Environment, Energy, and Resources Law

The Year in Review 2023

AMERICAN BAR ASSOCIATION
Environment, Energy, and Resources Section

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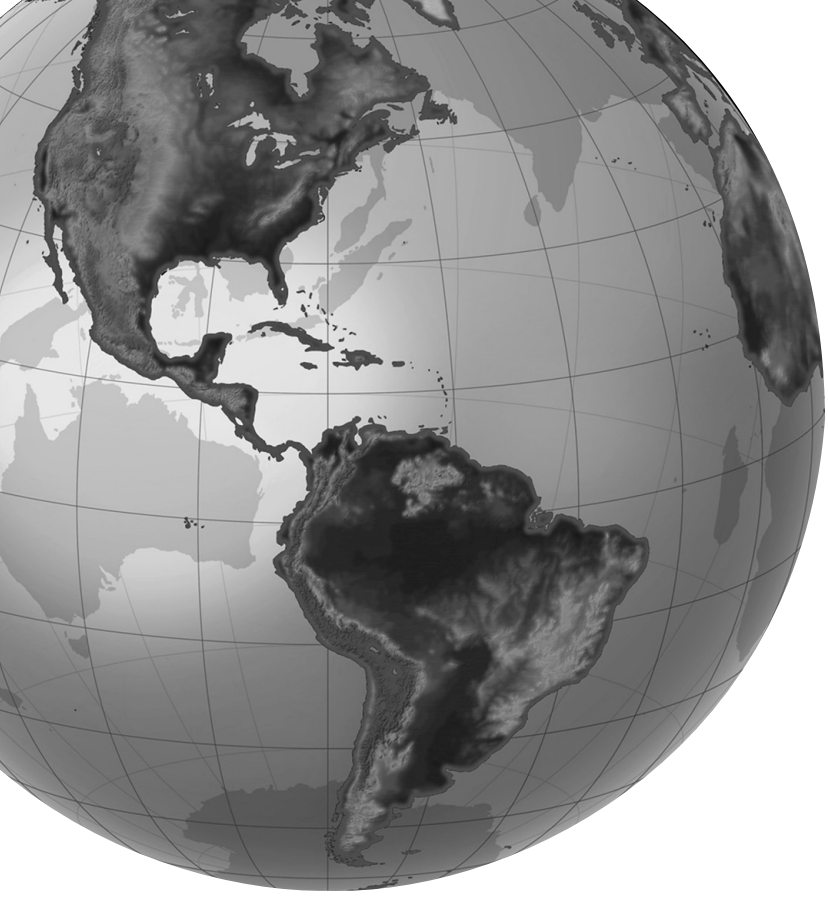

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Environment, Energy,
and Resources Section

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2023–2024

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SUMMARY OF CONTENTS

INTRODUCTION

The Year in Review: 2023 is the fortieth annual summary of developments in environmental, energy, and resources law. It is being made available without charge again, as a benefit to members of the Section of Environment, Energy, and Resources of the American Bar Association.

The Year in Review reflects the dedication and hard work of many individuals. Typically, members of a Section committee draft the analysis in that committee's area of expertise. The manuscript is then transmitted to the committee's Year in Review Vice Chair or designated primary author who reviews it before sending it to The University of Tulsa College of Law.

Among the students deserving special thanks are Maddie Brady, William Orr, and Kayla Tunley. Thank you also to the students on *The Year in Review* staff for their assistance in editing and their dedication to this publication. The time and effort put forth in such a compressed period indicates a commitment to quality and to providing information regarding substantive developments in law of the area.

A final thank you must be extended to Erin Potter Sullenger, Special Committee Chair on *The Year in Review*; Mason Gregg, Section Editorial Associate; Sean Dixon, Section Publications Officer; and Dana Jonusaitis, Section Director. Their time and efforts were instrumental in making the editing and publication process run smoothly.

The result of this process is a concise, comprehensive, and timely analysis of current developments in areas of law that are of crucial interest to Section members. All of us associated with *The Year in Review* are proud of our work and pleased to be of service to our profession.

Jordan "Lizzie" Faletto
Student Editor-in-Chief

Warigia Bowman
Faculty Advisor

Tulsa, Oklahoma
April 15, 2024

2023 *Year in Review* Highlights[1]

If you are on the hunt for a resource that can provide a snapshot of key developments in 2023 in the areas of environmental, energy, and resource law – look no further! You've arrived at the right place. Welcome to the 2023 *Year in Review*.

The ABA SEER's *Year in Review* is organized into chapters that correspond with and are written by members in each of the SEER substantive committees, as well as three chapters that cover topics that transcend our committees, namely Constitutional Law, Environmental Justice, and Ethics. Each committee organizes and writes its chapter as an annual report, focusing on significant developments, events, cases, regulations, and other notable policy changes that occurred in the prior calendar year. It is not the intent of the committees, nor the *Year in Review* to capture all developments. This Highlights section offers a brief snapshot of a few of the topics discussed by more than one of the committees, as well as noting a handful of unique developments that may be of interest to all SEER members. Just like the *Year in Review*, the Highlights section is not a comprehensive summary and by no means captures all of the topics mentioned by multiple committees. Instead, it serves as a starting point for you, the reader, identifying a few hot topics and what chapters to explore for different discussions and perspectives on those topics.

Environmental Justice

While several committees highlight developments in the area of environmental justice, the *2023 Year in Review* includes, for the first time, a stand-alone chapter on environmental justice. The **Environmental Justice** chapter examines developments at the federal and state levels, as well as action taken by the American Bar Association. These developments include the issuance of a comprehensive Presidential Executive Order on EJ; implementation of the EJ aspects of the Inflation Reduction Act; EPA's issuance of guidance to distribute billions to support EJ; New York State's adoption of a groundbreaking environmental justice law; New Jersey's issuance of first-of-a-kind EJ regulations; judicial rejection of EJ-based claims; and the ABA's issuance of a "Blueprint to Advance Environmental Justice."

Ongoing developments related to PFAS regulation and litigation

For the past several years, the topic of per- and polyfluoroalkyl substances (PFAS) was a hot topic among the SEER committees, and the *2023 Year in Review* is no different. Collectively, these committees provide a broad perspective of the legal developments around PFAS substances. The most thorough discussion is found in the **Pesticides and Chemicals** chapter. There, you can find updates ranging from EPA's proposed Significant New Use Rule (SNUR) on the manufacture of PFAS, certain ongoing litigation related to PFAS, and a snapshot of state PFAS legislation. What could be considered a "must read" for all SEER members is the thorough review and discussion offered in the **Transactions and Brownfields Redevelopment** chapter. The committee walks readers through how PFAS impacts real estate due diligence, particularly when conducting a Phase I and Phase

[1]The Highlights for the *Year in Review* is written by Erin Potter Sullenger, Senior Counsel, Environmental, Health and Safety, at The Williams Companies in Tulsa, Oklahoma. She is the Chair of the Special Committee for the *Year in Review*. The Chair would like to acknowledge the superb editing job by the students at the University of Tulsa College of Law on this year's publication.

II Site Assessments. The **International Law** committee provides information concerning a proposal from the European Chemical Agency (ECHA) to restrict PFAS across Europe. The **Science and Technology** committee discusses developments in judicial challenges to the EPA's PFAS health advisory. The **Enforcement and Litigation** committee kicks off its chapter with a discussion of PFAS developments in federal and state regulation and a discussion around the request for medical monitoring in most PFAS litigation. The committee also notes that "Addressing Exposure to PFAS" is listed in the EPA's Office of Enforcement and Compliance Assurance's (OECA) National Enforcement and Compliance Initiatives. Finally, the **Food and Agriculture** committee highlights several pieces of PFAS legislation in the states.

Climate disclosure laws and regulations

A growing clamor for improved corporate disclosures concerning climate risks, greenhouse gas emissions, and climate adaptation continued in 2023, with California's climate disclosure laws garnering much attention. The **Environmental, Social, Governance, and Sustainability** committee provides a very nice summary and overview of California's laws around climate data accountability, financial risk disclosure, and carbon market disclosure. Additionally, the committee offers perspective on additional activity related to the Security and Exchange Commission's (SEC) proposed rule for The Enhancement and Standardization of Climate-Related Disclosures for Investors. The SEC proposed rule is also discussed by the **International Law** and **Food and Agriculture** committees.

Infrastructure needs and development

In the wake of the Bipartisan Infrastructure Bill, several committees provided updates regarding infrastructure investment, assessments, and needs. The **Climate Change** committee discussed updates to the National Transmission Needs Study from the Department of Energy (DOE), as well as investments DOE is making in other energy infrastructures, such as hydrogen hubs. Many states are also keenly interested in ensuring the resilience of energy systems and took steps in 2023 to enact laws and implement policies with that as an end goal. The **Energy** committee also highlighted investment in tribal energy infrastructure and provides a thorough discussion of capital available for funding energy infrastructure projects through several pieces of congressional legislation. The **Project Development** committee gives updates concerning progress across the country in developing electric vehicle infrastructure. The **Waste and Resource Recovery** committee shares how funding from the Bipartisan Infrastructure Bill is going towards expanding the recycling and waste management infrastructure systems in an effort to build a circular economy.

Greenhouse gas emissions (GHG) legislative and regulatory developments

The **Air** committee discusses several proposed rules from the U.S. Environmental Protection Agency concerning GHG emissions from motor vehicles, as well as the proposed amendments to the Greenhouse Gas Reporting Rule and the proposed rule setting stricter new source performance standards for GHG emissions from new and modified fossil fuel power plants. The **Climate Change** committee outlined the proposed rule to implement the newly added section 136 of the Clean Air Act, creating a direct charge for methane emissions. This committee also summarized the Interim Guidance published by the Council on Environmental Quality on considering GHG emissions and climate change when conducting an environmental analysis under the National Environmental Policy Act (NEPA). The **Oil and Gas** committee discusses a new law in Colorado that sets the state

on a path towards eliminating GHG emissions from electricity generation, gas utilities, and transportation. Additionally, the **Forest Resources** committee includes an update on a proposed rule from the U.S. Forest Service to allow carbon capture and sequestration projects on national forests and grasslands, furthering the Biden Administration's goal to reduce GHG emissions.

The "Grab Bag" of other interesting developments

- **Artificial intelligence in the legal practice**: The **Ethics** chapter in the *2023 Year in Review* includes an interesting discussion on formal guidance issued by the California Bar's Committee on Professional Responsibility and the use of artificial intelligence (AI) in the legal practice. California is the first state to issue this guidance.
- **Licenses for nuclear power reactors**: The **Nuclear Law** committee provides an update on the developments in issuing new or renewal licenses for nuclear power reactors, noting there are ninety-three operating commercial nuclear power reactors in the U.S.
- **Successful corporate veil piercing**: The **Superfund** committee includes a case on parent-corporation owner liability under CERCLA, in which a federal court found the plaintiff presented sufficient evidence to maintain a corporate veil piercing claim.
- **Presidential proclamations under the Antiquities Act**: The **Public Lands** committee follows several cases from 2023 in which there was a challenge to several presidential proclamations in which President Biden expanded the acreage dedicated to different national monuments. The **Indigenous Law** committee also highlights one of these cases involving the Bears Ears National Monument and the Grand Staircase Escalante National Monument.
- **Challenges to offshore wind**: The **Biodiversity** committee discusses several legal challenges to federal approvals granted for the development of offshore wind projects. Many of these challenges allege inadequate environmental assessments or consultations regarding the Endangered Species Act. The **Oceans and Coasts** committee offers additional insight into this topic as well, providing information on several judicial and administrative developments that impact offshore wind development.
- **Water rights and changes to Waters of the United States**: In 2023, the U.S. Supreme Court issued a decision in *Sackett v. EPA* concerning the definition of "waters of the United States." The **Constitutional Law** and **Water Quality and Wetlands** committees each provide a quick overview of the Court's decision and how the decision was still somewhat divided among the Justices. The **Water Quality and Wetlands** committee also discusses the regulatory revisions undertaken by the U.S. EPA in response to the *Sackett* decision.
- **Ownership of Produced Water**: In addition to a catalogue of water rights and water resource developments across the U.S., the **Water Resources** committee includes an interesting case out of Texas involving the first appellate decision in Texas involving the question of ownership of produced water between the owners of the surface estate and an oil and gas lessee.
- **Highlighting the importance of engaging with the regulators during the regulatory development process**: Utilizing a case study around an issue that arose for nuclear power facilities, the **In-House Counsel** committee provides a thorough illustration of the importance of engaging with regulators and participating in the administrative rule-making process.

- **Interagency Working Group on Mining Laws, Regulations, and Permitting**: The **Mining** committee updates SEER members on the release of a final report from the Department of Interior's Interagency Working Group on Mining Laws, Regulations, and Permitting. The committee highlights some of the central recommendations from the final report.

We hope these highlights entice you to explore the *2023 Year in Review*!

Chapter A: AIR
2023 Annual Report[1]

I. JUDICIAL DEVELOPMENTS

A. Title I - National Ambient Air Quality Standards (NAAQS), Federal Implementation Plans (FIPs) & State Implementation Plans (SIPs)

In *Sierra Club v. EPA*,[2] the Sixth Circuit granted a petition for review filed by environmental groups challenging EPA's removal of Ohio's Air Nuisance Rule (ANR) from its State Implementation Plan (SIP) under the Clean Air Act (CAA). The court held that the petitioners had Article III standing to challenge EPA's decision, rejecting EPA's arguments that the alleged injury would not be redressed by reinstating the ANR and that petitioners had suffered no procedural injury because they could still bring a nuisance lawsuit in the absence of the ANR. The court held that EPA's removal of the ANR prevented the petitioners from using it to challenge pollution in Ohio and that this was enough to establish standing "without regard to the hypothetical outcome of such suits."

Granting EPA's request for voluntary remand, which Ohio as intervenor opposed but petitioners did not, the court did not rule on the merits of the ANR decision. Petitioners argued that EPA's decision was an improper use of the "error-correction provision" in CAA section 7410(k)(6). EPA argued that the approval of the ANR had been in error because the ANR had no "nexus" to NAAQS implementation, maintenance, or enforcement, as required for a SIP. The court emphasized that EPA had only belatedly asserted, in its rule finalizing the removal, that the ANR was not associated with NAAQS enforcement. The court declined to vacate the ANR removal on remand, weighing the "seriousness of the agency error" against the "disruptive consequences of vacatur."

In *Midwest Ozone Group v. EPA*,[3] the D.C. Circuit denied a petition for review brought by a collective of utilities seeking to overturn EPA's 2021 Revised Cross-State Air Pollution Update Rule for ozone.[4] The rule, promulgated in response to a 2019 D.C. Circuit decision remanding EPA's prior iteration,[5] promulgates ozone pollution reduction requirements for upwind states consistent with the CAA Good Neighbor Provision, section 7410(a)(2)(D)(i). The court rejected the petitioners' argument that EPA's revised rule was arbitrary and capricious because the agency had used an interpolation technique to project

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[1]The Air Committee prepared this report. This report lists significant judicial decisions and nationally applicable (i.e., not project- or area-specific) regulations. Cases and regulations are listed chronologically within each section. Zachary Fayne, Samuel Pickerill, Madison Dipman, and Stanley Kaminsky, Arnold & Porter Kaye Scholer LLP, San Francisco, Washington, D.C., Los Angeles, and New York edited the report. Contributing authors were Aidan R. Freeman, Marten Law LLP, Portland, Oregon; H. Michael Keller and Jacqueline Rosen, Fabian VanCott, Salt Lake City, Utah; Sean Kelley, Mississippi College School of Law, Jackson, Mississippi; John B. (Jack) Lyman, Marten Law LLP, Washington, D.C.; Todd E. Palmer, Michael Best & Friedrich LLP, Milwaukee, Wisconsin; Jennifer K. Rushlow, Maverick Lloyd School for the Environment, Vermont Law and Graduate School, South Royalton, Vermont; and Doug Williams, Saint Louis University School of Law, St. Louis, Missouri. Senior Legal Assistant Leigh Logan, Arnold & Porter Kaye Scholer LLP, Washington D.C., also assisted in the preparation of this report.

[2]60 F.4th 1008 (6th Cir. 2023).

[3]61 F.4th 187 (D.C. Cir. 2023).

[4]Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 86 Fed. Reg. 23,054 (Apr. 30, 2021) (to be codified at 40 C.F.R. pts. 51, 52, 78, 97).

[5]*See* Wisconsin v. EPA, 938 F.3d 303 (D.C. Cir. 2019).

ozone concentrations in 2021 based on prior years' data rather than the petitioners' preferred photochemical modeling technique, which EPA had used in previous rulemakings. The court held that EPA is not required to adhere to its own past practice in choosing a pollution assessment technique, nor is it required to use any particular method; rather, EPA is merely required to consider "the relevant factors" and "demonstrate a reasonable connection" between the facts and its decision. The court held that EPA's techniques were sufficiently rationally connected to the facts and appropriately explained. The court also rejected the petitioners' argument that EPA's action was arbitrary because it was done to comply with a tight deadline for downwind attainment and therefore rushed; the court noted CAA section 7411(a)(1)'s requirement that emissions reductions should be done "as expeditiously as practicable."

In *Board of County Commissioners of Weld County, Colorado v. EPA*,[6] the D.C. Circuit, in response to a petition, held that EPA's designation of a Colorado county as a "marginal nonattainment" area for ozone was not arbitrary or capricious, but that the agency's designation of a Texas county as being in ozone nonattainment was impermissibly retroactive and therefore reversed it. As to Weld County, the court held EPA had not acted "inconsistently" in choosing to designate Weld as part of a nonattainment area while leaving other nearby counties out of that area. The court rejected Weld's critiques of EPA's line-by-line, holding EPA presented data and facts on the record that justified its decision, especially in light of "affirmative evidence" that portions of Weld contribute to the area's nonattainment.

EPA had previously classified El Paso (the Texas county) as "in attainment" but then included it within an existing nonattainment area after that area's attainment deadline had passed, effectively backdating the time period in which El Paso would have had to achieve attainment by three years. The court held EPA "cannot impose on States new obligations with compliance deadlines already in the past."[7] The court rejected EPA's argument that the only obligation actually imposed on El Paso was the requirement that Texas submit a new SIP and thus was permissibly "prospective." The court held EPA's decision was a retroactive adjustment of Texas' "legal rights" because it exposed the state to consequences it otherwise would not have faced. The court reversed EPA's rule only as to El Paso County after finding that the rule's non-arbitrary designation as to Weld County was clearly severable and thus could be separately preserved.

In *Center for Biological Diversity v. EPA*,[8] the Third Circuit denied consolidated petitions brought by the Center for Biological Diversity (CBD) challenging EPA's approval of two revisions to Pennsylvania's SIP that granted seventeen major emitting facilities within the state emissions reduction technology variances. The court rejected CBD's argument that CAA section 110(l) (Plan revisions) required EPA to consider air quality impacts in a holistic manner when approving the SIP revisions. EPA had only considered the revisions' potential to impact emissions levels from the relevant facilities, and CBD argued this "emissions-based approach" did not ensure that the SIP did not interfere with progress toward attainment. The court held that section 110(l) permits a case-by-case approach to analysis that depends on "the specific relationship between the instrument doing the potential interfering . . . and its effect."[9] Regarding the challenged revisions, the court held those SIP revisions could only possibly have affected emissions, and thus it made sense for EPA to "eschew a comprehensive air quality analysis."[10]

The court declined to consider an argument raised by CBD in the second of its two consolidated petitions because that petition was still pending before EPA and thus could

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[6] 72 F.4th 284 (D.C. Cir. 2023).
[7] *Id.* at 293.
[8] 75 F.4th 174 (3d Cir. 2023).
[9] *Id.* at 180.
[10] *Id.*

not be reviewed by a court. That petition raised a discrete argument that the SIP revisions were flawed because some of the proposed emissions control technologies themselves emit pollutants. The court denied the petition without prejudice pending EPA's resolution of the reconsideration process.

In *Heal Utah v. EPA*,[11] petitioners Heal Utah, National Parks Conservation Association, Sierra Club, and Utah Physicians challenged EPA's final rule approving Utah's 2019 revised regional haze SIP. The SIP adopted an alternative measure to Best Available Retrofit Technology (BART) for nitrogen oxide (NOx) emissions from Utah's identified subject-to-BART[12] sources, four electric generating units at two PacifiCorp coal plants. Petitioners challenged the allegedly "technically and legally flawed" dispersion modeling underlying the calculation of NOx emissions reductions.[13] Petitioners also claimed that, when compared to the BART Benchmark calculation, Utah's BART-alternative did not, in fact, achieve the required overall improvement in visibility.[14] The Court disagreed with both substantive arguments, as well as the petitioners' procedural claim that EPA did not respond to certain public comments, and upheld the final rule.

In *Wyoming v. EPA*,[15] the Court heard two consolidated petitions relating to EPA's final rule that disapproved in part and approved in part Wyoming's SIP for nitrogen oxides (NOx) contributing to regional haze. The SIP applied to three qualifying emissions units at two PacifiCorps power plants (Wyodak and Naughton 1 and 2).

EPA's final rule disapproved of Wyoming's BART determination of new low NOx burners with advanced overfire air (LNB + OFA) for the Wyodak emissions unit and issued a Federal Implementation Plan (FIP) with a BART determination of LNB + OFA plus selective catalytic reduction. Wyoming and PacifiCorp petitioned for review of this aspect of the final rule. The Court found that in making its determination, EPA had wrongfully discredited Wyoming for not relying on nonbinding EPA agency guidance.[16] The Court vacated this portion of the final rule and remanded.

EPA's final rule approved of the BART determination of LNB + OFA for the other two emissions units (Naughton 1 and 2). Several conservation organizations petitioned for review of this aspect of the final rule on the basis that EPA should have mandated a BART determination of LNB + OFA plus selective catalytic reduction for Naughton 1 and 2, as EPA did for Wyodak. The Court found that EPA properly exercised its discretion and affirmed this portion of the final rule.

In *Center for Biological Diversity v. EPA*,[17] the Center for Biological Diversity (CBD) challenged EPA's final rule approving a revision of Colorado's SIP on procedural and substantive grounds. The revision pertained to exclusions in Colorado's Nonattainment New Source Review (NNSR) permit program for new or major modified stationary sources of air pollution in the Denver Metro-North Front Range area, a nonattainment area for the 2015 ozone NAAQS. The court disposed of CBD's procedural claim that EPA violated the Administrative Procedure Act by failing to include the proposed regulations in the rulemaking docket during the comment period.

CBD's first substantive claim pertained to the permit program's exclusion of "emissions resulting from temporary activities, such as construction or exploration [and] . . . emissions from internal combustion engines on any vehicle" when determining whether

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[11] 77 F.4th 1275 (10th Cir. 2023).
[12] 40 C.F.R. § 51.308(d).
[13] 77 F.4th at 1285.
[14] 40 C.F.R. § 51.308(e)(3).
[15] 78 F.4th 1171 (10th Cir. 2023).
[16] Guidelines for BART Determinations Under the Regional Haze Rule, 40 C.F.R. § 51, App. Y (2005).
[17] 82 F.4th 959 (10th Cir. 2023).

a new or modified stationary source is "major."[18] CBD alleged, and the Court agreed, that the regulations implementing the CAA[19] do not authorize the exclusion of temporary emissions when determining a stationary source's potential to emit.

CBD also claimed that Colorado's exclusion of emissions from internal combustion engines (ICE) on vehicles was unlawful. The CAA provides that "emissions resulting directly . . . from a nonroad engine" are excluded from the definition of new or modified major sources of air pollution.[20] A "nonroad engine" is defined as "an internal combustion engine that . . . [b]y itself or in or on a piece of equipment . . . is portable or transportable."[21] The Court held that Colorado's NNSR permit program permissibly excluded emissions from ICE vehicles, as they are a "subset of nonroad engines."[22]

B. New Source Review, Prevention of Significant Deterioration, New Source Performance Standards & Title V Permitting

In *Port Hamilton Refining and Transportation LLLP v. EPA*,[23] the Third Circuit held that EPA exceeded its authority under the CAA in applying its Reactivation Policy and issuing a Final Determination Letter requiring the operator of a refinery that was constructed prior to August 7, 1977 and idled for several years to obtain a Prevention of Significant Deterioration (PSD) permit for resumption of operations. The court granted the refinery operator's petition for review and vacated EPA's Final Determination Letter.

In *Port Arthur Community Action Network v. Texas Commission on Environmental Quality*,[24] the Fifth Circuit vacated and remanded a PSD permit issued to a proposed natural gas facility by the Texas Commission on Environmental Quality (TCEQ). The court first held that the petitioner organization had standing to challenge the PSD permit based on allegations of injury made by the organization's president. The court deemed it sufficient to establish Article III injury the president's declaration that, if the facility were permitted to emit all the pollutants authorized by the PSD permit, he would curtail the amount of time he spent outdoors. On the merits, and applying Texas law, the court held that TCEQ had not adequately explained why it selected the best available control requirements (BACT) set forth in the PSD permit. These BACT limitations allowed substantially higher emission rates than were authorized in a prior PSD permit issued to another natural gas facility using identical equipment. The court held that TCEQ had failed to justify its departure from a policy requiring any new PSD facility to reduce its emissions to a degree "at least equivalent" to those treated as BACT for prior facilities. This failing warranted vacatur and remand under Texas law.

In *Port Hamilton Refining and Transportation, LLLP v. EPA*,[25] the Third Circuit granted Port Hamilton Refining and Transportation, LLLP's ("Port Hamilton") petition for review and vacated the EPA's Final Determination Letter. Port Hamilton purchased an existing petroleum refinery (Refinery) in December 2021 with plans to continue operations. In November 2022, the EPA sent notice to Port Hamilton informing the new owner they are required to obtain a PSD permit per 42 U.S.C. §§ 7475(a), 7479(3) before Refinery operations could resume. Under the EPA's Reactivation Policy an existing facility

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[18] *Id.* at 963 (quoting 5 COLO. CODE REGS. § 1001-5:3D.II.A.23.f, 25.f (2021)).
[19] 40 C.F.R. § 51.165 (2024).
[20] 42 U.S.C. §§ 7502(c)(5), 7602(z) (2023).
[21] 40 C.F.R. § 1068.30 (2024).
[22] 82 F.4th at 969.
[23] No. 23-1094, 2023 WL 8103921 (3d Cir. Nov. 22, 2023) (*amending*, 75 F.4th 166 (3d Cir. 2023)).
[24] 86 F.4th 653 (5th Cir. 2023).
[25] 87 F.4th 188 (3d Cir. 2023).

is considered "new" if the EPA regards the facility as being "shut down" and restarted, in which a PSD permit is required before operations can resume.

However, if the EPA determines the facility to be "idle," a PSD permit is not needed. In 2018, the EPA notified the prior owner a PSD permit was not required as it was considered idled since it last operated in 2012. In 2022, the EPA reversed its 2018 decision notifying Port Hamilton an approved PSD permit was required before refinery operations could resume. Port Hamilton argued the EPA has exceeded its authority under the CAA section 7575(a) and petitioned the court to review the EPA's 2022 decision. The court agreed with Port Hamilton because the Refinery is not new and has not been "modified" per the CAA's definition. Further, the court concluded the EPA exceeded its statutory authority under the CAA in requiring Port Hamilton to obtain a PSD permit for the refinery, granting Port Hamilton's petition and vacating the EPA's decision.

C. Title II - Mobile Sources & Fuels

In *Minnesota Automobile Dealers Association v. Minnesota Pollution Control Agency*,[26] the Minnesota Court of Appeals affirmed the validity of the Clean Car Rule (CCR), a rule adopted by the Minnesota Pollution Control Agency (MPCA) that incorporates by reference California's emission standards for new vehicles sold in Minnesota. The court held that the CCR does not violate Minnesota's nondelegation doctrine because Minn. Stat. § 116.07 authorizes the Agency to adopt air-quality standards, including maximum allowable emission standards from motor vehicles. Further, MPCA did not improperly delegate future Minnesota rulemaking authority to California by incorporating California regulations "as amended" since this incorporation is limited to "minor housekeeping updates" and not major updates. The court also held that the CRR does not exceed the MPCA's statutory authority to establish a uniform statewide standard because the rule was consistent with the legislative purpose and policy goals in Minn. Stat. § 116.07, which allows the Agency to adopt air quality standards with statewide effect. Finally, the court held that Minnesota qualifies for the opt-in provision of the federal CAA, which allows states to adopt California's emission standards if the state has a designated nonattainment area. Minnesota qualified by having a lead nonattainment area even though that area achieved attainment in 2015.

In *United States v. Multistar Industries, Inc.*,[27] the court granted summary judgment for the United States, finding that the defendant violated CAA reporting requirements and the Emergency Planning and Community Right-to-Know Act (EPCRA). The defendant received rail cars of a hazardous substance, trimethylamine (TMA), at a transfer station and stored it for extended periods before delivering it to the end customer. The court rejected the defendant's argument that the rail cars qualified for the transportation exemption from the hazardous substance reporting requirements in 42 U.S.C. § 7412(r)(7) (the CAA) and 42 U.S.C. § 11022 (the EPCRA). The exemption applies to hazardous substances that are stored incident to transportation. However, the defendant's rail cars were "stationary sources" under the CAA because they sat for days or weeks decoupled from motive power before the TMA was transloaded into trucks for delivery. The rail cars were also "stationary items" under EPCRA for similar reasons.

In *United Refining Company v. EPA*,[28] the Third Circuit rejected a petition for review of EPA's denial of a refinery's request for a hardship exemption from the Renewable Fuel Standard (RFS) program for the 2019 compliance year. The RFS program requires gasoline and diesel fuel producers to ensure that a certain portion of their annual transportation fuel production consists of renewable fuels. EPA can grant hardship

[26] 986 N.W.2d 225 (Minn. Ct. App. 2023).
[27] 654 F. Supp. 3d 1165 (E.D. Wash. 2023).
[28] 64 F.4th 448 (3d Cir. 2023).

exemptions to small refineries that demonstrate that compliance with the RFS program would impose a disproportionate economic hardship on them. The court held that it was not arbitrary or capricious for EPA to rely on a revised financial statement that showed a higher-than-average refining margin at United's refinery and to refuse to consider the effects of COVID-19 on the refinery that were experienced the year *after* the hardship petition. The court rejected United's argument that the EPA should have followed the Department of Energy's recommendation to grant United a partial exemption. The court deferred to the EPA's interpretation of the statutory criteria for granting exemptions as a reasonable exercise of discretion in evaluating United's petition.

In *California v. EPA*,[29] the D.C. Circuit denied the petitions of twelve states, the District of Columbia, and three environmental groups that challenged the EPA's Aircraft Rule, which aligned domestic aircraft emissions standards with those set by the International Civil Aviation Organization (ICAO). The court held that the EPA acted within its authority under section 231 of the CAA, which grants the agency substantial discretion to regulate aircraft emissions that endanger public health or welfare and does not mandate the consideration of any particular factors. The court also held that the EPA adequately explained its decision to harmonize domestic regulation with the ICAO standards rather than exceed them. The court rejected the petitioners' arguments that the EPA failed to follow executive orders requiring the consideration of the effects of the emissions standards on minority and low-income populations.

In *Wynnewood Refining Co., LLC v. EPA*,[30] the D.C. Circuit denied petitions for review seeking to set aside an EPA rule extending the deadline for regulated entities to report compliance with the CAA's RFS program and establishing new compliance schedules for ensuing years. Responding to missed deadlines for establishing annual requirements for the RFS, and to mitigate the burdens such missed deadlines may place on regulated entities, EPA promulgated a rule that (1) extends the deadlines by which regulated entities must report compliance with the RFS for 2019-2022 and (2) establishes compliance deadlines for 2023 and ensuing years. The effect of these measures was to reduce the amount of time regulated parties had enjoyed to report compliance after learning what EPA had determined to be the relevant annual RFS standard.

The court held that the petitioning refineries had standing to challenge EPA's rules. Contrary to Judge Randolph's dissent conclusion that the petitioners had failed to establish that the rule had injured or will injure them, the majority found that the shortened compliance period imposed higher financial burdens on the refineries, this causing an injury traceable to the rule that could be redressed by a successful challenge. The refineries, accordingly, had standing to maintain their challenge to the rule.

On the merits, the court rejected claims that EPA's rule violated implicit statutory commitments to provide regulated entities with specific periods of time to comply with annual RFS requirements. Specifically, the court held that, contrary to the petitioners' arguments, the CAA does not entitle regulated entities to 13 months' lead time to comply or ensure a minimum of 12 months between each annual compliance deadline. The court also held that EPA's rule was not arbitrary and capricious because it reasonably balanced EPA's duty to meet the RFS's requirements with its responsibility to mitigate the hardships placed in regulated entities by the agency's delays in issuing the annual RFS standards. Finally, the court held that the rule's establishment of future reporting deadlines in the event of delays in establishing the annual RFS standard neither conflicted with the CAA nor was arbitrary and capricious.

In *Wynnewood Refining Company, L.L.C.* v. EPA,[31] the Fifth Circuit granted EPA's transfer of venue request as required under the CAA's venue provision. Venue is determined

[29] 72 F.4th 308 (D.C. Cir. 2023).
[30] 77 F.4th 767 (D.C. Cir. 2023).
[31] 86 F.4th 1114 (5th Cir. 2023).

proper only in the District of Columbia Circuit per 42 U.S.C. § 7607(b)(1). Wynnewood challenged the EPA's April alternative compliance approach (ACA) regarding its small refinery not being required to retire any Renewable Identification Numbers (RINs) to meet 2018 RFS obligations. Wynnewood contended the EPA should provide additional relief, such as Replacements RINs. This case revolves around CAA § 7545(o)(9)(B): in 2018, Wynnewood filed a sub paragraph (B) exemption petition, which EPA granted in August 2019. On remand, the EPA changed its position, denying the grant of Wynnewood's 2018 exemption petition due to a new CAA interpretation.

Under the new interpretation, small refineries do not have to retire any RINs to meet 2018 compliance obligations but are instead only required to "resubmit their annual compliance reports for 2016, 2017, and/or 2018 and report their actual gasoline and diesel fuel production, actual annual RVOs, and zero RIN deficit carryforward into the following compliance year."[32] As a result, Wynnewood retired approximately $31 million while waiting for the EPA to adjudicate its 2018 exemption petition. Wynnewood argued its 2018-eligible RINs lost approximately $19 million in value from when the RINs were retired to when they were sent back to the refinery as an RIN that may only be used for compliance in the calendar year in which it was generated or the year following. Wynnewood sought, in addition to its 2018 RFS obligations being excused, to have its 2018-eligible RINs replaced with new RINs to meet the current RFS compliance obligations. The court concluded the EPA's April ACA is to be based on a determination of nationwide scope or effect due to the April ACA stemming from the April denial meeting the first prong of the 7607(b)(1) proper venue requirement. The EPA's transfer motion was granted with further proceedings transferred to the D.C. Circuit.

In *Calumet Shreveport Refining L.L.C. v. EPA*,[33] the Fifth Circuit granted Calumet's petitions for review, vacated the challenged adjudications, denied EPA's motion to transfer to the D.C. Circuit, and remanded the case. Six refineries challenged the EPA's decision which denied their request to exempt them from their obligations under the RFS under the CAA. Congress delegated to the EPA "the authority to (1) set annual renewable fuel percentage standards and (2) establish an RFS compliance program."[34] Further, Congress enacted three exemptions from the compliance program: (1) the blanket exemption under 42 U.S.C. § 7545(o)(9)(A)(i) which exempted "smaller refineries" from RFS until 2011, (2) the refinery-specific exemption under 42 U.S.C. § 7545(o)(9)(A)(ii) if the Secretary of the Department of Energy determines the small refinery is being subjected to a disproportionate economic hardship, and (3) the sub paragraph (B) exemption which allows small refineries to petition the Administrator for an extension under 42 U.S.C. § 7545(o)(9)(B).

Petitioners challenged two EPA denial actions: a denial of the petitioners' request for exemption from their RFS obligations for 2018 on April 7, 2022; and the EPA's June 8, 2022 denial of petitioners' exemption request from their RFS obligations for 2016 to 2021. In a December 2021 publication, the EPA announced a revised interpretation of the statutory term "disproportionate economic hardship" in which the hardship must be caused due to RFS compliance costs. The court found the EPA's denial actions are locally or regionally applicable, denying the EPA's petition to transfer venue. Further, the court concluded the EPA's denials are impermissibly retroactive, with the EPA's interpretation of the exemption provisions being contrary to law and arbitrary and capricious.

D. Procedural & Jurisdictional Issues

[32] *Id.* at 1117.
[33] 86 F.4th 1121 (5th Cir. 2023).
[34] *Id.* at 1128.

In *RMS of Georgia, LLC v. EPA*,[35] the Eleventh Circuit held that EPA's allocation of permits under the American Innovation and Manufacturing (AIM) Act was a nationally applicable action that must be heard by the D.C. Circuit. RMS challenged EPA's 2022 allocation of permits to consume hydrofluorocarbons—a chemical refrigerant. The AIM Act adopts the CAA judicial review provision and makes it applicable "as though [the AIM Act] were expressly included in title VI of [the CAA]."[36] Under the AIM Act, challenges to "nationally applicable" actions "may be filed only in" the D.C. Circuit, while challenges to "locally or regionally applicable" actions "may be filed only" in the regional Courts of Appeals. The court concluded the challenged action was nationally applicable because its scope was not geographically limited and allowances are not geographically restricted, rejecting RMS's arguments that "local factors" controlled the allocation action and that the individual allocations were locally applicable actions.

In *Concerned Household Electr. Consumers Council v. EPA*,[37] the D.C. Circuit dismissed two consolidated petitions for review which challenged EPA's refusal to reconsider the agency's 2009 finding that emissions of greenhouse gases from new motor vehicles contribute to climate change and thus endanger public health and welfare ("Endangerment Finding"). The court found that neither of the petitioning organizations were directly regulated by EPA's Endangerment Finding and that neither had demonstrated that it or any of its members had been injured or would suffer injury by the challenged EPA actions. As a consequence, both organizations lacked standing under Article III of the Constitution to maintain their challenges. One organization, Concerned Household Electricity Consumers Council (CHECC), claimed that its members were injured because the Endangerment Finding would lead to higher rates for household electricity. The court concluded, however, that CHECC could not connect the Endangerment Finding, which compels the regulation of new motor vehicles, to any increases in household electricity rates. Nor could CHECC point to any regulation based on the Endangerment Finding that affected its members.

The court also held that CHECC and the other petitioning organization, FAIR Energy Foundation, had failed to demonstrate that they had standing to sue in their own right rather than on behalf of their members. Neither organization had established that the Endangerment Finding both harms their respective organizational interests and that either organization had expended its resources seeking to counteract such harm.

In *Sinclair Wyoming Refining Company, LLC v. EPA*,[38] the Tenth Circuit held an email from an EPA official denying a request to unretire certain RFS credits was not final agency action and therefore unreviewable. Sinclair applied for an RFS hardship exemption for compliance year 2018; when EPA did not act on the request within the statutory timeframe, Sinclair deposited its RFS credits—known as RINs—to ensure compliance. EPA initially denied the exemption request, then later reconsidered and approved it. On two occasions, Sinclair requested return of the 2018 RINs. Sinclair filed a petition for review of an April 2022 email from an EPA official stating the RINs would not be returned. The court held that the email was not a reviewable final agency action because it did not (1)"consummate[e]" EPA's decision-making, (2)"determine[]" Sinclair's "rights or obligations," (3)impose "legal consequences," or (4)exercise adjudicatory discretion. Rather, the email simply "restated EPA's established position" and Sinclair should have appealed a previous agency action—the 2019 notice initially denying the hardship application; the April 2022 action denying the application for a second time following remand from the D.C. Circuit Court of Appeals; or the April 2022 action providing an

[35]64 F.4th 1368 (11th Cir. 2023).
[36]*Id.* at 1372.
[37]No. 22-1139, 2023 WL 3643436 (D.C. Cir. May 23, 2023), *rehearing en banc denied*, 2023 WL 4669311 (Jul 20, 2023), *cert. denied*, 2023 WL 8531932 (Dec. 11, 2023).
[38]72 F.4th at 1137 (10th Cir. 2023).

alternative compliance approach for the refineries which, unlike Sinclair, had initially received exemptions in August 2019.

In the related cases *Counts v. General Motors, LLC*[39] and *In re Duramax Diesel Litigation*,[40] the District Court for the Eastern District of Michigan dismissed proposed class actions from drivers who allegedly overpaid for certain GM vehicles equipped with "defeat devices" that made the vehicles' emissions comply with the CAA. While the cases were pending, the Sixth Circuit dismissed similar claims as impliedly preempted by the EPCA and its corresponding regulations for emissions testing.[41] In that case, the Sixth Circuit held those claims conflicted with EPA's authority to set fuel economy ratings. Following supplemental briefing, the district court followed the Sixth Circuit's reasoning and found that the plaintiffs' claims were "inextricably intertwined with alleged violations of the CAA";[42] put another way, "[w]ithout the CAA and its regulations, Plaintiffs would have no basis for their claims."

In *Texas Commission on Environmental Quality v. Vecinos Para El Bienestar De La Comunidad Costera*,[43] a Texas appeals court reversed a trial court's finding of jurisdiction over a challenge to the Texas Commission on Environmental Quality's (TCEQ) grant of an air permit for construction of an LNG terminal. The Natural Gas Act (NGA) vests the Federal Energy Regulatory Commission (FERC) with the "exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of" an LNG terminal.[44] At the same time, TCEQ administers Texas's SIP under the CAA, such that before work begins on the construction of a new facility or modification of an existing facility that may emit air contaminants, the project proponent must obtain an air-quality permit or permit amendment from TCEQ. However, the NGA also provides that review of "an order or action of a . . . State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit . . . required under Federal law" lies in the United States Fifth Circuit.[45] The court of appeals held that TCEQ's order was within the NGA's special federal-circuit judicial-review provision. The permit challengers argued that the court should interpret the jurisdictional provision narrowly because its claims were purely state-law claims; the court disagreed, holding that Congress had created an exclusive federal forum for the described actions.

In *Chevron U.S.A. Inc. v. EPA*,[46] the Ninth Circuit held that an EPA letter, which superseded and reversed a prior EPA letter and stated that Chevron may be subject to CAA enforcement when decommissioning oil and gas drilling platforms located on the Outer Continental Shelf, even after well abandonment and removal of all emission-generating equipment from the platforms, was not final agency action and denied Chevron's petition for review due to lack of jurisdiction. The court stated that in changing the position put forth in its prior letter regarding enforcement, "EPA did not determine any rights or obligations or impose any legal consequences; it merely returned Chevron to a state of regulatory uncertainty."[47]

In *Conservation Law Foundation, Inc. v. Academy Express, LLC*,[48] the United States District Court for the District of Massachusetts granted summary judgment for the

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[39]No. 1:16-cv-12541, 2023 WL 4494336 (E.D. Mich. July 12, 2023).
[40]No. 1:17-cv-11661, 2023 WL 4493595 (E.D. Mich. July 12, 2023).
[41]In re Ford Motor Co. F-150 & Ranger Truck Fuel Econ. Mktg. & Sales Pracs. Litig., 65 F.4th 851, 862-64 (6th Cir. 2023).
[42]2023 WL 4494336, at *4.
[43]No. 03-21-00395-CV, 2023 WL 4670340 (Tex. Ct. App. July 21, 2023).
[44]*Id.* at *1.
[45]*Id.* at *2.
[46]No. 21-71132, 2023 WL 5665761 (9th Cir. Sept. 1, 2023).
[47]*Id.* at *1.
[48]No. 20-10032-WGY, 2023 WL 5984517 (D. Mass. Sept. 14, 2023).

defendant bus companies, holding that the plaintiff environmental advocacy organization failed to establish that it met Article III standing to maintain its suit in federal court. The plaintiff organization claimed that the defendants engaged in excessive idling in the operation of their bus fleets in violation of the CAA and anti-idling provisions in the SIPs of Massachusetts and Connecticut. On summary judgment motions, the court held that most of the injury claims regarding the plaintiff organization's members were insufficient to establish an injury in fact under Article III. Specifically, the court held that merely breathing polluted air without an explanation of how it harms a member is insufficient to make out an injury. A few members established that breathing polluted air has curtailed the extent of their normal activities, and this had established recreational injuries. But the court held that these injuries were not shown to be traceable to the defendants' idling.

In *City and County of Honolulu v. Sunoco LP*,[49] the Supreme Court of Hawaii affirmed the circuit court's denial of motions to dismiss for failure to state a claim and for lack of personal jurisdiction. The court considered whether state tort claims for failure to warn and deceptive promotion were preempted by federal common law and the CAA. In addition to various jurisdictional issues, the court analyzed whether preemption applied to bar state-law claims for injuries caused by interstate and international emissions. First, the court concluded that common law did not preempt such claims because the CAA displaced the common law of nuisance that had previously governed interstate pollution abatement. The court also clarified that the displaced federal common law is irrelevant to preemption analysis and, even were it relevant, it would not have preempted the state law claims where the alleged injury is based on a failure to warn and deceptive promotion, rather than on pollution or emissions. Finally, the court determined that the CAA did not preempt such tort claims because the CAA did not include express language preempting state tort claims, the CAA does not occupy the entire field of emissions, there was no obstacle preemption when the purposes of the CAA and the state claims were different, and impossibility preemption was also absent because the CAA does not bar consumer warnings.

In *District of Columbia v. Exxon Mobil Corp.*,[50] the United States Court of Appeals for the D.C. Circuit affirmed the District Court's order remanding the case to the Superior Court of the District Court of Columbia because Exxon Mobil Corp. provided no basis for federal jurisdiction under the parameters set by the well-pleaded complaint rule. Remand of the case was determined proper with the District requesting a permanent injunction barring Exxon from violating the Consumer Protection Procedures Act (CPPA), damages, and civil penalties stemming from the misrepresentations made by Exxon. The District of Columbia (District) alleged Exxon, and other energy companies, deceived consumers by making material misrepresentations regarding their fossil fuel products as green, clean, and failing to warn consumers about the effect of their products on climate change. The court concluded that any connection between the alleged misrepresentations and the Companies' operations on the Outer Continental Shelf is incidental and tenuous and therefore cannot support removal. The case was remanded to the Superior Court of the District of Columbia because the District brought suit solely under the D.C. Code and Exxon provided no basis for federal jurisdiction.

E. Greenhouse Gases

In *Heating, Air Conditioning & Refrigeration Distributors International v. EPA*,[51] the U.S. Court of Appeals for the D.C. Circuit concluded that the EPA lacked statutory authority to pass two measures regulating hydrofluorocarbons (HFCs), vacated those portions of the rule, and remanded to the agency. After the AIM Act directed the EPA to

[49] 537 P.3d 1173 (Haw. 2023).
[50] No. 22-7163, 2023 WL 8721812 (D.C. Cir. Dec. 19, 2023).
[51] 71 F.4th 59 (D.C. Cir. 2023).

pass a rule phasing out HFCs and EPA promulgated such rule, two regulated companies and three trade associations challenged the rule, arguing that the agency exceeded its statutory authority and that the Act violated the nondelegation doctrine. The court largely upheld the rule but determined that the EPA's refillable-cylinder and QR-code rules lacked a statutory basis. The court was clear that the decision was not based on the major-questions doctrine but was, instead, based on the rule of statutory interpretation that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."[52]

II. Regulatory Developments

A. Title I: NAAQS, Federal Implementation Plans & State Implementation Plans

On January 27, 2023, EPA issued a proposed rule revising national ambient air quality standards for particulate matter (PM). The proposed rule would lower the primary annual PM2.5 standard. EPA proposes to retain the current standards for primary 24-hour PM2.5 and PM10, as well as the current standards for secondary 24-hour PM2.5, secondary annual PM2.5, and secondary 24-hour PM10.[53] The proposed rule also includes revisions to the Air Quality Index and monitoring requirements.

On February 8, 2023, EPA issued a final rule revising the regulatory definition of volatile organic compounds (VOCs) under the CAA. The revision adds trans1,1,1,4,4,4-hexafluorobut-2-ene (also known as HFO–1336mzz(E)) to a list of compounds excluded from the VOC regulatory definition.[54]

On February 13, 2023, EPA finalized disapproval of 19 states' SIP submissions regarding interstate transport and finalized partial approval and partial disapproval of two states' submissions. The disapprovals triggered a 2-year deadline for EPA to promulgate Federal Implementation Plans unless EPA approves subsequent SIP submissions. EPA also deferred final action on disapprovals for two states.[55]

On Feb. 24, 2023, EPA issued a notice of proposed rulemaking "to update the current ozone absorption cross-section to the recommended consensus-based cross-section value."[56]

On March 10, 2023, EPA extended the deadline to April 15, 2024 for the submission of state plans submitted under the CAA per the Affordable Clean Energy rule.[57]

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[52]*Id.* at 67 (quoting *Whitman v. Am. Trucking Assoc.*, 531 U.S. 457, 468 (2001)).

[53]Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, 88 Fed. Reg. 5558 (proposed January 27, 2023) (to be codified at 40 C.F.R. pts. 50, 53, and 58).

[54]Air Quality: Revision to the Regulatory Definition of Volatile Organic Compounds—Exclusion of (2E)-1,1,1,4,4,4-hexafluorobut-2-ene (HFO–1336mzz(E)), 88 Fed. Reg. 8226 (February 8, 2023) (to be codified at 40 C.F.R. pt. 51).

[55]Air Plan Disapprovals; Interstate Transport of Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 9336 (to be codified at 40 C.F.R. pt. 52).

[56]Reference Measurement Principle and Calibration Procedure for the Measurement of Ozone in the Atmosphere (Chemiluminescence Method), 88 Fed. Reg. 11,835 (Feb. 24, 2023) (to be codified at 40 C.F.R. pt. 50).

[57]Delay of Submittal Date for State Plans Required Under the Affordable Clean Energy Rule, 88 Fed. Reg. 14,918 (March 10, 2023) (to be codified at 40 C.F.R. pt. 60).

On March 15, 2023, EPA made available for public review the revised "Policy Assessment for the Reconsideration of the Ozone National Ambient Air Quality Standards, External Review Draft Version 2."[58]

On March 23, 2023, EPA made available for public review the draft guidance document "Draft Guidance on the Preparation of State Implementation Plan Provisions that Address the Nonattainment Area Contingency Measure Requirements for Ozone and Particulate Matter."[59]

On May 15, 2023, EPA published a notice that Volume 3 of the *Integrated Review Plan for the Lead National Ambient Air Quality Standards* would be made available for public comment.[60]

On May 31, 2023, EPA made available for public review the document "Draft Policy Assessment for the Review of the Secondary National Ambient Air Quality Standards for Oxides of Nitrogen, Oxides of Sulfur and Particulate Matter—External Review Draft (PA)."[61]

On June 5, 2023, EPA issued a final rule promulgating Federal Implementation Plan requirements to address 23 states' obligations to eliminate significant contributions to nonattainment, or interference with maintenance, of the 2015 ozone NAAQS in other states under the "good neighbor" provision.[62] EPA established nitrogen oxides emissions budgets that would require fossil fuel-fired power plants in 22 states to participate in an allowance-based trading program starting in 2023. EPA also established nitrogen oxides emissions limitations for other industrial stationary sources in 20 states.

On July 3, 2023, the EPA published notice it had "designat[ed] a new equivalent method for measuring concentrations of PM_{10} in ambient air."[63]

On July 31, 2023, in response to judicial orders, EPA issued an interim final rule staying the FIP requirements in Arkansas, Kentucky, Louisiana, Mississippi, Missouri, and Texas, and revising other regulations to ensure these states continued to be subject to previously established requirements. The EPA also corrected deadlines that were published in the Good Neighbor Plan.[64]

On September 12, 2023, EPA published a notice of availability for the latest Motor Vehicle Emission Simulator model (MOVES4) modeling tool for estimating emissions

[58]Release of Draft Policy Assessment for the Reconsideration of the Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 15,940 (March 15, 2023) (to be codified at 40 C.F.R. pt. 50).

[59]Draft Guidance on the Preparation of State Implementation Plan Provisions That Address the Nonattainment Area Contingency Measure Requirements for Ozone and Particulate Matter, 88 Fed. Reg. 17,571 (March 23, 2023).

[60]Release of Volume 3 of the Integrated Review Plan for the Lead National Ambient Air Quality Standards, 88 Fed. Reg. 30,966 (May 15, 2023).

[61]Release of the Policy Assessment for the Review of the Secondary National Ambient Air Quality Standards for Oxides of Nitrogen, Oxides of Sulfur and Particulate Matter—External Review Draft, 88 Fed. Reg. 34,852 (May 31, 2023).

[62]Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36,654 (June 5, 2023) (to be codified at 40 C.F.R. pts. 52, 75, 78, 97).

[63]Ambient Air Monitoring Equivalent and Equivalent Methods; Designation of One New Equivalent Method, 88 Fed. Reg. 42,718 (July 3, 2023).

[64]Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards; Response to Judicial Stays of SIP Disapproval Action for Certain States, 88 Fed. Reg. 49,295 (July 31, 2023) (to be codified at 40 C.F.R. pts. 52, 97).

from cars, trucks, buses, and motorcycles for use in SIPs and transportation conformity analyses outside of California.[65]

On September 29, 2023, in response to judicial orders, EPA issued an interim final rule staying the FIP requirements in Alabama, Minnesota, Nevada, Oklahoma, Utah, and West Virginia, and making revisions to ensure these states continued to be subject to the previous requirements while the Good Neighbor Plan requirements are stayed.[66]

On October 12, 2023, EPA issued a final rule updating the ozone absorption cross-section to the recommended consensus-based cross-section value.[67]

On October 18, 2023, EPA issued a final rule finding that "11 states failed to submit SIP revisions," triggering CAA deadlines for the imposition of sanctions.[68]

On November 6, 2023, EPA published notice it had designated two new equivalent methods for monitoring ambient air quality: one for measuring "concentrations of lead," and one for "measuring concentrations of PM_{10} in ambient air."[69]

On November 17, 2023, EPA issued a final rule amending regulations governing "the process and timeline for state and Federal plans to implement CAA New Source Performance Standards for existing sources," including a process for states to consider "remaining useful life and other factors" in applying a standard for performance.[70]

B. New Source Review (NSR), Prevention of Significant Deterioration, New Source Performance Standards (NSPS), & Title V Permitting

On February 23, 2023, EPA finalized amendments to the 2007 National Emission Standards for Hazardous Air Pollutants (NESHAP) for Lead Acid Battery (LAB) Manufacturing Area Source.[71] The rule revised standards of performance, which limit atmospheric emissions of lead from new, modified, and reconstructed facilities at LAB plants, among other amendments. EPA also finalized a new subpart (subpart KKa) under New Source Performance Standards (NSPS), which updates the 1982 Standards of Performance for LAB Manufacturing Plants (subpart KK).

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[65]Official Release of the MOVES4 Motor Vehicle Emissions Model for SIPs and Transportation Conformity, 88 Fed. Reg. 62,567 (Sept. 12, 2023).

[66]Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards; Response to Additional Judicial Stays of SIP Disapproval Action for Certain States, 88 Fed. Reg. 67,102 (Sept. 29, 2023) (to be codified at 40 C.F.R. pts. 52, 97).

[67]Reference Measurement Principle and Calibration Proc. for the Measurement of Ozone in the Atmosphere (Chemiluminescence Method), 88 Fed. Reg.70,595 (Oct. 12, 2023) (to be codified at 40 C.F.R. pt. 50).

[68]Findings of Failure to Submit State Implementation Plan Revisions for Reclassified Moderate Nonattainment Areas for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 71,757 (Oct. 18, 2023) (to be codified at 40 C.F.R. pt. 52).

[69]Ambient Air Monitoring Equivalent and Equivalent Methods; Designation of Two New Equivalent Methods, 88 Fed. Reg. 76,212 (Nov. 6, 2023).

[70]Adoption and Submittal of State Plans for Designated Facilities: Implementing Regulations Under Clean Air Act Section 111(d), 88 Fed. Reg. 80,480 (Nov. 17, 2023) (to be codified at 40 C.F.R. pt. 60).

[71]New Source Performance Standards Review for Lead Acid Battery Manufacturing Plants and National Emission Standards for Hazardous Air Pollutants for Lead Acid Battery Manufacturing Area Sources Tech. Rev., 88 Fed. Reg. 11,556 (Feb. 23, 2023) (to be codified at 40 C.F.R. pts. 60 and 63).

On March 27, 2023, EPA finalized amendments to the NSPS for Industrial Surface Coating of Plastic Parts for Business Machines.[72] The agency established a new subpart (subpart TTTa) mandating volatile organic compound (VOC) emission limitations for prime, color, texture, and touch-up coating operations for affected facilities that commence construction, modification, or reconstruction after June 21, 2022. EPA also finalized a requirement for electronic submission of periodic compliance reports.

On April 25, 2023, EPA proposed stricter NSPS and NESHAPs for the Synthetic Organic Chemical Manufacturing Industry (SOCMI) and certain polymer and resin manufacturers.[73] The agency estimates the proposed NESHAPs will reduce HAP emissions from SOCMI flares by almost 5,000 tons per year, and that the new NSPS will reduce volatile organic compounds emissions from the same sources by 1,600 tons per year.

On May 9, 2023, EPA issued a final rule amending "new source performance standards for Automobile and Light Duty Trucks Surface Coating Operations."[74]

On May 23, 2023, EPA proposed a suite of changes to CAA section 111 greenhouse gas emissions requirements for fossil fuel power plants,[75] including repealing the Affordable Clean Energy (ACE) Rule, which was vacated in 2021 by the D.C. Circuit[76] and revived in 2022 after *West Virginia v. EPA*.[77] The changes would replace the ACE by adopting stricter NSPS for greenhouse gas emissions (GHGs) from certain new and modified fossil fuel plants that are based on "green" hydrogen co-firing and carbon capture and storage (CCS), setting tighter GHG emissions guidelines for coal, oil and gas fired power plants that include natural gas co-firing, and setting GHG emissions for the largest and most frequently operated existing stationary combustion turbines across the country. Compliance with these stricter emissions levels would be staggered, with hydrogen co-firing and CCS for some units required beginning in 2032, and for large and frequently used turbines in 2038. The rule would not establish an emissions cap-and-trade program, but the proposed rulemaking encourages states to establish such programs to ease compliance. EPA expects to finalize the new emissions guidelines in June 2024.

On July 21, 2023, EPA removed the emergency affirmative defense provisions formerly codified in 40 C.F.R. sections 70.6(g) and 71.6(g) in light of a 2014 decision by the D.C. Circuit[78] that EPA exceeded its authority in purporting to create an affirmative defense to civil penalties for certain emissions standard violations under the CAA.[79] The affirmative defense had applied to major pollution sources under CAA title V. The rule also

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[72]New Source Performance Standards Review for Indus. Surface Coating of Plastic Parts for Bus. Machines, 88 Fed. Reg. 18,056 (Mar. 27, 2023) (to be codified at 40 C.F.R. pt. 60).

[73]New Source Performance Standards for the Synthetic Organic Chem. Manufacturing Indus. and National Emission Standards for Hazardous Air Pollutants for the Synthetic Organic Chem. Manufacturing Indus. and Group I & II Polymers and Resins Indus., 88 Fed. Reg. 25,080 (proposed Apr. 25, 2023) (to be codified at 40 C.F.R. pts. 60, 63).

[74]Review of Standards of Performance for Automobile and Light Duty Trucks Surface Coating Operations, 88 Fed. Reg. 29,978 (May 9, 2023) (to be codified 40 C.F.R. pt. 60).

[75]New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. 33,240 (May 23, 2023) (to be codified at 40 C.F.R. pt. 60).

[76]Am. Lung Ass'n v. EPA, 985 F.3d 914 (D.C. Cir. 2021).

[77]West Virginia v. EPA, 142 S. Ct. 2587 (2022).

[78]Nat. Res. Def. Council v. EPA, 749 F.3d 1055 (D.C. Cir. 2014).

[79]Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Program, 88 Fed. Reg. 47,029 (Jul. 21, 2023) (to be codified at 40 C.F.R. pts. 70, 71).

instructs states to remove any similar affirmative defense provisions in their state operating permit programs to be consistent with the change.

On August 25, 2023, EPA revised the new source performance standards for electric arc furnaces (EAF) and argon-oxygen decarburization (AOD) vessels in the steel industry.[80] The rules are part of standard period review under the CAA; they set slightly more stringent monitoring requirements for AOD vessels and reduce the opacity limit for EAF melt shop emissions, among other changes.

On October 4, 2023, EPA proposed amendments to volatile organic liquid storage vessel performance requirements.[81]

On October 23, 2023, EPA published a proposed rule to revise the EPA's Guideline on Air Quality Models, which provides EPA-preferred models and other recommended techniques to be used in the PSD program, to include proposed "enhancements to the formulation and application of the EPA's near-field dispersion modeling system, AERMOD, and updates to the recommendations for the development of appropriate background concentration for cumulative impact analyses."[82]

On November 20, 2023 EPA issued a final rule revising the NSPS subpart L for secondary lead smelters constructed, reconstructed, or modified after December 1, 2022, and revising NSPS subpart L for secondary lead smelters constructed, reconstructed, or modified after June 11, 1973, and on or before December 1, 2022.[83] In addition, EPA Method 22 has been finalized as an alternative for demonstrating compliance with the opacity requirement.

C. Title II - Mobile Sources and Fuels

On January 24, 2023, EPA issued a final rule promulgating more stringent and expansive emission standards for heavy-duty engines and vehicles. The final rule will lower emissions of nitrogen oxides, particulate matter, hydrocarbons, carbon monoxide, and air toxics starting no later than model year 2027. The final rule is part of the "Clean Trucks Plan."[84]

On April 27, 2023, EPA issued a proposed rule to establish new Phase 3 GHG emissions standards for heavy-duty vehicles for model years 2028 through 2032 and revised GHG emissions standards for heavy-duty vehicles for model year 2027.[85]

On May 5, 2023, EPA issued a proposed rule to establish new, increasingly stringent GHG and criteria pollutant (i.e., non-methane organic gases (NMOG) plus nitrogen oxides) emissions standards for light- and medium-duty vehicles for model years 2027 through

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[80]New Source Performance Standards Review for Steel Plants: Electric Arc Furnaces and Argon-Oxygen Decarburization Vessels, 88 Fed. Reg. 58,442 (Aug. 25, 2023) (to be codified at 40 C.F.R. pt. 60).

[81]New Source Performance Standards Review for Volatile Organic Liquid Storage Vessels (Including Petroleum Liquid Storage Vessels), 88 Fed. Reg. 68,535 (proposed Oct. 4, 2023) (to be codified at 40 C.F.R. pt. 60).

[82]Guideline on Air Quality Models; Enhancements to the AERMOD Dispersion Modeling System; Proposed Rule, Notification of Public Hearing and Conference, 88 Fed. Reg. 72,826 (Oct. 23, 2023) (to be codified at 40 C.F.R. pt. 51).

[83]New Source Performance Standards Review for Secondary Lead Smelters, Proposed Rule, 88 Fed. Reg. 222 (Nov. 20, 2023) (to be codified at 40 C.F.R. pt. 60).

[84]Control of Air Pollution From New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards, Final Rule, 88 Fed. Reg. 15,4296 (Jan. 4, 2023) (to be codified at 40 C.F.R. pts. 2, 59, 60, 80, 85, 86, 600, 1027, 1030, 1031, 1033, 1036, 1037, 1039, 1042, 1043, 1045, 1048, 1051, 1054, 1060, 1065, 1066, 1068, 1090).

[85]Greenhouse Gas Emissions Standards for Heavy-Duty Vehicles – Phase 3, 88 Fed. Reg. 25,926 (Apr. 27, 2023) (to be codified at 40 C.F.R. pts. 1036, 1037, 1054, 1065, 1074).

2032.[86] The proposed standards would be applicable to passenger cars, light trucks, and large pickup trucks and vans. The proposed standards are performance-based, not technology-based, and EPA projects that one potential pathway for the industry to meet the proposed GHG standards would be through nearly 70 percent battery-electric vehicle (BEV) penetration in MY 2032 across the combined light-duty passenger car, crossover/SUV, and pickup truck categories. In addition, EPA proposed several GHG program revisions, battery durability and warranty requirements for plug-in vehicles, and revisions to small-volume vehicle manufacturer requirements.

On May 8, 2023, EPA published a notice inviting "public comment to inform the availability of zero-emission technologies in the heavy-duty vehicle and port sectors," as directed by the Inflation Reduction Act.[87]

On July 12, 2023, EPA established the applicable volumes and percentage standards for 2023 through 2025 for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel under CAA's RFS. The rule also established "the second supplemental standard addressing the judicial remand of the 2016 standard-setting rulemaking." The rule also made regulatory changes to the RFS program.[88]

On July 20, 2023, EPA published notice of its final action entitled "July 2023 Denial of Petitions for RFS Small Refinery Exemptions" denying "26 small refinery exemption (SRE) petitions under the" CAA RFS program.[89]

On August 3, 2023, EPA issued a final rule correcting the July 12, 2023 rule that defined "the applicable volume requirements and percentage standards for the [RFS] for 2023 through 2025," and had "made several regulatory changes to the RFS program." This correction made "several amendatory instructions in the regulatory text in the final rule."[90]

On October 2, 2023, EPA issued a notice that sources which do not meet their acid rain emission limitations for nitrous oxide or sulfur dioxide must pay inflation-adjusted penalties for excess emissions.[91]

On October 20, 2023, EPA published a finding "that lead air pollution may reasonably be anticipated to endanger the public health and welfare within the meaning of the" CAA and "that engine emissions of lead from certain aircraft cause or contribute to the lead air pollution that may reasonably be anticipated to endanger public health."[92]

On November 8, 2023, EPA issued a final rule revising regulations addressing federal "preemption of State and local regulation of locomotives and engines used in

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[86]Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 88 Fed. Reg. 29,184 (May 5, 2023) (to be codified at 40 C.F.R. pts. 85, 86, 600, 1036, 1037, 1066).

[87]Development of Guidance for Zero-Emission Clean Heavy-Duty Vehicles, Port Equipment, and Fueling Infrastructure Deployment Under the Inflation Reduction Act Funding Programs, 88 Fed. Reg. 29,666 (May 8, 2023).

[88]Renewable Fuel Standard (RFS) Program: Standards for 2023-2025 and Other Changes, 88 Fed. Reg. 44,468 (2023) (to be codified at 40 C.F.R. pts. 80, 1090).

[89]Notice of July 2023 Denial of Petitions for Small Refinery Exemptions Under the Renewable Fuel Standard Programs, 88 Fed. Reg. 46,795 (July 20, 2023).

[90]Renewable Fuel Standard (RFS) Program: Standards for 2023-2025 and Other Changes: Correction, 88 Fed. Reg. 51,239 (Aug. 3, 2023) (to be codified at 40 C.F.R. 80).

[91]Acid Rain Program: Excess Emissions Penalty Inflation Adjustments, 88 Fed. Reg. 67,748 (Oct. 2, 2023).

[92]Finding That Lead Emissions from Aircraft Engines That Operate on Leaded Fuel Cause or Contribute to Air Pollution That May Reasonably Be Anticipated To Endanger Public Health; Final Action and Welfare, 88 Fed. Reg. 72,372 (Oct. 20, 2023) (to be codified at 40 C.F.R. pts. 87, 1031, 1068). .

locomotives."[93] The revisions implement "a policy change to no longer categorically preempt" such regulation.[94]

D. Title VI - Stratospheric Ozone

On April 28, 2023, EPA issued a final rule pursuant to its Significant New Alternatives Policy program listing certain substances as acceptable, subject to use conditions, in the refrigeration and air conditioning sector.[95]

On May 24, 2023, EPA issued a notice of proposed rulemaking pursuant to its Significant New Alternatives Policy program to list certain substitutes as acceptable, subject to use, conditions, for retail food refrigeration, commercial ice machines, industrial process refrigeration, cold storage warehouses, and ice skating rinks.[96]

On September 8, 2023, EPA issued a determination, pursuant its Significant New Alternatives Policy program, expanding the list of acceptable substitutes for use in the refrigeration and air conditioning and fire suppression sectors.[97]

On October 19, 2023, EPA issued a notice of proposed rulemaking to establish recordkeeping and reporting requirements for uses of ozone-depleting substances as process agents and to update definitions to reflect current practice.[98]

E. Greenhouse Gases

On February 15, 2023, EPA announced that the Draft Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2021 is available for public review. The inventory report was finalized in April 2023.[99]

On May 22, 2023, EPA published a supplemental notice of proposed rulemaking that would amend specific provisions in the Greenhouse Gas Reporting Rule, including updates to the General Provisions to reflect revised global warming potentials, new GHG data reporting requirements from additional sectors, and revisions to improve rule implementation.[100] EPA also proposed to establish and amend confidentiality determinations for the reporting of certain data elements to be added or substantially revised in the proposed amendments.

On August 1, 2023, EPA issued a proposed rule to amend provisions of the Greenhouse Gas Reporting Rule applicable to the petroleum and natural gas systems source

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[93]Locomotives and Locomotive Engines; Preemption of State and Local Regs., 88 Fed. Reg. 77,004 (Nov. 8, 2023) (to be codified at 40 C.F.R. pt. 1074).
[94]*Id.*
[95]Protection of Stratospheric Ozone: Listing of Substitutes Under the Significant New Alternatives Policy Program in Refrigeration, Air Conditioning, and Fire Suppression, 88 Fed. Reg. 26,382 (May 30, 2023) (to be codified at 40 C.F.R. pt. 82).
[96]Protection of Stratospheric Ozone: Listing of Substitutes Under the Significant New Alternatives Policy Program in Commercial and Industrial Refrigeration, 88 Fed. Reg. 33,722 (proposed May 24, 2023) (to be codified at 40 C.F.R. pt. 82).
[97]Protection of Stratospheric Ozone: Determination 38 for Significant New Alternatives Policy Program, 88 Fed. Reg. 61,977 (Sept. 8, 2023) (to be codified in 40 C.F.R. pt. 82).
[98]Protection of Stratospheric Ozone: Updates Related to the Use of Ozone-Depleting Substances as Process Agents, 88 Fed. Reg. 72,027 (Oct. 19, 2023) (to be codified in 40 C.F.R. pt. 82).
[99]Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2021, 88 Fed. Reg. 31,9881 (Feb. 15, 2023).
[100]Revisions and Confidentiality Determinations for Data Elements Under the Greenhouse Gas Reporting Rule, 88 Fed. Reg. 32,852 (May 22, 2023) (to be codified at 40 C.F.R. pt. 98).

category.[101] In particular, the rule would amend requirements for applicable facilities concerning data gathering and reporting as well as establish and amend confidentiality determinations for the reporting of certain data elements.

F. Hazardous Air Pollutants

On January 5, 2023, EPA issued a proposed rule to amend the NESHAP for Lime Manufacturing facilities.[102] The revised requirements would include HAP emission standards for hydrogen chloride, mercury, total hydrocarbon as a surrogate for organic HAP, and dioxin/furans.

On February 22, 2023, EPA issued a final rule to include inorganic HAP standards for process vessels into the Miscellaneous Coating Manufacturing source category under NESHAP. [103]

On March 6, 2023, EPA revoked a May 22, 2020 finding[104] that it is not appropriate and necessary to regulate coal- and oil-fired electric utility steam generating units (EGUs) under CAA section 112, and concluded, as it did in its April 25, 2016 finding,[105] "that it remains appropriate and necessary to regulate HAP emissions from EGUs after considering cost."[106]

On March 20, 2023, EPA issued a final rule on Method 23, changing the method quality control format from prescriptive to a flexible performance-based approach, expanding the list of target compounds to include PAH and polychlorinated biphenyls, and providing facilities with a comprehensive isotope dilution method. [107]

On April 13, 2023, EPA published a proposed rule proposing amendments to the NESHAP for Commercial Sterilization Facilities, including proposed decisions concerning the risk and technology review, proposed "amendments pursuant to the technology review for certain point source emissions, and propos[ed] amendments pursuant to the risk review

[101]Greenhouse Gas Reporting Rule: Revisions and Confidentiality Determinations for Petroleum and Nat. Gas Sys., 88 Fed. Reg. 50,282 (proposed Aug. 1, 2023) (to be codified at 40 C.F.R. pt. 987).
[102]National Emission Standards for Hazardous Air Pollutants: Lime Manufacturing Plants Amendments, Proposed Rule, 88 Fed. Reg. 805 (proposed Jan. 5, 2023) (to be codified at 40 C.F.R. pt. 63).
[103]National Emission Standards for Hazardous Air Pollutants: Miscellaneous Coating Manufacturing Tech. Rev., 88 Fed. Reg. 10,842 (Feb. 22, 2023) (to be codified at 40 C.F.R. pt. 63).
[104]National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units-Reconsideration of Supplemental Finding and Residual Risk and Technology Review, 85 Fed. Reg. 31,286 (May 22, 2020) (to be codified at 40 C.F.R. pt. 63).
[105]Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units, 81 Fed. Reg. 24,420 (Apr. 25, 2016) (to be codified at 40 C.F.R. pt. 63).
[106]National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Revocation of the 2020 Reconsideration and Affirmation of the Appropriate and Necessary Supplemental Finding, 88 Fed. Reg. 13,956 (Mar. 6, 2023) (to be codified at 40 C.F.R. pt. 63).
[107]EPA Method 23—Determination of Polychlorinated Dibenzo-p-Dioxins and Polychlorinated Dibenzofurans from Stationary Sources, 88 Fed. Reg. 16,732 (Mar. 20, 2023) (to be codified at 40 C.F.R. pt. 60, 63, 266).

to specifically address ethylene oxide (EtO) emissions from point source and room air emissions from all commercial sterilization facilities."[108]

On April 24, 2023, EPA published a proposed rule to amend the NESHAP for Coal- and Oil-Fired EGUs (also known as the Mercury and Air Toxics Standards or MATS) by amending "the surrogate standard for non-mercury (Hg) metal HAP (filterable particulate matter (fPM)) for existing coal-fired EGUs, the fPM compliance demonstration requirements, the Hg standard for lignite-fired EGUs, and the definition of startup."[109]

On April 27, 2023, EPA issued a proposed rule with amendments to "work practice standards for pressure release devices, emergency flaring, and degassing of floating roof storage vessels."[110]

On May 15, 2023, EPA published a proposed rule to amend the NESHAP for Taconite Iron Ore Processing Facilities to include proposed emission standards for mercury and proposed revisions of the existing emission standards for hydrogen chloride and hydrogen fluoride.[111]

On May 18, 2023, "EPA proposed amendments to the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Plywood and Composite Wood Products (PCWP)" adding hazardous air pollutants (HAPs) including acetaldehyde, acrolein, formaldehyde, methanol, phenol, propionaldehyde, "HAP metals, hydrogen chloride, polycyclic aromatic hydrocarbons, dioxin/ furan," and more.[112]

On June 5, 2023, EPA issued a notice withdrawing a proposed modification of the OSWI definition of "municipal waste combustion unit." As a result, pyrolysis/combustion units will remain in the definition. [113]

On June 12, 2023, EPA extended the comment period for the proposed National Emission Standards for HAPs: Plywood and Composite Wood Products (PCWP).[114]

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[108]National Emission Standards for Hazardous Air Pollutants: Ethylene Oxide Emissions Standards for Sterilization Facilities Residual Risk and Technology Review, 88 Fed. Reg. 22,790 (proposed Apr. 13, 2023) (to be codified at 40 C.F.R. pt. 63).

[109]National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review, 88 Fed. Reg. 24,854 (proposed Apr. 24, 2023) (to be codified at 40 C.F.R. pt. 63).

[110]National Emission Standards for Hazardous Air Pollutants: Ethylene Production, Miscellaneous Organic Chemical Manufacturing, Organic Liquids Distribution (Non-Gasoline), and Petroleum Refineries Reconsideration, 88 Fed. Reg. 25,574 (proposed Apr. 27, 2023) (to be codified at 40 C.F.R. pt. 63).

[111]National Emission Standards for Hazardous Air Pollutants: Taconite Iron Ore Processing Amendments, 88 Fed. Reg. 30,917 (proposed May 15, 2023) (to be codified at 40 C.F.R. pt. 63).

[112]National Emission Standards for Hazardous Air Pollutants: Plywood and Composite Wood Products, 88 Fed. Reg. 31,856 (proposed May 18, 2023) (to be codified at 40 C.F.R. pt. 63).

[113]Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Other Solid Waste Incineration Units Review; Withdrawal of Proposed Provision Removing Pyrolysis/Combustion Units, 88 Fed. Reg. 36,524 (proposed Jun. 5, 2023) (to be codified at 40 C.F.R. pt. 60).

[114]National Emission Standards for Hazardous Air Pollutants; Plywood and Composite Wood Products; Extension of Comment Period, 88 Fed. Reg. 38,009 (proposed June 12, 2023) (to be codified at 40 C.F.R. pt. 63).

On June 26, 2023, EPA issued a proposed rule adding electronic reporting provisions for Reciprocating Internal Combustion Engines under NESHAP. The proposal specifies that "emergency engines can operate for up to 50 hours per year." [115]

On July 24, 2023, EPA published a supplemental notice of proposed rulemaking[116] supplementing amendments proposed January, 11, 2022[117] for the NESHAP for Primary Copper Smelting and proposing additional HAP standards for benzene, toluene, hydrogen chloride (HCl), chlorine, polycyclic aromatic hydrocarbons (PAH), naphthalene and dioxin/furans (D/F and proposing other changes.

On July 31, 2023, EPA published a proposed rule to amend "the NESHAP for Integrated Iron and Steel Manufacturing Facilities . . . [including] propos[ed] standards for HAP emissions from five unmeasured fugitive and intermittent particulate sources . . . that are currently not regulated by the NESHAP."[118]

On August 9, 2023, EPA proposed changes to the Air Emissions Reporting Requirements (AERR) that would require industry to report HAP emissions, replacing the current voluntary program for HAPs.[119] The updates would also require emissions reporting from additional facilities, including some on Native American land and in federal waters, and would add a requirement to report the use of prescribed fire.

On August 16, 2023, EPA issued a proposed rule that risks from HAP's from the Pushing, Quencing, and Battery Stacks (PQBS) source category for coke ovens under NESHAP are acceptable. The proposal includes a requirement for fence line monitoring for benzene, new standards for several unregulated HAP or sources of HAP at facilities subject to PQBS NESHAP, and the addition of electronic reporting for performance test results and compliance reports. [120]

On September 13, 2023, EPA issued a proposed rule to amend the NESHAP to address compliance issues related to applicability standards for sources that become major sources due to the addition of a compound to the CAA HAP list. [121]

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[115]National Emission Standards for Hazardous Air Pollutants: Reciprocating Internal Combustion Engines and New Source Performance Standards: Internal Combustion Engines; Electronic Reporting, 88 Fed. Reg. 41,361 (proposed June 28, 2023) (to be codified at 40 C.F.R. pts. 60, 63).

[116]National Emission Standards for Hazardous Air Pollutants: Primary Copper Smelting; Supplemental Notice of Proposed Rulemaking, 88 Fed. Reg. 47,415 (proposed July 24, 2023) (to be codified at 40 C.F.R. pt. 63).

[117]*See* National Emission Standards for Hazardous Air Pollutants: Primary Copper Smelting Residual. Risk and Technology Review and Primary Copper Smelting Area Source Technology Review, 87 Fed. Reg. 1616 (proposed Jan. 11, 2022) (to be codified at 40 C.F.R. pt. 63).

[118]National Emission Standards for Hazardous Air Pollutants: Integrated Iron and Steel Manufacturing Facilities Technology Review; Proposed Rule, 88 Fed. Reg. 49,402 (proposed July 31, 2023) (to be codified at 40 C.F.R. pt. 63).

[119]Revisions to the Air Emissions Reporting Requirements, 88 Fed. Reg. 54,118 (proposed Aug. 9, 2023) (to be codified at 40 C.F.R. pts. 2, 51).

[120]National Emission Standards for Hazardous Air Pollutants for Coke Ovens: Pushing, Quenching, and Battery Stacks, and Coke Oven Batteries; Residual Risk and Technology Review, and Periodic Technology Review, 88 Fed. Reg. 55,858 (proposed Aug. 16, 2023) (to be codified at 40 C.F.R. pt. 63).

[121]Regulatory Requirements for New HAP Additions, 88 Fed. Reg. 62,711 (proposed Sept. 13, 2023) (to be codified at 40 C.F.R. pt. 63).

On September 27, 2023, EPA issued a proposed rule adding requirements for sources reclassified from major source status to area source status under NESHAP for any source choosing to be reclassified or which has been reclassified since January 25, 2018.[122]

On November 16, 2023, EPA published a proposed rule to amend the NESHAP for Rubber Tire Manufacturing to include proposed emissions standards for the currently unregulated rubber processing subcategory of the rubber tire manufacturing industry.[123]

On November 24, 2023, EPA issued a notice of availability for determinations, alternative monitoring decisions, and regulatory decisions for the NSPS, the NESHAP, the "Emission Guidelines and Federal Plan Requirements for existing sources, and/or for the Stratospheric Ozone Protection Program."[124]

On December 1, 2023, EPA issued a proposed rule "to remove the affirmative defense provisions of the [NESHAP] for both the Oil and Natural Gas Production source category and for the Natural Gas Transmission and Storage source category."[125]

G. Cross-State Air Pollution Rule

On February 27, 2023, EPA issued a notice announcing the availability of data on preliminary calculations of emission allowance allocations for the Cross-State Air Pollution Rule (CSAP) trading programs' new unit set-asides for the 2022 control periods.[126]

On May 1, 2023, EPA issued a notice announcing the availability of final calculations of emission allowance allocations for the CSAP trading programs' new unit set-asides for the 2022 control periods.[127]

On August 24, 2023, EPA issued a notice announcing the "availability of data on new or revised default allocations of . . . NO_x Ozone Season Group 3 allowances . . . for the 2023-2025 control periods" to existing units subject to the CSAP.[128]

H. American Innovation and Manufacturing Act

[122]Review of Final Rule Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, 88 Fed. Reg. 66,336 (proposed Sept. 27, 2023) (to be codified at 40 C.F.R. pt. 63).

[123]National Emission Standards for Hazardous Air Pollutants: Rubber Tire Manufacturing, 88 Fed. Reg. 78,692 (proposed Nov. 16, 2023) (to be codified at 40 C.F.R. pt. 63).

[124]EPA Determinations of Compliance and Applicability Under CAA 111, 112, and 129 Dashboard: EPA Formal Responses to Inquiries Concerning Compliance With the Clean Air Act Stationary Source Program (Since May 2019), 88 Fed. Reg. 225 (proposed Nov. 24, 2023) (to be codified at 40 C.F.R. pt. 63).

[125]Removal of Affirmative Defense Provisions From the National Emission Standards for Hazardous Air Pollutants for the Oil and Nat. Gas Prod. Facility and Nat. Gas Transmission and Storage Facility Source Categories, 88 Fed. Reg. 230 (proposed Dec. 1, 2023) (to be codified at 40 C.F.R. pt. 63).

[126]Allocations of Cross-State Air Pollution Rule Allowances from New Unit Set-Asides for 2022 Control Periods, 88 Fed. Reg. 12,356 (Feb. 27, 2023).

[127]Final Allocations of Cross-State Air Pollution Rule Allowances from New Unit Set-Asides for 2022 Control Periods, 88 Fed. Reg. 26,538 (May 1, 2023).

[128]Availability of Data on Allocations of Cross-State Air Pollution Rule Allowances to Existing Electricity Generating Units, 88 Fed. Reg. 57,952 (Aug. 24, 2023).

On July 12, 2023, EPA issued a final rule correcting the U.S. HFC "production baselines to reflect corrected calculations for the phasedown of [HFCs]."[129]

On July 20, 2023, EPA issued a final rule amending existing regulations under the AIM Act establishing the "methodology for allocating [HFC] production and consumption allowances for the calendar years of 2024 through 2028." The regulations amend the HFC consumption baseline to reflect updated data.[130]

On October 19, 2023, EPA issued proposed regulations under the AIM Act to establish a program for the management of [HFCs] that includes requirements for: leak repair and use of automatic leak detection systems for certain equipment using refrigerants containing [HFCs] and certain substitutes; the use of reclaimed [HFCs] in certain sectors or subsectors; the use of recycled [HFCs] in fire suppression equipment; the recovery of [HFCs] from cylinders; container tracking; and certain recordkeeping, reporting, and labeling requirements.[131]

On October 19, 2023, the EPA published a notice of proposed rulemaking of the "calendar year 2024 allowances for the production and consumption of [HFCs]" pursuant to the AIM Act of 2020. EPA also finalized rules for "withhold[ing], retir[ing], and revok[ing] entities' remaining calendar year 2023 and newly issued calendar year 2024 allowances in accordance with [EPA's] administrative consequence regulatory provisions."[132]

On October 24, 2023, EPA issued a final rule addressing two petitions previously granted pursuant to the AIM Act. The rules "facilitate[] the transition to next-generation technologies by restricting use of HFCs in the sectors in which they are used."[133] The rules restrict the use of "HFCs within the refrigeration, air conditioning, and heat pump (RACHP), foam, and aerosol sectors."[134] The rule also establishes a process for submitting technology transitions petitions and "recordkeeping and reporting requirements."[135]

On December 26, 2023, EPA published an interim final rule stating that it will allow "one additional year, until January 1, 2026, for installation of new residential and light commercial air conditioning and heat pump systems using components manufactured or imported prior to January 1, 2025," "amending the recently finalized Technology Transitions Program under the AIM Act."[136]

I. Voluntary Consensus Standards

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[129]Phasedown of Hydrofluorocarbon Production Baseline, 88 Fed. Reg. 44,220 (July 12, 2023) (to be codified at 40 C.F.R. pt. 84).

[130]Phasedown of Hydrofluorocarbons: Allowance Allocation Methodology for 2024 and Later Years, 88 Fed. Reg. 46,836 (July 20, 2023) (to be codified at 40 C.F.R. pt. 84).

[131]Phasedown of Hydrofluorocarbons: Management of Certain Hydrofluorocarbons and Substitutes Under Subsection (h) of the American Innovation and Manufacturing Act of 2020, 88 Fed. Reg. 72,216 (Oct. 19, 2023) (to be codified at 40 C.F.R. pts. 84, 261, 262, 266, 270, 271).

[132]Phasedown of Hydrofluorocarbons: Notice of 2024 Allowance Allocations for Production and Consumption of Regulated Substances Under the American Innovation and Manufacturing Act of 2020, and Notice of Final Administrative Consequences, 88 Fed. Reg. 72,060 (Oct. 19, 2023).

[133]Phasedown of Hydrofluorocarbons: Restrictions on the Use of Certain Hydrofluorocarbons Under the American Innovation and Manufacturing Act of 2020, 88 Fed. Reg. 73,098 (Oct. 24, 2023) (to be codified 40 C.F.R. pt. 84).

[134]*Id.*

[135]*Id*.

[136]Phasedown of Hydrofluorocarbons: Technology Transitions Program Residential and Light Commercial Air Conditioning and Heat Pump Subsector, 88 Fed. Reg. 88,825 (Dec. 26, 2023) (to be codified at 40 C.F.R. pt. 84).

On February 21, 2023, the EPA published a final rule incorporating by reference voluntary consensus standards associated with the "formaldehyde standards for composite wood products regulations under the Toxic Substances Control Act."[137] EPA also finalized its "interpretation that remote inspections by third-party certifiers are allowed in certain circumstances in the event of unsafe conditions."[138]

J. Other

On July 13, 2023, the EPA "finalized the rescission of the rule 'Increasing Consistency and Transparency in Considering Benefits and Costs in the CAA Rulemaking Process' (Benefit-Cost Rule)."[139] The Benefit-Cost Rule was promulgated in 2020 and required a benefit-cost analysis for all significant proposed and final CAA regulations. In this action, EPA rescinded the rule because "the rule [was] inadvisable, untethered to the CAA," and not necessary to carry out the CAA's purposes.[140]

On November 17, 2023, the EPA issued a notice of proposed rulemaking soliciting comment on "development of regulations to reinstate reporting of animal waste emissions from farms under the Emergency Planning and Community Right-to-Know Act."[141]

[137]Voluntary Consensus Standards Update; Formaldehyde Emission Standards for Composite Wood Products, 88 Fed. Reg. 10,468 (Feb. 21, 2023) (to be codified 40 C.F.R. pt. 770).
[138]*Id.*
[139]Rescinding the Rule on Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 88 Fed. Reg. 44,710 (July 13, 2023) (to be codified 40 C.F.R. pt. 83).
[140]*Id.*
[141]Potential Future Regulation for Emergency Release Notification Requirements for Animal Waste Air Emissions Under the Emergency Planning and Community Right-to-Know Act (EPCRA), 88 Fed. Reg. 80,222 (proposed Nov. 17, 2023) (to be codified at 40 C.F.R. pt. 355).

Chapter B: BIODIVERSITY
2023 Annual Report[1]

I. ADMINISTRATIVE DEVELOPMENTS

A. Issuance of Proposed Rule to Revise Endangered Species Act Section 10 Incidental Take and Enhancement of Survival Permit Regulations

The United States Fish and Wildlife Service (FWS) proposed revisions to the section 10 incidental take permit and enhancement of survival permit regulations[2] to clarify that it has authority to issue a permit for non-listed species without also including a listed species on the permit, and to include the 1999 Five Point policy on habitat conservation plans (HCPs) in the regulations. Based on clarification of its authority to issue incidental take permits for non-listed species, FWS is proposing to eliminate candidate conservation agreement permits by rescinding 50 C.F.R. §§ 17.22(d) and 17.32(d). Candidate and other non-listed species would subsequently be covered by an incidental take permit or a Safe Harbor Agreement permit. The term Safe Harbor Agreement would also be changed to "Conservation Benefit Agreement."[3]

B. Issuance of Final Rule to Revise Endangered Species Act Section 10 Regulations Governing the Reintroduction of Experimental Populations of Listed Species

FWS issued a final rule[4] revising the section 10(j) regulations concerning the reintroduction of experimental populations of listed species to remove language indicating that species reintroductions should generally be limited to areas that are within the historical range of the species. FWS stated that it "may be increasingly necessary and appropriate to establish experimental populations outside of their historical range if the species' habitat has undergone, is undergoing, or is anticipated to undergo irreversible decline and is no longer capable of supporting the species due to threats such as climate change or invasive species."[5]

II. JUDICIAL DEVELOPMENTS

A. Section 4: Listings, Critical Habitat Designation, and Recovery Plans

1. Listings and Delistings

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[1]Author contributors to this report were Sean Skaggs of Ebbin Moser + Skaggs, LLP, San Diego, California; Emily Mott of Baker Botts, LLP, Houston, TX; Kerensa Gimre of Perkins Coie LLP, Washington, D.C.; and Nancy Cruz and Jared Padway of Perkins Coie LLP, Madison, Wisconsin. Sean Skaggs of Ebbin Moser + Skaggs, LLP, San Diego, California and Kerensa Gimre of Perkins Coie LLP, Washington, D.C. edited this report. This report covers many (but, due to space constraints and to avoid duplication with other chapters, not all) of the significant developments involving the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544 in 2023.

[2]Endangered and Threatened Wildlife and Plants; Enhancement of Survival and Incidental Take Permits, 88 Fed. Reg. 8380 (Feb. 9, 2023) (to be codified at at 50 C.F.R. pts 13, 17).

[3]*Id*. at 8392.

[4]Endangered and Threatened Species: Designation of Experimental Populations, 88 Fed. Reg. 42,642 (July 3, 2023) (to be codified at 50 C.F.R. pt. 17).

[5]*Id*. at 42,648.

In *Center for Biological Diversity v. United States Fish & Wildlife Service*,[6] environmental plaintiff filed an action against FWS challenging denial of plaintiff's second petition to list the Tucson shovel-nosed snake under the ESA. Plaintiff argued that defendants arbitrarily rejected substantial scientific or commercial information in reviewing the listing petition. The United States District Court for Arizona stated that whether a petition is granted or denied turns on

> [W]hether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. Substantial scientific or commercial information refers to credible scientific or commercial information in support of the petition's claims such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted.[7]

The court denied plaintiff's motion, finding the record presented no new or substantial information requiring defendants to reconsider its genetics-based classification of the snake and resultant range. The court found that defendant considered the relevant factors and articulated a rational connection between the facts found and the ultimate finding. Plaintiff's appeal of the court's judgment to the Ninth Circuit is pending.[8]

In *Center for Biological Diversity v. United States Fish & Wildlife Service*,[9] environmental plaintiffs filed a complaint against FWS seeking an order declaring that defendants' determination that the eastern hellbender should not be listed as either endangered or threatened is unlawful and should be vacated. The United States District Court for Southern District of New York denied defendant's motion and granted plaintiffs' motion, vacating defendant's determination and remanding the matter to the agency for further proceedings consistent with the court's opinion. Plaintiffs successfully argued that defendant's finding failed to rely on the best scientific and commercial data available, which rendered the decision arbitrary and capricious. For example, the court determined that it was arbitrary and capricious for defendants to have considered uncertain or future conservation efforts as part of its reasonable best plausible scenario in reaching a "not-warranted" determination. Defendant's were only permitted to consider future actions that are sufficiently certain to affect a species' status. In contrast, prospective future conservation efforts have uncertain results, which could not serve as a valid basis for consideration in a listing determination. Defendant's appeal of the court's opinion and order to the Second Circuit Court of Appeals is pending.[10]

In *Center for Biological Diversity v. United States Fish & Wildlife Service*,[11] environmental plaintiff challenged FWS's reclassification of the American Burying Beetle from "endangered" to "threatened." According to the U.S. District Court for the District of Columbia, while the parties essentially agreed on the future challenges the beetle will face due to the effects of climate change between 2040 and 2069, the parties disagreed about how to categorize that risk to the beetle under the ESA. In granting summary judgment in favor of defendant, the court found that defendant relied on a reasonable interpretation of the statute when reclassifying the beetle as threatened. Plaintiff claimed that the existential threat of climate change has the potential to cause the extinction of the beetle in the future.

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[6]No. CV-22-00286-TUC-JGZ, 2023 U.S. Dist. LEXIS 148624 (D. Ariz. Aug. 23, 2023).
[7]*Id.* at *3 (citation omitted).
[8]Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., No. 23-3026 (9th Cir. Oct. 24, 2023).
[9]No. 21-cv-5706 (LJL), 2023 U.S. Dist. LEXIS 157039 (S.D.N.Y. Sept. 5, 2023).
[10]Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., No. 23-7785, 2023 WL 9693304 (2d Cir. Nov. 29, 2023).
[11]No. 21-791 (TJK), 2023 U.S. Dist. LEXIS 176314 (D.D.C. Sept. 30, 2023).

The court found that FWS need not account for the seriousness of future threats faced by a species, only current threats, as a species is only endangered if it "*is* in danger of extinction." By contrast, a species is threatened if it *is likely* to become an endangered species within the foreseeable future.[12] Thus, there is a temporal distinction between endangered and threatened species. As noted by the court, "…it is permissible to conclude that a species is not endangered where extinction is unlikely to happen for at least 19 years."[13] In proposing to down-list the beetle as threatened, FWS explained that the "beetle's viability is higher than was known at the time of listing," meaning that it did "not currently meet the definition of endangered under the [ESA] because it is not presently in danger of extinction."[14] Because the beetle's risk of extinction had ameliorated since its original listing, the court held that FWS properly reclassified the beetle as threatened. Plaintiff's appeal of the court's opinion to the D.C. Circuit is pending.[15]

2. Critical Habitat Designations

In *Center for Biological Diversity v. United States Fish & Wildlife Service*,[16] environmental plaintiff challenged a biological opinion (BiOp) issued by FWS for a United States Forest Service (USFS) approval of a proposed mining project because of alleged effects to jaguar critical habitat. The project proponent intervened in the action and filed a crossclaim against defendants, arguing that the critical habitat designation for jaguar violated the Administrative Procedures Act (APA) and Endangered Species Act (ESA). The court found that the designation of unit 3 as *occupied* critical habitat was improper because FWS relied on materials outside the relevant time frame (occupancy at the time of listing). Photographs of jaguar sightings decades after the time of the listing decision should not have been considered by FWS with respect to the question of whether unit 3 had been occupied by jaguar at the time of the listing decision, as required by the ESA. The court also found that FWS's designations of unit 3 and unit 4b as *unoccupied* critical habitat was arbitrary and capricious because FWS did not establish, as required by the ESA and regulations, that the unoccupied areas were essential to the conservation of the species. The court determined that "'essential' in the ESA's definition of 'critical habitat' is an area that is indispensable or necessary to conservation, not merely beneficial to such efforts."[17] In making the designation, FWS conceded there is nothing establishing that the jaguar would be unable to recover if unit 3 was not designated as critical habitat. Accordingly, FWS was unable to explain how unit 3 is essential for the conservation of the jaguar. Likewise, unit 4b was found by the court to not be essential to the conservation of the jaguar because even though it connects the mountains in the United States to Mexico (where there is a larger population of jaguars), there was no evidence that jaguars had used the specific travel corridor. The Ninth Circuit affirmed the district court's vacatur of the designation of unit 3 as occupied critical habitat and reversed its grant of summary judgment to FWS regarding the designation of unit 3 and unit 4b as unoccupied critical habitat, remanding the critical habitat determination to FWS.

In *Natural Resources Defense Council v. United States Fish and Wildlife Service*,[18] environmental plaintiffs challenged the decision by FWS not to designate critical habitat

[12] *Id.* at *18 (citation omitted).
[13] *Id.* at *6.
[14] *Id.* at *6.
[15] Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., No. 23-5285 (D.C. Cir. Nov. 30, 2023).
[16] Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 67 F.4th 1027 (9th Cir. 2023).
[17] *Id.* at 1038.
[18] No. 21-0770 (ABJ), 2023 U.S. Dist. LEXIS 140922 (D.D.C. Aug. 11, 2023).

for the rusty patched bumble bee based on a determination that the designation would not be prudent. Plaintiffs argued that to use the narrow "not prudent" exception to the requirement to designate critical habitat, FWS needed to demonstrate that the designation would not be beneficial to the species and had failed to do that. The court granted plaintiffs' motion for summary judgment, holding and that the record did not demonstrate that critical habitat would not be beneficial in any way to the species and FWS did not set forth a reasoned basis for using the not prudent exception.

B. Section 7: Federal Agency Conservation Duty, Jeopardy Standard Consultations, and Incidental Take Statements

In *Center for Biological Diversity v. Haaland*,[19] environmental plaintiffs challenged a BiOp, alleging that the USFS and the U.S. Army Corps of Engineers (Corps) were in ongoing violation of the ESA and section 7 regulations for failing to reinitiate consultation after approving a land exchange and a § 404 permit for a copper mine project. Plaintiffs alleged that the BiOp was inadequate and that further consultation was required due to the revelation of "new information," specifically: (1) disease devastated the population of northern long-eared bats in the area; (2) the extent and magnitude of other mining activity in the area had significantly increased; (3) the potential adverse impacts of copper mining in the region are better understood; and (4) mine owners had revised their wetland-mitigation plan. In its BiOp, FWS found that, although mining operations would likely have some impact on the number of bats, those operations were "not likely to jeopardize the continued existence." The court denied the defendant's motion to dismiss for the claim related to the bat population information, because, while the previously existing population was large enough to absorb the impact of mining operations, the new information could change that outcome, despite the population decline being unrelated to any mining operations.[20] The court granted the motion to dismiss the remaining claims, finding that plaintiffs failed to present sufficient evidence to support the "new information" or failed to plausibly plead that the new information changed the project "in a manner that causes an effect to the listed species or critical habitat that was not considered."[21]

In *Friends of Del Norte v. California Department of Transportation*,[22] environmental plaintiffs challenged a biological assessment (BA) prepared by the California Department of Transportation (Caltrans) on behalf of the Federal Highway Administration for proposed lane modifications to improve the passage of larger-sized trucks. Defendant argued that neither the APA nor the ESA authorized plaintiffs to challenge the BA, because it is neither an "agency action made reviewable by statute" nor a "final agency action for which there is no other adequate remedy in a court."[23] Plaintiffs argued that the NMFS's letter of concurrence agreeing with the determinations in the BA constituted final agency action. In the alternative, plaintiffs argued that the ESA authorizes them to challenge the BA because Caltrans and NMFS did not engage in formal consultation. The court found that an agency's decision not to engage in consultation to the extent required by law is reviewable, at least when the agency has concluded its decision-making processes with respect to how and whether to consult. The court concluded that the BA adequately analyzed potential impacts to listed species, and therefore, it was not arbitrary and capricious for Caltrans and NMFS to conclude that formal consultation was unnecessary.

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[19]No. 22-CV-0181 (PJS/LIB), 2023 U.S. Dist. LEXIS 16574 (D. Minn. Feb. 1, 2023).
[20]*Id*. at *3-6.
[21]*Id*. at *6.
[22]No. 18-CV-00129-JD, 2023 U.S. Dist. LEXIS 35909 (N.D. Cal. Mar. 3, 2023).
[23]*Id*. at *27.

In *White v. United States Army Corps of Engineers*,[24] plaintiff filed suit seeking a declaration that the Corps violated the section 9 prohibition against unauthorized taking of protected salmon species through its flood control operations at a dam. Plaintiff requested that the court enjoin the Corps from continuing to cause unauthorized take-through water releases and requiring the Corps to reinitiate formal Section 7 consultation with NMFS on the effects of operations at the dam. The Corps moved to dismiss the suit arguing that plaintiff's claims were moot because the Corps had already reinitiated the consultation process with NMFS, or in the alternative, to stay the matter pending the processes' completion. Defendants argued that no effective relief remains to remedy plaintiff's section 7 claim because defendants had already reinitiated formal consultation. Moreover, because an Incidental Take Statement would exempt the Corps from the ESA's take prohibition going forward, defendants argued plaintiff's section 9 claim would also be moot once the reinitiated section 7 consultation is complete. The court disagreed and found that an injunction preserving the status quo could still provide plaintiff meaningful relief pending completion of the reinitiated consultation. The court declined to stay the litigation pending the completion of the consultation because a stay could harm plaintiff by allowing defendants "to engage in unlawful behavior with no concrete end date,"[25] which outweighed the potential hardship to the Corps of continuing litigation.

In *Center for Biological Diversity v. United States Maritime Administration*,[26] environmental plaintiffs sued the U.S. Department of Transportation Maritime Administration (MARAD), for failing to conduct a programmatic section 7 consultation with FWS and NMFS (Services) on the U.S. Marine Highway Program (the "Program") in its entirety and failing to consult with the Services on its issuance of a grant to fund dredging in the James River. Regarding the programmatic challenge, the court held that the Program is not the kind of program that constitutes a discrete agency action requiring consultation. As to plaintiffs' claim that issuance of the grant for the James River required section 7 consultation, the court found that MARAD's contention that it was under no duty to consult because it had determined that the issuance of the grant would have no effect on the listed species ran counter to the evidence before the agency. The court therefore held that that agency's decision not to conduct section 7 consultation on the issuance of the grant was arbitrary and capricious. The court granted in part and denied in part both parties' motions for summary judgment. Both parties have filed notices of appeal.[27]

In *Nantucket Residents Against Turbines v. United States Bureau of Ocean Energy Management*,[28] plaintiffs alleged that the Bureau of Ocean Energy Management (BOEM) decisions approving an offshore wind energy project off the coast of Martha's Vineyard and Nantucket were based on inadequate environmental assessments in violation of the National Environmental Policy Act (NEPA), the ESA, and the APA. Plaintiffs claimed that the 2021 BiOp issued by NMFS was flawed because it failed to use the "best scientific and commercial data available" as required under the ESA, and that, as a result, NMFS and BOEM acted arbitrarily and capriciously in violation of the ESA. The court reasoned that neither the ESA nor its implementing regulations provide direction as to what constitutes the "best scientific and commercial data available," and that determining which studies and data are the best available is "itself a scientific determination deserving deference.'[29] In light of the record and the deference accorded to NMFS in making such determination, the court found plaintiffs' arguments unpersuasive, and held that plaintiffs had not shown that

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[24]White v. U.S. Army Corps of Engineers, 659 F. Supp. 3d 1045 (N.D. Cal. 2023).
[25]*Id.* at 1056 (citation omitted).
[26]No. 4:21-cv-00132, 2023 U.S. Dist. LEXIS 57232 (E.D. Va. Mar. 31, 2023).
[27]Center for Biological Diversity v. United States Maritime Administration, No. 23-2076 (4th Cir. Oct. 16, 2023).
[28]No. 1:21-cv-11390-IT, 2023 U.S. Dist. LEXIS 86176 (D. Mass. May 17, 2023).
[29]*Id*. at *57.

NMFS and BOEM violated the ESA by failing to rely on the "best commercial data available" during the consultation process.

In *Maine Lobstermen's Association v. National Marine Fisheries Service*,[30] the Maine Lobstermen's Association appealed the district court's decision on its challenge to a BiOp in which NMFS relied on legislative history indicating that it should err on the side of the species during section 7 consultation. The D.C. Circuit Court of Appeals held that NMFS acted contrary to law and was arbitrary and capricious in issuing the BiOp. The court held that the ESA did not authorize a substantive presumption in favor of a species in determining under ESA section 7(a)(2) whether a federally licensed fishery was not likely to jeopardize the survival of a protected species, but instead required applying the ordinary meaning of "likely" to mean "more likely than not," and the agency gave no reasoned explanation for changing its practice. The court held that NMFS's reliance on "a half-sentence in the legislative history"[31] was "egregiously wrong," reasoning that legislative history cannot bind the executive branch and compel a presumption in favor of the species that is not required by the ESA. The court directed the district court to vacate the BiOp as it applies to the lobster and Jonah crab fisheries.

In *Los Padres Forestwatch v. United States Forest Service*,[32] environmental plaintiffs alleged that the FWS violated the ESA because it could not have reasonably concluded that the project was not likely to adversely affect the California condor or its critical habitat when it issued a BiOp for a USFS project authorizing the logging of an unspecified number of large trees on 755 acres within the Los Padres National Forest. The U.S. District Court for Central California concluded that FWS properly determined that the project's effect on the California condor and its critical habitat was virtually nonexistent based on the information available and that the project would remove few, if any, large trees. The court further concluded that FWS's determination that the project was "not likely to adversely affect" the California condor and its critical habitat was amply supported by the bird tracking data contained in the administrative record. The court stated that FWS reasonably concluded that any effects to California condor and its critical habitat as a result of the project activities will be insignificant and beneficial to the species, and that FWS's conclusions are entitled to substantial judicial deference.

In *Center for Biological Diversity v. United States Environmental Protection Agency*,[33] plaintiffs challenged the Environmental Protection Agency's (EPA) failure to consult with the Services before approving Washington State's limits on aquatic cyanide in 1993, 1997, and 2007. Defendant argued that plaintiffs' 1993 and 1997 claims were time-barred by a six-year statute of limitations, and that the 2007 claim failed to assert any ground for relief. In 2007, EPA initiated consultation with the Services. In 2010, the Services released draft biological opinions finding approval of the cyanide criteria would likely jeopardize the continued existence of numerous listed species. In "2016, EPA terminated continued consultations without a completed section 7 consultation". The court found that the present case met the "continuing violation doctrine" and that the obligation to consult under section 7 did not lapse; there is a current and ongoing duty to consult such that plaintiffs' claim was not time barred. Finally, the court held that defendant's claim that re-initiation is discretionary was not supported by the text of the ESA and denied defendant's motion to dismiss as to all claims.

In *Alliance for the Wild Rockies v. Marten*,[34] plaintiffs challenged USFS and FWS's failure to reinitiate section 7 consultation for the BiOp issued on the Helena-Lewis and Clark National Forest Plan. Defendants admitted that unauthorized motor access occurs in

[30] 70 F.4th 582 (D.C. Cir. 2023).
[31] *Id*. at 598.
[32] No. CV 22-2781-JFW (SKx), 2023 U.S. Dist. LEXIS 127627 (C.D. Cal. July 19, 2023).
[33] No. 22-486 (BAH), 2023 U.S. Dist. LEXIS 137361 (D.D.C. Aug. 8, 2023).
[34] No. CV 21-05-M-DLC, 2023 U.S. Dist. LEXIS 135334 (D. Mont. Aug. 3, 2023).

the Forest, and recognized in other reports, that vehicular traffic posed significant threats to grizzly bear survival. Plaintiffs claimed that defendants did not properly consider unauthorized motor use and the ineffectiveness of USFS efforts to curtail it, or its potential or cumulative effects on grizzly bears in the BiOp. Plaintiffs claimed that USFS failure to reinitiate ESA consultation upon learning that their assumption that travel management regulations would be effective was proven false, which amounted to a failed conservation promise. The court agreed with plaintiffs that the BiOp did not explain a decision that ran counter to evidence, and issuance of the BiOp was therefore arbitrary and capricious.

In *Western Watersheds Project v. McKay*,[35] environmental plaintiff challenged a BiOp issued by FWS to USFS for grazing in Oregon spotted frog critical habitat. The Ninth Circuit held that FWS failed to address information indicating that climate change would make low water conditions frequent or more severe and consider how that would impact the Oregon spotted frog. Although the BiOp considered how drought conditions might harm the frogs, the BiOp failed to consider how climate change would impact frogs in non-drought years or consider climate change as a cumulative effect or baseline condition. Although FWS claimed the mitigation strategies in the BiOp would address impacts to frog critical habitat during low water conditions, the court found that the BiOp contained no information that the mitigation strategies were developed with climate change in mind. Further, the mitigation measures were not tied to a clear, definite commitment of resources; were not subject to deadlines or enforceable obligations; and did not address threats to the species to satisfy jeopardy or adverse modification standards. The court held that it was, therefore, arbitrary and capricious for FWS to rely on the effectiveness of these mitigation measures to conclude there would be no jeopardy. The court vacated the BiOp and remanded to FWS for further consideration.

In *Center for Biological Diversity v. Haaland*,[36] environmental plaintiffs challenged a BiOp issued by FWS for the use of water by the U.S. Army from the San Pedro River Basin in Arizona. The Army pumps water from the Basin for use at Fort Huachuca in Arizona. As the Basin is home to several plant and animal species protected under the ESA, the Army proposed a conservation easement that would restrict agricultural development to save water and protect species that depend on the Basin. Environmental plaintiffs challenged the BiOp as lacking sufficient support for its conclusion that the easement would yield water savings. The Ninth Circuit agreed with plaintiffs, holding that FWS failed to show that the benefit from the conservation easement would be "reasonably certain" and that FWS relied mostly on speculation to claim water savings. Because the government could not claim water savings from the conservation easement, its no-jeopardy determination on protected wildlife was arbitrary and capricious. The court remanded the BiOp to FWS.

In *Migrant Clinicians Network v. United States Environmental Protection Agency*,[37] environmental plaintiffs challenged the EPA's amended pesticide registrations of streptomycin sulfate, an antibiotic used to combat citrus diseases. Plaintiffs claimed EPA failed to comply with the ESA as EPA did not evaluate the risk that streptomycin would pose to pollinators. EPA admitted that it did not comply with the ESA in amending its streptomycin registration and stated that it "has met its ESA obligations for less than 5%"[38] of its thousands of pesticide registrations approved in the past decades. Given the backlog, EPA estimated that it could not complete Section 7 consultation for streptomycin before fall 2026. The Ninth Circuit vacated and remanded the amended registration to EPA to

[35]No. 22-35706, 2023 U.S. App. LEXIS 28484 (9th Cir. Oct. 26, 2023).
[36]No. 22-15809, 2023 U.S. App. LEXIS 31888 (9th Cir. Dec. 4, 2023).
[37]88 F.4th 830 (9th Cir. 2023).
[38]*Id.* at 837.

make a Section 7 effects determination, holding that "the EPA may not avoid compliance with the ESA merely because of its own internal regulatory priorities."[39]

In *Sovereign Iñupiat for a Living Arctic v. Management,*[40] environmental plaintiffs alleged several violations of the ESA in the Services' BiOp for an oil drilling operation on the North Slope of Alaska. Plaintiffs alleged that the Services erred in finding in the BiOp that there would be no incidental take of polar bears, that the consultation failed to evaluate carbon emissions, and that the Bureau of Land Management (BLM) unlawfully relied on a flawed BiOp. The court held that FWS's basis for finding that nondenning polar bears would not be harassed by the project was not arbitrary and capricious, such that the agency's misinterpretation of its definition of harass in the regulations was harmless error. With respect to carbon emissions, the court found that BLM and the Services considered relevant factors and articulated a rational connection between the facts found and their conclusion that the project's greenhouse gas emissions did not constitute an effect of the action under the ESA. Because FWS's BiOp was not arbitrary or capricious, the court also found that BLM's reliance on the BiOp did not violate the ESA. The court further held that plaintiffs had not shown that FWS disregarded available scientific evidence better than the evidence it relied on, and FWS's use of the available scientific and commercial data was not arbitrary and capricious.

C. Section 9: Prohibited Acts

In *Flathead-Lolo-Bitterroot Citizen Task Force v. State*,[41] environmental plaintiffs filed suit against the State of Montana to enjoin the implementation of regulations that authorized wolf trapping in areas of the state occupied by grizzly bear, alleging that wolf trapping was reasonably certain to result in the prohibited take of grizzly bear under section 9. The court held that state-authorized recreational trapping violates the ESA when it risks taking a threatened or endangered species even when trappers comply with all laws and regulations. In enjoining the wolf trapping regulations, the court found persuasive plaintiffs' evidence that there is an increasing prevalence of grizzly bears with "trap-like" injuries in Montana. The court held that unauthorized taking of grizzly bear was reasonably certain to occur even if trappers complied with the regulations and that such taking would be "directly attributable to defendants' authorization of the State's trapping and snaring rule and regulations."[42]

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[39] *Id.* at 847 (citing *Ctr. for Food Safety v. Regan*, 56 F.4th 648, 658 (9th Cir. 2022).
[40] No. 3:23-cv-00058-SLG, 2023 U.S. Dist. LEXIS 201981 (D. Alaska Nov. 9, 2023).
[41] No. CV23-101-M-DWM, 2023 U.S. Dist. LEXIS 208881 (D. Mont. Nov. 21, 2023).
[42] *Id.* at *12.

Chapter C: CLIMATE CHANGE
2023 Annual Report[1]

I. INTERNATIONAL ACTIVITIES

A. United Nations

1. Framework Convention on Climate Change (UNFCCC)

The Twenty-Eighth Meeting of the Conference of the Parties (COP28) to the UNFCCC took place in Dubai, UAE, from November 30 to December 13, 2023. At COP28, parties to the UNFCCC operationalized the Loss and Damage Fund[2] by adopting the recommendation of the Transitional Committee, which was established at COP27.[3] The purpose of the Fund is, "to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and noneconomic loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events."[4] The Fund will be "serviced by a new, dedicated and independent secretariat" and "governed and supervised by a Board" that will convene before January 31, 2024, with the World Bank serving as host for an interim period of four years.[5] The responsibilities of the Fund host include receipt and implementation of contributions, holding and investing of funds, transfer of funds, accounting, reporting, and financial and fiduciary management, and ensuring compliance with established

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[2]UNFCCC, Operationalization of the New Funding Arrangements, Including a Fund, for Responding to Loss and Damage Referred to in Paragraphs 2–3 of Decisions 2/CP.27 and 2/CMA.4, Decision -/CP.28 -/CMA.5 (advance unedited version) (Dec. 13, 2023) [hereinafter Loss and Damage Fund Decision].

[3]UNFCCC, Funding Arrangements for Responding to Loss and Damage Associated with the Adverse Effects of Climate Change, Including a Focus on Addressing Loss and Damage, Decision 2/CP.27, U.N. Doc. FCCC/CP/2022/10/Add.1 (Nov. 20, 2022).

[4]Loss and Damage Fund Decision, *supra* note 2

[5]Loss and Damage Fund Decision, *supra* note 2, ¶¶ 3, 4, 10, 17.

procedures.[6] Parties pledged approximately $700 million to the Fund at COP28.[7] Parties also selected the UN's Office of Disaster Risk Reduction and Office for Project Services to host the Santiago Network on Loss and Damage,[8] which was established at COP25 to catalyze technical assistance.

COP28 also served as the Fifth Meeting of the Parties to the Paris Agreement. The Parties adopted the first Global Stocktake (GST), a periodic assessment of collective progress towards achievement of the Paris Agreement's goals.[9] The GST is intended to inform parties ahead of national determined contribution (NDC) submissions, the next round of which are due in 2025. The GST found that "despite overall progress on mitigation, adaptation and means of implementation and support, Parties are not yet collectively on track towards achieving the purpose of the Paris Agreement and its long-term goals" and that "limiting global warming to 1.5°C with no or limited overshoot requires deep, rapid and sustained reductions in global greenhouse gas (GHG) emissions of 43 per cent by 2030 and 60 per cent by 2035 relative to the 2019 level and reaching net zero carbon dioxide emissions by 2050."[10] The GST provided detail on the specific status of multiple categories of Paris Agreement objectives and, to address the gap between those goals and the progress of parties, the GST "calls on parties to contribute to . . . global efforts" to (among other things) triple renewable energy capacity and double energy efficiency improvements by 2030, accelerate efforts towards the phase-down of unabated coal power, phase out inefficient fossil fuel subsidies, accelerate and substantially reduce non-carbon-dioxide emissions like methane, and transition away from fossil fuels, in a just, orderly and equitable manner, with developed countries continuing to take the lead.[11]

Also pursuant to the Paris Agreement, Parties established the Global Goal on Adaptation framework to aid in meeting the Article 7 "global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change with a view to contributing to sustainable development and ensuring an adequate adaptation response."[12] The framework concluded the two-year Glasgow–Sharm el-Sheikh work programme and provides adaptation targets for specific sectors and thematic areas, including water, food and agriculture, ecosystems, and biodiversity. To facilitate development of progress assessment tools, Parties established the UAE–Belem two-year work programme.

Also at COP28, six countries contributed to the second replenishment of the Green Climate Fund (GCF), bringing the total pledges to $12.8 billion from thirty-one countries.[13] This was a continuation of progress made at the High-Level Pledging Conference in Bonn, Germany in October 2023, where twenty-five countries pledged $9.3

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[6] *See id.* ¶ 37.

[7] Press Release, United Nations Climate Change, COP28 Agreement Signals "Beginning of the End" of the Fossil Fuel Era (Dec. 13, 2023) [hereinafter COP28 Press Release].

[8] UNFCCC, Santiago Network for Averting, Minimizing and Addressing Loss and Damage under the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts, Decision -/CP.28, ¶1 (advance unedited version) (Dec. 13, 2023).

[9] UNFCCC, Outcome of the First Global Stocktake, Decision -/CMA.5 Advance unedited version (Dec. 13, 2023).

[10] *Id.* ¶¶ 2, 27.

[11] *Id.* ¶ 28.

[12] UNFCCC, Glasgow–Sharm el-Sheikh Work Programme on the Global Goal on Adaptation Referred to in Decision 7/CMA.3, Decision -/CMA.5 Advance unedited version (Dec. 13, 2023).

[13] COP28 Press Release, *supra* note 7.

million in total GCF support.[14] Approximately $188 million in pledges were made to the Adaptation Fund and eight governments announced over $174 million in pledges to the Least Developed Countries Fund and Special Climate Change Fund.[15]

At COP16 in 2010, Parties to the UNFCCC established an Adaptation Planning Process (APP), which allows developing countries to identify medium- and long-term adaptation needs and to formulate strategies for meeting those needs. Pursuant to the APP, a record eleven countries submitted national adaptation plans (NAPs) in 2023, increasing the total to fifty-three.[16] The Marshall Islands, Burundi, Argentina, Zambia, Bhutan, Pakistan, Mozambique, Papua New Guinea, Bangladesh, Ecuador, and Haiti each submitted NAPs.

B. Regional and National Activities

1. European Union (EU) Corporate Sustainability Reporting Directive (CSRD)

The EU's CSRD went into effect on January 5, 2023.[17] The CSRD requires certain businesses to report their Scope 1, Scope 2, and Scope 3 emissions,[18] as well as information regarding other forms of pollution, impacts on aquatic and marine resources, and on biodiversity as well as data on social and human rights, as well as corporate governance.[19]

Many companies will be required to establish entirely new data collection and reporting systems in order to comply, beginning with certain large European businesses will be required to meet CSRD's requirements in 2024.[20] By 2025, all businesses will be required to comply with the CSRD if they (1) are "large"[21] EU-registered business entities or groups, or (2) are listed on an EU stock exchange (with an exception for very small businesses), or (3) are non-EU companies that have annual revenues from the EU exceeding €150 million and have a subsidiary or branch located within the EU.[22] The EU estimates that approximately 50,000 businesses registered within the EU will be required

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[14] Press Release, Green Climate Fund, COP28: Green Climate Fund Reaches Record Funding Level (Dec. 3, 2023).

[15] 7*See* COP28 Press Release, *supra* note 7.

[16] Record Number of National Adaptation Plans Submitted in 2023, But More Are Needed, U.N.: CLIMATE CHANGE (Dec. 13, 2023).

[17] Council Directive 2022/2464, Amending Regulation (EU) No. 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as Regards Corporate Sustainability Reporting, 2022 O.J. (L 322/15) 16, 46 (EU).

[18] For an explanation of what constitutes a company's Scope 1, Scope 2, or Scope 3 emissions, see *Scope 1 and Scope 2 Inventory Guidance*, U.S. ENVTL. PROT. AGENCY (Aug. 21, 2023); *Scope 3 Inventory Guidance*, U.S. ENVTL. PROT. AGENCY (Dec. 15, 2023).

[19] Thibault Meynier et al., *EU Finalizes ESG Reporting Rules with International Impacts*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 30, 2023).

[20] Avery Ellfeldt, *U.S. Companies Scramble Ahead of EU Climate Disclosure Rules*, CLIMATEWIRE (Oct. 17, 2023).

[21] "Large" is defined as entities or groups that meet at least two of the following three criteria: (1) total assets exceeding €20 million, (2) total sales exceeding €40 million, or (3) average number of employees during the financial year exceeds 250. Meynier et al., *supra* note 19.

[22] *Id.*

to comply with the CSRD.[23] Additionally, the London Stock Exchange Group estimates that more than 10,000 non-EU registered companies will be required to comply with the CSRD, as well.[24] Detailed regulations implementing the CSRD, spelling out exactly which companies must report what kinds of information, are set to be adopted in early 2024.[25]

2. EU Carbon Border Adjustment Mechanism (CBAM)

On October 1, 2023, the EU's CBAM went into effect for the first time.[26] During the initial phase, importers of cement, iron and steel, aluminum, fertilizers, electricity and hydrogen will be required to submit annual reports on direct and indirect greenhouse gas (GHG) emissions related to their imports. Beginning on January 1, 2026, importers will be required to purchase emissions allowances equal to the GHG emissions related to their imports. The allowance price will be calculated using the weekly average auction price of EU Emissions Trading System allowances.

3. UK Solicitors Guidance

In April 2023, the Law Society of England and Wales, the professional association that represents solicitors in England and Wales, issued guidance for solicitors on climate change.[27] The first part of the guidance offers insights for firms on how to manage their business in a way that is consistent with a transition to net zero. The second part of the guidance deals with (a) how climate change raises physical and legal risks, which may be relevant when advising clients; (b) issues relating to the intersection of legal advice, climate change, and professional duties; and (3) other issues relating to the solicitor-client relationship in the context of climate change.

C. Litigation

In 2023, there was a surge in cases against both government bodies and corporate entities centered around constitutional, fundamental, and human rights infringements, as well as breaches of international agreements, conventions, and violations of national climate laws. Arguments reflected an increasingly nuanced and multifaceted approach to addressing the complexities of climate-related legal disputes.

In *VZW Klimaatzaak v. Kingdom of Belgium and Others*, an NGO, alongside 58,000 citizen plaintiffs, successfully sued the Belgian government, asserting that its measures to mitigate GHG emissions were insufficient. The plaintiffs advocated for more robust action, calling for 40% emissions reductions below 1990 levels by 2020 and 87.5% by 2050. On November 30, 2023, the Belgian Court of Appeals found that the government had failed to sufficiently contribute to global effort to combat climate change. Relying on Articles 2 and 8 of the European Convention on Human Rights and the Belgian Civil Code, the court mandated that the federal government and the governments of the Flanders and Brussels

[23]Ellfeldt, *supra* note 20.
[24]Elena Philipova, *How Many Companies Outside the EU Are Required to Report Under its Sustainability Rules?*, LSEG (June 2, 2023).
[25]Huw Jones, *EU Company ESG Disclosure Rules Set to Be Eased*, REUTERS (June 2, 2023, 4:11 AM).
[26]*Carbon Border Adjustment Mechanism*, EUR. COMM'N (last visited Apr. 17, 2024).
[27]*The Impact of Climate Change on Solicitors*, THE L. SOC'Y (Apr. 19, 2023) at 3 (The Law Society is distinct from the Solicitors Regulation Authority (SRA), which is supportive of the guidance.).

regions must decrease their GHG emissions by a minimum of 55% (as opposed to the current target of 47%) compared to 1990 levels by 2030.[28]

In *Greenpeace v. Spain I* and *Greenpeace v. Spain II*, the Spanish Supreme Court affirmed the alignment of Spain's regulatory measures with the Paris Agreement EU commitments and regulations. The cases were brought in 2020 when Greenpeace Spain, Oxfam Intermón, and Ecologistas en Acción initiated legal proceedings against the Spanish Government, accusing it of inadequate response to climate change. Alleging a violation of Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action, the plaintiffs argued that Spain failed to approve a National Energy and Climate Plan by December 2019, as mandated, with goals for 2030 and a Long-Term Strategy for 2050 and that aligned with recommendations for limiting global warming to 1.5°C. The decision reveals the complexities of assessing government actions on climate change and that courts may not be receptive to pushing governments beyond current mitigation commitments.[29]

In *DUH and BUND v. Germany*, two NGOs filed a claim with the Higher Administrative Court Berlin-Brandenburg, addressing the government's failure to meet emission targets in the building and transport sectors. The organizations contended that carbon dioxide emissions from these sectors surpassed legally permissible levels and insisted on the immediate development of an emergency program outlining swift emissions reductions, ensuring compliance with targets from 2023 to 2030. On November 30, 2023, the court determined that the German government had breached national climate legislation by failing to enforce GHG emissions targets in the specified sectors. The Climate Protection Act obliged the government to formulate programs facilitating a 65% reduction in GHG emissions by 2030, relative to 1990 levels, for these sectors. The court, citing non-compliance, ordered a reassessment of government policies.[30]

II. National Activities

A. Biden Administration Activities

1. Executive Order (EO) on Revitalizing Our Nation's Commitment to Environmental Justice for All

On April 21, 2023, President Biden signed EO 14096, entitled "Revitalizing Our Nation's Commitment to Environmental Justice for All."[31] EO 14096 builds upon EO 12898, issued by President Clinton in 1994, and reaffirms the federal government's commitment to environmental justice.[32] The Policy announced in the EO includes a commitment the ensuring every person has an environment that is healthy, sustainable, and climate-resilient, among other goals. The EO establishes a policy that every person must have "an environment that is healthy, sustainable, climate-resilient, and free from harmful pollution and chemical exposure" among other goals.[33] It also acknowledges that cumulative impacts and burdens of climate change upon environmental justice

[28] *VZW Klimaatzaak v. Kingdom of Belgium and Others*, CLIMATECASECHART.COM (last visited Apr. 7, 2024).
[29] *Greenpeace v. Spain I*, CLIMATECASECHART.COM (last visited Apr. 7, 2024); *Greenpeace v. Spain II*, CLIMATECASECHART.COM (last visited Apr. 7, 2024).
[30] *DUH & BUND v. Germany*, CLIMATECASECHART.COM (last visited Apr. 7, 2024).
[31] Exec. Order No. 14,096, 88 Fed. Reg. 25,251 (Apr. 26, 2023).
[32] Molly A. Lawrence & Rachael L. Lipinski, *Biden Administration Issues Long Anticipated Environmental Justice Executive Order*, The Nat'l L. Rev. (Jun. 15, 2023).
[33] Exec. Order No. 14,096, 88 Fed. Reg. 25,251 (Apr. 26, 2023).

communities and creates a process to identify, analyze and address those burdens. EO 14096 further directs the National Science and Technology Council to establish an environmental justice subcommittee, in order to coordinate federal strategies to identify and address gaps in science, data, and research related to environmental justice. The EO also established the White House Office of Environmental Justice within the Council on Environmental Quality (CEQ) and an Interagency Council. Within six months of the EO's issuance, the Chair of the CEQ is required to issue interim guidance[34] on implementation of the EO and no later than eighteen months of the order, and every four years thereafter, each agency shall submit an Environmental Justice Strategic Plan.

2. CEQ NEPA Guidance on Consideration of GHG Emissions and Climate Change

In January 2023, the Council on Environmental Quality (CEQ) issued interim guidance on considering climate change in environmental analysis under the National Environmental Policy Act (NEPA).[35] The guidance is "interim" in that it took immediate effect but also received a public comment period. It builds upon a 2016 guidance document[36] that CEQ withdrew in 2017.[37]

The Interim Guidance focuses primarily on how proposed federal actions affect climate change. CEQ instructs agencies on quantifying, contextualizing, and mitigating GHG emissions. First, CEQ instructs agencies to quantify both reasonably foreseeable direct and indirect emissions of proposed actions and reasonable alternatives. Second, it endorses the social cost of GHGs and other tools that enable comparisons and "help evaluate the significance of an action's climate change effects."[38] And third, CEQ instructs agencies to consider alternatives and mitigation measures that "avoid, minimize, or compensate for . . . climate change effects."[39]

The Interim Guidance also focuses on how climate change will affect proposed federal actions and mitigating those effects. It directs agencies to consider vulnerability and climate resilience throughout the NEPA process and use the most up-to-date scientific projections. The comment period closed in March 2023 and CEQ plans to finalize the guidance in April 2024.[40]

3. Action on Worker Protection from Extreme Heat

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[34]WHITE HOUSE COUNCIL ON ENVTL. QUALITY, STRATEGIC PLANNING TO ADVANCE ENVIRONMENTAL JUSTICE UNDER EXECUTIVE ORDER 14096 (Oct. 2023).

[35]National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023) [hereinafter Interim Guidance].

[36]Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 81 Fed. Reg. 51,866 (Aug. 5, 2016).

[37]Withdrawal of Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 82 Fed. Reg. 16,576 (Apr. 5, 2017).

[38]Interim Guidance, 88 Fed. Reg. at 1201-06, 1208, 1211.

[39]*Id.* at 1206.

[40]National Environmental Policy Act Guidance and Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023).

On July 27, 2023, President Biden directed action to protect workers and communities from extreme heat.[41] The EO asked the Department of Labor to issue Hazard Alert for heat and to ramp up enforcement to protect workers. It also directed the National Oceanic and Atmospheric Administration (NOAA) to invest up to $7 million from the IRA to improve weather forecasting to allow communities to better prepare for extreme weather events.[42] Additionally, the EO directed the Department of Interior to invest $152 million from the Bipartisan Infrastructure Law to expand water storage and enhance climate resilience in western states.[43]

B. Regulatory Activities

1. Mitigation and Adaptation

a. United States Department of Energy (DOE)

i. Clean Hydrogen Hubs

On October 13, 2023, DOE announced $7 billion, funded by the Bipartisan Infrastructure Law, for seven Regional Clean Hydrogen Hubs to deploy low-cost, clean hydrogen that can be produced with zero or near-zero carbon emissions.[44] The program will set up a national network of clean hydrogen producers, consumers, and connective infrastructure to support hydrogen production and use. DOE predicts that these hydrogen hubs will produce 3 million metric tons of hydrogen annually, reaching nearly a third of the 2030 production target and reduce 25 million metric tons of carbon dioxide emissions from end-use each year.

ii. Transmission Capacity Purchases

On October 30, 2023, DOE announced it would enter into negotiations for contracts for up to $1.3 billion for three transmission projects across six states that seek to add 3.5 GW of additional grid capacity.[45] DOE will purchase a percentage of the total capacity from each transmission line, with the goal of encouraging additional investment and reducing risk for project developers. Selected projects will increase resilience and reliability in their respective region and unlock clean energy to reduce power sector emissions.

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[41] Press Release, The White House, Fact Sheet: President Biden Announces New Actions to Protect Workers and Communities from Extreme Heat (July 27, 2023).
[42] Press Release, Nat'l Oceanic & Atmospheric Admin., Biden-Harris Administration Awards $7.2 Million to Improve Climate Projections of Extreme Weather Through the Investing in America Agenda (last updated Nov. 30, 2023).
[43] Press Release, U.S. Dep't of Interior, Biden-Harris Administration Investing $152 Million Through Investing in America Agenda to Expand Water Storage in the West (last edited July 27, 2023) (building on $210 million last year from the Bipartisan Infrastructure Law).
[44] Press Release, U.S. Dep't of Energy, Biden-Harris Administration Announces $7 Billion for America's First Clean Hydrogen Hubs, Driving Clean Manufacturing and Delivering New Economic Opportunities Nationwide (Oct. 13, 2023).
[45] Transmission Facilitation Program First Round Selections, U.S. DEP'T OF ENERGY (Oct. 30, 2023).

The DOE based its decision to enter into the capacity contract negotiations based upon its National Transmission Needs Study (Study).[46] The Study concludes that there is a pressing need for additional transmission infrastructure to support reliability and resilience needs as clean energy targets prompt higher levels of variable energy resource integration and extreme weather events nationwide continue to increase in frequency and intensity. The Study found a need for additional electric transmission infrastructure in nearly thirteen of the fifteen U.S. regions and that twelve of the fifteen regions to improve on cost-effective generation to meet demand. The Study also determined that historical transmission investments had declined in some regions in the second half of the last decade.

iii. GRIP Program Project Selection

On October 18, 2023, the Department of Energy awarded $3.46 billion for fifty-eight projects to strengthen electric grid resilience and reliability through the Grid Resilience and Innovation Partnership (GRIP) Program.[47] The GRIP Program funds activities to modernize the grid to reduce impacts of natural disasters and extreme weather worsened by climate change.[48] Projects included funding for interregional transmission to provide transfer capacity between regions and unlock significant renewable capacity, grid enhancing technologies, and microgrids. DOE also announced that all projects selected committed to the goals of the Justice40 Initiative, which requires providing 40% of the benefits to historically disadvantaged communities.[49]

b. United States Environmental Protection Agency

i. Mobile Source Standards

The mobile source regulatory space continues to be very active, thanks to a steady stream of rulemakings and associated litigation stemming from efforts by the Federal Government and State of California[50] to accelerate the transition to electric vehicles through more stringent GJG tailpipe standards.

At the federal level, EPA released new emission standards for all classes of on-road vehicles on April 12, 2023. For light-duty and medium-duty vehicles, EPA proposed new multi-pollutant emissions standards for model years 2027 through 2032.[51] This proposed rule included new standards for both GHG emissions and criteria pollutants like nitrogen oxides, carbon monoxide, and particulate matter. The proposed rule also includes new durability and warranty requirements for electric vehicle batteries.[52] For heavy-duty vehicles (trucks and buses), EPA released its phase 3 GHG proposal, covering model years

[46] National Transmission Needs Study, U.S. DEP'T OF ENERGY (Oct. 30, 2023).
[47] Press Release, U.S. Dep't of Energy, Biden-Harris Administration Announces $3.5 Billion for Largest Ever Investment in America's Electric Grid, Deploying More Clean Energy, Lowering Costs, and Creating Union Jobs (Oct. 18, 2023).
[48] *Id.*
[49] Jason Fargo, *US DOE Picks 58 Grid Projects for $3.5 Billion Funding in First Stage of Resilience Program*, S&P GLOBAL (Oct. 18, 2023, 00:59 UTC).
[50] *See* Section III.A.2.for discussion of California regulations regarding mobile sources.
[51] Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light Duty and Medium-Duty Vehicles, 88 Fed. Reg. 29,184 (proposed May 5, 2023) (to be codified at 40 C.F.R. pts. 85, 86, 600, 1036, 1037, 1066).
[52] *Id.* at 29,197.

2027 through 2032.[53] This proposed rule for heavy duty vehicles (HD) follows on the heels of the EPA's multi-pollutant standards.[54] The HD proposed rule also updates the model year 2027 GHG emission standards and promulgates new standards for model years 2028 to 2032.[55] The HD proposed rule also updates the advanced technology incentives in the averaging, banking and trading program for the HD phase 2 rule for electric vehicles.[56] Also, NHTSA announced its revised corporate average fuel economy (CAFE) standards on July 28, 2023.[57] These standards cover model years 2027 through 2032 for passenger cars and light trucks, and model years 2030 through 2035 for heavy-duty pickup trucks and vans. The standards would require increasing fuel economy by 2% each year for passenger cars, 4% each year for light trucks, and 10% each year for heavy-duty pickups and vans.

ii. Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review.

On November 30, 2023, the EPA issued notice of a Final Rule for standards of performance for new, reconstructed, and modified sources and emissions guidelines for existing sources within the oil and natural gas sector.[58] The Rule was developed in response to the January 20, 2021, EO titled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis."[59]

The EPA's Final Rule will reduce emissions of methane and other harmful air pollutants from oil and natural gas operations.[60] For the first time, existing oil and natural gas sources will be required to reduce GHG emissions in the form of methane emissions.[61]

First, the Rule created subpart OOOOb which regulates GHG and volatile organic compounds (VOCs) emissions for the Crude Oil and Natural Gas source category pursuant to the Clean Air Act Section 111(b)(1)(B). This subpart ensures that all well sites,

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[53]Greenhouse Gas Emissions Standards for Heavy-Duty Vehicles—Phase 3, 88 Fed. Reg. 25,926 (proposed Apr. 27, 2023) (to be codified at 40 C.F.R. pts. 1036, 1037, 1054, 1065, 1074.

[54]Control of Air Pollution from New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards, 88 Fed. Reg. 4296 (Jan. 24, 2023) (to be codified at 40 C.F.R. pts. 2, 59, 60, 80, 85, 86, 600, 1027, 1030, 1031, 1033, 1036, 1037, 1039, 1042, 1043, 1045, 1048, 1051, 1054, 1060, 1065, 1066, 1068, 1090).

[55]Greenhouse Gas Emissions Standards for Heavy-Duty Vehicles—Phase 3, 88 Fed. Reg. at 25,932.

[56]*Id*. at 25,934.

[57]Corporate Average Fuel Economy Standards for Passenger Cars and Light Trucks for Model Years 2027–2032 and Fuel Efficiency Standards for Heavy-Duty Pickup Trucks and Vans for Model Years 2030–2035, 88 Fed. Reg. 56,128 (proposed Aug. 17, 2023) (to be codified at 49 C.F.R. pts. 531, 533, 535, 537).

[58]Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 87 Fed. Reg 74,702 (proposed Dec. 6, 2022) (to be codified at 40 C.F.R. pt. 60).

[59]Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021).

[60]Press Release, U.S. Envtl. Prot. Agency, EPA's Final Rule for Oil and Natural Gas Operations Will Sharply Reduce Methane and Other Harmful Pollution (Dec. 2, 2023).

[61]Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 87 Fed. Reg 74,702 (The EPA has provided a chart disclosing the emissions guidelines and performance standards for sites covered under the rule.).

centralized production facilities and compressor stations are routinely monitored for leaks. It also sets emission standards for dry seal compressors and requires owners and operators to use best management practices to minimize or eliminate venting of emissions from gas well liquids unloading. The subpart also expands options for using advanced methane detection technologies to find leaks and encourages continued innovation to allow operators to use new technologies as they develop.

Second, the EPA developed subpart OOOOc which establishes emission guidelines and compliance schedules for the control of GHG emissions. This subpart requires that each state submit a plan to the EPA that implements the emission guidelines provided by the Rule. State plans are due twenty-four months after the effective date of the Rule and must set compliance deadlines that are no later than thirty-six months after the plans are due to the EPA.

