



2017
2017
2017
2017
2017
2017
2017
2017
2017
2017
2017
2017
2017
2017
2017

Environment, Energy, and Resources Law

The Year in Review 2017

ISBN: 978-1-64105-150-7
ISSN: 1946-9640

Copyright 2018 American Bar Association. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher. To request permission, contact the ABA's Department of Licensing and Copyrights and via www.americanbar.org/utility/reprint.

The material contained herein does not necessarily express the views or position of the American Bar Association, the Section of Environment, Energy, and Resources, or The University of Tulsa College of Law.

The materials contained herein represent the opinions of the authors and editors and should not be construed to be those of either the American Bar Association or the Section of Environment, Energy, and Resources unless adopted pursuant to the bylaws of the Association. Nothing contained herein is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. These materials and any forms and agreements herein are intended for educational and informational purposes only.

**ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES
2017-2018**

**COUNCIL
Executive Committee**

Chair

JOHN E. MILNER

Chair-Elect
AMY L. EDWARDS

Vice Chair
KAREN A. MIGNONE

Secretary
JEFFERY S. DENNIS

Budget Officer
MICHELLE
DIFFENDERFER

Education Officer
WENDY BOWDEN
CROWTHER

*Membership and
Diversity Officer*
SEAN T. DIXON

Publications Officer
JONATHAN W. KAHN

Immediate Past Chair
SETH A. DAVIS

Section Delegates to the ABA House of Delegates
PAMELA E. BARKER and SHEILA SLOCUM HOLLIS

Council Members

NORMAN A. DUPONT
SUSAN MARGARET FLOYD
ROGER R. MARTELLA, JR.
CHANNING J. MARTIN
ANGELA R. MORRISON

PAMELA K. ELKOW
RICHARD J. ERICSSON
STEPHEN J. HUMES
DAVID JOHNSON
CHRISTINE Y. LEBEL

PETER J. GIOELLO, JR.
IGNACIA S. MORENO
MARGARET E. PELOSO
LAURAN M. STURM

Special Committee on The Year in Review Co-Chairs: ERIN POTTER SULLENGER and
MARY ELLEN TERNES
Section Director: DANA JONUSAITIS

**THE UNIVERSITY OF TULSA COLLEGE OF LAW
EDITORIAL BOARD**

Faculty Advisor: ROBERT BUTKIN

Student Editors

Editor-in-Chief
WILLIAM BOYD

Executive Editors

TYLER EZELL

MORGAN VAUGHN

JARED CANNON
CAITLIN A. GETCHELL

Staff Editors
ALI HAUSNER
ROBERT HILL

MORGAN SMITH
AARON W. WRIGHT

This page is intentionally left blank.

SUMMARY OF CONTENTS

Introduction	xvii
Highlights of The Year in Review 2017	xviii

Environmental Committees

Chapter 1 • Agricultural Management	1
Chapter 2 • Air Quality	8
Chapter 3 • Endangered Species	32
Chapter 4 • Environmental Disclosure	41
Chapter 5 • Environmental Enforcement and Crimes	49
Chapter 6 • Environmental Litigation and Toxic Torts	59
Chapter 7 • Environmental Transactions and Brownfields	69
Chapter 8 • Pesticides, Chemical Regulation, and Right-to-Know	80
Chapter 9 • Superfund and Natural Resource Damages Litigation	95
Chapter 10 • Waste and Resource Recovery	110
Chapter 11 • Water Quality and Wetlands	121

Energy and Resources Committees

Chapter 12 • Energy Markets and Finance	137
Chapter 13 • Energy and Natural Resources Litigation	150
Chapter 14 • Energy Infrastructure, Siting, and Reliability	167
Chapter 15 • Forest Resources	176
Chapter 16 • Hydro Power	183
Chapter 17 • Marine Resources	189
Chapter 18 • Mining and Mineral Extraction	205
Chapter 19 • Native American Resources	208
Chapter 20 • Nuclear Law	221
Chapter 21 • Oil and Gas	227
Chapter 22 • Public Land and Resources	268
Chapter 23 • Renewable, Alternative, and Distributed Energy Resources	277
Chapter 24 • Water Resources	284

Cross Practice Committees

Chapter 25 • Alternative Dispute Resolution	314
Chapter 26 • Climate Change, Sustainable Development, and Ecosystems	321
Chapter 27 • Constitutional Law	351
Chapter 28 • International Environmental and Resources Law	357
Chapter 29 • Science and Technology	375

Council Related Committee

Chapter 30 • Ethics and the Profession	382
--	-----

TABLE OF CONTENTS

Chapter 1

<u>AGRICULTURAL MANAGEMENT</u>	1
I. THE FARM BILL	1
II. THE TRUMP ADMINISTRATION AND AGRICULTURAL TRADE.....	2
A. <i>Trans-Pacific Partnership (TPP)</i>	2
B. <i>North American Free Trade Agreement (NAFTA)</i>	2
III. BIOTECHNOLOGY DEVELOPMENTS	4
A. <i>U.S. Regulatory Updates</i>	4
B. <i>Gene-Edited Agricultural Products in Regulatory Limbo</i>	4
C. <i>Litigation Expands Boundaries of Negligence</i>	5
D. <i>International Regulation of Agricultural Biotechnology</i>	6
IV. MERGERS AND ACQUISITIONS	6

Chapter 2

<u>AIR QUALITY</u>	8
I. JUDICIAL DEVELOPMENTS	8
A. <i>Title I—Federal & State Implementation Plans, Conformity, & Federal Facilities</i>	8
B. <i>Preemption of State Law Claims & Displacement of Federal Law Claims</i>	9
C. <i>New Source Review (NSR), Prevention of Significant Deterioration (PSD), New Source Performance Standards (NSPS), & Title V Permitting</i>	10
D. <i>Hazardous Air Pollutants</i>	13
E. <i>Civil & Criminal Enforcement</i>	14
F. <i>Citizen Suits</i>	14
G. <i>Procedural Issues</i>	14
H. <i>Greenhouse Gas Emissions</i>	17
I. <i>Title II—Mobile Sources & Fuels</i>	18
II. REGULATORY DEVELOPMENTS	19
A. <i>Title I—Federal (FIPs) and State Implementation Plans (SIPs), Conformity, Federal Facilities</i>	19
B. <i>New Source Review (NSR), Prevention of Significant Deterioration (PSD), New Source Performance Standards (NSPS), and Title V Permitting</i>	20
C. <i>Title II—Mobile Sources and Fuels</i>	22
D. <i>Hazardous Air Pollutants</i>	24
E. <i>Title VI - Stratospheric Ozone</i>	28
F. <i>Greenhouse Gas Emissions</i>	29
G. <i>Criteria Air Pollutants</i>	30

Chapter 3

<u>ENDANGERED SPECIES</u>	32
I. LEGISLATIVE DEVELOPMENTS	32
II. ADMINISTRATIVE DEVELOPMENTS.....	33
III. JUDICIAL DEVELOPMENTS	35
A. <i>Section 4: Listings, Critical Habitat Designation, and Recovery Plans</i>	35
B. <i>Section 5: Habitat Acquisition</i>	37
C. <i>Section 6: State Cooperative Programs</i>	37
D. <i>Section 7: Federal Agency Conservation Duty, Jeopardy Standard Consultations, and Incidental Take Statements</i>	37
E. <i>Section 9: Take Prohibition</i>	39

F. Section 10: Permits and Experimental Populations	40
G. Section 11: Enforcement, Citizen Suits, Standing, and Jurisdiction Issues ...	40
H. Miscellaneous ESA Topics and Related Federal and State Laws	40
Chapter 4	
<u>ENVIRONMENTAL DISCLOSURE</u>	41
I. GOVERNMENTAL ACTION	41
A. SEC Rules and Proposals	41
B. ExxonMobil Climate Change Investigation and Litigation	43
C. Hydraulic Fracturing Disclosure Rules	44
II. SHAREHOLDER LITIGATION	44
III. SHAREHOLDER RESOLUTIONS	47
IV. NONGOVERNMENT ORGANIZATIONS	47
Chapter 5	
<u>ENVIRONMENTAL ENFORCEMENT AND CRIMES</u>	49
I. ENVIRONMENTAL ENFORCEMENT RESULTS	49
II. ENVIRONMENTAL ENFORCEMENT INITIATIVES	49
A. Reducing Air Pollution from the Largest Sources	49
B. Cutting Hazardous Air Pollutants	49
C. Ensuring Energy Extraction Activities Comply with Environmental Laws....	50
D. Reducing Pollution from Mineral Processing Operations	50
E. Reducing Risks of Accidental Releases at Industrial and Chemical Facilities	50
F. Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation’s Waters	50
G. Preventing Animal Waste from Contaminating Surface and Ground Water .	50
H. Keeping Industrial Pollutants Out of the Nation’s Waters	51
III. SUMMARY OF SIGNIFICANT CASES	51
A. Criminal Cases	51
B. Civil Cases	55
Chapter 6	
<u>ENVIRONMENTAL LITIGATION AND TOXIC TORTS</u>	59
I. COMMON LAW CLAIMS	59
A. Statute of Limitations	59
B. Prospective Tort	60
C. Injunctive Relief	60
D. Other Limitations	60
E. Jurisdiction	61
II. MASS TORT & GROUNDWATER CONTAMINATION	62
III. PUBLIC-ENTITY PLAINTIFFS	63
A. State-Led PCB Litigation	63
B. Municipality-Led PCB Litigation	64
C. Other Public Plaintiffs	64
IV. LONE PINE	65
V. PREEMPTION	66
VI. CORPORATE OFFICER LIABILITY	67
VII. MEDICAL MONITORING	68

Chapter 7

ENVIRONMENTAL TRANSACTIONS AND BROWNFIELDS..... 69

I. CONTRACTUAL LIABILITY	69
II. BANKRUPTCY	70
III. LENDER LIABILITY	70
IV. BROWNFIELDS LEGISLATIVE UPDATE.....	71
A. <i>Federal Legislation</i>	71
B. <i>State Legislation</i>	73
V. ENVIRONMENTAL INSURANCE	75
VI. INSTITUTIONAL CONTROLS AND OTHER CONTINUING OBLIGATIONS	76
A. <i>Private Sector Activities</i>	76
B. <i>Federal Agency Activities</i>	76
C. <i>State Activities</i>	77
VII. ENVIRONMENTAL INVESTIGATIONS/DUE DILIGENCE	78
VIII. EFFECT OF BUILDING ISSUES ON TRANSACTIONS.....	78
A. <i>Vapor Intrusion Developments</i>	78
B. <i>Lead-Based Paint</i>	79
C. <i>Radon</i>	79

Chapter 8

PESTICIDES, CHEMICAL REGULATION, AND RIGHT-TO-KNOW 80

I. TOXIC SUBSTANCES CONTROL ACT (TSCA).....	80
A. <i>Implementation of the Frank R. Lautenberg Chemical Safety for the 21st Century Act</i>	80
B. <i>New Chemicals Program and Significant New Uses</i>	81
C. <i>Regulation of Existing Chemicals</i>	82
D. <i>National Program Chemicals</i>	84
E. <i>Confidential Business Information</i>	84
F. <i>Reporting</i>	85
II. PESTICIDES AND FIFRA	86
A. <i>Endangered Species</i>	86
B. <i>Pollinators</i>	87
C. <i>Inerts</i>	87
D. <i>Cannabis</i>	87
E. <i>Particular Products</i>	88
F. <i>Pesticide Applicator Protections</i>	89
G. <i>State Preemption of Local Pesticide Ordinances</i>	89
H. <i>Significant Guidance and Science Consultation</i>	89
III. BIOTECHNOLOGY	90
IV. HYDRAULIC FRACTURING	91
V. NANOTECHNOLOGY	92
VI. EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW (EPCRA).....	93
VII. GREEN CHEMISTRY	93
VIII. CONSUMER PRODUCT SAFETY COMMISSION ACTION ON CHEMICALS	94

Chapter 9

SUPERFUND AND NATURAL RESOURCE DAMAGES LITIGATION 95

I. SUPERFUND: ADMINISTRATIVE AND REGULATORY DEVELOPMENTS.....	95
II. SUPERFUND: JUDICIAL DEVELOPMENTS	96
A.-C. <i>Constitutional Issues, Jurisdiction, and Standing</i>	96
D. <i>Elements of Liability</i>	97

E. Liability of Particular Parties	98
F. Private Cost Recovery	100
G. Allocation and Indemnification	101
H. Defenses	103
I. Recoverable Response Costs (Including Attorney's Fees)	107
J. Claims against the Government, Including Section 106(b) Actions	108
K. Preemption	108
L. Miscellaneous	109
III. NATURAL RESOURCE DAMAGES	109

Chapter 10

WASTE AND RESOURCE RECOVERY 110

I. LITIGATION AND ENFORCEMENT DEVELOPMENTS	110
A. D.C. Circuit Court Shrinks EPA's 'Sham Recycling' Rule	110
B. Intent Not Required for RCRA Criminal Conviction	111
C. Environmental Interest Group has Standing to Challenge Chemically Treated Utility Poles under RCRA	111
D. USEPA Region 6 Reaches Settlement with Macy's for RCRA Violations	112
II. REGULATORY DEVELOPMENTS	113
A. USEPA Developing E-Manifest System for Hazardous Waste	113
B. CCR Rule and WIIN Act Implementation, Litigation, and Reconsideration	113
C. California Takes Numerous Steps to Shore Up Waste Diversion Programs	115
III. DEVELOPMENTS IN ELECTRONIC WASTE	116
A. Enforcement and Litigation	116
B. Federal Legislative Developments	117
C. State Legislative Developments	117
D. International Developments	119

Chapter 11

WATER QUALITY AND WETLANDS 121

I. JUDICIAL DEVELOPMENTS	121
A. Clean Water Act (CWA) Section 303—Water Quality Standards	121
B. CWA Section 303(d)—Total Maximum Daily Loads (TMDLs)	122
C. CWA Sections 304 and 306—Criteria and Guidelines, and Performance Standards	122
D. CWA Section 309—Enforcement	123
E. CWA Section 401—State Certification	124
F. CWA Section 402—National Pollutant Discharge Elimination System (NPDES) Permitting	125
G. CWA Section 404—Wetlands	130
H. CWA Section 505—Citizen Suits	131
II. ADMINISTRATIVE DEVELOPMENTS	133
A. CWA Section 303—Water Quality Standards	133
B. CWA Section 303(d)—TMDLs	133
C. CWA Sections 304 and 306—Criteria and Guidelines, and Performance Standards	134
D. CWA Section 309—Enforcement	134
E. CWA Section 401—State Certification	134
F. CWA Section 402—NPDES Permitting	135
G. CWA Section 404—Wetlands	135
III. LEGISLATIVE DEVELOPMENTS	136

A. CWA Section 401—State Certification	136
B. CWA Section 402—National Pollutant Discharge Elimination System (NPDES) Permitting	136
C. CWA Section 505—Citizen Suits	136

Chapter 12

ENERGY MARKETS AND FINANCE 137

I. FERC INITIATES NEW PROCEEDING AFTER CONSIDERING PROPOSED DOE GRID RESILIENCY RULE.....	137
II. IMPACT OF THE TAX CUTS AND JOBS ACT ON ELECTRICITY MARKETS	139
III. CALIFORNIA ENERGY AND CLIMATE LAW AND POLICY UPDATE.....	141
A. <i>Introduction</i>	141
B. <i>Renewable Electricity Market</i>	141
C. <i>2017 Climate Change Scoping Plan Update</i>	143
D. <i>Emissions Trading System (Cap and Trade)</i>	144
E. <i>Energy Storage Mandates and Incentives</i>	144
F. <i>Zero Emission Vehicles</i>	145
IV. CALIFORNIA’S CAP AND TRADE EXTENSION LEGISLATION	146
V. KENTUCKY’S SUSPENSION OF ACTIVITY IN DEMAND SIDE MANAGEMENT PROGRAMS	147

Chapter 13

ENERGY AND NATURAL RESOURCES LITIGATION..... 150

I. DOMESTIC JUDICIAL DEVELOPMENTS	150
A. <i>Tenth Circuit Court of Appeals addresses objections to district court approval of class settlements in the so-called “hot fuel” litigation.</i>	150
B. <i>Court finds that county ordinance prohibiting storage and permanent disposal of wastewater was preempted by state law.</i>	152
C. <i>Court holds that wind energy developer’s excavation work in construction of wind turbines constituted “mining” under federal regulations applicable to the Indian lands.</i>	153
D. <i>Court addresses dispute over whether a binding contract to sell oil and gas properties was formed as a result of e-mail negotiations and communications.</i>	155
E. <i>Widely-followed rulings of the Bankruptcy Court in In re Sabine Oil & Gas Corp., allowing the debtor to reject midstream services contracts, are affirmed by the district court.</i>	160
F. <i>Court resolves venue issues of lawsuit relating to injection wells permitted by the Texas Railroad Commission.</i>	160
G. <i>Court finds that the transportation of liquid propane is not an ultrahazardous activity for purposes of strict liability.</i>	161
H. <i>Court affirms dismissal with prejudice of plaintiffs’ suit against operator of horizontal well for alleged damages to plaintiffs’ older vertical wells, and discusses important principles of limitations as a defense.</i>	163
I. <i>Court finds that plaintiff-town’s claims for trespass and nuisance with respect to natural-gas compressor stations and metering station were barred by limitations.</i>	165
J. <i>Tenth Circuit, in a criminal case, finds that Congress never properly disestablished the Creek Reservation, leaving broad potential implications for most sectors of the business community and other tribes.</i>	165

Chapter 14

ENERGY INFRASTRUCTURE, SITING, AND RELIABILITY..... 167

I. PART ONE: WHY IS RESILIENCY SO IMPORTANT?	167
A. <i>Part One: Main Issues</i>	167
B. <i>Part One: Snapshots & Highlights</i>	169
II. PART TWO: HOW DO WE VALUE RESILIENCY & RELIABILITY?.....	170
A. <i>Part Two: Main Issues</i>	170
B. <i>Part Two: Snapshots & Highlights</i>	171
III. PART THREE: WHOSE VISION WILL DECIDE WHAT RESILIENCY MEANS?.....	173
A. <i>Part Three: Main Issues</i>	173
B. <i>Part Three: Snapshots & Highlights</i>	174

Chapter 15

FOREST RESOURCES..... 176

I. DEVELOPMENTS IN FEDERAL LITIGATION	176
A. <i>National Forest Roadless Area Management</i>	176
B. <i>Federal Court Cases</i>	177
II. DEVELOPMENTS IN STATE COURTS	179
III. DEVELOPMENTS IN FEDERAL LEGISLATION, DIRECTIVES AND POLICY	181
A. <i>Federal Policy on the Carbon Neutrality of Forest Bioenergy</i>	181
B. <i>Congressional Actions Related to Forest Fires</i>	181
C. <i>United States - Canada Softwood Lumber Trade Dispute</i>	182

Chapter 16

HYDRO POWER..... 183

I. JUDICIAL DEVELOPMENTS	183
A. <i>Second Circuit Reinstates Water Transfers Rule</i>	183
B. <i>D.C. Circuit Affirms FERC Order on Credits for Past Overpayment of Headwater Benefits Charges</i>	184
II. ADMINISTRATIVE DEVELOPMENTS.....	186
A. <i>FERC Revises License Term Policy</i>	186
B. <i>FERC Issues Report to Congress on Two-Year Licensing Process</i>	187

Chapter 17

MARINE RESOURCES 189 |

I. FISHERIES	189
A. <i>Judicial Developments</i>	189
II. MARINE MAMMALS AND THE MARINE MAMMAL PROTECTION ACT (MMPA).....	192
A. <i>Judicial Developments</i>	192
B. <i>Legislative Developments</i>	192
C. <i>Administrative Developments</i>	192
III. POLAR BEARS, SEA TURTLES, SALMON, AND THE ENDANGERED SPECIES ACT (ESA)	193
A. <i>Judicial Developments</i>	193
B. <i>Legislative Developments</i>	195
C. <i>Administrative Developments</i>	196
IV. DEEP SEABED MINING, CONTINENTAL SHELF DELINEATION, THE ARCTIC, AND OTHER ISSUES UNDER THE 1982 LAW OF THE SEA CONVENTION	197
A. <i>Deep Seabed Mining</i>	197
B. <i>Continental Shelf Delineation</i>	197
C. <i>Arctic Developments</i>	198

D. <i>Implementation of the Polar Code</i>	199
E. <i>1982 Law of the Sea Convention</i>	200
V. COASTAL ZONE MANAGEMENT ACT AND MARINE SPATIAL PLANNING.....	201
A. <i>Judicial Developments</i>	201
B. <i>Administrative Developments</i>	201
C. <i>Marine Spatial Planning Developments</i>	201
VI. OFFSHORE WIND ENERGY	202
A. <i>Judicial Developments</i>	202
B. <i>Federal and State Project Updates</i>	203
<u>Chapter 18</u>	
<u>MINING AND MINERAL EXTRACTION</u>	205
I. REGULATORY DEVELOPMENTS.....	205
A. <i>U. S. Army Corps of Engineers Reissues CWA Section 404 Nationwide Permits</i>	205
B. <i>1983 SMCRA Stream Buffer Zone Rule – Reinstated Again?</i>	205
C. <i>U.S. Department of the Interior’s Effort to Limit Coal Mining Halted</i>	206
D. <i>Coal Ash Disposal</i>	206
<u>Chapter 19</u>	
<u>NATIVE AMERICAN RESOURCES</u>	208
I. JUDICIAL DEVELOPMENTS	208
A. <i>United States Supreme Court</i>	208
B. <i>Appellate Opinions</i>	210
C. <i>District Court Opinions</i>	215
D. <i>State Court Opinions</i>	216
II. LEGISLATIVE AND EXECUTIVE DEVELOPMENTS.....	217
A. <i>Legislative Developments</i>	217
B. <i>Regulatory Actions</i>	220
C. <i>Executive Actions</i>	220
<u>Chapter 20</u>	
<u>NUCLEAR LAW</u>	221
I. JUDICIAL DEVELOPMENTS	221
A. <i>Spent Fuel Litigation – Duke Energy Progress, Inc. v. United States</i>	221
B. <i>Price-Anderson – McMunn v. Babcock & Wilcox Power Generation Group, Inc.</i>	221
C. <i>Preemption – McNelis v. Pennsylvania Power & Light Co.</i>	222
D. <i>Preemption – Cox v. Duke Energy, Inc.</i>	222
E. <i>Preemption – Virginia Uranium, Inc. v. Warren</i>	223
F. <i>New Plant Licensing – Beyond Nuclear, Inc. v. U.S. Nuclear Regulatory Commission</i>	223
II. ADMINISTRATIVE DEVELOPMENTS.....	224
A. <i>Commission Makeup</i>	224
B. <i>New Facility Licenses and Applications</i>	224
C. <i>Significant NRC Adjudicatory Developments</i>	225
<u>Chapter 21</u>	
<u>OIL AND GAS</u>	227
I. ALASKA.....	227
A. <i>Legislative Developments</i>	227

B. <i>Judicial Developments</i>	227
C. <i>Administrative Developments</i>	228
II. ARKANSAS.....	228
A. <i>Legislative Developments</i>	228
B. <i>Judicial Developments</i>	229
III. CALIFORNIA.....	230
A. <i>Legislative Developments</i>	230
B. <i>Judicial Developments</i>	231
C. <i>Administrative Developments</i>	232
IV. COLORADO.....	232
A. <i>Judicial Developments</i>	232
B. <i>Administrative Developments</i>	236
V. KANSAS.....	236
A. <i>Judicial Developments</i>	236
VI. LOUISIANA.....	239
A. <i>Judicial Developments</i>	239
VII. NEW MEXICO.....	241
A. <i>Judicial Developments</i>	241
B. <i>Administrative Developments</i>	243
VIII. OHIO.....	243
A. <i>Judicial Developments</i>	243
B. <i>Administrative Developments</i>	246
IX. OKLAHOMA.....	246
A. <i>Judicial Developments</i>	246
B. <i>Administrative Developments</i>	251
X. PENNSYLVANIA.....	253
A. <i>Legislative Developments</i>	253
B. <i>Judicial Developments</i>	253
XI. TEXAS.....	257
A. <i>Judicial Developments</i>	257
XII. WEST VIRGINIA.....	264
A. <i>Legislative Developments</i>	264
B. <i>Judicial Developments</i>	264
C. <i>Administrative Developments</i>	265
XIII. WYOMING.....	266
A. <i>Legislative Developments</i>	266
B. <i>Judicial Developments</i>	266
C. <i>Administrative Developments</i>	267

Chapter 22

<u>PUBLIC LAND AND RESOURCES</u>	268
I. NULLIFICATION OF BLM’S PLANNING 2.0 RULE.....	268
II. REDUCTION IN SIZE OF BEARS EARS AND GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENTS.....	269
III. BLM LAND USE DECISIONS UNDER FLPMA.....	270
IV. AGENCY LAND USE DECISIONS AS TAKINGS.....	273
V. R.S. 2477 ROADS.....	273
VI. THE QUIET TITLE ACT.....	274
VII. THE WILD FREE-ROAMING HORSES AND BURROS ACT (“WILD HORSES ACT”)..	275

