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Environmental Cases Of The Decade

By **Jesse Greenspan**

Law360, New York (January 14, 2010) -- In the past 10 years, landmark rulings paved the way for the U.S. government to begin regulating greenhouse gas emissions, limited the scope of the Clean Water Act and overturned a number of Bush administration regulations.

Here are the cases that top environmental attorneys singled out for Law360 as the most influential in the last decade:

Massachusetts v. EPA

About a dozen states and certain environmental groups initiated this lawsuit after the U.S. Environmental Protection Agency denied an administrative rulemaking petition that asked it to set motor vehicle emission standards for greenhouse gases.

The EPA under President George W. Bush said it lacked the authority to regulate such emissions under the Clean Air Act. Even if the EPA did have the power to do so, it would prefer to handle the problem through voluntary programs and further study, it said.

But in April 2007, the U.S. Supreme Court ruled 5-4 that carbon dioxide and other greenhouse gas emissions fit within the definition of an air pollutant under the Clean Air Act, and that the EPA “offered no reasoned explanation” for its refusal to regulate them.

This ruling set the stage for the EPA under President Barack Obama to begin regulating greenhouse gas emissions for the first time. It also sparked a number of new lawsuits, prompted law firms to begin forming climate change practice groups, led to the Endangered Species Act listing of the polar bear, and shaped the debate in the U.S. Congress over cap-and-trade legislation, according to experts.

Massachusetts v. EPA “is going to usher in the dawn of regulating greenhouse gas emissions,” said Chet M. Thompson, co-chair of Crowell & Moring LLP's environment and

natural resources group and former deputy general counsel at the EPA.

“But for that decision, it would have been very difficult for [greenhouse gas regulation] to happen,” Thompson said. “For what it's worth, I think most other cases pale in comparison in terms of their importance and what it's going to mean from the standpoint of environmental law going forward.”

A recent survey of over 400 law professors and practicing attorneys — conducted by professors J.B. Ruhl of the Florida State University College of Law and James Salzman of Duke University School of Law — ranked Massachusetts v. EPA as the most significant environmental law case of all time.

“Its holding may have limited legal import, but its potential broader significance is huge,” Ruhl and Salzman wrote. “Before Mass. v. EPA, climate change was discussed but for the most part extraneous to our legal system. After that case, by contrast, talking about a 'law of climate change' doesn’t seem like a crazy idea."

The case is Massachusetts et al. v. Environmental Protection Agency et al., case number 05-1120, in the U.S. Supreme Court.

Rapanos v. United States

This case involved a Michigan developer who was convicted of filling in wetlands for a shopping mall without a permit.

In a convoluted decision issued in 2006, four Supreme Court justices led by Justice Antonin Scalia essentially ruled that a wetland was only covered under the Clean Water Act if it was adjacent to a water of the United States and had a continuous surface connection with that water.

But in a concurring opinion, Justice Anthony Kennedy said jurisdiction over a wetland depended on the existence of a “significant nexus” between the wetland in question and navigable waters.

Meanwhile, the remaining justices agreed with the federal government's broader position, which said any area supporting plants that required wet conditions during certain parts of the year could count as a wetland under the act.

“The law of the land is more or less what one justice says it is, versus what any four of the

other eight think it is," Ruhl said. "It's sort of an odd outcome."

Due to uncertainty as to which waters remain protected, EPA staff members have spent a significant amount of time working with the states to determine whether they have jurisdiction to issue a permit or take an enforcement action, according to the agency.

Meanwhile, a bill has been introduced in Congress that would negate the effect of Rapanos and another Supreme Court decision, Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers.

Among other things, the legislation would replace the term "navigable waters" in the Clean Water Act with the words "waters of the United States" and define that term to provide protection to a wide range of water bodies, from lakes and streams to mudflats, sandflats, wetlands, sloughs, prairie potholes and wet meadows.

It would also clarify that the CWA is principally intended to protect the nation's waters from pollution rather than just to sustain the navigability of waterways.

Rapanos was represented in the matter by the Pacific Legal Foundation.

The case is Rapanos et al. v. United States, case number 04-1034, in the U.S. Supreme Court.