The Rule also amended subparts OOOO, OOOOa, KKK and appendix K. Subparts OOOO and OOOOa were amended to include existing sources that were not previously regulated under the 2012 rule. Subparts OOOO, OOOOa and KKK also were amended to include clarity on when sources transition from being subject to the Federal Rule and when they become subject to state plans under OOOOc.

iii. NSPS for GHG Emissions from New and Reconstructed EGUs; Emission: Guidelines for GHG Emissions from Existing EGUs; and Repeal of the Affordable Clean Energy Rule (ACE)

On May 23, 2023, the EPA proposed a rule under section 111 of the CAA to address GHG emissions from fossil fuel-fired EGUs.[62] The rule contains five actions: 1) repeal of the Affordable Clean Energy Rule; [63] 2) revised NSPS for GHG emissions from new fossil fuel fired stationary combustion turbine EGUs; 3) revised NSPS for GHG emissions from fossil fuel-fired steam generating units that undertake a large modification; 4) emission guidelines for GHG emissions from existing fossil fuel-fired steam generating EGUs; and 5) emission guidelines for GHG emissions from the largest, most frequently operated existing stationary combustion turbines.[64] The EPA noted that "fossil fuel-fired EGUs are

[62]New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. 33,240 (proposed May 23, 2023) (to be codified at 40 C.F.R. pt. 60).

[63]EPA issued a final rule to regulate GHGs from new power plants under section 111(b) and 111(d), known as the Clean Power Plan (CPP) in 2015, during the Obama administration. In 2019, EPA replaced the CPP with the ACE rule, during the Trump administration. The ACE rule was vacated and remanded to the EPA in 2021 following a petition for review. American Lung Ass'n v. EPA, 985 F.3d 914 (D.C. Cir. 2021). After the U.S. Supreme Court reversed the vacatur of the ACE rules repeal of the CPP, West Virginia v. EPA, 142 S.Ct. 2587 (2022), the D.C. Circuit recalled its mandate for vacatur of the ACE rule and reinstated it on October 27, 2022.

[64]New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. at 33,240.

the nation's largest stationary source of GHG emissions.[65] Consistent with section 111, the proposed NSPS and emission guidelines reflect the application of the best system of emission reduction (BSER). Affected facilities are those that commence construction after May 23, 2023.

EPA stated that it was proposing the repeal of the ACE because the emission guidelines do not reflect the BSER for steam generating EGUs and are inconsistent with CAA section 111. EPA notes that since the promulgation of the ACE rule, the costs of CCS have decreased due to technology advancements as well as new policies including the expansion of the Internal Revenue Code section 45 Q tax credit in the IRA for CCS.[66] In addition, the costs of natural gas co-firing have decreased as well. EPA also discussed that it was rejecting the prior approach in the ACE rule that CAA section 111 requires that the BSER be "one that can be applied to and at the individual source" and rejected the ACE rule's exclusion of compliance measures that do not meet that requirement, such as trading.[67] EPA was basing its decision in part on the *American Lung Association v. EPA* decision vacating and remanding the rule that there is "nothing in the text, structure, history, or purpose of [CAA section 111] that compels the reading" the EPA adopted.[68]

EPA proposed a BSER for three subcategories for new and reconstructed fossil fuel-fired combustion turbines—low load, intermediate load, and base load, similar to the current NSPS for these sources. For the low load subcategory, the proposal is that the BSER will use lower emitting fuels.[69] For the intermediate load and base load subcategories, the EPA proposes an approach in which the BSER has multiple components: 1) highly efficient generation; and 2) use of CCS or co-firing log-GHG hydrogen depending on the subcategory.

Due to the similarity of large and frequently used existing stationary combustion turbines to new stationary combustion turbines, EPA is proposing a BSER similar to the second and third phases of BSER for new base load combustion turbines.[70]

Recognizing the cost-effectiveness of CO_2 is tied to the operating timeline for the plant, EPA proposed subcategories for existing fossil fuel-fired steam generating EGUs based on those timelines.[71] EPA proposes a BSER for existing fossil fuel-fired steam generating EGUs that plan to operate in the long-term of CCS with ninety percent capture. For units that commit to permanently cease operations prior to January 1, 2040, EPA proposed that the BSER is co-firing forty percent natural gas on a heat input basis. Units that elect to commit to permanently cease operations prior to January 1, 2035, and commit to operate with an annual capacity factor limit of twenty percent, the BSER is routine methods of operation and maintenance. For those units that will permanently cease operation prior to January 1, 2032, EPA proposes that the BSER is routine methods of operation and maintenance and no increase in emission rate.

The proposed rule maintains the 2015 standards for new coal units, based on CCS, and for reconstructed coal units, based on efficiency. EPA is not proposing to revise the

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[65] *Id.*
[66] *Id*. at 33,245.
[67] Am. Lung Ass'n v. Envtl. Prot. Agency, 985 F.3d 914, 957 (D.C. Cir. 2021).
[68] *Id.* (EPA relied on an "erroneous legal premise).
[69] New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. at 33,244.
[70] *Id.* at 33,361.
[71] *Id*. at 33,341.

NSPS because it does not anticipate any new or reconstructed coal EGUs.[72] EPA is proposing that modified units apply a BSER of CCS with ninety percent capture.

iv. GHG Reporting Rule: Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems

In 2022, the IRA added section 136 to the Clean Air Act (CAA). This section created, for the first time, a direct charge for methane emissions.[73] The section also required the EPA to revise the Code of Federal Regulations so that the charge calculations are "based on empirical data, . . . reflect the total methane emissions and waste emissions from the applicable facilities, and allow owners . . . to submit empirical emissions data."[74]

On August 1, 2023, the EPA proposed a rule to satisfy that requirement. The proposed rule contained four stated goals: (1) address potential gaps in emissions reporting; (2) revise to add new emissions calculation methodologies or improve existing methodologies; (3) revise reporting requirements to improve verification; and (4) make technical amendments, clarifications, and corrections.[75] The EPA also proposed confidentiality determinations for certain data reporting elements.

To address potential gaps in reporting, the EPA added new sources for reporting such as nitrogen removal units, produced water tanks, mud degassing, crankcase venting, and a category for "other large release events."[76] The EPA defined "other large release events" as a source not subject to reporting that either (1) emits methane at a rate of at least 100kg/hr at any point or (2) emits 250 metric tons of CO_2e or more over the duration of the event.[77] Controversially, the rule also allows for third-party notifications of "other large release events" to the emitters themselves.[78] The emitters then have to include every notification received in their reports or explain why they did not.

Other revisions include adjusting calculations to incorporate methodologies based on an improved understanding of emission sources and adjust methodologies for sources that cannot be accurately measured under the current rule.[79] It also adjusted reporting requirements to better align with calculation methods in the rules.[80] The rules have not yet been finalized.

c. United States Federal Energy Regulatory Commission (FERC)

i. Order No. 2023: Improvements to Generator Interconnection Procedures and Agreements

On July 27, 2023, the Federal Energy Regulatory Commission issued a final rule reforming its *pro forma* large and small generator interconnection procedures and

[72] *Id.* at 33,245.
[73] 42 U.S.C. § 7436(c).
[74] *Id.* § 7436(h).
[75] Greenhouse Gas Reporting Rule: Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems, 88 Fed. Reg. 50,282 (proposed Aug 1, 2023) (to be codified at 40 C.F.R. pt. 98).
[76] *Id*. at 50,415.
[77] *Id*. at 50,409.
[78] *Id*. at 50,432-33.
[79] *Id*. at 50,289.
[80] *Id*. at 50,291.

agreements.[81] These reforms, among other things, intend to increase the efficiency of the interconnection process by switching to a cluster study process and increasing financial commitments to proceed through the interconnection queue; increase the speed of interconnection study processing by eliminating the reasonable efforts standard and implementing an affected system study process; and address changes in technology, such as the rapid growth of energy storage systems and new, potentially more cost-effective grid-enhancing technologies.[82]

To ensure that transmission providers properly consider storage technologies in the interconnection process, Order No. 2023 required changes to how these technologies are treated and studied.[83] For example, if an interconnection customer proposes to add a second technology to its proposed generating facility, transmission providers are prohibited from categorically treating the addition as a material modification that would result in a loss of the interconnection customer's queue position. Instead, transmission providers must study these changes to determine if the addition would affect other interconnection customers. The final rule also prohibits transmission providers from studying energy storage using assumptions that would be inconsistent with the way in which the proposed facility commits to operate. To accelerate the interconnection process, the final rule also adopted a requirement that transmission providers must evaluate certain specific alternative transmission technologies.

ii. Extreme Weather Final Rule

On June 15, 2023, FERC finalized two rules related to electric systems and extreme weather to help improve reliability of the bulk power system. The first rule, One-Time Informational Reports on Extreme Weather Vulnerability Assessments Climate Change, Extreme Weather, and Electric System Reliability, directs transmission providers to submit one-time reports describing their policies and processes for conducting extreme weather vulnerability assessments and identifying mitigation strategies.[84] The second rule, Transmission System Planning Performance Requirements for Extreme Weather, requires the North American Electric Reliability Corporation to develop or modify reliability standards for extreme weather conditions.[85]

d. Department of Interior

i. Bureau of Land Management (BLM) Approval of Willow Oil Project

On March 13, 2023, BLM approved the Willow Master Development Project, an oil production project on land leased by ConocoPhillips within the National Petroleum Reserve in Alaska that will include drilling up to 199 new oil wells and construction of

[81] *Improvements to Generator Interconnection Procedures & Agreements*, 184 FERC ¶ 61,054 (2023).
[82] FED. ENERGY REGUL. COMM'N, FACT SHEET, IMPROVEMENTS TO GENERATOR INTERCONNECTION PROCEDURES AND AGREEMENTS (July 27, 2023).
[83] Order No. 2023, 184 FERC ¶ 61,054.
[84] *One-Time Informational Reports on Extreme Weather Vulnerability Assessments Climate Change, Extreme Weather, and Electric System Reliability*, 183 FERC ¶ 61,192 (2023).
[85] *Transmission System Planning Performance Requirements for Extreme Weather*, 183 FERC ¶ 61,191 (2023).

related transportation and processing infrastructure.[86] BLM initially approved the project in 2020, but Alaska Native interest groups and environmental organizations successfully challenged the approval in the U.S. District Court for the District of Alaska.[87] BLM developed a supplemental EIS for the Project and issued a new Record of Decision in March.[88] The BLM denied two of the five drill sites proposed by ConocoPhillips, reducing the scope of the project from its original size by 40%. In addition, ConocoPhillips relinquished rights to 68,000 acres of existing leases. At peak, the Project is expected to produce 180,000 barrels of oil per day, resulting in approximately 130 million metric tons of carbon dioxide emissions over its lifetime.

Alaska Native interest groups and environmental organizations again challenged the Project arguing that BLM violated NEPA, the Endangered Species Act (ESA) and other statutes; however, on November 9, 2023, the U.S. District Court of Alaska dismissed the case.[89] The court concluded, among other findings, that BLM had appropriately considered a reasonable range of alternatives, rejected claims that BLM's GHG emissions analysis failed to consider emissions from potential future development, concluded that the biological opinion was not arbitrary and capricious in its incidental take analysis of polar bears, and found that BLM had appropriately determined that the GHG emissions from the Project were not an effect of the action under the ESA. On Nov. 17, plaintiffs filed an appeal in the Ninth Circuit Court of Appeal along with a motion for a preliminary injunction to prevent the start of construction;[90] the injunction was denied on December 18, 2023.

ii. Bureau of Ocean Energy Management (BOEM) Wind Leases

To meet the Biden Administration's "30 by 30" goal of having 30 gigawatts (GW) of offshore wind in operation by 2030, BOEM took action to announce several new offshore wind leases.[91] The first offshore wind energy lease sale in the Gulf of Mexico was announced on July 20, 2023, with approximately 3.7 GW of power potential available through the auction.[92] Three areas were auctioned for lease, with only one receiving a bid. Most recently, on December 11, 2023, BOEM announced a proposal for an offshore wind lease sale in the Central Atlantic, which will include areas offshore of Delaware, Maryland

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[86] Press Release, U.S. Dep't of Interior, Interior Department Substantially Reduces Scope of Willow Project (Mar. 13, 2023).

[87] Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt., 555 F. Supp. 3d 739 (D. Alaska Aug. 18, 2021) (Granting summary judgment because BLM failed to consider GHG emissions and the impact on endangered polar bears); *see also* ADAM VANN, CONG. RSCH. SERV., LSB10943, THE WILLOW PROJECT: HISTORY AND LITIGATION (Apr. 3, 2023).

[88] *Willow Master Development Plan,* BUREAU OF LAND MGMT, 1 (March 2023).

[89] Sovereign Iñupiat for Living Arctic v. BLM, Case No. 3:23-cv-00058-SLG, 2023 U.S. Dist. LEXIS 201981 (D. Alaska Nov. 9, 2023).

[90] Sovereign Iñupiat for Living Arctic v. BLM, No. 23-3627, slip op. at 2 (D. Alaska Dec. 18, 2023).

[91] Press Release, The White House, Fact Sheet: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs (Mar. 29, 2021).

[92] Press Release, U.S. Dep't of Interior, Biden-Harris Administration Holds First-Ever Gulf of Mexico Offshore Wind Energy Auction (Aug. 29, 2023).

and Virginia, with the potential to provide over 2.2 million homes with clean energy.[93] A week later, BOEM also announced plans to prepare a programmatic EIS for offshore wind leases off the coast of California.[94] BOEM also released a proposed rule to speed up offshore wind permitting in January.[95]

iii. Bureau of Ocean Energy Management 2024-2029 National Outer Continental Shelf Oil and Gas Leasing Program

BOEM also published its final oil and gas leasing program in December. The IRA prevented BOEM from issuing offshore wind leases unless the agency offered at least 60 million additional acres for oil and gas leasing, and the program includes three oil and gas lease sales in the Gulf of Mexico to meet that minimum.[96]

e. Department of Treasury Hydrogen Production Tax Credits

On December 22, 2023, the U.S. Department of Treasury and the Internal Revenue Service released a proposed rule for the Clean Hydrogen Production Credit established under the IRA.[97] The rule recognized that conventional hydrogen production can result in climate pollution, while the tax credit "aims to make production of clean hydrogen with minimum climate pollution more economically competitive and accelerate deployment of the U.S. clean hydrogen industry."[98] The value of the credit will range depending on the lifecycle emissions of the hydrogen production. Importantly, the proposed rule describes how taxpayers may use energy attribute certificates (EACs), which demonstrate the purchase of clean power and are used as offsets against emissions from hydrogen production. The rule would require that three criteria be met for EACs being purchased by hydrogen producers, including (1) incrementality—the EAC must come from new clean generators that began commercial operation within three years of the hydrogen facility being placed into service or from uprates (added capacity); (2) deliverability—the EAC must come from clean power sourced in the same region as the hydrogen producer; and (3) time-matching—the EAC must be matched to hydrogen production on an hourly basis. The rule also provides details on eligibility for hydrogen produced using renewable natural gas and fugitive methane.

2. Environmental & Social Governance

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[93] Press Release, U.S. Dep't of Interior, Interior Department Proposes Offshore Wind Sale in the Central Atlantic (Dec. 11, 2023).
[94] Press Release, Bureau of Ocean Energy Mgmt., BOEM Announces Environmental Review of Future Development of California Offshore Wind Leases (Dec. 19, 2023).
[95] Renewable Energy Modernization Rule, 88 Fed. Reg. 5968 (proposed Jan. 30, 2023) (to be codified at 30 C.F.R. pt. 585); *see also* Joshua V. Berliner, *US BOEM Proposes Modernized Offshore Wind Regulations*, MAYER BROWN (Jan. 17, 2023).
[96] Press Release, U.S. Dep't of Interior, Interior Department Publishes Final 2024–2029 National Outer Continental Shelf Oil and Gas Leasing Program, Enabling Offshore Wind Industry to Progress (Dec. 15, 2023).
[97] Section 45V Credit for Production of Clean Hydrogen; Section 48(a)(15) Election to Treat Clean Hydrogen Production Facilities as Energy Property, 88 Fed. Reg. 89,220 (proposed Dec. 26, 2023) (to be codified at 26 C.F.R. pt. 1).
[98] Press Release, U.S. Dep't of Treasury, IRS Release Guidance on Hydrogen Production Credit to Drive American Innovation and Strengthen Energy Security (Dec. 22, 2023).

a. SEC Disclosures

The IRA has been a major driver of private sector investments.[99] While reporting requirements ranging from the EU's CSRD[100] to California's Climate Legislation[101] may apply to private sector investments and related GHG emissions, the U.S. Securities and Exchange Commission (SEC) has not finalized rules on climate-related disclosures. The SEC proposed rule, published in 2022, would require disclosure of certain climate-related risks and financial statement metrics in registration statements and periodic reports.

b. Other Disclosure Developments

Having fulfilled its remit and concurrent with release of its 2023 status report, the Taskforce on Climate-related Financial Disclosures (TCFD) was disbanded on October 12, 2023.[102] Companies can continue to use the TCFD recommendations, and some may still be required to do so.[103] The TCFD recommendations are incorporated into ISSB Standards and the International Financial Reporting Standards (IFRS) Foundation has taken over monitoring of the progress of companies' climate-related disclosures.

A new Taskforce on Nature-related Financial Disclosures (TNFD) was launched on September 18, 2023, at the New York Stock Exchange as part of New York Climate Week[104] to focus on conserving and restoring nature and the many ways that doing so will reduce risks to business and finance.[105]

C. Litigation

1. State and Local Government Climate Cases Against Fossil Fuel Companies

The U.S. Supreme Court denied fossil fuel industry defendants' petitions for writs of certiorari seeking review of the remand orders in climate change cases brought by state and local governments.[106] The plaintiffs asserted state common law and statutory claims

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[99]Henry Engler, *Recent ESG Developments Point to Progress Despite Polarized US Political Climate*, THOMSON REUTERS (Oct. 3, 2023).

[100]*See supra* section I.B.1.

[101]Climate Corporate Data Accountability Act, CAL. HEALTH & SAFETY CODE § 38532 et seq.; Greenhouse Gases: Climate-Related Financial Risk, CAL. HEALTH & SAFETY CODE § 38533 et seq.; The Voluntary Carbon Market Disclosures Business Regulation Act, CAL. HEALTH & SAFETY CODE § 44475 et seq.); *see also #DeloitteESG Now–The Sweeping Impacts of California's Climate Legislation*, DELOITTE (last updated Dec. 19, 2023).

[102]*About*, TASK FORCE ON CLIMATE RELATED FIN. DISCLOSURES (last visited Mar. 17, 2024).

[103]*ISSB & TCFD*, INT'L FIN. REPORTING STANDARDS (last visited Mar. 17, 2024).

[104]*Final TNFD Recommendations on Nature Related Issues Published and Corporates and Financial Institutions Begin Adopting*, TASKFORCE ON NATURE-RELATED FIN. DISCLOSURES (Sept. 18, 2023).

[105]*Id.*

[106]Chevron Corp. v. City of Hoboken, 143 S. Ct. 2483 (2023); Chevron Corp. v. County of San Mateo, 143 S. Ct. 1797 (2023); Shell Oil Prods. Co., L.L.C. v. Rhode Island, 143 S. Ct. 1796 (2023); BP p.l.c. v. Mayor of Baltimore, 143 S. Ct. 1795 (2023); Suncor

and allege that the defendants misled consumers about the climate change risks posed by their products. Seven federal circuit courts of appeal have rejected the grounds for federal jurisdiction asserted by fossil fuel industry defendants, including in 2023 decisions by the Second, Eighth, Ninth, and D.C. Circuit Courts of Appeal.[107] As of December 22, 2023, a petition for writ of certiorari seeking review of the Eighth Circuit's affirmance of the remand order in a case brought by Minnesota was still pending.[108]

In the state courts, the Hawai'i Supreme Court affirmed the denial of fossil fuel companies' motions to dismiss Honolulu's lawsuit.[109] The court found that the minimum contacts test for personal jurisdiction was satisfied. Regarding the motion to dismiss for failure to state a claim, the court held that Honolulu's claims were not preempted by the Clean Air Act or federal common law.

2. State Constitutional Rights: Montana and Hawai'i

State trial courts ruled in favor of youth plaintiffs who asserted climate change-based claims under the state constitutions of Montana and Hawai'i. In Montana, a trial court held, after a seven-day trial, that a provision of the Montana Environmental Policy Act (MEPA) that restricted consideration of climate change in environmental reviews violated the plaintiffs' rights under the Montana Constitution's environmental rights amendment.[110] The Montana Supreme Court has accepted the case for appeal.[111] In Hawai'i, a trial court denied a motion to dismiss a case in which youth plaintiffs assert that the State's fossil fuel-based transportation violates the Hawai'i Constitution's environmental rights amendment.[112] A trial is scheduled to begin on June 24, 2024.

In a case challenging the Hawai'i Public Utilities Commission's (PUC's) denial of an application to provide power from a biomass energy facility to the electric grid, the Hawai'i Supreme Court upheld the PUC's decision and rejected a contention that the statute barred consideration of the biomass facility's GHG emissions.[113] The court held that ignoring the facility's GHG emissions would not be consistent with the State's obligations under the State constitution's "right to a clean and healthful environment, which encompasses the right to a life-sustaining climate system."

3. ESG Litigation

A federal district court in Texas upheld a U.S. Department of Labor rule that provides that fiduciaries of private-sector employee benefit plans may consider the

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Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs of Boulder Cnty., 143 S. Ct. 1795 (2023); Sunoco LP v. City & County of Honolulu, 143 S. Ct. 1795 (2023).

[107]Connecticut v. Exxon Mobil Corp., 83 F.4th 122 (2d Cir. 2023); Minnesota v. Am. Petrol. Inst., 63 F.4th 703 (8th Cir. 2023); City of Oakland v. BP p.l.c., Nos. 22-16810, 22-16812, 22-16812, 2023 U.S. App. LEXIS 31263 (9th Cir. Nov. 27, 2023); District of Columbia v. Exxon Mobil Corp., No. 22-7163, 2023 U.S. App. LEXIS 33611 (D.C. Cir. Dec. 19, 2023).

[108]Am. Petrol. Inst. v. Minnesota, 63 F.4th 703 (8th Cir. 2023), *petition for cert filed*, (U.S. Aug. 18, 2023) (No. 23-168).

[109]City & Cnty. of Honolulu v. Sunoco L.P., 537 P.3d 1173 (Haw. 2023).

[110]Held v. State, No. CDV-2020-307 (D. Mont. Aug. 14, 2023).

[111]Held v. State, No. DA 23-0575, 2023 Mont. LEXIS 1034 (Mont. Oct. 17, 2023).

[112]Ruling, Navahine et. al. v. Haw. Dep't of Transp., No. 1CCV-22-0000631 (Haw. Cir. Ct. Apr. 6, 2023).

[113]In re Haw. Elec. Light Co., 526 P.3d 329 (Haw. 2023).

economic effects of environmental, social, or governance (ESG) factors on investments.[114] The court held that the rule was not contrary to the Employee Retirement Income Security Act of 1974 and was not arbitrary and capricious. The plaintiffs—which include 27 states—appealed the case to the Fifth Circuit Court of Appeals. Another challenge to the rule is pending in federal court in Wisconsin.[115]

In Kentucky, a federal district court dismissed a First Amendment challenge to the Kentucky Attorney General's investigation of the investment practices of six banks that were members of the United Nations' Net-Zero Banking Alliance.[116] The court held that the plaintiffs did not demonstrate standing for the claim and remanded the remaining claims, which were all grounded in state law, to state court.[117]

III. State and Local Activities

A. Mitigation

1. Regional and Multi-State Activities

The United States Climate Alliance (USCA) continues to convene states committed to reducing GHG emissions, even as the Biden Administration rejoined the Paris Climate Agreement in 2021 and set new NDCs.[118] USCA was initially established in 2017, after the Trump Administration announced its withdrawal of the United States from the Paris Agreement, when governors in Washington, New York, and California came together to announce that their states intended to honor the United States' commitment to reduce emissions by 26-28% from 2005 levels by 2025.[119]

The USCA continues to be a bipartisan partnership among twenty-four governors, representing over 60% of the country's economy, 55% of the U.S. population, and 41% of net GHG emissions.[120] Their goals now include, in addition to the Paris Agreement targets, a 50% reduction in GHG emissions by 2030, and achieving a net-zero target by no later than 2050.[121] Most recently, USCA members released a report finding that member states were on track to meet their 2025 reductions goal, though additional action must be taken to meet the goals for 2030 and beyond.[122] They also established new goals throughout

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[114]Utah v. Walsh, 2023 U.S. Dist. LEXIS 168696 (N.D. Tex. Sept. 21, 2023).
[115]Complaint, Braun v. Walsh, No. 23-CV-234 (E.D. Wis. Feb.21, 2023).
[116]Hope of Ky., L.L.C. v. Cameron, No. 3:22-CV-00062, 2023 U.S. Dist. LEXIS 175294 (E.D. Ky. Sept. 28, 2023).
[117]*Id.*
[118]Press Release, U.S. Climate All., U.S. Climate Alliance Releases Annual Report, Finds Members on Track to Meet 2025 Emissions Reduction Goal (Dec. 2023); Press Release, The White House, President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies (Apr. 22, 2021).
[119]Richard Nunno, *Fact Sheet: The U.S. Climate Alliance and Related Actions,* Envtl. & Energy Study Inst. (Aug. 14, 2017).
[120]Press Release, U.S. Climate All., U.S. Climate Alliance Releases Annual Report, Finds Members on Track to Meet 2025 Emissions Reduction Goal (Dec. 2023).
[121]*About*, U.S. Climate Alliance (last visited Apr. 17, 2024).
[122]2023 Annual Report | All Hands on Deck: Securing America's Net-Zero Future with State-Led, High-Impact Action, U.S. Climate All. (Dec. 2023).

2023, including a heat pump deployment target for the decarbonization of buildings in which 40% of the benefits are to be distributed amongst frontline communities.[123]

Other multi-state initiatives include 46 states currently developing Priority Climate Action Plans (PCAPs) under the Climate Pollution and Reduction Grant (CPRG) Program administered by the Environmental Protection Agency.[124] The CPRG program was created through the Inflation Reduction Act of 2022 (IRA), and facilitates the development and implementation of GHG reduction plans by providing planning grants to states, local governments, tribes, and territories.[125] Around $5 billion in funding is available, with the first phase aiding in the development of PCAPs.[126] PCAPs are due to be completed by March 2024, with Comprehensive Climate Action Plans due to be completed by March 1, 2024. The CPRG also has $4.3 billion in to support the implementation of these plans once submitted.[127]

At the regional level, states in the Northeast and Mid-Atlantic continue to reduce power sector emissions via the Regional Greenhouse Gas Initiative (RGGI). RGGI is a cooperative effort of eleven states that work to cap and reduce emissions from the power sector through an allowance trading program, and to invest proceeds from the sale of allowances in clean energy programs and projects.[128] In its most recent auction, held December 6, 2023, emissions allowances sold for almost $15 per ton, generating over $411 million in proceeds for states to invest in emissions-reducing programs.[129] Two additional states are in uncertain positions regarding participation in RGGI. In Pennsylvania, where Governor Wolf has been working to implement RGGI under existing legislative authority, the Commonwealth Court ruled in November that auction proceeds raised by the Program would be "an invalid tax."[130] Environmental groups within the state have filed an appeal of this ruling.[131] In Virginia, the State Air Pollution Control Board voted in June to repeal the regulation authorizing Virginia's participation in the program within the state, as per Governor Youngkin's EO 09 in 2022.[132] Virginia environmental groups filed a lawsuit in August. In November, a judge ruled that three of the four plaintiffs did not have standing,

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[123] Press Release, U.S. Climate All., U.S. Climate All. Announces New Commitments to Decarbonize Bldgs. Across America, Quadruple Heat Pump Installations by 2030 (Sept. 21, 2023).

[124] Mende Yangden, *Climate Pollution Reduction Grants (CPRG)*, NAT. RES. DEF. COUNCIL (Nov. 8, 2023).

[125] *Climate Pollution Reduction Grants*, U.S. ENVTL. PROT. AGENCY (last updated Mar. 4, 2024).

[126] Yangden, *supra* note 124.

[127] John Carlson & Holly Reuter, *States, Start Your Engines: The Race for Climate Pollution Reduction Grants Is On!*, CLEAN AIR TASK FORCE (Nov. 20, 2023).

[128] *Elements of RGGI*, THE REG'L GREENHOUSE GAS INITIATIVE (2023) (Excluding Pennsylvania, due to injunction and current lawsuit).

[129] Press Release, The Reg'l Greenhouse Gas Initiative, CO2 Allowances Sold for $14.88 in 62nd RGGI Auction (Dec. 8, 2023).

[130] Rachel McDevitt, *Pa. Court Rules Climate Program Is an Illegal Tax, Says State Cannot Join RGGI*, WHYY (Nov. 1, 2023).

[131] Cassie Miller, Pa. Environmental Groups File Appeal of RGGI Ruling, PENN CAP. STAR (last updated Nov. 30, 2023).

[132] Press Release, Off. Of the Va. Governor, Governor Glenn Youngkin Praises State Air Pollution Control Board's Repeal of RGGI (June 7, 2023).

but that the Association of Energy Conservation Professionals could theoretically suffer financial losses from the RGGI withdrawal and moved the case to Floyd County.[133]

Dozens of states are working to reduce GHG emissions within the transportation sector. Under Section 209 of the Clean Air Act, California may request a waiver from EPA to set stricter emissions standards for new vehicles than those set at the federal level; under Section 177, other states may then adopt requirements identical to California's.[134] Currently, seventeen states have adopted California's Low-Emission Vehicle criteria pollutant and GHG emission regulations, and fifteen have adopted its Zero-Emission Vehicle (ZEV) regulations. Advanced Clean Cars (ACC) II's provisions, adopted by California in 2022, effectively require all cars and light trucks sold in the state to be ZEVs beginning in 2035. As of January 2024, seventeen additional states and the District of Columbia have either announced their plans to develop legislation or have already implemented provisions adopting these standards, with most going into effect in 2026 or 2027.[135] An April 2023 report found that if all other Section 177 states adopted ACC II, GHG emissions from the transportation sector through 2050 would be reduced by a cumulative 1,310 million metric tons of CO_{2e}.[136]

2. State Activities

Across the country, states are continuing to lead efforts to reduce GHG emissions and address the impacts of climate change.

a. California

In October 2023, California Air Resources Board's (CARB) Advanced Clean Fleets (ACF) regulation[137] to outlaw the sales of medium-and heavy-duty internal combustion fleets[138] by 2036 and phase in ZEVs. ACF works in conjunction with the Advanced Clean Trucks rule[139] to "ensure that zero-emission vehicles are brought to market" [140] and requires that manufacturers build solely ZEV trucks beginning 2036. The ACF applies to any 1) federal fleet, 2) state or local government fleets, 3) fleet owners that control 50 vehicles or earned $50 million or more in revenue, or 4) fleets that visit seaports or railyards.[141] The ACF may impact fleet owners in other states because the U.S. CAA allows other states to

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[133]Jeremy Cox, *Judge Deals Blow to Legal Effort to Halt Virginia's RGGI Withdrawal*, BAY J. (Nov. 13, 2023).
[134]42 U.S.C. § 7507 (1990); *See* *States That Have Adopted California's Vehicle Standards Under Section 177 of the Federal Clean Air Act*, CARB (May 13, 2022).
[135]*Advanced Clean Cars II Regulations: All New Passenger Vehicles Sold in California to Be Zero Emissions by 2035*, CARB (Aug. 2022).
[136]Rachel Goldstein, Daniel O'Brien & Robbie Orvis, *Nationwide Impacts of California's Advanced Clean Cars II Rule*, ENERGY INNOVATION (Apr. 2023)
[137]CAL. CODE REGS. tit. 13, § 2013 et seq.; *see also* Press Release, Off. Of the Cal. Governor, California Approves World's First Regulation to Phase Out Dirty Combustion Trucks and Protect Public Health (Apr. 28, 2023).
[138]CAL. CODE REGS. tit. 13, §§ 2013(a)(2), 2015(a)(2) (Vehicles that are 8,500 pounds or greater).
[139]*Id.* §§ 1963, 2012 et seq.
[140]Press Release, Cal. Air Res. Bd., Advanced Clean Fleets Regulation Summary: Accelerating Zero-Emission Truck Markets (May 17, 2021).
[141]CAL. CODE REGS. tit. 13, §§ 1963, 2012 et seq.

adopt the ACF.[142] New York, New Jersey, Oregon, Massachusetts, Washington, and Vermont have stated they will adopt the ACF. California applied for a waiver to enforce the ACF from U.S. EPA in November 2023.

Also in April 2023, CARB passed a new In-Use Locomotive regulation,[143] which phases out locomotives built prior to 2000, limiting the federal definition of locomotive useful life,[144] limits idling, amends registration and reporting procedures, and requires locomotive operators to establish a new trust account that will work to fund cleaner locomotives.[145] In 2026, the rule requires railroads to set aside money in a Spending Account, calculated based on the operation of diesel-powered locomotives in the state the prior year.[146] After 2030, the Spending Account funds may be used solely for the purchase of zero-emission locomotives.[147] In addition, beginning in 2030, only zero-emission locomotives may be purchased in California for use in switching operations[148] and in 2035, the same sales limitation will apply to line haul locomotives that operate over longer hauls, including interstate transit.[149] Implementation of the Regulation is expected to significantly reduce nitrogen oxide and diesel particulate matter, resulting in over $32 billion in health benefits and savings.[150] The rule is applicable to every locomotive operator in California and is effective January 1, 2024.[151] The Association of American Railroads and the American Short Line and Regional Railroad Association filed suit challenging the legality of the regulation on June 16, 2023.[152]

California legislators have also adopted policies to mitigate the impacts of climate change. In October, Governor Newsom signed into law A.B. 579, which requires that by 2035, all newly purchased or leased school buses operating within California must be zero-emission.[153] $150 million in grants have been made available in allotments of up to $495,000 per vehicle to support school districts purchasing ZEV buses.[154] Prior to the passage of this legislation, school buses were exempt from California's requirements that all medium- and heavy-duty trucks be 100% ZEV by 2045. Connecticut, Maine, Maryland,

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[142] 42 U.S.C. § 7543(b) (allowing California to set motor vehicle engine standards and seek a waiver from U.S. EPA); *see id.* § 7507 (allowing states to adopt California motor vehicle engine standards).

[143] In-Use Locomotive Regulation, CAL. CODE REGS. tit. 13, §2478 et seq. (2023). CARB states that the Regulation will support its GHG reduction goals. CARB, Final Statement of Reasons for Rulemaking, Including Summary of Comments and Agency Response, Hearing Date: April 27, 2023, p. 4.

[144] 40 C.F.R. § 1033.101(g) (2023) (The useful life of a locomotive is defined by the federal rules as the period during which a new locomotive is required to comply with all applicable emission standards. Exhaust Emission Standards).

[145] In-Use Locomotive Regulations, CAL. CODE REGS. tit. 13, § 2478.5; *see also* Press Release, CARB, Locomotive Fact Sheets (2023).

[146] CAL. CODE REGS. tit. 13, § 2478.4(a), (d)(2) (2024).

[147] *Id.* § 2478.4(d).

[148] *Id.* § 2478.5(b).

[149] *Id.* § 2478.5(c).

[150] *Locomotive Fact Sheet*, *supra* note 145.

[151] CAL. CODE REGS. tit. § 2478.1(a), (c) (2024).

[152] Press Release, Ass'n of American R.R.'s, Railroads File Suit Against California Over Untenable Locomotive Rule (June 16, 2023).

[153] A.B. No. 579 (Cal. 2023); Hailey Branson-Potts, *California Will Soon Mandate Electric School Buses*, GOV. TECH. (Dec. 7, 2023).

[154] Press Release, Cal. Energy Comm'n, Funding to Switch to Zero-Emission School Buses Now Available (July 7, 2023).

and New York have passed similar fleet legislation requirements mandating either that new purchases or entire school bus fleets must transition to ZEVs, with implementation timelines ranging from the next four to seventeen years.[155]

Legislators also passed new laws relating to offshore wind this year. AB 3, the California Wind Advancement Act; SB 286, the Offshore Wind Expediting Act; and AB 1373, authorizing central procurement of clean energy resources, all work to accelerate the development and implementation of offshore wind within the state.[156] AB 1373 allows the state to agree to long-term contracts relating to the purchase of electricity from offshore wind facilities. SB 286 created a "consolidated permitting" process for permitting and review relating to offshore wind projects in the coastal zone.[157] It also created a new Offshore Wind Energy Fisheries Working Group, which is required to develop a statewide strategy by January 2026, that will minimize the impacts offshore wind projects will have on fisheries.[158] AB 3 mandates that the state's Energy Commission develop a plan for seaport readiness for offshore wind development while also studying the feasibility of reaching "70% and 85% in-state assembly and manufacturing of offshore wind energy projects."[159]

b. New York

The New York Climate Action Council finalized its Scoping Plan at the very end of 2022, outlining how New York is planning to reduce GHG emissions and reach its goals of net-zero emissions by 2050, as required by the Climate Leadership and Community Protection Act (CLCPA).[160] One of the most significant recommendations includes the implementation of a new cap-and-invest program. As directed in a January 2023 announcement by Governor Hochul, the state's Department of Environmental Conservation and the New York State Energy Research and Development Authority (NYSERDA) are collaborating to create a new cap-and-invest program that mandates a decreasing cap on GHG emissions, finances programs that drive reductions equitably with an emphasis on frontline communities, checks costs to low-income households, and maintains the competitiveness of New York businesses.[161] In December 2023, the two agencies released a Pre-Proposal Outline and Climate Affordability Study, which will help to provide a framework for program design and benefit distribution.[162] Five core principles form the basis of the program: affordability; climate leadership; creation of jobs and

[155]Ryan Gray, *California Legislature Passes 2035 Electric School Bus Mandates*, SCHOOL TRANSP. NEWS (Sept. 20, 2023).
[156]Paul C. De Bernier et al., *Offshore Wind: New California Law Aims to Simplify and Expedite Offshore Wind Energy Development*, MAYER BROWN (Dec. 19, 2023).
[157]Tyler S. Johnson et al., *New California Offshore Wind Legislation Addresses Procurement and Permitting*, BRACEWELL (Oct. 17, 2023).
[158]De Bernier et al., *supra* note 156.
[159]*Priority Bills 2023*, CAL. ENVTL. VOTERS (2023).
[160]*New York's Scoping Plan*,N.Y. STATE (2022).
[161]Press Release, Off. of N.Y. Gov. Kathy Hochul, Governor Hochul Unveils Cap-and-Invest Program to Reduce Greenhouse Gas Emissions and Combat Climate Change (Jan. 10, 2023).
[162]Press Release, N.Y. State Energy Rsch. and Dev. Authority, Cap-and-Invest Outline and Affordability Study Released: Pre-Proposal Details Preliminary Cap-and-Invest Program Information, Seeks Input on Development of Regulations to Implement Statewide Program (Dec. 20, 2023).

preserving competitiveness; investing in disadvantaged communities; and funding a sustainable future.[163]

As part of New York State's 2023 budget, legislators passed the Build Public Renewables Act, which had been four years in the making.[164] The new law will empower the New York Power Authority (NYPA) to build, operate, and own its own renewable energy projects that will work to advance CLCPA goals, filling gaps left by the private sector.[165] It also requires that NYPA provide all of its electricity from renewable energy by 2030. Several provisions emphasize prioritizing clean energy projects in low- and middle-income communities, and the creation of union jobs through the development and implementation of these projects.[166]

In December 2023, Governor Hochul announced funding that has been made to local communities in an effort to encourage clean energy programs. $25 million has been made available through the Clean Energy Communities Program, administered by NYSERDA. The Program works with city, county, town, and village governments to identify and implement clean energy projects that save energy and cut costs. Here too, there is an emphasis on funding projects in "disadvantaged communities."[167]

The budget also includes other environmental provisions. For example, it mandates that by 2029, the majority of new buildings built "within the state will be prohibited from using fossil fuels," marking the first legislation in the country to enact such a statewide ban. It also establishes the financial foundations that will be required to support the new cap-and-invest program and includes provisions that require that at least 30% of auction proceeds go toward rebate initiatives in environmental justice communities. $200 million were allocated to the state's EmPower Program, which assists frontline communities in upgrading to more energy-efficient appliances, $500 million to clean water investments, $200 million to state parks, and $400 million to the state's Environmental Protection Fund.[168]

c. Other State Activities

California and New York are not the only states making advancements in mitigation legislation. Minnesota enacted a flurry of climate legislation in 2023. In February, the state legislature passed SF 4 requiring all electricity sold in the state to be GHG-free by 2040 and adding Minnesota to the list of twenty-three other states – in addition to the District of

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[163] *New York Cap-and-Invest: Reducing Pollution, Investing in Communities, Creating Jobs, & Preserving Competitiveness*, N.Y. STATE CAP-AND-INVEST PROGRAM (2023).
[164] Akielly Hu, *After a Four-Year Campaign, New York Says Yes to Publicly Owned Renewables*, GRIST (May 4, 2023).
[165] Press Release, Assemblymember Robert C. Carrol, Assemblymember Carroll Announces His Major Climate Change Legislation – The Build Public Renewables Act Included in the State's Final Budget (May 2, 2023).
[166] Aliya Uteuova, *New York Takes Big Step Toward Renewable Energy in 'Historic' Climate Win*, THE GUARDIAN (May 3, 2023).
[167] Press Release, Off. of N.Y. Gov. Kathy Hochul, Governor Hochul Announces Additional $25 Million Available for Local Municipalities to Drive Clean Energy Action and Reduce Greenhouse Gas Emissions (Dec. 13, 2023).
[168] Ava Gallo, *New York State's Budget Includes Major Contributions to Climate Goals*, NAT'L CAUCUS ENVTL. LEGISLATORS (May 16, 2023).

Columbia and Puerto Rico – that have established 100% clean energy goals.[169] Minnesota's interim goals include 80% carbon-free energy by 2030 and 90% carbon-free energy by 2035.[170] The law also includes environmental justice provisions, which, among other things, require that utilities report to the Public Utilities Commission on the impacts their facilities have in environmental justice communities.[171] In May, Governor Tim Waltz signed into law a "transformational" environmental package, which includes new regulations on PFAS substances, $20 million in funding to the state's new green bank, and additional incentives for the sale and purchase of electric vehicles (EVs).[172] In all, Minnesota legislators passed more than forty climate initiatives this session relating to energy, the environment, health, agriculture, transportation, and construction – all of which will go towards advancing the state's Climate Action Framework.[173] HF 2887 allocates close to $9 billion in funding for roads, bridges, and transit infrastructure, the legislation requires that the Minnesota Department of Transportation evaluate the impact of any transportation plans through the projection of travel demand. It also includes language extending EV rebates, expanding bike lanes, incorporating vanpooling into transit services, and more.[174]

In August, Delaware passed the Delaware Climate Solutions Act, which requires the state to achieve adopted new legislation to reduce net-zero GHG emissions by 2050. The new law also sets an interim goal of 50% net reduction from 2005 levels by 2030, and the bill codifies the creation of a chief climate change officer, who will collaborate with other agency leads to implement these goals.[175] Governor Carney signed several other climate and environmental measures into law this year, including H.B. 10, which sets statewide targets for purchasing and transitioning the state's fleet of school buses to EVs, H.B 12, which expands the EV rebate program across the state, and S.B. 7, which expands the state's Energy Office.[176]

In Michigan, Governor Whitmer signed historic clean energy legislation into law this year. One of the most significant pieces of legislation includes S.B. 271, which establishes a 100% clean energy standard for the state by 2040. It also sets an interim goal of 50% clean energy by 2030, and a 2035 goal of producing 60% of its energy from renewables. Other bills focus on improving energy efficiency (S.B. 273); establishing the Office of Worker and Community Economic Transition, which will help with a just transition to clean energy within the state (S.B. 519); streamlining utility approval processes for clean energy projects (H.B. 5120 and H.B. 5121), and authorizing Michigan's

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[169] Ansha Zaman, *Minnesota's SF 4 Bill: Decoding the 100% Clean Energy Commitment and What It Means for Environmental Justice Communities*, CTR. FOR EARTH, ENERGY & DEMOCRACY (Feb. 14, 2023).

[170] Press Release, Sierra Club, Sierra Club Celebrates the Minnesota State Legislature's Passage of the 100% Clean Energy Bill (Feb. 3, 2023).

[171] Zaman, *supra* note 169.

[172] Drew Hutchinson, *Minnesota Governor Signs 'Transformational' Environmental Package*, BLOOMBERG L. (May 25, 2023).

[173] Press Release, Minn. Comm. Dep't., Governor Walz, Lieutenant Governor Flanagan Celebrate Historic Climate Action Legislation in Minnesota (May 31, 2023).

[174] H. Jiahong Pan, *New Transportation Law Hopes to Get Minnesotans Moving*, MINN. REFORMER (May 26, 2023); Jared Brey, *How Minnesota's Transportation Bill Addresses Climate Change*, GOVERNING (June 2, 2023).

[175] Delaware Climate Solutions Act, H.B. 99 (Del. 2023).

[176] Press Release, Off. of Gov. John Carney, Governor Carney Signs Multiple Pieces of Environmental Legislation (Aug. 3, 2023).

Public Service Commission to consider environmental justice and equity concerns in their regulatory decisions (S.B. 502).[177]

In New Jersey, Governor Murphy issued three EOs in February 2023 related to clean energy and clean transportation goals. EO 315 accelerated the state's timeline for achieving 100% clean energy, shifting that goal from 2050 to 2035. EO 316 deals with commercial and residential buildings, setting a new target of 2030 to install new energy-efficient heating and cooling systems in properties across the state, with an emphasis on low-to-moderate income properties. EO 317 directs the state's Board of Public Utilities to plan for the future of natural gas in New Jersey. Governor Murphy announced other measures as well, directing that $70 million in RGGI auction proceeds go towards medium- and heavy-duty EV incentives, that state officials work to adopt ACC II, and that new provisions be adopted to enhance flood protection for homeowners, commercial businesses, and infrastructure.[178]

Colorado also strengthened its emissions reduction commitments. Its new SB 23-016 targets include mandating economy-wide emissions reductions (below 2005 levels) of at least 65% by 2035, 75% by 2040, 90% by 2045, and strengthening Colorado's target to achieve net-zero GHG emissions by 2050.[179] Maryland signed legislation relating to its 2035 goal of 100% clean energy, codifying its new 8.5 gigawatt offshore wind goal, facilitating the transition to EVs, and ensuring that a just transition to clean energy occurs over the next decade.[180]

On the west coast, Washington and Oregon are working to advance climate legislation and plans. In Washington State, a new law passed by the legislature this year mandates that localities must include climate change considerations in their required 20-year comprehensive plans beginning in 2025. This includes considering GHG emissions reductions, as well as adaptive measures to climate-related threats.[181] Lawmakers also passed legislation that will address environmental justice concerns – H.B. 1215 mandates that the siting of clean energy projects take equity into account, and creates the Interagency Clean Energy Siting Coordinating Council to ensure that this happens.[182] In Oregon, the state's Global Warming Commission published a new Climate Action Roadmap to 2030, which includes a variety of recommendations that aim to help the state reach its new emissions reduction goals of 45% below 1990 levels by 2030.[183] Should the recommendations be implemented, the state projects that thousands of new jobs could be created, with upwards of $120 billion in cumulative net economic and health benefits.

However, not all states are advancing positive climate legislation, however. In May, Montana Governor Gianforte signed into law a bill that outlaws the consideration of climate impacts and GHG emissions during the Department of Environmental Quality's

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[177] Press Release, Gov. Gretchen Whitmer, Governor Whitmer Signs Historic Clean Energy & Climate Action Package (Nov. 28, 2023).

[178] Molly Freed, *New Jersey Just Announced Big Climate Actions. How Far Do They Go?*, RMI (Mar. 6, 2023).

[179] Greenhouse Gas Emission Reduction Measures, S.B. 23-016 (Colo. 2023).

[180] Press Release, The Off. of Gov. Wes Moore, Governor Moore Continues 'More Opportunity Tour,' Highlights Progress at Tradepoint Atlantic Facility with Ørsted and Signs Bills Solidifying Maryland's Clean Energy Future (Apr. 21, 2023).

[181] Laurel Demkovich, *New Law Pushes Washington Cities and Counties to Plan for Climate Change*, WASH. ST. STANDARD (July 24, 2023).

[182] Ava Galo, *Washington State Lawmakers Pass Bill to Make Clean Energy Transition More Efficient*, NAT'L CAUCUS OF ENVTL. LEGISLATORS (Apr. 26, 2023).

[183] OREGON CLIMATE ACTION ROADMAP TO 2030, OR. CLIMATE ACTION COMM'N, (2023).

comprehensive review of projects – including for coal mines and power plants.[184] In response, sixteen youth plaintiffs sued the state, arguing that the "limitation" to the MEPA is unconstitutional. A judge ruled in favor of the plaintiffs, writing that the "failure to consider GHG emissions from energy and mining projects violates the state constitution because it does not protect Montanans' right to a clean and healthful environment and the state's natural resources from unreasonable depletion."[185] The judge also permanently enjoined this version of the MEPA limitation.

3. Local Activities

Local governments have had a prominent role in climate mitigation efforts for years. In 2023, many cities, large and small, passed climate action plans for the first time, or updated their plans with more stringent targets. Charlottesville, Virginia released a climate action plan in March that establishes a goal of reducing emissions 45% by 2030 and reaching net neutrality by 2050. It breaks its recommendations down into steps community members can take in collaboration with the city versus strategies and actions that fall under the direct jurisdiction of the municipal government. It also provides implementation recommendations, as well as metrics and indicators for measuring the plan's application.[186] In the Midwest, cities like Des Moines, Iowa are adopting their own climate action plans as well. In December, Des Moines released its Climate Action and Adaptation Plan, which outlines the city's climate pollution and reduction goals, including a 2025 goal to reduce emissions by 25% from 2008 levels, a 2030 goal to reduce emissions by 45%, a 2035 goal to have 100% carbon-free electricity citywide, and a 2050 net-zero GHG emissions goal. The Plan's recommendations are divided into seven different focus areas, and take guiding principles of equity and justice, creativity and innovativeness, economic benefits, and health and welfare into account.[187]

Other cities are releasing implementation updates tracking progress toward their emissions reduction goals. Raleigh, North Carolina released an Implementation Progress Report in February 2023 that documents the successes the city has had and how the community has contributed to advancing the city's Community Climate Action Plan.[188] It outlines the projects that help the community reach its goal of 80% emissions reduction by 2050 and recommends additional strategies that will help continue on the path to reach this goal. Albuquerque, New Mexico released its Climate Action Implementation Report in November 2023. Since its 2021 Climate Action Plan was published, the city has advanced in the areas of sustainable buildings, improving energy efficiency and developing green building projects, adding to the state's renewable energy portfolio, and expanding EV infrastructure.[189]

B. Adaptation

[184]H.B. 971, 68th Legis., Reg. Sess. (Mont. 2023).
[185]Blair Miller, Judge Sides with Youth in Montana Climate Change Trial, Finds Two Laws Unconstitutional, Wash. ST. STANDARD (Aug. 14, 2023).
[186]CITY OF CHARLOTTESVILLE, CHARLOTTESVILLE: ACTING ON CLIMATE TOGETHER (2023).
[187]CITY OF DES MOINES, CLIMATE ACTION & ADAPTATION PLAN (2023).
[188]CITY OF RALEIGH, Raleigh Community Climate Action Plan: Implementation Progress Report (Feb. 2023).
[189]CITY OF ALBUQUERQUE, ONE ALBUQUERQUE – CLIMATE ACTION PLAN: IMPLEMENTATION REPORT (2023).

1. Regional and Multi-State Activities

2023 has been another record year for extreme weather and climate disasters. According to the NOAA, as of December 8, 2023, there were twenty-five confirmed climate-related disaster events this year with losses exceeding $1 billion each, up from fifteen events last year. These events have occurred all over the country, and include one drought, two floods, nineteen severe storms, one tropical cyclone, one wildfire, and one winter storm, resulting in the deaths of almost five hundred people. From 1980 to 2022, the annual average for these types of events was a little over eight; over the last five years, that number has skyrocketed to eighteen.[190] Total costs in damages are upwards of $73 billion in 2023 alone.[191]

Regional efforts are underway to accelerate adaptation efforts in the face of these growing threats. Using funding from the 2022 IRA, NOAA has created the Climate Resilience Regional Challenge, with almost $575 million available for regional, collaborative projects that address coastal community resilience and adaptation to extreme weather and sea-level rise. While the guidelines are relatively broad, NOAA is looking to focus on financing projects that facilitate regional coordination, with an emphasis on underserved communities.[192] California has implemented a similar program – the Regional Resilience Planning and Implementation Grant Program – to fund projects that "form regional partnerships to plan and implement projects that advance climate resilience and respond to the greatest climate risks in their regions."[193] And the California-Nevada Adaptation program – a regional effort that works to prepare communities across the two states to address climate hazards – has received funding from NOAA, through their Climate Adaptation Partners Initiative, to focus on collaborating on adaptation strategies, including a regionally focused extreme heat program.[194]

To the north, government officials and tribal leaders from British Columbia and Washington State, have announced an international regional agreement that commits both jurisdictions, as well as tribal nations within the area, to address flood risk and restore animal habitats in the Nooksack and Sumas watersheds. According to organizers, the goal of the agreement is to "collaboratively manage the flood risk from the Nooksack and Sumas rivers," while also working to restore important habitat and ecosystem capabilities so that fish and other aquatic species deemed as critical can thrive in these areas.[195] It will additionally facilitate collaboration and cooperation between state and Indigenous governments through the joint evaluation of flood hazards, the sharing of data and research, and the leveraging of financing opportunities for flood-mitigation projects."[196]

2. State Activities

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[190] *Overview*, NAT'L CTRS. FOR ENVTL. INFO. (Dec. 2023).
[191] *US Hit by 25 Reported Billion-Dollar Climate Disasters in 2023*, VOICE OF AM. (Nov. 10, 2023, 3:34 PM).
[192] *NOAA Climate Resilience Regional Challenge*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN. (2023).
[193] *Regional Resilience Planning and Implementation Grant Program*, GOV. OFF. OF PLANNING & RSCH. (last visited Dec. 18, 2023).
[194] Press Release, Desert Rsch Inst., DRI Leading $5 Million Regional Climate Adaptation Project (Jan. 4, 2023).
[195] Press Release, Off. of Gov. Jay Inslee, Governments Come Together to Build Flood Resilience in Nooksack, Sumas Watersheds (Oct. 20, 2023).
[196] *Id.*

States have continued to advance initiatives to make their communities more resilient and sustainable. In California, the Governor's Office of Planning and Research announced this year that it would award $8 million in funds toward the first round of its Adaptation Planning Grant program to support fourteen projects throughout the state that foster collaborative efforts and focus on equity, nine of which are located within Justice40 communities.[197] Governor Newsom also signed SB 337 into law in October, officially codifying the state's goal of conserving at least 30% of California's coastal waters and land by 2030.[198]

In 2023, the Oregon Legislature passed an expansive climate resilience package, including: the creation of a permanent fund for natural climate solutions; the conservation, restoration, and improved management of specific areas of forests and wetlands; the creation of a process to engage with local tribes concerning land management; the establishment of a "natural climate solutions" definition in state policy; and a mandate that state officials develop a natural and working lands carbon inventory.[199] The legislation also renamed the Oregon Global Warming Commission as the Oregon Climate Action Commission, and expanded its membership to additional agencies, while also granting the Commission increased authority.[200]

In May 2023, Governor Ivey signed E.O. 736, establishing Alabama's Resilience Council, which is tasked with collaborating with local, state, and federal officials to ensure that communities throughout the state can build more resiliently, live safer, and recover more quickly from disasters. Members of the council include leaders from the state's Department of Commerce, Forestry Commission, Department of Transportation, and other state agencies.[201] South Carolina's Office of Resilience released its Strategic Statewide Resilience and Risk Reduction Plan in 2023, which "is intended to serve as a framework to guide state investment in flood mitigation projects and the adoption of programs and policies to protect the people and property of South Carolina from the damage and destruction of extreme weather events."[202] Its recommendations are divided into ten categories, which include establishing a voluntary pre-disaster buyout program, incorporating resilience into housing recovery, maintaining natural flood protections through conservation efforts, and incorporating resilience into the design of infrastructure throughout the state.[203]

In 2023, the Washington State Department of Natural Resources released a three-year update to its Climate Resilience Plan.[204] Included among the resilience strategies are increasing tree canopy coverage in urban areas, conserving 10,000 acres of forests for

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[197] Press Release, Gov. Off. of Planning & Rsch., California Awards $8 Million to Help Communities Strengthen Resilience Against Growing Climate Impacts (June 1, 2023); *Adaptation Planning Grant Program*, GOV. OF. OF PLANNING & RSCH. (last visited Apr. 17, 2024).

[198] Clement Lau, *New Law Makes California's 30x30 Goal Official*, PLANETIZEN (Oct. 10, 2023).

[199] Sylvia Troost, *Oregon Elevates Natural and Working Lands to Help Slow Climate Change*, OR. CAPITAL CHRON. (Aug. 15, 2023).

[200] *Id.*

[201] Press Release, The Off. of Ala. Gov. Kay Ivey, Governor Ivey Signs Executive Order to Establish the Alabama Resilience Council (May 5, 2023).

[202] S.C. OFF. OF RESILIENCE, STRATEGIC STATEWIDE RESILIENCE & RISE REDUCTION PLAN: EXECUTIVE SUMMARY (2023).

[203] *Id.*

[204] Logan Washburn, *Washington DNR Takes Steps Toward Climate Goals*, THE CTR. SQUARE (Aug. 4, 2023).

carbon capture and market opportunities, and conserving and restoring at least 10,000 acres of kelp forest and eelgrass meadows by 2040. Importantly, the plan also establishes new benchmarks by which implementation can be measured.[205]

In May, the passage of HB 1578 – or the Cascading Impacts of Wildfires Act – updated Washington's existing wildfire prevention regime.[206] The Act will work to improve communities' response to and preparedness for wildfires, in addition to recovery after fires strike. Under the new law, the Department of Natural Resources will work with other agencies and localities to develop public safety evacuations and perform decadal assessments of areas that are at a higher risk of wildfire than others.[207] Two months later, the legislature passed HB 1181, which requires local communities and governments to plan for climate impacts as part of their required comprehensive planning processes.[208] The law also requires updates to local shoreline master program guidelines, and codifies new definitions of "environmental justice," "overburdened communities," "green infrastructure," and "vulnerable populations."[209]

In Massachusetts, Governor Maura Healey announced the creation of the ResilientCoasts Initiative in November 2023.[210] According to recent projections, Massachusetts could see upwards of 2.5 feet of sea-level rise by 2050 – causing more than $1 billion a year in weather-related damages by 2070. Led by the newly established Chief Coastal Resilience Officer within the Office of Coastal Zone Management, the purpose of the initiative is to establish resilience districts throughout the state, which will take into account the unique climate impacts these areas face.[211] The initiative supports the creation of nature-based solutions for coastal erosion, assures that resiliency projects take sea-level rise into account, and streamlines permitting processes. There is a strong emphasis on frontline and underserved communities, as 55% of the almost 2.5 million people living in Massachusetts' coastal communities are people of color, low-income, or individuals facing language barriers.[212] The establishment of the chief resilience officer position and the program is in alignment with the goals set forth in the ResilientMass Plan, which was announced in October.[213]

New Jersey's Department of Environmental Protection updated the state's Inland Flood Protection rule in July 2023. The purpose of the rule is to ensure that new investments and construction projects take future projections of rainfall and sea-level rise into account.[214] Using more recent data, the amended rules take a higher precipitation and

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[205] WASH. STATE DEP'T OF NAT. RES., PLAN FOR CLIMATE RESILIENCE 3-YEAR UPDATE (2023).

[206] *Washington HB 1578: Cascading Impacts of Wildfires Act*, ADAPTATION CLEARINGHOUSE (May 10, 2023).

[207] H.B. 1578, 68th Legis., Reg. Sess. (Wash. 2023).

[208] Washington HB 1181: Climate Change in Local Comprehensive Planning, ADAPTATION CLEARINGHOUSE (July 23, 2023).

[209] H.B. 1181, 68th Legis., Reg. Sess. (Wash. 2023).

[210] Press Release, Commonwealth of Mass., Healey-Driscoll Administration Launches Statewide Coastal Resiliency Strategy (Nov. 28, 2023).

[211] Marc Fortier et al., *Mass. Launches Effort to Address Coastal Threats: 'Now Is the Time for Action'*, NBC10 BOSTON (Nov. 28, 2023).

[212] Steve LeBlanc, *Massachusetts Unveils New Strategy to Help Coastal Communities Cope with Climate Change*, WBUR (Nov. 28, 2023).

[213] *ResilientMass Plan: 2023 Massachusetts State Hazard Mitigation and Climate Adaptation Plan,* MASS.GOV (Sept. 2023).

[214] Inland Flood Protection Rule, N.J. DEPT. OF ENVTL. PROT. (July 17, 2023).

sea-level rise estimate into account.[215] The state's Interagency Council on Climate Resilience also released a report documenting their progress in implementing the State's Climate Change Resilience Strategy.[216] Overall, more than forty regulatory and policy recommendations are included in the document, showcasing the projects and policy action that state agencies have taken since the original Resilience Strategy was released.[217]

3. Local Activities

Many communities across the country are developing, strengthening, and implementing their climate resilience plans. In New York City, Mayor Adams released "PlaNYC: Getting Sustainability Done," which provides a new strategic climate resilience plan for the city. Developed with input from thousands of stakeholders and recommendations from officials from more than 35 city agencies, the Plan outlines ways in which the city can improve quality of life and the ability to recover from climate hazards through a variety of strategies and recommendations.[218] It describes 32 different initiatives across 10 sectors. Action items include improving tree cover, creating a voluntary housing mobility and land acquisition program, creating a connected network of open spaces, and launching new climate education and training programs.[219]

The Resilient Houston Plan (Houston, Texas) was also updated this year by the Mayor's Office of Resilience and Sustainability, in coordination with other city officials and community stakeholders.[220] The original plan was published in 2018, and organized resilience action by program: equity and opportunity, mobility and land use, buildings and energy, water, disaster management, heat and nature, materials management, and resilience coordinate. Successes include the planting of more than 200,000 trees throughout the city, with the number of trees now at 31% of the overall goal. Other accomplishments include adopting an ordinance that protects almost 7,500 acres of natural habitat across 26 Houston Parks; continuing to plan and build resilience hubs throughout the city; and supporting the expansion of green stormwater projects.[221]

Tucson, Arizona released its Tucson Resilient Together plan in March of 2023, marking the first time that the city has developed a climate action plan.[222] Federal funds from the American Rescue Plan will be used to "move forward nearly 60% of the actions in the plan, in the first year."[223] Action items and goals include the expansion of transit services, as well as protected bike lanes and pedestrian paths, the development of an urban

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[215] Press Release, N.J. State League of Municipalities, Inland Flood Protection Rules to Take Effect in July (June 9, 2023).
[216] STATE OF N.J., CLIMATE CHANGE RESILIENCE STRATEGY: TWO YEAR ANNIVERSARY ACCOMPLISHMENTS (Oct. 2023).
[217] Press Release, N.J. Dep't of Envtl. Prot., Murphy Administration Unveils Report Highlighting State Government Climate Resilience Accomplishments (Nov. 1, 2023).
[218] Press Release, Off. of the Mayor of the City of N.Y., Mayor Adams Releases "PlaNYC: Getting Sustainability Done," New York City's Strategic Climate Plan (Apr. 20, 2023).
[219] CITY OF N.Y., PlaNYC: Getting Sustainability Done (Apr. 2023).
[220] Mayor Turner Releases Three-Year Update for Resilient Houston and the Climate Action Plan, HOUSTON STYLE MAG. (July 14, 2023).
[221] CITY OF HOUSTON MAYOR'S OFF. OF RESILIENCE AND SUSTAINABILITY, THREE-YEAR REPORT: RESILIENT HOUSTON & HOUSTON CLIMATE ACTION PLAN (2023).
[222] Mayor Regina Romero is Making Tucson One of the Most Climate-Resilient Cities in the Country, MEDIUM (Apr. 21, 2023).
[223] *Id.*

heat mitigation strategy in collaboration with other programs like the Tucson Million Trees and Resilience Hub programs, and more, which all work to achieve the goal of carbon neutrality by 2030. It aligns with other planning documents already in place within the city, including the One Water 2100 Master Plan, the Drought Preparedness and Response Plan, and the Move Tucson plan.[224]

C. State ESG Disclosure

On October 7, 2023, California Governor Gavin Newsom signed into law three domestically unprecedented mandates for climate-related disclosures. Each of the laws – SB 253 (Weiner),[225] SB 261 (Stern),[226] and AB 1305 (Gabriel)[227]—apply to specified business enterprises, public or private, that have even a modest connection to California regardless of an actual physical presence in the state.[228] And while the connection to California need only be minimal, the breadth of the required disclosures is for all operations globally.[229]

SB 253 requires that entities doing business in California with annual revenues in excess of $1 billion[230] publicly disclose all of their GHG emissions inclusive of Scope 1, Scope 2, and Scope 3 under the Greenhouse Gas Protocol.[231] The reporting obligation for Scopes 1 and 2 begins in 2026 and for Scope 3 in 2027.[232] The law directs CARB to draft implementing regulations by January 1, 2025,[233] including provision for administrative penalties of up to $500,000 per year of noncompliance.[234] Emissions reports must be affirmed by a "third-party assurance provider."[235] On or before July 1, 2027, CARB must contract with the University of California or comparable organization to prepare a report on the emissions reported including how emissions compare to California's adopted GHG reduction and climate goals.[236]

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[224]CITY OF TUCSON, TUCSON CLIMATE ACTION AND ADAPTATION PLAN (2023).
[225]S.B. 253, 2023-2024, Reg. Sess. (Cal. 2023).
[226]S.B. 261, 2023-2024, Reg. Sess. (Cal. 2023).
[227]A.B. 1305, 2023-2024, Reg. Sess. (Cal. 2023),
[228]*See, e.g.*, S.B. 253 § 38532(b)(2); S.B. 261 § 38533(a)(4).
[229]*See* S.B. 253 § 38352(c)(1)(A)(ii).
[230]S.B. 253 § 38532(b)(2).
[231]S.B. 253 § 38532(c)(1)A)(ii). For Greenhouse Gas Protocol generally, see WORLD BUS. COUNCIL FOR SUSTAINABLE DEVEL. & WORLD RES. INST., GREENHOUSE GAS PROTOCOL: A CORPORATE ACCOUNTING AND REPORTING STANDARD. Scope 1 emissions are those generated directly by the business enterprise's own operations. Scope 2 emissions are those indirectly attributable to the business enterprise due to their energy consumption, e.g., electricity from the grid. Scope 3 emissions are all upstream and downstream emissions attributable to sources from the supply chain, employee travel, consumer use of end products, and transport and distribution. *See* CAL. HEALTH & SAFETY CODE §§ 38532(b)(3), (4), and (5) (West 2024), respectively.
[232]CAL. HEALTH & SAFETY CODE § 38532(c)(1)(A)(i) (West 2024).
[233]*Id.* § 38532(c)(1).
[234]*Id.* § 38532(f)(1)(2)(A).
[235]*Id.* § 38532(c)(1)(F).
[236]*Id.* § 38532(d).

SB 261 requires that entities doing business in California with annual revenues in excess of $500 million[237] publicly report all "climate-related financial risks"[238] and "measures adopted to reduce and adapt to [those] climate-related risk[s] disclosed."[239] Reports of climate risks must align with the Recommendations Report (June 2017) by the Task Force for Climate-Related Financial Disclosures and any updates thereto.[240] The climate-related financial risk reports must be filed on or before January 1, 2026, and biennially thereafter.[241] Potential administrative penalties to be adopted by CARB may not exceed $50,000 in a reporting year.[242]

Finally, apparently seeking to foster greater transparency and veracity in the voluntary carbon offset market, AB 1305 mandates specified disclosures by entities marketing or selling carbon offsets in California;[243] entities that purchase or use voluntary carbon offsets in support of claims such as "net zero," "carbon neutrality," or other related claims;[244] or entities making claims about the achievement of net zero emissions, carbon neutrality, or that has otherwise accomplished "significant reductions to its carbon dioxide or GHG emissions."[245] Violations of AB 1305 are subject to civil penalties of not more than $2,500 per day, not to exceed a total of $500,000 for each violation.[246] Disclosures pursuant to AB 1305 must be updated no less than annually.[247]

IV. HUMAN RIGHTS AND CLIMATE JUSTICE

Between December 2022 and March 2023, three requests for advisory opinions were filed seeking to elicit official judicial declarations regarding the obligations of State Parties in relation to climate change as a human rights concern.

The first was submitted by the Commission of Small Island States on Climate Change and International Law (Commission of Small Island States) before the International Tribunal on the Law of the Sea (Tribunal). Specifically, the Commission is asking the Tribunal to articulate the obligations of state parties to the U.N. Convention on the Law of the Sea (Convention) "to protect and preserve the marine environment" from the negative impacts of climate change such as ocean warming, sea level rise, and ocean acidification as well as the marine pollution that will likely result from these phenomena.[248] The Tribunal's response will have implications for the free exercise of human rights,

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[237] *Id.* § 38533(a)(4).

[238] *Id.* § 38533(a)(2) ("Climate-related financial risk" is defined as a "material risk of harm to immediate and long-term financial outcomes due to physical and transition risks, including, but not limited to, risks to corporate operations, provision of goods and services, supply chains, employee health and safety, capital and financial investments, institutional investments, financial standing of loan recipients and borrowers, shareholder value, consumer demand, and financial markets and economic health.").

[239] *Id.* § 38533 (b)(1)(A).

[240] *Id.* § 38533(b)(1)(A)(i); *see* generally, TCFD, *Final Report: Recommendations of the Task Force on Climate-Related Financial Disclosures* (2017).

[241] CAL. HEALTH & SAFETY CODE § 38533(b)(1)(A)).

[242] *Id.* § 38533(e)(2).

[243] *Id.* §44475.

[244] *Id.* § 44475.1.

[245] *Id.* § 44475.2.

[246] *Id.* § 44475.3.

[247] *Id.*

[248] *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, CLIMATECASECHART.COM (Dec. 12, 2022).

particularly for coastal communities, and will influence the interpretation of state obligations under international human rights law. Interested state parties and other invited organizations submitted written statements by June 16, 2023, and the Tribunal heard oral arguments related to the advisory opinion request on September 11, 2023.

In January 2023, Colombia and Chile jointly submitted a separate advisory opinion request to the Inter-American Court of Human Rights (IACtHR) on the scope of state obligations under international human rights law in the context of the climate emergency. The request acknowledges that climate change poses a great challenge across the Americas and the world, disproportionately impacting communities that are geographically and economically vulnerable. The request observes that the IACtHR's guidance will be crucial to develop climate policies that meet human rights standards under the American Convention and other human rights and environmental treaties.

The petition includes questions across six main areas: (1) the scope of the duty of prevention and the type of policies states should undertake to minimize the harms stemming from climate change in order to meet their human rights obligations; (2) the scope of duties surrounding mitigation and adaptation measures, loss and damage (economic and non-economic), access to information, and climate change migration and displacement; (3) the differentiated obligations of states to protect the rights of children and future generations from climate change; (4) the obligations to provide effective judicial orders and remedies related to climate change; (5) the duty to protect environmental defenders, specially indigenous people and women; and (6) the considerations and principles states should consider when collaborating in line with their common but differentiated responsibilities to confront climate change. The request builds on an 2017 advisory opinion, where the IACtHR found that the right to a healthy environment is a human right. The deadline for amicus submission was December 18, 2023.[249]

In March 2023, the United Nations General Assembly adopted a resolution requesting yet another advisory opinion regarding State obligations with respect to climate change, this time before the International Court of Justice.[250] A multi-year campaign led by Vanuatu and a coalition of youth organizations, including the Pacific Island Students Fighting Climate Change and the World's Youth for Climate Justice, facilitated this request.[251] The deadline for States to submit statements is January 22, 2024.

In the midst of these advisory opinion requests, the European Court of Human Rights (European Court) fielded three contentious cases on the human rights implications of climate change: *Duarte Agostinho et al. v. 33 Member States*, *Carême v. France*, *and KlimaSeniorinnen v. Switzerland*.[252] The plaintiffs in all three cases allege that States have violated their human rights by causing climate change and its corresponding impacts to their lives, health, or privacy. Although these cases were filed separately, hearings were held for the latter two in front of the European Court's Grand Chamber on the same day in March 2023. The Grand Chamber heard oral arguments in *Duarte Agostinho* in September 2023. As of this writing, decisions in all three cases have yet to be delivered.

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[249] *Request for an Advisory Opinion on the Scope of the State Obligations for Responding to the Climate Emergency*, CLIMATECASECHART.COM (Jan. 9, 2023).

[250] *See* G.A. RES. A/77/L.58, Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change (Mar. 1, 2023).

[251] Press Release, World's Youth for Climate Just., Youth Celebrate Successful UN Vote Calling for International Court of Justice Opinion on Climate and Human Rights (Mar. 29, 2023).

[252] *Duarte Agostinho v. 33 Member States,* CLIMATECASECHART.COM (last visited Apr. 7, 2024); Carême v. France, CLIMATECASECHART.COM (last visited Apr. 7, 2024); KlimaSeniorinnen v. Switzerland, CLIMATECASECHART.COM (last visited Apr. 7, 2024).

Chapter D: ENERGY
2023 Annual Report[1]

I. Opportunities and Challenges Associated with Developing Renewable Energy Projects

A. Wind and Solar Land Use Restrictions

In May 2023, Columbia Law School's Sabin Center for Climate Change Law released an updated edition of its *Opposition to Renewable Energy Facilities in the United States* report.[2] The report catalogs state and local restrictions to solar and wind siting. The report found that in nearly all states, local governments have enacted regulations to block or restrict solar and wind development and/or local opposition has led to the delay or cancellation of individual projects. Overall, the report identified 9 state-level restrictions, 228 local restrictions, and 293 contested projects from 1995 to 2023, including one state-level restriction, fifty-nine new local restrictions, and eighty-two new controversies adopted/occurring from March 2022 to May 2023.[3]

In addition, an article published in Nature Energy by authors from the National Renewable Energy Laboratory identified a total of over 1,800 local-level (mostly county) wind ordinances and over 800 local-level (mostly county) solar ordinances as of the end of 2022.[4] The article concludes that if just the identified wind and solar setback ordinances were applied across the county it could reduce wind and solar resource potential by up to 87% and 38%, respectively.[5]

B. Updated Federal Offshore Wind Regulations

In January 2023, the Department of the Interior's Bureau of Ocean Energy Management (BOEM) proposed updated offshore wind regulations superseding those promulgated in 2009 via the Renewable Energy Modernization Rule. The proposed rule seeks to increase funding for decommissioning, create more flexible survey submission requirements, streamline approval of meteorological buoys, reform the auction process, and provide greater clarity on safety requirements.[6]

In addition, in January 2023, the Department of the Interior announced a transfer of offshore wind safety and environmental responsibility requirements from BOEM to the

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[1]This chapter was authored by Aaron Levine, Esq. Senior Legal & Regulatory Analyst|Strategic Energy Analysis Center, National Renewable Energy Laboratory (NREL), Taylor L. Curtis, Esq. Policy/Regulatory Analyst, National Renewable Energy Laboratory, Melissa M. Douglas, Attorney-at-Law, Conrad Douglas & Associates Limited and its subsidiary Environmental Science & Technology Limited, Ravay Smith, Esq. Elizabeth Bogle, Esq. Day Pitney LLP

[2]Matthew Eisenson, *Opposition to Renewable Energy Facilities in the U.S.: May 2023 Ed.,* Columbia Law School Sabin Center for Climate Change Law (2023).

[3]*Id*. at 3-4.

[4]Anthony Lopez, et al., *Impact of siting ordinances on land availability for wind and solar development*, Nature Energy 8, 1034–1043 (2023). (subscription required)

[5]*Id*.

[6]Renewable Energy Modernization Rule, 88 Fed. Reg, 5968 (proposed Jan. 30, 2023) (to be codified at 30 C.F.R. pt. 585).

Bureau of Safety and Environmental Enforcement (BSEE).[7] The transferred responsibilities to BSEE include oversight of safety management systems and oil spill response plans, enforcement of operational safety and environmental compliance, and decommissioning activities.[8]

II. A CIRCULAR ECONOMY FOR SOLAR PHOTOVOLTAICS (PV) IN THE U.S. ENERGY TRANSITION: A 2023 POLICY UPDATE

A circular economy for solar photovoltaics (PV) is considered an important strategy to alleviate U.S. supply chain constraints, reduce environmental impacts, and vital to ensuring PV continues to play a role in the zero-carbon energy transition.[9] With calls for more than fourteen times today's total installed PV capacity in the United States, cumulative installed capacity is expected to reach 1.75 terawatts by 2050 requiring ninety-seven million metric tons of virgin material for PV module manufacturing alone. The volume of PV modules needed to meet future demand in the United States, in conjunction with growing PV supply chain concerns, prompted a wave of new policy in 2023 to advance PV circularity, including direct funding and initiatives for PV module design, reuse, and secondary market opportunities, as well as domestic recycling and manufacturing.[10]

President Biden's Investing in America Agenda and the Bipartisan Infrastructure Law (BIL) took center stage for federal policy advancing PV circularity. Building upon 2022's Inflation Reduction Act's, and the CHIP and Science Act's unprecedent investment in advanced domestic manufacturing, and recycling innovation, the U.S. Department of Energy announced a $20 million funding opportunity in 2023, including $8 million from the BIL to advance PV circularity. The funding call entitled Materials, Operation, and Recycling for Photovoltaics (MORE PV) aims to minimize the use of PV system materials, improve system installation quality and resilience for PV systems, and streamline the reuse and recyclability of PV modules.[11] MORE PV will also set up a Solar Partnership to Advance Recycling and Circularity to improve materials recovery and develop safe end-of-life practices for PV system components.

In regulatory news, the U.S. Environmental Protection Agency (EPA) announced a plan, in October 2023, to propose new rules to improve the management and recycling of

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[7] Press Release, U.S. Dep't of Interior, Interior Department Finalizes Offshore Wind Safety and Environmental Responsibilities (Jan. 7, 2023); 30 C.F.R. § 285 (2023); 30 C.F.R. §§ 585-86 (2023).

[8] Press Release, U.S. Dep't of Interior, Interior Department Finalizes Offshore Wind Safety and Environmental Responsibilities (Jan. 7, 2023).

[9] U.S. DEPT. OF ENERGY, SOLAR FUTURES STUDY (Sept. 2021); U.S. DEPT. OF STATE, THE LONG TERM STRATEGY OF THE UNITED STATES: PATHWAYS TO NET-ZERO GREENHOUSE GAS EMISSIONS BY 2050 (Nov. 2021); Press Release, The White House, Fact Sheet: President Biden Sets 2020 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S Leadership on Clean Energy Technologies (April 22, 2021).

[10] MACKENZIE WOOD & SOLAR ENERGY INDUS. ASS'N, *U.S. Solar Market Insight Excel Data Q4 2022*, SOLAR ENERGY INDUS. ASS'N (last visited Mar. 18, 2024); *U.S. Solar Market Insight Full Report Q4 2022*, SOLAR ENERGY INDUS. ASS'N (Dec. 2022) (subscription required); U.S. Dep't. of Energy, *Supply Chain Deep Dive Assessment: U.S. Dept. of Energy Response to Exec. Order 14017, "America's Supply Chains"* (2022); Heather Mirletz *et al.*, *Circular economy priorities for photovolataics in the energy transition*, PLOS ONE (Sep. 9, 2022).

[11] Off. of Energy Efficiency & Renewable Energy, *Funding Notice: Materials, Operation, and Recycling of Photovaltaics (MORE PV)*, U.S. DEP'T OF ENERGY (July 21, 2023).

PV modules and lithium batteries. EPA is developing a proposed rule to add PV modules and to tailor hazardous universal waste (universal waste) regulatory requirements for lithium batteries.[12] Universal waste is a subset of hazardous waste regulation created under the Federal Resource Conservation and Recovery Act of 1976 program to streamline the collection and transport of certain types of hazardous waste that are commonly generated and have relatively low risk compared to other hazardous waste.[13] Hawaii also adopted universal waste regulations for PV modules in 2023, making it the second state after California to adopt the regulatory scheme.[14] New York and North Carolina have also considered adopting universal waste regulation for PV modules.[15]

In other 2023 state law adoption, Illinois and Minnesota passed new legislation focused on PV circularity. Illinois' law amends the state's Renewable Energy Component Recycling Task Force Act requiring the task force consider the benefits of a landfill ban for renewable energy and energy storage system components, including PV modules.[16] New Minnesota legislation enacted a requirement for the Minnesota Pollution Control Agency (MPCA) to carry out a study on PV equipment installation and removal rates and propose management options for a statewide collection, reuse, and recycling system.[17] The law also requires MPCA to convene a policy working group, after completion of the study, to make recommendations to Legislature for a preferred statewide system for retired PV equipment by January 2025.[18]

Wrapping up the 2023 policy update for PV circularity includes initiatives from the voluntary sustainability and environmental quality standards community. The International Electrotechnical Commission (IEC) Technical Committee 82 convened world experts to study the reuse of PV modules to inform a future industry standard.[19] The IEC 82 Standard will include testing specifications and screening protocols to assess the safe and reliable reuse of PV modules.[20] The Sustainable Electronics Recycling International (SERI) Responsible Recycling (R2) Standard, which provides a framework and standardized criteria to aid electronic recyclers in sustainable business practices, worked to add PV modules to existing standards in 2023. The new R2 for PV modules, expected for release in 2024, establishes a hierarchy of reuse, repair, and recycling of PV modules.

III. Environmental and Energy Justice

The Biden-Harris Administration's focus on increasing awareness and action on environmental justice and further developing the concept of energy justice was solidified with appropriations in the Inflation Reduction Act (IRA) of 2022. The largest single investment across the climate title of IRA was the Greenhouse Gas Reduction Fund, a clean energy and sustainability accelerator funded at $27 billion with at least 60 percent of those

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[12] *Improving Recycling and Management of Renewable Energy Wastes: Universal Waste Regulations for Solar Panels and Lithium* Batteries, U.S. Envtl. Prot. Agency (last updated Dec. 14, 2023).

[13] 40 C.F.R. §§ 260-65, 273 (2023); *Universal Waste*, U.S. Envtl. Prot. Agency (last updated Oct. 23, 2023).

[14] Haw. Code. R. §§ 11-273.1-3; 11-273.1-4; 11-273.1-5 (2023).

[15] *Rulemaking - Adding Solar Panels To The Universal Waste Regulations*, N.Y. Dep't. of Envtl. Conservation (last visited Apr. 9, 2024); 2019 N.C. Sess. Laws 132.

[16] S.B. 1160, 103rd Gen. Assemb., Reg. Sess.(Ill. 2023).

[17] Minn. Stat. § 60 (2023).

[18] *Id.*

[19] *TC 82 Solar Photovolatic Energy Sys.*, Int'l. Electrotechnical Comm'n. (last visited Mar. 17, 2023).

[20] *Public Comment for the Addition of PV Modules*, Sustainable Elec. Recycling Int'l (last visited Mar. 17, 2024).

funds focused on disadvantaged communities.[21] The funding is provided to non-federal governments, as well as state or regional green banks, and is allocated across three buckets: 1) "$7 billion for zero-emission technology deployment – including rooftop and community solar – in low-income and disadvantaged communities"; 2) "$8 billion for a general fund making broad investments in reducing greenhouse gas emissions and promoting environmental justice, exclusively allocated to low-income and disadvantaged communities"; 3) "$11.97 billion for a similar general fund but available to all Americans and communities."[22] To further assist clean energy efforts in residential communities IRA funded a $1 billion dollar grant program that helps over the cost of energy efficiency upgrades – including electrification of systems and appliances – as well as installation of renewable energy, and improvements to property resiliency.[23]

In 2023, the Department of Energy renamed its Office of Economic Impact and Diversity to the Office of Energy Justice and Equity (EJE).[24] The name change represented an alignment with the Biden-Harris Administration's long-term environmental justice and equity goals. Two of the most notable agreements developed by the DOE EJE concerning energy justice in 2023 included a $6.3 million dollar grant to Black Owners of Solar Services (BOSS) and the Low-Income Communities Bonus Credit Program. BOSS is the largest community of experienced African American energy professionals working in the solar photovoltaic space. DOE's partnership with BOSS further advances the agency's Justice 40[25] Initiative efforts by increasing equity in clean energy technology (e.g., solar and storage), stimulating clean energy enterprise creation, along with creating clean energy jobs and training for disadvantaged and underserved communities.[26] The Low-Income Communities Bonus Credit Program was developed in partnership with the IRS and Department of Treasury to provide a 10 or 20 percentage point credit increase to the investment tax credit for qualified solar or wind energy facilities that are less than five megawatts (AC). The program allows for up to 1.8 gigawatts of eligible solar and wind capacity to be allocated in credits each year.[27] The goals of the program are to increase access to clean energy in low-income communities, encourage new market participants, and benefit individuals and communities that have experienced adverse health or environmental effects or lacked economic opportunities.[28]

IV. Capital Available for Funding Energy Infrastructure Projects

A. Infrastructure Investment and Jobs Act, Inflation Reduction Act, and 2023 Congressional Appropriations Updates

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[21] Environmental Justice in the Inflation Reduction Act, Senate Democrats (last visited Mar. 22, 2024).
[22] *Id.*
[23] *Id.*
[24] Off. of Energy Just. and Equity, *DOE's Office of Econ. Impact and Diversity Changes Its Name to Office of Energy Justice and* Equity, U.S. Dep't Of Energy (Oct. 31, 2023).
[25] Justice40 is defined as the federal government's goal that 40 percent of the overall benefits of certain Federal investments flow to disadvantaged communities that are marginalized, underserved, and overburdened by pollution. *See Justice40: A Whole-of-Government Initiative,* The White House (last visited Apr. 10, 2024).
[26] Off. of Energy Just. And Equity, *DOE Awards $6.3 Million to Black Owners of Solar Services (BOSS) to Advance Equity in Clean Energy Business and Workforce Development*, U.S. Dep't of Energy (Feb. 23, 2023).
[27] *Biden-Harris Administration Opens Low-Income Communities Bonus Credit Program for Clean Energy Projects Benefitting Underserved* Communities, U.S. Dep't of Energy (last visited Mar. 24, 2024).
[28] *Id.*

1. IIJA - Hydroelectric Incentives Programs

The Infrastructure Investment and Jobs Act (IIJA), also known as the Bi-Partisan Infrastructure Law authorized funding three hydroelectric incentives programs. Section 40331 of the IIJA authorized $125 million in new incentives payments under the Energy Policy Act of 2005 (EPAct 2005) Section 242 for qualified hydroelectric facilities for electricity generated and sold. In October 2023, the U.S. Department of Energy (DOE) announced payments for calendar years 2021 and 2022, which funded sixty-six hydroelectric facilities a total of $36.7 million.[29] Section 40332 of the IIJA authorized $75 million in new incentive payments under EPAct 2005 Section 243 for capital improvements that increase hydroelectric facility efficiency by at least 3%. DOE solicited applications from March through June 2023 and is currently in the process of selecting awardees.[30] Section 40333 of the IIJA authorized $554 million in incentive payments for a newly created program, EPAct 2005 Section 247, for capital improvements to existing hydroelectric facilities directly related grid resiliency, dam safety, and environmental improvements. DOE solicited applications from June to October 2023 and is currently in the process of selecting awardees.[31]

2. IIJA - Grid Resilience and Innovation Partnerships (GRIP) Program

The IIJA authorized $10.5 billion across Section 40101(c): Grid Resilience Grants; Section 40107: Smart Grid Grants; and Section 40103(b) collectively referred to as the Grid Resilience and Innovation Partnership (GRIP) Program to enhance grid flexibility and improve power system resilience against extreme weather and climate change. In October 2023, DOE announced a first round of payments with up to $3.46 billion in funding for fifty-eight projects across forty-four states.[32] In addition, in November 2023, DOE announced a second solicitation for GRIP applications offering up to $3.9 billion across government fiscal years 2024 and 2025.[33]

3. IIJA - Carbon Management Programs

The IIJA authorized around $7 billion for carbon management across multiple provisions, including Section 40303: Carbon Capture Technology Program ($300 million), Section 40305: Carbon Storage Validation and Testing ($2.5 billion), and Section 40308: Carbon Removal ($3.5 billion), to fund programs previously created under EPAct 2005 and the Energy Act of 2020, collectively referred to as the Carbon Management Portfolio and managed by the DOE's Office of Clean Energy Demonstrations (OCED).

In February 2023, DOE announced a funding opportunity announcement for Carbon Capture Large-Scale Pilot projects (up to $820 million for up to ten projects) and Carbon Capture Demonstration projects (up to $1.7 billion for up to six projects).[34] In December 2023, DOE announced up to $890 million within the Carbon Capture

[29] Grid Deployment Off., *Hydroelectric Incentives Funding in the Bipartisan Infrastructure Law*, U.S. DEP'T OF ENERGY (last visited Mar. 24, 2024).
[30] *Id.*
[31] *Id.*
[32] Grid Deployment Off., *Grid Resilience and Innovation Partnership (GRIP) Program*, U.S. DEP'T OF ENERGY (last visited Mar. 24, 2024).
[33] *Id.*
[34] *Biden-Harris Administration Announces $2.5 Billion to Cut Pollution and Deliver Economic Benefits to Communities Across the Nation*, U.S. DEP'T OF ENERGY (last visited Mar. 24, 2024).

Demonstration projects program for three projects to demonstrate technologies designed to capture, transport, and store carbon emissions located in California, North Dakota, and Texas. DOE estimates the three projects will prevent roughly 7.75 million metric tons of CO2 emissions from being released into the atmosphere each year.[35] DOE anticipates announcing selections for the Large-Scale Pilot projects in early 2024.[36]

In addition, DOE announced up to $1.2 billion for two commercial-scale facilities in Texas and Louisiana under the Regional Direct Air Capture Hubs program. DOE estimates the two facilities will remove more than two million metric tons of carbon dioxide emissions from the atmosphere each year.[37]

4. IIJA - Clean Energy Demonstration on Current and Former Mine Land

Section 30432 of the IIJA authorized $500 million in funding for clean energy demonstration projects on current and former mine land, including solar; micro-grids; geothermal; direct air capture; fossil-fueled electricity generation with carbon capture, utilization, and sequestration; energy storage, including pumped storage hydropower and compressed air storage; and advanced nuclear technologies. In April 2023, DOE announced a funding opportunity for up to $450 million for clean energy demonstration projects.[38] DOE has not yet determined when selections will be announced for this funding opportunity.

5. IIJA - Energy Improvements In Rural or Remote Areas

Section 40103(c) of the IIJA authorized $1 billion for the Energy Improvements in Rural and Remote Areas program to improve energy resilience, reliability, and affordability in communities with 10,000 or fewer inhabitants. In 2023, DOE announced several funding opportunities under the Energy Improvements in Rural and Remote Communities program.

In March 2023, DOE announced a funding opportunity for up to $300 million for community-scale ($40 million) or large-scale ($260 million) demonstration clean energy projects that benefit one or multiple rural communities, respectively.[39] DOE anticipates announcing selections for the community-scale and large-scale demonstration clean energy projects in winter 2024.[40]

In May 2023, DOE announced a funding opportunity of $50 million small community-driven clean energy projects requiring $500,000 to $5,000,000 under the Fixed

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[35]Off. of Clean Energy Demonstrations, *OCED Selects Three Projects in CA, ND, and TX to Reduce Harmful Carbon Pollution, Create New Economic Opportunities, and Advance Carbon Reducing Technologies*, U.S. DEP'T OF ENERGY (last visited Mar. 24, 2024).

[36]Off. of Clean Energy Demonstrations, *Carbon Capture Large Scale Pilot Projects*, U.S. DEP'T OF ENERGY (last visited Mar. 24, 2024).

[37]*Biden-Harris Administration Announces Up to $1.2 Billion For Nation's First Direct Air Capture Demonstrations in Texas and Louisiana*, U.S. DEP'T OF ENERGY (last visited Mar. 24, 2024).

[38]Off. of Clean Energy Demonstrations, *Bipartisan Infrastructure Law Clean Energy Demonstration Program on Current and Former Mine Land*, U.S. DEP'T OF ENERGY (last visited Mar. 24, 2024).

[39]Off. of Clean Energy Demonstrations, *Bipartisan Infrastructure Law Energy Improvement in Rural or Remote Areas Fixed Award Grant* Program, U.S. DEP'T OF ENERGY (Sept. 1, 2023).

[40]Off. of Clean Energy Demonstrations, *Energy Improvement in Rural or Remote Areas*, U.S. DEP'T OF ENERGY (last visited Mar. 24, 2024).

Award Grant Program.[41] DOE anticipates announcing selections for the Fixed Award Grant Program in March 2024.[42]

In July 2023, DOE issued sixty-seven $100,000 prizes as part of the Energizing Rural Communities Prize Competition.[43]

6. IIJA - Long-Duration Energy Storage Demonstrations

Section 41001 of the IIJA authorized over $500 million for programs previously created under the Energy Act of 2020 for Long-Duration Energy Storage Demonstration projects to validate new energy storage technologies. In September 2023, DOE announced selections for two funding opportunities under the Long-Duration Energy Storage Demonstrations program. DOE announced $30 million to four national laboratories with industry partners for projects greater than 100kW that can discharge ten or more hours of energy storage and projects greater than 500kW that can discharge twenty-four or more hours of energy storage.[44] In addition, DOE announced $325 million to fifteen selectees across seventeen states and one tribal nation to accelerate the development of long duration storage technologies.[45]

7. IIJA - Regional Clean Hydrogen Hubs and Demand-Side Support

Section 40314 of the IIJA authorized $8 billion for the Regional Clean Hydrogen Hubs program by amending EPAct 2005, which includes $7 billion to establish six to ten regional clean hydrogen hubs and $1 billion for Clean Hydrogen Hubs Demand-Side Support. In October 2023, DOE announced seven selectees across sixteen states for the Regional Clean Hydrogen Hubs program. DOE estimates the seven hydrogen hubs will collectively produce three million metric tons of hydrogen annually, which will reduce twenty-five million metric tons of carbon dioxide emissions from end-uses annually.[46] In addition, DOE announced a request for proposals for the Regional Clean Hydrogen Hubs Demand-Side Support in September 2023.[47] DOE anticipates announcing selectees in early 2024.

8. Consolidated Appropriations Act of 2023 - Distributed Energy Systems Demonstrations

The Consolidated Appropriations Act of 2023 authorized funding for Distributed Energy System Demonstration projects. In September 2023, DOE announced a funding opportunity for up to $50 million for transformative at-scale projects within distribution

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[41] *Bipartisan Infrastructure Law Energy Improvement in Rural or Remote Areas Fixed Award Grant Program*, *supra* note 39.
[42] *Energy Improvement in Rural or Remote Areas*, *supra* note 40.
[43] Am. Made Challenges, *Energizing Rural Communities Prize*, U.S. DEP'T OF ENERGY (last visited Mar. 22, 2024).
[44] Off. of Clean Energy Demonstrations, *Long Duration Energy Storage Demonstrations Selections for Lab Call*, U.S. DEP'T OF ENERGY (last visited Mar. 14, 2024).
[45] *Biden-Harris Administration Announces $325 Million for Long Duration Energy Storage Projects to Increase Grid Resilience and Protect America's Communities*, U.S. DEP'T OF ENERGY (last visited Mar. 22, 2024).
[46] *Biden-Harris Administration Announces $ 7 Billion for America's First Clean Hydrogen Hubs, Driving Clear Manufacturing and Delivering New Economic Opportunities Nationwide*, U.S. DEP'T OF ENERGY (last visited Mar. 22, 2024).
[47] Off. of Clean Energy Demonstration, *Demand-Side RFP for Independent Entity*, U.S. DEPT. OF ENERGY (last updated Sept. 14, 2023, 1:08 PM).

systems to enable a larger contribution from distributed energy resources.[48] DOE anticipates announcing selections for Distributed Energy System Demonstration projects in Summer 2024.[49]

9. IRA - EPA Greenhouse Gas Reduction Fund Solar for All Program

The Inflation Reduction Act Section 60103 amended the Clean Air Act by adding Section 134, which authorized the U.S. Environmental Protection Agency (EPA) to implement the $27 billion Greenhouse Gas Reduction Fund. Included within the Greenhouse Gas Reduction Fund is the $7 billion for zero emission technologies directed towards low-income and disadvantaged communities, which the EPA used to establish the Solar for All program. From June to September 2023, the EPA solicited applications for the Solar for All program, which plans to award up to sixty grants to states, territories, Tribal governments, municipalities, and nonprofits for low income distributed solar programs, such as residential rooftop solar and residential community solar.[50] The EPA intends to start making awards under the Solar for All program in July 2024.[51]

V. International Standards and Policies Regarding Renewables

A. EU Renewable Energy Directive

The EU in accelerating the clean energy transition revised the Renewable Energy Directive EU/2018/2001. EU/2023/2413 came into force on November 20, 2023.

EU Member States have been given an eighteen month period in which to transpose the provisions of the revised directive into national law and until July 2024 for the permitting of renewables.[52] The revised directive's objective is to ensure that all possibilities for the further uptake of renewables are fully utilized.[53] The main areas of the directive include cooling and heating and transport, industry and buildings.[54] The new directive has been designed to accommodate electric vehicles and the smart charging of same.[55]

This revised directive is viewed as the EU Member States agreeing to an overall greener and carbon free future. The revised directive is a charge to various industry players to keep their strategies in tandem with the ongoing energy transition.

B. 2023: Solar PV dominates growth, and onshore wind additions rebound to break the 2020 record

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[48] Off. of Clean Energy Demonstrations, *Distributed Energy Systems Demonstrations Funding Opportunity Announcement*, U.S. Dep't of Energy (Sept. 26, 2023).
[49] Off. of Clean Energy Demonstrations, *Distributed Energy Systems Demonstrations Programs*, U.S. Dep't of Energy (last visited Mar. 24, 2024).
[50] Press Release, U.S. Dep't of Energy, Biden-Harris Administration Launches $ 7 Billion Solar for All Grant Competition to Fund Residential Solar Programs that Lower Energy Costs for Families and Advance Environmental Justice Through Investing in America Agenda (Jun. 28, 2023).
[51] *Frequent Questions about Solar for All*, U.S. Dep't of Energy (last updated Mar. 19, 2024).
[52] *Renewable Energy Directive*, Eur. Comm'n (last visited Mar. 22, 2024).
[53] *Id.*
[54] *Id.*
[55] *Id.*

In the International Energy Agency's (IEA) *Renewable Energy Market Update* for 2023 and 2024, it reported that,

> Solar PV remains the main source of global renewable capacity expansion in 2023, accounting for 65% of growth with distributed applications, including residential and commercial systems, accounting for almost half of global PV expansion. Since Russia's invasion of Ukraine, the global energy crisis has driven up wholesale and retail electricity prices in many parts of the world, making small solar PV systems more economically attractive for residential and commercial customers. Policy makers in many countries, especially in Europe, have been seeking options for immediate diversification away from imported fossil fuels, improving the policy environment for distributed solar PV systems that can be installed rapidly. Following two consecutive years of decline, annual global onshore wind capacity additions are expected to jump 70% in 2023 to break the 2020 record. This surge is being fueled mostly by the commissioning of projects in China that were delayed by Covid-related restrictions last year. Supply chain challenges also slowed the pace of construction in the United States and Europe, pushing project commissioning from 2022 to 2023.[56]

C. Clean energy policies are stepping up

In the IEA's 2023 World Energy Outlook, it reported that,

> Many countries and an increasing number of businesses are committed to reaching net zero emissions. As of September 2023, net zero emissions pledges cover more than 85% of global energy-related emissions and nearly 90% of global GDP. Ninety-three countries and the European Union have pledged to meet a net zero emissions target. Moreover, governments around the world, especially in advanced economies, have responded to [...] the global energy crisis by putting forward new measures designed to promote the uptake of renewables, electric cars, heat pumps, energy efficiency, and other clean energy technologies.[57]

VI. TRANSMISSION GRID INFRASTRUCTURE

A. Introduction

In October 2023, the White House announced a historic investment of more than $30 billion dollars aimed at strengthening the nation's electric grid infrastructure, reducing energy costs for families, and generating good-paying jobs. This significant initiative aligns with the administration's commitment to modernize the energy grid, enhance its resilience, and accelerate the transition to clean and reliable energy sources.[58]

As part of this unprecedented effort, the U.S. Department of Energy (DOE) unveiled a $1.3 billion investment specifically dedicated to expanding the country's

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[56] RENEWABLE ENERGY MARKET UPDATE: OUTLOOK FOR 2023 AND 2024, 18, INT'L ENERGY AGENCY (June 2023).

[57] WORLD ENERGY OUTLOOK 2023, INT'L. ENERGY AGENCY, 42 (Oct. 2023).

[58] Press Release, The White House, *Fact Sheet: Biden-Harris Administration Announces Historic Investment to Bolster Nation's Electric Grid Infrastructure, Cut Energy Costs for Families, and Create Good Paying Jobs* (Oct. 30, 2023).

electric transmission infrastructure.[59] This substantial financial commitment underscores the critical importance of upgrading and expanding the transmission grid to accommodate the growing share of renewable energy sources, improve grid reliability, and facilitate the transition to a cleaner energy future. The funding provided through this program will support various transmission projects nationwide, helping to address transmission bottlenecks and modernize the grid's infrastructure.

In addition to the DOE's $1.3 billion investment, another significant announcement came from President Biden, who revealed a separate $3.5 billion allocation for projects across the country aimed at strengthening the electric grid and bolstering its resilience.[60] These projects will not only enhance the grid's capacity to withstand disruptions and extreme weather events but also contribute to the overall reliability and stability of the electrical system. This funding serves as a crucial incentive for utilities and developers to invest in grid infrastructure projects that align with the administration's goals.

The combined efforts of these programs and investments signal a profound commitment to transforming the nation's energy landscape. They encourage private sector involvement in the development of critical transmission lines and grid modernization efforts while supporting the broader objective of transitioning to cleaner and more sustainable energy sources. Ultimately, these initiatives aim to lower energy costs for American families, create employment opportunities, and ensure a reliable and resilient electrical grid for generations to come. Some of the highlights of the announcement are as follows:

- **Accelerating the Transition to Clean Energy**: The announcement aligns with the broader national goal of transitioning to cleaner and more sustainable energy sources. By facilitating the development of transmission infrastructure that supports the integration of renewable energy, this initiative contributes to reducing carbon emissions and promoting environmental sustainability.
- **Lowering Energy Costs**: A core objective is to reduce energy costs for families across the United States. By investing in grid infrastructure and modernization, the initiatives will aim to make energy more affordable and accessible to consumers.
- **Job Creation**: This initiative is expected to create a substantial number of good-paying jobs across the country. By supporting transmission and grid projects, employment opportunities will be generated while advancing clean energy goals.
- **Private Sector Engagement**: The initiatives will encourage private sector involvement in the development of critical transmission lines and grid modernization efforts. This partnership with the private sector helps accelerate the pace of infrastructure development.
- **Support for Environmental Goals**: The announcement also underscores the commitment to addressing climate change and promoting environmental sustainability by recognizing the importance of grid modernization in achieving emissions reduction targets.
- **National Resilience**: Enhancing the resilience and reliability of the electric grid is a fundamental aspect of the initiative, helping ensure that the electrical system can withstand challenges and disruptions.[61]

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[59] *Biden-Harris Administration Announces $1.3 Billion to Build Out Nation's Electric Transmission*, U.S. DEP'T OF ENERGY (last visited Mar. 30, 2024).

[60] *Biden announces $3.5 for projects nationwide to strengthen electric grid, bolster resilience*, CBS NEWS MINN. (last visited Mar. 30, 2024).

[61] Press Release, The White House, Fact Sheet: Biden-Harris Administration Announces Historic Investment to Bolster Nation's Electric Grid Infrastructure, Cut Energy Costs for Families, and Create Good Paying Jobs (Oct. 30, 2023); *Biden-Harris Administration Announces $1.3 Billion to Build Out Nation's Electric Transmission*, U.S. DEP'T OF

This section aims to document some of the programs that are playing a critical role in bolstering the United States' transmission infrastructure and development of a grid that not only will allow for renewable energy sources, but will also serve to be resilient against major weather related disasters.

B. Department of Energy's National Transmission Needs Study Program

The Department of Energy's National Transmission Needs Study[62] program is a comprehensive and forward-thinking initiative designed to address the critical challenges facing the electricity transmission infrastructure throughout the United States. This program has gained prominence in light of the increasing demand for reliable and resilient energy transmission systems, especially with the growing emphasis on renewable energy sources and the modernization of the electric grid. Its primary objective is to assess the current state of the transmission grid, anticipate future energy trends, and evaluate how these changes will impact the electric grid's capacity, reliability, and efficiency.

One of the central objectives of the National Transmission Needs Study program is to provide a strategic roadmap for the upgrading and expansion of the energy and electric transmission infrastructure. This is essential to facilitate the seamless integration of clean energy sources like wind and solar power into the grid. By conducting detailed regional assessments and scenario-based analyses, the program identifies critical transmission bottlenecks and constraints. This invaluable information empowers policymakers, utilities, and industry stakeholders to make informed decisions about investments in grid infrastructure and modernization efforts.

This initiative underscores the Department of Energy's commitment to advancing the nation's energy infrastructure in a sustainable and resilient manner. Through rigorous analysis and close collaboration with industry experts, the National Transmission Needs Study program seeks to guide strategic investments, advocate for regulatory reforms, and promote technology innovation. Ultimately, its goal is to ensure that the United States possesses a reliable and efficient transmission network capable of meeting the evolving energy needs of the country.

As the United States transitions toward a more sustainable and renewable energy future, the National Transmission Needs Study program plays a pivotal role in optimizing the transmission grid's performance. By anticipating challenges and proactively addressing them, the program aligns with the broader national goal of reducing greenhouse gas emissions and enhancing energy security. It serves as a valuable resource for shaping the future of the nation's electricity transmission infrastructure and ensuring a cleaner and more resilient energy landscape for generations to come.[63]

C. Department of Energy's Coordinated Interagency Transmission Authorization and Permits Program

The Department of Energy's Coordinated Interagency Transmission Authorization and Permits program (CITAP) is a strategic initiative aimed at accelerating the development and expansion of the electrical grid's transmission infrastructure within the United States. CITAP's primary objective is to streamline and expedite the permitting and authorization processes required for the construction and operation of new transmission

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ENERGY (last visited Mar. 30, 2024); *Biden announces $3.5 for projects nationwide to strengthen electric grid, bolster resilience*, CBS NEWS MINN. (last visited Mar. 30, 2024).

[62] NATIONAL TRANSMISSION NEEDS STUDY, U.S. DEP'T OF ENERGY (Oct. 2023).

[63] Grid Deployment Off., *National Transmission Needs Study*, U.S. DEP'T OF ENERGY (last visited Mar. 30, 2024).

lines. By addressing regulatory challenges and enhancing interagency coordination, CITAP seeks to facilitate the efficient deployment of critical grid infrastructure.[64]

One of the key ways CITAP supports the build-out of the transmission infrastructure is by fostering collaboration among federal agencies, state authorities, and project developers. It establishes a framework for improved communication and coordination, reducing potential delays caused by overlapping or conflicting permitting requirements. This collaborative approach helps identify potential environmental and regulatory challenges early in the process, allowing for timely mitigation strategies and ensuring that projects can proceed smoothly.

CITAP also places a strong emphasis on enhancing the transparency and predictability of the permitting process for project developers. By providing clearer guidelines and timelines for permitting decisions, it reduces uncertainty for project developers and investors who are looking to build out timelines for their projects. This, in turn, encourages private sector investment in transmission projects, as stakeholders can have greater confidence in the regulatory process.

In addition to its focus on collaboration and transparency, CITAP seeks to leverage advanced technologies and data-driven approaches to streamline the permitting process. By harnessing data analytics and digital tools, the program aims to expedite the environmental review process and make it more efficient for everyone involved. This approach not only reduces administrative burdens but also enhances the ability to identify optimal routing and design solutions that will have the ability to potentially minimize environmental impacts from the project.

CITAP recognizes the critical role of transmission infrastructure in enabling the integration of renewable energy sources, enhancing grid reliability, and supporting the transition to a cleaner energy future. By simplifying and expediting the permitting process, fostering interagency cooperation, and embracing modern technologies, the program plays a crucial role in ensuring that the United States has a robust, resilient and efficient electrical grid capable of meeting the nation's ever evolving energy needs.[65]

D. Department of Energy's National Interest Electric Transmission Corridors Program

The Department of Energy's National Interest Electric Transmission Corridors (NIETC) program is a significant initiative aimed at bolstering the development and expansion of the electrical grid's transmission infrastructure in the United States. The primary focus is on identifying and designating areas where the construction of high-voltage transmission lines is of national importance. The program seeks to address the challenges related to grid reliability, capacity expansion, and the integration of renewable energy sources by streamlining the permitting process and providing incentives for infrastructure development.[66]

One of the central objectives of the NIETC program is to identify regions where transmission congestion and bottlenecks pose a significant threat to the reliability and efficiency of the grid. By designating these areas as "national interest electric transmission corridors," the program underscores their critical importance for ensuring the stability and resilience of the nation's electrical infrastructure. This designation provides regulatory advantages and tools to expedite the permitting process, making it easier for transmission projects to move forward.

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[64]Grid Deployment Off., *Coordinated Interagency Transmission Authorizations and Permits Program*, U.S. DEP'T OF ENERGY (last visited Mar. 24, 2024).

[65]*Id*.

[66]Grid Deployment Off., *National Interest Electric Transmission Corridor Designation Process*, U.S. DEP'T OF ENERGY (last visited Mar. 24, 2024).

In addition to streamlining permitting, the NIETC program offers incentives to encourage investment in transmission infrastructure. One key incentive is the federal government's commitment to ensuring that transmission projects within NIETCs receive timely reviews and approvals. This commitment helps reduce regulatory uncertainties, making it more attractive for private sector developers and investors to fund and undertake these projects.

Another significant incentive is the potential for federal loan guarantees and financial support for qualified projects. By providing access to capital and credit enhancements, the NIETC program helps mitigate financial risks associated with large-scale transmission investments. This, in turn, stimulates private sector involvement, fostering the development of critical transmission lines needed to support renewable energy integration and grid modernization.

Furthermore, the NIETC program promotes the use of advanced technologies and innovative solutions in the planning and deployment of transmission infrastructure. By encouraging the adoption of smart grid technologies, improved grid management systems, and efficient routing and siting strategies, the program aims to optimize the use of existing infrastructure and minimize environmental impacts, further expediting the build-out of the grid.

Overall, the NIETC program plays a pivotal role in addressing the nation's transmission infrastructure needs. It identifies priority areas, streamlines permitting processes, offers financial incentives, and promotes technological innovation to ensure the grid can meet the challenges of integrating renewable energy sources, enhancing reliability, and supporting a sustainable and resilient energy future.[67]

E. Inflation Reduction Act Transmission and Infrastructure Incentives

The Inflation Reduction Act of 2022 (the "Act") contains a range of transmission incentives aimed at accelerating the development and expansion of the United States' electrical grid infrastructure. These incentives are designed to promote grid reliability, support the integration of renewable energy sources, and enhance energy security while addressing regulatory and financial barriers. Several key provisions within the Act offer significant incentives for transmission infrastructure projects.

One of the notable incentives under the Act is the provision for federal grants to facilitate the siting of interstate electricity transmission lines. This program, administered by the Department of Energy, aims to ensure that transmission projects are properly sited and efficiently permitted all while providing economic benefits to various impacted communities throughout the United States. These grants will aim to offset some of the costs associated with the development and permitting of transmission lines, making it more attractive for private sector developers to invest in critical infrastructure updates and new projects.

The Act also provides incentives in the form of federal loan guarantees and financial support for qualified transmission line projects. By offering access to capital and credit enhancements, the government is hoping to reduce the financial risks associated with large-scale transmission investments so as to obtain larger investments in infrastructure development from the private sector and encourage private sector involvement in not only funding of these projects but also undertaking them so as to accelerate the pace of grid expansion.

Furthermore, the Act encourages the adoption of advanced technologies and innovative solutions in transmission infrastructure planning and deployment. It promotes the use of smart grid technologies, improved grid management systems, and efficient routing and siting strategies. These advancements aim to optimize the use of existing

[67] *Id*.

infrastructure, minimize environmental impacts, and increase the efficiency and reliability of the grid.

To complement these incentives, the Act emphasizes the importance of enhancing the coordination between federal agencies and state authorities to streamline the permitting process for transmission projects. Improved interagency collaboration will help identify potential regulatory challenges early in the process, enabling timely mitigation strategies and smoother project development for transmission and infrastructure projects.

Moreover, the Act recognizes the vital role that transmission infrastructure plays in supporting the integration of renewable energy sources. By streamlining the permitting process, offering financial incentives, and promoting technological innovation, the Act aligns with the broader national goal of transitioning to a cleaner and more sustainable energy future.

Overall, the Act offers a comprehensive set of incentives aimed at expediting the development and expansion of the electrical grid's transmission infrastructure. These incentives range from federal grants to loan guarantees, and are designed to address regulatory, financial, and technological barriers associated with transmission infrastructure project development while supporting the integration of renewable energy sources into transmission infrastructure and enhancing grid reliability and resiliency.[68]

F. Department of Energy's Transmission Facilitation Program

The Department of Energy's Transmission Facilitation Program is a critical initiative aimed at promoting the development and expansion of the United States' transmission infrastructure. This program plays a pivotal role in addressing the challenges associated with modernizing the electrical grid, accommodating the integration of renewable energy sources, and enhancing overall grid reliability and resilience.[69]

The Transmission Facilitation Program is designed to provide essential resources, technical assistance, and expertise to support the planning, permitting, and deployment of transmission infrastructure projects. It serves as a valuable partner for states, utilities, and developers looking to advance critical transmission lines and associated grid enhancements. By offering guidance and support, the program helps streamline the development process, reducing regulatory hurdles and facilitating the efficient siting and permitting of transmission projects.

One of the program's primary objectives is to accelerate the transition to cleaner energy sources. By aiding in the planning and execution of transmission projects that enable the transport of renewable energy from generation hubs to demand centers, the program aligns with the broader national goal of achieving a sustainable and resilient energy future. This supports the integration of wind, solar, and other clean energy sources into the grid, reducing carbon emissions and promoting environmental sustainability.

Overall, the Transmission Facilitation Program represents a vital component of the Department of Energy's efforts to modernize the electrical grid and foster a more reliable, efficient, and sustainable energy system. By providing technical assistance and resources, it empowers stakeholders to navigate the complexities of transmission project development

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[68] *Electricity Transmission Provisions in the Inflation Reduction Act of 2022*, CONG. RSCH. SERV. (last visited Mar. 24, 2024); *Inflation Reduction Act*, U.S. DEP'T OF ENERGY (Jan. 4, 2024); Interagency Working Group on Coal & Power Plant Communities & Economic Revitalization, *IRA-Transmission Siting and Economic Development Program*, U.S. DEP'T OF ENERGY'S NAT'L ENERGY TECH. LAB'Y (last visited Mar. 2024).

[69] Grid Deployment Off., *Transmission Facilitation Program*, U.S. DEP'T OF ENERGY (last visited Mar. 24, 2024).

while advancing the nation's clean energy goals and ensuring a robust and resilient electrical grid for years to come.[70]

G. Investment into the United States' States and Tribes

1. Department of Energy's Grid Resilience and Innovation Partnerships Program

The Department of Energy's Grid Resilience and Innovation Partnerships (GRIP) Program, overseen by the Grid Deployment Office (GDO), represents a critical effort to modernize and fortify the electric grid in the United States. This initiative, part of President Biden's Investing in America agenda, allocates a substantial $3.46 billion in its first round of selections, out of a broader $10.5 billion GRIP Program, to enhance grid resilience, flexibility, and reliability. The program aims to mitigate the impacts of natural disasters, extreme weather events exacerbated by climate change, and faults that can lead to wildfires. It also focuses on unlocking the potential of clean energy sources like solar and wind while fostering innovation in electricity transmission, storage, and distribution.[71]

A notable aspect of the GRIP Program is its commitment to Justice40, ensuring that all selected projects benefit disadvantaged communities. Additionally, the program emphasizes collaboration with labor unions, with 86 percent of the selected projects involving labor union partnerships or collective bargaining agreements, supporting job creation and community resilience.[72]

In October of 2023, the first round of projects were announced. The selected projects span several states, each tailored to address region-specific challenges. The following are a few of the projects noted:

- **Georgia:** A transformative project in Georgia, with an investment exceeding $507 million, will update smart grid infrastructure, implement battery storage, local microgrids, and new transmission lines. Focusing on historically underinvested communities, it aims to improve service reliability, reduce power outages, lower energy bills for low-income households, and create more than 140 construction jobs.
- **Louisiana:** Entergy New Orleans has a project in which they are focusing on grid resilience enhancements, including hardening transmission lines, reducing outage frequency and duration, and deploying battery backup systems.
- **Oregon:** Multiple projects across Oregon will connect renewable resources east of the Cascade Mountains, including on the Warm Springs Reservation, to customers. Additionally, grid-edge computing platforms and wildfire resilience infrastructure will be deployed to improve grid reliability and reduce outage duration.

Additionally, various inter-regional collaborations were announced that will expand transmission infrastructure across multiple states, fostering renewable energy generation, lowering energy costs, and enhancing community engagement and workforce development. One of note is the Joint Targeted Interconnection Queue Transmission Study Process and Portfolio (JTIQ) which will coordinate the construction of five transmission projects across seven states (Iowa, Kansas, Nebraska, North Dakota, Minnesota, Missouri, and South Dakota).[73]

In summary, the GRIP Program is a significant step toward a more resilient, reliable, and sustainable U.S. electric grid. By investing in various states and fostering

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[70] *Id.*

[71] *Biden-Harris Administration Announces $3.5 Billion Largest Ever Investment in America's Electric Grid Infrastructure*, U.S. DEP'T OF ENERGY (Oct. 18, 2023).

[72] *Id.*

[73] *Id.*

partnerships, it supports clean energy integration, job creation, and community resilience, aligning with the administration's broader clean energy and climate goals.[74]

2. Grid Resilience State/Tribal Formula Grant Program

The Grid Resilience State/Tribal Formula Grant Program, managed by the Department of Energy's Grid Deployment Office, is a critical initiative aimed at enhancing the resilience of state and tribal electrical grids. This program focuses on strengthening the electric grid's ability to withstand disruptions caused by natural disasters, extreme weather events, and other threats. It plays a pivotal role in modernizing the grid and ensuring the reliable delivery of electricity to communities across the United States.[75]

Under the Grid Resilience State/Tribal Formula Grant Program, states and tribal nations receive financial support to invest in grid resilience projects. These projects aim to reduce the impact of grid disruptions and enhance the system's ability to quickly recover from adverse events. By providing funding to both states and tribal nations, the program promotes a holistic approach to grid resilience, acknowledging the unique challenges faced by different regions.

Notably, the program places a strong emphasis on tribal nations' involvement and resilience. Several key points related to tribal nations in the program include:

- **Tribal Formula Grants:** The program allocates a portion of its funding specifically to tribal nations, recognizing their importance in the broader grid resilience efforts. Tribal nations receive dedicated financial support to implement projects that enhance the resilience of their electrical grids.
- **Community Resilience:** The program encourages tribal nations to invest in projects that improve community resilience. This includes initiatives to strengthen the grid, deploy distributed energy resources, and enhance emergency response capabilities, ensuring tribal communities can better withstand and recover from disruptions.
- **Collaboration:** Tribal nations are encouraged to collaborate with federal, state, and local entities to maximize the effectiveness of grid resilience projects. By fostering partnerships and knowledge-sharing, the program aims to create a more robust and interconnected grid infrastructure.

During the 2022/2023 grant year, forty-nine tribal entities were awarded over $15 million in funding to address grid resiliency and transmission infrastructure issues. Some of the notable grants went to the following tribal entities:

- **Aroostook Band of Micmacs:** Grant funding will go towards modernization of the grid infrastructure and improvement of failing infrastructure.
- **Miccosukee Tribe of Indians:** Award monies will update infrastructure and communications to enhance local grid control so as to avoid disruptions to energy output.
- **Washoe Tribe of Nevada & California (Carson Colony, Dresslerville Colony, Woodfords Community, Stewart Community, & Washoe Ranches):** Funding will support modernizing grid infrastructure and investments in clean energy.[76]

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[74] *Biden-Harris Administration Announces $3.5 Billion Largest Ever Investment in America's Electric Grid Infrastructure*, U.S. DEP'T OF ENERGY (Oct. 18, 2023); Grid Deployment Off., *Grid Resilience and Inovation Partnership (GRIP) Program Projects*, U.S. DEP'T. OF ENERGY (Oct. 18, 2023).

[75] Grid Deployment Off., *Grid Resilience State/Tribal Formula Grant Program*, U.S. DEP'T OF ENERGY (last visited Mar. 22, 2024);

[76] Grid Deployment Off, *Grid Resilience State and Tribal Formula Grant Awards*, U.S. DEP'T OF ENERGY (last visited Mar. 22, 2024); *Biden-Harris Administration Announces*

In summary, the Grid Resilience State/Tribal Formula Grant Program is a vital tool for improving the resilience of electrical grids across the United States, including tribal nations. By providing financial support and fostering collaboration, the program helps strengthen grid infrastructure, reduce vulnerabilities to disruptions, and enhance the overall reliability of the nation's electricity supply.[77]

$34 Million for States and Tribal Nations to Strengthen Grid Resilience, U.S. DEP'T. OF ENERGY (Aug. 3, 2023).

[77]Grid Deployment Off., *Grid Resilience State/Tribal Formula Grant Program*, U.S. DEP'T OF ENERGY (last visited Mar. 22, 2024); Grid Deployment Off, *Grid Resilience State and Tribal Formula Grant Awards*, U.S. DEP'T OF ENERGY (last visited Mar. 22, 2024); *Biden-Harris Administration Announces $34 Million for States and Tribal Nations to Strengthen Grid Resilience*, U.S. DEP'T. OF ENERGY (Aug. 3, 2023).

Chapter E: ENFORCEMENT AND LITIGATION 2023 ANNUAL REPORT[1]

I. UPDATES TO PFAS REGULATION AND LITIGATION

A. Regulatory Updates

1. Federal

During 2023, the U.S. Environmental Protection Agency ("EPA") engaged in a variety of regulatory activities, including setting guidelines for effluent limitations, regulating the amount of per- and polyfluoroalkyl substances ("PFAS") in drinking water, and enhancing reporting requirements related to PFAS. Starting in January, EPA released its final Effluent Limitations Guidelines ("ELGs") Plan 15, including a determination that revised ELGs and pretreatment standards are warranted for reducing PFAS in leachate discharges from landfills, an announcement of an expansion of the ongoing study of PFAS discharges from textile manufacturers, and a new study of publicly owned treatment works ("POTW") influents.[2] EPA also proposed a rule that would prevent anyone from starting or resuming without complete EPA review and risk determination the manufacture, processing, or use of an estimated 300 PFAS that have not been made or used for many years, known as "inactive PFAS."[3]

In March 2023, EPA proposed to establish legally enforceable levels for six PFAS chemicals known to occur in drinking water: perfluorooctanoic acid ("PFOA"), perfluorooctane sulfonic acid ("PFOS"), perfluorononanoic acid ("PFNA"), hexafluoropropylene oxide dimer acid ("HFPO-DA, and its ammonium salt, which are commonly referred to together as "GenX chemicals"), perfluorohexane sulfonic acid ("PFHxS"), and perfluorobutane sulfonic acid ("PFBS").[4]

In June 2023, EPA released a framework for addressing new uses of PFAS under the Toxic Substances Control Act ("TSCA"), which requires EPA to undertake an extensive evaluation before the chemicals enter commerce[5]

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[1]This report was authored by Inga C. Caldwell, of Cole Schotz, P.C.; Leland P. Frost, of KMCL LLP; Heather Lee Miller, Ph.D., of Historical Research Associates, Inc.; and David B. Weinstein, of Greenberg Traurig, LLP. Jennifer M. Faggion, and Madeleine Voigt of Greenberg Traurig, LLP; Jack F. Devine, of KMCL LLP; Joseph Zaleski of Shook, Hardy & Bacon L.L.P.; Riley Desper and Andrew R. Stewart of Sidley Austin LLP; J. Tom Boer and Maia H. Jorgensen, of Hogan Lovells US LLP, with international research assistance from Ernesto Morell, of Hogan Lovells International LLP; Edward K. Roggenkamp IV, of Nossaman LLP; Julian Harrell of Faegre Drinker Biddle & Reath LLP; Jared J. Standish of Geosyntec Consultants; and Talia Gordner of McMillan LLP.

[2]U.S. ENVTL. PROT. AGENCY, EPA-821-R-22-004, EFFLUENT GUIDELINES PROGRAM PLAN 15 (2023).

[3]Per- and Poly-Fluoroalkyl Chemical Substances Designated as Inactive on the TSCA Inventory; Significant New Use Rule, 88 Fed. Reg. 4937 (proposed Jan. 26, 2023) (to be codified at 40 C.F.R. pt. 721).

[4]PFAS National Primary Drinking Water Regulation Rulemaking, 88 Fed. Reg. 18,638 (proposed Mar. 29, 2023) (to be codified at 40 C.F.R. pts. 141, 142).

[5]U.S. ENVTL. PROT. AGENCY, Framework for TSCA New Chemicals Review of PFAS Premanufacture Notices (PMNs) and Significant New Use Notices (SNUNs) (June 28, 2023).

EPA released important data in August 2023.[6] As part of the fifth Unregulated Contaminant Monitoring Rule ("UCMR 5"), EPA is conducting the most comprehensive monitoring effort for PFAS ever at every large and midsize public water system in America and at hundreds of small water systems. Specifically, this data will improve EPA's understanding of the frequency that 29 PFAS are found in the nation's drinking water.

In October 2023, EPA finalized two separate but analogous rulemakings concerning the recordkeeping and reporting requirements related to PFAS.[7] First, it released a final rule that eliminates an exemption that allowed facilities to avoid reporting information on PFAS when those chemicals were used in small concentrations.[8] Second, PFAS are now subject to the same reporting requirements as other chemicals of special concern.[9]

Also, in October 2023, EPA published a final rule that will provide EPA, its partners, and the public with the largest-ever dataset of PFAS manufactured and used in the United States.[10] The rule requires all manufacturers and importers of PFAS and PFAS-containing products in any year since January 1, 2011, to report information to EPA on "PFAS uses, production volumes, byproducts, disposal, exposures, and existing information on environmental or health effects."[11]

2. State

In addition to the actions taken by EPA, several states set forth regulations related to PFAS, including bans on PFAS in all or specific products.[12] The first-in-the-nation ban on PFAS in all products in Maine began under LD1503.[13] It bans intentionally added PFAS from all products of any kind sold in the state and includes deadlines that set limitations on how long industry is allowed to adapt. The law aims to ban the use of PFAS except when it is "unavoidable."[14]

New York implemented laws banning intentionally added PFAS in paper-based plates, cups, bowls, and other food packaging under its Hazardous Packaging Act.[15] Similarly, California banned the sale and distribution of paper food packaging made with

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[6] *Fifth Unregulated Contaminant Monitoring Rule Data Finder*, U.S. ENVTL. PROT. AGENCY (last updated Apr. 11, 2024).

[7] Adam R. Troutwine & Jacob M. Levin, *October PFAS Regulatory Update*, THE NAT'L L. REV. (Nov. 6, 2023).

[8] Changes to Reporting Requirements for Per- and Polyfluoroalkyl Substances and to Supplier Notifications for Chemicals of Special Concern; Community Right-to-Know Toxic Chemical Release Reporting, 87 Fed. Reg. 74,379 (proposed Dec. 5, 2022) (to be codified at 40 C.F.R. pt. 372).

[9] Changes to Reporting Requirements for Per- and Polyfluoroalkyl Substances and to Supplier Notifications for Chemicals of Special Concern; Community Right-to-Know Toxic Chemical Release Reporting, 88 Fed. Reg. 74,360 (Oct. 31, 2023) (to be codified at 40 C.F.R. pt. 372).

[10] Toxic Substances Control Act Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances, 88 Fed. Reg. 70,516 (Oct. 11, 2023) (to be codified at 40 C.F.R. pt. 705).

[11] *Id*. at 70,517.

[12] Zach Bright, *PFAS Bans, Restrictions Go Into Effect in States in 2023 (1)*, BLOOMBERG L. (Jan. 4, 2023)(subscription required).

[13] An Act To Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution, Pub. L. No. 477, 38 MRSA § 1612 (2021).

[14] *Id*. at 3.

[15] Bright, *supra* note 12.

intentionally added PFAS.[16] The law requires food packaging manufacturers to use the "least toxic alternative" when replacing PFAS chemicals and requires cookware manufacturers to disclose PFAS.[17] Minnesota enacted a similar statute that makes it illegal for a person to manufacture or knowingly sell, offer for sale, distribute for sale, distribute, or offer for use in Minnesota a food package that contains intentionally added PFAS.[18]

B. Medical Monitoring

As regulatory focus related to PFAS continues to grow, courts across the nation have experienced a surge of PFAS litigation over the past few years.[19] One of the most common causes of action in these suits is medical monitoring.[20] Medical monitoring is a "nontraditional" tort that seeks to recover "the economic costs of the extra medical check-ups" that a plaintiff expects to incur as a result of his or her exposure to a product.[21] Medical monitoring claims are often asserted in toxic tort suits where the plaintiff was exposed to an allegedly harmful substance that causes latent symptoms.[22]

However, whether a plaintiff with latent symptoms is entitled to damages depends on location. Currently, thirteen states allow recovery of medical monitoring damages without requiring the plaintiff to prove a present physical injury, while twenty-eight states require a showing.[23] The remaining states have either not yet addressed the issue or have conflicting opinions. Importantly, the U.S. Supreme Court has rejected no-injury medical-monitoring claims for the federal common law.[24]

At the federal level, courts deciding whether to allow a medical monitoring claim grapple with standing.[25] In fact, a PFAS-medical monitoring claim is at the forefront of the issue, as the Sixth Circuit is currently charged with determining whether a plaintiff alleging PFAS exposure has standing for medical-monitoring relief.[26]

The case, styled as *3M v. Hardwick*, is a medical-monitoring class action that, if certified, could encompass over 330 million individuals.[27] However, the prospective relief sought hinges on whether the class has standing under Article III.[28] Relying on the Supreme Court's 2013 decision in *Clapper v. Amnesty International*, Defendant-Appellants argue that plaintiff Hardwick has failed to show a "certainly impending" future injury and thus,

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[16]AB1200, Gen. Assemb., Reg. Sess. (Cal. 2021).
[17]*Id*.
[18]Minn. Stat. § 325F.075 (2023).
[19]*PFAS UPDATE: LITIGATION TRENDS IN PFAS CONSUMER PRODUCT LITIGATION FROM 2021 TO 2022*, BRYAN CAVE LEIGHTON PAISNER (June 8, 2023).
[20]Sheila L. Birbaum et al., *PFAS: Expected Litigation Trends*, DECHERT LLP (April 2021).
[21]Jerise Henson, *What is Medical Monitoring?*, THE MASS TORT INST. (May 28, 2021) (citation omitted).
[22]David A. Fusco et al., *American Law Institute Vote on Medical Monitoring Could Spur Increased "No-Injury" Claims*, THE NAT'L L. REV. (May 17, 2023).
[23]*Id*.
[24]*Id*.
[25]Conor Winters, *Bridging the Gap: State Legislative Creation of Medical Monitoring Rights*, THE GEORGETOWN ENVTL. L. REV. (Nov. 14, 2023); *see also* Christopher Mason, *Yet another thing to worry about: The evolving law of standing in state courts when federal standing is lacking*, NIXON PEABODY (Apr. 13, 2020).
[26]John Gardella, *Hardwick Case Briefing One of Most Significant PFAS Legal Briefs Yet*, THE NAT'L L. REV. (Jan. 3, 2023).
[27]Opening Brief of Defendants-Appellants at 14, 3M v. Hardwick (6th Cir. Dec. 21, 2022) (No. 22-3765, ECF No. 54).
[28]*Id*. at 5.

is not entitled to prospective relief such as medical monitoring.[29] In *Clapper*, the Supreme Court held that standing for claims based on impending or future harm requires the plaintiff to demonstrate that the harm is "certainly impending" to satisfy the injury-in-fact requirement of Article III.[30] The proposed class in *Hardwick* encompasses "any individual residing within the United States at the time of class certification for one year or more since 1977 with 0.05 parts per trillion or more of PFAO and at least 0.05 parts per trillion or more of any other PFAS in their blood serum." Thus, determining whether the proposed class's PFAS-exposure created future harm that is "certainly impending" enough to amount to an injury, as the Sixth Circuit will here, is no easy task.

In response to alleged PFAS exposures in particular, some states are beginning to enact medical monitoring legislation.[31] In March 2023, Minnesota lawmakers introduced HF2794/SF2727, which creates a medical monitoring cause of action for individuals exposed to proven toxic substances.[32] Vermont became the first state in the nation to enact similar legislation in 2022.[33]

A national medical monitoring tort would seemingly provide clarity and level the playing field. In May 2023, the American Law Institute was set to vote on a proposed rule for the Third Restatement of Torts that would recognize a claim for medical monitoring in the absence of a physical injury.[34] Proponents argue that a national tort can help bridge the gap between exposure and onset of illness, thereby improving health outcomes and lowering medical bills.[35] Others counter that "recognizing a medical monitoring cause of action would be akin to recognizing a cause of action for fear of future illness." [36]

C. Case Developments

The U.S. Supreme Court declined to review a $40 million verdict against E. I. du Pont de Nemours & Co. ("DuPont") pertaining to an Ohio lawsuit arising from a release of "forever chemicals."[37] The verdict was the result of one of the thousands of lawsuits alleging that a West Virginia DuPont plant discharged PFOA into the Ohio River, causing cancer and other illnesses in the surrounding populations. Those cases have been consolidated in multidistrict litigation ("MDL") in Ohio Federal Court. The underlying plaintiff, Mr. Abbott, won in the district court in 2021, arguing that DuPont's contamination of the Ohio River caused his cancer.[38] DuPont argued that the court's use of a prior bellwether trial to establish liability in the Abbott matter was improper and that results from bellwether trials are not binding against the company in every other case pending in the MDL. DuPont argued that differences between the Abbott matter and the bellwether trials, such as proximity to the DuPont facility, rendered the determination of liability in the bellwether trial inapplicable in the individual Abbott case. In denying

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[29] *Id*. at 20.
[30] *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013).
[31] Winters, *supra* note 25.
[32] H.R. 2794, 93rd Gen. Assemb., Reg. Sess. (Minn. 2023).
[33] 12 V.S.A. § 7201.
[34] *RESTATEMENT OF THE LAW THIRD*, *Torts: Miscellaneous Provisions*, THE AM. L. INST. (2023).
[35] Winters, *supra* note 25.
[36] Larry P. Schiffer, *Can Fear or Emotional Distress Associated With COVID-19 Be a "Bodily Injury"?*, THE NAT'L L. REV. (Apr. 1, 2020).
[37] In Re: E. I. Du Pont de Nemours and Company C-8 Personal Injury Litigation, 54 F.4th 912 (6th Cir. 2022), *cert. denied*, No. 23-12, 2023 WL 8007334 (U.S. Nov. 20, 2023) (J. Thomas, dissenting) (discussing nonmutual offensive collateral estoppel concerns).
[38] In Re E. I. Du Pont de Nemours & Co. C-8 Pers. Inj. Litig., 529 F. Supp. 3d 720 (S.D. Ohio 2021).

certiorari, the Supreme Court provided no explanation.

Michigan Attorney General Dana Nessel reached a $3.2 million settlement in Michigan's PFAS-related lawsuit against Asahi Kasei Plastics North America, Inc. ("Asahi") pertaining to Asahi's former Brighton, Michigan, facility.[39] Michigan alleged that Asahi's ownership and operation of a custom reinforced plastic compounding business resulted in the release of PFAS into the environment.[40] Among other things, the settlement requires Asahi to engage in extensive monitoring of, and investigations into, PFAS levels in soil, groundwater, and surface water discharged from the former site. Asahi's investigation and work plans must be approved by the Michigan Department of Environment, Great Lakes, and Energy. Work plans that are of significant public interest may be required to undergo a comment period as well. Finally, Asahi must pay the state's past and future monitoring costs, as well as the state's costs of litigation, including attorney fees. Asahi was one of seventeen PFAS defendants named in Attorney General Nessel's 2020 PFAS lawsuit. Of the original seventeen defendants, six cases proceeded to trial, and *Asahi* is the first of the six to be resolved.[41]

In June 2023, 3M Company and DuPont proposed settlements in their South Carolina MDL related to aqueous film-forming foam ("AFFF") containing PFAS.[42] The proposed settlement was announced on the eve of the MDL's first bellwether trial, *City of Stuart v. 3M Co.*, obviating the need for the trial to begin as scheduled.[43] Under the proposed terms, 3M would pay up to $12.5 billion, and DuPont up to $1.185 billion, to resolve all liability pertaining to their manufacture and supply of AFFF, which allegedly led to the contamination of municipal water supplies around the nation. DuPont's fairness hearing occurred on December 14, 2023, and 3M's will be held on February 2, 2024. In late July, a group of twenty-two state attorneys general filed a motion to intervene in the settlement proceedings and in opposition to 3M's proposed settlement.[44] As a result of that opposition, an amended settlement proposal was submitted on August 28, 2023, which removed indemnity clause provisions that would have offered 3M greater protections following the settlement. The South Carolina District Court issued an order preliminarily

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[39] Nessel v. Asahi Kasei Plastics North America Inc., No. 20-030909-NZ (Mich. 44th Cir. Ct. Jan. 12, 2023) (Consent Decree).

[40] *Id*. at 3.

[41] Press Release, State of Mich., AG Nessel Announces Landmark Settlement in First PFAS Case (Jan. 30, 2023) (Other ongoing Michigan PFAS cases include: Nessel v. 3M, et al., (PFAS manufacturers) removed from Kent Circuit Court (No. 20-03366-NZ(Quist)) to MDL Case No. 3873 in U.S. District Court in South Carolina (Gergel); Nessel v. Chemguard, et al. (manufacturers of commercial firefighting foam) pending in MDL No. 3873; Nessel v. E. I. Dupont de Nemours, et al. (manufacturers of mil-spec firefighting foam) pending in MDL No. 3873; Nessel, et al. v. FKI Hardware, Inc., pending in Kent Circuit Court (No. 2022-09032-CE (Quist)); and Nessel v. Domtar Industries, Inc., pending in St. Clair Circuit Court (No. 22-002604-NZ (Lane))).

[42] In Re: Aqueous Film-Forming Foams Prod. Liab. Litig., 357 F. Supp. 3d 1391 (J.P.M.L. 2018) (MDL No. 2873) (granting consolidation of the original 75 actions, giving rise to the MDL).

[43] In re Aqueous Film-Forming Foams Prod. Liab. Litig., No. 2:18-CV-3487-RMG, 2023 WL 3686120, at *1 (D.S.C. May 26, 2023) (order dispensing with City of Stuart's omnibus motion in limine in preparation for trial).

[44] States' and Sovereigns' Omnibus Opposition to Plaintiffs' Motion for Preliminary Approval of Class Settlement, for Certification of Settlement Class and for Permission to Disseminate Class Notice, In Re: Aqueous Film-Forming Foams Prod. Liab. Litig., No. 2-18-CV-3487-RMG (D.S.C. July 26, 2023) (related to City of Camden, et al. v. 3M Company, No. 2:230cv093147-RMG).

approving the amended settlement proposed by 3M on August 29, 2023.[45] The court previously approved the DuPont proposed settlement on August 22, 2023.[46] The settlement is far from final and still must be approved as to both defendants in separate fairness hearings.

