

Energy Cases To Watch In 2020

By **Keith Goldberg**

Law360 (January 1, 2020, 12:04 PM EST) -- Climate change will take center stage in energy-related courtroom battles in 2020, with fossil fuel companies and the federal government in the hot seat for their alleged roles in exacerbating climate change and for the Trump administration's easing of greenhouse gas emissions regulations.

Federal circuit courts are poised to weigh in on whether municipalities can seek climate-related infrastructure damages from energy giants including ExxonMobil Corp., Chevron Corp. and BP PLC, and whether the federal government is unconstitutionally promoting fossil fuel use at the climate's expense.

Those courts will also determine the legality of the Trump administration's repeal and replacement of the Obama-era Clean Power Plan, which aimed to slash greenhouse gas emissions from existing power plants, and a move to block California and allied states from setting their own GHG and fuel economy standards for vehicles while the feds pursue a rollback of Obama-era standards.

Outside the climate-change realm, appeals courts will weigh cases that have big implications for the energy industry. The U.S. Supreme Court will review the invalidation of a U.S. Forest Service permit for a gas pipeline that crosses the Appalachian Trail, while circuit courts are reviewing the Federal Energy Regulatory Commission's landmark energy storage rule and the agency's role in utility bankruptcies.

There's action at the state court level as well. The Texas Supreme Court is poised to clarify state partnership law in a \$535 million fight between pipeline heavyweights, while Pennsylvania's top court will determine whether oil and gas drillers could face additional litigation over hydraulic fracturing.

Here are nine cases that energy attorneys will be watching closely next year.

Climate Tort Litigation Against Fossil Fuel Cos.

As states, counties and cities continue to seek to hold fossil fuel companies liable for climate change-related infrastructure damages, federal appeals courts draw closer to determining whether the state-law tort claims can be sustained.

The Second Circuit heard oral arguments in November in New York City's bid to revive its climate tort against Big Oil, which a lower court said is displaced by the Clean Air Act and the U.S. Environmental Protection Agency. Meanwhile, the Fourth Circuit in December heard oral arguments in fossil fuel companies' bid to undo a lower court ruling that sent Baltimore's suit back to state court.

The Ninth Circuit on Feb. 5 will hear oral arguments in Oakland and San Francisco's appeal of the dismissal of their suits on grounds that global warming should be tackled by lawmakers, not courts. Those Ninth Circuit oral arguments will also tackle a lower court decision that sent suits by several California cities and counties back to state court.

"I think we'll have guidance by the first half of 2020 from the three different circuit courts, that then could tee it up for something the Supreme Court could weigh in on," said Kirkland & Ellis LLP litigation partner Anna Rotman, who is representing an oil and gas company in several climate torts.

The Second Circuit appeared skeptical that New York City could sustain its claims at oral arguments in November. But attorneys say all it takes is a single split between two circuit courts on the issue to create an opening for Supreme Court review that the justices will likely find irresistible.

"The issue is too large and the legal doctrines are too significant for any circuit split not to be resolved by the Supreme Court," Holland & Hart LLP energy litigation partner Chris Chrisman said.

The cases include *City of New York v. BP PLC et al.*, case number 18-2188, in the U.S. Court of Appeals for the Second Circuit; *Mayor and City Council of Baltimore v. BP PLC et al.*, case number 19-1644, in the U.S. Court of Appeals for the Fourth Circuit; and *City of Oakland et al. v. BP PLC et al.*, case number 18-16663, and *County of San Mateo et al. v. Chevron Corp. et al.*, case number 18-15499, both in the U.S. Court of Appeals for the Ninth Circuit.

Kids' Climate Suit Against Feds

The Ninth Circuit is poised to rule on another case that could have huge implications for climate-related litigation going forward: a landmark suit accusing the federal government of unconstitutionally harming future generations by pushing policies that accelerate climate change.

A group of children alleges that their constitutional rights are being violated because the federal government has helped proliferate the use of fossil fuels and pursued other actions that exacerbate climate change. But the government says the kids can't connect those policies to a specific injury and haven't been able to show that a court could give them redress.

