acre of land in Idaho, and in 2007 they began filling the property with rock and dirt to build a house. Shortly thereafter, the EPA sent them a compliance order saying the property was a wetland under the Clean Water Act and that they had failed to obtain a permit to build there.

After unsuccessfully seeking a hearing over the matter with the EPA, the Sacketts sued seeking declaratory and injunctive relief.

A district court dismissed the case, and the Ninth Circuit upheld the ruling in September 2010, saying the CWA barred pre-enforcement judicial review of EPA administrative compliance orders. In June, the Supreme Court agreed to take up the case.

The Sacketts argued in their petition that compelling landowners to wait for judicial enforcement of a compliance order forces them to choose between expensive permitting processes or facing tens of thousands of dollars in daily fines if they don't comply.

"Some people would say that when Congress authorized this tool it intended that the EPA would use it in extraordinary cases, but part of the reason we are where we are is that the

EPA has used that tool in ordinary circumstances," Porter said. "That kind of EPA muscle flexing, which has increased over the years, is why it finds itself in the Supreme Court."

If the court rules in the Sacketts' favor, it could upend the way the EPA undertakes regulatory actions under not just the CWA but other environmental statutes, like the Comprehensive Environmental Response Compensation and Liability Act, attorneys said. It could also affect other federal agencies, depending on the wording of the opinion.

"If the Sacketts win, it's going to slow down regulatory agencies and it could slow down a lot of enforcement programs," Alston & Bird LLP's Maureen Gorsen said.

Argument is scheduled in the case for Jan. 9.

The Sacketts are represented by Damien Schiff of the Pacific Legal Foundation.

The case is Chantell Sackett et vir v. EPA et al., case number 10-1062, in the U.S. Supreme Court.

Greenhouse Gas Litigation

Dozens of petitioners — including business and trade organizations, states, private companies and policy groups — have asked the District of Columbia Circuit to determine the legality of a set of EPA regulations designed to reduce greenhouse gases, and four consolidated cases are slated for argument at the end of February.

In the four cases consolidated in the D.C. Circuit, three greenhouse gas emissions rules and one EPA determination are up for review.

The petitioners, led by the Coalition for Responsible Regulation, are challenging the EPA's controversial "endangerment finding," in which the EPA ruled that greenhouse gas emissions threaten public health and well-being. The finding opened the door for numerous regulations on greenhouse gases when the agency published it in December 2009.

As part of the consolidated litigation, the D.C. Circuit will also hear argument on the EPA's tailpipe rule, which the agency unveiled in April 2010 with the U.S. Department of Transportation. That rule sets tighter emissions standards for 2012 through 2016 light-duty vehicles, with the goal of cutting back on vehicle pollution and improving fuel economy.

Also as part of the consolidated litigation, the D.C. Circuit will determine the legality of the EPA's so-called timing and tailoring rules. Those rules lay a range of new requirements on stationary emissions sources like power plants and force new facilities emitting between 100 and 250 tons of regulated pollutants annually to obtain preconstruction permits.

The petitioners object to the rules on a number of grounds. Among their arguments are that the rules are arbitrary, based on inadequate research and evidence, and inconsistent with the Clean Air Act.

"It boils down to whether the EPA is doing more than the Clean Air Act authorizes or doing things without the appropriate decision-making," Porter said.

Other attorneys cited industry concerns that upholding the rules could create regulatory uncertainty or even discourage new construction of facilities with regulated emissions.

"This is a very complex series of cases that will affect not only utilities but virtually all of industry and potential sources across the country that have never been regulated under Clean Air Act programs before," Troutman Sanders LLP's Margaret Campbell said.

Argument will take place Feb. 28 and 29.

The petitioners are represented in the matters by Holland & Hart LLP, Vinson & Elkins LLP, Sidley Austin LLP, and others.

The cases are Coalition for Responsible Regulation Inc. et al. v. EPA, case numbers 09-1322, 10-1092 and 10-1073, and American Chemistry Council v. EPA, case number 10-1167, in the U.S. Court of Appeals for the District of Columbia Circuit.