II. Constitutional Law Developments

A. Supreme Court Allows Constitutional Challenge of Agency Action in Federal Court Prior to Conclusion of Administrative Enforcement Process

On April 14, 2023, the U.S. Supreme Court issued an opinion in the case of *Axon Enterprises*, *Inc*. *v*. *Federal Trade Commission*, *et al*.[47] in which the unanimous Court held that federal district courts retain jurisdiction to hear challenges related to the constitutionality of agency actions or structures even before the conclusion of the administrative enforcement process.

The case involved two separate underlying causes of action in which respondents each filed suit in federal district court challenging the constitutionality of administrative enforcement proceedings brought against them by the Securities and Exchange Commission and the Federal Trade Commission, respectively.[48] In each underlying case, the federal district court dismissed the suit for lack of jurisdiction, citing the relevant statutes,[49] under which each agency brought the enforcement action and finding that the judicial review schemes in those statutes only permit federal judicial review in an appellate court after the conclusion of the administrative review and adjudication process. However, the Supreme Court analyzed these challenges using three factors previously developed in the case of *Thunder Basin Coal Company v*. *Reich*[50] and determined that Congress did not intend to displace a district court's federal-question jurisdiction, per 28 U.S.C. § 1331, over challenges to the constitutionality of the underlying enforcement action or the agency's structure because doing so would "foreclose all meaningful judicial review," these constitutional challenges were wholly "collateral" to the administrative enforcement actions, and these constitutional issues were "outside the Commission's competence and expertise."[51]

The Court's decision in *Axon Enterprises* may pave the way for more federal district court suits challenging the fundamental constitutionality of administrative enforcement actions or administrative and regulatory structures during, or in parallel with, administrative adjudication of regulatory enforcement actions.

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[45] In Re: Aqueous Film-Forming Foams Prod. Liab. Litig., No. 2:23-cv-03147-RMG, Preliminary Approval Order for Settlement Between Public Water Systems and 3M Company (D.S.C. Aug. 29, 2023) (Entry Number 3626).

[46] In Re: Aqueous Film-Forming Foams Prod. Liab. Litig., No. 2:23-cv-03147-RMG (D.S.C. Aug. 22, 2023) (Entry Number 3603).

[47] Axon Enterprise, Inc. v. Federal Trade Commission et al., No. 21-86; consolidated with Securities and Exchange Commission, et al. v. Cochran, No. 21-1239.

[48] *Axon Enterprise*, slip op. at 3.

[49] Securities Exchange Act, 15 U.S.C. § 78a *et seq*.; Federal Trade Commission Act, 15 U.S.C. § 41 *et seq*.

[50] 510 U.S. 200 (1994).

[51] *Axon Enterprise*, slip op. at 1–17; *see also* slip op. at 17 ("All three Thunder Basin factors thus point in the same direction—toward allowing district court review of Axon's and Cochran's claims that the structure, or even existence, of an agency violates the Constitution").

B. New Youth Climate Change Litigation Raises Additional Constitutional Claims Against EPA

On December 10, 2023, a group of eighteen children ranging in age from eight to seventeen years old filed a Complaint[52] in the U.S. District Court for the Central District of California against EPA Administrator Michael Regan and the United States. The Complaint alleges that EPA has violated the children's constitutional rights by failing to more aggressively regulate and curtail what the Complaint calls "climate pollution" or the "carbon dioxide (CO_2), methane, nitrous oxide, and fluorinated gases, the 'greenhouse gases' that are emitted to, disposed of, and accumulate in the atmosphere by human activity" (the "*G. B.* Case").[53]

Further, the Complaint alleges that EPA has "forged an unlawful path by authorizing levels of climate pollution that have destabilized the very foundation and ordered liberty of children's lives, including Plaintiffs'."[54] Specifically, the Complaint raises constitutional claims against EPA, including violations of the Equal Protection Clause, violations of the Fifth Amendment's Due Process Clause (including a violation of the right to life and a violation of an implied "right to a life-sustaining climate system on which all life depends"), and a violation of Article II's Take Care Clause.[55] The Complaint seeks declaratory relief.[56] No substantive motions have yet been filed and no merits briefing schedule has yet been set in the *G. B.* Case.

The *G. B.* Case bears similarities to *Juliana*, *et al. v. United States of America*, *et al.*,[57] which has recently restarted in federal district court in Oregon. First filed in 2015, *Juliana* involves a group of youth plaintiffs who brought suit against a number of federal agencies, including EPA, alleging constitutional violations related to alleged discrimination and harms caused by climate change and those agencies' continued permitting and authorization of fossil fuel–related projects and activities. On June 1, 2023, a federal district court allowed plaintiffs to file a second amended complaint in the case[58] after the U.S. Court of Appeals for the Ninth Circuit dismissed the original complaint in 2020 for lack of Article III standing, citing a lack of redressability in the relief sought by the plaintiffs.[59] The *Juliana* plaintiffs filed a second amended complaint on June 8, 2023, narrowing the relief sought to declaratory relief.[60] The Department of Justice has filed a motion to dismiss the second amended complaint.[61]

III. EPA'S ENFORCEMENT PRIORITIES

For over two decades, EPA's Office of Enforcement and Compliance Assurance ("OECA") has selected National Enforcement and Compliance Initiatives ("NECIs") to invest federal enforcement resources into what EPA deems the "most serious and

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[52] Complaint, G. B. et al. v. U.S. Envtl. Prot. Agency et al., No. 2:23-cv-10345-MWF-AGR (C.D. Cal. Dec. 12, 2023).
[53] *Id.* at ¶¶ 9–10, n. 2.
[54] *Id.* at ¶ 9.
[55] *Id.* at ¶¶ 335–386.
[56] *Id.* at Prayer for Relief (¶¶ 1–7).
[57] Silke Goldberg and Ben Rubinstein, *Juliana v. United States, No. 6:15-cv-01517-AA (D. Or.)*, Herbert Smith Freehills (Oct. 18, 2018).
[58] Opinion and Order, Juliana v. United States, ECF No. 540 at 2 (June 1, 2023).
[59] Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).
[60] Second Amended Complaint, Juliana v. United States, No. 6:15-cv-01517-AA, ECF No. 542 (D. Or. June 8, 2023).
[61] Motion to Dismiss, Juliana v. United States, No. 6:15-cv-01517-AA, ECF No. 547 (D. Or. June 22, 2023).

widespread environmental problems."[62] Earlier this year, OECA announced the six FY 2024—2027 NECIs, introducing three new initiatives on climate change, PFAS exposure, and coal ash contamination.[63] To promote key goals in the FY 2022—2026 EPA Strategic Plan, all six initiatives collectively aim to advance environmental justice and further climate action.[64]

A. Mitigating Climate Change

OECA created a new climate change mitigation initiative to respond to the threat of climate change to public health, resources, and ecosystems.[65] The NECI will focus on two climate "super-pollutants": methane and hydrofluorocarbons ("HFCs").[66] To reduce methane emissions, OECA will increase enforcement of existing air pollution requirements at oil and gas facilities and landfills—such as the Clean Air Act's ("CAA") New Source Performance Standards—but any newly promulgated rules on methane emission reduction could also be enforced.[67] To address the use, importation, and production of HFCs, OECA will focus on the phasedown schedule under the American Innovation and Manufacturing Act ("AIM Act") and the Kigali Amendments to the Montreal Protocol, looking to criminal and civil enforcement of the AIM Act when necessary.[68]

B. Addressing Exposure to PFAS

Another initiative OECA introduced in this cycle addresses persistent PFAS contamination across the United States, with an emphasis on potential risks to drinking water supplies, through EPA's statutory authority under the Resource Conservation and Recovery Act ("RCRA"), Clean Water Act ("CWA"), Safe Drinking Water Act ("SDWA"), and Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[69] While continuing to respond to violations of these statutes, OECA will initially focus on identifying and characterizing the extent of contamination near federal facilities and facilities that use and manufacture PFAS.[70] Then, in FY 2025, OECA will consider bringing additional enforcement actions where appropriate.[71] In addition, if EPA designates PFOA and PFOS acid as hazardous substances under CERCLA,[72] OECA will implement EPA's PFAS Strategic Roadmap to hold responsible major manufacturers

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[62] Memorandum from U.S. Envtl. Prot. Agency on FY 2024–2027 National Enforcement and Compliance Initiatives to Reg'l Adm'rs et al. (Aug. 17, 2023).
[63] *Id*.
[64] Memorandum from U.S. Envtl. Prot. Agency on Updated Policy for EPA's Enforcement and Compliance Initiatives to Reg'l Adm'rs et al. (Dec. 20, 2022); *see* FY 2022–2026 EPA Strategic Plan, U.S. ENV'T PROT. AGENCY, March 2022, at 9–37.
[65] Memorandum on FY 2024–2027 National Enforcement and Compliance Initiatives, *supra* note 62; *see also* Memorandum from U.S. Env't Prot. Agency on EPA's Climate Enforcement and Compliance Strategy to Off. of Enf't & Compliance Assurance Dirs. et al. (Sept. 28, 2023).
[66] Memorandum on FY 2024–2027 National Enforcement and Compliance Initiatives, *supra* note 62.
[67] *Id*. at 2-3.
[68] *Id*. at 3.
[69] *Id*.
[70] *Id*. at 4.
[71] *Id*.
[72] *See Proposed Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances*, U.S. ENVTL. PROT. AGENCY (last updated Oct. 30, 2023).

and users, other industrial parties, and federal facilities that are "significant sources of PFAS."[73]

C. Protecting Communities from Coal Ash Contamination

OECA's final new NECI will apply to facilities regulated under RCRA coal combustion residual requirements.[74] This initiative was designed to address widespread noncompliance with these requirements, particularly to protect communities, many of which face environmental justice concerns, surrounding coal ash facilities from associated serious health effects such as cancer.[75] As a primarily federally run program, OECA will focus on investigating noncomplying coal ash facilities and taking enforcement action to improve the water resources of the affected communities.[76]

D. Reducing Air Toxics in Overburdened Communities

Originally titled *Creating Cleaner Air for Communities by Reducing Excess Emissions of Harmful Pollutants*, this FY 2020–2023 NECI addressed hazardous air pollutants ("HAPs") regulations and National Ambient Air Quality Standards for ozone.[77] For this cycle, EPA modified the initiative to focus on overburdened communities ("OBCs") facing the worst levels of HAPs—such as benzene, ethylene oxide, and formaldehyde—which the EPA regions and states will select.[78] OECA will address HAPs noncompliance in these areas through investigation and enforcement actions, with relief tailored to each community's specific concerns.[79]

E. Increasing Compliance with Drinking Water Standards

OECA will also work to further improve residential drinking water systems' compliance with SDWA through its continuance of this FY 2020–2023 NECI, originally titled *Reducing Noncompliance with Drinking Water Standards at Community Water Systems*.[80] During the first cycle, this initiative decreased SDWA violations and increased collaborative training efforts according to OECA.[81] The second cycle of this NECI will

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[73] Memorandum on FY 2024–2027 National Enforcement and Compliance Initiatives, *supra* note 62, at 3. (Note that OECA "does not intend to pursue entities where equitable factors do not support CERCLA responsibility, such as farmers, water utilities, airports, or local fire departments, much as OECA exercises CERCLA enforcement discretion in other areas.")

[74] *Id*. at 4.

[75] *Id*.

[76] *Id*. at 1.

[77] *National Enforcement and Compliance Initiative: Creating Cleaner Air for Communities by Reducing Excess Emissions of Harmful Pollutants*, U.S. ENVTL. PROT. AGENCY (last updated Dec. 18, 2023).

[78] Memorandum on FY 2024–2027 National Enforcement and Compliance Initiatives, *supra* note 62, at 1,4-5.

[79] *Id*. at 5.

[80] *Id*.

[81] *National Enforcement and Compliance Initiative: Reducing Noncompliance with Drinking Water Standards at Community Water Systems*, U.S. ENVTL. PROT. AGENCY (last updated Dec. 18, 2023).

involve increased compliance assistance and enforcement actions to address continued noncompliance, especially in OBCs.[82]

F. Chemical Accident Risk Reduction

The final continuing FY 2020–2023 initiative—originally titled *Reducing Risks of Accidental Releases at Industrial and Chemical Facilities*—addresses inadequate risk and safety management at facilities regulated under CAA's section 112(r) risk management program.[83] This continuation is a response to continued, frequent releases of two high-risk hazardous substances: anhydrous ammonia used mostly as agriculture fertilizer or refrigerant and hydrogen fluoride used by petrochemical manufacturers.[84] OECA will rely on all of its enforcement methods, including the imposition of criminal liability when applicable.[85]

G. Discontinued FY 2020–2023 NECIs

Three FY 2020–2023 NECIs—addressing hazardous waste facilities' emissions, defeat devices, and CWA permit compliance—were retired, but the associated environmental issues will continue to be addressed through baseline enforcement programs run by EPA, the EPA regions, and the states.[86]

The first discontinued NECI—titled *Reducing Hazardous Air Emissions from Hazardous Waste Facilities*—addressed emissions from the improper management of hazardous waste at facilities subject to RCRA organic air emission standards.[87] Under this NECI, EPA assessed millions of dollars in civil penalties and set up extensive training and resources for states and industry to build capacity to conduct compliance monitoring and initiate follow-up enforcement actions where appropriate.[88]

The discontinued *Stopping Aftermarket Defeat Devices for Vehicles and Engines* initiative involved the upstream manufacturing and distribution of "defeat devices" designed to bypass required emissions controls on vehicles and engines.[89] This NECI led to over 130 civil and criminal enforcement actions under the CAA.[90] Under this baseline program, OECA and the EPA regions will continue investigations, enforcement, and compliance assistance.[91]

Finally, through collaborative efforts under the discontinued *Reducing Significant Non-Compliance with National Pollutant Discharge Elimination System* NECI, EPA and

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[82]Memorandum on FY 2024–2027 National Enforcement and Compliance Initiatives, *supra* note 62.
[83]*Id.*; *National Enforcement and Compliance Initiative: Reducing Noncompliance with Drinking Water Standards at Community Water Systems*, U.S. ENVTL. PROT. AGENCY (last updated Dec. 18, 2023).
[84]Memorandum on FY 2024–2027 National Enforcement and Compliance Initiatives, *supra* note 62, at 6.
[85]*Id*. at 2,6-7.
[86]*Id*. at 6-7
[87]*National Enforcement and Compliance Initiative: Reducing Hazardous Air Emissions from Hazardous Waste Facilities* U.S. ENVTL. PROT. AGENCY (last updated Dec. 18, 2023).
[88]*Id*.
[89]*National Enforcement and Compliance Initiative: Stopping Aftermarket Defeat Devices for Vehicles and Engines,* U.S. ENVTL. PROT. AGENCY (last updated Dec. 18, 2023).
[90]Memorandum on FY 2024–2027 National Enforcement and Compliance Initiatives, *supra* note 62, at 6.
[91]*Id*.

the states undertook a comprehensive review and analysis of compliance data and effected a large reduction in significantly noncomplying permittees.[92] With a focus on remaining permit violators, EPA and the states will continue instituting enforcement actions and providing technical support to permittees to solve common compliance problems that often result from inadequately trained operators or a lack of sufficient funding.[93]

IV. Update On 6PPD Regulation And Litigation

A. 6PPD: What It Is and Why You Should Care

N-(1,3-dimethylbutyl)-*N'*-phenyl-p-phenylenediamine ("6PPD") is a rubber antioxidant used to prevent tires from physically degrading due to reactions with ozone and other airborne reactive oxygen species.[94] It has been used since the 1960s, and today it is the primary antidegradation agent used in tires throughout the world. As tires wear down through road contact, 6PPD can be released to the environment. Recent scientific studies have found that when 6PPD reacts with ozone it can form 6PPD-quinone ("6PPD-q").[95]

In early 2021, a team of researchers from Washington state published a study in *Science* indicating that 6PPD-q, even in very small water concentrations (~1 microgram), can induce "acute mortality" in Pacific Northwest coho salmon (*Oncorhynchus kisutch*).[96] As a result of its toxicity to aquatic species, the study postulated that the presence of 6PPD-q in the environment was contributing to the collapse of coho salmon populations in Puget Sound.[97]

The U.S. Tire Manufacturers Association ("USTMA"), a trade group, has pointed out that 6PPD-q is not used in tire manufacturing and is only a transformation product of 6PPD that may form as the result of environmental exposure.[98] The group has noted that while 6PPD has been extensively studied, there is more limited information available about 6PPD-q. As a result, USTMA stated that the group and its members are committed to collaborating with researchers and regulators to examine 6PPD-q further to resolve knowledge gaps and assess appropriate regulatory action.[99]

Since publication of the 2021 scientific study, legal developments related to 6PPD-q have progressed quickly. As such, the story of 6PPD illustrates how swift regulatory responses and court challenges can develop in response to new scientific assessments of emerging chemicals. In years past, it may have taken a decade or longer to see significant regulatory and legal action in response to new scientific evidence. In contrast, in the few years since the 2021 study was published, 6PPD has faced increasing scrutiny from EPA, while state regulators in California and Washington have taken independent steps to

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[92] *National Enforcement and Compliance Initiative: Reducing Significant Non-Compliance with National Pollutant Discharge Elimination System*, U.S. Envtl. Prot. Agency (last updated Dec. 18, 2023).

[93] Memorandum on FY 2024–2027 National Enforcement and Compliance Initiatives, *supra* note 62.

[94] *See Safer Chemicals Research Page for 6PPD-quinone*, U.S. Envtl. Prot. Agency (last updated Feb. 2, 2024).

[95] *Id.*

[96] Tian, Z. et al., *A ubiquitous tire rubber-derived chemical induces acute mortality in coho salmon*, 371 Science 185, 187 (Dec. 3, 2020).

[97] *Id.*; *See also* Tian, Z. et al., *Erratum for the report "a ubiquitous tire rubber–derived chemical induces acute mortality in coho salmon,"* 375 Science (Feb. 18, 2022) (last visited Dec. 28, 2023).

[98] *6PPD and Tire Manufacturing*, U.S. Tire Manufacturers Ass'n (last visited December 28, 2023).

[99] *Id.*

regulate 6PPD. Much of the concern about 6PPD has been driven by a coalition of U.S.-based environmental groups and Tribes that have advocated for administrative remedies to regulate 6PPD while, concomitantly, pursuing litigation to restrict its use. While the European Commission has not yet taken extensive action on 6PPD, it has begun to focus more generally on environmental concerns associated with tires.

B. Regulatory Developments

1. Federal, Toxic Substances Control Act Petition and Regulatory Action

On November 2, 2023, EPA announced that it would initiate multiple regulatory actions for 6PPD pursuant to its authority under TSCA section 6.[100] The decision came following an August 1, 2023, petition filed by EarthJustice, on behalf of the Yurok Tribe, Port Gamble S'Klallam Tribe, and Puyallup Tribe of Indians, under section 21,[101] calling on EPA to "establish regulations prohibiting the manufacturing, processing, use, and distribution" of 6PPD.[102]

While EPA has not committed to a specific rulemaking timeframe or outcome, it announced that it would publish an Advance Notice of Proposed Rulemaking for 6PPD by fall 2024 pursuant to TSCA section 6, to determine whether there is an unreasonable risk associated with 6PPD,[103] and separately finalize a rule under TSCA section 8(d)—requiring "manufacturers (including importers) of 6PPD to report lists and copies of unpublished health and safety studies to EPA by the end of 2024."[104] EPA has also established a cross-agency working group to "facilitate inter-program office coordination"[105] for 6PPD-q and has made 6PPD one of its research priorities for the 2023–2026 research cycle.[106]

2. State

a. California Safer Consumer Products Regulations

In March 2022, the California Department of Toxic Substances Control ("DTSC") published a report on 6PPD that concluded motor vehicle tires should be designated as a "priority product" pursuant to article 3 of the California Safer Consumer Products ("SCP")

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[100] 15 U.S.C. § 2605(a); *See* U.S. Envtl. Prot. Agency, Re: Petition ID No. 001845: Toxic Substances Control Act Section 21 Petition Regarding N-(1,3-Dimethylbutyl)-N'-phenyl-p-phenylenediamine (CASRN 793-24-8, aka 6PPD) in Tires—Final EPA Response to Petition at 3 (Nov. 2, 2023)[hereinafter U.S. Envtl. Prot. Agency November 2 Decision Letter].

[101] 15 U.S.C. § 2620.

[102] Letter from EarthJustice to EPA Administrator Regan Regarding Citizen Petition under TSCA Section 21 to Prohibit 6PPD in Tires (Aug. 1, 2023).

[103] U.S. Envtl. Prot. Agency November 2 Decision Letter, *supra* note 100, at 6.

[104] Press Release, U.S. Envtl. Prot. Agency, EPA Grants Tribal Petition to Protect Salmon from Lethal Chemical (last updated Nov. 2, 2023).

[105] U.S. Envtl. Prot. Agency November 2 Decision Letter, *supra* note 100, at 3.

[106] *See Safe and Sustainable Water Resources: Strategic Research Action Plan Fiscal Years 2023-2026*, U.S. ENVTL. PROT. AGENCY 13 (Oct. 2022) (Research Area 10 is dedicated to research on stormwater management, including "Evaluations of industrial inputs . . . including contaminants that can affect human health and the environment (e.g., 6ppd-quinone)"); EFFLUENT GUIDELINES PROGRAM PLAN 15, *supra* note 94 (Attorneys are encouraged to monitor EPA's Safer Chemicals Research page for 6PPD-quinone may provide updates on its research efforts related to the chemical).

regulations.[107] The SCP regulatory regime, adopted a decade ago, provides authority for DTSC to require manufacturers (or other responsible entities) to seek safer alternatives to chemical ingredients in widely used products.

Final regulatory text, adding tires containing 6PPD as a priority product, was published in May 2023 and approved on July 3, 2023.[108] The DTSC designation, which took effect on October 1, 2023,[109] requires all "responsible entities"[110] to prepare and submit preliminary analysis reports,[111] evaluating available 6PPD alternatives, by March 29, 2024 (within 180 days after the effective date of the regulation).[112]

b. Washington Priority Toxic Chemical Listing

6PPD is now listed as a priority toxic chemical under Washington state law.[113] The Washington State Department of Ecology ("Ecology") is actively developing methods to test and monitor 6PPD and 6PPD-q in the environment so it can identify areas most affected by these chemicals. On May 18, 2021, the Washington State Legislature passed a proviso authorizing the release of funds to Ecology to support research efforts to identify priority areas affected by 6PPD.[114] Ecology submitted an initial report of its findings in October 2022.[115] The report identified assessment strategies for determining which ecosystems in the State of Washington should be prioritized for further research and monitoring and control measures.[116] The report indicated that the management and assessment of 6PPD-q will require a multi-disciplinary approach, using a variety of tools, including the adoption of appropriate regulations in the future.[117]

3. European Union

The European Union has taken a slightly different approach to regulating tires. While questions were raised about 6PPD in 2022, when the European Commission ("Commission") was developing a draft proposal to regulate emissions from tires (the "Euro 7" proposal), the Commission preliminarily dismissed the idea of regulating 6PPD due to concerns over the lack of sufficient evidence.[118] However, this has not precluded the Commission from evaluating environmental impacts associated with tire usage. The Commission published the draft Euro 7 proposal focused on regulating, among other

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[107] CAL. CODE REGS. tit. 22, §§ 69503.7-69504.

[108] *See Listing Motor Vehicle Tires Containing N-(1,3-Dimethylbutyl)-N-phenyl-p-phenylenediamine (6PPD) as a Priority Product*, DEP'T. OF TOXIC SUBSTANCES CONTROL (last visited Feb. 16, 2024).

[109] *Id*.

[110] CAL. CODE REGS. tit. 22, § 69501.1(a)(60) (All manufacturers, importers, assembler, or retailers of tires containing 6PPD are "responsible entities" within the meaning of the regulations.).

[111] *See* CAL. CODE REGS. tit. 22, § 69505.

[112] *See* CAL. CODE REGS. tit. 22, § 69511.7(h).

[113] *See Tire anti-degradant (6PPD) and 6PPD-quinone,* STATE OF WASH. DEP'T. OF ECOLOGY (last visited Feb. 16, 2024).

[114] S.B. 5092 § 302(23), 67th Leg., 2021 Reg. Sess. (Wash. 2021).

[115] *See* 6PPD in Road Runoff: Assessment and Mitigation Strategies, STATE OF WASH. DEP'T. OF ECOLOGY (Oct.2022).

[116] *Id*.

[117] *Id*. at 47.

[118] *See, e.g.*, EUR. PARL. DOC. (E-007042) (2020); EUR. PARL. DOC. (E-002319) (2023).

things, microplastics and particulate matter from tires on November 10, 2022.[119]

The Euro 7 proposal, which the European Parliament approved November 9, 2023,[120] marks the first time the Commission has proposed regulations focusing on non-exhaust emissions from vehicles. The legislative process to set the basis for the Euro 7 standard will be completed during 2024, but specific limits for tire emissions will be defined at a later stage, with detailed provisions required by 2026.[121]

C. Litigation in the United States

On August 15, 2023, EarthJustice sent notices to thirteen U.S. tire manufacturers alleging violations of section 9 of the Endangered Species Act ("ESA")[122] related to illegal take of coho salmon, Chinook salmon, and steelhead trout as a result of environmental releases of 6PPD-q, and announced their intent to sue on behalf of the Institute for Fisheries Resources and Pacific Coast Federation of Fishermen's Associations.[123] After waiting the requisite 60 days, EarthJustice promptly filed suit against the tire manufacturers in the Northern District of California on November 8, 2023.[124] The complaint asks the court to declare that the defendant tire manufacturers are unlawfully taking ESA-protected fish species in violation of the ESA, enjoin the defendants from continuing the unauthorized take of ESA-protected aquatic species, and award attorneys' fees and costs.[125]

V. OFFSHORE WIND LITIGATION

The nascent offshore wind industry saw several decisions, including the first decisions upholding, on the merits, the government's environmental review and permitting for an offshore wind farm in federal waters.

A. Leasing

The court in *Save Long Beach Island v. U.S. Department of the Interior*[126] rejected claims under the National Environmental Policy Act ("NEPA")[127] and ESA[128] challenging the Bureau of Ocean Energy Management's ("BOEM") identification of wind leasing areas in the New York Bight. The court relied on *Fisheries Survival Fund v. Haaland*,[129] which held a NEPA challenge to an offshore wind lease was unripe because it did not authorize activities within the leased area, so it was not the "irreversible and irretrievable commitment" by an agency needed to make a NEPA challenge ripe for review.[130]

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[119] Press Release, Eur. Comm'n, Commission proposes new Euro 7 standards to reduce pollutant emissions from vehicles and improve air quality (Nov. 10, 2022).
[120] Press Release, Eur. Parl., Euro 7:MEPs support new rules to cut down pollutant emissions (Sept. 11, 2023).
[121] *See id.*
[122] 16 U.S.C. § 1540(g).
[123] Letter from Earth Justice to U.S. Tire Manufacturer (Aug. 15, 2023) (on file with author).
[124] Institute For Fisheries Resources et al. v. Bridgestone Americas, Inc. et al., No. 3:2023cv05748 (N.D. Cal Nov. 8, 2023) (complaint for declaratory and injunctive relief).
[125] *Id.*
[126] No. 22-cv-55, 2023 WL 2424608 (D.D.C. Mar. 9, 2023).
[127] 42 U.S.C. §§ 4321 – 4370m-12.
[128] 16 U.S.C. §§ 1531 – 1544.
[129] 858 F. App'x 371, 372 (D.C. Cir. 2021).
[130] *Id.*

B. DOE Grant Funding

The court in *American Bird Conservancy v. Granholm*[131] considered a NEPA challenge to Department of Energy ("DOE") funding for Project Icebreaker, a six-turbine pilot project proposed for Lake Erie. The court found that plaintiffs lacked standing to assert that DOE should have prepared an environmental impact statement rather than an environmental assessment because the Plaintiffs "have not linked the causal chain between a purported NEPA error and [their] interests, because DOE has made no decision based on its NEPA analysis."[132] The court also found that the U.S. Army Corps of Engineers ("Corps") had not violated CWA section 404,[133] deferring to the Corps' alternatives analysis and its determination that uncertainty about Project Icebreaker's impact on bird and bat populations did not render it "contrary to the public interest."[134]

C. Project Approvals

1. South Fork Wind

In *Mahoney v. Department of Interior*, the plaintiffs asserted that the NEPA review and CWA section 404 permit for South Fork Wind had failed to consider the effects that trenching for the project's export cable could have on groundwater contamination.[135] The court held the plaintiffs lacked standing, because the cable route was approved by the New York Public Service Commission and was outside the federal agencies' jurisdiction; therefore, the plaintiffs' alleged that injury was not fairly traceable to the agencies' conduct.[136]

2. Vineyard Wind

Four lawsuits seeking to block the Vineyard Wind project—the first utility-scale offshore wind project in the United States, which is currently under construction offshore of Massachusetts, and will have a capacity of 800 megawatts when completed—were resolved by summary judgment.

a. Standing Determinations

In *Nantucket Residents Against Turbines v. BOEM* ("*ACK RATS*"), the District of Massachusetts found that the plaintiffs had "marginally"[137] demonstrated standing but only as to ESA claims relating to the endangered North Atlantic right whale ("NARW") and not Vineyard Wind's potential effects on air quality.[138] The court also found standing under the Marine Mammal Protection Act ("MMPA") for the plaintiff in *Melone v. Coit*,[139] who had expressed interest in protecting the NARW and taken part in whale-watching. The court noted that there are less than 400 remaining NARW, so even a slightly increased risk

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[131] No. 19-3694 (TJK), 2023 WL 6276618 (D.D.C. Sept. 26, 2023).
[132] *Id.* at *4.
[133] *Id.* at *4-5.
[134] *Id.* at *5.
[135] 22-cv-01305-FB-ST, 2022 WL 1093199 (E.D.N.Y. Apr. 12, 2022).
[136] *Id.* at *2.
[137] 1:21-cv-11390-IT at 28 (D. Mass. May. 17, 2023), *appeal docketed,* No. 23-1501 (1st Cir. June 20, 2023).
[138] *Id.* at 30.
[139] 1:21-cv-11171-IT, 2023 WL 5002764 (D. Mass. Aug. 4, 2023), *appeal docketed*, No. 23-1736 (1st Cir. Sept. 8, 2023).

could harm Melone's interest in viewing the species. Thus, Melone had standing based on his contention that the National Marine Fisheries Service ("NMFS") had increased the likelihood of harm to the whale and reduced Melone's chances of observing it in the future.[140]

The court addressed standing for fishing companies and a fishing industry group in the consolidated cases *Seafreeze Shoreside v. Dep't of Interior* and *Responsible Offshore Development Alliance v. Dep't of Interior* ("*Seafreeze/RODA*").[141] The court found that none of the commercial entities had standing to assert aesthetic or environmental interests on behalf of their owners or employees, the industry group did not have standing to assert non-economic injuries on behalf of its members, and their alleged economic injuries did not provide standing under the ESA, MMPA, or NEPA.[142]

b. Merits Decisions

The *ACK RATS* plaintiffs claimed that NMFS's Biological Opinion failed to address five studies on the NARW and therefore did not rely on the "best scientific and commercial data available."[143] The court found that NMFS had considered those studies and deferred to NMFS's evaluation of the data and conclusion that Vineyard Wind would not jeopardize the continued existence of the NARW.[144] The court also rejected the argument that NMFS and BOEM failed to consider the impact of Vineyard Wind's construction on the NARW and dismissed the plaintiff's ESA and NEPA claims, both of which relied on impacts to the NARW.[145]

In *Melone*, the court determined that procedural defects in NMFS's issuance of an incidental harassment authorization for the NARW were harmless error.[146] The court also rejected Melone's arguments that NMFS had misinterpreted the MMPA, deferring to the agency's statutory interpretation.[147]

In *Seafreeze/RODA*, the court rejected claims under CWA section 404, finding that the Corps' alternatives analysis complied with the CWA and its cumulative impacts analysis was properly limited to the transmission cable corridor that was the subject of the permit.[148] The court also dismissed several claims under the Outer Continental Shelf Lands Act ("OCSLA")[149] as time-barred and found that BOEM acted within its discretion in balancing the interests protected by OCSLA.[150]

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[140] *Id.*

[141] 2023 WL 6691015 (D. Mass. Oct. 12, 2023), *appeal docketed*, No. 23-1853 (1st Cir. Oct. 20, 2023).

[142] 2023 WL 6691015 at *11–16.

[143] *Nantucket Residents Against Turbines*, 1:21-cv-11390-IT (D. Mass. 17, 2023) *(see* 16 U.S.C. § 1536(a)(2), 50 C.F.R. § 402.14(g)(8)).

[144] *Id*. at 40.

[145] *Id.* at 45, 47, 52.

[146] *Melone*, 2023 WL 5002764 at *15 (D. Mass. Aug. 4, 2023).

[147] *Id*. at *16–27 (For example, the court evaluated the suite of mitigation measures required by NMFS, including protected species observers and vessel speed restrictions, pointed out that Melone had not offered any evidence to undermine NMFS's conclusion that those mitigation measures would result in the "least practicable impact" to the species as required by the MMPA, and rejected Melone's contention that those mitigation measures were inadequate.); *Id*. at *25–26.

[148] 2023 WL 6691015 at *16–*18.

[149] 43 U.S.C. §§ 1331 – 1356c.

[150] 2023 WL 6691015 at *19–*23 (citing 43 U.S.C. § 1337(p)(4)).

VI. THREE 2023 ESG ENFORCEMENT AND LITIGATION TRENDS TO KEEP WATCHING IN 2024

In the context of the continually evolving framework of environmental, social, and governance ("ESG"), 2023 saw several ESG-related enforcement and litigation trends develop, including some with far-reaching implications. At a high level, regulators and stakeholders are taking more aggressive stances against greenwashing, increasing the importance of claim substantiation—the significance of this will continue into 2024 and beyond. Items of specific importance are the impending carbon- and climate-related disclosure compliance regime established by the California legislature; increased greenwashing litigation, including class actions; and new regulations impacting environmental justice ("EJ") compliance and strategy.

A. California's Climate- and Carbon-Related Mandatory Reporting

On October 7, 2023, California governor Gavin Newsom signed three climate- and carbon-related bills into law: Senate Bills 253[151] and 261[152], known as the Climate Corporate Data Accountability Act ("CCDAA") and the Climate-Related Financial Risk Act ("CRFRA"), respectively, along with California Assembly Bill ("AB") 1305[153] (also known as the Voluntary Carbon Market Disclosures Act ("VCMDA"). The VCMDA, effective January 1, 2024, requires companies doing business in California that purchase and use carbon offsets and/or make "net zero" or "carbon neutral" or carbon or GHG emissions reductions claims in California, to make website disclosures about the underlying carbon reduction or removal projects and/or company sustainability programs substantiating such usage and/or claims, including, without limitation, those relating to project details and data as well as entities selling the offsets, how program progress is measured, whether third-party verification is obtained, and the accuracy of such claims.[154]

Key disclosure requirements aimed at combatting greenwashing include requiring companies to provide documentation of the veracity of "net zero," "carbon neutral," or similar claims, how interim progress or successful accomplishment of these goals will be measured, and whether a third party has verified the claims.[155] Additionally, companies purchasing or using voluntary carbon offsets must provide information about the actual voluntary carbon offset project itself.[156]

Companies subject to AB 1305, especially those making "net zero," "carbon neutral," and/or similar claims in California, will need to understand the universe of those claims and take steps to evaluate whether each of those claims are/can be substantiated.

B. Increasing Greenwashing Litigation

In addition to regulatory risk, greenwashing litigation claims against "household" brands continued in 2023 across various sectors, including fashion, retail, food/beverage, and aviation. As regulatory stakeholders in the United States catch up with corporate claims of being "carbon neutral" and "net zero," it is foreseeable that greenwashing claims (under consumer protection laws, for example) will increase.

To date, litigants in greenwashing cases have achieved various results on both the plaintiffs' and defendants' sides. In cases where defendants have prevailed in part, courts

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[151] CAL. HEALTH & SAFETY CODE § 38532.
[152] CAL. HEALTH & SAFETY CODE § 38533.
[153] CAL. HEALTH & SAFETY CODE § 44475 – 44475.2.
[154] *See id.*
[155] CAL. HEALTH & SAFETY CODE § 44475.2.
[156] CAL. HEALTH & SAFETY CODE § 44475.1.

have been hesitant to find fault with so-called puffery statements that a reasonable consumer would not interpret as factual and/or statements found to be aspirational. [157] That said, for companies seeking to improve their posture against such litigation, efforts toward evaluating and documenting rigorous substantiation are imperative.

C. Environmental Justice Regulations

With passage of Executive Order ("EO") 14096 on April 21, 2023, the Biden administration called for the "advance[ment] [of] environmental justice for all by implementing and enforcing the Nation's environmental and civil rights laws, preventing pollution, addressing climate change and its effects, and working to clean up legacy pollution that is harming human health and the environment."[158] Applicable to all federal agencies within the Executive Branch, EO 14096 requires development of Environmental Justice Strategic Plans that provide agency-specific roadmaps that weave together their unique mission with the White House's EJ charges. To support agency work, the Council on Environmental Quality recently released its guidance document, *Strategic Planning to Advance Environmental Justice*.[159]

At the state level, New Jersey became the first to ratify an Environmental Justice Law and implementing rules.[160] This legislation requires the New Jersey Department of Environmental Protection to evaluate environmental and public health impacts of certain facilities on overburdened communities ("OBCs") when reviewing certain permitting applications. While this set of rules applies to a limited type of facility seeking permitting in New Jersey, there have been multiple instances of permit denials—based on an applicant's failure to avoid disproportionate impacts on OBCs. To keep abreast of new laws, regulations, and rules in 2024, the Environmental Justice State by State website is a useful resource.[161]

VII. Impact of Canadian Regulation of Emerging Contaminants on U.S.–Canada Trade

The scope and number of emerging contaminants continue to expand as substances are newly identified as harmful to the environment and human health, studied, regulated, and in some instances, banned. In today's globalized world, such evolution does not happen in a vacuum; instead, information is shared across borders to inform and develop regulations and practices to address such growing concerns and risks.

Canadian regulation of emerging contaminants can directly affect American businesses, whether doing business in Canada or doing business with Canadians, including supply chains, manufacturing operations, trade, retail, and waste management. Given the interconnection of North American supply chains across the U.S.–Canada border, increased regulation of substances and products in Canada impacts manufacturers, distributors, and retailers in the United States who supply such substances or products into Canada as well as distributors, retailers, and consumers in the United States who purchase such substances or products exported from Canada.

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[157] *See, e.g.*, *Dwyer v. Allbirds, Inc.*, Case 7:21-cv-05238-CS (S.D.N.Y. 2022).
[158] Exec. Order No. 14,096, 88 Fed. Reg. 25,251 (Apr. 21, 2023).
[159] *Strategic Planning to Advance Environmental Justice: Under Executive Order 14096, Revitalizing Our Nation's Commitment to Environmental Justice for All*, White House CEQ (Oct. 2023).
[160] Environmental Justice Rules Frequently Asked Questions, N.J.A.C. 7:1C, N.J. Dep't of Envtl. Prot. (last visited Apr. 14, 2024).
[161] *Environmental Justice State by State*, Vt. L. School/Env't Just. Clinic (last visited Apr. 14, 2024).

In 2023, the highest-profile emerging contaminants in Canada were microplastics and PFAS with pharmaceutical and personal care products ("PPCPs") and tire and brake tread trailing but picking up speed behind them.

From this list, Canada has made the most progress in regulating microplastics through its broader regulation of single-use plastic products. In particular, there has been a national ban implemented for certain single-use products[162] (and some overlapping or more expansive bans at the provincial level), an increase of extended producer responsibility programs for end-of-life and plastic products recycling at the provincial level, the development of a plastics registry to inform the study of plastic production and supply in Canada,[163] and a proposed recycling labeling regulation to ensure consistent and more accurate recycling information available to the public and recycling facilities.[164] These developments target plastic products more generally but have an underlying intention and purpose of reducing the quantity of microplastics in the environment.

With respect to PFAS, Canada currently prohibits certain PFAS substances and their precursors, including PFOS, PFOA, and perfluorocarboxylic acids ("LC-PFCAs"), from being manufactured, used, sold, offered for sale, or imported into Canada with some exemptions for certain uses involving AFFF, photolithography, and photographic film,[165] which are anticipated to be phased out in the near future. In the meantime, the Canadian government has been researching and monitoring PFAS since 2021 to inform future regulation of these substances. In 2023, the government announced its intention to regulate PFAS as a class, as opposed to regulating only specific varieties of PFAS.[166] The study is expected to be concluded in 2024 with proposed regulations to follow.

While microplastics and PFAS make media headlines, PPCPs and tire and brake treads have garnered significantly less attention. While PPCPs are being studied on a more local scale, often because of concerns raised by the public, the focus of Canadian and local governments is on the assessment of the presence of PPCPs in and studying their impacts on the environment. Similarly, the scope of impacts from particulate emitted from automobile tires and brake wear are in the research stage and does not appear to be the focus of any proposed regulation. However, in both instances, it is reasonable to anticipate additional attention to and possible regulation of these substances in Canada in the future.

Companies doing business in Canada or with Canadians involving these emerging contaminants should consider whether any of their products are subject to existing, proposed, or future regulation (or even bans) in Canada as well as products targeted for additional regulation through stewardship, labeling, or reporting requirements. A proactive approach to compliance with Canadian laws is key to ensuring American businesses are not caught by surprise as Canadians implement additional regulation of such materials.

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[162] Single-Use Plastics Prohibition Regulations, 1999 (SOR/2022-138).

[163] *Notice of Intent to Issue a Notice under Section 46 of the Act with Respect to Reporting of Certain Plastic Products for 2024, 2025, and 2026*, CANADA GAZETTE, Part I, Vol. 157, No. 52 (Dec. 30, 2023).

[164] Recycled Content and Labelling Rules for Plastics: Regulatory Framework Paper, ENV'T AND CLIMATE CHANGE CANADA (last updated May 5, 2023).

[165] Prohibition of Certain Toxic Substances Regulations, 2012 (SOR/2012-285).

[166] *Draft State of Per- and Polyfluoroalkyl Substances (PFAS) Report*, ENV'T AND CLIMATE CHANGE CANADA (May 2023).

Chapter F: ENVIRONMENTAL, SOCIAL, GOVERNANCE, AND SUSTAINABILITY
2023 Annual Report[1]

I. GOVERNMENTAL ACTION

A. U.S. Administrative Law Developments

1. U.S. Securities and Exchange Commission

Following the April 11, 2022 proposal of a climate change disclosure rule titled The Enhancement and Standardization of Climate-Related Disclosures for Investors (Climate Disclosure Rule),[2] the U.S. Securities and Exchange Commission (SEC) moved forward with a public comment period in 2022 and a final review process, which lasted throughout 2023. Under current securities regulations, registrants make financial and risk-related disclosures informing investors of material factors impacting those companies.[3] The Climate Disclosure Rule represents the next step in the SEC's response to investors' calls for "more consistent, comparable, and reliable information about how a registrant has addressed climate-related risks when conducting its operations and developing its business strategy and financial plan."[4] If finalized as proposed, the Climate Disclosure Rule would require affected companies to provide "information about a registrant's climate-related risks that are reasonably likely to have a material impact on its business, results of operations, or financial condition," as well as "greenhouse gas emissions, which have become a commonly used metric to assess a registrant's exposure to such risks."[5] A final rule is expected in 2024.

Relatedly, on October 11, 2023, the SEC published a final rule titled Investment Company Names (2023 Names Rule).[6] Intended to tackle greenwashing in the financial services industry, the 2023 Names Rule "addresses certain broad categories of investment company names that are likely to mislead investors about an investment company's investments and risks"[7] and highlights examples, such as funds "that consider ESG factors in their investment strategies…."[8] The 2023 Names Rule, which expands the requirements of Rule 35d-1 under the Investment Company Act,[9] requires funds having names that suggest a focus in a particular type of investment, industry, geographic area, or (new for

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[1]This summary was prepared by Ashley Ball, Year in Review Vice Chair for the ABA SEER ESG and Sustainability Committee; Thomas A. Utzinger, Managing Member, GlacierAdvisory LLC; Norman A. Dupont, Partner, Ring Bender LLP; Tiffany Huey, Senior Corporate Advisory, BPM; David Restaino, Partner, Fox Rothschild LLP; and Jessica Tung and Karly Beaumont, Consultants, Antea Group.

[2]The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

[3]*Rules and Regulations for the Securities and Exchange Commission and Major Securities Laws*, SEC. & EXCH. COMM'N (last visited Dec, 4, 2023).

[4]SEC. & EXCH. COMM'N, FACT SHEET: ENHANCEMENT AND STANDARDIZATION OF CLIMATE-RELATED DISCLOSURES 1 (2022).

[5]The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21,334.

[6]Investment Company Names, 88 Fed. Reg. 70,436 (Oct. 11, 2023) (to be codified at 17 C.F.R. pts. 230, 232, 239, 270, 274).

[7]Investment Company Names, 88 Fed. Reg. at 70,436.

[8]*Id*. at 70,439.

[9]17 C.F.R. § 270.35d-1.

2023) characteristic (such as ESG) must invest at least 80 percent of the value of their assets in that particular type of investment.[10]

2. U.S. Department of Labor

The U.S. Department of Labor (DOL) spent the better part of 2023 facing challenges in the U.S. Congress and the courts to its December 1, 2022 final rule titled Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (2022 ESG Rule).[11] The 2022 ESG Rule clarifies how retirement plan fiduciaries should approach selections of investments and investment courses of action under the Employee Retirement Income Security Act of 1974 (ERISA),[12] while providing some flexibility to allow a fiduciary to consider "the economic effects of climate change and other [ESG] factors. . . ." if the fiduciary determines such factors "relevant to a risk and return analysis."[13]

The 2022 ESG Rule encountered significant political opposition in 2023. For example, on February 7, 2023, a resolution (H.J. Res. 30) was introduced in the U.S. House of Representatives, providing for Congressional disapproval of the 2022 ESG Rule.[14] H.J. Res. 30 was passed by both houses of Congress and sent to President Joe Biden, who vetoed it on March 20, 2023, noting in a Message to the House of Representatives that "fiduciaries should be able to consider any factor that maximizes financial returns for retirees across the country."[15]

On September 21, 2023, the 2022 ESG Rule was upheld by the Northern District of Texas following a lawsuit filed on January 26, 2023 by 25 state attorneys general and other interested parties.[16] In a Memorandum Opinion and Order in *Utah v. Walsh*, Judge Matthew J. Kacsmaryk held that the ESG Rule does not violate ERISA and, as a matter of administrative law, is not arbitrary and capricious.[17] A Notice of Appeal to the Fifth Circuit was filed on October 26, 2023.[18]

3. U.S. Financial Regulation

On October 30, 2023, an interagency guidance titled Principles for Climate-Related Financial Risk Management for Large Financial Institutions (Guidance) was published by the U.S. Department of the Treasury's Office of the Comptroller of the Currency, the Federal Reserve System, and the Federal Deposit Insurance Corporation.[19] The Guidance provides the largest financial institutions – those with over $100 billion in consolidated assets – with "a high-level framework for the safe and sound management of exposures to

[10]Investment Company Names, 88 Fed. Reg. at 70,440.
[11]Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73,822 (Dec. 1, 2022) (to be codified at 29 C.F.R. pt. 2550).
[12]Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1003 (2020).
[13]Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. at 73,827.
[14]H.R.J. Res. 30, 118th Cong. (1st Sess. 2023).
[15]Press Release, White House, Message to the House of Representatives – President's Veto of H.J. Res. 30 (Mar. 20, 2023).
[16]Complaint for Declaratory and Injunctive Relief, Utah v. Walsh, No. 2:23-cv-00016-Z (N.D. Tex. Jan. 26, 2023).
[17]Memorandum Opinion and Order, Utah v. Walsh, No. 2:23-cv-00016-Z (N.D. Tex. Sept. 21, 2023).
[18]Notice of Appeal, Utah v. Su, No. 2:23-cv-00016-Z (N.D. Tex. Oct 26, 2023).
[19]Principles for Climate-Related Financial Risk Management for Large Financial Institutions, 88 Fed. Reg. 74,183 (Oct. 30, 2023).

climate-related financial risks."[20] Based on the premise that climate change and the transition to a lower carbon economy may threaten the U.S. financial system, the Guidance offers: (1) principles related to governance, policies and procedures, strategic planning, risk management, data and reporting, and scenario analysis; and (2) a framework addressing credit risks, liquidity risks, operational risks, and legal and compliance risks.[21]

B. U.S. Legislative Developments

Representative Ralph Norman (R-SC) sponsored H.R. 4655, to amend the Securities Exchange Act of 1934 to prohibit the SEC from compelling the inclusion or discussion of shareholder proposals or proxy or consent solicitation materials, and for other purposes.[22] The bill, which was introduced in the U.S. House of Representatives and referred to the House Committee on Financial Services on July 14, 2023, was reported out of committee on July 27, 2023, but has not moved forward. H.R. 4655 would prohibit the SEC from compelling an issuer to include any shareholder proposal or discussion related to a proposal within a proxy statement.[23]

Representative Bryan Steil (R-WI) sponsored H.R. 4767, the Protecting Americans' Retirement Savings from Politics Act.[24] The bill, which was introduced in the U.S. House of Representatives and referred to the House Committee on Financial Services on July 20, 2023, was reported out of committee on July 27, 2023 but has not moved forward. Among other things, Title III of H.R. 4767 would allow issuers to exclude from shareholder meeting materials shareholder proposals submitted pursuant to 17 C.F.R. 240.14a-8 "if the subject matter of the shareholder proposal is environmental, social, or political (or a similar subject matter)."[25] Additionally, under Title IV of H.R. 4767, issuers may exclude shareholder proposals submitted pursuant to 17 C.F.R. 240.14a-8(i) "without regard to whether such shareholder proposal relates to a significant social policy issue."[26]

Representative Bill Huizenga (R-MI) sponsored H.R. 4790, the Guiding Uniform and Responsible Disclosure Requirements and Information Limits Act of 2023.[27] The bill, which was introduced in the U.S. House of Representatives and referred to the House Committee on Financial Services on July 20, 2023, was reported out of committee on July 27, 2023, but has not moved forward. H.R. 4790 provides that the SEC, when engaged in rulemakings regarding disclosure obligations, shall only require an issuer to disclose information to the extent that the issuer determines the information is material within the context of voting or investment decisions made regarding the issuer's securities.[28]

C. California Legislative Developments

[20] Principles for Climate-Related Financial Risk Management for Large Financial Institutions, 88 Fed. Reg. at 74,183.
[21] *Id*. at 74,187-89.
[22] H.R. 4655, 118th Cong. (1st Sess. 2023).
[23] *Id*. at 2.
[24] H.R. 4767, 118th Cong. (1st Sess. 2023).
[25] *Id*. at 5.
[26] *Id*. at 6.
[27] H.R. 4790, 118th Cong. (1st Sess. 2023).
[28] *Id*. at 2-3.

In 2023, California signed into law three first-in-the-nation climate-related bills, potentially taking effect as soon as 2026."[29] These laws are expected to impact thousands of businesses, including both private and publicly held companies.[30]

1. California's Climate Corporate Data Accountability Act, SB 253

Governor Gavin Newsom approved California Senate Bill 253 ("Climate Corporate Data Accountability Act") on October 7, 2023.[31] The Climate Corporate Data Accountability Act provides for three types of disclosures for all public and private entities that have more than $1 billion in annual sales *and* "do business" in California. This applies even if the corporation, partnership, limited liability company, "or other business entity" is not California-based and is based on the entity's revenue for the prior fiscal year.[32]

SB 253 requires all covered entities to disclose their Scope 1 and Scope 2 emissions to an emissions reporting organization, starting in 2026, as well as Scope 3 starting in 2027.[33] SB 253 requires the California Air Resources Board (CARB) to develop and adopt implementing regulations by January 1, 2025.[34] In signing SB 253, Governor Newsom expressed concerns over the feasibility of these deadlines, signaling potential delays.[35]

2. California's Climate-related Financial Risk Disclosures, SB 261.

California also passed a separate but related bill, SB 261 ("Greenhouse Gases: Climate-Related Financial Risk"), mandating disclosure of "climate-related financial risk" that includes both a physical risk to a reporting entity and a "transition" risk that the entity might incur.[36]

SB 261 is similar to the SEC's proposed Climate Disclosure Rule.[37] However, it is broader than the proposed SEC Rule in that it applies not just to publicly traded corporations but also to private entities. In a change from the $1 billion threshold set in SB 253, SB 261 sets a *lower* financial threshold for entities that are deemed "covered entities"—those with total annual revenues over $500 million and do business in

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[29] *California's Not Waiting for the SEC's Climate Disclosure Rules*, PRICEWATERHOUSECOOPERS (PWC) IN THE LOOP, 1 (2023).
[30] *Id*.
[31] Climate Corporate Data Accountability Act, S. 253, 2023-2024 Leg., Reg. Sess. (Cal. 2023).
[32] Climate Corporate Data Accountability Act, S. 253, 2023-2024 Leg., Reg. Sess. (Cal. 2023) (adding Health & Safety Code provision and defining "reporting entity").
[33] *Id.* (new statutory term Section 38532(b)(3)-(5) defining "Scope 1 emissions," "Scope 2 emissions," and "Scope 3 emissions").
[34] *Id.* (new statutory provision Sect. 38532(c)(1)).
[35] Letter from Governor Gavin Newsom to Members of Cal. State S. (Oct. 7, 2023).
[36] Greenhouse Gases: Climate Related Financial Risk, Cal. S.B. 261 (2023 Cal. Stat. Chap. 383) (to be codified as CAL. HEALTH & SAFETY CODE § 38533).
[37] The Enhancement and Standardization of Climate-related Disclosures for Investors, 87 Fed. Reg. 21,334 (proposed April 11, 2022). For a detailed discussion of the SEC proposed rule, *see* T. Fox, B. Israel, and S. Gray, *Climate-Related Disclosure Obligations at the Federal and International Level*, in ENVIRONMENTAL, SOCIAL, GOVERNANCE: THE PROFESSIONAL'S GUIDE TO THE LAW AND PRACTICE OF ESG CHAPTER 6 (B. Israel, E. Fleishhacker, and T. Johnson eds) (2023).

California.[38] As with SB 253, Governor Newsom also expressed concerns about the feasibility of the deadlines required by SB 261.[39]

3. California's Voluntary Carbon Market Disclosure Business Regulation Act, AB 1305

On October 7, 2023, Governor Newsom also signed Assembly Bill (AB) 1305, now known as the Voluntary Carbon Market Disclosures Business Regulation Act (VCMDA). Unlike SB 253 and SB 261, AB 1305 requires disclosure without implementing regulations. Rather, effective January 1, 2024, covered business entities marketing or selling voluntary carbon offsets must disclose details regarding project accountability, completion, and emissions reductions. AB 1305 applies to businesses operating in California or "making claims" in California. It also requires "an entity that purchases or uses voluntary carbon offsets that makes claims regarding the achievement of net zero emissions or other, similar claims, as specified" to disclose and document how claims have been determined or accomplished, how progress is measured, and whether there is independent third-party verification.[40]

D. U.S. Judicial Developments

A multitude of climate change lawsuits continued to move through the U.S. courts in 2023, including those filed by states and local government entities. Most cases are still in the procedural stage; however, some rulings have been made on choice of venue.

Over the past few years, several states filed climate change litigation against oil and gas companies.[41] The companies are trying to remove the climate cases to federal venues. Courts generally are deciding the cases should remain in state court; and the Supreme Court is denying petitions for writ of certiorari.[42]

Additional decisions have been rendered by federal circuit courts, in suits brought by county and local governments, concerning remands to state court.[43]

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[38]S. 261, Sec. 2 (Cal. 2023) (providing for new Cal. Health & Safety Code section 38533, subpart 38533(a)(4) (defining term "Covered entity").

[39]Letter from Governor Gavin Newsom to Members of Cal. State S. (Oct. 7, 2023) (on file with the Off. of the Governor).

[40]Act of October 7, 2023, ch. 365, 2023

[41]*See* Mayor & City Council of Balt. v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019); Delaware v. BP America Inc., No. N20C-09-097-AML-CCLD (Del. Super. Ct. Sept. 10, 2020); Minn. v. Amer. Pet. Inst., (Ramsey Cnty. Dist. Ct., June 24, 2020) (No. 62-CV-3837); Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142, 146 (D.R.I. 2019); New Jersey v. Exxon Mobil Corp., No. MER-L-001797-22 (N.J. Super. Ct. Oct. 18, 2022); Platkin v. Exxon Mobil Corp, No. 22-cv-06733 (RK) (JBD), 2023 WL 4086353 (D.N.J. June 20, 2023).

[42]*See* Mayor of Balt., et al. v. BP P.L.C., 31 F.4th 178 (4th Cir. 2022), *cert. denied* 143 S. Ct. 1795 (2023); Delaware v. BP America Inc., No. 20-1329-LPS, 2022 WL 605822 (D. Del. Feb. 8, 2022); Minn. v. Amer. Pet. Inst., (Ramsey Cnty. Dist. Ct. June 24, 2020) (No. 62-CV-3837), *cert. denied* (U.S. Jan. 8, 2024) (No. 23-168); Rhode Island v. Shell Oil Prods. Co., 35 F.4th 44 (1st Cir. 2022), *cert. denied* 145 S. Ct. 1796 (2023).

[43]*See, e.g.*, Boulder Cnty. v. Suncor Energy, 25 F.4th 1238 (10th Cir. 2022), *cert. denied* 143 S. Ct. 1795 (2023); Honolulu v. Sunoco, 39 F.4th 1101 (9th Cir. 2022), *cert. denied* 143 S. Ct. 1795 (2023), *on remand* 153 Haw. 326 (Haw. Oct. 31, 2023) (denying motions to dismiss); San Mateo Cnty. v. Chevron Corp., 32 F.4th 733 (9th Cir. 2022), *cert. denied* 143 S. Ct. 1797 (April 24, 2023); City of Hoboken v. Chevron Corp., 45 F.4th 699 (3d

II. International Sustainability Reporting Requirements

A. International Financial Reporting Standards Sustainability Reporting Standards S1 and S2

In response to demands for a comprehensive global baseline of sustainability disclosures, the International Financial Reporting Standards Foundation (IFRS Foundation) formed the International Sustainability Standards Board (ISSB) in 2021. On June 26, 2023, to help companies avoid duplicative reporting, the ISSB issued its first two sustainability reporting standards, IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information and IFRS S2 Climate-related Disclosures.[44] Both standards require an entity to disclose information that "is useful to users of general purpose financial reports in making decisions relating to providing resources to the entity."[45] This includes sustainability and climate-related "risks and opportunities that could reasonably be expected to affect the entity's cash flows, its access to finance or cost of capital over the short, medium or long term."[46] The mandatory application of these standards depends on each jurisdiction's endorsement or regulatory processes.

B. The E.U. Corporate Sustainability Reporting Directive (CSRD)

The European Union's Corporate Sustainability Reporting Directive (CSRD) took effect on January 5, 2023.[47] For companies falling within the scope of the CSRD, including many non-E.U. companies, the directive requires disclosure of qualitative and quantitative information related to their environmental, social, and governance impacts based on a double materiality assessment that will eventually inform the development of a strategic business plan. The CSRD aims to standardize climate reporting globally, increase transparency, and minimize greenwashing.

The first step of the CSRD reporting process is to conduct a double materiality assessment, which requires (1) a financial materiality assessment of the impact sustainability matters have on operations[48] and (2) an impact materiality assessment evaluating each step in the company's value chain for the impact on the planet and society.[49] Value chain mapping will be especially challenging for businesses with a global reach or complex product lines. Finally, the CSRD introduces third-party assurance and audit requirements for certain aspects of disclosed information.[50] The scope of the CSRD is wide-reaching and has the potential to affect global companies with activities in the E.U., requiring companies worldwide to evaluate if or when they will be subject to the CSRD as it is applied in four stages between 2024 and 2028.

Cir. 2022), *cert. denied* 143 S. Ct. 2483 (May 15, 2023); Plaquemines Parish v. Chevron USA, Inc., No. 22-30055 (5th Cir. Oct. 17, 2022), *cert. denied* 143 S. Ct. 991 (Feb. 27, 2023); Oakland v. BP PLC, 2023 WL 8179286 (9th Cir. Nov. 27, 2023); Dist. of Col. v. Exxon Mobil Corp., No. 22-7163, 89 F.4th 144 (D.C. Cir. Dec. 19, 2023).

[44] *ISSB issues inaugural global sustainability disclosure standards*, IFRS Found. (June 26, 2023).

[45] *IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information*, IFRS Found. (Dec. 11, 2023).

[46] *IFRS S2 Climate-related Disclosures*, IFRS Found. (Dec. 11, 2023).

[47] Directive 2022/2464, of the European Parliament and of the Council of 14 December 2022, As Regards Corporate Sustainability Reporting, 2022 O.J. (L 322) 15.

[48] *Id.* at Recital 29.

[49] *Id.*

[50] *Id.*

Chapter G: FOOD AND AGRICULTURE
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I. No New Farm Bill, but a Farm Bill Extension

Every five years, Congress considers the Farm Bill, a package of legislation affecting commodity prices, conservation measures, trade and subsidy programs, nutrition and food infrastructure programs (such as the Supplemental Nutrition Assistance Program), loan programs and crop insurance for farmers, rural development and economic growth, agricultural and food research and development, energy programs (biofuel, research programs, etc.), and more. The last Farm Bill was passed in 2018, so negotiations for the next Farm Bill came to a head in 2023. Unfortunately, a Congress caught up in looming shutdowns and leadership challenges was unable to pass a new Farm Bill in 2023, which threatened funding for hundreds of agricultural- and food-based programs. Congress did, however, agree to extend the 2018 Farm Bill through September 2024, providing ten additional months to reach a compromise – albeit by a deadline just weeks before the next Presidential election.[2]

II. Supreme Court Upholds California's Prop 12 and Out-of-State Regulation of Animal Agricultural Production

Wastewater and air emissions are not the only environmental concerns faced by the animal agriculture industry. In 2018, California voters passed Proposition 12 (Prop 12), a measure establishing minimum requirements for operations involved in raising egg-laying hens, breeding pigs, and calves raised for veal.[3] The measure does not only impact California farmers, though, as it prohibits the sale or distribution in the state of California of any egg, pork, or veal products that do not meet the Prop 12 standards.

After years of legal challenges, on May 11, 2023, the United States Supreme Court upheld the law in *National Pork Producers Council v. Ross*, with the majority determining that a state's interest in protecting the public health and welfare can extend to actions that occur beyond the state's boundaries.[4] Accordingly, persons engaged in the distribution of regulated products in the state of California must register with the state (including a separate registration for each location from which they distribute) and provide a certificate of compliance issued by an accredited certifying agent, California Department of Food and Agriculture, or other qualified governmental entity affirming compliance.

III. Golden State Leads the Way on Mandatory Greenhouse Gas Emissions Disclosures

Securities and Exchange Commission ("SEC") to issue its final climate disclosure rule after publishing the proposed rule[5] in early 2022, the State of California stepped in, enacting its

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[1]This chapter was authored by Brandon Neuschafer, BCLP LLP and Nora Faris, BCLP LLP.

[2]*Farm Bill Home*, Farm Serv. Agency: U.S. Dep't of Agric. (last visited Mar. 17, 2024).

[3]Cal. Health & Safety Code §§ 25990-25994 (2010); Cal. Code Regs. tit. 3, §§ 1320-1326 (2022).

[4]Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2023).

[5]The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (April 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

own mandatory climate disclosure and greenhouse gas ("GHG") emissions reporting regime in October 2023—the Climate Accountability Package, or "CAP." California's new disclosure requirements will require many US companies—including large US agribusinesses—to make a public accounting of their GHG emissions and key climate-related financial risks.[6] Responding to the CAP will require an industry-wide effort to measure (and mitigate) emissions up and down the global supply chains and distribution networks for food, fiber, and fuel.

The CAP consists of two landmark laws: the Climate Corporate Data Accountability Act (SB 253)[7] and the Climate-Related Financial Risk Act (SB 261).[8] The former requires the annual third-party verification and public disclosure of companies' GHG emissions, while the latter requires companies to publish, on a biennial basis, reports of their climate-related financial risks and the steps they are taking to reduce or adapt to such risks.[9]

The Golden State's new greenhouse gas and climate disclosure rules have accelerated companies' timelines for assessing emissions baselines by imposing an actual deadline—2026—for compliance with the relevant reporting requirements. And the reach of these California laws sweep well beyond the SEC's proposed rule, covering not only the publicly traded companies contemplated under the SEC proposal, but also capturing partnerships, corporations, limited liability companies, and any other business entities (public or private) doing business in California.

A. Climate Corporate Data Accountability Act (SB 253)

The Climate Corporate Data Accountability Act (SB 253) applies to US companies (public or private) doing business in California "with total [annual] revenues in excess of $1 billion" in the prior fiscal year.[10] (This revenue threshold includes *all* of a company's revenues, not only revenues attributable to the company's business in California.) SB 253 calls for the annual public reporting of a company's scope 1 and 2 emissions beginning in 2026, with annual reporting of scope 3 emissions starting in 2027.[11] For purposes of SB 253, scope 1 emissions are defined as "all direct…emissions [stemming] from sources …a reporting entity owns or directly controls, …including …fuel combustion activities." While scope 2 emissions capture "indirect greenhouse gas emissions from consumed electricity, steam, heating or cooling purchased or acquired by [a] reporting entity."[12] Scope 3 emissions—a broad, catch-all category of emissions—include "indirect upstream and downstream greenhouse gas emissions, other than scope 2 emissions, from sources that the reporting entity does not own or directly control and [that] may include...purchased goods and services, business travel, employee commutes, and processing and use of sold products."[13]

SB 253 requires a company's emissions reports to be audited by an independent third-party assurance provider before being submitted to a non-profit emissions reporting organization designated by California Air Resources Board (CARB).[14] scope 1 and 2

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[6]Dirk Cockrum et al., *California Enacts GHG & Climate Reporting Laws Requiring Major Action by US Companies*, FORVIS (last visited Mar. 17, 2024).
[7]S.B. 253, 2023-2024 Reg. Sess. (Cal. 2023).
[8]S.B. 261, 2023-2024 Reg. Sess. (Cal. 2023).
[9]*See* S.B. 253; S.B. 261.
[10]CAL. HEALTH & SAFETY CODE § 38532(b)(2) (2023).
[11]HEALTH & SAFETY § 38532(c)(1)(A)(i)(I)-(II).
[12]HEALTH & SAFETY § 38532(b)(3)-(4).
[13]HEALTH & SAFETY § 38532(b)(5).
[14]HEALTH & SAFETY § 38532(c)(1).

emissions= audits are to be performed at a "limited assurance" level until 2030, when a "reasonable assurance" standard takes effect.[15] For scope 3 emissions, CARB may establish an assurance standard by January 1, 2027 that will govern reporting before 2030; then, beginning in 2030, audits of scope 3 emission reports will become subject to a "reasonable assurance" audit standard.[16] A copy of the third-party assurance provider's audit report must be submitted with a reporting entity's disclosure of greenhouse gas emissions.[17] The CARB-designated emissions reporting organization is required to make reporting entities' disclosures available on a publicly accessible online platform.[18]

SB 253 authorizes CARB to adopt regulations imposing penalties up to $500,000 per reporting year for insufficient reporting or for failure to report.[19] Reporting entities will not be subject to penalties with respect to misstatements of scope 3 emissions that are "made with a reasonable basis and disclosed in good faith," and from 2027 to 2030, penalties with respect to scope 3 emissions reporting will only be imposed for a failure to file disclosures.[20]

B. Climate-Related Financial Risk Act (SB 261)

The Climate-Related Financial Risk Act (SB 261) applies to any U.S. covered entity that does business in California (excluding certain insurance businesses) with total revenues more than $500 million in the previous fiscal year.[21] (As with SB 253, the revenue threshold for SB 261 includes all revenues, not just those derived from business in California). SB 261 requires these covered entities to publish on their public-facing websites reports of relevant climate-related financial risks on at least a biennial basis, starting January 1, 2026.[22] It also broadly defines a "climate-related financial risk" as a

> [M]aterial risk of harm to immediate and long-term financial outcomes due to physical and transition risks, including, but not limited to, risks to corporate operations, provision of goods and services, supply chains, employee health and safety, capital and financial investments, institutional investments, financial standing of loan recipients and borrowers, shareholder value, consumer demand, and financial markets and economic health.[23]

Disclosures under SB 261 must be made in accordance with a recognized standard accepted under the statute, such as the Task Force on Climate-Related Financial Disclosures framework or the International Financial Reporting Standards Sustainability Disclosure Standards issued by the International Sustainability Standards Board.[24]

SB 261 also calls for CARB to contract a nonprofit climate reporting organization to prepare, on a biennial basis, a public report summarizing climate-related financial risks from companies' public disclosures.[25] The climate reporting organization will also aid in

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[15] HEALTH & SAFETY § 38532(c)(1)(F)(ii).
[16] CAL. HEALTH & SAFETY CODE § 38532(c)(1)(F)(iii).
[17] HEALTH & SAFETY § 38532(c)(1)(F)(i).
[18] HEALTH & SAFETY § 38532(e)(1).
[19] HEALTH & SAFETY § 38532(f)(2)(A).
[20] HEALTH & SAFETY § 38532(f)(2)(B)-(C).
[21] HEALTH & SAFETY § 38533(a)(4).
[22] CAL. HEALTH & SAFETY CODE § 38533 (b)(1)(A).
[23] HEALTH & SAFETY § 38533 (a)(2).
[24] HEALTH & SAFETY § 38533 (b)(1)(A)(i) & (b)(4)(A)(1)(B)(1).
[25] HEALTH & SAFETY § 38533(d)(1)(A).

enforcement by identifying inadequate or insufficient reports.[26] Companies may face administrative penalties of up to $50,000 in a reporting year for inadequate reporting or for failure to publish a report.[27]

C. Implementation of California's Climate Disclosure Laws

Before the reporting obligations in SB 253 and 261 take effect, CARB must issue regulations to clarify the implementation and administration of the laws' climate-related financial risk and greenhouse gas emissions disclosure obligations. As the regulated community awaits further guidance from CARB on the scope and application of the California laws, it remains to be seen whether the SEC will adapt its own disclosure rule in light of California's more expansive reporting regime.

IV. PFAS

No discussion of 2023 would be complete without a discussion of the ubiquitous and ill-defined family of chemicals called per- and polyfluoroalkyl substances (PFAS). From a food and agriculture perspective, it has been the state-level "laboratories of democracy" where action has been most prevalent.

The nature of many PFAS chemicals as grease- and water-resistant means there has been widespread use in food production and packaging. At least a dozen states have enacted laws regulating the use or presence of PFAS chemicals in food packaging, with at least a dozen additional states considering their own actions.[28] New York, California, and Maine – the vanguards in this space – all had laws that took effect the beginning of 2023, and more state laws continue to become effective on a rolling basis.

In general, the laws have become more expansive and more proscriptive as time goes on. Early laws, like in California and New York, prohibited the intentional addition of PFAS chemicals in certain types of fiber-based packaging that come into direct contact with foods.[29] Subsequent laws, however, began chipping away at some of the qualifiers, such as removing the direct food contact requirement, expanding beyond intentionally added PFAS to capture any PFAS, applying to all food containers (not just those made out of plant fibers), or defining food packaging to include things like shipping containers and pallets.

EPA and the states have also been taking action with respect to PFAS chemicals in pesticide products and pesticide product packaging. In the last year, the EPA has removed certain PFAS chemicals from its approved inerts ingredients list[30] and issued TSCA orders directing a packaging supplier that supplies to the pesticide industry (among other industries) to cease producing PFAS chemicals as part of its production of fluorinated

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[26] HEALTH & SAFETY § 38533(d)(1)(C).
[27] HEALTH & SAFETY § 38533(e)(2).
[28] *See, e.g.*, *PFAS In Food Packaging: State-by-State Regulations*, BCLP (last updated Sept. 6, 2023).
[29] *Id.*
[30] Removal of PFAS Chemicals from Approved Inert Ingredient List for Pesticide Products, Notice of Decision, 87 Fed. Reg. 76,488 (Dec. 14, 2022).

HDPE containers.[31] Several states have begun passing laws prohibiting or regulating the intentional use of PFAS chemicals in pesticide products and packaging.[32]

[31] *See* *Per- and Polyfluoroalkyl Substances (PFAS) in Pesticide and Other Packaging*, U.S. ENVTL. PROT. AGENCY (last updated Feb. 14, 2024).
[32] *See, e.g.*, *Products With Added PFAS*, MINN. DEP'T OF AGRIC. (last visited Jan. 28, 2024); H.P. 1501, 130th Me. Leg., 2nd Reg, Sess. (Me. 2022).

Chapter H: FOREST RESOURCES
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I. FEDERAL CASES

In *Cascadia Wildlands v. Bureau of Land Management*,[2] non-profit conservation groups challenged BLM's promulgation of a Final Rule (Forest Management Decision Protest Process and Timber Sale Administration) that eliminated a 15-day administrative protest process for forest management decisions, including advertised timber sales. Plaintiffs argued that BLM violated the APA by failing to provide a reasoned explanation for its change in policy and failing to respond to public comment and that the Final Rule violates the Federal Land Policy and Management Act (FLPMA) because it does not provide for adequate public participation or objective administrative review of agency decisions. The court granted BLM's motion for summary judgment, affirming the Final Rule and a challenged timber sale and finding that BLM had adequately responded to public comments in accordance with the APA. The court also found that BLM met the "reasoned analysis" requirement of the APA because (1) BLM demonstrated awareness that it was changing its position from the 1984 Rule; (2) the new policy is permissible under the FLPMA; (3) in responses to public comment, BLM sufficiently explained the Final Rule was a better policy because it encouraged earlier intervention in resource management decisions and would expedite implementation of forest management decisions; and (4) BLM provided good reasons for the Final Rule, including improving administrative efficiencies and more quickly effectuating decisions about wildfire risks and timber sales. The court also held that the Final Rule did not violate the FLPMA because the FLPMA establishes only broad policy directives, not specific obligations of BLM. As a result, the 15-day protest process was not required to ensure adequate participation and objective administrative review under the FLPMA when there were other public participation opportunities available through NEPA and administrative review through the Interior Board of Land Appeals.

In *Alliance for the Wild Rockies v. Petrick*, the Ninth Circuit Court of Appeals vacated two district court rulings involving an ongoing dispute over the Hanna Flats logging project in the Idaho panhandle (Project).[3] When the U.S. Forest Service (USFS) approved the Project, it invoked a categorical exclusion to NEPA under the Healthy Forest Restoration Act (HFRA) for projects in the wildland-urban interface ("an area within or adjacent to an at-risk community that is identified in a community wildfire protection plan"[4]). The Alliance for the Wild Rockies (Alliance) challenged the Project, arguing that it does not qualify for the exclusion. The district court agreed, finding that the community plan USFS relied on defined wildland-urban interface differently than HFRA. The USFS then issued a supplement to its decision memo explaining the application of the exclusion further, but the district court found it still did not justify the USFS's action and granted Alliance's request for preliminary injunction. The USFS appealed both decisions. The Ninth Circuit first held that Alliance provided only vague and generalized objections that

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[1] Author contributors to this report were Lindsey Huang, Kelly Soldati, Paige Whidbee from Perkins Coie LLP; Sara Melton, American Forest Resource Council; Kirstin K. Gruver, Beverage and Diamond, PC. This report was edited by Robert A. Maynard and Janet M. Howe, from Perkins Coie LLP. This report covers many (but, due to space constraints, by no means all) of the notable developments in forest management law in 2023. Any opinions of the authors in this report should not be construed to be those of Perkins Coie LLP.

[2] 664 F.Supp.3d 1180 (D. Or. 2023).

[3] 68 F.4th 475, 483 (9th Cir. 2023).

[4] 16 U.S.C. § 6511(16)(A).

were not sufficient notice to the USFS of its concerns and the subject of its complaint. The court thus vacated the first decision and remanded for the district court to consider Alliance's alternative argument that such comments were not necessary to challenge a project exempted from NEPA analysis by a categorical exclusion. Then, the Ninth Circuit vacated the preliminary injunction, reasoning that the district incorrectly interpreted HFRA. Under HFRA, an area qualifies as a "wildland-urban interface" if it is "within or adjacent to an at-risk community." A community is "at-risk" if it is "within or adjacent to Federal land."[5] The district court collapsed these distinct provisions by requiring the project itself to border the at-risk community. Under this interpretation, even if a project fell within a properly defined wildland-urban interface, the project would not be valid unless it also directly borders or abuts an at-risk community. This is not what HFRA requires.

In *Los Padres ForestWatch v. U.S. Forest Service,* a Central District of California district court reviewed USFS's approval of the Reyes Peak Forest Health and Fuels Reduction Project (Project).[6] The Project involves "thinning of tree stands, removal of downed material, and prescribed burning to reduce surface/ladder fuels, decrease fire intensity, improve the health of the remaining trees, and improve forest resilience, as well as create a fuel break to provide for firefighter and public safety."[7] USFS relied on three categorical exclusions for its approval: (1) 36 C.F.R. § 220.6(e)(6) (CE-6), which allows an agency to skip an EA or EIS if the agency's project is for "timber stand improvement activities" and does not have "extraordinary circumstances" that would warrant further analysis; (2) HFRA, 16 U.S.C. § 6591b (Insect and Disease Infestation); and (3) HFRA, 16 U.S.C. § 6591d (Wildfire Resilience). The court granted USFS's motion for summary judgment, finding that the Project fell within CE-6 because it allows USFS to thin trees without regard to the size of the trees, even commercially viable trees that reduce the overall fire hazard. Further, the court agreed that USFS appropriately relied on the HFRA categorical exclusions because, among other things, the Project is specifically designed to retain and promote large trees. And the court found no extraordinary circumstances precluding the application of these exclusions. Moreover, USFS's Decision Memo, which relied on a biological assessment, sufficiently analyzed and clearly articulated why the Project was unlikely to adversely affect the California condor and its critical habitat, as well as other sensitive species. The court also granted summary judgment on plaintiffs' claims that USFS violated the Roadless Rule and HFRA.

In *Los Padres ForestWatch v. U.S. Forest Service*,[8] the Ninth Circuit previously issued a mixed ruling in a challenge to the Tecuya Ridge Project (Project), vacating the district court's summary judgment order and remanding to the USFS to substantiate its determination that 21-inch trees are generally small-diameter trees in the Project area.[9] On remand, the district court for the Central District of California concluded that USFS sufficiently explained its reasoning for classifying trees up to 21-inches diameter at breast height (DBH) as generally small timber by demonstrating that the Project area is overgrown with small-diameter timber; that the focus of the Project is to thin small-diameter timber within the 0-14-inch DBH range; and that a few middle and upper-diameter trees will be thinned to prevent the spread of wildfires, all of which is consistent with the Roadless Rule's focus on areas that are overgrown with small-diameter trees.

In *Knezovich v. United States*, the Tenth Circuit assessed whether USFS acted negligently in its response to the Roosevelt Fire in Wyoming.[10] Plaintiffs, victims of the

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[5] *All. for the Wild Rockies*, 68 F.4th at 495 (citing 16 U.S.C. § 6511(16)(A), (a)(A)(ii)).
[6] No. CV 22-2781-JFW (SKX), 2023 WL 5667533 (C.D. Cal. July 19, 2023).
[7] *Id*. at *2.
[8] No. 2:19-cv-05925-VAP-KSx, 2022 WL 18356465 (C.D. Cal. Dec. 5, 2022).
[9] 25 F.4th 649, 664 (9th Cir. 2022).
[10] 82 F.4th 931 (10th Cir. 2023).

fire, sued under the Federal Tort Claims Act (FTCA). The United States argued that the FTCA's discretionary function exception applies and precludes plaintiffs from seeking damages from the United States for conduct "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[11] After assessing a two-step analysis—(1) "whether the action is a matter of choice for the acting employee"[12]; and (2) "whether that judgment is of the kind that the discretionary function was designed to shield"[13]—the court concluded that USFS's decisions were discretionary, noting that the USFS Manual and Initial Decision did not require USFS to suppress the fire in a specific way, or limit USFS's ability to make a judgment call in its initial response to a fire. The court reasoned that USFS exercised "policy judgment of the sort [that] the exception is meant to protect."[14]

In *Earth Island v. Muldoon*, the Ninth Circuit affirmed an Eastern District of California ruling that the National Park Service (NPS) sufficiently evaluated the environmental impacts of two vegetation thinning projects preceding controlled burns in Yosemite National Park.[15] The 2021 Wawona Project and the 2022 Yosemite Valley Project were both approved under the Department of the Interior's Categorical Exclusion B-1, the so-called "minor-change exclusion," which includes "changes or amendments to an approved plan when such changes would cause no or only minimal environmental impact," exempting the projects from most NEPA requirements.[16] Plaintiff claimed that NPS's approval of the Projects using B-1 was arbitrary and capricious and that there were extraordinary circumstances preventing the agency's use of a categorical exclusion. The court disagreed, holding that the thinning projects validly fall under B-1 because they are changes to the NPS's 2004 comprehensive Fire Management Plan that are consistent with the Plan, contributing to the Plan's primary goals and using its methods with only minor modifications.[17] Further, the court held that the agency supported and explained its conclusion that the modifications would have no or only minimal environmental impacts. The court also found no extraordinary circumstances, rejecting plaintiff's argument that the Projects were highly controversial because some scientists dispute the efficacy of thinning to reduce the risk of wildfire and found that plaintiffs mischaracterized the Projects and that to the extent a controversy exists, it concerns the Plan.

In *Greater Hells Canyon Council v. Wilkes*,[18] a district of Oregon magistrate judge issued findings and recommendations in the challenge to the USFS's "Revised Continuation of Interim Management Direction Establishing Riparian, Ecosystem and Wildlife Standards for Timber Sales," ("Eastside Screens"). The Eastside Screens set interim management standards for six national forests in eastern Oregon and southwest Washington and included a variety of standards, including the prohibition on removal of trees 21-inch DBH or larger outside of late and old structure stands, i.e. an area where the minimum number of large trees per acre has been reached. The Amendment replaced this standard with a more flexible guideline that requires the retention of trees 150 years old or older but allows for the limited removal of certain trees 21- to 30-inches DBH, depending

[11] *Id.* at 936 (citing to 28 U.S.C. § 2680(a)).
[12] *Id*. at 936 (citing Berkovitz v. United States, 486 U.S. 531, 536 (1988)) .
[13] *Id*. (citing Berkovitz, 486 U.S. at 536)
[14] *Id*. at 942. (citing Hardscrabble Ranch, L.L.C. v. United States, 840 F.3d 1216, 1222 (10th Cir. 2016) (quoting United States v. Gaubert, 499 U.S. 315, 325 (1991)).
[15] 82 F.4th 624 (9th Cir. 2023).
[16] *Id.* at 632; *See* 42 U.S.C. §§ 4321 *et seq.*
[17] *Earth Island*, 82 F.4th at 632-33.
[18] No. 2:22-CV-00859-HL, 2023 WL 6443823 (D. Or. Aug. 31, 2023).

on the tree species and its growth potential.[19] Environmental groups challenged the decision to approve the amendment as violating the National Forest Management Act ("NFMA"), NEPA, and the ESA. In its findings and recommendations, the court agreed with plaintiffs that the expected effects of the amendment were "significant," because (1) the "amendment is massive in terms of scope and setting"; (2) there is substantial uncertainty in how USFS will apply the amendment; and (3) plaintiffs "raised plausible concerns that the amendment may result in large tree removal in and around riparian areas," affecting aquatic species.[20] As a result, the amendment required the preparation of an EIS. The court also found that USFS violated the NFMA by failing to conduct a pre-decisional administrative objection resolution process.[21] And the court found that USFS violated the ESA by failing to undergo section 7 consultation with the U.S. Fish and Wildlife Service and National Marine Fisheries Service and to address the effects of the amendment on aquatic species through a biological assessment.[22] Objections to the court's findings and recommendation were filed this fall and together were referred to the district court.

Two cases, *State of Alaska v. U.S. Department of Agriculture*[23] and *Inside Passage Electric Cooperative v. U.S. Department of Agriculture*,[24] have been filed in the Alaska District Court challenging the reinstatement of the 2001 Roadless Area Conservation Rule (Roadless Rule),[25] which prohibits timber harvest and road construction in 9.37 million acres of designated Inventoried Roadless Areas (IRAs) in the Tongass National Forest in Southeast Alaska.[26] The 2001 Roadless Rule was rolled back in 2020 but reinstated in 2023.[27] In the first case, the state of Alaska alleges that the Secretary of the Department of Agriculture (DOA) acted without congressional authorization and that the reinstatement of the rule "through executive action" stifles the State's interest in economic and social development, negatively affects state revenues, and increases state operating costs.[28] The state argues that the DOA made an abrupt policy reversal reinstating the 2001 Roadless Rule and has failed to provide a reasoned explanation for disregarding the facts and circumstances underlying the 2020 rollback of the 2001 rule.[29] The state also alleges the reinstatement violates multiple acts, including the Alaska Statehood Act, Alaska National Interest Lands Conservation Act, Tongass Timber Reform Act, as well as NEPA, NFMA,

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[19] *Id*. at *2. In 2021. The Forest Service reassessed the Eastside Screens, the "Forest Management Direction for Large Diameter Trees in Eastern Oregon," and adopted the "Old Tree and Large Tree Guidelines" Amendment.

[20] *Wilkes,* 2023 WL 6443823 at *10, *12, *16.

[21] *Id.* at *7; *See* 16 U.S.C.A. § 1600 ("[P]lan amendments...proposed by the Secretary of Agriculture or the Under Secretary for National Resources and Environment are not subject to" the objection process and "[a] decision by the Secretary or Under Secretary constitutes the final administrative determination."; 36 C.F.R. § 219.51(b)). Another court reached the same conclusion in Blue Mts. Biodiversity Project v. Wilkes, No. 1:22-cv-01500 (D. Or. Apr. 27, 2023), which was referred by the Magistrate Judge to the district court.

[22] *Wilkes,* 2023 WL 6443823 at *9.

[23] No. 3:23-cv-00203-HRH (D. Alaska Sept. 8, 2023).

[24] No. 3:23-cv-00204-SLG (D. Alaska Sept. 8, 2023).

[25] Special Areas: Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

[26] Special Areas; Roadless Area Conservation; National Forest System Lands in Alaska, 85 Fed. Reg. 68,688 (Oct. 29, 2020) (to be codified at 36 C.F.R pt. 294).

[27] Special Areas; Roadless Area Conservation; National Forest System Lands in Alaska, 88 Fed. Reg. 5252 (Jan. 27, 2023) (to be codified at 36 C.F.R. pt. 294).

[28] Complaint, State of Alaska v. U.S. Dept. of Ag., No. 3:23-cv-00203-HRH, at 9 (D. Alaska Sept. 8, 2023).

[29] *Id.* at 19.

and the Multiple-Use Sustained-Yield Act.[30] Similarly, in the second lawsuit Inside Passage Electric Cooperative and the Alaska Power Association claim: (1) the Secretary acted without authority; and (2) and the decision to reinstate the Roadless Rule prevents plaintiffs from pursuing hydroelectric and geothermal energy projects aimed at reducing utility costs for local communities because of the Rule's prohibition on road construction.[31] The two cases have been consolidated, along with a third similar complaint, federal defendants have filed their answers, and briefing on the merits will begin in spring of 2024.[32]

In *American Forest Resource Council v. United States*, seven consolidated cases were on appeal.[33] In these cases, the D.C. Circuit Court of Appeals reversed the D.C. District Court's grant of summary judgment and an injunction in favor of the plaintiffs. The Circuit Court held: (1) the expansion of the Cascade-Siskiyou National Monument under the Antiquities Act through Presidential Proclamation 9564, and the BLM 2016 Western Oregon Resource Management Plans (2016 RMPs), did not violate the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937 (O&C Act)[34]; and (2) striking down the injunction compelling the BLM to, in perpetuity, "sell or offer for sale in each future fiscal year no less than the declared annual sustained yield capacity of timber from timberlands on the O&C land."[35] Notably, the court held that the O&C Act and Antiquities Act are compatible and can be read harmoniously, such that the O&C Act grants the Secretary of the Interior discretion to classify those O&C "timberlands" subject to "permanent forest production," which are not fixed or defined under the O&C Act.[36] Therefore, the court concluded that the O&C Act allows land to be classified as "timberland or not," and Proclamation 9564 had reclassified a "modest" 40,000 acres of O&C land "by implication."[37] The court also held that the Secretary could issue the BLM's 2016 RMPs under the O&C Act, and the 2016 RMPs "reasonably harmonize" the Secretary's duties under the O&C Act with their obligations under the ESA and CWA.[38] The parties have filed a petition with the U.S. Supreme Court for a *writ of certiorari*.[39]

In *Murphy Company v. Biden*, a divided Ninth Circuit panel affirmed the district court's decision granting summary judgment in favor of the United States and upheld the 2017 expansion of the Cascade-Siskiyou National Monument in southwestern Oregon and northwestern California under Presidential Proclamation 9564,[40] issued under the Antiquities Act, which added 48,000 acres to the Monument.[41] The Monument's expansion included 40,000 acres of lands managed pursuant to the O&C Act, which reserved O&C lands for timber production to benefit local communities, effectively ending timber harvest on that previously reserved land.[42] According to plaintiff-appellants, removing those acres

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[30] *Id.* at 39.
[31] Complaint, Inside Passage Elec. Coop. v. U.S. Dep. of Ag., No. 3:23-cv-00204-SLG, at 3 (D. Alaska Sept. 8, 2023).
[32] Order, *Inside Passage Electric Coop.*, No. 3:23-cv-00204 (D. Alaska Sept. 12, 2023) (consolidating cases No. 3:23-cv-00204, No. 3:23-cv-00203, and No. 1:23-cv-00010).
[33] 77 F.4th 787 (D.C. Cir. 2023).
[34] *See id.* at 799 (citing generally 43 U.S.C. §§ 2601-34).
[35] *See id.* at 790; *see also* Memorandum Order, American Forest Resource Council v. Nedd, No. 1:15-cv-01419, 2021 WL 6692032, at *6 (D.D.C. Nov. 19, 2021).
[36] *Am. Forest Res. Council*, 77 F.4th at 799-800.
[37] *Id.*
[38] *Id.* at 802.
[39] Am. Forest Res. Council v. United States, 77 F.4th 787 (D.C. Cir. 2023), *petition for cert. filed,* No. 23-525 (U.S. Nov. 15, 2023).
[40] Murphy Co. v. Biden, 65 F.4th 1122, 1126 (9th Cir. 2023); *See* Proclamation No. 9564, 82 Fed. Reg. 6145 (Jan. 12, 2017).
[41] *Murphy Co.*, 65 F.4th at 1126.
[42] 43 U.S.C. §§ 2601-34.

from sustained yield timber production was a clear violation of the O&C Act and overstepped presidential authority. The court held that "timber production was not the sole purpose that Congress envisioned for the more than two million acres of O&C Lands" and upheld the district court's conclusion that the Antiquities Act afforded the President substantial flexibility to modify national monuments.[43] The dissent warned of "a troubling trend of increased judicial deference to presidential uses of the Antiquities Act" that "is unsustainable" and urged a "return to the textual strictures of the Antiquities Act."[44] Plaintiffs-Appellants petitioned for rehearing *en banc*, which was denied,[45] and have filed a petition with the U.S. Supreme Court for a *writ of certiorari*.[46]

In *Oregon Wild v. U.S. Forest Service*,[47] the Oregon District Court granted summary judgment in favor of USFS, upholding the agency's application of the "timber stand and/or wildlife habitat improvement" categorical exclusion (CE-6) to the South Warner Project, Bear Wallow Project, and Baby Bear Project (Projects) on the Fremont-Winema National Forest in Oregon.[48] Plaintiffs challenged the agency's use of CE-6, arguing that no reasonable interpretation of CE-6 would permit 29,000 acres of national forest land, requesting that the court infer and impose an acreage limitation onto CE-6 for commercial harvesting activities. The court declined to do so and found that nothing in the text of CE-6 limits the applicable project acreage. USFS reasonably determined that the projects' authorized activities were "squarely within those permitted by CE-6," thinning and prescribed burning to improve wildlife habitat and favorable timber stand conditions.[49] The court also rejected plaintiff's claim that USFS lacked the authority to promulgate CE-6. Plaintiffs appealed to the Ninth Circuit and have filed their Opening Brief. Defendants' Answering Brief is due in spring of 2024.

II. Federal Policy

A. USDA Forest Service Proposed Rule for Carbon Capture and Storage Exemption

On November 3, 2023, USFS announced a proposed rule to allow carbon capture and sequestration projects on national forests and grasslands. Currently, 36 CFR § 251.54(e)(1)(ix) prohibits the storage of hazardous substances on USFS lands and sets initial screening criteria for the definition of hazardous substances. The proposed rule would define "carbon capture and storage" "in such a manner as to qualify the carbon dioxide stream for the exclusion from classification as a 'hazardous waste' pursuant to the United States Environmental Protection Agency regulations at 40 CFR § 261.4(h)."[50] This would permit USFS to review proposals and applications for carbon capture and storage and to authorize proposed carbon capture and storage on USFS lands, where the agency deems it appropriate. If passed, this rule would support the Biden administration's goal to reduce greenhouse gas emissions by 50 percent below the 2005 levels by 2030.

B. Updates on Executive Order 14072 on Strengthening the Nation's Forests

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[43] *Id.* at 1133.
[44] *Id.* at 1143.
[45] Order, Murphy Co. v. Biden, No. 19-35921 (9th Cir. Aug. 30, 2023).
[46] Murphy Co. v. Biden, 65 F. 4th 1122 (9th Cir. 2023), *petition for cert. filed*, No. 23-525 (U.S. Nov. 15, 2023).
[47] No. 1:22-cv-01007, 2023 WL 5002473 (D. Or. Aug. 4, 2023).
[48] *Id*. at *2; *See* 36 C.F.R. § 220.6(e)(6) (2008).
[49] *Id.* at *6.
[50] Land Uses; Special Uses; Carbon Capture and Storage Exemption, 88 Fed. Reg. 75,530 (proposed Nov. 3, 2023) (to be codified at 36 C.F.R pt. 251).

On April 22, 2022, President Biden signed Executive Order (EO) 14072 on Strengthening the Nation's Forests, Communities, and Local Economies. In April 2023, under this EO, USFS and BLM released the Mature and Old-Growth Forests inventory report identifying more than 32 million acres of old-growth and around 80 million acres of mature forest across 200 types of forests. USDA and DOI also released a joint reforestation report, which includes reforestation targets, assessments, and recommendations for increased capacity for seeds and nurseries. In December 2023, USDA also announced a proposal to amend all 128 forest land management plans to conserve and steward old-growth forest conditions on national forests and grasslands nationwide.[51]

III. STATE CASES

In *James v. PacifiCorp*,[52] an Oregon jury found utility PacifiCorp grossly negligent in causing a group of Labor Day 2020 fires in class-wide liability findings, and the jury awarded almost $89.9 million—$71.9 million in compensatory damages and $17.9 million in punitive damages[53]—to named plaintiffs representing the class. Following a seven-week trial, the jury concluded that PacifiCorp's conduct with respect to four fires was reckless and willful, constituted a private and public nuisance, and constituted a trespass, but not an intentional taking that could lead to a finding of inverse condemnation. Key to these findings were plaintiffs' allegations that PacifiCorp left overgrowing or dying trees near its lines, ignored weather forecasts predicting the severity of the upcoming windstorm, and failed to take preventative action like cutting off power even after it learned fires were beginning to break out. Plaintiffs also alleged that PacifiCorp destroyed evidence by failing to secure and preserve burned equipment and other relevant items, despite policy requiring PacifiCorp to do so. In addition, plaintiffs pointed to PacifiCorp's decision to mark some areas in its service zone as less important than others, claiming that the utility showed a "'callous indifference to the 83% of its customers that are in the lesser-consequence areas, who were never told that their power company had chosen not to care about them in the face of a historic windstorm.'"[54] Almost all named plaintiffs were ultimately awarded a full recovery along with $3 to $4.5 million each in noneconomic damages.

In *LFF IV Timber Holding LLC v. Heartwood ForestLand Fund IV, LLC*,[55] LFF IV Timber Holding Company and Lyme Mountaineer Timberlands II LLC ("Lyme") allege they were left with a carbon offset credit shortfall after the former property owner, Heartwood Forestland Fund IV, miscalculated the amount of carbon sequestered in more than 97,000 acres of forestland property in West Virginia to secure carbon offset credits from the California Air Resources Board (CARB). Lyme purchased the forestland in a 2017 transaction that Lyme alleges allowed Heartwood to keep its initial credit disbursement but also obliged Heartwood to hold Lyme harmless from losses or other problems arising from Heartwood's initial carbon capture calculations. During a carbon inventory update, Lyme discovered that carbon stocks were significantly below what was

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[51] Press Release, U.S. Dep't of Agric., USDA Proposes First-of-its Kind National Forest Plan Amendment to Conserve and Steward Old Growth Forests (Dec. 19, 2023).

[52] Final Verdict at 5, James v. Pacificorp, No. 20CV33885 (Or. Cir. Ct. Multnomah Cnty. June 9, 2023).

[53] Verdict Form – Punitive Damages, James v. Pacificorp, No. 20CV33885 (Or. Cir. Ct. Multnomah Cnty. June 14, 2023).

[54] Cara Salvatore, *PacifiCorp Owes $72M+ To Prop. Owners After Fires*, LAW360 (June 12, 2023, 2:43 PM) (subscription required).

[55] Complaint, LFF IV Timber Holding LLC v. Heartwood ForestLand Fund IV, LLC, No. 23CVS001175 (N.C. Super. Ct. Orange Cnty. Oct. 20, 2023).

indicated on annual reports, which had been based on Heartwood's calculations. Lyme claims the sudden shortfall obliged it to purchase additional offset credits, called a reversal, from the CARB at a cost of over $1 million. Lyme seeks to recover these costs under the terms of the 2017 transaction, and it also seeks to recover anticipated additional charges related to the carbon project—such as legal and investigation fees—based on a claim of unjust enrichment. This case has been to the North Carolina Business Court.[56]

In *Standing Trees Inc. v. State of Vermont*,[57] a Vermont judge dismissed a lawsuit seeking to block the harvesting of trees from state forests and parklands because the environmental group and individual plaintiffs lacked standing. The lawsuit was prompted by Vermont's Camel Hump State Forest management plan, "which calls for logging roughly 3,800 acres of forest over the next 15 years."[58] Plaintiffs asked to block state agencies from authorizing new timber contracts on state lands until new rules considering environmental and climate impacts are adopted. Plaintiffs also alleged that the policies violated a state statute—Vermont's Global Warming Solutions Act—that requires state agencies to consider global warming and flood resiliency in their decision-making procedures. The court found that plaintiffs lacked constitutional standing because none of the statutes plaintiffs cited provided a private right of action, and plaintiffs lacked a cognizable, non-speculative injury as to any of their claims. At bottom, all the plaintiffs could show was that the agencies *might* approve a harvest in the Camel Hump State Forest after a robust review process—not that the harvest would definitely be approved, nor that the robust review process would lack the climate considerations about which plaintiffs were concerned.

IV. STATE POLICY

A. Oregon Law Relating to the Prevention of Wildfire in Federal Forest

A new Oregon law instructs the Oregon Department of Forestry to step up its efforts to help USFS manage public forests in Oregon. Senate Bill 872 calls on the Oregon Department of Forestry to "endeavor to further shared stewardship to decrease wildfire risk across Oregon through increased partnership with federal agencies," with "a focus on protecting lands and rural communities within the wildland-urban interface."[59] The law enumerates several activities the Department could perform to meet this goal, including: increasing forest thinning, reducing ladder fuels and other hazardous fuel loading, restoring meadowland, increasing biomass utilization, and increasing post-disturbance recovery and restoration activities. The law also instructs the Department to request funding from relevant federal agencies for these activities. In executing its duties under this law, the Department must promote the long-term ecological health of any landscape by implementing broadly accepted scientific principles of forestry.

B. California Wildfire Regulation Update.

In California, regulators are writing new defensible space rules to implement A.B. 3074,[60] a 2020 law that created an "ember-resistant zone" within five feet of a structure,

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[56]Peter McGuire, *NC Co. Overvalued Forest Carbon Offset, Buyer Alleges,* LAW360 (Oct. 24, 2023, 7:38 PM) (subscription required).
[57]Order Granting State's Motion to Dismiss, Standing Trees Inc. v. State, No. 22-CV-04195 (Vt. Super. Ct. Sept. 1, 2023).
[58]Christian Wade, *Vermont judge rejects lawsuit over logging on state lands,* THE CENTER SQUARE (Sept. 12, 2023).
[59]S.B. 872, 2023 Reg. Sess. (Or. 2023).
[60]A.B. 3074, 2023 Reg. Sess. (Cal. 2023).

Fire experts say that maintaining a defensible space that lacks or has only limited greenery or other combustible items (such as decorative pieces, attached wooden fencing, etc.) around a structure will significantly reduce the fire risk associated with that structure. Motivated by destructive wildfires in recent years and rapidly rising insurance premiums on California structures, the new rules heighten the already-existing defensible space requirements.[61] Out of concern that an overly aggressive rule that disallowed any vegetation or combustible items within five feet of a structure would frustrate and prompt resistance from the public at large, California regulators are currently weighing where to draw the line, considering items such as parallel fencing, small plants with space between them, green lawns, groundcover, or mature trees that are sufficiently cut back from a building.[62] The new rules were supposed to be finalized in January 2023, but disagreements have led to delays. Once finalized, the new rules will apply to new constructions beginning in 2025 and existing homes in 2026.[63]

[61] Lauren Sommer, *With wildfires growing, Cal. writes new rules on where to plant shrubs*, NPR (Oct. 20, 2023, 5:00 AM).
[62] *Id.*; *See* CAL. BD. OF FORESTRY AND FIRE PROT., AB 3074 ZONE 0 WORKSHOP PRESENTATION (2022).
[63] Sommer, *supra* note 61.

Chapter I: INDIGENOUS LAW
2023 Annual Report[1]

Following several notable years for Indigenous law practitioners and reporters, 2023 was comparatively quiet, except for the issuance of one extremely significant Supreme Court decision. Various fact-specific cases at the federal district court and appellate level demonstrated the complex interplay between environmental justice issues and Indigenous peoples and governments. Although not specific to this area of law, Congress generally failed to move legislation across the finish line, and some federal courts and agencies found themselves wrestling with the tension caused by the Biden administration's efforts to restore policies the Trump administration had tried to dismantle.

I. JUDICIAL DEVELOPMENTS

A. United States Supreme Court

1. *Haaland v. Brackeen*[2]

On June 15, 2023, the U.S. Supreme Court reaffirmed the validity of the Indian Child Welfare Act (ICWA),[3] the landmark 1978 federal law governing child welfare matters involving Indian children which "[a]mong other things . . . requires a state court to place an Indian child with an Indian caretaker, if one is available."[4] Following a spate of other cases challenging ICWA since 2010, plaintiffs – including Texas, Louisiana, Indiana, and various individuals – filed suit in the U.S. District Court for the Northern District of Texas (District Court). The District Court initially granted summary judgment for plaintiffs in 2018, finding ICWA and related regulations violated the U.S. Constitution and the Administrative Procedure Act.[5] Defendants, including the United States, various government agencies, and intervening tribal governments, appealed and, in 2019, the Fifth Circuit Court of Appeals, reversed, finding ICWA is "constitutional because [it is] based on a political classification that is rationally related to the fulfillment of Congress's unique obligation toward Indians."[6] The Fifth Circuit panel held ICWA preempted conflicting state laws, did not violate the anti-commandeering doctrine or the non-delegation doctrine of the U.S. Constitution, and the related regulations were valid.[7] Plaintiffs then sought, and received, *en banc* review,[8] resulting in eight separate opinions analyzing ICWA's constitutionality, none of which garnered a majority.[9] As a result, portions of the original District Court decision holding ICWA unconstitutional were upheld without a precedential

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[1]This Chapter, which addresses the year's significant cases and developments in Indigenous Law, was prepared by attorneys and staff of Hobbs, Straus, Dean & Walker, LLP, Oklahoma City, Oklahoma: William R. Norman, Jr., Michael D. McMahan, Jonathan Sutton, M. Vincent Amato, Gwendolyn Bell, and Winyan-Was'Te James.
[2]599 U.S. 255 (2023).
[3]Pub. L. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901-1963).
[4]*Brackeen*, 599 U.S. at 264.
[5]*See* Brackeen v. Zinke, Civil Action No. 4:17-cv-00868-O (N.D. Tex. 2018); *see also* Administrative Procedure Act (as amended), Pub. L. 79-404 § 10(e), 60 Stat. 237, 243-44 (1946) (codified at 5 U.S.C. § 706).
[6]Brackeen v. Bernhardt, 937 F.3d 406, 441 (5th Cir. 2019).
[7]*Id.* at 445.
[8]Brackeen v. Bernhardt, 942 F.3d 287, 289 (5th Cir. 2019).
[9]*See* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021).

opinion.[10] The U.S. Supreme Court granted certiorari.

The Supreme Court "reject[ed] all of petitioners' challenges to the statute, some on the merits and others for lack of standing"[11] in one of the most important nationally applicable Indian law cases in the last decade. First, the Supreme Court held ICWA was consistent with Congress's Article I authority and, as such, the act lawfully preempts conflicting state laws.[12] Second, the Supreme Court rejected all anticommandeering challenges to ICWA on the merits, finding plaintiffs' claims did not implicate the Tenth Amendment to the U.S. Constitution.[13] Finally, the Supreme Court dismissed the remaining equal protection and nondelegation doctrine challenges to ICWA, holding no plaintiff had standing to challenge ICWA on that basis.[14]

2. *Arizona v. Navajo Nation*[15]

On June 22, 2023, the U.S. Supreme Court held the United States lacks an affirmative treaty obligation to identify and account for Navajo Nation (Nation) water rights in the Colorado River Lower Basin (Basin),[16] rejecting the Nation's claims that the federal government breached trust obligations to the Nation by failing to manage the Basin in a manner that considered and met the Nation's water rights and water needs. The majority opinion, authored by Justice Kavanaugh, rejected the Nation's argument that the 1868 Treaty of Bosque Redondo (1868 Treaty) established a general trust responsibility to the Nation to fulfill the purposes of the 1868 Treaty, including ensuring water rights[17] and, with it, the Nation's argument under the Indian Canons of Construction that the Treaty should be interpreted in the way its drafters would have intended and the Nation would have understood it.[18] The majority concluded the 1868 Treaty did not support the claimed rights because they were not specifically enumerated.[19]

As has become common in recent cases holding against tribal interests, Justice Gorsuch authored a dissent in which he scolded the majority. Applying the Indian Canons of Construction, and considering the historical context of the 1868 Treaty, which permitted the Nation's members to return to homelands from which they were forcefully removed in 1864. Justice Gorsuch concluded the United States is required to fulfill obligations under the 1868 Treaty, including ensuring access to water resources.[20] Justice Gorsuch also noted the Nation had not sought to force the Federal government to guarantee water rights, but merely to identify water rights it holds for them.[21]

3. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*[22]

On June 15, 2023, the U.S. Supreme Court decided *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin* (*Coughlin)*, holding that – contrary to established

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[10] *Id*. at 268.
[11] *Brackeen*, 599 U.S. at 264.
[12] *Id*. at 280.
[13] *Id*. at 285.
[14] *Id*. at 291.
[15] 599 U.S. 555 (2023).
[16] *Id*. at 559.
[17] *Id*. at 562.
[18] *Id*. at 564.
[19] *Id*. at 567.
[20] *Id*. at 584-85 (Gorsuch, J., dissenting).
[21] *Arizona*, 599 U.S. at 599 (Gorsuch, J., dissenting).
[22] 599 U.S. 382 (2023).

precedent – in certain circumstances, a general abrogation of "government" sovereign immunity in federal statute may capture tribal governments and abrogate tribal sovereign immunity even if tribes are not mentioned.[23] Similar to suits brought against governments generally, suits against Indian tribes are barred by tribal sovereign immunity unless the Indian tribe clearly waives immunity or Congress abrogates immunity via legislation.[24]

The Lac du Flambeau Band of Lake Superior Chippewa Indians (the Band), a federally recognized Indian tribe, conducted economic activity through Lendgreen, a wholly owned subsidiary of the Band involved in providing short-term loans. In 2019, Respondent Brian Coughlin borrowed $1,100 from Lendgreen through a high-interest, short-term loan. Prior to repaying Lendgreen, however, Coughlin filed for Chapter 13 bankruptcy in the U.S. Bankruptcy Court for the District of Massachusetts (Bankruptcy Court),[25] triggering an automatic stay against creditors' collection efforts.[26] Lendgreen nevertheless continued efforts to collect its debt from Coughlin. In response, Coughlin filed a motion in the Bankruptcy Court to have the statutory stay enforced against both Lendgreen and the Band and, in addition, sought damages against both parties.[27] The Band moved to dismiss the filings, claiming the Bankruptcy Court lacked subject matter jurisdiction over the Band and Lendgreen due to the Band's tribal sovereign immunity.

Citing cases from both bankruptcy and federal appellate courts, the Bankruptcy Court agreed with the Band, finding the federal Bankruptcy Code did not represent a clear Congressional abrogation of tribal sovereign immunity.[28] The First Circuit Court of Appeals, however, reversed, determining the Bankruptcy Code "unequivocally strips tribes of their immunity."[29] In doing so, the appellate court agreed with the Ninth Circuit. However, this court rejected a holding from the Sixth Circuit, regarding whether Congress, through enactment of the Bankruptcy Code, abrogated tribal sovereign immunity with respect to federal bankruptcy actions.[30] The U.S. Supreme Court granted certiorari to address the circuit split.

The Supreme Court affirmed the First Circuit, holding the Bankruptcy Code's abrogation of the sovereign immunity of "governmental unit[s]"[31] applies to Indian tribes despite their absence from definition of "governmental unit" for purposes of the Bankruptcy Code.[32] The Supreme Court reasoned the use of the phrase "foreign and domestic governments" is a term of art all-encompassing in scope, similar to "rain or shine" and "near and far."[33] Thus, the Supreme Court held, Indian tribes are "undeniably" governmental units under the Bankruptcy Code, and as such, Congress abrogated their tribal sovereign immunity for purposes of the Bankruptcy Code.[34]

Justice Gorsuch penned yet another scathing dissent, explaining, "until today, there was not one example in all of history where this Court had found that Congress intended to abrogate tribal sovereign immunity *without* expressly mentioning Indian tribes

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[23] *Id*. at 393.
[24] *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978).
[25] *Coughlin*, 599 U.S. at 385-86; *see also* 11 U.S.C. §§1301-1330.
[26] *See* 11 U.S.C. § 362(a).
[27] *Coughlin*, 599 U.S. at 386; *see also* 11 U.S.C. § 362(k).
[28] In re Coughlin, 622 B.R. 491, 493 (Bankr. D. Mass. 2020).
[29] In re Coughlin, 33 F.4th 600, 603-04 (1st Cir. 2022).
[30] *Compare* Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1061 (9th Cir. 2004) (holding the Bankruptcy Code abrogates tribal sovereign immunity), *with* In re Greektown Holdings, LLC, 917 F.3d 451, 460-61 (6th Cir. 2019) (holding the inverse).
[31] 11 U.S.C. § 106(a).
[32] *See* 11 U.S.C. § 101(27).
[33] *Coughlin*, 599 U.S. at 389.
[34] *Id*. at 388.

somewhere in the statute."[35] Justice Gorsuch rejected the majority's assertion that "foreign and domestic governments" is a catchall phrase, noting that Indian tribes are "*sui generis* entities falling outside the foreign/domestic dichotomy."[36]

B. U.S. Circuit Courts of Appeals

1. *Apache Stronghold v. United States*[37]

On March 22, 2023, the Ninth Circuit Court of Appeals heard oral arguments *en banc* concerning the Religious Freedom Restoration Act (RFRA) and the First Amendment in a case concerning a copper mine. The *en banc* arguments followed the June 24, 2022, Ninth Circuit panel decision affirming a district court's denial of a preliminary injunction designed to stop a land exchange and prevent copper mining on lands in Arizona.[38] In 2014, an act of Congress[39] required the U.S. Secretary of Agriculture to convey a piece of national forest known as Oak Flat to Resolution Copper (Resolution), a mining company. In exchange, Resolution would convey land to the United States.[40] Apache Stronghold, a nonprofit organization, sued to enjoin the land exchange, arguing it violated RFRA,[41] the Free Exercise Clause of the First Amendment, and a trust obligation imposed on the United States by the 1852 Treaty of Santa Fe between the Apache and the United States because Oak Flat is a sacred religious site to certain Apache people.[42] The District Court denied the motion for a preliminary injunction,[43] and Apache Stronghold appealed.

On appeal, the Ninth Circuit panel first found Apache Stronghold was not likely to succeed on its RFRA claim. Under RFRA, the Court held, a claim may be sustained only if no governmental benefits will be lost because of the religious practice, or there will be government penalties associated with religious practice.[44] The court held no government benefits would be lost because of the land exchange, nor would any government penalties be imposed on the Plaintiffs.[45] Instead, the Court held the land exchange did not coerce the Apache to abandon their religion by threatening them with a negative outcome.[46] Additionally, the Court found that, to the degree the 1852 Treaty created an enforceable trust duty on the part of the United States, it extended only to control or supervision over tribal monies or properties.[47] Because Oak Flat was federal government land not designated as Apache territory under the 1852 Treaty, the Court reasoned there was no Indian trust responsibility attached to the land.[48] Accordingly, the Ninth Circuit upheld the district

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[35] *Id*. at 402 (Gorsuch, J., dissenting) (quoting *Greektown Holdings*, 917 F.3d at 460 (internal quotations omitted and cleaned up) (emphasis in original).
[36] *Id*. at 409, 414 (Gorsuch, J., dissenting) (citing Parks v. Ross, 11 How. 362, 374 (1851)).
[37] 38 F.4th 742 (9th Cir. 2022), *vacated*, 56 F.4th 636 (9th Cir. 2022).
[38] *Apache Stronghold*, 38 F.4th at 748.
[39] *See* Carl Levin and Howard P 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 3003, 128 Stat. 3292, 3732-41 (2014) (codified at 16 U.S.C. § 539p).
[40] *Apache Stronghold*, 38 F.4th at 748.
[41] 42 U.S.C. § 2000bb *et seq*.
[42] Apache Stronghold v. United States, 519 F. Supp. 591, 597 (D. Ariz. 2021).
[43] *Id*. at 611.
[44] *Apache Stronghold*, 38 F.4th at 757.
[45] *Id*.
[46] *Id*.
[47] *Id*. at 772-73.
[48] *Id*. at 772.

court's denial of the motion for a preliminary injunction, and Apache Stronghold sought rehearing *en banc*, with support from several non-Indian religious institutions filing briefs as *amici curiae*. On June 30, 2023, the Ninth Circuit granted Resolution's motion to intervene in the case. As of January 2024, no *en banc* decision has been issued.

2. *Littlefield v. U.S. Department of the Interior*[49]

In a case demonstrating the ongoing struggle resulting from the Supreme Court's *Carcieri* decision, [50] on October 31, 2023, the First Circuit Court of Appeals affirmed a Bureau of Indian Affairs (BIA) decision to take two parcels of land into trust in Massachusetts for the Mashpee Wampanoag Indian Tribe (Tribe).

In 2007, BIA granted formal recognition to the Tribe and, shortly thereafter, the Tribe asked BIA to take into trust for its benefit two parcels of land in Massachusetts – one in Mashpee, the other in Taunton. Following multiple decisions that were challenged in court, first by residents of Taunton, and then by the Tribe, BIA issued a decision in December 2021, finding the Tribe met the "under Federal jurisdiction" requirement of the Indian Reorganization Act (IRA).[51] The U.S. Department of the Interior (DOI) also found the Tribe could conduct gaming activities on the land taken into trust because the land qualified as the Tribe's "initial reservation" under the Indian Gaming Regulatory Act (IGRA).[52] Taunton residents challenged the decision, arguing the Tribe did not qualify as a "tribe" within the meaning of the IRA as it was not "under Federal jurisdiction," and, by extension, the land was not eligible for gaming under IGRA.[53] The U.S. District Court for the District of Massachusetts agreed with DOI, and the Plaintiffs appealed, arguing *Carcieri* requires a finding that the Tribe was not under Federal jurisdiction and that the Tribe did not qualify as a "tribe" within the meaning of the IRA.[54]

The First Circuit distinguished the facts of this case from those in *Carcieri*, noting that in *Carcieri*, BIA did not consider whether the Narragansett Tribe was under Federal jurisdiction in 1934, which the Supreme Court ultimately found to be the determining factor.[55] Second, the First Circuit rejected the appellant's argument that the Tribe was not a "tribe" under the IRA, holding DOI provided sufficient justification in the administrative record to conclude the Tribe had maintained a distinct community and autonomy from historical times until the present.[56] Finally, the First Circuit clarified the requirement of "under federal jurisdiction" does not specifically require explicit modern federal recognition[57] and instead articulated a two-step inquiry: (1) whether the United States had, prior to 1934, taken actions for or on behalf of the tribe establishing federal obligations, responsibility for, or authority over the Tribe; and (2) whether jurisdictional status remained intact in 1934. Here, the administrative record showed the Tribe's children attended federal Indian boarding schools, the federal government considered whether to forcibly remove the Tribe from its ancestral homelands, and tribal members were counted in federal census records prior to 1934.[58] In contrast, the First Circuit determined the

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[49] 85 F.4th 635 (1st Cir. 2023).
[50] *See* Carcieri v. Salazar, 555 U.S. 379 (2009)
[51] 25 U.S.C. § 5129; *see also* Letter from Bryan Newland, Assistant Sec'y, Indian Affs, to Brian Weeden, Chairman, Mashpee Wampanoag Tribe (Dec. 22, 2021).
[52] *See* 25 U.S.C. § 2719(b)(1)(B)(ii).
[53] Littlefield v. U.S. Dep't of the Interior, 656 F. Supp. 3d 280, 285 (D. Mass. 2023).
[54] *Littlefield*, 85 F.4th at 643.
[55] *Id*. at 644.
[56] *Id*. at 645.
[57] *Id*. at 647-48.
[58] *Id*. at 649-52.

administrative record did not demonstrate the Federal government terminated the Tribe's jurisdictional status in 1934 following the passage of the IRA.[59] Accordingly, the First Circuit affirmed the District Court and upheld DOI's decision to take the land into trust.

3. *Swinomish Indian Tribal Community v. Lummi Nation*[60]

On September 11, 2023, the Ninth Circuit Court of Appeals upheld a district court decision granting summary judgment to the Swinomish Indian Tribal Community, Tulalip Tribes, and Upper Skagit Indian Tribe (Tribes) regarding fishing rights in the waters east of Whidbey Island in the Puget Sound. The three Tribes had filed suit in the U.S. District Court for the Western District of Washington (District Court) seeking a ruling that the recognized fishing rights of the Lummi Nation (Lummi), under a precedential 1974 decree known as the Boldt Decision,[61] do not extend to waters disputed here. The District Court determined that the disputes waters were not Lummi's usual and accustomed fishing grounds and granted summary judgment on the matter in favor of the Tribes.

On appeal, the Ninth Circuit considered whether the District Court gave effect to the intent of the Boldt Decision. The Ninth Circuit first looked to the Boldt Decision's Findings of Fact and determined it was fundamentally ambiguous whether the parties would have understood the areas of North Puget Sound to include any waters east of Whidbey Island.[62] Second, the Ninth Circuit the plaintiff Tribes and determined met their burden to show there was no evidence in the record before the 1974 Court demonstrating historical Lummi fishing in the disputed waters beyond what would be incidental or occasional.[63] Accordingly, the Ninth Circuit affirmed summary judgment for the Tribes.

4. *Western Watersheds Project v. McCullough*[64]

On July 17, 2023, the Ninth Circuit upheld the Bureau of Land Management's (BLM) approval of a lithium mine project in Thacker Pass, in Nevada, after challenges by the Burns Paiute Tribe (Tribe), environmental groups, and Nevada residents. The plaintiffs sued in the U.S. District Court for the District of Nevada (District Court), arguing BLM's approval was arbitrary and capricious and violated applicable water quality standards, the National Environmental Protection Act (NEPA), and the National Historic Preservation Act (NHPA). The District Court granted summary judgment in favor of BLM, and plaintiffs appealed. On appeal, the Ninth Circuit affirmed, first finding BLM's approval of the project was not an abuse of discretion, finding BLM conditioned its approval on the

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[59] *Id*. at 653.

[60] 80 F.4th 1056 (9th Cir. 2023).

[61] United States v. Washington, 384 F. Supp. 312, 350 (1974). In 1854 and 1855, the Governor of then-Washington Territory signed treaties with Pacific Northwest tribes that ceded lands to the United States but retained the "right of taking fish at usual and accustomed grounds and stations." *See, e.g.,* Treaty of Point Elliott, art. I, 12 Stat. 927 (1859). The Point Elliott treaty led to years of litigation among tribes, Washington State, and the United States. These issues were generally settled through the Boldt Decision, which purported to determine the parties' competing claims to fishing rights off the Washington coast. The Ninth Circuit affirmed the Boldt Decision, as did the U.S. Supreme Court. United States v. Washington, 520 F.2d 676, 693 (9th Cir. 1975)); Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 685-87 (1979).

[62] *Lummi Nation*, 80 F.4th at 1067.

[63] *Id*. at 1072.

[64] Nos. 23-15259, 23-15261, 23-15262, 2023 WL 4557742 (9th Cir. July 17, 2023).

mining company's groundwater monitoring and water quality compliance.[65] Second, the Ninth Circuit determined the project was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with NEPA. The Court found BLM addressed the cumulative impacts of the Project in its Final Environmental Impact Statement in a manner beyond conclusory statements and with a complete discussion of possible mitigation measures.[66] In addition to the environmental issues, the Tribe argued BLM did not properly consult the Tribe, which claimed religious and cultural significance to sites within the Project area. The Ninth Circuit also dismissed claims BLM failed to properly consult with the Tribe, which attached religious and cultural significance within the project area, concluding BLM never received any information that the Tribe claimed a cultural, religious, or historical interest in the project area prior to BLM approval.[67]

5. *Oklahoma v. U.S. Department of the Interior*[68]

The State of Oklahoma's challenges to federal regulation of mining on lands within the affirmed Indian reservations of Oklahoma tribes ended abruptly in May 2023, as Oklahoma, without explanation, dismissed an appeal against the U.S. Department of the Interior (DOI) before the Tenth Circuit Court of Appeals.[69] Previously, Oklahoma sought a preliminary injunction in a case in which it attempted to block DOI from regulating coal mining on the Muscogee (Creek) Reservation (Reservation). There, Oklahoma argued the Reservation did not constitute "Indian lands" under the Surface Mining Control and Reclamation Act (SMCRA),[70] which excludes Indian lands from state regulatory programs. Specifically, Oklahoma argued the *McGirt* decision,[71] which affirmed the continued existence of the Reservation, concerned only criminal jurisdiction under the Major Crimes Act[72] and not civil regulatory provisions, such as the SMCRA.[73]

The U.S. District Court for the Western District of Oklahoma (District Court) disagreed with Oklahoma and denied its injunction request, finding the Reservation would likely be considered Indian lands under the SMCRA, even though most of the reservation is held in fee simple ownership, rather than held in trust by the Federal government.[74] Cross-motions for summary judgment were filed by both Oklahoma and DOI, and, on November 9, 2022, the District Court denied Oklahoma's motion for summary judgment and granted DOI's motion for summary judgment in both the Muscogee (Creek) Reservation case and the companion federal case concerning the Choctaw and Cherokee Reservations.[75] On January 9, 2023, Oklahoma appealed both cases to the Tenth Circuit. But on May 18, 2023, Oklahoma filed a stipulated dismissal of the mining cases with DOI, and the Tenth Circuit entered dismissal orders on the same day.[76] As a result, Oklahoma may no longer operate its state mining regulatory program on the reservations of the

[65] *McCullough*, slip op. at 5.
[66] *Id*., slip. op. at 7.
[67] *Id*., slip. op. at 9.
[68] 640 F. Supp. 3d. 1130 (W.D. Okla. 2022), *appeal voluntarily dismissed*, Order, Case No. 23-6008 (10th Cir. May 18, 2023).
[69] Order, Case No. 23-6008 (10th Cir. May 18, 2023).
[70] Surface Mining Control and Reclamation Act (as amended), Pub. L. 95-87, 91 Stat. 445 (1977) (codified at 30 U.S.C. §§ 1201-1328).
[71] 140 S. Ct. 2452 (2020).
[72] 18 U.S.C. § 1153.
[73] Oklahoma v. U.S. Dep't of the Interior, 640 F. Supp. 3d at 1138.
[74] Oklahoma v. U.S. Dep't of the Interior, 577 F. Supp. 3d 1266, 1274 (W.D. Okla. 2021).
[75] Oklahoma v. U.S. Dep't of the Interior, 640 F. Supp 3d 1130 (W.D. Okla. 2022).
[76] Order, Case No. 23-6008 (10th Cir. May 18, 2023).

Muscogee (Creek), Choctaw, and Cherokee nations. It is possible the effect of those decisions may extend to other affirmed reservations in Oklahoma.

C. U.S. District Courts

1. *Garfield County v. Biden*[77]

This case resulted from the consolidation of two related cases regarding proclamations by President Biden restoring and expanding the boundaries of Bears Ears National Monument[78] and Grand Staircase Escalante National Monument,[79] both located in southern Utah, in October 2021. In August 2022, a group consisting of Garfield and Kane counties, Utah, the State of Utah, and several private individuals and organizations (Utah Plaintiffs) filed complaints alleging President Biden violated the Antiquities Act in issuing the proclamations,[80] and that the Utah Plaintiffs were adversely affected by defendant federal agencies through interim memoranda and denial of permits, both of which Plaintiffs alleged were final agency actions.[81] Plaintiffs ultimately sought a declaration that the President's proclamations were "unlawful, unenforceable, and void,"[82] declarations that the purported final agency actions were unlawful, and injunctions prohibiting any enforcement of the proclamations. Tribal intervenors, including the Hopi Tribe, Navajo Nation, Pueblo of Zuni, and Ute Mountain Ute Tribe, responded by moving to dismiss the complaint in March 2023.[83] On August 11, 2023, the U.S. District Court for the District of Utah granted the tribal parties' Motion to Dismiss (alongside a similar motion from the federal parties), holding President Biden's actions were not "reviewable by a district court," as Congress had explicitly authorized the President to take these actions as "necessary or appropriate to carry out the policy of Congress."[84] Plaintiffs appealed to the Tenth Circuit Court of Appeals, with arguments expected in 2024.

2. *United States v. Osage Wind, LLC*[85]

This was the latest development in more than a decade of litigation concerning a private company's ability to establish a wind farm on land constituting a portion of the Osage Mineral Estate (OME). This development stems from a suit filed in 2014 by the United States against Osage Wind, LLC, seeking a permanent injunction and monetary relief, as well as a declaratory judgement that the company's actions constituted "unauthorized mining and excavation in the [OME] without first obtaining a lease,"[86] which the Osage Tribe Allotment Act of 1906 requires be approved by the Secretary of the

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[77]No. 4:22-CV-00059-DN-PK, 2023 WL 5180375 (D. Utah Aug. 11, 2023).
[78]Presidential Proclamation No. 10285, 86 Fed. Reg. 57,321 (Oct. 8, 2021).
[79]Presidential Proclamation No. 10286, 86 Fed. Reg. 57,335 (Oct. 8, 2021).
[80]Antiquities Act (as amended), 34 Stat. 225 (June 8, 1906) (codified at 16 U.S.C. §§ 431-33).
[81]*Garfield Cnty.*, slip op. at 6.
[82]*Id*.
[83]*Id*.
[84]*Id*., slip. op. at 28 (quoting *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940)).
[85]United States v. Osage Wind, LLC, Case No. 4:14-cv-00704-JCG-JFJ, 2023 WL 8813867 (Dec. 20, 2023).
[86]*Id*., slip op. at *3.

Interior.[87] The U.S. District Court for the Northern District of Oklahoma ruled on September 30, 2015, in favor of Osage Wind, granting summary judgment and stating that its activities "did not constitute mining under 25 C.F.R. § 214" and, therefore, no lease was required.[88] The Osage Mineral Council subsequently filed as a Plaintiff-Intervenor in the case and appealed the District Court's 2015 holding. This resulted in a 2017 reversal by the Tenth Circuit Court of Appeals, which held the wind farm excavations constituted "mining," and holding the phrase "mineral development" within the "mining" definition of the applicable regulations was ambiguous and was not limited to action to exploit the minerals themselves.[89] In 2019, the U.S. Supreme Court denied Osage Wind's petition for certiorari, after which the Tenth Circuit remanded the case to the district court.[90] On December 20, 2023, the District Court granted summary judgment to the federal defendants and OME "as it pertains to the granting of declaratory, monetary, and equitable relief against Defendants."[91] The Court anticipates trial "on the issue of damages"[92] in 2024.

D. State Courts

1. *Lustre Oil Company v. Anadarko Minerals, Inc.*[93]

From the 1950s until the 1980s, a large amount of private oil and gas exploration took place on the Fort Peck Indian Reservation (Reservation) in northeast Montana, home to the Assiniboine and Sioux Tribes (Tribes). Much of this mineral development occurred without regulation, and unsurprisingly, numerous environmental disasters resulted. This led the Tribes to begin actively managing and regulating all oil and gas extraction within the Reservation. In 2009, the Tribes formed A&S Mineral Development Compact (A&S) as a wholly owned economic development entity, formed under the laws of Delaware, in the business of developing oil and gas resources on the Reservation.[94]

Another privately held company, Anadarko Minerals, Inc. (Anadarko), also conducted oil and gas exploration on the Reservation subject to tribal and federal regulation. Despite this, in 2018, Anadarko spilled more than 600 barrels of oil within the Reservation.[95] As part of a resulting settlement agreement with the U.S. Environmental Protection Agency and the Tribes, Anadarko assigned all its oil and gas leases within the Reservation to A&S, which began to operate some of Anadarko's 57 assigned wells.[96]

In 2021, however, A&S and Anadarko were sued in Montana state district court by Lustre Oil Company (Lustre), which alleged it obtained valid title to 41 of the 57 wells from a third party after Anadarko let its then-current leases expire before the assignment

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[87]Osage Tribe Allotment Act, ch. 3572, 34 Stat. 539, § 3 (June 28, 1906). The act also severed the subsurface estate from the surface land within the Osage Reservation, creating the OME. *Id*. at § 2; *see also* William R. Norman & Zachary T. Stuart, *United States v. Osage Wind: An Example of How an Indian Tribe's Unique Status Governs Appeal Rights and Statutory Construction*, 90 Okla. Bar. J. 28 (Nov. 2019).
[88]*Osage Wind*, 2023 WL 8813867, at *3.
[89]United States v. Osage Wind, LLC, 871 F.3d 1078, 1081 (10th Cir. 2017).
[90]Osage Wind, LLC v. Osage Minerals Council, 139 S. Ct. 784 (Jan. 7, 2019); United States v. Osage Wind, LLC, No. 14-CV-704-GKF-JFJ, 2020 WL 3578351 (July 1, 2020).
[91]*Osage Wind*, 2023 WL 8813867, at *18.
[92]*Id*.
[93]527 P.3d 586 (Mont. 2023).
[94]*Id*. at 588.
[95]*Id*.
[96]*Id*.

to A&S.[97] Anadarko and A&S moved to dismiss Lustre's action, arguing A&S's sovereign immunity (as a tribal subsidiary) deprived the state district court of subject matter jurisdiction over the case.[98] The state court agreed and dismissed the suit on tribal sovereign immunity grounds, noting that A&S' necessary dismissal from the matter created a situation where an indispensable party could not be joined.[99]

The Montana Supreme Court reversed the state district court, holding that A&S was not entitled to assert tribal sovereign immunity because it was not an "arm" of the Tribes for purposes of the sovereign immunity analysis.[100] The Montana Supreme Court considered persuasive the Tribes' choice to incorporate A&S under Delaware law, which subjected A&S to Delaware laws pertaining to corporations and lawsuits.[101] Additionally, the Montana Supreme Court also considered a lengthy history of actions from the Tribes' governing body to separate and distinguish A&S from the tribal government.[102] Thus, the Montana Supreme Court remanded the case to the state district court.[103]

II. Legislative and Executive Developments

A. Legislative Developments

In 2023, the U.S. Congress moved only 27 bills through both houses and to the President's desk, a notable decline from previous years.[104] Nevertheless, Congress managed to approve a significant tribal bill: the Pala Band of Mission Indians Land Transfer Act (Land Transfer Act), which required the federal government to take more than 720 acres of land in San Diego County, California, into trust on behalf of the Pala Band of Mission Indians (Pala Band).[105] The Land Transfer Act also declared the added acreage - known as Chokla to the Pala Band - part of the Pala Band's reservation.[106] Chokla is part of the Pala Band's ancestral homelands and, according to the Pala Band in 2019 testimony before the U.S. House of Representatives, the land is also the site of an ancestral Pala Band village, rock art paintings, sacred artifacts, and other culturally significant objects.[107] The Land Transfer Act permits the Pala Band to expand its land base while foregoing the sometimes arduous land-into-trust process through the Bureau of Indian Affairs.[108]

B. Executive Developments

On December 6, 2023, President Biden, while attending his administration's Tribal

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[97] *Id*.
[98] *Id*.
[99] *Lustre Oil Co*., 527 P.3d at 588.
[100] *Id*. at 596.
[101] *Id*. at 595.
[102] *Id*.
[103] *Id*. at 596.
[104] *See* Annie Karni, *The 27 Bills That Became Law in 2023*, N.Y. Times (Dec. 19, 2023) (subscription required).
[105] Pala Band of Mission Indians Land Transfer Act of 2023, Pub. L. 118-11, § 2(a)(1), 137 Stat. 60 (July 28, 2023).
[106] *Id.* at § 2(a)(2).
[107] Pala Band of Mission Indians Land Transfer Act of 2023: Hearing in support of H.R. 1031, Before the U.S. House of Representatives, Nat. Res. Comm., Subcomm. on Indigenous Peoples of the U.S., 116th Cong. (June 5, 2019) (Testimony of Robert Smith, Chairman, Pala Band of Mission Indians).
[108] *See generally* 25 C.F.R. pt. 151.

Nations Summit, issued Executive Order 14112, "Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination" (Order).[109] The Order explained that Indian tribes' progress over the last 50 years of the "Self-Determination Era" has been hindered by federal programs being "administered in ways that leave Tribal Nations unduly burdened and frustrated with bureaucratic process."[110] In response, the Order first requires all federal agencies, other than independent regulatory agencies, to coordinate with the White House Council on Native American Affairs ("Council") to share best practices and implement reforms to "promote accessible, equitable, and flexible administration of Federal funding and support programs for tribal Nations."[111] The Council, tasked with "improv[ing] coordination of federal programs and the use of resources available to Tribal communities," was originally created by President Barrack Obama in June 2013 via executive order.[112] From January 2017, until April 2021, the Council did not meet regularly; however, President Biden reinstated the Council during the early days of his administration.[113]

Additionally, the Order requires development of guidance memoranda, following tribal consultation, to assess agency funding and regulatory shortfalls related to federally funded tribal programs. Finally, the Order requires agencies, as permissible, to revise regulations to encourage: (1) intergovernmental agreements with Indian tribes; (2) tribal set-asides in grants programs; (3) streamlined reporting criteria; and, among other goals, (4) removal of limitations on tribal spending.[114] According to the Biden administration, the Order will better serve the U.S. government's trust responsibility to Indian tribes by requiring new assessments and progress reports regarding agencies' use of federal funds devoted to tribal purposes.[115] Contemporaneous with President Biden's issuance of the Order, the Biden administration launched the Tribal Access to Capital Clearinghouse, described as "a one-stop-shop for federal funding available to Tribes."

During 2023, the Biden administration continued implementing the Infrastructure Investment and Jobs Act of 2021 (referred to as the Bipartisan Infrastructure Law) and the Inflation Reduction Act of 2022, making tribal-specific investments and funding contributions.[116] The U.S. Department of Energy, the U.S. Department of the Treasury, and the U.S. Department of Transportation (DOT) held numerous consultations during 2023. Together, these three federal agencies allocated, in 2023, more than $13 billion for roads, bridges, public transit, and internet infrastructure through the Bipartisan Infrastructure Law and $700 million for climate resilience and adaptation, drought mitigation, and clean energy development programs through the Inflation Reduction Act.[117]

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[109]Exec. Order 14,112, 88 Fed. Reg. 86,021 (Dec. 6, 2023).
[110]*Id*. at § 1.
[111]*Id*. at § 3.
[112]Exec. Order 13,647, § 2, 78 Fed. Reg. 39,539, 39,540 (June 26, 2013).
[113]Press Release, The White House, Readout of the Biden-Harris Admin.'s First Meeting of the White House Council on Native Am. Affs. (Apr. 23, 2021).
[114]Exec. Order 14,112 at § 4.
[115]Press Release, The White House, Fact Sheet: President Biden Signs Historic Executive Order to Usher in the Next Era of Tribal Self-Determination (Dec. 6, 2023) [hereinafter Fact Sheet].
[116]Infrastructure Investment and Jobs Act of 2021, Pub. L. No. 117-58, 135 Stat. 429 (Nov. 15, 2021); Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (Aug. 16, 2022).
[117]*See generally* Fact Sheet, *supra* note 115.

Chapter J: IN-HOUSE COUNSEL

2023 Annual Report[1]

I. DECABDES IN NUCLEAR: A CASE STUDY IN HOW AN AGENCY OTHER THAN YOUR PRIMARY REGULATOR CAN AFFECT YOUR OPERATIONS, AND WHAT YOU CAN DO TO HEAD OFF ISSUES

Much of the U.S. Nuclear Regulatory Commission's (NRC) statutory authority to regulate the civilian use of nuclear materials in the United States comes from the Atomic Energy Act of 1954, as amended.[2] As a lead federal agency carrying out major federal actions such as issuing new licenses to construct nuclear power plants or renewing nuclear power plant licenses for an additional 20 years, the NRC often carries out the procedural provisions of the National Environmental Policy Act (NEPA). Indeed, the NRC's mission is to "license[] and regulate[] the Nation's civilian use of radioactive materials to provide reasonable assurance of adequate protection of public health and safety, to promote the common defense and security, and to protect the environment."[3]

However, as all agencies are, their jurisdictional power is bound only to what Congress has delegated to them. Thus, although the NRC's mission includes to "protect the environment," that can only extend to an issue with a radiological health, safety, and security nexus.[4] Compare this with the U.S. Environmental Protection Agency (EPA), where the EPA's statutory basis and authority is numerous and broad.[5] Accordingly, at a nuclear power plant, although the NRC may be considered the "primary" federal regulator due to the obvious radiological health and safety and security nexus, the EPA (or authorized state authority) has jurisdiction over the nuclear power plant in many non-radioactive material areas, such as air and water effluents (e.g., NPDES permit), and toxic substances that one would expect at any industrial power plant. Because nuclear power plants have certain environmental licenses and permits other than their NRC-issued license that affect their operability, companies in the nuclear power industry not only must pay attention to NRC-proposed and final rules, but EPA-proposed and final rules, as well (and any other agency that may affect the plant, for that matter).