Chapter 23

RENEWABLE, ALTERNATIVE, AND DISTRIBUTED ENERGY

RESOURCES 277

- I. STATES ADDRESS RENEWABLE ENERGY PRIORITIES THROUGH THE PUBLIC
 - UTILITY REGULATORY POLICIES ACT..... 277
- II. ENERGY STORAGE TARGETS IN THE NORTHEAST..... 278
- III. SOLAR AND WIND-ANOTHER STRONG YEAR..... 279
- IV. OFFSHORE WIND 279
- V. PARIS AGREEMENT 280
- VI. REPEAL OF THE CLEAN POWER PLAN AND FEDERAL RENEWABLE ENERGY POLICY 280
- VII. MISCELLANEOUS..... 281
 - A. *War on Coal*..... 281
 - B. *Renewable Fuel Standards* 281
 - C. *Carbon Tax*..... 282
 - D. *Greenhouse Gas Emissions* 282
 - E. *Property Assessed Clean Energy*..... 282

Chapter 24

WATER RESOURCES 284

- I. FEDERAL DEVELOPMENTS 284
 - A. *Alaska* 284
 - B. *Arizona*..... 285
 - C. *California*..... 285
 - D. *Maine* 286
 - E. *Nevada* 286
 - F. *North Dakota* 287
 - G. *Oregon* 287
 - H. *Wyoming* 288
- II. STATE DEVELOPMENTS 288
 - A. *Arizona*..... 288
 - B. *California*..... 289
 - C. *Colorado* 292
 - D. *Idaho* 294
 - E. *Kansas* 296
 - F. *Montana*..... 297
 - G. *Nebraska*..... 299
 - H. *Nevada* 300
 - I. *New Mexico* 302
 - J. *North Dakota* 302
 - K. *Oklahoma*..... 302
 - L. *Oregon* 304
 - M. *South Dakota* 305
 - N. *Texas* 306
 - O. *Utah* 307
 - P. *Washington* 310
 - Q. *Wyoming* 311
 - R. *Eastern States* 312
 - S. *Great Lakes States* 312

<u>Chapter 25</u>	
<u>ALTERNATIVE DISPUTE RESOLUTION</u>	314
I. ADR CASES	314
II. SETTLEMENT EXAMPLES	315
A. <i>Air Quality</i>	315
B. <i>Energy and Mining</i>	315
C. <i>Indian Country</i>	316
D. <i>Superfund</i>	317
E. <i>Water</i>	318
III. FEDERAL ACTIONS AFFECTING ADR AND SETTLEMENTS	319

<u>Chapter 26</u>	
<u>CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT, AND ECOSYSTEMS</u>	321
I. CLIMATE CHANGE	321
A. <i>Mitigation</i>	321
B. <i>Adaptation</i>	337
II. SUSTAINABLE DEVELOPMENT	342
A. <i>International Activities</i>	342
B. <i>National Activities</i>	343
III. ECOSYSTEMS	344
A. <i>International Activities</i>	344
B. <i>State and National Activities</i>	347

<u>Chapter 27</u>	
<u>CONSTITUTIONAL LAW</u>	351
I. STANDING	351
II. COMMERCE CLAUSE	351
III. PREEMPTION	352
IV. FIFTH AMENDMENT TAKINGS	355

<u>Chapter 28</u>	
<u>INTERNATIONAL ENVIRONMENTAL AND RESOURCES LAW</u>	357
I. ATMOSPHERE AND CLIMATE	357
A. <i>Twenty-Third Session of the Conference of the Parties</i>	357
B. <i>Twenty-Eighth Meeting of the Parties to the Montreal Protocol</i>	359
II. ENVIRONMENTAL PROTECTION AND CONSERVATION	359
A. <i>Biodiversity Beyond National Jurisdiction - Preparatory Committee</i>	359
B. <i>Protected Area Conservation</i>	360
C. <i>Central Arctic Fisheries Agreement Negotiations</i>	362
D. <i>International Arctic Oil & Gas Developments and Restrictions</i>	363
E. <i>Cultural Heritage</i>	364
III. INTERNATIONAL HAZARDOUS MANAGEMENT	364
A. <i>Transboundary Movement of Hazardous Waste</i>	364
B. <i>International Regulation of Agricultural Biotechnology</i>	365
IV. INTERNATIONAL CHEMICALS	366
A. <i>International Committees on Pollutant Review and Chemical Review</i>	366
B. <i>Minamata Convention on Mercury</i>	366
V. NATURAL RESOURCES	367
A. <i>International Regulations of Endangered Species, Invasive Species, and Conservation</i>	367

B. <i>Domestic Measures to Combat Wildlife Trafficking</i>	368
C. <i>Multilateral Environmental Agreement Updates: Global Pact for the Environment</i>	369
VI. TRADE AND ENVIRONMENT	369
A. <i>World Trade Organization Disputes and Negotiations</i>	369
B. <i>North American Free Trade Agreement (NAFTA) Negotiations</i>	371
VI. LITIGATION.....	371
A. <i>Chevron Litigation</i>	371
B. <i>Climate Change Litigation</i>	372
C. <i>Hydrofluorocarbon Litigation</i>	373

Chapter 29

<u>SCIENCE AND TECHNOLOGY</u>	375
I. DEBATING CLIMATE ON TV—SOMETHING NEW IN 2017	375
II. AN UPDATE ON THE TOXIC SUBSTANCES CONTROL ACT	376
A. <i>Prioritized Risk Evaluation of “Existing” Chemicals</i>	377
B. <i>Legal Challenges</i>	380

Chapter 30

<u>ETHICS AND THE PROFESSION</u>	382
I. SEER BOOK PROJECT	382
II. AMENDMENT TO MODEL RULES	382
A. <i>Proposed Amendments</i>	382
B. <i>State Bar Adoption of Amended Rule 8.4</i>	383
III. ABA ETHICS OPINIONS	383
A. <i>Formal Opinion 477 – Securing Communication of Protected Client Information (May 11, 2017)</i>	383
B. <i>Formal Opinion 479 – The “Generally Known” Exception to Former-Client Confidentiality (December 15, 2017)</i>	384
IV. SURVEY OF DEVELOPMENTS.....	385
A. <i>Unlicensed Practice of Law</i>	385
B. <i>Receipt of Confidential Information Intentionally Disclosed by Third Parties</i>	385

Introduction

The Year in Review: 2017 is the thirty-fourth annual summary of developments in environmental, energy, and resources law. It is again being made available without charge 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 this year are Executive Editors Tyler Ezell and Morgan Vaughn. 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. 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.

A final thank you must be given to Erin Potter Sullenger and Mary Ellen Ternes, Co-chairs of the Special Committee on The Year in Review; and Ellen Rothstein, Section Publications Manager.

All of us associated with *The Year in Review* are proud of our work and pleased to be of service to our profession.

William Boyd
Student Editor-in-Chief

Robert Butkin
Faculty Advisor

Tulsa, Oklahoma
May 1, 2018

HIGHLIGHTS OF THE YEAR IN REVIEW 2017¹

I. INTRODUCTION

As was foreshadowed in the 2016 *Year in Review*, 2017 proved to be an eventful year and the 2017 committee reports reflect as much. After a year of the Trump Administration, the committee reports catalogue the impacts and trends thus far of the Administration's deregulatory efforts and reversal of many actions taken by prior Administrations, including reversal in climate change policies. These impacts include citizen groups and NGOs challenging regulatory and executive actions in court, states responding to federal deregulation with increased regulatory activity, and the international community remaining committed to pledges made in climate and other environmental agreements.

The Trump Administration has stayed true to many of the pledges made on the campaign trail and has implemented a "Back to Basics" philosophy at the federal agencies, especially the U.S. Environmental Protection Agency (EPA). President Trump also issued several executive orders that have an impact on the work of SEER members and are discussed in several of the committee reports. These orders include reducing the size of the regulatory state with his "2 for 1" deregulatory order, rescinding guidance and regulations related to climate change that hinder the economy, expediting the environmental review process for significant infrastructure projects, removing regulatory roadblocks for domestic energy development, and review of national monuments under the Antiquities Act. Congress and the President also took action rescinding many regulations through the use of the Congressional Review Act (CRA).

After an eventful 2017, however, we crossed into 2018 with a healthy amount of uncertainty as many of the regulatory and executive actions are awaiting review in the courts. While the courts started to weigh in on administrative procedural matters and maneuvers, it does not appear that any setbacks experienced are altering the deregulatory agenda; they only slow the timeline. While 2018 has already been an active year and SEER members anticipate continued significant regulatory measures, the 2017 committee reports

¹These highlights of the following committee reports were prepared Erin Potter Sullenger, Associate, Crowe & Dunlevy, Oklahoma City, Oklahoma, Co-Chair of the ABA SEER Special Committee on The Year in Review, except for the highlights for the following committees: Air Quality; Environmental Enforcement and Crimes; Water Quality and Wetlands; Marine Resources; and Climate Change, Sustainable Development, and Ecosystems. These committees provided their own highlights. A special thank you to Mary Ellen Ternes, Partner, Earth & Water Law, LLC, Oklahoma City, Oklahoma, for serving as my co-chair this year and for her guidance and encouragement throughout. Thank you to Billy Boyd, Student Editor in Chief for his hard work, and to his team and staff of editors at The University of Tulsa College of Law. Thank you also to Professor Robert Butkin. No citations to authority are provided in this Highlights chapter, which is provided as a mere preview to the committees' complete discussion. While several committees may have covered the same case or event, each committee offers its own perspective such that each committee discussion is helpful. The format for the Highlights chapter consists of a brief introduction to each and a summary of the highlights from the committee's report, largely excluding duplicative coverage.

contained in this *Year in Review* will provide excellent context and summarize many of the precursor activities leading to the events occurring in 2018.

II. ENVIRONMENTAL COMMITTEES

A. [Agricultural Management](#)

The Agricultural Management Committee focuses on cutting-edge issues in managing the environmental impacts of agriculture, including developments in biotechnology, livestock, pollution, sustainability, food safety, zoology, and biodiversity. The Committee highlights several policies of the Trump Administration and the potential impact on American farmers. First, the Farm Bill expires in 2018, and while several committees in Congress began working on legislative language, the work was sidelined to address tax reform. There was also concern with President Trump's initial 2018 budget proposal, but farm groups were granted a reprieve when the Senate budget resolution contained no funding cuts to Farm Bill Programs. President Trump's withdrawal of the U.S. from the Trans-Pacific Partnership is expected to have a large impact on farms with an estimated annual loss of \$4.4 billion in net farm income. Additionally, President Trump let it be known that he intends for his administration to renegotiate the North American Free Trade Agreement (NAFTA), triggering a 90-day consultation process in which representatives from livestock groups, feed seed exporters, and dairy suppliers offered comments.

The Committee also shares some developments in biotechnology regulation, some of which had not been updated since the 1980s. The Obama Administration released the final version of its update to the Coordinated Framework for the Regulation of Biotechnology, providing the first comprehensive review of federal regulatory landscape of biotechnology products. The United States Department of Agriculture (USDA) requested public input about aspects of new regulations that would establish mandatory labeling requirements for "bioengineered foods." The Food and Drug Administration (FDA) and USDA published updated proposed guidance on how each agency would regulate gene-edited animals, animal products, plants, and crops. The FDA's guidance indicated its intent to regulate intentionally altered genomic animal DNA as an animal drug. Conversely, USDA's proposal proposed to exclude certain gene-edited organisms from regulation. Consequently, the USDA withdrew its proposed guidance. Additionally, a Kansas City jury found Syngenta negligent for \$217.77 million in damages in a case that broadens the boundaries of tort law in agricultural biotechnology leading the company to ultimately settle grower class-action cases for up to \$1.5 billion in September 2017. Finally, the Committee updates us on three mega-mergers between "Big Six" ag-biotech companies that received regulatory approvals in the U.S. and the E.U. despite citizen group opposition on environmental, food security and anti-monopoly grounds.

B. [Air Quality](#)

The Air Quality Committee focuses on Clean Air Act (CAA) regulation and litigation. This year, the case law addressed challenges to National Ambient Air Quality Standards (NAAQS) implementation, as well as disputes regarding jurisdiction over tribal lands, CAA preemption of state law claims, permitting of new sources, operating permits, and technology performance standards.

These interesting developments include *Yazzie v. U.S. Env'tl. Prot. Agency*, where the Ninth Circuit found that the federal government's partial ownership of a coal-fired power plant on the Navajo Nation Reservation in Arizona did not weigh against affording

deference to EPA's interpretation of the CAA and related regulations as they applied to the plant. This chapter also reviews *Counts v. Gen. Motors, LLC* and *Felix v. Volkswagen Grp. of Am., Inc.*, where the courts found that the CAA did not preempt state and federal law claims against vehicle manufacturers who allegedly fraudulently marketed as "clean" engines equipped with defeat devices. Also addressed in this chapter is *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, where the U.S. District Court for the Northern District of California found that it lacked federal question subject-matter jurisdiction over state court complaints alleging that Volkswagen violated state law by equipping certain diesel engine vehicles with defeat devices.

In *United States v. Ameren Missouri*, the U.S. District Court for the Eastern District of Missouri found that Ameren violated Prevention of Significant Deterioration (PSD) requirements and its Title V permit. The court's decision addressed arguments regarding the required standard of care for "a reasonable power plant operator or owner," the proper use and scope of "demand growth" and "routine monitoring, repair and replacement," among other issues.

The report addresses multiple cases challenging EPA's ability to postpone administrative action. In *Ctr. for Biological Diversity v. Pruitt*, the U.S. District Court for the Northern District of California denied EPA's request to extend a consent decree's deadline indefinitely pending review of existing EPA regulations. The court also held in *State of California v. U.S. Bureau of Land Mgmt.* that the U.S. Bureau of Land Management could not postpone compliance with Obama-era regulations to limit methane emissions on public lands without undergoing proper administrative procedures, including public notice and comment. Similarly, in *Clean Air Council v. Pruitt*, the D.C. Circuit found that EPA lacked authority to stay Obama-era New Source Performance Standards (NSPS) pending reconsideration. The report also addresses several procedural and citizen suit cases, including *Texas v. U.S. Env'tl. Prot. Agency* and *S. Illinois Power Coop. v. Env'tl. Prot. Agency* which both involved interpretations of the CAA's venue provision granting the District of Columbia Circuit exclusive jurisdiction over nationally applicable agency actions and determinations of nationwide scope or effect.

EPA took several actions regarding implementation of the ozone, sulfur dioxide (SO₂), and fine particulate matter (PM_{2.5}) NAAQS, including a finding that 15 states and the District of Columbia failed to submit SIP revisions in a timely manner to satisfy certain requirements for the 2008 ozone NAAQS that apply to nonattainment areas and/or states in the Ozone Transport Region. EPA also established initial air quality designations for the primary and secondary ozone NAAQS that were promulgated in October 2015; proposed certain state designations for the 2010 primary SO₂ NAAQS; and established air quality designations for the 2012 primary annual PM_{2.5} NAAQS for the remaining undesignated areas in the state of Tennessee.

EPA also stayed and/or proposed reconsideration of several NSPS rules, including the NSPS for the oil and gas industry. Regarding mobile sources, EPA issued several proposed and final rules impacting the Renewable Fuels Standard program and greenhouse gas and fuel economy standards. And in April, EPA announced that it was withdrawing its proposed federal plan to implement its greenhouse gas emission guidelines for existing electric utility generating units (commonly known as the Clean Power Plan). EPA also announced that it would be undertaking a review of the Clean Power Plan and, if appropriate, would "suspend, revise or rescind" it. In October, EPA proposed a repeal of the Clean Power Plan and solicited public comment on the repeal. EPA also announced its review of the NSPS for greenhouse gas emissions (GHG) from electric generating units and noted that it will initiate proceedings to suspend, revise or rescind the standards if necessary.

Finally, EPA took a number of actions regarding hazardous air pollutants, including modifying the National Emission Standards for Hazardous Air Pollutants (NESHAP) for the following source categories: Operating Mill Tailings; Ferroalloys Production; Portland Cement Manufacturing Industry; Phosphoric Acid Manufacturing; Phosphate Fertilizer Production; Manufacturing of Nutritional Yeast; Publicly Owned Treatment Works; and Wool Fiberglass Manufacturing Industry.

C. Endangered Species

The Endangered Species Committee covered major legislative, administrative, and judicial developments. Several major bills advanced through the House Committee on Natural Resources in October 2017. First, the Gray Wolf State Management Act would direct the Department of the Interior (DOI) to reissue two final rules that would reinstate the delisting and removal of Endangered Species Act (ESA) protections for the gray wolf populations located in Wyoming and in nine states in the western Great Lakes region.

The Listing Reform Act would require the government to consider economic factors in listing decisions and would allow regulators to consider petitions to list species based on priority rather than in the order the petitions are received. The State, Tribal, and Local Species Transparency and Recovery Act would require the government to disclose all data that serves as the basis for designating a species as threatened or endangered listing. The Saving America's Endangered Species Act or "SAVES Act" would amend the ESA to provide that species in the United States that are "not native to the United States" cannot be treated as endangered or threatened species for the purposes of the ESA. The Endangered Species Litigation Reasonableness Act would limit the award of costs and attorney's fees to the prevailing party. The advancement of these pieces of legislation may signal upcoming legislative changes to the Endangered Species Act.

The Committee provides a summary of a busy year for administrative developments. In January 2017, the Fish and Wildlife Service (FWS) issued a Director's Order establishing a new Policy Regarding Voluntary Prelisting Conservation Actions that addresses the crediting of voluntary conservation actions taken for species prior to their listing under the ESA. In December 2017, the Solicitor of the U.S. Department of the Interior (DOI) released an opinion announcing reversal of longstanding DOI policy on what constitutes a "take" under the Migratory Bird Treaty Act (MBTA). In August 2017, the DOI initiated a review of federal plans and state conservation plans and programs for the greater sage-grouse that had been finalized in 2015. Then, in October 2017, the BLM and NFS announced the reopening of its greater sage-grouse land use plans.

DOI released a report entitled "Review of the Department of the Interior Actions that Potentially Burden Domestic Energy," which specifically discusses a number of ESA-related issues and progress on implementing March 2017 Executive Order 13783, "Promoting Energy Independence and Economic Growth." The FWS and NMFS announced review of regulations and policies on the topics of ESA mitigation policy, conservation planning, and Candidate Conservation Agreements with Assurances (CCAAs). The FWS also formally requested participation of at least two representatives from state government in each science team that develops a Species Status Assessment pursuant to the ESA.

The Committee organizes the judicial developments by section of the ESA. Developments relating to Section 4, Listings, Critical Habitat Designation, and Recovery Plans, the D.C. Circuit vacated a rule designating and delisting a sub-population of the endangered gray wolf in Minnesota. The D.C. Circuit, however, upheld the delisting of the gray wolf in Wyoming and transferring the management of the wolf from federal to state control. The Ninth Circuit Court of Appeals rejected a claim that FWS ignored climate

change as a factor in assessing whether desert eagles are significant to their taxon. The U.S. District Court of Montana vacated a not warranted finding for the Cabinet-Yaak grizzly bear after determining the FWS was not entitled to *Chevron* or *Skidmore* deference in applying “on the brink of extinction” standard.

Developments relating to Section 7, Federal Agency Conservation Duty, Jeopardy Standard Consultations, and Incidental Take Statements, in what is reported to be a rare outcome, the U.S. District Court of Nevada found that USDA had not satisfied its ongoing conservation obligations under Section 7(a)(1) by simply terminating a beetle release program when it was found to adversely affect the endangered flycatcher. The Ninth Circuit concluded that NMFS was entitled to rely on a climate model that could only predict changes in the turtle population for 25 years. It also ruled, in a separate case, that although the EPA has an ongoing duty under FIFRA to comply with the ESA, triggering of Section 7 consultation duties is based on an affirmative agency action and thus the retention of discretionary control over previously issued pesticide registrations is not such an ongoing action. Finally, the U.S. District Court of Colorado found conservation measures inadequate regarding a proposed ski resort development and the shifting of ongoing agency oversight from the Forest Service to FWS impermissible.

In the developments relating to Section 9, Take Prohibition, the U.S. Court of the Eastern District of California, in a case where a government agency was bound by a water delivery contract that resulted in unauthorized takings of aquatic species, found that as a matter of law “it is [not] appropriate to impose Section 9 liability on a government agency for take caused by an action over which it has no control.” The “agency cannot be the proximate cause of Section 9 take by undertaking that non-discretionary action.” The Fifth Circuit Court of Appeals denied preliminary injunction that barge traffic was taking the endangered sea turtle, finding the theory “quintessential speculation.”

Finally, the Committee reports that the FWS issued an incidental take permit to the Maine Department of Inland Fisheries and Wildlife authorizing incidental takes of Canada lynx. The U.S. District Court of the Eastern District of New York rejected an Article III standing challenge to a case by a wildlife conservation group that feral cats in a state park were posing a risk to a threatened bird species. The Tenth Circuit reversed a district court ruling finding that a regulation prohibiting the “take” of Utah Prairie dog on nonfederal land was a constitutional exercise of congressional authority under the Commerce Clause.

D. Environmental Disclosure

The Environmental Disclosure Committee tracks legally mandated Securities and Exchange Commission (SEC) and financial statement disclosure of environmental matters, the relationship between such disclosures, voluntary corporate sustainability, and social responsibility disclosures of environmental matters to stakeholders, as well as issues arising from product-related environmental disclosures in the commercial marketplace.

The chapter notes that in 2017, the SEC did not issue a final rule. The SEC also did not act on comments received on the Concept Release from 2016, which seeks to modernize certain business and financial disclosure requirements in Regulation S-K, chief among them disclosure of sustainability-related information. Instead, the SEC and Congress took aim at particular disclosure requirements in Dodd-Frank Reform and Consumer Protection Act. First, the SEC suggested that companies would not have to file the Conflict Minerals Disclosure as mandated in Dodd-Frank. At the end of the year, however, the requirement still stands. However, the SEC did file new guidance on when issuers can fairly ignore shareholder proposals, such as those on climate and other social issues. Following this guidance, Apple pushed back on some of its shareholders’ proposals. Using the Congressional Review Act, Congress rolled back certain SEC rules relating to

portions of Dodd-Frank meant to curb corruption in resource-rich countries by requiring disclosure of payments made to governments by U.S. companies. An earlier version of this rule had been vacated by the U.S. District Court for the District of Columbia.

Ongoing state climate change investigations resulting in ExxonMobil seeking a court order to prevent disclosure of certain documents under the accountant-client privilege under Texas state law. New York's highest state court affirmed the lower court's ruling that New York does not recognize that privilege and ExxonMobil is required to produce documents requested by New York Attorney General Eric Schneiderman. ExxonMobil continues to fight the investigation in federal court.

Automobile manufacturers were involved in numerous lawsuits. First, Volkswagen must face a suit brought by the Miami Police Relief and Pension fund in the U.S. because the securities were purchased here and this country has an interest in protecting its investors. Another bondholder suit is pending against Volkswagen awaiting amended filings by the plaintiffs. The U.S. DOJ, SEC, and several state attorney generals subpoenaed Fiat for information about possible excess diesel emissions. This subpoena spawned several civil lawsuits, including a proposed class action filed by investors in New York federal court. The EPA filed suit against Fiat accusing it of installing "defeat devices" in over 100,000 diesel vehicles. This suit has been moved to California as part of a multidistrict litigation taking place there. There is also pending disclosure lawsuits pending against Daimler AG for lying about using software to cheat emissions tests for certain diesel Mercedes-Benz vehicles.

On the citizen activism front, while there were fewer shareholder proxy proposals in 2017 when compared to previous years, the proposals related to environmental and social issues remained high. Many were dealing with the business impact of the Paris Agreement's 2 degree Celsius limit on global warming. The Global Reporting Initiative held numerous international launch events for its new edition of the world's first global standards for sustainability reporting (GRI Standards). And a group of global investors launch Climate Action 100+ Program, which aims to act on climate change by engaging with the world's largest corporate greenhouse gas emitters to improve the corporate governance on climate change, curb emissions, and strengthen climate-related financial disclosures.

E. Environmental Enforcement and Crimes

The Environmental Enforcement and Crimes Committee monitors and communicates developments and trends of interest to its members and their clients, focusing on issues arising in civil and criminal environmental enforcement. Current topics include Lacey Act violations (unlawful trade in animals and plants), vessel pollution prosecutions, CAA and Clean Water Act (CWA) enforcement, prosecution and sentencing for filing false reports and emissions fraud, and court decisions clarifying EPA's authority.

EPA's 2017-2019 National Enforcement Initiatives include large air pollution emission sources, energy extraction, municipal sewer systems, animal waste, hazardous air pollution emission sources, prevention of accidental releases, industrial sources of water pollution, reducing the risk of accidental releases at industrial facilities, and keeping industrial pollutants out of the nation's waters.

Significant criminal cases reviewed include sentencing in the Volkswagen emissions case, convictions for the explosion of an offshore oil platform in the Gulf of Mexico, prosecutions for illegal trade and trafficking of plants and animals, sentencing of a former employee of American Suzuki Motor Corporation for submitting false report to EPA, and efforts to prosecute vessel pollution cases.

Significant civil cases reviewed include a settlement with Exxon Mobil regarding Clean Air Act violations, a multi-million agreement with Starkist for CAA and CWA violations, a settlement with Husquanva for failing to perform proper emissions tests, an agreement with PDC Energy for not properly storing hydrocarbons, a focus on enforcing lead paint restrictions, and a series of D.C. Circuit cases covering EPA’s authority to regulate hydrofluorocarbons (HFCs) and “sham recycling.”

F. *Environmental Litigation and Toxic Torts*

The Committee covers a broad range of litigation topics – statute of limitations, nuisance, preemption, *Lone Pine*, corporate officer liability, medical monitoring, and others in between. First, on the subject of statute of limitations cases, the Texas Supreme Court found contamination claims from long-dormant oil and gas operations was time barred because the land owners knew of multiple spills on the property even though the land owner recently learned of the full extent of the contamination. The land owner was not entitled to have the limitations period tolled. The Sixth Circuit Court of Appeals partially revived a nuisance suit against a refinery, but limited the claims to only those injurious emissions that occurred within the last three years; all claims prior to that were barred by Michigan’s statute of limitations.