Mingo Logan Coal Co. Inc. v. EPA

In another test of the EPA's authority, the U.S. District Court for the District of Columbia is expected to rule on the agency's unprecedented attempt to revoke a CWA permit the Army Corps of Engineers issued Mingo Logan Coal Co. Inc. to discharge fill materials from a West Virginia mine.

In 2007, the Corps granted Mingo Logan a CWA permit to discharge fill material from its Spruce No. 1 mine into federal waters, following about 10 years of evaluation it conducted with the EPA and state regulators.

After more than three years of compliance under the permit, the EPA asked the Corps to revoke the permit, citing new concerns about degradation of surrounding water and the company's fill and mitigation measures. It marked the first time the agency had sought to pull an already-issued CWA permit.

Mingo Logan took the EPA to court, claiming the EPA was acting well beyond its authority under the law.

The court heard argument on motions for summary judgment from both sides at the end of November. Attorneys say that they expect a decision soon and that either side is almost certain to appeal.

John Iani, a partner at Perkins Coie LLP, said the outcome of the case could have far-reaching consequences for mining and natural gas companies and could prompt congressional action.

"Three years later they're reaching back and using authority they had and could have invoked at any time," Iani said, adding that the agency's rationale could be used to stop projects proposed in areas the EPA deems to need protection.

"If the court upholds [the EPA's decision], there will be some interest in Congress to try and curtail that authority," he added.

Mingo Logan is represented by Robert Rolfe, Michael Shebelskie, George Sibley, Virginia Albrecht and Deirdre Duncan of Hunton & Williams LLP and Robert McLusky of Jackson Kelly PLLC.

The case is Mingo Logan Coal Co. Inc. v. EPA, case number 1:10-cv-00541, in the U.S. District Court for the District of Columbia.

EME Homer City Generation LP v. EPA

Utility operators will be paying close attention to a legal battle over a controversial new EPA rule regulating airborne pollution that travels across state lines, which attorneys say will be played out in the D.C. Circuit this year.

In August, the EPA published the Cross-State Air Pollution Rule, or CSAPR, which requires power plant operators in 28 states to reduce sulfur dioxide and nitrogen oxide emissions that migrate into other states. The rule takes effect Jan. 1, and industries have until 2014 to comply.

The rule is expected to fall hard on aging coal-fired power plants. Government and private analyses have both indicated that many will be forced to shut down or pare back operations until they can install costly pollution-control equipment.

Legislative attempts to block the rule have so far been unsuccessful, but a consolidated D.C. Circuit case involving numerous petitioners, some of them states, seeks a stay of the rule and a full court review. If the court doesn't grant a stay, the petitioners seek an expedited appeal.

EME Homer City Generation LP is the lead petitioner in the case.

The company is represented by Lori McGill, Gregory Garre, Claudia O'Brien, Katherine Twomey, and Stacey VanBelleghem of Latham & Watkins LLP.

The case is EME Homer City Generation LP v. EPA, case number 11-1302, in the U.S. Court of Appeals for the District of Columbia Circuit.

National Environmental Development Association's Clean Air Project et al. v. EPA

In a case similar to the challenge to the cross-state rule, several states and industry groups have asked the D.C. Circuit to throw out the EPA's rule placing new limits on sulfur dioxide.

The EPA rolled out new national air quality standards for the pollutant in June 2010, restricting sulfur dioxide concentrations to 75 parts per billion and requiring stricter monitoring and reporting requirements for the emissions.

The National Environmental Development Association, Asarco LLC, and several states petitioned for review, claiming the modeling the EPA used overestimated sulfur dioxide concentrations and made the limits more stringent than necessary.

The parties have exchanged briefs and argument will take place in 2012, attorneys said. A ruling in favor of the EPA could pave the way for the agency to use the same type of modeling down the road, they said.

"The EPA is going to be relying much more heavily on modeling to determine which areas are complying with the standards, which will have a major impact on the sources in those areas," Campbell said.

National Environmental Development Association's Clean Air Project is represented by Leslie Ritts of Ritts Law Group PLLC.

The case is National Environmental Development Association's Clean Air Project et al. v. EPA, case number 10-1252, in the U.S. Court of Appeals for the District of Columbia Circuit.

--Editing by Cara Salvatore.