For example, take the following case study. Decabromodiphenyl ether, also known as "decaBDE," is used as an additive flame retardant in electronics, applications for aerospace and vehicles, as well as wires and cables – including those found in nuclear power plants.[6] In 2021, the EPA concluded that decaBDE was "toxic to aquatic invertebrates, fish, and terrestrial invertebrates. Data indicate the potential for developmental, neurological, and immunological effects, developmental toxicity and liver effects in mammals."[7] Accordingly, the EPA asserted jurisdiction over the material under the Toxic Substance Control Act (TSCA) Section 6(h), and banned the manufacture, processing, and distribution of the material in commerce after March 8, 2021. With regard to the nuclear

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[1]The contributor of Part I is Joseph D. McManus, Senior Nuclear Regulatory Counsel at Westinghouse Electric Company LLC (Westinghouse). His contributions are made in his personal capacity and do not reflect Westinghouse's or the American Bar Association's views.

[2]Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919.

[3]U.S. Nuclear Regulatory Comm'n, NUREG-1350, Vol. 34, 1, 3 (2023).

[4]*Id.* at 3.

[5]*See, e.g.*, *Laws and Executive Orders*, U.S. ENVTL. PROT. AGENCY (last updated July 3, 2023).

[6]Decabromodiphenyl Ether (DecaBDE); Regulation of Persistent, Bioaccumulative, and Toxic Chem. Under TSCA Section 6(h), 86 Fed. Reg. 880 (Jan. 6, 2021) (to be codified at 40 C.F.R. pt. 751).

[7]*Id.* at 885, 890.

industry and nuclear power plants using decaBDE, the EPA set forth a delayed compliance date of "[t]wo years for any processing and distribution in commerce of decaBDE for wire and cable insulation in nuclear power generation facilities, and the decaBDE-containing wire and cable insulation."[8] Although the EPA's final rule was not intended to disrupt the power supply sector, it would have a wide impact, as decaBDE wiring is broadly used in the nuclear industry—possibly affecting any planned maintenance that was already slated to use decaBDE wiring in pre-planned outages in the upcoming year. The EPA even stated that it was

> Aware of the critical role the nuclear industry plays in the U.S. which provides 20% of the domestic power supply. The Department of Energy (DOE) and/or NRC estimate that flame-retardant material is required in approximately 450 miles of wires and cables and in over 2,000 components and subcomponents in each of over 90 commercial nuclear power reactors.[9]

The EPA continued, stating that any unplanned outage by a nuclear power plant would reduce the amount of available power to the grid, which in turn could potentially impact grid stability.

One company was caught up in the EPA's decaBDE ban. On May 1, 2023, the EPA's Environmental Appeals Board ratified a consent agreement and issued a final order[10] between RSCC Wire & Cable LLC (RSCC) and the EPA outlining certain terms. Although the order alleged that RSSC manufactured decaBDE at least nine times after the EPA's ban date of March 8, 2021, and RSSC agreed to pay a civil penalty of $253,741, RSSC was permitted to continue to process and distribute "in-process" wire and cable for the purpose of processing decaBDE-containing wire and cable for use in nuclear facilities. The consent agreement permitted RSCC to continue to use decaBDE for five years from the date of the consent agreement and provided, among other things, measures to ensure employee and environmental protection during the processing of raw decaBDE. This outcome likely demonstrated that the EPA realized that the continued use of decaBDE wires and cables (especially for five years after the consent decree was effective) was critical to the nuclear industry, notwithstanding its final rule.

On May 2, 2023, the EPA issued an enforcement statement[11] communicating that it would provide broad enforcement discretion permitting continued use of decaBDE in wiring and cable in the nuclear industry, provided that companies that process or distribute decaBDE-containing wire or cable complied with the following conditions:

- They work diligently to qualify decaBDE-free alternative components under NRC regulations and guidance;
- They include a statement in records required to be kept under 40 C.F.R. § 751.405(c)(1)(ii) that the decaBDE-containing products or articles either comply with section 751.405(a), or are consistent with the Enforcement Statement; and
- They report any exports of decaBDE-containing wire or cable to EPA using the TSCA Section 12(b) reporting tool available in EPA's Central Data Exchange.[12]

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[8] *Id.* at 887.

[9] Memorandum from Lawrence E. Starfield, Acting Assistant Administrator, to Michal Freedhoff, Assistant Administrator, Office of Chemical Safety and Pollution Prevention at 2 (May 2, 2023).

[10] Final Order, In re RSCC Wire & Cable LLC, Dkt. No. TSCA-HQ-2023-5006 (May 1, 2023).

[11] *Id.* at 1.

[12] *Id.* at 3.

On November 24, 2023, the EPA published a proposed rule that, among other chemicals, would reexamine the ban on decaBDE.[13] The EPA proposed to extend the compliance period for processing and distribution in commerce of decaBDE-containing wire and cable insulation, and the components for use at nuclear power generating facilities, including research and test reactors, until after the end of the service life of the wire and cable and components containing the wire and cable.[14] Comments were due on the proposed rule January 8, 2024.

Consider some takeaways from this case study for an in-house general counsel. First, although one may be in an industry regulated primarily by state or Federal regulators, one must not forget that there are other regulators out there that may promulgate rules that can have an immense impact on your industry's operations. One must keep abreast with the industry and government happenings by participating in industry trade groups to learn about any proposed rule that, while may be well intended, might not be best carried out if eventually promulgated into a final rule. Also, strive to submit comments on proposed rules—either on behalf of your company, or contribute to your lobbying group to submit on your industry's behalf. Comments submitted through the administrative process make a difference, and government agencies do take painstaking time to carefully consider and respond to each comment. Finally, schedule a meeting with the regulator's representative (e.g., inspector) and describe the potential adverse impact of the proposed rule that the agency may not have considered. For example, while it is no doubt that everyone would like to eliminate toxic materials like decaBDEs, the implementation is more complex than simply banning the material—and as the EPA stated itself, it had no intent to impact the nation's power supply sector. Through the administrative process, industry and government can hopefully work together on rules that are efficient and effective and arrive at a common goal—a clean, safe environment for all.

[13] Decabromodiphenyl Ether and Phenol, Isopropylated Phosphate (3:1); Revision to the Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under the Toxic Substances Control Act, 88 Fed. Reg. 82,287 (proposed Nov. 24, 2023) (to be codified at 40 C.F.R. pt. 751).

[14] *Id.* at 82,299.

Chapter K: INTERNATIONAL LAW
2023 Annual Report[1]

I. CLIMATE CHANGE AND EMISSIONS

A. The Green Deal Industrial Plan

In January 2023, the European Commission presented the Green Deal Industrial Plan to accelerate Europe's transition to climate neutrality by improving the competitiveness of its net-zero industry and increasing manufacturing capacity for net-zero technologies.[2] This initiative responds to other major economies' investment surge in green innovation, aiming to establish a level playing field and support European industries such as hydrogen, chemicals, biotech, and nanotech. The plan has four key pillars: (1) predictable and simplified regulatory environment; (2) faster access to funding; (3) enhancing skills; and (4) open trade for resilient supply chains.[3]

The "Predictable and Simplified Regulatory Environment" pillar creates a streamlined and predictable regulatory framework. It encompasses three initiatives: (1) the Net-Zero Industry Act, which sets goals for net-zero industrial capacity and facilitates rapid deployment; (2) the Critical Raw Materials Act, which ensures access to essential materials like rare earths for technology manufacturing; and (3) the reform of electricity market design to help consumers benefit from lower renewable energy costs.[4]

The "Faster Access to Funding" pillar accelerates investment and financing for European clean-tech production. The European Commission has amended the Temporary State Aid Crisis and Transition Framework and revised the General Block Exemption Regulation to ensure a fair market and streamline aid. The Commission also aims to leverage existing EU funds for clean-tech projects and to establish the European Sovereignty Fund for mid-term investment needs.[5]

The "Enhancing the Necessary Skills" pillar addresses the skill demands of new technologies for the green transition. The Commission plans to establish Net-Zero Industry Academies for up- and re-skilling in strategic industries, adopt a 'skills-first' approach alongside qualification-based methods, facilitate third-country nationals' access to EU labor markets in priority sectors, and align public and private funding for skills development.[6]

Finally, the "Facilitating Open and Fair Trade" pillar emphasizes global cooperation and aligning trade with the green transition, adhering to fair competition and

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[1]The International Environmental and Resources Law Committee examines the legal concepts relevant to international efforts to promote environmental protection. The Committee is immersed in diverse disciplines focused on atmosphere and climate change, environmental protection and conservation, international chemical regulation, and litigation. The issues discussed in this chapter range from the COP28 to the BBNJ to international litigation. The purpose of the 2023 review is to assess the most significant events during 2023; however, it is not meant to be an all-inclusive summary. This chapter was edited by Gabe Malouf, Lexi Orgill, and Nisha Albert. This chapter was authored by Achinthi Vithanage, Agnes Enochs, Annalise Groves, Catherine Janasie, Gabe Malouf, James "Jake" Negvesky, Jesse Medlong, Jesse Valente, Jonathan Nwagbaraocha, Kaia Turowski, Katherine Savage, Lexi Orgill, Natale Fuller, Paige Kendrick, Sera Simpson, ThuLan Pham, and Verity Thomson.

[2]*A Green Deal Industrial Plan for the Net-Zero Age*, COM (2023) 62 final (Jan. 2, 2023).

[3]*Id*. at 3.

[4]*Id*. at 3-6.

[5]*Id*. at 13.

[6]*Id*. at 14-16.

open trade principles. The Commission plans to expand the EU's Free Trade Agreements and cooperation with partners to support this transition. It will protect the Single Market from unfair trade practices, building on collaborations with the EU's partners and the WTO.[7]

B. EU Renewable Energy Directive

In March 2023, European leaders reached an agreement on the final revisions to the EU's Renewable Energy Directive (RED) III, which was formally adopted in late 2023 as part of the "Fit for 55" package.[8] RED III aims to increase renewable energy in the EU's overall energy consumption to 42.5% by 2030—with an additional 2.5% indicative top-up to allow the target of 45% to be achieved. Member States will have 18 months to transpose the directive into national legislation, and RED III provides specific targets for renewable energy in various sectors, including transport, industry, buildings, and district heating and cooling. The revised directive also aims to strengthen sustainability criteria for the use of biomass for energy, providing new limitations for the use of forest biomass to count towards renewable energy targets and to qualify for subsidies.[9] Notably, however, RED III's new biomass policy has been met with criticism from forest advocates for its various loopholes and for maintaining the definition of woody biomass as a renewable energy source on par with zero-carbon wind and solar.[10]

C. Carbon Markets and Carbon Border Adjustments

On October 1, 2023, the EU began the Carbon Border Adjustment Mechanism (CBAM) transitional period.[11] The CBAM represents an innovative approach aimed at aligning the carbon pricing of imported goods with the carbon price of domestic production, thus addressing carbon leakage issues when companies opt to relocate carbon-intensive production to regions with less stringent climate policies.[12] Importers are mandated to report the GHG emissions embedded in their products and surrender the corresponding number of CBAM certificates (carbon allowances), unless the importer can prove that a carbon price has already been paid on the imports under a different carbon pricing regime.

Importers' first reporting period ends January 31, 2024. CBAM will initially target imports of sectors at the highest risk of carbon leakage (cement, iron and steel, aluminum, fertilizers, electricity, and hydrogen). Once fully phased in, CBAM will capture over 50% of emissions in ETS-covered sectors. The first stage will be phased in over three years, gradually including more sectors until the policy reaches its full force on January 1, 2026. Importers will not have to purchase any CBAM certificates until the start of 2026, but will still be required to make quarterly reports on the amount of both direct and indirect emissions embedded in their products.[13]

D. CORSIA and Aviation Emissions

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[7] *Id.* at 18.
[8] Council Directive 2023/2413, 2023 O.J. (L 2413).
[9] *Id.* at ¶ 10
[10] Justin Catanoso, *EU woody biomass final policy continues threatening forests and climate: Critics*, MONGABAY (Apr. 3, 2023).
[11] Council Regulation 2023/956, 2023 O.J. (L 130).
[12] *See id.; see also What is Carbon Leakage?*, CLEAR CENTER (Apr. 24, 2020).
[13] *See* Council Regulation 2023/956, *supra* note 11; Noor Crabbendam & Sam Bird, *What is CBAM and how will it impact your business?*, CARBON TRUST (Oct. 13, 2023).

As of December 2023, eleven more States have announced their intention to participate in the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA)—bringing the total participants to 126 of the 193 International Civil Aviation Organization (ICAO) member states.[14] As a global market-based measure (MBM) that caps the net CO_2 emissions of international flights at their 2019 emission level, CORSIA aims "to avoid a possible patchwork of duplicative State of regional MBMs, thus ensuring that international aviation CO_2 emissions should be accounted for only once."[15] In doing so, CORSIA does away with piecemeal international aviation emission regulatory initiatives and continues with the long-standing goal of the Chicago Convention to harmonize international civil aviation in order to avoid friction and to promote that cooperation between nations.[16]

Additionally, the Second Edition of Volume IV (CORSIA) of Annex 16 to the Convention on International Civil Aviation was adopted in March, became effective in July, and will start to apply on January 1, 2024.[17] The Second Edition provides technical clarifications relating to monitoring and calculation offsetting requirements for new aircraft operators and includes guidance on offsetting thresholds for aircraft "operators with low levels of international aviation activity."[18]

2023 also brought significant developments to sustainable aviation fuel (SAF). On December 15, the Biden Administration issued guidance through the Treasury Department that approved the Department of Energy's (DOE) Greenhouse Gases, Regulated Emissions and Energy Use in Technologies (GREET) model, enabling ethanol-based SAF to qualify for tax credits under the Inflation Reduction Act (IRA).[19] The IRA requires lifecycle SAF emissions to be calculated under CORSIA "and any similar method that meets certain requirements of the Clean Air Act."[20] Notably, the ongoing debate in this area revolves around the use of corn- and soy-based ethanol, as the DOE's GREET guidelines currently "attribute lower lifecycle emissions to ethanol-based SAF than the ICAO methodology."[21] The methodology will be updated again in early 2024 to satisfy the statutory requirements under the IRA and the Internal Revenue Code § 40B(e)(2).[22]

E. COP28

In November 2023, this year's climate summit in Dubai began with an unprecedented first-day decision to fund efforts related to address loss and damage from climate change—representing the culmination of many years of hard-fought negotiations

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[14] *CORSIA States for Chapter 3 State Pairs*, INT'L CIV. AVIATION ORG (2023).
[15] Int'l Civ. Aviation Org. G.A. Res. A41-22, at 6 (Oct. 2022).
[16] *See id.*
[17] INT'L CIV. AVIATION ORG., *Volume IV Carbon Offsetting and Reduction Scheme for International Aviation*, *in* ANNEX 16 TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION (2d ed. 2023).
[18] *See id.*
[19] I.R.S. Notice 2024-6, *Sustainable Aviation Fuel Credit; Lifecycle Greenhouse Gas Emissions Reduction Percentage and Certification of Sustainability Requirements Related to the Clean Air Act; Safe Harbors* (2023); *see also* Stephanie Kelly & Leah Douglas, *Biden Backs Ethanol Industry on Low-Emission Aviation Fuel Tax Credits*, REUTERS (Dec. 18, 2023 4:25 AM CST).
[20] *See Treasury, IRS Issue Guidance on Sustainable Aviation Fuel Credit*, INTERNAL REVENUE SERVICE (Dec. 15, 2023).
[21] Robert Silk, *Treasury Department Issues Guidance about Tax Credits for Sustainable Aviation Fuel*, TRAVEL WEEKLY (Dec. 15, 2023).
[22] *See* I.R.S. Notice 2024-06, *supra* note 19.

celebrated by vulnerable countries.[23] Despite a steady drumbeat of criticism for the oil-rich country's selection as host of COP28, the UAE Presidency delivered another historic outcome with the conclusion of the first Global Stocktake under the Paris Agreement.[24] The Global Stocktake is a periodic assessment of the world's collective progress toward achieving the objectives of the Paris Agreement, taking place every five years to determine whether the nationally determined commitments of each country—and the tangible efforts to implement those commitments—are sufficient to achieve the Paris Agreement's goals.[25] Recognizing that this decade is "critical" to addressing climate change, COP28's Global Stocktake is particularly significant because the next opportunity to test this progress will not come until the second Global Stocktake in 2028.

With perhaps the most ambitious multilateral commitments ever made regarding the transition from fossil fuels, 2023's Global Stocktake tempered the grim backdrop of a narrowing window to keep global temperature rise within 1.5°C. The decision calls for, in part, "[t]ransitioning away from fossil fuels in energy systems, in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with the science."[26] Although the Global Stocktake decision did not include a call to "phase out" fossil fuels by the end of the decade as many had hoped, the Global Stocktake was still a landmark commitment by nearly 200 countries to "transition away" from fossil fuels—representing "the first time a COP final decision has singled out fossil fuels."[27]

The conference made uneven progress on other key priorities related to the objectives of the Paris Agreement. These included adopting the framework for a global goal on adaptation, making progress under the Sharm el-Sheikh mitigation work program, working toward establishing a new collective quantified goal for climate finance (after developed countries failed to deliver on the prior goal), and formalizing a process toward making finance flows consistent with a pathway toward low-emission and climate-resilient development. Negotiations related to international carbon markets under Article 6 of the Paris Agreement, however, broke down completely over EU objections to the draft texts. As a result, all work from the past year on this contentious and highly technical topic was scrapped, sending negotiators back to the drawing board. Similarly, no decisions were taken on other topics such as capacity building, a review of the functions of the standing committee on finance, and agriculture.[28]

II. Human Rights and the Environment

A. Climate Change and the European Convention on Human Rights

In 2023, the European Court of Human Rights heard its first cases alleging that government inaction on climate change violates human rights.[29] In two separate cases heard back-to-back on March 29, 2023, citizens of Switzerland and France respectively argued that the state's failure to take action to cut carbon emissions breached their

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[23] U.N. Framework Convention on Climate Change, Summary of Global Climate Action at COP28 (Dec. 11, 2023).
[24] Global Stocktake, U.N.: Climate Change (last visited Mar. 17, 2024).
[25] *Id.*
[26] U.N. Framework Convention on Climate Change, First Global Stocktake: Draft Decision, U.N. Doc. FCCC/PA/CMA/2023/L.17 (Dec. 13, 2023).
[27] *Some Key Takeaways from the COP28 Climate Summit,* U.N. Environment Programme (Dec. 20, 2023).
[28] *See Summary of Global Climate Action, supra* note 23.
[29] *European Court Hears Landmark Lawsuits that Could Shape Climate Policy*, Climate Home News (Mar. 29, 2023, 6:42 PM)

obligations under the European Convention of Human Rights (ECHR). In September, the panel heard a third case alleging that government inaction on climate change violated human rights, this time brought by six Portuguese youths.

In *KlimaSeniorinnen v Switzerland*, a group of senior Swiss women alleged that their right to life was being violated by the Swiss government's failure to take greater action to combat climate change.[30] Unsuccessful before the Swiss courts, the group escalated their case to the European Court of Human Rights. They claimed that, as elderly women, they are at an increased risk of illness and death from climate-induced heat waves, and the Swiss government's climate inaction, therefore, violates their rights to life and health protected by Articles 2 and 8 of the ECHR. In addition, they argued that the Swiss courts violated their ECHR Article 6 right to a fair trial and Article 13 right to an effective remedy by arbitrarily rejecting their case and failing to deal with the content of their application. In response, Switzerland argued that its carbon emissions cannot be directly tied to the health of these women and that its existing climate targets are sufficient.[31]

Heard the same day, *Carême v. France* was brought by a former mayor of a municipality on France's northern coast. Arguing that he is personally vulnerable to climate change because his home is at risk of flooding, the former mayor alleged that the French government's climate inaction threatens his right to life (ECHR, Article 2) and right to respect for private and family life (ECHR, Article 8).[32]

In September, the panel again heard a case alleging that government inaction violated human rights. In *Duarte Agostinho and Others v. Portugal and 32 Other States*, the claimants were six Portuguese youths who claimed that 33 countries—including all EU member states, in addition to the United Kingdom, Switzerland, Norway, Russia, and Turkey—violated their rights under Articles 2 (right to life), 8 (right to privacy and family life), and 14 (right to be free from discrimination on grounds of age) of the ECHR. The youths seek an order requiring more ambitious climate action that will keep temperature rise to 1.5 degrees Celsius, as envisioned by the Paris Agreement.[33]

The cases are currently pending before the European Court of Human Rights' Grand Chamber, with decisions expected in 2024.

B. Nation-State Climate Change Obligations

In March 2023, the 77th Session of the United Nations General Assembly (UNGA) formally adopted a resolution that requests an advisory opinion from the world's highest court: the International Court of Justice (ICJ).[34] The resolution requests that the ICJ, as the primary judicial function of the United Nations, define the "obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations."[35] The resolution also requests that the ICJ identify the legal consequences if States cause significant harm to other States that are "particularly vulnerable" or "specially affected" by climate change, or to "[p]eoples and individuals of the present and future generations affected by the adverse effects of climate change."[36]

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[30] *KlimaSeniorinnen v Switzerland: Application to the European Court of Human Rights,* CLIMATECASECHART.COM (last visited Mar. 15, 2024)
[31] *Id.* at 6-8.
[32] *Careme v. Fr.*, CLIMATECASECHART.COM (last visited Mar. 15, 2024).
[33] *Duarte Agostinho and Others v. Portugal and 32 Other States*, CLIMATECASECHART.COM (last visited Mar. 15, 2024).
[34] G.A. Res. A/77 (Mar. 1, 2023).
[35] *Id.* at 3.
[36] *Id.* at 3-4.

The resolution follows a similar request made in January 2023, where Columbia and Chile requested an advisory opinion of similar scope from the Inter-American Court of Human Rights.[37] Taken together, these requests illustrate an international trend seeking to define governmental obligations and legal consequences relating to human rights and climate change. The advisory opinions are expected in late 2024 or 2025.[38]

III. International Trade, Financial Institutions, and Corporate Social Responsibility

A. Environmental, Social, and Governance Factors in Investing

The Department of Labor's (DOL) Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights rule became effective in January 2023.[39] This new rule includes explicit language that risk-return factors may include environmental, social, and governance (ESG) factors, allowing ERISA fiduciaries to consider ESG factors. Such ESG factors include the economic effects of climate change when evaluating the risk-return of potential investments. The rule also modified the previously used "tiebreaker" test, which originally permitted fiduciaries to consider collateral benefits only when competing investments were "indistinguishable" if the competing investments "equally serve" the financial interests of the plan—a more flexible standard than the prior policy. Although these modifications may remove some barriers to considering ESG factors in plan investments, ERISA fiduciaries still may not sacrifice investment returns or assume greater investment risks as a means of promoting collateral social policy goals unrelated to the financial benefits owed to participants and beneficiaries under the plan.[40]

Notably, though the rule survived through the end of 2023, it has faced significant challenges in both the courts and the U.S. Congress since implementation. In September 2023, plaintiffs in *State of Utah v. Walsh* alleged the rule was arbitrary and capricious in violation of the Administrative Procedure Act.[41] The U.S. District Court for the Northern District of Texas disagreed and ruled in favor of the DOL; however, not without noting the validity of the concerns over ESG investing trends.[42] The ruling is still subject to appeal, and another similar federal case, *Braun v. Walsh*, is currently pending in the Eastern District of Wisconsin.[43] 2023 has also seen congressional pushback on the rule, including a resolution from the Senate to rescind the regulation. Although the resolution passed, it was ultimately struck down by a presidential veto from President Biden—the first of his presidency.[44]

B. Climate-Related Disclosures

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[37] *See* *Advisory Opinion Request to the Inter-American Court of Human Rights*, CLIMATECASECHART.COM (last visited Mar. 15, 2024).
[38] Maria Tigre & Jorge Banuelos, *The ICJ's Advisory Opinion on Climate Change: What Happens Now?*, CLIMATE LAW: A SABIN CENTER BLOG (Mar. 29, 2023).
[39] 87 Fed. Reg 73,822 (Dec. 1, 2022) (to be codified at 29 C.F.R. pt. 2550).
[40] *Id.; see also* *Final Rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights,* U.S. DEP'T OF LABOR (Nov. 22, 2022).
[41] 2:23-CV-016-Z, 2023 WL 6205926 (N.D. Tex. Sep. 21, 2023).
[42] *Id.*
[43] 2:23-cv-00234, (E.D. Wis. Feb. 21, 2023).
[44] *See* Mark Schoeff Jr., *Congressional rejection of DOL ESG rule casts pall over measure*, INVESTMENTNEWS (Mar. 2, 2023); Malone et al., *Biden's First Veto: Understanding the Implications of the DOL's ESG Rule*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Apr. 6, 2023).

In March 2022, the Securities and Exchange Commission (SEC) proposed a rule, The Enhancement and Standardization of Climate-Related Disclosures for Investors rule, that would require publicly traded companies to disclose certain climate-related information in their already requisite statements and reports.[45] Though the SEC had originally considered that the rule would be finalized by December 2022, the Commission has continuously—and controversially—delayed final action on the rule through 2023. In December 2023, the SEC once again announced another delay, now anticipating final action in Spring 2024.[46] Beyond the pattern of delays on a final action, rulemaking on this proposal has also been controversial because many critics are questioning whether the SEC has the statutory authority to promulgate a regulation that is arguably a piece of climate policy.[47]

The SEC's proposed rule seeks to protect investors through mandatory disclosure of climate-related information.[48] The primary goal of the proposed rule is to create reliable and standardized data that will allow investors to make informed decisions when it comes to the intersection of investment and climate risk. Key proposed disclosures include: (i) climate-related risks and their actual or likely impacts on the registrant's business; (ii) details about governance practices on climate-related risks; (iii) information regarding the registrant's climate-related goals or transition plan; and, (iv) the amount of direct greenhouse gas (GHG) emissions, indirect GHG emissions, and, if applicable, indirect GHG emissions present in the registrant's value chain.[49]

C. EU Corporate Sustainability Due Diligence Directive

In December 2023, the European Council and European Parliament formed a provisional deal on the Corporate Sustainability Due Diligence Directive (CSDDD).[50] The CSDDD is a significant article of legislation that intends to bolster environmental and human rights protections in the EU and globally by mandating human rights due diligence. The provisional deal imposes obligations on a variety of companies, including multinational U.S.-based companies, requiring them to address both actual and potential adverse impacts on the environment and human rights.[51]

The directive applies to EU companies with over 500 employees and a net profit of €150 million. Non-EU companies are included if they generate €300 million of profit in the EU, with a three-year phase-in period. Additionally, EU companies with over 250 employees and profits surpassing €40 million are covered by the directive if a minimum of €20 million is generated in high-risk sectors such as textiles, agriculture, food, mineral resources, and construction. Several entities within the financial sector now face a limited

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[45] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,473 (proposed Mar. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, and 249).

[46] Soyoung Ho, *SEC Once Again Delays Action on Final Climate Disclosure Rule*, THOMSON REUTERS (Dec. 12, 2023).

[47] *Id.*

[48] 87 Fed. Reg. at 21,335.

[49] *Id.*

[50] *See* Hannah Edmonds-Camara et al., *Provisional Agreement on the EU's Corporate Sustainability Due Diligence Directive (CSDDD): Key Elements of the Deal*, COVINGTON (Dec. 15, 2023).

[51] Michael R. Littenberg & Samantha Elliott, *Provisional agreement reached on EU Corporate Sustainability Due Diligence Directive – Christmas gift or lump of coal for U.S.-based multinationals?*, ROPES&GRAY (Dec. 15, 2023).

due diligence obligation, with a review clause for potential future inclusion based on impact assessment.[52]

The CSDDD mandates due diligence with regard to actual and potential adverse impacts on the environment and human rights, encompassing various activities within the supply chain. The directive outlines specific corporate aspects requiring due diligence, such as risk-management systems, complaint mechanisms, company policies, contractual assurances, and engagement with stakeholders.[53] The impacts covered by the CSDDD include slavery, child labor, deforestation, pollution, and damage to ecosystems.[54] The directive revamps legal recourse, allowing affected individuals, civil society organizations, and trade unions to bring damages claims within five years. Enforcement will be at the member state level, with penalties of up to 5% of net profits for non-compliant companies.[55] Compliance with CSDDD may also be a factor in awarding public contracts and concessions. The final text of "the [d]irective is expected to be signed before EU elections" in June 2024, with transposition into national law and company obligations anticipated to commence in 2027.[56]

D. Circular Economy Action Plan

This year saw various developments relating to the EU Commission's Circular Economy Action Plan from 2020, which describes initiatives for the entire life cycle of products—from design and manufacturing to consumption, repair, reuse, recycling, and bringing resources back into the economy.[57] In May 2023, the European Commission revised the circular economy monitoring framework to improve the progress to track the transition to a circular economy in the EU. The revisions add a fifth dimension on global sustainability and resilience to the previous monitoring framework, as well as new indicators such as material footprint, resource productivity, consumption footprint, greenhouse gas emissions from production activities and material dependency.[58]

Relatedly, in March 2023, the European Commission adopted proposals on green claims and right to repair.[59] The proposal on common rules promoting the repair of goods would require that sellers offer repair except when it is more expensive than replacement. In addition, the proposal would establish a new set of rights and tools will be available to consumers to make repair an easy and accessible option including 1) the obligation to inform consumers about the products that they are obliged to repair themselves and 2)

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[52] *Id.*

[53] *Id.*

[54] Seher Budak & Matilda Nyman, *Corporate sustainability due diligence: The European Council and the European Parliament have finally reached a provisional agreement with the aim to protect the environment and human rights*, BAKER MCKENZIE: GLOBAL SUPPLY CHAIN COMPLIANCE (Dec. 27, 2023).

[55] Edmonds-Camara, *supra* note 50.

[56] Littenberg & Elliot, *supra* note 51.

[57] *Commission Communication on A New Circular Economy Action Plan for a Cleaner and More Competitive Europe,* COM (2020) 98 final (Nov. 3, 2020).

[58] *Circular economy: Faster progress needed to meet EU resource-efficiency targets, ensure sustainable use of materials and enhance strategic autonomy,* EUR. COMM'N (May 15, 2023); see also *Improved Circular Economy Framework Now Live*, EUROSTAT (May 15, 2023).

[59] *See Commission Proposal for a Directive of The European Parliament and of the Council on substantiation and communication of explicit environmental claims*, COM (2023) 155 final (Mar. 22, 2023).

creation of an online repair platform to connect consumers with repairers and sellers of refurbished goods in their area.[60]

In addition to these proposals, in August 2023 the EU adopted the Ecodesign Regulation (EU) 2023/1670 and the Energy Label Regulation (EU) 2023/1669. The Ecodesign Regulation requirements apply to mobile phones and tablets starting on June 20, 2025 and would require these devices to be resistant to accidental drops or scratches and protection from dust and water, require producers to make critical spare parts for seven years after the end of sales of the product models on the EU market, and require non-discriminatory access for professional repairers to any software or firmware needed for the replacement.[61] The Energy Label Regulation, which also becomes effective on June 20, 2025, requires smartphones and tablets to display an energy label that shows their energy efficiency class (from A to G) and other related information, such as battery performance, reliability, and repairability).[62]

Finally, in December 2023, the Council reached an agreement on a proposal to revise the EU's packaging and packaging waste rules.[63] The agreed proposal would:

- cover all packaging, regardless of the material used, and all packaging waste, regardless of its origin;
- require that packaging be considered recyclable when designed for material recycling, and when the waste packaging can be separately collected, sorted and recycled at scale;
- set overall headline targets for reducing packaging waste, based on 2018 quantities: 5% by 2030, 10% by 2035, and 15% by 2040;
- establish new re-use and re-fill targets for 2030 and 2040, including that economic operators making certain large household appliances available on the market for the first time within the territory of a Member State shall ensure that 90 % of those products are made available in reusable transport packaging within a system for re-use; and
- establish restrictions on certain packaging formats, including single-use plastic packaging for fruit and vegetables, for food and beverages, condiments and for small cosmetic and toiletry products used in the accommodation sector, such as shampoo or body lotion bottles.[64]

IV. BIODIVERSITY

A. Biodiversity Beyond National Jurisdiction Treaty

On June 19, 2023, the resumed fifth session of the Intergovernmental Conference (IGC) officially adopted the 'Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of

[60] *See Commission Proposal for a Directive of The European Parliament and of the Council on common rules promoting the repair of goods and amending Regulation* (EU) 2017/2394, Directives (EU) 2019/771 and (EU) 2020/1828, COM (2023) 155 final (Mar. 22, 2023).
[61] Commission Regulation, 2023/1670, 2023 O.J. (L 214).
[62] Commission Regulation, 2023/1669, 2023 O.J. (L 214).
[63] Council of the EU Press Release, Packaging and packaging waste: Council adopts its negotiating position on new rules for more sustainable packaging in the EU (Dec. 18, 2023).
[64] *Proposal for a Regulation of the European Parliament and of The Council on packaging and packaging waste*, COM (2022) 677 final (Nov. 30, 2023).

Areas Beyond National Jurisdiction.'[65] Often known informally as the 'Biodiversity Beyond National Jurisdiction' (BBNJ) Treaty or the 'High Seas Treaty,' this agreement marks the culmination of twelve years of study on the growing threats to marine biodiversity and nearly five years of discussion and treaty text negotiation by the IGC.—tasked with developing an international legally binding instrument targeting "the conservation and sustainable use of marine biological diversity" in areas beyond national jurisdiction—were unable to reach an agreement on various crucial articles.[66] Areas of disagreement included benefit-sharing, decision-making provisions, relationships with other bodies, the role of potential bodies to be established under the agreement, as well as general overarching provisions. However, when the fifth session resumed in February 2023, delegates were able to reach an agreement—though not without significant compromises—after working non-stop in multiple working streams through the night. Following technical edits and translation of the draft into the UN's six official languages, the IGC reconvened three months later to formally adopt the new treaty.

Adopted by consensus, the BBNJ Treaty marks the third implementing agreement under the United Nations Convention on the Law of the Sea (UNCLOS) and comes at a critical juncture in the need for ocean protection. With 84 signatories counted to date, the agreement will remain open for signature until September 20, 2025.[67] The agreement has yet to enter into force, and in accordance with article 68(1) of the agreement, will only do so "120 days after the date of deposit of the sixtieth instrument of ratification, approval, acceptance or accession."[68] For comparison, it took twelve years for the United Nations Convention on the Law of the Sea (UNCLOS) and six years for the UN Fish Stocks Agreement to enter into force, meaning that ratification of this new treaty may take some time.[69] Proponents of the BBNJ Treaty confess that the real work begins now with campaigns for treaty ratification afoot. Once the treaty enters into force, guidance will still be necessary on the treaty's interactions with existing global, regional, and subregional bodies; the interrelation between different international benefit-sharing systems; needs-assessments for capacity building and technology transfer; financing the treaty's implementation; and other administrative and procedural matters. Guidance on these matters will remain outstanding for consideration at the first Conference of the Parties (CoP1) to the agreement.[70]

B. Global Biodiversity Framework and Fund

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[65] *Summary Report, 20 February—4 March 2023 Resumed 5th Session of the Intergovernmental Conference (IGC) on BBNJ,* INT'L INST. FOR SUSTAINABLE DEV. (last visited Feb. 18, 2023).

[66] *Id.*

[67] *See Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction*, U.N. Treaty Collection (June 19, 2023).

[68] *See Id.*

[69] *See* INT'L INST. FOR SUSTAINABLE DEV.: EARTH NEGOTIATIONS BULLETIN, SUMMARY OF THE FURTHER RESUMED FIFTH SESSION OF THE INTERGOVERNMENTAL CONFERENCE TO ADOPT AN INTERNATIONAL LEGALLY BINDING INSTRUMENT UNDER THE UN CONVENTION ON THE LAW OF THE SEA ON THE CONSERVATION AND SUSTAINABLE USE OF MARINE BIODIVERSITY OF AREAS BEYOND NATIONAL JURISDICTION (June 23, 2023).

[70] *See* IUCN, THE HIGH SEAS BIODIVERSITY TREATY: AN INTRODUCTION TO THE AGREEMENT UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA ON THE CONSERVATION AND SUSTAINABLE USE OF MARINE BIOLOGICAL DIVERSITY OF AREAS BEYOND NATIONAL JURISDICTION (Nov. 2023).

In August 2023, the Global Biodiversity Framework Fund was launched to support the implementation of the Kunming-Montreal Global Biodiversity Framework (GBF).[71] The GBF was adopted at COP15 in 2022 and sets forth four key biodiversity goals for 2050: (1) working to prevent species' extinction; (2) promoting sustainable use and management of biodiversity; (3) achieving "fair sharing of the benefits from the utilization of genetic resources"; and (4) ensuring "that adequate means of implementing the GBF be accessible to all Parties, particularly Least Developed Countries and Small Island Developing States."[72] By substantially increasing the financial resources available to countries, the GBF Fund aims to facilitate the fulfillment of these four goals by 2050—as well as the fulfillment of the twenty-three narrower targets that the GBF identified for 2030.[73]

Two countries, the United Kingdom and Canada, have already announced initial contributions to the fund. Future contributions are anticipated from public, private, and philanthropic sources alike to mobilize and accelerate investment in the conservation of the world's biodiversity. As the GBF Fund continues to grow, priority will be given to support for Indigenous communities, Small Island Developing States, and Least Developed Countries.[74]

V. Environmental Protection and Conservation

A. EU Nature Restoration Law

In November 2023, the European Union Parliament and the Council of the EU reached an agreement over the European Commission's proposed Nature Restoration Law (NRL) as part of the Biodiversity Strategy in the European Green Deal.[75] The NRL provides a number of meaningful targets, requiring Member States to develop national restoration plans by November 2025 and to begin implementing restoration measures by approximately 2026. Member States must analyze the specific conditions of their unique habitats, the most appropriate methods for nature restoration, financing needs for implementation and the socio-economic impact of the proposed restoration measures. The NRL encourages Member States to work collaboratively and in tandem with their neighboring countries to draft and develop their national restoration plans, especially when habitat areas cross borders.[76]

The NRL builds on existing law, including Directive 92/43/EEC, which provides a framework to determine whether habitat types are in good condition and when those habitats have attained sufficient quality and quantity. With these goals in mind, the NRL sets forth both qualitative and quantitative targets for restoring ecosystems. Qualitatively, the NRL requires Member States to show "a continuous improvement in the condition of the habitat types . . . until good condition is reached."[77] "Good condition," in turn, is defined as a habitat where "key characteristics . . . reflect the high level of ecological

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[71] *See Launch of the Global Biodiversity Framework Fund*, Convention on Biological Diversity (Aug. 22, 2023), [hereinafter "*Launch*"]; *see also Kunming-Montreal Global Biodiversity Framework*, Convention on Biological Diversity (Dec. 18, 2023), [hereinafter "*Framework*"].

[72] *See COP15 Ends with Landmark Biodiversity Agreement,* United Nations Environment Programme (Dec. 20, 2022).

[73] *See* Launch, *supra* note 71; *see* Framework, *supra* note 71*; see also* Press Release, U.N. Envtl. Programme, New global biodiversity fund launched in Vancouver (Aug. 25, 2023).

[74] *See Launch, supra* note 71;Press Release*, supra* note 73.

[75] *See* Eur. Parl. Doc. (COM 304) COD 195 (2022) [hereinafter "NRL"].

[76] *Id.*

[77] *Id*. at Art. 5 ¶ 6.

integrity, stability and resilience."[78] Though compliance with these qualitative requirements may be subjective and difficult to enforce, the NRL focuses on continuous improvement and preventing further deterioration as measured on a national level. For example, in urban ecosystems, Member States must ensure there is an "increasing trend" in the total national area of urban green space and must "ensure that there is no net loss . . . of urban green space" on a national level.[79] Quantitatively, the NRL requires Member States to implement restoration measures over certain percentages of their degraded habitats. For example, in marine ecosystems that are not in "good condition," Member States must put restoration plans in place for 30% of the total area by 2030. This requirement increases to 60% by 2040, and 90% by 2050. Notably, however, Member States have until 2040 to "know" the condition of all marine habitat types in their jurisdiction.[80]

The NRL will be subject to review every two years beginning in 2030, at which time the Commission must assess the various impacts of the law, particularly on the agricultural sector and rural areas. Whether the NRL helps the EU meet its climate change, socio-economic, sustainability, and resilience objectives will depend largely on the quality of the national restoration plans submitted by Member States. The specific format of the plans has not yet been determined, but the plans must cover the period up to 2050 and must account for the various restoration measures and frameworks established in other EU Regulations and Directives. In a nod to environmental justice concerns, Member States are required to develop these plans using a transparent process that engages with the public and relies on the best available scientific evidence. Furthermore, the resulting plans must consider the social, economic, and cultural characteristics of the various regions or communities—particularly as they effect the outermost regions.[81]

Most of the NRL's provisions rely on each Member State's good faith efforts to "endeavor" to meet the restoration targets. Notably, the NRL exempts Member States from compliance for a variety of different reasons, including force majeure or natural disasters; "unavoidable habitat transformations which are directly caused by climate change"; actions or inactions of other countries for which the Member State is not responsible; and, in exceptional circumstances, the realization or continuation of certain activities that are in the public interest.[82] Similarly, areas sited for renewable energy developments or used solely for national defense activities may be exempt from the NRL's provisions, and the NRL provides an "emergency brake" provision that allows restoration activities to be temporarily suspended if the impact on agriculture is placing food security or production at risk.[83]

B. Arctic Region Protections

In 2023, the Biden Administration released its Implementation Plan for achieving the ten-year National Strategy for the Arctic Region issued in 2022.[84] The Implementation Plan provides over 30 objectives and 200 actions that advance the prior strategy and address the impact of climate change in the Arctic region in collaboration with international partners. For example, Strategic Objective 2.2 assigns the Office of the Special Presidential Envoy for Climate and the U. S. State Department as the lead agencies responsible for

[78] *Id*. at Art. 3 ¶ 4.
[79] *Id.* at Art. 6 ¶ 1.
[80] *Id*. at Art. 5 ¶ 1(a), 1(b), Art. ¶ 1.
[81] *NRL, supra* note 75 at Art. 11 ¶ 9(a).
[82] *Id.* at ¶ 35.
[83] *Id.*
[84] *See* THE WHITE HOUSE, IMPLEMENTATION PLAN FOR THE 2022 NATIONAL STRATEGY FOR THE ARCTIC REGION (Oct. 18, 2023).

working with the intergovernmental Arctic Council to mitigate emissions of carbon dioxide, methane, and black carbon through existing and new international initiatives. Other steps listed in the plan are assigned to various agencies and include (i) organizing an expanded U.S.-Canada Arctic dialogue, (ii) supporting a successful Norwegian chairmanship of the Arctic Council, (iii) continuing implementation of the Central Arctic Ocean (CAO) Fisheries Agreement, including the establishment of exploratory fishing measures, (iv) continuing to lead and support adoption, by 2023, and entry into force, by 2026, of Polar Code amendments at the International Maritime Organization's (IMO) Maritime Safety Committee to address gaps in Polar Code implementation, and (v) initiating discussions among international funders of Arctic science, and with international science organizations, to identify high priority areas conducive to collaborative research.[85]

Prior to this development, in September 2023, the Biden Administration announced several actions it was taking to better protect the Arctic.[86] This announcement included the Secretary of the Interior's determination to cancel the remaining seven oil and gas leases in the Arctic National Wildlife Refuge, which the previous administration had issued. The Biden Administration also issued a draft supplemental environmental impact statement to reassess the environmental impacts on the Refuge.[87] In addition, the Administration proposed new regulations for the National Petroleum Reserve in Alaska to provide additional protections as well as support subsistence activities for Alaska Native communities.[88] "The draft rules… are expected to be finalized in the coming months."[89]

C. Forest Management Impacts of the Russian-Ukrainian Conflict

Russia's invasion and continued occupation of Ukraine continues to exacerbate the existing challenges to sustainable forest management in Ukraine.[90] "More than 10% of the Ukrainian forests are still occupied."[91] Contamination by mines and explosive objects has degraded forest area, exacerbated by the prioritization of demining efforts in regions other than forests. In de-occupied areas, the extent of damage to protected forest areas will only be able to be determined after demining these areas.[92]

The National Parks are in critical condition. "Russian invaders still occupy 10 national parks, 8 nature reserves and 2 biosphere reserves across Ukraine."[93] Hundreds of hectares of valuable area have been devastated by war-caused forest fires. Movement of military equipment, destruction and theft of equipment, and other war activities continue to have tragic effects on the forest lands. Chernobyl radiation remains an issue due to lack

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[85] *Id.* at 21.
[86] *See* *Statement from President Joe Biden on Protecting Arctic Lands and Wildlife in Alaska*, THE WHITE HOUSE (Sep. 6, 2023).
[87] *See* *Supplemental Environmental Impact Statement for the Coastal Plain Oil and Gas Leasing Program*, BUREAU OF LAND MGMT. (last updated Nov. 8, 2023).
[88] *Id.;* Management and Protection of the National Petroleum Reserve in Alaska, 88 Fed. Reg. 62,025 (proposed Sept. 8, 2023) (to be codified at 43 C.F.R. pt. 2360).
[89] Heather Richards, *Biden's Arctic oil rules may leave 'big gaps' on climate*, E&E NEWS BY POLITICO: ENERGYWIRE (Dec. 18, 2023, 6:46 AM).
[90] Liubov Poliakova & Silvia Abruscato, *Final Report: Supporting the recovery and sustainable management of Ukrainian forests and Ukraine's forest sector*, FOREST EUROPE (June 21, 2023).
[91] *Id*. at 49.
[92] *Id.* at 43.
[93] *Id*. at 14.

of care from the Russian troops. The invaders raise radioactive dust with their vehicles, and they have destroyed the laboratory and looted the administrative office.[94]

Despite the destruction, limited access to external financial sources, and plummeting numbers of forest staff members, the government has acted remarkably quickly to address the critical state of its forests. The Ukrainian government's first national Recovery Plan, presented in July 2022, included various forest-related priorities. Since then, the area of Forest Stewardship Council (FSC) certified forests has since increased in 2023, despite the suspension of Forest FSC certificates in the military conflict zones.[95]

VI. INTERNATIONAL CHEMICALS

A. EU Chemical Industry Transition Pathway

In January 2023, the European Commission published the Transition Pathways for the Chemical Industry (The Pathway).[96] The Pathway, which supports the 2021 updated EU Industrial Strategy, was co-created by EU countries, chemical industry stakeholders, and NGOs.[97] The Pathway contains over 150 actions aimed at transforming the chemical industry by building resilience, sustainability, and circularity in line with principles of a circular economy. These actions are organized into twenty-six groups and are designed to be co-implemented by stakeholders within an agreed timeline.[98]

Following the Pathway's publication, the Commission also published the first initiatives meant to support the "twin" green and digital transitions of the chemical sector in December 2023.[99] These twin transitions are key to transforming the European economy and delivering on the European Green Deal and are particularly important to achieve in the chemical sector, which is the fourth largest industry sector in the EU and has a major influence on Europe's manufactured goods. The eighty-three initiatives originally published were crowd-sourced from industry stakeholders and reviewed by the Commission, aiming to build a more resilient and climate-neutral economy through safe and sustainable chemicals. Additional initiatives will continue to be reviewed and published on an ongoing basis.[100]

B. European Chemical Agency PFAS Proposal

In February 2023, the European Chemical Agency (ECHA), an agency of the European Union, published its proposal for restricting per- and polyfluoroalkyl substances (PFAS) in Europe.[101] Representatives from Denmark, Germany, the Netherlands, Norway, and Sweden prepared the proposal over the last three years. The ECHA claims the proposal is the broadest ever prepared, as it covers over 10,000 PFAS substances.[102] The proposal

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[94] *Id*. at 16.
[95] *Id.* at 20.
[96] *See Transition Pathway for the Chemical Industry*, EUR. COMM'N (last updated May 17, 2023).
[97] *Id.; see also European Industrial Strategy*, EUR. COMM'N (last visited Apr. 10, 2024).
[98] *Transition Pathway, supra* note 96.
[99] *See Transition Initiatives,* EUR. COMM'N (last visited Mar. 16, 2024); *see also The Chemical Industry Takes Bold Steps to Achieve the Twin Transition***,** EUR. COMM'N (last visited Mar. 16, 2024).
[100] *Id.*
[101] *See* EUR. CHEM. AGENCY, ANNEX TO THE ANNEX XV RESTRICTION REPORT (Mar. 22, 2023).
[102] *See* Press Release, Eur. Chem. Agency, ECHA publishes PFAS restriction proposal (Feb. 7, 2023).

process involved a risk assessment and an impact analysis that considered both the benefits of the PFAS restrictions and the costs to the industry for transitioning to PFAS-free alternatives. The availability of alternatives for industry played a large part in the development of the proposal. The ECHA considered two restrictions: 1) a full ban on PFASs that would go into effect 18 months after the EU adopts the ban or 2) a ban with different effective dates depending on the availability of alternatives for the use of the PFAS.[103]

The proposal bans the manufacture, sale, and use of PFASs above a concentration limit, including future uses in substances, mixtures, and equipment. The concentration limits are as follows: "1) 25 ppb for any PFAS (except polymeric PFASs), 2) 250 ppb for the sum of PFASs, optionally with prior degradation of precursors, and 3) 50 ppm for PFASs, including polymeric PFASs."[104]

The default under the proposal is to ban the use of PFASs eighteen months after the restriction goes into effect. This time frame applies to the use of PFAS, for which alternatives are already available and work, such as non-stick pans and cosmetics. Other uses of PFAS will have five years to transition to non-PFAS alternatives. These uses have alternatives that are under development but have yet to be added to the market, such as food contact materials for industrial food and feed production. Finally, additional uses will have twelve years to transition to non-PFAS alternatives. These uses still need to identify, develop, and certify alternatives, such as implantable medical devices like pacemakers.[105]

The ECHA received over 5,600 comments on the proposal over the six-month consultation period from March-September 2023.[106] ECHA's scientific committees for Risk Assessment (RAC) and Socio-Economic Analysis (SEAC) will now consider the comments and the proposal as a whole. It is anticipated that they will deliver their opinions to the ECHA in 2024. ECHA anticipates that it will adopt those opinions in 2025 and send them to the European Commission, which will decide on the potential restriction with the EU Member States. ECHA is anticipating that the restriction will go into effect in 2026 or 2027.[107]

VII. Global Litigation Efforts

A. United States

1. Juliana v. United States

After years of litigation since their original filing in 2015, twenty-one plaintiffs in *Juliana v. United States* filed their second amended complaint on June 8, 2023.[108] The U.S. District Court Judge Ann Aiken granted the plaintiffs' motion to amend their complaint on June 1, 2023, allowing the case to proceed to trial. In their second amended complaint, the plaintiffs claimed the U.S. government violated the plaintiffs' rights to life, liberty, and property by substantially causing and contributing to the concentration of CO_2 in the atmosphere. The plaintiffs also claimed that the U.S. government failed to protect public

[103] *See Annex to the Annex XV Restriction Report, supra* note 101.
[104] *Id.* at 24.
[105] *Id.* at 31.
[106] *See ECHA receives more than 5,600 comments on PFAS restriction proposal*, Eur. Chem. Agency (Sept. 26, 2023).
[107] *See* Eur. Chem. Agency, Media Briefing: proposal to restrict PFAS chemicals in the EU, YouTube (Feb. 7, 2023).
[108] *See* Juliana v. United States, Our Children's Trust (last visited Feb. 10, 2024).

trust resources. The plaintiffs outlined how the U.S. government knew about the effects of the fossil fuel industry, yet continued to allow for the exploitation of fossil fuels. [109]

This complaint was similar to the original complaint filed in 2015; however, it made a narrower claim for declaratory relief in response to the Ninth Circuit's dismissal of the case in 2020. The Ninth Circuit had found the plaintiffs' case compelling, but ultimately held that it was unable to provide the relief requested. Judge Ann Aiken stated that the relief sought in the second amended complaint would address the concerns made by the Ninth Circuit, as well as partially relieve the plaintiffs' injuries and guide the actions of the other branches of government. [110]

As the case has proceeded since 2015, it has garnered national and international media attention—leading to increased awareness, support, and opposition to the case from various communities. For example, in March 2023, Judge Ann Aiken denied 18 Republican Attorney General's requests to intervene as defendants in the case. Similarly, in June 2023, a coalition of different organizations delivered the Department of Justice a petition requesting that the Attorney General end its aggressive opposition to the case proceeding to trial via various attempts to dismiss or delay the case. In December 2023, Judge Ann Aiken dismissed many of these attempts and ruled in favor of the *Juliana* plaintiffs, allowing the case to proceed to trial and scheduling a pretrial conference. The growing interest and developments in this landmark case will likely proceed even further next year as the case progresses. [111]

B. United Kingdom

2. *ClientEarth v. Shell*

In February 2023, ClientEarth filed a derivative action against Shell's Board of Directors for their alleged breach of duty to protect shareholders from long-term risks related to climate change.[112] The case was the first of its kind which attempted to hold corporate directors personally liable for failing to shift away from fossil fuels quickly enough. ClientEarth, a non-profit environmental law organization and UK-registered charity, brought suit in an attempt to compel Shell's board to continue its promised move toward an alternative business model to remain competitive in the energy markets of the future. Failure to do so, argued ClientEarth, would cause the company's stock to plummet and significantly devalue shareholders' investments. Shell countered that its strategy remained consistent with the goals of the 2015 Paris Agreement.[113] The case was filed after Shell's CEO Wael Sawan announced plans to scale back investments in renewable energy and low-carbon business as part of its strategy to boost returns. The company boasted record profits in 2022 – more than $42 billion, double its 2021 profits.[114] ClientEarth sought declaratory and injunctive relief to require that Shell properly manage its climate risk. However, the UK High Court dismissed the case without considering its merits, holding that ClientEarth "failed to demonstrate it had a prima facie case; and that the case was not brought in good faith" within the meaning of the UK Companies Act 2006.[115]

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[109] *Juliana v. United States*, No. 6:15-cv-01517-AA at 134 (9th Cir. Dec. 2020).
[110] *See* Jennifer Hijazi, *Youth Climate Case Plaintiffs Win Bid to Proceed Toward Trial*, BLOOMBERG L. (June 1, 2023, 3:21 PM).
[111] *See Juliana, supra* note 108.
[112] *See Our Groundbreaking Case Against Shell's Board of Directors Comes to an End*, CLIENTEARTH (Nov. 15, 2023).
[113] *See ClientEarth v. Shell Plc*, BLACKSTONE CHAMBERS (July 24, 2023).
[114] *See* Somini Sengupta, *A Lawsuit Against Big Oil Gets Personal*, N.Y. TIMES (Feb. 10, 2023) (subscription required).
[115] *See ClientEarth*, *supra* note 113.

In a derivative action, the claimant bears the burden of proving that the claim is brought in good faith, and not for an ulterior motive.[116] It may be challenging for a non-profit to meet this burden and may prove even more difficult when the claimant is a *de minimis* shareholder. While ClientEarth had the support of institutional investors, who collectively hold over 12 million shares, the organization itself only holds a small number of shares. ClientEarth was ordered to pay the costs of the proceedings, which may serve as a deterrent to non-profits and other organizations seeking to bring such claims.[117] The judgment handed down in *ClientEarth v. Shell Plc* leaves open the question of whether litigation is a suitable tool for enforcing corporate compliance with ESG-related obligations.

[116] *See* Christopher Boyne et. al., *ClientEarth v. Shell Plc: High Court Rejects Climate Change Activist Group's Application for Permission to Bring Derivative Suit*, DEBEVOISE & PLIMPTON (Sept. 5, 2023).
[117] *See id.* at 6.

Chapter L: MINING
2023 Annual Report[1]

I. JUDICIAL DEVELOPMENTS

A. Great Basin Resource Watch v. United States Department of the Interior

This case is the second district court review of the Bureau of Land Management's ("BLM") approval of a molybdenite ore mine in central Nevada, called the Mt. Hope Project.[2] In 2013, environmental plaintiffs challenged BLM's approval on various grounds. The U.S. District Court of Nevada found for defendants on all counts, but the Ninth Circuit reversed, holding BLM violated the National Environmental Policy Act ("NEPA") (and declining to reach the other grounds). The original Record of Decision ("ROD") was vacated, and the matter remanded to BLM. BLM then issued a second ROD in 2019, giving rise to this second lawsuit.

In this second iteration, the district court found BLM's approval of the mine failed to protect waters and land under Public Water Reserves 107 ("PWR 107"). PWR is an executive order from 1926 that withdrew qualifying springs and their surrounding land, but held them open to occupation relating to metalliferous minerals "as the mining laws permitted."[3] The issue in *Great Basin* was whether BLM can "occupy" the land that qualifies for PWR 107 protection solely by dumping waste rock on it. The court answered in the negative. Under section 22 of the Mining Act of 1872 and the Ninth Circuit's recent *Rosemont* decision interpreting the same, a "discovery of valuable minerals" in the PWR 107 lands "is essential to the right to any occupancy."[4] Because there was no evidence in the record that "the PWR 107 springs or surrounding lands contain molybdenite ore or any other metalliferous minerals", the court remanded a second time so that BLM could conduct this analysis.[5]

The district court went on to reject the plaintiffs' NEPA challenges, finding that (1) BLM's setting of baseline values for air quality conditions at zero was reasonable, (2) "BLM made a reasonable decision to not include potential oil and gas developments in its cumulative impacts analysis"[6] because no oil and gas developments had occurred since 2012 and there were no pending permit applications, and (3) BLM's failure to adequately analyze mitigation to water sources was harmless error because the amount of replacement water at issue was minor.[7]

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[1]This report was compiled and edited by Kayla Weiser-Burton of Dorsey & Whitney LLP, in addition to Samantha Burke, Janet Howe, and Andrea Driggs, all of Perkins Coie LLP, and Laura Granier of Holland & Hart, LLP. This chapter provides a synopsis of many significant judicial and regulatory developments as they relate to the mining industry. Any opinions of the authors in this report should not be construed to be those of Dorsey & Whitney LLP, Perkins Coie, LLP, or Holland & Hart LLP.

[2]Great Basin Res. Watch v. U.S. Dep't of Interior, No. 3:19-CV-00661-LRH-CSD, 2023 WL 2744682, at *1 (D. Nev. Mar. 31, 2023).

[3]*See* Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv., 33 F.4th 1202, 1219 (9th Cir. 2022).

[4]*Great Basin Res. Watch*, 2023 WL 2744682, at *3-4.

[5]*Id.* at *5.

[6]*Id*. at *9

[7]*Id.* at *6-10.

B. *Center for Biological Diversity v. United States Fish and Wildlife Service*

This suit is the latest litigation development surrounding the proposed Rosemont copper mine in Southern Arizona.[8] Environmental plaintiffs challenged Fish and Wildlife Service's ("FWS") approval of the project after it determined that the mine would not destroy critical jaguar habitat as designated under the Endangered Species Act ("ESA"). In an in-depth opinion analyzing the ESA's critical habitat provisions and their application, the Ninth Circuit found that "the district court correctly vacated the FWS's occupied critical habitat designation but erred in upholding the unoccupied critical habitat designations."[9]

As to the relevant occupied critical-habitat designation, the Ninth Circuit agreed with the district court that FWS erred in considering a photograph of a jaguar from 2013 to determine the bounds of an occupied zone.[10] The controlling question is whether the habitat was occupied at the time the jaguar was listed as an endangered species—in 1972—and thus recent photographs were not relevant. Because the only other evidence supporting the occupied designation was a single sighting in 1965 from a different mountain range, FWS's occupied critical habitat designation was arbitrary and capricious.[11]

As to the relevant unoccupied critical habitat designations, the Ninth Circuit preliminarily confirmed that in order to designate an unoccupied critical habitat, the FWS must first determine that the occupied critical habitat is inadequate to conserve a protected species. FWS failed to do so, rendering its designations arbitrary and capricious.[12] Beyond that, the court found that the FWS considered irrelevant factors in designating the subject areas as unoccupied critical habitats. Specifically, FWS improperly considered recent sightings as well as the presence of primary constituent elements ("PCEs"), which are "those specific elements of the physical or biological features that provide for a species' life history processes and are essential to the conservation of the species."[13] Permitting a designation based solely on the presence of PCEs would flip the standard by making it *easier* to designate an area as unoccupied than occupied.

C. *Idaho Conservation League v. Poe*

An environmental organization brought a Clean Water Act ("CWA") citizen suit alleging that a miner committed ongoing CWA violations by operating a suction dredge in a navigable river without a National Pollutant Discharge Elimination System ("NPDES") permit.[14] The United States District Court for the District of Idaho entered summary judgment for the organization, and the Ninth Circuit affirmed. Specifically, the Ninth Circuit held that the miner's activities—excavating dirt and gravel in the river using a high-pressure blaster nozzle, extracting any gold and other heavy metals, and then discharging the dirt and other non-heavy metal materials into the water—constituted a "discharge of pollutants" under Section 1311(a).[15]

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[8]Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv., 67 F.4th 1027 (9th Cir. 2023).
[9]*Id.* at 1030.
[10]*Id.*
[11]*Id.* at 1039-1040.
[12]*Id*. at 1042.
[13]*Id.* at 1033.
[14]Idaho Conservation League v. Poe, 86 F. 4th 1243, 1245-46 (9th Cir. 2023).
[15]*Id.* at 1248.

In reaching this conclusion, the court determined that the miner's activities were like those in United States Supreme Court precedent, *Rybacheck v. EPA*,[16] which upheld EPA regulations interpreting the CWA as prohibiting discharges from placer mining sluice boxes.[17] The court also distinguished *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*[18] and *L.A. Cnty. Flood Control Dist. v. Nat. Res. Def. Council, Inc.*,[19] in which the Supreme Court held that "pumping polluted water from, and back into, the same body of water, without more, 'cannot constitute an "addition" of pollutants.'"[20] By contrast, here the miner excavated the materials from the riverbed, processed them, and then discharged them into the water, creating a plume of turbid wastewater.[21] These materials were not already suspended in the water but deposited in the riverbed, so it was very different than the simple water transfers at issue in *Miccosukee* and *LA Cnty. Flood Control*.

Further, the court held that the excavated material was not "dredged" or "fill material" for which the Army Corp had exclusive jurisdiction, because the relevant regulations do not speak clearly to whether "dredged" material remains "dredged" after it is processed, and the EPA has required section 402 permits for sluice dredging since 2013.[22]

D. *Twin Metals Minn. LLC v. United States*

A Washington D.C. District Court dismissed a complaint filed by Twin Metals Minnesota, LLC ("Twin Metals") alleging that the Bureau of Land Management ("BLM") cancelled Twin Metals' mineral leases and rejected Twin Metals' preferential lease application ("PRLA") and mine plan of operations ("MPO") in a manner that was arbitrary and capricious and violated the Administrative Procedures Act ("APA").[23] Since 1986, Twin Metals held two mineral leases in the Superior National Forest.[24] After going through a political roller coaster, renewal of the leases was ultimately denied and the leases cancelled in 2022.[25] In addition to its leases, Twin Metals also filed a PRLA to investigate deposits it discovered on nearby land, which BLM denied because the Forest Service applied to withdraw from mining much of the land identified in the PRLA.[26] Moreover, Twin Metals filed a MPO that BLM denied, because it included those lands in the rejected PRLA.[27] BLM also rejected a subsequent MPO filed by Twin Metals that excised the PRLA land.[28]

Relying on the plain language of the mineral leases, the court dismissed Twin Metals' complaint because Twin Metals' rights stemmed from its contracts with BLM and not a separate statutory authority. Further, the court found that the procedural obligation identified by Twin Metals—the right to be free of an arbitrary and capricious contract interpretation—does not exist prior to and apart from the rights created by Twin Metals'

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[16] 904 F.2d 1276 (9th Cir. 1990).
[17] *Idaho Conservation League,* 86 F.4th at 1247-48.
[18] 541 U.S. 95 (2004).
[19] 568 U.S. 78 (2013).
[20] *Idaho Conservation League,* 86 F.4th at 1247-48 (citing *Miccosukee Tribe of Indians*, 541 U.S. at 109).
[21] *Id.* at 1248.
[22] *Id.* at 1249-50.
[23] Twin Metals Minn. LLC v. United States, No. 22-CV-2506 (CRC), 2023 WL 5748624 at *1 (D.D.C. Sept. 9, 2023).
[24] *Id.* at *2
[25] *Id.* at *5.
[26] *Id.* at *6.
[27] *Id.* at *6.
[28] *Id.* at *7.

contracts. As a result, Twin Metals could only bring these claims as Tucker Act claims, and the court therefore, had to dismiss the APA claims for lack of jurisdiction.[29]

The court also dismissed for failure to state a claim Twin Metals' claim that BLM arbitrarily dismissed its PRLA, because Twin Metals failed to show that it was entitled to approval of its PRLA based on its discovery of a mineral deposit on the subject land. Since approval of the PRLA was discretionary, BLM had to deny it when the Forest Service requested to withdraw the relevant land from mining.[30] On this basis, BLM's rejection of Twin Metals' first MPO was also proper. Finally, the court found Twin Metals failed to state a claim that BLM improperly rejected its second MPO, finding instead that BLM was not required to consider it as an amendment to the first MPO and BLM otherwise properly considered and rejected it.[31]

E. Bartell Ranch LLC v. McCullough

On February 6, 2023, a Nevada District Court issued an order applying *Rosemont*[32] to a lithium mining project on BLM lands, remanding BLM's authorization to the agency for evaluation of the proposed use of mining claims for waste rock storage facilities under *Rosemont*. In *Bartell Ranch LLC v. McCullough*,[33] the Court considered numerous challenges to the BLM's approval of the Thacker Pass Lithium Mine in Nevada, including a challenge that the company did not have rights under the mining law to use mining claims for waste rock storage. The District Court applied *Rosemont*, remanded the agency's decision, but did not vacate the record of decision, concluding that based on evidence in the record, this case was distinguishable from *Rosemont*: The record before this Court included evidence of widespread mineralization across the project area, and there was a reasonable possibility the BLM could "fix" its *Rosemont* issue and reach the same decision on remand.[34] In completing its review on remand, BLM evaluated the proponent's rights under the *Rosemont* decision under 30 U.S.C. § 22 based on a "discovery of a valuable mineral deposit for a mining project proponent . . . before that proponent may permanently occupy any land."[35] BLM noted that the Nevada District Court supplied several guidelines for BLM's evaluation on remand including that BLM need only conduct an "analysis" of the record to determine whether, on the record before the agency, the proponent had discovered valuable minerals.

In undertaking its analysis, BLM was mindful that *Rosemont* does not require that BLM conduct a "validity determination," meaning an independent determination of the validity of the mining claims in question based on an on-the-ground field examination by licensed agency mineral examiners. Importantly, BLM recognized that *Rosemont* itself had noted that such a determination was "irrelevant" for the analysis at issue in the *Rosemont* case.[36] Instead, BLM analyzed whether, on the evidence before it, the agency could reasonably conclude that the proponent had discovered valuable minerals – an inquiry that is not tantamount to a formal mining claim validity determination.

BLM completed the remand and, after reviewing the evidence of mineralization on the mining claims in question, determined that all but eight of the claims had adequate evidence of mineralization to support use of the mining claims to site waste rock storage

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[29] *Twin Metals*, 2023 WL 5748624, at *8, 13.
[30] *Id.* at *18.
[31] *Id.* at *20.
[32] *See* Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv., 33 F.4th 1202 (9th Cir. 2022).
[33] No. 3:21-cv-00080-MMD-CLB, 2023 WL 1782343 (D. Nev. Feb. 6, 2023).
[34] *Id.* at *24.
[35] *Id.* at *5.
[36] *Id.* at *6.

and tailings facilities under *Rosemont*. BLM affirmed its prior authorization for the Thacker Pass Mine.

On the same day that BLM issued its letter affirming its prior decision on Thacker Pass, the Solicitor for the United States Department of the Interior issued an opinion on the Use of Mining Claims for Mine Waste Deposition, and Rescission of M-37012 and M-37057.[37] The Solicitor's Opinion interpreted *Rosemont* to mean that plans to place significant waste rock or tailings facilities on mining claims create a rebuttable presumption against the discovery of valuable minerals. Importantly, the Solicitor recognized that in most cases, neither the Mining Law nor the Departmental regulations require a proactive or independent gathering and determination of evidence of discovery before development, including when a proponent submits a proposed plan of operations for authorization.[38] However, the Solicitor goes on to explain that the agency may not "look the other way" when a proponent's plan suggests a lack of any discovery of valuable minerals – citing the *Rosemont* court's discussion that placement of a 700-foot layer of waste rock on mining claims seemed to that court and on that record to strongly imply such inconsistency with future extraction of valuable minerals from the mining claims at issue.[39]

The Solicitor's Opinion noted that *Rosemont* did not "categorically determine the types and quanta of evidence sufficient to demonstrate a discovery of valuable minerals or lack thereof."[40] Indeed, there was no reason for the *Rosemont* Court to opine on this issue given the record before it was undisputed that the lands at issue lacked any evidence of mineralization. The Solicitor's opinion explains that to obtain approval to site this type of "permanent" waste rock storage on mining claims, the record must include evidence of discovery, such as that found in a mineral potential report, "to support a reasonable conclusion that there are valuable mineral deposits underlying each mining claim on which the waste rock and tailings facilities will be located."[41]

II. Policy Updates

A. Interagency Working Group on Mining Laws, Regulations and Permitting

In September 2023, the Interagency Working Group on Mining Laws, Regulations, and Permitting ("IWG") released its final report containing recommendations on the reformation of mining on public lands (the "Final Report").[42] The Department of the Interior announced the formation of the IWG in March of 2022, noting that it was created to assess the adequacy of the existing regulatory framework governing domestic hardrock mining, and to determine whether changes were necessary in order to satisfy the goals identified in the Executive Order 14017 100-Day reviews.[43]

The Final Report identified a number of recommendations, including those that would necessitate legislative action by Congress, would require Federal agencies to promulgate new or amend existing regulations, and others that may be achieved by updating Federal or agency policies. Some of the central recommendations that substantially differ from the current regulatory framework include the following.

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[37] Memorandum from Robert T. Anderson, Solic. to Sec'y Dir., Bureau of Land Mgmt. (May 16, 2023).
[38] *Id.* at 4.
[39] *Id.*
[40] *Id.*
[41] *Id.* at 5.
[42] Interagency Working Grp. on Mining L., Reguls., and Permitting, Recommendations to Improve Mining on Pub. Lands (2023) (hereinafter, "Final Report").
[43] Request for Information to Inform Interagency Working Group on Mining Regulations, Laws, and Permitting, Notice of Decision, 87 Fed. Reg. 18,811 (Mar. 31, 2022).

1. Leasing System

The Final Report includes a recommendation to amend the General Mining Law of 1872 to permanently end the patenting of Federal lands, and replace the current mining claim location system with a leasing system.[44] The Final Report notes that Congress should develop a "fair process" for converting existing claims into leases or other legal instruments.[45] Once a leasing system has been established, the Final Report also recommends that a programmatic Environmental Impact Statement incorporating mining into land use planning processes be prepared and adopted for the eleven contiguous Western states and Alaska.[46]

2. Permitting Reform

The IWG has also recommended that the project management process adopted by the Bureau of Land Management ("BLM") Nevada state office be updated to reflect the recommendations of the Final Report and be made standard procedure nationwide for BLM and the United States Forest Service ("USFS"), with modifications necessary to ensure consistency with individual State laws and regulations.[47] The current management process is designed to provide consistency and coordination between the project proponent and applicable federal and state agencies and Tribes and was developed based on a number of Memorandums of Understanding between BLM and the Environmental Protection Agency ("EPA"), and BLM and USFS to coordinate the development of documentation pursuant to the National Environmental Policy Act ("NEPA").[48] The Final Report also recommends the adoption of a requirement that BLM and USFS share baseline reports with the EPA, other applicable Federal cooperating agencies, and Tribal governments in order to support a coordinated NEPA effort.[49] To promote accountability and enhance transparency, the Final Report also recommends developing procedures to establish coordinated and transparent environmental review and permitting schedules, to be shared publicly.[50] Of note, the Final Report does not explicitly address the additional directives for permitting reform identified in the Infrastructure Investment and Jobs Act or the Fiscal Responsibility Act.

3. Dirt Tax

Recognizing the need for additional resources in order to address hardrock abandoned mine lands, particularly those impacting Tribes and environmental justice communities, the Final Report includes a recommendation for Congress to adopt a fee on "material displaced from hardrock mining" to fund abandoned mine land reclamation.[51] While the Final Report does not explicitly include a recommended tax amount, the report does note the Obama administration's proposal of 7 cents per ton of material displaced from hardrock mining, which was estimated to have raised $200 million per year for such reclamation activities.[52]

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[44] *Final Report*, *supra* note 39, at 99.
[45] *Id.*
[46] *Id.* at 97.
[47] *Id.* at 107.
[48] *Id.* at 58.
[49] *Id.* at 107.
[50] *Final Report*, *supra* note 39, at 108.
[51] *Id.* at 105.
[52] *Id.*

4. Royalties

The IWG has also included a recommendation that "Congress enact a royalty for hardrock mineral production from federal lands."[53] "The IWG is not taking a position on whether such a royalty should be placed only on new mines, on expansions to existing mines, or on all new and existing mining operations."[54] Instead, the Final Report includes a recommendation to adopt a "royalty on net proceeds with a floor of 4 percent and a ceiling of 8 percent."[55] The recommendation is that royalties not be fixed at a single value for all minerals, but rather, be specific to a particular commodity, and possibly also the ore grade.[56]

Among other things, the Final Report also includes recommendations to require adherence to the Global Industry Standard on Tailings Management,[57] and the reformation of bankruptcy laws to prevent creditors from receiving reclamation assurances during bankruptcy proceedings.[58] Notably, the Final Report does not recommend any specific legislative or regulatory changes regarding ancillary use or mill sites, and instead defers to Congress "to consider legislation . . . to resolve longstanding controversies on these issues."[59]

[53] *Id.* at 104.
[54] *Id.*
[55] *Id.*
[56] *Final Report*, *supra* note 39, at 104.
[57] *Id.* at 126.
[58] *Id.* at 131.
[59] *Id.* at 103.

Chapter M: NUCLEAR LAW
2023 Annual Report[1]

I. JUDICIAL DEVELOPMENTS

A. *Texas v. U.S. NRC*[2]

The State of Texas and the Texas Commission of Environmental Quality (Texas), along with two oil and mineral firms (Fasken) (both collectively, Petitioners) filed a petition for review of the U.S. Nuclear Regulatory Commission's (NRC, or Commission) decision to issue a special nuclear materials (SNM) license to store spent nuclear fuel to Interim Storage Partners LLC (ISP) at the United States Court of Appeals for the Fifth Circuit. Specifically, Texas argued, among other things, that the NRC lacked the authority to issue a license under the Atomic Energy Act (AEA) to ISP away from reactor spent fuel storage.

The Court proceeded to analyze the Petitioners' standing under the Administrative Orders Review Act, or the Hobbs Act.[3] The Court observed that the Hobbs Act gives a "party aggrieved" by the final order the standing to file a petition to review the order in the court of appeals wherein the venue lies. The Commission argued that neither Texas nor Fasken had standing under the Hobbs Act because neither is a "party aggrieved," because Texas only submitted comments on the license proceeding and did not participate in the available administrative procedures, and Fasken may only challenge the order denying its intervention as a party, not later being able to seek review of the final judgment on the merits.[4] Utilizing a plain text reading of the Hobbs Act, the Court disagreed with the Commission. The Court opined that "[t]he plain text of the Hobbs Act merely requires that a petitioner seeking review of an agency action be a 'party aggrieved.'"[5] Accordingly, the Court explained that because Texas and Fasken participated in "some way" in the NRC's administrative proceedings (Texas, submitting comments, and Fasken, submitting a hearing petition), the Petitioners had met the Hobbs Act requirements.[6] Although the Court realized that its interpretation of the Hobbs Act would likely conflict with other Circuits because other Circuits have heightened participation requirements under relevant case law, the Court wrote that it did not need to resolve that tension because the Fifth Circuit recognizes an ultra vires exception to the party-aggrieved status requirement. This exception applies in either of the "two rare instances" where standing is given to a person "even if not a party to the original agency proceeding"—(1) "where 'the agency action is attacked as exceeding [its] power' and (2) where the person 'challenges the constitutionality of the statute conferring authority on the agency.'" [7] Under this standard, the Court observed that both Texas and Fasken had challenged the NRC's authority under the AEA or the Nuclear Waste Policy Act (NWPA) for issuing the SNM license to ISP. The Court accordingly found that the Petitioners had standing.

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[1]The contributor of this chapter is Joseph D. McManus, Senior Nuclear Regulatory Counsel at Westinghouse Electric Company LLC (Westinghouse). His contributions are made in his personal capacity and do not reflect Westinghouse's views.

[2]78 F.4th 827 (5th Cir. 2023).

[3]*Id.* at 837.

[4]*Id.* at 837-838.

[5]*Id.* at 838.

[6]*Id.*

[7]*Id.* at 839 (quoting Am. Trucking Ass'n., Inc. v. ICC, 673 F.2d at 85 n.4 (5th Cir. 1982)).

The Court then agreed with the Petitioners that "[t]he Commission ha[d] no statutory authority to issue the license," and that issuance of the license contradicted Congressional policy under the NWPA.[8] The Court took a textual approach in its analysis, opining that the Atomic Energy Act authorizes the Commission "to issue such licenses only for certain enumerated purposes—none of which encompass storage or disposal of material as radioactive as spent nuclear fuel."[9] Notwithstanding the Commission's argument that it could issue the license to ISP because the AEA conferred upon the NRC the enumerated authority to issue licenses for the possession of SNM, source material, and biproduct material, and these materials are constituent material of SNM, the Court was not persuaded. Moreover, the Court wrote that the issued license could not be reconciled with the NWPA, because the NWPA was created by Congress as the comprehensive statutory scheme for addressing spent nuclear fuel accumulation in the country.[10] Accordingly, the Court granted the Petitioner's petition for review and vacated ISP's license.

The NRC and ISP petitioned the Fifth Circuit for *en banc* review of the Panel's decision. On March 14, 2024, the Fifth Circuit denied the petitions, leaving the decision in place.

II. ADMINISTRATIVE DEVELOPMENTS

A. Commission Makeup

President Biden renominated Commissioner Jeffery Baran (D) for an additional five-year term. On June 14, 2023, the Senate Environment and Public Works Committee reported favorably to advance Commissioner Baran's nomination to the Senate Floor.[11] However, the Senate declined to vote on the President's nomination before Commissioner Baran's term expired on June 30, 2023. To date, the Senate has taken no action to bring another vote regarding Mr. Baran's nomination. Accordingly, the Commission is operating with four Commissioners, and there is currently a vacancy at the Commission that will remain open for the near future.

If not renominated and approved by the Senate, Chair Christopher Hanson's term is set to expire on June 30, 2024.[12] Commissioner David Wright's term is due to expire on June 30, 2025, if not renominated and approved by the Senate for another term.[13] Commissioner Annie Caputo is currently serving a term that will end on June 30, 2026,[14] and Commissioner Bradley Crowell's term is due to expire on June 30, 2027, if their terms are not renewed.[15]

B. Rulemakings

[8] 78 F.4th 840 (5th Cir. 2023).
[9] *Id*.
[10] *Id.* at 842-844.
[11] Jeffrey Martin Baran — U.S. Nuclear Regul. Comm'n, P.N. 547, 118th Cong. (lst Sess. 2023).
[12] *Chair Christopher T. Hanson*, U.S. NUCLEAR REGUL. COMM'N (last updated Feb. 9, 2024).
[13] *Commissioner David A. Wright*, U.S. NUCLEAR REGUL. COMM'N (last updated Sept. 25, 2023).
[14] *Commissioner Annie Caputo*, U.S. NUCLEAR REGUL. COMM'N (last updated Jan. 22, 2024).
[15] *Commissioner Bradley R. Crowell*, U.S. NUCLEAR REGUL. COMM'N (last updated Jan. 29, 2024).

1. Part 53 Rulemaking[16]

Consistent with the Nuclear Energy Innovation and Modernization Act (NEIMA), the Nuclear Regulatory Commission is continuing to establish a technology-inclusive, risk-informed, and performance-based regulatory framework, also referred to as the 10 C.F.R. Part 53 rulemaking. On March 1, 2023, the NRC staff provided a proposed Part 53 rule to the Commission for approval.[17] The NRC staff states that the draft proposed rule "provide[s] an integrated, performance-based, and technology-inclusive regulatory framework that covers the areas of staffing, personnel qualifications, training programs, operator licensing examinations, and human factors."[18] The staff notes that the framework would add new flexibilities such as provisions for automatic load-following and online refueling, among others. The NRC staff also continued its stakeholder engagement on various initiatives on the proposed regulatory framework, "including hosting public meetings on micro-reactor licensing, developing a PRA to support a construction permit application, and issuing draft Technology-Inclusive Content of Application Project and ARCAP guidance documents."[19]

To date, Commissioners Caputo and Wright have voted on the proposed rule, and although both have commended the staff and stakeholders on the effort taken to develop the proposed rule, both voted to "approve" and "disapprove" the rule and provided extensive comments to the NRC staff for consideration.

2. Regulation of Fusion Energy Systems

On January 3, 2023, the NRC staff sent the Commission SECY-23-0001, "Options for Licensing and Regulating Fusion Energy Systems." On April 13, 2023, the Commission approved the NRC staff's Option 2 and accordingly directed the NRC staff to develop regulations for fusion energy systems under the existing Part 30 byproduct material regulatory framework.[20] Additionally, the Commission directed the NRC staff to provide guidance for the program by developing a new volume that addresses fusion energy systems under NUREG-1556, "Consolidated Guidance About Materials Licenses".[21]

3. Part 110 Rulemaking for Advanced Reactor Export Licensing

On May 16, 2023, the Commission approved the NRC staff's recommended Alternative 3 in its SRM-SECY-0029, "Rulemaking Plan for the Implementation of Changes to Reflect Advanced Reactor Export Licensing Considerations"[22] to incorporate clarifying changes on advanced reactor concepts into NRC regulations governing the

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[16] *Part 53 – Risk Informed, Technology-Inclusive Regulatory Framework for Advanced Reactors*, U.S. NUCLEAR REGUL. COMM'N (last updated Nov. 20, 2023).
[17] U.S. NUCLEAR REGUL. COMM'N, SEMIANNUAL STATUS REPORT ON THE LICENSING ACTIVITIES AND REGULATORY DUTIES OF THE U.S. NUCLEAR REGULATORY COMMISSION, 17 (Oct. 2022—Mar. 2023).
[18] *Id.*
[19] U.S. NUCLEAR REGUL. COMM'N, SEMIANNUAL STATUS REPORT ON THE LICENSING ACTIVITIES AND REGULATORY DUTIES OF THE U.S. NUCLEAR REGULATORY COMMISSION, 18 (Apr.—Sep. 2023).
[20] Memorandum from Brooke P. Clark, Sec'y to Daniel H. Dorman, Exec. Dir. For Operations (April 13, 2023).
[21] *Id.*
[22] Memorandum from Brooke P. Clark, Sec'y to David Skeen, Dir. Off. of Int'l. Programs (May 16, 2023).

export of nuclear reactor equipment and material. The Commission also requested that the NRC staff consider additional proposed changes to 10 C.F.R. Part 110, Appendix A, to reflect items like control drums or novel equipment used for reactivity control in advanced reactors. The Commission additionally pointed out that the term "reactor pressure vessel" is expected to be replaced with "reactor vessel" to reflect differences in design and operating conditions and requested the staff consider whether the term should continue to include "pressure." The Commission stated that the staff should ensure that there is clarity on whether salt as a coolant should be governed as a nuclear material or a component under the applicable regulations.[23]

4. Part 140 Increase in Maximum Amount of Primary Nuclear Liability Insurance

The NRC's regulations at 10 C.F.R. Part 140, "Financial protection requirements and indemnity agreements," implement the financial protection requirements for certain persons and NRC licensees required under the Price-Anderson Act. The Price-Anderson Act requires that "the amount" of primary financial protection required shall be the maximum amount available at reasonable cost and on reasonable terms from private sources.[24] On July 14, 2023, American Nuclear Insurers, the underwriter of American nuclear liability policies, informed the NRC that it was increasing the maximum available primary nuclear liability limit from $450 million to $500 million, effective January 1, 2024. Accordingly, on October 19, 2023, the NRC promulgated a final rule which amended 10 C.F.R. § 140.11.[25] This final rule was effective on January 1, 2024, and increased the required amount of primary nuclear liability insurance from $450 million to $500 million for each nuclear reactor that is licensed to operate, is designed for the production of electrical energy, and has a rated capacity of 100,000 electrical kilowatts or greater.

5. Emergency Preparedness for Small Modular Reactors and Other New Technologies

On August 14, 2023, the Commission issued SRM-2022-0001, which approved the NRC staff's final rule for emergency preparedness for small modular reactors (SMRs) and other new technologies (ONT). [26] The final rule amends 10 C.F.R. Part 50 which impacts SMRs, non-light water reactors, research and test reactors, and medical radioisotope facilities.[27] Among other things, the final rule provides four major provisions: a new alternative performance-based emergency plan framework, including requirements for demonstrating effective response in drills and exercises; a requirement for a hazard analysis of any facility contiguous to or near an SMR or ONT, that considers any hazard that would adversely impact the implementation of emergency plans developed under the new framework; a scalable approach for determining the size of the plume exposure pathway emergency planning zone; and it requires any applicant of the above technologies to describe the ingestion response planning in the emergency plan, including offsite capabilities and resources available to prevent contaminated food and water from entering

[23] *Id.*
[24] Price Anderson Amendments Act of 1988, PUB. L. No. 100-408, § 170B.(1) .
[25] Increase in the Maximum Amount of Primary Nuclear Liability Insurance, 88 Fed. Reg. 71,988 (Oct. 19, 2023) (to be codified at 10 C.F.R. pt. 140).
[26] Memorandum from Rochell C. Bavol, Acting Sec'y to Daniel H. Dorman, Exec. Dir. For Operations (Aug. 14, 2023).
[27] *Id.*; *see* Emergency Preparedness for Small Modular Reactors and Other New Technologies,88 Fed. Reg. 80,050 (Nov. 16, 2023) (to be codified at 10 C.F.R. pts. 50, 52, 72).

the ingestion pathway. The final rule was effective December 18, 2023, and the NRC concurrently issued Regulatory Guide 1.242, "Performance-Based Emergency Preparedness for [SMRs], Non-Light-Water Reactors, and Non-Power Production or Utilization Facilities" which identifies methods and procedures that the NRC staff considers acceptable for SMR and ONT applicants to comply with performance-based emergency preparedness requirements in 10 C.F.R. Part 50.[28]

C. New Licenses, License Renewals, and Applications

There are ninety-three operating commercial nuclear power reactors in the United States.[29] Ten reactors have been operating for over fifty years; forty-two have been operating for between forty and forty-nine years; thirty-seven have been operating for between thirty and thirty-nine years; two have been operating between twenty and twenty-nine years, and one has been operating between one and nineteen years.[30]

The following are currently undergoing initial license renewal review by the NRC staff: Comanche Peak Units 1 and 2 (Texas); Perry Unit 1 (Ohio); and Diablo Canyon Units 1 and 2 (California).[31] With regards to subsequent license renewal (SLR) (i.e., additional 20 years of operation after 60 years), the staff is currently reviewing six applications, with six more SLR applications expected from 2024-2028.[32] The NRC notes that, with the Commission's issuance of certain orders in 2022 and SRM-SECY-21-0066, "Rulemaking Plan for Renewing Nuclear Power Plant Operating Licenses – Environmental Review,"[33] it would impact certain SLR applications because the applicants would not be able to rely on the NRC's 2013 Generic Environmental Impact Statement in their environmental report portion of their SLR application until an updated GEIS is finalized.

Regarding the newest power reactors constructed in the United States, on July 28, 2023, the NRC issued a press release announcing that it authorized the licensee, Southern Nuclear Operating Company, to load fuel and begin commercial operations of Vogtle Unit No. 4 in Georgia. Three days later, on July 31, 2023, Vogtle Unit No. 3 began commercial power operations on July 31, 2023, making it the first nuclear power reactor fully licensed and operating under the 10 C.F.R. Part 52 licensing scheme.[34]

On December 12, 2023, after holding a mandatory (uncontested) hearing, the Commission issued CLI-23-5 affirming that the NRC staff's review on the safety and environmental matters regarding Kairos Power LLC's (Kairos) construction permit application for its Hermes Test Reactor was sufficient and accordingly granted the

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[28] U.S. NUCLEAR REGUL. COMM'N, PERFORMANCE BASED EMERGENCY PREPAREDNESS FOR SMALL MODULAR REACTORS, NON-LIGHT WATER REACTORS, AND NON-POWER PRODUCTION OR UTILIZATION FACILITIES (2023).

[29] *Frequently Asked Questions (FAQs): How many nuclear power plants are in the United States, and where are they located?*, U.S. ENERGY INFO. ADMIN. (last updated Aug. 3, 2023).

[30] U.S. NUCLEAR REGUL. COMM'N, NUREG-1350, 2022-2023, 31, Vol. 34, Section 2: Nuclear Reactors (2023).

[31] *Status of Initial License Renewal Applications and Indus. Initiatives*, U.S. NUCLEAR REGUL. COMM'N (last updated Feb. 7, 2024).

[32] *Status of Subsequent License Renewal Applications*, U.S. NUCLEAR REGUL. COMM'N (last updated Feb. 7, 2024).

[33] Memorandum from Annette L. Vietti-Cook, Sec'y to Daniel H. Dorman, Exec. Dir. for Operations (Feb. 24, 2022).

[34] Press Release, Off. Of Pub. Affs.: U.S. Nuclear Regul. Comm'n, NRC Authorizes Fuel Loading and Operation at Vogtle Unit 4 (July 28, 2023).

construction permit.[35] The construction permit would allow the construction of a 35-megawatt thermal test reactor on a brownfield site in Oak Ridge, Tennessee. The Hermes test reactor proposes to use a combination of tri-structural isotropic (TRISO) fuel and molten fluoride salt coolant. Kairos expects to complete construction by the end of 2026 and operate the test reactor for four years.

Regarding non-power reactors, there are approximately thirty-one licensed and operating research and test reactors in the United States.[36] The NRC is currently reviewing construction permit application from Abilene Christian University for an advanced research reactor.[37]

D. Agreement State Applications and Amendments

In 2023, two states, Connecticut and Indiana, remain in the process of becoming agreement states and are currently drafting regulations to be reviewed by the NRC.[38] On January 9, 2023, the Governor of West Virginia submitted its letter of intent to the NRC Chair in becoming an agreement state.[39] Further, on August 24, 2023, the NRC staff sent SECY-23-0075 to the Commission, which if approved, would amend Wyoming's agreement under AEA Section 274.b. to give Wyoming regulatory authority over source material that is recovered during mineral processing activities which are primarily undertook for the purpose other than obtaining source material content, instead of the NRC.[40]

E. Adjudicatory Decisions

The number of Commission decisions continued its trend down again this year, with only five decisions being issued in 2023, compared to nine decisions that were issued in 2022. Three adjudicatory decisions issued in 2023 are summarized below:[41]

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[35]Kairos Power LLC (Hermes Test Reactor), CLI-23-5, No. 50-7513-CP (Dec. 12, 2023) (Slip op.).

[36]*Backgrounder on Research and Test Reactors*, U.S. NUCLEAR REGUL. COMM'N (last updated Dec. 30, 2021).

[37]*Abilene Christian University*, U.S. NUCLEAR REGUL. COMM'N (last updated May 19, 2023).

[38]*See Connecticut Agreement,* U.S. NUCLEAR REGUL. COMM'N (last updated Mar. 16, 2023); *see also Indiana Agreement,* U.S. NUCLEAR REGUL. COMM'N (last updated Mar. 16, 2023).

[39]Letter from Jim Justice, Governor of West Virginia, to Christopher T. Hanson, Chairman, U.S. Nuclear Regul. Comm'n (Jan. 9, 2023); *see also West Virginia: Non-Agreement State*, U.S. NUCLEAR REGUL. COMM'N (last updated Dec. 19, 2023).

[40]Policy Issue from Daniel H. Dorman, Exec. Dir. For Operations to The Commissioners, Wyoming's Proposal to Amend the Existing Agreement to Regulate the Processing of Source Material to Extract Mineral Res' Other than the Uranium or Thorium Content, 1 (Aug. 24, 2023).

[41]*Kairos Power LLC*, *supra* note 35, at Section C. On October 19, 2023, the Commission issued CLI-23-4, which concerned an appeal by applicant Pacific Gas & Electric Co. (PG&E) on a granted hearing request regarding a proffered contention alleging outdated financial analysis in PG&E's Diablo Canyon ISFSI license renewal application. However, since the appeal, PG&E had subsequently updated the financial analysis, and moved the Board to dismiss the contention as moot. The intervenor, San Luis Obispo Mothers for Peace, also moved to withdraw its contention; the Board

On March 17, 2023, the Commission issued CLI-23-1,[42] which concerned an application by Susquehanna Nuclear, LLC (the Applicants) for an indirect transfer and conforming license amendments of the operating licenses for Susquehanna Steam Electric Station, Units 1 and 2, as well as the general license for the Susquehanna independent spent fuel storage installation (ISFSI). The Applicants sought to transfer these licenses to reflect a corporate restructuring resulting from bankruptcy proceedings of its parent company. An individual petitioned to intervene in the proceeding, proffering two contentions: one questioning the Applicant's compliance with ISFSI decommissioning financial assurance regulations given its bankruptcy status, and one arguing that the Applicant failed to comply with the NRC's Bankruptcy Review Team (BRT) compliance mandates.

Regarding the contention that questioned the Applicant's decommissioning financial assurance, the Commission found that the Applicant's application did in fact address the financial assurance for decommissioning and that the Applicants asserted that their status in bankruptcy did not affect the decommissioning funding assurance of the ISFSI. As such, the Commission held that the petitioner failed to raise a material dispute with the application. As to the contention that concerned the NRC's BRT, the Commission observed that the decision to establish a BRT was the NRC staff's decision as part of its review, and therefore outside the scope of the proceeding. The proceedings were accordingly terminated because there were no admissible contentions.

On September 11, 2023, the Commission issued CLI-23-2, which concerned a request by a member of the public for an oral hearing and leave to intervene on an export license application by the U.S. Department of Energy and National Nuclear Security Administration (DOE/NNSA).[43] The DOE/NNSA's application sought to export up to 130 kilograms of highly enriched uranium (HEU) at 93.20% in broken metal form to a facility in France. The Petitioner requested that the NRC limit the amount of HEU that DOE/NNSA may export under its license.

The Commission observed that, under its regulations at 10 C.F.R. Part 110, it would grant a hearing in an export licensing proceeding if the hearing would be in the public interest and would assist it in making statutory determinations required by the AEA. Further, NRC regulations require that a hearing must "specify, when a person asserts that his interest may be affected, both the facts pertaining to his interest and how it may be affected."[44] The Commission accordingly analyzed the Petitioner's interest under these standards. The Petitioner described his past and ongoing professional work on non-proliferation issues which related to public information and education programs, and argued that his ability to carry out these functions would be significantly impaired unless he was granted a hearing on the issues. The Commission rejected this argument, holding that the Petitioner had not demonstrated that his educational activities would be adversely affected if the export license was issued to the DOE/NNSA; the Commission further noted that the Petitioner had not shown how a hearing would be in the public interest in assisting the Commission in making the required statutory and regulatory determinations. Although the Commission held that the Petitioner failed to meet the regulatory requirements for a hearing, it determined that the Petitioner's request amounted to a public comment on the application and was accordingly referred to the NRC's Office of International Programs for appropriate action.

On October 5, 2023, the Commission issued CLI-23-3, which concerned a license

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dismissed the contention and terminated the proceeding. The Commission accordingly vacated the Board's decision and dismissed PG&E's appeal.

[42]Susquehanna Nuclear, LLC (Susquehanna Steam Elec. Station, Units 1 and 2), CLI-23-1, Nos. 50-387-LT-3, 50-388-LT-3, 72-28-LT-3 (March 17, 2023) (Slip Op).

[43]U.S. Dep't of Energy (Export of 93.20% Enriched Uranium), CLI-23-02, No. 11006398 (Sept. 11, 2023) (Slip. Op.).

[44]*Id*.

amendment request to a 10 C.F.R. Part 70 SNM license that would allow the licensee, Nuclear Fuel Services, Inc. (NFS) to provide uranium purification and conversion services at its Erwin, Tennessee facility.[45] In response to the hearing opportunity, Erwin Citizens Awareness Network, Inc. (ECAN) proffered four contentions challenging the license amendment request: Contention A, asserting a need for a nuclear weapons proliferation assessment under the National Environmental Policy Act (NEPA); Contention B, challenging the purpose and need statement portion in the environmental report; Contention C, asserting an inadequate consideration of legacy contamination in the cumulative effects analysis; and Contention D, arguing that the NRC's fuel cycle facility regulations are inadequate with regards to quality assurance. Although the Atomic Safety and License Board (ASLB, or Board) found that ECAN established standing in the proceeding, it held that none of the contentions brought forward were admissible for hearing. The ASLB accordingly terminated the proceeding. ECAN accordingly appealed the decision to the Commission.

Under a clear error of law or abuse of discretion standard, the Commission held that ECAN failed to demonstrate that the ASLB erred or abused its discretion. Regarding Contention A, the Commission observed that the Board correctly applied Commission precedent whereby neither the AEA nor NEPA mandates a proliferation assessment by an applicant due to the comprehensiveness of 10 C.F.R. Part 70. With respect to Contention B, the Board held that ECAN's challenge of purpose and need statement being too "narrow and time limited" resulting in an alleged inadequate consideration of the no-build alternative did not address certain "critical facts" in the applicant's supplemental environmental report, and therefore the contention was inadmissible.[46] On appeal, ECAN contested this statement, arguing that it had only received the "critical facts" by oral argument and therefore was unable to challenge the application. However, the Commission held that the information was in fact in the supplemental environmental report, and ECAN could not show clear error by the Board; the Commission accordingly affirmed the Board's decision that the contention was inadmissible. Regarding Contention C, ECAN argued that NFS's supplemental environmental report was devoid of a cumulative impacts analysis, to include past actions that would prevent future contamination, which would accordingly make future contamination reasonably foreseeable.[47] ECAN also asserted that the supplemental environmental report was inadequate with regards to PFAS and sinkholes at the site, and that air emissions would double if the amendment was granted. Concerning these issues, the ASLB had determined that ECAN had not demonstrated either that these issues were within the scope of the proceeding or that NRC regulations or applicable statute demanded a further analysis by the applicant. The Commission affirmed the Board's finding that the contention was inadmissible, as ECAN did not show that the Board erred. As to Contention D, the Commission observed that because ECAN had not submitted a waiver petition as required to challenge an NRC regulation, and because ECAN failed to point to any error by the ASLB in its decision, the Commission affirmed the Board's decision in finding the contention inadmissible. Accordingly, the Commission affirmed the Board's decision to terminate the proceeding.

[45]Nuclear Fuel Serv. Inc., CLI-23-03, No. 70-143-LA (Oct. 5, 2023) (Slip Op.).
[46]*Id.* at 11.
[47]*Id.* at 14.

Chapter N: OCEANS AND COASTS
2023 Annual Report[1]

I. FISHERIES

A. Judicial Developments

1. *A.P. Bell Fish Co., Inc. v. Raimondo*[2]

The U.S. District Court for the District of Columbia granted summary judgment in favor of NMFS after commercial fishermen and a trade association challenged Amendment 53 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico. NMFS created Amendment 53 when, in the evaluation of stock assessment using new technology, it found that annual catch limits of red grouper needed to be altered. The plaintiffs alleged that the implementation of these new catch limits substantially decreased the allowed catch of red grouper in the commercial industry while simultaneously increasing the allowed catch of the same fish within the recreational industry. The plaintiffs argued that the change in allocation did not promote conservation or adhere to legal requirements mandated by the MSA, and the new allocation was based on bad data. Furthermore, the plaintiffs argued that the Amendment unfairly disadvantaged the commercial sector. In its analysis, the court found the plaintiffs' challenges to the Amendment to be incorrect and unreasonable, stating that NMFS acted neither arbitrarily nor capriciously but within the scope of its authority and adhered to national standards.

2. *Sea Shepherd New Zealand v. United States*[3]

In November 2022, the Court of International Trade issued a preliminary injunction ordering the immediate ban on imports into the United States of fish and fish products deriving from nine fish species caught in New Zealand's West Coast North Island inshore trawl and set net fisheries, unless affirmatively identified as having been caught with a gear type other than gillnets or trawls. The Government of New Zealand petitioned the court to modify the preliminary injunction to allow New Zealand a grace period to implement a "traceability system." The court denied the request, noting the government did not make a requisite showing of "changed circumstances" that would allow a modification of the preliminary injunction.

3. *Fishermen's Finest, Inc. v. United States*[4]

The Federal Circuit Court of Appeals recently affirmed the Federal Claims Court's dismissal of several fishing companies' Fifth Amendment takings claim because they did not possess any cognizable property interests in their fishing permits, licenses, and endorsements. Central to the plaintiffs' claims was the Frank LoBiondo Coast Guard Authorization Act (Coast Guard Act), which limits the number of fish that vessels could

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[1]This report was prepared by the Oceans and Coasts Committee and edited where necessary by Catherine Janasie, Sr. Research Counsel, National Sea Grant Law Center (NSGLC). Contributors also include: Ashley Koehler, AnnaGrace Meeks, Jonathan Scoggins, Kaitlyn Shaw, Madison Vice, and Matthew Sheffield. Case summaries in this chapter from the *NSGLC Ocean and Coastal Case Alert* used with permission. Nothing in this review represents the views of the contributors' employers or their clients.
[2]No. CV 22-1260 (TJK), 2023 WL 6159985 (D.C. Cir. Sept. 21, 2023).
[3]611 F. Supp. 3d 1406 (Ct. Int'l Trade 2023).
[4]59 F.4th 1269 (Fed. Cir. 2023).

collectively harvest and process in federally managed areas, such as the United States' Exclusive Economic Zone (EEZ). The plaintiffs alleged that the Coast Guard's limits on the number of fish that their vessels could collectively harvest and process within the EEZ amounted to an unlawful, uncompensated taking that deprived them of the full scope of its rights under its endorsements, licenses, and permits, and devalued its vessels. The court held that because there is no express language or other indication of intent to limit Congress's legislative power to determine licensing privileges under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Coast Guard Act's limitation on the companies' aggregate catch totals did not amount to any taking of compensable property. The court further clarified that fishing permits and licenses issued pursuant to the MSA are revocable privileges, rather than compensable property interests.

4. *Mexican Gulf Fishing Co. v. U.S Department of Commerce*[5]

Several charter fishing companies that operate in the Gulf of Mexico filed a class action complaint challenging a final rule requiring charter boat owners to install vessel monitoring systems (VMS) that would record and transmit GPS-location information. The final rule also required charter boat owners to report information about fishing yields and certain economic information related to charter trips. However, the district court denied the companies' summary judgment motion and granted summary judgment in favor of the government. On appeal, the companies' challenge was primarily focused on the GPS-tracking requirement, alleging that it violated the Fourth Amendment, exceeded the authority granted by the MSA, and violated the Administrative Procedure Act (APA) by being arbitrary and capricious. While the Fifth Circuit did not reach the constitutionality question, the court concluded that the MSA does not authorize the government to promulgate a GPS-tracking requirement because VMS devices are not "equipment" furthering the regulatory goals of the MSA, nor are they "necessary and appropriate" to further those goals. The Fifth Circuit reversed the district court's judgment and set the final rule aside.

5. *Relentless, Inc. v. U.S Department of Commerce*[6]

The owners of two fishing vessels that harvest herring (collectively, "Relentless") challenged NMFS's authority to promulgate a final rule under the MSA that requires fishing vessels to carry monitors on board in certain circumstances. The final rule also requires vessel owners to pay for monitors in certain instances by contracting with private entities. The U.S. District Court for the District of Rhode Island ruled in favor of the government, concluding that the final rule is a permissible exercise of NMFS's authority and is otherwise lawful. On appeal, Relentless argued that the final rule violated the MSA, APA, Regulatory Flexibility Act (RFA), and Commerce Clause of the U.S. Constitution. The court found that because Congress expressly authorized NMFS to require vessels to carry monitors, and because NMFS's interpretation of that authority does not depend on its payment of the costs, the final rule is authorized by the MSA. Further, the rule does not violate MSA's National Standards. The court also found that because NMFS had a rational basis for adopting the rule, the rule is not arbitrary and capricious in violation of the APA. The court concluded that the rule does not violate the RFA because NMFS considered and responded to comments and evaluated the impact of its action on small businesses. Lastly, because Relentless is not being forced to participate in the market, the rule does not violate the Commerce Clause. Accordingly, the First Circuit Court of Appeals affirmed.

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[5]60 F.4th 956 (5th Cir. 2023).

[6]62 F.4th 621 (1st Cir. 2023), *cert. granted in part sub nom. Relentless, Inc. v. Dep't of Com.*, 144 S. Ct. 325, 217 L. Ed. 2d 154 (2023).

6. *Center for Biological Diversity, et al. v. Haaland*[7]

Three environmental groups filed suit to compel the Department of the Interior to respond to its petition regarding the "take" and "trade" of endangered totoaba in Mexico, which threatens the endangered vaquita porpoise. The groups claimed that the take and trade of the species diminishes the effectiveness of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). On May 18, 2023, the Secretary of the Interior certified to President Biden that "nationals of Mexico are engaging in taking and trade of the totoaba fish ... and the related incidental take of vaquita ... that diminishes the effectiveness" of CITES.[8] Following the Secretary's certification, the parties agreed to dismiss the case with prejudice.

7. *Louisiana Department of Wildlife & Fisheries v. National Oceanic & Atmospheric Administration*[9]

In December 2019, NMFS promulgated a rule requiring certain shrimping vessels in Louisiana to use turtle excluder devices (TEDs) on all skimmer trawlers over 40 feet, including those that operate inshore. Louisiana's Department of Wildlife and Fisheries sued NMFS under the APA, challenging the rule as arbitrary and capricious. The district court found that Louisiana lacked standing to challenge the rule. On appeal, Louisiana argued that it had standing on four bases: the final rule preempts state laws regulating the harvest of shrimp in Louisiana waters, Louisiana has an interest in regulating marine resources, the state has a sovereign interest in the shrimp in its waters, and the rule interferes with Louisiana's enforcement of its wildlife laws. The U.S. Court of Appeals for the Fifth Circuit rejected each of these arguments.

8. *North Carolina Coastal Fisheries Reform Group v. Captain Gaston LLC*[10]

An environmental organization brought suit alleging shrimp trawlers were violating the Clean Water Act (CWA) by throwing bycatch overboard and by disturbing sediment with their trawl nets. The U.S. District Court for the Eastern District of North Carolina dismissed the suit. On appeal, the Fourth Circuit affirmed. The court stated that the issue required the court to apply the major-questions doctrine in interpreting the CWA. The court found that the return of bycatch to the ocean was not a discharge of a "pollutant" that would require compliance with the CWA. Sediment from the lagoon floor that was temporarily suspended in the water due to the trawl nets was not "dredged spoil," and, therefore, not a "pollutant" that required a CWA discharge permit. And, even if sediment from the lagoon floor was a pollutant, the trawlers did not "discharge" it.

9. *Massachusetts Lobstermen's Association, Inc. v. National Marine Fisheries Service*[11]

After NMFS announced that it would close an area off the coast of Massachusetts to lobster fishing from February 1 to April 30, 2023, the Massachusetts Lobstermen's Association filed suit, arguing that the closure is inconsistent with a provision in the

[7]639 F.Supp.3d 1355 (Ct. Int'l Trade 2023).
[8]*Id*. at 1358 (quoting Letters from Sec'y Deb Haaland, Dep't of the Interior, to Kamala Harris, Pres. of the S., and Kevin McCarthy, Speaker of the H.R., at 1 (May 26, 2023)).
[9]70 F.4th 872 (5th Cir. 2023).
[10]76 F.4th 291 (4th Cir. 2023).
[11]No. CV 23-293 (JEB), 2023 WL 3231450 (D.C. Cir. May 3, 2023).

Consolidated Appropriations Act of 2023. NMFS moved to dismiss the case as moot because the closure ended on April 30th. The court agreed and granted the motion.

B. Legislative Developments

On May 10, 2023, Rhode Island Senator Jack Reed introduced the Rhode Island Fisherman's Fairness Act of 2023, which would amend the Magnuson-Stevens Fishery Conservation and Management Act to add Rhode Island to the Mid-Atlantic Fishery Management Council, and for other purposes.[12] Rhode Island Rep. Seth Magaziner introduced a similar bill to the House on the same day.[13]

On June 12, 2023, Virginia Rep. Rob Wittman introduced the Supporting the Health of Aquatic systems through Research Knowledge and Enhanced Dialogue Act or the "SHARKED" Act which would amend Section 318(c) of the MSA to address shark depredation, a concern of the fishing community.[14] Depredation is "the partial or complete removal of a captured species by a shark" and a goal of the legislation is "to establish a task force of fisheries managers and shark experts responsible for improving coordination and communication on shark depredation across the fisheries management community."[15]

These acts have not yet cleared their respective committees.

C. Administrative Developments

On September 18, 2023, NMFS and the National Oceanic and Atmospheric Administration (NOAA) published the proposed rule for the Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations.[16] The proposed rule would expand the boundaries of the Massachusetts Restricted Area to include the Massachusetts Restricted Area Wedge, which is an area between state and federal waters. Emergency Rulemaking closed this area in 2022 and 2023 due to the immediate risk to North Atlantic right whales caused by buoy lines in the area. The proposed rule takes into account that this risk is expected to recur annually.

On October 19, 2023, NMFS and NOAA published a proposed rule to prohibit commercial fishing in the Northeast Canyons and Seamounts Marine National Monument.[17] The proposed rule is meant to align U.S. fishing regulations with Presidential Proclamations 9496 and 10287, which prohibited commercial fishing in the Northeast Canyons and Seamounts Marine National Monument.

II. MARINE MAMMALS AND THE MARINE MAMMAL PROTECTION ACT

A. Judicial Developments

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[12]Rhode Island Fishermen's Fairness Act of 2023, S. 1508, 118th Cong. (1st Sess. 2023).
[13]H.R. 3187, 118th Cong. (1st Sess. 2023).
[14]Supporting the Health of Aquatic systems through Research Knowledge and Enhanced Dialogue Act, H.R. 4051, 118th Cong. (2nd Sess. 2023).
[15]Marcus Drymon, *SHARKED!*, MISSISSIPPI-ALABAMA SEA GRANT CONSORTIUM (Nov. 2, 2023).
[16]Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, 88 Fed. Reg. 63,917 (proposed rule Sept. 18, 2023) (to be codified at 50 C.F.R. pt. 229).
[17]Magnuson-Stevens Act Provisions; Prohibition of Commercial Fishing in the Northeast Canyons and Seamounts Marine National Monument, 88 Fed. Reg. 72,038 (proposed rule Oct. 19, 2023) (to be codified at 50 C.F.R. pt. 600).

1. *Center for Biological Diversity v. Raimondo*[18]

The Center for Biological Diversity sued NMFS for violating the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA) concerning commercial fishing operations in the sablefish pot fishery spanning Washington, Oregon, and California. The group challenged NMFS's issuance of a permit that authorized the incidental taking of ESA-protected humpback whales in the pot fishery as unlawful pursuant to the MMPA and ESA because NMFS failed to ensure that a take reduction plan for the whales was being developed. NMFS argued that it was not required to develop a take reduction plan for the whales because it lacked the funding to do so, citing section 1387(f)(1) of the MMPA, which allows the agency to "set priorities for developing take reduction plans and not develop a reduction plan at all if there is insufficient funds."[19] The court determined that the plain language of section 1387 directs that NMFS "shall develop and implement a take reduction plan" for strategic stocks in commercial fisheries that involve occasional incidental injury or death to marine mammals; therefore, NMFS was required by statute to develop a take reduction plan for the incidental taking of humpback whales in the sablefish pot fishery.

2. *Sea Shepherd New Zealand v. United States*[20]

Sea Shepherd New Zealand and Sea Shepherd Conservation Society filed suit claiming that the U.S. Department of Commerce is required to ban imports of fish and fish products from New Zealand under the MMPA due to the decline of the Māui dolphin population caused by bycatch in gillnet and trawl fisheries. The MMPA mandates a ban on the importation of fish caught with technology that results in incidental kill or incidental serious injury of ocean mammals in excess of U.S. standards. The court granted a preliminary injunction temporarily banning imports into the United States of fish and fish products deriving from nine species caught in New Zealand's West Coast North Island inshore trawl and set net fisheries. The government motioned to dismiss as moot the plaintiff's claim that the government acted arbitrarily, capriciously, and otherwise not in accordance with the law in issuing findings of comparability with U.S. standards because the relevant comparability findings expired in January of 2023. The U.S. Court of International Trade denied the motion to dismiss.

B. Administrative Developments

NMFS issued a final rule, effective November 17, 2023, that revised regulations related to import provisions governed by the MMPA, extending the two-year exemption period.[21] In 2016, the NMFS enacted a rule that outlines criteria for assessing the efficacy of harvesting nations' regulatory programs compared to U.S. regulations and establishes the procedure for determining comparability findings.[22] The rule specifies that importing fish or fish products from listed fisheries in the List of Foreign Fisheries into the U.S. is contingent upon the harvesting nation applying for and obtaining a comparability finding

[18]661 F.Supp.3d 964 (N.D. Cal. 2023).
[19]*Id*. at 969 (quoting Kohola v. Nat'l Marine Fisheries Serv., 669 F. Supp. 2d 1182, 1191 (D. Haw. 2009), vacated as moot, 439 F. App'x 618 (9th Cir. 2011)).
[20]639 F.Supp.3d 1367 (Ct. Int'l Trade 2023).
[21]Modification of Deadlines Under the Fish and Fish Product Import Provisions of the Marine Mammal Protection Act, 88 Fed. Reg. 80,193 (Nov. 17, 2023) (to be codified at 50 C.F.R. pt. 216).
[22]Fish and Fish Product Import Provisions of the Marine Mammal Protection Act, 81 Fed. Reg. 54,390 (Aug. 15, 2016) (to be codified at 15 C.F.R. pt. 902, 50 C.F.R. pt. 216).

from NMFS. However, under the 2016 rule, the import prohibition had a five-year exemption period, allowing harvesting nations sufficient time to evaluate marine mammal stocks, estimate bycatch, and create regulatory programs to alleviate such bycatch. In 2020 and 2022, NMFS further prolonged the exemption period. NMFS has currently received 134 applications from nations with roughly 2,500 fisheries, causing the NMFS to extend the exemption period by another two years until December 31, 2025. This extension aims to accommodate the extensive number of foreign fisheries, the dynamic nature of fisheries data, and the practical challenges in evaluating the comparability of regulatory programs in foreign countries.

III. ENDANGERED SPECIES ACT

A. Judicial Developments

1. *Center for Biological Diversity v. U.S. Maritime Administration*[23]

To relieve landside congestion along coastal corridors, Congress enacted the U.S. Marine Highway Program, authorizing the U.S. Department of Transportation (DOT) to provide grants to projects that develop, expand, or promote marine highway transportation. The Center for Biological Diversity brought a citizen suit alleging that the agency's failure to engage in consultation for the U.S. Marine Highway Program as a whole, as well as the James River Container Expansion Project, which encompasses a critical habitat of the endangered Atlantic sturgeon species, violated the consultation requirements of section 7 of the ESA. The court determined that although consultation for the entire Marine Highway Program is not required under the ESA, the agency is nevertheless required to engage in section 7 consultation of individual projects. Accordingly, the court found that the agency's failure to conduct a consultation of the James River Container Expansion Project to be in violation of the ESA. The Center for Biological Diversity has filed an appeal.

2. *Wild Fish Conservancy v. Rumsey*[24]

The U.S. District Court for the District of Washington adopted a magistrate's report in a lawsuit related to NMFS 2019 Southeast Alaska Biological Opinion (BiOp) evaluating the effects of the Southeast Alaska salmon fisheries on threatened and endangered species. The court remanded the BiOp to NMFS to remedy violations of the ESA and the National Environmental Policy Act (NEPA). The court vacated the incidental take statement authorizing the "take" of the Southern Resident Killer Whale and Chinook salmon for the Chinook summer and winter commercial troll fishery. The case has been appealed to the Ninth Circuit.

3. *Fish Northwest v. Rumsey*[25]

The U.S. Court of Appeals for the Ninth Circuit affirmed and adopted a district court's opinion granting summary judgment to NMFS in an action filed by a recreational fishing organization challenging actions related to the management of Puget Sound Fisheries. The group alleged that NMFS violated ESA section 7(a)(2) by failing to ensure that its actions in a 2021 BiOp for resource management plans for salmon and steelhead gillnet fisheries do not jeopardize listed Chinook salmon. The district court dismissed this claim for lack of notice and found the claim was not supported by the record.

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[23]No. 4:21-CV-00132 (E.D. Va. Mar. 31, 2023).
[24]No. 20-CV-417-RAJ (W.D. Wash. May 2, 2023).
[25]No. 22-35641 (9th Cir. June 20, 2023).

4. *Maine Lobstermen's Association v. National Marine Fisheries Service*[26]

NMFS issued a BiOp on the impact of the lobster and Jonah crab fisheries on the North Atlantic Right Whale population. Data on the North Atlantic Right Whale entanglement is limited, so NMFS relied on a "scarring analysis" from a 2019 study, concluding that the fishing gear in the lobster and Jonah crab fisheries kill about 46 North Atlantic Right Whales each year. Shortly after, NMFS promulgated a final rule implementing a Conservation Framework designed to be implemented in four stages to reduce right whale entanglements to near zero by 2030. The Maine Lobstermen's Association brought an action under the ESA challenging the BiOp and phase one rule implementing the take- reduction plan. Other lobstermen groups and Maine's Department of Marine Resources intervened as plaintiffs, and conservation groups intervened as defendants. The U.S. Court of Appeals, District of Columbia Circuit held that NMFS may not give an endangered species the "benefit of the doubt" by relying on worst-case scenarios or pessimistic assumptions and remanded the case.

5. *El Puente v. U.S. Army Corps of Engineers*[27]

The U.S. District Court for the District of Columbia granted the U.S. Army Corps of Engineers' motion for summary judgment in a lawsuit over the San Juan Harbor Navigation Improvements Project. The project involves deepening and widening current shipping channels by dredging and then disposing of the dredged material in a designated ocean disposal site. Environmental groups alleged that the government violated NEPA and the ESA in approving the project. The court disagreed and found that the Corps adequately considered environmental concerns, including impacts on endangered coral and sea turtles, in a 2018 environmental analysis. The decision has been appealed.

6. *Sovereign Inupiat for a Living Arctic v. Bureau of Land Management*[28]

The U.S. District Court for the District of Alaska dismissed a lawsuit brought by a tribe and an environmental group challenging the Bureau of Land Management's (BLM) Record of Decision and Final Supplemental Environmental Impact Statement and the U.S. Fish and Wildlife Service's (FWS) BiOp regarding the Willow Project in the National Petroleum Reserve in Alaska. The court found that BLM complied with the NEPA and Naval Petroleum Reserves Production Act by considering a reasonable range of alternatives and adequately analyzing greenhouse gas emissions from future oil developments. Furthermore, the court concluded that BLM took steps to minimize impacts on subsistence uses as required by Section 810 of the Alaska National Interest Lands Conservation Act. Additionally, despite finding errors in FWS's interpretation of "harassment" under the ESA, the court upheld the BiOp, determining that the FWS adequately considered various factors and that the BiOp was not arbitrary or capricious. As a result, the court denied the request for vacatur and dismissed the plaintiffs' claims with prejudice. The decision has been appealed.

7. *White v. U.S. Army Corps of Engineers*[29]

[26]70 F. 4th 582 (D.C. Cir. 2023).
[27]No. 1:22-CV-02430 (D.D.C. July 24, 2023).
[28]No. 3:23-CV-00058-SLG (D. Alaska Nov. 9, 2023).
[29]No. 3:22-CV-06143-JSC (N.D. Cal. Oct. 23, 2023).

A Mendocino County resident filed suit arguing that flood control releases from the Coyote Valley Dam into the Russia River violated the ESA due to impacts on protected salmonids. The Russia River is a designated critical habitat for three species of salmonids, specifically, the Central California Coast Steelhead (threatened), the Central California Coast Coho (endangered), and the California Coast Chinook Salmon (threatened). The plaintiff moved for an injunction pursuant under the ESA, arguing that the increase in turbidity in the river led to negative impacts, such as a decrease in salmonid embryo survival and available space. The court denied the plaintiff's motion for an injunction because he did not establish that the salmonids were facing "serious or extreme" harm due to the flood control releases, and he failed to prove that the injunction would remedy the harm to the salmonids.

B. Administrative Developments

On June 22, 2023, the FWS, National Oceanic and Atmospheric Administration (NOAA), and the NMFS proposed to revise the interagency consultation rule under section 7 to clarify "effects of the action" and "environmental baseline," remove 402.17 "Other Provisions," clarify consultation responsibilities for the agencies, and revise provisions concerning incidental take statements, specifically reasonable and prudent measures.[30]

The Services also proposed to revise the rule governing how species are listed and reclassified and how critical habitats are designated. They intend to reintroduce previous language that emphasizes listing decisions made "without reference to possible economic or other impacts of such determination," revise the framework for assessing future possibilities, clarify the criteria for removing species from the list, and modify processes for designating critical habitats by reworking standards for determining when critical habitats might not be considered prudent and establishing criteria for identifying unoccupied critical habitats.[31]

IV. AQUACULTURE

A. Judicial Developments

1. *Don't Cage Our Oceans v. U.S. Army Corps of Engineers*[32]

The U.S. District Court for the Western District of Washington denied the defendant's motion to limit the scope of review to the administrative record regarding the U.S. Army Corps of Engineers' issuance of Nationwide Permit 56. This permit allows commercial finfish mariculture facilities to operate in U.S. navigable waters. The court acknowledged that most claims should be evaluated based on the administrative record but found that the ESA citizen-suit claim might warrant a broader review. There are certain limited circumstances where extra-record evidence could be considered, so the court rejects the idea that Ninth Circuit precedence limits review to the administrative record.

2. *Matter of Rulemaking to Amend Coastal Zone Management Rules*[33]

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[30] Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation, 88 Fed. Reg. 40,753 (proposed on June 22, 2023) (to be codified at 50 C.F.R. pt. 402).

[31] Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat, 88 Fed. Reg. 40,764 (proposed on June 22, 2023) (to be codified at 50 C.F.R. pt. 424).

[32] No. C22-1627-KKE (W.D. Wash. Oct. 20, 2023).

[33] In the Matter of Pet. for Rulemaking to Amend Coastal Zone Management Rules, N.J.A.C. 7:7-4.16, No. A-1771-20, at 3 (N.J. Super. Ct. App. Div. Apr. 19, 2023).

Bayside Shellfish, LLC (Bayside), an aquaculture business in New Jersey, sought to amend one of New Jersey's Coastal Zone Management Rules to include aquaculture hatchery activities in a "permit by rule" category that covered aquaculture nursery activities. The Department of Environmental Protection (DEP) denied the petition, requiring the business to obtain a Coastal Area Facility Review Act (CAFRA) individual permit for hatchery activities. Bayside appealed the decision, alleging DEP's denial was arbitrary, capricious, and unreasonable because it violated CAFRA's express and implied legislative policies, and DEP's findings were not supported by substantial evidence in the record. The New Jersey Superior Court deferred to DEP's authority and affirmed the denial of Bayside's rulemaking petition.

3. *Wild Fish Conservancy v. Washington Department of Fish and Wildlife*[34]

An environmental group sued the Washington Department of Fish & Wildlife (WDFW), alleging that the Skykomish Program, a fish hatchery program, violates ESA Section 9, which prohibits the taking of endangered fish or wildlife species. The group further alleges that WDFW is engaged in a pattern and practice of implementing hatchery programs throughout the State of Washington that violates Section 9. The court held that the claims regarding the Skykomish Program are moot because WDFW has since obtained an exemption from Section 9 liability for its operation of the program, and any further relief granted by the court would serve no purpose because the plaintiff's core objectives have already been met. The court granted the plaintiff leave to amend and supplement its complaint to include alleged violations of Section 9 that occurred after the initial complaint was filed. Accordingly, the group is free to incorporate its post-exemption allegations against the Skykomish Program into its Amended Complaint.

B. Legislative Developments

Rep. Barry Moore of Alabama introduced the Bringing Aquaculture Indemnities to Speed or BAITS Act. The bill aims to expand the Livestock Indemnity Program (LIP) to eligible producers of farmed fish, to protect them against loss or reduced sales due to specific events. This bill was referred to the House Committee on Agriculture, the Subcommittee on General Farm Commodities, Risk Management, and Credit, and the Subcommittee on Livestock, Dairy, and Poultry on April 28, 2023.[35]

Sen. Susan Collins of Maine introduced the Relief for Farmers Hit with PFAS Act. The purpose of the act is to provide a program for governmental assistance to farmers whose agricultural products, including products of aquaculture, have been detrimentally affected by contamination from PFAS and related chemicals. The Act was referred to the Senate Committee on Agriculture, Nutrition, and Forestry.[36]

Reps. Jared Huffman and Mary Peltola introduced the Coastal Seaweed Farm Act of 2023. The purpose of the Act was to direct the Secretary of Agriculture and the NOAA Administrator to carry out a study on the farming of coastal seaweed, the regulation of the issues it would raise, establish an Indigenous Seaweed farming fund, as well as other purposes relevant to the administration of the Act. The Act was referred to the House Committee on Natural Resources, the Committee on Agriculture, and the Committee on Energy and Commerce. On March 17, 2023 it was referred to the Subcommittee on

[34]No. C21-169-RSL, at 2 (W.D. Wash. Feb 7, 2023) (citing 16 U.S.C § 1538(a)(1)(B)).
[35]Baits Act, H.R. 1020, 118th Cong. (2023).
[36]Relief for Farmers Hit with PFAS Act, S.B. 747, 118th Cong. (2023).

Environment, Manufacturing, and Critical Materials, and on April 14, 2023 to the Subcommittee on Water, Wildlife and Fisheries.[37]

Representative Ed Case of Hawaii introduced the Saving NEMO Act, a bill meant to prohibit certain actions regarding certain marine reef species. Among other things, this bill would prohibit sale of certain species of corals and marine life unless they were raised by a qualified aquaculture or mariculture facility and did not contribute to the spread of harmful pathogens or environmental degradation. This bill was referred to the Committee on Natural Resources and the Ways and Means Committee.[38]

C. Administrative Developments

In June, the Biden Administration announced it was beginning the development of the first U.S. Ocean Climate Plan and was accepting public comments for its priorities. Among the stated goals of the Ocean Climate Plan is utilizing climate-adaptive aquaculture as a means of meeting the seafood needs of the American public.[39]

The year 2023 also marked the beginning of the five-year NOAA Aquaculture Strategic Plan. The plan is meant to set out a framework to support "a thriving, resilient, and inclusive U.S. aquaculture industry as part of a resilient seafood sector" and lays out specific goals to manage and sustainably grow the industry in the U.S.[40]

V. OFFSHORE WIND

A. Judicial Developments

1. *Seafreeze Shoreside, Inc. v. U.S. Department of the Interior*[41]

Several fisheries brought a suit against the Bureau of Ocean Management (BOEM) and NMFS to challenge their approval of the Vineyard Wind Project, claiming it violated the MMPA, ESA, NEPA, and Outer Continental Shelf Lands Act (OCSLA). The plaintiff fisheries filed a motion for a stay to postpone the decision of defendant agencies to approve the Vineyard Wind construction and operation plan until all judgments and appeals are completed. Alternatively, plaintiffs requested a preliminary injunction to revert to the status quo before the construction and operation plan was approved. The U.S. District Court for the District of Massachusetts denied the plaintiffs' motion for stay and preliminary injunction. It held that the plaintiffs could not demonstrate a likelihood that they would succeed on the merits and that plaintiffs would not suffer irreparable harm absent a stay. Additionally, the district court held that a stay would substantially injure the Vineyard Wind Project and that the construction of the offshore energy project is in the public interest due to climate impacts.

2. *Seafreeze Shoreside, Inc. v. U.S. Department of Interior*[42]

The U.S. District Court for the District of Massachusetts denied two commercial fishing groups' motions for summary judgment in a case challenging the Vineyard Wind project offshore Martha's Vineyard. The groups claimed that the federal agencies' issuance

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[37]Coastal Seaweed Farm Act of 2023, H.R. 1461, 118th Cong. (2023).
[38]Saving Natural Eco-systems and Marine Organisms Act, H.R. 6447, 118th Cong. (2023).
[39]Scott Doney, Ocean Sol*utions* to a More Sustainable World, WH.GOV (June 1, 2023).
[40]NOAA Aquaculture Strategic Plan (2023-2028), NOAA (Oct. 6, 2022).
[41]No. 1:22-cv-11091-IT (D. Mass. May 25, 2023).
[42]No. 1:22-cv-11091-IT (D. Mass. Oct 12, 2023).

of permits and authorizations for the project violated the APA, ESA, MMPA, NEPA, OCLSA, and the Clean Water Act. The court noted that "the APA affords great deference to agency decision-making and agency actions are presumed valid."[43] The court found that the groups did not show that the defendants acted arbitrarily, capriciously, or otherwise unlawfully in issuing the permits and authorizations.

3. *Nantucket Residents Against Turbines v. U.S. Bureau of Ocean Energy Management*[44]

The Nantucket Residents Against Turbines (ACK RATs) brought suit alleging that BOEM and NMFS's decisions approving a Vineyard Wind Project off the coast of Martha's Vineyard and Nantucket were in violation of the ESA and NEPA because they were based on an inadequate environmental assessment and would harm the endangered Northern Atlantic Right Whale population. The U.S. District Court for the District of Massachusetts granted summary judgement in favor of the defendants, holding that the plaintiffs failed to demonstrate that the agencies violated the ESA or NEPA by issuing an inadequate BiOp and environmental impact statement for the offshore energy project. The decision has been appealed.

4. *Melone v. Coit*[45]

A resident alleged that NMFS violated the MMPA and APA in issuing an Incidental Harassment Authorization (IHA) for the Vineyard Wind Project offshore of Martha's Vineyard and Nantucket. Both sides moved for summary judgment. NMFS and Vineyard Wind asserted that the plaintiff lacked standing, and Vineyard Wind was entitled to summary judgment due to compliance with the MMPA. The resident claimed that he had standing because of his environmental interest in right whales and argued he was entitled to summary judgment and vacatur of the IHA because NMFS acted arbitrarily and capriciously in issuing the IHA. The U.S. District Court for the District of Massachusetts found that the plaintiff had standing but failed to show that NMFS acted arbitrarily, capriciously, or otherwise unlawfully in issuing the IHA. The plaintiff filed an appeal on September 8, 2023.

B. Administrative Developments

On January 30, 2023, BOEM issued proposed regulations to modernize its renewable energy "regulations to facilitate the development of offshore wind energy resources to meet U.S. climate and renewable energy objectives."[46] Proposed changes include: (1) eliminating unnecessary requirements for deploying meteorological buoys, (2) increasing survey flexibility, (3) improving the verification process for project design and installation, (4) establishing a Public Renewable Energy Leasing Schedule, (5) reforming BOEM's renewable energy auction regulations, (6) tailoring financial assurance requirements and instruments, (7) clarifying safety management system regulations, and (8) revising other provisions and making technical corrections.[47]

On January 31, 2023, the Department of the Interior issued a final rule reassigning the renewable energy regulations pertaining to safety, environmental oversight, and

[43] *Id*. at 9.
[44] No. 1:21-cv-11390-IT (D. Mass. May 17, 2023).
[45] No. 1:21-cv-11171-IT (D. Mass. Aug. 4, 2023).
[46] Renewable Energy Modernization Rule, 88 Fed. Reg. 5968 (proposed Jan. 30, 2023) (to be codified at 30 C.F.R. pt. 585).
[47] *Id*.

enforcement from BOEM to the Bureau of Safety and Environmental Enforcement (BSEE).[48] The rule parallels the roles of BOEM and BSEE in the oversight of oil and gas activities. Because the rule "reorganizes current regulations to be consistent with Departmental delegations without making substantive changes to those regulations or modifying substantive rights or interests," the rule was exempt from notice-and-comment rulemaking requirements.[49]

In 2023, South Fork Wind installed 12 offshore wind turbines and Vineyard Wind installed 62. BOEM approved four Construction and Operation Plans for offshore wind development (*i.e.,* Ocean Wind 1, Revolution Wind, Empire Wind, and Coastal Virginia Offshore Wind) and issued corresponding Records of Decisions completing the NEPA process.[50] NMFS issued biological opinions under the ESA for all four projects.[51] NMFS also promulgated regulations under the MMPA and issued two letters of authorization under those regulations for the incidental taking of small numbers of marine mammals during the construction of the Ocean Wind 1 project[52] and Revolution Wind project.[53] However, in October 2023, Ocean Wind announced it is ceasing development of the

[48] Reorganization of Title 30-Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 88 Fed. Reg. 6376 (Jan. 31, 2023) (to be codified at 30 C.F.R. pts. 285, 585, 586).

[49] *Id.* at 6377-78.

[50] *See* Notice of Availability of a Joint Record of Decision (ROD) for the Ocean Wind LLC Proposed Wind Energy Facility Offshore New Jersey, 88 Fed. Reg. 44,154 (July 11, 2023); Notice of Availability of a Joint Record of Decision for the Revolution Wind Farm and Revolution Wind Export Cable Project, 88 Fed. Reg. 57,967 (Aug. 24, 2023); Notice of Availability of a Joint Record of Decision for the Proposed Coastal Virginia Offshore Wind Commercial Project, 88 Fed. Reg. 75,624 (Nov. 3, 2023); Notice of Availability of a Joint Record of Decision for the Proposed Empire Offshore Wind Projects, 88 Fed. Reg. 83,146 (Nov. 28, 2023).

[51] *See* Nat'l Marine Fisheries Serv., Biological Opinion and Conference for the Construction, Operation, Maintenance, and Decommissioning of the Coastal Virginia Offshore Wind Commercial Project (Lease OCS-A 0483) (Apr. 3, 2023); Nat'l Marine Fisheries Serv., Biological Opinion and Conference for the Construction, Operation, Maintenance, and Decommissioning of the Coastal Virginia Offshore Wind Commercial Project (Lease OCS-A 0483) (July 21, 2023); Nat'l Marine Fisheries Serv., Biological Opinion and Conference for the Construction, Operation, Maintenance, and Decommissioning of the Empire Wind Offshore Energy Project (Lease OCS-A 0483) (Sept. 8, 2023); Nat'l Marine Fisheries Serv., Biological Opinion and Conference for the Construction, Operation, Maintenance, and Decommissioning of the Coastal Virginia Offshore Wind Commercial Project (Lease OCS-A 0483) (Sept. 18, 2023)

[52] *See* 50 C.F.R. § 217.260-267; Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Ocean Wind 1 Project Offshore of New Jersey, 88 Fed. Reg. 62,898 (Sept. 13, 2023); Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Ocean Wind 1 Project Offshore of New Jersey, 88 Fed. Reg. 72,048 (Oct. 19, 2023).

[53] *See* 50 C.F.R. § 217.270-277; Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Revolution Wind Offshore Wind Farm Project Offshore Rhode Island, 88 Fed. Reg. 72,562 (Oct. 20, 2023) (to be codified at 50 C.F.R. pt. 217); Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Revolution Wind Offshore Wind Farm Project Offshore Rhode Island, 88 Fed. Reg. 82,834 (Nov. 27, 2023).

project.[54] Wind turbine foundation installation for Revolution Wind is anticipated to begin in 2024.

VI. Offshore Oil & Gas

A. Judicial Developments

1. *United States v. Patriot Marine, LLC*[55]

Following an oil spill off the coast of Woods Hole, Massachusetts in January 2018, the Commonwealth of Massachusetts, and the United States brought separate suits under the Oil Pollution Act (OPA) and the Massachusetts Oil and Hazardous Material Release Prevention and Response Act. The court combined the complaints and, in 2022, granted declaratory judgment for the United States and Massachusetts. The court found Patriot Marine to be the responsible party liable for removal costs under OPA and state law. The United States moved for summary judgment on the issue of whether Patriot Marine could limit its liability under OPA. The court granted the United States' motion for partial summary judgment, agreeing that the issue had already been litigated by a hearing officer, and Patriot Marine would not qualify to limit its liability pursuant to the OPA because it failed to report the incident.

2. *Center for Biological Diversity v. Haaland*[56]

The U.S. District Court for the Central District of California rejected a motion to dismiss a case alleging that BOEM failed to review development and production plans (DPPs) for offshore oil platforms in two California counties. The plaintiff alleged that studies indicating that the platforms and pipelines have deteriorated in quality show that a review of the DPPs, if any, was inadequate. BOEM claimed the OCLSA citizen suit provision does not authorize suits against agencies for alleged failure to follow procedural requirements. The court disagreed, finding BOEM had a legal obligation to review the plans.

3. *Alaska Industrial Development & Export Authority v. Biden*[57]

Several plaintiffs and the State of Alaska challenged President Biden's Executive Order 13990 and actions the U.S. Department of the Interior and BLM took to implement the order's directive to place a temporary moratorium on the implementation of an oil and gas leasing program on the Coastal Plain of the Arctic National Wildlife Refuge. The plaintiffs filed a motion for summary judgment, and the defendants filed a cross-motion. The court denied plaintiffs''and the state's motions and entered judgment in favor of the federal government.

4. *United States v. Jacob*[58]

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[54] Press Release, Orsted, S. Fork Wind Offshore Constr. Continues, with Turbine Component Loadout Underway (Oct. 31, 2023).
[55] No. 21-CV-10243-AK (D. Mass. Apr. 6, 2023).
[56] No. 2:22-cv-06996-CAS-KSx (C.D. Cal. Apr. 17, 2023).
[57] No. 3:21-cv-00245-SLG (D. Alaska Aug. 7, 2023).
[58] No. 21-1594 (GMM) (D.P.R. Sept. 7, 2023).

In 2006, a tanker carrying over 300,000 barrels of oil stranded "in navigable waters in an area containing coral reefs off the coast of Tallaboa, Puerto Rico."[59] The United States filed a complaint "seeking reimbursement and recovery of natural resource damages" under OPA. In 2022, the plaintiffs sought a partial summary judgment on the issue of whether the vessel's grounding "constituted a 'substantial threat' of an oil discharge into navigable waters, thus establishing that Defendants were liable pursuant to OPA."[60] The defendants filed a motion to deny the judgment. The court granted the plaintiffs' motion, agreeing that the Coast Guard's determination that the grounding was a "substantial threat" was not arbitrary or capricious under the APA. An appeal has been filed in the case.

5. *Louisiana v. Haaland*[61]

In August 2023, the State of Louisiana, along with multiple petroleum companies, filed a motion for preliminary injunction in federal district court to prevent BOEM from adding a term to the Final Notice of Sale of an oil and gas lease located on the Outer Continental Shelf in the Gulf of Mexico. The court found BOEM's actions to be in violation of regulations set forth by OCSLA since the agency made significant changes to the Final Notice of Sale, thereby not allowing the affected parties the opportunity to comment. The court also found BOEM's actions to be arbitrary and capricious as the agency failed to reasonably explain both its swift change in position and the challenged terms, resulting in economic harm and a potential change in future industry operations. The court issued the requested preliminary injunction, requiring the Department of Interior to hold the sale no later than September 30th absent the additional terms. On November 14, 2023, the Fifth Circuit issued an order with a new timeframe for the lease sale.[62] On December 20, 2023, BOEM held Lease Sale 261.[63]

B. Administrative Developments

In September, the Biden Administration released its 5-year plan for offshore oil and gas leasing - the 2024–2029 National Outer Continental Shelf Oil and Gas Leasing Program.[64] The Department of Interior announced that it was the smallest plan in history, as the plan only contains three lease sales in the Gulf of Mexico.[65] The Biden Administration needed to include some lease sales, however, to comply with requirement in the Inflation Reduction Act to offer at least 60 million acres on the outer continental shelf for oil and gas leasing in the previous year. The lease sales will be held in 2025, 2027, and 2029 in areas of the Gulf of Mexico that already have oil and gas production and infrastructure.