Next, an Illinois appellate court reversed a trial court dismissal, finding sufficient evidence to support the relatively uncommon “prospective nuisance” claim. In Louisiana, the Fifth Circuit Court of Appeals affirmed that Louisiana’s “subsequent purchaser doctrine” applies to claims involving expired mineral leases. Finally, in Montana, a federal district court declined jurisdiction over a matter requesting declaratory relief under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) - because the operator’s affirmative arguments in the federal case were virtually identical to its summary judgment arguments in state court. A New York federal court dismissed some tort claims, with leave to amend, in a consolidated litigation alleging personal injury and property damage from perfluorooctanoic acid (PFOA) groundwater contamination in Upstate New York. Claims remaining in the case include medical monitoring, property damage, and public nuisance.

In cases brought by public-entities, Monsanto Co. was unsuccessful in its efforts to remove litigation brought by the State of Washington alleging widespread polychlorinated biphenyl (PCB) contamination. The federal district court disagreed with Monsanto’s federal officer jurisdiction argument and federal question jurisdiction under CERCLA and remanded the case to state court. Another PCB case brought by the City of Seattle against Monsanto remains in federal court and includes a novel public nuisance claim. Several other cases are in the federal courts in California.

In a California toxic tort class action litigation, the court issued a *Lone Pine* case management order requiring plaintiffs to show evidence of exposure and to support their damage claims. Plaintiffs produced their *Lone Pine* submission and five expert opinions. The court then allowed the case to proceed after finding that the plaintiffs’ experts showed that plaintiffs’ case was not meritless or frivolous.

The Sixth Circuit found that the Safe Drinking Water Act did not preempt constitutional claims brought by the Citizens of Flint against the State of Michigan, the City of Flint, and their respective officials. The court found no congressional intent to displace the remedies under constitutional jurisprudence when it passed SDWA.

A personal liability case was allowed to continue against a company executive in a wrongful death action where the family of the decedent alleges that the corporate executive failed to comply with a 1998 clean-up order and that contributed to the death. The court denied the motion to dismiss finding that “[i]t is at least plausible that had [the corporate

officer] decided to comply with the 1998 [cleanup order] . . . [the decedent] would not have passed away when she did.”

G. Environmental Transactions and Brownfields

The Committee opens the chapter with a summary of several cases involving issues arising in and out of bankruptcy cases. In one case, the Texas Supreme Court found that an indemnification agreement not listed as a liability in a bankruptcy reorganization plan nevertheless contained a liability to be assumed by the purchaser of the assets out of the bankruptcy. In another case, a bankruptcy court rendered a discretionary “declaratory judgment” decision on whether injunctive relief sought under Resource Conservation and Recovery Act (RCRA) and CWA citizen suit provision was a “debt” under 11 U.S.C. § 101(12). The court, relying on RCRA precedent, held that the relief sought does not give rise to a debt.

The Brownfields Enhancement, Economic Redevelopment, and Reauthorization Act of 2017, H.R. 3017, was passed by the House of Representatives on November 30, 2017 and received by the Senate on December 1, 2017, concluding legislative action for 2017. The legislation includes provisions that would provide some clarification to liability of state and local governments that acquire ownership or control of a property and the eligibility of government entities to receive brownfields grants, expand the eligibility of non-profits, increase the amount of grants and establish multi-purpose grants, and facilitate renewable energy development on brownfield sites. Two other pieces of legislation introduced (H.R. 1747 and S. 822) contained provisions that would address similar topics contained in H.R. 3017. There was also two other pieces of legislation addressing contamination referred to as “emerging contaminants” emanating from industrial sites and entering the drinking water supply.

The Committee reports that while there was no significant federal or state legislation relating to institutional controls, the EPA released documents relating to the state voluntary cleanup programs, including underground storage tank cleanup programs, and the EPA Administrator appointed a Superfund Task Force that issued a report in July on the more than 1,330 Superfund sites in the U.S. Several states made efforts to streamline the process of implementing institutional controls. ASTM also updated its Standard Guide for Use of Activity and Use Limitations, Including Institutional and Engineering Controls (E 2091).

Building issues, including vapor intrusion, lead-based paint, and radon continue to require careful evaluation and assessment of potential liability in commercial, industrial, and residential real estate transactions. On January 9, 2017, the EPA issued a final rule adding vapor or water intrusion as a contaminant pathway for placing a site on the National Priorities List. In October, the EPA announced over 125 federal enforcement actions over the previous twelve-months related to lead-based paint.

Finally, the Committee reports that Connecticut, Maine, Michigan, and New York all amended their laws concerning brownfield development or funding. New York also specifically addressed the emerging contaminants issue and implementing water quality protection measures.

H. Pesticides, Chemical Regulation, and Right-to-Know

The U.S. EPA continues to work quickly to meet the many deadlines set by Congress in the deadlines of the 2016 Frank R. Lautenberg Chemical Safety for the 21st Century Act (Lautenberg Act). Most significantly, EPA proposed and timely completed the three “framework” rules, which implement the Lautenberg Act’s principal change to

Toxic Substances Control Act (TSCA) and were required by the first anniversary of the Act – the Inventory Reset Rule, the Prioritization Rule, and the Risk Evaluation Rule. However, due to changes in the Administration, the final rules were different than the proposed rules and were judicially challenged.

The Lautenberg Act amended the new chemical premanufacture notice (PMN) and significant new use rule (SNUR) provisions under section 5 of TSCA, including, as a practical matter, removing the 90-day limit for risk reviews and requiring EPA to consider currently unintended but foreseeable future uses of substances, to make affirmative determinations about risk prior to concluding a review, and to issue section 5(e). A significant backlog of PMNs was not resolved until August 2017. EPA issued SNURs for 38 chemical substances that were the subject of PMNs and for which EPA completed new chemical review under the “old” TSCA, prior to June 22, 2016.

On action related to existing chemicals, the EPA advanced work on risk evaluations for the ten chemicals selected in 2016 to undergo the first risk evaluations under the new TSCA section 6(b) procedures. The EPA held a public meeting and sought comments on the process for identifying the order in which candidate substances from the TSCA Inventory would enter the formal prioritization process. The EPA also denied two petitions – one related to chlorinated phosphate esters and the other seeking to rule to prohibit use of fluoridation chemicals as drinking water additives. A judicial challenge to the latter may open a pathway for individuals to bypass prioritization and broad public input to obtain action on individual uses of particular chemicals of concern to them. The EPA issued a final rule implementing federal formaldehyde emissions standards for certain wood component products and establishing labeling and a third-party compliance certification process for covered importers, distributors, and manufacturers.

The EPA also established a negotiated rulemaking committee for Chemical Data Reporting (CDR) requirements for inorganic byproducts (Reg Neg Committee), that was required by the Lautenberg Act. However, the Reg Neg Committee reached an impasse after only three meetings and, in light of the impasse, EPA determined that no further meetings were warranted. The EPA also published initial inventory of mercury supply, use, and trade in the U.S., determined that the standards for classifying manufacturers and processors as small manufacturers and processors for purposes of TSCA reporting obligations, and issued the first of its two annual implementation reports required by the Lautenberg Act.

Turning to Pesticides and the Federal Insecticide, Fungicides and Rodenticide Act (FIFRA), the U.S. Court of Appeals for the District of Columbia Circuit held that for FIFRA registrations issued after a public comment period, challenges based on EPA’s alleged failure to comply with the Endangered Species Act’s (ESA) section 7(a)(2) consultation provisions must be brought in the Courts of Appeals. The National Marine Fisheries Service (NMFS) met a court-ordered deadline and completed and submitted to EPA final Endangered Species Act biological opinions for EPA’s registration of chlorpyrifos, diazinon and malathion and potential effects on certain endangered salmon nationwide.

The EPA also took several actions related to pesticides – released a final policy to mitigate risks to bees; reversed a 2015 decision concerning special local needs pesticide registrations for use on cannabis cultivation; denied a petition to revoke residue tolerances for chlorpyrifos under section 408(d) of the Federal Food, Drug, and Cosmetic Act; and released a draft risk assessment for glyphosate, finding insignificant evidence of an association between glyphosate and any of several types of cancer. EPA reached an agreement with certain dicamba manufacturers on measures to reduce the potential for drift damage to neighboring non-target crops after it was widely alleged to have caused major damage on neighboring non-resistant crops in the summer of 2017.

On the Biotechnology front, the EPA issued a final update to the 1986 Coordinated Framework for the Regulation of Biotechnology that summarizes the current responsibilities and the relevant coordination across EPA, FDA, and USDA for the regulatory oversight of an array of biotechnology product areas. The EPA has cleared forty-one Microbial Commercial Activity Notices (MCANs) since the enactment of the Lautenberg Act. The United States Food and Drug Administration (FDA), in consultation with EPA, issued final Guidance for Industry (GFI) #236, which clarifies that mosquito-related products intended to function as pesticides for mosquito population control purposes are not “drugs” and will be regulated by the EPA under FIFRA. The EPA also registered a unique mosquito biopesticide – bacterium *Wolbachia* ZAP (also known as wPip) strain, contained within the Asian Tiger mosquito (*Aedes albopictus*), a public health pest. Sale is allowed in only 21 jurisdictions.

The Bureau of Land Management (BLM) formally rescinded a 2015 rule governing fracking operations on federal and tribal lands, including rules requiring fracking fluid chemical ingredient disclosure. Meanwhile, Maryland enacted legislation permanently banning hydraulic fracturing effective October 1, 2017 and the Delaware River Basin Commission (DRBC) proposed to ban hydraulic fracturing in areas within its jurisdiction.

Finally, other topics that the Committee covered in this year’s chapter include a final rule establishing reporting requirements for existing chemical substances when manufactured or processed in nanoscale form to exploit a unique and novel size-related property; a D.C. Circuit opinion that vacated a 2008 “Farm Rule” that exempted most farm waste releases (other than from concentrated animal feeding operations) from Emergency Planning and Community Right to Know Act (EPCRA) emergency reporting; updates on developments in the field of green chemistry; and, the formation of an advisory panel by the U.S. Consumer Product Safety Commission (CPSC) to study halogenated flame retardants in certain categories of consumer products.

I. Superfund and Natural Resource Damages Litigation

While Congress enacted no changes to the CERCLA, the EPA took several actions. These include a proposal to establish financial responsibility requirements under section 108(b) of CERCLA for classes of facilities in the hard rock mining industry; adopted a binding schedule to decide whether financial assurance is needed for facilities in the chemical, petroleum and electric power industries; added seven sites to the National Priorities List (NPL); changed the Hazard Ranking System (HRS) to add vapor intrusion as a contaminant pathway to evaluate in deciding whether a site belongs on the NPL; and increased maximum penalties for CERCLA violations.

The Committee highlights several court opinions that examined the jurisdiction and standing issues. One particular case was *Waterkeeper Alliance v. EPA*. In that case, the D.C. Circuit held that plaintiffs’ allegation that a rule that reduced the reporting of important information from farms to the public was a sufficient injury to confer standing. The court also found that the EPA did not have the authority under section 103(b) to exempt agricultural releases of ammonia and hydrogen sulfide from mandatory release reporting. In another agricultural related case, a federal court denied a motion to dismiss based on claims that agricultural releases of phosphorous and ammonia were exempt from CERCLA.

In liability related litigation, the U.S. District Court in Arizona held that the United States’ ownership of Navajo Nation tribal lands as a fiduciary gave it sufficient control to make the United States liable as an owner under CERCLA. Four district court decisions addressed the kind of activities and level of control necessary to hold a party liable as an operator. The court in the Southern District of Iowa held sale of a building known to be

contaminated with PCBs qualified the seller as an “arranger” for disposal of hazardous substances. In the Southern District of New York, a court held that an allegation of negligent removal and disposal of contaminated soil stated a claim for arranger liability, but not transporter liability. The Committee also discusses two cases that examined successor liability.

In litigation related to cost recovery and contribution the Tenth Circuit reversed summary judgment awarded to a contribution defendant after finding there were disputed issues of fact on defendant’s share of an EPA cost recovery claim. A district court in Oklahoma dismissed a cost recovery counterclaim after determining that the defendant was limited to a contribution claim. A court approved a consent decree resolving CERCLA liabilities for PCB contamination for two companies in the Fox River in Wisconsin. Another judge entered a consent decree to resolve liability for two mining companies and the Department of Interior at the Tar Creek Superfund Site in Oklahoma.

Several cases on the issue of allocation and indemnification highlight the court’s review of fairness in the review of cost allocation. In one case, the court assigned 55% of the cost to the City of Fairbanks for the remediation of contamination from a dry cleaner operation because the City should have known about the contamination and failed to inform the buyer or any regulatory agency, thereby potentially endangering the health of its citizenry. Another court approved a consent decree that used a four-category scoring system; the court held the settlement to be substantively fair. The U.S. District Court of Arizona held that private parties can allocate environmental liability by contract. The Ninth Circuit Court of Appeals reversed a district court’s holding that a private entity was responsible for 100% of the costs of remediation of chromium and PCBs after the U.S. government required use of the contaminants in U.S. military contracts to ensure the final product met quality standards.

One case reported by the Committee illustrates the important of obtaining EPA approval of response actions so as to avoid those costs being labeled “duplicative costs” and thus not recoverable. A couple of cases demonstrate the importance of conducting a feasibility study prior to selecting a site remedy in order to have a sufficient CERCLA claim or making sure that the remedy selected is consistent with the National Contingency Plan.

A circuit split deepened when the Ninth Circuit aligned itself with the Third Circuit instead of the Second Circuit when it held that corrective measures undertaken under a 1998 RCRA Consent Decree represented a response action under CERCLA Section 113(f)(3)(B). The court also held that the consent decree did not resolve liability for the site and the limitations period was not triggered. In another case, the Second Circuit held that remedial work in the 1960s, before plaintiffs owned the site, barred any claims to recover response costs today because “there can only be a single remedial action per facility.”

The Committee discusses several cases concerning other defenses and challenges, including one where the defendant successfully argued that passive migration of benzene during a period of ownership does not represent a “disposal” for purposes of former owner liability. There is also a discussion of several cases concerning recoverable response costs, including the denial of a motion to dismiss a CERCLA claim brought by a class of residents alleging lead and arsenic contamination in the soils of the plaintiffs’ properties. The costs incurred with investigating the contamination and considerations of temporary housing were specific response costs sufficient to state a CERCLA claim.

Finally, a court approved a long-negotiated settlement of a complex federal and state natural resource damage claim involving the Shenandoah River in Virginia.

J. [Waste and Resource Recovery](#)

In a decision likely to affect a range of industrial sectors that deal with hazardous residual materials, on July 7, 2017 the D.C. Circuit struck down portions of the EPA's regulatory definition of solid waste in the Agency's "sham recycling" rule. The decision vacated "Factor 4," which stated that for recycling to be legitimate, the product of the process must be analogous to a comparable product or intermediate. Environmental groups requested the D.C. Circuit reconsider the decision, arguing that the court should have remanded the rule to the EPA rather than vacating portions of it. Industry groups also requested reconsideration arguing that the court should have vacated Factor 4 as applied to all recycling activities and not just hazardous secondary materials.

The Ninth Circuit Court of Appeals affirmed the conviction and sentence of an individual who stored approximately 3,400 containers of hazardous waste in his yard without a permit. The defendant argued that the trial court should have allowed evidence of his diminished capacity. The appellate court rejected this argument after concluding that the crime was one of general intent. The Ninth Circuit also found an environmental group had standing under the citizen suit provision of the Clean Water Act and RCRA because members of the group had attested to "concrete and particularized harm" to their own uses and enjoyment of San Francisco Bay. The environmental group alleged that the methods used by Pacific Gas & Electric Co. to service chemically treated utility poles allowed wood treatment chemicals onto the ground, which were then carried into San Francisco and Humboldt Bays via indirect and direct stormwater discharges.

Following a two-year investigation, U.S. EPA Region 6 announced a settlement with Macy's Retail Holdings, Inc. concerning violations of hazardous waste regulations at Macy's department stores in Region 6. Macy's will correct the violations, pay a \$375,000 civil penalty, and implement a supplemental environmental project (SEP) that requires Macy's to develop a training program that can be used to train more than 400 retailers in Oklahoma and Texas, and to conduct third-party audits of eleven of its largest stores in Louisiana, New Mexico, Oklahoma, and Texas.

The EPA is nearing launch of its electronic manifest system for tracking shipments of hazardous waste. In December, the EPA issued a final rule setting the methodology for calculating user fees for the system. While litigation is pending to the EPA's 2015 Coal Combustion Residuals (CCR) Rule, several key compliance deadlines took place in 2017, the most significant of which related to the development of a groundwater monitoring program to determine whether a release of constituents associated with CCR has occurred. In August 2017, USEPA issued an interim guidance document to assist states in developing CCR permit programs under the WIIN Act that would allow consideration of site-specific conditions. On November 7, 2017, the EPA filed a motion in the litigation seeking remand without vacatur of five specific subsections of the CCR Rule that the industry petitioners are challenging and one subsection challenged by environmental petitioners.

With the adoption of AB-341 in 2011, California established a statewide solid waste diversion goal of 75% by 2020. In 2017, the California Department of Resources Recycling and Recovery ("CalRecycle"), the State agency responsible for solid waste and recycling regulatory programs, increased enforcement efforts against stewardship organizations involved in implementing its extended producer responsibility ("EPR") programs. CalRecycle also took steps in 2017 towards establishing a policy model for the diversion of packaging, which comprises approximately 25% of California's total disposal stream.

There were two developments in electronic waste enforcement – the parent company of Dollar General Stores pay \$1.125 million to settle an action brought by thirty-two district attorneys in the state of California alleging the retailer of illegally handling and disposing of hazardous waste, including electronic waste ("e-waste"), throughout the state;

and, the former owner and operator of Global Environmental Services, LLC, an e-waste recycling company in Kentucky, was indicted on one count of conspiracy and seven counts of environmental crimes, including illegally storing, transporting, and disposing of hazardous waste, including cathode ray tubes.

Several states took legislative or regulatory action to address issues associated with e-waste. New Jersey enacted a bill revising several provisions of the state's Electronic Waste Management Act and New Jersey Department of Environmental Protection to establish a statewide program to collect, transport, and recycle covered electronic devices. CalRecycle undertook an emergency rulemaking to establish a clearer connection between local governments and designated approved collectors and ensure that all necessary information is available for local governments to complete annual reporting requirements. Indiana enacted a law requiring manufacturers of video display devices to provide a report with the total weight of electronic devices collected and recycled each year. Illinois passed a handful of laws that amend the state's various laws concerning electronic disposal and recycling. Rhode Island also passed legislation amendment its Electronic Waste Prevention, Reuse and Recycling Act.

Finally, the European Commission adopted a Waste Electrical & Electronic Equipment ("WEEE") package. Interpol reported that it seized more than 1.5 million tons of illegal waste during a global operation targeting illegal shipments and disposal of waste. The Regional Platform for Electronic Residues in Latin America and the Caribbean released a practical guide for the systemic design of policies for the management of WEEE in developing countries.

K. [Water Quality and Wetlands](#)

The Water Quality and Wetlands Committee focuses on CWA legislation, regulation, and litigation. This year the Committee reports on judicial developments regarding CWA section 303 water quality standards and total maximum daily load allocations (TMDL), CWA section 304 and 306 effluent limitation guidelines and performance standards; and CWA section 309 enforcement. Also reported are: CWA section 401 state certification cases, including *Delaware Riverkeeper Network v. Federal Energy Regulatory Commissioner*, finding the Federal Energy Regulatory Commission (FERC) has the authority to issue a Certificate Order with the condition that the application obtain state 401 certification; and several CWA section 402 National Pollutant Discharge Elimination System (NPDES) permitting cases, including cases pertaining to discharges via groundwater, permit shield and collateral attacks on permits, stormwater, existence of a point source, and water transfers. Additionally, the Committee reported: CWA section 404 permitting determinations; and CWA section 505 citizen suit cases, which addressed issues of diligent prosecution, failure to provide notice, claim preclusion, standing, and subject matter jurisdiction.

Administrative developments include novel water quality criteria for mercury developed by the California State Water Resources Control Board, which account for tribal cultural use and subsistence fish consumption; EPA's approval of Ohio's impaired waters list, and the related controversy over Ohio's failure to list the open waters of the Western Lake Erie Basin (WLEB) in spite of harmful algal bloom issues and Michigan's recent listing of its portion of the open waters of the WLEB; and EPA's issuance of interim evaluations on progress in the Chesapeake Bay jurisdictions towards meeting 2016-2017 Watershed Implementation Plan (WIP) goals under the landmark Bay TMDL. Additionally, the EPA published technology-based pretreatment standards for dental offices to address discharges of mercury-containing amalgam into publicly owned wastewater treatment facilities. The EPA also announced it would reconsider portions of

the final 2015 rule that amended portions of the effluent limitations guidelines and standards for the Steam Electric Power Generating Point Source Category, also known as “the steam electric rule.” The Committee also includes: a FERC decision to dismiss an electric utility’s petition to declare the Oregon’s state law requiring fish passage at dams preempted by federal law on basis that the petition was premature prior to FERC’s consideration of the effect of Oregon’s CWA 401 certifications; EPA’s issuance of final NPDES general permit for storm water discharges associated with construction activities; and EPA Administrator Pruitt’s directive to end regulation through litigation, also known as “sue and settle.” Further, the Committee reports on a series of late 2017 regulatory maneuvers by EPA and the Corps to reconsider, rescind, and replace the Clean Water Rule, which is the 2015 rule that revised the definition of jurisdictional waters under the CWA, or “waters of the United States,” and has been stayed pending the outcome of nationwide litigation since shortly after it went into effect in 2015.

Finally, in the Congressional arena, the Committee reports a few 2017 legislative proposals, which may gain traction in 2018 and have implications for various CWA regulations and litigation, including: the latest legislative effort to eliminate NPDES permitting requirements for FIFRA-compliant pesticide spraying; and the Discouraging Frivolous Lawsuits Act (H.R. 1179), which would amend the CWA section 505 citizen suit provision to place new limitations on awarding litigation costs to prevailing parties, among other restrictions.

III. ENERGY AND RESOURCES COMMITTEES

A. [*Energy Markets and Finance*](#)

On September 28, 2017, the Secretary of Energy submitted to the Federal Energy Regulatory Commission (FERC or Commission) for final action a proposed Grid Resiliency Pricing Rule (Proposed Resiliency Rule). On January 8, 2018, the FERC issued an order terminating the Proposed Resiliency rulemaking proceeding initiated in Docket No. RM18-1-000 and initiated a new proceeding in Docket No. AD18-7-000 “to specifically evaluate the resilience of the bulk power system in the regions operated by RTOs and ISOs.” Despite its termination of the rulemaking proceeding, the FERC concluded that the Proposed Rule and the record “shed additional light on resilience more generally and on the need for further examination by the Commission and market participants of the risks that the bulk power system faces and possible ways to address those risks in the changing electric markets.” To this end, the FERC requested RTOs and ISOs to address a lengthy list of questions and describe how they mitigate threats to resilience.

After the passage of the tax reform bill at the end of 2017, consumer advocacy groups in states such as Delaware, Massachusetts, and Kansas filed petitions with their state public utility commissions to amend current rates to prevent electric utility companies from reaping a windfall from the recent tax cuts. The groups seek to ensure that ratepayers receive the benefits of the new tax reform law, either in an immediate reduction off their monthly bills, or over the long term through mitigating the increase in rates in the future. In other states, such as Montana and Kentucky, public utility commissions have begun directing their regulated utilities to calculate the change in tax liability they expect under the new law, and submit proposals for how the utilities would apply the savings.

California’s notable 2017 energy and climate law and policy developments included legislation to extend the state’s cap-and-trade market program and to encourage deployment of energy storage technologies and renewable microgrids. Significant non-legislative policy actions in 2017 included the adoption by the California Air Resources

Board (CARB) of an updated strategy for reducing the state’s greenhouse gas emissions to 40% below 1990 levels by 2030 and approval of significant infrastructure investment for zero emission vehicles. Energy storage technologies are a priority for the state because they improve grid flexibility and reliability and are particularly important for integrating high levels of intermittent renewable energy such as wind and solar. As of May 2017, nearly 300,000 zero-emission vehicle (ZEV) and plug-in hybrid electric vehicles (PHEV) have been sold in California, approximately half of the 600,000 ZEVs and PHEVs in the United States. By executive order, California’s goal is that “[o]ver 1.5 million zero-emission vehicles will be on California roads” by 2025.

In July 2017, after intense negotiation by a number of environmental, industrial and local and regional governmental stakeholders, California Governor Jerry Brown signed into law a comprehensive “grand bargain” package of environmental legislation designed to address both the extension of the cap and trade program and environmental justice concerns about the local impacts of air pollution on economically disadvantaged communities. The package was comprised of three separate bills, including a state constitutional amendment. Taken as a whole, it extended and revised California’s far reaching cap and trade climate change regulatory program, enacted a new community based regulatory approach for toxic air contaminants and criteria pollutants, and created a constitutional vehicle for approval of future uses of the proceeds of auctions of carbon credits.

