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Energy Cases To Watch In The Second Half Of 2019

By **Keith Goldberg**

Law360 (July 15, 2019, 2:28 PM EDT) -- Climate change will dominate the energy-related court cases attorneys will watch in the second half of 2019, while fights over the Federal Energy Regulatory Commission's bankruptcy authority and state-level disputes over energy partnerships and oil and gas rights will draw plenty of eyeballs.

The Ninth Circuit is poised to decide whether a landmark case accusing the federal government of unconstitutionally harming future generations by pushing policies that accelerate climate change can go forward. That appeals court is also mulling the future of lawsuits brought by cities and counties against fossil fuel companies, along with the Second and Fourth Circuits, which creates the potential for a circuit split.

The climate change battle is also being waged in the D.C. Circuit, as the Trump administration and several states square off over a proposed rollback of vehicle greenhouse gas emissions and fuel economy standards. And while it may not be directly tied to climate, the Sixth Circuit's looming decision on whether FERC can have a say in whether utilities can ditch power purchase agreements in bankruptcy could impact clean energy development.

Meanwhile, the U.S. Supreme Court could clarify the scope of Clean Water Act liability for pollution, the Texas Supreme Court will have the last word on a soured pipeline partnership between Energy Transfer Partners and Enterprise Products Partners LP, and the Pennsylvania Supreme Court could decide whether a 19th-century liability shield for oil and gas drillers covers hydraulic fracturing.

Here are seven cases that energy attorneys will be watching in the second half of the year.

Kids' Constitutional Climate Suit Against the Government

A group of children made their last push in June 4 oral arguments to convince the Ninth Circuit to allow their case accusing the federal government of failing to curb and contributing to climate change to go to trial.

The children allege 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 they can't connect those policies to a specific injury and haven't been able to show that a court could give them redress.

An answer from the Ninth Circuit could have huge implications for future climate-related litigation. The judges on the panel seem to acknowledge that, with one saying that 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.

But Kirkland & Ellis LLP partner Anna Rotman said that, while the subject matter and claims may be weighty, all the Ninth Circuit is being asked to do at this point is decide whether the claims clear the pleading requirement bar. The appeals court doesn't have to make any broader pronouncements than that, she said.

"The claim itself is controversial, but just procedurally, where the case is, that the motion to dismiss not be granted and the case allowed to proceed certainly doesn't mean that they're going to ultimately rule on the merits, or that the case would get anywhere near the merits," Rotman said.

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

Climate Tort Litigation Against Fossil Fuel Companies

States, counties and cities continue to seek to hold fossil fuel companies liable for climate change-related infrastructure damages, and more cracks are forming between federal courts as to whether the state-law tort claims can be sustained.

In June, fossil fuel companies asked the Fourth Circuit to review a lower court ruling that Baltimore's climate tort belongs in state court. Two other circuit courts are already refereeing fights over the fate of state-law climate suits.

The Ninth Circuit is currently mulling Oakland and San Francisco's appeal of the dismissal of their suits on grounds that global warming should be tackled by lawmakers, not courts, as well as another lower court decision that sent suits by several California cities and counties back to state court.

Meanwhile, New York City has urged the Second Circuit 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.

Rotman, who is representing an oil and gas company in several climate torts, said it's likely that the Supreme Court is eventually going to have to weigh in on the issue.

"I do think everyone thinks that's where it's going, because you could have so many circuits that are split," Rotman said. "I don't think that the Supreme Court case will be teed up in the second half of 2019, but I believe that's where this is heading."

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

FERC's Power Deal Authority in Bankruptcy

While much of the focus has been on FERC's bid to have a say in whether Pacific Gas and Electric Co. can ditch $42 billion worth of power purchase agreements in bankruptcy — a bid emphatically struck down by a California bankruptcy judge — the Sixth Circuit's pending ruling in FERC's fight with FirstEnergy Corp. could be a key turning point in the growing turf war between FERC and the bankruptcy courts over what roles they play when a utility goes belly up.

FERC wants the Sixth Circuit to nix an Ohio bankruptcy court's August ruling blocking it from taking any action on FirstEnergy Corp.'s bankrupt merchant unit, FirstEnergy Solutions Corp., rejecting a wholesale PPA with an electricity cooperative. FERC claims the ruling usurps its Federal Power Act authority over wholesale power contracts, while FirstEnergy and three creditor groups argue FERC's position would "nullify" the Bankruptcy Code by depriving the bankruptcy court of the ability to fully oversee a successful reorganization as intended by Congress.

At oral arguments June 26, a Sixth Circuit panel appeared split on the issue. Two judges questioned whether FERC's claim of concurrent jurisdiction would eviscerate the authority of bankruptcy courts to approve contract rejections as part of reviewing and approving a reorganization plan. But the panel's third judge said FERC's obligations to regulate in the public interest can't be swept aside just because a utility has landed in bankruptcy court.

The judges also acknowledged they could potentially create a split with the Fifth Circuit, which said in In the Matter of Mirant Corp. that wholesale power contracts can be breached without FERC approval. With parties in the PG&E litigation already indicating they will appeal the bankruptcy judge's bar of FERC to the Ninth Circuit, the chances of a circuit split will only grow, and the stakes are high for parties on either side of a PPA.

"There are significant consequences to these contracts being rejected," McKool Smith PC principal Willie Wood said. "It affects the financial reporting of companies involved in rejected contracts. It could affect the ability of consumers to get the energy that they need."

The case is In re: FirstEnergy Solutions Corp. et al., case number 18-3787, in the U.S. Court of Appeals for the Sixth Circuit.