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[59] *Id*. at 2.
[60] *Id*. at 4.
[61] No. 2:23-CV-01157 (W.D. La. Sept. 21, 2023), *order modified*, *appeal dismissed in part*, 86 F.4th 663 (5th Cir.2023).
[62] *Louisiana v. Haaland*, 86 F.4th 663 (5th Cir. 2023).
[63] Lease Sale 261, BUREAU OF ENERGY MGMT. (last visited Feb. 25, 2024).
[64] Notice of Availability of the 2024-2029 National Outer Continental Shelf Oil and Gas Leasing Proposed Final Program and Final Programmatic Environmental Impact Statement, Bureau of Ocean Energy, 88 Fed. Reg. 67,798 (Oct. 2, 2023).
[65] Press Release, U.S. Dep't of the Interior, Reflecting Am.'s Rapid and Accelerating Shift to Clean Energy, Interior Department Announces Fewest Offshore Oil and Gas Lease Sales in Hist. in Proposed Final Program for 2024–2029 (Sept. 29, 2023).

Chapter O: OIL AND GAS
2023 Annual Report[1]

I. ALASKA

A. Federal Legislative Developments

On March 13, 2023, the Biden Administration approved the Willow Project ("Willow Project"). It is an oil drilling project by ConocoPhillips ("CPAI") located on the North Slope in the National Petroleum Reserve ("NPR-A") owned by the federal government.[2]

The Biden administration canceled the seven remaining oil and gas leases in Alaska's Arctic National Wildlife Refuge ("ANWR") overturning sales made by the Trump administration.[3] The administration stated that they will abide by the provision of the 2017 Tax Act[4] that requires a second Arctic lease sale by the end of 2024.[5]

B. Alaska Legislative Developments

Governor Dunleavy signed Senate Bill 48, which allows the state to use state land for carbon credits purchased by companies to offset their carbon emissions.[6]

C. Judicial Developments

In *AVCG LLC v. State of Alaska, Department of Natural Resources*, Alaska Venture Capital Group, LLC ("AVCG") owns interests in oil and gas leases on state lands on the North Slope and sought approval to create an overriding royalty interest ("ORRI") on the

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[2]Ella Nilsen, *The Willow Project has been approved. Here's what to know about the controversial oil-drilling venture*, CNN (Mar. 14, 2023).

[3]Press Release, U.S. Dep't of the Interior, Biden-Harris Administration Takes Major Steps to Protect Arctic Lands and Wildlife in Alaska (Sept. 6, 2023).

[4]Public L. No. 115-97, 131 Stat. 2054 (2018).

[5]*Id.*

[6]Press Release, Off. of Gov. Mike Dunleavy, Legislature Passes Governor Dunleavy's Carbon Offset Legislation (May 16, 2023).

lease.[7] The Department of Natural Resources ("DNR"), denied AVCG's request, as the royalty burdens jeopardized the state's interest in sustained oil and gas development.[8] AVCG appealed, and five years later, the DNR Commissioner affirmed the DNR decision.[9] The Superior Court and the Alaska Supreme Court affirmed the Commissioner's decisions.[10] The Supreme Court held that the proposed ORRI's were denied for a reasonable basis as they would amount to a $1 million loss to the state.[11]

In *Alaska Crude Corporation v. Alaska Oil & Gas Conservation Commission*, Alaskan Crude Corporation ("Crude") obtained three permits from the Alaska Oil and Gas Conservation Commission ("AOGCC") and drilled three wells.[12] At the time of purchase, the AOGCC's regulation required a $200,000 blanket performance bond from operators with two or more wells.[13] In 2019, AOGCC amended the bonding regulation to $400,000 per well.[14] Crude asked for reconsideration of the increase and AOGCC denied the request.[15] Crude filed an appeal with the Superior Court who ruled in favor of the AOGCC. On appeal, the Alaska Supreme Court ruled that the parties failed to argue the correct legal analysis of the Administrative Procedures Act ("APA") during the administrative proceedings[16] which is against the exhaustion of remedies doctrine.[17] The case was remanded to AOGCC for a new hearing to apply the correct analysis of the APA's retroactivity rule.[18]

In *ConocoPhillips Alaska Inc. v. AOGCC*, CPAI had several 10-year federal leases in the NPR-A pursuant to the Naval Petroleum Reserves Production Act from the Bureau of Land Management ("BLM").[19] The leases stated that BLM would withhold CPAI's "Well Data from the public during the 'existence of [the] lease.'"[20] CPAI received permits from AOGCC to drill the wells and, pursuant to Alaska Statute ("AS") 31.05.035, AOGCC requested well data from CPAI.[21] CPAI complied but also requested that the data remain confidential pursuant to federal law.[22] AOGCC and DNR denied the request, quoting state disclosure laws AS 31.05.035(c) and 20 AAC 25.537(d).[23] The Federal District Court for the District of Alaska held that the state disclosure laws impeded Congress's intent to expeditiously advance private oil and gas development on the NPR-A as the disclosure of CPAI's well data would cause CPAI to lose its competitive advantage.[24] The case was dismissed in favor of CPAI.

The Alaska National Interest Lands Conservation Act ("ANILCA") requires the Interior Secretary to conduct two lease sales for competitive oil and gas production on

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[7] 527 P.3d 272, 275 (Alaska 2023).
[8] *Id*. at 276.
[9] *Id*.
[10] *Id*.
[11] *Id*. at 276, 288.
[12] No. S-18290, 2023 WL 2784583, at *1 (Alaska Apr. 5, 2023).
[13] *Id.*at *2
[14] *Id*.
[15] *Id*. at *3-4.
[16] *Id*. at *7.
[17] *Id.*
[18] 2023 WL 2784583, at *7-8.
[19] 660 F. Supp. 3d 822 (D. Alaska Mar. 8, 2023).
[20] *Id.* at 828
[21] *Id*. at 827-828.
[22] *Id*. at 828.
[23] *Id.*
[24] *Id*.

ANWR.[25] The first lease sale was required no later than December 22, 2021, and the second no later than December 22, 2024.[26] The first sale occurred in 2021, but President Biden issued EO 13990, directing a supplemental environmental review of the program, temporarily halting all activities.[27] In *Alaska Industrial Development and Export Authority, et al. v. Biden, et al.*, AIDEA, North Slope Borough, Artic Slope Regional Corporation, and Kaktovik Iñupiat Corporation ("Plaintiffs") and Intervenor Plaintiff, State of Alaska ("State"), and the U.S. filed cross-motions for summary judgment. In granting the administration's motion for summary judgment,[28] the Federal District Court for the District of Alaska held that the Moratorium is only temporary and limited in nature, with the Defendants showing intent to release a Draft Supplemental EIS later that year.[29] The court stated that a temporary pause on implementing the program is not a permanent cease in the implementation and the Moratorium is appropriately tailored "to address specifically identified legal concerns that, once addressed, should facilitate Agency Defendants' efforts to implement the Program in accordance with the law."[30]

In *Sovereign Iñupiat for a Living Arctic, et al., v. Bureau of Land Management & ConocoPhillips Alaska Inc. and Center for Biological Diversity v. Bureau of Land Management & ConocoPhillips Alaska Inc.*, the Federal District Court for the District of Alaska combined two related cases where Plaintiffs were challenging the BLM's Record of Decision ("ROD") for the Willow Project.[31] Sovereign Iñupiat for a Living Arctic ("SILA Plaintiffs") and the Center for Biological Diversity ("CBD Plaintiffs") (collectively, "Plaintiffs") separately filed suits pursuant to the APA, National Environmental Policy Act ("NEPA"), ANILCA, Endangered Species Act ("ESA") and other federal statutes.[32] The court addressed both cases in one decision and order, holding that BLM did not violate NEPA since its "decision to consider only those alternatives that constitute full field development, subject to reasonable mitigation measures, is consistent with the NPRPA's policy objectives and the purpose and need of the Willow Project."[33] The court also held that climate change can damage NPR-A's surface resources, but the Plaintiffs failed to causally link how emissions from the Willow Project would specifically harm NPR-A's surface resources.[34] Additionally, the court rejected Plaintiffs' argument that NEPA was violated by the Defendants' analysis of the greenhouse gas ("GHG") emissions as the final EIS analysis provided "'a reasonably thorough discussion of the significant aspects of the probable environmental consequences' of Willow's growth-inducing impacts, allowing for meaningful public participation and informed decision-making about the Willow Project" even though projected downstream emissions were not specifically included.[35] Furthermore, the court held that the ESA was not violated when the Fish and Wildlife Service's ("FWS") biological opinion found that there would be no incidental taking of polar bears.[36] FWS was within the bounds of reasoned decision-making when they "considered the relevant factors and articulated a rational connection between

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[25]No. 3:21-CV-00245-SLG, 2023 WL 5021555, at *2 (D. Alaska Aug. 7, 2023).
[26]*Id*. at *2.
[27]*Id.*
[28]*Id*. at *2
[29]*Id.* at *17, *18.
[30]*Id.* at *25.
[31]Case No. 3:23-cv-00061-SLG, 2023 WL 7410730 (D. Alaska Nov. 9, 2023).
[32]*Id*. at *1.
[33]*Id*. at *7.
[34]*Id*. at *14.
[35]*Id*.
[36]*Id*. at *32.

the facts found and the choice made."[37] The court dismissed all Plaintiffs' claims with prejudice.[38] The Plaintiffs have since requested an injunction pending appeal of this decision by the court. On December 18, 2023, the Ninth Circuit Court of Appeals denied the injunction without prejudice and expedited the appeal briefing schedule.

D. Alaska Regulatory Developments

On June 28, 2022, the AOGCC ordered CPAI to pay $913,796.80 in penalties for a well blowout that led to the release of natural gas. The release was discovered on March 4, 2022, and traced to freeze-protection. The commission concluded that CPAI had committed five separate violations that led to the blowout.

II. ARKANSAS

A. Legislative Developments

The 2023 Arkansas General Assembly enacted Act No. 140 which amended Arkansas' Underground Gas Storage Act, Arkansas Code Annotated §§ 15-72-601 et seq., which, prior to amendment, covered only storage of natural gas.[39] The amended act now includes additional gasses, carbon oxides, ammonia, hydrogen, nitrogen, and noble gas. Since the act provides a methodology for a gas storage operator to acquire reticent interests within its storage reservoir through eminent domain, it will now enable additional gas storage applications, including permanent carbon dioxide sequestration.

B. Judicial Developments

1. Restoration Standards

In its 1986 decision *Bonds v. Sanchez-O'Brien Oil and Gas Co.*,[40] the Arkansas Supreme Court recognized the existence of an "implied" covenant in an oil and gas lease which requires the lessee "to restore the surface, as nearly as practicable, to the same condition as it was before drilling."[41] Unfortunately, no subsequent decision of that court has defined the meaning of the phrase "as nearly as practicable." More recently, in 2010, the Arkansas Oil and Gas Commission ("Commission"), adopted its General Rule B-9(e), setting its own standard for wellsite cleanup. The recent Arkansas Court of Appeals case *Taylor Family Limited Partnership "B" v. XTO Energy Inc.*[42] involved the question whether compliance by a lessee with General Rule B-9(e) satisfies the restoration "as nearly as practicable" standard established in *Bonds*.

XTO was the successor operator of gas wells drilled in 1959 and 1961 by a predecessor lessee. XTO plugged two of the wells in 2017. In doing so, it complied with the dictates of General Rule B-9(e) to the satisfaction of the Commission inspector who enforces compliance with the rule. The surface owner, Taylor, sued XTO, contending that its cleanup efforts failed to restore the surface of its land to the degree required by *Bonds*. The trial court then granted XTO's summary judgment motion, agreeing with XTO that, by enacting General Rule B-9(e), the Commission defined the standard of restoration

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[37] *Id*.
[38] *Id*. at *40.
[39] S.B. 210, 94th Gen. Assemb., Reg. Sess. (Ark. 2023).
[40] 715 S.W.2d 444 (Ark. 1986).
[41] *Id*. at 446.
[42] 658 S.W.3d 455 (Ark. 2022).

mandated by the Supreme Court in *Bonds*.

The Arkansas Court of Appeals reversed that summary judgment and remanded the case for trial, holding that a lessee's cleanup duties under *Bonds* and under General Rule B-9(e) were separate duties, both of which must be complied with. Thus, proof of its compliance with General Rule B-9(e) was a factor in determining whether XTO had performed its total cleanup duty, but was not conclusive, and issues of fact remained as to the extent of any remaining duty and compliance therewith.

2. Royalties

Two somewhat conflicting 2023 decisions involved Arkansas' royalty blending statute, Ark. Code Ann. §15-72-305, which requires gas unit operators to combine and blend one-eighth of the proceeds of all unit participants' gas sales for royalty payment purposes so that all royalty owners within a producing unit receive their proportionate share of that one-eighth at the blended price, rather than at the actual price received by each of their respective lessees. Specifically, the statute requires the selling parties to remit to the operator "one-eighth (1/8) of the revenue realized or royalty moneys from gas sales computed at the mouth of the well, less all lawful deductions, including, but not limited to, all federal and state taxes levied upon the production or proceeds…."[43]

In *J. R. Hurd, et al v. Flywheel Energy Production, LLC*[44], the United States District Court attempted to certify to the Arkansas Supreme Court the question whether the statutory language "less all lawful deductions" overrode the provisions of a "gross proceeds" lease forbidding any deduction other than taxes with respect to allowable deductions, but that court refused the certification request. The district court then entered summary judgment for the lessee, holding that the statutory language did override the lease provision, thus permitting proportionate deduction of post-production expenses.

Subsequently, the Arkansas Oil & Gas Commission entered an order to the effect that the "lawful deductions" referenced in the statute permitted deduction of taxes and third-party charges, but did not permit deduction of other post-production expenses such as compression, treating and gathering. That Commission order was affirmed by the Arkansas Court of Appeals in *Flywheel Energy Production, LLC v. Arkansas Oil and Gas Commission*[45], which appears to be in direct conflict with *Hurd.*

Neither the United States District Court nor the Arkansas Court of Appeals is the final arbiter of Arkansas statutory interpretation, however. Only a decision from the Arkansas Supreme Court will resolve the conflict which arose, in part, by that court's refusal to accept the certification request in *Hurd*. Counsel for Flywheel has petitioned the Arkansas Supreme Court for review of the court of appeals decision in *Flywheel*, so the answer may come in 2024, at least as far as "gross proceeds" leases are concerned.

Still unresolved is the application of the royalty blending statute to an oil and gas lease which expressly allows deduction of post-production expenses ("net proceeds" leases), as well as the related issue of how to blend proceeds of sales in a production unit where both types of leases are present.

In *Cambiano v. Arkansas Oil and Gas Commission*[46], the Arkansas Court of Appeals upheld the Oil and Gas Commission's refusal to reopen and vacate a 2007 integration order for alleged due process violations in the hearing which resulted in that order, specifically lack of effective notice. That integration order had been entered upon application of SEECO, Inc., which held oil and gas leases covering most of the interests

[43] ARK. CODE ANN. §15-72-305 (2020).
[44] No. 4:21-CV-01207-LPR, 2023 WL 3687166 (D. Ark. May 26, 2023).
[45] 678 S.W.3d 851 (Ark. Ct. App. 2023).
[46] 680 S.W.3d 773 (Ark. Ct. App. 2023).

within its proposed drilling unit. The parties integrated by the order included the unknown heirs of Louis and Nola Conner, who had died intestate and without probate proceedings. The Conners' heirs held disputed title to an unleased mineral interest within the unit. The identity of the heirs was unknown at the time SEECO's application for integration was filed and only partially discovered by time of the Commission's hearing. Thus, the only service upon them was by publication. Later, the Conner heirs employed Appellant Mark Cambiano's father, Attorney Joe Cambiano, to represent them in a quiet title action which confirmed their mineral ownership versus adverse claimants. They then conveyed 35% of that interest to Joe Cambiano as his contingent fee.

After Joe Cambiano's death, the Appellants inherited his interest and requested that the Commission vacate its 2007 order insofar as it applied to them. When the Commission declined to do so, Appellants unsuccessfully appealed to the circuit court and then to the Arkansas Court of Appeals. In so doing, Appellants argued that, if a unit contains unknown or missing owners, the Commission must delay issuing its integration order until such time as all have been found and personally noticed, a highly impractical proposition.

III. CALIFORNIA

A. Legislative Developments

1. Enhanced CalGEM Enforcement and Penalty Authority

The enforcement authority of the California Geologic Energy Management Division ("CalGEM") was significantly enhanced by the enactment of Assembly Bill ("AB") 631. The bill's amendments of the California Public Resources Code substantially increased civil penalty and administrative amounts which CalGEM could impose on operators[47]. AB 631 also authorizes CalGEM to refer enforcement to a city attorney, district attorney, or the Attorney General to a bring civil action.[48] The bill extended the statute of limitations for civil penalties for violations of the Public Resources Code to five years from the discovery of the violation.[49] AB 1167 also authorized the Supervisor to order an operator to secure a site,[50] to perform testing and remedial work,[51] and to seek an emergency injunction to enjoin an operator from conducting specified activities that threaten to damage life, health, property, or natural resources, including waters suitable for irrigation or domestic purposes, or that violate the requirements of existing law and regulations.[52] The amendments also modify the typical standard for the issuance of a temporary restraining order or a preliminary injunction to enjoin violations of the Public Resources Code to allow such an injunction to be issued without proof of potential irreparable damage or that the remedy at law is inadequate.[53] The bill also allows cost recovery for CalGEM's response, prosecution, and enforcement costs incurred and, in certain cases, would create a lien against real or personal property of the operator, owner, or property owner who was ordered to do the work.[54]

2. New Bonding Requirements

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[47] CAL. PUB. RES. CODE §§ 3236.2, 3236.5 (2023).
[48] CAL. PUB. RES. CODE §§ 3236, 3236.2, 3236.3.
[49] CAL. CIV. CODE § 338.1.
[50] CAL. PUB. RES. CODE § 3224.5.
[51] CAL. PUB. RES. CODE § 3224.
[52] CAL. PUB. RES. CODE § 3236.3.
[53] CAL. PUB. RES. CODE § 3236.3(c).
[54] CAL. PUB. RES. CODE § 3224.5.

AB 1167 expressed the "intent of the Legislature that the oil and gas industry pay for all necessary costs of plugging, abandonment, and site restoration of oil and gas wells" and "to minimize the risk that the state will be liable for costs of plugging and abandonment" by requiring that "no well be transferred to another owner until and unless a bond has been filed that would cover the full cost of plugging and abandonment and site restoration."[55] To implement this legislative direction, effective January 1, 2024, "[a] person who acquires the right to operate a well or production facility, whether by purchase, transfer, assignment, conveyance, exchange, or other disposition," is required to notify CalGEM "not later than the date when the acquisition of the well or production facility becomes final" and allows CalGEM to obtain documentation regarding a transaction.[56] The bill added section 3205.8 to the Public Resource Code to require anyone intending to acquire marginal or idle wells or production facilities to first obtain a determination from CalGEM of the estimated total costs associated with plugging and abandonment, decommissioning, and site restoration related to those wells and facilities and to file a bond in an amount determined by CalGEM. Since these new bonding requirements apply to the transfer of any well with an average *daily* production level less than or equal to 15 barrels of oil or 60,000 cubic feet of natural gas during the 12 months preceding the date of acquisition, the new law covers the great majority of producing wells in California.[57] The bill also requires CalGEM to post its indemnity bond determinations on its website.[58] AB 1167's new requirements have the potential to significantly impact sale transactions and increase the cost and liabilities associated with the acquisition of producing properties in California. Governor Gavin Newsom acknowledged these concerns in his signing message, stating: "However, increasing the financial assurances required for oil and gas well transfers also potentially creates risk of current oil and gas well operators deserting these hazardous wells" and stating his intention to seek revisions of the law to align with the programs that CalGEM is developing to address orphaned and abandoned wells.[59]

3. Coastal Zone Development

Senate Bill ("SB") 704[60] amended the California Coastal Act of 1976 to, among other things, authorize the permitting of new or expanded oil and gas development if found to be consistent with all applicable provisions of the Coastal Act and to comply with certain additional conditions. SB 704 also authorizes the permitting of the repair and maintenance of existing oil and gas facilities if the repair and maintenance conform to certain requirements, including an existing requirement that all oil field brines be reinjected.

4. State Oil and Gas Supervisor

Governor Gavin Newsom returned without his signature SB 275[61] which would have required the Governor's appointment of the State Oil and Gas Supervisor to be affirmed by the State Senate, effectively vetoing the bill.[62]

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[55] CAL. PUB. RES. CODE § 3017.
[56] CAL. PUB. RES. CODE § 3202.
[57] CAL. PUB. RES. CODE § 3205.8(a).
[58] CAL. PUB. RES. CODE § 3205.8(e).
[59] Letter from Governor Gavin Newsom to the California State Assembly (Oct. 7, 2023).
[60] S.B. 704, 2023-2024 Gen. Assemb., Reg. Sess. (Cal. 2023).
[61] S.B. 275, 2023-2024 Gen. Assemb., Reg. Sess. (Cal. 2023).
[62] Letter from Governor Gavin Newsom to the California Senate (Jul. 13, 2023).

B. Judicial Developments

The California Supreme Court affirmed the Court of Appeal's opinion in *Chevron U.S.A., Inc. v. County of Monterey*[63] (discussed in The Year in Review 2021), which had held that a Monterey County ordinance banning well stimulation treatments, wastewater injection and impoundment and the drilling of new wells in the County was preempted by state law.[64] The court held that Public Resources Code section 3106, which gives the State Oil and Gas Supervisor and CalGEM the responsibility for oversight of drilling, operation, maintenance, and plugging and abandonment of oil and gas wells,[65] implicitly preempted a local agency's ability to regulate production methods.

In *In re Venoco, LLC*,[66] the district court affirmed the decision of a bankruptcy court[67] holding that the takeover by the California State Lands Commission and its operation of an offshore platform after the operator quitclaimed its leases back to the Commission and filed for bankruptcy was a reasonable exercise of the State's police powers and not a taking in violation of U.S. and California Constitutions.

C. Administrative Developments

1. Suspension of Implementation of SB 1137.

The California Legislature passed SB 1137 in 2022 to ban drilling and reworking operations in any inhabited area within the State by prohibiting CalGEM from approving any "notice of intention" submitted by an operator under Public Resources Code section 3203[68] for the drilling of oil or gas wells or the reworking of existing oil or gas wells within a "Health protection zone," defined as the area within 3,200 feet of a "Sensitive receptor."[69] CalGEM adopted emergency regulations implementing SB 1137 with an intended effective date of January 7, 2023.[70] However, on February 3, 2023, the California Secretary of State certified a referendum challenging SB 1137. Accordingly, CalGEM issued Notice to Operators 2023-03 informing operators that the provisions of Senate Bill 1137 were stayed by operation of law pending a vote in 2024 on the referendum and that CalGEM's implementing regulations were suspended. CalGEM added 14 C.C.R. section 1765.11 to the California Code of Regulations to ensure that the public was aware that, by operation of law, its emergency regulations were suspended.[71]

2. Proposed Cost Estimate Report Regulations.

In August 2023, CalGEM released its proposed "Cost Estimate Regulations Oil & Gas Operations" for official public comment. The proposed regulations would require each operator to submit a report demonstrating its total liability to plug and abandon all wells and to decommission all attendant production facilities, including any needed site

[63] 532 P.3d 1120 (Cal. 2023).
[64] 70 Cal. App. 5th 153 (Cal. Ct. App. 2021).
[65] CAL. PUB. RES. CODE § 3106.
[66] No. 17-10828 (JTD), 2023 WL 8596325 (D. Del. Dec. 12, 2023).
[67] In Re Venoco, LLC, No. 17-10828 (JTD), 2022 WL 3639414 (Bankr. D. Del. Aug. 23, 2022).
[68] CAL. PUB. RES. CODE § 3203.
[69] CAL. PUB. RES. CODE § 3280(b).
[70] SB 1137 Emergency Implementation Regulations (proposed Dec. 19, 2022).
[71] CAL. CODE. REGS. tit. 14 § 1765.11.

remediation.[72] A revised draft of the regulations was released in November 2023.[73]

3. New Bonding Requirements Implementing AB 1167.

CalGEM issued Notice to Operators NTO 2023-10[74] in December 2023 to inform operators of the new bonding requirements required by AB 1167 which must be complied with prior to the acquisition of certain wells and production facilities.

4. CalGEM Permits in Kern County.

Ongoing litigation over a 2015 Kern County ordinance intended to streamline the permitting process for new oil and gas wells[75] has resulted in disruption of CalGEM's administration of its own permits. In 2021, the Kern County Superior Court in *Vaquero Energy Inc. v. County of Kern*[76] ordered the County to suspend the review and approval of oil and gas permits until the court determined that the ordinance complied with CEQA requirements. CalGEM issued Notice to Operators 2023-06 on May 31, 2023, advising operators that they should resubmit their applications designating CalGEM as the lead agency and with revised information to support CalGEM's review.[77]

IV. COLORADO

A. Legislative Developments

1. Renaming of Regulatory Agency and Related Developments

On May 22, 2023, Colorado Governor Jared Polis signed SB 23-285[78] into law. Under SB 23-285, as of July 1, 2023, the Colorado Oil and Gas Conservation Commission was renamed the Colorado Energy and Carbon Management Commission (the "ECMC"). SB 23-285 updated ECMC's regulations of geothermal resources and granted the ECMC sole authority to regulate intrastate underground natural gas storage facilities.[79] It also requires the ECMC to create and maintain a website that serves as a state portal for information regarding the ECMC's regulatory activities.[80]

In tandem with SB 23-285, Governor Polis signed SB 23-016[81] into law, which amends the role of the Colorado Energy Office to include "[s]upport achieving legislative goals to reduce statewide greenhouse gas pollution" and to "[m]ake progress toward eliminating greenhouse gas pollution from electricity generation, gas utilities, and

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[72] Cost Estimate Regulations for Oil and Gas Operations (proposed Aug. 18, 2023).
[73] Notice of Availability of Modified Text and Documents added to the Rulemaking Files, *Cost Estimate Regulations for Oil and Gas Operations* (Nov. 2023).
[74] Notice to Operators, *New Bonding Requirements Associated with Assembly Bill 1167* (proposed Dec. 15, 2023).
[75] CAL. PUB. RES. CODE § 21000, et seq.
[76] Nature of Proceedings Ruling, No. BCV-15-101645 (Cal. Super. Ct. Kern Cnty. Oct. 4, 2021).
[77] Notice to Operators, *Notice of Appellate Order Regarding Kern County Code Chapter 19.98; Guidance for CEQA Compliance for Proposed Operations in Unincorporated Kern County* (proposed May 31, 2023).
[78] S.B. 23-285, 74th Gen. Assemb., Reg. Sess. (Colo. 2023).
[79] COLO. REV. STAT. § 34-60-102, *et seq.*
[80] COLO. REV. STAT. § 34-60-106(22).
[81] S.B. 23-016, 74th Gen. Assemb., Reg. Sess. (Colo. 2023).

transportation."[82] It further declares that Colorado will reduce statewide greenhouse gas pollution by 26% by 2025, 50% by 2030, 65% by 2035, 75% by 2040, 90% by 2045, and 100% by 2050, all from the 2005 baseline.[83] This reaffirms previous reduction targets set in 2019, with additional benchmarks.[84]

Additionally, on March 16, 2023, Colorado Governor Jared Polis issued a signed letter announcing new action to curb "harmful air pollution from the oil and gas sector," focusing on nitrous oxide ("NO_x").[85] The letter directs ECMC and the Colorado Department of Public Health and Environment to work together to develop rules by the end of 2024 that require upstream oil and gas producers in the nonattainment area (generally Colorado's "Front Range" of Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, and Jefferson Counties, plus portions of Weld and Larimer Counties[86]) to reduce NO_x by 30% in 2025 and 50% in 2030 from the 2017 baseline.[87] The letter also directs ECMC to undertake a "rulemaking to solidify environmental best management practices addressing ozone."[88]

B. Judicial Developments

1. Colorado Supreme Court Declines to Adopt a Universal Definition of "Production" in Oil and Gas Leases

In *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Crestone Peak Res. Operating LLC*, the Board of County Commissioners of Boulder County ("Boulder"), as the current lessor, sought to invalidate two leases (the "Leases") held by Crestone Peak Resources Operating LLC ("Crestone").[89] Each of the Leases contained a habendum clause extending the life of the lease in a secondary term for "… as long thereafter as oil or gas … is produced" from the leased land.[90] Each Lease additionally contained standard cessation-of-production and shut-in royalty clauses.[91]

In 2014, during the secondary terms of the Leases, the gas sales pipeline operated by an unaffiliated third party and servicing the wells producing from the Leases was closed for repairs for four months. During this period, the affected wells remained commercially viable, and Crestone's predecessor-in-interest regularly maintained the affected well sites. Boulder continued to accept royalty payments under the Leases, even while the suit was pending, and never claimed the Leases terminated.[92]

In 2018, Boulder sued Crestone under a variety of theories, including the shut-in related to the pipeline maintenance constituted a cessation in production entitling Boulder to terminate the Leases.[93] The District Court granted Crestone summary judgment, holding

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[82] COLO. REV. STAT. § 24-38.5-102(1)(a)(I)-(II).
[83] COLO. REV. STAT. § 25-7-102.
[84] *See* H.B. 19-1261, 72d Gen. Assemb., 1st Reg. Sess. (Colo. 2019).
[85] *See* Letter from Jared Polis, Gov. of Colo., to Jeff Robbins, Chair, Colo. Oil and Gas Conservation Comm'n, et al., at 2 (Mar. 16, 2023) (hereinafter "Polis Letter").
[86] *See generally*, COLO. DEP'T OF PUBLIC HEALTH & ENVTL & REG'L AIR QUALITY COUNCIL, STATE IMPLEMENTATION PLAN FOR THE 2015 8-HOUR OZONE NATIONAL AMBIENT AIR QUALITY STANDARDS (2022).
[87] Polis Letter, *supra* note 85, at 2.
[88] *Id.* at 3.
[89] 538 P.3d 745 (Colo. 2023).
[90] *Id.* at 747.
[91] *Id.*
[92] *Id.* at 748.
[93] *Id*. at 749.

Crestone had merely ceased marketing, not producing, and the Leases remained valid. Boulder appealed, and the Colorado Court of Appeals affirmed the decision of the District Court.[94] The Colorado Court of Appeals relied on *Davis v. Cramer*, which adopted the "commercial discovery" rule, interpreting the term "production" as capable of producing oil or gas "in commercial quantities."[95]

Boulder appealed to the Colorado Supreme Court, which rejected the Colorado Court of Appeal's adoption of the commercial discovery rule, choosing instead to interpret the language of each Lease on its own terms and circumstances.[96] Although the Court declined to adopt any general rule defining "production" under Colorado oil and gas leases, it held the 2014 shut-in at issue did not trigger termination under the cessation-of-production clauses under the Leases.[97]

2. Colorado Supreme Court Clarifies ECMC's Authority to Resolve Contractual Oil and Gas Payment Disputes

In *Antero Res. Corp. v. Airport Land Partners, Ltd.*, the Colorado Supreme Court upheld the Colorado Court of Appeals' holding that established the bounds of ECMC's[98] authority to resolve contractual disputes.[99] Under Colo. Rev. Stat. section 34-60-118.5(5.5), the ECMC is required to decline jurisdiction over disputes regarding the interpretation of a contract for payment of oil and gas proceeds.[100] In *Antero Resources*, Airport Land Partners, Ltd. and other royalty owners (collectively, the "Royalty Owners") alleged Antero Resources Corporation ("Antero") underpaid royalties due to the Royalty Owners by deducting various costs it was not entitled to deduct under the applicable leases.[101] The Royalty Owners filed individual breach-of-contract suits against Antero, and Antero moved to dismiss, arguing that the claims should have been brought before the ECMC in the first instance.[102] The District Court granted Antero's motion to dismiss.

The Royalty Owners subsequently brought the matter before the ECMC, asking the agency to determine whether it had jurisdiction. The ECMC decided that it did not have jurisdiction to resolve the royalty payment dispute, and Antero sought judicial review of ECMC's determination with the District Court. The District Court reversed ECMC's determination, holding ECMC had jurisdiction to hear the dispute at issue, concluding that the applicable lease provisions were unambiguous, so ECMC was only resolving issues of fact, not law. The Royalty Owners appealed to the Colorado Court of Appeals, which reversed the District Court stating that relevant terms in the leases were subject to legal debate.[103]

After granting *de novo* review, the Colorado Supreme Court stated that the "most

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[94] Bd. Of Cty. Comm'rs v. Crestone Peak Res. Operating LLC, 493 P.3d 917 (Colo. App. 2021).
[95] 837 P.2d 218, 222 (Colo. App. 1992).
[96] *Bd. of Cnty. Comm'rs,* 538 P.3d at 752-53 (stating that "[t]herefore, we decline to adopt a universal rule defining 'production' in Colorado oil and gas leases…").
[97] *Id.* at 753-56.
[98] ECMC was formerly the COGCC. *See* Colorado, Part A.1 *infra*.
[99] 526 P.3d 204 (2023).
[100] *Id*. at 209-210. More fully, "[If ECMC finds that] a bona fide dispute exists regarding the interpretation of a contract defining the rights and obligations of the payer and payee …, the commission shall decline jurisdiction over the dispute and the parties may seek resolution of the matter in district court."
[101] *Id.* at 207.
[102] *Id.* at 207-08.
[103] *See* Antero Res. Corp. v. Airport Land Partners, Ltd., 526 P.3d 204, 210 (Colo. 2023).

sensible reading of these provisions together is that once parties whose mineral interests are the subject of a lease agreement have raised a nonfrivolous, genuine dispute about a contract term, jurisdiction to interpret that contract lies with the courts, and not with [ECMC]," holding that the ECMC does not have jurisdiction to review the lease provisions at issue, including whether or not the provisions are ambiguous.[104]

V. KANSAS

Kansas had a quiet year in both the legislature and the judiciary. Two decisions were issued of interest to practitioners. No statutes or regulations of import were enacted.

A. Judicial

In *Mog, Tr. of Craig M. Mog Living Tr. Dated Oct. 23, 2015 v. St. Francis Episcopal Boys' Home of Salina*,[105] the Kansas Court of Appeals confirmed the conventional wisdom that plaintiffs in a partition action do not need to provide defaulting parties notice of filings or rulings in the case. Kansas does not recognize forced-pooling. As a result, operators must secure leases with all mineral owners before drilling or be willing to carry the unleased fractional interest. As a practical matter, this means that Kansas operators do not drill unless they have all the mineral estate leased, which can be difficult. As a solution, landowners use partition actions to clear title defects and consolidate ownership.

In *Mog*, the plaintiffs owned sixty percent of the mineral interest in the partitioned tracts. The McEwen Trust owned about two percent of the minerals. The Trust did not file an answer or other responsive motion to the petition for partition, but the trustee sent a letter to the Court saying that she opposed the partition. The trustee then appeared at a hearing pro se. The Court explained that the trustee could not represent an entity because she was not an attorney. After an extensive discussion, the trustee said that she would not hire an attorney or challenge the partition. The Court found the trust was in default. After the hearing, the partition proceeded, and the property was sold. When the plaintiffs filed a motion to approve the sale, the Trust claimed the sale should be set aside because it did not receive sufficient notice of developments in the case. The plaintiffs' counsel had sent the trustee copies of pleadings via email which the trustee claimed was deficient. The Court of Appeals found that ongoing notice is not required when a party that has been properly served with a petition has opted not to respond or participate in the case,[106] nor could the trust claim detrimental reliance on a statement by plaintiffs' counsel that they would send the trustee copies of pleadings because the trust was a defaulting party.

This ruling is important because mineral partition actions typically have many defaulting defendants, including unknown and unascertainable parties. If parties were required to serve copies of all pleadings, it could substantially drive up the administrative costs of these routine actions.

In *United States v. Coffeyville Res. Ref. & Mktg., LLC*,[107] the federal District of Kansas ruled on a dispute involving a refinery's Clean Air Act and Kansas Air Quality Act violations. Most Kansas operators sell crude oil to one of two refineries in the state – CHS Refinery or Coffeyville Resources ("Coffeyville"). Coffeyville has had two consent

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[104] *See Antero Res.,* 526 P.3d at 210.
[105] 534 P.3d 604, 605 (Kan. 2023).
[106] *Id.* at 607-08.
[107] No. 04-1064-JAR-KGG, 2023 WL 3496274, at *1 (D. Kan. May 17, 2023) (reviewing Magistrate Judge Gale's opinion in United States v. Coffeyville Res. Ref. & Mktg., LLC, No. 6:04-cv-01064-JAR-KGG, 2023 WL 2707220, at *1 (D. Kan. Mar. 30, 2023)).

decrees with EPA over Clean Air Act violations at its facility. In 2020, EPA and the Kansas Department of Health and Environment ("KDHE") demanded stipulated penalties from Coffeyville pursuant to paragraph 202 of the 2012 Consent Decree. In December 2021, plaintiffs filed a supplemental complaint, alleging nine new claims based on "transactions, occurrences, and events" that occurred after the filing of the original complaint.[108] In February 2022, plaintiffs filed an additional eight claims.

In October 2022, the District Court dismissed KDHE's claims for civil penalties under a Kansas statute. The State then moved for leave to amend. Coffeyville did not oppose with one exception: KDHE asked to add claims for injunctive relief under K.S.A. section 65-3012.[109] The magistrate judge granted leave to amend. The District Court then found that the plain language of the statute authorized suit to be filed in "any court of competent jurisdiction." Coffeyville subsequently entered into a proposed settlement with EPA, agreeing to pay over $23 million, representing $13.25 million in penalties, $9 million on implementation measures to prevent future violations, and $1 million on a Supplement Environmental Project.[110]

VI. LOUISIANA

A. Legislative Developments

The Louisiana legislature amended the state statutes governing carbon capture and storage with Act No. 378 of the 2023 Regular Session. The governing authority of an affected parish must now receive notice in the following circumstances: (1) from the Office of Conservation when the application for a permit to construct/drill a Class V or Class VI injection well is complete,[111] (2) any time notice is required under the Louisiana Geological Sequestration of Carbon Dioxide Act,[112] (3) from the State Mineral and Energy Board before entering into an operating agreement,[113] and (4) from an applicant applying for a permit to conduct geophysical and geological surveys for a carbon capture and storage project.[114] Act No. 378 also amended La. R.S. 30:1104.1 to require any applicant to include an environmental analysis in its submission for a Class VI injection well permit. This analysis is to be considered by the Office of Conservation in its role as a public trustee. New statutes were also added to Title 30 to specify how carbon capture and storage revenues from leases and operating agreements must be split between the local governing authority of the affected parish and various state funds.[115]

Significantly, the act increased the delay before liability is transferred to the State of Louisiana from ten to fifty years.[116] The act also requires operators to provide quarterly reports to the Office of Conservation regarding their operations and to report within twenty-four hours in the case of a failure of mechanical integrity or if operations conducted may endanger or compromise underground sources of drinking water.[117] The act allows for the recording of a "notice of geologic storage agreement" in the public records instead of the

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[108] *Id.*
[109] KAN. STAT. ANN. § 65-3012.
[110] 2023 Coffeyville Resources Refining & Marketing, LLC Clean Air Act Settlement Information Sheet, U.S. ENVTL. PROT. AGENCY (2023).
[111] La. R.S. 30:6(H) (2023).
[112] La. R.S. 30:1105 (2023).
[113] La. R.S. 30:209 (2023).
[114] La. R.S. 56:30.5 (2023).
[115] La. R.S. 30:149 (2023); La. R.S. 30:209.2 (2023).
[116] La. R.S. 30:1109 (2023).
[117] La. R.S. 30:1107.1 (2023).

complete agreement.[118] Finally, Title 30's provisions related to the Carbon Dioxide Geologic Storage Trust Fund were also amended. The law now requires fees assessed to operators to recommence once the amount deposited for the site is reduced below $4 million due to state expenditures instead of the previous $5 million.[119] Moreover, while an operator of multiple projects will not have an obligation to pay into the trust fund after reaching a balance of $10 million, the operator will be required to resume payments once the balance is reduced below $8 million.

B. Judicial Developments

Significant litigation is ongoing in the Western District of Louisiana regarding whether unleased mineral owners whose land is in a drilling unit created by the Commissioner of Conservation must bear their pro rata share of post-production costs when the unit operator markets and sells its share of production from the unit. After the District Court affirmed this obligation last year under the Civil Code regime of *negotiorum gestio*, it certified its decisions in *Self v. BPX Operating Co.*[120] and *Johnson v. Chesapeake Louisiana, LP*[121] for interlocutory appeal pursuant to 28 U.S.C. section 1292(b). Following a consolidated oral argument in December 2022 before the Fifth Circuit Court of Appeals, the Court issued nearly identical opinions in each case certifying the following question to the Louisiana Supreme Court: "Does La. Civ. Code art. 2292 apply to unit operators selling production in accordance with La. R.S. 30:10(A)(3)?"[122] One of the judges on the panel dissented on the grounds that, in his opinion, this Civil Code regime was incompatible with La. R.S. 30:10(A)(3), and therefore, certification to the Louisiana Supreme Court was improper. At the time of this publication, the Louisiana Supreme Court has only granted certification in *Self*,[123] and the briefing will be submitted in early 2024.

Air Products Blue Energy, LLC v. Livingston Parish Government[124] is an important case in the context of carbon sequestration projects in Louisiana. The plaintiff, Air Products Blue Energy, LLC ("Air Products"), sought to drill a Class V test well beneath Lake Maurepas and within Livingston Parish. It also planned to perform a subsurface seismic survey of Lake Maurepas to construct a carbon sequestration facility beneath the lake pursuant to La. R.S. 30:209(4)(e)(ii). In addition to acquiring the necessary permits for the project, Air Products entered into a storage agreement with the State of Louisiana that provided Air Products with, among other things, "the sole and exclusive right to control, or perform all activities on the Property as may be necessary or incidental to the Permitted Purposes…" However, on October 13, 2022, Livingston Parish "adopted a twelve-month moratorium[] on 'any activities associated with Class V wells where the well is specific to geologic testing of rock formation, monitoring, drilling, or injecting of CO2 [sic] for long term storage.'" In response, Air Products filed suit seeking declaratory and injunctive relief to enjoin any enforcement of Livingston Parish's moratorium as it relates to seismic surveys, Class V injection wells, and associated activities on the grounds of federal and state preemption. The Middle District of Louisiana juxtaposed this moratorium with the legislation enacted by the Louisiana Legislature that empowers the Office of Conservation to regulate injection wells as part of the state's EPA-approved program. The court

[118] La. R.S. 30:1112 (2023)
[119] La. R.S. 30:1110.
[120] 595 F. Supp. 3d 528 (W.D. La. 2022).
[121] No. 16-1543, 2022 WL 989341 (W.D. La. Mar. 31, 2022).
[122] Self v. BPX Operating Co., 80 F.4th 632 (5th Cir. 2023); Johnson v. Chesapeake, L.P., 87 F.4th 305 (5th Cir. 2023).
[123] Self v. BPX Operating Co., 373 So. 3d 712 (La. 2023).
[124] No. 22-809-SDD-RLB, 2022 WL 17904535 (M.D. La. Dec. 26, 2022).

concluded that the extensive nature of legislation was intended to preempt the field of underground injection wells and associated activities, as there was a need for state-wide uniformity. The court agreed the injury to Air Products constituted irreparable harm to support the issuance of the preliminary injunction.

In legacy litigation, *Hero Lands Company, L.L.C. v. Chevron U.S.A., Inc.* provides an extensive analysis of Act 312 and its application at trial.[125] Plaintiff, Hero Lands Company ("Hero"), owns approximately 155 acres of land that has been subject to decades of oil and gas exploration and production. On March 5, 2018, Hero sued Chevron and eight other defendants alleging its property incurred harm due to the defendants' oil and gas operations. At trial, the jury found that one of the allegedly impacted tracts suffered no "environmental damage," as defined by Act 312, and that neither Chevron nor its assignees or lessees acted "excessively or unreasonably" on any of the Hero tracts. On appeal, several noteworthy issues were addressed. First, the Louisiana Fourth Circuit Court of Appeal interpreted Subpart M of Act 312 to allow damages for "unreasonable or excessive operations" based on the existing rules and standards at the time of the complained of activity.[126] The Fourth Circuit determined that it was inappropriate to conclude that either Chevron's or its assignees' operations were "*per se* unreasonable or excessive based solely on the fact that the environmental compliance orders were issued."[127] Second, the Fourth Circuit held that the trial court was bound to allow argument and jury instruction as to the complexities of Act 312 because the jury was obliged to evaluate, as a preliminary matter, whether environmental damage existed.[128] Third, and finally, the Fourth Circuit rejected Hero's argument that the definition of environmental damage, which includes potential damage or injury, exists on a tract where the jury found there was no environmental damage merely because environmental damage existed on the surrounding tracts, noting that the testimony of several experts provided a more than reasonable basis for the jury to determine that there was no environmental damage on the tract notwithstanding the state of the adjacent properties.[129]

Castex Development, LLC v. Anadarko Petroleum Corp.[130] expressly declares a long line of Louisiana legacy cases to be dicta and finds it possible for a prior landowner to transfer rights to sue for environmental damage to the property to a buyer under a mineral lease after the lease has already expired. The plaintiff, Castex Development, LLC ("Castex"), purchased property from a prior owner years after alleged oilfield damage was sustained. Prior to finalizing the sale, Castex entered an agreement with the prior owner wherein Castex would acquire the prior owner's interest in the property pursuant to the terms of a 1954 oil, gas, and mineral lease which had expired over thirty years prior to the sale. Thereafter, Castex sued Anadarko for tort and contract claims based on alleged breaches of the expired mineral lease which led to contamination of the property. Anadarko cited to *LeJeune Bros., Inc. v. Goodrich Petroleum Co., L.L.C.*[131] and a string of cases citing *LeJeune*. The case, which has been heavily relied upon in similar arguments, holds that it is not possible to transfer rights under a lease that has expired. The Third Circuit, however, overturned its own prior rulings on the matter and held that *LeJeune* is contrary to the express provisions of La. C.C.P. arts. 1984 and 2642. Therefore, according to the Third Circuit, the holding in *LeJeune* and the cases following its ruling are "pure *obiter dicta*," and that relying on them as law "simply is not supported by our civil law

[125]359 So. 3d 130 (La. App. 4 Cir. 2023).
[126]*Id*. at 143; La. R.S. 30:29(M).
[127]359 So. 3d at 146.
[128]*Id.* at 155-57.
[129]*Id.* at 158.
[130]374 So. 3d 384 (La. App. 3 Cir. 2023).
[131]981 So. 2d 23 (La. App. 3 Cir. 2007), *writ denied*, 978 So. 2d 327 (La. 2008).

tradition."[132] The court went on to conclude that a subsequent landowner was not precluded from suing by the subsequent purchaser doctrine where the transfer of rights to sue was done pursuant to an expired oil, gas, and mineral lease.

Finally, in November 2023, the Louisiana First Circuit Court of Appeal provided further insight into what must be included in a "Most Feasible Plan" issued by the Louisiana Department of Natural Resources under Act 312[133] when it affirmed the trial court decision in *Louisiana Wetlands, LLC v. Energen Resources Corp.*[134] The First Circuit found that a most feasible plan adopted pursuant to Act 312 "need not identify the specific numeric values to which constituents in the soil and groundwater may need to be remediated if remediation ultimately proves unnecessary after further evaluation."[135] The court further reasoned that if LDNR were required to "definitively grant or deny any exception from the remediation standards before the environmental damage is fully evaluated, Act 312's option for evaluation plans is pointless."[136]

VII. New Mexico

A. Judicial Developments

The New Mexico Supreme Court resolved a lengthy and convoluted dispute between a sole heir, his successor-in-interest, and the distant devisees of Herbert and Marie Welch in the case of *In re Last Will and Testament of Welch (Premier Oil & Gas, Inc. v. Welch, et al)*.[137] The careful and narrowly crafted opinion resolves only one of the many thorny issues as to bona fide purchaser ("BFP") protection under facially regular but void judgments, otherwise affirming the New Mexico Court of Appeals' handling of other issues relating to notice, jurisdiction, and finality of probate judgments.[138]

The facts are as follows: Marie and her husband had a joint will, probated after Herbert's death in 1975.[139] That joint will left everything to the surviving spouse, later devising Herbert's share of the minerals to his brother (the Welch Heirs) upon the death of the surviving spouse.[140] That will was probated after his death, resulting in a final judgment titling all minerals in Marie as her sole and separate property.[141] Marie later moved to Florida and executed another will, the 1980 Will.[142] After Marie died in 1988, her nephew (Griffin) knew Marie had a will but was unable to locate a copy. Some twenty years later, without any additional or renewed search, Griffin filed a determination of heirship proceeding in 2007, attesting that Marie died intestate and he was Marie's only heir.[143] Notice was provided only by publication in the same New Mexico county as the heirship proceeding and the Welch Heirs were neither named nor served.[144] The 2007 judgment

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[132] *Castex Dev.*, 374 So. 3d at 392.
[133] Codified as La. R.S. §§30:29-29.2 (2024).
[134] No. 2022 CA 1169, 2023 WL 8290245 (La. App. 1 Cir. Nov. 30, 2023).
[135] *Id* at *9.
[136] *Id*. at *5.
[137] 533 P.3d 1086 (N.M. 2023) ("*Premier II*").
[138] Premier Oil & Gas, Inc. v. Welch (In re Last Will & Testament of Marie G. Welch), 493 P.3d 400 (N.M. Ct. App. 2021) ("*Premier I*").
[139] *Id.* at 404-06.
[140] *Id.* at 405.
[141] *Id.*
[142] *Id.*
[143] *Id.* at 405-06.
[144] *Premier I*, 493 P.3d at 406, *see also id.* at 412.

declared Griffin to be the sole heir and owner of Marie's mineral interest.[145]

In 2010, prior to acquiring a lease covering Griffin's interest, Premier commissioned a title opinion.[146] The title opinion indicated that Premier was entitled to rely on the 2007 judgment.[147] In 2012, Marie's cousin and devisee probated her 1980 Will, providing notice to Griffin and the Welch Heirs. Premier joined to quiet title.[148] On summary judgment, the district court found in favor of Griffin and Premier, affirming the 2007 judgment and Premier as a BFP.[149] The Court of Appeals reversed in favor of the Welch Heirs, finding the 2007 judgment void because Griffin failed to exercise reasonable diligence,[150] but affirmed Premier's BFP claim.[151]

The New Mexico Supreme Court affirmed the Court of Appeals, clarifying that the actual notice prong of the BFP analysis hinges on the four corners of the judgment in question.[152] The Court followed *Archuleta v. Landers*,[153] which held that a purchaser of property sold under a facially valid judgment, later determined void as to excluded minor heirs, is entitled to bona fide purchaser protections.[154] Therefore, extrinsic evidence cannot overcome the rights of a BFP who relies on a facially valid judgment.[155] Moreover, the mere possibility of an adverse claim, which arises only from considering facts outside of a facially valid judgment,[156] cannot be "actual notice of adverse title claims."[157] Here, the 1980 Will, upon which the Welch Heirs singularly relied to challenge the 2007 judgment and Premier's title, was "only visible by looking at documents outside of its four corners."[158] The Court also noted that the improper exercise of jurisdiction by one court is not to be corrected at the expense of an innocent purchaser for value.[159] The Court reasoned that holding otherwise invites second-guessing, speculation, and absurd outcomes that "diminish public trust in our judicial system."[160]

The U.S. Court of Appeals for the Tenth Circuit reviewed a multi-faceted NEPA case from the District of New Mexico.[161] The *Diné Citizens* case involved a challenge by a coalition of environmental groups to the Bureau of Land Management's ("BLM") environmental assessments ("EAs") and environmental assessment addendum ("EA Addendum") analyzing the environmental impact of 370 applications for permits to drill ("APDs") oil and gas wells in the San Juan Basin of New Mexico.[162] The Tenth Circuit

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[145] *Id*. at 406.
[146] *Premier II*, 533 P.3d at 1089.
[147] *Id.*
[148] *Premier I*, 493 P.3d at 406.
[149] *Id.* at 413.
[150] *Id.* at 412.
[151] *Id.* at 417.
[152] *Premier II*, 533 P.3d at 1088-89.
[153] 356 P.2d 443 (1960).
[154] *Premier II,* 533 P.3d at 1091-92.
[155] *Id.* at 1092 (quoting Pettis v. Johnston, 190 P. 681, 692 (1920)); *see also id.* (quoting and discussing United States v. Morton, 467 U.S. 822, 829 n.10 (1984), and In re Mathews, 61 Comp. Gen. 229, 230-31(Feb. 2, 1982)).
[156] *Id.* at 1092 & n.2 (providing non-exhaustive list of facial irregularities that could defeat BFP status: incorrect address or legal description of property, date incorrect, void for lack of jurisdiction based on court's location, judgment with party name misspelled)
[157] *Id.* at 1090-91.
[158] *Id.* at 1092.
[159] *Id.* at 1091.
[160] *Premier II,* 533 P.3d at 1092-93.
[161] Diné Citizens Against Ruining Our Env't v. Haaland, 59 F.4th 1016 (10th Cir. 2023).
[162] *Id*. at 1024.

affirmed the district court's decision to decline to review 171 of the APDs, as those had not been approved by the BLM and were not ripe for review.[163]

Review of the BLM's NEPA decisions was under the standard of whether those decisions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[164] The Tenth Circuit held that the BLM did not unlawfully predetermine the outcome of the EA Addendum when it did not revoke 199 APDs approved prior to beginning the EA Addendum process.[165] The remainder of the decision concerned whether BLM took the requisite "hard look" at various environmental consequences of the proposed drilling activity.[166] The Court held that the BLM's NEPA analysis failed to take the requisite hard look at cumulative greenhouse gas (GHG) emissions limiting its analysis to direct GHG emissions from the first twenty years of the proposed wells rather than over the projected lifetime of the wells.[167] It also held that the GHG analysis failed under the hard look test "by relying solely on percentage comparisons where at least one more precise method was available."[168] The Court rejected a challenge to BLM's consideration of water usage in the wells and whether that usage would increase water insecurity in the region.[169] The Tenth Circuit also ruled that the EA process failed to consider the cumulative effect of hazardous air pollutants resulting from the construction of approximately 3,000 wells over the years.[170] The final dispute to resolve was the environmental groups' request to vacate the EAs and EA Addendum or enjoin them given the deficiencies in the process. The Tenth Circuit adopted the test promulgated by the D.C. Circuit concerning vacatur: "(1) 'the seriousness of the [agency action's] deficiencies (and thus the extent of doubt whether the agency chose correctly),' and (2) 'the disruptive consequences of an interim change that may itself be changed.'"[171] The Tenth Circuit determined that the vacatur and injunction issues were "fact intensive" and should be decided by the District Court in the first instance so remanded the case.

The U.S. District Court for the District of New Mexico declined to certify a class of San Juan Basin overriding royalty owners claiming underpayment of their interests by the operator.[172] The court's ruling turned on the lack of predominance of common questions. The District Court acknowledged that there were common questions concerning payment methodology and course of performance but determined that there would be no or very little trial time devoted to those questions.[173] Conversely, testimony concerning differences in the language of various royalty provisions would occupy the bulk of the trial.[174] Plaintiffs argued that certain variations in language could be managed by subclassification, but the Court determined that the "same concerns are prevalent" given the varying language and "the different industry-custom-and-usage evidence that will be needed to interpret" those language variations.[175]

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[163] *Id*. at 1025.
[164] *Id*. at 1029 (internal quotations and citations eliminated).
[165] *Id*. at 1033.
[166] *Id*. at 1034.
[167] *Diné Citizens,* 59 F.4th at 1036-37.
[168] *Id*. at 1044.
[169] *Id*. at 1045.
[170] *Id.* at 1047.
[171] *Id*. at 1049 (quoting Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (bracketed material inserted by *Diné Citizens* court)).
[172] Anderson Living Trust v. ConocoPhillips Co., LLC, No. CIV 12-0039 JB/SCY, 2023 WL 6554427 (D.N.M. Mar. 31, 2023).
[173] *Id*. at *20.
[174] *Id*.
[175] *Id*.

VIII. OHIO

The development of oil and gas law in Ohio continued in 2023, with significant cases addressing issues of subsurface trespass, the deduction of post-production costs from royalties, and whether off-lease operations were sufficient to maintain a lease even without pooling, just to name a few.

A. Legislative Developments

On July 4, 2023, House Bill 33 became effective, establishing, in part, a new permitting mechanism for stratigraphic wells in Ohio.[176] Among other things, the legislation (i) provides that stratigraphic wells must be plugged within one year after drilling commenced on the well unless the owner applies to convert the well to another use within that one-year period or obtains financial assurance payable to the state in an amount equal to or greater than the estimated cost to plug the well and reclaim the associated well site; and (ii) allows the well owner to designate certain data and other information as confidential business information not subject to disclosure for a 5-year period.

In December 2023, the Ohio General Assembly introduced two companion bills (House Bill 358 / Senate Bill 200) declaring its intent to establish a regulatory framework for the safe and secure deployment of carbon capture and storage technologies in Ohio. We anticipate further action on this legislation in 2024.

B. Judicial Developments

In *TERA, LLC v. Rice Drilling D, LLC*,[177] Ohio's Seventh District Court of Appeals affirmed a trial court decision granting summary judgment to lessors on their trespass claim and finding the lessees liable for $40 million in damages. The parties' oil and gas leases granted the right to develop the "formation commonly known as the Utica Shale."[178] The lessees had produced from the Point Pleasant, which they maintained was an interval within the formation commonly known as the Utica Shale.[179] The appeals court disagreed, finding that the lease language unambiguously excluded the Point Pleasant from the grant.[180] The court concluded that because the lease language was unambiguous, there was no set of facts by which the oil and gas companies could demonstrate a good faith belief that they had the right to produce from the Point Pleasant, and were thus bad faith trespassers as a matter of law and subject to the associated harsh penalties.[181] Finally, the court upheld the jury's damages award based on a NYMEX price for natural gas rather than a local price actually available to a producer in Ohio.[182] The Supreme Court of Ohio accepted jurisdiction[183] and heard oral argument in November 2023.

In *Golden Eagle Resources II LLC v. Rice Drilling D, LLC*,[184] the U.S. District Court for the Southern District of Ohio granted, in part, and denied, in part, a producer's motion to dismiss a complaint alleging that it trespassed into the Point Pleasant formation

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[176] H.B. 33, 135th Gen. Assemb., Reg. Sess. (Ohio 2023).
[177] 205 N.E.3d 1168 (Ohio Ct. App. 2023).
[178] *Id.* at 1183 (emphasis added).
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.* at 1197-99.
[183] Entry, Tera, LLC v. Rice Drilling D, LLC, No. 2023-0411 (Ohio June 6, 2023).
[184] No. 2:22-cv-02374, 2023 U.S. Dist. LEXIS 23575 (S.D. Ohio Feb. 10, 2023).

under the plaintiff's property.[185] The parties held competing oil and gas leases to a property.[186] The plaintiff alleged that the defendant's leases did not cover the Point Pleasant formation, but that the defendant nonetheless drilled into and produced from it, resulting in a subsurface trespass.[187] The court rejected two of the plaintiff's theories, including that a trespass resulted merely by including the plaintiff's property in a pooled unit,[188] although the court did recognize that a lessee does not necessarily physically enter a property that it pools into a unit. But the court did find viable the plaintiff's theory that a producer may commit a subsurface trespass by injecting fluids and proppants into a property's subsurface as part of the hydraulic fracturing process.[189] The court also found that the rule of capture does not preclude a plaintiff from asserting a conversion claim for produced oil and gas acquired by hydraulic fracturing that invades the plaintiff's property.[190]

In *Grissoms, LLC v. Antero Res. Corp.*,[191] the U.S. District Court for the Southern District of Ohio held in favor of the lessors in a suit alleging the breach of an oil and gas lease.[192] The issue was whether the lessee was entitled to deduct a pro rata share of post-production processing and fractionation costs from royalty payments under the lease's market enhancement clause.[193] That clause provided, in part:

> [All] royalties or other proceeds accruing … shall be without deduction … for the cost of … processing, transporting, and marketing the oil, gas and other products produced hereunder to transform the product into marketable form; however, any such costs which result in enhancing the value of the marketable oil, gas or other products … may be proportionally deducted[.][194]

Following the Fourth Circuit's decision in *Corder v. Antero Resources Corp.*, the court held that the phrase "other products" included natural gas liquid ("NGL") purity products, and thus "when [the lessee] pays royalties from the sale of a particular product, it may deduct actual and reasonable costs it incurred after that product became fit for sale[.]"[195] Costs to process the gas stream into residue gas and Y-Grade, and then fractionate the Y-Grade into individual NGL purity products therefore could not be shared with the lessors. The lessee is expected to appeal to the Sixth Circuit Court of Appeals.

In *Sabre Energy Corp. v. Gulfport Energy Corp.*,[196] the U.S. District Court for the Southern District of Ohio considered whether ORRIs in the drilling units of shallow vertical wells attached to subsequently drilled deep horizontal wells.[197] The plaintiff was assigned ORRIs in specified wells and associated drilling units, but the assignments

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[185] *Id.* at *1.
[186] *Id.*
[187] *Id.* at *11.
[188] *Id.* at *18.
[189] *Id.* at *21-22.
[190] *Golden Eagle Resources II*, 2023 U.S. Dist. LEXIS 23575 at *30.
[191] No. 2:20-CV-2028, 2023 U.S. Dist. LEXIS 136540 (S.D. Ohio Aug. 4, 2023).
[192] *Id.* at *3.
[193] *Id.* at *4.
[194] *Id.* at *14.
[195] *Id.* at *16 (quoting Corder v. Antero Resources Corp, 57 F.4th 384, 399 (4th Cir. 2023)).
[196] No. 2:19-cv-5559, 2023 U.S. Dist. LEXIS 126634 (S.D. Ohio July 21, 2023).
[197] *Id.* at *1.

provided that the ORRIs would not extend to "undrilled acreage."[198] Decades later, defendant lessees drilled horizontal wells to produce from the Utica/Point Pleasant formation, and certain of these wells traversed those drilling units, producing from beneath the shallow vertical wells.[199] While the plaintiff believed they were entitled to proceeds from *any* well producing from acreage included in those drilling units, the court disagreed, finding that the plaintiff's ORRIs did not attach to horizontal wells.[200] In doing so, the court focused on the language of the ORRI assignments, which were limited to referenced wells and their "drilling units," and further limited to exclude "undrilled acreage."[201] As to those drilling units smaller than forty acres, the ORRIs did not attach to any deep horizontal well because the court determined that "drilling units" were limited in depth to the depths identified in Ohio regulatory spacing law.[202] In other words, the court found that inherent in the grant of ORRIs in drilling units under forty acres was a 4,000-foot depth restriction, which is well above the Utica/Point Pleasant formation.[203] And while the ORRI grant would encompass the Utica/Point Pleasant formation for the larger drilling units, the court held that in the context of the ORRI assignments, "undrilled acreage" included a depth component.[204] As a result, the ORRIs did not attach to depths below the deepest of the shallow vertical wells.[205]

In *Lehman v. Gulfport Energy Corp.*,[206] the U.S. District Court for the Southern District of Ohio rejected a claim that the lessee had breached an oil and gas lease by releasing the plaintiff's property rather than drilling an offset well to protect the land from drainage after another producer drilled adjacent wells.[207] The lease included a reasonable development clause providing that "[i]f oil or gas should be produced in paying quantities from a well on adjacent acreage that is draining any acreage of the leased premises that is not pooled or unitized with that well," then the lessee must begin efforts to drill an offset well "within six (6) months after the earlier of: (1) notice from the Lessor of such producing well or (2) Lessee's knowledge of such well having been drilled . . . ."[208] The court agreed that, under this language, the lessee's obligation to drill an offset well did not trigger until it had knowledge that an adjacent well was, in fact, producing, rather than merely having been drilled.[209] By the time two of the adjacent wells had commenced production, the lessee had already released the property.[210] And, while the third adjacent well began producing before the lessee released the lease, the release still occurred within the six-month deadline to drill an offset well as provided in the reasonable development clause.[211] The lease's release clause, which stated that the lessee was "relieved of all obligations as to the released acreage," terminated that obligation.[212]

In *Faith Ranch & Farms Fund, Inc. v. PNC Bank, Nat'l Ass'n*,[213] Ohio's Seventh

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[198] *Id*. at *3.
[199] *Id*. at *3-4.
[200] *Id*. at *17-18.
[201] *Id*. at *6-7.
[202] *Sabre Energy Corp*, 2023 U.S. Dist. LEXIS 126634 at *10-11.
[203] *Id*. at *11.
[204] *Id*. at *13-14.
[205] *Id*. at *17.
[206] No. 2:20-cv-3053, 2023 U.S. Dist. LEXIS 75895 (S.D. Ohio May 1, 2023).
[207] *Id.* at *9.
[208] *Id.* at * 11.
[209] *Id.* at *12.
[210] *Id.* at *15.
[211] *Id.* at *15-16.
[212] *Lehman*, 2023 U.S. Dist. LEXIS 75895 at *16-17.
[213] 2023-OHIO-3608 (Ct. App. Oct. 3, 2023).

District Court of Appeals analyzed whether the phrase "other minerals" used in a 1953 reservation was intended to include oil and gas rights. The grantor in the 1953 deed reserved coal "and other minerals, with the right to mine and remove such coal or other minerals … using any convenient underground mining methods.…"[214] Relying on its earlier decision in *O'Brandovich v. Hess Ohio Devs., LLC*,[215] the court began its analysis with the presumption that "other minerals" includes oil and gas.[216] The court's next step was to determine whether the reservation language demonstrated the parties' intent to either include or exclude oil and gas interests. In doing so, the court looked at the easement language included in the reservation.[217] The court determined that the references to "right to mine" and "mining methods" as the method of removal, as opposed to "drilling," suggested that "other minerals" was not intended to include oil and gas.[218] The court further found that the reservation language was ambiguous and went on to consider parol evidence, including language used by the same grantor in earlier deeds.[219] Because the grantor had explicitly reserved oil and gas in earlier deeds, the court held that the phrase "other minerals" used in the 1953 deed did not include oil and gas rights.[220]

In *Ischy v. Northwood Energy Corp.*,[221] plaintiff lessors contended that defendant lessee's pooling of only 0.19 acres of their 297-acre lease into a production unit where the 0.19 acres would not even be drained by the unit well was done in bad faith solely to maintain the lease's primary term without paying to exercise the extension option.[222] Ohio's Seventh District Court of Appeals rejected that claim, noting that the lease gave the lessee the right to pool all or *any portion of* the leased premises and to determine the size and shape of the unit *in its sole discretion*, and a party does not breach the implied covenant of good faith and fair dealing simply by exercising its rights under the express terms of the lease.[223] Further, had the lease not been properly pooled into that unit, the court opined that the lease was still extended into its secondary term by certain off-lease activities related to another well due to the lease's broad definition of "operations."[224]

In *Scenicview Ests., LLC v. SWN Prod. (Ohio), LLC*,[225] the United States Court of Appeals for the Sixth Circuit considered whether a lease expired as to acreage outside of a producing unit at the expiration of its primary term by operation of the lease's Pugh clause. Here, the lease's habendum clause provided that operations conducted on the leasehold *or lands pooled therewith* would serve to extend the lease into its secondary term.[226] And based on the language of the lease's pooling provision, the court found that the land in question was properly pooled into the new unit.[227] The lease defined "operations" to include "any preliminary or preparatory work necessary for drilling, conducting internal technical analysis to initiate and/or further develop a well, [and] obtaining permits and

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[214] *Id*. at ¶ 3.
[215] 170 N.E.3d 1240 (Ohio Ct. App. 2021).
[216] *Faith Ranch & Farms Fund, Inc.*, 2023-OHIO-3608 at ¶ 14.
[217] *Id*. at ¶ 15.
[218] *Id*. at ¶ 16.
[219] *Id*. at ¶¶ 18-24.
[220] *Id*. at ¶¶ 24-25.
[221] 203 N.E.3d 1249 (Ohio Ct. App. 2022).
[222] *Id*. at 1252-53.
[223] *Id*. at 1253-54.
[224] *Id*. at 1255-56.
[225] No. 22-3318, 2023 U.S. App. LEXIS 3658 (6th Cir. Feb. 14, 2023).
[226] *Id*. at *2.
[227] *Id*. at *11-*13 The court rejected plaintiff's claim that valid pooling required compliance with OHIO REV. CODE ANN. § 1509.26, finding that the requirements of that statute are only triggered at the point of application for a drilling permit.

approvals associated therewith."[228] In addition to filing a declaration of pooling, the lessee was engaged in a number of activities involving the creation of the unit prior to the expiration of the lease's primary term.[229] These activities included, but were not limited to, title research, budgeting activities, surveying, negotiations with other working interest owners, and cellar digging (which constitutes the "first step of a drilling operation").[230] The court held that these activities, despite being off-lease, were sufficient to continue the lease into its secondary term.[231]

In *Kocher v. Ascent Res.-Utica, LLC*,[232] Ohio's Seventh District Court of Appeals addressed whether a deed conveying a fractional interest in the subject property could serve as a root of title to extinguish previously reserved mineral interests under the Ohio Marketable Title Act, OHIO REV. CODE ANN. section 5301.47, *et seq*. ("MTA"). In this case, the property was owned by ten individuals as tenants-in-common.[233] By way of two deeds, each recorded on February 9, 1957, the collective owners of a 9/10 interest in the property conveyed their interests to a company, excepting and reserving the mineral rights.[234] A third deed ("Rembish Deed") was also recorded on February 9, 1957 after the two reservation deeds whereby the owner of the remaining 1/10 interest conveyed "an undivided one-tenth (1/10th) interest in" the property to the same company.[235] Importantly, the Rembish Deed did not contain a mineral reservation, and it was this deed that the surface owners relied on as their root of title to claim that the severed mineral rights were extinguished under the MTA.[236] In order for an interest to be extinguished under the MTA, the claimant must have a root of title, which consists of two distinct components, one temporal and one substantive.[237] Here, the temporal element was not in dispute, so the question was whether the Rembish Deed purported to create the interest claimed by the surface owners.[238] While the trial court had focused on the nature of ownership rights afforded to individual co-tenants (*i.e.*, ownership of an undivided share and the right of possession of the entirety of the property),[239] the appellate court instead focused on the language utilized in the Rembish Deed. By its plain language, the Rembish Deed only purported to convey an undivided 1/10 interest in the property, while the surface owners were claiming a 100% interest. As a result, the appellate court held that the Rembish Deed did not satisfy the root of title's substantive element because it purported to create a lesser interest than that claimed by the surface owners.[240] Moreover, even if the Rembish Deed qualified as a root of title, the appellate court explained that the MTA could not extinguish the severed mineral rights because the two reservation deeds and the Rembish Deed were all recorded on the same date.[241] While the reservation deeds were recorded before the Rembish Deed, the MTA only extinguishes interests "existing prior to the effective date [(*i.e., the recording date*)] of the root of title" (emphasis added).[242]

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[228] *Id*. at *3-4.
[229] *Id*. at *6-9.
[230] *Id*.
[231] *Id*. at *16-17.
[232] 225 N.E.3d 528 (Ohio Ct. App. 2023).
[233] *Id*. at 533.
[234] *Id*. at 533-34.
[235] *Id*. at 534.
[236] *Id*.
[237] *Id*. at 536-37.
[238] *Kocher,* 225 N.E.3d at 537.
[239] *Id*. at 535-36.
[240] *Id*. at 538.
[241] *Id*. at 539.
[242] OHIO REV. CODE ANN. § 5301.47(A) (LexisNexis 2023).

In *Crozier v. Pipe Creek Conservancy, LLC*,[243] the Seventh District Court of Appeals was faced with the oft-litigated question of whether a reference in a deed to a prior reservation was specific or general. Under the MTA, an interest can be saved from extinguishment if there is a specific reference to the interest in the claimant's forty-year chain of record title.[244] In this case, the severance language was as follows: "EXCEPTED AND RESERVED, all the oil & gas rights and privileges on and underlying the above described tract of land."[245] The court undertook the three-part test established by the Supreme Court of Ohio in *Blackstone v. Moore* to determine whether a reference to the severance in the surface owner's root of title deed was specific or general.[246] Here, the root of title contained the following language, being a repetition of the original severance: "Excepting and reserving all the oil and gas rights and privileges on and underlying the above described tract of land."[247] After comparing and contrasting several prior decisions applying the *Blackstone* test—both its own and the Supreme Court of Ohio's—the court acknowledged that the only difference between the reference and the original severance is the change of tense from "excepted and reserved" to "excepting and reserving."[248] However, even after concluding that the change in tense "does not affect the repetition," the court found the reference to be vague, as the use of "excepting and reserving" left it unclear whether the repetition was a reference to a prior reservation or an entirely new, original reservation.[249] Because the reference was subject to two interpretations, it was a general reference and the severed mineral interest was extinguished under the MTA.[250]

IX. OKLAHOMA

A. Judicial Developments

In likely the most significant case of the year in Oklahoma oil and gas law, the Oklahoma Supreme Court interpreted an oil and gas lease cessation of production clause. In *Tres C, LLC v. Raker Resources, LLC*,[251] the issue before the court was whether the defendant's oil and gas lease terminated following ninety days of no production in paying quantities because the defendant failed to commence drilling or reworking operations within the sixty-day grace period provided under the lease's cessation of production clause. The clause provided as follows: "If, after the expiration of the primary term of this lease, production on the leased premises shall cease from any cause, this lease shall not terminate provided the lessee resumes operations for drilling a well within sixty (60) days from such cessation . . . ."[252] Due to difficulty bucking pipeline pressure, the defendant struggled to

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[243]No. 22 BE 0052, 2023 WL 8234447 (Ohio Ct. App. Nov. 28, 2023).
[244]OHIO REV. CODE ANN. § 5301.49(A) (LexisNexis 2023).
[245]*Crozier*, 2023 WL 8234447 at *2.
[246]*Id.* at *5 (establishing a "three-step inquiry: (1) Is there an interest described within the chain of title? (2) If so, is the reference to that interest a 'general reference'? (3) If the answers to the first two questions are yes, does the general reference contain a specific identification of a recorded title transaction?").
[247]*Id.* at *7.
[248]*Id.*
[249]*Id.*
[250]*Id.* Despite there being no requirement in OHIO REV. CODE ANN. § 5301.49(A) that a reference be included in multiple deeds in the claimant's chain of title, the court seemed to give consideration to the fact that the reference was never repeated in the surface owner's chain of title. *See id.* at *7.
[251]532 P.3d 1 (Okla. 2023).
[252]*Id.* at 2.

sell natural gas for a period totaling approximately ninety days. No drilling or reworking operations were commenced on the lease until sixty days following the end of this period of unprofitability. The plaintiff, which held a top lease on the premises, asserted that the defendant's bottom lease terminated for lack of production in paying quantities and was not salvaged by the cessation of production clause because the cessation continued for greater than 60 days without resolution or new drilling or reworking operations. The district court agreed, finding the lease terminated for lack of production in paying quantities based on the 90-day period of unprofitability.[253] On appeal, the defendant argued that the cessation clause provided 60 days in which to commence drilling or reworking operations following a permanent cessation of production in paying quantities, and that 90 days of unprofitability was not long enough to establish such a cessation.

The Oklahoma Supreme Court held that ninety days of continuous lack of profit from operations was insufficient as a matter of law to establish a cessation of production in paying quantities.[254] It further concluded that the grace period furnished by the cessation of production clause did not start running until a permanent cessation of production, or a cessation of production in paying quantities, was established. The clause's grace period did not set the accounting period for determining whether the lease had terminated for lack of production in paying quantities. Instead, the cessation clause saved the lease that had otherwise expired for want of production. This is the interpretation of the cessation clause advanced in Kuntz, *Law of Oil and Gas*.[255] In adopting this interpretation, the *Tres C* court disapproved of the view that the time period defined in a cessation of production clause displaces or overrides the reasonable time period for determining whether a lease has terminated for lack of production under the temporary cessation of production doctrine.[256]

The dispute in *Oil Valley Petroleum, LLC v. Moore*[257] centered around a lease allegedly held by production from a shallow gas well. The leasehold interest in the shallow zones where the well was producing was held by Staab subject to an overriding royalty interest held by the plaintiff, Moore. Moore also owned the leasehold interest in the formations below the deepest producing formation. Staab executed a release of the shallow rights, which caused a top lease held by Oil Valley to spring into effect, covering all formations. Oil Valley sued to quiet title to the working interest in all depths, asserting that Moore's interest in the deep rights terminated for lack of production when Staab released the lease as to those depths where the only existing well produced. Moore argued that the release did not extinguish his overriding royalty interest or his working interest in the deep zones because the well was producing in paying quantities and the release was given fraudulently for the purpose of washing-out Moore's interests.[258] The district court granted summary judgment in favor of Oil Valley against Moore's claims, finding that Moore failed to furnish evidence to support his claim that the well was producing in paying quantities. Moore's only evidence of the well's profitability consisted of receipts or check stubs indicating revenues from the sale of natural gas; he provided no evidence of operating costs as would be necessary to demonstrate whether production was in paying quantities.[259] The Oklahoma Supreme Court affirmed and remanded the case for further fact finding. Pending further factual development, the court declined to opine on Moore's legal theory that

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[253] *Id.* at 12.
[254] *Id.* at 15.
[255] *Id.* 15–16 (citing 2 KUNTZ, LAW OF OIL & GAS § 26.6).
[256] *Id.* at 18–19 (stating that the cessation clause "was never designed to eliminate or avoid the operation of the temporary of cessation doctrine").
[257] 536 P.3d 556 (Okla. 2023).
[258] *Id.* at 562.
[259] *Id.* at 565-66.

Staab's release improperly washed-out Moore's overriding and working interests.[260]

The Oklahoma Supreme Court clarified the extent of a trial court's discretion in dividing property interests related to oil and gas in divorce proceedings in *Fitzpatrick v. Fitzpatrick*.[261] Husband appealed a trial court order that deferred distribution of certain equity interests in oil and gas exploration and production companies acquired by husband during the marriage, requiring husband to hold the equities in constructive trust for the benefit of both spouses. The Oklahoma Supreme Court affirmed the order, holding that when faced with an asset, "the value of which could not be determined at the time of property division," trial courts should use a deferred distribution method rather than attempt to value and equitably divide the assets at the time of the divorce.[262] The court further held that trial courts are within their discretion to impose constructive trusts on marital assets in the hands of one spouse when equitable under the circumstances.[263]

In *Hitch Enters., Inc. v. Key Prod. Co.*,[264] the plaintiffs, lessors under oil and gas leases operated by the defendant, alleged that the defendant breached its implied duty to market and Oklahoma's marketable product doctrine by deducting from the royalty paid under their leases the costs of removing NGLs from gas extracted from wells on their lands. The trial court certified the plaintiffs as a class, and defendants appealed. The defendant argued that class adjudication was inappropriate because individual issues of fact predominated common questions. The fact issues, argued defendant, concerned the quality or condition of the gas in its raw state from the class wells and the proper interpretation of the defendant's individual oil and gas leases with members of the class. The Court of Civil Appeals affirmed the trial court's order, finding that individual fact issues did not predominate because neither the quality of the raw gas from each individual well nor the language of particular leases was necessary to determine whether the gas was marketable when sold. The fact that the class leases included various types of clauses that calculated royalty on "actual proceeds," based on the value of "raw gas" or "gas in its natural state," or "at the well," did not matter to the appellate court because most of these provisions existed in some form in the leases at issue in the trilogy of cases establishing Oklahoma's marketable product rule, and thus have implicitly been found not to abrogate the common law rule.[265]

In federal cases, the Eastern District of Oklahoma heard a case similar to *Hitch* in *Sagacity, Inc. v. Magnum Hunter Prod., Inc.*[266] Like *Hitch*, *Sagacity* involves putative class action claims for underpaid royalties based on allegedly improper deductions under the marketable product rule. Unlike *Hitch*, which was an appellate court opinion, *Sagacity* is the ruling of the trial court on class certification. The merits of the claims in *Sagacity* and in *Hitch* are substantially similar, as were the primary legal issues involved in the plaintiffs' respective motions for class certification. As in *Hitch*, the *Sagacity* court found that class certification was appropriate because facts regarding the quality of raw gas at the defendant's wellheads and the particular language of most of defendant's leases did not predominate given that all leases and gas are subject to the marketable product rule. The *Sagacity* court did, however, exclude two categories of oil and gas leases owned by the defendant from the class. These leases used language indicating an intent that royalties be

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[260] *Id.* at 577-78.
[261] 533 P.3d 757 (Okla. 2023).
[262] *Id.* at 760-61.
[263] *Id.* at 763.
[264] 540 P.3d 489, 494 (Okla. Civ. App. 2022).
[265] This is the *Mittlesteadt* trilogy of cases: Mittelstaedt v. Santa Fe Minerals, Inc., 954 P.2d 1203 (Okla. 1998); TXO Prod. Corp. v. State ex rel. Comm'rs of the Land Office, 903 P.2d 259 (Okla. 1995); Wood v. TXO Prod. Corp., 854 P.2d 880 (Okla. 1993).
[266] No. CIV-17-101-GLJ, 2023 WL 7388897 (E.D. Okla. Nov. 8, 2023).

paid on "raw gas," called *Whisenant* leases, and so-called *Fankhouser* leases calculating royalties on "net proceeds," "net amount," and "gas sold."[267] *Sagacity* also made clear that although it is unsettled in Oklahoma at what point or in what condition gas may be "marketable" for purposes of the marketable product rule, the question is ultimately one for the trier of fact. The factual question may be resolved, according to the court, on the basis of expert testimony that all the gas from defendant's wells was required to undergo at least some gathering, compression, dehydration, treatment, or processing before it could be sold into the interstate pipeline market.[268]

The Western District of Oklahoma interpreted the state's anti-indemnity statute not to apply to a master services agreement ("MSA") for oilfield services in *Chesapeake Operating, LLC v. C.C. Forbes, LLC*.[269] Chesapeake had settled a personal injury claim with an employee of the defendant who was injured at a Chesapeake wellsite while conducting work contracted for under the parties' services agreement. Chesapeake brought this suit to recover from the defendant under the parties' mutual indemnity clause in their agreement. The defendant argued that the indemnity clause was void under Oklahoma's anti-indemnity statute, which prohibits such provisions in "construction contracts." The court held that the services provided under the MSA were not "construction" under the statute.[270] A previous case also decided in the Western District of Oklahoma, *Jet Maint., Inc. v. Devon Energy Prod. Co., L.P.*,[271] held that the anti-indemnity statute applied to an MSA when the underlying injury occurred during construction of a well pad for a drilling rig, because a drilling rig constitutes a "structure." The *Chesapeake Operating* court declined to follow *Jet Maintenance*, however, because the underlying injury in this case occurred at the wellhead. The common, ordinary meaning of "structure" would not, in the court's view, encompass a well, which is little more than a hole in the ground.[272] Moreover, the court cited to the legislative history of the anti-indemnity statute which indicated that the provision was not meant to apply to oilfield services contracts.[273]

The Eastern District of Oklahoma dismissed a landowner's damages claims for contamination allegedly caused by defendant's leaking refined-products pipeline. In *Lazy S. Ranch Props., LLC v. Valero Terminaling & Distrib. Co.*, the court first granted summary judgment in defendant's favor,[274] then denied the plaintiff's motion to alter or amend the judgment.[275] The court found the plaintiff had no cause of action because no reasonable trier of fact could have found that the trace amounts of petroleum products detected on plaintiff's property constituted a nuisance or rendered the environment harmful, detrimental, or injurious.[276] In making this determination, the court did not hold that contamination must exceed regulatory limits to be actionable. However, the court was persuaded by the fact that the contaminants found on plaintiff's land did not reach, let alone exceed, applicable regulatory limits for such contaminants.

The Eastern District of Oklahoma interpreted the Class Action Fairness Act ("CAFA") to determine whether the plaintiff's class claims satisfied the Act's jurisdictional

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[267] *Id.* at *14.
[268] *Id.* at *15 (citing Naylor Farms, Inc. v. Chaparral Energy, LLC, 923 F.3d 779, 793–94 (10th Cir. 2019)).
[269] 660 F. Supp. 3d 1140 (W.D. Okla. 2023).
[270] *Id.* at 1142, 1144-45; *see also* OKLA. STAT. tit. 15, § 221(A).
[271] No. CIV-22-263-C, 2022 U.S. Dist. LEXIS 103199 (W.D. Okla. June 9, 2022).
[272] *Chesapeake Operating*, 660 F. Supp. 3d at 1145-46.
[273] *Id.* at 1146-47.
[274] No. 19-CV-425-JWB, 2022 US Dist. LEXIS 222116, *2 (E.D. Okla. Dec. 7, 2022).
[275] No. 19-CV-425-JWB, 2023 US Dist. LEXIS 36622 (E.D. Okla. Mar. 2, 2023).
[276] *Id.* at *4.

requirement for amount in controversy in *Colton v. Cont'l Res., Inc.*[277] CAFA requires plaintiffs in class actions to demonstrate that the amount in controversy exceeds $5 million "exclusive of interests and costs" to confer diversity jurisdiction on federal courts.[278] The plaintiffs in this case sued alleging entitlement to more than $5 million in interest due on late-paid gas royalties under the Oklahoma Production Revenue Standards Act ("PRSA"). Previously, in *Whisenant v. Sheridan Prod. Co., LLC*, the 10th Circuit dismissed class claims for underpaid royalties under oil and gas leases because the amount in controversy satisfied CAFA only by including interest on the amount of royalties alleged to have been underpaid.[279] Distinguishing *Whisenant*, the court in *Colton* found that interest may be counted under CAFA "[i]f the amount in controversy itself is the failure to pay interest."[280] Thus, since the *Colton* plaintiffs sought only unpaid interest under the PRSA, those amounts could be counted toward CAFA's jurisdictional requirement.

The 10th Circuit Court of Appeals ruled in an appeal of a $155 million judgment for failure to pay interest under the PRSA in the ongoing case of *Cline v. Sunoco, Inc.*[281] The judgment debtor, Sunoco, has attempted multiple times to appeal the trial court's judgment in the case, and each time it has failed because the Circuit Court has found the order fails to satisfy the requirements of finality for a judgment in a class action. In this latest order, the 10th Circuit reversed the district court's denial of Sunoco's motion for relief from judgment in which Sunoco sought amendments to the district court's judgment on the merits that, Sunoco argued, were necessary to make it appealable. The 10th Circuit explained the consequences of its order:

> We note, however, that the necessary consequence of our analysis is that the district court has yet to enter a final judgment. So although we do not yet decide whether Rule 60(b)(6) relief is appropriate, we urge the district court to promptly take whatever steps it deems necessary to cure the allocation plan's defects and produce a final judgment that complies with our precedents.[282]

In *Hayes v. Halland*,[283] the Northern District of Oklahoma found that the Bureau of Indian Affairs ("BIA") failed to comply with NEPA in issuing oil and gas leases and permits to drill on the Osage mineral estate. The court agreed with the plaintiff, who owned the surface estate overlying the subject leases, that the Osage Agency's environmental assessment and Finding of No Significant Impact did not satisfy the requirements of NEPA because they lacked sufficient site-specific analysis of the leases' environmental impacts. Because actual drilling operations on the surface of the land subject to the leases was reasonably foreseeable at the time the agency issued the leases, NEPA required analysis of the foreseeable impacts.[284] The court further found that BIA acted arbitrarily and capriciously in its analysis of two leases it previously issued without conducting site-specific analyses and under which surface-disturbing activities had previously been undertaken, explaining that "the BIA has an obligation under NEPA to include additional

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[277]No. CV–22–208–RAW–JAR, 2023 WL 6614426 (E.D. Okla. Sept. 1, 2023).
[278]*Id.* at *5.
[279]627 Fed. App'x 706 (10th Cir. 2015).
[280]*Colton*, 2023 WL 6614426, at *5.
[281]No. 22-7018, 2023 WL 4946312 (10th Cir. Aug. 3, 2023).
[282]*Id.* at *17–18.
[283]No. 4:16-cv-00615-JAR-CDL, 2023 WL 7360856 (N.D. Okla. Nov. 7, 2023).
[284]*Id.* at *9.

terms [in its environmental assessment] to remedy that default."[285] The court declined to vacate the environmental assessments at this stage, instructing the parties to brief the issue of remedies for further proceedings.[286]

An opinion and order from the Northern District of Oklahoma is the latest in the long-running litigation in *United States v. Osage Wind, LLC*.[287] In the latest development in over ten years of litigation over a wind turbine farm, the district court entered a permanent injunction ejecting the wind farm from its continuing trespass on the Osage mineral estate. The court will hold a trial on damages for the plaintiffs' trespass and conversion claims. This order follows the 10th Circuit's determination that the wind farm project constituted mining that required a lease under BIA regulations, which the developers did not obtain.[288] The issue before the district court was whether the developers' lack of a lease constitutes a continuing trespass for which injunctive relief and damages are appropriate. The court found that the developer's "use of crushed rocks as backfill for support [for its wind towers] falls within the definition of 'mining' and required a lease . . . [and therefore] that Defendants are liable for continuing trespass because of the continuing use of the minerals as backfill for support."[289] The court then concluded that the remedy of ejectment is appropriate because the continuing trespass has caused irreparable harm by interfering with the sovereignty of the Osage Nation, that the balance of harms weighs in the tribe's favor, and that ejectment would serve the public interest in preserving the Osage Nation's tribal sovereignty.

Finally, in *New Dominion, LLC v. H&P Invs., LLC*,[290] the Northern District of Oklahoma held that nonoperating working interest owners under participation agreements and AAPL Model Form Joint Operating Agreements ("JOA") were not liable for any of the operator's costs of litigating claims related to earthquakes allegedly caused by the operator's saltwater disposal wells. The operator, NDL, argued that the language of the parties' participation agreements required the nonoperating parties to pay their share of legal expenses that result from "operations under the operating agreement" and that are "necessary to protect or recover the Joint Property."[291] The nonoperating working interest owner, H&P, asserted that the saltwater disposal wells and earthquake litigation were not "operations under the operating agreement" and that the disposal wells were the operator's sole property.[292]

The court interpreted the JOA to cover only operations relating to oil and gas wells, including drilling, reworking, recompleting, sidetracking, plugging back, and deepening wells. The operator's disposal wells were merely "ancillary production facilities" under the JOA.[293] Moreover, while accounting procedures incorporated into the JOA allowed the operator to charge nonoperators for legal expenses "necessary to protect or recover the Joint Property," the court concluded that the disposal wells did not qualify.[294] The accounting procedures defined "Joint Property" as the "real and personal property subject to the Operating Agreement to which this Accounting Procedure is attached."[295] Each

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[285] *Id.*
[286] *Id.* at *11.
[287] No. 4:14-cv-00704-JCG-JFJ, 2023 WL 8813867 (N.D. Okla. Dec. 20, 2023).
[288] *Id.* (citing United States v. Osage Wind, LLC, 871 F.3d 1078 (10th Cir. 2017)).
[289] *Id.* at *13.
[290] Nos. 20-CV-059-CVE-CDL, 21-CV-0504-CVE-CDL, 2023 WL 8788951 (N.D. Okla. Dec. 19, 2023).
[291] *Id.* at *4.
[292] *Id.* at *14.
[293] *Id.* at *14–15.
[294] *Id.* at *6.
[295] *Id.* at *16.

participation agreement contained language that conditioned the agreement "on the parties' recognition that the saltwater disposal wells 'shall remain the property of NDL and [H&P] will have no ownership interest therein, beneficial or otherwise.'"[296]

NDL also argued that defending the claims for earthquake damage brought against its disposal operations was necessary to protect the Joint Property because those claims involved requests for injunctive and other relief that would have interfered with the ongoing disposal of wastewater from the parties' joint oil and gas wells. The court found the argument "baseless," responding: "NDL can dispose of saltwater elsewhere. H&P has no working interest in the saltwater disposal wells. The saltwater disposal wells are ancillary to the operations under the agreements; they are not joint property."[297] In addition, much of the litigation costs NDL incurred were not necessary to protect the continued operation of the disposal wells, but rather to pursue affirmative claims against NDL's insurer in a dispute over coverage for the underlying earthquake-damage claims.[298] NDL was held liable for reimbursing H&P for past charges for these legal expenses because they were not authorized under either the parties' participation agreements or the JOA.

X. PENNSYLVANIA

A. Legislative Developments

On March 3, 2023, Act 153 of 2022 went into effect. This law amends several sections of Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes. One of the amendments requires unconventional oil and gas operators to provide production and sales information for each well when remitting payment to the royalty owner.[299] If this information is not provided with payment, it must be provided within 60 days after receipt of a written request via certified mail from the royalty owner.[300] If a royalty owner does not receive the requested information or an explanation for the payor's failure to provide it within this time period, the Act authorizes the filing of a civil action and the recovery of any resulting attorney fees and court costs.[301] The Act also requires all royalties to be paid within 120 days from the date of first sale and within 60 days thereafter "after the end of the month when the production is sold".[302] Failure to remit payment within this period will result in a mandatory interest penalty set at the legal rate of interest until all required payments are made, unless the lease provides otherwise.[303]

B. Judicial Developments

In *Warner Valley Farm, LLC v. SWN Prod. Co.*, the Middle District of Pennsylvania upheld the validity of Act 85, which eased regulatory barriers to cross-unit drilling, concluding that it did not violate the Contracts Clause of both the Constitution of the United States and the Constitution of the Commonwealth of Pennsylvania because it allowed the parties the freedom to allow or prohibit cross-unit drilling in their leases.[304]

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[296] *Id.* (modification in original).
[297] *Id.* at *17.
[298] *Id.*
[299] 58 PA. STAT. AND CONS. STAT. ANN. § 35.3(a) (West 2023).
[300] *Id.* at § 35.3(c).
[301] *Id.*
[302] *Id.* at § 35.3(e).
[303] *Id.*
[304] 652 F. Supp. 3d 495, 502, 504 (M.D. Pa. 2023).

The court concluded that the plaintiff's lease permitted cross-unit drilling.[305] The court rejected the plaintiff's argument that a provision stating that the lease would remain in effect as long as "a well capable of producing oil and/or gas is located … **on** lands pooled, unitized or combined with all or a portion of the Leasehold"[306] meant that the wellbore must be drilled on the surface of lands pooled, unitized, or combined with the leasehold.[307] The court found this argument was "too far a stretch" in light of the lease provision permitting the defendants "in their sole discretion . . . to pool, unitize, or combine all or any portion of the Leasehold with any other land or lands, whether contiguous or not contiguous . . . to create one (1) or more drilling or production units" and "to change the size, shape and conditions of any unit created."[308] The court reasoned that this provision did not limit the defendants to unitizing or pooling – terms of art in the industry – but also allowed them to combine the leasehold with contiguous or non-contiguous lands necessarily including lands "beyond unit boundaries" and permitting cross-unit drilling.[309] The court also rejected the argument that the defendants were limited to creating one unit that included the leasehold and combining the leasehold only with lands in that same unit.[310] The court concluded that the lease language "expressly contemplates the creation of one or more units" and that "[t]he additional use of the word 'combine' after 'unitize' strongly suggests that the 2006 Lease contemplated that the Leasehold might be combined in an arrangement containing more than one unit."[311]

In *Bootes v. PPP Future Dev., Inc.*, the court denied a motion to dismiss claims based on the defendant's purported material breaches of their lease.[312] After the plaintiffs sent the defendant a notice that they were terminating the lease based on the defendant's breaches, the defendant rejected the lease termination and the plaintiffs filed suit.[313] The defendant filed a motion to dismiss based on failure to state a claim upon which relief could be granted arguing that, because the lease granted the lessor the option of purchasing the wells and pipeline or having the wells plugged when the lessee determined "in its sole discretion" that operations of the wells were "no longer commercially feasible," the plaintiffs could not terminate the lease until the defendant made such a determination.[314] The court disagreed, explaining that this provision gives the plaintiffs the option to purchase the wells and pipelines but "does not, in any way, make termination of the Lease solely contingent upon Defendant's discretionary determination that the wells are no longer feasible, nor does it foreclose Plaintiffs' right to terminate the Lease based upon Defendant's material breach of other provisions of the Lease."[315] The defendant also argued that the claim for negligence *per se* based on its alleged contamination of the property in violation of the Oil and Gas Act and the Solid Waste Management Act must be dismissed because the plaintiffs failed to allege how these Acts were intended to protect their specific interests rather those of the public generally.[316] The court agreed as to the Solid Waste Management Act, but disagreed as to the Oil and Gas Act based on *Roth v.*

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[305] *Id.* at 506.
[306] *Id.* at 498-99 (emphasis added).
[307] *Id.* at 508.
[308] *Id.* (emphasis omitted).
[309] *Id.*
[310] Warner Valley Farm, LLC v. SWN Prod. Co., LLC, No. 4:21-CV-01079, 2023 U.S. Dist. LEXIS 35031, at *4-5 (M.D. Pa. Mar. 1, 2023).
[311] *Id.* at *5-6 (emphasis omitted).
[312] No. 22-154 Erie, 2023 U.S. Dist. LEXIS 50038, at *16 (W.D. Pa. Mar. 21, 2023).
[313] *Id.* at *2, 6-7.
[314] *Id.* at *8.
[315] *Id.* at *8-9.
[316] *Id.* at *13.

Cabot Oil & Gas Corp.[317], which found that people residing less than 1,000 feet from gas wells, similar to the plaintiffs, were "within the particular group of individuals that the Act is intended to protect."[318] The court also refused to dismiss the plaintiffs' breach of contract claims finding that there could be no anticipatory repudiation when they were alleging the lease terminated after the defendant's material breaches of the lease.[319]

In *Douglas Equip. Inc. v. EQT Prod. Co.*, the Pennsylvania Superior Court affirmed a grant of summary judgment for the defendants concluding that the original lessees' sale of the property included the right of reversion of the oil and gas after the lease terminated.[320] In 1994, the Willisons entered an oil and gas lease with Douglas Equipment (the "Douglas Lease") and ownership of the well on the property was transferred to Douglas Equipment.[321] The Douglas Lease provided that it would remain in effect for as long as the property "is operated for the exploration or production of gas or oil, or as gas or oil is found in paying quantities thereon" and for annual payments for up to three years as the shut-in royalty for wells that were no longer profitable to operate.[322] While the Douglas Lease remained in effect, in 1999, the Willisons conveyed the land via general warranty deed to the Holts and Lee which included an exception for "all rights, title, and interest" in the Douglas Lease and a provision that conveyed the land with all reversions belonging to the Willisons (the "1999 Conveyance").[323] In 2008, production stopped from the well subject to the Douglas Lease and Douglas Equipment began paying the required shut-in royalty.[324] In 2016, the Holts and Lee entered an oil and gas lease with EQT (the "EQT Lease").[325] The plaintiffs filed suit arguing that the Douglas Lease remained in effect and had become an at-will lease when the well stopped producing.[326] The defendants argued that the Douglas Lease expired in 2011 after production ended and three years of shut-in royalties were paid, at which point the oil and gas rights reverted back to the Holts and Lee.[327] The court concluded that the 1999 Conveyance "conveyed the surface estate and the possibility of reverter of the oil and gas rights as they were not excepted or reserved" which resulted in the revision of the oil and gas rights to the Holts and Lee when the Douglas Lease expired in 2011.[328] Important to the court's decision was that the Douglas Lease did not include language permitting the modification, amendment, ratification, or termination of the lease but provided that it would terminate upon the failure to produce in paying quantities and preserved only the Willisons' right to royalties, household gas, and the possibility of reverter.[329] The court rejected the plaintiffs' argument that the provision of the 1999 Conveyance excepting "all right, title, and interest" in the Douglas Lease resulted in the Willisons retaining the oil and gas rights.[330] The court concluded that the phrase "'all right, title, and interest' . . . specifically related to the Douglas Lease—not to the oil and gas itself" meaning that the Willisons did not retain any interest in the Douglas Lease after the 1999 Conveyance other than in the royalties owed

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[317] 919 F. Supp. 2d 476 (M.D. Pa. 2013).
[318] *Bootes,* 2023 U.S. Dist. LEXIS 50038, at *15 (quoting Roth, 919 F.Supp.2d at 489).
[319] *Id.* at *10.
[320] No. 674 WDA 2022, 2023 Pa. Super. Unpub. LEXIS 2025, at *20 (Pa. Aug. 15, 2023).
[321] *Id.* at *2.
[322] *Id.* at *3 (emphasis omitted).
[323] *Id.* at *3-4.
[324] *Id.* at *5.
[325] *Id.*
[326] *Douglas Equip. Inc.,* 2023 Pa. Super. Unpub. LEXIS 2025, at *6.
[327] *Id.*
[328] *Id.* at *14.
[329] *Id.*
[330] *Id.* at *16.

under the Douglas Lease that were specifically excepted from the conveyance.[331] The court thus concluded that, "even if an at-will tenancy survived the termination of the Douglas Lease in 2011, that tenancy expired when the Holts and Lee entered into the EQT lease and defended against the Douglas Appellants' claims in court."[332]

In *Marcellus Shale Coal. v. Dep't of Envtl. Prot.*, the Pennsylvania Supreme Court considered whether oil and gas regulations extending protections to areas and entities not included in Act 13 were void, unenforceable and unreasonable.[333] After Act 13 of 2012 amended Pennsylvania's Oil and Gas Act, the Pennsylvania Department of Environmental Protection (the "DEP") and Environmental Quality Board (the "Board") promulgated regulations for unconventional gas wells expanding the types of "public resources" which, if potentially impacted by a proposed well, required well permit applicants to notify the associated entity and permitted the DEP to consider comments from those entities when reviewing permit applications.[334] The Marcellus Shale Coalition argued that, without express statutory authority, the DEP and the Board could not expand the definition of "public resources" beyond those identified in 58 Pa.C.S. Section 3215.[335] By using the term "public resources" deriving from the Environmental Rights Amendment ("ERA") that includes a broad and undefined conception of such resources, the court concluded that the General Assembly intended to allow the DEP and the Board "a large degree of [] flexibility" in defining those resources.[336] Because the challenged definitions fell within the ERA's broad conception of public resources, the court upheld the definitions.[337] The court further found that these definitions were reasonable and not at odds with the statutory scheme in light of their link to the ERA, rejecting the lower court's finding that these definitions "upset the balance between industry and the environment" as "just an alternative way of saying that they are 'unwise or burdensome or inferior to another.'"[338]

C. Administrative Developments

In *Protect PT v. Commonwealth*, the Pennsylvania Environmental Hearing Board (the "Board") refused to dismiss an appeal challenging the issuance of two gas well permits.[339] Protect PT appealed the issuance of two gas well permits arguing that the Pennsylvania Department of Environmental Protection (the "DEP") failed to properly consider the release of per- and polyfluoroalkyl chemicals (collectively, "PFAS") into the environment when issuing the permits.[340] The permittee filed a motion to partially dismiss the appeal arguing, among other things, that the appeal sought to have the Board exceed its authority to promulgate regulations of PFAS or compel the DEP to do the same and sought a ruling beyond the scope of the case that would impact the entire oil and gas industry.[341] The Board concluded that the crux of the appeal was "to determine whether the Department's action in issuing the permits is in accordance with the law and supported by the facts of this case," which was within the scope of the Board's authority.[342] The Board

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[331] *Id.*
[332] *Douglas Equip. Inc.,* 2023 Pa. Super. Unpub. LEXIS 2025, at *17.
[333] 292 A.3d 921, 929 (Pa. 2023).
[334] *Id.* at 924-27.
[335] *Id.* at 929.
[336] *Id.* at 942.
[337] *Id.* at 945.
[338] *Id.* at 953.
[339] No. 2022-072-B, 2023 PA. ENVIRN. LEXIS 21 (Pa. Commw. June 29, 2023).
[340] *Id.* at *3.
[341] *Id.* at *8.
[342] *Id.* at *6.

further rejected the permittee's arguments regarding the broader applicability of the case, reasoning that its decisions "routinely have broad applicability" but "[t]his is not a basis to avoid exercising [its] statutory duty to hear appeals" from DEP action.[343]

XI. TEXAS

A. Judicial Developments

In 2023, Texas courts issued several impactful opinions clarifying numerous oil and gas issues. The clarifications addressed the interest assigned, fixed vs flowing royalty calculations, covenants running with the land, adverse possession of a working interest, the timely payment of royalties, clarification of common contract terms, the ownership of produced water, cotenancy issues, and allocation wells.

In *Davis v. COG Operating, LLC*[344], the Eight Circuit Court of Appeals of Texas was asked to construe a 1939 warranty deed between the Sesslers, as grantors, and Dora Roberts, as grantee. In March 1926, the Sesslers signed a mineral lease in favor of F. K. Campbell covering Section 45 (the "Campbell Lease").[345] Later that year, the Sesslers executed an instrument titled "Royalty Deed" (the "1926 Deed"), which conveyed part of their interest in Section 45 to W. H. Haun.[346] Then in 1939, the Sesslers executed an instrument (the "1939 Deed") which purported to convey to Roberts the remainder of their interest in Section 45, except for a 1/4 non-participating royal interest (NPRI).[347] The 1939 Deed mentioned twice that an interest in the land had previously been conveyed to Haun.[348] Since the execution of the 1939 Deed, the remaining 3/4 of the royalties have been paid to Roberts and her successors.[349] However, no royalties have been paid to the Sesslers or their heirs/successors (the "Appellants").[350]

On appeal, the Appellants argued that they own a portion of the Sesslers' NPRI pursuant to the 1939 Deed.[351] The court first looked to the 1926 Deed, which conveyed to Haun a 1/32 interest in and to all of the oil, gas, and other minerals, in and under the lands.[352] The court clarified that the 1926 Deed clearly and unambiguously conveyed an interest in the mineral estate itself, not merely a royalty interest.[353] The court then looked to the 1939 Deed, explaining that the language of the deed stated that 1/32 of the oil, gas and other minerals had been conveyed to Haun.[354] Additionally, the 1939 Deed stated that

> [W]e [the Sesslers] reserve unto ourselves, our heirs and assigns, one-fourth (1/4) of the 1/8 royalty usually reserved by and to be paid to the landowner in event of execution of oil and gas leases, so 1/4 of the 1/8 royalty to be paid to us, our heirs or assigns, if, as and when produced from the above

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[343] *Id.* at *10.
[344] 658 S.W.3d 784 (Tex. App. 2022).
[345] *Id*. at 788.
[346] *Id*.
[347] *Id*.
[348] *Id*.
[349] *Id*.
[350] *Davis*, 658 S.W.3d at 788.
[351] *Id*. at 789.
[352] *Id*. at 792.
[353] *Id*. at 793.
[354] *Id*. at 794.

described land.[355]

The court explained that "the Sesslers' and Roberts' intent behind the use of the 1/32 fraction in the 1939 Deed turns on whether they were operating under an "estate misconception"" (where historically lessors believed that a 1/8 royalty reservation reserved one-eighth of the mineral estate instead of merely a 1/8 royalty interest and a fee simple determinable with the possibility of reverter in the *entire* mineral estate).[356] If they were not operating under a misconception, then the Sesslers failed to provide adequate notice to Roberts regarding their prior conveyance to Haun.[357] However, if Roberts and the Sesslers were operating under the estate misconception, Roberts would have notice that the Sesslers had previously conveyed a 1/4 interest in the minerals to Haun.[358] The court found that the parties were operating under the estate misconception due to the 1939 Deed's plain language.[359] Specifically, the court found: (1) the date of the deed was 1939, at the height of the relevant period of the estate-misconception; (2) 1/32 is a product of multiplying 1/4 of 1/8; (3) the use of a double fraction in the reservation was found in the third paragraph of the deed.[360] Consequently, the parties' intent was to reserve a 1/8 mineral interest, not just a 1/8 royalty interest.

In *Devon Energy Prod. Co. v. Enplat II, LLC*,[361] the court was asked to determine whether the grantors in a 1940 deed reserved a 1/16th fixed royalty interest or a 1/16th non-executive mineral interest when conveying their property. The deed provided that the grantors reserved "an undivided one-sixteenth (1/16) of any and all oil, gas or other mineral produced on or from under the land" and that the grantees "shall have the right to lease said land for mineral development without the joinder of Grantors..., and to keep all bonus money, as well as all delay rentals, but when, if and as Oil, Gas or other mineral is produced from said land, one-sixteenth (1/16) of same, or the value thereof, shall be the property of Grantors...."[362] The court held that the deed reserved a mineral estate shorn of all attributes but for the right to receive a royalty interest if and when there was production on the land. Because the deed did not use any terms historically associated with a post-production royalty interest (minerals "produced and saved"), and rather used terms traditionally associated with a mineral interest (minerals "in, on and under"), the deed reserved a mineral estate. Turning to the remaining provisions of the deed, the court concluded that an attribute-stripping approach was appropriate to harmonize the provisions and that the grantors stripped themselves of the rights to develop, lease, receive bonus payments, and receive delay rentals, but retained the right to receive royalty payments. The court reasoned that had the grantors intended only to reserve a royalty interest, the remaining provisions would be unnecessary.

It was an active year in the Texas courts for fixed or floating royalty interpretations. *Pacer Energy, Ltd. v. Endeavor Energy Res., L.P.*[363] involved a fixed-versus-floating dispute and highlighted the grant wording for a fixed royalty. A 1923 warranty deed conveyed "One-Eighth of the Oil and Mineral rights…conveyed as a royalty."[364] In two 1960 declarations of interest, the parties described the 1923 interest as "1/8 of all of the oil,

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[355] *Id*.
[356] *Davis*, 658 S.W.3d at 794-95.
[357] *Id*.
[358] *Id*.
[359] *Id*. at 795.
[360] *Id*.
[361] No. 08-21-00217-CV, 2023 WL 4424629 (Tex. App. July 10, 2023).
[362] *Id*. at *1.
[363] 675 S.W.3d 390 (Tex. App. 2023).
[364] *Id*. at 392.

gas and mineral rights…as a free royalty interest."[365] Following Texas Supreme Court guidance in *Watkins v. Slaughter*,[366] *Temple-Inland Forest Prods. Corp. v. Henderson Family P'ship, Ltd.*,[367] and distinguishing *French v. Chevron U.S.A. Inc.*,[368] the court held that the 1923 deed conveyed a fixed 1/8 royalty interest.

The common use of 1/8 creates different interpretations as seen in *Permico Royalties, LLC v. Barron Props. Ltd.*[369] A 1937 deed reserved

> [A] one-sixteenth (1/16) free royalty interest, (being 1/2 of the usual 1/8th free royalty) in and to all of the oil and gas in and under, and that may be produced from, the above described land…and the Grantors…shall be entitled to receive 1/16th of the oil and/or gas produced, saved and sold from said land, being 1/2 of the usual 1/8 royalty therein.[370]

The court held that the deed reserved a 1/2 floating royalty interest, rather than a 1/16 fixed royalty. Based on the related doctrines of the "legacy of the 1/8 royalty" and "estate misconception", the court held that

> [T]he use of a double fraction involving 1/8th creates a rebuttable presumption that the parties intended to use the 1/8th as a placeholder for the royalty provided for in a lease (the legacy doctrine) or as a placeholder for the grantor's entire mineral estate (the estate misconception doctrine).[371]

The court dispensed with numerous arguments by the appellees that the legacy-of-the-eighth doctrine should not apply to the deed here and held that it reserved a floating 1/2 royalty. The court noted that if the parties had intended a fixed 1/16 royalty, there would've been no reason for them to include the parenthetical "1/2 of the usual 1/8 royalty".[372] The court also pointed out that Texas law creates a presumption that drafters believed that 1/8 would always be the royalty interest under future leases, bolstering their intent to reserve a 1/2 floating royalty.

In *Bridges v. Uhl*,[373] the court analyzed the language of reserved NPRI to determine the nature and quantum of the interest. The court focused on the following language: reserving "an undivided one half (1/2) of the usual one-eighth (1/8) royalty in, to and under the above[-]described land" and "if, as and when production is obtained," the grantor "shall receive one-half (1/2) of the usual one-eighth (1/8) royalty, or one-sixteenth (1/16) of the total production…."[374] The parties disputed whether this language reserved a fixed 1/16 royalty or a 1/2 floating royalty. Applying *U.S. Shale Energy II, LLC v. Laborde Props., L.P.*[375] and *Hysaw v. Dawkins*,[376] the court interpreted the royalty reservation holistically,

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[365] *Id.*
[366] 189 S.W.2d 699, 699–700 (Tex. 1945).
[367] 958 S.W.2d 183 (Tex. 1998).
[368] 896 S.W.2d 795 (Tex. 1995).
[369] No. 08-22-00168-CV, 2023 WL 4442007 (Tex. App. July 10, 2023).
[370] *Id.* at *1.
[371] *Id.* at *4.
[372] *Id.* at *1.
[373] 663 S.W.3d 252, 258 (Tex. App. 2022).
[374] *Id.* at 262-63.
[375] 551 S.W.3d 148, 151 (Tex. 2018).
[376] 483 S.W.3d 1, 13 (Tex. 2016).

not mathematically.[377] The court held that "descriptive language in the text, as well the deed's overall structure, confirms the grantors' intent to reserve a 1/2 floating royalty."[378]

Practitioners should not rely on the 1/8 reference alone to opine on the royalty granted. In *Van Dyke v. Navigator Group*[379], the court once again held, in line with *Hysaw v. Dawkins*, that a royalty reservation of "1/2 of 1/8" does not always equal 1/16. In analyzing a 1924 conveyance, the court reiterated the effect of the estate misconception theory in the drafting of historical conveyances. Here, there was also a ninety-year history of the parties treating the reservation of "1/2 of 1/8" as 1/2 of the minerals for royalty purposes. The court noted that, regardless of how "1/2 of 1/8" would be read today, the analysis should focus on how the original parties to the 1924 conveyance would have understood the language to be read. The court added that even if the reservation was to be read as 1/16, the ninety-year history of the parties treating the reservation as 1/2 of the mineral estate satisfied the three-part test of the presumed grant doctrine.

In *Royalty Asset Holdings II, LP v. Bayswater Fund III-A LLC*,[380] the court analyzed whether the NPRI reserved in a 1945 deed was fixed or floating. When conveying the land through the 1945 deed, the original grantor reserved an "undivided 1/4th of the land owner's usual 1/8th royalty interest" in existing and future oil, gas and mineral leases on the conveyed land.[381] When a new lessee acquired an existing lease, it argued that the NPRI should be a floating 1/4th, not a fixed 1/32nd.[382] Analyzing the deed's text based on the ordinary meaning at the time of drafting, the court held that the deed's use of multiple fractions with 1/8th implicated a rebuttable presumption of a floating interest.[383] The court reasoned that the "usual 1/8th royalty interest" referred to the entire mineral estate.[384] Though the multiple fractions are followed by a parenthetical, which on its own may imply a fixed 1/32nd royalty interest, the court interpreted the parenthetical as an explanation for the multiple fraction clause.[385] Coupled with references to future leases, the court concluded that the deed's text supports the presumption of a floating 1/4th interest.[386]

The Texas courts provided guidance on assignment provisions in numerous cases. The Eighth Court of Appeals of Texas was tasked with determining whether an assignment of oil and gas interests conveyed the assignor's interest in a 1998 oil and gas lease in *Mark S. Hogg, LLC v. Blackbeard Operating, LLC*.[387] The assignment's granting clause provided that the assignors transferred all of their identified "properties and assets," which it defined in separate subparagraphs, including "leases, lands, wells, units, and properties" that were identified and described in exhibits.[388] The exhibits made explicit reference to prior leases, but not to the 1998 lease. Because the exhibits named a well that was drilled under the 1998 lease, the court held that the assignors intended to transfer all of their interests, including the 1998 lease. Noting that courts typically construe deeds to confer upon the grantee the greatest estate permitted, the court held that the deed lacked evidence of any intent to grant a lesser estate than what the grantor owned because the assignment neither contained an express reservation nor did it grant only a portion, thus conveying the entire estate,

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[377] 663 S.W.3d at 265.
[378] *Id.*
[379] 668 S.W.3d 353 (Tex. 2023).
[380] No. 08-22-00108-CV, 2023 WL 2533169, at *1 (Tex. App. Mar. 15, 2023).
[381] *Id.*
[382] *Id.*
[383] *Id.* at *4.
[384] *Id.*
[385] *Id.* at *5.
[386] *Royalty Asset Holdings II*, 2023 WL 2533169, at *1.
[387] 656 S.W.3d 671 (Tex. App. 2022).
[388] *Id.* at 674 (capitalization removed).

including the 1998 oil and gas lease.

In *Armour Pipe Line Co. v. Sandel Energy, Inc.*, the court addressed the reservation of an ORRI in favor of a party to the assignment that did not have title in the leases prior to that reservation.[389] The assignees argued the reserved royalty was ineffective and void as it was reserved to the plaintiff, a party that was a stranger to title as to the leases.[390] Holding for the plaintiff, the court heavily leaned on the holding of *Greene v. White* in applying the doctrine of estoppel-by-deed.[391] Ultimately, the court held that regardless of the status of title prior to the reservation, the assignees, as parties to the assignment, were bound under the recitals of the assignment asserting the reserved royalty.[392] In harmonizing the stranger to title rule with estoppel-by-deed, the court emphasized estoppel-by-deed only implies the recognition of the reserved royalty as between parties to the assignment, even if one of those parties to the assignment is a stranger to title.[393]

The court in *Citation 2002 Inv. LLC v. Occidental Permian, Ltd.* analyzed whether the assignment at issue was a depth-limited grant, conveying only certain shallow rights or an unlimited grant of all depths.[394] The granting language of the assignment read, "it is the intent of this assignment to transfer and convey… [and] hereby [does] convey… all rights and interests now owned… regardless of whether the same may be incorrectly described or omitted from Exhibit A…."[395] Exhibit A described the conveyed interests, sometimes referring to the depths of the interests.[396] Both parties conceded that the assignment and exhibit were unambiguous.[397] However, they disputed whether the assignment was depth-limited.[398] Using the four-corners rule and harmonizing, the court concluded that the plain language showed an intent to convey all of the rights and interests and the exhibit was included merely to provide relevant information to the agreement.[399] The court has ruled that when an agreement references an exhibit to describe the property conveyed, the description of the interest in the exhibit controls the scope of the grant.[400] However, an exhibit is only relevant because of the relevant granting language.[401] Here, the exhibit contained no limiting language; it merely contained depth references among other information about the conveyed interests.[402] Additionally, while the granting language of the assignment directed attention to the exhibit, it also made the grant "subject to the terms and conditions contained herein."[403] The express granting language of the assignment which conveyed "all rights and interests now owned… regardless of whether the same may be incorrectly described or omitted from Exhibit A" combined with the exhibit demonstrated the parties' intent to convey all of the interests owned.[404]

Royalty calculations and payment obligations remain a longstanding issue for Texas courts. *Devon Energy Prod. Co., L.P. v. Sheppard* resolved one wrinkle in this

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[389] 672 S.W.3d 505 (Tex. App. 2023).
[390] *Id.* at 510.
[391] *Id.* at 516-17.
[392] *Id.*
[393] *Id.* at 524.
[394] 662 S.W.3d 550, 554 (Tex. App. 2022).
[395] *Id.* at 556.
[396] *Id.*
[397] *Id.* at 553.
[398] *Id.*
[399] *Id.* at 559.
[400] *Citation 2002 Inv. LLC*, 662 S.W.3d at 558.
[401] *Id.*
[402] *Id.*
[403] *Id.*
[404] *Id.*

ongoing issue: calculating a landowners' royalty under the terms of a mineral lease. In this case of first impression, the Supreme Court of Texas affirmed that owners of oil and gas royalties are owed more than gross proceeds under unique "proceeds plus" lease provisions. Specifically, the court analyzed the following provision,

> [I]f any disposition, contract or sale of oil or gas shall include any reduction or charge for the expenses or costs of production, treatment, transportation, manufacturing, process[ing] or marketing of the oil or gas, then such deduction, expense or cost shall be added to … gross proceeds so that Lessor's royalty shall never be chargeable directly or indirectly with any costs or expenses other than its pro rata share of severance or production taxes.[405]

The court reasoned that a plain reading of the provision unambiguously established a royalty payable on an amount that exceeded gross proceeds and could even exceed the profits accruing to the producers. The court noted that the provision's language clearly expressed an intent to deviate from the usual expectations of allocation of postproduction costs. Thus, the court found that the lease language created "proceeds plus" leases. Under this type of lease, royalties were payable on gross proceeds "plus sums identified in producers' sales contracts as accounting for the actual or anticipated postproduction costs, even if such expenses are incurred only by the buyer after or downstream from the point of sale."[406] Specifically, the court ruled that proceeds plus leases require a two-prong calculation of the royalty base. First, the producer must determine gross proceeds, and then "when the producers' contracts, sales, or dispositions state that enumerated postproduction costs or expenses have been deducted in setting the sales prices, those costs and expenses shall be added to the … gross proceeds."[407]

In *Brooke-Willbanks v. Flatland Mineral Fund, LP*, the court determined that the two previously reserved non-participating royalty interests ("NPRI") proportionally burdened the mineral interest Kay Brooke-Willbanks ("KBW") conveyed to Flatland.[408] In 2014, KBW was conveyed a 45/100 mineral interest, equivalent to a 144-acre mineral interest.[409] In 2016, KBW conveyed "an undivided seventy-two (72) Net mineral acres" to Flatland subject to the terms of any valid and subsisting oil, gas and other mineral lease.[410] While selling an undivided thirty-six net mineral acres, Flatland became aware of two NPRIs, from a conveyance in the 1940s, that burdened the royalty interest.[411] Flatland requested that KBW execute a correction deed to clarify the interests.[412] In response, KBW filed suit claiming the NPRIs in the chain of title proportionately burdened the entire mineral estate including the mineral interest conveyed to Flatland.[413] Interpreting the parties' intent as expressed in the deed, the court ruled that the interest KBW conveyed to Flatland was proportionally burdened by the previously reserved NPRIs based on the use of "net mineral acre" and the "subject to" clause.

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[405] Devon Energy Prod. Co. L.P. et. al. v. Sheppard, et. al., No. 20-0904, slip op. at 6 (Tex. Mar. 10, 2023).
[406] *Id.* at 3.
[407] *Id.* at 27 (internal quotations omitted).
[408] 660 S.W.3d 559, 567 (Tex. App. 2023).
[409] *Id.* at 561.
[410] *Id.* at 561–62.
[411] *Id.* at 562.
[412] *Id.*
[413] *Id.*

The Texas courts also upheld covenants running with the land. In *In re KrisJenn, Ranch LLC*, the district court looked to whether a net profits interest ran with a pipeline right-of-way as a real property covenant.[414] Regarding the element of intent, the court found that the contracts in question "unambiguously" state an intent for the covenant to run with the land.[415] Although the Bankruptcy Court relied on *In re Chesapeake* to find otherwise, the district court differentiated the *KrisJenn* case from the *Chesapeake* case because it departed from the recognized general rule that express language of an intent of an obligation to run with the land is sufficient.[416] Regarding the element of touch and concern, the district court found that the "shall attach and run" provision within the contracts supported interpreting the term "assigns" to include future owners of the ROW.[417] Regarding the element of notice to successors of the burden, the district court agreed with the Bankruptcy Court finding that the element of notice was satisfied.[418] Regarding the element of privity of estate, the district court found that to the extent Texas requires horizontal privity, the successive grants of property interests satisfy the requirement.[419] Therefore, the district court found that all required elements for a real covenant that runs with the land were satisfied and held that the Bankruptcy Court erred in "finding that the net-profits-interest assignments owned by Appellants were personal covenants rather than real covenants running with the land."[420]

Adverse possession was at issue when a party attempted to correct a prior misstatement. In *PBEX II, LLC v. Dorchester Minerals, L.P.*,[421] the court held that a non-operating working interest may be adversely possessed. In 1990, Torch, a non-operating working interest owner, mistakenly notified the operator that Torch had assigned its leasehold to Dorchester's predecessors. In 2016, Torch assigned the same interest to PBEX II, LLC.[422] Torch notified Dorchester one year after the twenty-five year statute of limitation period passed and subsequently attempted to negotiate the execution of a correction, which Dorchester refused.[423] Texas law establishes that both operating and non-operating working interests are possessory, and adverse possession can occur through a tenant.[424] Over the past twenty-six years Dorchester and its predecessors were hostile by performing all the functions required of a working interest owner such as collecting the revenues of its share of production from the operator's sale, collecting payment invoices from the operator, and paying all taxes due on the working interest.[425] Furthermore, the court held that the operator adversely possessed the working interest on behalf of Dorchester and its predecessors for the twenty-six years prior to this case.[426] Thus, adverse possession of the non-operating working interest occurred since Torch failed to exercise its rights with regard to the working interest during the statute of limitations period and Dorchester and its predecessors usurped all the benefits, liabilities, and obligations for the working interest.[427]

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[414] 661 F. Supp. 3d 654 (W.D. Tex.2023).
[415] *Id*. at 674.
[416] *Id*.
[417] *Id*. at 676.
[418] *Id*. at 677.
[419] *Id*. at 679.
[420] *In re KrisJenn*, 661 F. Supp. 3d at 679.
[421] 670 S.W.3d 374 (Tex. App. 2023).
[422] *Id.* at 379.
[423] *Id.*
[424] *Id.* at 381, 385.
[425] *Id.* at 381-83.
[426] *Id.* at 385.
[427] *Id.* at 384.

The Texas courts provided guidance on the timeliness of royalty payments. In *Freeport-McMoRan Oil & Gas LLC v. 1776 Energy Partners, LLC*,[428] the court analyzed whether the safe-harbor provision of the Texas division order statute applied during the pendency of a title dispute. The statute permits operators to withhold production payments "without interest" under certain circumstances. Longview, a non-party, sued 1776 Energy, a non-operator, alleging that the leases owned by 1776 Energy were actually acquired on behalf of Longview instead. Operator suspended 1776 Energy's royalties until Longview's suit was resolved. After the Longview suit was resolved in favor of 1776 Energy, the operator released the suspended funds but did not remit interest. The operator argued that the safe-harbor provisions of Section 91.402(b) of the Texas Natural Resources Code allowed them, as payor, to withhold payments from the payee "without interest" under certain circumstances. The first circumstance is if a title dispute would affect the distribution,[429] and the second is if there is reasonable doubt that the payee has clear title to proceeds.[430] The court held that until it had issued its final mandate in the Longview suit, the suit created the required circumstances that satisfied the elements of both Section 91.402(b)'s safe harbor circumstances and, thus, held that the operator "established as a matter of law that it was entitled to withhold distribution of production payments without interest under the statutory safe-harbor provisions . . . ."[431]

Taylor Props. v. Scout Energy Mgmt.[432] answered the question of whether paying two shut-in royalty payments in one year extends the lease by two years. Two wells in Moore County, Texas allowed the lessee to pay a royalty of "$50.00 per well per year, and upon such payment it will be considered that gas is being produced…"[433] The lessee made two fifty-dollar payments within one month of each other and claimed that this had the effect creating a two-year shut-in period. The appeals court disagreed and found that the unambiguous and plain language in the lease that "upon such payment" "per year" extended the lease for twelve months from the time the payment. Payments that act as a substitution for production serve to prevent the expiration of the primary term and must be consistent with and satisfy the habendum clause.

The Texas courts provided guidance on various contract provisions. In *Apache Corp. v. Apollo Exploration, LLC*,[434] the Texas Supreme Court analyzed the common law rules in contract cases regarding the meaning of the words "from" and "after" in the calculation of deadlines. The Texas Supreme Court reaffirmed the default rule that the measuring date—the date "from" or "after" a period is to be measured—is excluded in calculating time periods unless a contrary intent is clearly manifested by the contract. For example, for periods of years, the period ends on the anniversary of the measuring date, not the day before the anniversary. Departing from the rule does not require specific language, but the lease's text must include something that either expressly describes how the date will be calculated or that, at a minimum, is clearly incompatible with the default rule.

In *Finley Res., Inc. v. Headington Royalty, Inc.*, the Texas Supreme Court addressed the meaning of "predecessors" within a release provision of an acreage-swap agreement.[435] The release provision provided that "[Headington] waives, releases, acquits, and discharges Petro Canyon and its affiliates and their respective . . . predecessors . . . for any

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[428] 672 S.W.3d 391 (Tex. 2023).
[429] TEX. NAT. RES. CODE § 91.402(b)(1)(A)).
[430] TEX. NAT. RES. CODE § 91.402(b)(1)(B)(ii).
[431] *See Freeport-McMoRan*, 672 S.W.3d at 400.
[432] No. 07-22-00242-CV, 2023 WL 5486220 (Tex. Aug. 23, 2023).
[433] *Id*. at *1.
[434] 670 S.W.3d 319 (Tex. 2023).
[435] 672 S.W.3d 332 (Tex. 2023).

liabilities, claims, demands, causes of action or obligations . . . related to [a certain tract of land]."[436] The Court reiterated past precedent that a release only discharges "persons named or identified with such descriptive particularity that their identify or connection to the released claims is not in doubt."[437] In analyzing the plain meaning of the word, the Court noted that "predecessors" is often shorthand for predecessors in title or interest.[438] However, in the immediate agreement, the Court held the word referred not to predecessors of the tract, but predecessors of Petro Canyon, as the "syntactic use of 'predecessors' thus connotes a prior connection *to the corporate entities themselves*, not the land."[439]

In *Point Energy Partners Permian, LLC v. MRC Permian Co.*, the court determined a force majeure provision did not encompass an operator's "30-hour slowdown of an essential operation that was already destined to be untimely due to a scheduling error."[440] The operator, needing to drill a well within 180 days after the spudding of their previous well to extend the secondary term of the lease, made a scheduling error in which the new well would not have been drilled until after the deadline.[441] The operator noticed this error after the deadline to drill, and relied on the force majeure provision to extend the secondary term.[442] The alleged force majeure event was a thirty-hour delay in a drilling operation – that used the drilling rig intended for the lease at issue – about a month before the deadline.[443] The court reasoned that the force majeure clause must be understood in its entirety, rather than just a literal interpretation of "Lessee's operations are delayed by an event of force majeure."[444] Holding that the force majeure provision was intended to prevent lease termination when an event occurs outside of the lessee's control, the court reasoned that the wrongfully scheduled and untimely drilling operation would not have suspended termination of the lease even with a delay.[445] Thus, the risk of lease termination was due to a scheduling error which did not fall under the agreed upon force majeure provision.[446]

Conflicting grants of produced water was at issue in a 2023 case. In *Cactus Water Servs. LLC v. COG Operating LLC*,[447] the court held that an oil and gas lease granted the mineral lessee the rights to produced water. The Collier family owned the surface and minerals under 37,000 acres in Reeves County. They leased this acreage in various oil and gas leases, and eventually COG acquired the leases. Later the Colliers entered into an agreement with Cactus, giving Cactus the rights to own all water "produced from oil and gas wells and formations on or under" the Collier's acreage.[448] Cactus notified COG that Cactus owned the produced water, and COG sued Cactus for declaratory judgment that COG owned the produced water. Holding for COG, the court held that because produced water is a waste byproduct of the oil and gas stream of production, the mineral lessee owned the produced water. The court relied on the distinction between potable groundwater and hazardous produced water, which appears in various statutory and regulatory contexts. The court also noted that as a matter of historic practice, industry has traditionally treated

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[436] *Id.* at 336.
[437] *Id*. at 339 (internal quotations omitted).
[438] *Id.* 343-44.
[439] *Id.* at 343.
[440] 669 S.W.3d 796, 810 (Tex. 2023).
[441] *Id*. at 800.
[442] *Id*. at 801-02.
[443] *Id.*
[444] *Id*. at 808.
[445] *Id*. at 810-11.
[446] *Id.*
[447] 676 S.W.3d 733 (Tex. App. 2023).
[448] *Id*. at 736.

produced water as a liability and not an asset, and that to hold for Cactus would have been to give it the "benefit of costs and risks [COG] voluntarily undertook."[449] The Texas Supreme Court has granted review.

One 2023 case highlighted the cotenancy limitations when a non-operator refuses to be a party of the joint operating agreement. In *Cromwell v. Anadarko E & P Onshore, LLC*[450], Cromwell acquired a minority working interest in two leases in Loving County, Texas. Prior to that, Anadarko had entered into joint operating agreements with other working interest owners and was named as the operator for the leases. Although he paid some expenses, Cromwell later disputed his status as a "Working Interest Owner" since he had not signed any joint operating agreements with Anadarko and began to refuse to pay invoices. Anadarko believed Cromwell's leases expired due to lack of production, and the landowner then leased such properties to Anadarko. The court looked to the habendum clause in each lease, and while the parties both agreed the leases were producing in paying quantities, Anadarko asserted that since it drilled the wells, Cromwell's actions were insufficient to constitute production, whereas Cromwell claimed that the fact he participated in the liabilities, risks, and costs of production is sufficient. Under *Cimarex v. Anadarko*, Cromwell needed to "take some action to cause production" on the leases, and the court found Cromwell's actions did not reach the necessary level.[451] Cromwell's costs that he asserted as "construction participation" were merely his proportionate share of a production well's operating expenses by a nonparticipating cotenant.

One last 2023 case worth of note, is *Railroad Comm'n v. Opiela*[452], which addressed the Railroad Commission's ("RRC") authority to issue drilling permits for production sharing agreement ("PSA") wells. A PSA is an agreement among the owners of a horizontal well's production (working and royalty interest owners) on how to allocate production among the various tracts. The mineral owners' lease prohibited the lessee from pooling the lease, and they had not signed any PSA. The RRC nevertheless issued the drilling permit, and mineral owners sought review. The court noted that Texas law requires a permit applicant to demonstrate to the RRC a good-faith claim of the right to operate the well. The court also observed that the RRC has historically granted PSA well permits where the operator certifies that at least 65% of the working and royalty interest owners in each tract have signed a PSA. Given that less than 65% of the tract's owners had signed a PSA in this case, the court held that the RRC erred in concluding that the operator had shown a good-faith claim to the well in question.

XII. WEST VIRGINIA

A. Legislative Developments

One law was amended and another enacted during the 2023 Legislative Session that will affect the oil and gas industry in the State of West Virginia. First, S.B. 609 amended the West Virginia Public Energy Authority ("WVPEA") Act at § 5D–1–1 *et seq.* to add a new section, § 5D–1–5c. Under this new section, existing coal-fired, natural gas-fired, and oil-fired power plants must petition the WVPEA to begin decommissioning and deconstructing any utility or non-utility plants. Said petition must include an analysis by an WVPEA-approved third party that "evaluates the social, environmental, and economic impact at a local and statewide level of such decommissioning and deconstruction" and accounts for potential alternatives to the decommissioning and deconstruction of the plant,

[449] *Id*. at 740.
[450] 676 S.W.3d 860 (Tex. 2023).
[451] *Id*. at 872.
[452] 681 S.W.3d 397 (Tex. App. 2023).

including "the reconstruction that make[s] use of other technologies, including novel technologies and green technologies as alternative fuel sources."[453] Additionally, the amendment empowers the WVPEA to propose rules for legislative approval and promulgate emergency rules to implement the new section.[454]

Second, S.B. 188, or the Grid Stabilization and Security Act of 2023 ("Act"), became effective on June 4, 2023.[455] Codified at § 5B-2N-1 *et seq*. in the West Virginia Code, the Act directs state agencies to streamline their procedures to simplify the generation of electricity from natural gas. Under the Act, the Secretary of the West Virginia Department of Economic Development is directed to identify and designate economically viable sites suitable for natural gas electric generation facilities.[456] Then, in a timely fashion, the Secretary must consider and render a decision on applications for permits to construct and operate natural gas electric generation facilities and communicate the designated sites to the West Virginia Department of Environmental Protection's Division of Air Quality and the West Virginia Public Service Commission ("WVPSC").[457] In keeping with the intended efficiency of the Act, any application for a siting certificate filed with the WVPSC to construct, or construct and operate, a natural gas electric generation project at a designated site shall be adjudicated and a final order issued by the WVPSC within 270 calendar days after the initial date of the filing of the application.[458]

B. Judicial Developments

In *Collingwood Appalachian Minerals III, LLC v. Erlewine*,[459] the Supreme Court of Appeals of West Virginia examined whether a purchaser of a delinquent oil and gas interest could have its tax deed invalidated due to it being erroneously and separately assessed from the surface estate. It also examined whether a prior deed in the chain of title effectively conveyed all interest the grantor had in the oil and gas, thereby preventing a delinquent interest from being sold at a future date, or alternatively, whether a partial interest was conveyed, thereby permitting a tax sale of the remaining interest. The Court held that "[u]nder West Virginia Code § 11A-3-63, no such irregularity, error, or mistake invalidates a tax-sale purchaser's tax deed unless the Legislature created a specific cause of action allowing it."[460] Here, the Court determined that the delinquent taxpayer of the original 1989 sale did not pay taxes on either the oil and gas or the surface estate.

In addition, the Court noted that the West Virginia Legislature has not specified a cause of action that "allows a third party such as Respondent, not related to the delinquent owner, to challenge a tax deed on the grounds that the delinquent owner was improperly taxed or that the tax sale severed a mineral estate."[461] Accordingly, the Petitioner's title as to the 1989 tax sale and subsequent tax deed is protected from the claims of the Respondent. Regarding the 1993 tax sale, the Court determined that the prior owner did not convey an undivided fifty percent interest in all the oil and gas, being all he owned at the time, but rather, only conveyed a twenty-five percent interest, thereby leaving a residual twenty-five percent interest that would remain taxed, and later delinquent, in the 1993 tax sale.

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[453] W. VA. CODE § 5D-1-5c(b)(1)-(2).
[454] *See* W. VA. CODE § 5D-1-5c(c).
[455] S.B. 188, 85th Gen. Assemb., Reg. Sess. (W. Va. 2023).
[456] *See* W. Va. Code § 5B-2N-3.
[457] *See* W. Va. Code § 5B-2N-4(a).
[458] *See* W. Va. Code § 5B-2N-4(b).
[459] 889 S.E.2d 697 (W. Va. 2023).
[460] *Id.* at 703.
[461] *Id.*

In *L&D Invs. Inc. v. Antero Res. Corp.*,[462] the Supreme Court of Appeals of West Virginia examined whether an attorney who represented plaintiffs in a case to recover royalties for oil gas production was entitled to attorney's fees and reasonable expenses undertaken for the benefit of unknown heirs. The Court notably adopted the persuasive authority of the Restatement (Third) of Restitution and Unjust Enrichment § 29 (Am. Law Inst. 2022) in its entirety, as the law of West Virginia.[463] The Court also held that "[c]ounsel is entitled under the common fund doctrine to 'require those beneficiaries for whom [he] is not acting by agreement to contribute to the reasonable and necessary expense of securing the common fund for their benefit, in proportion to their respective interests therein, as necessary to prevent unjust enrichment.'"[464]

C. Administrative Developments

The West Virginia Code of State Rules Section 53-5-1, as applicable to S.B. 609, as codified in W. Va. Code Section 5D-1-5c(c), referenced within the Legislative Developments hereinabove, was enacted via Emergency Action effective July 27, 2023.

XIII. WYOMING

A. Legislative Developments

During Wyoming's 2023 Legislative General Session, the Legislature amended the Wyoming Energy Authority's authority to include the ability to finance oil and gas refinery construction and expansion projects in Wyoming.[465] The Wyoming Energy Authority's purpose is to support the energy industry including securing federal grants and loans, assisting in permitting, engaging stakeholders on potential market opportunities, and financing certain projects directly. This amendment permits the Wyoming Energy Authority to finance oil and gas refinery construction and expansion activities through outstanding bonds.