Over the course of last year, significant changes have occurred in relation to the Kentucky Public Service Commission’s (“PSC” or “Commission”) demand-side management (DSM) programs serving a region facing declining load and whose price spikes have exacerbated financial strains on the area’s low-income customers. After the PSC opened an investigation into the reasonableness of Kentucky Power Company’s DSM programs in February, the Commission ultimately decided to suspend the programs until further notice. The PSC’s decision to suspend Kentucky Power’s DSM program will have a significant impact on Eastern Kentucky consumers. For those low-income customers who hoped to rely on DSM programs as a means of mitigating the impact of future energy costs, the suspension represents a substantial setback and creates uncertainty over how to cope with future price fluctuations.

B. Energy and Natural Resources Litigation

In the area of domestic judicial developments, the Committee reports on several rulings from a Tenth Circuit Court of Appeals case that addressed objections to a district court’s approval of class settlements in the so-called “hot fuel” litigation. First, the court considered the meaning and effect of the commonly-used phrase “including, without limitation.” Second, the court recognized the general rule that non-settling co-defendants have no standing to object to a proposed class settlement, because “they lack ‘a legally protected interest in the settlement’ and therefore can’t satisfy Article III’s injury-in-fact requirement.” Finally, the court rejected an argument that approval of the class settlements usurped the role of the state legislatures.

In West Virginia, an operator of oil and gas wells sought to enjoin an ordinance passed by Fayette County, West Virginia, which enacted a blanket ban on all permanent wastewater disposal wells within the county, even those with a state-issued permit. The oil and gas company argued that the ordinance was preempted by state and federal law. The Fourth Circuit affirmed the judgment of the district court in all respects finding that all local law in the State is subject to the implied condition that the law may not be inconsistent with state law and must yield to the predominant power of the state.

The Tenth Circuit Court of Appeals held that a wind energy developer’s excavation work in construction of wind turbines constituted “mining” under federal regulations applicable to the Indian lands. Osage Wind, LLC leased surface rights to approximately 8,400 acres of private fee land in Osage County, Oklahoma. The excavation work for each turbine involved the extraction of soil, sand, and rock of varying sizes—all of which was of a common mineral variety, including limestone and dolomite. The U.S. asserted that the sand, soil and rock extraction activities of Osage Wind “was ‘mining’ under 25 C.F.R. § 211.3 and thus required a mineral lease under 25 C.F.R. § 214.7.” After the district court granted summary judgment for Osage Wind, the U.S. decided not to appeal the decision.

However, the Osage Minerals Council, not a party in the district court proceedings, appealed the summary judgment decision to the Tenth Circuit. The Tenth Circuit allowed the appeal finding that OMC had a “unique interest in this case entitling it to appeal without having intervened below.” The Tenth Circuit reversed the summary judgment after concluding that Osage Wind “acted upon” the rocks and minerals after removing the material from each hole, sorting and crushing the minerals for the purposes of backfilling and stabilization. Citing again the rule that ambiguous laws designed to favor the Indians are to be liberally construed in the Indians’ favor, the court held that Osage Wind’s excavation work constituted mining under Section 211.3 and that the company was required to secure a federally-approved lease from OMC under Section 214.7.

The *Le Norman Operating LLC v. Chalker Energy Partners III, LLC* case addresses several issues that can easily arise, and lead to litigation, in energy and resources transactions. Notably, it illustrates the litigation risks that arise when negotiating the more-detailed terms of a transaction by e-mail. After receiving an email announcing the sale of the assets and advising as to the person to whom interested parties should direct their inquiries, Le Norman engaged in the bidding process, gained access to information in the virtual data room, and attended a presentation of Chalker’s assets. After numerous emails between Le Norman and Chalker negotiating terms of the sale, Chalker received an offer from a third party, which they accepted. Le Norman protested and demanded Chalker honor the agreement reached prior to the offer received from the third party. Chalker refused and closed with the third party. However, once the third party learned of Le Norman’s demands, it refused to release the escrow funds to the Chalker. Le Norman sued Chalker and the third party buyer. The Texas Supreme Court reviewed the facts and circumstances presented in this lawsuit and concluded that “the conduct of the parties here in engaging in negotiations and other relevant business via electronic means constitutes at least some evidence that the parties agreed to conduct some of their transactions electronically.” The trial court’s summary judgment ruling against Le Norman on this issue was reversed.

In a case of first impression, a Texas appellate court responded to the question of “whether a trial court outside of Travis County has the jurisdiction to enjoin a party with a valid permit from developing and using an injection well based on the claims that the injection well will cause imminent and irreparable injury to the complaining party.” After obtaining permits to inject fluids from the Texas Railroad Commission (TRC), Trey Resources was sued by Ring Energy in the county where the injection wells were located. Trey Resources argued that the case must be filed in Travis County, the location of the TRC. The Texas Court of Appeals rejected this argument citing the general venue provisions in Texas permitted the suit to be filed where the claim occurred and that the Texas district courts are courts of general jurisdiction and generally have subject matter jurisdiction.

Other cases highlighted include: Mississippi Court of Appeals finding that the transportation of liquid propane is not an ultrahazardous activity for purposes of strict liability; the Tenth Circuit Court of Appeals dismissing with prejudice as time-barred well owners’ suit against operator of horizontal well for alleged damages to plaintiffs’ older,

vertical wells; the Town of Dish, Texas nuisance and trespass claims were barred by the two-year statute of limitations; and the Tenth Circuit, in a criminal case, finding that Congress never properly disestablished the Creek Reservation, leaving broad potential implications for most sectors of the business community and other tribes.

C. [Energy Infrastructure, Siting, and Reliability](#)

The Committee highlights the reasons why 2017 was such a pivotal year for energy infrastructure and identifies the underlying drivers of change at play through highlights.

The debate over what resiliency means for energy infrastructure and whether it poses a conflict to reliability of the grid took on a renewed urgency in 2017, driven by a slew of costly and tragic natural disasters as well as an energy marketplace struggling to respond to rapidly evolving technologies, opportunities, and regional needs. The Department of Energy released a Quadriennial Energy Report stating that a cyberattack on the grid is “imminent.” Although still a small share of the energy picture, storage has continued to grow with projections that 295 MW of storage would be deployed in 2017, up from 231MW in 2016. Residential energy storage surged in 2017 and increased ability of individuals and businesses to go ‘off-grid’ pose significant challenges to traditional utility business models and has raised concerns about an impending “death spiral.” Several catastrophic hurricanes made landfall in 2017. The impacts of these storms, and who bears responsibility for rebuilding the infrastructure in these communities, will be subject to ongoing contention through 2018.

Several energy policy debates in 2017 involved questions of the resiliency and reliability attributes of electric generating resources. These debates pitted traditional, large-scale grid resources on one end with newer, small-scale and distributed resources on the other. The shift in the Obama and Trump Administration priorities, however, is only part of the story; rapidly emerging technologies and new energy markets also contributed to create many new fault lines in the resiliency and reliability debate. The DOE issued a Notice of Proposed Rulemaking directing FERC to modify the pricing mechanisms used in Regional Transmission Organization (RTO) and Independent System Operator (ISO) wholesale electricity markets in order to ensure that the “reliability and resiliency” attributes of such generation resources receive full value in those markets. There were also three court challenges around state Zero Emission Credit (ZEC) programs.

The Trump Administration signaled its policy for securing the grid through a) development of traditional baseload resources like oil and coal and b) through the processes of regulatory rollback and streamlining favored by proponents of traditional utility business models. New York indicated that it believes utilities are better suited to be the main gatekeepers to oversee and implement new programs, while Nevada appears poised to open up its markets to encourage net metering, distributed generation, and alternative energy suppliers. The FERC issued an Order preventing retail electric regulators (i.e., states) from barring low-cost energy efficiency resources competing in the wholesale electricity market without express authority from FERC.

President Trump issued two executive orders seeking to streamline National Environmental Policy Act (NEPA) and federal environmental review processes, as well as an executive order halting the federal government’s enforcement of climate regulations and directing the EPA to withdraw and revise the Clean Power Plan.

D. [Forest Resources](#)

The Committee highlighted several developments in the federal and state courts, as well as legislative developments. Litigation continues over the validity of the 2001

Roadless Area Conservation Rule (Roadless Rule). Alaska challenged the validity of the Rule against the Tongass Timber Reform Act's mandate that the United States Forest Service (Forest Service) consider and seek to meet market demand for timber from the Tongass National Forest. The D.C. Circuit Court rejected Alaska's challenge. Alongside the litigation, Senator Lisa Murkowski and others have been pursuing federal legislation to exempt both the Tongass and Chugach National Forests in Alaska from the Roadless Rule. In November 2017, an exemption provision was included in the United States Senate's (Senate) draft version of the Fiscal Year 2018 Interior appropriations draft bill.

A California federal district court rejected the environmental group's challenge to the designation of landscape-scale areas for insect or disease treatment, the court explained that a designation has only potential or contingent effects on the environment and Congress clearly intended to create an expedited process for insect and disease treatment that would not be subject to National Environmental Policy Act (NEPA) analysis in *Center for Biological Diversity v. Ilano*. In Colorado, the federal district court found that the Forest Service violated NEPA, the access provision of Alaskan National Interest Lands Conservation Act (ANILCA), and the ESA in its approval of a land exchange that would have provided access to private land for the development of a ski resort within the Rio Grande National Forest.

The Ninth Circuit addressed two cases involving National Forests. First, in *Alliance for the Wild Rockies v. Bradford*, the Ninth Circuit affirmed the Forest Service's compliance with the National Forest Management Act (NFMA), ESA, and NEPA in connection with the Forest Service's decision to construct 4.7 miles of new roads to permit access to a timber sale project in Montana's Kootenai National Forest under the Kootenai Forest Plan, finding that the Forest Service had authority and was entitled to deference in determining whether the new roads were permissible under the forest plan. In *In re Big Thorne Project*, a split panel of the Ninth Circuit held that the Forest Service did not violate the NFMA when it determined that the Big Thorne logging project was consistent with the Alaska Tongass National Forest Plan (Tongass Forest Plan) and would "safeguard the continued and well-distributed existence of the Alexander Archipelago wolf."

The Committee highlights three state court cases from Georgia, Louisiana, and Washington. In *Redcedar, LLC v. CML-GA Social Circle, LLC*, the Georgia Court of Appeals held that Georgia's conversion statute created "broad, strict liability" for anyone who converts timber without written consent rendering a third-party timber cutter, Redcedar, LLC liable to a secured lender for the value of trees removed from undeveloped collateralized land under Georgia's timber conversion law. In *M/V Resources LLC v. Louisiana Hardwood Products LLC*, the Louisiana Court of Appeals interpreted a 1950 deed as evidence that the original landowners intended a sale of the then-existing timber coupled with a leasehold interest to grow and cut timber into the future, including the right during the 99 year period to enter the land at any time, and for as many times as necessary, for the purpose of timber management. In *Herring v. Pelayo*, the Washington Court of Appeals held that, "in recognition of the long recognized lawful authority to trim overhanging vegetation, the lawful authority to use and maintain property held in common with a cotenant, and the plain language of the timber trespass statute," "where a tree stands on a common property line, the common owners of the tree may lawfully trim vegetation overhanging their property but not in a manner that the common owner knows will kill the tree."

On the legislative front, the Bureau of Land Management's (BLM) "Planning 2.0" rule, released December 20, 2016, was repealed with a joint resolution under the Congressional Review Act. The Fiscal Year 2017 Omnibus Appropriations bill included a policy rider directing the Secretaries of Energy and Agriculture to ensure consistency in federal policy relating to forest bioenergy across federal departments and agencies through

consistent policies that reflect the carbon-neutrality of forest bioenergy and to encourage private investment throughout the forest biomass supply chain. The House of Representatives passed a piece of legislation that would allow the President to declare major wildfires a natural disaster and make emergency funding available for fire suppression.

E. [Hydro Power](#)

On January 18, 2017, the U.S. Court of Appeals for the Second Circuit reinstated the EPA's Water Transfers Rule, reversing a district court's opinion vacating the Rule. The Rule, adopted in 2008, codifies EPA's longstanding policy that water transfers between navigable waters that do not subject the water to an intervening industrial, municipal, or commercial use do not constitute an "addition of pollutants" to navigable waters and are not subject to National Pollutant Discharge Elimination System permits under section 402 of the Clean Water Act. A group of states and environmental groups each filed petitions for certiorari with the U.S. Supreme Court.

On December 22, 2017, the U.S. Court of Appeals for the D.C. Circuit affirmed FERC order denying a downstream licensee's request for credits for past overpayments of headwater benefits where the licensee had already resolved the dispute with the upstream operator by contract. The Court found that section 10(f) of the FPA grants FERC the equitable authority to establish a policy of crediting downstream licensees for their state overpayments to an upstream operator.

In October, the FERC issued a policy statement revising its longstanding policy on the length of license terms for hydroelectric project generally establishing a default 40-year license term. A longer or shorter term will be considered by the FERC in certain circumstances. The FERC submitted a mandatory report and recommendations to Congress on the effectiveness of the two-year pilot hydropower licensing process, as required under section 6 of the Hydropower Regulatory Efficiency Act of 2013. The FERC indicated that it believes it is feasible under current regulations for developers to complete the licensing (or small hydro exemption) process in two years by refining tools and resources that are presently offered rather than amending the Federal Power Act (FPA) or FERC's authority.

F. [Marine Resources](#)

The Marine Resources Committee focuses on issues arising from the protection and use of coastal and ocean areas, including the Great Lakes, and the multiple stressors that operate on ocean and coastal ecosystems. Specific focus areas include marine transportation, from tankers and cruise ships to maritime security; exploration and production of natural resources such as oil, gas and minerals; ports and terminals; weather and climate change; and fishing and aquaculture and related legal issues including "harvest" of marine mineral and biological resources, pollution from vessels, sewage and coastal zone development and degradation, to non-indigenous or exotic nuisance species.

Within its 2017 report, the Committee Reviews developments regarding fisheries, marine mammals pursuant to the Marine Mammal Protection Act (MMPA), the Endangered Species Act (ESA), Deep Seabed mining, continental shelf delineation, the Arctic, and other issues under the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the Coastal Zone Management Act (CZMA), and offshore wind energy.

Regarding fisheries, in *Coastal Conservation Association v. U.S. Department of Commerce*, the Fifth Circuit held the Secretary did not act arbitrarily or capriciously in choosing the periods of catch data upon which to base red snapper allocations and the quota for charter anglers under the final rule implementing Amendment 40 of the Reef Fishery

Management Plan was a sub-category of recreational anglers. In *Territory of American Samoa v. National Marine Fisheries Service*, the court found America Samoa's Deeds of Cession constituted "any other applicable law" under the Magnuson Stevens Act. In *Goethel v. U.S. Department of Commerce*, the First Circuit found an email announcing the carrying observers cost payment date was an "update," not agency action under the APA. In *Turtle Island Restoration Network v. U.S. Department of Commerce*, the Ninth Circuit found FWS' issuance of "special purpose" permits to NMFS was arbitrary and capricious and reversed the district court's decision finding NMFS' failed to incorporate climate based model results into its "no jeopardy finding."

Concerning marine mammals under the MMPA, in *California Sea Urchin Commission v. Bean*, the court found the FWS' interpretation of Public Law No. 99-625 was reasonable and deferred to FWS' interpretation that it had discretion to terminate the program, which provided an exemption from liability for incidentally harming California sea otters on San Nicholas Island under the MMPA and ESA.

Regarding polar bears, sea turtles, salmon, and the ESA, in *Sierra Club & South Carolina Wildlife Federation v. Kolnitz*, the court granted the preliminary injunction, which ordered immediate sea wall removal and prohibited future sea wall development finding plaintiffs proved each *Winter* factor, including irreparable harm to sea turtles. In *Friends of Lydia Ann Channel v. United States Army Corps of Engineers*, the Fifth Circuit vacated the preliminary injunction and dismissed the suit as moot finding the NEPA challenge could only be maintained under the APA and plaintiffs failed to show sea turtle takes occurred under the ESA. In *Maine Council of the Atlantic Salmon Federation v. National Marine Fisheries Services*, the First Circuit upheld the District court's decision finding the Atlantic salmon BiOps obtained for four hydropower dam license modifications must be challenged directly in an appellate court. In *Hoopa Valley Tribe v. National Marine Fisheries Service*, the court found NMFS failed to comply with ESA Section 7 and granted the Tribes' motion for partial summary judgment and its preliminary injunction for Coho salmon protective waterflows. In *San Luis & Delta-Mendota Water Authority v. Haugrud*, the Ninth Circuit found the Bureau of Reclamation had authority under 1955 legislation to order additional dam releases to the Trinity River where necessary to protect downstream fish populations.

Concerning deep seabed mining, the Arctic, and UNCLOS, the International Seabed Authority (ISA) held its 23rd annual session where it discussed the final report on the first periodic review of the ISA pursuant to Article 154 of UNCLOS and reviewed the ISA's exploitation of marine minerals on the international seabed draft regulations. In the Arctic, the United States transferred chairmanship of the Arctic Council to Finland, and President Trump signed Executive Order 13795 to roll back restrictions on oil and gas development in the Arctic, Chukchi and Beaufort Seas as well as the Northern Bering Sea Climate Change Resilience strategy. The International Code for Ships Operating in Polar Waters entered into force in January 2017, and in September 2017, the Coast Guard issued its final rule adding the Polar Ship Certificate to the list of certificates certain U.S. and foreign-flag ships will need to carry on board if the engage in international voyages in polar waters. At the United Nations, nations agreed to recommend to the United Nations General Assembly elements that would be considered in the development of a new treaty on marine biodiversity of areas beyond national jurisdiction.

Regarding the CZMA, in *Board of Commissioners of the Southeast Louisiana Flood Protection Authority-East v. Tennessee Gas Pipeline Company, LLC*, the Fifth Circuit affirmed the district court's ruling that the issuance of permits licensing oil and gas exploration activities under the CZMA does not impose private duties to prevent environmental damage.

Concerning offshore wind energy, in *Fisheries Survival Fund v. Jewell*, the first legal challenge to Bureau of Ocean Energy Management's (BOEM) offshore wind leasing program was brought in Federal District Court alleging BOEM failed to adequately solicit fishing industry and other affected stakeholder input when it issued a commercial wind lease. Cape Wind Associates, LLC applied to BOEM to relinquish its federal wind energy lease offshore Massachusetts. BOEM issued a commercial wind energy lease off North Carolina's shore and approved Site Assessment Plans offshore Rhode Island, Massachusetts, and Virginia.

G. [*Mining and Mineral Extraction*](#)

The U.S. Army Corps of Engineers reissued with CWA section 404 nationwide permits (NWP), including NWP 21. Changes to NWP 21 make it such that only activities specifically allowed by the 2017 NWP 21 will now be authorized by it. The Office of Surface Mining Reclamation and Enforcement issued a final rule titled the "Stream Protection Rule." Industry and many in Congress have complained that the rule is a significant burden on coal mining, particularly in Appalachia. Consequently, Congress, pursuant to the Congressional Review Act, passed a joint resolution disapproving of the Stream Protection Rule, which was signed by President Trump. The Trump Administration's DOI issued an order revoking a previous order that required BLM to prepare a programmatic environmental impact statement (PEIS) to comprehensively review the federal coal program. Several environmental groups and the Northern Cheyenne Tribe immediately challenged the revocation order.

Finally, Congress enacted the Water Infrastructure Improvements for the Nation Act providing states the opportunity to submit programs for the regulation of coal ash as solid waste to the EPA for review and approval.

H. [*Native American Resources*](#)

The Committee reports that this year's major developments tended to involve questions of tribal jurisdiction and the nuances of sovereign immunity, although there were significant developments in long-running cases concerning treaty rights covering fishing, water and land use issues.

In *Lewis v. Clarke*, the U.S. Supreme Court held that a suit brought against a Mohegan Tribal Gaming Authority employee in his individual capacity did not implicate the Mohegan Tribe's sovereign immunity. The Court further held that "an indemnification provision does not extend a tribe's sovereign immunity where it otherwise would not reach." The U.S. Supreme Court's decision in *Matal v. Tam*, finding that the disparagement clause of the Lanham Act was an unconstitutional burden on free speech, had a direct impact on the pending Washington Redskins' trademark case in the Fourth Circuit Court of Appeals, a case in which five Native Americans sought revocation of the "Redskins" trademarks.

The Tenth Circuit Court of Appeals issued a landmark decision concerning state criminal jurisdiction over former allotted lands. In *Murphy v. Royal*, the criminal defendant argued in his habeas appeal that the State of Oklahoma lacked jurisdiction to convict him of murder because the crime occurred on former allotment land within the boundaries and former reservation of the Muscogee (Creek) Nation, of which the defendant was a member. The Tenth Circuit agreed, concluding Congress had not disestablished the Muscogee (Creek) Nation Reservation, the murder occurred in Indian country, and the federal court had exclusive jurisdiction over the matter. The Tenth Circuit denied rehearing en banc and the State of Oklahoma intends to seek certiorari review.

The Ninth Circuit court affirmed a district court's holding that the reserved rights doctrine (i.e. the *Winters* doctrine) applied to groundwater underlying a tribe's reservation and that the U.S. had reserved appurtenant groundwater when it established the Agua Caliente Band of Cahuilla Indians reservation in California. This was the first time the court had expressly held that the *Winters* doctrine applied to groundwater.

In another case, the Ninth Circuit affirmed the principle that a tribe's right to exclude non-tribal members from its land imparts regulatory and adjudicative jurisdiction over conduct on that land, at least with regard to civil jurisdiction. The Ninth Circuit required exhaustion of remedies in the tribal forum before a party can seek relief in the federal courts.

The U.S. Supreme Court granted certiorari review of the Ninth Circuit's 2017 decision reaffirming the reserved rights doctrine and affirming a district court's permanent injunction, which ordered the State of Washington to correct culverts violating the Stevens Treaties. These treaties authorized local tribes to continue to take fish from streams and rivers in the area. The state's construction of culverts related to road construction over streams and rivers sometimes completely bars passage by fish to upstream spawning waters.

In a series of cases from the U.S. District Court's, the Committee highlights: a case concerning the Cherokee Nation freedmen and rights of their descendants to citizenship in the Tribe; a case where the court applied the "Oklahoma Exception" to the definition of reservation; and two cases raising constitutional arguments against the Indian Child Welfare Act.

In state court developments: the Idaho Supreme Court overruled prior case law and held that tribal court judgments are not entitled to full faith and credit, but are "entitled to recognition and enforcement under principles of comity; and, the Alabama Supreme Court reversed summary judgment for the Poarch Band of Creek Indians based on tribal sovereign immunity grounds.

Congress passed legislation Indian Employment, Training and Related Services Consolidation Act of 2017, referred to as PL 477, that would make the PL 477 program permanent, expands the range of programs and funds eligible for integration of PL 477 plans, clarifies the plan approval process and makes other improvements to strengthen tribal employment and training programs. Several pieces of legislation relating to tribal concerns were introduced in the House and Senate, including a bill to abrogate sovereign immunity of Indian tribes as a defense in *inter partes review* of patents; passage in the Senate of a bill making Indian tribes eligible for AMBER Alert grants; passage in the Senate of a bill repeals outdated provisions regarding treatment of Native Americans; and, passage of a bill that will amend the Energy Policy Act of 2005 allowing tribes better ability to develop their energy resources.

Finally, President Trump signed an executive order expediting environmental review and approval for high priority infrastructure projects, including the Dakota Access Pipeline. President Trump also issued a proclamation reducing the size of Bears Ears National Monument, an area that contains hundreds of archaeological sites and Native American artifacts.

I. [Nuclear Law](#)

The Nuclear Law Committee focuses on legal issues arising with nuclear power and nuclear materials, including the nuclear fuel cycle, fuel production, storage and disposal, as well as licensing and operation of power plants. This year the Committee highlighted some court cases dealing with preemption questions and licensing questions

and addressed new facilities licenses and applications to the U.S. Nuclear Regulatory Commission.

First, in *McMunn v. Babcock & Wilcox Power Generation Group*, the Third Circuit Court of Appeals affirmed summary judgment for Babcock & Wilcox on cancer claims arising from alleged excessive exposure to radiation. The Court concluded that the Price-Anderson Act preempted the common-law claims and granted summary judgment on the Price-Anderson “public liability” claims. The Fourth Circuit Court of Appeals also affirmed summary judgment for the defendants in *Cox v. Duke Energy*. The Court agreed with the district court that the plaintiff’s state law claims related to an unidentified airplane circling its nuclear facility were preempted by the Atomic Energy Act. Finally, the Fourth Circuit also concluded that the Atomic Energy Act does not preempt state regulations of conventional uranium mining in *Virginia Uranium v. Warren*.

On the licensing front, the D.C. Circuit Court of Appeals denied a petition by Beyond Nuclear challenging the Nuclear Regulatory Commission’s (NRC) decisions that lead to the issuance of the combined license for Fermi Unit 3. In 2017, the NRC issued a combined license authorizing the construction and operation of one new commercial nuclear power reactor in Virginia. While three design certification applications remain pending, the NRC docketed and began formal review of the NuScale Power design certification application for its small modular reactor design and renewed the operating licenses for 89 reactor units for an additional 20 years. The chapter also focused on three instances where the Commission rejected hearing requests submitted by opponents of nuclear facilities – one challenging Tennessee Valley Authority’s request for power uprate and two alleging that a request for an extension of certain deadlines in post-Fukushima orders were in fact amendments to the license subject to a hearing.