At oral arguments in June on whether the case can go forward, a Ninth Circuit panel acknowledged the gravity of a potential decision. One judge said the children were asking the court to "break new ground," while another judge questioned whether the children's alleged harms can be redressed with a declaratory judgment against the government.

"Maybe 2020 will be the year when a lot of these climate change cases, from the different directions — the municipalities, the constitutional climate suits and the investor suits — will really have some decisions," Kirkland & Ellis' Rotman said.

The case is *Juliana et al. v. the U.S. et al.*, case number 18-36082, in the U.S. Court of Appeals for the Ninth Circuit.

Power Plant GHG Litigation

Dozens of states, cities and environmental groups are fighting the Affordable Clean Energy rule finalized

by the EPA in June. The policy replaces and is more limited in scope than the Obama-era Clean Power Plan.

The ACE rule aims to reduce emissions at existing power plants through improvements at the plants, stopping short of the "beyond the fence line" approaches endorsed by the CPP, which called for current power plants to slash carbon dioxide emissions 32% from 2005 levels by 2030.

The question of whether the EPA had the Clean Air Act authority to regulate emissions beyond the fence line of power plants was a major point of dispute in challenges to the CPP. The EPA under the Trump administration signaled that it believes the agency doesn't have that authority under Section 111(d) of the CAA, which sets performance standards for new and existing pollution sources.

"If the court does issue a decision, it will have pretty sweeping impacts on not just the electric utility industry, but any future rulemaking under Section 111(d)," Holland & Hart environmental partner Emily Schilling said. "It's a very narrow position that the EPA is taking."

The scope of the EPA's CAA authority is the big legal question in the case, but the practical question is whether the D.C. Circuit will issue a decision before the presidential election this fall and a potential change in administration. The appeals court in November rejected an EPA bid to fast-track the case.

"The court is ultimately making a decision at the very end of an administration and there's some question as to the outcome of the election," Schilling said. "That just injects an enormous amount of regulatory uncertainty into the process."

The lead case is American Lung Association et al. v. EPA et al., case number 19-1140, in the U.S. Court of Appeals for the District of Columbia Circuit.

Vehicle GHG Litigation

The Trump administration's efforts to replace Obama-era vehicle GHG and fuel economy standards has ignited a bitter feud between the White House and California over the future of vehicle emissions regulation.

The Golden State, allied states, cities and green groups are challenging the administration's "One National Program" rule, under which the White House asserts that the Energy Policy and Conservation Act gives the U.S. Department of Transportation the right to set national fuel economy standards and preempts similar state programs.

As part of the new program, the EPA is rescinding a CAA waiver that allows California to set its own, more stringent GHG standards and a zero emissions vehicle program. Some states have chosen to adopt California's standards, and many of them have joined California in challenging the EPA's move.

The EPA has never sought to revoke a waiver granted to California to deal with its specific air pollution problems, something enshrined in the CAA when it was enacted. Meanwhile, challengers claim that Congress has never authorized the National Highway Traffic Safety Administration to issue regulations that say state laws are preempted by the EPCA, and that the administration's move flies in the face of the EPCA, the CAA and the Supreme Court's landmark ruling in 2007's Massachusetts v. EPA, in which the justices said GHGs are an air pollutant under the CAA.

The One National Program rule is one part of the Safer Affordable Fuel-Efficient Vehicles rule, which was issued jointly by the EPA and NHTSA last year. The White House is still working on the second half of the rule, in which the EPA has proposed to roll back Obama-era GHG standards and NHTSA has proposed to set new national Corporate Average Fuel Economy, or CAFE, standards. That will assuredly also be challenged in court once it's finalized.

The battle between President Donald Trump and California has also divided automakers. Ford Motor Co., Honda Motor Co. Ltd., Volkswagen AG and BMW AG have agreed to abide by California's GHG emissions standards no matter what the EPA does. General Motors Co., Fiat Chrysler Automobiles NV, Toyota Motor Corp. and several other auto giants have sided with the administration.