B. Judicial Developments

In *EOG Res., Inc. v. JJLM Land, LLC*, the Wyoming Supreme Court concluded that Wyo. Stat. Ann. § 30-5-405(b) requires operators to pay double damages when it fails to pay any portion of an installment payment owed under a surface use and damage agreement and fails to cure the underpayment after sixty days of receiving a notice of default.[466] EOG argued that the statute only affected installment nonpayment as opposed to installment underpayment. But the Court disagreed, finding that § 30-5-405(b)'s text includes both nonpayment and underpayment.

In *Chesapeake Operating, LLC v. Dep't of Revenue*, the Wyoming Supreme Court held that a facility is not a processing facility under Wyo. Stat. Ann. § 39-14-203(b)(iv) based only on the volume of gas it receives, the size of its separators, the occurrence of separation, or the presence of a triethylene glycol (TEG) dehydrator.[467] Chesapeake produces oil and gas from horizontal wells within a complex system. A separator near the wellhead separates liquids and gas. The gas then passes through a custody transfer meter

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[462] 887 S.E.2d 208 (W. Va. 2023).
[463] *Id.* at 221.
[464] *Id.*
[465] 2023 Wyo. Sess. Laws 147; WYO. STAT. ANN. §§ 37-5-503(a)(xi), 602(o) (2023).
[466] 522 P.3d 605 (Wyo. 2022).
[467] 537 P.3d 1134 (Wyo. 2023).

and flows through a natural gas pipeline to one of seven facilities. Once at a facility, the gas undergoes more separation, pressurization, and water remove by way of a TEG dehydrator. The gas then moves through transport lines to natural gas liquids (NGL) extraction facilities.

Wyoming's tax code permits deduction of costs incurred in the processing of oil and gas from severance and ad valorem taxes though it does not permit deductions for production costs.[468] Wyoming law does not define "processing facility." But it defines processing to include "dehydration within a processing facility" and "separation which occurs within a processing facility".[469] The Department of Revenue maintained that the seven facilities were not processing facilities under § 39-14-203(b)(iv) and that Chesapeake could not deduct costs until the natural gas arrived at the NGL extraction facilities. Chesapeake contended that the seven facilities were processing facilities based on the volume of gas received and separation and dehydration occurring at the facilities.

Relying on case law to further clarify processing, the Wyoming Supreme Court decided that—while the facilities did separate byproducts from large volumes of gas and dehydrate the gas—the facilities did not engage in enough processing functions to be considered a processing facility. Thus, Chesapeake could not deduct costs associated with the seven facilities from its severance and ad valorem tax balance.

C. Administrative Developments

In *In re Devon Energy Prod. Co. LP*, the Wyoming Board of Equalization ruled that the purchase of fracking services to improve state lands is not exempt from sales tax, but intrastate water transport is exempt.[470] Devon purchased fracking services to enhance oil and gas production on state lands. Devon also hired contractors to transport water to the production site. Most of the water transportation took place outside of the site and all water transportation took place within state lines. When the water did arrive, Devon Energy stored it in tanks just inside the site's boundaries. Within the invoices, Devon contractors did not distinguish between taxed and untaxed water transportation.

Wyoming law imposes sales tax on services used in rendering services to real or tangible property within an oil and gas well site.[471] Devon accepted that the fracking services fell within this description. But the law exempts services "sold to government … organizations" for "improvement of real property … owned by, or incorporated in projects under contract to the state of Wyoming…"[472] Devon contended that the fracking services fell within this exception. The Board ruled that "sold to government organizations" requires the services to be purchased by a government organization and not a private organization.[473] Thus, the § 39-15-104(a)(iv)(F) exception did not apply to Devon and it was left to pay the corresponding sales taxes.

But the Board did not require Devon to pay taxes on its water transportation. Wyoming law offers another exception to § 39-15-103(a)(i)(K). Section 39-15-105(a)(viii)(A)(II) exempts intrastate transportation of freight and property. The Department of Revenue argued that transportation within the site's boundaries became an indispensable fracking function and thus taxable. The Department also has a rule that if taxable charges are not separated from non-taxable charges, the entirety of the service is

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[468] WYO. STAT. ANN. §§ 39-14-203(b), 39-13-102(m)(i), 39-13-103(b)(iv) (2022).
[469] WYO. STAT. ANN. § 39-14-201(a)(xviii) (2022).
[470] Docket No. 2020-34 (Dec 1, 2022) (not appealed).
[471] WYO. STAT. ANN. § 39-15-103(a)(i)(K)(2022); Rules and Regulations, Wyo. Dep't of Revenue, ch. 2, § 7(a) (2023).
[472] *Id*. § 39-15-104(a)(iv)(F).
[473] *Id*.

taxable.[474] The Board ruled against the Department. It found that § 39-15-105(a)(viii)(A)(II)'s text unambiguously excluded all intrastate transportation—including within the site's boundaries—of freight and property from sales tax. It also found that water was both freight and property. So, the law did not require Devon to pay sales tax on any of the water transportation services.

In *In re Merit Energy Co., LLC*, the Wyoming Board of Equalization ruled that a sales tax exemption exists for the portion of electricity purchased to transport fluids from the wellhead to custody transfers even when the source powered by the electricity resides within the wellbore.[475] Merit uses submersible pumps installed in wellbores which—in one continuous, uninterrupted movement—convey the crude oil not just from the wellbore to the wellhead, but from the wellhead to surface facilities and custody transfers as well.

Wyoming law imposes sales tax on tangible personal property consumed in oil and gas production.[476] Merit accepted that electricity fell within this definition but fell within a sales tax exemption. The law makes an exception to the tax for tangible personal property consumed in production and consumed directly in generating motive power for actual transportation business.[477] The Board moved step by step through each phrase of the statutory text. It held that Wyoming law defines electricity as personal property.[478] The Board then determined that the electricity was consumed in production based on statutory text that defined "the production process for crude oil" to include various activities which occur before custody transfer.[479] The parties agreed that the electricity was consumed directly in generating motive power. But they did not agree that the power was used for actual transportation business. Citing Meriam Webster's Collegiate Dictionary, the Board found that the pumps transported the fluids. Thus, the electricity—used to transport the fluid from wellhead to custody transfer—that powered the wellbore-residing pumps was consumed in production and consumed directly in generating motive power for actual transportation business. So, the law did not require Merit to pay sales tax on that portion of the electricity.

On July 12, 2023, the Wyoming Department of Environmental Quality ("DEQ") announced that it will create, in partnership with the University of Wyoming, a data-verified Class VI geologic database to provide geotechnical information that has been compiled and verified from public geologic databases.[480] This effort will be partially funded by the U.S. Department of Energy. The purpose is to make the application process for carbon storage projects more efficient with all necessary information located in one database.

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[474] Rules and Regulations, Wyo. Dep't of Revenue, ch. 2, § 7(a) (2023).
[475] Docket No. 2021-109 (Mar. 16, 2023) (not appealed).
[476] WYO. STAT. ANN. § 39-15-103(a)(i)(K) (2022).
[477] *Id.* § 39-15-105(a)(iii)(E).
[478] *Id.* § 39-15-101(a)(ix).
[479] *Id.* § 39-14-203(b)(iii).
[480] *UW and Partners to Create Geologic Database for Carbon Storage*, WYO. DEP'T OF ENVTL. QUALITY (last visited Dec. 11, 2023).

Chapter P: PESTICIDES AND CHEMICALS
2023 Annual Report[1]

In 2023, the Environmental Protection Agency (EPA) made significant progress implementing the Toxic Substances Control (TSCA) section 6 risk evaluation program, completing its rework of risk evaluations conducted under the prior Administration and proposing its first comprehensive risk management rules. It also moved to codify in rules important changes to the risk evaluation process the Biden Administration initially had adopted as policy. The new chemical program generated a number of firsts, including the first 5(f) order in more than 30 years and the first judicial challenge to a 5(e) order. Significant litigation on each of these initiatives was filed and argued in 2023, setting the stage for future clarity on the extent of EPA authority. EPA made significant progress toward addressing difficult and long-standing issues implementing the 1998 endocrine screening program and addressing systemic and practical challenges to meeting Endangered Species Act assessment and mitigation requirements for pesticides, including settlement of the so-called "Mega" litigation.

I. TOXIC SUBSTANCES CONTROL ACT (TSCA)

A. New Chemicals Program, Significant New Use Rules, and Litigation

1. New Chemical Review

The U.S. EPA's pace of completing new chemical determinations remains slow. EPA reported a total of only 153 new PMN, MCAN, and SNUN submissions in calendar year 2023,[2] which is a very significant decrease from earlier periods. By comparison, there were 493 total such notices in fiscal year 2016, the year the TSCA amendments were adopted.[3]

EPA's Office of Inspector General (OIG) released a report on the results of its audit of the New Chemicals Program after receiving complaints about EPA's new chemical review process.[4] EPA agreed with OIG's recommendations, and proposed corrective actions, including the development of a schedule for periodic workforce and workload analysis.

EPA proposed amendments to the new chemicals procedural regulations that, according to EPA, would aid in more timely completion of new chemical reviews by

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[1]L. Margaret Barry, Lawrence Culleen, Arnold & Porter Kaye Scholer LLP; Lynn Bergeson, Lisa R. Burchi, Heather F. Collins, Richard Engler, Ph.D., Carla Hutton, and Edith Nagy, Bergeson & Campbell, P.C.; Javaneh Tarter and Julia Casciotti, Hunton Andrews Kurth LLP; Greg Clark and James Votaw, Keller and Heckman LLP; Julia Hatcher, Allison In, Ashley Maiolatesi and De Vann Sago, Latham & Watkins LLP; Keith Matthews, Hume Ross, Sarah Simonetti and Sara Beth Watson, Wiley Rein LLP.

[2]*See Premanufacture Notices (PMNs) and Significant New Use Notices (SNUNs) Table,* U.S. ENVTL. PROT. AGENCY (last updated Feb. 1, 2024).

[3]*Statistics for the New Chemicals Review Program under TSCA* (Valid Submissions Received by Fiscal Year), U.S. ENVTL. PROT. AGENCY (last updated Feb. 2, 2024).

[4]OFF. OF INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, THE EPA LACKS COMPLETE GUIDANCE FOR THE NEW CHEMICALS PROGRAM TO ENSURE CONSISTENCY AND TRANSPARENCY IN DECISIONS (Aug. 2023).

improving the quality of new chemical notices.[5] The proposed rule also would amend the regulations for low volume exemptions (LVE) and low release and exposure exemptions (LoREX) to require EPA approval of an exemption notice prior to commencement of manufacture, make per- and polyfluoroalkyl substances (PFAS) categorically ineligible for these exemptions, and provide that certain persistent, bioaccumulative, and toxic (PBT) chemical substances are ineligible for these exemptions.

EPA also continued outreach efforts intended to improve the efficiency of new chemical reviews. EPA held the third and final webinar in its series on the Agency's process for new chemical reviews, covering commonly missed information in TSCA section 5 submissions and how EPA evaluates environmental release information for operations that occur at non-submitter sites.[6] For mixed metal oxides (MMO), EPA held the second of two webinars on the standardized process announced in 2022 to assess risk and apply mitigation measures, as appropriate, for MMOs, including new and modified cathode active materials (CAM).[7]

EPA released a new framework for reviewing new PFAS and new uses of existing PFAS that are also persistent, bioaccumulative and toxic (PBT) chemicals.[8] The framework describes the kinds and timing for data the Agency will require for new chemicals and new uses, keyed to the extent of expected release and exposure.[9]

2. Significant New Use Rules

In 2023, EPA proposed significant new use rules (SNUR) for only one batch of controversial new chemicals. EPA proposed SNURs for 18 substances that were fuels made from plastic waste-derived feedstocks.[10] The SNUR focused on the character of the feedstocks rather than the end products and proposed to designate as a significant new use manufacture of any of the fuels with feedstocks containing any quantity of a list of common plastic additives and impurities. As reported below, the underlying 5(e) consent order associated with the SNUR substances was challenged in the U.S. Court of Appeals for the D.C. Circuit.[11]

To advance its PFAS Strategic Roadmap, EPA proposed a SNUR for those PFAS that are currently listed on the TSCA Inventory as "inactive" as a consequence of the

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[5]Updates to New Chemicals Regulations Under the Toxic Substances Control Act (TSCA), 88 Fed. Reg. 34,100 (proposed May 26, 2023) (to be codified at 40 C.F.R. pts. 720, 721, 723, 725).

[6]U.S. ENVTL. PROT. AGENCY, TSCA NEW CHEMICAL ENGINEERING OUTREACH INITIATIVE TO INCREASE TRANSPARENCY AND REDUCE REWORK -- WEBINAR SERIES: PART 3, COMMONLY MISSED INFORMATION (Feb. 28, 2023).

[7]U.S. ENVTL. PROT. AGENCY, EPA'S NEW CHEMICALS PROGRAM UNDER TSCA, STANDARDIZED APPROACH FOR MIXED METAL OXIDES (MMOS) IN CATHODE ACTIVE MATERIALS (CAMS) AND MODIFIED CAMS: WEBINAR SERIES: PART 2 (Mar. 30, 2023).

[8]Press Release, U.S. Envtl. Prot. Agency, EPA Announces New Framework to Prevent Unsafe New PFAS from Entering the Market (June 29, 2023).

[9]U.S. ENVTL. PROT. AGENCY, FRAMEWORK FOR TSCA NEW CHEMICALS REVIEW OF PFAS PREMANUFACTURE NOTICES (PMNS) AND SIGNIFICANT NEW USE NOTICES (SNUNS) (Jun. 28, 2023).

[10]Significant New Use Rules on Certain Chemical Substances (23-2.5e), 88 Fed. Reg. 39,804 (proposed June 20, 2023) (to be codified at 40 C.F.R. pt. 721).

[11]*See infra* note 16 (discussion of the *Cherokee Concerned Citizens* suit) and accompanying text.

Inventory "Reset" Rule.[12] The final SNUR would require submission of a significant new use notice (SNUN) and EPA review before non-exempt manufacture or processing of these PFAS.

EPA published proposed existing chemical SNURs for three flame retardants that are undergoing risk evaluations under TSCA section 6: tris(2-chloroethyl) phosphate (TCEP); tetrabromobisphenol A (TBBPA); and triphenyl phosphate (TPP).[13] EPA stated that the rule is intended to foreclose uses of these chemicals not included within the formal scope of their respective risk evaluations without prior submittal of a SNUN.

EPA issued its first TSCA section 5(f) order since the 1980s. Arising from EPA's review of Significant New Use Notices, the order barred Inhance Technologies from manufacturing certain PFAS as incidental byproducts from fluorinating high-density polyethylene (HDPE) plastic containers. The Agency found that the PFAS byproducts presented an unreasonable risk of injury to health or the environment.[14] The Agency simultaneously issued a unilateral 5(e) order for certain other PFAS byproducts, barring manufacture pending extensive testing.[15] Inhance promptly challenged these orders, as reported in the next section.

3. TSCA Section 5 Litigation

In another first, EPA garnered its first-ever challenge to a section 5(e) consent order. In *Cherokee Concerned Citizens v. EPA*,[16] non-governmental organization (NGO) petitioners challenged the sufficiency of a TSCA section 5(e) order authorizing Chevron U.S.A. Inc. to commence manufacturing certain fuels made from alternative feedstocks, which recognized the existing comprehensive regulation of fuels and fuel handling under the Clean Air Act and other legislation. Petitioners assert the order is insufficiently protective under the statute against unreasonable risk.[17] EPA has moved to dismiss the 2023 challenge to the 2022 order as untimely under the TSCA 60-day statute of limitations for such challenges.[18]

The U.S. District Court for the Eastern District of Pennsylvania heard oral argument in EPA's suit against Inhance Technologies, in which EPA claims that Inhance is generating PFAS when fluorinating plastic containers in violation of a 2020 SNUR on

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[12]Per- and Poly-Fluoroalkyl Chemical Substances Designated as Inactive on the TSCA Inventory; Significant New Use Rule, 88 Fed. Reg. 4937 (proposed Jan. 26, 2023) (to be codified at 40 C.F.R. pt. 721).

[13]Flame Retardants; Significant New Uses Rules for Certain Non-Ongoing Uses, 88 Fed. Reg. 40,728 (proposed June 22, 2023) (to be codified at 40 C.F.R. pt. 721).

[14]OFF. OF POLLUTION PREVENTION & TOXICS, U.S. ENVTL. PROT. AGENCY, TSCA Section 5 Order for a Significant New Use of Certain Chemical Substances, Significant New Use Notice Numbers SN-23-0002, SN-23-0004, & SN-23-005 (2023); *see also* Press Release, U.S. Envtl. Prot. Agency, EPA Takes Action to Protect People from PFAS that Leach from Plastic Containers into Pesticides and Other Products (Dec. 1, 2023).

[15]OFF. OF POLLUTION PREVENTION & TOXINS, U.S. ENVTL. PROT. AGENCY TSCA SECTION 5 ORDER FOR A SIGNIFICANT NEW USE OF CERTAIN CHEMICAL SUBSTANCES, SIGNIFICANT NEW USE NOTICE NUMBERS SN-23-0003/0006 AND 0008-0011 (Dec. 1, 2023).

[16]No. 23-1096 (D.C. Cir. filed Apr. 7, 2023).

[17]Petitioner's Non-Binding Statement of Issues, Cherokee Concerned Citizens v. EPA, No. 23-1096 (D.C. Cir. May 11, 2023).

[18]Respondents' Motion to Dismiss, Cherokee Concerned Citizens v. EPA, No. 23-1096 (D.C. Cir. Nov. 8, 2023).

certain PFAS.[19] After the U.S. District Court for the District of Columbia dismissed a citizen suit brought by the Center for Environmental Health (CEH) and Public Employees for Environmental Responsibility (PEER),[20] CEH and PEER intervened in the EPA case. EPA claims that the burden was on Inhance to notify EPA during the SNUR rulemaking process that it was engaged in an ongoing use of the SNUR substances. Inhance maintains that it had no knowledge at that time that its fluorination process generated PFAS and that any PFAS generated are subject to exemptions for impurities and articles. Both EPA and Inhance have filed motions for summary judgment. Separately, Inhance filed suit in the U.S. Court of Appeals for the Fifth Circuit to challenge EPA's TSCA section 5(f) and (e) orders that would prohibit Inhance from continuing its container fluorination process.[21] The court granted Inhance's motions for expedited briefing and argument and a stay of the Orders pending appeal.

A suit brought by a coalition of NGOs against EPA for failure to disclose non-confidential information from TSCA section 5 new chemical notices remains ongoing. Although EPA has asserted that it now has made available to the public all PMN forms and supplementary correspondence to the extent required to be disclosed, plaintiffs contend EPA has incorrectly deferred to CBI claims by submitters as the basis for withholding documents.[22] EPA's motion for judgment on the pleadings based solely on justiciability and jurisdiction remains pending.

B. Test Order Activity and Litigation

In 2023, EPA issued two new test orders under its National PFAS Testing Strategy. The first requires testing on trifluoro(trifluoromethyl)oxirane (HFPO), a substance used in making plastics.[23] The second test order requires testing on 2,3,3,3-tetrafluoro-2-(heptafluoropropoxy)propanoyl fluoride (HFPO-DAF), a reactant used in organic chemical manufacturing.[24] EPA also acted on a TSCA section 21 petition seeking a test order. An NGO coalition withdrew and resubmitted a petition requesting a TSCA section 4 order to perform human and environmental health and safety testing for polyvinyl alcohol (PVA/PVOH) as it is used in product categories (e.g., laundry and dishwasher detergent pods) relevant to the EPA Safer Choice program.[25] The coalition also petitioned under the Administrative Procedure Act to change the status of PVA/PVOH on EPA's Safer Chemical Ingredients List (SCIL). EPA denied both petitions because petitioners did not

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[19] United States v. Inhance Technologies, No. 5:22-cv-05055-JFM (E.D. Pa. filed Dec. 19, 2022).

[20] Ctr. for Envtl. Health v. Inhance, No. 1:22-cv-03819-JEB, slip op. (D.D.C. Apr. 26, 2023).

[21] Inhance Technologies LLC v. EPA, No. 23-60620 (5th Cir. filed Dec. 8, 2023).

[22] Notice at 2-3, Envtl. Def. Fund v. Regan, No. 1:20-cv-00762-LLA (D.D.C. Jan. 18, 2023).

[23] Press Release, U.S. Envtl. Prot. Agency, EPA Issues Next Test Order Under National Testing Strategy for PFAS Used in Plastics, Chemical Manufacturing (Jan. 4, 2023).

[24] Press Release, U.S. Envtl. Prot. Agency, EPA Issues Next Test Order Under National Testing Strategy for PFAS Used in Chemical Manufacturing (Aug. 15, 2023).

[25] BLUELAND, ET AL., PETITION TO REQUEST HEALTH AND ENVIRONMENTAL TESTING AND REGULATION ON POLYVINYL ALCOHOL UNDER THE TOXIC SUBSTANCES CONTROL ACT AND AN UPDATE TO THE CHEMICAL SAFETY STATUS OF POLYVINYL ALCOHOL ON THE EPA'S SAFER CHEMICAL INGREDIENTS LIST (Jan. 26, 2023).

establish the need for testing under section 4 or demonstrate that PVA/PVOH does not meet the SCIL criteria.[26]

The U.S. Court of Appeals for the District of Columbia Circuit held oral argument in the Vinyl Institute, Inc.'s suit against EPA seeking review of EPA's 2022 TSCA section 4(a)(2) test order for 1,1,2-trichloroethane, particularly the requirement for an Avian Reproduction Test.[27]

National Foam, Inc. filed suit in the U.S. Court of Appeals for the District of Columbia Circuit, seeking review of a 2022 TSCA section 4(a)(2) test order for PFAS 6:2 fluorotelomer sulfonamide betaine on the grounds that National Foam is not a "processor" subject to order.[28] Following mediation, EPA granted National Foam an exemption from testing, subject to the cost reimbursement provisions of the order, and the parties asked the court to hold the case in abeyance completion of testing by other order recipients.[29]

DuPont de Nemours filed a petition in the U.S. Court of Appeals for the Third Circuit challenging EPA's issuance of the 2023 test order for HFPO to DuPont.[30] EPA subsequently determined that DuPont de Nemours was not a HFPO manufacturer, and the court granted the parties' motion to dismiss the case on May 22, 2023.

The U.S. District Court for the Eastern District of North Carolina granted an EPA motion to dismiss in litigation challenging EPA's response to a 2020 TSCA section 21 petition seeking a section 4 test rule for 54 PFAS, finding that EPA granted the petition and that the court lacks jurisdiction to review such a grant.[31] Petitioners filed an appeal in the U.S. Court of Appeals for the Fourth Circuit.[32]

C. Regulation of Existing Chemicals

1. Prioritization, Risk Evaluation, and Risk Management

During 2023, EPA's ongoing effort to revisit its risk evaluations and belatedly comply with statutory deadlines resulted in a flurry of activity. The Agency issued a revised final risk determination for trichloroethane (TCE); this time, as a whole chemical substance determining, that 52 out of 54 conditions of use contribute to finding that TCE presents an unreasonable risk of injury to human health.[33] This revision did not reflect the previous assumption that workers always and appropriately use PPE, which the Agency moved away from in revising the risk evaluation process rule, discussed below. Following this determination, EPA proposed a section 6 risk management rule for TCE to ban all commercial and industrial uses of TCE, with longer compliance timeframes and workplace

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[26]Polyvinyl Alcohol (PVA); Toxic Substances Control Act (TSCA) Section 21 Petition for Rulemaking; Reasons for Agency Response; Denial of Requested Rulemaking, 88 Fed. Reg. 25,590 (proposed Apr. 27, 2023).
[27]Petition for Review, Vinyl Institute v. EPA, No. 22-1089 (D.C. Cir filed May 23, 2022).
[28]Nat'l Foam v. EPA, No. 22-1208 (D.C. Cir. filed Aug. 15, 2022).
[29]Joint Motion to Hold Case in Abeyance, Nat'l Foam v. EPA, No. 22-1208 (D.C. Cir. May 8, 2023).
[30]DuPont de Nemours Inc v. EPA, No. 23-1444 (3d Cir. filed Mar. 9, 2023).
[31]Order Granting Defendant's Motion to Dismiss, Ctr. for Envtl. Health v. Regan, No. 7:22-CV-00073-M (E.D.N.C. Mar. 30, 2023).
[32]Ctr. for Envtl. Health v. Regan, No. 23-1476 (4th Cir. filed May 1, 2023).
[33]Trichloroethylene (TCE); Revision to the Toxic Substances Control Act (TSCA) Risk Determination; Notice of Availability, 88 Fed. Reg. 1222 (Jan. 9, 2023).

controls allowed for certain activities and uses.[34] The proposal includes banning disposal of TCE to industrial pre-treatment, industrial treatment, or publicly owned treatment works, except for cleanup projects temporarily exempted under the TSCA section 6(g) critical use provision.

Similarly, EPA proposed a section 6 risk management rule for methylene chloride that would ban all consumer uses and most industrial uses, providing time-limited exemptions for certain military, critical infrastructure, or emergency-related uses with conditions to comply with a workplace chemical protection program ("WCPP").[35]

EPA revised its prior risk evaluation for 1,4-dioxane,[36] and proposed risk management rules for perchloroethylene (PCE) and carbon tetrachloride (CTC). The revised risk determination finding that 1,4-dioxane presents an unreasonable risk of injury to human health under its conditions of use supplemented the 2020 risk evaluation, which did not consider various air and water exposure pathways.[37] For PCE, EPA proposed to ban most uses (including all consumer uses) and, as it did with TCE and methylene chloride, EPA proposed a WCCP for uses not prohibited to address the unreasonable risk to human health.[38] For CTC, the Agency proposed to establish a WCPP for uses not prohibited, in addition to banning uses that have been phased out.[39] Both proposed rules establish recordkeeping and downstream notification requirements.

Two suits were filed against EPA over its failure to meet statutory deadlines to complete section 6 risk evaluations.[40] The cases concern the twenty high priority substance risk evaluations (filed by a group of NGOs) and two manufacturer-requested risk evaluations (filed by the American Chemical Council).

Concerning the latter, EPA announced that it will perform a cumulative risk assessment of one of the manufacturer-requested substances, DINP, with five other phthalates separately designated as "high priority" by EPA.[41] EPA also released a draft proposed principles document for cumulative risk assessment, to take into account combined human health exposure to multiple chemical substances with similar effects.[42]

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[34]Trichloroethylene (TCE); Regulation Under the Toxic Substances Control Act (TSCA), 88 Fed. Reg. 74,712 (proposed Oct. 31, 2023) (to be codified at 40 C.F.R. pt. 751).

[35]Methylene Chloride; Regulation Under the Toxic Substances Control Act (TSCA), 88 Fed. Reg. 28,284 (proposed May 3, 2023) (to be codified at 40 C.F.R. pt. 751).

[36]1,4-Dioxane; Draft Revision to Toxic Substances Control Act (TSCA) Risk Determination; Notice of Availability and Request for Comment, 88 Fed. Reg. 48,249 (July 26, 2023).

[37]1,4-Dioxane; Draft Supplement to the TSCA Risk Evaluation; Science Advisory Committee on Chemicals (SACC) Meeting; Notice of Meeting and Request for Comment, 88 Fed. Reg. 43,562 (July 10, 2023).

[38]Perchloroethylene (PCE); Regulation Under the Toxic Substances Control Act (TSCA), 88 Fed. Reg. 39652 (proposed June 16, 2023) (to be codified at 40 C.F.R. pt. 751).

[39]Carbon Tetrachloride (CTC); Regulation Under the Toxic Substances Control Act (TSCA), 88 Fed. Reg. 49,180 (proposed July 28, 2023) (to be codified at 40 C.F.R. pt. 751).

[40]Cmty. In-Power and Dev. Ass'n. v. EPA, 304 F. Supp. 3d 212 (D.D.C. filed Sept. 18, 2023); Complaint for Declaratory and Injunctive Relief, Am. Chemistry Council v. EPA, No. 1:23-cv-03726-DLF (D.D.C. filed Dec. 13, 2023).

[41]U.S. ENVTL. PROT. AGENCY, DRAFT PROPOSED APPROACH FOR CUMULATIVE RISK ASSESSMENT OF HIGH-PRIORITY PHTHALATES AND A MANUFACTURER-REQUESTED PHTHALATE UNDER THE TOXIC SUBSTANCES CONTROL ACT (Feb. 2023).

[42]U.S. ENVTL. PROT. AGENCY, DRAFT PROPOSED PRINCIPLES OF CUMULATIVE RISK ASSESSMENT UNDER THE TOXIC SUBSTANCES CONTROL ACT (Feb. 2023).

Both of these documents were released for public comment and were reviewed by the Science Advisory Committee on Chemicals (SACC).

EPA proposed to modify the rules governing procedures for chemical substance risk evaluations established in 2017, to codify changes to the implementation approach adopted by the EPA during the Biden Administration.[43] Proposed procedural changes include EPA assessment of all exposure pathways regulated under other environmental statutes; excluding consideration of the exposure reduction effects of worker PPE at the risk evaluation stage; and making determinations of unreasonable risk for a chemical as a whole, and not separately for each condition of use. EPA also proposed deleting the current regulatory definitions of "best available science" and "weight of scientific evidence" to provide EPA with additional flexibility.

In December 2023, EPA designated five chemicals as candidates for risk evaluation: acetaldehyde, acrylonitrile, benzenamine; 4,4'-Methylene bis(2-chloroaniline) (MBOCA), and vinyl chloride, and identified the next ten substances it anticipates designating for prioritization in December 2025 and 2026.[44] EPA must finalize the prioritization of the five substances by December 2024. These designations reflect the Agency's determination that it will complete in the next year only five of the 20 pending risk evaluations, which are were already overdue by at least six months in December 2023.

2. Petitions for Section 6 Risk Management Rules

EPA granted a citizen petition filed on behalf of three federally recognized Tribes requesting EPA to initiate rulemaking to prohibit the manufacturing, processing, use, and distribution of N-(1,3-Dimethylbutyl)-N'-phenyl-p-phenylenediamine (6PPD), a chemical which is used as an anti-degradant in tires. In granting this petition, EPA indicated that it planned to issue an advanced notice of proposed rulemaking under TSCA section 6(a) to consider the possibility of bans or restrictions as well as whether technically and economically feasible alternatives exist for the use of 6PPD in tires; and to undertake additional data gathering activities, initially through TSCA section 8(d), which may be followed by testing requirements under TSCA section 4.[45]

The long-running challenge TSCA section 21 litigation, *Food & Water Watch v. EPA*, was set for a second trial in 2024. The case concerns EPA's denial of a 2016 petition under TSCA section 21 to ban fluoridation of drinking water due to claimed neurotoxic effects.[46] After conducting a bench trial in 2020, the court put the case in abeyance in part to allow the EPA to consider new studies not available at the time of the original petition, and an anticipated new study by the National Toxicology program.[47] In the new trial, EPA is expected to present the Agency's perspective on the minimum legal requirements for a

[43]Procedures for Chemical Risk Evaluation Under the Toxic Substances Control Act (TSCA), 88 Fed. Reg. 74,292 (proposed Oct. 30, 2023) (to be codified at 40 C.F.R. pt. 702).

[44]Initiation of Prioritization Under the Toxic Substances Control Act (TSCA); Request for Comment, 88 Fed. Reg. 87,423 (Dec. 18, 2023).

[45]Letter from Michal Freedhoff, Assistant Administrator for Chem. Safety and Pollution Prevention, U.S. Envtl. Prot. Agency, to Elizabeth Forsyth, Earthjustice Biodiversity Def. Program, and Katherine O'Brien, Earthjustice Toxic Exposure & Health Program (Nov. 2, 2023).

[46]Food & Water Watch, Inc. v. United States Env't Prot. Agency, 291 F. Supp. 3d 1033, 1037–38 (N.D. Cal. 2017).

[47]Plaintiff's Motion to Lift Stay and Take Case Out of Abeyance, Food & Water Watch v. EPA, No 3:17-cv-02162-EMC (N.D. Cal. Sep. 12, 2022).

section 6 risk determination in relation to specific fact patterns,[48] which in turn play an important role in future challenges to risk determinations and risk management rules for other chemicals.

3. Persistent, Bioaccumulative, and Toxic (PBT) Chemicals

As previously announced,[49] EPA reevaluated the exemptions previously granted for certain uses of five otherwise banned persistent, bioaccumulative, and toxic chemicals (PBTs) and proposed rule changes to further narrow the exemptions applicable decabromodiphenyl ether (decaBDE) and phenol, isopropylated phosphate (PIP (3:1)), and confirmed the October 2024 compliance date for PIP (3:1) in articles.[50] EPA also issued temporary, emergency enforcement relief concerning decaBDE-containing wire and cable insulation for nuclear power generation facilities.[51]

D. TSCA Section 8 Reporting and Information Collection Rules

EPA issued a TSCA section 8(a) rule establishing a one-time reporting requirement applicable to those who have manufactured or processed asbestos and asbestos-containing articles, including as an impurity, between 2019 and 2022 with annual sales above $500,000 in any of those years.[52] The rule created a reporting deadline of May 24, 2024. The term "asbestos" includes several types of asbestos, including chrysotile, crocidolite, amosite, anthophyllite, tremolite, actinolite, and libby amphibole asbestos.

EPA finalized a one-time TSCA section 8(a)(7) reporting, and associated recordkeeping, requirement for PFAS manufactured (including imported) between 2011 and 2022.[53] The final rule uses the same structure-based PFAS definition that EPA has used in other contexts,[54] which is narrower than the definition used by the Organization for

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[48] *See* Defendants' Trial Brief for Second Phase of Trial at 7, Food & Water Watch, Inc. v. EPA, No 3:17-cv-02162-EMC (N.D. Cal. Dec. 22, 2023).

[49] *See, e.g.*, Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h); Phenol, Isopropylated Phosphate (3:1); Further Compliance Date Extension, 87 Fed. Reg. 12,875 (Mar. 8, 2022) (to be codified at 40 C.F.R. pt. 751).

[50] Decabromodiphenyl Ether and Phenol, Isopropylated Phosphate (3:1); Revision to the Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under the Toxic Substances Control Act (TSCA), 88 Fed. Reg. 82,287 (proposed Nov. 24, 2023) (to be codified at 40 C.F.R. pt. 751).

[51] Memorandum from Lawrence Starfield, Acting Asst. Admin, Off. of Enforcement and Compliance Assurance, to Michal Freedhoff, Asst. Admin., Off. of Chem. Safety and Pollution Prevention, Enforcement Statement Regarding the Prohibition of Processing and Distribution in Commerce of Decabromodiphenyl Ether (DecaBDE)-Containing Wire and Cable Insulation in Nuclear Power Generation Facilities under 40 C.F.R. § 751.405(a)(2)(ii) (May 2, 2023).

[52] Asbestos; Reporting and Recordkeeping Requirements Under the Toxic Substances Control Act (TSCA), 88 Fed. Reg. 47,782 (July 25, 2023) (to be codified at 40 C.F.R. pt. 704).

[53] Toxic Substances Control Act Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances, 88 Fed. Reg. 70,516 (Oct. 11, 2023) (to be codified at 40 C.F.R. pt. 705).

[54] 40 C.F.R. § 705.3 (2023) (defining "PFAS"). This is the same definition EPA used, for example, under the TSCA new chemicals program. *see* U.S. ENVTL. PROT. AGENCY,

Economic Co-operation and Development (OECD) and United Nations Environment Programme (UNEP), which has been relied on by some countries.[55] The final rule applies to any person who manufactured or imported any chemical substance, or mixture containing any chemical substance, that satisfies the Rule's PFAS definition.[56] There are none of the typical TSCA reporting exemptions for small businesses, research and development substances, intermediates, impurities, byproducts, articles or de minimis quantities. The subject persons must submit information concerning chemical identity, disposal, environmental and health effects, uses, volumes made and produced, and worker exposure, among others. Although there is no exemption, there are streamlined reporting options for small quantities of R&D substances and articles containing PFAS. The reporting period begins on November 12, 2024, and runs through May 8, 2025, or through November 10, 2025, for small businesses that import PFAS only in articles.[57]

E. Confidential Business Information

EPA finalized a rule concerning requirements for the assertion and treatment of Confidential Business Information (CBI) claims under TSCA.[58] This rule is the outcome of EPA codifying and consolidating all TSCA CBI claim procedures in a new section under 40 CFR Part 703 (except for other modified provisions). Significant changes concern data protected from disclosure under other statutes, changes to the definition of "health and safety study," and preventing waiver of CBI status by submitters that do not know the underlying confidential information. Finally, the rule requires companies to submit health and safety information using OECD templates, when available, in addition to the full study report.

F. National Program Chemicals

EPA finalized an expanded set of extraction and determinative methods used to characterize and verify the cleanup of polychlorinated biphenyl (PCB) waste under TSCA, and made changes to the PCB remediation rules, including harmonizing the general disposal requirements for PCB remediation wastes and removing provisions allowing PCB bulk product waste to be disposed of as roadbed material.[59]

EPA proposed "to lower the dust-lead hazard standards (DLHS) from 10 mg/ft^2 and 100 mg/ft^2 for floors and windowsills," respectively, "to any reportable level as analyzed by a laboratory recognized by EPA's National Lead Laboratory Accreditation Program."[60]

FRAMEWORK FOR TSCA NEW CHEMICALS REVIEW OF PFAS PREMANUFACTURE NOTICES (PMNS) AND SIGNIFICANT NEW USE NOTICES (SNUNS) (June 28, 2023).

[55]OECD Environment Directorate Chemicals and Biotechnology Committee, *Reconciling Terminology of the Universe of Per-and Polyfluoroalkyl Substances: Recommendations and Practical Guidance*, U.N. Doc. ENV/CBC/MONO (2021)25 (July 9, 2021).

[56]40 C.F.R. §§ 705.5, 705.10 (2023).

[57]40 C.F.R. § 705.20 (2023).

[58]Confidential Business Information Claims Under the Toxic Substances Control Act (TSCA), 88 Fed. Reg. 37,155 (June 7, 2023) (to be codified at 40 C.F.R. pts. 2, 702-04, 707, 716-17, 720, 723, 725, 729).

[59]Alternate PCB Extraction Methods and Amendments to PCB Cleanup and Disposal Regulations, 88 Fed. Reg. 59,662 (Aug. 29, 2023) (to be codified at 40 C.F.R. pt. 761).

[60]Reconsideration of the Dust-Lead Hazard Standards and Dust-Lead Post-Abatement Clearance Levels, 88 Fed. Reg. 50,444 (proposed Aug. 1, 2023) (to be codified at 40 C.F.R. pt. 745).

EPA also proposed to lower the dust-lead clearance levels (DLCL) to 3 mg/ft^2 (floors), 20 mg/ft^2 (window-sills), and 25 mg/ft^2 (window troughs).

II. Emergency Planning and Community Right-to-Know (EPCRA)

EPA added several chemicals to the list of those subject to reporting under the Toxics Release Inventory (TRI) regulations. EPA added nine PFAS chemicals to the TRI list by direct final rule pursuant to National Defense Authorization Act for Fiscal Year 2020,[61] which causes individual PFAS chemicals automatically to be added to the TRI list after EPA makes any of several determinations with respect to the substances (e.g., EPA finalizes a toxicity value for the PFAS).[62] EPA also added a category of diisononyl phthalate (DINP) plasticizers to the TRI list in response to a petition submitted in 2000.[63]

EPA amended the TRI list of "chemicals of special concern" to add several PFAS already subject to TRI reporting. All chemicals on this list are ineligible the Form A, de minimis exemption, and range-reporting TRI reporting burden-reduction options.[64] The amendments also eliminated the availability of the de minimis exemption from supplier notification requirements for all chemicals of special concern.

The Agency began the process of reconsidering its 2019 rule exempting all farms from reporting air emissions from animal waste under EPCRA reporting. The rule had been challenged in the District Court for the District of Columbia and remanded to EPA without vacatur.[65] EPA issued a notice soliciting comment on the particular costs and benefits of removing the exemption.[66]

III. Biotechnology and Nanotechnology Developments

Building on President Biden's 2022 executive order creating the National Biotechnology and Biomanufacturing Initiative (NBBI),[67] the White House Office of Science and Technology Policy (OSTP) developed and published an agenda of particular

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[61] National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92, § 7321, 133 Stat. 1198, 2277 (2019).

[62] Implementing Statutory Addition of Certain Per- and Polyfluoroalkyl Substances (PFAS) to the Toxics Release Inventory Beginning With Reporting Year 2023, 88 Fed. Reg. 41,035 (June 23, 2023) (to be codified at 40 C.F.R. pt. 372) (adding nine PFAS with final toxicity values or added to a SNUR).

[63] Addition of Diisononyl Phthalate Category; Community Right-to-Know Toxic Chemical Release Reporting, 88 Fed. Reg. 45,089 (July 14, 2023) (to be codified at 40 C.F.R. pt. 372).

[64] Changes to Reporting Requirements for Per- and Polyfluoroalkyl Substances and to Supplier Notifications for Chemicals of Special Concern; Community Right-to-Know Toxic Chemical Release Reporting, 88 Fed. Reg. 74,360 (Oct. 31, 2023) (to be codified at 40 C.F.R. pt. 372).

[65] *See* Memorandum Order, Rural Empowerment Assn. for Cmty. Help v. EPA, No. 18-2260 (TJK) (D.D.C. Feb. 14, 2022).

[66] Potential Future Regulation for Emergency Release Notification Requirements for Animal Waste Air Emissions Under the Emergency Planning and Community Right-to-Know Act (EPCRA), 88 Fed. Reg. 80,222 (proposed Nov. 17, 2023)(to be codified at 40 C.F.R. pt. 355).

[67] Exec. Order 14,081, Advancing Biotechnology and Biomanufacturing Innovation for a Sustainable, Safe, and Secure American Bioeconomy, 87 Fed. Reg. 56,849 (Sept. 15, 2022).

policy goals and priorities designed to advance U.S. biotechnology and biomanufacturing,[68] and an action plan to expand U.S. biotechnology and biomanufacturing education and job training.[69] EPA, U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS), and the Food and Drug Administration (FDA) together issued a new, plain-language guidance document for new entrants to the U.S. biotechnology regulatory system and the Coordinated Framework for Regulation of Biotechnology (Coordinated Framework)[70] responding to a review of stakeholders' perceived uncertainties about regulation under the Coordinated Framework.[71] EPA and FDA announced plans to seek public input on the best approaches for updating their respective oversight responsibilities for specific products, including genetically engineered pest animals utilized for pest control purposes.[72]

APHIS issued its final Regulatory Status Review (RSR) Guide, detailing the procedures for preparing and submitting an RSR request under the revised biotechnology regulations at 7 C.F.R. Part 340,[73] and released a revised draft of its permitting guide for microorganisms developed using genetic engineering.[74] It proposed to exempt five new types of plant genetic modifications from regulation under the Plant Protection Act on the basis that the modifications could otherwise be achieved through conventional breeding methods.[75] APHIS also published a new five-year strategic plan that includes biotechnology-related objectives.[76]

EPA promulgated a new exemption from FIFRA registration requirements and pesticide tolerance requirements under the Federal Food, Drug, and Cosmetic Act for plant-incorporated protectants (PIPs). The new rules exempt PIPs created from sexually

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[68] Press Release, The White House, Fact Sheet: Biden-Harris Administration Announces New Bold Goals and Priorities to Advance American Biotechnology and Biomanufacturing (Mar. 22, 2023).

[69] *Building the Bioworkforce of the Future*, MFG. USA (last visited Mar. 30, 2024).

[70] U.S. DEPT. OF AG., U.S. ENVTL. PROT. AGENCY, U.S. FOOD AND DRUG ADM., THE COORDINATED FRAMEWORK FOR THE REGULATION OF BIOTECHNOLOGY PLAIN LANGUAGE INFORMATION ON THE BIOTECHNOLOGY REGULATORY SYSTEM (Nov. 2023).

[71] U.S. DEPT. OF AG., U.S. ENVTL. PROT. AGENCY, U.S. FOOD AND DRUG ADM., REPORT ON STAKEHOLDER OUTREACH RELATED TO AMBIGUITIES, GAPS, UNCERTAINTIES IN REGULATION OF BIOTECHNOLOGY UNDER THE COORDINATED FRAMEWORK (Mar. 2023).

[72] *See* EPA and FDA to Seek Public Input on Modernizing Their Approach to Oversight of Certain Products, U.S. ENVTL. PROT. AGENCY (last updated Apr. 25, 2023).

[73] *See* Press Release, U.S. Dep't of Agric.: Animal and Plant Health Inspection Serv., APHIS Announces Final Regulatory Status Review Guide (Dec. 20, 2022).

[74] ANIMAL AND PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., GUIDE FOR SUBMITTING PERMIT APPLICATIONS FOR MICROORGANISMS DEVELOPED USING GENETIC ENGINEERING UNDER 7 CFR PART 340 (Oct. 13, 2023).

[75] Movement of Organisms Modified or Produced Through Genetic Engineering; Notice of Proposed Exemptions; 88 Fed. Reg. 78,285 (Nov. 15, 2023).

[76] ANIMAL AND PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC, FISCAL YEARS 2023–2027 STRATEGIC PLAN (Apr. 25, 2023).

compatible plants and "loss-of-function PIPs."[77] EPA registered a first-of-its-kind sprayable interfering RNA (RNAi) pesticide product.[78]

OSTP published an RFI seeking public input in updating the National Nanotechnology Initiative (NNI) Environmental, Health, and Safety (EHS) Research Strategy.[79]

IV. Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)

A. Pesticide Regulatory Developments

EPA published an advance notice of proposed rulemaking to solicit comment on whether to initiate regulatory action on seeds and paint treated with preservatives.[80] Articles of this type are generally exempt from FIFRA registration when prepared and sold consistent with the treated articles exemption. Stakeholders have raised questions about the clarity and enforceability of instructions related to treated seed products, and whether treated paints warrant instructions for use to protect professional painters.

The agency developed antimicrobial registration guidance to address several particular pests and application scenarios. In response to strong interest in antimicrobial products with approved public health claims to reduce bacteria and viruses on soft, porous surfaces, EPA developed and released final guidance for evaluating the efficacy of and registering such products, but only for use in clinical and institutional (non-residential) environments.[81] In a significant policy shift, the EPA issued draft guidance for approving virucidal claims to sanitizer products.[82] Approval will be limited to seven years, when the guidance and registrations will be reviewed. EPA released for comment draft guidance[83] for evaluating efficacy claims to reduce planktonic *Legionella pneumophila* in cooling tower water systems and extended its Emerging Viral Pathogen Guidance to allow

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[77]Pesticides; Exemptions of Certain Plant-Incorporated Protectants (PIPs) Derived From Newer Technologies, 88 Fed. Reg. 34,756 (May 31, 2023)(to be codified at 40 C.F.R. pt. 174).

[78]Registration Decision for the New Active Ingredient Ledprona (Leptinotarsa decemlineata-specific recombinant double-stranded interfering oligonucleotide GS2) (CAS Number: 2433753-68-3), U.S. Envtl. Prot. Agency (Dec. 21, 2023).

[79]Request for Information; National Nanotechnology Initiative Environmental, Health, and Safety Research Strategy, 88 Fed. Reg. 20,194 (Apr. 5, 2023).

[80]Pesticides; Review of Requirements Applicable to Treated Seed and Treated Paint Products; Request for Information and Comments, 88 Fed. Reg. 70,625 (proposed Oct. 12, 2023) (to be codified at 40 C.F.R. pt. 152).

[81]Pesticides; Antimicrobial Product Efficacy Claims on Soft Surface Textiles in Non-Residential Settings; Guidance, Methods, and Response to Comments; Notice of Availability 88 Fed. Reg. 59,522 (Aug. 29, 2023).

[82]Draft Guidance for the Evaluation of Products for Claims Against Viruses; Notice of Availability and Request for Comments, 88 Fed. Reg. 45,417 (July 17, 2023); U.S. Envtl. Prot. Agency, Draft Guidance for the Evaluation of Products for Claims Against Viruses (June 1, 2023).

[83]Pesticides; Draft Guidance and Proposed Method for Antimicrobial Product Efficacy Claims Against Planktonic Legionella Pneumophila in Cooling Tower Water; Notice of Availability and Request for Comments, 88 Fed. Reg. 67,749 (Oct. 2, 2023); U.S. Envtl. Prot. Agency, EPA Releases Draft Guidance on Testing the Efficacy of Antimicrobial Pesticides Against Legionella Pneumophila in Cooling Towers (Oct. 2, 2023).

registrants to make limited off-label efficacy claims for a limited time for Marburg virus[84] without organism-specific efficacy data or label amendments.

EPA proposed framework to strengthen the assessment of antimicrobial resistance (AMR) efficacy risks for human and animal drugs associated with pesticide use,[85] a growing global public health threat. The framework was developed jointly by EPA, USDA, and the U.S. Department of Health and Human Services (HHS).

EPA proposed updates to its Safer Choice Standard,[86] which was last updated in 2015.[87] The standard identifies the requirements that products and their ingredients must meet to earn EPA's Safer Choice certification. The DfE program, related to the Safer Choice Standard, is used by EPA for the purpose of helping consumers and commercial buyers identify antimicrobial products that meet this Standard and are registered under FIFRA. The proposed updates include updates to the packaging criteria, allowing certification of cleaning service providers, and adding several product and functional use class requirements.

B. Endocrine Disruptors

EPA released its long-awaited strategic plan to complete screening all pesticide ingredients for potential endocrine-disrupting effects in humans through the 1998 Endocrine Disruptor Screening Program (EDSP)[88] as required by section 408(p) of the Federal Food, Drug, and Cosmetic Act (FFDCA).[89] Among other things, the plan provides that EPA will defer action on all List 2 chemicals and prioritize review of conventional pesticide active ingredient chemicals currently in registration or registration review proceedings,[90] including a data call-in for thirty of these. The plan also describes the endocrine-related data needed to register a new active ingredient and how it will address data deficiencies.

C. Developments: Particular Products and Uses of National Significance

The U.S. Court of Appeals for the Eighth Circuit held that EPA's August 2021 revocation of all food tolerances for chlorpyrifos[91] was arbitrary and capricious because EPA failed to recognize its discretion to cancel less than all tolerances, although canceling

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[84] *Emerging Viral Pathogen Guidance and Status for Antimicrobial Pesticides*, U.S. ENVTL. PROT. AGENCY (last updated Dec. 18, 2023).

[85] Pesticides; Concept for a Framework To Assess the Risk to the Effectiveness of Human and Animal Drugs Posed by Certain Antibacterial or Antifungal Pesticides; Notice of Availability and Request for Comment, 88 Fed. Reg. 65,998 (Sep. 26, 2023).

[86] Modifications to the Safer Choice Standard and Potential Implementation of a Safer Choice Cleaning Service Certification Program; Notice of Availability, Webinar and Request for Comment, 88 Fed. Reg. 78,017 (Nov. 14, 2023).

[87] U.S. ENVTL. PROT. AGENCY, EPA'S SAFER CHOICE STANDARD (revised Feb. 2015).

[88] Endocrine Disruptor Screening Program (EDSP); Near-Term Strategies for Implementation; Notice of Availability and Request for Comment, 88 Fed. Reg. 73,841 (Oct. 27, 2023).

[89] FFDCA § 408(p); 21 U.S.C. § 346a(p).

[90] U.S. ENVTL. PROT. AGENCY, LIST OF CONVENTIONAL REGISTRATION REVIEW CHEMICALS FOR WHICH AN FFDCA SECTION 408(P)(6) DETERMINATION IS NEEDED (Oct. 2023).

[91] Chlorpyrifos; Tolerance Revocations, 86 Fed. Reg. 48,315 (Aug. 30, 2021) (to be codified at 40 C.F.R. pt. 180).

some would reduce exposure sufficiently to keep certain high-benefit agricultural uses "safe."[92]

EPA announced that some organophosphate uses of diazinon,[93] ethoprop, tribufos, and phosmet were determined to have unacceptable risks, and registrants agreed to voluntary mitigation measures years before EPA completed its registration review. [94]

D. Endangered Species Act (ESA) Developments

EPA continued implementation of its 2022 ESA-FIFRA workplan, which describes how the agency will handle new registration applications and registration review cases while meeting its obligations under the ESA to ensure that pesticide registrations do not jeopardize endangered species or adversely modify critical habitat.[95] Certain elements of the workplan were given court-enforceable deadlines as part of the landmark settlement of the long-running, so-called "Mega" litigation.[96] The final settlement of the Mega litigation obligates EPA to complete Biological Evaluations for several organophosphates by 2027 and to publish certain class-wide "strategies" and presumptive remedies that are part of the "workplan" (*i.e.*, for herbicides, rodenticides, and insecticides) by dates certain. EPA completed and released the draft herbicide strategy[97] and draft rodenticide biological evaluation, which will serve as the rodenticide strategy when finalized.[98] The Insecticide Strategy draft is due in July of 2024. The Mega settlement also set a date for the issuance of the EPA Vulnerable Species Pilot Program, or VSPP document, designed to move toward a more programmatic and less chemical-by-chemical approach to protect a suite of 12 particular species.

Notably, the strategies and the VSPP do not alter product use requirements themselves; rather, they provide a framework to be applied during the registration review or evaluation of new applications. A major component of how EPA intends to implement these frameworks is through Bulletins Live Two.[99]

The Mega case settlement did not eliminate all ESA litigation. The Center for Food Safety challenged EPA's assertion that it may grant a registration prior to the completion of consultation with FWS and NMFS because doing so (imposing early mitigation if needed in EPA's view pending completion of consultation) does not constitute an "irreversible or irretrievable commitment of resources" and is therefore permissible under

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[92] Red River Valley Sugarbeet Growers Ass'n v. Regan, No. 22-1422 (8th Cir. Nov. 2, 2023).

[93] Press Release, U.S. Envtl. Prot. Agency, EPA Reaches Agreement on Early Mitigation Measures Initiative for an Organophosphate Pesticide (Apr. 27, 2023).

[94] Press Release, U.S. Envtl. Prot. Agency, EPA Reaches Agreements on Early Mitigation Measures for Three More Organophosphate Pesticides (May 25, 2023).

[95] *EPA's Workplan and Progress Toward Better Protections for Endangered Species*, U.S. ENVTL. PROT. AGENCY (last updated July 11, 2023).

[96] Proposed Stipulated Settlement Agreement, Ctr. for Biological Diversity v. EPA, No. 3:11-cv-00293 (N.D. Cal. Sept. 21, 2023).

[97] Press Release, U.S. Envtl. Prot. Agency, Draft Strategy to Better Protect Endangered Species from Herbicide Use (July 24, 2023).

[98] Press Release, U.S. Envtl. Prot. Agency, EPA Releases Draft Biological Evaluation of 11 Rodenticides' Effects on Endangered Species (Dec. 1, 2023); *see also* U.S. ENVTL. PROT. AGENCY, UPDATE ON VULNERABLE SPECIES PILOT (Nov. 2023).

[99] *Bulletins Live! Two -- View the Bulletins*, U.S. ENVTL. PROT. AGENCY (last updated Jan. 10, 2024).

ESA Section 7(d).[100] A challenge was also filed to EPA's application of the treated articles exemption to certain neonicotinoid-treated seeds, arguing in part, that EPA had failed to properly evaluate the effects of treated seeds under the ESA.[101]

In *Maine Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*,[102] the D.C. Circuit Court of Appeals vacated a NMFS biological opinion (BiOp) concerning the effects of certain fisheries on the Right Whale. Instead of making "an empirical judgment" about whether fishery activities were "likely" to jeopardize the whales, NMFS had relied on worst-case assumptions. If NMFS "lacks a clear and substantial basis for predicting an effect is reasonably certain to occur… [then] the effect must be disregarded in evaluating the agency action."[103]

In *Migrant Clinicians Network v. U.S. Envtl. Prot. Agency*,[104] the Court vacated an amended registration of streptomycin. The Court rejected a claim that EPA did not properly assess possible antibiotic resistance concerns but agreed that EPA failed to adequately assess effects on pollinators. EPA did not contest an additional complaint that it had failed to comply with ESA screening requirements and asked for remand without vacatur, but court vacated the registration when EPA could not commit to a relatively short timeline (180 days) to come into compliance with the ESA, a benchmark the Court had used in a recent case.[105]

E. Agricultural Worker Protection Standard

In March 2023, EPA issued a proposed rule revising certain application exclusion zone (AEZ) requirements of the Agricultural Worker Protection Standards (WPS).[106] EPA had initially revised the AEZ requirements in a final rule published on October 30, 2020 (2020 AEZ Rule),[107] but that rule remains stayed pursuant to a court order. Since then, EPA has determined that certain requirements in the 2020 AEZ Rule do not adequately protect public health, including limiting the applicability of the AEZ to the agricultural employer's property and the distance determination criteria. EPA has therefore proposed rulemaking to reconsider the 2020 AEZ Rule. The proposed rule would reinstate certain requirements in the 2015 WPS standards[108] while retaining some standards in the 2020

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[100]Complaint, Ctr. for Food Safety v. EPA, No. 23-cv-1633 (D.D.C. June 6, 2023).
[101]Complaint, Ctr. for Food Safety v. EPA, No. 23-cv-02714 (N.D. Cal. May 31, 2023).
[102]70 F.4th 582 (D.C. Cir. 2023).
[103]Notably, the Court's reference to the "reasonably certain to occur" standard implicates a separate ongoing rulemaking process by FWS and NMFS concerning the consultation regulations that will likely result in updates to the interagency consultation regulations in 2024. The Proposed Rule was issued only a week after the *Maine Lobstermen's* decision. *See* Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation, 88 Fed. Reg. 40,753 (proposed June 22, 2023) (to be codified at 50 C.F.R. pt. 402).
[104]No. 21-70719, 2023 WL 8613493 (9th Cir. Dec. 13, 2023).
[105]Ctr. for Food Safety v. Regan, 56 F.4th 648, 669 (9th Cir. 2022).
[106]Pesticides; Agricultural Worker Protection Standard; Reconsideration of the Application Exclusion Zone Amendments, 88 Fed. Reg. 15,346 (proposed Mar. 13, 2023) (to be codified at 40 C.F.R. pt. 170).
[107]Pesticides; Agricultural Worker Protection Standard; Revision of the Application Exclusion Zone Requirements, 85 Fed. Reg. 68,760 (Oct. 30, 2020) (codified at 40 C.F.R. pt. 170).
[108]Pesticides; Agricultural Worker Protection Standard Revisions, 80 Fed. Reg. 67,496 (Nov. 2, 2015) (to be codified at 40 C.F.R. pt. 170).

AEZ Rule. For example, EPA's 2023 proposed rule would reinstate the 2015 requirement that pesticide handlers suspend application if a person, other than appropriately trained and equipped applicators, enters an AEZ regardless of whether they are within the property's boundaries that are under the agricultural employer's control.[109] EPA's 2023 proposed rule also would reinstate the 2015 requirements that specify: (1) a 100 feet AEZ for ground-based fine spray applications, (2) a 25-foot AEZ for ground-based applications using medium or large droplet sizes sprayed above 12 inches, and (3) all applicable determination criteria from the 2015 WPS standards with the exception of the Volume Median Diameter (VMD) droplet size criterion when making distance determinations.

F. State Developments of National Significance

In *National Association of Wheat Growers v. Bonta*,[110] the Ninth Circuit entered a permanent injunction enjoining the California Attorney General from enforcing California's Proposition 65's (Prop 65) carcinogen warning requirement for the herbicide glyphosate, finding that requiring the warning was unconstitutional as a violation of First Amendment free speech rights.[111] In so holding, the Ninth Circuit determined that: (1) the government's proposed Prop 65 warning as applied to glyphosate was not purely factual and uncontroversial, as the use of the word "risk" was still "factually misleading because a reasonable person reading it would understand this to mean that glyphosate poses a *risk* not a *hazard*[,]" and therefore, the warning was subject to intermediate scrutiny;[112] and (2) there were "less burdensome ways for [California] to convey its message than to compel plaintiffs to convey it for them," (e.g., California could post information about glyphosate on its own website or conduct an advertising campaign).[113]

California's Department of Pesticide Regulation (DPR) issued a notice of proposed regulatory action on November 3, 2023, which would impose additional requirements for notices of intent (NOI) for the agricultural use of restricted materials.[114]

G. Pesticide Registration Improvement Act (PRIA) developments

The Pesticide Registration Improvement Act of 2022 (PRIA 5) reauthorized EPA's ability to collect pesticide maintenance fees through FY2027 and registration services fees through FY2029.[115] PRIA 5 increased the average annual maintenance fee collection target and raised the registration service fees and added new categories. The PRIA 5 pesticide registration service fee schedule became effective February 27, 2023.[116] EPA also is working on implementing other provisions of PRIA 5 including: (1) Section 3(f)(5) of FIFRA, which directs EPA to require some sections of the pesticide product labeling to be translated into Spanish; (2) the establishment of the Vector Expedited Review Voucher

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[109]Pesticides; Agricultural Worker Protection Standard; Reconsideration of the Application Exclusion Zone Amendments, 88 Fed. Reg. at 15,347.
[110]85 F.4th 1263 (9th Cir. 2023).
[111]*Id.*
[112]*Id.* at 1281.
[113]*Id.* at 1283.
[114]Statewide Notification of Agricultural Use of Restricted Materials, 44-Z Cal. Regulatory Notice Reg. 1402 (Nov. 3, 2023).
[115]Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, § 703, 136 Stat. 4459, 5999 (2022).
[116]*See FY 2023-2024 Fee Schedule for Registration Applications*, U.S. ENVTL. PROT. AGENCY (last updated Mar. 5, 2024).

(VERV) Program, which would incentivize expedited review of new insecticides to control the spread of vector-borne disease; and (3) information technology modernization, including an information technology system for electronic submissions and application tracking. EPA estimated that it would be able to accomplish many of these actions by December 29, 2023.[117]

As part of PRIA 5 implementation, EPA has: held a webinar on bilingual pesticide labels and conducted outreach to the states and other stakeholders on bilingual labeling; developed Endangered Species Act (ESA) guidance related to the registration of new active ingredients and outdoor new uses of pesticides;[118] and announced funding opportunities for the Pesticide Safety Education Program[119] and the National Pesticide Information Center.[120]

V. State Chemical Control Developments

In 2023, at least five states instituted new or revised laws related to PFAS in products. Minnesota enacted legislation requiring the phase-out of intentionally added PFAS in certain consumer products, including cookware, cosmetics, upholstered furniture, and juvenile products, starting in 2025, and then all covered products by 2032.[121] Manufacturers of PFAS-containing products must begin reporting products to the state environmental agency beginning in 2026. The Maine legislature amended that state's PFAS product reporting and restriction law to extend the initial reporting deadline from 2023 to January 1, 2025.[122] Other states adopted bans and disclosure requirements applicable to particular categories of PFAS-containing products. New York banned intentionally-added PFAS in apparel and outdoor apparel for severe wet conditions.[123] Indiana now requires firefighting gear containing PFAS to be labeled.[124] Oregon banned the manufacture, sale, and distribution of cosmetic products containing PFAS or certain other chemicals of concern beginning in 2027,[125] and banning foodware containers containing PFAS beginning in 2025.[126] Maryland will study the use of PFAS in pesticides in the state and determine if other actions are needed.[127]

States have addressed other chemicals in products. Minnesota now restricts the amount of cadmium and lead content in various consumer products.[128] New York banned

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[117] *PRIA 5 Implementation*, U.S. Envtl. Prot. Agency (last updated Jan. 10, 2024).
[118] Press Release, U.S. Envtl. Prot. Agency, Register for EPA's Webinar on Bilingual Pesticide Labels (May 18, 2023).
[119] Press Release, U.S. Envtl. Prot. Agency, EPA Opens Application Period for Grant Supporting Education and Training for Pesticide Applicators (Mar. 13, 2023).
[120] Press Release, U.S. Envtl. Prot. Agency, EPA Requests Applications for $10 Million National Pesticide Information Center Agreement (June 23, 2023).
[121] H.F. 2310, 93rd Leg., Reg. Sess. (Minn. 2023), 2023 Minn. Laws Ch. 60, art 3, § 21.
[122] L.D. 217, 131st Leg., 1st Spec. Sess. (Me 2023) (codified at Me Stat. tit. 38, § 1614).
[123] S.B. 1322, 2023-2024 Leg. Sess. (N.Y. 2023) (codified at N.Y. Envtl. Conserv. Law § 37-0121).
[124] H.B. 1341, 123rd Gen. Assemb., 1st Reg. Sess. (Ind. 2023) (codified at Ind. Code § 36-8-27).
[125] S.B. 546, 82nd Leg. Assemb., 2023 Reg. Sess. (Or. 2023), 2023 Or. Laws Ch. 575.
[126] S.B. 543, 82nd Leg. Assemb., 2023 Reg. Sess. (Or. 2023) (to be codified at Or. Rev. Stat. § 459.995).
[127] S.B. 158, 2023 Leg. Sess. (Md. 2023), 2023 Md. Laws Ch. 485.
[128] H.F. 2310, 93rd Leg., Reg. Sess. (Minn. 2023), 2023 Minn. Laws Ch. 60, art 3, § 24.

the sale of cosmetics or personal care products containing mercury,[129] and Maine banned the sale of certain mercury-added lamps.[130] California banned the sale of any juvenile product, mattress, or upholstered furniture containing textile fiberglass,[131] and expanded the list of substances prohibited in cosmetic products.[132] Oregon banned the sale of cosmetics containing certain chemicals, and imposed disclosure requirements on the sale of cosmetics containing high priority chemicals designated by the Oregon Health Authority.[133] Oregon also banned food vendors from using polystyrene foam containers when selling or serving food to consumers, and anyone from selling polystyrene foam containers and packaging peanuts.[134] Delaware and Rhode Island passed a similar laws prohibiting food establishments from providing polystyrene foam containers for ready to eat food and beverages.[135]

[129] A. 619, 2023-2024 Leg. Sess. (N.Y. 2023) (codified at N.Y. ENVTL. CONSERV. LAW § 37-0117).
[130] L.D. 1814, 131st Leg., 1st Spec. Sess. (Me. 2023) (codified at 38 M.R.S.A. § 1672).
[131] A.B. 1059, 2023-2024 Reg. Sess. (Cal. 2023) (codified at CAL. BUS. & PROF. CODE § 19101.5).
[132] A.B. 496, 2023-2024 Leg. Sess. (Cal. 2023) (codified at CAL. HEALTH & SAFETY CODE § 108980).
[133] S.B. 546, 82nd Leg. Assemb., 2023 Reg. Sess. (Or. 2023); 2023 Or. Laws Ch. 575.
[134] S.B. 543, 82nd Leg. Assemb., 2023 Reg. Sess. (Or. 2023) (to be codified at OR. REV. STAT. § 459.995).
[135] S.B. 51, 152. Gen. Assemb., 2023 Leg. Sess. (Del. 2023) (codified at DEL. CODE. ANN. tit. 16, § 122, § 3001Q *et seq.*); S.B. 14, 2023 Reg. Sess. (R.I. 2023) (codified at R.I. GEN. LAWS tit. 21, § 27.3).

Chapter Q: PROJECT DEVELOPMENT
2023 Annual Report[1]

I. INTRODUCTION

This 2023 report, while touching upon such subjects as impactful legislation and private developments in the energy sector, expands the scope of this year's report to include ever important environmental justice considerations within the field.

II. ENVIRONMENTAL JUSTICE GROWS INFLUENCE IN INFRASTRUCTURE DEVELOPMENT

A. Electric Vehicle Infrastructure

1. Introduction

The Biden Administration is continuously working on funding and incentives for a nationwide network of charging stations for Electric Vehicles (EV). In recent years, President Biden's Justice40 initiative tasked the Department of Transportation, Department of Energy, and the Joint Office of Energy and Transportation with overseeing the Electric Vehicle (EV) charging and infrastructure programs.[2] "Transportation is the single largest source of carbon emissions in the" United States.[3] Biden's goal is to build a national network of 500,000 public EV charging stations and reduce national greenhouse emissions by 50-52% by 2030.[4] Multiple steps were taken in 2023 to meet the goals set by the administration and departments.

2. *Policy Developments*

The U.S. Department of Transportation's new Changing and Fueling Infrastructure (CFI) Discretionary Grant Program provides "$2.5 billion over 5 years to a wide range of applications, including cities, counties, local governments, and Tribes."[5] The first round of funding in fiscal years 2022 and 2023 makes up to $700 million of "funding available to strategically deploy EV charging and other [...] infrastructure projects in publicly accessible locations in urban and rural communities, as well as designated Alternative Fuel Corridors (AFCs)."[6] "The final minimum standards for federally funded EV charging infrastructure projects [along with the] implementation plan for President Biden's EV

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[1]This report, which covers significant developments in the area of energy and environmental infrastructure projects during 2023 was authored by Megan Burke Freveletti, Nancy C. Ralston Graduate Attorney with the Conservation Law Center; Kate Johnson, Associate, Husch Blackwell LLP; Rob Markus, Associate Husch Blackwell LLP; Olivia Montgomery, Judicial Law Clerk at the U.S. District Court for the Northern District of Mississippi; Brittney Beetcher, J.D. Candidate at University of Colorado School of Law; and Zechariah McGugan, J.D. Candidate at University of Wisconsin School of Law.

[2]*Justice40 Initative*, THE WHITE HOUSE (last visited Mar. 17, 2024).

[3]Tom Krisher & Matthew Daly, *AP Sources: EPA car rule to push huge increase in EV sales*, ASSOCIATED PRESS (Apr. 10, 2023 6:02 PM).

[4]Press Release, The White House, Fact Sheet: President Biden Announces Steps to Drive American Leadership Forward on Clean Cars and Trucks (Aug. 5, 2021).

[5]Press Release, U.S. Dep't of Transp., Biden-Harris Administration Opens Applications for First Round of $2.5 Billion Program to Build EV Charging in Communities & Neighborhoods Nationwide (March 14, 2023) [hereinafter $2.5 Billion Program].

[6]*Id.*

charging Build America, Buy America requirements [aids all states in building] EV charging stations pursuant to their approved state charging plans [that were] developed under the National Electric Vehicle Infrastructure (NEVI) Formula Program."[7] The Federal Highway Administration (FHWA) established a temporary public interest waiver effective March 23, 2023 "to waive Buy America requirements for steel, iron, manufactured products, and construction materials in" EV chargers.[8] The temporary waiver enabled EV charger acquisition and installation to immediately proceed while also ensuring the application of Buy America to EV chargers after the short term waiver is phased out.[9] The waiver applies to all EV chargers manufactured by July 1, 2024, whose final assembly occurs in the United States, and whose installation has begun by October 1, 2024.[10] The goal of these national standards is to "give EV users confidence that they will be able to find available, safe, and reliable EV charging stations across the country," which is a "critical step in building a seamless national network" for the widespread adoption of EVs.[11]

3. *Policy Implementation and Shortcomings*

Overall, there was significant growth in EV sales in 2023. EVs "are on pace to make up 9% of sales" in 2023 compared to light-duty vehicles "including plug-in hybrids, accounting for 7.3% of sales in 2022."[12] Further, "sales of hybrids, plug-in, and battery [EVs] account for 15.8% of all new light-duty vehicle sales in the United States [as of September 2023], compared to 12.3% in 2022 and 8.5% in 2021."[13]

One of the goals of the Biden administration is to expand EV charging infrastructure.[14] The reason for expansion is to address concerns American drivers may "have when considering making the switch to electric," by ensuring that they are accessible and visible in the community.[15] While the Biden administration is making policy changes to implement the widespread adoption of EV and EV charging sites, "regulatory mandates [and incentives alone] will not address the conditions that will determine the ultimate success of the EV transition."[16] In a 2023 study by Pew Research,

> Americans who are confident the country will build the necessary infrastructure are more likely than others to say they would consider purchasing an EV. Among those who are extremely or very confident that the U.S. will build the infrastructure needed to support EVs, 68% say they would be at least somewhat likely to consider purchasing an EV. Just 19% of those who are not too or not at all

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[7] Press Release, U.S. Dep't of Transp., Biden-Harris Administration Announces Latest Steps to Deliver National Network of Convenient, Reliable, Made in America Electric Vehicle Chargers (Feb. 15, 2023). [hereinafter American-made EVC].
[8] Waiver of Buy America Requirements for Electric Vehicle Chargers, 88 Fed. Reg. 10,619 (Feb. 21, 2023).
[9] *Id.*
[10] *Id.*
[11] American-made EVC, *supra* note 7.
[12] Robert Walton, *EV Sales climb and are on track to be 9% of US new car purchases in 2023: Atlas Public Policy*, UTILITY DIVE (Nov. 28, 2023).
[13] *Id.*
[14] $2.5-Billion Program, *supra* note 5.
[15] *Id.*
[16] Krisher & Daly, *supra* note 3.

confident in future EV infrastructure say they are at least somewhat likely to consider purchasing an EV.[17]

Further, the public interest "in purchasing an EV is down 4 percentage points from May 2022." [18] This points to that while people need the charging sites to successfully drive their EV, they need confidence that the charging is there in order to purchase an EV in the first place.[19] The study suggests that investments in EV charging alone isn't enough, and that communication about those investments are the key to making them successful.[20] Thus, it is important that education about EVs and charging sites directly to consumers and other outreach programs are available to reach President Biden's emissions goals.[21]

B. Clean Energy Infrastructure

1. Introduction

In 2023, several Midwestern states, including Michigan and Minnesota, took instrumental steps towards improving and achieving their state's clean energy standards. Governor Gretchen Whitmer of Michigan signed a package of bills that enable the state to become a leader in clean energy standards in the United States and help accomplish Governor Whitmer's earlier proposed clean energy goals. Notably, this package of bills includes Senate Bill 271, which requires [energy companies in Michigan] to meet a 100% clean energy standard by 2040.[22] Other pieces of legislation in the package include measures that increase the state's energy waste reduction standards and create goals for further energy savings and allow farmers to rent out their land for solar energy generation while still participating in the state's farmland and open space preservation program. Other signed bills consider the authority granted to state agencies when regulating the energy sector and provide the Michigan Public Service Commission "the authority to approve large scale renewable energy projects."[23]

2. Progress with Pushback

However, while this legislation instructs the Michigan Public Service Commission to weigh factors like equity, environmental justice, affordability, public health, and more, it is important to note that several environmental justice advocacy groups criticized some aspects of this legislation, specifically Senate Bill 271.[24] Environmental justice advocates stated that the legislation's definition of renewable energy to include landfill gas, biomass, gas from a methane digester, and incinerators and natural gas using carbon capture technology will potentially impact low-income communities and communities of color that are already disproportionately adversely affected from greenhouse gas emissions and

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[17]Allison Spencer et al., *How Americans View Electric Vehicles*, PEW RESEARCH CENTER (July 13, 2023) [hereinafter *American view EV*].
[18]*Id.*
[19]Elizabeth Turnbull, *If You Build It, You'd Better Tell Them About It*, UTILITY DIVE (Nov. 13, 2023).
[20]*American view EV*, *supra* note 17.
[21]Turnbull, *supra* note 19
[22]Jon King, *Whitmer signs climate change legislation setting 100% clean energy standard for Michigan by 2040*, MICH. ADVANCE (Nov. 28, 2023, 6:06 PM).
[23]*Id.*
[24]Elle Meyers, *Here's a look at the response to Michigan's Clean Energy and Jobs Act*, CBS NEWS (Nov. 30, 2023, 5:58 PM).

pollution, in future siting of these projects.[25] Similarly, Minnesota Governor Tim Walz signed two pieces of legislation, Senate File 4 and House File 7. These bills represent a commitment to "both a carbon-free energy standard and a renewable energy standard."[26] The carbon-free standard commits all Minnesota utilities to provide their in-state customers with one hundred percent carbon-free electricity by 2040.[27] In the Minnesota legislation, carbon-free is defined as an energy source that does not release carbon dioxide, and includes sources such as solar, wind, nuclear, and hydropower. Moreover, the legislation simplifies the process for siting new clean energy projects throughout the state by, for example, streamlining the siting and routing process for solar energy generation projects.[28]

III. Interest Grows in Clean Energy Alternatives, Hydrogen and Off-Shore Wind

A. Global Interest in Hydrogen Energy Rises, U.S. Drafts Guidelines for Green Hydrogen Tax Credits

1. Introduction

In 2023, there was a surge of interest in hydrogen energy, with governments around the world announcing ambitious hydrogen strategies. The European Union moved forward with its European Hydrogen Bank to help invest in hydrogen projects across Europe and held a pilot auction in December to help bidders prepare for projects in 2024.[29] Japan announced its intention to invest $107 billion in hydrogen supply over the next 15 years and increase its yearly hydrogen production to 12 million tons.[30] In October, the United States announced seven regional "Hydrogen Hubs" that will receive a collective $7 billion of government funding.[31]

2. Public and Private Progress

This increased interest culminated in the 28th Conference of the Parties to the U.N. Framework Convention on Climate Change (COP28), where hydrogen energy was spotlighted.[32] High-level panels and dedicated sessions delved into the challenges and opportunities of scaling up green hydrogen production, building robust infrastructure, and fostering technological advancements to increase the efficiency of production and transportation. Countries like Australia, Japan, and Morocco showcased ambitious

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[25]Nidhi Sharma, *Whitmer signs package to push Michigan to 100% clean energy by 2040*, NBC News (Nov. 28, 2023, 1:37 PM CST).
[26]Madeline Dawson, *Minnesota Joins 20 Other States in Pursuit of 100 Percent Clean Energy*, EESI (Apr. 21, 2023).
[27]Jo Olson, *Minnesota's 100% clean electricity law explained*, Fresh Energy (Feb. 20, 2023).
[28]Dawson, *supra* note 26.
[29]*Hydrogen*, Eur. Comm'n: Energy, Climate Change, Envt. (last visited Mar. 17, 2024); Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Hydrogen Bank, COM/2023/156 (Mar. 16, 2023).
[30]Katya Golubkova & Yuka Obayashi, *Japan to Invest $107 Billion in Hydrogen Supply Over 15 Years*, Reuters (June 6, 2023).
[31]Press Release, The White House, Biden-Harris Administration Announces Regional Clean Hydrogen Hubs to Drive Clean Manufacturing and Jobs (Oct. 13, 2023).
[32]Hydrogen and Fuel Cell Technologies Office, *Clean Hydrogen Takes Center Stage at COP28 in Dubai*, Office of Energy Efficiency & Renewable Energy (Dec. 6, 2023).

hydrogen roadmaps, and private companies unveiled innovative projects and partnerships.[33] At the end of COP28, over 30 countries signed a Declaration of Intent on Mutual Recognition of Certification Schemes for Renewable and Low-carbon Hydrogen and Hydrogen Derivatives.[34]

In December 2023, the U.S. Treasury Department and IRS released draft guidance for claiming the 45V "Green Hydrogen Energy Credit" established by the 2022 Inflation Reduction Act.[35] The 45V tax credit offers up to $3 per kilogram of clean hydrogen produced.[36] In order to claim this credit, the electricity in hydrogen production needs to be sourced from renewable or zero-emission sources.[37] Hydrogen producers may use Energy Attribute Certificates (EACs) to confirm this.[38] The proposed guidance creates three new criteria for the EACs specific to hydrogen: incrementality, deliverability, and temporal matching.[39] The finalized guidance is expected in mid-2024.

B. U.S. Offshore Wind Experiences Growth and Growing Pains

1. Introduction

The U.S. offshore wind industry saw continued growth in 2023. Since the passage of the Inflation Reduction Act in August of 2022, investment in the industry has increased by $7.7 billion, including significant investments in U.S. infrastructure and supply chain.[40] However, inflation, supply chain issues, high-interest rates, and insufficient subsidies resulted in rising project costs in 2023.[41] As a result, some developers canceled or sought to renegotiate power purchase agreements signed prior to the onset of higher project costs.[42]

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[33] *ANU at COP28: Hydrogen as a Pathway to Decarbonization – What can Australia Supply?*, AUSTRALIAN NAT'L UNIV. (Dec. 5, 2023); Eva Levesque, *Morocco Reveals Strategy to Speed Up Energy Transition*, ARABIAN GULF BUSINESS INSIGHT (Dec. 11, 2023) ; Yosuke Watanabe & Yomiuri Shimbun, *Gov. Koike Announces Plans for 'Hydrogen Exchange' at COP28; Looks to Boost Adoption of Energy Source*, THE JAPAN TIMES (Dec. 2, 2023 16:46 JST); *COP28: Focusing on Private-Sector Solutions*, U.S. CHAMBER OF COMMERCE (last updated Mar. 8, 2024).

[34] Press Release, U.S. Dep't of Energy, At COP28, Countries Launch Declaration of Intent on Clean Hydrogen (Dec. 6, 2023).

[35] Section 45V Credit for Production of Clean Hydrogen, 88 Fed. Reg. 89,220 (proposed Dec. 26, 2023) (to be codified at 29 C.F.R. pt. 1).

[36] *Id.* at 89,247.

[37] *Id.* at 89,220.

[38] *Id.* at 89,227.

[39] *Id.* at 89,228.

[40] Press Release, The White House, Fact Sheet: Biden-Harris Administration Advances Offshore Wind Transmission, Strengthens Regional Supply Chain Buildout, and Drives Innovation (Sept. 21, 2023).

[41] Scott DiSavino & Nerijus Adomaitis, *Explainer: Why the US offshore wind industry is in the doldrums*, REUTERS (Sept. 7, 2023; 3:01 AM CST); *see also* U.S. Dep't of Energy, *Offshore Wind Market Report: 2023 Edition*, 82 (Aug. 2023) (mid-year industry survey suggesting cost inflation of 11%-20% since 2021, with some respondents reporting cost increases of more than 30%).

[42] Diana DiGangi, *New York rejects Ørsted, Equinor and BP bids to adjust offshore wind contracts*, UTILITY DIVE (Oct. 13, 2023); Emma Penrod, *Avangrid moves to cancel Park City offshore wind contracts on heels of SouthCoast termination*, UTILITY DIVE (Oct. 4, 2023).

2. *Growth and Interest Persist*

Despite setbacks, many projects remain on track. In New York, Ørsted's South Fork Wind began producing power in December, and Vineyard Wind 1 off the coast of Massachusetts is expected to follow suit soon.[43] The construction of Atlantic Shores Project I off of New Jersey, Revolution Wind off of Rhode Island, and the Coastal Virginia Offshore Wind Project—the nation's largest offshore wind farm approved to date—will also begin in the coming year.[44]

The industry expects 2023's challenges to begin subsiding in 2024.[45] Several Northeastern states recently announced solicitation rounds where developers intend to place new bids on canceled or threatened power purchase agreements.[46] Five states will allow contracts for new projects to be adjusted for inflation that occurs before construction commences.[47] IAnd finally, 18 planned component manufacturing projects coupled with the collaboration between nine East Coast states and federal agencies should increase supply chain capacity.[48]

IV. INCREASED REGULATION OF UTILITY AND RESIDENTIAL CLEAN ENERGY INDUSTRIES

A. Property Assessed Clean Energy Financing Faces New Lending Rules

1. Introduction

On May 11, 2023, the Consumer Financial Protection Bureau (CFPB) proposed a rule to amend Regulation Z, addressing the applicability of the Truth in Lending Act (TILA) to Residential Property Assessed Clean Energy (R-Pace) programs.[49]

2. R-Pace Market and Loan Structure

The market for R-Pace loans has grown in recent years, reportedly financing approximately $8.46 million worth of upgrades in 2022.[50] Eligible upgrades under these programs vary by locality,[51] but generally cover energy efficiency, water efficiency,

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[43]Scott DiSavino & Nora Buli, *Ørsted South Fork offshore wind farm delivers first power to NY electric grid*, REUTERS (Dec. 6, 2023; 11:43 AM CST); Benjamin Storrow, *Vineyard Wind begins construction after ducking financial peril*, E&E NEWS BY POLITICO (Aug. 8, 2023).

[44]*Atlantic Shores Offshore Wind Project 1*, NS ENERGY (last visited Mar. 17, 2024); Scott DiSavino, *US offshore wind poised for success next year after turbulent 2023*, REUTERS (Dec. 22, 2023; 1:41 PM CST).

[45]DiSavino, *supra* note 44.

[46]*Id*.

[47]Maria Gallucci, *After a brutal 2023, offshore wind looks to overcome growing pains*, CANARY MEDIA (Dec. 21, 2023).

[48]Oceantic Network, *2023 (Q2) U.S. Offshore Wind Quarterly Market Report*, 6 (July 5, 2023); Oceantic Network, *2023 (Q3) U.S. Offshore Wind Quarterly Market Report*, 7 (Oct. 17, 2023).

[49]Residential Property Assessed Clean Energy Financing (Regulation Z), 88 Fed. Reg. 30,388 (proposed May 11, 2023) (to be codified 12 C.F.R. pt. 1026).

[50]*See PACE Market Data*, PACENATION (last updated Mar. 31, 2023).

[51]Residential Property Assessed Clean Energy (R-PACE): Key Considerations for State Energy Officials, NAT'L ASS'N OF STATE ENERGY OFFICIALS at 1 (Mar. 2018) [hereinafter R-PACE Key Considerations].

resiliency, and renewable energy upgrades.[52] While the municipality and locality authorize the programs through enabling legislation, private lenders can administer the funds.[53] The program is distinctive for its collateral. Most enabling legislation[54] creates a "Super Priority"[55] voluntary tax lien, which holds a senior position to any non-tax debt on the property.[56] Another unique aspect of the program is the underwriting criteria which focuses on the property's financial health and the owner's equity in it.[57] This varies significantly from the traditional ability-to-repay model which considers a borrower's credit score, credit history, and debt-to-income ratio.[58]

3. TILA Requirements for R-Pace Transactions

The proposed rule primarily focuses on clarifying TILA's applicability to R-Pace programs, including both its ability-to-repay rules and civil penalties.[59] The current definition for "credit" in Regulation Z categorically excludes all "tax lien[s]" and "tax assessment[s]."[60] This exclusion implies that TILA provisions do not apply to the voluntary tax assessments created by most R-Pace programs. The proposed change specifies that the exclusion only applies to *involuntary* "tax lien[s]" and "tax assessment[s]."[61] With this clarification, R-Pace lenders would be required to comply with TILA rules. This includes the ability-to-repay rule, which would shift the traditional underwriting criteria for these transactions from looking solely at the properties financials to also mandating a review of the borrower's credit score, credit history, and debt-to-income ratio.[62]

4. Modified Loan Estimates and Closing Disclosures Required for R-Pace Transactions

If adopted, the proposed rule would also require R-Pace lenders to provide Loan Estimates and Closing Disclosures that reflect the unique nature of R-Pace transactions.[63] A Loan Estimate provides a borrower with a good faith estimate about the credit costs and the terms of the transaction while a Closing Disclosure provides a final disclosure of the actual terms.[64] Both form documents use clear language to help consumers find key information, assess affordability, and compare costs.[65] While imposing an additional requirement on R-Pace lenders, the proposed rule does adjust certain aspects of these disclosures to account R-Pace transactions' unique nature.[66] Notable changes include clarifying information about transactions implications[67] and providing a separate

[52] *Id.* at 2.
[53] *Id.*
[54] *See* MINN. STAT. § 216C.437(4); VT. STAT. ANN. tit. 24 § 3255 (b) (2022).
[55] Property Assessed Clean Energy (PACE) Program, 85 Fed. Reg. 2736 (Jan. 16, 2020).
[56] R-PACE Key Considerations, *supra* note 51, at 2.
[57] *Id.*
[58] *Id.*
[59] Residential Property Assessed Clean Energy Financing (Regulation Z), 88 Fed. Reg. at 30,388.
[60] *Id.* at 30,396 (alteration in original).
[61] *Id.* (emphasis added).
[62] *Id.* at 30,388.
[63] *Id.* at 30,399.
[64] *Id.*
[65] Residential Property Assessed Clean Energy Financing (Regulation Z), 88 Fed. Reg. at 30,399.
[66] *Id.*
[67] *Id.* at 30,388.

component identifying a sperate tax assessment for property tax obligations on the Loan Estimate.[68] The changes also mandate disclosures about the R-Pace lender itself in the Loan Estimate, including identifying information about the company,[69] and disclosures in the Closing Disclosure related to the assumption,[70] late payment,[71] partial payment policy, and the consumer's liability after foreclosure.[72]

B. Utility Scale Renewable Energy Faces New Foreign Ownership Rules

1. Introduction

Between January to June 2023, fifteen states enacted restrictions on foreign ownership of land. Joining the states that already had restrictions prior to 2023 are Montana, Idaho, Utah, North Dakota, South Dakota, Oklahoma, Arkansas, Louisiana, Mississippi, Alabama, Florida, Tennessee, Indiana, West Virginia, and Virginia.[73] At year's end, roughly half of U.S. states have some form of restriction on foreign ownership of land, and it is suspected that this number will continue to increase as various states propose restrictions of their own.[74] There are no states with an absolute prohibition on foreign ownership, though there are several with severe enough restrictions that foreign ownership is impractical or impossible long-term.[75]

2. Long-term Effects Remain to be Seen

These restrictions, depending on the state, may forbid or limit nonresident aliens, foreign businesses and corporations, and foreign governments from acquiring or owning an interest in agricultural land in a particular state. Some of the largest U.S. states in the renewable energy arena have some of the most restrictive laws regarding who can control and invest in private agricultural land. From North Dakota to Oklahoma, nearly the entire central midwestern chain of states limits foreign ownership in some way. North Dakota has a total limit on alien ownership of agricultural land unless they comply with a list of statutory requirements.[76] South Dakota limits the acreage that can be owned by foreign citizens or governments. [77] Nebraska has what almost amounts to a blanket ban on aliens owning land or acquiring title except under the treaty of the United States, except for certain time limits.[78] Kansas limits corporate ownership of agricultural land.[79] Oklahoma has a blanket ban on acquiring title and requires those that acquire title via devise or bequest to get rid of the title within five years.[80]

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[68] *Id.* at 30,401.
[69] *Id.*
[70] *Id.* at 30,403.
[71] Residential Property Assessed Clean Energy Financing (Regulation Z), 88 Fed. Reg. at 30,404.
[72] *Id.*
[73] April J. Anderson et al., *State Regul. If Foreign Ownership of U.S. Land: January to June 2023*, CONGRESSIONAL RESEARCH SERVICE (July 28, 2023).
[74] Micah Brown & Nick Spellman, *Statutes Regulating Ownership of Agric. Land,* THE NAT'L AGRIC. LAW CENTER (last visited Mar. 17, 2024).
[75] *Id*.
[76] N.D. CENT. CODE § 47-10.1-01 (2021).
[77] S.D. CODIFIED LAWS § 43-2A-2 (2021).
[78] NEB. REV. STAT. § 76-402 (2021)
[79] KAN. STAT. ANN. §17-5904 (2021)
[80] OKLA. STAT. tit. 18, §1020 (2020).

Who exactly is forbidden from controlling agricultural land, in what amount, and for what duration, may depend on where any particular person or entity secures their funding from, their citizenship, or even their affiliations with certain foreign nations. Large swaths of land, often agricultural land, being the preferred sites for large wind and solar renewable energy projects; these restrictions are important to keep in mind for those on the developing, investing, or selling side of land deals in rural areas.

Chapter R: PUBLIC LAND AND RESOURCES
2023 Annual Report[1]

The year 2023 saw numerous administrative and judicial actions and opinions affecting public lands and resources, including: judicial review of presidential proclamations expanding national monuments under the Antiquities Act; Bureau of Land Management (BLM) land use decisions under the Federal Land Policy and Management Act (FLPMA) and the National Environmental Policy Act (NEPA); decisions regarding R.S. 2477 roads; and decisions regarding the Quiet Title Act.

I. JUDICIAL REVIEW OF PRESIDENTIAL PROCLAMATIONS EXPANDING NATIONAL MONUMENTS UNDER THE ANTIQUITIES ACT.

Under the Antiquities Act of 1906,[2] the "President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" situated on federal public land to be national monuments.[3] The President may reserve parcels of land as part of the national monuments, and in so doing "[t]he limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."[4] Numerous national monuments have been declared since the passage of the Antiquities Act, some of which have encompassed large parcels of public land. For example, the Grand Staircase-Escalante National Monument in Utah, covering approximately 1.7 million acres, was declared by President Bill Clinton in 1996.[5] Likewise, the Bears Ears National Monument, also located in Utah, covering approximately 1.35 million acres, was declared by President Obama just before he left office in 2016.[6] President Trump reduced the size of both monuments in 2017, and in October 2021 President Biden issued proclamations enlarging Grand Staircase to 1.87 million acres and Bears Ears to 1.36 million acres.[7]

In *Garfield County, Utah v. Biden,*[8] a federal district court considered complaints brought by individual plaintiffs and state plaintiffs (collectively "plaintiffs") to the Bears Ears and Grand Staircase proclamations. The plaintiffs challenged the proclamations on several grounds, all of which the federal district court rejected.

First, the court considered whether there had been a waiver of sovereign immunity to bring the suits against the President. The court noted that "[w]ithout a statutory waiver by Congress, judicial review of a president's actions is only permitted for constitutional challenges and *ultra vires* challenges," and that "[w]ithout either of those bases, '[judicial] review is not available when the statute in question commits the decision to the discretion

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[1]This report was prepared by Stan N. Harris, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, New Mexico, and Michael B. O'Hora, Jr., J.D. Candidate 2025, Elizabeth Haub School of Law, Pace University. The report attempts to cover significant developments in federal agency action and published judicial decisions. State legislation, agency action, and judicial developments are beyond the scope of this report. The statements made herein represent solely the view of the authors.

[2]54 U.S.C. § 320301.

[3]54 U.S.C. § 320301(a).

[4]54 U.S.C. § 320301(b).

[5]Establishment of the Grand Staircase-Escalante Nat'l Monument, 61 Fed. Reg. 50, 223, 225 (Sept. 24, 1996).

[6]Establishment of the Bears Ears Nat'l Monument, 82 Fed. Reg. 1139, 1143 (Dec. 28, 2016).

[7]Garfield Cnty. v. Biden, No. 4:22-cv-00059-DN-PK, 2023 WL 5180375, at * 5 (D. Utah Aug.11, 2023).

[8]*Id.*

of the President.'"[9] The court held that because the claims against the President challenged the President's exercise of discretion to designate national monuments under the Antiquities Act, "they are statutory claims, and judicial review is unavailable."[10]

Plaintiffs, however, argued that Section 702 of the Administrative Procedure Act (APA) – which provides for judicial review to a person suffering legal wrong because of agency action – waived the government's sovereign immunity in the case.[11] The court ruled that the provision applied when the action complained of was taken by subordinate officials and entities who are subject to the court's equitable jurisdiction, but that the instant suit identified the President as the sole official connected to the Proclamations.[12] Because "the APA does not expressly allow review of the President's action," the President's actions were not reviewable under the APA, and the court rejected plaintiffs' argument.[13]

The court also rejected the plaintiffs' argument that the President's action fell within the *ultra vires* exception to sovereign immunity. The plaintiffs' amended complaint did "not contain allegations that the President lacked the authority to designate federal land" such as the Bears Ears and Grand Staircase monuments.[14]

Likewise, the court ruled the memoranda issued by the Bureau of Land Management (BLM) implementing the proclamations were not final agency actions reviewable under the APA because the memoranda did not meet the three requirements for final agency action: (1) they did not have a direct and immediate impact on plaintiffs (because they did not compel any action by plaintiffs);[15] (2) the memoranda were not a consummation of the BLM's decision making process (because "[n]othing in the Memoranda suggest that they are anything more than informative dicta and internal agency discretion");[16] and (3) the memoranda did not generate legal consequences (because they only quoted from the proclamations, but did "not create anything new that was not already created by the Proclamations").[17]

As a consequence, the *Garfield County* court held that "[i]n spite of the sincere and deeply held view of the Plaintiffs, there is no relief for them in this action," and that "President Biden's judgment in drafting and issuing the Proclamations as he sees fit is not an action reviewable by a district court."[18] Plaintiffs' claims were therefore dismissed with prejudice.

A different result was reached by the D.C. Circuit Court of Appeals in *American Forest Resource Council v. United States*.[19] In *American Forest,* counties, trade associations, and timber companies (collectively "plaintiffs") brought several lawsuits against the federal government over a presidential proclamation enlarging the Cascade-Siskiyou National Monument in southwestern Oregon. When the monument was originally created in 2000, its proclamation stated that "[t]he commercial harvest of timber or other vegetative material is prohibited . . . ."[20] In 2017, an additional proclamation was issued, which included approximately 40,000 acres of land that had been set aside under a different federal statute (the Oregon and California Railroad and Coos Bay Wagon Road Grant

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[9] *Id.* at *6 (quoting Dalton v. Spector, 511 U.S. 462, 474 (1994)).
[10] *Id.*
[11] *Id. at *7.*
[12] *Id.*
[13] *Garfield Cnty*., 2023 WL 5180375 at *8 (quoting Franklin v. Massachusetts, 505 U.S. 788, 801 (1992)).
[14] *Id.*
[15] *Id*. at *9-10.
[16] *Id*. at *11.
[17] *Id.*
[18] *Id.* at *13.
[19] 77 F.4th 787 (9th Cir. 2023).
[20] *Id.* at 795 (quoting 65 Fed. Reg. at 37,250).

Lands Act, or "O&C Act") which specifically mandated timber production on O&C lands.[21]

The government contended that "even if non-statutory review of an *ultra vires* challenge to presidential action is available in some cases, review should be denied here because the Antiquities Act vests the President with broad discretion and the O&C Act puts no discernible limit on that discretion."[22] The D.C. Circuit ruled, however, that in the present case the claim was that the presidential action independently violated another statute (the O&C Act) and that "[e]ven when the Congress gives substantial discretion to the President by statute, we presume it intends that the President heed the directives contained in other statutes."[23] Further, the court noted that "we have consistently reviewed claims challenging national monument designation like the one challenged here."[24] Because the plaintiffs argued that the proclamation was *ultra vires* because it was inconsistent with another statute, the court held that the plaintiffs' claims were reviewable.[25]

Turning to the merits of the case, the *American Forest* court first considered the government's argument that because the O&C Act is directed at the Secretary of the Interior, it does not limit the President's authority to reserve land under the Antiquities Act.[26] In rejecting this argument, the appeals court held that "[b]ecause the President relied solely on the Antiquities Act to expand the Monument, he was constrained by the Congress's other enactments in exercising that delegated power."[27]

Next, the appeals court considered the government's second argument, that the monument's expansion is permissible because it was compatible with the O&C Act, and that the Antiquities Act and the O&C Act can be harmonized.[28] In agreeing with this argument, the appeals court ruled that, although the principal objective of the O&C Act is permanent forest production in conformity with the principle of sustained yield,[29] the O&C Act had provided the Secretary with three layers of discretion in reaching this objective: "first, discretion to decide how land should be classified, which includes discretion to classify land as timberland or not, second, discretion to decide how to balance the Act's multiple objectives, and third, discretion to decide how to carry out the mandate that the land classified as timberland be managed 'for permanent forest production.'"[30] As a result, the appeals court ruled that "the Antiquities Act and the O&C Act are indeed compatible."[31]

The same issues considered in *American Forest* were addressed by the Ninth Circuit Court of Appeals in *Murphy Company v. Biden*,[32] in which plaintiff timber companies also claimed that the presidential proclamation expanding the Cascade-Siskiyou National Monument violated the O&C Act. Similar to *American Forest,* the *Murphy* court first considered whether the *ultra vires* exception to sovereign immunity applied, and held that the plaintiff's "particularized allegations that the O&C Act restricts the President's designation powers under the Antiquities Act satisfies the jurisdictional standard set forth

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[21] *Id.* at 791, 795.
[22] *Id.* at 797.
[23] *Id.*
[24] *Id.*
[25] 77 F.4th at 798.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 801.
[30] *Id.* at 802 (quoting 43 U.S.C. § 2601).
[31] 77 F.4th at 799.
[32] 65 F.4th 1122 (9th Cir. 2023).

here and elsewhere."[33] Likewise, on the merits, the *Murphy* court concluded that "the O&C Act's plain text envisions economic, recreational, and environmental uses for the O &C Lands beyond logging and grants the Department significant discretion in how to achieve statutory compliance," and, therefore, "the Proclamation is fully consistent with the O&C Act, which governs a much larger swath of timberlands in Oregon and gives the Secretary discretion in administering those lands within the Act's directives."[34]

II. BLM Land Use Decisions Under FLPMA and NEPA.

BLM's management responsibility is governed by, among other statutes, Federal Land Policy and Management Act (FLPMA),[35] which provides for the general management of federal public lands. Under FLPMA, many competing uses may be put to the land, including recreation, range, timber, minerals, watershed, fish and wildlife, and uses serving scenic, scientific, and historical values.[36] Which provides for the management of federal public lands under the principles of multiple use and sustained yield.[37]

In fulfilling its FLPMA mandate, BLM is required to develop, maintain, and, when appropriate, revise land use plans to control its management of public lands.[38] All BLM decisions must, in turn, be made in accordance with the National Environmental Policy Act (NEPA),[39] which requires federal agencies to thoroughly evaluate the potential environmental impacts of any major federal action significantly affecting the quality of the human environment.[40] In assessing the environmental impacts of a proposed major federal action, federal agencies prepare an "environmental assessment" (EA), or a more thorough "environmental impact statement" (EIS) when significant environmental impacts are found.[41] The year 2023 saw opinions concerning BLM's decisionmaking process under FLPMA and NEPA, some of which are addressed here.

In *Dine Citizens Against Ruining Our Environment v. Haaland*,[42] environmental groups challenged BLM's EAs and an EA addendum that analyzed the environmental impact of numerous applications for permits to drill (APDs) for oil and gas in the New Mexico. Among other issues, the Tenth Circuit Court of Appeals considered as a matter of first impression whether BLM had unlawfully predetermined the outcome of the EA addendum. In particular, the plaintiffs argued that BLM violated NEPA "because BLM approved the APDs prior to preparing the EA Addendum and did not vacate, suspend, or withdraw those approvals while gathering additional information about the environmental impact of the actions."[43]

In considering the issue, the court noted that "NEPA does not require agency officials to be 'subjectively impartial' while preparing the environmental analysis,"[44] and

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[33] *Id.* at 1131.

[34] *Id.* at 1135, 1138.

[35] 43 U.S.C. § 1701–87.

[36] *See* 43 U.S.C. § 1732(a); *see also* Norton v. Utah Wilderness All., 542 U.S. 55, 58 (2004).

[37] 43 U.S.C. § 1732(a).

[38] *See* 43 U.S.C. § 1712(a).

[39] 42 U.S.C. § 4321 et seq.

[40] *See* 42 U.S.C. § 4332(2)(C).

[41] *See* 40 C.F.R. pts. 1500-08.

[42] 59 F.4th 1016 (10th Cir. 2023).

[43] *Id.* at 1030.

[44] *Id.* (quoting Forest Guardians v. U.S. Fish & Wildlife Serv., 611 F.3d 692, 712 (10th Cir. 2010)).

that "a petitioner must show 'that the agency has *irreversibly and irretrievably* committed itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, *before* the agency has completed that environmental analysis."[45] The court then ruled that "BLM did not engage in unlawful predetermination by conducting the supplementary analysis in the EA Addendum without first vacating the underlying APD approval" because, in that case, it was not irreversibly and irretrievably committed to a plan of action producing a certain outcome.[46] The court further held that "[t]he fact that BLM ultimately affirmed its original decision does not make the decision unlawfully predetermined where BLM maintained the option to reopen and vacate the APDs throughout the supplemental process."[47]

In *Western Watersheds Project v. Interior Board of Land Appeals*,[48] the Tenth Circuit Court of Appeals considered a conservation group's challenge to expired grazing permits that had been automatically renewed to a permit holder. The statute at issue provided that the terms and conditions of an expired grazing permit shall be continued under a new permit "until the date on which the Secretary concerned completes any environmental analysis and documentation for the permit or lease required under" NEPA.[49] Among other things, the court ruled that "[t]his court cannot override the Secretary's statutorily given discretion to determine when a new NEPA analysis occurs,"[50] and thus "this court cannot remedy the alleged harm by requiring a new NEPA analysis."[51] As a result, because the expired permits no longer existed at the start of the litigation and no evidence suggested any ongoing impact that the court could address through a favorable decision, "no relief could be granted with respect to those permits that could redress the harm that has allegedly been cause by the agency," and the plaintiff therefore lacked standing to bring the lawsuit.[52]

III. R.S. 2477 ROADS.

Federal Revised Statute 2477, commonly referred to as "R.S. 2477," was passed in 1866, and provided for public access across unreserved public domain by granting rights-of-way for the construction of highways.[53] R.S. 2477 presented a free right-of-way which takes effect as soon as it is accepted by a state.[54] Although repealed in 1976 by the passage of FLPMA, any valid, existing R.S. 2477 rights-of-way are preserved.[55]

R.S. 2477 was considered in *High Lonesome Ranch, LLC v. Board of County Commissioners for County of Garfield*.[56] In *High Lonesome,* a ranch owner brought suit in state court against a county that had concluded that two roads within the county and crossing the ranch were subject to public rights-of-way.[57] The county counter-claimed, asserting, among other things, that the roads were public under R.S. 2477.[58] Because the roads accessed BLM land, BLM was joined as a necessary party, and the case was removed

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[45] *Id.* (quoting *Forest Guardians*, 611 F.3d at 714-15 .
[46] *Id.* at 1033.
[47] *Id.*
[48] 62 F.4th 1293 (10th Cir. 2023).
[49] *Id.* at 1297 (quoting FLPMA, 43 U.S.C. § 1752(c)(2)).
[50] *Id.* at 1288 (citing 43 U.S.C. § 1752(i)).
[51] *Id.*
[52] *Id.* at 1299.
[53] 43 U.S.C. § 932 (repealed).
[54] *See*, *e.g.*, Mills v. United States, 742 F.3d 400 (9th Cir. 2014).
[55] *Id.* at 403 n.1.
[56] 61 F.4th 1225 (10th Cir. 2023).
[57] *Id*. at 1231.
[58] *Id.* at 1233.

to federal court.[59] The district court ruled that public use had established R.S. 2477 right-of-way for most portions of the disputed roads,[60] and the ranch appealed.[61]

On appeal, the Tenth Circuit Court of Appeals first determined that, under the federal Quiet Title Act (QTA),[62] the court had jurisdiction over the matter.[63] Turning to R.S. 2477, the court held that "[t]o establish an R.S. 2477 right-of-way, a party must show (1) a right-of-way over the public domain and (2) the public's acceptance of it by use." [64] In interpreting R.S. 2477, the court ruled that

> [T]he district court had correctly noted that 'federal law governs the interpretation of R.S. 2477, but that in determining what is required for acceptance of a right of way under the statute, federal law "borrows" from long-established principles of state law, to the extent that state law provides convenient and appropriate principles for effectuating congressional intent.'[65]

However, the court also noted that "'to the extent state law is borrowed in the course of interpreting R.S. 2477, it must be in service of federal policy or functions[ ] and cannot derogate from the evident purposes of the federal statute.'"[66]

In considering the R.S. 2477 standard for acceptance of a right-of-way by use, the district court in *High Lonesome* relied on a state court decision which declared that acceptance of a right-of-way "results from use by those for whom it was necessary or convenient… even if the use be by only one."[67] The court, however, noted that one of its own later decisions rejected a lenient standard of use, and had instead held that "Congress's intent under R.S. 2477 in establishing a public thoroughfare required an acceptance standard under which '[t]he intensity of public use remains a pertinent component.'"[68] Because Congress had stated that R.S. 2477 was 'for the construction of highways," the court of appeals held that the district court's acceptance standard requiring only that the use be "as often as the public finds convenient or necessary" was too lenient and had departed from Congress's intent.[69] The court, therefore, reversed and remanded to the district court on the issue of acceptance of an R.S. 2477 right-of-way.[70]

IV. THE QUIET TITLE ACT.

The United States is generally immune from suit absent a waiver of sovereign immunity.[71] The federal QTA[72] establishes a limited waiver of sovereign immunity, providing that "[t]he United States may be named as a party defendant in a civil action

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[59] *Id.* at 1233-34.
[60] *Id.*
[61] *Id.* at 1237.
[62] 28 U.S.C. § 2409a.
[63] *High Lonesome*, 61 F.4th at 1238-39.
[64] *Id.* at 1245. (citing Wilderness Soc'y v. Kane Cnty., 632 F.3d 1162, 1165-66 (10th Cir. 2011) (en banc)).
[65] *Id.* (quoting S. Utah Wilderness All. v. BLM, 425 F.3d 735, 768 (10th Cir. 2005)).
[66] *Id.*
[67] *Id.* (quoting Brown v. Jolley, 387 P2d 278, 281 (Colo. 1963)).
[68] *Id.* (quoting San Juan County v. United States, 754 F.3d 787 (10th Cir. 2014)).
[69] *High Lonesome*, 61 F.4th at 1245.
[70] *Id.*
[71] *See generally*, Hart v. United States, 630 F.3d 1085, 1088 (8th Cir. 2011).
[72] 28 U.S.C. § 2409a.

under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights."[73] The QTA provides the exclusive means by which claimants can challenge the United States' title to real property.[74]

The QTA's statute of limitations (SOL) is twelve years.[75] The SOL begins to run against any plaintiff other than a state "on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States."[76] With regard to states, however, a QTA action "shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands."[77] The statute defines "notice" as either "public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands," or "the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious."[78]

In 2023, the United States Supreme Court considered whether the QTA's 12-year SOL is jurisdictional. In *Wilkins v. United States*,[79] owners of property living alongside a road over which the federal government held an easement brought suit against the United States under the QTA over the scope of the easement. The property owners argued that the 12-year SOL is a non-jurisdictional claims-processing rule.[80] The government argued that, under prior Supreme Court precedent, the QTA's 12-year SOL is jurisdictional; "the district court and court of appeals agreed, and the action was dismissed for lack of jurisdiction."[81]

The Supreme Court reversed. In so doing, the Court first re-emphasized "the distinction between limits on 'the classes of cases a court may entertain (subject matter jurisdiction)' and 'nonjurisdictional claim-processing rules, which seek to promote the orderly progress of litigation that the parties take certain steps at certain specified times.'"[82] The Court then noted that "[t]o police this jurisdictional line, this Court will 'treat a procedural requirement as jurisdictional only if Congress "clearly states" that it is.'"[83]

From this, the Court ruled that the text of the 12-year SOL speaks only to a claim's timeliness, and thus that the provision only says that after a certain time, a claim is barred.[84] The Court further noted that a separate QTA provision provides the jurisdictional grant for the Act, and that "nothing conditions the jurisdictional grant on the limitations perio[d], or otherwise links those separate provisions."[85] Further, the Court distinguished prior opinions upon which the government and the lower courts had relied in ruling the 12-year SOL is jurisdictional.[86] The Court, therefore, held that the 12-year SOL is a non-

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[73] *Id.* § 2409a(a).
[74] *See* United States v. Mottaz, 476 U.S. 834, 841 (1986).
[75] 28 U.S.C. § 2409a(g).
[76] *Id.*
[77] *Id.* § 2409a(i).
[78] *Id.* § 2409a(k).
[79] 598 U.S. 152, 155 (2023).
[80] *Id.*
[81] *Id.* at 156.
[82] *Id.* at 157 (quoting Fort Bend County v. Davis, 139 S. Ct. 1843, 1849 (2019)).
[83] *Id.* (quoting Boechler v. Commissioner, 142 S. Ct. 1497 (2022)).
[84] *Id.* at 159.
[85] 598 U.S. 152, 159 (quoting United States v. Kwai Fun Wong, 575 U.S. 402, 412 (2015)).
[86] *Id.* at 159-164 (discussing Block v. North Dakota ex rel. Bd. of Univ. and School Lands, 461 U.S. 273 (1983); United States v. Mattaz, 476 U.S. 834 (1986); and United States v. Beggerly, 524 U.S. 38 (1998)).

jurisdictional claims-processing rule, and reversed and remanded the appeals court's judgment.[87] Three justices dissented from the opinion, reasoning that the QTA's SOL "functions as a condition on a waiver of sovereign immunity, and is therefore jurisdictional."[88]

The practical effect of the Supreme Court's holding in *Wilkins* was seen in other QTA cases decided in 2023. For example, in *In re: United States of America v. 6.03 Acres of Land in the County of Santa Barbara*,[89] the Ninth Circuit Court of Appeals considered an appeal by a landowner from a district court's dismissal of the landowner's claim of easement rights over a road on federal land. The district court had ruled that the claim was time-barred, and that the landowner had failed to allege a property interest in the road.[90]

On appeal, the court noted that, under its own precedent that had interpreted the QTA's SOL to be a jurisdictional requirement, [91] "we may have been obligated to resolve the parties' dispute regarding the applicability of the QTA's statute of limitations before considering the merits."[92] Acknowledging, however, that *Wilson* had overruled the court's precedent on the issue, and "[w]ith our jurisdiction no longer in question," the court held that it could affirm on any ground supported in the record.[93]

The court then considered whether the landowner had a property interest in the access road at issue. The landowner had asserted that its predecessor in interest had an easement over the road as owners of property abutting the road.[94] However, the landowner did not allege that, at the time of condemnation by the government, the access road existed as a "public street," which was a status required under state law to establish the landowner's property interest in the road.[95] As a result, the court affirmed the dismissal of the lawsuit.[96]

The QTA was also at issue in the High Lonesome case. In particular, the case had been removed to federal court because the county "sought an R.S. 2477 right-of-way over BLM land, which can be accomplished only under the QTA . . . ."[97] The court held that there are two requirements for federal jurisdiction under the QTA: "(1) the United States must 'claim[ ] an interest' in the property, and (2) the property's title must be 'disputed.'"[98] Although the ranch did not argue that BLM claimed an interest in the property, the ranch did contend that the property's title was not disputed because BLM had changed its position regarding the county's crossclaims, in turn opposing them, supporting them, or taking no position on them.[99] The court, however, ruled that BLM's opposition at the outset of the suit qualified as an action that actually conflicted with the county's title, and that the QTA's jurisdictional requirements were therefore met.[100] The court also ruled that there was no statute of limitations problem in the case because "the limitations period doesn't begin until the United States 'provide[s] a county or state with sufficient notice of the United States' claim of a right to exclude the public," and "[t]hat never happened here."[101]

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[87] *Id*. at 165.
[88] *See id.* at 174 (Thomas, J., dissenting).
[89] 67 F.4th 1006 (9th Cir. 2023).
[90] *Id*. at 1009.
[91] *Id.* (citing Adams v. United States, 255 F.3d 787, 796 (9th Cir. 2001)).
[92] *Id.*
[93] *Id.* at 1010.
[94] *Id.*
[95] 67 F.4th at 1010-11.
[96] *Id*. at 1011.
[97] *High Lonesome*, 61 F.4th at 1238.
[98] *Id.* (quoting Kane County, Utah v. U.S., 772 F.3d at 1210-11).
[99] *Id.*
[100] *Id.* at 1238-39.
[101] *Id.* at 1239 (quoting *Kane County*, 772 F.3d at 1216).

Chapter S: SCIENCE AND TECHNOLOGY
2023 Annual Report[1]

I. EPA'S SCIENCE ADVISORY BOARD—LITIGATION AND ENVIRONMENTAL JUSTICE COMMENTS

A. Litigation: Suit challenging the selection and composition of the Science Advisory Board and related Clean Air Scientific Advisory Committee.

In today's balkanized, political world, even the appointment process to EPA's Science Advisory Board becomes a hotly contested point between industry representatives and others. In March 2021, the new EPA Administrator Michael Regan indicated he was revising the Science Advisory Board (SAB) and would propose new members to it and related boards, essentially eliminating many Trump appointees to those boards.[2] Later, in August 2021, Administrator Regan announced a new group of appointees.[3]

Weeks later, Stanley Young, a Trump appointee to the SAB, filed a complaint rested on an obscure federal statute enacted in 1972, the Federal Advisory Committee Act (Advisory Act).[4] Young used this statutory baseboard to launch a broad attack on Administrator Regan's efforts to reconstitute the SAB and a separate advisory group, the Clean Air Advisory Committee. The political nature of this process was not lost on the press, with at least one commentator referring to Administrator Regan's moves as a "purge."[5] Anthony Cox, a statistician also appointed by Trump to the SAB, later joined the suit as a plaintiff.

Young's lawsuit claimed that EPA's appointment process violated Section 5 of the Advisory Act, which requires that when forming an advisory committee, agency heads should ensure that the appointed members be "fairly balanced in terms of the points of view represented."[6] The plaintiffs claimed that the new SAB and Clean Air Advisory Committee failed to meet this requirement, partly because each lacked industry representation. After

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[1]Section I was authored by Norman A. Dupont, Esq., a partner with the firm of Ring Bender LLP, where he practices with a focus on environmental and municipal law. He is an active SEER member and currently serves as the Section's Constitutional Law Advisor. Section II was authored by Jay Thompson, Ph.D., P.E., a Senior Environmental Engineer with Geosyntec Consultants. His practice focuses on fate and transport modeling, environmental forensics, and cost allocation. He currently co-chairs the SEER Science and Technology committee. This Chapter was edited by John W. Wallace, Esq., a partner with the law firm of Smith Hulsey & Busey in Jacksonville, Florida, where he practices with a focus on environmental, land use & zoning and real estate law, and Rica Enriquez, Ph.D., P.E., a Senior Environmental Engineer with Geosyntec Consultants, where she focuses on applying computational modeling and data science for environmental forensics and remediation.

[2]L. Friedman, *The E.P.A. administrator purges its scientific advisory boards, which included many Trump appointees*, N.Y. TIMES (March 31, 2021) (subscription required).

[3]Press Release, U.S. ENVTL. PROT. AGENCY, EPA Announces Selections of Charter Members to the Science Advisory Board (August 2, 2021).

[4]5 U.S.C. §§ 1001-1014.

[5]Friedman, *supra* note 2.

[6]5 U.S.C. § 1004 (b)(2) (specifying that authorizing legislation for an advisory committee must ensure in part that such law "require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee. . ."); *Id*. at (c) (applying same standards is subpart (b) "to the extent that they are applicable" to agency heads appointed advisory committees).

both sides moved for summary judgment on the Clean Air Advisory Committee issues, Judge Kelly of the District Court for the District of Columbia ruled for the Government.[7]

Predictably, this case then moved upstairs to the Court of Appeals for the D.C. Circuit.[8] Although briefing was completed and oral argument was held, a strange thing happened next—the Court of Appeals for the D.C. Circuit issued a terse order asking for supplemental briefing "addressing whether appellants have standing."[9] Given that standing is a jurisdictional prerequisite in any federal case, it appears that the Court of Appeals has determined that perhaps the advocates for both sides were putting the proverbial merits cart before the jurisdictional horse (i.e., standing).

The two sides predictably provided different answers to the Court's question on standing. Appellants told the Court that standing is established by a doctrine that a person has a legal right to litigate whether there was a "legally valid selection process."[10] EPA and other governmental entities reject this theory of standing. Instead, the Government argued that there was no evidence that appellants were denied an "equal footing" by EPA in evaluating their applications for positions on the SAB. Rather, the Government argued that the Appellants (like all other applicants) were given equal treatment because the evaluation process for selecting new candidates was fair and based on candidate merits.[11]

As of year-end, it is unclear how the Court of Appeals will rule. What is clear, however, is that the process of selecting individuals to serve on the Science Advisory Board will remain a political (and litigation) football.

B. Litigation: Scientific peer review criticism of EPA on PFAS and related compound health advisories.

In June 2022, EPA issued a new series of "health advisories" for four PFAS-related compounds.[12] Two of the health advisories were termed "interim" and related to PFOA and PFOS.[13] The levels recommended for individuals exposed to those two compounds in drinking water were "near zero and below EPA's ability to detect at this time."[14] The other set of health advisories were termed final by the EPA and dealt with perfluorobutane sulfonic acid and its potassium salt (PFBS) and for hexafluoropropylene oxide (HFPO) dimer acid and its ammonium salt ("Gen X" chemicals).[15] EPA cited its broad authority under the Safe Drinking Water Act to set these "advisories" which are not formal regulations.[16]

Two lawsuits followed shortly thereafter, with the plaintiff in each claiming that EPA disregarded science in setting the health advisories. Both suits raise interesting and

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[7]Young v. EPA, 633 F. Supp. 3d 181 (D.C. Cir. 2022).
[8]Notice of Appeal, Young v. EPA, No. 22-5305 (filed Nov. 22, 2022).
[9]Young v. EPA, No. 22-5305 (D.C. Cir. filed Sept. 12, 2023) (per curiam).
[10]Supplemental Brief for Appellants at 1, Young v. EPA, No. 22-5305 (D.C. Cir. filed Sept. 22, 2023).
[11]Supplemental Brief for Appellees, Young v. EPA, No. 22-5305 (D.C. Cir. filed Sept. 22, 2023).
[12]U.S. ENVTL. PROT. AGENCY, TECHNICAL FACT SHEET: DRINKING WATER HEALTH ADVISORIES FOR FOUR PFAS (PFOA, PFOS, GENX CHEMICALS, AND PFBS) (June 2022).
[13]*Id.* at 2-3.
[14]Press Release, U.S. Envtl. Prot. Agency, EPA Announces New Drinking Water Health Advisories for PFAS Chemicals, $1 Billion in Bipartisan Infrastructure Law Funding to Strengthen Health Protections (June 15, 2022).
[15]*Id.*
[16]*Drinking Water Health Advisories (HAs),* U.S. ENVTL. PROT. AGENCY (last updated May 30, 2023).

direct challenges to EPA's scientific decision-making process based in part upon its alleged disregard of peer-review comments and the SAB process of review.[17]

First, the American Chemistry Council filed a petition for review of the EPA's advisories in the D.C. Circuit. In January 2023, that the Court determined that the Council, an association of various members, could not establish the required jurisdictional standing based on any quantifiable harm to any of its members.[18]

In a separate suit, a major manufacturer of PFAS compounds, The Chemours Company FC, LLC (Chemours), filed suit in the U.S. Court of Appeals for the Third Circuit challenging EPA's health advisory for the Gen X chemicals. Chemours alleged that EPA's advisory violated sound scientific methodology, noting that one of EPA's own scientific peer review members, a professor from the University of South Carolina, criticized the Agency's reference dose calculation as "extreme" and "excessive."[19] Unlike the D.C. Circuit, the Third Circuit denied a government motion to dismiss the *Chemours* case for lack of standing and thereby allowed the lawsuit to proceed before that Court.[20] Recently, that Court has requested additional letter briefs on the potential impacts of three pending U.S. Supreme Court cases on the *Chemours* suit. The Third Circuit sought letter briefs on whether it should hold any decision until after opinions by the Supreme Court were issued in two cases dealing with the scope of administrative deference due to a federal agency and in a third case raising the question of the scope of congressional delegation to an administrative agency.[21] The Third Circuit has set oral argument for January 29, 2024.

C. Regulatory: The Science Advisory Board and Environmental Justice

In November 2023, the SAB issued a final report entitled "Review of the Updated Methodology of Environmental Justice Screening and Mapping Tool (EJ Screen Version 2.1)."[22] The EPA "screening tool" for Environmental Justice (EJ) was initially launched in 2019 as version 2.0 and further revised in October 2022 with version 2.1.[23] As EPA describes it, the EJ screening tool is designed to provide a preliminary assessment of

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[17] *See* Order, Am. Chemistry Council v. EPA, No. 22-1177 (D.C. Cir. Jan. 23, 2023) (per curiam); *see also* Petition for Review, The Chemours Company FC, LLC v. EPA, No. 22-2287 (3rd Cir. July 13, 2022).

[18] Order, Am. Chemistry Council v. EPA, No. 22-1177 (D.C. Cir. Jan. 23, 2023) (per curiam).

[19] Petition for Review at 18, The Chemours Company FC, LLC v. EPA, No. 22-2287 at 6 (3rd Cir. 2022) (citing EPA, RESPONSE TO ADDITIONAL FOCUSED EXTERNAL PEER REVIEW OF DRAFT HUMAN HEALTH TOXICITY VALUES FOR HEXAFLUOROPROPYLENE OXIDE (HFPO) DIMER ACIDS AND ITS AMMONIUM SALT (GENX CHEMICALS) (Oct. 2021) (Comments of Professor Warren on calculation of reference dose; Professor Warren was one of seven external peer reviewers who evaluated the EPA draft report)).

[20] Order, The Chemours Company FC, LLC v. EPA, No. 22-2287 (3rd Cir. 2022) (subscription required).

[21] Order, The Chemours Company FC, LLC v. EPA, No. 22-2287 (3rd Cir. Dec. 7, 2023), Doc. No. 70 (text order only). The order referenced three pending Supreme Court cases: *Relentless v. Department of Commerce*, No. 22-1219, *Loper Bright Enterprises v. Raimondo*, No. 22-451 (both dealing with application of the *Chevron* doctrine) and *SEC v. Jarkesy*, No. 22-859 (involving a challenge to administrative action based in part on the "non-delegation" doctrine).

[22] Sci. Advisory Bd., EPA-SAB-24-002, *Transmittal of the Science Advisory Board Report Review of the Updated Methodology of EPA's Environmental Justice Screening and Mapping Tool* (EJScreen version 2.1) (November 20, 2023) [hereinafter SAB Report].

[23] *Technical Information about EJScreen*, U.S. ENVTL. PROT. AGENCY (last updated March 5, 2024).

communities that may require further consideration under EJ criteria, including socioeconomic standards such as income, racial composition, and five other factors such as relative age of the community, relative education levels and other items.[24]

The SAB set up a subcommittee to evaluate the revised (2.1) model used by EPA for screening on environmental justice areas and published its report in November 2023. The SAB made recommendations on expanding the utility of the EJ Screen and its supporting documentation and commented on at least one key socioeconomic factor—low income. SAB reported that the EJ Screen's measurement of low-income "should be reconsidered because the current indicator does not account for geographic differences and may not match current economic realities confronting many households across the nation."[25] The SAB also cautioned that as to the various environmental factors used in an EJ Screen, "[SAB] does not support any systematic weighting scheme for combining environmental indicators, as there is insufficient scientific basis for determining such weights."[26]

EPA did not wait for SAB's final report. Instead, in June 2023 EPA issued a further revision, model 2.2, to its EJ Screen.[27] While the new version (2.2) may not make any fundamental changes from the prior 2.1 version, it is, at best, a problematic use of the established scientific review to publish new versions of a document which is currently undergoing a review based on a prior version.

While the SAB was reviewing the revised EPA EJ screening model, SAB reported that it was self-initiating a review of materials to support rulemaking in the EJ field. In its report, SAB indicated that its staff "will form a panel comprised of the members of the SAB Environmental Justice Science Committee, other SAB members, and additional scientific experts selected from a pool of candidates nominated by the public" with an anticipated deliverable by the fall of 2024.[28] Of course, the next Presidential election will occur in the fall of 2024, and the results of that election may determine whether SAB's report is either accepted or placed in the trash pile of unread and unconsidered scientific documents.

II. Applications of Artificial Intelligence in Environmental Modeling

The public release of OpenAI's ChatGPT in November 2022 pushed the issue of artificial intelligence (AI) to the forefront of public consciousness. ChatGPT, like other large language models, possesses language processing capabilities that enable it to assist with tasks ranging from research to drafting documents to creating computer code. Like the legal community[29], the scientific community is grappling with the opportunities and risks associated with AI. 2023 saw an incredible surge in AI-related scholarly output -- 8% of all research papers published worldwide mention "AI" or "Machine Learning" in the

[24]U.S. Envtl. Prot. Agency, EJScreen: Environmental Justice Mapping and Screening Tool: EJScreen Technical Documentation for Version 2.2 (July 2023).
[25]SAB Report, *supra* note 22 at 2.
[26]*Id*. at 3.
[27]U.S. Envtl. Prot. Agency, EJScreen Fact Sheet (June 2023) at 1 ("What's New in EJScreen 2.2").
[28]Sci. Advisory Bd., EPA-SAB-24-007, *Science Advisory Board (SAB) Consideration of: (1) A Proposed Self-Initiated Project on Environmental Justice Analyses to Support EPA Regulations, and (2) Ten Planned Regulatory Actions Listed on EPA's 2023 Spring Regulatory Agenda and Discussed During the Chartered SAB Meeting on September 21 - 22, 2023* at 1-2 (September 29, 2023).
[29]Am. Bar Ass'n, Resolution 604 (adopted Feb. 6, 2023).

title or abstract.[30] An informal poll of 1,600 researchers conducted by the scientific journal *Nature* in 2023, captured the sentiment of the scientific research community. A majority of these respondents harbored optimism regarding AI's potential to speed data processing, computation, and enhance writing quality. However, this optimism was counterbalanced by concerns over the possibility of AI perpetuating biases, and its role in propagating misinformation, plagiarism, and academic fraud.[31]

The environmental science and engineering field is also witnessing a surge in AI research. While environmental research applying generative AI such as ChatGPT is still in its infancy,[32] many applications of machine learning[33] are being actively researched. Some of the most potentially impactful applications of AI in environmental science and engineering are related to the development and improvement of environmental models. The remainder of this section examines modeling advancements in two areas: water quality and toxicology.

A. AI in Water Quality Modeling

Predictive modeling of harmful bacterial and algal impacts to recreational waters is a technical challenge, as the magnitude of these impacts is a function of numerous biological, physical, and chemical parameters. The accuracy and forecast range of these models are not merely academic concerns; they have tangible implications for public health and regulatory compliance. Two studies released in 2023 report improvements in these water quality models by applying AI and machine learning.

A research team from Iowa State University presented a study on one-week-ahead prediction of cyanobacterial harmful algal blooms in Iowa lakes.[34] The study focused on identifying factors associated with hazardous microcystin (a toxin produced by cyanobacteria) levels and developing predictive classification models. The study utilized water samples from thirty-eight Iowa lakes collected between 2018 and 2021. Three machine learning models were employed to produce seven-day forecasts of microcystin exceedances. The machine learning models were successful in identifying which factors were associated with microcystin exceedances and produced strong predictions of microcystin exceedances on a one-week forecast basis. Furthermore, a comprehensive review article published by a research team from Los Alamos National Laboratory suggested that more comprehensive and sophisticated machine learning approaches may result in further improvements in the forecasting of harmful algal blooms.[35] Such advancements will assist public health authorities and regulators in managing regulatory compliance.

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[30]Richard Van Noorden & Jeffrey M. Perkel, *AI and science: what 1,600 researchers think*, NATURE (Sept. 28, 2023) (subscription required).

[31]*Id.*

[32]Jun-Jie Zhu et al., *ChatGPT and Environmental Research,* 57 ENVTL. SCI. & TECH. at 17667-70 (Mar. 21, 2023).

[33]Machine learning is a subset of AI that specifically involves algorithms that analyze and interpret patterns and structures in data to enable learning, decision-making, and predictions; *See, e.g.*, Shixuan Cui et al., *Advances and Applications of Machine Learning and Deep Learning in Environmental Ecology and Health*, 335 ENVTL. POLLUTION (Aug. 9, 2023).

[34]Paul Villanueva et al., *One-Week-Ahead Prediction of Cyanobacterial Harmful Algal Blooms in Iowa Lakes* 57 ENVTL. SCI. & TECH. at 20,636-46. (Nov. 27, 2023).

[35]Babetta L. Marrone et al., *Toward a Predictive Understanding of Cyanobacterial Harmful Algal Blooms Through AI Integration of Physical, Chemical, and Biological Data,* ACS ES&T WATER (2023).

In a second study, a Stanford University team developed a data-driven framework for predicting bacterial standard exceedances at marine beaches up to three days in advance.[36] Utilizing historical data sets from two California sites, they trained nearly 400 forecast models using statistical and machine learning techniques and screened these models for performance based on a comparison with two traditional models akin to what is currently employed by California authorities. Forecast model performance of the top-performing models was similar to "nowcast" models (i.e., models that do not forecast the future), suggesting that the machine learning approach is an effective predictive tool for bacterial standard exceedances for at least three-day forecasts and is a significant improvement to current methods. Forecasting of this nature may help public health authorities manage beach closures.

B. AI in Toxicology and Risk

A research team from the Swiss Federal Institute of Aquatic Science and Technology (Eawag) applied machine learning to screen thousands of possible anthropogenic pollutants, identified in high-resolution chemical analyses, for potential toxicity. The study by Arturi and Hollender (2023) introduces a machine learning framework that is designed to prioritize environmental pollutants based on their toxicity.[37] Such a screening framework may be employed to identify potentially toxic molecules for additional study. Utilizing molecular fingerprints from high-resolution mass spectrometry data, this framework classifies thousands of unidentified features as toxic or non-toxic. It leverages a large database of *in vitro* toxicity data and known chemical structures to train models that have demonstrated high predictive accuracy. While the authors identify several limitations, foremost that the model was trained on cellular rather than organism toxicity endpoints, this method represents an advancement in the screening and prioritization of yet-uncharacterized environmental compounds.

Overall, the studies highlighted in this section represent but a small sample of the extensive research output in the environmental field employing AI and machine learning. Although the enhancements over traditional modeling methods vary, with some being relatively modest, these initial improvements portend a potentially exciting future for the research community. As methodologies continue to evolve and refine, we can anticipate further performance improvements in the years ahead. Meanwhile, regulators and lawyers will have to keep abreast of these developments to ensure that applicable rules and standards continue to incorporate the most accurate analytical techniques.

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[36]Ryan T. Searcy & Alexandria B. Boehm, *Know Before You Go: Data-Driven Beach Water Quality Forecasting*, 57 ENVTL. SCI. & TECH. at 17,930-39 (Dec. 6, 2022).

[37]Katarzyna Arturi & Juliane Hollender, *Machine Learning-Based Hazard-Driven Prioritization of Features in Nontarget Screening of Environmental High-Resolution Mass Spectrometry*, 57 ENVTL. SCI. & TECH. at 18,067-79 (June 6, 2023).

Chapter T: SUPERFUND AND COST RECOVERY
2023 Annual Report[1]

I. SUPERFUND: ADMINISTRATIVE AND REGULATORY DEVELOPMENTS

Congress did not amend the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[2] in 2023.

The Environmental Protection Agency (EPA) added four sites to the National Priorities List (NPL),[3] while deleting four sites and partially deleting ten sites.[4] It also proposed to add five sites to the NPL.[5]

On April 13, 2023, EPA issued an Advanced Notice of Proposed Rulemaking requesting public input on potential future designations of per- and polyfluoroalkyl substances as CERCLA hazardous substances.[6] Comments were due on or before June 12, 2023, but EPA extended the comment period to August 11, 2023.[7] According to EPA's Fall 2023 Unified Agenda of Regulatory and Deregulatory Actions, EPA estimates publication of the final rule designating perfluorooctanoic acid (PFOA) and perflurooctanesulfonic acid (PFOS), including their salts and structural isomers, as CERCLA hazardous substances in 2024.[8]

II. SUPERFUND: JUDICIAL DEVELOPMENTS

A. Elements of Liability

1. Facility Definition

ELG Utica Alloys, Inc. v. Niagara Mohawk Power Corp.[9] contains a useful discussion of case law on how to define the contours of a CERCLA "facility." The court

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[1]This chapter was authored by Amanda Kesler and Van Hilderbrand, Miles & Stockbridge, P.C. Washington, D.C.; John Barkett, Shook Hardy & Bacon, LLP, Miami, FL. This chapter reviews significant 2023 CERCLA decisions and developments. The views expressed are the authors own and not necessarily those of their firms or clients.

[2]42 U.S.C. §§ 9601-9675.

[3]National Priorities List, 88 Fed. Reg. 18,435 (Mar. 29, 2023) (to be codified at 40 C.F.R. pt. 300); National Priorities List, 88 Fed. Reg. 61,470 (Sept. 7, 2023) (to be codified at 40 C.F.R. pt. 300).

[4]Deletion from the National Priorities List, 88 Fed. Reg. 10,851 (Feb. 22, 2023))(to be codified at 40 C.F.R. pt. 300); Deletion from the National Priorities List, 88 Fed. Reg. 55,582 (Aug.16, 2023))(to be codified at 40 C.F.R. pt. 300).

[5]National Priorities List, 88 Fed. Reg. 18,499 (proposed Mar. 29, 2023) (to be codified at 40 C.F.R. pt. 300); Proposed Deletion From the National Priorities List, 88 Fed. Reg. 55,611 (proposed Aug. 16, 2023) (to be codified at 40 C.F.R. pt. 300); National Priorities List, 88 Fed. Reg. 61,492 (proposed Sept. 7, 2023) (to be codified at 40 C.F.R. pt. 300).

[6]Addressing PFAS in the Environment, 88 Fed. Reg. 22,399 (proposed Apr. 13, 2023) (to be codified at 40 C.F.R. pt. 302).

[7]Addressing PFAS in the Environment, 88 Fed. Reg. 37,841 (proposed June 9, 2023) (to be codified at 40 C.F.R. pt. 302).

[8]Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54,415 (proposed Sept. 6, 2022) (to be codified at 40 C.F.R. pt. 302).

[9]6:16-cv-1523 (BKS/ATB) 2023 U.S. Dist. LEXIS 51146, at *59-62 (N.D.N.Y. Mar. 27, 2023).

concluded that a 23-acre site that was administratively divided into two areas was a "single facility for CERCLA purposes."

