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Energy Cases To Watch In 2017

By **Keith Goldberg**

Law360, New York (January 2, 2017, 1:03 PM EST) -- After a year filled with blockbuster rulings, energy litigation will again grab the spotlight in 2017, with an eagerly awaited decision on the legality of the U.S. Environmental Protection Agency's Clean Power Plan — the Obama administration's signature climate change regulation — taking center stage.

Here are the cases that energy attorneys will be watching this year.

Challenge to EPA's Clean Power Plan

After several twists, including the U.S. Supreme Court's stay and the D.C. Circuit's electing to consider the case en banc, a decision will come in the biggest energy and environmental case in years: a dispute over whether the EPA has the Clean Air Act authority to mandate greenhouse gas emissions cuts from existing power plants.

The D.C. Circuit had heard oral arguments on Sept. 27. However, the Presidential election of Donald J. Trump, who has vowed to rescind the rule, is a potential game-changer, attorneys say.

“If there is no decision issued by [Trump's] Jan. 20 [inauguration], they may be able to ask for an abeyance from the court and pull that rule back,” Morgan Lewis & Bockius LLP partner Stephen Spina said. “If it's affirmed, then it becomes more difficult in terms of what steps the new administration has to take in order to pull that rule back.”

Attorneys say the CPP may never be implemented, regardless of how the D.C. Circuit rules.

“Either way, I think that rule is dead on arrival,” Holland & Knight LLP partner Steve Humes said.

The state petitioners are represented by their respective attorneys general.

The nonstate petitioners are represented by Sidley Austin LLP, Hunton & Williams LLP and Crowell & Moring LLP, among others.

The EPA is represented by Eric Hostetler, Amanda Berman, Norman Rave and Brian Lynk of the U.S. Department of Justice.

The case is West Virginia et al. v. Environmental Protection Agency et al., case number 15-1363, in the U.S. Court of Appeals for the District of Columbia Circuit.

Challenge to EPA's GHG Rule For New Power Plants

While it hasn't gotten as much of the attention as the fight over the Clean Power Plan, several states and industry groups are also challenging the legality of the EPA's rule capping greenhouse gas emissions at new and reconstructed power plants, in the D.C. Circuit.

The challengers argue that the EPA is relying on the use of uneconomic and unproven carbon capture and sequestration technology to achieve the emissions standards for coal- and gas-fired power plants, in violation of the CAA. The agency says that it reasonably determined the new limits and that they're feasible because partial CCS is an adequately demonstrated technology.

But like the Clean Power Plan's, the GHG rule's fate could ultimately be determined by the Trump administration and not the courts, especially since the president-elect had repeatedly vowed on the campaign trail to revitalize dwindling coal-fired power in the U.S.

The states and state agencies are represented by their respective attorneys general or general counsel, and North Dakota is additionally represented by Greenberg Traurig LLP.

Murray Energy Corp. is represented by Squire Patton Boggs LLP. Petitioners Utility Air Regulatory Group and American Public Power Association are represented by Hunton & Williams LLP. The other industry, labor and utility groups are represented by Balch & Bingham LLP, Troutman Sanders LLP and Holland & Hart LLP, among others.

The EPA is represented by Brian H. Lynk and Chloe H. Kolman of the U.S. Department of Justice and Steven Silverman, Scott J. Jordan, Matthew Marks and Howard J. Hoffman of the U.S. Environmental Protection Agency.

The lead case is North Dakota et al. v. Environmental Protection Agency, case number 15-1381, in the U.S. Court of Appeals for the District of Columbia Circuit.

Challenge to the EPA's New Ozone Standards

The EPA is facing opposition from all sides in the D.C. Circuit to the regulators new ozone National Ambient Air Quality Standard of 70 parts per billion, down from 75 parts per billion.

Several states and industry groups claim the EPA is imposing prohibitively expensive, unnecessary and

unachievable standards, while environmental and health groups claim the agency ignored scientific consensus that the standards should be even tighter.

The EPA claims that it balanced environmental and industry concerns when crafting the new standards and that the challenges are simply repeats of arguments made against the 2008 ozone NAAQS, which the D.C. Circuit upheld.