J. Oil and Gas

The Committee covers regulatory, judicial and legislative developments for many of the energy producing states. Here are some highlights applicable across multiple states or the industry include:

- President Trump’s Executive Order 13795, Implementing an America-First Offshore Energy Strategy, expanding offshore drilling in the Arctic and Atlantic Oceans and assessing whether energy exploration can take place in marine sanctuaries in the Pacific and Atlantic Oceans;
- The Tax Cuts and Jobs Act of 2017 opened a portion of Arctic National Wildlife Refuge (ANWR) to oil drilling and other energy development and requires the federal government to hold two lease sales within seven years;
- A U.S. District Court in California held that the BLM, in its efforts to implement Executive Order 14783, violated the Administrative Procedures Act when it postponed the compliance dates for certain sections of the BLM’s Rule relating to the venting, flaring, and royalty-free use of gas, after the rule’s effective date had already passed;
- A Colorado appeals court potentially changed the focus of the Colorado Oil and Gas Conservation Commission when it held that “the clear language of the Act ... mandates that the development of oil and gas in Colorado be regulated subject to the protection of public health, safety and welfare, including protection of the environment and wildlife resources.”;
- The New Mexico Oil Conservation Division issued a Notice to operators May 5, 2017 specifying that oil gathering lines are subject to health and safety regulations that previously were understood to apply to gas gathering lines;

- Ohio's appellate court addressed, as a matter of first impression, Ohio's standard for determining whether an oil and gas lease is producing in paying quantities;
- Ohio's appellate court also ruled that landmen in Ohio were required to obtain real estate broker's licenses in order to be entitled to compensation for brokering deals with landowners on behalf of oil and gas companies;
- Contrasting cases in Oklahoma where Oklahoma's Court of Appeals reversed a district court order certifying a hybrid class comprised of approximately 48 legal issues, concluding that the requirements for class certification were not met, while the Western District Court of Oklahoma granted certification of a limited class despite the variety of royalty provisions presented in the case;
- A federal court in Oklahoma dismissed a lawsuit by Sierra Club against several oil and gas companies under the *Burford* abstention doctrine and primary jurisdiction doctrine where plaintiffs sought declaratory and injunctive relief under the citizen suit provision of the Solid Waste Disposal Act, amended as the RCRA, alleging deep injection of liquid waste from oil and gas production has contributed, and continues to contribute, to an increase in earthquakes throughout the State of Oklahoma;
- The Pennsylvania Supreme Court issued a landmark decision holding that the Environmental Rights Amendment to the Pennsylvania Constitution created a trust in which proceeds that the Commonwealth generates by selling its oil and gas reserves remain in the corpus of the trust and are to be used for conservation and maintenance purposes and not diverted to other programs;
- A case in Texas highlighted the potential pitfall of a vaguely worded reservation, which read as "the 160 acre proration unit surrounding said well," when it held the reservation void, stating that merely identifying the property as some specific quantum of acreage surrounding a well does not meet the demands of the statute of frauds;
- In *Wyoming v. Zinke*, the district court set aside the BLM's March 2015 hydraulic fracturing regulation and the Tenth Circuit dismissed the appeal as prudentially unripe after the BLM asked the court to hold the case in abeyance based on 2017 Executive Orders.

K. [Public Land and Resources](#)

The year 2017 saw the nullification of BLM's recently-promulgated land use planning rule, and the Trump Administration's reduction in size of the Bear's Ears and Grand Staircase-Escalante National Monuments. On December 12, 2016, the BLM issued the final Planning 2.0 rule. However, through the Congressional Review Act, Congress passed and President Trump signed a joint resolution disapproving the final Planning 2.0 rule, and declaring the rule to have no force or effect.

On April 26, 2017, President Trump issued an executive order for Interior Secretary Zinke, among other things, to review all Antiquities Act designations made since January 1, 1996, where the designation covers more than 100,000 acres, and to make recommendations regarding those designations. Secretary Zinke provided a draft report indicating review of eight national monuments including Grand Staircase-Escalante and Bears Ears. On December 4, 2017, President Trump issued two proclamations: one reducing Bears Ears by approximately 1.15 million acres and the other reducing Grand Staircase-Escalante by approximately 860,000 acres, and identifying the remaining monument as three separate units (to be known as Grand Staircase, Kaiparowits, and Escalante Canyons). Legal challenges were filed.

Two environmental groups challenged BLM's approval of four Wyoming Powder River Basin coal mining leases issued pursuant to BLM's authority under FLPMA and the Mineral Leasing Act. BLM prepared an environmental impact statement on the leases following NEPA regulations and took into consideration carbon dioxide emissions and impacts on climate change. However, the Tenth Circuit Court of Appeals agreed with the environmental groups holding the BLM's environmental impact statement (EIS) and resulting records of decision (RODs) were arbitrary and capricious. The court remanded the matter with instructions to require BLM to revise its EIS and RODs; the court did not, however, vacate the resulting leases.

The Federal Claims Court held that the U.S. Fish and Wildlife service had taken actions that amounted to a taking under the U.S. Constitution. The court found that a cattle grazing association had established ownership of water rights prior to the creation of a national forest and had shown beneficial use of the water. The U.S. Fish and Wildlife had fenced off bodies of water in an effort to protect the habitat of the Sacramento Mountains Thistle after it was proposed to be designated as threatened under the Endangered Species Act. The court held that the actions by U.S. Fish and Wildlife effected a taking of the cattle grazer's right to beneficial use of stock water since it denied all access to a property interest.

Finally, the Committee provides an update on a case involving R.S. 2477 roads and transfer of property from public to private ownership; a report on a case involving the federal Quiet Title Act and its 12-year statute of limitations; and a challenge to a BLM proposal to remove wild horses in an overpopulation situation from a range in Utah's Cedar Creek mountains.

L. Renewable, Alternative, and Distributed Energy Resources

In 2017, multiple state public utility commissions reduced avoided cost calculations and/or contract lengths for Public Utility Regulatory Policy Act (PURPA) qualifying facilities. PURPA requires electric utilities to purchase energy and capacity from qualifying renewable energy facilities ("QFs"), and the rates are based on the utility's avoided costs. The Michigan Public Service Commission (MPSC) laid out the framework for its new PURPA policy that is anticipated to spur new development of solar energy facilities. The Montana Public Service Commission (PSC) cut avoid cost rates for solar projects up to three MW by 40% and reduced contract lengths from twenty-five years to five years, but subsequent action by the PSC spawned a lawsuit by solar advocates. The North Carolina Public Utilities Commission (PUC) ordered utilities to recalculate avoided costs rates paid to PURPA qualifying facilities after passage of HB 589, which lowered the eligibility for standard offer contracts under PURPA.

The RADER committee also provides an update on the total electric power consumed reporting that in October 2017, 296,077 million kilowatt hours (Kwh) was consumed, a 0.2% drop from the 296,681 million Kwh consumed in October 2016. The source of the energy consumption for the month of October 2017 when compared to October 2016 increased 21.9% from wind and 50.5% from solar Thermal and Photovoltaic. Additionally, the first offshore wind farm in the United States, off Block Island, Rhode Island, officially began generating electricity in December 2016. The Committee also notes that the Federal Housing Authority announced it would no longer allow Property Assessed Clean Energy (PACE) programs for its properties based on consumer protection concerns. PACE is a means of financing energy savings infrastructure investment.

One of several committees to offer updates on the Paris Climate Agreement and the EPA's Clean Power Plan, the RADER Committee highlights that soon after President Trump's announcement to opt out of the Paris Agreement, fourteen U.S. states declared that they would meet or exceed the Paris accord climate change goals. Additionally, the

EPA updated its publication entitled “Smart Growth Fixes for Climate Adaptation and Resilience: Changing Land Use and Building Codes and Policies to Prepare for Climate Change.” This publication provides policy discussions and recommendations on local government smart growth strategies, increased precipitation and flood potential and management strategies, green building and energy efficiency measures, water conservation, and wildfire management and control.

There were also several interesting articles on topics related to the Paris Agreement and Clean Power Plan including an article that opines that the Trump Administration’s efforts to end the “war on coal” “may actually result in a less effective, or at least slower, implementation process.” Another article opines that the Renewal Fuel Standards (RFS) program will continue to incentivize private efforts to reduce greenhouse gas emissions and, as a result, federal prosecution of renewable fuels fraud cases will continue. A series of articles in 2017 showed support for a carbon tax so that the market, not politicians, would determine which strategies or technologies are best. Finally, the Committee highlights an article discussing the *Sierra Club v. FERC* decision where the D.C. Circuit agreed that downstream GHG impacts were “reasonably foreseeable” and, therefore, should have been considered by the Federal Energy Regulatory Commission (FERC) when completing its EIS for a natural gas pipeline.

M. [Water Resources](#)

Like the Oil and Gas Committee, the Water Resources Committee reports developments on a state by state basis. Here are some noteworthy highlights:

- The United States and Mexico agreed to update and extend a 2012 agreement regarding conservation and allocation of Colorado River water;
- The First Circuit Court of Appeals ruled in favor of the State of Maine in *Penobscot Nation v. Mills*, finding that the tribe had authority only over the reserved lands on the river and not over the water itself, based on the “plain meaning” of the Maine Implementing Act;
- In what is believed to be the first case in which an appellate court has found that the issuance of a Supplemental EIS and Record of Decision constituted changed circumstances worthy of reconsidering the scope of an injunction, the D.C. Circuit Court of Appeals overturned the district court and remanded with instructions to modify an injunction in a case concerning a project to transfer water between river basins for the Northwest Area Water Supply;
- The Montana Supreme Court ruled that a ranch owned *Walton* rights under the Crow Tribal Compact after a conveyance of fee lands from a tribal member to the ranch;
- Nevada passed a law that exempts from permit requirements the “de minimus collection of precipitation from the rooftop of a single-family dwelling for nonpotable domestic use or, under certain circumstances, in a guzzler to provide water to wildlife”;
- The State of Oklahoma and the Chickasaw Nation and Choctaw Nation of Oklahoma reached a settlement agreement to allow Oklahoma City to access water from Sardis Lake and the Kiamichi River;
- In South Dakota, a new law includes a provision that makes all nonmeandered waters overlying private property open for recreation unless the landowner marks the area as closed; entrance upon the private property or a closed section of water without landowner permission constitutes a criminal trespass;

- The surface water rights adjudication in the Yakima River basin marked its 40th year with a Proposed Final Decree to bring the proceeding to conclusion in 2018;
- Nestlé Waters North America submitted a permit application to the Michigan Department of Environmental Quality seeking to increase their pumping for bottled water operations in Michigan to 400 gallons per minute.

IV. CROSS PRACTICE COMMITTEES

A. [Alternative Dispute Resolution](#)

Alternative dispute resolution (ADR) played a key role in resolving a variety of environmental disputes in 2017. In a Texas case, the Texas Supreme Court rejected an argument that an arbitration panel exceeded its authority by awarding damages not permitted under Texas law. The court found that the arbitration clause gave the arbitrators broad authority to determine the scope of the arbitration clause, what damages Texas law allows, and authority to determine the amount of those damages. In Kansas, the Court of Appeals heard an appeal about the scope of a pipeline easement as part of a mediated agreement when the oil and gas company sought to install additional pipelines in the easement. The Court of Appeals affirmed the district court's ruling that the easement was enforceable and precluded additional pipelines.

The Committee provided some examples of how ADR and settlement continue to play a role in resolving environmental law disputes. These include a settlement between the U.S. EPA, the State of Colorado, and PDC Energy, Inc. addressing oil and gas tank batteries that leaked volatile, smog-causing compounds into the air. Also, the EPA settled a lawsuit brought by a mining company seeking to develop the proposed Pebble mine near Alaska's Bristol Bay after the EPA effectively vetoed the project before any permit applications were filed. The settlement requires the EPA to withdraw the proposed permit determination.

Settlements involving Indian tribes require Congressional approval. Senator Jerry Moran (R-KS) introduced the Kickapoo Tribe in Kansas Water Rights Settlement Agreement Act to authorize a settlement the Tribe and the State of Kansas that would confirm the Tribe's consumptive right of up to 4,705 acre-feet of water annually for any purpose. Additionally, the U.S. District Court for the District of Columbia gave claimants until November 27, 2017 to file claims as part of the *Cobell v. Salazar* settlement. The \$3.4 billion settlement, reached in 2009, resolved a class action lawsuit against the United States for federal mismanagement of Indian trust funds.

Two notable water settlements from 2017: in Hawaii, the State Water Commission approved a mediated settlement in April to restore continuous flows in the Waimea River and provide for a possible renewable energy project, farming, and Hawaiian homesteading; and, Environment America and the Sierra Club announced a settlement with Pilgrim's Pride, the world's second-largest chicken producer, over alleged violations of the Clean Water Act in Florida's Suwanee River.

In October, EPA Administrator Scott Pruitt issued a directive intended to end the so-called practice of "sue and settle," in which federal agencies settle environmental disputes and then use the settlements as the basis for new regulations or other action. Settlements have been a driving force behind some recent and controversial EPA regulations, particularly CAA regulations such as former President Obama's Clean Power Plan. Environmental groups, however, have largely condemned the directive as hindering their right to compel EPA to fulfill its statutory obligations. Attorney General Jeff Sessions also issued a memorandum prohibiting federal attorneys from negotiating criminal and

civil settlements that require companies to donate to nongovernmental or other third parties.

B. Climate Change, Sustainable Development, and Ecosystems

The Climate Change, Sustainable Development, and Ecosystems Committee (CCSDE) is a cross-practice committee focusing on the law and policies related to climate change, sustainable development, and ecosystems.

2017 represented a marked change in federal policies from the prior eight years with the inauguration of President Trump, engendering reaction from a range of stakeholders, including state and local governments. The following are highlights of the year, and these and other important developments are explained in detail in the committee's chapter of this year in review.

In June 2017, President Trump announced his intent to withdraw the United States from the Paris Agreement, leaving the U.S. as the sole party to the United Nations Framework Convention on Climate Change (UNFCCC) to choose not to abide by the landmark climate change accord. Trudging on, Parties met in Bonn, Germany at the Twenty-Third Session of the Conference of the Parties (COP23) to the UNFCCC, where discussions focused on developing a rulebook for implementing the Paris Agreement to be completed by COP24 in Katowice, Poland in December 2018. Several countries (Chile, Colombia) and Alberta, Canada began implementing carbon taxes this year and Ontario, Canada opened an emissions trading scheme, which will be linked with California and Québec.

Although the U.S. plans to exit the Paris Agreement, in December 2017, the Trump Administration announced its support, pending Senate ratification, for the Kigali Amendment to the Montreal Protocol. The Amendment adds hydrofluorocarbons (HFCs) to the list of controlled substances and establishes a legally binding freeze and gradual phase-down plan for nearly all countries to reduce their HFC consumption to 15-20 percent of baseline levels by mid-century. The Kigali Amendment is focused on the global warming potential of HFCs, rather than just the depletion of the ozone layer.

Complicating domestic compliance, a prior Obama-era effort that could potentially implement the Kigali Amendment was struck down by the D.C. Circuit. The court invalidated a 2016 EPA regulation requiring substitutes of safe alternatives under Title VI of the CAA that was based on the alternatives' global warming potential, opining that regulation of global warming under Title VI was not permissible.

On the domestic front, President Trump issued several Executive Orders (EOs) that impact climate change regulations issued by the Obama Administration. The EOs included directives to review and, if appropriate, replace or repeal regulations that address climate change, such as the Clean Power Plan (CPP).

The D.C. Circuit granted EPA's motion, over vehement opposition, to place the challenges to the CPP in abeyance while EPA considers what to do next on this regulation. On this front, EPA issued an advance notice of proposed rulemaking (ANPR) seeking comment on whether and how to replace the CPP if it is repealed.

As to regulation of methane from the oil and gas industry, EPA withdrew the information collection request (ICR) that was issued by the prior administration to oil and gas companies to gather data to issue an existing source methane standard for the sector pursuant to CAA Section 111(d). For the already promulgated standard, EPA issued a 3-month stay of the New Source Performance Standards (NSPS) for methane emissions from the oil and natural gas sector (referred to as Quad Oa). The D.C. Circuit vacated that stay. EPA then proposed an additional 3-month and 2-year stay of Quad Oa requirements, the

most significant aspect being extensive leak detection and repair obligations, which were not yet finalized at the end of the year.

The D.C. Circuit granted EPA's motion to hold in abeyance the challenges to its 2016 final endangerment finding for GHG emissions from certain classes of engines used in aircraft contribute under CAA Section 231(a) and the challenges to the Phase 2 GHG emissions standards and fuel efficiency standards for Medium-and-Heavy-Duty Engines and Vehicles.

The Trump administration also targeted fuel economy standards. EPA and the National Highway Transportation Safety Administration (NHTSA) announced the administration's intent to revisit the EPA January 12, 2017 conclusion of the Midterm Evaluation of the GHG standards established for MY2022-2025 light duty vehicles, which were issued in a 2012 final rule establishing national GHG emissions standards under the CAA and Corporate Average Fuel Economy (CAFE) standards for model years (MY) 2017-2025 light-duty vehicles.

Local governments and states have taken steps to address climate change – both in the courts and through regulatory action. Local governments filed lawsuits primarily against oil companies asserting nuisance claims for climate change-related injuries to their communities. These landmark cases raise important jurisdictional issues that will be addressed in the coming year.

In response to the intended Paris Agreement withdrawal and other federal actions revising, reversing, or reviewing the prior administration's climate regulations, several regional, state, local, and private actors increased their commitments to address climate change, including the formation of several new coalitions and alliances. Among these, fourteen governors formed the U.S. Climate Alliance, declaring an intent to honor the U.S. Paris Agreement commitments.

Member states of the Regional Greenhouse Gas Initiative (RGGI) agreed on a plan to extend the cap-and-trade program through 2030, setting the GHG emissions cap on the region's power sector at 65 percent below 2009 levels by 2030. Similarly, California adopted AB 398 to extend California's cap-and-trade program through 2030. Virginia announced its plans to regulate CO₂ from its power plants and intent to join RGGI. Meanwhile, Massachusetts adopted a suite of climate regulations, including carbon and clean energy standards for power plants, while Maryland increased its renewable portfolio standard.

Trump administration executive actions reversed many of President Obama's policies to promote climate adaptation and resilience at federal, state, and local levels. President Trump's EO 13783, "Promoting Energy Independence and Economic Growth," revoked or rescinded several key directives and documents guiding the integration of climate change resilience into federal agencies' decision-making processes. It also rescinded the Obama administration's President's Climate Action Plan and revoked EO 13653, "Preparing the United State for the Impacts of Climate Change." Notwithstanding these federal actions, a wide variety of states and localities from across the political spectrum continue to incorporate such adaptation and resilience considerations into planning decisions, including the creation of new state-level executive positions and inter-agency commissions to help prepare for climate change.

While the Trump Administration has revisited many of the Obama Administration programs on climate change, it did not rescind EO 13693, an order that directs agencies to set energy and resource targets for the next decade. Nevertheless, the administration's 2018 EPA budget recommended terminating select sustainability programs such as pollution prevention and volunteer climate programs like Energy Star. These recommendations were rejected by the House of Representatives. Sustainability efforts continue at the state level with 32 states having adopted legislation authorizing "benefit" corporations," which allows

companies to go beyond the fiduciary duty of maximizing stockholder value to address social, environmental and employee benefit.

Global ecosystem conservation was largely enhanced in 2017. Pacific nations led the way, helping to raise the share of oceans covered by protected areas to nearly seven percent. Most notably, the Cook Islands approved legislation creating Marae Moana, the world's largest marine park (about the size of Mexico), covering the entirety of the country's Exclusive Economic Zone (EEZ). Likewise, Chile created three new marine protected areas and expanded others, bringing 46 percent of their EEZ under protection. China made great strides in implementing its national park system. Leaders announced China's plan for the national park system, guiding large ecosystem conservation measures at both the national, provincial, and regional levels. This year, China created the Great Panda National Park (three times larger than Yellowstone) and a national park in the northeast (60 percent larger than Yellowstone) that will serve as habitat for critically endangered big cats.

Despite the year's progress, actions by Australia and the U.S. have caused alarm among conservationists by establishing precedent for scaling back both the scope and coverage of protected areas. In July, Australia announced plans to dramatically scale back protections for a network of 42 marine reserves. In April, President Trump directed Department of Interior (DOI) Secretary Ryan Zinke to review prior national monument designations and expansions for compliance with the Antiquities Act of 1906. Trump directed a similar review of marine monuments and sanctuaries by the Secretary of Commerce. Based on Secretary Zinke's recommendation, on December 4, 2017, President Trump "modified and reduced" the 1996 proclamation creating the Grand Staircase-Escalante National Monument, replacing the monument with three smaller monuments that together encompass about half of the land protected in 1996. Similarly, President Trump "modified and reduced" the Bears Ears National Monument which had been set aside by President Obama less than a year earlier, removing approximately 85 percent of the land from the monument and replacing it with two smaller monuments. President Trump also issued EO 13795, opening up millions of acres of federal waters in the Arctic and Atlantic Oceans for oil and gas leasing, reversing President Obama's prior orders under the Outer Continental Shelf Lands Act banning such activity. On land, Congress opened up Alaska's ANWR to oil drilling, as part of the tax reform legislation passed in December 2017.

C. [Constitutional Law](#)

The Committee highlights cases at the intersection of constitutional law and environmental, energy, and natural resources law occurred in the areas of standing, the Commerce Clause, preemption, takings, due process, the First Amendment, and the Eleventh Amendment.

In *Town of Chester*, intervenors argued that, although they must of course meet the requirements of Federal Rule of Civil Procedure 24 for intervention, it would be inefficient and serve no purpose to also impose standing requirements on them when the original plaintiffs clearly have standing. The Court rejected this argument and held that intervenors must demonstrate standing anytime they seek relief that is different from the relief plaintiffs seek.

The Committee discusses several cases involving the dormant Commerce Clause. A few involved city ordinances relating to pet stores. In a case involving the extraterritoriality prong of the dormant Commerce Clause, the Seventh Circuit Court of Appeals struck down an Indiana state law that placed specific requirements on the manufacturing process of e-liquids used in e-cigarettes and e-devices sold within Indiana's

borders. The court held that Indiana failed to justify imposing extraterritorial requirements on out-of-state manufacturers and as such was in violation of the extraterritoriality prong of the dormant Commerce Clause.

The Committee highlights numerous preemption cases. The circuit courts of appeals focused on whether federal energy laws preempted state efforts to foster renewable energy sources and other preemption claims. Several district court opinions analyzed claims of federal conflict preemption of state laws under the Federal Energy Act or state tort claims that clashed with the CERCLA.

D. International Environmental and Resources Law

At the Twenty-Third Session of the Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC), discussions focused on implementation of the Paris Agreement. The U.S. is the only Party that has indicated it will not abide by the Paris Agreement. In 2018, a facilitative dialogue (the “Talanoa dialogue”) will be held “to take stock of the collective efforts of Parties” to achieve the Paris Agreement and “inform the preparation of [their] nationally determined contributions.” Several significant climate financing initiatives were announced, including a partnership between UN Environment and BNP Paribas that aims to fund \$10 billion worth of sustainable projects in developing countries by 2025, an EU commitment to invest €9 billion in sustainable cities, energy, and agriculture by 2020, and a commitment by French insurance company AXA to invest €12 billion in sustainable projects by 2020.

After the Twenty-Eighth Meeting of the Parties (MOP28) to the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), the Kigali Amendment to the Protocol had been ratified by twenty-three parties the threshold number required for the treaty to enter into force. The Amendment adds hydrofluorocarbons (HFCs) to the list of substances controlled under the Montreal Protocol and establishes a freeze and gradual phase-down of HFC consumption.

Overall, 2017 represented a positive year for protected area conservation around the world. Many nations strengthened domestic efforts to conserve existing or establish new protected areas in line with UN Sustainable Development Goal (SDG) 14 (conserve and sustainably use the oceans, seas and marine resources for sustainable development) and the Convention on Biological Diversity’s Aichi Target 11, which seeks to conserve 17% of terrestrial and inland water and 10% of coastal and marine areas as effectively managed protected areas by 2020. Global marine conservation also made significant strides this year. Over 80 countries and 1,000 participants affirmed their commitment to meet SDG14, establish well-managed Marine Protected Areas (MPAs) inside and outside national jurisdictions, and integrate local and indigenous communities into management approaches. Several other MPAs were announced at the UN Oceans Conference (New York, June 2017) and Our Oceans Conference (Malta, October 2017).

China continued to make good on Xi Jinping’s goal to create a national park system. In September 2017, China released its plan for the national park system, setting forth the top-down design of its national park system, which will follow the principle of “ecological protection first” to conserve its large ecosystems.

In a reversal from last year, the U.S. President changed the Arctic energy policy approach by revoking conservation protections for the Bering Sea and Bering Strait and calling for reconsideration of the ban on offshore drilling in the Arctic and of proposed offshore air quality regulations. The U.S. Government also released a Draft Environmental Impact Statement for a second project in the Beaufort Sea; if that project is approved, it could become the first-ever production facility completely in federal Arctic waters.

The thirteenth meeting of the Conference of the Parties (COP13) for the Basel Convention on the Transboundary Movements of Hazardous Wastes and Their Disposal (Convention). In furtherance of efforts to improve the effectiveness of the Convention, the Parties adopted practical manuals prepared by the expert working group for the promotion of the environmentally sound management (ESM) of wastes, as well as general, non-binding technical guidelines for ESM of wastes consisting of or contaminated with persistent organic pollutants (POPs).

The Minamata Convention on Mercury entered into force on August 16, 2017, with ratification by over 50 Parties. The first meeting of the Conference of the Parties to the Minamata Convention (COP1) convened in Geneva, Switzerland in September.