The cases are State of California et al. v. Chao et al., case number 1:19-cv-02826, in the U.S. District Court for the District of Columbia, and Union of Concerned Scientists et al. v. NHTSA, case number 19-1230, in the U.S. Court of Appeals for the District of Columbia Circuit.

Pipeline Permitting Fight at the Supreme Court

The U.S. Supreme Court in October agreed to review the Fourth Circuit's invalidation of the U.S. Forest Service's authorization for the \$7 billion Atlantic Coast gas pipeline, which the agency and the project's developers claimed could stifle East Coast energy infrastructure development.

Specifically, the high court is reviewing the Fourth Circuit's conclusion that the Forest Service didn't have the Mineral Leasing Act authority to grant a right-of-way for the pipeline across the Appalachian National Scenic Trail. The Forest Service and Atlantic Coast argue that the Fourth Circuit improperly transformed the trail into part of the National Park System, meaning a 0.1 mile section of the 600-mile pipeline being built by Dominion Energy Inc. and Duke Energy Corp. subsidiaries would need congressional approval to cross that span.

The government and Atlantic Coast have backing from industry groups, that have argued in amicus brief that the ruling could put up barriers to proposed and existing projects along the 2,200-mile Appalachian Trail, as well as other trails that cross national forests and other federal lands.

"The question of whether trails like that pose a barrier to linear infrastructure is significant," said Bracewell LLP environmental partner Ann Navaro, a former Department of Interior official.

Conservation groups told the Supreme Court there's no dispute that the Appalachian Trail is part of the National Park System and that Atlantic Coast itself identified alternate routes for the pipeline. If the high court accepts that argument, that could give pipeline opponents another tool to resist projects, said Kirkland & Ellis energy and infrastructure partner Brooksany Barrowes.

"It could create additional hurdles for pipeline developers where they have to reevaluate their permitting strategies," Barrowes said.

Oral arguments are scheduled for Feb. 24.

The cases are U.S. Forest Service et al. v. Cowpasture River Preservation Association et al., case number 18-1584, and Atlantic Coast Pipeline LLC v. Cowpasture River Preservation Association et al., case number 18-1587, in the Supreme Court of the United States.

FERC's Role in Utility Bankruptcies

FERC and federal bankruptcy courts are locked in a jurisdictional tug of war over who gets to determine the fate of utility power purchase agreements in bankruptcy, and the Ninth Circuit is poised to declare a winner in a case involving one of the nation's largest utilities.

The Ninth Circuit is reviewing a California bankruptcy judge's ruling that FERC has no say over whether Pacific Gas and Electric Co. can ditch more than \$42 billion worth of PPAs in Chapter 11. The court's decision will be immediately compared with the Sixth Circuit's Dec. 12 ruling that the bankruptcy court has the final word over whether FirstEnergy Corp.'s bankrupt merchant unit can ditch a PPA, but should consult with FERC in determining whether rejecting the contract is in the public interest.

Taken together, the cases have major implications for clean energy developers that rely on PPAs to make their projects viable, as well as state regulatory programs that require utilities to use greater amounts of renewable power.

A potential split between the Ninth and Sixth Circuits also raises the prospect of the Supreme Court being asked to settle the issue of where to draw the jurisdictional lines between FERC and the bankruptcy courts when it comes to PPA rejection.

The case is *In re: PG&E Co.*, case number 19-80089, in the U.S. Court of Appeals for the Ninth Circuit.

FERC's Energy Storage Rule

The D.C. Circuit is mulling challenges from utility industry groups and the National Association of Regulatory Utility Commissioners — the umbrella advocacy group for state utility commissions — to FERC's landmark rule making a place for energy storage in wholesale electricity markets.

The challengers claim that FERC Order No. 841 unlawfully intrudes on state authority under the Federal Power Act by saying it can direct local distribution entities — which generally fall under state jurisdiction — to allow energy storage resources to use their facilities in order to access wholesale markets.