> The Universal Waste and Utica Alloys Sites had shared common ownership, control, and management since at least 1984 and it was undisputed that the Companies 'had the same voting stockholder, officers, and directors, used the same buildings and areas at the Site, and shared Site costs.' Such common ownership and management weighed in favor of finding a single facility. Moreover, the PCB and TCE contamination at issue extended throughout the 23-acre Site resulted from the same sources. Finally, NYSDEC investigated the Site as a single site for approximately twenty years and listed it on the registry as such.[10]

While the state environmental agency bifurcated the Site, it did so "'to facilitate an independent remediation' of the Utica Alloys portion. The Court conclud[ed] that the 1998 administrative bifurcation was more akin to the division of the Site into operable units and a division as convenience."[11]

B. Liability of Particular Parties

1. Owners and Operators

In *MRP Properties Company, LLC v. United States*,[12] Valero Energy Corporation sought contribution from the United States for contamination at twelve of its refinery sites alleging that the government's control over the refineries during Work War II made the United States an "operator" under CERLCA. On interlocutory appeal, the Sixth Circuit held that, although the government rationed oil and refinery equipment, set wages and prices, inspected facilities and directed facilities what to produce and for whom during World War II, these activities were not sufficient to make the United States an "operator" of the refineries under CERCLA because the refineries retained control over waste disposal activities and decisions "specifically related to pollution" as required for operator liability under *Bestfoods*.[13]

In *Barclay Lofts LLC v. PPG Industries, Inc*.,[14] defendants sought leave to file a third-party complaint against Plaintiff Barclay's parent company, Sherman Associates, for CERCLA 113 contribution alleging that Sherman was the real party in interest and may be independently liable as a direct operator. The court found defendant's concern that Barclay would not be able to pay for any share of costs that may be allocated to it given that it was a "single purpose entity" with no apparent funds. The court also found that the third-party complaints sufficiently stated a claim for operator liability against Sherman by alleging that it directed the work of the consultant that caused the contamination, as well as controlled the maintenance of the building that caused further groundwater contamination. Accordingly, despite Barclay's counter-argument that the failure to act does not show

[10] *Id.* at *18 (case and record citations omitted).
[11] *Id.* (case and record citations omitted).
[12] 72 F.4th 166 (6th Cir. 2023).
[13] *Id.* at 174 (citing United States v. Bestfoods, 524 U.S. 51, 66-67 (1998)).
[14] Case No. 20-CV-1694, 2023 WL 6997473 (E.D. Wisconsin Oct. 24, 2023).

control over operations related to pollution, the court granted leave to file thirty party complaints against Sherman under Fed.R.Civ.P. 14.[15]

In *California Department of Toxic Substances Control v. Jim Dobbas*,[16] the Department of Toxic Substances Control and the Toxic Substances Control Account (collectively DTSC) sought recovery of costs and declaratory relief under CERCLA in connection with the cleanup of a wood preserving operation in Elmira, California.[17] A group of insurer Intervenors filed an answer and counterclaims for cost recovery and contribution against DTSC, alleging that it was an "operator" at the time of "disposal."[18] DTSC moved to, among other things, (i) dismiss the counterclaims and (ii) strike Intervenors' affirmative defense for contributory and comparative negligence.[19] The court dismissed the counterclaims holding that: (1) "a vague allegation that DTSC 'actively operated' a groundwater system and DTSC's alleged knowledge of its contractor's failure to maintain a remedial structure on the site was insufficient to properly allege DTSC had an active role running the facility with daily participation in management as required for operator liability; and (2) that passive migration of hazardous substances does not represent a "disposal" so it was not alleged that DTSC operated the site at the time hazardous materials were disposed.[20] Because comparative fault or contributory negligence by the government is not a defense to CERCLA, the court also struck Intervenors' affirmative defense.[21]

In *California Department of Toxic Substances Control v. NL Industries*,[22] the DTSC brought a cost recovery action against owners and operators of a former lead battery recycling plant in Vernon, California.[23] Defendants counterclaimed contending that DTSC had also "operated" the plant because DTSC caused pollution to occur when conducting remediation activities and because DTSC took over the plant after the bankruptcy of one of the defendants pursuant to the terms of an environmental trust created in the bankruptcy proceedings.[24] After a bench trial, the court held that DTSC established a prima facie case against several defendants as either owner/operators or arrangers.[25] Many of the court's rulings dealt with the requirements and application of the Superfund Recycling Equity Act's (SREA) recycling defense to CERCLA arranger and transporter liability.[26] The court held that: (1) "recycling" was encompassed in the term "treatment" within the meaning of the SREA recycling safe harbor; (2) that spent lead-acid batteries were not useful products, and therefore those entities that sent those batteries to the plant for recycling were not exempt from CERCLA arranger liability under the SREA safe harbor;[27] (3) that lead-acid battery plates were useful products, and therefore entities' shipments of battery plates to the plant fell within the SREA safe harbor;[28] and (4) that plates from spent lead-acid

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[15] *Id.*; *see also* Barclay Lofts LLC v. PPG Industries, Inc., No. 20-CV-1694, 2023 WL 7384650 (E.D. Wisconsin Oct. 24, 2023) (clarifying Oct. 24, 2023 decision was decided under Rule 14 and did not decide real party in interest under Rule 17).
[16] No. 2:14-cv-00595 WBS EFB, 2023 WL 4871717 (E.D. Cal. July 31, 2023).
[17] *Id*. at *1.
[18] *Id*.
[19] *Id*.
[20] *Id*. at *4.
[21] *Id*. at *5.
[22] No. 2:20-cv-11293-SVW-JPR, 2023 WL 6194098 (C.D. Cal. Aug. 18, 2023).
[23] *Id*. at *1
[24] *Id*. at *6.
[25] *Id*. at *11-21.
[26] *Id*. at *21.
[27] *Id*. at *33-34.
[28] *Id*.

batteries were "scrap metal" within the SREA safe harbor.[29] As to the counterclaims, the court held that DTSC only acted in a regulatory capacity and did not have a day-to-day role in hazardous waste related activities before the bankruptcy and its control of the site in connection with the bankruptcy of the defendant owner was excluded from liability pursuant to the definition of the terms "owner or operator" in CERCLA section 101(20)(D).[30]

2. Generators, Transporters, Arrangers

In *Estes Express Lines v. U.S.A Lamp and Ballast Recycling, Inc.*,[31] U.S.A Lamp and Ballast Recycling, Inc., d/b/a Cleanlites Recycling Inc., (Cleanlites) filed a motion to dismiss Estes Express Lines' (Estes) amended complaint alleging strict liability under CERCLA. Cleanlites hired Estes to transport 18.6 gallons of mercury to a mercury recovery, recycling and retirement company for disposal.[32] Cleanlites packaged the mercury for shipment and certified that the mercury was in a proper condition, properly packaged, marked and labeled according to appropriate Department of Transportation regulations. Enroute, 6.6 gallons of mercury was released and Estes hired a company specializing in hazardous material spill response management to address the release. The court found that mercury is a "hazardous substance" as defined under CERCLA, that Cleanlites "arranged for the disposal or treatment or arranged with a transporter for transport for disposal or treatment of a hazardous substance owned or possessed by Defendant", and that Estes' amended complaint pled a plausible claim for strict liability under CERCLA section 107(a).[33]

In *City of Lincoln v. County of Placer*, [34] among other claims, the County of Placer moved for summary judgment on the City's claim under section 107 of CERCLA. The County argued that the City could not meet two elements of its claim under section 107(a): (1) that the City could not show its response costs were actually attributable to the release of any hazardous substances from the landfill, and (2) that the City could not show that the County was a current or former owner, operator, arranger or transporter.[35] The court denied the County's motion for summary judgment. With respect to the first element, the court found that a genuine dispute existed with regards to causation since at least some of the City's response costs could be tied to the release of volatile organic compounds from the landfill, which are "hazardous substances" under CERCLA.[36] With respect to arranger liability, the County argued that it did not own the garbage deposited in the landfill and therefore could not be an arranger, but the court found that argument unavailing.[37] Further, the County argued that an "arranger" under section 107(a)(3) must intend to dispose of a substance it knows or has reason to know is "hazardous." [38] The court looked to case law, the plain wording of the text, Congress' intent, and the broader structure of CERCLA to find that an arranger does not have to have a specific state of mind about whether a particular substance is hazardous or dangerous. In regard to transporter liability, the court found that the evidence in the record might suffice at trial to show that the County transported at least some waste to the landfill for disposal. Thus, summary judgment was

[29] *Id*. at *23
[30] *Id*. at *12.
[31] No. 2:2023-cv-609, 2023 WL 3027433 (W.D. PA Apr. 20, 2023).
[32] *Id.* at *1.
[33] *Id.* at *5-6.
[34] 668 F. Supp. 3d 1079 (E.D. Cal Apr. 4, 2023).
[35] *Id.* at 1095-96.
[36] *Id.* at 1096.
[37] *Id.* at 1097.
[38] *Id.*

inappropriate. Finally, the County sought summary judgment on its counterclaim and declaratory judgment claim under section 113 of CERCLA. The court granted summary judgment finding that if the City prevails in its section 107 claim, the County may seek contribution.

3. Parent/Shareholder and Successors

It is not often that "veil piercing" succeeds to create parent-corporation owner liability under CERCLA. But the plaintiff in *Successor Agency to the Former Emeryville Redevelopment Agency v. Swagelok Co*.[39] presented sufficient facts to get to trial on the claim. Applying California common law to complicated facts relating to corporate transactions that occurred decades ago, the court determined that the following evidence was sufficient to maintain the veil piercing claim: (1) The parent corporation (HBML) "was in charge of and profited from these transactions"; (2) HBML knew "generally of its environmental liabilities, at least strongly suspected it," inherited "specific and significant" liabilities of a company called "SCM," and could have known about the liability at what was called the "Marchant" site; (3) HBML "undertook its corporate form—including the initial acquisition form, the fan companies, and the eventual transfer and sell off of [a company called] Millennium— in order to reap the profitable rewards while 'kicking the can down the road' on the environmental liabilities to avoid having to fund them."[40] This evidence was sufficient to create a fact question on the existence of bad faith (required to pierce the corporate veil under California law), or whether HBML's corporate form was "'used to . . . circumvent a statute or accomplish some other wrongful or inequitable purpose.'"[41] This evidence also was sufficient to show a connection between "the contamination and recovery of response costs and the alleged misuse of HBML's corporate structure—chosen to avoid paying for 'superfund' responsibilities."[42] The court added that it would be inequitable to permit HBML "to profit from its acquisition and corporate structuring without being held responsible for its CERCLA liabilities."[43] After a lengthy analysis of a number of corporate transactions, the court next determined that the acquisition of SCM should be treated as an asset purchase for purposes of successor liability.[44] The court then determined that plaintiff presented sufficient evidence that HBML assumed SCM's Marchant liability when it acquired SCM.

A broad assumption-of-liability clause in a 1962 liquidation agreement was found by the court in *Wisconsin Gas LLC v. American Natural Resources Company*[45] to cover CERCLA liability. Wisconsin Gas incurred response costs at a facility formerly owned by a company called Milwaukee Solvay. The 1962 agreement in question provided that defendant ANR "assume[d] and agree[d] to pay on behalf of [Milwaukee Solvay] any and all . . . liabilities of [Milwaukee Solvay] which may hereafter be established."[46] After concluding that 42 U.S.C. § 9607(e)(1) prohibits transfers of CERCLA liability but permits indemnification for that liability, the court determined that the assumption embraced future CERCLA claims.

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[39]Case No. 3:17-cv-00308-WHO, 2023 U.S. Dist. LEXIS 95726, at *3-8 (N.D. Cal. June 1, 2023).
[40]*Id.* at *30.
[41]*Id.* at *30-31 (citations omitted).
[42]*Id.* at *31.
[43]*Id.*
[44]*Id.* at *35-41.
[45]Case No. 20-CV-1334-SCD, 2023 U.S. Dist. LEXIS 51271 at *10 (E.D. Wisc. Mar. 27, 2023).
[46]*Id*.

> The liquidation agreement in this case is silent on the matter of Milwaukee Solvay's CERCLA liabilities. Nevertheless, the language used is clear, unambiguous, and very broad. ANR assumed 'any and all . . . liabilities of [Milwaukee Solvay] which may hereafter be established.' The parties' use of the phrase 'any and all' signifies their intent not to limit the assumption to specific types of liabilities. Similarly, the use of 'hereafter' shows that the liabilities were not limited to those that existed at the time; in other words, the parties clearly contemplated—and the liquidation agreement encompassed—future, unknown liabilities.[47]

The court also held that the agreement did not contain "limiting" language.

> Here, the only specific liability the liquidation agreement mentions is workmen's compensation. The agreement, however, expressly indicates that the liabilities ANR assumed included but were not limited to worker's comp. The agreement also says that the aggregate amount of debts, obligations, and liabilities ANR assumed shall not exceed the value of the assets transferred by Milwaukee Solvay to ANR. However, that limitation does not suggest a clear intent to exclude environmental liabilities.[48]

Finally, the court held that the agreement did not mention Wisconsin's dissolution statute (that had a two-year limitations period on claims against dissolved companies) or "suggest a limited temporal period for when Milwaukee Solvay's liabilities could 'hereafter be established.'"[49] Thus, the two-year limitations period did not preclude the claim.

Metro Container Group v. AC&T Company Incorporated[50] involved a defendant's, Rahway Steel Drum Co., Inc.'s (Rahway), motion for partial summary judgment on the issue of its liability under a theory of successor liability. Metro Container Group (Metro) brought a contribution claim under CERCLA against numerous defendants that also stored hazardous materials at an industrial site in Trainer, Pennsylvania.[51] After many years of litigation, the parties had only completed limited fact discovery and discovery had only recommenced a few months earlier. Because many outstanding questions remained that prevented the court from concluding that no genuine dispute of fact exists as to Rahway's liability, the court denied the motion for summary judgment as premature. In doing so, the court stated that the limited discovery that had occurred raised more questions than answers about Rahway's successor liability. Further, in addition to potential indirect liability, the court noted that fact discovery could also show that Rahway had potential direct liability as an owner and operator of the site and as an arranger for disposal of hazardous substances.

C. Private Cost Recovery

1. Contribution (113) v. Cost Recovery (107)

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[47] *Id.* at *16-17.
[48] *Id.* at *19-20.
[49] *Id*. at *21.
[50] No. 18-3623, 2023 WL 2955888 (E.D. PA Apr. 14, 2023).
[51] *Id.* at *1.

In *ELG Utica Alloys, Inc. v. Niagara Mohawk Power Corp.*,[52] the court dismissed a section 113(f)(1) contribution claim because plaintiff could not show that it had been sued under CERCLA section 106 or 107, a prerequisite to such a claim. Plaintiff argued that it was "subject to CERCLA liability under the 2015 [Consent Order]" but that fact did not satisfy section 113(f)(1)'s requirement of a prior civil action under sections 106 or 107(a) that gives rise to a contribution claim.[53]

In *Atlantic Richfield Company v. NL Industries Inc.*,[54] the district court approved the recommendation of a magistrate judge to dismiss NL's third-party complaint in contribution because ARCO's claim against NL was a contribution claim. Thus, NL would only be allocated its several share and would not have a contribution claim for paying more than its share.

In *Vincent v. Estate of Beard*,[55] the Ninth Circuit reversed a decision of the district court awarding summary judgment to defendants on *res judicata* grounds. An earlier lawsuit brought by the owner of "the Property" (Mayhew) resulted in a settlement of Superfund claims brought by a neighbor (Walnut Creek Manor) to the Property, that was owned originally by the Beards and later by Mayhew. Mayhew was supposed to conduct a remediation but defaulted on its obligation. Vincent stepped in, bought a promissory note signed by Mayhew, foreclosed on the property, remediated it, and then sued the Beards Estate and Mayhew in cost recovery under CERCLA. The district court decided that the claims in the Mayhew action that was settled were the same as the claim brought by Vincent (a required element to establish *res judicata*). The court of appeals held otherwise.

> Although the Mayhew/Beard complaint purported to seek both section 113(f) contribution for the Walnut Creek Manor Action judgment and section 107 cost recovery for expenses related to PCE "under and emanating from [the] Mayhew Center property," the Settlement Agreement and stipulated injunction order focused on the Walnut Creek Manor property. Specifically, the Escrow Agreement, which was incorporated by the Settlement Agreement and the injunction order, only allowed money from the settlement-created escrow account to be used for remediating the Walnut Creek Manor property and a portion of the Property adjacent to the Walnut Creek Manor property.[56]

As a result, the court of appeals concluded that,

> Mayhew's CERCLA claim—which sought apportionment of the liability stemming from the Walnut Creek Manor Action—is distinct from GP Vincent's CERCLA claim—which seeks reimbursement for costs incurred in connection with remediation of the Property's own contamination. In so concluding, we do not hold that the distinctions between section 107 and section 13 CERCLA claims are dispositive, only that the record and facts of this case lead to the

[52]No. 6:16-cv-1523 (BKS/ATB), 2023 U.S. Dist. LEXIS 51146 (N.D.N.Y Mar. 27, 2023).
[53]*Id.* at *72-77.
[54]No. 20-cv-00234-NYW-KLM, 2023 U.S. Dist. LEXIS 63696 (D. Colo. Feb. 23, 2023).
[55]68 F.4th 508 (9th Cir. May 17, 2023).
[56]*Id.* at 516.

> conclusion that the prior litigation concerned different liability than the present litigation."[57]

Wardlow Funding, LLC v. Foasberg Laundry & Cleaners, Inc.[58] resulted in dismissal of Foasberg's section 107/113 third-party complaint because of the insufficiency of the pleadings with respect to the release of hazardous substances and the migration of chemicals from neighboring properties to the facility in issue.[59] However, the court decided that Foasberg could allege both a section 113 claim in contribution for response costs being sought by the plaintiff in the main action and a section 107 claim for investigation and remediation costs that it independently incurred.[60]

In *Los Angeles County Metropolitan Transport Authority v. California Drop Forge, Inc.*,[61] the district court denied a motion to dismiss a cost recovery action by a potentially liable party. The court succinctly explained:

> [T]he liability structure outlined in CERCLA allows for a party, regardless of its status as a PRP, to file a section 107 claim to hold other PRPs jointly and severally liable. Those defendants can then file a section 113 counterclaim to ensure the equitable distribution of costs amongst the liable parties, including the plaintiff. The fact that a party might be a PRP that is attempting to hold other PRPs jointly and severally liable is therefore an insufficient basis to grant a motion to dismiss.[62]

StarLink Logistics Inc. v. ACC, LLC[63] required the court to decide whether a "Voluntary Oversight and Assistance Program" (VOAP) settlement between StarLink and the Tennessee Department of Environment and Conservation (TDEC) was an administrative settlement under section 113(g)(3), thereby limiting StarLink to a contribution action. The court held that it was. Since StarLink had only pursued a cost recovery action, the court granted summary judgment to defendant. The court looked to the "specific terms" of the agreement and applied state contract-construction law, while recognizing that Sixth Circuit case law on whether a settlement agreement resolves the liability of the party in question to the federal government or state government is not easily reconciled.[64] Ultimately, the court looked to the Sixth Circuit's decision in *Hobart* for its analytic framework: (1) Is there language in the agreement that states the intent that the agreement be an administrative settlement? (2) Is there contribution protection from actions or claims as provided by sections 113(f)(2) and 122(h)(4) of CERCLA? (3) Was the

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[57] *Id.* at 518.
[58] Case No. 8:21-cv-1519-SPG-JDE, 2023 U.S. Dist. LEXIS 44818 (C.D. Cal. Mar. 14, 2023).
[59] *Id.* at *19-22, *25-26.
[60] *Id.* at *26-28.
[61] No. CV 23-1728-MWF (KSx), 2023 U.S. Dist. LEXIS 119456 (C.D. Cal. July 7, 2023).
[62] *Id.* at *10 (citations omitted).
[63] 653 F. Supp. 3d 462, 481-487 (M.D. Tenn. 2023).
[64] The court analyzed the holdings in ITT Indus., Inc. v. BorgWarner, Inc., 506 F.3d 452 (6th Cir. 2007); RSR Corp. v. Commercial Metals Co., 6 F.3d 552 (6th Cir. 2007); Hobart Corp. v. Waste Mgmt. of Ohio, Inc., 758 F.3d 757 (6th Cir. 2014); and Florida Power Corp. v. FirstEnergy Corp., 810 F.3d 996 (6th Cir. 2015), on the question of whether a settling party had resolved its liability to the United States or a state. The concluded that it had a "healthy respect for the nuances in the analysis that exist due to some tension between some Sixth Circuit cases." 653 F. Supp. 3d at 483.

document titled "Administrative Settlement Agreement and Order on Consent," thereby matching the statutory language in section 113(f)(3)(B)? And (4) is there a covenant not to sue or take administrative action pursuant to §106 and 107(a) of CERCLA for the work and future response costs?[65] The court then explained that: (1) The language in the VOAP agreement states in section VIII that the VOAP agreement "constitutes an approved administrative settlement pursuant to 42 U.S.C. § 9613(f) and resolves [Plaintiff's] liability, if any whatsoever, to the State of Tennessee as of the date of [the VOAP agreement] under the Comprehensive Response, Compensation and Liability Act (CERCLA) and its amendments, 42 U.S.C. § 9601 et seq."[66] The VOAP agreement expressly used the term "administrative settlement," and identified it as an administrative settlement specifically for purposes of CERCLA liability. (2) The VOAP agreement provided protection from contribution actions under CERCLA, which was not diminished by the proviso that it "applied to third parties who were given by Plaintiff actual or constructive notice of the VOAP agreement and given an 'opportunity to comment upon' (whatever that means) the VOAP agreement."[67] (3) The title of the VOAP agreement does not use the term "Administrative Settlement" as did the agreement in *Hobart*, but this "strikes the Court as rather unimportant, given the above-quoted content from the VOAP agreement that makes very clear in express terms that the parties intended it to be an administrative settlement."[68] (4) Unlike in *Hobart*, "the Court does not see where the VOAP agreement contains any express covenant by TDEC not to sue or take administrative action pursuant to CERCLA," but the VOAP agreement "seem[s] meticulous in omitting any clear reference to the possibility that Plaintiff could be sued or subject to administrative action."[69] Saying that the first two factors were the most important and the latter two "do not go far in tilting the balance in the other direction," the court held that the VOAP agreement was an administrative settlement limiting plaintiff to a contribution claim.[70]

D. Allocation and Indemnification

In an unpublished decision, *Columbia Falls Aluminum Company, LLC v. Atlantic Richfield Company*,[71] the Ninth Circuit affirmed the district court's 65-35 percent allocation. The court of appeals agreed that indemnity provisions in an agreement between the parties were not sufficiently specific to affect a waiver of a right to sue under CERCLA but could be considered for purposes of equitable allocation.[72] The court of appeals affirmed the application of the Gore factors by the district court.

> [T]he district court considered the Gore Factors but found the first four to be neutral, taking into consideration the practical effect of the proposed remedial measure—a slurry

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[65] 653 F. Supp. 3d at 484.
[66] *Id*.
[67] *Id*. at 486.
[68] *Id*.
[69] *Id.* at 485-86.
[70] *Id.* at 486-87.
[71] No. 21-36042, 2023 U.S. App. LEXIS 2425 (9th Cir. Jan. 31, 2023).
[72] *Id.* at *2-3. The court of appeals offered this supporting case law: "Cadillac Fairview/California, Inc. v. Dow Chemical Co., 299 F.3d 1019, 1025 (9th Cir. 2002) (equitably allocating 100 percent of CERCLA cleanup costs to the government based on an indemnity clause that was not enforceable as a matter of law); Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co., 14 F.3d 321, 326 (7th Cir. 1994) (holding the district court erred in allocating cleanup costs by not considering contractual arrangements, which reflected an intent to indemnify)." *Id.* at *4.

> wall that would encompass the West Landfill and the Wet Scrubber Sludge Pond ("WSSP"). Considering CFAC's contamination of the WSSP, along with the fact that a large portion of the slurry wall would contain the WSSP, the district court did not err in considering the proposed remedial measure alongside the Gore Factors.[73]

While the district court might "have explained more fully each party's relative contribution to the need for this joint remedial measure," the court of appeals determined that it could not say "that the district court clearly erred in finding that the slurry wall was occasioned by both ARCO's and CFAC's contamination."[74] The court of appeals also affirmed the district court's economic benefits analysis.

> Both parties realized hundreds of millions of dollars in profits during their respective operations. Although ARCO earned more profit than CFAC, ARCO expended over $1 billion dollars on the Site—including the facility's construction and upgrades to mitigate environmental contamination—while CFAC spent only $95 million on Site improvements. The district court also considered that CFAC received the facility and everything ARCO put into it for $1.00. Recognizing these other forms of economic benefit and the substantial profits earned by both parties, the district court did not err in concluding that the totality of the economic picture was neutral.[75]

Tailored Chem. Prods., Inc. v. Kiser-Sawmills, Inc.[76] represents the judgment of the district court in a CERCLA contribution action that resulted in an allocation to four parties. Plaintiff (TCPI) arranged for treatment of "glue wastewater," contained in several thousand totes, by DAFCO, Inc., a defunct entity. DAFCO leased property from Anderson Family Properties (AFP) referred to as the "Disposal Site." Elizabeth Keister was the President and Resident Agent for DAFCO. Neither she nor DAFCO appeared in the action. Perry Keister, Elizabeth Keister's father, was having marital difficulties, and was a consultant for TCPI before becoming the "chief technical officer" at DAFCO. Perry suggested to TCPI that it use DAFCO to treat its glue wastewater and he arranged for DAFCO to sublease property from CARRE, a company he owned.[77] The court found that,

> Perry K benefited personally through his efforts on DAFCO's behalf related to the TCPI totes, including DAFCO obtaining over $1 million . . . which was spent in part on rent that would have otherwise had to have been paid by CARRE, a company owned by Perry K; the success of DAFCO providing an entity through which he could obtain work and avoid income in connection with his (former)

[73] *Id.* at *4-5.
[74] *Id.* at *5.
[75] *Id.* at *5-6.
[76] No. 5:21-CV-00069-KDB-SCR, 2023 U.S. Dist. LEXIS 224113 (W.D.N.C. Dec. 15, 2023).
[77] *Id.* at *5-12.

> wife's company; and supporting a company where his daughter could have the title of President.[78]

DAFCO defaulted on its obligations to treat the glue wastewater, resulting in TCPI stepping in under an Administrative Order on Consent (AOC) with the EPA to remediate the AFP property. It spent over $7 million. AFP cooperated in providing access to TCPI and was liable as a current owner. Its third-party landowner liability defense was rejected because

> [I]t failed to reasonably monitor DAFCO's activities, including failing to require DAFCO to provide evidence of appropriate government permits or even to regularly check on the number of totes on the premises, which could have significantly limited the scope of the problem. Further, even after AFP was aware of the number and condition of the totes at the site, it failed to take immediate action against DAFCO (although it ultimately filed a legal action against TCPI and cooperated with state and federal regulators in an effort to have the totes removed and avoid liability).[79]

DAFCO was liable as the site operator. Because of his authority to control hazardous wastes that were the source of the contamination, Perry K was found to be an operator. Elizabeth K, as President of DAFCO, was found to be an operator. Another defendant (KSI) was found not liable as an arranger for disposal. KSI arranged with Perry K to transport about 8,000 totes of untreated wastewater from the "Virginia Street property" to the AFP property. The Virginia Street property was investigated by EPA, but no contamination was discovered. "In light of all the circumstances," the court held that there was "insufficient evidence to prove that KSI had the specific intent to dispose that is required under the *Burlington Northern* standard. Indeed, there is no evidence that KSI even 'should have known' of contamination at the [AFP] Property."[80] A third-party defendant, Southern Resin, however, was found by the court to be an "'arranger' of transportation of hazardous waste" but received a zero allocation vis-à-vis third-party plaintiff, AFP.[81] The court then rendered its allocation. DAFCO and one other party were not included in the allocation because these entities were no longer in existence. Applying the Gore and Torres factors, the court allocated 92% to TCPI given that most of the waste came from TCPI and it did not test the untreated waste, diligence DAFCO's permits to treat the waste or monitor DAFCO in cleaning the totes, instead continuing to deliver totes to the Disposal Site after it should have known DAFCO was not timely or properly processing them. [82] Perry K and Elizabeth K were each allocated 1%. While the court found them culpable for accepting the wastewater totes and large sums of money for treatment and cleaning despite their inability to process the totes, many of which were instead abandoned, the court recognized that their limited financial resources prevented the court from allocating an amount commensurate with their role and culpability.[83] AFP was allocated 6% but received a credit against its 6% share of $82,083 for "expenses and

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[78] *Id.* at *13.
[79] *Id.* at *48.
[80] *Id.* at *53-54 (citing Burlington N. & Santa Fe Ry. Co. v. U.S., 556 U.S. 599, 610 (2009)).
[81] 2023 U.S. Dist. LEXIS 224113 at *55, *64.
[82] *Id.* at *60.
[83] *Id.* at *61.

damages" it incurred at the Disposal Site.[84] The court allocated a "meaningful share" to AFP both for its role renting a portion of the site to DAFCO without exercising due care and diligence to monitor them, which contributed to the accumulation of totes, and because AFP benefited from TCPI's cleanup of the property in terms of collected increased rent."[85] Saying that the degree of cooperation with federal and state officials was an "important factor in allocation, the court concluded that all of the parties either cooperated or there was no evidence of a failure to cooperate.[86] The court considered ability to pay arguments[87] and noted that "[m]athematical precision in the allocation process is not realistic and is not part of the plaintiff's burden for establishing an equitable share."[88] Finally, the court noted that it "included consideration of pre-judgment interest under 42 U.S.C. § 9607(a)(4) in making the allocation" and, therefore, "TCPI is not entitled to receive additional pre-judgment interest from any of the defendants."[89]

In an earlier decision in *Tailored Chem. Prods. v. Dafco Inc.*,[90] the court denied a motion *in limine* in which the movant argued that the expert (Rabah) was offering legal opinions that invade the province of the court.

> Plaintiff disavows any intent to present expert legal opinions on the ultimate legal issues, and the Court will hold Plaintiff to that representation (which certainly appears to be called into question by Mr. Rabah's 'allocation' opinions). However, in light of the discretion afforded the Court by a bench trial and the fact that some of his opinions relate to issues underlying the allocation decision (for example the reasonableness of the response costs) rather than the allocation itself, the Court declines to preclude all of Mr. Rabah's testimony.[91]

"Instead," the court said, "the Court will allow Mr. Rabah to testify and defer a final ruling on the admissibility and weight to give his testimony until it can be evaluated at trial."[92]

The decision in *Pac. Res. Assocs. LLC v. Cleaners*[93] resulted in approval of a settlement of a private CERCLA and California Hazardous Substance Act cost recovery claims. The matter involved successive owners of a 50-year plus dry-cleaning operation that was the source of perchloroethylene releases. Certain co-defendants objected, unsuccessfully arguing that the contribution protection clause in the settlement agreement was overbroad because it barred them from seeking contribution for plaintiff's future costs. Applying the factors set forth in *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.*,[94] the court determined that a rough approximation of plaintiffs' total recovery was $185,000. Settling defendants collectively were paying about ten percent of these costs. Saying that "black letter law" provides "that a settlor should pay less in settlement than he would after trial

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[84]*Id.* at *63-64.
[85]*Id.* at *61-62.
[86]*Id.* at *62-63.
[87]2023 U.S. Dist. LEXIS 224113 at *63.
[88]*Id.* (citation omitted).
[89]*Id.*
[90]No. 5:21-CV-00069-KDB-SCR, 2023 U.S. Dist. LEXIS 161602 (W.D.N.C. Sept. 12, 2023).
[91]*Id*. at *10.
[92]*Id.* at *9-10.
[93]Case No.: 3:20-cv-00234-RBM-DEB, 2023 U.S. Dist. LEXIS 205895, *25-32 (S.D. Cal. Nov. 16, 2023).
[94]38 Cal. 3d 488, 499-500 (1985).

and that the Court's evaluation is to be made based on information available at the time of settlement (now)," the court reviewed the evidence with respect to each of the settling defendants in determining that this allocation was fair and equitable.[95] Settling defendants Howard and Angela Cho operated the facility for only two years. Angela Cho was dead. Howard Cho was retired, had no insurance coverage, and lived on his social security income. Settling Defendant Long operated for two and one-half years. She earned $46,000 per year as a seamstress and hoped to retire within a year after which she would live on social security income of $2,400 per month. She had no insurance coverage. Settling defendant Hong acquired the business in 2002 and, in 2004, replaced the dry-cleaning system to one that did not use PCE. The Chos, Long, and Hong were found by the court to be de minimis sources of releases based on the evidence of the care they exercised in handling PCE.[96] These same facts also supported a CERCLA equitable allocation. "Applying the Gore Factors, the Settling Defendants' contribution and involvement in the generation, treatment, storage, or disposal of the hazardous waste is minimal, and it is therefore within the Court's discretion to approve the Settling Defendants' respective settlement figures."[97]

In a companion case, *Pac. Res. Assocs. LLC v. Suzy Cleaners*,[98] the court also found that a payment of $25,000 by settling defendant "M&E," or about 13.5 percent of plaintiff's response costs ($185,000), was fair under both state law and CERCLA. M&E never operated a dry-cleaning business. It operated an adult daycare facility, but it was alleged by objectors to the settlement that historic discharges at its property was a continuing source of the contamination in issue. The court was not persuaded.

> While the Court agrees that a current landowner can be held strictly liable for past pollution emanating from its property, the Court need not decide the merits of Plaintiff's CERCLA claims at this juncture. It is within the Court's discretion to allocate settlement costs as it sees fit. Here, M&E is contributing $25,000 for pollution that the parties agree it did not cause. Thus, the Court finds that the contemplated settlement is fair and reasonable under CERCLA.[99]

In *L.A Terminals, Inc. v. City of Los Angeles*,[100] the court denied motions *in limine* relating to expert testimony on allocation. As to one of the motions, the court decided that challenges to the expert's "conclusions on how to choose and weigh allocation factors are better addressed through cross examination than the present motion."[101] As to a second such motion (where the movant argued that the same expert's allocation testimony "would not be helpful because his report merely assumes the Court's role of weighing the equitable factors and arriving at an allocation 'recommendation'"), the court determined that it would benefit from the expert's "technical and specialized knowledge, as well as his experience in equitable allocation, by considering his reasoned allocation suggestions," and held that the expert "may distill his various scientific opinions based on his review of the evidence

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[95] *Id*. at 499.
[96] 2023 U.S. Dist. LEXIS 205895 at *25-28.
[97] *Id.* at *32.
[98] Case No. 3:20-cv-00234-RBM-DEB, 2023 U.S. Dist. LEXIS 205888 (S.D. Cal. Nov. 16, 2023).
[99] *Id*. at *37 (citations omitted).
[100] Case No. CV- 18-6754-MWF (PVC), 2023 U.S. Dist. LEXIS 53290 (C.D. Cal. Feb. 15, 2023).
[101] *Id.* at *15.

into a complete allocation proposal without usurping the role of the Court."[102] As to a second expert, the court determined that the expert's owner class benchmark (20%), which he notes serves only as placeholder, is sufficiently based on the expert's "experience as a CERCLA allocation expert on applicable CERCLA case law to survive an exclusion request."[103] The court also held that the expert's "treatment of post-operational ownership is reliably based on the EPA's Non-Binding Preliminary Allocation of Responsibility Guidance."[104] Again, the court said that the movant could raise its challenges through cross examination. The court also allowed rebuttal experts to testify, saying that because the other experts "will be permitted to offer their opinions implicating the equitable factors pertinent to the Court's ultimate allocation of liability among the parties, the Court determines it is appropriate for the City's experts to be permitted to offer rebuttal opinions based on their own reliably based conclusions."[105] The final allocation aspect of this case related to an indemnity that was otherwise time barred. The court held it could still be considered for allocation purposes.

> Like the indemnified parties in *Cadillac Fairview* and *Beazer II*, the City is not trying to enforce the indemnity provision of Permit No. 530, but is asking the Court to consider as an equitable factor the promises that LAT made to the City that it would be responsible for its own contamination. LAT's argument that the Court must exclude evidence of the time-barred indemnity claim must therefore fail. Equitable consideration of the indemnification provision does not implicate the legal determinations regarding enforceability of the same provisions.[106]

Koczur v. Rock Island Res. Co.[107] addressed allocation in the context of approval of a settlement agreement between plaintiff and three defendants. Three other defendants had yet to appear in the action. The agreement was substantively fair because (1) "Plaintiffs have shown that they diligently searched for potential successor entities or principals of the three non-settling entities, but were unsuccessful"; (2) "Given this diligent search, it appears that the settlements allocate liability among all potentially liable parties"; (3) "Settling Parties explain the settlements together correspond to roughly 25% of the cost of the investigation and remediation work at the site"; and (4) "Settling Parties indicate that they believe that this amount is fair given the uncertainty of the litigation and the fact that 'there are no available records or witnesses clearly proving their liability.'"[108]

Substantive fairness was also found by the court in *Berendo Prop. v. Closed Loop Ref.*[109] Based on records of a cathode ray tube (CRT) recycling warehouse facility, the settling party (IMS) was,

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[102]*Id.* at *18-19, 20-21.
[103]*Id*. at *24-25.
[104]*Id*. at *25.
[105]2023 U.S. Dist. LEXIS 53290 at *27.
[106]*Id.* at *50-51 (citing Cadillac Fairview/California Inc. v. Dow Chemical Co., 299 F.3d 1019, 1027 (9th Cir. 2002) and Beazer E., Inc. v. Mead Corp., 412 F.3d 429 (3d Cir. 2005)).
[107]Case No. 3:21-CV-646 JD, 2023 U.S. Dist. LEXIS 41588, *11-13 (N.D. Ind. Mar. 10, 2023).
[108]*Id.* at *12-13 (record citations omitted).
[109]Case No. CV-22-01721-PHX-SMM2023, 2023 U.S. Dist. LEXIS 16195 (D. Ariz. Jan. 31, 2023).

> [R]esponsible for 71.5 million out of the 195 million tons of CRT waste that reached the warehouse. This amounts to a little under 36.7% of the total CRT waste. The estimated cleanup cost is over $15 million. The $5,000,000.00 that IMS is agreeing to contribute to cleanup costs therefore represents a little over 33.3% of the total cleanup costs. Because the settlement amount is proportional to IMS' alleged share of responsibility and the funds will be put toward cleanup efforts, the settlement agreement is substantively fair and reasonable.[110]

The court approved a consent decree agreed to by defendants in *United States v. Atl. Richfield Co.*[111] The court had no difficulty finding substantive fairness since the ARCO defendants agreed to implement the remedies set forth in EPA's Record of Decision at their cost. "The Consent Decree puts the full burden of remediation on the party deemed responsible for the contamination."[112] The ARCO defendants also agreed to pay EPA's past costs and put-up financial assurance.

E. Defenses

1. Necessary and Consistent with NCP

Lovejoy Amcox Oil and Gas LLC[113] involved five motions *in limine* by Amcox Oil and Gas LLC (Amcox). The court previously dismissed all of Ms. Lovejoy's negligence and private nuisance causes of action under which economic damages was recoverable. The only remining claim was for recovery of response costs and declaratory relief under section 107 of CERCLA. The court noted that under this claim, Ms. Lovejoy "may recover only the necessary costs of responding to a legitimate environmental threat."[114] Amcox's four motions to exclude evidence regarding economic damages were therefore denied as moot. Its fifth motion to exclude certain opinion testimony by Ms. Lovejoy's expert remained pending and would be addressed at trial.

2. Statutes of Limitation

ELG Utica Alloys, Inc. v. Niagara Mohawk Power Corp.[115] involved a 2016 contribution claim for response costs incurred following a 2015 Consent Order associated with a metal recycling facility that had operated in Utica, New York from the 1950s until 2012. The court held that the claim was time-barred because physical onsite construction of the remedy was undertaken more than six years before a tolling agreement was executed in 2015. Specifically, the excavation in 2007 of 715 tons of PCB and TCE-contaminated soil and pumping 6,951 gallons of groundwater for offsite disposal represented remedial action because it was consistent with a permanent remedy, was aimed at eliminating the source of the PCB contamination, and was not conducted to address an imminent threat or emergency situation. Plaintiff attempted to take advantage of Second Circuit precedent[116]

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[110] *Id.* at *4-5.
[111] No. CV-23-50-GF-BMM, 2023 U.S. Dist. LEXIS 208576 (D. Mont. Nov. 20, 2023).
[112] *Id*. at 6.
[113] No. 2:20-cv-00537, 2023 WL 2801216 (S.D. W. Va. Apr. 5, 2023).
[114] *Id.*
[115] No.6:16-cv-1523 (BKS/ATB), 2023 U.S. Dist. LEXIS 51146 (N.D.N.Y. Mar. 27, 2023).
[116] MPM Silicones, LLC v. Union Carbide Corp., 966 F.3d 200 (2nd Cir. 2020).

that created an exception to the common law doctrine that there can be only one remediation at a Superfund site. However, the court concluded that application of the single-remediation principle,

> [W]ould not be illogical or unfair because Plaintiff has not pointed to evidence from which a reasonable factfinder could conclude that the contamination being addressed pursuant to the 2015 Consent Order is a new problem that was non-existent, unknown, and/or not reasonably foreseen at the time of the 2007 soil excavation and disposal.[117]

The PCB contamination addressed in 2007 was the same contamination discovered in 1977 and while the 2015 remedial work addressed contaminants other than PCBs, this was not "a new, different, or unforeseen problem."

> [A]pplication of the single-remediation principle in these circumstances is not unfair because nothing precluded Plaintiff from bringing a section 107 cost recovery action against Defendants prior to the expiration of the limitations period. Evidence in the record indicates that Plaintiff was aware well before it initiated the 2007 soil excavation and disposal that certain Defendants might be responsible for a share of response costs incurred in relation to the Site and that litigation might be necessary to recover those costs."[118]

In *United States v. Boeing Company*,[119] Boeing moved to dismiss the government's cost recovery and declaratory relief action arguing that the cause of action accrued, and the government had to file its complaint six years after the remedy was adopted because some of the remedial actions that had already been taken were consistent with the adopted remedy. The court disagreed holding that accrual starts after the remedy is adopted, when on-site construction consistent with the adopted remedy begins. Because the complaint did not indicate on its face when onsite construction consistent with the final remedy began, the court held the government may be able to show the complaint was timely so the statute of limitation defense was not appropriately resolved on a motion to dismiss. Boeing also moved to dismiss arguing that a contractual indemnity and hold harmless clause barred its CERCLA liability. The court, however, denied the motion holding that indemnity or hold harmless agreements do not bar CERLCA liability in an action by the government.[120]

Atl. Richfield Co. v. NL Indus.[121] involved the CERCLA statute of limitations on unusual facts. ARCO began remedial work at the site in issue in March 2011 following receipt of a Unilateral Administrative Order (UAO). ARCO sued NL in cost recovery in January 2020. NL moved for summary judgment in June 2021, arguing that the six-year statute of limitations for remedial actions had run. Before that motion was decided, in December 2021, ARCO entered into an Administrative Settlement Agreement and Order on Consent for Removal Action (AOC). ARCO then amended its complaint, arguing that, as a result of the AOC, it was limited to a contribution action and the three-year limitations period for contribution actions was applicable. NL refiled the motion for summary

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[117]2023 U.S. Dist. LEXIS 51146 at *69-70.
[118]*Id.* at *71-72.
[119]670 F. Supp. 3d 1185 (W.D. Wash. April 25, 2023).
[120]*Id*. at 1192.
[121]No. 20-cv-00234-NYW-KLM, 2023 U.S. Dist. LEXIS 72895 (D. Colo. Apr. 26, 2023).

judgment in August 2022. NL argued that CERCLA section 113(g)(2) (six-year limitation period for a remedial action and a three-year limitations period following completion of a removal action) applies to ARCO's claim for contribution despite ARCO's contention that its claims were now governed by section 113(g)(3) (three-year limitation period for contribution claims following an administrative settlement).[122] Relying on Tenth Circuit's decision in *Sun Co., Inc. (R&M) v. Browning-Ferris, Inc.*, the court held that section 113(g)(2) was applicable.[123] In *Sun Co.*, the Tenth Circuit applied section 113(g)(2) to the plaintiffs' contribution action for response costs that were incurred pursuant to a unilateral administrative order, as was the case here. The court of appeals in *Sun Co.* determined that the three-year limitations period in section 113(g)(3) was not applicable because costs incurred in response to a UAO is not a triggering event for the running of the limitations period under section 113(g)(3). In effect, the Tenth Circuit held that there were two different limitations periods for a contribution action depending upon the triggering event: (1) Where a civil action under sections 106 or 107 resulted in the costs incurred by a contribution plaintiff, the three-year limitations period set out in section 113(g)(3) will apply, and (2) a party that incurred cleanup costs pursuant to an EPA UAO will have its contribution claim governed by the limitations period in section 113(g)(2), which governs "initial actions" for recovery of such costs.[124] The district court acknowledged that decisions from other circuits applied the three-year limitations period to all contribution actions, irrespective of the triggering event, but held that it was bound by Tenth Circuit precedent. Thus ARCO's claims were governed by the limitations periods in section 113(g)(2).[125] The court then held that ARCO's claims were time barred because (1) if ARCO conducted a remedial action, its suit was filed more than six years after initiation of physical construction of the remedy and thus was time-barred under section 113(g)(2)(B); and (2) EPA completed a removal action in 2000 and since, again under Tenth Circuit precedent, there can only be one removal action at a site, suit brought in 2020 was time barred under section 113(g)(2)(A).[126] The only claim that was allowed was one for $400,000 that was paid to EPA under the 2020 AOC.[127] ARCO then moved the court to permit an interlocutory appeal on two questions: (1) whether *Sun Co*. should be revisited in light of recent Supreme Court CERCLA decisions, and (2) whether "the single-action principle applies to a geographically diverse site involving multiple temporally and substantively discrete response actions."[128] The court granted the motion. Stay tuned.[129]

F. Recoverable Response Costs (Including Attorney's Fees)

In *Paddock Enterprises LLC v. United States*,[130] the U.S. moved to dismiss Plaintiff Paddock Enterprises LLC's (Paddock) cause of action for incurred response costs under Section 107(a) of CERCLA and for declaratory judgment that the U.S. is liable. Paddock claimed it incurred four different categories of necessary response costs related to the cleanup at the Jaite Mill site. These included costs for its preparation of investigatory plans and securing access to the site, costs related to its investigation activities, costs for when it analyzed and reported on those activities to the U.S., and costs for its pursuit of liable

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[122] *Id.* at *2-3, 8-12.
[123] 124 F.3d 1187 (10th Cir. 1997).
[124] 2023 U.S. Dist. LEXIS 72895 at *14-17.
[125] *Id.* at *13-16.
[126] *Id.* at *14-16.
[127] *Id.* at *16-17.
[128] *Id*. at *15.
[129] Atl. Richfield Co. v. NL Indus., No. 20-cv-00234-NYW-KLM, 2023 U.S. Dist. LEXIS 145781 (D. Colo. Aug. 18, 2023).
[130] Case No. 5:22-cv-1558, 2023 WL 6161999 (N.D. Ohio Sept. 21, 2023).

parties, including the U.S., to benefit the overall cleanup effort at the site. The U.S. contends that some of these costs are unrecoverable under the terms of the governing permit granted by the National Park Service in November 2018 and the remaining costs are not adequately pled as necessary costs of response. With respect to the costs for its pursuit of liable parties, the court agreed and granted the U.S. motion to dismiss. The court found that to the extent that these costs were recoverable, Paddock failed to adequately plead any supportive factual allegations for them. The court further found that Paddock's costs for securing access to the site, investigation activities, and associated analysis and reporting were incurred "pursuant to" the permit, and that these claims were not covered under the reservation of rights provision, thus these cost claims must be dismissed, and the court granted the U.S. motion to dismiss. [131] Although Paddock's first cause of action under Section 107(a) was dismissed, the court found that its unchallenged cause of action for contribution under Section 113(f)(1) was sufficient on its own to maintain a cause of action for declaratory judgment under CERCLA Section 113(g)(2). [132]

G. Miscellaneous

While for decades Superfund lawyers have been taught that there is no right to a jury trial in CERCLA cost recovery actions, the court in *Cal. Dep't of Toxic Substances Control v. Jim Dobbas, Inc.*[133] refused to strike a jury demand. Why? The prior case law has been "called into question" by the Supreme Court in *Great-West Life & Annuity Insurance Co. v. Knudson*, where the Court cautioned that "not all relief falling under the rubric of restitution is equity." The district court also noted the Second Circuit's holding that in light of the decision in *Great-West*, "it is by no means clear that the restitution provided by section 9607(a) is equitable, rather than legal, in nature."[134]

In *United States v. Boeing Co.*,[135] the United States convinced the court to phase proceedings to address liability before considering damages. Doing so, the court held, would use court resources efficiently, was unlikely to prejudice Boeing or create confusion. The decision is perhaps best explained by this observation: "Phasing is especially appropriate here because resolution of a single issue—namely, Boeing's liability—could dispose of the entire case."[136]

II. NATURAL RESOURCE DAMAGES

In Re: Gold King Mine Release in San Juan County, Colorado, on August 5, 2015,[137] involved state law tort claims and claims under CERCLA by several states and the Navajo Nation for natural resources damages against EPA and its contractors. While EPA's contractor, Weston Solutions Inc., was conducting remediation work, a spill from a gold mine occurred releasing acid mine drainage and heavy metals into a river and onto tribal lands.[138] Two CERCLA-related issues were presented in Weston's Motion for Summary Judgment: (1) whether the CERCLA "limitation on the use of natural resources damages applies to the Navajo Nation;" and (2) whether the Navajo Nation's state law tort

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[131] 2023 WL 6161999 at *14.
[132] *Id.* at *14-15.
[133] No. 2:14-cv-00595 WBS EFB, 2023 U.S. Dist. LEXIS 132085, *14-17 (E.D. Cal. July 31, 2023).
[134] *Id.* at *14-15 (citing AMW Materials Testing, Inc. v. Town of Babylon, 584 F.3d 436, 452 (2d Cir. 2009)).
[135] Case No. C22-0485JLR, 2023 U.S. Dist. LEXIS 154711 (W.D. Wash. Aug. 31, 2023).
[136] *Id*. at 7-8.
[137] 669 F. Supp. 3d 1146 (D.N.M. Apr. 12, 2023).
[138] *Id.*

claims "for restorative damages are preempted by CERCLA's natural resources damages scheme." [139] The court stated that the limitation on use does apply to the Navajo Nation finding that "CERCLA Section 107(f), as amended by SARA Section 207(c), authorizes Indian Tribes to recover natural resource damages and limits the use of those recovered sums to restore, rehabilitate, or acquire the equivalent of the damaged natural resources."[140] Regarding preemption, the court found that CERCLA, although a comprehensive mechanism to clean up hazardous waste sites, "does not completely preempt all remedies available under state law."[141] Further, Weston had not shown that the state law tort claims for restorative damages are the same natural resources damages preempted by CERCLA.[142] The court noted that the Navajo Nation had not filed a claim for natural resources damages at that time, the evidence showed that "the restorative programs seek to restore confidence in the resources and that the Navajo Nation does not seek to restore, replace, or acquire the equivalent of the damaged resource," and that "[t]he restorative damages claims, while arising from the contamination from the Spill, seek to remedy injuries that are distinct from the injury to the River."[143]

In *Pakootas v. Teck Cominco Metals Ltd.*,[144] the U.S. District Court for the Eastern District of Washington denied Teck Cominco Metals Ltd.'s (Teck Cominco) Motion for Summary Judgment on Ripeness. The Plaintiffs, Confederate Tribes of the Colville Reservation (the Colville Tribes), and the State of Washington as Plaintiff-Intervenor brought claims under the CERCLA for natural resource damages at the Upper Columbia Rivers Site. In its Motion for Summary Judgment, Teck Cominco argued that Plaintiffs' claims were unripe because they had "failed to meet two pre-suit conditions of CERCLA" section 113(g) (1): that (1) Plaintiffs provide a 60-day notice of intent to sue; or that (2) the remedial action be selected.[145] The court found that both Teck Cominco and EPA "had actual notice of Plaintiffs' intent to sue for natural resource damages."[146] Plaintiff sent a letter to Teck Cominco regarding their natural resource damages claim and requesting that Teck Cominco agree to waive any defense to natural resource damages liability and execute an agreement "to toll the statute of limitations for filing suit."[147] Teck Cominco replied to Plaintiffs a month later offering to toll the statute of limitations. A final tolling agreement was never executed, but the court found that Teck Cominco's reply unequivocally acknowledged Plaintiffs' intent to sue and found this to be adequate notice of Plaintiffs' intent to sue for natural resource damages. The court did not reach a conclusion as to the second pre-suit condition since the conditions were disjunctive.

[139] *Id.* at 1152-1153.
[140] *Id.* at 1155.
[141] *Id.* at 1159-1160.
[142] *Id.* at 1159.
[143] 669 F. Supp. 3d at 1159-1160.
[144] No. 2:04-CV-00256-SAB, 2023 WL 2090977 (E.D. Wash. Feb. 17, 2023).
[145] *Id.* at *2.
[146] *Id.* at *3.
[147] *Id.*

Chapter U: TRANSACTIONS AND BROWNFIELDS REDEVELOPMENT
2023 Annual Report [1]

I. INTRODUCTION

Per- and polyfluoroalkyl substances (PFAS) are a group of thousands of chemicals that have unique physical characteristics, such as the ability to resist heat, oil, stains, grease and water. Some of the more commonly known chemicals in the PFAS family are perfluorooctane sulfonic acid (PFOS) and perfluorooctanoic acid (PFOA). In September 2022, EPA proposed listing PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[2] Three months later, EPA finalized changes to how parties seeking CERCLA liability protection conduct diligence on potentially contaminated properties—now parties have guidance on how to evaluate PFAS.[3] For these and other reasons, it is crucial for counsel advising clients on brownfields and similar transactions to understand the evolving PFAS landscape.

II. CONTEXT

Environmental due diligence in real estate transactions involves the assessment of known, potential, and contingent environmental liabilities and obligations associated with a parcel of property to be acquired. With respect to PFAS, environmental due diligence in the real estate context tends to focus on: (1) known or potential soil or groundwater contamination beneath the property from current and historic uses, (2) the potential for contamination to migrate to the property to be acquired from offsite locations; and (3) compliance with environmental requirements.

Under CERCLA, parties can be held strictly liable for cleaning up hazardous substances at properties they either currently own or operate, or owned or operated in the past.[4] The definition of a hazardous substance is lengthy and references multiple EPA regulations, including CERCLA, the Resource Conservation and Recovery Act (RCRA), the Clean Water Act (CWA), and the Clean Air Act (CAA).[5] In September 2023, EPA

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[1]This chapter was authored by Jack Lyman, a partner at Marten Law LLP, Kaitlyn Rhonehouse, a Senior Principal Engineer at Geosyntec Consultants, Inc., and Grant Nichols, a Senior Vice President at CAC Specialty

[2]Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54,415 (proposed Sept. 6, 2022) (to be codified at 40 C.F.R. pt. 302).

[3]Standards and Practices for All Appropriate Inquiries, 87 Fed. Reg. 76,578 (Dec. 15, 2022) (to be codified at 40 C.F.R. pt. 312); *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*, ASTM (Dec. 2021).

[4]42 U.S.C. § 9607(a).

[5]Substance defined as a *hazardous substance* pursuant to CERCLA 42 U.S.C. § 9601(14), as interpreted by EPA regulations and the courts: "(A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any *hazardous waste* having the characteristics identified under or listed pursuant to section 3001 of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, (42 U.S.C. §6921) (but not including any waste the regulation of which under RCRA (42 U.S.C.§§6901 *et seq*.) has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act (42 U.S.C. §7412), and (F) any imminently hazardous

published a proposed rule to designate PFOA and PFOS as hazardous substances under CERCLA.[6] The White House Office of Management & Budget (OMB) initiated interagency review of the final rule in early December 2023,[7] and EPA is expected to finalize the rule in March 2024.[8] EPA is also considering designating seven additional PFAS chemicals, PFAS precursor chemicals and "categories of PFAS" chemicals, as hazardous.[9]

CERCLA requires parties purchasing potentially contaminated property undertake "all appropriate inquiries" into prior ownership and use of property before purchasing the property to qualify for protection from CERCLA liability for costs relating to releases of hazardous substances.[10] Since 2005, EPA has promulgated regulations that set standards and practices for all appropriate inquiries, in large part through incorporating by reference ASTM International standards.[11] In November 2021, ASTM International issued the latest Standard for Phase I Environmental Site Assessments (ESAs) (E1527-21).[12] Among other updates and revisions in the new standard, ASTM E1527-21 recommends evaluating PFAS and other emerging contaminants as Non-Scope Considerations either when requested by the "User" of the Phase I ESA or to satisfy requirements in states that already have established regulatory standards for PFAS, which could result in PFAS or other Non-Scope Considerations being identified as a Business Environmental Risk (BER). ASTM E1527-21. EPA has formally adopted ASTM E1527-21 as the all appropriate inquiries standard for most properties. [13]

III. PHASE I ENVIRONMENTAL SITE ASSESSMENT

A. Classifying the PFAS Risk

The objective of a Phase I ESA is to identify recognized environmental conditions, or RECs, which requires the presence or likely presence of a hazardous substance or a

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chemical substance or mixture with respect to which the Administrator (of EPA) has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a *hazardous substance* under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas)."

[6] Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54,415 (proposed Sept. 6, 2022) (to be codified at 40 C.F.R. pt. 302).

[7] Pending Exec. Order 12866 Regulatory Review, RIN 2050-AH09 (Received Dec. 26, 2023).

[8] Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 88 Fed. Reg. 54,415 (proposed Sept. 6, 2022) (to be codified at 40 C.F.R. pt. 302).

[9] Addressing PFAS in the Environment, 88 Fed. Reg. 22,399 (proposed Apr. 13, 2023) (to be codified at 40 C.F.R. pt. 302).

[10] Standards and Practices for All Appropriate Inquiries, 70 Fed. Reg. 66,070 (Nov. 1, 2005) (to be codified at 40 C.F.R. pt. 312).

[11] *See generally* Standards and Practices for All Appropriate Inquiries, 87 Fed. Reg. 76,578 (Dec. 15, 2022) (to be codified at 40 C.F.R. pt. 312).

[12] *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*, ASTM (2021).

[13] *See* Standards and Practices for All Appropriate Inquiries, 87 Fed. Reg. 76,578.

petroleum product.[14] Until PFAS chemicals are designated as hazardous,[15] an appropriate classification for potential or known PFAS impacts at a subject property is a business environmental risk (BER).[16] A BER is a risk that "can have a material environmental or environmentally-driven impact on the business."[17] Emerging contaminants are listed as an example of a BER based on the potential for future liability as regulations for these compounds evolve. If a Phase I ESA is being done to obtain liability protections within a state that has regulated PFAS, it may also be appropriate to classify PFAS impacts as a REC.

B. Identifying PFAS Impacts

PFAS can be found in a variety of applications and industries dating back to the 1930s and 1940s. Identifying former operations and the associated timing of those operations is critical to identifying potential sources of PFAS impacts. Fire training facilities or locations of actual fires may be a source of aqueous film-forming foam (AFFF). A coating facility may have used PFOA or PFNA, whereas a metal plating facility may have used PFOS. Landfills contain numerous types of PFAS because of the variety of products that are disposed. In addition, impacts may be found at wastewater or sewage treatment plants and sludge disposal sites due to the inability of traditional water treatment technologies to remove PFAS from wastewater. Equally as important as identifying sources is identifying potential pathways to the environment beyond a typical release of a chemical. These include unlined lagoon systems, land application, and air deposition.

Interested parties are also collecting PFAS-related data. Through its PFAS Analytical Tools, EPA is compiling and integrating a community-based collection of data regarding PFAS manufacturing and known releases.[18] Commercial vendors such as ERIS and Lightbox (formerly EDR) are now including PFAS databases in their radius searches based on compiled data. These databases can serve as useful starting points; however, the analysis should not end there. For example, a database may confirm that PFOA or PFOS (but not other PFAS) contaminants have been detected in water or soil. Others may include a facility solely based on a North American Industry Classification System or similar sector code.

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[14] ASTM, *supra* note 12 (RECs are (1) the presence of hazardous substances or petroleum products in, on, or at the subject property due to a release to the environment; (2) the likely presence of hazardous substances or petroleum products in, on, or at the subject property due to a release or likely release to the environment; or (3) the presence of hazardous substances or petroleum products in, on, or at the subject property under conditions that pose a material threat of a future release to the environment).

[15] At the state level, some states have already published health advisories or enforceable standards. For example, North Carolina has an Interim Maximum Allowable Concentration (IMAC) for PFOA in groundwater of 2 parts per billion (ppb) and has published non-cancer-based soil screening levels for over a dozen PFAS compounds. The request for sampling soil and groundwater as part of voluntary cleanup or brownfields redevelopment programs has already begun.

[16] BERs are risks which can have a material environmental or environmentally-driven impact on the business associated with the current or planned use of commercial real estate, not necessarily related to those environmental issues required to be investigated in this practice. Consideration of BER issues may involve addressing on or more non-scope considerations (e.g., asbestos, lead-based paint, mold, emerging contaminants).

[17] *Standard Practice for Environmental Site Assessments: Phase 1 Environmental Site Assessment Process*, ASTM (last visited Feb. 25, 2024).

[18] *PFAS Analytical Tools*, U.S. ENVTL. PROT. AGENCY (last updated Feb. 6, 2024).

If a Phase I ESA identifies presence or potential presence of PFAS at a subject property, a Phase II ESA may be conducted to evaluate the scope of PFAS impacts. In the PFAS context, there are several important factors to consider.

A. PFAS Sources and Ubiquity

The Phase I ESA should inform the user of the potential source(s) of PFAS and, therefore, can inform the specific PFAS compounds that may be present. Because PFAS are ubiquitous and are often detected at concentrations above very low regulatory limits or health advisories, a user should consider analyzing for only a subset of PFAS compounds based on former site operations. In this way, detection of "background" concentrations of other PFAS not associated with the subject property may be avoided. PFAS may also behave differently than other common contaminants in the environment. For example, because they are highly soluble and have less preference for sorption, one might find high concentrations in groundwater but very little detections in soil, even in a source area.

B. Laboratory Selection and Analysis

Selecting a laboratory and an appropriate method of analyzation are equally important. Regulatory agency-approved methods are continuing to emerge, and not all commercial labs offer the appropriate methods or accreditation or the ability to analyze for all relevant PFAS. In many cases, PFAS analysis has longer turnaround times for obtaining laboratory data, and fees are substantially higher than more traditional testing for volatile compounds or metals.

C. Field Considerations

Sampling itself presents significant challenges associated with cross-contamination. PFAS are common in environmental sampling equipment and materials. They are often found in the personal care products we use, the clothes we wear, and the things we touch before or during a sampling event, such as food wrappers and sunscreen. Even water sources needed for decontamination or drilling may be impacted by PFAS, which can be introduced into the environment or the equipment and result in false positives. Lastly, disposing of investigation-derived waste (IDW) can be challenging because many waste disposal facilities do not accept PFAS-impacted wastes or do so at a premium. The environmental engineers, scientists, and geologists scoping and conducting a Phase II ESA should understand the challenges of collecting and analyzing PFAS-impacted media so that environmental data is defensible and can be used to make important decisions regarding property acquisition and reuse.

D. Forensics

Finally, forensic tools can also be useful. Desktop reviews of historical information, chemical fingerprinting, and ratio comparisons have been used for decades to help distinguish between contamination sources. The same way the presence of MTBE in petroleum-impacted media can help determine the timeframe of the release, PFAS fingerprinting can identify sources of contamination based on the chemical signature. There are also forensic tools unique to PFAS that include isomer comparisons, specialized analysis such as precursory assays, and AFFF forensics. These technologies are still emerging but may be helpful in litigation and "proving the negative."

V. ROLE OF ENVIRONMENTAL INSURANCE: PROACTIVE AND REACTIVE RISK MANAGEMENT

A. Reactive: Hunting Down General Liability Coverage

Most of the existing scholarship related to insurance coverage for PFAS addresses possible coverage in older commercial general liability (CGL) policies.[19] Pursuing CGL coverage has its place in a broader PFAS risk management context but is a relatively low-percentage effort. This is largely (although not exclusively) because CGL policies have, since at least 1986, been subject to the "absolute pollution exclusion," which excludes from coverage any pollution release that occurred during the applicable policy period. For that reason, any PFAS-related release that occurred after 1986 will face an uphill battle in a CGL, PFAS-related coverage effort. Nevertheless, it is worth reviewing older CGL policies to determine any potentially applicable coverage.

B. Proactive: Obtaining New Insurance Coverage for PFAS

As a preliminary matter, there is a common misunderstanding that pollution legal liability (PLL) coverage—both within the context of PFAS and generally—covers only (i) "unknown" events that could give rise to a pollution release; (ii) pollution releases that occur during the policy period. In fact, much of the value of PLL coverage is its ability to (sometimes) provide coverage for known pollution issues, and especially those pollution issues issues that may have occurred in the past, often long in the past. Thus, PLL coverage can be critical for companies that in the past may have used or handled PFAS-containing products in their processes or manufacturing (or, in the transactional context, are looking to purchase properties or companies that may have done so).

The remainder of this Section V is designed to provide a brief, heuristic roadmap for obtaining some level of PFAS-related PLL coverage, which can enable a property owner/operator to ring-fence PFAS risk in some manageable (and hopefully quantifiable) way.

1. Current Stance of the PLL Marketplace and Relevant Coverages

The threshold question is whether an owner/operator can obtain go-forward pollution coverage for a site that may be subject to historical PFAS releases. Generally speaking, PLL underwriters disfavor the relatively unsettled regulatory status of PFAS compounds, and for good reason: not knowing what standard might be applied a few years down the road when they are providing ten years of coverage can expose them to significant claims. That being said, PLL insurance companies can and do provide coverage for PFAS. Whether, and the extent to which, an owner/operator can procure PFAS coverage depends on the historical use of a site, current use of a site, historical recordkeeping, and the regulatory backdrop of the state where a site is located.

It is important to parse out the type of pollution coverage an owner/operator may seek. First, and often the most difficult to obtain, is what is commonly referred to as "clean-up cost" coverage, which is often the primary concern of PLL insurance companies in the PFAS context.[20] Second, and applicable particularly to PFAS-related medical monitoring

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[19] *See e.g.*, Adam H. Fleischer, et al., *PFAS: Liability and Coverage for the "Forever Chemicals*," BATESCARY LLP WHITE PAPER (May 11, 2022).

[20] A typical coverage grant for clean-up costs would read as follows: "The Insurance Company will pay on behalf of the Insured for Clean-up Costs and associated Legal Costs because of a Pollution Release on, at, under, or migrating from or through a

claims, is bodily injury and property damage coverage. Third is PLL coverage for an operation's business interruption (including loss of rent) resulting from a pollution release. And fourth is a series of ancillary coverage sections (*e.g.*, coverage for a release during transportation or at a non-owned disposal site, etc.).

2. Arguing for PFAS Coverage

It is not uncommon for PLL insurance companies (as is the case with the procurement of new CGL insurance) to include broad PFAS exclusions during the quotation procurement stage, but there may be room to push back. For example, if there is no documented historical PFAS use at a subject property, any such exclusion should be removed.[21] Even for sites with documented historical PFAS use, PFAS-related PLL coverage may still be obtained in certain circumstances. For example, where PFAS sampling data is available for a property, and that data does not indicate the presence of PFAS compounds, coverage may be obtained. Additionally, where sampling data is available for other pollutants often found together with PFAS for the property, and such pollutants are not present, there is an argument that PFAS compounds also are not present.

However, even in the face of a cleanup cost exclusion, the owner/operator can take steps to limit the exclusion. First, an owner/operator could advocate for cleanup coverage that is only triggered by a cleanup mandate from a regulator. This approach is especially useful for policies with longer terms (*e.g.*, five or ten years) in states that have not yet promulgated PFAS cleanup levels. Second, in the face of a cleanup cost exclusion, it may be worthwhile to try to limit the media to which the exclusion applies. For example, an exclusion could be limited to soil cleanup in order to retain cleanup cost coverage for groundwater issues that may arise. Third, even without cleanup cost coverage, an owner/operator can still obtain those meaningful other coverages that PLL offers, including bodily injury and business interruption. Finally, the owner/operator could seek to limit an exclusion to only those compounds that were part of the historical use and not "PFAS" generally.

VI. OTHER KEY LEGAL ISSUES

A. Structuring a Purchase and Sale Agreement to Address PFAS

As sellers and buyers work to identify potential environmental liabilities in their real estate deals, both parties should consider the potential presence of PFAS compounds and associated risks. Several areas of a typical purchase and sale agreement (PSA) implicate PFAS risks. For example, a "hazardous substance" definition could list specific PFAS chemicals or PFAS chemicals as a class, or cross-reference substances as defined by Health, Safety, and Environment (HSE) law, or include some combination thereof. Additionally, a seller may want to include a "no-dig" clause since any non-essential sampling may result in PFAS detection at actionable levels, while a buyer would likely seek broad exceptions to such a clause. Finally, a seller who knows or suspects PFAS releases could schedule such conditions, and the parties could consider the effects of scheduling them on their allocation of liabilities.

Covered Location (i) that the Insured becomes legally obligated to pay as a result of a Claim that is first made against the Insured during the Policy Period; or (ii) if such Pollution Release is first discovered by the Insured during the Policy Period…"

[21] A common rationale for the insertion of broad PFAS exclusions is the possible use of aqueous film forming foam (AFFF) at a site. But without a documented firefighting event that used AFFF, an owner/operator would have a strong argument that possible, undocumented AFFF use should not be the basis for broad PFAS exclusions.

B. Addressing PFAS with Regulators

In addition to assigning rights and responsibilities between themselves, the parties to a real estate transaction with PFAS risks should consider how they address such risks with regulators. First, many properties with historic contamination are subject to "no further action" letters from state or federal regulators, which can limit post-acquisition liability, but those letters almost always have re-openers for events such as changes in facts (such as the discovery of PFAS) or changes in law (such as a new hazardous designation or lower cleanup level). Second, once PFOA, PFOS, and other PFAS compounds receive hazardous designations, buyers may be able to use CERCLA's bona fide prospective purchaser protections[22] for sites with those contaminants. So, a buyer who complied with the all appropriate inquiries standard and observes continuing obligations could be insulated from CERCLA liability. Similarly, states may start to include PFAS risks in prospective purchaser agreements or brownfields agreements, though a property subject to such an agreement would likely still need some institutional controls and/or remediation with respect to the PFAS contamination. Finally, states can vary in their policies toward liability for contamination (which may or may not cover PFAS) that has migrated to a subject property from an offsite source.

[22] *See* 42 U.S.C. § 9601(40); *Bona Fide Prospective Purchasers*, U.S. ENVTL. PROT. AGENCY (last updated Sept. 15, 2023).

Chapter V: WASTE AND RESOURCE RECOVERY
2023 Annual Report[1]

I. A CIRCULAR ECONOMY: RECYCLING, ORGANICS, AND PLASTICS

In 2023, the Environmental Protection Agency ("EPA") continued working towards the concept of creating a circular economy through the use of recycling and waste grants and publishing two more parts in its National Strategies Series on Building a Circular Economy for All.[2] In general, the concept of a circular economy is to keep products in circulation for as long as possible, which thereby "reduces material use, redesigns materials and products to be less resource intensive, and recaptures 'waste' as a resource to manufacture new materials and products."[3] A major focus for the circular economy approach was the elimination of plastic pollution and the expansion of recycling infrastructure and waste collection and management systems. The focus on the elimination of plastic pollution was even an emphasis in Hollywood with the official launch of the "Green Council" in March and April 2023, which is a group intended to encourage and implement more sustainable practices throughout the entertainment industry.[4]

A. The EPA's Recycling and Waste Grants

In 2023, the EPA's focus on recycling as a goal to build a circular economy continued through some of the largest investments made towards the expansion of recycling infrastructure and waste management systems in the last 30 years.[5] These investments were derived from the $275,000,000 provided by the Bipartisan Infrastructure Law, which focused, in part, "on improving the effectiveness of residential and community recycling and composting programs through public education and outreach" and provided funding for programs "to improve post-consumer materials management and infrastructure, support improvements to local post-consumer materials management and recycling programs, and assist local authorities in making improvements to their waste

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[1]This report was authored by Chayla A. Witherspoon of Treece Alfrey Musat P.C., Denver, Colorado; and Sotheby M. Shedeck of Treece Alfrey Musat P.C., Denver, Colorado. This report was edited by Chayla A. Witherspoon of Treece Alfrey Musat P.C. with the assistance of the student editors at the University of Tulsa College of Law. This report summarizes developments, legislation, and decisions in waste and resource recovery from January 2023 through December 2023, but does not purport to summarize all developments, legislation, and decisions.

[2]*See, e.g.*, U.S. ENVTL. PROT. AGENCY, NAT'L RECYCLING STRATEGY: PART ONE OF A SERIES ON BLDG. A CIRCULAR ECON. FOR ALL (Nov. 2021).

[3]*What is a circular economy?*, U.S. ENVTL. PROT. AGENCY (last updated Dec. 14, 2023).

[4]The Green Council intends to begin implementing more sustainable practices by encouraging the elimination of single-use plastics. Dianna Cohen, Green Council: SAG-AFTRA and MPA Team Up to Eliminate Single-Use Plastic in the Entertainment Industry, PLASTIC POLLUTION COAL. (last updated Apr. 28, 2023). This further relates to the Plastic Pollution Coalition's initiative, "Flip the Script on Plastics," designed to influence and change perceptions on single-use plastics "by showing package-free[,] reusable[,] and refillable systems in popular television shows and movies." *Flip the Script on Plastics*, PLASTIC POLLUTION COAL. (last visited Apr. 12, 2024).

[5]*See* Press Release, U.S. Envtl. Prot. Agency, Biden-Harris Admin. Invests More than $100 Million in Recycling Infrastructure Projects Through Investing in America Agenda (Sept. 13, 2023).

management systems."[6] Much of the investments permitted funding to authorized grants under the Save Our Seas 2.0 Act, and the minimum and maximum award ceilings varied for each funding opportunity.

On September 13, 2023, the EPA announced that twenty-five communities had been selected to receive grants totaling more than $73,000,000 through its funding opportunity, "Solid Waste Infrastructure for Recycling Grants for Communities."[7] It also announced $32,000,000 in grants had been disbursed to states and territories through the funding opportunity, "Solid Waste Infrastructure for Recycling Grants for States and Territories."[8] These grants would assist states and territories in improving their data collection and implementation plans for solid waste management.

Then, on November 15, 2023, the EPA announced fifty-nine grants had been awarded for a total of over $60,000,000 to different Tribes and Intertribal Consortia through the funding opportunity, "Solid Waste Infrastructure for Recycling Grants for Tribes and Intertribal Consortia."[9] Included in this announcement, the EPA noted that twenty-five grants had also been awarded for a total of over $33,000,000 through the EPA's funding opportunity, Consumer Recycling Education and Outreach Grants.[10] These grants to are intended to expand education and infrastructure for recycling and waste management systems.

B. The EPA's 2023 National Strategies for a Circular Economy

On December 5, 2023, the EPA published a notice of availability[11] requesting public comment on its "Draft National Strategy for Reducing Food Loss and Waste and Recycling Organics" ("NSO"). The NSO[12] is created in collaboration with the U.S. Department of Agriculture ("USDA") and the U.S. Food and Drug Administration ("FDA"). It includes concrete objectives that will assist in the recycling and reduction of loss and waste for organics. It also assists these agencies in meeting goals set to be completed by 2030, such as the EPA and USDA's joint goal to reduce waste and food loss by 50%.

Because yard, tree trimmings, and other organic materials (*i.e.*, carbon-based materials) can be recycled on their own or with food, the NSO "addresses organic waste, defined as food, yard and tree trimmings, and other organic (carbon-based) materials in the waste stream," and not just food and fiber.[13] The NSO consists of the following four objectives: (1) "prevent the loss of food where possible;" (2) "prevent the waste of food where possible;" (3) "increase the recycling rate for all organic waste;" and (4) "support policies that incentivize and encourage food loss and waste prevention and organics

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[6] *Recycling Grant Selectees and Recipients*, U.S. ENVTL. PROT. AGENCY (last updated Mar. 12, 2024).

[7] *Solid Waste Infrastructure for Recycling Grants for Communities*, U.S. ENVTL. PROT. AGENCY (last updated Sept. 25, 2023).

[8] *Solid Waste Infrastructure for Recycling Grants for States and Territories*, U.S. ENVTL. PROT. AGENCY (last updated Oct. 16, 2023).

[9] Press Release, U.S. Envtl. Prot. Agency, Biden-Harris Administration Announces More than $90 Million in Tribal Recycling Infrastructure Projects and Recycling Education and Outreach Grants (Nov. 15, 2023).

[10] *Id.*

[11] Draft National Strategy for Reducing Food Loss and Waste and Recycling Organics: Request for Public Comment, 88 Fed. Reg. 84,322 (Dec. 5, 2023).

[12] EPA, USDA, & FDA, DRAFT NATIONAL STRATEGY FOR REDUCING FOOD LOSS & WASTE & RECYCLING ORGANICS, 1 (Dec. 2023).

[13] *Id.* at 3.

recycling."[14] Of note, the strategic actions for each objective are similar to the overall purposes for the grants discussed above; however, these strategic actions are specifically focused on organics. For example, the fourth objective includes strategic actions to support and incentivize efforts, such as developing recycling infrastructure and waste collection and processing infrastructure for organics, while the second objective includes strategic actions to "[d]evelop, launch[,] and run a national consumer education and behavior change campaign."[15] The public comment period for the NSO was extended on December 13, 2023, and, as of writing this Chapter, was anticipated to close on February 3, 2024.[16]

On May 2, 2023, the EPA published a notice of availability[17] requesting public comment on its "Draft National Strategy to Prevent Plastic Pollution" ("NSPP"). The NSPP[18] identifies objectives and actions that aim "to prevent plastic pollution through initiatives that reduce, reuse, collect, and capture plastic and other waste from land-based sources."[19] Its primary focus is on strategies related to the life-cycle of plastic products (*i.e.*, the production, consumption, and end stages); however, it is also intended to address concerns with other solid waste materials. The NSPP will assist the EPA in building a more circular plastics economy, as well as meet its goal to reduce plastic waste from land-based sources by 50% by 2040.

The NSPP's three objectives are to: (1) "reduce pollution during plastic production;" (2) "improve post-use materials management;" and (3) "prevent trash and micro/nanoplastics from entering waterways and remove escaped trash from the environment."[20] These objectives too are similar to the purposes behind the grants above because the strategies further comply with Congress' directions provided to the EPA under the Save Our Seas 2.0 Act. Further, objective three incorporates actions intended to increase public awareness and educate consumers on the impacts of plastic pollution on our water ways and systems. Objective two incorporates actions related to waste collection and management, while objective one incorporates actions intended to reduce the use of single-use plastics. The public comment period for the NSPP concluded on June 16, 2023.

C. Litigation Related to Plastics in a Circular Economy

While initiatives and funding are being provided to prevent plastic pollution as part of the circular economy approach, litigation on plastics is also rising. Since 2021, most cases related to plastic and recycling have involved false advertising and/or consumer protection claims.[21] Two cases following this trend were pursued in 2023 in California's federal courts.

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[14] *Id.* at 7, 11, 17, 21.
[15] *Id.* at 11.
[16] Memorandum from Carolyn Hoskinson, Dir. of Off. of Res. Conservation & Recovery, to Docket No. EPA-HQ-OLEM-2022-0415 (Dec. 13, 2023).
[17] Draft National Strategy to Prevent Plastic Pollution: Request for Public Comment, 88 Fed. Reg. 27,502 (May 2, 2023).
[18] U.S. ENVTL. PROT. AGENCY: OFF. RES. CONSERVATION & RECOVERY, EPA-530-R-23-006, DRAFT NATIONAL STRATEGY TO PREVENT PLASTIC POLLUTION: PART OF A SERIES ON BUILDING A CIRCULAR ECONOMY FOR ALL, 1 (Apr. 2023).
[19] *Id.* at 15.
[20] *Id.* at 1.
[21] *See, e.g.*, Earth Island Institute v. Coca-Cola Co., No. 2021-CA-001846-B (D.C. Super. Ct. Nov. 10, 2022), *appeal filed*, No. 22-CV-0895 (D.C. Mar. 14, 2023) (currently in the appeal process regarding lower court's grant of dismissal and holding that the plaintiffs had failed to state a claim under the D.C. Consumer Protection Procedures Act because allegations regarding "general impressions" or a "mosaic of representations" had to be

In *Swartz v. Coca-Cola Co.*,[22] the plaintiffs brought claims against Coca-Cola, Blue Triton Brands, and Niagara Bottling (the defendants), alleging that the defendants misled consumers through the labeling of their plastic bottles as "100% recyclable." The plaintiffs' initial complaint was dismissed for failure to plausibly allege that reasonable consumers would interpret "'100% recyclable' to mean that the [plastic] bottle will always be recycled or is part of a circular plastics economy in which all bottles are recycled into new bottles to be used again."[23] In making this determination, the court defined the word "recyclable" as either an adjective that describes a product as capable of being recycled (*e.g.*, this napkin is composed of recyclable paper), or a noun identifying an object that is either recycled or can be recycled (*e.g.*, the recyclables were placed outside for collection). However, the court held that recyclable did "not mean a promise that an object *will actually be* recycled."[24]

Nonetheless, in reviewing the plaintiffs' amended complaint, the court again determined the plausibility standards had not been met. The court held that the plaintiffs' focus on bottle caps and labels as not being recycled by a majority of facilities in California was not sufficient because federal regulations considered bottle caps and labels as minor, incidental components. Further, the court found that the plaintiffs' allegations were not sufficient because they did not allege that recycling bottle caps and labels were impossible or that no component of the defendants' bottles could be identified and otherwise recovered from California's waste stream. The court ultimately provided the plaintiffs with one more opportunity to amend their complaint, and the plaintiffs filed their second amended complaint on August 17, 2023.

In *Peterson v. Glad Products Co.*,[25] the court determined that the plaintiff had pleaded sufficient allegations to withstand the defendant's motion to dismiss, and, therefore, was able to move forward on his request for injunctive relief. In this case, the plaintiff alleged that the defendant, The Glad Products Company, was attempting to defraud environmentally conscious consumers through its labeling, which included the word "recycling" and the phrase "designed for municipal use" on its packaging. The plaintiff alleges that the labeling is misleading because the plastic the trash bag is made from is virtually non-recyclable. The court held that because the plaintiff could not rely on the products' labeling in the future and would purchase the product again if he believed he could trust the label, the plaintiff had pled sufficient facts to withstand the defendant's motion to dismiss.

II. Coal Combustion Residuals ("CCRs") Update

Last year, this Chapter[26] provided an overview and discussion of different promulgations and litigation related to the EPA's regulation of CCRs. To build upon that discussion, the EPA published a proposed rule[27] on May 18, 2023, intended to expand the CCR regulatory framework to include "Legacy CCR Surface Impoundments" ("LCCRSIs") and "CCR Management Units" ("CCRMUs"). LCCRSIs are defined as

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tied to material facts and "aspirational, limited, and vague" statements were not misleading as a matter of law).

[22]No. 21-CV-04643-JD, 2023 WL 4828680 (N.D. Cal. July 27, 2023).

[23]*Id.* at *3 (internal quotes omitted).

[24]*Id.*

[25]No. 3:23-CV-00491 (N.D. Cal. July 17, 2023).

[26]*See* Chapter J: Waste and Resource Recovery, in ABA Section of Env't, Energy, & Res., The Year in Review 2022, at J-1.

[27]Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments, 88 Fed. Reg. 31,982 (proposed May 18, 2023) (to be codified at 40 C.F.R. pt. 257).

"inactive surface impoundments at inactive electric utilities."[28] CCRMUs are defined as the different areas the EPA found "at regulated CCR facilities where CCR was disposed of or managed on land outside of regulated units at CCR facilities."[29] The proposed rule is intended to incorporate both LCCRSIs and CCRMUs to be regulated under the criteria and provisions already governing active CCR surface impoundments, with a few minor exceptions. Specifically, the EPA proposes adding definitions for both LCCRSIs and CCRMUs. "It also proposes [the] require[ment] that [LCCRSIs] comply with certain existing CCR regulations with tailored compliances," and that it "extend a subset of the existing requirements in part 257, subpart D to [CCRMUs]."[30] Lastly, the rule proposes technical corrections to other existing regulations, so as to correct citations, typographical errors, and harmonize definitions.

The proposed rule is in direct response to the U.S. Court of Appeals for the D.C. Circuit's holding arising in *Utility Solid Waste Activities Group v. Environmental Protection Agency* (the "USWAG Decision").[31] In this case, the court vacated and remanded the CCR provisions that permitted LCCRSIs to be exempt from the CCR regulations. A little over two years later, a group of environmental organizations filed another lawsuit against the EPA, alleging it failed to review and revise regulations concerning LCCRSIs, which resulted in the EPA entering into a consent decree.

On February 3, 2023, the EPA published notice[32] of its intent to enter into the proposed consent decree that would establish deadlines requiring the EPA to sign a proposed rule by May 5, 2023, and issue a final rule by May 6, 2024. That is, these deadlines would only be required if the EPA determined that it was necessary for it to revise regulations regarding LCCRSIs in the existing CCR regulations under RCRA. Thus, in compliance with the consent decree and the USWAG Decision, the EPA published its proposed rule in May 2023.

III. Resource Conservation & Recovery Act ("RCRA") Updates

A. Administrative

On October 19, 2023, the EPA published a notice of proposed rulemaking, entitled "Phasedown of Hydrofluorocabons: Management of Certain Hydrofluorocarbons and Substitutes Under Subsection (h) of the American Innovation and Manufacturing Act of 2020."[33] Of relevance, the EPA is proposing to create RCRA standards, as an alternative to establishing a hydrofluorocarbons management program, that will regulate spent ignitable refrigerants recycled for reuse. The EPA intends to create the program through its authority provided under the American Innovation and Manufacturing Act ("AIM Act"). It is

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[28] *Proposed Changes for Legacy Coal Combustion Residuals Surface Impoundments and CCR Management Units*, U.S. Envtl. Prot. Agency (last updated Dec. 12, 2023).
[29] *Id.*
[30] Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments, 88 Fed. Reg. at 31,984.
[31] 901 F.3d 414 (D.C. Cir. 2018).
[32] Proposed Consent Decree, Resource Conservation and Recovery Act Citizen Suit, 88 Fed. Reg. 7443 (Feb. 3, 2023).
[33] Phasedown of Hydrofluorocarbons: Management of Certain Hydrofluorocarbons and Substitutes Under Subsection (h) of the American Innovation and Manufacturing Act of 2020, 88 Fed. Reg. 72,216 (proposed Oct. 19, 2023) (to be codified at 40 C.F.R. pts. 84, 261, 262, 266, 270, 271); *see also* U.S. Envtl. Prot. Agency: Off. Air & Radiation, EPA-HQ-OAR-2022-0606, Proposed Emissions Reduction and Reclamation Program: Fact Sheet (Oct. 2023).

additionally proposing RCRA standards as an alternative because, in part, the terms "reclaim" and "recycle" have different definitions and purposes from those in the AIM Act or the Clean Air Act. The comment period for this notice ended on December 18, 2023.

On October 18, 2023, the EPA published a final rule[34] that consisted of two parts: (1) the revision of the definition of paper recycling residuals and (2) the denial of further rulemaking amendments previously requested by petition. In 2018, the EPA received requests for amendments to RCRA's Non-Hazardous Secondary materials regulations. The Non-Hazardous Secondary Materials regulations consist of standards and procedures that identify when non-hazardous secondary materials, used as ingredients in combustion units and/or fuels, are to be considered solid wastes per RCRA. The amendment requests were for the EPA to:

> [1] Change the legitimacy criterion for comparison of contaminants in the non-hazardous secondary material against those in the traditional fuel the unit is designed to burn from mandatory to 'should consider[;]' [2] remove associated designed to burn, and other limitations for creosote-treated railroad ties; and [3] revise the definition of 'paper recycling residuals.'[35]

While the EPA denied the first two requests, it granted the third, resulting in its revision to the definition of paper recycling residuals to limit their categorization as a non-waste fuel, which could previously occur because of non-fiber material's impact on the heat value of paper recycling residuals. The revision to the definition went into effect on December 18, 2023.

On August 11, 2023, the EPA published an advance notice of proposed rulemaking[36] to obtain information and comments on a potential development for regulations that would address the cleaning and handling of used containers that previously held hazardous waste and/or chemicals. These regulations could include procedural requirements and conditions placed on the drum reconditioning process or revisions to RCRA regulations. In 2022, the EPA published a report that defined its understanding of the drum reconditioning process and its examination of the present RCRA regulations applicable to the process. The EPA is now proposing to create new regulations, such as defining what it means for these drums to be "emptied," how non-emptied drums should be transferred, and so forth. Comments were due to the EPA by November 22, 2023, following the EPA's extension of the comment deadline on September 5, 2023.[37]

On August 9, 2023, the EPA published a proposed rule[38] making corrections to RCRA regulations in order to provide clarification and eliminate confusion in any applicably regulated communities. The corrections were for overlooked typographical errors made during previous updates to the regulations following the promulgations of these three rules: (1) the Hazardous Waste Generator Improvements Rule; (2) the

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[34]Non-Hazardous Secondary Material Standards; Response to Petition, 88 Fed. Reg. 71,761 (Oct. 18, 2023) (to be codified at 40 C.F.R. pt. 241).

[35]*Id.* at 71,761, 71,763-64.

[36]Used Drum Management and Reconditioning Advance Notice of Proposed Rulemaking, 88 Fed. Reg. 54,537 (proposed Aug. 11, 2023) (to be codified at 40 C.F.R. pts. 260, 261, 262, 263, 264, 265, 266, 267, 268, 270).

[37]*See* Used Drum Management and Reconditioning; Extension of Comment Period, 88 Fed. Reg. 60,609 (proposed Sept. 5, 2023) (to be codified at 40 C.F.R. pts. 260, 261, 262, 263, 264, 265, 266, 267, 268, 270).

[38]Hazardous Waste Generator Improvements Rule, the Hazardous Waste Pharmaceuticals Rule, and the Definition of Solid Waste Rule; Technical Corrections, 88 Fed. Reg. 53,836 (proposed Aug. 9, 2023) (to be codified at 40 C.F.R. pts. 260, 261, 262, 264, 265, 266, 270, 271, 441).

Hazardous Waste Pharmaceuticals Rule; and (3) the Definition of Solid Waste Rule. Included in these corrections were updates to other typographical errors that had not been triggered by the promulgations but were corrections to regulations in the same sections. Anticipating no adverse comments because the EPA viewed the corrections as noncontroversial actions, it published its final rule[39] alongside its proposed rule. However, the EPA received some adverse comments, resulting in its publication of a partial withdrawal[40] of eight amended corrections. The corrections withdrawn included, but were not limited to, subtle changes, such as the removal of introductory text from specific sections within part 262 and the removal of the addition of "RCRA-" to "designated facility." The corrections not subject to the withdrawal went into effect on December 7, 2023.

B. Judicial

In *Center for Biological Diversity v. United States Forest Service*,[41] the Ninth Circuit Court of Appeals held that passive conduct and land ownership were not sufficient to establish liability under RCRA's citizen-suit provisions. The Center for Biological Diversity ("CBD") brought claims against the United States Forest Service ("USFS"), alleging that it was liable under RCRA for contributing to the disposal of solid or hazardous waste through its alleged failure to regulate lead ammunition from hunters in the Kaibab National Forest. The CBD alleged that the USFS's passive conduct in refusing to regulate the use of lead ammunition or stop the disposal of lead in the form of spent ammunition constituted "contribution" as required for a finding of liability under RCRA.

The Ninth Circuit disagreed, determining that the word "contribute" as used in RCRA requires active and actual control over the disposal of solid or hazardous waste. Passive conduct, such as the USFS's lack of action to regulate or issue permits regarding the use and disposal of lead ammunition, was not active or actual control, and constituted "incidental" activity at best. Thus, it did not satisfy the requirements for RCRA liability. Finally, relying on other Circuit Court holdings, the Ninth Circuit concluded that mere ownership over the land was not sufficient to establish RCRA liability, as mere ownership was the equivalent to passive conduct, and like before, RCRA's term "contribute" required affirmative/active action for a finding of liability.[42]

In *Housatonic River Initiative v. United States Environmental Protection Agency*,[43] the First Circuit Court of Appeals held, in part and of relevance here, that: (1) the EPA was not prohibited from using mediation to help determine a draft corrective action permit under RCRA, despite the mediation being held off the record and closed to the public; and (2) the resulting settlement had not rendered the notice-and-comment period a "façade." The case arose from an objection made by the petitioners to a RCRA permit issued by the EPA to General Electric ("GE"). In October 2000, a consent decree was entered into by GE and other municipalities/agencies. The consent decree incorporated a draft RCRA permit, which was to be revised and finalized upon the selection of a remedy for the cleanup.

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[39]Hazardous Waste Generator Improvements Rule, the Hazardous Waste Pharmaceuticals Rule, and the Definition of Solid Waste Rule; Technical Corrections, 88 Fed. Reg. 54,086 (Aug. 9, 2023) (to be codified at 40 C.F.R. pts. 260, 261, 262, 264, 265, 266, 270-71, 441).

[40]Hazardous Waste Generator Improvements Rule, the Hazardous Waste Pharmaceuticals Rule, and the Definition of Solid Waste Rule; Technical Corrections, 88 Fed. Reg. 84,710 (Dec. 6, 2023) (to be codified at 40 C.F.R. pts. 261, 262, 266).

[41]80 F.4th 943 (9th Cir. 2023).

[42]*Id*. at 954.

[43]75 F.4th 248 (1st Cir. 2023).

However, the consent decree still required the permit to undergo the notice and comment process required by RCRA regulations.

The petitioners filed procedural and substantive challenges to the permit, primarily implicating RCRA on the grounds of RCRA's notice and comment process. The petitioners contended that the mediation "improperly influenced the remedy selection process and rendered the notice-and-comment process a 'façade'" because RCRA regulations require the EPA to "allow public access to the mediation and maintain an administrative record of the negotiations."[44] The court rejected this argument, reasoning that nothing in the consent decree required anything other than the draft permit to be subject to RCRA regulations, and therefore, the negotiations and mediation were not subject to the notice and comment process or required to occur on the record.

In *Talarico Brothers Building Corp. v. Union Carbide Corp.*,[45] the plaintiffs alleged that three chemical plant operators had disposed of radioactive slag (*i.e.*, toxic byproducts) on their properties between the years of 1940-1970. The plaintiffs sought relief under RCRA, where the district court dismissed their claims, holding that "'disposal of slag material recycled as asphalt base is not the discard of solid waste under RCRA because [s]uch reuse is not part 'of the waste disposal problem' that RCRA addresses.'"[46] The plaintiffs appealed, leading the Second Circuit Court of Appeals to determine whether "some recycled waste can be 'discarded material' within the meaning of RCRA."[47] The court held that recycled waste can be considered "discarded material," so as to be regulated under RCRA's hazardous, solid waste regulations, when the circumstances are appropriate.

Relying on other Circuits, the court identified some considerations to determine if the circumstances were appropriate, which include: (1) "the manner in which the material was stored prior to recycling;" (2) "how long the material sat before being put to beneficial use;" (3) "whether the material was subject to a reclamation process;" and (4) "how market participants value the material."[48] During review, the court noted the plaintiffs' following allegations: (1) the defendants had generated byproducts, which included slag; (2) studies had detected radioactivity attributable to contaminated slag; and (3) the defendants transported and disposed of said byproducts on the plaintiffs' land. The court held these allegations were sufficient to meet plausibility standards that the radioactive slag constituted "discarded materials" and was subject to RCRA's hazardous, solid waste regulations. The court then determined that the plaintiffs sufficiently alleged "imminent and substantial" harm and "contribution," as required by RCRA.

In *Public Employees for Environmental Responsibility v. Environmental Protection Agency*,[49] the petitioners sought a rule revision for the "corrosivity" characteristic used in the identification of "hazardous wastes" under RCRA's Subtitle C regulation. The petitioners contended, in part, that the EPA should have amended the corrosivity characteristic regulation by "lowering the upper pH threshold and removing the requirement of 'aqueousness.'"[50] The petitioners argued that "non-aqueous high-pH substances" could cause serious health issues, and presented "anecdotal evidence" of studies related to cement kiln dust respiratory illnesses and respiratory illnesses in the wake of the 9/11 World Trade Center attacks, as well as a report that had not available in the 1980s when the characteristic was set. Providing deference to the EPA, the court held that the EPA had presented reasonable grounds for discounting the petitioners' "anecdotal

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[44] *Id.* at 266.
[45] 73 F.4th 126 (2d Cir. 2023).
[46] *Id.* at 138.
[47] *Id.* at 137.
[48] *Id.* at 138.
[49] 77 F.4th 899 (D.C. Cir. 2023).
[50] *Id.* at 916.

evidence" and acted within its discretion when it declined to revise the corrosivity characteristic to regulate "non-aqueous high-pH substances."

Chapter W: WATER QUALITY AND WETLANDS
2023 Annual Report[1]

I. JUDICIAL

A. CWA Section 303 – Water Quality Standards ("WQS")

In *Northwest Environmental Advocates v. U.S. Fish & Wildlife Service*,[2] the court held that, because the Environmental Protection Agency ("EPA") had the ability to re-open approved water quality standards ("WQS"), it retained sufficient discretionary involvement over federal action to require reinitiation of consultation with Fish and Wildlife Services ("FWS") under the Endangered Species Act ("ESA").[3] EPA argued it lacked discretion because it had already approved the State of Oregon's WQS and the WQS could only be changed through two procedures under the CWA section 303(c)(3)-(4), both of which would constitute "new agency actions…supported by a new record and new ESA section 7 consultation."[4] The court disagreed with this argument, finding persuasive a precedential case's determination that a Memorandum of Agreement ("MOA") between EPA and FWS, as well as a Policy Memo, "clearly demonstrate EPA's ongoing 'discretionary involvement' in state water quality standards under the CWA—including standards it has already approved."[5] The court, citing the MOA, found that "EPA has 'considerable judgment' in approving WQS, that endangered and threatened species 'are an important component of the aquatic environment that the CWA is designed to protect,' and that re-opening existing [WQS] are well within the CWA."[6]

B. CWA Sections 304 and 306 – Criteria, Guidelines, and Performance Standards

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[2]No. 3:18-CV-01420-AR, 2023 WL 7181694 (D. Or. Sept. 15, 2023), *adopted by* No. 3:18-CV-01420-AR, 2023 WL 8190727 (D. Or. Nov. 27, 2023).

[3]*Id*.; *see also* 50 C.F.R. § 402.16(a); Section I.B., *infra*, at W-2 (discussing a case in Washington, D.C. brought by Center for Biological Diversity regarding EPA's ongoing duty to reinitiate consultation on its approval of WQS).

[4]*Nw. Envtl. Advoc.*, 2023 WL 7181694, at *22 (citing 33 U.S.C. § 1313(c)(3)-(4)).

[5]*Id*. (citing Wild Fish Conservancy v. U.S. Environmental Protection Agency, 331 F. Supp. 3d 1210, 1225 (W.D. Wash. 2018)).

[6]*Id*. at *23 (quoting Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act; Notice, 66 Fed. Reg. 11,202, 11,206 (Feb. 22, 2001)).

In *Center for Biological Diversity v. Environmental Protection Agency*,[7] a federal judge in Arizona found that EPA's issuance of recommended water-quality criteria ("WQC") for cadmium under CWA section 304(a) is an "action" under ESA section 7 that requires consultation with expert agencies before publication. The Center for Biological Diversity ("CBD") sued EPA in 2022 over four WQC EPA issued to states and tribes in 2016, one of which substantially raised the chronic freshwater criterion for cadmium. EPA argued that the cadmium WQC were nonbinding recommendations, which states and tribes could either accept, modify, or reject, and the ESA requires EPA to consult with expert agencies only when states apply to adopt or modify the recommended WQC.

The court held that EPA issuing the nonbinding WQC was an "action" under the ESA that required consultation with FWS and the National Marine Fisheries Service ("NMFS" and collectively with FWS, the "Services") because it was affirmative, discretionary, and influential on state WQS, which may affect protected species. The court reasoned that the WQC were affirmative because they directly or indirectly caused modifications to the water and established conditions under which states had to explain any departure from such criterion. The court found that the WQC were discretionary because EPA had broad latitude in choosing when and how to update them based on its own judgment and assumptions. The court determined that the WQC were influential because they created a strong incentive for states to adopt them verbatim, as most states did, and because they signaled EPA's future actions in cases of state noncompliance or other scenarios. The court vacated the freshwater chronic criterion, but remanded the other three WQC, which EPA had lowered, without ordering consultation. An appeal was filed with the Ninth Circuit Court of Appeals on October 20, 2023.

On August 8, 2023, in *Center for Biological Diversity v. Environmental Protection Agency*,[8] a federal judge in Washington, D.C., held for the first time that EPA has an "ongoing duty" under the ESA to reinitiate consultation with the Services on its approval of state WQC in cases where new data shows potential risks to listed species or their habitat. In 1992, the State of Washington submitted its first proposed WQC for cyanide in freshwater sources, which EPA approved in 1993, along with EPA's included promulgation of a marine chronic WQC for cyanide. EPA did not consult the Services regarding its approval of Washington's WQC or the promulgation of the marine chronic WQC. EPA initiated consultation with the Services in 1997, when Washington submitted a revised cyanide WQC for marine waters in Puget Sound, but approved the WQC in 1998 without the Services issuing a final biological opinion. In 2007, EPA again approved Washington's new revised cyanide WQC for marine waters in Puget Sound (changed to match the National Toxics Rule). In 2010, the Services issued a draft biological opinion that stated EPA's approval of the latest cyanide WQC would likely jeopardize endangered species. In 2016, EPA terminated consultations with the Services without having a completed ESA section 7 consultation.

CBD sued EPA over EPA's failure to consult with the Services before approving Washington state's cyanide WQC in 1993, 1997, and 2007. EPA argued the statute of limitations had expired as over six years had passed since the 2007 approval. The court rejected EPA's argument and held EPA was required to reinitiate consultation regarding its approval for the state's WQS, taking into consideration the Services' 2016 designation of a new critical habitat and the Services' 2021 final rule revising the critical habitat designation.

[7]No. 4:22-CV-00138-TUC-JCH, 2023 WL 5333260 (D. Ariz. Aug. 18, 2023), *appeal filed*, No. 23-2946 (9th Cir. Oct. 20, 2023).
[8]No. 1:22-CV-00486-BAH, 2023 WL 5035782 (D.D.C. Aug. 8, 2023).

In *Cape Fear River Watch v. Environmental Protection Agency*,[9] EPA issued notice[10] on March 1, 2023, that it had entered a proposed consent decree[11] with the plaintiffs. The consent decree obligated EPA to sign a notice of proposed rulemaking by December 13, 2023, and sign a decision taking final action by August 31, 2025, to revise Effluent Limitation Guidelines ("ELGs") and promulgate pretreatment standards for the Meat and Poultry Products industrial category. The consent decree[12] was approved by the court on May 3, 2023.

C. CWA Section 309 – Enforcement

In *United States v. ABF Freight System, Inc.*,[13] EPA, the Louisiana Department of Environmental Quality, the state of Maryland, and the state of Nevada entered into a consent decree[14] with ABF Freight Systems, Inc. ("ABF"), a freight carrier that operates more than 200 transportation facilities in 47 states and Puerto Rico. The consent decree resolves allegations that ABF failed to comply with certain conditions of their CWA permits (*e.g.*, spills that had not been cleaned up; failure to implement required spill prevention measures; failure to implement measures to minimize contamination of stormwater runoff; failure to conduct monitoring of stormwater discharges as required; and failure to provide all required training to ABF's employees) at nine of its transportation facilities. Under the consent decree, ABF will enhance and implement its comprehensive, corporate-wide stormwater compliance program at all its transportation facilities except those located in the State of Washington, and pay a civil penalty of $535,000, a portion of which will be directed to the states who joined this settlement.

In *United States v. City of Holyoke, Massachusetts*,[15] the U.S. District Court for the District of Massachusetts lodged a consent decree[16] between EPA, the Commonwealth of Massachusetts, and the City of Holyoke, Massachusetts. The consent decree resolves allegations against Holyoke for illegal discharges from Holyoke's combined sewer overflow ("CSO") to the Connecticut River during periods of heavy rain, when the wastewater volume can exceed the capacity of the sewer system or the treatment facility. Holyoke, in cooperation with federal and state environmental agencies, has taken steps in recent years to address the unlawful discharges, including finalizing a long-term overflow control plan, separating sewers, and eliminating certain overflows. The consent decree requires Holyoke to undertake further sewer separation work that will eliminate or reduce additional CSO discharges and pay a $50,000 penalty for past permit violations. Holyoke must also conduct sampling of its storm sewer discharges, work to remove illicit connections, and take other actions to reduce pollution from stormwater runoff. The total cost to comply with the proposed consent decree is estimated at approximately $27 million.

D. CWA Section 401 – Water Quality Certification

[9]No. 1:22-CV-03809 (D.D.C. filed Dec. 23, 2022).
[10]Proposed Consent Decree, Clean Water Act and Administrative Procedure Act Claims, Notice of proposed consent decree, 88 Fed. Reg. 12,930 (Mar. 1, 2023).
[11]Proposed Consent Decree, *Cape Fear*, No. 1:22-CV-03809 (D.D.C. Mar. 1, 2023).
[12]Consent Decree Order, *Cape Fear*, No. 1:22-CV-03809 (D.D.C. May 3, 2023).
[13]No. 2:23-CV-02039 (W.D. Ark. filed Mar. 20, 2023).
[14]Consent Decree, *ABF Freight Sys., Inc.*, No. 2:23-CV-02039-PKH (W.D. Ark. Mar. 20, 2023).
[15]No. 3:19-CV-10332 (D. Mass. filed Feb. 21, 2019).
[16]Final Consent Decree, *City of Holyoke*, No. 3:19-CV-10332-MGM (D. Mass. Aug. 31, 2023).

In *Sierra Club v. West Virginia Department of Environmental Protection*, [17] the U.S. Court of Appeals for the Fourth Circuit vacated West Virginia's section 401 certification for Mountain Valley Pipeline, LLC's ("MVP") natural gas pipeline construction permit. The Fourth Circuit held the Department of Environmental Protection's conclusion that MVP's activities would not violate West Virginia's WQS was arbitrary and capricious. Specifically, the court found the certification insufficiently addressed MVP's history of WQS violations, its lack of conditions requiring compliance with MVP's general construction permit and stormwater pollution prevention plans, and its decision to forgo location-specific antidegradation review.

E. CWA Section 402 – National Pollutant Discharge Elimination System ("NPDES")

In *Idaho Conservation League v. Poe*,[18] the U.S. Court of Appeals for the Ninth Circuit held that "suction-dredge mining" constituted the "addition" of a pollutant under section 402. Suction-dredge mining uses a floating watercraft device with a pump to suck water, riverbed sands, and minerals through a nozzle. The water and riverbed material flow through a "sluice box" that sorts out gold and other heavy metals. Water, sand, and minerals are then discharged to the river, along with sediments and other pollutants. A miner had engaged in suction-dredge mining without a National Pollutant Discharge Elimination System ("NPDES") permit for years when an environmental organization filed a citizen suit. The trial court granted summary judgment to the plaintiff, and the Ninth Circuit affirmed.

The Ninth Circuit held that the miner's dumping of suction-dredge mining waste into the river constituted a point-source discharge for which a NPDES permit was required. In protest, the miner had claimed that a person does not illegally discharge a pollutant unless he or she adds new material from the outside world. But the court disagreed, contending the mining waste was in fact from beneath the riverbed and thus from outside the river's world. As such, the court upheld summary judgment for the environmental organization.

In *City & County of San Francisco v. U.S. Environmental Protection Agency*,[19] the U.S. Ninth Circuit Court of Appeals held that inclusion of general, narrative provisions in a NPDES permit was a permissible exercise of EPA's authority. At issue was a NPDES permit regulating a sewer system and wastewater treatment facility for the City and County of San Francisco. In the permit, EPA stated "[d]ischarge shall not cause or contribute to a violation of any applicable water quality standard . . . ."[20] San Francisco filed a petition for review challenging that provision, along with others, as violating the CWA and lacking a factual basis.

The Ninth Circuit, however, denied San Francisco's petition for review. The Court instead held the EPA's conditions were supported by sufficient evidence. For instance, the Court cited evidence in the administrative record that the facilities at issue had caused discharges in the past impairing popular recreation areas, including nearby beaches. Because of the CWA's broad mandate to impose limitations necessary to ensure adherence to "any applicable water quality standard," the Court also held the narrative conditions were consistent with the CWA.[21] Thus, while a dissenting judge would have vacated the provisions in the permit, the Court upheld them over San Francisco's challenge.

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[17] 64 F.4th 487 (4th Cir. 2023).
[18] 86 F.4th 1243 (9th Cir. 2023).
[19] 75 F.4th 1074 (9th Cir. 2023).
[20] *Id.* at 1085.
[21] *Id.* at 1089-92.

In *United States v. Southern Coal Corporation*,[22] the U.S. Court of Appeals for the Fourth Circuit held that a company may not allow its NPDES permits to lapse to avoid obligations under a consent decree. The defendant, a coal company, had formed a consent decree with the U.S. Department of Justice over alleged violations of its NPDES permits. When the company then allowed its NPDES permits to lapse, it defended itself by claiming that nothing in the decree had obligated it to renew its NPDES permits. The trial court compelled compliance with the decree and ordered the company to stipulated penalties under the decree.

The Fourth Circuit affirmed. It held that even setting aside the decree's context, its plain language imposed on the company an obligation to maintain its NPDES permits. Among other similar provisions, the decree contained a general requirement for the company to comply with "all applicable federal, state and local laws, regulations and permits."[23] Moreover, the court held that to the extent the company had intended "a backdoor to compliance," that would have constituted bad faith.[24] Over a partial dissent, the Court upheld the trial court's compliance order and award of penalties.

F. CWA Section 404 – Wetlands, including Waters of the United States ("WOTUS")

In *Sackett v. Environmental Protection Agency*,[25] the United States Supreme Court was tasked with deciding the test for identifying whether wetlands are "waters of the United States" ("WOTUS") under the CWA.[26] The Sacketts' plan to construct a house on their vacant lot was put on hold for over 16 years, as they alleged their property did not contain a protected wetland.[27] Yet, EPA found that the plaintiff's property did contain a WOTUS subject to regulation under the CWA.[28] EPA classified the Sacketts' wetlands as "waters of the United States" because they were near a ditch that fed into a creek, which fed into Priest Lake, a navigable interstate lake.[29] To establish a significant nexus, EPA employed dual reasoning. First, EPA argued that the Sackett's wetlands were "adjacent to" an unnamed tributary on the other side of a road, which then connected to a non-navigable creek and eventually to Priest Lake.[30] Second, EPA grouped the Sacketts' lot with the Kalispell Bay Fen, a nearby wetland complex it deemed "similarly situated."[31] Combining these two perspectives, EPA asserted that the Sacketts' property had a substantial impact on the ecology of Priest Lake, justifying the classification as having a significant nexus and being a WOTUS. EPA's interpretation was ultimately found to be inconsistent with the text and structure of the CWA.[32]

In a 5-4 decision, the United States Supreme Court held that the CWA applies only to wetlands that are practically indistinguishable from waters of the United States.[33] This practical indistinguishability is achieved when wetlands have a continuous surface connection to bodies recognized as "waters of the United States," creating a challenge in distinguishing where the WOTUS ends and the wetland begins.[34] To assert jurisdiction

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[22] 64 F.4th 509 (4th Cir. 2023).
[23] *Id.* at 514.
[24] *Id.* at 517.
[25] 598 U.S. 651 (2023).
[26] *Id.* at 658.
[27] *Id.* at 661.
[28] *Id.* at 662.
[29] *Id.* at 664.
[30] *Id.* at 662.
[31] *Sackett*, 598 U.S. at 663.
[32] *Id.* at 679.
[33] *Id.* at 678.
[34] *Id.*

over such wetlands, two key elements must be demonstrated: (1) that the adjacent body of water qualifies as a WOTUS; and (2) that the wetland maintains a continuous surface connection with that water, making it difficult to discern the boundary between the WOTUS and the wetland.[35] It was also acknowledged that a continuous surface connection could still be established, even if temporary interruptions in surface connection occur due to phenomena such as low tides or dry spells.[36]

In *Hillcrest Natural Area Foundation, Inc. v. Montana Department of Environmental Quality*,[37] protesters contested the Montana Department of Environmental Quality's ("DEQ") issuance of a solid waste management system ("SWMS") license to a city for the prospective expansion of its regional landfill. The Supreme Court of Montana determined that the DEQ's conditioning of the city's permit to expand the landfill into wetlands, contingent on obtaining a CWA section 404 permit, fell within a reasonable range of action. The Court also found that DEQ thoroughly evaluated pertinent factors, ultimately concluding that the Development and Management Plan did not introduce a conflict resulting in a substantial adverse impact on the human environment; thus, negating the necessity for an Environmental Impact Statement ("EIS"). The Court ultimately deferred to DEQ's judgment since there were no conflicts with statutory requirements and steps were taken to minimize the loss of wetlands.

In *D'Andrea v. U.S. Army Corps of Engineers*,[38] the plaintiff entered into a settlement agreement with the Army Corps of Engineers (the "Corps"), which recognized the property had wetlands under the Corps' jurisdiction. The Corps granted the plaintiff a permit that allowed 0.06 acres of fill to remain in wetlands on the property and required restoration of the remaining 2.8 acres of filled wetland. The plaintiff, after spending over $400,000 to fulfill the agreement, hired a consultant who determined that the wetlands were actually uplands. The plaintiff requested that the settlement agreement be modified, claiming that the agreement was based on a mutual mistake about the location of wetlands versus uplands. The central contentions included assertions of arbitrary and capricious final agency actions by the New Jersey Department of Environmental Protection ("NJDEP"), subject to review under the Federal Administrative Procedure Act ("APA"). However, the court clarified that the APA does not apply to state agencies, citing the statutory definition of "agency" as being limited to federal entities. The plaintiff also invoked the doctrine of pre-enforcement review based on the *Sackett v. EPA* decision, which the court held was also not applicable to state agencies.[39] Ultimately, the court determined that the plaintiff lacked standing and, thus, must adhere to the specified remediation and restoration outlined in the settlement agreement. An appeal was filed with the U.S. Circuit Court of Appeals for the Third Circuit on July 13, 2023.

In *O'Reilly v. All State Financial Company*,[40] the plaintiffs successfully challenged the Corps' issuance of a section 404 permit for the Timber Branch II ("TB II") residential development project, arguing the Corps' Environmental Assessment ("EA") failed to adequately consider the potential impacts of the project in violation of the CWA and the National Environmental Policy Act ("NEPA"). Notably, the EA indicated the project's impact on wetlands was a "minor effect (long term)" and suggested compensatory mitigation.[41] The court held that the Corps acted arbitrarily and capriciously in relying on an EA that lacked sufficient detail and explanation for its significance determinations. The

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[35] *Id.* at 680.
[36] *Id.* at 678.
[37] 521 P.3d 766 (Mont. 2022).
[38] No. 1:21-CV-09569-JHR-SAK, 2023 WL 4103929 (D.N.J. June 20, 2023), *appeal filed*, No. 22-2237 (3d Cir. July 13, 2023).
[39] *D'Andrea*, 2023 WL 4103929, at *6 (referencing Sackett v. EPA, 566 U.S. 120 (2012)).
[40] No. 22-30608, 2023 WL 6635070 (5th Cir. Oct. 12, 2023).
[41] *Id.* at *4.

court found that the Corps did not articulate a reasonable basis for its findings of no or minor effects on various environmental factors, did not independently evaluate the applicant-submitted information or respond to public comments, and did not conduct a meaningful cumulative impact analysis as required by both the CWA and NEPA.

In *Healthy Gulf v. United States Army Corps of Engineers*,[42] the petitioners challenged the Corps' decision to issue a Coastal Use Permit to Driftwood LNG and Driftwood Pipeline ("Driftwood") for a natural gas liquefaction and export project in Louisiana. The Corps justified its decision based on rigorous scientific analysis, pointing to proposals that promised extensive marsh habitat restoration exceeding the project's impact. The court deferred to the Corps' evaluation of complex scientific data, finding that the Corps adequately explained its decision based on the record and upheld the Corps' use of the Louisiana Rapid Assessment Methodology ("LRAM"). The court further dismissed concerns about dredged material impacts, citing the Corps' detailed analysis, accountability measures, and its imposition of permit conditions to ensure driftwood would not dredge and use contaminated material.

In *United States v. Andrews*,[43] the United States ("U.S.") brought an action against a landowner for filling in 13.3 acres of 16.3 acres of jurisdictional wetlands. The court granted the U.S.'s motion for summary judgment, finding the landowner to have violated the CWA by discharging pollutants into wetlands without the necessary permit. The evidence demonstrated that the landowner engaged in activities such as clear-cutting, stumping, filling, and grading on their property, leading to the discharge of pollutants into approximately 13.3 acres of wetlands. The court's decision highlighted the undisputed facts, including aerial images and EPA observations, indicating the plaintiff's direct involvement in filling wetland areas with heavy machinery. This conduct ultimately resulted in the court finding violations of CWA section 308 for the filling of wetlands on the property.

In *Reyes v. Dorchester County of South Carolina*,[44] the plaintiffs claimed a regulatory taking under the U.S. Constitution's Fifth Amendment, asserting that Dorchester County's regulation of a stormwater pond significantly diminished the value of their property. The court, engaging in a *de novo* analysis of the three *Penn Central* factors, found that plaintiffs failed to show a substantial diminution in value to their property, that they had a reasonable investment-backed expectation to alter the stormwater pond, or that the ordinance was not a valid exercise of the county's police power to protect the public interest.[45] Under the third *Penn Central* factor (*i.e.*, the character of the governmental action), the plaintiffs contended that the Supreme Court's decision in *Sackett v. EPA* stripped Dorchester County of the authority to regulate stormwater facilities on their property.[46] The plaintiffs asserted that the lack of water on their premises or a continuous connection to "waters of the United States" limits the county's jurisdiction. The court rejected that argument, clarifying that *Sackett* addresses federal agency control over wetlands and doesn't impede local regulations. Concluding that the principles set forth in *Sackett* do not apply; therefore, the court deemed it unnecessary to determine whether the property qualifies as "waters of the United States." Consequently, the court granted summary judgment in favor of the defendant, dismissing the regulatory taking claim, and emphasized the continued validity of local ordinances regulating wetlands.

G. CWA Section 505 – Citizens Suits

[42] 81 F.4th 510 (5th Cir. 2023).
[43] No. 3:20-CV-1300 (JCH), 2023 WL 4361227 (D. Conn. June 12, 2023).
[44] No. 2:21-CV-00520-DCN-MGB, 2023 WL 5345549 (D.S.C. Aug. 21, 2023).
[45] *Id.* at *4 (referencing Penn Central Transp. Co. v. City of N.Y., 438 U.S. 104 (1978)).
[46] *Id.* at *8 (referencing Sackett v. EPA, 598 U.S. 651, 678-83 (2023)).

In *Pacific Coast Federation of Fishermen's Associations v. Conant*,[47] the parties were before the court on a motion for summary judgment. Pacific Coast Federation and other environmental groups filed a CWA citizen suit against Ernst Conant, in his capacity as the Regional Director of the Bureau of Reclamation's California-Great Basin Region, for allegedly discharging pollutants from an agricultural drainage project to a wetland without a NPDES permit. The case also raised the question of whether the water project was required to have a NPDES permit or whether it qualified under a NPDES exception for discharges composed entirely of return flows from irrigated agriculture.

The environmental groups' associational standing was challenged based on the redressability requirement of Article III, requiring the plaintiff to show relief is substantially likely to redress the claimed injuries and is within the court's power to award. The project was already regulated under California Waste Discharge Requirements, and therefore, defendant argued it was not required to have a NPDES permit. If that were the case, there would be no relief available to the plaintiffs, and without redressability, the plaintiffs would not satisfy standing requirements. In addition, the project ceased all agricultural related subsurface discharges in 2019, while the plaintiffs initiated their case 8 years earlier in 2011. The court noted that when analyzing Article III standing, it must look at the facts as they existed at the time the complaint was filed. Thus, just because certain discharges had been voluntarily stopped, did not negate the plaintiffs' claims or right to enforce the CWA. The court also ruled that the allegations made by the plaintiffs did not correlate to the prior cessation of the specific subsurface discharges. The court granted summary judgment to the plaintiffs on the issue of Article III standing. On April 24, 2023, an appeal[48] was filed with the U.S. Court of Appeals for the Ninth Circuit.

In *Conservation Law Foundation, Inc. v. Massachusetts Water Resources Authority*,[49] the court issued an order granting the defendant's motion to dismiss. The case relates to a 37-year cleanup effort of the Boston Harbor, overseen by the federal court. The court-ordered steps included an EPA-approved Enforcement Response Plan ("ERP") setting forth criteria by which the Massachusetts Water Resources Authority ("MWRA") is to both investigate and respond to discharge violations by industrial users. The plaintiff, an environmental advocacy group, alleged that MWRA violated its NPDES permit by failing to take sufficient enforcement action against its industrial users, who have violated pollutant parameters and other permit conditions. The defendant argued that the plaintiff's claim was barred by sovereign immunity, as the right of enforcement of the discharge violations in this case is discretionary and vested solely with EPA. The court found that the plaintiff did not have statutory authorization to sue under the CWA's citizen-suit provision because EPA has the exclusive discretion to review and enforce the MWRA's ERP under 33 U.S.C. § 1319(f). The court reasoned that allowing citizen suits to second guess EPA's discretionary determinations of the appropriateness of an ERP enforcement action would raise public policy concerns, such as excessive litigation, inconsistent remedies, lack of expertise, and lack of accountability. The court advised that in the event EPA was in dereliction of its duty to enforce violations, that suit would be better brought by a writ of mandamus under 33 U.S.C. § 1365(a)(2), seeking to compel EPA's Administrator to act.

In *South River Watershed Alliance, Inc. v. Dekalb County, Georgia*,[50] the court considered whether a 2011 CWA consent decree and efforts to enforce it are considered a diligent prosecution bar to filing a CWA citizen suit. The diligent prosecution bar prevents CWA citizen suits when EPA or a state has commenced and is diligently prosecuting an action under the CWA. South River argued that the "best efforts" to achieve full compliance

[47] 657 F. Supp. 3d 1341, 1347 (E.D. Cal. 2023), *appeal docketed*, No. 23-15599 (9th Cir. Apr. 24, 2023).
[48] *Pac. Coast*, No. 23-15599 (9th Cir. filed Apr. 24, 2023).
[49] No. 22-10626-RGS, 2023 WL 2072429 (D. Mass. Feb. 17, 2023).
[50] 69 F.4th 809 (11th Cir. 2023)

with the CWA does not equate to a required compliance under the CWA, thereby leaving room for CWA citizen-suits to require full compliance. The court applied the following two-part inquiry to determine whether the diligent prosecution bar applied: first, whether the government's civil action addressed the same CWA violations that the citizen suit sought to remedy, and second, whether the government's prosecution was diligent. The court found that both prongs were satisfied, as the consent decree's express goal was to achieve full compliance with the CWA and eliminate all sewage spills, and the government had been diligent in monitoring, penalizing, and modifying the consent decree to enforce its terms. The court rejected the plaintiff's arguments that the consent decree was insufficient or lax, and deferred to the government's discretion and strategy in enforcing the CWA.

In *South Carolina Coastal Conservation League v. United States Army Corps of Engineers*,[51] the plaintiffs consisted of a number of conservation organizations bringing a civil action to contest EPA and the Corps' approval of filling wetlands for mixed-use development in Berkeley County, South Carolina. The case discusses the overlap of CWA sections 404 and 505. The question was whether the plaintiffs could file a CWA citizen suit for the Corps' failure to prepare an EIS and to choose the least environmentally damaging practicable alternative and for EPA's failure to object to issuance of the 404 permit or, in the alternative, under the APA, to its exercise oversight under the CWA. The CWA citizen-suit provision permits action under the CWA only for non-discretionary agency actions that the agency is required to take (in other words, a citizen suit is not permitted for non-discretionary acts). The court determined that the Corps has a mandatory duty to regulate dredge and fill material, EPA has ultimate responsibility for the protection of wetlands, and both the Corps and EPA had a mandatory duty not just to issue permits under section 404, but also to enforce them. For that reason, the plaintiffs were authorized to bring suit against the Corps and EPA.

Similarly, in *Naturaland Trust v. Dakota Finance LLC*,[52] the defendants filed a petition for *writ of certiorari* with the United States Supreme Court based on a divided ruling from the U.S. Court of Appeals for the Fourth Circuit. The Court was asked to decide the proper test for determining whether the diligent prosecution bar precludes CWA citizen-suits when a state has commenced and is prosecuting an action under a state law that is comparable to the Clean Water Act's enforcement scheme for assessing penalties. The petition was denied on May 15, 2023.

II. LEGISLATIVE AND RULEMAKING

A. CWA Section 303 – Water Quality Standards ("WQS")

On May 5, 2023, EPA published its proposed rule[53] to develop baseline WQS that would be applicable to over 250 Native American reservations. "The proposed baseline [WQS] would provide a common set of designated uses[,] . . . establish pollution limits to advance progress toward clean and safe water, and include antidegradation policies to protect Tribal waters from becoming more polluted."[54] These baseline WQS would apply until Tribes replace them with their own CWA WQS. However, exceptions to these WQS would be granted to Tribes upon request, on a case-by-case basis, and would automatically be granted to: (1) Tribes with existing EPA-approved WQS; (2) those water bodies where

[51]No. 2:22-cv-02727-RMG at 2 (D.S.C. Mar. 7, 2023).
[52]41 F.4th 342 (4th Cir. 2022), *cert. denied*, No. 22-720, 143 S. Ct. 2459 (2023).
[53]Federal Baseline Water Quality Standards for Indian Reservations, 88 Fed. Reg. 29,496, 29,504 (proposed May 5, 2023) (to be codified at 40 C.F.R. pts. 131, 230, 233).
[54]U.S. ENVTL. PROT. AGENCY, FACT SHEET: PROPOSED FEDERAL BASELINE WATER QUALITY STANDARDS FOR INDIAN RESERVATIONS, 1 (May 2023).

a state's WQS or federal WQS already apply; and (3) off-reservation allotments or dependent Tribal communities. The comment period for the proposed rule ended on August 3, 2023.

B. CWA Section 401 – Water Quality Certification

On September 27, 2023, EPA published its final CWA Section 401 Water Quality Certification Improvement Rule,[55] altering the 2020 Certification Rule through what EPA describes as a "return to past practices with added clarity."[56] In particular, the 2023 certification rule redefines the role of states, territories, and Tribes by restoring their authority over federal infrastructure projects. The rule restores the scope of review whereby certifying authorities may consider whether the "'activity as a whole will comply with [all applicable] water quality requirements,'" but further clarifies that they should exclusively consider "adverse water quality-impacts" in their activity analysis.[57] The final rule additionally:

- Sets requirements to begin agency coordination before the statutory time period for certification review begins to run, by providing for pre-filing meetings where the project proponent ordinarily must request an agency meeting at least 30 days before submitting a request for certification;
- Sets a six-month default timeline for certification review that the federal and certifying agencies can agree to extend (the one-year statutory maximum still applies);
- Establishes a "bright-line approach" for project proponents on the content requirements of certification requests; and
- Provides four certification decisions with recommendations for minimum information the certifying authority should include in its decision.

The final rule went into effect on November 27, 2023.

C. CWA Section 404 – Wetlands, including Waters of the United States ("WOTUS")

On August 29, 2023, EPA and the Corps issued a final rule[58] to amend the "Revised Definition of 'Waters of the United States'" Rule[59] issued January 18, 2023. The final rule, which became effective on September 8, 2023, conforms the definition of "waters of the United States" to the U.S. Supreme Court's May 25, 2023 decision in *Sackett v. EPA* by addressing provisions invalidated by that ruling.[60] Notably, the final rule removes the "significant nexus" standard established in Justice Kennedy's concurring opinion in *Rapanos v. U.S.*[61] and amends the definition of "adjacent," specifying that wetlands will no longer be automatically considered jurisdictional "solely because they are 'bordering, contiguous, or neighboring . . . [or] separated from other 'waters of the United States' by

[55]Clean Water Act Section 401 Water Quality Certification Improvement Rule, 88 Fed. Reg. 66,558 (Sept. 27, 2023) (to be codified at 40 C.F.R. pts. 121, 122, 124).
[56]*Id.* at 66,655.
[57]*Id.* at 66,605-06, 66,613.
[58]Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61,964 (Sept. 8, 2023) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pt. 120).
[59]Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004 (Jan. 18, 2023) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pt. 120).
[60]Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. at 61,964 (referencing Sackett v. EPA, 598 U.S. 651 (2023)).
[61]*Id.* at 61,965 (referencing Rapanos v. U.S., 547 U.S. 715 (2006)).

man-made dikes or barriers, natural river berms, beach dunes and the like.'"[62] The final rule also invalidates the provision for assessing streams and wetlands under the "additional waters" provision of the former rule, consolidating their evaluation under other provisions of the final rule. Lastly, the final rule removed "interstate wetlands" from the definition "waters of the United States" because the *Sackett* Court clarified that the CWA's predecessor statute exclusively defined "interstate waters" as open waters crossing state boundaries, and not wetlands. Consequently, the provision enabling wetlands to be deemed jurisdictional solely due to their interstate status is declared invalid.

III. ADMINISTRATIVE

A. CWA Section 303(d) – Impaired Waters and Total Maximum Daily Loads ("TMDLs")

On March 29, 2023, EPA issued a 2024 Integrated Reporting memorandum[63] ("IR Memo") to assist states, territories, and authorized tribes in consideration and development of their 2024 Integrated Reports concerning CWA sections 303(d), 314, and 505(b). Integrated reports ("IRs") are biennial submissions to meet requirements under sections 303(d) and 505(b); however, new considerations may arise based on EPA's 2022-2032 Vision for the Clean Water Act Section 303(d) Program ("2022 Vision").[64] One of the first goals in the 2022 Vision encouraged states, territories, and tribes to submit to the EPA by April 1, 2024, a "Prioritization Framework" outlining long-term priorities that included supporting rationales and strategies. The IR Memo is intended to assist in the development and implementation of such frameworks, and to provide considerations and guidance for future IRs. Specifically, the IR Memo includes the following topics: (1) 2022-2032 CWA Section 303(d) Vision; (2) Clarification Regarding Priority Rankings and TMDL Submission Schedules; (3) Environmental Justice; (4) Participatory Science; (5) Climate Change; (6) Indian Tribes and Tribal Water Resources; (7) CWA Section 303(d) Assessment/Listing for Trash-Related Impairments; (8) CWA Section 303(d) Assessment/Listing for Nutrient-Related Impairments; and (9) Identification of Pollutants Causing or Expected to Cause an Exceedance of Applicable WQS for Waters on the CWA 303(d) List.

B. CWA Sections 304 and 306 – Criteria, Guidelines, and Performance Standards

On January 12, 2023, EPA released a draft guidance,[65] entitled Frequently Asked Questions: Implementing the 2021 Recommended Clean Water Act Section 304(a) Ambient Water Quality Criteria to Address Nutrient Pollution in Lakes and Reservoirs, for states to implement the 2021 Recommended CWA section 304(a) Ambient Water Quality Criteria to Address Nutrient Pollution in Lakes and Reservoirs. In October 2023, EPA

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[62] *Id.* at 61,966.

[63] Memorandum from Brian Frazer, Acting Dir. of Off. of Wetlands, Oceans, and Watersheds, to Water Div. Dirs., EPA Regions 1-10 (Mar. 29, 2023).

[64] For more information on EPA 2022 Vision Program, *see* Caleb Bowers et al., *Environment, Energy, and Resources Law: The Year in Review 2022 Chapter K. Water Quality and Wetlands*, AM. BAR ASS'N, at K-12.

[65] U.S. ENVTL. PROT. AGENCY, FREQUENTLY ASKED QUESTIONS: IMPLEMENTING THE 2021 RECOMMENDED CLEAN WATER ACT SECTION 304(A) AMBIENT WATER QUALITY CRITERIA TO ADDRESS NUTRIENT POLLUTION IN LAKES AND RESERVOIRS (Jan. 2023).

released the final guidance ("FAQ").[66] EPA's 2021 recommended criteria[67] provided metrics for managing levels of nitrogen, total phosphorus, and chlorophyll a in lakes and reservoirs. Excessive nitrogen and phosphorus can stimulate excess growth of algae. This can impair the recreational use of lakes or reservoirs and also increase organic matter (which when decomposed) can depress dissolved oxygen concentrations harming aquatic life. Further, excessive nutrients can stimulate nuisance algae, which can produce cyanotoxins. A significant portion of EPA's FAQ focuses on the implementation of nutrient criteria under the authority of the CWA. The FAQ is divided into four sections:

- Section 1 provides information for states and authorized tribes that choose to adopt the 304(a) recommended nutrient criteria into state or tribal WQS;
- Section 2 provides information for implementing the 304(a) recommended nutrient criteria through NPDES permits;
- Section 3 provides information for implementing the 304(a) recommended nutrient criteria in monitoring and assessing ambient waters, determining whether to list waters as not attaining their WQS, and developing TMDLs for those listed waters; and
- Section 4 provides information for implementing the 304(a) recommended nutrient criteria for drinking water source protection.

On January 20, 2023, EPA published the final Effluent Limitation Guidelines (ELGs) Program Plan 15[68] ("Plan 15"), which governs EPA's ELG program over the next two years. Plan 15 updates earlier agency proposals for addressing nutrient releases from concentrated animal feeding operations ("CAFOs") and meat processing, and notes EPA plans to impose more stringent standards on discharges from coal-fired power plants.

ELGs apply to discharges from industrial facilities to waterbodies. CWA section 304(m) requires EPA to annually review the ELGs and revise them if appropriate. Plan 15 announces that EPA plans to initiate one new rulemaking and several new studies:

- EPA will revise the ELG and pretreatment standards for the Landfills Category (40 C.F.R. pt. 445) in light of per-and polyfluoroalkyl substances ("PFAS") found in landfill leachate;
- EPA will expand the study of the Textile Mills Category (40 C.F.R. pt. 410) to gather information on the use and treatment of PFAS in this industry and associated PFAS discharges;
- EPA will initiate a publicly owned treatment works ("POTW") Influent Study of PFAS, which will collect data on industrial discharges of PFAS to POTWs to both verify sources of PFAS wastewater and to discover new PFAS wastewater sources; and
- EPA will undertake a detailed study of the CAFOs Category (40 C.F.R. pt. 412) to determine whether to revise the ELG for CAFOs.

EPA is not pursuing further action for the Electrical and Electronic Components ("E&EC") Category (40 C.F.R. pt. 469) but will continue monitoring for PFAS discharge

[66]U.S. ENVTL. PROT. AGENCY, FINAL: FREQUENTLY ASKED QUESTIONS: IMPLEMENTING THE 2021 RECOMMENDED CLEAN WATER ACT SECTION 304(A) AMBIENT WATER QUALITY CRITERIA TO ADDRESS NUTRIENT POLLUTION IN LAKES AND RESERVOIRS (Feb. 2023).
[67]Ambient Water Quality Criteria to Address Nutrient Pollution in Lakes and Reservoirs; Notice of Availability, 86 Fed. Reg. 44,712 (Aug. 13, 2021).
[68]U.S. ENVTL. PROT. AGENCY, EFFLUENT GUIDELINES PROGRAM PLAN, 15 (Jan. 2023).

data through the POTW Influent Study. EPA will also continue to monitor PFAS use and discharges from the Pulp, Paper, and Paperboard Category (40 C.F.R. pt. 430) and airports.

Plan 15 also provides updates of four ongoing rulemakings: (1) Steam Electric Power Generating Category rulemaking to strengthen certain wastewater pollution discharge limitations for coal power plants that use steam to generate electricity; (2) Meat and Poultry Products Category rulemaking to address nutrient discharges; (3) Organic Chemicals, Plastics & Synthetic Fibers Category rulemaking to address PFAS discharges; and (4) Metal Finishing Category and Electroplating Category rulemakings to address PFAS discharges.

On April 21, 2023, EPA issued notice[69] that it had submitted an information collection request ("ICR") for Chromium Finishing Industry Data Collection to the Office of Management and Budget ("OMB") for review. The ICR was narrowed from an earlier version in response to metal finishers' comments on the original draft ICR. The purpose of the ICR is primarily to facilitate EPA determining whether new regulations are needed to control PFAS discharges from metal finishing and electroplating facilities by developing new ELGs.

C. CWA Section 402 – National Pollutant Discharge Elimination System ("NPDES")

On November 8, 2023, EPA's proposed 2026 Pesticide General Permit[70] was signed by the parties in *Center for Biological Diversity v. EPA*.[71] On July 25, 2023, these parties entered into a settlement agreement[72] regarding the permit and resolving the case. The case began in October 2021, when Center for Biological Diversity filed a petition in the Ninth Circuit challenging EPA's issuance of the 2021 Pesticide General Permit.[73] The petition alleged *inter alia* that EPA had failed to comply with the CWA in issuing the permit. The parties have now proposed a settlement agreement that contains permit requirements for point source discharges of biological pesticides and chemical pesticides that leave a residue. These include mosquito and other flying insect pest control, weed and algae pest control, animal pest control, and forest canopy pest control. EPA received comments on the proposed settlement agreement through May 24, 2023. EPA received comments on the proposed 2026 Pesticide General Permit through January 12, 2024.[74]

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[69]Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Chromium Finishing Industry Data Collection (New); Notice, 88 Fed. Reg. 24,615 (Apr. 21, 2023).

[70]U.S. ENVTL. PROT. AGENCY, DRAFT 2026 NPDES PESTICIDE GENERAL PERMIT (PGP) (Nov. 2023); *see also Pesticide Permitting – Proposed 2026 PGP*, U.S. ENVTL. PROT. AGENCY (last updated Nov. 28, 2023).

[71]No. 21-71306 (9th Cir. Oct. 4, 2021).

[72]U.S. ENVTL. PROT. AGENCY, PGP PROPOSED SETTLEMENT AGREEMENT (Apr. 2023); *see also* Proposed Settlement Agreement Clean Water Act and Administrative Procedure Act Claims, 88 Fed. Reg. 27,792 (proposed Apr. 24, 2023).

[73]U.S. ENVTL. PROT. AGENCY, 2021 PESTICIDE GENERAL PERMIT (PGP) (Sept 15, 2023).

[74]Draft National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit for Point Source Discharges From the Application of Pesticides; Reissuance, 88 Fed. Reg. 83,120 (Nov. 28, 2023).

Chapter X: WATER RESOURCES
2023 Annual Report[1]

I. FEDERAL DEVELOPMENTS

A. Alaska

1. Judicial

In 2021 and 2022, the Federal Subsistence Board (FSB) and agency field commissioner exercised their authority under the Alaska National Interest Lands Conservation Act (ANILCA) and issued emergency special actions to close the 180-mile-long section of the Kuskokwim River within the Yukon Delta National Wildlife Refuge to

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[1] This chapter summarizes significant federal developments and significant state judicial, legislative, and administrative developments in water resources in 2023, but is not comprehensive. Editors: Christen T. Maccone, New York City Law Department, New York, New York; Daniel Guarracino, Legal Services of New York City, New York, New York; Haley Gentry, Tulane Law School, New Orleans, Louisiana; Christopher J Dalbom, Tulane Law School, New Orleans, Louisiana. Co-Editors: Zachary Alberts, Sturm College of Law at the University of Denver Denver, Colorado; Logan O'Connell, Elisabeth Haub School of Law at Pace, White Plains, New York; Elizabeth Newlin Taylor, Taylor & McCaleb, P.A., Corrales, New Mexico; Justin Townsend, D.R. Horton, Reno, Nevada. The editors were ably assisted by the correspondents listed below who authored the states' reports. The correspondents are; **for Alaska,** George R. Lyle and Bree Mucha of Guess & Rudd P.C., Anchorage, Alaska; **for Arizona**, Michele L. Van Quathem, Law Offices of Michele Van Quathem, PLLC, Phoenix, Arizona; **for California,** Elizabeth P. Ewens, Kelly V. Beskin, Heraclio Pimentel, Lauren Neuhaus, and Janelle S.H. Krattiger, Stoel Rives LLP, Sacramento, California; **for Colorado,** Dulcinea Hanschak, Brownstein Hyatt Farber Schreck LLP, Denver, Colorado; **for the Eastern States of Florida, Indiana Massachusetts, and New Jersey**, Lauren Lynam, J.D. Candidate 2026, Elisabeth Haub School of Law at Pace University, White Plains, New York, and M.E.M. Candidate 2025, Yale School of the Environment, New Haven, Connecticut, assisted by Todd D. Ommen, Professor of Law, Managing Attorney, Pace Environmental Litigation Clinic, Inc., Elisabeth Haub School of Law, White Plains, New York; **for Idaho**, Garrick L. Baxter and Lacey Rammell-O'Brien, Deputy Attorneys General, Idaho Department of Water Resources, Boise, Idaho; **for Kansas,** Stephanie A. Kramer, Esq., Chief Counsel for the Kansas Department of Agriculture in Manhattan, Kansas; **for Montana,** Judge Stephen R. Brown, Montana Water Court, Bozeman, Montana; **for Nebraska**, Hannes D. Zetzsche, Baird Holm LLP, Omaha, Nebraska; **for Nevada,** Karen Peterson, Esq. and Alida Mooney, Esq. of Allison MacKenzie, Ltd. in Carson City, Nevada and Justin Townsend, Esq. of D.R. Horton, Inc. in Reno, Nevada; **for New Mexico**, Elizabeth Newlin Taylor, Taylor & McCaleb, PA, Corrales, New Mexico; **for North Dakota,** Jennifer Verleger, Esq., Assistant Attorney General, South Dakota (formerly Assistant Attorney General, North Dakota, and counsel of record for the State of North Dakota in each of the two cases discussed herein); **for Oregon,** Laura Schroeder, shareholder at Schroeder Law Offices, P.C., Portland, Oregon and Kelsey Seibel associate attorney at Schroeder Law Offices, P.C.; **for Texas,** Drew Miller, Esq. of Kemp Smith, LLP, Austin, Texas; **for Utah,** Jonathan R. Schutz, Mabey Wright & James, Salt Lake City, Utah; **for Washington,** Adam Gravley and Jenna Mandell-Rice with Van Ness Feldman LLP, Seattle, Washington; **for Wyoming,** Andi N. Grave, Holland & Hart, LLP, Cheyenne, Wyoming.

non-subsistence uses.[2] They also allowed "limited subsistence uses by local rural residents under narrowly prescribed terms and means of harvest."[3] Also in 2021 and 2022, the state of Alaska issued their own emergency orders that permitted fishing on the same stretch of the river that had been closed by FSB for non-federally recognized subsistence harvest.[4] Alaska explained that it did "not believe this opportunity under state subsistence fishing regulations will negatively impact the ability of federally qualified subsistence users from meeting their needs during these fishing periods."[5]

The United States sued the state of Alaska in *United States of America and Kuskokwim River Inter-Tribal Fish Commission, et al., v. State of Alaska, et al.*, claiming that under ANILCA the federal government "provides that rural subsistence users are given priority to hunt and fish on federal land and waters within Alaska" which preempts any state action that conflicts with a federal law or emergency order. [6]

The United States requested a temporary restraining order to stop Alaska from issuing emergency orders that open harvest on the Kuskokwim River or from taking similar action in contravention of federal orders under ANILCA as these actions effectuate the federal rural subsistence priority.[7] The District Court denied the temporary restraining order. However, the District Court did grant the United States a later request for a preliminary injunction on June 23, 2022, stating that the issuance will allow the United States to "pursue federal priorities, which are inherently in the public interest, until a final decision on the merits is reached in this case."[8]

Alaska has filed a Motion for Summary Judgment (Motion) with the District Court, claiming that the federal government has no regulatory authority over the Kuskokwim, as the Kuskokwim does not fit within the definition of what ANILCA covers.[9] Alaska believes that the United States does not have "title" over the Kuskokwim "lands," as "Alaska gained ownership of these lands when it joined the Union in 1959."[10] Alaska then contends that water cannot be owned; the "only possible 'interests' the United States could have would be reserved water rights."[11] Alaska states that the Supreme Court's decision in *Sturgeon v. Frost*[12], does not allow the United States title "over reserved water rights, and even if it could, that would give it the power only to take a specific 'amount of water,' which has no application here."[13] As of this writing, the Motion has not been ruled on.