South Florida Water Management District v. Miccosukee Tribe

In this case, the Miccosukee Tribe of Indians and the Friends of the Everglades alleged that the South Florida Water Management District illegally pumped canal water loaded with phosphorous and other pollutants into an undeveloped wetland without a permit.

The water district responded by saying it did not add any pollutants to the water and therefore had not violated the Clean Water Act.

The tribe and the conservation group won victories at the lower court and appeals court levels. But then, in 2004, the Supreme Court ruled unanimously in favor of the water district, finding that a discharge permit was required to transfer water from one place to another only when the two places were meaningfully distinct.

This type of situation comes up often for dam owners and operators, according to Richard M. Glick, chair of the natural resources group at Davis Wright Tremaine LLP. Thus far,

though, the government has not required them to get permits, he said.

He pointed out, however, that the issue was still being resolved.

The case is South Florida Water Management District v. Miccosukee Tribe of Indians et al., case number 02-626, in the U.S. Supreme Court.

Burlington Northern & Santa Fe Railway Co. v. United States

In this Superfund case, the U.S. government sued Shell Oil Co., certain railroads and others to recover cleanup costs associated with a now-defunct chemical distributor near Bakersfield, Calif.

In a May 2009 opinion, the Supreme Court ruled 8-1 that Shell could not be held liable for any cleanup costs even though it knew spills would occur, and that the railroads — which leased land to the defunct company — were only responsible for a small portion of the bill.

Knowledge alone is insufficient to qualify a company as an arranger under the Superfund law, according to the high court, which had decided a couple of related Superfund cases earlier in the decade.

“Most Superfund practitioners had been practicing under the assumption that there was joint and several liability,” Glick said.

“That got people to the table and brought about rapid settlements,” he added. “It's a different ballgame now. I think EPA has less leverage as a result of that decision.”

Shell was represented in the matter by Quinn Emanuel Urquhart Oliver & Hedges LLP. The railroads were represented by Latham & Watkins LLP.

The case is Burlington Northern & Santa Fe Railway Co. v. U.S. et al., case number 07-1601, in the U.S. Supreme Court.

Bush Administration Air Rules

According to Glick, the Supreme Court was unusually active in environmental law over the past few years, but it has not provided much clarity.

“The [justices] hear the cases, they take them on, but they don't resolve them,” Glick said. “The Supreme Court strikes me as muddled in its approach to resolving disputes.”

Ruhl agreed that the Supreme Court had not brought much clarity to the field, but he said its job was to decide cases and not to make lawyers' jobs easier.

Either way, not all the significant cases of the past decade went to the high court. In fact, over the span of a couple of years, the U.S. Court of Appeals for the District of Columbia Circuit shot down at least three separate Bush administration rules dealing with the Clean Air Act.

In March 2006, the D.C. Circuit vacated a rule promulgated by the EPA to relax its new source review program, saying that “only in a Humpty Dumpty world” could the EPA lawfully make those exemptions for industry.

Then, in February 2008, the D.C. Circuit struck down an EPA decision to regulate mercury emissions from coal-fired plants through a cap-and-trade system, rather than through a stricter provision of federal law.

The court said in that ruling that EPA had used “the logic of the Queen of Hearts, substituting EPA's desires for the plain text” of the Clean Air Act.

“There were a lot more, dozens and dozens of cases like these,” said Patti Goldman, vice president for litigation at nonprofit environmental law firm Earthjustice.

The Bush administration tried to stop enforcing environmental laws and to undo statutes by regulation and interpretation — actions that resulted in citizen and prevention groups bringing the issues to the courts, “and then the courts being the constitutional check on that overreaching,” Goldman said.

In a third case, decided in July 2008, the D.C. Circuit struck down the EPA's Clean Air Interstate Rule, which would have directed 28 Eastern states and the District of Columbia to cut their emissions of smog and soot-producing gases that travel downwind to other states.

A couple of months later, though, the appeals court decided to keep the rule in place to protect public health while the federal government fixed its flaws.

“When that rule got vacated, it was a huge blow,” Thompson said. “No one really wanted that.”

“I think industry, the states, the environmentalists and the EPA were all on the same side in this one, which is pretty rare now-a-days,” he added.