It's another battle over where the line is between state and federal FPA jurisdiction that has some likening the case to a previous fight over FERC's demand response rule, which the Supreme Court said didn't intrude on state jurisdiction over retail electricity markets and distribution systems in 2016's *Federal Energy Regulatory Commission v. Electric Power Supply Association et al.*

But Morgan Lewis & Bockius LLP energy regulatory partner Dan Skees said while FERC's demand response rule just addresses customers being paid for reducing their electricity consumption during high-demand periods, Order No. 841 involves resources like batteries that both consume and put power on the distribution grid.

"That has a number of jurisdictional implications that FERC didn't really deal with," Skees said. "To the extent there's a tug of war with FERC and the states, it's a pretty big pull by FERC to say, 'We want jurisdiction over things we haven't traditionally regulated.'"

The lead case is *National Association of Regulatory Utility Commissioners v. FERC*, case number 19-1142, in the U.S. Court of Appeals for the District of Columbia.

Texas Fight Over Soured ETP-Enterprise Partnership

The Texas Supreme Court is poised to have the final word in a \$535 million fight over a soured pipeline deal and its central question that has riveted the Lone Star State's business community: What constitutes a formal partnership?

The court heard oral arguments in October in Energy Transfer Partners LP's fight to reinstate a \$535 million trial court judgment on the grounds that Enterprise Products Partners LP cut it out of a pipeline partnership. The Fifth Court of Appeals wiped out the blockbuster verdict in July 2017, concluding that the parties' written agreements included "conditions precedent" that were not met and were not waived, precluding the formation of a partnership.

"You need the law of the land, at least the Republic of Texas land, to clarify the law on partnerships," McKool Smith PC principal Willie Wood said.

Though the two companies had agreed in writing to market a potential crude oil pipeline without forming a partnership, ETP argues that Enterprise's conduct transformed the nature of their working relationship because the conduct satisfies the principles for partnership formation outlined in a five-factor test in the Texas Business Organizations Code.

An Enterprise lawyer told the Texas Supreme Court at oral arguments that the TBOC doesn't prohibit conditions precedent and that it's "legally wrong" that an intent to form a partnership is one of the five factors of partnership formation outlined in the TBOC.

"So many clients want to understand what would be the conduct that they could engage in that would deem them to be in a partnership when their contractual agreement disavows a partnership," said Kirkland & Ellis' Rotman, whose firm represented ETP at oral arguments.

The case is Energy Transfer Partners LP et al. v. Enterprise Products Partners LP et al., case number 17-0862, in the Supreme Court of Texas.

Rule of Capture and Fracking in Pennsylvania

Oil and gas companies are eagerly awaiting the Pennsylvania Supreme Court's ruling on whether fracking in the Keystone State is covered by a long-standing rule protecting drillers from certain underground trespass lawsuits.

The court heard oral arguments in September on whether the "rule of capture" — a 150-year-old legal doctrine that shields drillers from liability when a well taps oil and gas pockets that cross multiple properties — applies to fracking. A lower court said the rule doesn't apply, setting Pennsylvania apart from other energy-producing states, which have applied the rule of capture to the fracking operations that are an essential part of modern-day production.

"If the Pennsylvania Supreme Court deems it appropriate to allow there to be all of this litigation brought in the fracking context, it will have an impact on where oil and gas companies are going to drill going forward," Rotman said.

The case is drawing plenty of attention from outside Pennsylvania's borders. Local and outside industry groups are urging the Pennsylvania Supreme Court to reverse the lower court's decision, and landowner

groups are pressing the high court to uphold it.

"We already know that the state of Texas has looked at this issue and has continued to enforce the rule of capture," Rotman said. "Now if the Pennsylvania Supreme Court goes a different way in the fracking context, it will be a big dichotomy between these two major [energy-producing] states and the risks producers associate with those drilling activities."

The case is Adam Briggs et al. v. Southwestern Energy Production Co., case number 63 MAP 2018, in the Pennsylvania Supreme Court.

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