On September 8, 2017, the Ballast Water Management Convention was implemented. The Convention seeks to halt the spread of potentially invasive aquatic species in ships' ballast water. U.S. Secretary of State, Rex Tillerson, signed an environmental agreement among eight nations adopting the first Arctic Invasive Alien Species (ARIAS) strategy and action plan. The purpose behind adopting ARIAS is to encourage prevention, keeping invasive alien species from entering the Arctic.

In February 2017, the U.S., in cooperation with the International Consortium to Combat Wildlife Crime, joined enforcement agencies from more than 40 countries in Operation Thunderbird. The 3-week international enforcement operation resulted in the identification of nearly 900 suspects and 1,300 seizures of illicit products worth an estimated USD 5.1 million. Yet, the Trump Administration published new guidelines and began allowing the import of lion trophies from Zimbabwe and Zambia, with imports from Tanzania, Mozambique, and Namibia still under review and announced it was lifting restrictions on the import of elephant trophies from Zimbabwe and Zambia.

On April 25, 2017, the latest dispute between the United States and Mexico (US – Tuna II) over the importation of yellowfin tuna was decided by arbitration at the World Trade Organization. Mexico stated that even though its fishing practices adhered to international standards, it was still refused the dolphin-safe label. The WTO arbitrator found in favor of Mexico but determined the loss to be \$163 million per year, far under Mexico's claimed losses. This decision allows Mexico to recover \$163 million annually from the U.S. in retaliatory measures such as suspending concessions and other obligations.

On May 18, 2017, the Trump administration informed Congress that the President intended to commence negotiations with Canada and Mexico on the North American Free Trade Agreement "to support higher-paying jobs in the United States and to grow the U.S. economy by improving U.S. opportunities under NAFTA."

The Committee discusses several climate change related litigations: one where a Peruvian farmer and mountain guide sued a German electric utility as having caused climate change, which is causing the glacial lake in Lliuya's area to grow and flood nearby lands; one where twenty-one young plaintiffs ages 8 to 19 sued the U.S. Government alleging that, in allowing excessive amounts of greenhouse gases to be emitted in the U.S., the government violated their generation's constitutional rights to life, liberty, and property, and breached its duty to protect public resources; a nine-year-old from India, filed a petition with the National Green Tribunal of India arguing that pursuant to the Public Trust Doctrine India is required to take action to mitigate the effects of climate change; and, environmental groups and Filipino citizens filed a petition with the Philippine Commission on Human Rights, requesting that the commission investigate 50 "Carbon Majors," defined as producers of crude oil, natural gas, coal, and cement that are allegedly responsible for the majority of global carbon dioxide and methane emissions since the onset of the industrial revolution.

E. [Science and Technology](#)

The Science and Technology Committee evaluates scientific and technological issues and trends in litigation, federal and state regulatory regimes, and legislative developments in practice areas across the spectrum of environmental, energy, and natural resources law. This year's annual report covers two topics in which there were developments in 2016. Part I provides a summary of the EPA updates to and progress relating to the TSCA. Part II discusses current climate change science and litigation concerning the same.

EPA Administrator Scott Pruitt grabbed national headlines by suggesting a formal debate over the science supporting the role of humans in changing global climate. Pruitt discussed the possibility of a scientific debate in the course of a press interview to Reuters in July 2017. The debate concept apparently adopted the red team/blue team model of the U.S. military used to assess operational vulnerabilities and question underlying assumptions. However, by the end of the year, the debate proposal was deferred. Although a formal explanation was not given for this decision to proceed in a glacial manner, news sources reported that there were still many "issues" to be resolved about such a debate.

The EPA began implementing key provisions of the Frank R. Lautenberg Chemical Safety for the 21st Century Act ("Lautenberg Act"), which amended the TSCA. One provision addresses the need to address thousands of chemicals grandfathered under the original Act that never underwent any TSCA review. The Lautenberg Act establishes a two-step process for prioritizing and then evaluating existing chemicals. The EPA published the Inventory Reset Rule, which contains retrospective reporting requirements and prospective reporting requirements for chemical manufacturers and processors. It also governs how claims of confidential business information ("CBI") are handled. The EPA also published its Prioritization Rule for classifying active chemical substances as high-priority or low-priority and the Risk Evaluation Rule, which establishes the process for determining whether a chemical "presents an unreasonable risk of injury to health or the environment, without consideration of costs or other non-risk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation by the Administrator under the conditions of use." Several lawsuits were filed by environmental groups challenging each of the three framework rules published by the EPA.

F. [Ethics and the Profession](#)

This chapter reports on activities of the American Bar Association's Standing Committee on Ethics and Professional Responsibility, state bar association and other disciplinary boards, and emerging issues relevant to the intersection of legal ethics and environmental law. The rules of ethics apply to all lawyers, including lawyers who practice in the areas of environment, energy, and resources, and all lawyers should be aware of and maintain compliance with the rules of their jurisdictions. The potential risks to public health and safety from violations of environmental law makes the stakes high for environmental lawyers concerned about ethics rules.

The ABA's Standing Committee on Ethics and Professional Responsibility released a Working Draft of proposed amendments to the Model Rules of Professional Conduct concerning lawyer advertising.

The ABA's Standing Committee on Ethics and Professional Responsibility ("Standing Committee") released three ethics opinions in 2017. One (Formal Opinion 478) concerns independent factual research by judges using the Internet and is not addressed here. The other two are summarized by the Committee. Formal Opinion 477 determines

that lawyers may (and indeed likely must) continue to use computer-based technology to store client information and communicate with clients, but while doing so, lawyers must “exercise reasonable efforts” to protect the information and communications. The Formal Opinion concludes with the caution that under Model Rule 1.4, the duty to communicate may require the lawyer to specifically communicate with the client about the risks of email when highly sensitive confidential client communications are involved, and confirms that clients may require communication methods with security protections either more or less stringent than those normally used by the lawyer.

Formal Opinion 479 gives guidance about the “generally known” standard, and explains that it does not equate to “publicly available,” on the “public record,” as a “matter of public record,” or “available to be known if members of the general public choose to look where the information is to be found.”

The Committee also reports on some developments in the courts. These cases demonstrate the wisdom in disclosing co-counsel representation or fee-sharing arrangements to clients or the court and the scope of Model Rule 4.4 and inadvertent delivery of documents or information relating to the representation of a client.

The Year in Review 2017

Chapter 1 • AGRICULTURAL MANAGEMENT

2017 Annual Report¹

I. THE FARM BILL

The current Farm Bill (Agricultural Act of 2014) expires on September 30, 2018. The committees responsible for drafting the next iteration of the Farm Bill started work on the massive piece of legislation at the end of 2017. Both the House and Senate Agriculture Committees are trying to jumpstart discussions in hopes of rolling out the 2018 Farm Bill on time.² But with tax reform taking center stage in Congress, the possibility of an early start on the 2018 Farm Bill is looking grim.

President Trump's initial 2018 budget proposal, which included a \$230 billion reduction to various programs under the Bill over the next ten years, provided little hope for positive change in the 2018 Farm Bill.³ By way of comparison, the 2014 Bill directed cuts of approximately \$23 billion over 10 years to various programs.⁴ Farm groups were granted a reprieve when the Senate budget resolution, adopted by the House on October 26, 2017, contained no funding cuts to Farm Bill programs.⁵ But Congress' budget blueprint did not authorize higher levels of funding, which program proponents aggressively lobbied for in response to the 2014 Farm Bill funding decrease.

For some, the 2018 Farm Bill is an opportunity to push for large-scale environmental change with many groups initiating campaigns to focus on sustainability and conservation programs. Key proposals include emphasizing climate change adaptation and mitigation in agriculture⁶ and increasing funding for the Conservation Reserve Program (CRP). Without additional funding, the CRP will need creative solutions to restructure the program and allow for increased qualifying acreage.⁷

The ability of the House and Senate Agriculture Committees to advance discussions in early 2018 will determine whether Congress can meet the September deadline. But one thing is for sure: this next iteration of the Farm Bill comes at a time of uncertainty in the farm economy fueled by low commodity prices, international trade concerns, and other potential Trump Administration policy changes.

¹Contributors include: Krystal D. Williams, Associate, Pierce Atwood, LLP, Portland, ME; Thomas P. Redick, Global Environmental Ethics Counsel, LLC, Clayton, MO; Corey Brown, J.D., Domestic Policy Advisor, National Pork Producers Council, Washington, D.C.; Rebecca Bratspies, J.D., Professor, CUNY School of Law, Long Island City, NY; Rosemary E. Hambright, J.D., Public Utilities Commission of Texas, Austin, TX; Alan J. Sachs, Principal, Beveridge & Diamond, P.C., Washington, D.C.; Luke A. Westerman, Associate, Bryan Cave, LLP, St. Louis, MO.

²Jacqui Fatka, [Congress Gears Up For New Farm Bill](#), FARM FUTURES (Oct. 27, 2017).

³John Newton & Jaime Luke, [Farm CBO Evaluates Impact of Trump's Budget on Agriculture](#), FARM BUREAU (Jan. 18, 2018).

⁴Karen James Sloan, [Trump Budget Proposal Has Many US Farmers Reeling](#), CNBC (June 1, 2017).

⁵Philip Brasher, [Senate Budget Spares Farm Bill](#), AGRI-PULSE (Sept. 29, 2017).

⁶[An Agenda for the 2018 Farm Bill](#), NAT'L SUSTAINABLE AGRIC. COAL. (Oct. 2017).

⁷Tom Steever, [More CRP Acres Possible in 2018 Farm Bill](#), BROWNFIELD (Dec. 4, 2017).

II. THE TRUMP ADMINISTRATION AND AGRICULTURAL TRADE

U.S. farmers struggled as net farm income decreased by more than \$43 billion from 2013 to 2016.⁸ U.S. Department of Agriculture (USDA) Secretary Sonny Perdue and many agricultural groups believe U.S. farm income woes may be solved by trade agreements⁹ and increasing exports.

A. *Trans-Pacific Partnership (TPP)*

Shortly after his inauguration, President Trump pulled the U.S. out of TPP negotiations.¹⁰ The U.S. farm community was split on whether or not it was a beneficial agreement for farmers. The American Farm Bureau Federation (AFBF) broadly supported TPP, while community and environmental groups held strong reservations.¹¹

The AFBF and the National Cattleman's Beef Association (NCBA) estimated that withdrawing from TPP would result in an annual loss of \$4.4 billion to U.S. net farm income, including a \$400,000 daily drain on U.S. cattle ranchers.¹² The predicted losses stem from the U.S.'s loss of benefits reserved for TPP-member countries. For example, Canada conceded a 3.25% increase of foreign access to its dairy market to other TPP members.¹³ In addition, TPP would have allowed for tightened control over intellectual property rights in seeds and plant varieties, and TPP contains confidential business information protections which arguably could have been utilized for expediting approvals of biotechnology product imports.¹⁴ The remaining eleven TPP members decided to continue to negotiate the trade deal without U.S. involvement and renamed it the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.¹⁵

B. *North American Free Trade Agreement (NAFTA)*

Canada, Mexico, and the U.S. entered into [NAFTA](#) in 1994. NAFTA is credited with opening robust markets for U.S. corn and beef in Mexico and Canada¹⁶ and

⁸[Economic Research Service, Farm Income and Wealth Statistics](#), USDA (last visited Apr. 30, 2018).

⁹See USDA FOREIGN AGRICULTURAL SERVICE, [International Agricultural Trade Report](#) (June 2016).

¹⁰Presidential Document, [Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement](#), 82 Fed. Reg. 8497 (Jan. 25, 2017).

¹¹See AM. FARM BUREAU FED'N, [Comments Regarding the Effects of the Trans-Pacific Partnership on the United States Agricultural Sector](#) (2016); [Letter from Citizens Trade Campaign to Members of Congress](#) (Jan. 7, 2017).

¹²AM. FARM BUREAU FED'N, [Trans-Pacific Partnership \(TPP\) Agreement](#); NAT'L CATTLEMEN'S BEEF ASS'N, [Cattlemen Express Concerns with Trump Administration's Trade Action](#) (Jan. 23, 2017).

¹³TPP, Appendix A Tariff Rate Quotas of Canada.

¹⁴See TPP, Arts. 16.2(8), 18.9(2), Annex 18-A(1). See also Karen Hansen-Kuhn, [Trump and Trade: The Perils for Agriculture](#), FOREIGN POLICY IN FOCUS (Jan. 10, 2017).

¹⁵Alexandra Stevenson & Motoko Rich, [Trans-Pacific Trade Partners Are Moving on, Without the U.S.](#), N.Y. TIMES (Nov. 11, 2017).

¹⁶[AG Industry Letter to Trump Highlights NAFTA Successes](#), NAT'L CORNGROWERS ASS'N (Jan. 24, 2017); Ashley Davenport, [What NAFTA Renegotiations Will Mean](#), AG WEB (May 8, 2017).

quadrupling U.S. agricultural exports to these countries from \$8.9 billion in 1993 to more than \$38 billion in 2017.¹⁷ Yet, President Trump characterizes NAFTA as a “disaster” and a “horrible deal for the United States.”¹⁸

On May 18, 2017, U.S. Trade Representative (USTR) Lighthizer informed Congress of President Trump’s intention to renegotiate NAFTA.¹⁹ According to Lighthizer, the U.S.’s NAFTA-renegotiation agenda would include environmental and resource concerns such as regulatory practices, sanitary and phytosanitary measures, and environmental protection.²⁰ The announcement triggered a mandatory 90-day consultation process designed to develop more clear negotiation goals and positions.²¹

During that time, the Trump Administration worked with Congress, reviewed comments, and listened to testimony.²² The National Pork Producers Council and NCBA commented they wanted no changes made to NAFTA provisions affecting pork, beef, and cattle, but U.S. feed seeds exporters and dairy suppliers said they like to see lower phytosanitary barriers into Mexico and changes to Canada’s dairy pricing practices.²³

The USTR published its final negotiation agenda on July 17, 2017, and released updated negotiating objectives in November 2017.²⁴ There have been five rounds of NAFTA re-negotiations and no final agreement has been reached. Observers have identified two key points in the ongoing talks: (1) agricultural market access, which some observers describe as “the area where U.S. negotiators often make incremental progress from agreement to agreement”,²⁵ and (2) “the seasonality poison pill.”²⁶ Also of note is the continued and vocal opposition of the U.S. agricultural lobby against Trump’s apparent willingness to terminate NAFTA, which Trump himself has called a negotiating tactic.²⁷ The eighth round of renegotiations is anticipated to take place in April in Washington, D.C.

¹⁷[Statement by AFBF President Zippy Duvall Regarding the Importance of Trade to U.S. Agriculture](#), AMERICAN FARM BUREAU FED’N (Jan. 23, 2017).

¹⁸See [Trump calls NAFTA a “disaster”](#), 60 MINUTES (Sept. 25, 2015); WHITE HOUSE OFFICE OF THE PRESS SECRETARY, [Remarks by President Trump in Meeting with President Macri of Argentina](#) (Apr. 27, 2017).

¹⁹[Letter from Robert Lighthizer, U.S. Trade Rep., to Sen. Chuck Schumer](#) (May 18, 2017).

²⁰*Id.*

²¹Bipartisan Congressional Trade Priorities and Accountability Act of 2015, [19 U.S.C.A. § 4205\(a\)\(1\)](#) (2017).

²²OFFICE OF THE U.S. TRADE REP., [North American Free Trade Agreement \(NAFTA\)](#).

²³Ashley Davenport, [What NAFTA Renegotiations Will Mean](#), AG WEB (May 8, 2017).

²⁴OFFICE OF THE U.S. TRADE REP., [SUMMARY OF OBJECTIVES FOR THE NAFTA RENEGOTIATION](#) (July 17, 2017); OFFICE OF THE U.S. TRADE REP., [SUMMARY OF SPECIFIC NEGOTIATING OBJECTIVES FOR THE INITIATION OF NAFTA NEGOTIATIONS](#) (Nov. 2017).

²⁵Chandri Navarro et al., [NAFTA Negotiations: Where We Are](#), HOGAN LOVELLS (Dec. 14, 2017).

²⁶Daren Bakst, [NAFTA Renegotiations Should Not Harm Agriculture and Consumers with the “Seasonality Poison Pill”](#), THE HERITAGE FOUND. (Nov. 9, 2017).

²⁷WHITE HOUSE OFFICE OF THE PRESS SECRETARY, *supra* note 18.

III. BIOTECHNOLOGY DEVELOPMENTS

A. *U.S. Regulatory Updates*

1. Coordinated Framework for the Regulation of Biotechnology Updates

At the beginning of 2017, the Obama Administration released the final version of its update to the Coordinated Framework for the Regulation of Biotechnology. This update represented the first comprehensive overview of the federal regulatory landscape for biotechnology products in 30 years.²⁸ The update addressed genetic-editing tools, (CRISPR-Cas9, TALEN etc.) that precisely alter the DNA of crops and animals.²⁹

2. APHIS Proposes -- And Later Withdraws -- Biotechnology Regulations

On January 19, 2017, USDA's Animal and Plant Health Inspection Service (USDA-APHIS) proposed the first comprehensive changes to its rules governing plant-based biotechnology since first established in 1987. On November 6, 2017, the Trump Administration announced the withdrawal of this proposal, stating that it will begin "a fresh stakeholder engagement aimed at exploring alternative policy approaches."³⁰

3. USDA Prepares Labeling Requirements for Bioengineered Foods

The 2016 National Bioengineered Food Disclosure Law requires USDA to develop proposed regulations establishing mandatory labeling requirements for "bioengineered foods." Over the summer, USDA requested public input about aspects of the new regulations, which the Agency must issue by July 2018.³¹

4. FDA Issues Guidance on Biotechnology and Mosquito-Related Products

On October 4, 2017, the U.S. Food and Drug Administration (FDA) issued final guidance clarifying the U.S. Environmental Protection Agency (EPA) authority to regulate mosquito-related products intended to control mosquito populations.³² A draft version of this guidance had been distributed for public comment on January 18, 2017.

B. *Gene-Edited Agricultural Products in Regulatory Limbo*

Gene editing is a group of technologies that has revolutionized the world of genetic engineering. Gene editing – also referred to as [CRISPR-Cas9](#) – allows scientists to add or delete a genetic trait with far more precision and ease than previous genetic engineering

²⁸WHITE HOUSE, [MODERNIZING THE REGULATORY SYSTEM FOR BIOTECHNOLOGY PRODUCTS: FINAL VERSION OF THE 2017 UPDATE TO THE COORDINATED FRAMEWORK FOR THE REGULATION OF BIOTECHNOLOGY](#) (Jan. 4, 2017).

²⁹Philip Brasher, [FDA, EPA Join USDA in Mulling Regulation of Gene Editing](#), AGRI-PULSE (Sept. 21, 2016).

³⁰Proposed Rule; Withdrawal, [Importation, Interstate Movement, and Environmental Release of Certain Genetically Engineered Organisms: Proposed Rule; Withdrawal](#), 82 Fed. Reg. 51,582 (Nov. 7, 2017).

³¹USDA, [Proposed Rule Questions Under Consideration](#) (last visited Apr. 30, 2018).

³²FDA, CLARIFICATION OF FDA AND EPA JURISDICTION OVER MOSQUITO-RELATED PRODUCTS, GUIDANCE FOR INDUSTRY #236 (Oct. 2017).

techniques.³³ Unlike traditional genetic engineering methods, which have been predominantly limited to crops, gene editing holds [enormous potential for animal agriculture](#) as well.

Gene editing's potential impact on agriculture may not be fully realized, however, given its uncertain regulatory framework. On January 19, 2017 both the FDA and the USDA issued proposed updated guidance on how each would regulate gene-edited animals, animal products, plants, and crops.³⁴ Together these actions propelled the conversation on how gene-edited agricultural products should be regulated and whether the U.S.'s existing framework remains adequate given continued genetic engineering advancements.

The FDA's proposed guidance indicated its intent to regulate intentionally altered genomic animal DNA, in both the founder animal and the entire subsequent lineage, as an animal drug.³⁵ The FDA's approach has received criticism, with some [arguing](#) that it is expansive, unworkable, and ultimately a barrier to entry and innovation.³⁶ Conversely, and arguably confusingly, USDA's proposal³⁷ took a more measured approach. Instead of requiring all gene-edited organisms to undergo a regulatory assessment before approval, USDA proposed to proactively exclude certain gene-edited organisms from regulation.

In November 2017, the USDA announced that it was withdrawing its proposed guidance,³⁸ and although the FDA received hundreds of comments on its proposed guidance this summer, the agency has yet to respond to those comments or finalize its guidance.³⁹ Thus, those developing and investing in gene-edited animals and crops remain in regulatory limbo, potentially leaving the technology's revolutionary impact on agriculture in jeopardy.

C. *Litigation Expands Boundaries of Negligence*

On June 23, 2017, a Kansas City jury found Syngenta negligent for \$217.77 million in damages for disrupting the export market for U.S. corn to China.⁴⁰ Grower class action suits claimed Syngenta failed to follow industry stewardship standards to keep Viptera corn (which lacked China approval) out of the export distribution channel and falsely told growers in 2010 that China would approve the trait in 2012. These cases sought over \$6 billion in economic loss.

The following week, a state court in Ohio found that Syngenta's duty should not "extend to economic harm caused by the intended use of its products" because the

³³NAT. INST. HEALTH, [What are Genome Editing and CRISPR-Cas9?](#) (Jan. 16, 2018).

³⁴Notice of availability, [Regulation of Intentionally Altered Genomic DNA in Animals; Draft Guidance for Industry; Availability](#), 82 Fed. Reg. 6561 (Jan. 19, 2017); Proposed Rule, [Importation, Interstate Movement, and Environmental Release of Certain Genetically Engineered Organisms](#), 82 Fed. Reg. 7008 (Jan. 19, 2017).

³⁵FDA's cited legal authority for Guidance 187 comes from the Federal Food, Drug, and Cosmetic Act's definition of animal drug. *See* [21 U.S.C. § 321](#) (2017).

³⁶Nick Stockton, [The FDA Wants to Regulate Edited Animal Genes as Drugs](#), WIRED (Jan. 24, 2017).

³⁷82 Fed. Reg. 7008 at 7014.

³⁸82 Fed. Reg. 51,582.

³⁹[Guidance for Industry; Regulation of Genetically Engineered Animals Containing Heritable rDNA Constructs; Availability](#)", Docket ID: FDA-2008-D-0394, Agency: Food and Drug Admin, REGULATIONS.GOV (last visited Apr. 30, 2018).

⁴⁰[In re: Syngenta Ag MIR162 Litigation](#), 249 F. Supp. 3d 1224 (D. Kan. 2017).

“economic loss doctrine” barred recovery.⁴¹ In September 2017, Syngenta settled grower class-action cases for up to \$1.5 billion.⁴² Other pending cases filed by grain traders Cargill and ADM are reportedly not part of this settlement.

This case broadens the boundaries of tort law in agricultural biotechnology. For the first time in the history of litigation over biotech crops, a claim for negligence hit it rich for a crop that had full approval for marketing in the U.S. If Syngenta had a legal duty to seek major market approval in a merely “foreseeable” market, then biotech seed companies face difficult decisions ahead in determining what is “major” in the minds of future judges, not the growers associations who have defined the duty for many years.

D. *International Regulation of Agricultural Biotechnology*

The number of nations and acres planted with biotech crops increased by 3% in 2016 after increasing 10% annually for the last twenty years.⁴³ Onerous regulatory approval requirements for biotech crops (both planting and food-feed-processing import approvals) continue to arise among the 171 nations that are parties to the 2003 Cartagena Protocol on Biosafety (CPB).⁴⁴ The CPB next convenes this November in Sharm El-Sheikh, Egypt for the Ninth Meeting of the Conference of the Parties to the Cartagena Protocol on Biosafety (MOP 9). The CPB may use this meeting to approve pre-market approval requirements for organisms made with new genetic-editing tools, or “synthetic biology.”⁴⁵

IV. MERGERS AND ACQUISITIONS

In 2017, three mega-mergers between “Big Six” ag-biotech companies received regulatory approvals in the U.S. and the E.U. Last May, after obtaining antitrust approval on the condition that it divests parts of its existing pesticide and plant-growth regulator business, the Chinese National Chemical Corporation completed its acquisition of Switzerland-based Syngenta.⁴⁶ A few months later, Dow and DuPont completed a “merger of equals” after completing certain crop-protection and petrochemical divestments required by regulators.⁴⁷ Bayer’s merger with Monsanto is still under scrutiny but, assuming approvals are forthcoming, will finalize this year.⁴⁸

Citizen groups opposed all three mergers on environmental, food security and anti-monopoly grounds. Even before these latest merger proposals, the agro-chemical market

⁴¹Judgment Awarding Motion to Dismiss, *Fostoria Ethanol, LLC vs. Syngenta Seeds, Inc.*, Case No. 15 CV 0323 (Ohio Ct. of Common Pleas June 28, 2017).

⁴²Jef Feeley & Margaret Fisk, [Syngenta Agrees to Pay More Than \\$1.4 Billion in Corn Accord](#), BLOOMBERG (Sept. 26, 2017).

⁴³INT’L SERV. FOR THE ACQUISITION OF AGRI-BIOTECH APPLICATIONS, [BRIEF 52 GLOBAL STATUS OF COMMERCIALIZED BIOTECH/GM CROPS: 2016](#) (2016).

⁴⁴[Cartagena Protocol on Biosafety Ratification List](#) (Party No. 171, Kuwait, ratified on Aug. 30, 2017) (last visited Apr. 30, 2018).