Revised Vehicle GHG and Fuel Economy Standards

The D.C. Circuit will hold oral arguments Sept. 6 in the opening salvo of what's likely to be a vicious, extended legal battle over the Trump administration's bid to roll back Obama-era vehicle GHG and fuel economy standards.

Several states, environmental groups and electric vehicle industry players are challenging the EPA's April 2018 decision to revisit the standards, claiming the agency provided no reasonable explanation for yanking the so-called midterm evaluation that determined that corporate average fuel economy, or CAFE, standards for model year 2022-2025 light-duty vehicles were still appropriate.

The EPA, which is poised to finalize its revised GHG and CAFE standards along with the National Highway Traffic Safety Administration, claims its decision to revisit the Obama-era standards isn't a final agency action that can be fought in court. The D.C. Circuit in November rejected the agency's bid to dismiss the suit on those grounds, saying it should incorporate its jurisdictional arguments into its main defense.

Even if the appeals court ultimately decides it can't review the EPA's decision to revisit the Obama-era standards, the case still serves as a preview for the even larger legal battle that will be waged over the revised GHG and CAFE standards once they're finalized. All signs point to the EPA freezing the GHG standards after the 2020 vehicle model year, as well as revoking California's Clean Air Act waiver that allows the state to set its own vehicle emissions standards.

Thirteen other states and Washington, D.C., have adopted California's standards.

The lead case is State of California et al. v. EPA et al., case number 18-1114, in the U.S. Court of Appeals for the District of Columbia Circuit.

Groundwater Pollution Liability

The Supreme Court in February agreed to consider whether CWA liability extends to facilities that pollute certain U.S. waters via groundwater, an issue that has split circuit courts and could impact pipeline spills, coal ash pond leaks and agricultural runoff.

Maui County, Hawaii, had asked the high court to review the Ninth Circuit's finding that the CWA gives permitting authority to the federal government or its state and tribal delegates when pollution is released from a point source, travels through groundwater and ultimately migrates to "navigable waters," which are subject to CWA jurisdiction.

Maui County has since indicated it's in settlement talks with the environmental groups that originally sued the county. But even if a deal is struck, there are a pair of groundwater petitions that the Supreme Court could take on in place of the Maui petition.

Kinder Morgan is seeking review of a Fourth Circuit ruling that was in line with the Ninth Circuit's on the issue of pollution from a point source through groundwater to a CWA-covered water, and environmental groups have asked the high court to take a look at the Sixth Circuit's ruling that ran counter to the findings of the other two circuits.

The case is County of Maui v. Hawaii Wildlife Fund et al., case number 18-260, in the U.S. Supreme Court.

Rule of Capture and Fracking in Pennsylvania

The Pennsylvania Supreme Court agreed in November to determine how to apply the so-called 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, to hydraulic fracturing. The implications for gas development in the Keystone State could be huge, attorneys say.

A lower court held in April 2018 that the rule of capture doesn't apply to fracking — the drilling technique that has fueled the boom in U.S. oil and gas production. The Superior Court of Pennsylvania concluded that the differences between conventional drilling and hydraulic fracturing, including the possibility that fractures could cross property lines below ground, were significant enough that the rule could not apply to the latter.

Read broadly, the lower court ruling could essentially abolish the rule of capture for new drilling technologies and create new litigation risks for the companies that employ them in Pennsylvania, according to Wood.

"If the rule of capture cannot protect that company from allegations by neighboring landowners of drainage, then you could be mired in a number of lawsuits by unleased mineral owners who are unhappy about not being leased," Wood said.

Rotman said she's already had conversations with clients concerned over whether they should drill close to the borders of their properties in light of future litigation risks if the Pennsylvania Supreme Court decides the rule of capture doesn't apply to fracking.

Attorneys also noted the potential for a split between states over the rule of capture's reach. The Texas Supreme Court, for example, held in the 2008 case Coastal Oil and Gas v. Garza Energy Trust that the rule of capture shielded drillers from potential damages from drainage of oil and gas from a neighboring property due to a fracked well on their property.

"If the Pennsylvania Supreme Court were to decide differently, it would really put quite a difference in terms of how very oil and gas rich jurisdictions are addressing the exact same issue, and for developers, put a lot more risk into developing in Pennsylvania," Rotman said.

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

Texas Tussle Over Soured ETP-Enterprise Partnership

The Texas Supreme Court on June 28 agreed to review an appellate court's reversal of a $535 million judgment in Energy Transfer Partners' suit alleging that Enterprise Products Partners had cut it out of a pipeline deal. The Fifth Court of Appeals concluded in July 2017 that the parties' written agreements related to marketing a potential crude oil pipeline included "conditions precedent" that were not met and were not waived, precluding the formation of a partnership.

The case has not only attracted the attention of Texas oil and gas firms, but all Lone Star State companies, as the original trial judgment in ETP's favor created uncertainty over what it takes to form a partnership and at what point in negotiations potential liabilities start cropping up.
"It is a major case for all entities in the M&A business," Wood said. "If courts are going to enforce a deal that had not completely bloomed into an executed, final document ... then I think folks are going to be extra careful about their letters of intent, their memorandums of understanding and documents that are preparatory to getting to a final, signed deal."

Some attorneys have said the appellate court's reversal eased some of the uncertainty that permeated after the ETP trial, but they were hopeful the ruling would give the Texas Supreme Court a chance to offer final clarification on what the steps are in the formation of a partnership.

Oral arguments are scheduled for Oct. 8.

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

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