B. Arizona

1. Judicial

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[2]U.S. v. Alaska, 1:22-cv-00054-SLG, 2022 WL 1746844, at *2 (D. Alaska May. 31, 2022).
[3]*Id*.
[4]*Id*. at *2-3.
[5]*Id.* at *3.
[6]608 F. Supp. 3d 802, 806 (D. Alaska 2022).
[7]*Alaska*, 2022 WL 1746844, at *1.
[8]*Alaska*, 608 F. Supp. 3d at 813.
[9]Defendants' Combined Motion for Summary Judgment, Memorandum in Support, and Opposition to Motions for Summary Judgment at 1, 10, United States v. Alaska, 1:22-cv-00054-SLG (D. Alaska Jun. 23, 2022); ANILCA covers "lands, waters, and interests therein… the title to which is in the United States" 16 U.S.C. § 3102.
[10]*Id*.
[11]*Id*.
[12]139 S. Ct. 1066 (2019).
[13]*Id*.

On June 22, 2023, in a five-to-four split decision, the U.S. Supreme Court held that neither the 1849 or 1868 treaties between the United States and the Navajo Tribe of Indians, nor fraught history, required the United States to take affirmative acts to secure water for the Navajo Nation.[14]

The 1935 Federal Globe Equity Decree No. 59 decreed rights to use the mainstream surface water of the Gila River in Arizona and the decree has been administered by the United States District Court for the District of Arizona ever since. Two cases with significant implications for Gila River mainstream water users were issued by the court in 2023. In *Gila River Indian Community v. Schoebroek*, the Gila River Indian Community challenged the Defendant's use of four irrigation wells as withdrawing Gila River mainstream subflow without a decreed water right.[15] Defendant asserted that the right to use water from wells should be determined in Arizona's long-running comprehensive state water right adjudication case for the Gila River system, a process in which the subflow zone in the relevant area had still not been determined. The court rejected the jurisdiction challenge and refused to delay a determination of the claims. The court determined it has "exclusive" jurisdiction over all Gila River mainstream water uses and ruled that no withdrawal of water from a well containing subflow of the river can occur, even if the quantity is *de minimus*.[16]

In another case concerning Globe Equity Decree No. 59 rights, *Gila River Indian Community v. Bowman*, the court invalidated certain decreed irrigation rights to Gila River mainstream water, finding the rights were lost because of nonuse.[17] The affected parties' parcels had been flooded many years ago, rendering them unsuitable for irrigation, but for various reasons the parcels had not been irrigated since. The court reasoned that the explanations given by the parties did not fall within the "catchall" exception for nonuse in Arizona Revised Statutes section 45-189.E.8 (that "Any other reason that a court of competent jurisdiction deems would warrant nonuse.")[18]

2. Administrative

On August 15, 2023, the Bureau of Reclamation announced the ongoing shortage condition[19] for the Lower Colorado River Basin would be at Tier 1 in 2024 per the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead[20] and a series of interstate and intrastate drought agreements addressing shortages through 2026.[21] On April 11, 2023, the Secretary of Interior released a Draft Supplemental Environmental Impact Statement that identified proposed alternatives to revise the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead to address

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[14]Arizona v. Navajo Nation, 599 U.S. 555, 564 (2023).
[15]No. CV-19-00407-TUC-SHR, 2023 WL 5723400, at *1 (D. Ariz. Sept. 5, 2023).
[16]*Id.* at *21.
[17]663 F. Supp. 3d 1064 (D. Ariz. 2023).
[18]*Id.* at 1071.
[19]Press Release, U.S. Bureau of Reclamation, *Reclamation Announces 2024 Operating Conditions for Lake Powell and Lake Mead* (Aug. 15, 2023).
[20]U.S. DEP'T OF INTERIOR, 2007 COLORADO RIVER INTERIM GUIDELINES FOR LOWER BASIN SHORTAGES AND THE COORDINATED OPERATION FOR LAKE POWELL AND LAKE MEAD (Dec. 2007).
[21]*See generally*, Press Release, U.S. Dep't of Interior, Interior Department Announces Actions to Protect Colorado River System, Sets 2023 Operating Conditions for Lake Powell and Lake Mead (Aug. 16, 2022); *see generally*, *Colorado River Basin Drought Contingency Plans*, U.S. BUREAU OF RECLAMATION (last updated Apr. 10, 2020).

changing conditions through 2026.[22] After the draft was released, the Lower Basin States proposed voluntary cuts by consensus. As a result of this agreement and improved hydrology in 2022, the Secretary of Interior released a Revised Draft Supplemental Environmental Impact Statement on October 19, 2023 that included the consensus proposal, which was accepted as a solution on October 26, 2023.[23] Work on a longer term agreement among the affected states continues.

C. Kansas

1. Judicial

In *Audubon of Kansas, Inc. v. United States Dep't of Interior*,[24] the 10th Circuit Court of Appeals affirmed the dismissal of claims against the United States Fish and Wildlife Service (Service) on grounds that all claims asserted against the Service were either moot or nonjusticiable. Audubon of Kansas (Audubon) had originally filed claims against the Service, the Kansas Department of Agriculture, the Kansas Department of Agriculture, Division of Water Resources (KDA-DWR), and various state government officials. The District Court for the District of Kansas dismissed claims against the state government defendants on Eleventh Amendment immunity grounds. Audubon did not appeal the dismissal of the state government defendants, but, on appeal, sought reversal of the dismissal of claims against the Service. Audubon sued to compel the Service, under the National Wildlife Refuge System Improvement Act (NWRSIA), to protect the Service's senior water right in the Quivira National Wildlife Refuge (Refuge). The Service had known for decades that junior rights holders were impairing the Service's senior rights, which threatened harm to endangered species in the Refuge, and Audubon asserted the Service was required to act to protect its senior rights. Audubon sought to compel the Service's action and to set aside an agreement between the Service and a water district. The Court of Appeals found that all material terms of the agreement had expired and, therefore, Audubon's request to set the agreement aside was moot. The Court of Appeals also concluded that the NWRSIA did not contain any discrete, legally required action that Audubon could assert the Service had failed to perform, and, therefore, Audubon's claims, under the Administrative Procedure Act, were nonjusticiable.

D. Nevada

1. Judicial

On March 31, 2023, in ongoing litigation in *Great Basin Resource Watch v. United States Department of the Interior*,[25] parties opposed to the Bureau of Land Management's (BLM) approval of the Mt. Hope Project moved for summary judgment on their claims that the BLM failed to protect lands withdrawn under Public Water Reserve 107 (PWR 107), violated the National Environmental Policy Act (NEPA), and violated the Federal Land Policy Management Act (FLPMA). The United States District Court for the District of Nevada ruled further analysis from the BLM was necessary before reaching a decision on whether the Pickett Act exception to the withdrawal of land under PWR applied. Since

[22]U.S. BUREAU OF RECLAMATION, DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR NEAR-TERM COLORADO RIVER OPERATIONS (2023).
[23]U.S. BUREAU OF RECLAMATION, REVISED DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR NEAR-TERM COLORADO RIVER OPERATIONS (2023).
[24]67 F.4th 1093 (10th Cir. 2023).
[25]3:19-cv-00661-LRH-CSD, 2023 WL 2744682 (D. Nev. Mar. 31, 2023).

the BLM had not yet determined whether metalliferous minerals existed on the land proposed for the Mt. Hope Project, the Court could not determine whether this exception applied or whether the BLM had violated the FLPMA as it relates to the PWR 107 land. The Court then ruled the BLM had not violated NEPA as it had adequately reviewed baseline values for pollutants, satisfied the requirements for analysis regarding cumulative impacts of oil and gas, and prepared a satisfactory mitigation plan. While the Court did not decide whether the BLM violated FLPMA as it relates to PWR 107 lands, the Court ruled the FLPMA claim depended on the NEPA claim and, therefore, also failed.

E. New Mexico

1. Judicial

The special master in the *Texas v. New Mexico* case, an original action in the Supreme Court, recommended that the High Court approve a proposed settlement, which would settle litigation begun in 2013.[26] In late 2022, New Mexico, Texas and Colorado proposed a settlement establishing how Rio Grande water would be split below Elephant Butte Reservoir.[27] New Mexico would receive fifty-seven percent of the Rio Grande water while Texas would receive forty-three percent (these percentages exclude Mexico's share). Among other terms, the settlement would establish a new index that factors groundwater pumping into those formulas, which are based on the drought from 1951-1978. The United States, which opposed the settlement because it did not approve it, has filed exceptions to the special master's report.[28] Other parties also are expected to file exceptions.

F. North Dakota

1. Judicial

In July 2023, the Eighth Circuit Court of Appeals, in *Missouri ex rel. Bailey v. United States Dep't of Interior, Bureau of Reclamation*,[29] affirmed a 2021 decision, upholding the Bureau of Reclamation's decisions and processes to allow a political subdivision of the State of North Dakota to divert a total of 165 cubic feet per second (cfs) from the Missouri River under what is known as the Central Dakota Project. The Court of Appeals held the Bureau's completion of an Environmental Assessment (EA) and issuance of a Finding of No Significant Impact was supported by a rational basis, rejecting the State of Missouri's claims that the Bureau had failed to analyze adverse impacts, adequately analyze mitigation measures, adequately consider reasonable alternatives, and that the Central Dakota Project was a "major federal action" requiring an Environmental Impact Statement rather than an EA. The Court of Appeals reiterated that NEPA "is not about preventing 'unwise' agency action – just 'uninformed' action."[30] The Court of Appeals also concluded the federal "connected-actions doctrine" did not require the Bureau to consider the Central Dakota Project in connection with North Dakota's own Red River Valley Water

[26]Susan Montoya Bryan, *US Judge Recommends Settlement Over Management of the Rio Grande*, ASSOCIATED PRESS (July 5, 2023, 4:31 PM).
[27]Memorandum of Points and Authorities in Support of the Joint Motion of the State of Texas, State of New Mexico, and State of Colorado to Enter Consent Decree Supporting the Rio Grande Compact, Texas v. New Mexico, S. Ct. No. 141 (Nov. 14, 2022).
[28]Exceptions and Brief of the United States, Texas v. New Mexico (U.S. Oct. 6, 2023) (No. 141 Orig.).
[29]73 F.4th 570 (8th Cir. 2023).
[30]*Id*. at 579.

Supply Project because the purpose of said doctrine is to prevent the federal government from segmenting its own federal actions into separate projects, but does not require the aggregation of federal and state actions.

In *Mandan, Hidatsa & Arikara Nation v. United States Dep't of the Interior*,[31] the District of Columbia Circuit Court of Appeals reversed and remanded a decision of the United States District Court for the District of Columbia to deny the State of North Dakota's intervention in a case filed by a North Dakota tribe to set aside certain findings and decisions of the United States Department of the Interior regarding ownership of a portion of the bed of the Missouri River flowing through the tribe's reservation. The Court of Appeals noted there is no doubt North Dakota has an interest relating to the property that is the subject of the tribe's action and that the State's intervention was warranted. The Court of Appeals also strongly suggested the Department of Interior needed to file a quiet title action regarding ownership of the subject property. Shortly after remand, the Department filed a motion in the District Court for leave to amend its answer and file a cross-claim against North Dakota to quiet title to the riverbed. As of this writing, the District Court was still considering whether to grant the Department's motion as well as whether a quiet title claim properly belongs in the District Court for the District of North Dakota.

G. Eastern States

1. Michigan

In *Michigan Department of the Environment v. Mueller*, the Western District Court granted summary judgment in favor or the Michigan Department of Environment, Great Lakes, and Energy (EGLE) and the Michigan Department of Natural Resources the Michigan (collectively, Plaintiffs) against Boyce Hydro LLC and Boyce Hydro Power LLC (Defendants) for the Edenville dam collapse.[32] The court found that Defendants violated several sections of Michigan's Natural Resource and Environmental Protection Act (NREPA) through their ownership and control of Edenville dam.[33]

Defendants owned and controlled Edenville dam from 2006 until its failure in 2020.[34] The court found that the Dam Modification Upgrading Spillway Capacity Design Report, which was created but not implemented, showed Defendants knew of the "alarming circumstance" of the dam's vulnerability, but failed to notify EGLE, violating NREPA's Part 315.[35] The court also found that Defendants failed to make dam renovations, despite their knowledge of the dam's weakness, and Michigan's natural resources suffered, violating Part 17 of NREPA that prohibits impairment of Michigan's air, water, and other natural resources and the public trust.[36]

Due to the Edenville dam's failure, Wixom Lake's water and large amounts of sediment flowed into floodplains, stream beds, and river channels connected to the Tittabawassee River.[37] The court found this violated Part 301[38] of NREPA, which prohibits diminishment of a lake without a permit. The failure also violated Chapter 324, Act 451 of

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[31] 66 F.4th 282 (D.C. Cir. 2023).
[32] No. 1:20-cv-528, 2023 U.S. Dist. LEXIS 198254, *3, *11 (W.D. Mich. Oct. 6, 2023).
[33] *Id.* at *11.
[34] *Id.*
[35] *Mich. Dep't of the Envtl.*, U.S. Dist. LEXIS 198254, at *7, *8.
[36] *Id.* at *8.
[37] *Id.* at *9.
[38] MICH. COMP. LAWS § 324.30102(1)(d) (1995).

1994, Part 31,[39] which requires a permit for sediment to enter the floodplain, stream bed, and channels of a stream.[40]

II. State Developments

A. Arizona

1. Legislative

To assist property owners who lack a reliable water supply within the unincorporated area of Rio Verde, Arizona, the Arizona Legislature passed Senate Bill 1432 to authorize a limited water standpipe district with authority to arrange billing and enter into agreements for standpipe service for up to 750 residences.[41] The law also requires the director of Arizona Department of Water Resources' (DWR) to study and report to the Governor and Legislature by December 31, 2023, regarding certain potential changes to the assured water supply program as to residences not currently required to comply.[42]

House Bill 2590 was passed in part to provide additional enforcement and increased penalties for "wildcat subdivisions" (land splits that are intended to avoid Arizona's 100-year assured and adequate water supply requirements applicable to subdivisions).[43]

2. Judicial

Arizona's long-running stream adjudications continue in the Superior Courts with a special master presiding over contested cases.[44] In *Defenders of Wildlife v. Arizona Navigable Stream Adjudication Commission*, the Arizona Court of Appeals considered the final navigability determinations of the Arizona Navigable Stream Adjudication Commission (ANSAC) for riverbed land title purposes as to the Verde, Salt, and Gila Rivers within Arizona.[45] With the exception of the Colorado River, ANSAC concluded all Arizona rivers were non-navigable at statehood (in their natural condition), but the court reversed as to one segment, segment 8 of the Gila River near the confluence of the Gila River and Colorado River, finding it was navigable at statehood.[46]

3. Administrative

In January 2023, the DWR released an updated Hassayampa Sub-Basin groundwater model,[47] and on June 1, 2023, it released an updated regional groundwater model that included the Hassayampa Sub-Basin and certain other sub-basins within the

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[39]Mich. Comp. Laws § 324.3108 (1995).
[40]*Mich. Dep't of the Envtl.*, U.S. Dist. LEXIS 198254, at *9.
[41]S.B. 1432, 56th Leg., 1st Reg. Sess. (Ariz. 2023) (codified at Ariz. Rev. Stat. §§ 9-500.40, 45-576).
[42]*Id.*
[43]H.B. 2590, 56th Leg., 1st Reg. Sess. (Ariz. 2023) (codified at Ariz. Rev. Stat. §§ 11-831, 32-2185, 33-422).
[44]*See generally, Hearings and Proceedings*, The Jud. Branch of Ariz.: Maricopa Cnty. (last visited Mar. 15, 2024).
[45]525 P.3d 641 (Ariz. Ct. App. 2023).
[46]*Id.* at 662.
[47]Press Release, Ariz. Dep't of Water Res., ADWR Releases Much-Anticipated Hassayampa Sub-Basin Groundwater Model (Jan. 20, 2023).

Phoenix Active Management Area that include much of the Phoenix metropolitan area.[48] The groundwater hydrology models are not regulatory documents, but applicants for determinations of assured water supply availability to support future growth are required to use the DWR's base groundwater models as a starting point for hydrologic studies. The updated model results indicate local groundwater in the affected areas is largely reserved for the use of existing assured water supply determinations.[49] New assured water supply determinations will likely need to be proven with non-groundwater sources that may be more expensive or unavailable in some locations.

B. Alaska

1. Judicial

Williams Alaska Petroleum, Inc. and The Williams Companies, Inc. (collectively Williams) owned and operated a refinery in North Pole on leased State-owned land in 1977.[50] In 1985, Williams started to use sulfolane in their refining process and allowed the sulfolane to migrate into the groundwater which was not discovered until 1996.[51] In 2019, the sulfolane had traveled laterally in the groundwater creating a plume approximately two miles wide, three and a half miles long, and over three hundred feet deep extending into the city of North Pole's groundwater.[52] In 2019, the State's case against Williams proceeded to bench trial in the Superior Court.[53] The Superior Court concluded that sulfolane is a hazardous substance and that Williams is strictly, jointly, and severally liable for the sulfolane release.[54] Williams appealed to the Alaska Supreme Court in *Williams Alaska Petroleum, Inc. and The Williams Companies, Inc. v. State of Alaska; Flint Hills Resources Alaska LLC*.

One of Williams' arguments on appeal was that there is no right to uncontaminated groundwater under state law and even if the right exists it is held by the public; thus, the State is not harmed and cannot recover damages.[55] The court stated that "groundwater is a public trust resource over which the State serves as trustee."[56] "Even if there were no independent right of access to clean groundwater, the State could pursue damages for harm to this natural resource based on Williams's violations of the Act."[57] The public could no longer safely use the ground water because of the contamination, thus the State could sue for damages.

Since 2012, Donlin Gold LLC has sought administrative approval from the Alaska Department of Natural Resources (DNR) for an open pit gold mine in the Yukon-Kuskokwim region in southwestern Alaska in *Orutsararmiut Native Council and Native Village of Eek v. John Boyle, Alaska Department of Natural Resources and Donlin Gold*

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[48] Press Release, Off. of the Gov. Katie Hobbs, Gov. Hobbs Unveils 100-Year Study to Protect Valley Groundwater Supplies and Announces $40 Million Investment in Arizona Water Resiliency Fund (June 1, 2023).
[49] ARIZ. DEP'T OF WATER RES., TECHNICAL MEMO: LOWER HASSAYAMPA SUB-BASIN 100-YEAR ASSURED WATER SUPPLY PROJECTION 9-10 (Jan. 2023).
[50] Williams Alaska Petroleum, Inc. v. State, 529 P.3d 1160, 1171 (Alaska 2023).
[51] *Id*.
[52] *Id*. at 1172.
[53] *Id*. at 1175.
[54] *Id*.
[55] *Williams*, 529 P.3d at 1186.
[56] *Id*. at 1187.
[57] *Id*.

LLC.[58] In 2021, DNR approved 12 water use permits for water appropriation for the proposed mine.[59] Orutsararmiut Native Council and the Native Village of Eek ("The Tribes") filed an agency appeal. DNR rejected the appeal on April 25, 2022.[60] The Tribes filed an appeal with the Superior Court and argued two main issues:

1) "DNR's decision granting the 12 challenged water permits violated Article VIII of the Alaska Constitution because the agency failed to consider the cumulative impacts of the whole Donlin Gold Mine project;"[61] and
2) "DNR acted arbitrarily or violated AS 46.15.080 [Alaska Water Act] because the agency failed to analysis."[62]

The Superior Court held that the "DNR was not required to conduct a cumulative impacts analysis that took into account the entirety of the mine project."[63] The Supreme Court's decision in *Sullivan v. Resisting Environmental Destruction on Indigenous Lands*[64] (*REDOIL*), held that agencies must consider the cumulative effects of a project before disposing of an interest in state resources under Article VIII of the Alaska Constitution.[65] This Court concluded that the ruling in *REDOIL* "does not mandate that DNR consider the cumulative impacts of the mine project in this case."[66] The Court reasoned that "the cumulative impacts analysis in *REDOIL* was a creature of the particular statutory scheme that regulated oil and gas leases" and does not apply in this case.[67] The Court held that they were "unpersuaded that the language of Article VIII indicates that a cumulative impacts analysis is appropriate in cases that do not involve phased projects or projects governed by a comparable statutory framework."[68]

They also held that DNR did not violate the Alaska Water Act by failing to consider the pit lake and its effects before granting the permits,[69] as the "effects of the pit lake are too attenuated for DNR to be required to consider them as part of their public interest analysis under the Alaska Water Act."[70] The Court concludes that the DNR's issuance of the permits was not arbitrary as well.[71] The Court states that the pit lake and its effects are not "direct effects" of the issued permits, but rather they are anticipated effects.[72] Also the pit lake and its effects are "too remote from the appropriations here to broadly considered 'important factors' which the agency must consider before their approval."[73] The Court holds that the pit lake and its effects are future water appropriations that may be necessary,

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[58]Orutsararmiut Native Council v. Boyle, No. 3AN-22-06374 CI, slip op. at 3, 6 (Alaska Aug. 31, 2023).
[59]*Id*. at 2, 11.
[60]*Id*. at 12.
[61]*Id*.
[62]*Id*. at 13.
[63]*Id.* at 15.
[64]311 P.3d 625 (Alaska 2013).
[65]*Orutsararmiut, supra* note 57, at 16.
[66]*Id.* at 20.
[67]*Id*. at 23.
[68]*Id*. at 23-24.
[69]*Id.* at 29.
[70]*Id.* at 32.
[71]*Orutsararmiut,* No. 3AN-22-06374 CI, slip op. at 35.
[72]*Id.*
[73]*Id.*

and "DNR lacks the requisite information to truly assess whether or not it will issue permits" in the future. [74]

The Tribes appealed the Superior Court decision to the Alaska Supreme Court on October 2, 2023.[75]

2. Administrative

The Alaska Department of Environmental Conservation (ADEC) amended 18 AAC 72 Wastewater Treatment and Disposal Regulations effective October 2, 2023, "which updated permit-by-rule or authorization-by-rule processes which allows more wastewater systems to be installed without prior approval from the department."[76]

C. California

1. Judicial

In *Yurok Tribe v. U.S. Bureau of Reclamation*,[77] the U.S. District Court for the Northern District of California held the federal Endangered Species Act (ESA) preempts an Oregon Water Resources Department's (OWRD) order that prohibited the U.S. Bureau of Reclamation (Bureau) from releasing water from Upper Klamath Lake except for irrigation purposes. The Court explained that the OWRD order presented an obstacle to the Bureau's compliance with the ESA and therefore was preempted under the supremacy clause and unenforceable. Following the District Court's decision, the Klamath Water Users Association, which in part represents Northern California interests, and Klamath Irrigation District filed notices of appeal, which are now consolidated in the Ninth Circuit. The appeals raise several issues, including whether the ESA applies to the Bureau's order, whether there is obstacle preemption, and who owns the water rights in the Upper Ukiah Lake and has the right to use, exclude, and enforce such water rights.

2. Legislative

On September 1, 2023, Governor Newsom signed Senate Bill No. 756[78] into law. The legislation provides the State Board more flexibility in serving notices and legal documents required under current law and offers Regional Water Quality Control Boards the authority to participate in inspections of unlicensed cannabis cultivation sites. The newly authorized inspections allow the State Board to inspect "property or facilities of any person or entity" for the purpose of determining the person or facility's lawful compliance with state laws, regulations, orders, permits, and other determinations governing the lawful diversion of water and to protect water quality.[79] The State Board is also now authorized to participate in inspections performed pursuant to a warrant issued under the California Penal Code for the purposes of investigating potential violations of the Water Code by unlicensed cannabis cultivation producers.

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[74] *Id*. at 36.
[75] *Case Summary*, ALASKA APP. COURTS: CASE MGMT .SYSTEM (last visited Apr. 3, 2024); Notice of Appeal, Orutsararmiut Native Council v. Boyle, No. 3AN-22-06374 CI (Oct. 2, 2023).
[76] Updated Onsite Wastewater Regulations, ALASKA DEP'T OF ENVTL. CONSERVATION (last updated Oct. 2, 2023).
[77] 231 F. Supp. 3d 450 (N.D. Cal. 2017).
[78] CAL. WATER CODE § 1051.1 et seq., *as amended by* S.B. 756.
[79] *Id*.

On October 8, 2023, Governor Newsom signed Senate Bill 389[80] (SB 389) into law. SB 389 amends California Water Code section 1051 to authorize the State Board to investigate and ascertain the validity of senior water rights, referred to as pre-1914 and riparian rights. Appropriative surface water rights initiated prior to California's Water Commission Act of 1913, which created the state's permitting and licensing scheme for surface water rights, are referred to as "pre-1914" water rights. Those rights initiated after 1914, "post-1914" water rights, are subject to the permitting and licensing jurisdiction of the State Board. Although the State Board may regulate the reasonable use of surface water, it does not maintain permitting and licensing jurisdiction over pre-1914 or riparian rights because such rights pre-date the Water Commission Act.

As adopted, SB 389 allows the State Board to "investigate and ascertain whether or not water heretofore filed upon or any claimed riparian or appropriative right is valid under the laws of this state."[81] Proponents of the legislation claim that by authorizing the State Board to investigate and collect diversion and water use information, it will be better equipped to scrutinize water usage pursuant to its reasonable use jurisdiction for senior pre-1914 and riparian right holders.

On October 13, 2023, Governor Newsom signed into law Assembly Bill 1572 (AB 1572), which declares that use of potable water to irrigate nonfunctional turf to be "wasteful" and "incompatible with state policy relating to climate change, water conservation, and reduced reliance on the Sacramento-San Joaquin Delta ecosystem."[82] AB 1572 prohibits the use of potable water for the irrigation of nonfunctional turf (any turf that is not functional turf, such as turf located within street rights-of-way and parking lots) located on commercial, industrial, and institutional properties, other than a cemetery, and on properties of homeowners' associations, common interest developments, and community service organizations or similar entities. Public water systems, cities, or counties are authorized pursuant to AB 1572 to enforce these provisions. Likewise, AB 1572 authorizes the State Water Board to ensure compliance through certification and require owners of properties subject to the prohibitions to certify their compliance.

3. Administrative

On January 20, 2023, the U.S. Department of the Interior Bureau of Reclamation released its "Initial 2023 Restoration Allocation & Default Flow Schedule"[83] (Report), which sets the default flow schedule for releases from the Friant Dam into the San Joaquin River. The Report, which set the 2023 default flow schedule releases at a total of 556,542 acre-feet (unless hydrological or operating changes warrant modifying the releases), is part of the Bureau's ongoing obligations under a Settlement Agreement[84] with the Natural Resources Defense Council. Per the Settlement Agreement, flows must be released into the San Joaquin River to reestablish salmon runs. Increased rains in California during 2023 resulted in additional water flowing into the Friant Dam and the San Joaquin River, which added flexibility in meeting 2023 flow releases. However, it is still uncertain whether future flow releases will support salmon spawning in dryer years.

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[80]CAL. WATER CODE § 1051, *as amended* by S.B. 389.
[81]CAL. WATER CODE § 1051(a)(3), *as amended by* S.B. 389.
[82]CAL. WATER CODE §§ 110, 10540, 10608.12, 10608.14, 10608.22, *as amended by* A.B. 1572.
[83]Bureau of Reclamation, *Initial 2023 Restoration Allocation & Default Flow Schedule* (Jan. 23, 2023).
[84]Notice of Lodgment of Stipulation of Settlement at 4, Nat. Res. Def. Council v. Rodgers, No. CIV S-88-1658 LKK/GGH (ECF No. 1341-1) (E.D. Cal. Sept. 13, 2006).

On February 13, 2023, California Governor Gavin Newsom issued Executive Order N-3-23 (Order), which permits the State Water Resources Control Board (State Board) to waive minimum outflow requirements for the Sacramento-San Joaquin Delta (the Delta) to facilitate greater water storage. The Order is meant to assist with the state's long-term drought resilience preparations by capitalizing on the significant precipitation experienced throughout the state in January 2023. Specifically, the Order is designed to expand the state's ability during wet periods to capture storm runoff and to recharge aquifers by allowing the State Board to modify requirements for reservoir releases or diversion limitations in the federal Central Valley Project or State Water Project (collectively Projects) facilities. Practically, the Order functions by suspending California Water Code section 13247 and applicable sections of the California Environmental Quality Act, which in turn permits the State Board to suspend environmental requirements that mandate minimum outflow requirements from the Delta into the San Francisco Bay.

On February 21, 2023, in response to the Order, the State Board's Executive Director issued an order[85] approving a Temporary Urgency Change Petition[86] (Petition) filed by the Bureau and the California Department of Water Resources (DWR) to temporarily modify water right conditions for the Projects. The water right conditions were imposed pursuant to the State Board's water right Decision 1641 (D-1641). Essentially, D-1641 makes the Projects responsible for meeting flow and water quality objectives pursuant to the Water Quality Control Plan for the San Francisco Bay-Sacramento/San Joaquin Delta watershed. In their Petition, the Bureau and DWR requested a waiver of the Delta outflow requirements during February and March 2023 for Port Chicago located in the Delta. The order was revoked by a modification order[87] issued by the State Board on March 9, 2023, due to improved hydrological conditions and public pushback received[88] as a result of allowing the waiver.

In August 2023, the State Board released its proposed *Making Conservation a California Way of Life*[89] regulation. The proposed regulation would add sections 965 through 978 to Title 23 of the California Code of Regulations, relating to Urban Water Use Efficiency Standards, Objectives, and Performance Measures and would require urban retail water suppliers to calculate and comply with urban water use objectives by January 1, 2025. The State Board has received public comment and held a public hearing on the proposed regulation. The State Board expects to consider adoption of the regulation in Summer 2024. If adopted, the regulation is anticipated to become effective October 1, 2024.

D. Colorado

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[85]Eileen Sobeck, Order Approving Temporary Urgency Changes to Water Right License and Permit Terms Relating to Delta Water Quality Objectives, Cal. State Water Res. Control Bd. (Feb. 21, 2023).

[86]Cal. State Water Res. Control Bd., *Notice of Temporary Urgency Change Petition Filed by the California Department of Water Resources and the United States Bureau of Reclamation Regarding Permits and a License of the State Water Project and the Central Valley Project* (Feb. 13, 2023).

[87]Order Modifying an Order That Approved Temporary Urgency Changes to Water Right License and Permit Terms Relating to Delta Water Quality Objective, Cal. State Water Res. Control Bd. (Mar. 9, 2023).

[88]Notice of Petition for Reconsideration of the State Water Resources Control Board's February 21, 2023 Approval of the Temporary Urgency Change Petition (Mar. 6, 2023).

[89]Urban Water Use Efficiency Standards, Objectives, and Performance Measures (proposed Aug. 18, 2023) (to be codified at 23 C.C.R. §§ 965-978).

1. Judicial

In *Front Range Feedlots, LLC v. Rein*,[90] Front Range Feedlots, LLC (Front Range), a cattle feedlot operator, challenged the Colorado State Engineer's authority to issue and enforce an Order to Comply with Front Range's substitute water supply plan (SWSP). The controversy arose when Front Range withdrew both the pending application to use the water rights at issue for its cattle feeding operations and the augmentation plan, which would allow Front Range to use the water rights out-of-priority by replacing the well depletions.[91] Front Range withdrew the water court application because it had located new local water sources and no longer needed the wells for feedlot uses.[92] The Colorado State Engineer and Division Engineer for Water Division 1 Engineers (collectively Engineers) opposed withdrawal of the application and sought an injunction to force compliance with the terms of the SWSP, which had authorized Front Range to use the wells for the feedlot operations while the water court application was pending.[93] The SWSP included the requirement that Front Range replace 100% of depletions caused in Boxelder Creek, including lagged depletions.[94] The water court for Water Division 1 (Water Court) granted the Engineers' request and issued an Order Granting Mandatory Injunction requiring Front Range to comply with the SWSP and affirmed the State Engineer's authority to issue the Order to Comply.[95] Front Range alleged that the Water Court abused its discretion and appealed.[96]

The Colorado Supreme Court upheld the State Engineer's authority under Colo. Rev. Stat. §§ 37-92-501 and 502, and Colo. Rev. Stat. § 97-92-308(4) to issue an Order to Comply with a substitute water supply plan.[97] The Supreme Court held that: (1) under the plain language of Colo. Rev. Stat. §§ 37-92-501 and 502, and Colo. Rev. Stat. § 97-92-308(4), the State Engineer has the authority to issue an Order to Comply; (2) the State Engineer has the authority to enforce terms and conditions of a SWSP after the expiration of an SWSP and withdrawal of the associated water court application for an augmentation plan; (3) it is proper for the State Engineer to attach terms and conditions of an SWSP to Front Range, rather than to the water rights at issue; (4) the State Engineer has jurisdiction to require replacement of depletions from pre-application pumping; and (5) the Water Court properly exercised its discretion in ordering Front Range to acquire additional replacement water sources.[98] The Supreme Court also affirmed the Water Court's decision that the Engineers were entitled to recover their reasonable attorney fees and costs, and found that the Engineers were also entitled to recover the fees and costs they incurred in this appeal.[99]

In *State v. Hill*,[100] the Colorado Supreme Court held that an individual lacked standing to pursue a declaratory judgment that a river segment was navigable at statehood and belongs to the State. Hill asserted an injury to his alleged right to access the riverbed of the Arkansas River where his favorite fishing hole was located.[101] Hill claimed that he had legal access to the riverbed as a member of the public based on his assertion that the

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[90] 528 P.3d 494 (Colo. 2023).
[91] *Id*. at 500.
[92] *Id*.
[93] *Id*.
[94] *Id*. at 498.
[95] *Id*. at 500.
[96] *Rein*, 528 P.3d at 500.
[97] *Id*. at 497.
[98] *Id*.
[99] *Id*.
[100] 530 P.3d 632 (Colo. 2023).
[101] *Id*. at 633.

State of Colorado holds ownership.[102] Despite extensive discussion of the public trust doctrine, the equal footing doctrine, and arguments around who is best positioned to determine policy regarding public access to rivers that cross through private property, the Court granted certiorari in this case only on the procedural issue of standing.[103] The Court determined that the question of whether Hill had a legally protected interest to which Hill could claim injury relied entirely on the substantive and unresolved "antecedent question of whether the State owns the property at issue."[104] Therefore, Hill did not have standing to pursue a declaratory judgment that the river was navigable at the time of statehood and thus, property of the State.[105]

2. Legislative

House Bill 23-1005[106] adds water efficiency improvements and resiliency improvements, which include stormwater control measures, to the definition of "new energy improvements" for which the Colorado new energy improvement district may provide financing to eligible real property owners through the Commercial Property Assessed Clean Energy Program (C-PACE). Additionally, this bill modifies new energy improvement district notice requirements and removes the district's hearing requirement.[107]

House Bill 23-1220[108] directs the Colorado Water Center at Colorado State University to study economic consequences associated with compliance with certain 2016 resolutions resolving disputes among the three states who are parties to the 1942 Republican River Compact, Colorado, Nebraska, and Kansas. Specifically, the Colorado Water Center will study the economic consequences that will result if Colorado does not comply with the resolution under which Colorado agreed to reduce the number of acres irrigated in the South Fork Focus Zone by 25,000 acres by December 31, 2029.[109] Additionally, the State Engineer is then required to curtail all large-capacity groundwater withdrawals within the Republican River Basin.[110]

House Bill 23-1125[111] modernizes the process for changing groundwater well owner contact information by clarifying who must file information and the format in which the information may be filed.

House Bill 23-1274[112] allocates annual funding for species conservation projects within the Colorado Water Conservation Board by appropriating $5 million from Species Conservation Trust Fund.

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[102] *Id.*
[103] *Id.* at 634.
[104] *Id.* at 633.
[105] *Id.*
[106] H.B. 23-1005, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023) (amending COLO. REV. STAT. § 32-20-103).
[107] *Id.*
[108] H.B. 23-1220, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023) (adding COLO. REV. STAT. § 23-31-804).
[109] *Id.*
[110] *Id.*
[111] H.B. 23-1125, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023) (amending COLO. REV. STAT. § 37-90-143).
[112] H.B. 23-1274, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023) (pursuant to COLO. REV. STAT. § 24-33-111 (2)).

Senate Bill 23-177[113] appropriates funding to several CWCB water projects from the CWCB construction fund to the CWCB or the Division of Water Resources. Notably, this bill appropriates $8,000,000 to purchase up to 924 acre-feet of orphan shares from the CWCB as part of the Chatfield Reservoir reallocation project.[114] Additional appropriations include funding to continue and support the Platte River Recovery Implementation Program, the Upper Colorado River Endangered Fish Recovery Program, the San Juan River Basin Recovery Implementation Program, and the Frying-Pan Arkansas project.[115] Finally, the bill allocates up to $2,000,000 to the CWCB litigation fund to address legal issues associated with compact compliance and other related litigation activities.[116]

Senate Bill 23-237[117] transfers $12.6 million from severance tax operational fund to the Water Plan Implementation Cash Fund created in Colo. Rev. Stat. § 37-60-123.3. This fund also includes sports-betting revenues collected pursuant to Colo. Rev. Stat. § 44-30-1509.[118]

Senate Bill 23-270[119] promotes the creation of stream restoration projects (such as for wildfire mitigation, bank stabilization, water quality protection, ecosystem restoration, infrastructure protection, or erosion management) and determines that certain such projects do not cause material injury to vested water rights. The owners of these stream restoration projects may not adversely affect the function of water infrastructure that owners of vested water rights use without permission from the vested water right owner.[120]

To address unprecedented drought in the Colorado River Basin since 2000, Senate Bill 23-295[121] establishes the Colorado River Drought Task Force to make recommendations for legislative action to assist Colorado in addressing drought and the state's interstate commitments. The Task Force includes the Executive Director of the Department of Natural Resources, the Commissioner of Agriculture, representatives from the Colorado River Water Conservation District, Ute Mountain Tribe and Southern Ute Indian Tribe, Southwestern Water Conservation District, Southeastern Colorado Water Conservancy District, and Northern Colorado Water Conservancy District, among others.[122] Twelve meetings are authorized to start no later than July 31, 2023 and a final report is due to the Water Resources Agricultural Review Committee by December 15, 2023.

E. Eastern States

1. Florida

In an appeal from the Southern District of Florida District Court, the Fourth District Court of Appeal affirmed the trial court's findings in *Town of Indian River Shores v. City*

[113] S.B. 23-177, 74th Gen Assemb., 1st Reg. Sess. (Colo. 2023).
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] S.B. 23-237, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023) (adding COLO. REV. STAT. § 39-29-109.3(9) (amending adding COLO. REV. STAT. § 37-60-123.3(1)(a)).
[118] *Id.*
[119] S.B. 23-270, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023) (adding COLO. REV. STAT. § 37-92-602(9)).
[120] *Id.*
[121] S.B. 23-295, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023) (adding COLO. REV. STAT. § 37-98-105).
[122] *Id.*

of Vero Beach.[123] The Town of Indian River (the Town) claimed that its contract with the City of Vero Beach (the City) required the City to match its pressurized reclaimed water[124] rates with the Indian River County's (the County) non-pressurized reclaimed water rates. The trial court found that because non-pressurized reclaimed water is a different classification than pressurized reclaimed water, the City did not need to match the County's rate. The Fourth District Court of Appeal affirmed this decision, finding no ambiguity or genuine issue of material fact within the contract. Further, even if there was a genuine issue of material fact, municipal bodies are delegated the authority to set water rates,[125] as long as the city does not "supply water at less than cost."[126]

The Town failed to show that the "City's enterprise would not lose money" if the City used the County's reduced rate for non-pressured water.[127] If the City did lose money, it would be forced to charge in-jurisdiction residents (residents) a higher rate than residents outside of its jurisdiction (non-residents).[128] Charging residents a higher rate than non-residents is contrary to Florida Law section 180.191,[129] which provides that a municipality cannot charge its residents a higher rate than non-residents. Thus, the court affirmed the trial court's finding that pressurized reclaimed water rates do not need to match non-pressurized reclaimed water rates.

2. Indiana

In 2023, Indiana established a watershed development commission (WDC), to increase the "commerce, health, enjoyment, and prosperity" of Indiana's people.[130] The watershed development commission is a coalition of counties across Indiana and is supervised by Indiana's natural resources commission (NRC).[131] Executives of a county may join the WDC by ordinance, if at least 10% of the designated watershed is within the county's boundaries.[132] The WDC may plan, take, and promote action for purposes of reducing flood damage, drainage, stormwater management, recreation, water infrastructure purposes, and managing water quality, subject to control of the NRC.[133] A WDC also is empowered to "prevent or mitigate flooding through generally accepted structural and nonstructural means," including bank stabilization, increasing water storage capacity, erosion control, sediment reduction, logjam management, selective construction, maintenance and removal of berms, construction of levees, and bridge and structure removal and replacement.[134]

3. New Jersey

In *In re New Jersey Department of Environmental Protection Direct Oversight*

[123] 363 So. 3d 148 (Fla. Dist. Ct. App. 2023).
[124] Reclaimed water that has an increased water pressure, making the flow of water stronger.
[125] *Town of Indian River Shores*, 363 So. 3d at 149 (citing Mohme v. City of Cocoa, 328 So. 2d 422, 424 (Fla. 1976)).
[126] *Id.* (citing City of Daytona Beach v. Stansfield, 258 So. 2d 809, 810 (Fla. 1972)).
[127] *Id.* at 150.
[128] *Id.*
[129] *Id.*; FLA. STAT. ANN. § 180.191(1)(a) (2019).
[130] IND. CODE § 14-30.5-3-2 (2023).
[131] *See* IND. CODE § 14-30.5-2-2 (2023).
[132] IND. CODE § 14-30.5-2-1 (2023).
[133] IND. CODE § 14-30.5-3-1 (2023).
[134] *Id.*

Determination, the New Jersey Superior Court Appellate Division upheld the constitutionality of a decision by the New Jersey Department of Environmental Protection (DEP).[135] Solvay operated and owned a manufacturing plant (Plant) to create polyvinylidene fluoride (PVDF).[136] The process aids used to create PVDF presented PFAS in the Delaware River and the nearby Paulsboro water system.[137] In 2013, at DEP's request, Solvay began a remediation program to address the Plant's PFAS contamination.[138] In March 2019, DEP released a Statewide PFAS Directive, faulting Solvay for its PFAS contamination.[139] Further, in September 2020, DEP issued a Direct Oversight Determination stating that Solvay must "immediately comply with" DEP's "compulsory and discretionary direct oversight" of the Plant's remediation.[140]

The court found that pursuant to the Spill Compensation and Control Act, whose purpose is to preserve water as a balanced resource, the DEP was within its authority to remove PFAS from the Delaware River.[141]

F. Idaho

1. Judicial

As reported in the Year-In-Review 2021, the enacted legislation established an administrative process for declaring state-based de minimis stockwater rights forfeited.[142] In *United States v. Idaho*, the United States argues the legislation establishing the administrative forfeiture process is unconstitutional.[143] The matter is currently pending on cross motions for summary judgment with a hearing date set for January 23, 2024.

2. Legislative

Senate Bill S1033[144] added Idaho Code 42-204A, giving IDWR authority to condition new ground water irrigation permits to require the use of surface water rights first. The intent of the legislation is to conserve ground water resources and encourage the continued use of surface water for irrigation. The Surface Water First Act became effective July 1, 2023.

3. Administrative

On April 21, 2023, IDWR's Director issued the Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover (Fifth Methodology Order), which updated the nine-step methodology for determining material injury to members of the Surface Water

[135]No. A-0635-20, 2023 WL 125229, at *2 (N.J. Super. Ct. App. Div. Jan. 9, 2023).
[136]*Id.* at *1.
[137]*Id.*
[138]*Id.*
[139]*Id.*
[140]*Id.* at *2.
[141]*In re New Jersey*, 2023 WL 125229 at *8; N.J. STAT. § 58:10–23.11 et. seq (West 1977).
[142]Christen T. Maccone et al., *Environmental, Energy, and Resources Law: The Year in Review 2021 Chapter U: Water Resources*, AM. BAR. ASS'N (2022).
[143]*See generally*, 661 F. Supp. 3d 1017 (D. Idaho 2023).
[144]S.B. 1033, 66th Leg. 1st Extraordinary Sess. (Idaho 2022) (to be codified at IDAHO CODE § 42-204A).

Coalition (SWC).[145] Following a four-day hearing, on July 19, 2023, the Director issued the Sixth Methodology Order correcting data in the Fifth Methodology Order found to be in error.[146] The most significant change in the new methodology order is the change from steady-state to transient modeling.

G. Kansas

1. Judicial

In *Audubon of Kansas Inc. v. Lewis*,[147] the Kansas Supreme Court declined to exercise its original jurisdiction and dismissed a petition for writ of mandamus in which Audubon of Kansas requesting an order requiring the Chief Engineer of the Kansas Department of Agriculture, Division of Water Resources (KDA-DWR) to immediately administer all junior water rights that KDA-DWR has determined are impairing the senior water right held by the United States Fish and Wildlife Service (Service) for the benefit of the Quivira National Wildlife Refuge. Audubon subsequently filed a substantially similar petition[148] in the Shawnee County District Court, but that lawsuit was dismissed by agreement of the parties without any ruling after the Service effectively withdrew its request to secure water for 2024 in favor of continuing to work toward a cooperative solution to the impairment.

2. Legislative

On April 24, 2023, Governor Laura Kelly approved House Bill No. 2279, which requires "groundwater management districts to submit annual reports to the [L]egislature" and "to submit conservation and stabilization plans to the [C]hief [E]ngineer," identifying areas of priority concern within each district.[149]

3. Administrative

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[145]Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover at 2, In The Matter Of The Distribution Of Water To Various Water Rights Held By And For The Benefit Of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, And Twin Falls Canal Company, No. CM-DC-2010-001 (Apr. 21, 2023).

[146]Idaho Dep't of Water Res., Sixth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover at 2, In The Matter Of The Distribution Of Water To Various Water Rights Held By And For The Benefit Of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, And Twin Falls Canal Company, No. CM-DC-2010-001 (July 19, 2023).

[147]Case No. 126,520, slip op. (Kan. June 30, 2023).

[148]Motion for Peremptory Order of Mandamus, Audubon of Kan. v. Lewis, Case No. SN-2023-CV-000420 (Shawnee Cnty. filed July 17, 2023); KANSAS DEP'T OF AGRICULTURE., ORDER OF DESIGNATION REGARDING THE MANGEMENT PLAN FOR THE FOUR-COUNTY LOCAL ENHANCED MANAGEMENT AREA, 003-DWR-LEMA-2022 (May 10, 2023).

[149]H.B. 2279, 2023 Sess. L (Kan. 2023).

On May 10, 2023, the Chief Engineer entered an Order[150] designating the Four-County Local Enhanced Management Area (LEMA) in the Western Kansas Groundwater Management District No. 1 (GMD1) in Scott, Lane, Greeley, and Wallace Counties. The LEMA management plan will limit irrigation pumping of perfected, non-vested rights within the LEMA boundary to 472,000 acre-feet for the initial five-year term of the LEMA, which would accomplish a reduction from the 2011-2020 average use of those water rights in excess of 10 percent.

H. Montana

1. Judicial

The Montana Supreme Court did not report any citable decisions in 2023 arising out of Montana's ongoing statewide water rights adjudication.[151] However, a significant ruling in the long-running *Montana v. Talen Montana, LLC*,[152] the Montana federal district court ruled on the extent to which the state of Montana may collect rent from hydroelectric power projects that utilize certain riverbeds. The riverbed litigation is based on the equal footing doctrine.

To reach its decision, the court first divided the disputed rivers into numerous "reaches" to comply with the Supreme Court's segment by segment directive.[153] The court then made navigability determinations for each of these reaches. Ultimately the court concluded all but one of the reaches failed the navigability for title test, meaning Montana does not own the riverbeds in these reaches, thereby precluding its ability to charge rent for their use. The federal district court's ruling illustrates the fact-intensive and complex proof problems Montana faced in establishing navigability for title for some of Montana's largest and most iconic rivers.

Also decided was *Flathead Lakers v. Mont. Dep't of Natural Res. & Conservation*. Montana Artesian proposed to source the water to the bottling plant from a deep aquifer. A number of local residents and groups oppose the plant, and it has been mired in litigation for many years, including two prior cases before the Montana Supreme Court.[154] The permit was reviewed under Montana's Water Use Act which requires that water be both physically and legally available.

Department of Natural Resources and Conservation (DNRC) determined the permit application met both the physical availability and legal availability criteria.[155] The Montana Supreme Court upheld the district court's decision to vacate the DNRC's decision to approve the permits because water was not legally available.[156]

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[150]Order of Designation Regarding The Management Plan for the Four–County Local Enhanced Management Area, In the Matter of the Designation of the Four-County Local Enhanced Management Area in Wallace, Greeley, Scott, and Lane counties, Kansas, No. 003 – DWR-LEMA – 2022 (May 20, 2023).

[151]On November 21, 2023, the Montana Supreme Court issued an unpublished opinion rejecting a challenge to a settlement agreement previously approved by the Water Court. In re State Bd. of Land Comm'rs, No. DA 22-0691, 2023 Mont. LEXIS 1159 (Mont. Nov. 21, 2023) (rejecting a challenge to a settlement agreement previously approved by the Water Court).

[152]No. CV 16-35-H-DLC, 2023 U.S. Dist. LEXIS 150453 (D. Mont. Aug. 25, 2023).

[153]*Id*. at *12.

[154]*See* 530 P.3d 769, 773 (Mont. 2023).

[155]*Id*.

[156]*Id*.

The Court concluded DNRC failed to consider the proper range of potentially affected water sources under the legal availability prong.[157] Without a complete range, the full legal availability analysis could not be performed.

2. Legislative

Montana's biennial legislature met in 2023 passed House Bill 114 (HB 114). The bill was passed to address the time-consuming process of evaluating and approving permits for beneficial water uses.[158]

HB 114 streamlines the review and approval process for both. For example, assuming no requested extensions or application deficiencies, HB 114 shortens DNRC's application review timeframes from 360 days to 105 days.[159] The new legislation also creates expanded opportunity for public comment on applications and enhances public accessibility to pending applications.[160]

As of the date of this update, DNRC is in the process of adopting rules to implement HB 114.[161]

I. Nebraska

1. Judicial

The Nebraska Supreme Court's decision in *In re Application A-19594* significantly curtailed the ability of objectors to participate in Nebraska water-rights applications.[162] An interlocal entity known as Platte to Republican Basin High Flow Diversion Project (PRD) applied to the Nebraska Department of Natural Resources (DNR) for a permit to appropriate up to 150 cubic feet per second of "excess flows" from the Platte River Basin and divert it into the Republican River Basin.[163] PRD proposed that the appropriation would be "perpetually junior" to all other surface-water appropriations and "w[ould] never be able to exercise a call over any future junior appropriations granted for water uses of the Platte River within the Platte River Basin."[164] The diversion, according to PRD, would aid the state in complying with the Republican River Compact.[165]

After publishing notice of the application, DNR received ninety-five comment

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[157] *Id.* at 786.

[158] S.B. 72, 68th Gen. Assembly., Reg. Sess. (Mont. 2023) (Adopted as Chapter 244, 2023 Mont. Leg.; the legislature also considered, but ultimately did not adopt a bill addressing the Montana Water Court's role in administering water rights during and after the completion of Montana's statewide water rights adjudication).

[159] H.B. 114, 68th Gen. Assemb., Reg Sess. (Mont. 2023) (modifying Mont. Code Ann. § 82-2-302(5)).

[160] *Id.* (modifying Mont. Code Ann. § 82-2-307).

[161] No. 36-22-219 Mont. Admin. Reg. Notice 1872 (Oct. 6, 2023). The public comment period on the proposed rules closed on November 3, 2023. DNRC prepared a summary of the various provisions of the proposed rules which is available at: HB114-Rulemaking-One-Pager.pdf (mt.gov).

[162] In re Application A-19594 for An Interbasin Transfer from the Platte River to the Republican River Basin, No. 2018-16-1cc-1, 995 N.W.2d 655 (Neb. 2023) (Disclosure: This report's author assisted in the briefing of this case).

[163] *Id.* at 664.

[164] *Id.* at 665.

[165] 57 Stat. 86 (1943) (codified at NEB. REV. STAT. § A1-106).

letters and seven formal objections.[166] All seven objectors used or managed Platte River flows downstream of the proposed diversion. They claimed a right to object and initiate a contested case under both DNR regulations and Nebraska's judge-made injury-in-fact requirement.

On PRD's motion, without discovery or a contested case, however, DNR dismissed all seven objectors on standing. Four objectors appealed, one cross-appealed, and the Nebraska Supreme Court accepted direct review.

The court affirmed DNR's dismissal for lack of standing. First, the court rejected the objectors' argument that DNR regulations conferred standing. The Nebraska Constitution imposes no case-or-controversy requirement,[167] and DNR regulations confer objector standing on any "interested person," meaning "a person who or an entity which has a specific legally protectable interest" and "is or could be adversely affected in a legally cognizable way by the outcome of a proceeding."[168] The objectors contended that the phrase "could be adversely affected" conferred standing more broadly than common law. But the court disagreed. It held that the next phrase, "in a legally cognizable way," tethered objector standing to the judge-made injury-in-fact requirement.[169]

Second, the court held that the objectors lacked common-law standing. The objectors had disputed that PRD's proposed "excess flows" and "perpetually junior" conditions could be considered in a facial motion to dismiss.[170] The court, however, relied on those conditions to affirm dismissal.[171] While the objectors claimed that statutes would permit DNR to approve the application without the requested condition, the court expressly relied on PRD and DNR's assertions during oral argument "that the condition was a 'critical part' of the application" and that if "the condition was not warranted, PRD would need to amend and refile the application."[172]

The court then dispensed with each objector individually. Because the application only concerned "excess flows" that would be "perpetually junior," the court held that no objector could show that their water rights or statutory authority would diminish.[173] And, because the objectors already owed statutory duties to manage Platte River water, the court held that any reduction in that water by PRD would not necessarily trigger *new* duties and use of public funds. Without discussion, the court also rejected public-interest standing as a basis for objections.[174] At least one scholar has speculated that the decision leaves unclear whether any objector could have standing to participate in an interbasin transfer application.[175]

2. Legislative

The Nebraska Legislature, in 2022, adopted the Perkins County Canal Project

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[166] *Surface Water Permitting & Data*, NEB. DEP'T NAT. RES. (last visited Mar. 1, 2024).
[167] *See* Griffith v. Nebraska Dep't of Corr. Servs., 934 N.W.2d 169, 174 (2019).
[168] 454 NEB. ADMIN. CODE § 001.07 (2023) (emphasis added).
[169] *In re Application A-19594*, 995 N.W.2d at 668.
[170] *Id.* at 670.
[171] *Id.*
[172] *Id.* at 670-71.
[173] *Id.* at 673.
[174] *Id.* at 671.
[175] Paul Hammel, *Supreme Court: NRDs, Other Entities Lack Standing to Object to Interbasin Transfer of Flows from Platte*, NEB. EXAMINER (Oct. 9, 2023, 5:00 AM).

Act.[176] It directed DNR to develop, construct, and operate a canal in Perkins County, Nebraska consistent with the South Platte River Compact to protect Nebraska's full entitlement to flows of the South Platte River.[177] Two new statutes will allow DNR to construct the canal along Nebraska's border with Colorado.

The first is Legislative Bill 818, which directly amends the Perkins County Canal Project Act.[178] It appropriates $574.5 million for the Perkins County Canal Fund. DNR may use that money to identify and purchase the land then develop, construct, manage, and operate the Perkins County Canal. Combining this with 2022 funding, DNR now has received $628 million in appropriations to construct and operate the Perkins County Canal.[179]

Second is Legislative Bill 565,[180] which creates the Public Water and Natural Resources Project Contracting Act. While the bill does not itself amend the Perkins County Canal Project Act, testimony for this legislation made the connection clear. DNR may now utilize alternative methods of contracting for public water and natural resources projects, including the Perkins County Canal. DNR may, for instance, solicit and execute design-build contracts, progressive design-build contracts, or construction manager-general contractor contracts.[181] DNR may also hire an engineering or architectural consultant to assist with various project performance criteria and requests for proposals.[182]

J. Nevada

1. Legislative

On May 23, 2023, Governor Joe Lombardo approved Assembly Bill 19[183] which expands the entities eligible to apply for a grant for "the clearance, maintenance, restoration, surveying and monumenting of navigable rivers" in Nevada to include tribal governments. The bill also provides for an officer or employee of a tribal government, who is not a professional engineer or professional land surveyor, to apply for appointment as a state water right surveyor. Any certificate issued by such officer or employee is restricted to work for the tribal government.

On June 2, 2023, Governor Joe Lombardo approved Assembly Bill 34[184] which modifies the public notice requirements for certain water applications and revises requirements for maps relating to water rights. The bill eliminated the requirement that notice be published consecutively and further requires the notice to be published on the internet website of the Division of Water Resources of the State Department of Conservation and Natural Resources. Further, the bill removed the requirement that certain maps relating to water rights be on mylar and tracing linen.

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[176] *See* COLO. REV. STAT. § 37-65-101, Art. VI, ¶ 1; NEB. REV. STAT. § A1-105, Art. VI, ¶ 1 (permitting Nebraska to acquire the land necessary for the canal, whether "by purchase, prescription, or the exercise of eminent domain").
[177] NEB. REV. STAT. § A1-105, Art. VI, ¶ 1
[178] L.B. 818 § 14, 108th Leg., 1st Reg. Sess. (Neb. 2023) (codified at NEB. REV. STAT. § 61-305).
[179] *See* L.B. 1012, 107th Leg., 2nd Reg. Sess. (Neb. 2022).
[180] L.B. 565 § 1, 108th Leg., 1st Reg. Sess. (Neb. 2023) (codified at NEB. REV. STAT. §§ 61-501–61-520).
[181] *Id.* at § 2.
[182] *Id.* at § 5.
[183] A.B. 19, 82nd Leg. Gen. Sess. (Nev. 2023).
[184] A.B. 34, 82nd Leg. Gen. Sess. (Nev. 2023).

On June 6, 2023, Governor Joe Lombardo approved Assembly Bill 220[185] which authorizes a district board of health to establish a voluntary financial assistance program to pay the costs for property owners with existing septic systems to connect to the community sewage disposal system; revises the conditions which must be met before the issuance of a permit to operate a water system; exempts public agencies or volunteer fire departments from statutory requirements relating to the appropriation of water when extinguishing fires in an emergency; restricts the issuance of applications and temporary permits to appropriate groundwater in areas containing water furnished by a public entity; restricts the use of waters of the Colorado River for irrigating nonfunctional turf; authorizes the Southern Nevada Water Authority (SNWA) to restrict the use of water by single-family residences to not more than .5 acre-feet of water during any year in which the Federal Government reduces Nevada's allocation of the Colorado River to 270,000 acre-feet or less; prohibits the installation of new septic systems on parcels of property which use waters of the Colorado River; requires certain parcels of property using waters of the Colorado River to participate in an irrigation water efficiency monitoring program; authorizes SNWA to operate a program to convert property served by a septic system to a municipal sewer system and assess fees related thereto; and authorizes SNWA to authorize its General Manager to restrict water usage when the Federal Government has declared a water shortage in the Colorado River, if an emergency exists, or if the delivery system cannot provide adequate volumes of water. The bill further requires that, if a proposed subdivision will be served by a public water system, the planning commission or governing body must file the tentative map for review and comment with the supplier of water in a county whose population is 700,000 or in a general improvement district. In these cases, the governing body may not approve a tentative map unless the supplier of water determines that there is available water which meets applicable health standards and is sufficient in quantity for the reasonably foreseeable needs of the subdivision. The presented final map in such a county or general improvement district must include a certificate of approval from the supplier of water.

On June 1, 2023, Governor Joe Lombardo approved Senate Bill 113[186] which requires the State Engineer to affirm or modify the perennial yield of a basin when they designate it as a critical management area (CMA), authorizes the State Engineer modify the perennial yield for the CMA based on the best available science, and requires the State Engineer to review, and modify if necessary, the perennial yield before reviewing the results of a groundwater management plan (GMP). If the State Engineer decreases the perennial yield after a GMP is submitted, holders of permits and certificates with a date of priority after the date on which total permitted and certificated withdrawals were equal to the perennial yield must comply with the GMP. If the perennial yield is increased, those water right holders may opt out of complying with the GMP.

On May 31, 2023, Governor Joe Lombardo approved Assembly Bill 91[187] which expands an existing exception to the requirement to submit an application for a permit to change place of diversion where the applicant will sink or bore a replacement well less than 300 feet from the existing place of diversion and the original site and replacement site are on property owned by the same person for whom water has already been appropriated. This exception is expanded to allow a replacement well without a permit if both the original and replacement wells are on public land or if the original well is on public lands and the site of the replacement well is on the appropriator's land, but less than 300 feet from the original well. A person seeking to sink or bore a replacement well on public land must notify relevant federal agencies and comply with all applicable federal laws.

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[185]A.B. 220, 82nd Leg. Gen. Sess. (Nev. 2023).
[186]S.B. 113, 82nd Leg. Gen. Sess. (Nev. 2023).
[187]A.B. 91, 82nd Leg. Gen. Sess. (Nev. 2023).

On June 2, 2023, Governor Joe Lombardo approved Assembly Bill 191[188] which removed the requirement for suppliers of water with less than fifteen service connections to adopt and update a plan of water conservation, conduct a water loss audit or calculate water losses, or adopt a plan to provide certain incentives relating to water conservation.

On May 31, 2023, Governor Joe Lombardo approved Senate Bill 258[189] which allows the State Engineer to grant a permit for a temporary change of the place of diversion, manner of use or place of use of water already appropriated for a period not to exceed three years if the temporary change is for a renewable energy generation project. The bill further requires the State Engineer to give notice when such an application is filed.

2. Administrative

On April 20, 2023, the State Engineer issued Order 1333[190] establishing the perennial yield for the Cold Springs Valley Hydrographic Basin (100) as 1,500 acre-feet annually and finding that current groundwater commitments exceed the perennial yield but consumptive use of current pumping does not.

K. New Mexico

1. Judicial

Intrepid Potash-New Mexico, LLC lost its appeal of a district court decision that determined it had forfeited or abandoned all but 150 acre feet per year (AFY) of its almost 20,000-AFY claim to the surface water of the Pecos River.[191] The New Mexico Court of Appeals affirmed the district court, which found in an expedited *inter se* proceeding that Intrepid and its predecessors (collectively, Intrepid) had forfeited all water rights in excess of about 5,800 AFY and abandoned all but 150 AFY of the remaining water rights.[192] Beginning in 1931, Intrepid developed a potash mine and refining facility using Pecos River water, but in 1948, cooling towers were installed that obviated the need to use river water for cooling.[193] In the 1950s, the mining operation switched to using groundwater, and by 1973, the facility near the Pecos River was dismantled.[194] Deferring to the district court findings of automatic forfeiture under pre-1965 law, the appellate court rejected Intrepid's arguments, which it made in twenty-five extensions of time, that it failed to use water because of shortages in the Pecos River, noting that Intrepid could not put the water to beneficial use because it had dismantled the facility.[195] The court also found that Intrepid's due process rights were not violated by the pre-1965 law that automatically forfeited water rights after four years of nonuse without notice because Intrepid participated in the expedited *inter se* proceeding decades later.[196] The court also affirmed the district court in its finding that Intrepid abandoned all but 150 AFY of its remaining water rights through

[188]A.B. 191, 82nd Leg. Gen. Sess. (Nev. 2023).
[189]S.B. 258, 82nd Leg. Gen. Sess. (Nev. 2023).
[190]STATE ENGINEER'S ORDER NO. 1333, ESTABLISHING THE PERENNIAL YIELD FOR THE COLD SPRING VALLEY HYDROGRAPHIC BASIN (100) WITHIN WASHOE COUNTY, NEVADA, RESCINDING INTERIM ORDER 1307 (JAN. 24, 2023).
[191]Carlsbad Irr. Dist. v. D'Antonio, 544 P.3d 276 (N.M. Ct. App. 2023).
[192]*Id.*
[193]*Id.* at 282.
[194]*Id.*at 282-83
[195]*Id.* at 283.
[196]*Id.* at 283-84.

decades of non-use.[197] The district court applied the seven-factor framework announced in 2021 to determine whether abandonment occurred.[198] Using those factors, the district court concluded that Intrepid and its predecessors were speculators, who merely hoped to use the water rights when it was profitable, instead of intending to put the water to beneficial use.[199]

The New Mexico Supreme Court let stand a decision that denied an application to appropriate 350 acre-feet per year (AFY) of groundwater for a subdivision on the unusual basis of conservation.[200] The Court of Appeals affirmed the district court's reversal of a State Engineer decision and determined that the appropriation was contrary to the conservation of water in the state and would impair as many as 100 wells.[201] Aquifer Science, LLC first filed an application to appropriate 1,500 AFY in June 2009 to provide water to a multi-use development with two golf courses.[202] After the State Engineer had initially denied its application because no water was available to appropriate, Aquifer Science reduced its application twice before trimming its request to 350 AFY.[203] Following the final reduction, the State Engineer reversed its earlier position and approved the permit.[204] Several parties opposed the application, including nearby residents and Bernalillo County.[205] Following a two-week bench trial in the appeal, a district court denied the application.[206] The court denied the application on the uncommon ground of conservation of water, finding in part that neither Aquifer Science nor the State Engineer considered climate change.[207] The Court of Appeals declined to rely on this finding in affirming the decision because the State Engineer never considers climate change in its decisions.[208] Instead, the appellate court relied on several other facts, including the lack of limits on water use, allowance of independent wells, and the long lead time before a planned golf course could use effluent for irrigation instead of fresh water.[209]

2. Legislative

The New Mexico Legislature passed a bill that significantly reduces the governor's power to appoint members of the nine-member Interstate Stream Commission (ISC), which oversees water policy and interstate issues.[210] In the future, the New Mexico Senate must approve new ISC members. The bill also adds new qualifications, such as ten years of experience in New Mexico water issues. Only four members may be from irrigation

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[197] *Carlsbad Irr. Dist.*, 544 P.3d at 284.
[198] *Id.* at 284-85 (citing State ex rel. Office of State Engineer v. Elephant Butte Irr. Dist., 499 P.3d 690 (N.M. Ct. App. 2021). *See also* Christen T. Maccone et al., *Environment, Energy, and Resources Law: The Year In Review 2021 Chapter U. Water Resources*, AM. BAR ASS'N, 2023 at U-24-U-25 (2022) for a description of the factors.
[199] *Carlsbad Irr. Dist.*, 544 P.3d at 291-92.
[200] Aquifer Sci., LLC v. Verhines, 527 P.3d 667, 671, *cert. denied*, No. S-1-SC-39734 (2023).
[201] *Id.* at 673-74.
[202] *Id.* at 671.
[203] *Id.* at 672.
[204] *Id.*
[205] Laura Paskus, *East Mountain Water Application Spurs Protests from Residents, Silence from State Engineer*, NEW MEXICO PBS (Apr. 2, 2018).
[206] *Aquifer Science,* 527 P.3d at 672.
[207] *Id.* at 679.
[208] *Id.*
[209] *Id.* at 679-680.
[210] S.B. 58, 56th Leg., 1st Sess. (N.M. 2023) (codified at N.M. STAT. ANN. § 72-14-1).

districts or other sections of the state, and members must include a representative of an acequia or community ditch, a drinking water utility that provides at least 500 AFY of water for domestic use, such as Albuquerque, a member of a Native American nation or tribe, and a member of a New Mexico Indian pueblo.

The Water Security Planning Act requires the ISC to promulgate rules and guidelines for regional water planning, and the plans must consider access to water for domestic use.[211]

The Regional Water System Resiliency Act allows two or more public water providers, such as small mutual domestic associations, to voluntarily merge and form a regional water system.[212] Such a merger previously required a specific act of the legislature.

L. North Dakota

1. Legislative

During the 68th regular and special sessions, the Legislative Assembly of North Dakota enacted Senate Bill 2372[213] and Senate Bill 2397[214] requiring certain water resource districts within certain drainage basins to form and remain a member of a joint water resource board relative to the district's respective drainage basin. Previously, water resource districts in North Dakota were generally organized based on county lines and overseen by county commissions. The purpose of this change appears to be to force local water management decisions to be managed on a watershed basis rather than by political boundaries.

M. Oregon

1. Judicial

The Oregon Court of Appeals in *Waterwatch of Oregon, Inc. v. Water Resources Department*[215] found that calculations for an extension of time request on a municipal water right permit, made by the Oregon Water Resources Department (OWRD), complied with statutory and administrative rule requirements. Compliance was met because neither the statute nor the rule explicitly tells OWRD how to calculate the required consideration.[216] Thus, the agency's determination of what information to use and consider in its own application process was sufficient to comply with the Court's orders. The Court found for OWRD and Oregon Fish and Wildlife Department.[217]

The Oregon Court of Appeals in *East Valley Water District v. Oregon Water Resources Commission*[218] approved the denial of an application for water storage because evidence supported that the reservoir would conflict with the habitat of cutthroat trout,

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[211]S.B. 337, 56th Leg., 1st Sess. (N.M. 2023) (codified at N.M. STAT. ANN. §§ 72-14A-1–72-14A-5).
[212]S.B. 1, 56th Leg., 1st Sess. (N.M. 2023) (codified at N.M. STAT. ANN. §§ 62-20-1–62-20-7).
[213]S.B. 2372, 68th Leg., Reg. Sess. (N.D. 2023).
[214]S.B. 2397, 68th Leg., Spec. Sess. (N.D. 2023).
[215]316 P.3d 330 (Or. Ct. App. 2013).
[216]*Id*.
[217]*Id*. at 340
[218]East Valley Water District v. Or. Water Res. Comm'n, R87871; A173292; No. 567 (Or. Ct. App. Nov. 1, 2023).

frustrating the purpose of the senior instream water right.[219] Within its opinion, the Court of Appeals went through seven assignments of error presented by East Valley Water District.[220] Notably, the Court found that an instream right does not only guarantee a flow that is left instream, meaning so long as the flow designated in the certificate is met at the measurement point, but the senior instream water right must not be frustrated by a junior water right.[221] Also, the Court found that when the Commission interprets the public interest factors in ORS 537.170(8), it need only identify the specific public interest which will be impaired or detrimentally affected, and how it will be affected—i.e., only one factor needs to be impaired, not all factors considered.[222]

2. Legislative

The Oregon State Legislature passed a bipartisan Drought Resilience and Water Security Package (BiDRAWS), outlined in House Bill 2010,[223] to assist in battling the extreme drought conditions many western states experience.[224] The areas receiving the largest amount of funds from the package include water project investments, instream priorities, and watershed health.[225] Water project investments include an irrigation modernization grant program, aquifer recharge, storage, and recovery for areas with groundwater challenges, Deschutes River conservancy, piping, monitoring, and measurement, Rogue River and Medford Irrigation District dam project, South Cooper Mountain Purple Pipe project, and professional engineering services for dams.[226] Instream priorities and watershed health include fish and wildlife passage priorities, streamflow restoration and planning, drought resilience projects, high desert restoration and infrastructure, and Western Juniper removal.[227]

3. Administrative

Oregon Water Resources Department (OWRD) and Oregon Water Resources Commission (OWRC) adopted rules to implement requirements from House Bill 2145 (2021),[228] House Bill 3030 (2019)/Senate Bill 688 (2019),[229] and House Bill 4061 (2022),[230] as well as "housekeeping" items. The changes modified Oregon Administrative Rules (OAR) Chapter 690, Divisions 190, 200, 205, 210, 2015, 225, 240 and 260.

OWRD and OWRC amended rules surrounding well construction including well constructor licensing, start cards, well reports, special standards, exempt use registration and well construction compliance to comply with House Bill 2145 (2021).[231] Changes include modifications to OAR 690-205-0200 and OAR 690-240-0065 to contain a welding

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[219] *Id*. at 792.
[220] *Id*. at 806.
[221] *Id*.
[222] *Id*.
[223] OFF. OF REP. KEN HELM, OREGON'S 2023 DROUGHT RESILIENCE AND WATER SECURITY PACKAGE—OVERVIEW (Aug. 31, 2023).
[224] *Id*.
[225] *Id*. at 6.
[226] *Id*. at 10-11.
[227] *Id*. at 9-10.
[228] H.B. 2145, 81st Gen. Assemb., Reg. Sess. (Or. 2021).
[229] H.B. 3030, 80th Gen. Assemb., Reg. Sess. (Or. 2019); S.B. 688, 80th Gen. Assemb., Reg. Sess. (Or. 2019).
[230] H.B. 4061, 81st Gen. Assemb., Reg. Sess. (Or. 2022).
[231] H.B. 2145, 81st Gen. Assemb., Reg. Sess. (Or. 2021).

proficiency for water supply well constructors and for monitoring well constructors respectively.[232] Also, OAR 690-205-0200, 0205, and OAR 690-240-0385 were modified for new requirements for "start cards"—the document submitted to OWRD when a well driller plans to start drilling a well. Changes include electronic submittal, and a requirement to submit a card not later than three days and not earlier than 60 days before beginning construction. OAR 690-205-0020 and OAR 690-240-0065 were amended to comply with House Bill 3030 (2019)/Senate Bill 688 (2019) permitting a temporary authorization for well drilling licenses for spouses of active-duty military members.[233]

Also, OWRD and OWRC amended OAR 690-260-0030 to reflect the change from House Bill 4061 (2022) which modifies the timeline for a notice of violation.[234] OWRD must notify a party of a violation within ten business days of confirmation from the OWRD Director of a violation.[235]

N. Texas

1. Constitutional

The Legislature of the State of Texas passed *Senate Joint Resolution 75*,[236] which proposed to amend the Texas Constitution to require the creation of the Texas Water Fund. On November 7, 2023, Texas voters approved Proposition 6 and adopted the proposed amendment. This new fund, which is to be administered by the Texas Water Development Board (TWDB), will serve as a new dedicated source of funding to be used to replace and upgrade water utility infrastructure and develop new water sources. The Legislature also authorized a one-time $1 billion deposit into the fund. TWDB is authorized to transfer funds between the Texas Water Fund and several other water-related funding accounts. Money appropriated by the state legislature to the fund is excluded from the state's appropriation limit.

2. Judicial

Cactus Water Services, LLC v. COG Operating, LLC[237] is the *first* appellate decision in Texas involving questions related to the ownership of *produced water*. A majority of the justices on the El Paso Court of Appeals sided with oil and gas lessee over the owners of the surface estate and held that lessee had exclusive right to "produced water" as part of oil and gas product stream. "Produced water" results from hydraulic fracturing or "fracking" which involves pumping fluid down a well at high pressure so that it is forced into the formation, which creates cracks in the rock. The fluid pumped into the well contains proppants that keep those cracks open and allow oil and gas to flow to the wellbore. The composition of the fluid that flows to the wellbore depends on the location, but once it reaches the surface, it is treated by equipment that separates out the oil and gas. What remains is referred to as *produced water*. The majority held that the mineral leases at issue in this case – which conveyed to the oil and gas lessee the exclusive right to explore for and produce oil and gas – also conveyed the exclusive right to "produced water" resulting from lessee's fracking operations, and thus the surface owners' subsequent

[232] *Id*. Section 6(10).
[233] H.B. 3030, 80th Gen. Assemb., Reg. Sess. (Or. 2019).
[234] H.B. 4061, 81st Gen. Assemb. (Or. 2022).
[235] *Id*. at Section 5.
[236] S.J.R. No. 75, 88th Leg., R.S. (Tex. 2023).
[237] 676 S.W.3d 733 (Tex. App. 2023).

transfer of rights to "water produced from oil and gas wells" was void.[238] The majority also noted that: state law classifies "produced water" as a waste byproduct of oil and gas production, rather than groundwater, and that this is consistent with industry practice; surface owners did not claim ownership over "produced water" before entering subsequent leases; common industry practice was for well operators to dispose of oil and gas waste; and that leases did not suggest that the parties intended to assign rights at a molecular level. One justice filed a dissenting opinion disagreeing with the majority and asserting that, based on long-established legal principles regarding water, and oil and gas, the mineral leases at issue should be interpreted as conveying oil, gas and hydrocarbons, but not the water incidentally recovered from the subsurface, to the oil and gas operator.

3. Legislative

The Texas Legislature passed Senate Bill No. 1047,[239] which concerns the Texas Produced Water Consortium (TPWC). TPWC was created with the goal of finding beneficial use for fluid oil and gas waste, known as "produced water." In 2022, TPWC released a report detailing the economics of treating produced water and recommending next steps to deal with 250,000 acre-feet per year of such water. Senate Bill 1047 amends current law relating to the funding and activities of TPWC by, among other things, requiring TPWC to: (1) select a pilot project for consideration and implementation by October 1, 2023; and (2) submit to the Legislature, by October 1, 2024, a report regarding (a) the status of the pilot project that was selected; and (b) any suggested policy, regulatory, or legislative changes resulting from an analysis of the implementation of the pilot project selected.

O. Utah

1. Judicial

In *Utah Stream Access Coalition v. VR Acquisitions*,[240] Utah Stream Access Coalition claimed a constitutional right to incidentally touch privately owned beds of state waters as reasonably necessary to exercise public recreation rights in those waters. The issue on appeal is whether the historical record supports the appellant's constitutional claim. The district court concluded it did not, holding that the historical record did not demonstrate a public easement to touch private land while engaged in the recreational use of public waters, based on the law of easements as it existed at the time of the framing of the Utah Constitution. The Supreme Court affirmed.

2. Legislation

Utah Passed Senate Bill 144.[241] Senate Bill 144 allows water right holders to file instream flow applications to deliver water to reservoirs in the Colorado River System in accordance with "in the state in accordance with: (i) Colorado River Drought Contingency Plan Authorization Act, Public Law 116-14; (ii) a water conservation program funded by the Bureau of Reclamation; or (iii) a water conservation program authorized by the state."[242] Before filing the application with the Utah State Engineer, the water right holder

[238] *Id.*
[239] S.B. 1047, 88th Leg., Reg. Sess. (Tex. 2023).
[240] Utah Stream Acces Coalition v. VR Acquisitions, LLC, 531 P.3d 195 (Utah 2023).
[241] S.B. 144, 65th Leg., 2023 Gen Sess. (Utah 2023).
[242] *Id.*

must obtain authorization from the executive director of the Utah Colorado River Authority who must attest that the use is consistent with the bill.

Utah passed Senate Bill 277[243] which creates the "Agricultural Water Optimization Committee." The committee is to adopt rules for the allocation of grant money for agricultural water optimization projects. The bill also allows water users to file a water right change application on "saved water," which is the diversion or depletion reduction resulting from the optimization project. "Depletion reduction" means a net decrease in water consumed accomplished by implementing water optimization practices during beneficial use of water under an approved water right." "'Diversion reduction' means a decrease in net diversion amount from that allowed under a water right accomplished by implementation of water optimization practices."[244] Allowing water users to maintain an historical beneficial use and file a change application on conserved water for a new beneficial use is a sea change in Utah water law.

Utah passed House Bill 150[245] allowing the governor to declare a temporary water shortage emergency and establish water use preferences during the emergency. To declare a water shortage emergency, "an existing or imminent short-term interruption of water delivery . . . caused by manmade or natural causes other than drought" must threaten "the availability or quality of an essential water supply or water supply infrastructure" or "the operation of the economy" and "jeopardizes the peace, health, safety, or welfare of the people of this state."[246] Such declaration may only be issued "with the advice and recommendation of the State Engineer" and "in consultation with the emergency management administration committee."[247] The bill allows compensation if a preferential water use interrupts another water user.

Utah passed House Bill 349[248] prohibiting the State Engineer from approving water reuse applications after November 1, 2023, if the water in the reuse project would have been discharged into the Great Salt Lake. The restriction does not apply to federally owned water rights or projects that have a water replacement plan.

Utah passed House Bill 370[249] criminalizing interference of public utilities, including water facilities such as a dam, pipeline, culvert, fire hydrant, flume, conduit, ditch, head gate, canal, reservoir, storage tank, spring box, well, meter, weir, valve, casing, cap, or other facility used for the diversion, transportation, distribution, measurement, collection, containment, or storage of water, stormwater, wastewater, or sewage. Interference is a first-degree felony if done intentionally or knowingly, and a second-degree felony if done recklessly.

Utah passed House Bill 491[250] creating a new Office of the Great Salt Lake Commissioner. The Office is tasked with preparing "a strategic plan for the long-term health of the Great Salt Lake and update the strategic plan regularly" as well as executing the plan, monitoring lake levels, salinity, and the lake's overall health.[251] Also, "[t]o the extent not prohibited by federal law and notwithstanding any other provision of state law, the commissioner may require a state agency to comply with the strategic plan, or to take action or refrain from acting to benefit the health of the Great Salt Lake."[252]

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[243]S.B. 277, 65th Leg., 2023 Gen Sess. (Utah 2023).
[244]*Id*.
[245]H.B. 150, 65th Leg., 2023 Gen Sess. (Utah 2023).
[246]*Id*.
[247]*Id*.
[248]H.B. 349, 65th Leg., 2023 Gen Sess. (Utah 2023).
[249]H.B. 370, 65th Leg., 2023 Gen Sess. (Utah 2023).
[250]H.B. 491, 65th Leg., 2023 Gen Sess. (Utah 2023).
[251]*Id*.
[252]*Id*.

P. Washington

1. Judicial

In *Burbank Irrigation Dist. #4 v. Washington Dep't of Ecology*,[253] Division III of the Washington Court of Appeals issued a decision on a water right transfer from one municipal water provider to another. The decision leaves many issues undecided, however the decision is pending a remand to the Pollution Control Hearings Board (PCHB).

The case involved a proposed transfer by an irrigation district (Burbank) that provided drinking water to an unincorporated area across the Snake River from the City of Pasco. Burbank applied to the local Conservancy Board to amend the water right and to transfer a portion of the water right to Pasco. The Conservancy Board recommended approval of the transfer based on findings that the water right was valid for transfer because it had been continuously used as a municipal water right, Burbank had exercised reasonable diligence in putting the water to beneficial use, and the proposed transfer would not be detrimental to the public interest.[254] Rejecting the Conservancy Board's findings, the Department of Ecology (Department) denied the application on grounds that the change would unlawfully: (1) enlarge the right; (2) contradict original intent; and (3) be contrary to the public interest as speculation. Burbank and Pasco appealed the decision to the PCHB. The PCHB concluded that the transfer would result in enlargement of the water right and upheld the denial.[255] Burbank appealed the PCHB's decision to the local trial court, which reversed the PCHB's order and granted summary judgment to Burbank. The Department appealed.

The Court of Appeals reversed the trial court's summary judgment, affirmed the trial court's reversal of the PCHB's summary judgment in favor of the Department, and remanded the decision to the PCHB for further fact finding and proceedings.[256] The Court held that there were disputed material issues of fact as to whether the subject water right was independent of three related water rights and could be transferred without unlawful enlargement.

Several of the arguments and issues raised before the Court of Appeals will potentially impact future municipal water rights. First, the Court recognized that alternative water rights are independent water rights, regardless of whether they are additive or non-additive of annual quantity. Second, the Court of Appeals determined that the Department could consider the original intent of the water right in determining the scope of the water right. Third, although the Court of Appeals did not reach issues regarding the public interest and the transfer of inchoate municipal water, these issues remain alive on remand.

2. Legislative

In 2023, the Washington State Legislature modified timelines and other initial procedural actions in a water rights adjudication, amending The Revised Code of Washington (RCW) 90.03.120-140, 90.03.625, 90.03.635, and 90.03.645.[257] These amendments included specific timelines for an adjudication filed in Water Resource Inventory Area (WRIA) 1. The Department is preparing to file a general stream

[253] 534 P.3d 833 (Wash. Ct. App. 2023).
[254] *Id.* at 840.
[255] *Id.*
[256] *Id.* at 846-47.
[257] H.B. 1792 Gen Assemb., Reg. Sess. (Wash. 2023).

adjudication in WRIA 1 that covers the Nooksack River system and the area of Whatcom County north to Canada in 2024.[258]

Specifically, the statutory amendments specify that for a WRIA 1 adjudication, claims are to be filed within one year after the service of summons.[259] Additionally, claimants are to file evidence to support their claims no less than three years after the claim filing deadline.[260] For both deadlines, the court may establish special rules to allow for later filing dates.[261]

In 2023, the Washington State Legislature also enacted legislation relating to drought preparedness.[262] While the Department was previously authorized to issue grants to qualifying public entities to reduce hardship related to drought, pursuant to H.B. 1138, projects funded by such grants no longer need to be completed while a drought emergency order is in effect. The legislation also contains several funding mechanisms for drought preparedness and response.

Q. Wyoming

1. Legislative

House Bill 93 authorizes and appropriates funds for certain Level III construction projects.[263] These projects include cloud seeding in the Medicine Bow, Sierra Madre, and Wind River Mountain Ranges, water transmission and storage projects, and certain rehabilitation projects.[264] The Wyoming Legislature further amended prior Level III construction projects to include new development projects, rehabilitation projects, and dams and reservoirs projects.[265] Its companion bill, Senate File 96, authorized certain reconnaissance (Level I) and feasibility (Level II) studies for water development projects.[266] It appropriates money to certain reconnaissance and feasibility studies for both new development and rehabilitation projects.[267] It also sets forth reporting requirements and details the use of unexpended or unobligated funds and sets forth amendments to prior studies.[268]

In Senate File 68, the Wyoming Legislature created Wyoming Statute section 34-1-158, setting forth the requirements for a prescriptive easement for a water conveyance.[269] Specifically, such an easement can be established if a water user has "maintained a water conveyance under a claim of right for a period of ten years."[270] During those ten years, the use must be continuous and uninterrupted, open and notorious, and adverse.[271] The holder

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[258] *See Adjudication of WRIA 1 (Nooksack),* DEPARTMENT OF ECOLOGY STATE OF WASHINGTON, (last visited Apr. 14, 2024).
[259] WASH. REV. CODE § 90.03.120(2).
[260] WASH. REV. CODE § 90.03.635(2).
[261] WASH REV. CODE § 90.03.120(2); WASH. REV. CODE § 90.03.635(2).
[262] LAWS OF WASHINGTON, Ch. 287 (2023) (H.B. 1138).
[263] Omnibus water bill-construction, H.B. 0093, 67th Leg., WYO. Gen. Sess. §§ 99-3-2801–99-3-2804 (2023).
[264] *Id.*
[265] *Id.* at §§ 99-3-2803, 99-3-2804, 99-3-2205, 99-3-2303-2704.
[266] Omnibus water bill-planning and administration, S.F. 0096, 67th Leg., WYO. Gen. Sess. §§ 1-5, W.S. 41-2-124(a)(i), W.S. 41-2-124(a)(ii) (2023).
[267] *Id.*
[268] *Id.* at §§ 5, 9.
[269] S.F. 0068, 67th Leg., Wyo. Gen. Sess. § 34-1-158 (2023).
[270] *Id.*
[271] *Id.*

of such a prescriptive easement may file a notice describing the easement with the county clerk in the county in which the easement is located and may use, repair, and maintain the water conveyance if compliant with all notice and other requirements.[272]

2. Administrative

On February 27, 2023, Wyoming, Colorado, Utah, and New Mexico, through the Upper Colorado River Commission (UCRC), submitted an amendment to the 2022 Drought Response Operations Plan.[273] Pursuant to this Amendment, Drought Response Operations releases at Flaming Gorge were suspended beginning no later than March 7, 2023, through the remainder of the Plan Year.

On May 17, 2023, Wyoming, Colorado, New Mexico, and Utah, through the UCRC, approved the 2023 Drought Response Operations Plan, which impacts Flaming Gorge, Lake Powell, and Blue Mesa through April 2024. The plan seeks to recover water released from Flaming Gorge and Blue Mesa in 2021 and 2022.[274]

On September 21, 2023, at a special meeting of the UCRC, Colorado, New Mexico, Utah, and Wyoming agreed to move forward with a System Conservation Pilot Program in 2024 to mitigate drought impacts in the Upper Colorado River Basin.[275]

[272] *Id.*

[273] Letter from Upper Co. River Comm'n on Amendment 1 to Attachment C of the 2022 Drought Response Operations Plan (Feb. 27, 2023) (on file with UCRC).

[274] Letter from Upper Co. River Comm'n on 2023 Drought Response Operations Plan (May 17, 2023) (on file with UCRC).

[275] Press Release, Upper Colorado River Comm'n, Upper Colorado River Basin States, through the Upper Colorado River Commission, Kickoff System Conservation Pilot Program (SCPP) in 2024 (Oct. 3, 2023).

Chapter Y: CONSTITUTIONAL LAW
2023 Annual Report[1]

I. SUPREME COURT CASES DECIDED IN 2023

In its 2022 Term, the Supreme Court issued four opinions in the environmental field, including one on animal law, two on Indian tribal rights, and one case interpreting the Clean Water Act as applied to wetlands. Each case involved differing majorities and in two cases the Court had narrow 5-4 majority opinions. Further, the Court took one action vacating a stay by a court of appeals as to a natural gas pipeline running through a national park.

A. The Dormant Commerce Clause does not apply to California's ban on pork products from mistreated pigs.

In *National Pork Producers Council v. Ross,* the Court held that a California statute that forbids the in-state sale of pork products derived from breeding pigs "confined in a cruel manner" does not violate the dormant Commerce Clause.[2] Some members of the Court have questioned the "negative" or "dormant" application of the Commerce Clause at all.[3] But, the Court did not reach that expansive position and instead held that the traditional strict scrutiny rule against state laws that directly discriminate against commerce

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[2]598 U.S. 356, 390-91 (2023) (The California law, adopted by a popular referendum under the designation of Proposition 12, deems confinement "cruel" if it prevents a pig from "lying down, standing up, fully extending [its] limbs or turning around freely." *Id.* at 365-66).

[3]*See* South Dakota v. Wayfair Inc. et al., 585 U.S. 162, 189-90 (2018) (Thomas, J., concurring) (". . . [A] quarter century of experience has convinced me that *Bellas Hess* and *Quill* "can no longer be rationally justified.") (The same is true for this Court's entire negative Commerce Clause jurisprudence.); *id.* at 190 (Gorsuch, J., concurring) ("My agreement with the Court's discussion of the history of our dormant commerce clause jurisprudence, however, should not be mistaken for agreement with all aspects of the doctrine."); American Trucking Ass'n v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 439 (2005) (Thomas, J., concurring)(" '[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense and has proved virtually unworkable in application' and consequently, cannot serve as a basis for striking down a state statute)(citations omitted); Tyler Pipe Indus. V. Wash. Dept. of Revenue, 423 U.S. 232, 259 (1987) (Scalia, J, with whom Rehnquist, C.J., joins, concurring in part and dissenting in part)(" It takes no more than our opinions this Term, and the number of prior decisions they explicitly or implicitly overrule, to demonstrate that the practical results we have educed from the so-called "negative" Commerce Clause form not a rock but a "quagmire," (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959). "Nor is this a recent liquefaction.").

from other states did not apply.[4] California banned the sale of pork products from in-state as well as out-of-state producers who confined their pigs in a cruel fashion. Therefore, it did not involve a "discriminatory" application of a law favoring local in-state pork producers.

The majority in *National Pork Producers* rejected two ancillary bases for invoking the dormant commerce clause. The first alternative argument invoked by the challengers is the "extraterritoriality doctrine." According to the petitioners,[5] this doctrine involves an " 'almost per se' rule forbidding enforcement of state laws" that practically "control commerce" outside of the legislating state. The majority of the Court, however, rejected that argument. Instead, it held that the cases cited by the petitioner in support of a per se rule were, in fact, variations of the classic "no discrimination on out-of-state goods" cases and did not establish this new "extraterritoriality" doctrine.[6]

This left petitioners with an alternative theory that urged the Court to weigh the relative "burden imposed on interstate commerce" and reject California's law on that basis. Petitioners cited to the *Pike* standard in support of this alternative argument.[7] The Court rejected that alternative theory as well. For the majority, the request to utilize the Commerce Clause as a "freewheeling" judicial power to weigh costs and benefits was a step too far.[8]

One commentator suggests that the decision in *National Pork Producers* portends a greater receptivity toward dismissal of other cases challenging state clean energy laws as somehow offending the "extraterritorial" limits of the Commerce Clause.[9] Time, and other cases, will tell.

B. Sackett v. EPA (Part II)[10]—Scope of "waters" subject to Clean Water Act Curtailed.

In *Sackett v. EPA*, the Court unanimously rejected the "significant nexus" test for determining whether a wetland is covered under the Clean Water Act. However, the Court essentially split 5-4 over selection of an appropriate alternative standard. A 5-member majority of the Court held that for a wetlands area to be regulated it must have a "continuous surface connection" with a regulated (Navigable) waterway which makes it "difficult to determine where the 'water' ends and the 'wetland' begins."[11] In so doing the Court majority essentially endorses Justice Scalia's plurality opinion in *Rapanos v. U.S*,[12] a divided decision without a majority, but with a concurring decision by Justice Kennedy supporting the "significant nexus test" that was routinely used by Courts of Appeal in

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[4]*See* S. Kalen, THE DORMANT COMMERCE CLAUSE AND THE ENVIRONMENT, Ch. 6, pg. 153, PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW (ABA & James May eds. 2011).

[5]Petition for Writ of Certiorari, National Pork Producers Council et al. v. Ross, 598 U.S. 356 (No. 21-468) (The petitioners were two agriculture-based trade associations, the National Pork Producers Council and the American Farm Bureau Federation).

[6]*Id.*

[7]Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

[8]*National Pork Producers,* 598 U.S. at 380-381.

[9]Ari Peskoe, *The Supreme Court ends a looming legal threat to state clean energy laws*, ABA TRENDS (Sept. 1, 2023).

[10]This is the second time that Mr. Sackett and his wife have had a Supreme Court hearing. In the first case, *Sackett v. EPA*, 566 U.S. 120 (2012), the Court held that EPA's compliance order constituted a final decision which could be immediately challenged by the Sacketts. This second case, decided in 2023, is the final result of that challenge.

[11]598 U.S. 651, 651 (2023).

[12]547 U.S. 715 (2005).

deciding wetland challenges. In rejecting Justice Kenney's "significant nexus" test, the majority took a very narrow interpretation of the word "waters" in "waters of the United States," the jurisdictional hook for both Section 402 and 404.

The Justices concurring in judgment only, led by Justice Kavanaugh, stressed that in 1977 Congress amended the Act to include wetlands that were "adjacent" to a regulated waterway and that the "ordinary meaning" of the term "adjacent" has not changed since 1977.[13] In her concurrence, Justice Kagan says "adjacent" is broader than the majority opinion, and that this decision is just like the *West Virginia v. EPA* where the Court imposed its own policy preferences, effectively rewriting the law.[14]

Whether the current decision in *Sackett* brings clarity is still an outstanding question.[15] Although EPA promptly revised its current rule interpreting the scope of the Clean Water Act's application to wetlands, that new rule, the "Revised Definition of Waters of the United States; Conforming", is subject to likely future litigation which might further "muddy" the proverbial waters.[16]

C. Two cases involving tribal rights

1. Court rejects Navajo Nation's claim that the federal government must actively provide potable water to its reservation

In its 5-4 decision in *Arizona v. Navajo Nation*, the Court rejected the claims of the Navajo Nation requesting that the federal government do something to provide more water to its reservation property located in the arid Southwest.[17] The majority framed the issue as whether the United States, under its 1868 treaty with the Navajo, was obligated to take "affirmative" steps to ensure delivery of water to the tribal reservation.[18] Beneath the framing of the key issue, however, was a dramatically different view of the Tribe and its treaty rights. For the majority, it was an interpretation issue: Did the Treaty of 1868 between the U.S. and the then-sovereign Tribe (Navajo) expressly commit the U.S. to provide potable water to the tribe? Justice Kavanaugh, who drafted the majority opinion, and Justice Thomas, in his concurrence, state that there is no specific language in the Treaty that would obligate the federal government to undertake protection of additional rights beyond what the Navajo currently have.

For the dissenters, Justice Gorsuch paints a poetic and powerful picture of the history of the Navajo, who after a series of wars with the U.S., were consigned to a program for their "removal and isolation" and assimilation into a new life apart from what many deemed their prior unconfined "wild and predatory life."[19] The dissenters point out that various oral promises about water were made at the time by General Sherman, the lead negotiator for the U.S.[20]

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[13] 598 U.S. 651, 717-18 (2023) (Kavanaugh, J., with whom Sotomayor, Kagan, and Jackson join, concurring in judgment).

[14] 598 U.S. 651, 717-18 (2023) (Kagan, J. with whom Sotomayor and Jackson join, concurring in judgment).

[15] *See* Robin K. Craig, *Does Sackett bring clarity to waters of the United States?,* AM. BAR ASS'N (Jun. 30, 2023).

[16] *See* Susan L. Stephens, *Here we go again: EPA releases Amendments to WOTUS rule post-Sackett,* AM. BAR ASS'N (Nov. 1, 2023).

[17] 599 U.S. 555 (2023).

[18] *Id.* at 558.

[19] *Id.* at 575-580 (Gorsuch J., with whom Sotomayor, Kagan, and Jackson, JJ. join, dissenting).

[20] *Id.* at 578 (referencing assurances by General Sherman that the Navajo would have "plenty of water").

One set of commentators, including the lead counsel for the State of Arizona, concluded that this case was in essence a preservation of the status quo in a complex set of treaties, prior Supreme Court decisions, and scarce water rights.[21]

2. Court upholds the Indian Child Welfare Act against a panoply of constitutional challenges.

Haaland v. Brackeen is a 7-2 decision in which the Court upheld the constitutionality of the Indian Child Welfare Act (ICWA).[22] Enacted in 1978, the ICWA governs adoption procedures for Indian children with the aim of preserving the culture by keeping Indian children connected to Indian families. The statute thus goes to the heart of a congressional process to secure continuity for native families.

In *Haaland,* the underlying individual claimants asserted rights in three separate adoption proceedings in which they (non-Native Americans) sought to adopt Native American children. In each case, tribes sought to intervene and prevent the adoption. The adopting families, along with the States of Texas, Indiana, and Louisiana, sued the United States, the Department of Interior, the Bureau of Indian Affairs, and the Department of Health and Human Services ("Federal Defendants") to challenge the constitutionality of the ICWA on several grounds. While the Fifth Circuit upheld the ICWA itself as constitutional, it held that some of its provisions did not hold up. The Supreme Court reversed that portion of the Fifth Circuit's decision challenging the Act.

The Court held that Congress' power "to legislate with respect to the Indian tribes is 'plenary and exclusive'" under Article I of the Constitution.[23] This authority derives from three distinct sources, which include the Indian Commerce Clause, Treaty Clause, and the structure of Constitution.

As to the Indian Commerce Clause, which allows Congress "[t]o regulate Commerce . . . with the Indian Tribes," it must be interpreted to include "not only 'trade' but also 'Indian affairs.'"[24] That is, the Indian Commerce Clause is broader than the Interstate Commerce Clause and thus confers in the Federal Government "virtually all authority over Indian commerce and Indian tribes."[25]

The Treaty Clause allows the President, with the advice and consent of the Senate, to "make Treaties" with Native American tribes. While conceding the treaty power "does not literally authorize Congress to act legislatively" as it is in Article II rather than Article I, the Court observed that treaties made pursuant to the treaty power "can authorize Congress to deal with matters with which otherwise 'Congress could not deal.'"[26]

Further, the Court noted that principles inherent in the Constitution, namely the Federal Governments powers described as "'necessary concomitants of nationality'" authorize "Congress to act in the field of Indian affairs,"[27] including "creating departments of Indian affairs, appointing Indian commissioners, and ... 'securing and preserving the friendship of the Indian Nations.'"[28]

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[21]Rita P. McGuire & Nicole D. Klobas, *The Supreme Court's decision in Arizona v. Navajo Nation: A tale of scare water and treaty rights in the Southwest*, AM. BAR ASS'N (Nov. 1, 2023).
[22]599 U.S. 255 (2023).
[23]*Id.* at 272.
[24]*Id.* at 273 (citing U.S. CONST. art. I, § 8, cl. 3; Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989)).
[25]*Id.* at 273 (citing Seminole Tribe of Fl. v. Florida, 517 U.S. 44, 62 (1996)).
[26]*Id.* at 274 (citing United States v. Lara, 541 U.S. 193, 200 (2004)).
[27]*Id.* (citing Morton v. Mancari, 417 U.S. 535, 551-52 (1974)).
[28]*Haaland*, 599 U.S. at 279.

Justice Gorsuch wrote a separate puissant concurrence explaining the historical context of the ICWA, including the movement away from an older policy of simply removing Indian children from their families.[29]

D. Natural Resources: The Court vacates a stay of pipeline construction through a National Forest

The Mountain Valley Pipeline (MVP) is a proposed 303-mile natural gas pipeline which runs through the Jefferson National Forest in West Virginia and Virginia. The pipeline is substantially complete, but construction has been stalled pending challenges related to two remaining approvals from the Forest Service and the Bureau of Land Management (BLM) authorizing construction in the Jefferson National Forest. In a petition for review of the administrative action filed with the Fourth Circuit, The Wilderness Society and others challenged the continued construction of the pipeline. On July 10, 2023, the Fourth Circuit issued a one-sentence stay order halting all construction in the Jefferson National Forest without explanation. Immediately thereafter, the Petitioners, the Pipeline owner, and others applied to the U.S. Supreme Court for an order vacating the Fourth Circuit's stay. The applications from the pipeline owner and others came shortly after President Biden signed into law the Fiscal Responsibility Act of 2023 (Ac"), which, in addition to raising the debt ceiling, contained a provision to aid the completion of MVP. Specifically, the Act "ratifies and approves," "notwithstanding any other provision of law," all administrative actions "necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline"[30] The applicant argued that this Act effectively deprived the Fourth Circuit of jurisdiction to hear the petitions for review filed by The Wilderness Society and others. The Supreme Court acted with alacrity, and within two weeks of the initial application, it vacated the stays issued by the Fourth Circuit in three pending cases.[31]

II. SUPREME COURT CASES SET IN 2023 FOR HEARING IN 2024

A. The Court will examine EPA's Good Neighbor Rule

On December 20, 2023, the Court announced it would hear four cases (now consolidated) involving challenges to EPA's disapproval of various State Implementation Plans (SIPs) under the Clean Air Act.[32] These cases, including one brought by the States of Ohio, Indiana, and West Virginia, seek to stay EPA's disapproval of the SIPs. EPA based its disapproval on the State plans' inconsistency with EPA's separate rule attempting to reduce ozone impacts from "upwind" states on "downwind" recipient states. EPA's rule is commonly referenced as its "Good Neighbor Plan", and the combined cases are scheduled for argument on February 21, 2024.

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[29] *Id.* at 279 (Gorsuch, J., with whom Kagan and Jackson, JJ. joined). Justice Gorsuch in the concurrence noted that: "In all its many forms, the dissolution of the Indian family has had devastating effects on children and parents alike).

[30] Fiscal Responsibility Act of 2023, Pub. L. no. 118-5, § 324 (c)(1), 137 Stat. 47 (2023).

[31] Mountain Valley Pipeline, LLC, v. The Wilderness Society, et al., 144 S. Ct. 42 (July 27, 2023).

[32] Order of the Court dated Dec. 20, 2023 in Nos. 23A349 (Ohio v. EPA), 23A350 (Kinder Morgan v. EPA), 23A351 (Am. Forest & Paper Assn. v. EPA) and 23A384 (U.S. Steel v. EPA).

B. Loper Bright Enterprises v. Raimondo, Relentless, Inc. v. Department of Commerce and the scope of judicial deference to administrative agencies.

On May 1, 2023, the Supreme Court granted the petition for certiorari in *Loper Bright Enterprises v. Raimondo*. The case challenges a federal rule that requires fisheries to pay the salaries of compliance observers on their boats, a rule promulgated by the National Marine Fisheries Service. In its grant, the Court specifically advised it would consider the decades-old *Chevron* doctrine. In *Chevron v. Natural Resources Defense Council*, the court held that when a federal law is ambiguous, courts should defer to an agency's reasonable interpretation of the statute. Criticism of the doctrine has increased recently, but until now, the Supreme Court has sidestepped or ignored the doctrine. In *Loper*, however, the petitioners specifically asked the court to overrule *Chevron*, or at least narrow it. The Solicitor General opposed certiorari. In October 2023, the Court granted certiorari in a similar case from the First Circuit, raising the same question about the continued viability of *Chevron* in *Relentless, Inc. v. Department of Commerce*. The Court consolidated both cases for argument, which is set for January 17, 2024.

III. SUPREME COURT AND OTHER CASES DISCUSSING THE "MAJOR QUESTIONS" DOCTRINE

On June 30, 2023, the Court issued its opinion in *Biden v. Nebraska*,[33] which for the second time invoked the "major questions doctrine." *Biden v. Nebraska* was issued on the first anniversary of *West Virginia v. EPA*,[34] which for the first time articulated the major questions doctrine as a distinct constitutional concept. Relying on this newly-minted doctrine, the Court in *West Virginia* concluded that the Obama Administration's Clean Power Plan was a "major question" because of its economic and political significance. The Court further held that the EPA overstepped its authority under Section 111(d) of the Clean Air Act (CAA) because that section did not provide explicit authority for EPA to require a shift from coal-fired electricity to sources that emit fewer greenhouse gases. Rather, the CAA only authorized technological pollution controls of the type traditionally imposed by EPA under the CAA.

In *Biden v. Nebraska*, the Court again invoked the major questions doctrine, this time rejecting the Biden Administration's plan to forgive $430 billion of federal student loans under the Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES Act). While the case does not directly implicate environmental law, it helps define, and arguably expands, the contours of the major questions doctrine.

The Biden Administration asserted that, in light of the COVID pandemic, its debt forgiveness plan is authorized by a provision of the HEROES Act authorizing the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to"[35] student loan programs "as the Secretary deems necessary in connection with a war or other military operation or national emergency."[36] Chief Justice Roberts' majority opinion rejecting this claim starts as a run-of-the-mill statutory interpretation case. The majority relies on dictionary definitions of the key terms "modify" and "waive" to conclude that the complete cancellation of student debts cannot reasonably be characterized as either a modification or waiver.[37]The Court then took an extra step, invoking the major questions doctrine, to reject the Administration's claims about Congress's intent in enacting the

[33]143 S. Ct. 2355 (2023).
[34]597 U.S. 697 (2022).
[35]Waiver authority for response to military contingencies and national emergencies, 20 U.S.C. § 1098bb(a)(1).
[36]*Biden,* 143 S. Ct. at 2358.
[37]*Id*.

HEROES Act.[38] The Court's decision sheds some light on when the major questions doctrine can be invoked and how it is to be applied.

As formulated by the Court in *West Virginia*, the doctrine requires that, absent "clear congressional authorization," courts presume Congress does not delegate issues of major political or economic significance to executive agencies.[39] In permitting the Administration to "waive or modify" student loan requirements, the majority concludes that the HEROES Act did not provide clear authorization to cancel up to $20,000 in student debt for eligible borrowers, as opposed to modifying or waiving specific terms governing loan repayment.[40]

At the outset, following *West Virginia v. EPA*, the Court concludes that the student loan relief program's $430 billion price tag has "economic and political significance" that is "staggering by any measure," thus establishing the threshold requirement for applying the major questions doctrine.[41]

On the other hand, unlike in *West Virginia*, the Court does not claim that student loans are outside the expertise of the Department of Education. Hence, it appears that an agency acting outside its area of expertise may indicate that the agency acted beyond its authority under the major questions doctrine, but that such a showing is not necessary. Likewise, several other factors the Court pointed to in *West Virginia* are not discussed in *Biden*.[42]

Finally, the Court rejects the government's argument that the major questions doctrine should not apply, or should apply with less force, when federal benefits, as opposed to federal regulations, are involved. This distinction is invalid, according to the majority, because the power of the purse is one of the central powers of Congress, and it follows that Congress is no less likely to delegate the spending power than the power to regulate without a clear statutory statement authorizing the Executive Branch to exercise that power.[43]

Justice Barrett's concurring opinion[44] takes a relatively limited view of the nature of the major questions doctrine, in contrast to the view espoused by Justice Gorsuch in his *West Virginia* concurrence.[45] A comparison of these opinions suggests that there is no consensus among the Court's majority as to the fundamental nature of the major questions doctrine. Justice Barret's concurrence is aimed primarily at rebutting "the charge that the [major questions] doctrine is inconsistent with textualism."[46] According to Justice Barrett, the major questions doctrine is simply an ordinary canon of statutory interpretation, similar to the canon that words in a statute must be interpreted in context.[47] In her view, the doctrine recognizes that, in the constitutional context of legislation, Congress is unlikely to delegate power to the Executive Branch using ambiguous or obscure language.[48] In this way, "the major questions doctrine is a tool for discerning—not departing from—the text's most natural interpretation."[49]

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[38]*Id.* at 2368.
[39]*Id.* at 2361, 2373, 2375.
[40]*Id.* at 2375.
[41]*Id.* at 2372-2373.
[42]*Biden,* 143 S. Ct. at 2377 (Barrett, J. concurring) (noting that "The major questions doctrine reinforces that conclusion but is not necessary to it.").
[43]*Id.* at 2374-2376.
[44]*Id*. at 2376.
[45]West Virginia et al., v. Env't Protection Agency, 597 U.S. 697, 735 (2022).
[46]*Biden*, 143 S. Ct. at 2376.
[47]*Id.*
[48]*Id*. at 2380.
[49]*Id*. at 2376.

In this respect, Justice Barrett's concurrence departs from Justice Gorsuch's concurrence in West Virginia, which characterizes the major questions doctrine as a strong rule of interpretation, like the rule requiring courts to interpret statutes to avoid constitutional issues even if the court must adopt a strained interpretation of the statute. Thus, "nothing but express words, or an insurmountable implication" from statutory language would suffice to provide the necessary statutory authorization for an administrative rule.[50] If the major questions doctrine is treated as such a strong rule of interpretation, it would require courts to reject statutory interpretations that create a delegation of Congressional authority to the Executive Branch if there is any question about the scope of the delegation, even if the statute could reasonably be read to create such a delegation. Justice Barrett's view, however, would not permit courts to employ the major questions doctrine to reject the most plausible interpretation of the statute. The future resolution of this unresolved question is likely to have a major impact on the development of the major questions doctrine.

In addition, courts will be required to resolve a variety of questions arising from *West Virginia* and *Biden.* These include, for example, how big an economic impact a particular rule must have to meet the threshold requirement that the question is "major." Similarly, because the list of factors relied on in *West Virginia* is not the same as the list of factors considered in *Biden,* it is unclear which of the factors cited in the two cases must be met before a statute can be struck down as a violation of the major questions doctrine or, alternatively, if the test is a flexible one, requiring only some subset of the various factors to be present to invoke the doctrine.

It is also becoming clear that, as the courts work out the details of the doctrine, it will become a staple of administrative law across a wide spectrum of cases. Two recent cases suggest how the doctrine may be applied in the context of environmental law. In *North Carolina Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, the Fourth Circuit invoked the major questions doctrine in rejecting claims that bycatch disposed of in the ocean by shrimp trawlers must be regulated as a "discharge of pollutants" under the Clean Water Act.[51] By contrast, the U.S. District Court for the District of Alaska in *Alaska Industrial Development & Export Authority v. Biden* concluded that the major questions doctrine did not apply to a challenge of the Administration's temporary moratorium on oil and gas leasing on the arctic coastal plain.[52]

The doctrine has also been raised in a variety of other contexts. For example, it has been cited to support the conclusion that federal regulation of "ghost guns" oversteps federal firearms statutes.[53] On the other hand, the doctrine was unsuccessfully raised in the context of: a preemption challenge to state regulation of the abortion drug mifepristone;[54] in a dispute about Medicare reimbursements;[55] a Securities and Exchange Commission rule on disclosure of board diversity of exchange members;[56] and the Department of Labor's new interpretation of the term "investment advice fiduciary."[57]

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[50] *West Virginia,* 597 U.S. at 736.
[51] 76 F.4th 291, 296, n.5 (4th Cir. 2023)
[52] No. 3:21-CV-00245-SLG (D. Alaska Aug. 7, 2023).
[53] VanDerStok v. Garland, 86 F.4th 179, 195 (5th Cir. 2023).
[54] *See* GenBioPro, Inc. v. Sorsaia, No. CV 3:23-0058 (S.D. W. Va. Aug. 24, 2023).
[55] *See* Medica Ins. Co. v. Becerra, No. 1:22-CV-1440-RCL (D.D.C. Sept. 28, 2023), *appeal filed*, No. 23-5276 (D.C. Cir. Nov. 27, 2023).
[56] *See* Alliance for Fair Bd. Recruitment v. Sec. & Exch. Comm'n, 85 F.4th 226, 256 (5th Cir. 2023).
[57] *See* Fed'n of Americans for Consumer Choice, Inc. v. U.S. Dep't of Lab., No. 3:22-CV-00243-K-BT (N.D. Tex. June 30, 2023).

Chapter Z: ENVIRONMENTAL JUSTICE
2023 Annual Report[1]

"Environmental Justice" (EJ) acknowledges the right of every individual to dignity and a clean, healthy environment and that overburdened communities should have their voices heard.[2] This chapter summarizes EJ developments at the federal and state levels, in the courts, and within the ABA. These developments include the issuance of a comprehensive Presidential Executive Order on EJ; implementation of the EJ aspects of the Inflation Reduction Act; EPA's issuance of guidance to distribute billions to support EJ; New York State's adoption of a groundbreaking environmental justice law; New Jersey's issuance of first-of-a-kind EJ regulations; judicial rejection of EJ-based claims; and the ABA's issuance of a "Blueprint to Advance Environmental Justice."

I. EJ AT THE FEDERAL LEVEL

In 2023, the Biden-Harris Administration took steps to advance environmental justice (EJ) initiatives through several different actions – including Executive Orders, Guidance, updates to EJ tools, and Title VI investigations – all with the aim of addressing disproportionate harms born by marginalized communities from environmental exposure. This chapter summarizes key environmental justice actions taken in 2023 by the White House, the Environmental Protection Agency (EPA), and the Department of Justice (DOJ).

A. EJ Executive Order

On April 21, 2023, President Biden issued Executive Order 14096, entitled "Revitalizing Our Nation's Commitment to Environmental Justice for All." EO 14096 aims to "to dismantle racial discrimination and institutional bias that disproportionately affect the health, environment, safety, and resiliency of communities with environmental justice concerns" and advance environmental justice by expanding the definition of environmental justice, requiring agencies to create EJ strategic plans and assess their efforts biannually, directing research on EJ issues, expanding notifications for chemical releases, and directing compliance with NEPA in a manner that evaluates effects on EJ communities.[3] This historic "all government" approach "make[s] environmental justice a part of the mission of every agency by directing federal agencies to develop programs, policies, and activities to address the disproportionate health, environmental, economic, and climate impacts on disadvantaged communities."[4] The Administration issued a separate Executive Order,

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[1]This chapter was authored by James R. May, Esq. and Julia Casciotti, Esq. The authors thank Giulia Lima, Delaware Law School '24, for research assistance.

[2]*See* Exec. Order No. 14,096, Revitalizing Our Nation's Commitment to Environmental Justice for All, 88 Fed. Reg. 25,251 (April 21, 2023) ("To fulfill our Nation's promises of justice, liberty, and equality, every person must have clean air to breathe; clean water to drink; safe and healthy foods to eat; and an environment that is healthy, sustainable, climate-resilient, and free from harmful pollution and chemical exposure. Restoring and protecting a healthy environment — wherever people live, play, work, learn, grow, and worship — is a matter of justice and a fundamental duty that the Federal Government must uphold on behalf of all people.").

[3]Exec. Order No. 14,096, Revitalizing Our Nation's Commitment to Environmental Justice for All, 88 Fed. Reg. 25,251 (Apr. 21, 2023).

[4]Press Release, The White House, Fact Sheet: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government (Jan. 27, 2021).

14008, focused on "Tackling the Climate Crisis at Home and Abroad," which created a government-wide "Justice40 Initiative" with the goal of delivering 40 percent of the overall benefits of relevant federal investments to disadvantaged communities and the development of equitable decision making across the federal government.[5]

B. EJ Screening Tools

EPA's EJSCREEN allows users to map environmental, health, and socioeconomic indicators for potential EJ concerns.[6] EPA also utilizes EJSCREEN to identify EJ issues across permitting, enforcement, outreach, and compliance. On June 26, 2023, EPA released EJSCREEN 2.2, which adds mapping layers regarding health disparities, housing, health insurance, transportation, and location of facilities that are out of compliance with federal environmental laws.

C. EJ in Environmental Enforcement

On August 17, 2023, EPA published its National Enforcement and Compliance Initiatives for fiscal years 2024-2027 for mitigating climate change, addressing exposure to PFAS, protecting communities from coal ash contamination, reducing air toxics in overburdened communities, increasing compliance with drinking water standards, and reducing the risk of chemical accidents, all of which incorporate environmental justice considerations.[7]

On October 13, 2023, DOJ published its first annual report detailing the implementation of its EJ enforcement strategy.[8] The EJ strategy directs DOJ attorneys to prioritize cases that reduce harm to overburdened and underserved communities, ensure meaningful engagement with impacted communities, and promote transparency regarding EJ enforcement efforts. The report details EJ-related "successes" under various legal authorities, including the Clean Air Act, Safe Drinking Water Act, and Affordable Care Act. The report also discusses enforcement trends and outlines new opportunities the DOJ has identified to progress its EJ strategy, such as incorporating more mitigation and Supplemental Environmental Projects into settlements.

D. EJ in Regulatory Actions

EPA has proposed to incorporate EJ into environmental regulatory regimes in new ways. For example, in January 2023, it released a "Cumulative Impacts Addendum" to its existing guidance document entitled "EPA Legal Tools to Advance Environmental Justice."[9] This addendum walks through various statutory frameworks - including air, water, waste, chemicals, and others – and discusses the various authorities under each program that may present opportunities to address cumulative impacts as part of regulatory or agency decision-making processes.

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[5]Exec. Order No. 14008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619 (Jan. 27, 2021).

[6]*EJScreen: Environmental Justice Screening and Mapping Tool*, U.S. ENVTL. PROT. AGENCY (last updated Jan. 23, 2024).

[7]Memorandum from David M. Uhlmann to Regional Administrators on FY 2024 – 2027 National Enforcement and Compliance Initiatives (Aug. 17, 2023) (on file with author).

[8]U.S. DEP'T OF JUST., COMPREHENSIVE ENVIRONMENTAL JUSTICE ENFORCEMENT STRATEGY ANNUAL REPORT (2023).

[9]*EPA Legal Tools to Advance Environmental Justice: Cumulative Impacts Addendum*, U.S. ENVTL. PROT. AGENCY (Jan. 2023).

On April 19, 2023, EPA released a "Framework for the Implementation of the Greenhouse Gas Reduction Fund as Part of President Biden's Investing in America Agenda," which implements the Inflation Reduction Act's $27 billion Greenhouse Gas Reduction Fund (GGRF).[10] This is a transformative opportunity embraced by industry to accelerate energy transition, advance environmental justice, and fight climate change. It includes $14 billion for the "National Clean Investment Fund," $6 billion for the "Clean Communities Investment Accelerator," and $7 billion for the "Solar for All" program. Collectively these programs advance Environmental Justice with direct and support funding "to ensure low-income and disadvantaged communities have access to financing for cost-saving and pollution-reducing clean technology projects," and other EJ-advancing objectives.[11]

In April, the EPA also announced a proposal to update air emissions regulations that apply to chemical plants, including those that make synthetic organic materials and polymers. If finalized, the proposal would reduce the action level for certain hazardous chemicals, impose fenceline monitoring requirements on facilities, and require that data be transparent and available to communities.[12]

Over the past several years, EPA has developed various resources and guidance to promote environmental justice in the permit application process under different permitting frameworks. For example, in late 2023, the EPA granted Louisiana primary permitting authority for Class VI Underground Injection Control permits under the Safe Drinking Water Act for the geologic sequestration of carbon in that state. Louisiana has agreed to implement various EJ-focused elements into the permitting process.[13]

E. EJ and Title VI

EPA continues to utilize investigations under Title VI of the Civil Rights Act as an avenue for addressing environmental justice concerns. Title VI prohibits recipients of federal financial assistance from discriminating based on race, color, or national origin. EPA's Office of Environmental Justice and External Civil Rights may investigate complaints of Title VI discrimination against EPA-funded agencies and negotiate with those entities to address non-compliance. As of December 2023, EPA is reviewing approximately 20 complaints filed in the last year.

In one such investigation, the EPA was investigating a complaint that alleged that the Louisiana Department of Environmental Quality and the Louisiana Department of Health subjected Black communities living near chemical plants to disparate treatment under Title VI. In mid-2023, Louisiana filed a complaint and motion for preliminary injunction challenging EPA's investigation, after which EPA announced it was closing its investigation.

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[10]Press Release, U.S. Envtl. Prot. Agency, EPA Releases Framework for the Implementation of the Greenhouse Gas Reduction Fund as Part of President Biden's Investing in America Agenda (Apr. 19, 2023).

[11]*Id.*

[12]New Source Performance Standards for the Synthetic Organic Chemical Manufacturing Industry and National Emission Standards for Hazardous Air Pollutants for the Synthetic Organic Chemical Manufacturing Industry and Group I & II Polymers and Resins Industry, 88 Fed. Reg. 25,080 (proposed Apr. 25, 2023) (to be codified at 40 C.F.R. pts. 60, 63).

[13]State of Louisiana Underground Injection Program; Class VI Primacy, 89 Fed. Reg. 703 (Jan. 5, 2024) (to be codified at 40 C.F.R. pt. 147).

F. EJ and the Inflation Reduction Act

In early 2023, EPA announced approximately $100 million in grants for projects that advance environmental justice as part of the Inflation Reduction Act.[14]

II. EJ AT THE STATE LEVEL

A. New York

On March 3, 2023, New York Governor Kathy Hochul signed a new law that requires that the N.Y. Department of Environmental Conservation (DEC) prepare "existing burden reports" and that it "shall not issue an applicable permit for a new project if it determines that the project will cause or contribute more than a de minimis amount of pollution to a disproportionate pollution burden on the disadvantaged community."[15] The New York law goes beyond the procedural requirements of most other environmental justice laws in prohibiting the DEC from greenlighting new projects that affect disadvantaged communities in more than a de minimis way.

B. New Jersey

On April 17, 2023, New Jersey adopted detailed regulations[16] to implement its 2020 "Environmental Justice Act," which requires that the New Jersey Department of Environmental Protection (NJDEP) prepare "environmental justice impact statements." The rules will ensure "public participation in the Department's analysis of environmental and public health stressors in overburdened communities"[17] while seeking to "limit the placement of new facilities that would create a disproportionate impact by causing or contributing to adverse cumulative stressors in an overburdened community"[18] and "reduce environmental and public health stressors in overburdened communities in the permitting of new, expanded, and existing major source facilities by requiring incorporation of measures to avoid, minimize, and/or reduce facility contributions thereto."[19] The new rules provide detailed requirements for those seeking to make changes in facilities located near overburdened communities with the goal of limiting environmental and public health stressors. The regulations would have the NJDEP

> [D]eny a permit for a new facility upon a finding that approval of the permit, as proposed, would, together with other environmental or public health stressors affecting the overburdened community, cause or contribute to adverse cumulative environmental or public health stressors in the overburdened community that are higher than those borne by other communities.[20]

III. EJ IN THE COURTS

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[14] Press Release, U.S. Envtl. Prot. Agency, Biden-Harris Administration Announces Availability of $100 Million through Inflation Reduction Act for Environmental Justice Grants (Jan. 10, 2023).
[15] N.Y. 70 § 70-0118 (Consol. 2023),
[16] 55 N.J.R 661(b) (Apr. 17, 2023).
[17] N.J. ADMIN. CODE § 7:1C-1.3(a)(1) (2023).
[18] N.J. ADMIN. CODE § 7:1C-1.3(a)(2) (2023).
[19] N.J. ADMIN. CODE § 7:1C-1.3(a)(3) (2023).
[20] N.J. STAT. ANN. § 13:1D-160 (West 2020).

Courts continue regularly to turn aside EJ-based challenges to environmental assessments or environmental impact statements under NEPA, provided the agency has taken a 'hard look' at EJ concerns. For instance, in *Shoshone-Bannock Tribes of Fort Hall Rsrv. v. Daniel-Davis*, the court rejected an effort to enforce EO 12,898 in challenging an EIS, noting that it "does not create a private right to judicial review" and that the agency had taken a sufficient "hard look" at EJ concerns.[21] In *Ctr. for Cmty. Action & Env't Just. v. Fed. Aviation Admin.*, the Ninth Circuit upheld a Federal Aviation Administration EA over a challenge that it failed to adequately consider EJ concerns, noting that it considered displacement of individuals in overburdened communities and the increased usage of diesel trucks.[22] In *Nat'l Ass'n for Advancement of Colored People Erie Unit 2262 v. Fed. Highway Admin*., the court rejected plaintiffs' contention that the agency "failed to consider the possibility of increased air pollution, noise, and traffic speed, as well as whether the Project will benefit the EJ communities" finding instead that it took a 'hard look' at the project's environmental consequences as required by NEPA.[23] Likewise, in *El Puente v. U.S. Army Corps of Engineers*, the court rejected an EJ challenge to an EIS that contended that the Corps failed to take a "hard look" at EJ, finding that "no group of people would bear a disproportionately higher share of adverse environmental consequences resulting from the proposed work."[24]

Constitutional claims fared no better. In *Inclusive Louisiana v. St. James Par.*, the court dismissed plaintiffs' claims that a zoning plan "used to protect majority white parts of the Parish from industrial development, while steering industry to the 4th and 5th Districts, which are home to populations that are majority Black" violates the Thirteenth and Fourteenth Amendments because the plaintiffs could not show that the zoning plan was the sole cause of alleged health injuries.[25]

IV. EJ AND THE ABA

In August 2021, the ABA passed a historic resolution at its Annual Meeting, committing to promoting Environmental Justice through its programs, policies, and activities, and to advocate for environmental justice legislation and policy.[26] Following this, the ABA Board of Governors established an 18-member Environmental Justice Task Force (EJTF) to integrate Environmental Justice principles within the ABA's operations and to explore ways to support and promote these principles across the legal profession, as well as at federal, state, local, tribal, and international levels. The EJTF issued the "Blueprint for Environmental Justice in the ABA," "which highlights the ABA's role in combating the disparate impact of environmental policies and practices on poor

[21]Shoshone-Bannock Tribes of Fort Hall Rsrv. v. Daniel-Davis, 4:20-cv-00553-BLW (D. Idaho Mar. 31, 2023) (quoting Vecinos para el Bienestar de la Comunidad Costera v. FERC, 6 F.4th 1321, 1330 (D.C. Cir. 2021)).
[22]Ctr. for Cmty. Action & Env't Just. v. Fed. Aviation Admin., 61 F.4th 633, 637-38 (9th Cir. 2023).
[23]NAACP Erie Unit 2262 v. Fed. Highway Admin., 648 F. Supp. 3d 576, 591-97 (W.D. Pa. 2022).
[24]El Puente v. United States Army Corps of Eng'rs, Civil Action No. 1:22-cv-02430 (CJN) (D.D.C. 2023).
[25]Inclusive Louisiana v. St. James Par., Civil Action No. 23-987 (E.D. La., 2023).
[26]*Environmental Justice Resources*, AM. BAR ASS'N (last visited Mar. 20, 2024).

communities, people of color and tribal communities, at the ABA's August 2023 Annual Meeting." [27]

[27] *ABA task force issues blueprint for advancing environmental justice*, AM. BAR ASS'N (Aug. 9, 2023).

Chapter AA: ETHICS AND THE PROFESSION
2023 Annual Report[1]

Like all practitioners, environmental lawyers are subject to rules of professional responsibility.[2] The American Bar Association's (ABA) Standing Committee on Ethics and Professional Responsibility (ABA Standing Committee) is the principal drafter of the Model Rules of Professional Conduct (Model Rules). Additionally, it issues ethics opinions on questions it identifies as significant.[3] It does not issue enforcement decisions. The highest court from each state adopts ethical rules that apply to lawyers licensed in that state for conduct, including rules relating to competence, communication, consultation and candor, direct and imputed responsibility, and misconduct. While all state ethics rules follow the template of the Model Rules, states alter the rules in both minor and significant ways. For example, the ethics codes in California, the District of Columbia, and New York diverge markedly from the Model Rules. Additionally, special rules apply to attorneys who act in specific roles. Judges, arbitrators, special masters (also called court-appointed neutrals) and lawyers who represent governmental entities are subject to specific rules by under specific rules.

The highest court in a state typically has authority over lawyers licensed in that state regardless of where or in what jurisdiction the lawyer is practicing, virtually or otherwise. Independent disciplinary boards within each state, whose decisions enjoy Full Faith and Credit under the U.S. Constitution, typically enforce ethics rules. Direct or imputed misconduct can lead to disbarment, suspension from practice, censure, fines, or other penalties, which are generally part of the public record. Moreover, proof of violation of a rule may be a factor for malpractice or other civil liability for failure to comply with the prevailing standard of care.

This chapter starts with a brief review of ABA and state ethics Opinions, rules changes, and professional developments since November 2022 that may be related to the practice of Environmental, Energy and Resources Law. The most far-reaching state debates focus on the use and disclosure of artificial intelligence (AI) in the Practice of Law.

The rest of the chapter focuses on the debates surrounding the status of attorney ethics with respect to sustainability disclosures and climate change, the ongoing ethical charges brought against attorneys related to the 2020 presidential election results, and continuing risk to energy attorneys regarding sanctions against Russia.

I. ABA ETHICS OPINIONS

The ABA issued ethics opinions 504, 505, 506, 507, and 508 in 2023. Though these are general in nature, they may be of interest to environmental, energy, and resources law practitioners.

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Thanks to former SEER Ethics Advisors, Professors Katrina Fischer Kuh and James R. May, for their past work utilized in this chapter.

[2]*See generally,* Irma S. Russell and Vicki J. Wright, eds., ETHICS & ENVIRONMENTAL PRACTICE: A LAWYER'S GUIDE (2017) (exploring cases of application of principles of legal ethics in the environmental context).

[3]*Model Rules of Professional Conduct*, AM. BAR ASS'N (last visited on Feb. 25, 2022).

A. Choice of Law (March 1, 2023)[4]

Formal Opinion 504 regards Model Rule 8.5. That rule generally declares that for an attorney admitted to more than one Bar, that ethics rules of both jurisdictions apply. But if there is a conflict between jurisdictions rules, the governing jurisdiction can provide a "safe harbor" for ethical charges in the competing jurisdiction. The controlling analysis should be generally governed by the location of the ethics tribunal where the action occurred unless the "predominant effect" of the action is in another jurisdiction. This opinion clarifies that in addition to the factors that can be considered in determining an attorney's reasonable belief regarding "predominant effect," that an agreement between the attorney and client agreeing to a particular jurisdiction can be considered in making the determination. Specifically, the following clarifying language was adopted:

> [W]ith respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.[5]

Many environmental, energy, and natural resources attorneys operate in multiple jurisdictions. Additionally, direct conflicts may be more likely to emerge in the future as jurisdictions start to look more at actions related to greenhouse gas emissions and environmental protection in general.

B. Fees Paid in Advance for Contemplated Services (May 3, 2023)[6]

Formal Opinion 505 clarifies that pre-paid attorney fees should not be labelled *non-refundable*. Until work is expended using the pre-paid legal fees, ownership in funds remains with the client.

C. Responsibilities Regarding Non-Lawyer Assistants (June 7, 2023)[7]

Formal Opinion 506 states that attorneys may use non-legal assistants for many client intake procedures, including presenting fee proposals, but that due to the bar on attorneys assisting non-attorneys in the practice of law, any questions a client may have in intake procedures, including scope of work, or fee arrangements, must be directed to the attorney.

D. Office Sharing Arrangements With Other Lawyers (July 12, 2023)[8]

Formal Opinion 507 clarifies that attorneys may share offices in many circumstances, but that special care should be afforded the protection of client confidentiality and records. The precautions needed for such protection will vary based on the circumstances.

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[4]ABA Comm. on Pro. Ethics & Grievances, Formal Op. 504 (2023).
[5]*Id*. at 3.
[6]ABA Comm. on Pro. Ethics & Grievances, Formal Op. 505 (2023).
[7]ABA Comm. on Pro. Ethics & Grievances, Formal Op. 506 (2023).
[8]ABA Comm. on Pro. Ethics & Grievances, Formal Op. 507 (2023).

E. The Ethics of Witness Preparation (August 5, 2023)[9]

Formal Opinion 508 begins by noting that competent representation of a client includes the important tactical component of a lawyer's advocacy when a client or witness will provide testimony. It also notes the applicability of prohibitions against falsity and assisting in criminal enterprises may be in tension. Among the rules applicable to such conduct are Rule 1.1 (Thoroughness and Preparation), Rule 1.2 (Scope of Representation and Allocation of Authority between Client and Lawyer), Rule 3.3 (Candor Toward the Tribunal), Rule 3.4 (Fairness to Opposing Party and Counsel), Rule 4.4 (Respect for Rights of Third Persons), and Rule 8.4 (Misconduct). The opinion was motivated by the increase in the opportunity to coach witnesses in depositions or trials when participants may be in various remote locations.

F. Significant State Actions.

1.

The most significant state ethics debates this past year revolved around the use of AI in legal practice and disclosure of that use to clients, other attorneys, and tribunals. In November of 2023, the California Bar's Committee on Professional Responsibility and Conduct was the first state to issue a formal guidance.[10] The guidance emphasizes that AI can raise issues of client confidentiality and attorney competence. In particular, an attorney must be on guard that the generative AI is factually correct and free of bias, and that client information is protected. The protection of confidentiality is of particular import because generative AI programs may allow the program to use the information entered.

The guidance also notes that the attorney should not be charging clients for time saved by the use of generative AI. California guidance documents can be referenced in attorney disciplinary proceedings.

By this time next year, attorneys should expect more state rules or guidance concerning the use of generative AI in practice. Many law firms are now routinely using some AI. Very importantly, this suggests that all attorneys may be required to learn how to use and interpret AI according to their duty of competent representation and the duty to keep abreast of technological change, as AI continues to impact the legal environment.

2.

California also became the final state to require attorneys with knowledge of ethical violations to report them. New Rule 8.3 was accepted by the California Supreme Court on June 21, 2023.[11]

3.

In an attempt to make legal services more available to the public, this year, ten states (Colorado, Alaska, New Hampshire, Oregon, Utah, Arizona, Minnesota, North

[9]ABA Comm. on Pro. Ethics & Grievances, Formal Op. 508 (2023).
[10]Executive Summary from The Comm. on Pro. Responsibility to Members, Board of Trustees (Nov. 16, 2023) (on file with The State Bar of California).
[11]Approval of Rule 8.3 of The California Rules Of Professional Conduct, Admin. Ord. 2023-06-21-02 (Cal. 2023) (en banc).

Carolina, Washington and DC) took steps to make it easier for non-attorneys to provide help in certain situations related to routine legal representation.[12]

II. Client Disclosure and Information Regarding Environmental And Climate risks; impact of New SEC Rules

2023 continues to see concern about information provided in company sustainability reports to government offices and to private rating organizations. In particular, the environmental, resource, and energy attorney should beware of making "net zero" pledges that cannot be substantiated. Such pledges may implicate candor to the public as well as issues of fraud. The rule for attorney competence also suggests that attorneys in this space must continue to make themselves aware of new rules for reporting sustainability and client information required by the EU, California, and other jurisdictions. The SEC's greenhouse gas reporting rule was put off again and is now predicted to drop in April of 2024.

Competent attorneys must also make themselves aware of the growing political backlash against ESG in some state jurisdictions. In the past year, in compliance with state law, the Florida Bar has prohibited CLE credit for bar programs about "fairness" or "DEI." Additionally, Florida, Texas and many other states are attempting to penalize certain company actions or statements.[13] Such fast changing requirements (whether legal or not) can implicate the best interests of the client and may signal the need for different or more nuanced ESG reporting.

III. Fallout Continues From Attorney Work for Donald Trump and From Russian Invasion of Ukraine

This past year saw action in multiple state bars regarding disbarment of attorneys associated with Donald Trump's false claim of election fraud and attempts to seat alternate electors in the 2020 election.

Of particular note to Environmental, Energy, and Resources attorneys, one of those whose disbarment has been sought is Jeffrey Clark, former head of the Environment and Natural Resources Division (ENRD) at Justice during the Trump Administration. Speculation about Mr. Clark includes the possibility that he would be a possible Attorney General in a new Trump Administration.

Similar to a year ago, there are concerns on representation that might run afoul of sanctions against Russia. For energy attorneys in particular, there is a chilling effect on representation of energy extraction and transport which could run afoul of multiple sanctions scheme put in place around the world against Russia and Russian companies and resources. Many of the sanction schemes are new and evolving, and depend on insurance companies and finance companies for enforcement, spreading the risk of their impact on attorney actions.

IV. SEER Ethics Activities

SEER webinars, some of which have ethics content, can be accessed here. Of particular note is the SEER ethics panel on SEER attorneys and DEI at the SEER Fall

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[12]Sam Skolnik, *By the Numbers: 10 States Allowed Non-Lawyers to Offer Services*, Bloomberg L. (Dec. 23, 2023, 4:00 AM).

[13]Ann E. Marimow and Cat Zakrzewski, *Landmark Texas, Florida social media cases added to Supreme Court term*, Washington Post (last updated Sept. 29, 2023, 3:07 PM).

conference.[14] This panel looked at attorney recruiting and representation of community groups, particularly given the new Supreme Court case on affirmative action.

[14] ABA Section of Env't, Energy, & Res., 31st Fall Conference (Oct. 13, 2023).