⁴⁵[How Are Governments Regulating CRISPR and New Breeding Technologies \(NBTs\)?](#), GENETIC LITERACY PROJECT (last visited Apr. 30, 2018).

⁴⁶In the Matter of China Nat’l Chem. Corp., F.T.C. Docket No. C-4610, F.T.C. File No. 1610093 (June 13, 2017).

⁴⁷[Revisiting Dow-DuPont Merger Motivation As Companies Win U.S. Anti-Trust Approval](#), FORBES (June 23, 2017).

⁴⁸Angela Mueller, [Antitrust review of Bayer/Monsanto Deal Goes In Depth](#), ST. LOUIS BUS. J. (Nov. 30, 2017),

was already astonishingly consolidated, with six global behemoths controlling the lion's share of the global agro-chemical and seed market and conducting more than two-thirds of all private-sector agricultural research. The current mergers will further consolidate intellectual property rights over traits, germplasm, breeding programs, technologies, and crop-protection products.

Also in 2017, Smithfield Foods, continued to pursue its vertical integration strategy by purchasing three Polish meat companies from the Pini Group.⁴⁹ Grain handler AGI, expanded its grip on grain-storage equipment with the purchase of Global Industries.⁵⁰ A series of lower-profile mergers consolidated Deere & Company (Deere) equipment dealerships in the Northeast and Plains states.⁵¹

Not all agricultural-sector merger attempts fared as well. Deere's deal to purchase Monsanto's Precision Planting unit foundered on Department of Justice anti-trust pressures.⁵² Deere then inked a deal to acquire Blue River Technology, a leader in the use of machine learning and GPS technology in farming and proposed a strategic alliance with Kramer-Werke GmbH.⁵³

⁴⁹Oscar Rousseau, [Smithfield Acquires Three Polish Meat Companies](#), GLOBALMEATNEWS.COM (May 31, 2017).

⁵⁰Holly Demaree, [AGI acquires Global Industries](#), WORLD-GRAIN.COM (Apr. 5, 2017).

⁵¹[Atlantic Tractor Deal Heralds More Deere Dealership Consolidation](#), AM. AGRICULTURIST (Mar. 7, 2017).

⁵²Catherine Shu, [After Scrapping Monsanto deal, Deere Agrees to Buy Precision Farming Startup Blue River for \\$305M](#), TECH CRUNCH (Sept. 6, 2017).

⁵³*Id.*

Chapter 2 • AIR QUALITY 2017 Annual Report¹

I. JUDICIAL DEVELOPMENTS

A. Title I—Federal & State Implementation Plans, Conformity, & Federal Facilities

In [*Wyoming v. EPA*](#), the State of Wyoming and an agricultural organization petitioned for review of the U.S. Environmental Protection Agency’s (EPA) determination of the boundaries of the Wind River Indian Reservation for the purpose of determining the lands over which the Eastern Shoshone and Northern Arapahoe had jurisdiction to administer certain non-regulatory programs under the Clean Air Act (CAA).² The Tenth Circuit held that the original 1868 reservation had been diminished by a 1905 act of Congress and that the tribes’ jurisdiction only extended to the lands within the diminished reservation, and not to the lands removed from the reservation by the 1905 act. The court vacated the EPA’s determination and remanded the matter to the EPA.

In [*Yazzie v. EPA*](#),³ the Ninth Circuit denied tribal conservation and environmental organizations’ petition for review of the EPA’s source-specific federal implementation plan (FIP) under the CAA for the Navajo Generating Station—a coal-fired power plant on the Navajo Nation Reservation in Arizona. The court held, *inter alia*, that the federal government’s partial ownership of the power plant did not weigh against affording deference to the EPA’s interpretation of the CAA and its implementing regulations and that deference should be afforded to the EPA’s reasonable determination that the FIP alternative was better than best available retrofit technology (BART). The court also held that the FIP for the Station was not subject to the regulatory requirement that all necessary emission reductions take place during the period of the first long-term strategy for regional haze and that EPA exercised reasonable discretion in determining that it was not necessary

¹The Air Quality Committee prepared this report. Zachary Fayne, Thomas Santoro, and Maggie Girard, Arnold & Porter Kaye Scholer LLP, San Francisco, California and Washington, D.C., edited the report. Contributing authors were: Eric Gallon, Porter Wright Morris & Arthur LLP, Columbus, Ohio; Michael Gray, Dinsmore & Shohl LLP, Cincinnati, Ohio; H. Michael Keller and Megan Nelson, Fabian VanCott, Salt Lake City, Utah; Ali Nelson, Husch Blackwell LLP, Denver, Colorado; Todd Palmer, Michael, Best & Friedrich LLP, Milwaukee, Wisconsin; Douglas Williams, St. Louis University School of Law, St. Louis, Missouri; Zachary Pilchen, United States Environmental Protection Agency, Washington, D.C.; James L. Simpson, former Assistant Regional Counsel, United States Environmental Protection Agency, ABA Air Quality Committee Vice-Chair of Electronic Communications, Washington, D.C.; Gary Steinbauer, Babst, Calland, Clements and Zomnir, P.C., Pittsburgh, Pennsylvania; and Carlos Evans, ABA Air Quality Committee Vice-Chair of Membership, Dallas, Texas. This work is not a product of the United States Government or the United States Environmental Protection Agency and neither Mr. Pilchen nor Mr. Simpson are doing this work in any governmental capacity. The views expressed by Mr. Pilchen and Mr. Simpson are their own only and do not necessarily represent those of the United States or EPA. Senior Legal Assistant Leigh Logan, Arnold & Porter Kaye Scholer LLP, Washington, D.C., also assisted in the preparation of this report.

²875 F.3d 505 (10th Cir. 2017) (amending and superseding on rehearing, [849 F.3d 861](#) (10th Cir. 2017)).

³851 F.3d 960 (9th Cir. 2017).

or appropriate under the CAA to conduct a BART determination for particulate matter emissions.

In *Hopi Tribe v. EPA*, a companion case to *Yazzie*, the Ninth Circuit denied other petitions for review of the EPA's regional haze FIP for the Navajo Generating Station in Arizona.⁴ The Hopi tribe argued that, in promulgating the FIP, the EPA had failed to consult with the tribe and failed to consider the statutory factors in determining BART for the generating station. The court rejected both of these claims.

In *Arizona ex rel. Darwin v. EPA*, the Ninth Circuit denied petitions for review of a FIP that the EPA promulgated to address deficiencies in Arizona's state implementation plan (SIP).⁵ The deficiencies that the EPA addressed in the FIP related to the regional haze requirements in the CAA—specifically, BART determinations, reasonable progress goals, and reasonable progress strategies. The state challenged the EPA's FIP on various grounds, including a challenge that the EPA's decision to require reasonable progress controls on a BART-ineligible cement kiln was arbitrary and capricious. The court found that the EPA had considered the relevant factors and therefore fulfilled its statutory responsibilities. The state also challenged the EPA's BART determinations for two copper smelters operated by Asarco and Freeport-McMoran. For both smelters, the EPA declined to impose more stringent control requirements for nitrogen oxides and instead imposed a 40 tons-per-year limit, which the EPA determined was well above the levels the smelters were achieving with their existing control technologies. The state argued that the emissions limitations were arbitrary because they were: (1) unnecessary, given that each of the smelters' emissions were currently well below those limits; and (2) improper because neither smelter's emissions of nitrogen oxides caused or contributed to visibility impairment exceeding the regulatory threshold of 0.5 deci-views, rendering each smelter ineligible for BART controls. The court rejected both claims, holding that it was appropriate for the EPA to limit potential emissions from each of the smelters and that BART eligibility is determined by aggregating emissions of all visibility-impairing pollutants from a source, not by pollutant-specific determinations. Because the smelters' aggregate pollutant emissions caused impacts exceeding the regulatory threshold, each was BART-eligible. The court also rejected the state's challenge to the EPA's particulate matter limitations on the Asarco smelter, concluding that reliance on other regulatory requirements as the basis for BART was not error because Asarco itself had relied on those requirements when it conducted its own BART analysis. Finally, the court rejected the state's claim that the EPA's imposition of a 99.8 efficiency rate on sulfur dioxide emission controls from Asarco's plant was unsupported by evidence, technically infeasible, and arbitrarily more stringent than the limitations placed on Freeport-McMoran's competing smelter.

B. Preemption of State Law Claims & Displacement of Federal Law Claims

In *Counts v. General Motors, LLC*, the U.S. District Court for the Eastern District of Michigan granted in part and denied in part General Motor's (GM's) motion to dismiss claims brought by purchasers of GM's 2014 Chevrolet Cruze Diesel.⁶ The plaintiffs alleged that the Cruze Diesels were falsely marketed as "clean diesel" vehicles but actually had "defeat devices" that deactivated the emissions reduction system under highway driving conditions. GM's motion, among other claims, argued that the CAA preempted the plaintiffs' claims. The court held the plaintiffs could not seek damages under state law "based solely on GM's alleged violations of the [Clean Air Act]," because such claims

⁴851 F.3d 957 (9th Cir. 2017).

⁵852 F.3d 1148 (9th Cir. 2017).

⁶237 F. Supp. 3d 572 (E.D. Mich. 2017).

would be preempted by CAA section 209(a).⁷ But the court held the plaintiffs' state-law fraud and consumer protection act claims were not preempted because those claims focused on GM's alleged misrepresentations about the Cruze Diesel's emissions, not whether those emissions complied with EPA regulations. The court also denied GM's request to stay the action and refer it to the EPA, finding that the question within the EPA's core expertise (whether the Cruze Diesel complied with EPA regulations) was not the issue raised by the plaintiffs' claims and that the EPA had no power to consider the plaintiffs' claims or award them damages.

In [*Felix v. Volkswagen Group of America, Inc.*](#), the Superior Court of New Jersey, Appellate Division, upheld a lower court's ruling that a civil lawsuit based on the alleged misrepresentation of a vehicle's compliance with federal emissions standards could proceed.⁸ Defendant Volkswagen (VW) had moved to dismiss the complaint, arguing that it was preempted by the CAA. The court ruled that the CAA did not preempt the lawsuit because the plaintiffs' complaint "center[ed] on VW's alleged deceitful, fraudulent practices, and its alleged breach of a duty not to mislead consumers" and neither sought enforcement of an EPA emission standard or attempted to force a manufacturer to adopt a different emission standard.⁹

In [*Brown-Forman Corp. v. Miller*](#), the Kentucky Supreme Court held that the CAA does not preempt state tort claims for damages or injunctive relief.¹⁰ The plaintiff filed a state nuisance claim alleging that fugitive ethanol emissions from a nearby warehouse (stocked with aging barrels of Kentucky bourbon) had caused a black film of "whisky fungus" to spread across his property. The court agreed with, and adopted the analysis of, a Sixth Circuit opinion holding (in a case with identical facts) that the CAA does not preempt state tort causes of action.¹¹ The court further held that, although the CAA does not provide a mechanism for private parties to obtain damages from a defendant's air pollution, it also does not preempt state-law tort claims that would allow for such recovery. Finally, the court held that the CAA does not preempt injunctive relief obtainable under state law, citing a U.S. Supreme Court case interpreting the "virtually identical" citizen suit provision of the Clean Water Act.¹² However, the court held that injunctive relief was unavailable in the instant case because of state laws that prohibit the imposition of air pollution requirements more stringent than required by federal law.

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

In [*United States v. DTE Energy Co. \(DTE II\)*](#), the Sixth Circuit held that (1) the EPA was entitled to review whether a company's projections for a project under the New Source Review (NSR) program were made pursuant to the NSR statutory and regulatory requirements, even when post-construction data showed an actual emissions decrease and (2) there remained a genuine dispute of material fact as to whether DTE's projections met the NSR program requirements.¹³ On March 28, 2013, the Court in [*U.S. v. DTE Energy*](#)

⁷42 U.S.C. § 7543(a) (2017).

⁸No. A-0585-16T3, 2017 WL 3013080 (N.J. Super. Ct. App. Div. July 17, 2017).

⁹*Id.* at 6

¹⁰528 S.W.3d 886 (Ky. 2017).

¹¹*Id.* at 893 (adopting the reasoning of *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 690–694 (6th Cir. 2015)).

¹²*Id.* at 895 (citing *City of Milwaukee v. Illinois*, 451 U.S. 304, 328–29 (1981)).

¹³845 F.3d 735 (6th Cir. 2017).

*Co. (DTEI)*¹⁴ reversed the district court’s grant of summary judgment to DTE, finding that the EPA was not required to wait for DTE’s post-project data before demonstrating that DTE’s projections were incorrect for purposes of EPA enforcement action. On remand, the district court granted DTE’s motions for summary judgement, finding that the EPA was only entitled to a “surface review” or “ cursory examination” of a company’s projections and was not entitled to “second-guess” those projections.

In *United States v. Ameren Missouri*, the U.S. District Court for the Eastern District of Missouri found that Ameren Missouri violated the CAA’s Prevention of Significant Deterioration (PSD) provisions and its Title V permit when it undertook major modifications at its Rush Island coal-fired power plant without obtaining the requisite permits and without installing the best achievable pollution control technology (BACT).¹⁵ Ameren’s Rush Island plant includes two coal-fired electric generating units, Units 1 and 2. In order to make the plant more reliable and less susceptible to shut-downs, Ameren replaced certain boiler components at these units. The district court found that Ameren should have expected, and did expect, that increased reliability of each unit would burn more coal and consequently emit significantly more SO₂ pollution. The court further found that Ameren failed to meet its burden of showing that the projects were routine maintenance, repair or replacement pursuant to 40 C.F.R. § 52.21(b)(2)(iii)(a), and did not meet the criteria to exclude emissions resulting from demand growth from its projected post-modification emissions pursuant to 40 C.F.R. § 52.21(b)(41)(ii)(c). The court therefore held that Ameren’s upgrades at Unit 1 and Unit 2 were each major modifications under the PSD provisions of the Clean Air Act, and Ameren violated the PSD program by failing to obtain a preconstruction permit and install BACT at the units. Ameren also violated its Title V permit by performing these major modifications without the required permission.

In *Little v. Louisville Gas & Electric Co.*, the U.S. District Court for the Western District of Kentucky granted the defendants’ motion for partial summary judgment in a case involving the defendants’ Cane Run Generating Station.¹⁶ The court had previously dismissed all but one of the CAA claims against the defendants. The remaining CAA claim asserted that the defendants had operated without a Title V operating permit. The court dismissed that claim, holding that the defendants had timely applied for a renewal permit and thus lawfully continued operating under their previous Title V permit until the Louisville Air Pollution Control District issued a renewal permit. The court rejected the argument that the “permit application shield” did not apply because the defendants had failed to respond to certain requests for information over the years, finding that the information requests in question did not relate to the Title V renewal permit application.

In *Sierra Club v. Mosier*, the Kansas Supreme Court rejected the Sierra Club’s second challenge to a 2010 CAA PSD permit that the Kansas Department of Health and the Environment (KDHE) issued to Sunflower Electric Power Corporation.¹⁷ In the Sierra Club’s successful first challenge to the permit, the court found that KDHE failed to comply with the EPA’s national ambient air quality standards and remanded the permit to KDHE. On remand, KDHE issued an addendum to its original permit instead of issuing an entirely new permit. The Sierra Club brought this second challenge against KDHE’s addendum. The court first found that its remand of the original 2010 PSD permit did not require KDHE to start a new permitting process because the Kansas Judicial Review Act granted KDHE broad discretion in handling post-remand proceedings. The court then found that, since the

¹⁴711 F.3d 643 (6th Cir. 2013).

¹⁵229 F. Supp. 3d 906 (E.D. Mo. 2017).

¹⁶No. 3:13-CV-01214-JHM, 2017 WL 603294 (W.D. Ky. Feb. 14, 2017).

¹⁷391 P.3d 667 (Kan. 2017).

original permit predated the compliance date for the EPA’s regulation requiring sources otherwise subject to PSD review for a different pollutant (i.e., “anyway sources”) to comply with BACT requirements for greenhouse gases, KDHE was not required to comply with this regulation in its addendum.

In *Nucor Steel-Arkansas v. Pruitt*, the D.C. Circuit denied the EPA’s motion to dismiss Nucor Steel-Arkansas’ complaint.¹⁸ In its complaint, Nucor asked the EPA to respond to Nucor’s petition to object to its competitor’s PSD permit. Nucor’s competitor, Big River Steel Company, obtained a PSD permit to build a new manufacturing facility roughly twenty miles from Nucor’s two facilities near Blytheville, Arkansas. In its complaint, Nucor alleged that it was “nearly certain” that its two Arkansas facilities would engage in future construction projects that would require PSD review and that its future PSD permit applications would be constrained by the emissions from Big River Steel’s facility, located in the same air quality region as Nucor’s facilities. The EPA claimed in its motion to dismiss that Nucor lacked Article III standing, but the court disagreed. The court found that Nucor had asserted a concrete and particularized injury resulting from the approval of Big River Steel’s permit, because Nucor plausibly contended that its current plans to modify its existing plants would likely require PSD review and Big River Steel’s new facility would consume all or most of the applicable PSD increment. Furthermore, since Nucor’s allegations were procedural in nature, Nucor met the more lenient redressability requirement—that is, it demonstrated that requiring the EPA to respond to its petition might result in the EPA blocking Big River Steel’s permit.

In *Tennessee Gas Pipeline Co., LLC v. Paul*, the D.C. Circuit granted a petition for review filed under the Natural Gas Act alleging that the Nashville Public Health Department (NPHD) had failed to timely issue a Title V operating permit for a natural gas compressor station.¹⁹ The compressor station was part of an interstate natural gas pipeline and Petitioner (Tennessee Gas Pipeline Company) had been waiting more than two years for the NPHD to act on the application. The Natural Gas Act gives the D.C. Circuit exclusive jurisdiction to review claims that a state administrative agency failed to issue any permit required under federal law for an interstate pipeline. Section 503b(c) required NPHD to act on the Title V permit application within 18 months of receipt. NPHD argued that Petitioner had filed its application without a Reasonably Available Control Technology (RACT) analysis, which rendered the application incomplete and therefore failed to trigger the 18-month deadline. The court disagreed, holding that NPHD had failed to timely deem the NPHD application as incomplete and the NPHD regulations do not require a RACT analysis to be part of a complete application.

In *Clean Air Council v. Pruitt*, the D.C. Circuit concluded that the EPA lacked authority under the CAA to stay the New Source Performance Standard (NSPS) for fugitive emissions of methane and other pollutants by the oil and natural gas industries.²⁰ The Obama administration had issued the NSPS in June 2016. Industry groups petitioned the EPA for reconsideration and on June 5, 2017, the EPA published a notice of reconsideration and partial stay. Environmental groups challenged the EPA’s actions arguing that it violated CAA section 307(d)(7)(B) because the issues raised in support of the reconsideration could have been, or actually were, raised during the comment period. The D.C. Circuit agreed with the environmental groups and vacated the stay concluding that it was not “impracticable” for industry groups to raise their concerns during the comment period.

¹⁸No. 14-CV-0199, 2017 WL 1239558 (D.D.C. Mar. 31, 2017).

¹⁹692 F. App’x 3 (D.C. Cir. 2017).

²⁰862 F.3d 1 (D.C. Cir. 2017).

In [*Riverkeeper, Inc. v. New York State Department of Environmental Conservation*](#), the New York Supreme Court Appellate Division affirmed the lower court’s dismissal of a petition for review of a decision by the Department of Environmental Conservation (DEC) to grant a State Pollutant Discharge Elimination System permit and Title V permit to a natural gas electric generating station.²¹ The Appellate Division rejected the argument that DEC was required to hold a public adjudicatory hearing prior to issuing the permits. The court noted that its own judgment “should not be substituted for that of the agency” and found that DEC’s determination—that the petitioner failed to meet its burden to show that its issues were “substantive and significant” enough to warrant a public hearing—was not arbitrary and capricious.²² The Appellate Division also found that reactivation of the storm-damaged source did not need to be treated as operation of a new source because there was never an intent to permanently shut down the source.

D. *Hazardous Air Pollutants*

In [*Blue Ridge Environmental Defense League v. Pruitt*](#), the U.S. District Court for the District of Columbia granted summary judgment for the plaintiffs, who alleged that the EPA had failed to comply with its non-discretionary duty to review maximum available control technology standards (MACT) and make residual risk determinations for 13 source categories of hazardous air pollutants.²³ These determinations are generally made in a single rulemaking known as a Risk and Technology Review (RTR). The parties disagreed only on an appropriate compliance order. The court accepted neither party’s proposed compliance timeline, ordering the EPA to complete the relevant RTRs for seven source categories by December 31, 2018, and the remaining six source categories by June 30, 2020.

In [*Sierra Club v. EPA*](#), the U.S. District Court for the District of Columbia denied a motion to dismiss a lawsuit by environmental groups arguing that the EPA had arbitrarily relied upon standards set for other emissions when establishing the MACT for three hazardous air pollutants (HAPs): polychlorinated biphenyls (PCBs), polycyclic organic matter (POM), and hexachlorobenzene (HCB).²⁴ For these chemicals, the environmental groups alleged that the EPA relied upon previously set emissions limits for other HAPs as a “surrogate.” The court noted that the EPA may only rely upon a surrogate if doing so is reasonable and concluded that the EPA did not provide adequate explanation for its reliance on surrogates.

In [*Grand Canyon Trust v. Energy Fuels Resources \(U.S.A.\) Inc.*](#), the U.S. District Court for the District of Utah granted the defendants’ motion for summary judgment in a citizen suit for alleged violations of CAA radon emissions regulations at a uranium mill.²⁵ Radon is a designated HAP subject to EPA regulation. The court found that the Utah Department of Air Quality (DAQ) was entitled to some deference in its administration of the CAA because, among other reasons: (1) the EPA properly delegated much of its HAP implementation and enforcement authority to the State of Utah; (2) DAQ’s application of the radon regulations to the mill was not inconsistent with federal law; and (3) DAQ’s interpretation of the radon regulations was reasonable. The court, therefore, accepted DAQ’s conclusions that the mill did not violate scheduling requirements, measurement protocols, or phased disposal requirements. The court also found that a closed tailings

²¹59 N.Y.S.3d 806 (N.Y. App. Div. 2017).

²²*Id.* at 809-10

²³261 F. Supp. 3d 53 (D.D.C. 2017).

²⁴863 F.3d 834 (D.C. Cir. 2017).

²⁵269 F. Supp. 3d 1173 (D. Utah 2017).

impoundment at the mill was not subject to the radon emissions regulations at the time of alleged exceedance of a radon flux limit.

E. Civil & Criminal Enforcement

In [Natural Resources Defense Council v. Illinois Power Resources, LLC](#), the U.S. District Court for the Central District of Illinois found that the defendants were not entitled to a jury trial for the determination of civil penalties for violations of the CAA and equivalent Illinois law.²⁶ The court reasoned that the plain language of the CAA at 42 U.S.C. § 7604(a) and 42 U.S.C. § 7413(e)(1) makes it the duty of the presiding district court to determine civil penalties. The court also cited Supreme Court precedent finding that determination of civil penalties is not an essential function of a jury trial and that Congress intended trial judges to exercise their discretion to determine appropriate penalties.

F. Citizen Suits

In [California Communities Against Toxics v. Pruitt](#), environmental advocacy organizations sued the EPA to compel it to perform overdue rulemakings mandated by the CAA regarding emissions standards for categories of major sources of hazardous air pollutants.²⁷ The U.S. District Court for the District of Columbia held that it would impose a timeline for the EPA to perform overdue rulemakings that was greater than the organizations' requested one to two years and less than the EPA's proposed five years, because the organizations' requested one to two year timeline was too compressed to afford any reasonable possibility of compliance but the EPA failed to demonstrate that something less than its proposed five year timeline would be impossible.

In [White v. Global Cos., LLC](#), the U.S. District Court for the Northern District of New York dismissed a citizen suit alleging that a source (1) failed to apply for and obtain a requisite nonattainment new source review (NNSR) permit, and (2) violated an emission limitation in its Title V permit.²⁸ First, the court held that CAA section 307(b)(2) barred the plaintiff's ability to challenge the lack of an NNSR permit. The court reasoned that plaintiffs should have petitioned EPA to object to the source's modified Title V permit, which included conditions purporting to obviate the need for an NNSR permit. The EPA's non-objection to that permit constituted an "[a]ction of the Administrator with respect to which review could have been obtained" directly, and which CAA section 307(b)(2) bars review of in an enforcement proceeding.²⁹ Second, the court held that plaintiffs had not sufficiently alleged the existence of the purportedly violated emission limitation, and dismissed the remaining claim on that basis.

G. Procedural Issues

In [Global Community Monitor v. Mammoth Pac., L.P.](#), the U.S. District Court for the Eastern District of California granted the defendants' motion for summary judgment and denied the plaintiffs' motion for partial summary judgment in a case challenging the air permits for three existing geothermal plants.³⁰ The court had previously dismissed all

²⁶No. 13-CV-1181, 2017 WL 3037434 (C.D. Ill. July 18, 2017).

²⁷241 F. Supp. 3d 199 (D.D.C. 2017).

²⁸No. 1:16-CV-125 (GLS/CFH), 2017 WL 4286282 (N.D.N.Y. Sept. 26, 2017).

²⁹*Id.* at 4.

³⁰230 F. Supp. 3d 1235 (E.D. Cal. 2017).

but one of the causes of action in the plaintiffs' complaint. The remaining court asserted that the plants should have been treated as a single source when they received preconstruction permits because they are "owned and operated by the same company, located on adjacent lands," and share "a common control room" and other facilities.³¹ The plaintiffs argued the plants' combined emissions of volatile organic compounds (VOCs) would have been sufficient to require installation of BACT if the plants were treated as a single source. The court held that the plaintiffs' claim was time-barred under the applicable statute of limitations,³² because the plants were permitted decades ago and any violation of California's preconstruction permit regulations at that time was not a continuing violation. The court also held the plaintiffs' claims for injunctive relief were time-barred.

