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Biggest Environmental Law Rulings So Far In 2020

By **Juan Carlos Rodriguez**

Law360 (July 2, 2020, 12:06 PM EDT) -- 2020 has already been a huge year for environmental litigation, with the U.S. Supreme Court clearing up important unanswered questions in water and Superfund law, and an ambitious group of youths losing their effort to bring the federal government to trial over climate policy.

The justices made a splash when they said the Clean Water Act may be used to require permits for pollution discharges that travel through groundwater to federally regulated bodies of water, known as navigable waters of the United States.

They also gave hope to plaintiffs in Montana looking to clean up properties near a Superfund site beyond what the EPA said was necessary by allowing them to pursue certain damages claims in state court, though the decision had good news for companies on the hook, too.

And in another major ruling, the Ninth Circuit held that a group of youth plaintiffs lacked standing to sue the federal government for policies they said exacerbated climate change and put their futures at risk.

Here are five of the biggest environmental law rulings so far in 2020.

Supreme Court Creates New Clean Water Test

In April a split high court **delivered** a big win for the Sierra Club and other environmental groups that are seeking to force Maui County, Hawaii, to get Clean Water Act permits for wastewater injection wells that discharge pollution into the ground and that travels through groundwater to the Pacific Ocean.

The justices said a National Pollution Discharge Elimination System permit is required "when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge."

The U.S. Environmental Protection Agency had argued the law could never be used to regulate pollution that travels through groundwater, but environmentalists convinced the judges that such a finding would create a huge loophole.

Megan Brillault, a principal at Beveridge & Diamond PC, said the decision broke new ground but at the same time was something of a "punt."

"They're punting it back to the courts and even to EPA to provide 'guidance' on this, whether it's through rulemaking or informal guidance," Brillault said. "They didn't want to let Maui County off the hook, but they didn't want to get too involved in defining exactly what a 'functional equivalent' discharge would be."

Justices Break Ground In Superfund Law

In another April split decision, a majority of justices held that the Comprehensive Environmental Response, Compensation and Liability Act does not preclude Montana landowners' right to assert state law claims like nuisance and trespass that don't arise under the act.

The residents are suing Atlantic Richfield Co. under state law for money to clean up their properties on a Superfund site that's already covered by a settlement agreement with the EPA.

But the ruling wasn't a complete win for the plaintiffs, because the justices said that any additional remedial action that comes from the litigation must be approved by the EPA.

John McGahren, a partner at Morgan Lewis & Bockius LLP and deputy chair of the firm's global environmental practice, said the ruling brought a big change for parties like homeowners and owners of municipal wells. Under the Arco ruling, they are now considered to be "potentially responsible parties" under CERCLA.

McGahren said the EPA and those parties did not see themselves that way previously.

"I think you're going to be seeing some interesting arguments coming down the pike on what these parties can and cannot do in the face of the Arco decision," McGahren said. "I think in the past they felt free to demand relief that was above and beyond or consistent with what EPA was doing and I think that's going to be subject to challenges in the future."

Kids Lose On Climate Claims

The Ninth Circuit in January said a group of kids suing the federal government over policies they said help fuel climate change can't take their case to trial because courts don't have the power to change those policies.

In a split decision, a panel said the legislative and executive branches of government are the only ones with the authority to redress the kids' alleged injuries.

The majority said that the kids presented compelling evidence about their injuries, such as being forced to move because of lack of drinking water and having to evacuate because of coastal flooding. And the judges said there's also evidence that the government's policies are a "substantial factor" in causing the alleged injuries. But they drew the line at whether a court could give the kids the relief they were seeking.

Sara Colangelo, a professor at Georgetown University Law Center and director of the Environmental Law & Policy Program there, said although the plaintiffs lost, they cleared the way for other lawsuits, such as those filed by cities and counties seeking climate change-related damages against fossil fuel companies.

Colangelo said courts handling those lawsuits might have an easier time awarding damages since money is well within the traditional scope of court-mandated awards.

And she said the youths gained ground in other areas, too.

"The [plaintiffs] wrested some key admissions from the government regarding the monumental danger that climate change presents to our nation's health, welfare and resources, and that the primary driver is fossil fuel combustion," she said. "And the Ninth Circuit panel itself issued favorable findings in its standing analysis, including that the plaintiffs' damages stemmed from climate change and that particular injuries suffered could be traceable to government conduct."

The plaintiffs are seeking en banc review.

EPA Gives Up On Controversial Adviser Policy

The EPA stirred up a hornet's nest in 2017 when it banned scientists who receive agency grants from serving on its advisory committees. Environmentalists and science groups sued the agency over the policy, and were successful enough to prompt the EPA to abandon it.

Former EPA Administrator Scott Pruitt said when he issued the policy that it was intended to help avoid conflicts of interest, but in April, New York U.S. District Judge Denise Cote vacated the policy, siding with the Natural Resources Defense Council on the argument that the EPA failed to properly explain why it changed its past practice of allowing EPA grant recipients to serve on advisory committees, or to back up its conclusion that "grant recipients suffered from bias on account of those grants when they served as members of EPA advisory committees."

In addition to Judge Cote's rulings, the D.C. Circuit in April reversed a lower court judge's dismissal of a challenge to the policy filed by Physicians for Social Responsibility and other groups.

And the Union of Concerned Scientists convinced the First Circuit in March to overturn Massachusetts U.S. District Judge F. Dennis Saylor IV's 2019 ruling upholding the policy and revive their lawsuit challenging it, but the EPA did not address that decision in its statement.

All those losses caused the EPA to announce in June that it would no longer seek to defend the policy in court.

No Undoing HFC Regs

The D.C. Circuit in April sided with environmental groups and states that challenged the EPA's decision to stop implementing an Obama-era rule restricting hydrofluorocarbon use.

A split three-judge panel **said** the EPA had no right in 2018 to stop implementing an Obama-era rule restricting hydrofluorocarbon use after the D.C. Circuit in 2017's Mexichem Fluor Inc. v. EPA vacated parts of the rule. The majority sided with the Natural Resources Defense Council and a coalition of state attorneys general and state agencies that had argued the EPA's 2018 action was a rule that was improperly promulgated without the required rulemaking notice-and-comment process.

U.S. Circuit Judges Sri Srinivasan and David S. Tatel said that under Section 307 of the Clean Air Act, the EPA is supposed to solicit public comments when it issues legislative rules that create legal effects. That

process isn't required when the agency issues interpretive rules, which notify the public of pre-existing legal obligations or rights.

The EPA tried to argue its action was interpretative and therefore didn't require public comment, but the two judges didn't bite.

"The 'line between interpretive and legislative rules' is 'fuzzy' and 'enshrouded in considerable smog,'" they said. "Here, the 2018 rule has independent legal effect beyond that compelled by Mexichem and reflects EPA's intent to exercise its delegated legislative power."

--Editing by Rebecca Flanagan and Alyssa Miller.