

Environmental Legislation And Regulation To Watch In 2016

By **Juan Carlos Rodriguez**

Law360, New York (December 24, 2015, 8:37 PM ET) -- Environmental attorneys are awaiting a raft of important regulations and legislation in 2016 — from new methane limits in the oil and gas sector to wildlife rules regarding habitat and species protection — as well as the results of a continued push to revamp a toxic substances law.

Here, Law360 looks at the most important environmental legislation and regulation to watch in 2016.

Oil and Gas Methane Rule

The U.S. Environmental Protection Agency expects to finalize its rule clamping down on methane emissions from new and modified sources — including hydraulically fractured wells — by June 2016. It's the linchpin of the Obama administration's plan to reduce methane emissions from the oil and gas sector by 40 percent to 45 percent from 2012 levels by 2025.

Under the rule proposed in August, oil and gas companies will have to find and repair leaks, capture gas from the completion of fracked wells, limit emissions from new and modified pneumatic pumps, and limit emissions from several types of equipment used at gas transmission compressor stations, including compressors and pneumatic controllers.

The EPA's proposal would also require that the industry reduce volatile organic compounds and methane emissions from hydraulically fracked and refracked oil wells, which the agency said can contain significant amounts of natural gas along with oil. The proposed rule also means methane and VOC reductions downstream from wells and production sites, covering equipment in the natural gas transmission segment of the industry that was not previously regulated.

Critical Habitat Designations

The U.S. Fish and Wildlife Service and the National Marine Fisheries Service have proposed two joint, interrelated rules regarding the implementation of Sections 4 and 7 of the Endangered Species Act and a draft policy concerning critical habitat designations.

"The services state throughout the Federal Register notices that the amendments are intended to add clarity, and provide for credible, predictable, and simplified processes, but the proposed amendments go far beyond mere clarifications to overhaul the entire critical habitat designation process and significantly change how the services will determine what constitutes 'destruction or adverse

modification' of that critical habitat," said Barbara Craig, a partner at Stoel Rives LLP.

She said that if the services adopt the rules and policy as proposed, it is likely the rules and policy will be challenged, with stakeholders from all sides weighing in on the legal boundaries of critical habitat.

Animal Species Protection

Parker Moore, a principal at Beveridge & Diamond PC and chair of the firm's ESA practice group, said 2016 promises to be one of the most active years under the nation's protected-wildlife laws, particularly the Endangered Species Act and the Migratory Bird Treaty Act.

Moore said the U.S. Fish and Wildlife Service this winter plans to finalize a rule under Section 4(d) of the Endangered Species Act that would provide exemption for some activities in the northern long-eared bat's 37-state range from the ESA's take prohibition, which disallows the killing of listed animals.

"FWS likely will take a broader approach under the final rule that focuses on potential impacts associated with the location of an activity rather than the activity type," Moore said.

He said the service is expected to expand 4(d) rule coverage beyond the timber industry to also cover tree-clearing activities of other industries as long as project developers take steps to protect the species through setbacks, in lieu fee payments into conservation funds, and other conservation measures.

Later in 2016, the FWS will make two significant determinations on whether to propose ESA protections for two pollinator species with extensive ranges: the monarch butterfly and the rusty-patched bumblebee. An ESA listing for either species could dramatically limit warm weather project development across the majority of the U.S., Moore said.

And this January FWS plans to issue an interpretive rule defining unauthorized "take" under the Migratory Bird Treaty Act. The issuance of that interpretive rule, which will not be subject to public notice and comment, is coming as a result of the Fifth Circuit's September decision striking down a criminal prosecution under the MBTA for incidental take of birds resulting from commercial activities.

Toxic Substances Control Act

After many years of trying, both the House and Senate passed legislation to revamp the Toxic Substances Control Act in 2015. The Senate's version passed in December, and another version cleared the U.S. House of Representatives earlier in the year.

Many lawmakers have said the TSCA is outdated and fails to offer necessary protections against certain harmful chemicals. Those supporting the overhaul seek to better protect public health and safety and reduce confusion for manufacturers.

Under the Senate version, the EPA is required to consider only the health and safety impact of a chemical when assessing its safety. The bill would ensure special protections for those most vulnerable from chemicals — pregnant women, infants, the elderly and chemical workers.

The bill must now make its way through a House and Senate reconciliation process before it can go before President Barack Obama.

Aircraft Emissions

This year the EPA intends to finalize its findings that greenhouse gas emissions from aircraft cause or contribute to air pollution that may reasonably be anticipated to endanger public health and welfare. But the agency has said it is not planning at this time to propose or issue aircraft engine greenhouse gas emission standards.

In June, the EPA determined that under the Clean Air Act, carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride emissions from aircraft endanger the public health and welfare of current and future generations. Those six chemicals were defined as air pollution in a 2009 Endangerment Finding under the law, and together, the EPA said, they constitute the primary cause of climate change.

Along with the proposed rule, the agency issued an advance notice of proposed rule-making about issues related to setting an international carbon dioxide standard for aircraft at the International Civil Aviation Organization. The agency also said it wants to research the potential use of Section 231 of the Clean Air Act to adopt and implement corresponding aircraft engine GHG emissions standards domestically.

Congressional Targets

Members of Congress, particularly Republicans, have gone to great — and mostly unsuccessful — lengths to express their displeasure with Obama and his administration's various environmental initiatives. The various spending riders and legislation haven't hit their marks, but Thomas Jensen, a partner at Holland & Hart LLP, said the effort is unlikely to slow in the coming year.

The priorities of some in Congress include legislation to revise the land use plans recently announced by the Department of the Interior's Bureau of Land Management to conserve sage-grouse habitat, specifically bills to remove limits on mining and oil and gas development, Jensen said.

There could also be legislation to overturn the president's recent directive on mitigating impacts on natural resources, particularly the provision urging agencies to seek to ensure a "net gain" for resources when defining the amount or type of mitigation required to offset development-related effects on a natural resource.

Jensen said there may also be legislation to privatize federal water projects as a means to loosen or eliminate federal environmental restrictions on water users as well as legislation to transfer federal public lands in Utah and other western states to state ownership.

He said Congress is reacting to Obama's perceived aggressive use of executive authority on a range of environmental matters, including measures to protect habitat for at-risk species from development and climate change.

"Many on Congress and in some sectors of industry are sure to try to push back with bills undoing executive branch initiatives or taking federal assets out of federal control," Jensen said. "The odds of any bills becoming law are slim, given the president's stated willingness to veto anti-environmental legislation, but the symbolic and political messaging appeal of the efforts will be irresistible to some."