Oral arguments are scheduled for April 19, and the stakes are high — not only because states and regions will have to comply with the new standards, but also because they're incorporated into other air emissions rules and CAA permitting programs.

The environmental and health petitioners are represented by Seth L. Johnson and David S. Baron of Earthjustice.

The EPA is represented by John C. Cruden, Justin D. Heminger and Simi Bhat of the U.S. Department of Justice and David Orlin, Steven Silverman, Melina Williams, Brian Doster and Kristi Smith of the U.S. Environmental Protection Agency.

The industry petitioners are represented by Sidley Austin LLP, Hunton & Williams LLP and Crowell & Moring LLP, among others.

The case is Murray Energy Corp. v. Environmental Protection Agency, case number 15-1385, in the U.S. Court of Appeals for the District of Columbia Circuit.

Challenge to New York's Nuclear Plant Subsidies

A coalition of power producers are fighting New York's plan to subsidize three struggling nuclear power plants as part of the state's clean energy program, in what attorneys say is the first key test of the scope of the U.S. Supreme Court's April ruling in Hughes v. Talen Energy Marketing, which invalidated Maryland's subsidy program for new gas-fired plant construction because it usurped Federal Energy Regulatory Commission authority over wholesale electricity markets.

“We went from a bright line to a blurry line, and figuring out what side of the line these programs will be on will be a challenge going forward,” Arnold & Porter Kaye Scholer LLP energy regulatory partner Sandy Rizzo said. “There are going to still be disputes going forward about what's a direct effect [on wholesale markets] and what's an indirect effect.”

The challengers claim the zero-emission credits offered by the New York Public Service Commission artificially depress wholesale power prices, making it an intrusion on FERC's jurisdiction over wholesale power markets, similarly to what the high court concluded in Hughes.

However, the PSC argues that the ZECs are nothing like Maryland's subsidies and are a crucial part of New York's clean energy standard calling for half its electricity to come from renewable sources by 2030.

Environmental goals are well within the electricity regulatory authority of states, the PSC claims.

The plaintiffs are represented by Jonathan D. Schiller, Edward J. Normand and Jason C. Cyrulnik of Boies Schiller & Flexner LLP.

The PSC is represented in-house by Paul Agresta, Jonathan D. Feinberg and John C. Graham and by Scott Strauss, Peter J. Hopkins and Jeffrey A. Schwarz of Spiegel & McDiarmid LLP.

The intervenors are represented by Elizabeth A. Edmonson, Matthew E. Price, Paul M. Smith, Zachary C. Schauf and William K. Dreher of Jenner & Block LLP.

The case is Coalition for Competitive Electricity et al. v. Zibelman et al., case number 1:16-cv-08164, in the U.S. District Court for the Southern District of New York.

FERC Market Manipulation Enforcement Cases

As FERC's market manipulation enforcement efforts are increasingly challenged by enforcement targets, several cases are making their way through the district courts that could help shed light on what trading activity can actually be considered manipulative. They include Barclays PLC's fight against a $453 million electricity market manipulation penalty in California federal court, and a now-shuttered Pennsylvania trading firm's fight against $42 million in penalties over allegedly manipulative power trading activity.

The push for defining manipulative activity could be helped by recent rulings from two federal judges that FERC must go through a full court case, as opposed to merely having the judge review the agency's proceedings, to enforce a manipulation penalty.

On the gas side, a battle is being waged over FERC's market manipulation jurisdiction. A Total SA unit fighting $225 million in proposed penalties claims that FERC can't adjudicate manipulation cases itself and must pursue them in federal district court. A Texas federal judge sided with FERC's position that Total must wait until FERC finalizes any penalty, then challenge the decision in a federal appeals court. Total has appealed that decision to the Fifth Circuit.

Among the cases are Federal Energy Regulatory Commission v. Barclays Bank PLC et al., case number 2:13-cv-02093, in the U.S. District Court for the Eastern District of California, and Total Gas & Power North America Inc. et al. v. Federal Energy Regulatory Commission et al., case number 16-20642, in the U.S. Court of Appeals for the Fifth Circuit.

Challenges to DOE Approval of LNG Exports

Having struck out in challenging FERC's approval of liquefied natural gas export projects, with the D.C. Circuit ruling that the agency wasn't required to evaluate potential gas drilling increases as part of its environmental review, the Sierra Club and other environmental groups are now challenging the U.S. Department of Energy's approval of LNG exports from those same projects on similar grounds.

In absolving FERC, the D.C. Circuit had concluded that the decision to allow LNG to be exported to countries that don't have free trade agreements with the U.S. rests exclusively with the DOE, so FERC — tasked with approving the export facilities themselves — can't be legally required to base its environmental review on actions the commission has no control over.

However, in defending its approval of LNG exports, the DOE is relying on another argument made by FERC that helped sway the D.C. Circuit: that the alleged environmental impacts of increased gas drilling and GHGs are too speculative to be considered in an environmental review.

Among the cases are Sierra Club v. Department of Energy, case numbers 16-1186 and 16-1252, in the U.S. Court of Appeals for the District of Columbia Circuit.

Children's Climate Change Suit Against the U.S.

When an Oregon federal judge in November refused to dismiss a lawsuit accusing the federal government of failing to protect future generations from climate change, attorneys say she stepped into uncharted legal territory and could reopen a door to climate change litigation under federal common law that many assumed had been slammed shut.

U.S. District Judge Ann L. Aiken concluded that 21 plaintiffs, ranging in age from 8 to 19, along with climate change advocates such as former NASA climate scientist James Hansen could pursue a claim that the government violated the so-called public trust doctrine by supporting fossil fuel use despite knowledge of the climate change consequences, which she summarized as "the fundamental understanding that no government can legitimately abdicate its core sovereign powers."

While the plaintiffs still face an uphill battle — Judge Aiken's ruling is likely to be appealed, and there's no language in the U.S. Constitution that specifically says citizens have a right to a healthy environment — Trump's election and vow to roll back climate change regulations could spark similar suits, attorneys say.

The plaintiffs are represented by Julia A. Olson of Wild Earth Advocates, Joseph W. Cotchett, Philip L. Gregory and Paul N. McCloskey of Cotchett Pitre & McCarthy LLP, and Daniel M. Galpern.

The federal government is represented by John C. Cruden and Sean C. Duffy of the U.S. Department of Justice.

The American Petroleum Institute and American Fuel & Petrochemical Manufacturers are represented by C. Marie Eckert and Suzanne C. Lacampagne of Miller Nash Graham & Dunn LLP and Roger R. Martella Jr., Quin M. Sorenson and Benjamin E. Tannen of Sidley Austin LLP.

The case is Juliana et al. v. U.S. et al., case number 6:15-cv-01517, in the U.S. District Court for the District of Oregon.

Challenge to EPA's Methane Rule for Oil and Gas Infrastructure

Several states and oil and gas industry groups are fighting a methane rule issued in May by the EPA for new and modified oil and gas infrastructure, regulations that are a linchpin of the Obama administration's efforts to slash methane emissions from the oil and gas sector by 40 to 45 percent from 2012 levels by 2025.

The challengers are arguing that the EPA doesn't have the CAA authority to issue the rule, which also requires reductions in volatile organic compound and methane emissions from fracked and refracked oil wells. But the challengers may ultimately not have to convince the D.C. Circuit to overturn the rule.

Trump pledged to rescind methane regulations during his campaign, and he and the Republican-controlled Congress could explore whether they can use the Congressional Review Act to rescind the rule. Under the CRA, Congress can pass a resolution disapproving major federal regulations within 60 legislative days of their release by a simple majority vote, and if the resolution is signed by the president, then the regulation is nullified and the decision isn't subject to judicial review.

The states are represented by their respective attorneys general. North Dakota is also represented by Paul M. Seby of Greenberg Traurig LLP.

The industry challengers are represented by Hunton & Williams LLP and Davis Stubbs & Graham LLP, among others.

The EPA is represented by Amanda Shafer Berman of the U.S. Department of Justice.

The case is North Dakota v. Environmental Protection Agency, case number 16-1242, in the U.S. Court of Appeals for the District of Columbia Circuit.

--Editing by Edrienne Su.

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