In [*California Chamber of Commerce v. State Air Resources Board*](#), the California Court of Appeal rejected challenges to regulations promulgated by the California Air Resources Board (CARB) to implement the California Global Warming Solutions Act of 2006, popularly known as AB 32.³³ CARB's implementing regulations established a cap-and-trade program, including quarterly auctions for emissions allowances. The plaintiffs challenged CARB's authority to establish allowance auctions on two principal grounds, claiming that the auctions exceeded the scope of authority delegated to CARB by the state legislature and that the revenue generated by the auctions amounted to a tax in violation of Proposition 13. The court held that the auctions were within the broad grant of authority the California legislature delegated to CARB. It also concluded that the revenue from emissions allowance auctions were not taxes subject to Proposition 13 because the auctions involved business-driven decisions to voluntarily purchase a valuable commodity. The revenue was, therefore, unlike other government-imposed fees that the court had considered in prior challenges under Proposition 13.

In [*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Product Liability Litigation*](#), the U.S. District Court for the Northern District of California granted motions to remand to state court complaints alleging that Volkswagen violated state law by using a defeat device in certain diesel engine vehicles.³⁴ Volkswagen had removed the cases to federal court asserting federal question subject-matter jurisdiction.³⁵ In remanding the cases, the court rejected Volkswagen's arguments that the state complaints alleged claims "arising under" the CAA. Although some of the claims relied upon state statutes referencing EPA regulations and Volkswagen's use of a "defeat device" (a term defined by CAA regulations), the mere presence of these federal components was insufficient to support "arising under" jurisdiction. The court also rejected Volkswagen's argument that the state claims conflicted with the CAA's division of enforcement authority between states and the federal government. The court held that to be a preemption defense which did not give rise to federal subject-matter jurisdiction.

In [*Murray Energy Corp. v. Administrator of EPA*](#), the Fourth Circuit vacated a district court's order compelling the EPA to fulfill its mandatory duty under CAA section 321(a) to further analyze the potential employment impacts which may result from the administration and enforcement of air pollution regulations.³⁶ The Fourth Circuit held that section 304(a)(2) grants district courts jurisdiction over claims alleging the administrator's

³¹*Id.* at 1239.

³²28 U.S.C. § 2462 (2017) (which creates a five-year statute of limitations for "action[s], suit[s] or proceeding[s] for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise").

³³216 Cal. Rptr. 3d 694 (Cal. Ct. App. 2017).

³⁴No. 2672 CRB (JSC), 2017 WL 2258757 (N.D. Cal. May 23, 2017).

³⁵28 U.S.C. § 1331 (2017).

³⁶861 F.3d 529 (4th Cir. 2017).

failure to perform non-discretionary duties under the CAA. However, section 304(a)(2) must be narrowly construed to give district courts jurisdiction only over claims alleging a failure to perform required acts or duties of a “specific and discrete nature that preclude broad agency discretion.”³⁷ Section 321(a) requires the EPA to continuously evaluate the entire set of actions administered and enforced under the CAA, without specifying guidelines or procedures for performing those tasks. The Fourth Circuit held that section 321(a) provision grants the EPA “considerable discretion” of “an opened ended nature” and does not impose on the EPA a specific and discrete duty amenable to section 304(a)(2) review. The circuit vacated the district court’s judgments as applicable to the EPA and remanded the matter with instructions to dismiss the suit for lack of jurisdiction.

In *Southern Illinois Power Cooperative v. EPA*,³⁸ the Seventh Circuit overruled its earlier decision in *Madison Gas & Electric Co. v. EPA*,³⁹ where it held that a party could challenge an element of a national program in a regional court based solely on a local factor. The court found that, under CAA section 307(b)(1), if a challenged rule is nationally applicable then the D.C. Circuit is the exclusive forum for judicial review of that rule. The challenged rule in this case—the 2010 sulfur dioxide primary NAAQS⁴⁰—made attainment designations for 61 geographic areas spanning 24 states and was therefore nationally applicable within the meaning of section 307(b)(1).

In *Texas v. EPA*, the Fifth Circuit denied the EPA’s motion to transfer to the D.C. Circuit a challenge to EPA’s determination that three areas in Texas did not attain national ambient air quality standards for sulfur dioxide.⁴¹ In 2016, the EPA designated three Texas regions “nonattainment” under its revised air quality standards, triggering an obligation for Texas to develop and submit revised state implementation plans. The State of Texas, the Texas Commission on Environmental Quality, and power and mining companies petitioned for review of the designation. The EPA moved to transfer the petition to the D.C. Circuit pursuant to the CAA’s venue provision. The Fifth Circuit held that transfer was not warranted because the EPA’s designation was neither a “nationally applicable” agency action nor a “determination of nationwide scope or effect” within the meaning of the venue provision. Since the EPA’s determination rested on particularized factual findings about air quality only in certain regions in Texas, the regional courts—which, under the CAA, have exclusive jurisdiction over review of locally or regionally applicable final EPA actions—were the proper venue.

In *Center for Biological Diversity v. Pruitt*, the U.S. District Court for the Northern District of California denied EPA Administrator Scott Pruitt’s motion to indefinitely extend a consent decree’s September 29, 2017 deadline.⁴² The consent decree pertained to the EPA’s approval or disapproval of Delaware’s proposed SIP changes to meet the ozone national ambient air quality standard. EPA asked the court to hold the consent decree’s deadline in abeyance while the new administration completed its review of an EPA rule regarding emission controls during start-up, shutdown, and malfunction (SSM) of stationary sources. The EPA argued that its review of the SSM rule could affect its Delaware SIP decision. The EPA sought relief under Federal Rule of Civil Procedure 60(b)(5), which offers relief from a judgment where applying the judgment is “no longer equitable.” But the court found that a party seeking relief from a consent decree under Rule

³⁷*Id.* at 535.

³⁸863 F.3d 666 (7th Cir. 2017).

³⁹4 F.3d 529 (7th Cir. 1993).

⁴⁰Final Rule, *Air Quality Designations for the 2010 Sulfur Dioxide*, 81 Fed. Reg. 45,039 (July 12, 2016) (to be codified at 40 C.F.R. pt. 81).

⁴¹No. 17-60088, 2017 WL 3700989 (5th Cir. Aug. 25, 2017).

⁴²No. 16-CV-04092-PJH, 2017 WL 3782696 (N.D. Cal. Aug. 31, 2017).

60(b)(5) bears a heavy burden, and the EPA had not met this burden because any change in the EPA's circumstances were the EPA's own doing and were therefore foreseeable. The court held that the "EPA's decision to consider changing a related regulatory policy, at some point in the future, cannot excuse its failure to comply with its statutory duties and the judgment of the court."⁴³

In [*State of California v. U.S. Bureau of Land Management*](#), the U.S. District Court for the Northern District of California found that the U.S. Bureau of Land Management (BLM) could not postpone compliance with Obama-era regulations to limit methane emissions on public lands without undergoing proper administrative procedures, including public notice and comment.⁴⁴ BLM issued a notice⁴⁵ stating that it would postpone compliance dates for its Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule—which was part of Obama's Climate Change Action Plan—pursuant to Executive Order No. 13783 (issued on March 28, 2017 and instructing federal agencies to suspend or rescind agency actions that "unduly burden" the development of domestic energy resources). BLM cited section 705 of the Administrative Procedure Act (APA)—which allows agencies to "postpone the effective date" of a rule, pending judicial review, when "justice so requires"—as legal authority for this action, arguing that the term "effective date" in APA section 705 also includes compliance dates. The court found that the terms "effective date" and "compliance date" have distinct meanings, and so APA section 705 permits an agency to postpone the effective date of a not yet effective rule but does *not* permit an agency to suspend a promulgated rule without notice and comment. The court further held that BLM's Postponement Notice was arbitrary and capricious because it took into account only the Rule's costs to the oil and gas industry and ignored the Rule's benefits, such as decreased resource waste, air pollution, and enhanced public revenues. The court therefore vacated the Postponement Notice on the grounds that it violated the APA's notice and comment requirements and its prohibition on arbitrary agency action.

In [*Sierra Club v. EPA*](#), the D.C. Circuit dismissed a petition brought by environmental and community organizations challenging the EPA's modification, without notice and comment, of its prior methods for measuring a proposed transportation project's impact on ambient levels of PM_{2.5} and PM₁₀.⁴⁶ The court found that the organizations lacked standing to challenge the EPA's modification of methods for measuring PM_{2.5} because (1) they could not show threatened imminent and concrete harm to the interests of their members, and (2) the EPA's method for measuring PM₁₀ was embodied in a non-binding guidance document, the modification of which was not a final agency action reviewable under the APA.

H. Greenhouse Gas Emissions

In [*Mexichem Fluor, Inc. v. EPA*](#), the D.C. Circuit vacated an EPA final rule that removed hydrofluorocarbons (HFCs) from the list of safe substitutes for ozone-depleting substances and placed it on the list of prohibited substitutes to the extent that the rule required manufacturers to replace HFCs with a substitute substance.⁴⁷ The court reasoned

⁴³*Id.* at *3.

⁴⁴Nos. 17-cv-03804-EDL, 17-cv-3885-EDL, 2017 WL 4416409 (N.D. Cal. Oct. 4, 2017).

⁴⁵Notification, *Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates*, [82 Fed. Reg. 27,430 \(June 15, 2017\) \(to be codified at 43 CFR § 3170\)](#).

⁴⁶873 F.3d 946 (D.C. Cir. 2017).

⁴⁷866 F.3d 451 (D.C. Cir. 2017).

that the EPA lacked authority to require replacement of HFCs under CAA section 612, as that statute only authorizes the EPA to promulgate rules requiring the replacement of ozone-depleting substances with safe substitutes and HFCs are not ozone-depleting substances. However, the court noted that the EPA had argued in passing for a “retroactive disapproval” approach under which the EPA could retroactively conclude that a manufacturer’s past decision to replace an ozone-depleting substance with HFCs is no longer lawful. The court remanded the case for the EPA to address three hurdles to the “retroactive disapproval” approach: (1) establishing that section 612 provides statutory authority for retroactive disapproval, or that the EPA has inherent authority to retroactively disapprove a prior replacement; (2) explaining the basis for the EPA’s change from its prior interpretation that section 612 did not authorize the EPA to review substitutes for substances that are not themselves ozone-depleting; and (3) complying with due process limits on retroactive decision-making. The court upheld the portion of the rule that removed HFCs from the list of safe substitutes.

I. Title II—Mobile Sources & Fuels

In [*United States v. Navistar International Corp.*](#),⁴⁸ the federal government sued a manufacturer of heavy-duty diesel engines and its holding company, alleging that they violated provisions of the CAA and related regulations⁴⁹ by introducing on-highway engines into commerce without first obtaining a certificate of conformity for those engines. Ruling on cross motions for summary judgment, the U.S. District Court for the Northern District of Illinois held, *inter alia*, that the manufacturer’s on-highway, heavy-duty diesel engines were “produced,” for purposes of whether they were covered by a particular year’s certificate of conformity, when all manufacturing and assembling processes necessary to produce a saleable unit were complete, rather than when the crankshafts were installed in the engine blocks. The court held, however, that there remained a genuine issue of material fact as to whether the manufacturer’s holding company was a manufacturer and distributor of engines or merely a passive holding company.

In [*United States v. NGL Crude Logistics, LLC*](#), the U.S. District Court for the Northern District of Iowa denied a motion to dismiss a civil enforcement action that alleged that the defendant NGL Crude Logistics, LLC (NGL) entered into a series of transactions that generated 36 million invalid renewable identification numbers (RINs).⁵⁰ NGL and co-defendant Western Dubuque generated new RINs from biodiesel feedstock that had previously generated RINs. NGL argued that this activity was authorized by a plain reading of 40 C.F.R. sections 80.1426(a)(1) and (c)(6) which, according to NGL, allowed Western Dubuque to use biodiesel as a feedstock to produce new RIN-generating biodiesel so long as Western Dubuque did not receive RINs with the biodiesel it purchased from NGL. The court applied *Auer* deference to uphold the EPA’s interpretation of the regulations at issue and held that the regulations cited by NGL did not limit the government’s pursuit of the relief in the Amended Complaint.

In [*Americans for Clean Energy v. EPA*](#), the D.C. Circuit considered challenges to the EPA’s final rule setting renewable fuel requirements for the years 2014 through 2017 and vacated the portion of the rule that reduced the total renewable fuel volume requirements through use of the EPA’s “inadequate domestic supply” waiver authority.⁵¹ In so holding, the court rejected the EPA’s interpretation that the “inadequate domestic

⁴⁸240 F. Supp. 3d 789 (N.D. Ill. 2017).

⁴⁹See 40 C.F.R. § 85.2305 (2017).

⁵⁰2017 WL 2268324 (N.D. Iowa May 24, 2017).

⁵¹864 F.3d 691 (D.C. Cir. 2017).

supply” provision applied to the supply of renewable fuel available to the ultimate consumer and allowed consideration of factors affecting demand for renewable fuel by consumers, finding instead that the provision only authorizes the EPA to consider supply-side factors affecting the volume of renewable fuel available to refiners, blenders, and importers.

In *In re Volkswagen “Clean Diesel” Marketing, Sales Practices, & Product Liability Litigation*, the U.S. District Court for the Northern District of California dismissed claims against Volkswagen based on its operation of “clean diesel” vehicles in Wyoming.⁵² The claims stemmed from Volkswagen’s alleged criminal installation of defeat device software in nearly 600,000 so-called “clean diesel” vehicles for model years 2009–2016. For every day that each offending vehicle was operated in Wyoming, the State of Wyoming alleged that Volkswagen violated provisions of Wyoming’s SIP related to vehicle tampering and emissions concealment. The court concluded that Wyoming’s attempted application of these SIP provisions to Volkswagen would effectively render the provisions new motor vehicle standards, which CAA section 209(a) prohibits states from attempting to enforce. Specifically, the court reasoned that a requirement that vehicles not contain defeat devices was as much a “standard” as a requirement that a vehicle contain a pollution control device. The SIP provisions as interpreted by Wyoming could not be “in use” vehicle regulations permitted under CAA section 209(d) because, *inter alia*, such regulations tend to apply to individual owners rather than manufacturers and distributors.

In *Sinclair Wyoming Refining Co. v. EPA*, the Tenth Circuit held that the EPA exceeded its statutory authority under the CAA in interpreting the hardship exemption in the Renewable Fuel Standards Program to require a threat to a refinery’s survival as an ongoing operation.⁵³ The CAA provides for the exemption in cases of “disproportionate economic hardship.” The court found that this standard requires a comparison of the effects of compliance costs on a given refinery with other refineries, rather than a demonstration that compliance costs would make ongoing operation economically impossible.

II. REGULATORY DEVELOPMENTS

A. *Title I—Federal (FIPs) and State Implementation Plans (SIPs), Conformity, Federal Facilities*

On January 6, 2017, the EPA published notice that preliminary interstate ozone transport modeling data and associated methods relative to the 2015 ozone National Ambient Air Quality Standard (NAAQS) were available for public review and comment. The EPA provided this information to help states develop State Implementation Plans (SIPs) to address the requirements of Clean Air Act (CAA) section 110(a)(2)(D)(i)(I) for the 2015 ozone NAAQS.⁵⁴

On January 10, 2017, the EPA issued a final rule revising its 1999 Regional Haze Rule. The revisions clarify and modify the requirements that states and tribes must meet to

⁵²No. 2672 CRB (JSC), 2017 WL 3816738 (N.D. Cal. Aug. 31, 2017).

⁵³874 F.3d 1159 (10th Cir. 2017).

⁵⁴Notice of data availability; request for public comment, *Notice of Availability of the Environmental Protection Agency’s Preliminary Interstate Ozone Transport Modeling Data for the 2015 Ozone National Ambient Air Quality Standard (NAAQS)*, 82 Fed. Reg. 1733 (Jan. 6, 2017).

comply with the visibility protections for Class I Federal areas under sections 169A and 160B of the CAA.⁵⁵

On [January 11, 2017](#), the EPA issued a final rule establishing a federal plan for states that do not have an approved plan for implementing CAA sections 111(d) and 129(b) emissions guidelines for existing commercial and industrial incineration units.⁵⁶

On [February 3, 2017](#), the EPA found that 15 states and the District of Columbia had failed to submit SIP revisions in a timely manner to satisfy certain requirements for the 2008 ozone NAAQS that apply to nonattainment areas and/or states in the Ozone Transport Region (OTR). This finding triggered certain deadlines for the imposition of sanctions for states that did not submit timely SIP revisions.⁵⁷

On [December 11, 2017](#), the EPA found that three states had failed to submit timely revisions to their SIPs as required to satisfy certain requirements under the CAA for implementation of the 2008 ozone NAAQS.⁵⁸

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

On [January 17, 2017](#), the EPA announced that it had promulgated revisions to the *Guideline on Air Quality Models* (“*Guideline*”). The *Guideline* provides the EPA’s preferred models and other recommended techniques, as well as guidance for their use in estimating ambient concentrations of air pollutants. It is incorporated into the EPA’s regulations, satisfying a requirement under the CAA for the EPA to specify with reasonable particularity models to be used in the PSD program.⁵⁹

On [February 15, 2017](#), the EPA published a Withdrawal of the Direct Final Rule withdrawing, effective February 15, 2017, the Direct Final Rule entitled “Revisions to Procedure 2—Quality Assurance Requirements for Particulate Matter Continuous Emission Monitoring Systems at Stationary Sources” published November 15, 2016, at 81 Fed. Reg. 83,160.⁶⁰

On [April 4, 2017](#), the EPA announced that it is reviewing the 2016 Oil and Gas NSPS and, if appropriate, will initiate reconsideration proceedings to suspend, revise or rescind this rule. This review was initiated pursuant to an Executive Order “direct[ing]

⁵⁵Final Rule, *Protection of Visibility; Amendments to Requirements for State Plans*, 82 Fed. Reg. 3078 (Jan. 10, 2017) (to be codified at 40 C.F.R. pts. 51 and 52).

⁵⁶Proposed Rule, *Federal Plan Requirements for Commercial and Industrial Solid Waste Incineration Units*, 82 Fed. Reg. 3554 (Jan. 11, 2017) (to be codified at 40 C.F.R. pt. 62).

⁵⁷Final Rule, *Findings of Failure to Submit State Implementation Plan Submittals for the 2008 Ozone National Ambient Air Quality Standards (NAAQS)*, 82 Fed. Reg. 9158 (Feb. 3, 2017) (to be codified at 40 C.F.R. pt. 52).

⁵⁸Final Rule, *Findings of Failure to Submit State Implementation Plan Submittals for the 2008 Ozone National Ambient Air Quality Standards (NAAQS)*, 82 Fed. Reg. 58,118 (Dec. 11, 2017) (to be codified at 40 C.F.R. pt. 52).

⁵⁹Final Rule, *Revisions to the Guideline on Air Quality Models: Enhancements to the AERMOD Dispersion Modeling System and Incorporation of Approaches To Address Ozone and Fine Particulate Matter*, 82 Fed. Reg. 5182 (Jan. 17, 2017) (to be codified at 40 CFR pt. 51).

⁶⁰Withdrawal of Direct Final Rule, *Revisions to Procedure 2—Quality Assurance Requirements for Particulate Matter Continuous Emission Monitoring Systems at Stationary Sources*, 82 Fed. Reg. 10,711 (Feb. 15, 2017) (to be codified at 40 C.F.R. pt. 60).

agencies to review existing regulations that potentially burden the development of domestic energy resources.”⁶¹

On [May 31, 2017](#), the EPA stayed for 90 days certain requirements of the final rules “Standards of Performance for Municipal Solid Waste Landfills” and “Emission Guidelines and Compliance Times for Municipal Solid Waste Landfill” pending reconsideration. The final rules, published August 29, 2016, established NSPS and guidelines “intended to reduce emissions of landfill gas from new, modified, and reconstructed municipal solid waste landfills.”⁶²

On [June 5, 2017](#), the EPA announced that it is convening a proceeding for reconsideration of the fugitive emission requirements at well sites and compressor station sites in the final rule “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources.” The reconsideration process will review “(1) [t]he applicability of the fugitive emissions requirements to low production well sites, and (2) the process and criteria for requesting and receiving approval for the use of an alternative means of emission limitations for purposes of compliance with the fugitive emissions requirements in the 2016 Rule.”⁶³

On June 16, 2017, the EPA issued proposals to stay for [three months](#)⁶⁴ and [two years](#),⁶⁵ respectively, certain requirements that are contained within the Final Rule titled “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources.”

On [August 14, 2017](#), the EPA published a Final Rule to become effective September 13, 2017, finalizing Revisions to Procedure 2—Quality Assurance Requirements for Particulate Matter Continuous Emission Monitoring Systems at Stationary Sources to “include[] quality assurance/quality control procedures for particulate matter continuous emission monitoring systems used for compliance determination at stationary sources.”⁶⁶

On [September 8, 2017](#), the EPA published a Proposed Rule “propos[ing] editorial and technical revisions to the EPA’s Method 202—Dry Impinger Method for Determining

⁶¹Announcement of Review, *Review of the 2016 Oil and Gas New Source Performance Standards for New, Reconstructed, and Modified Sources*, 82 Fed. Reg. 16,331 (Apr. 4, 2017) (to be codified at 40 C.F.R. pt. 60).

⁶²Stay, *Stay of Standards of Performance for Municipal Solid Waste Landfills and Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills*, 82 Fed. Reg. 24,878 (May 31, 2017) (to be codified at 40 C.F.R. pt. 60).

⁶³Notice of Reconsideration and Partial Stay, *Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Grant of Reconsideration and Partial Stay*, 82 Fed. Reg. 25,730 (June 5, 2017) (to be codified at 40 C.F.R. pt. 60).

⁶⁴Proposed Rule, *Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Three Month Stay of Certain Requirements*, 82 Fed. Reg. 27,641 (June 16, 2017) (to be codified at 40 C.F.R. pt. 60).

⁶⁵Proposed Rule, *Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements*, 82 Fed. Reg. 27,645 (proposed June 16, 2017) (to be codified at 40 C.F.R. pt. 60).

⁶⁶Final Rule, *Revisions to Procedure 2—Quality Assurance Requirements for Particulate Matter Continuous Emission Monitoring Systems at Stationary Sources*, 82 Fed. Reg. 37,822 (Aug. 14, 2017) (to be codified at 40 C.F.R. pt. 60).

Condensable Particulate Emissions From Stationary Sources to improve the consistency in results achieved across the testing community.”⁶⁷

C. *Title II—Mobile Sources and Fuels*

On [January 17, 2017](#), the EPA announced that it granted the California Air Resources Board’s (CARB) request for a waiver of CAA preemption for its On-Highway Heavy-Duty Vehicle In-Use Compliance program (In-Use Regulation). The EPA also “confirm[ed] that CARB’s amendments to its 2007 and Subsequent Model Year On-Highway Heavy-Duty Engines and Vehicles regulation and CARB’s amendments to its Truck Idling requirements are within the scope of previous waivers issued by EPA.”⁶⁸

On [January 19, 2017](#), the EPA announced that it granted the CARB request for an authorization of its amendments to its Commercial Harbor Craft regulations (CHC Amendments). The EPA also confirmed that certain CHC amendments are within the scope of a prior EPA authorization. CARB’s CHC Amendments primarily subject diesel fueled engines on crew and supply, barge and dredge vessels to the in-use engine emission requirements of the original CHC regulations; allow CARB or EPA Tier 2 or higher tier certified off-road (“nonroad”) engines to be used as auxiliary or propulsion engines in both new and in-use CHC vessels; and clarify requirements and address certain issues that have arisen during CARB’s implementation of the original CHC regulations.⁶⁹

On [January 19, 2017](#), the EPA announced that it granted CARB’s request for authorization of amendments to its Airborne Toxic Control Measure for In-Use Diesel-Fueled Transport Refrigeration Units (TRU) and TRU Generator Sets and Facilities Where TRUs Operate (together “2011 TRU Amendments”). The EPA’s decision also confirmed that certain of the 2011 TRU amendments are within the scope of prior EPA authorizations. The 2011 TRU Amendments primarily provide owners of TRU engines with certain flexibilities; clarify recordkeeping requirements for certain types of TRU engines; establish requirements for businesses that arrange, hire, contract, or dispatch the transport of goods in TRU-equipped trucks, trailers, or containers; and address other issues that arose during the initial implementation of the regulation.⁷⁰

On [January 19, 2017](#), the EPA announced that it granted CARB’s request for an authorization of its amendments to its Off-Highway Recreational Vehicle regulation (“OHRV Amendments”). The OHRV Amendments establish new evaporative emission standards and test procedures for 2018 and subsequent model year OHRVs. The California

⁶⁷Proposed Rule, Method 202—Dry Impinger Method for Determining Condensable Particulate Emissions From Stationary Sources, 82 Fed. Reg. 42,508 (Sept. 8, 2017) (to be codified at 40 C.F.R. pt. 51).

⁶⁸Notice of Decision, *California State Motor Vehicle Pollution Control Standards; Amendments to On-Highway Heavy-Duty Vehicle In-Use Compliance Program, Amendments to 2007 and Subsequent Model Year On-Highway Heavy-Duty Engines and Vehicles, and Amendments to Truck Requirements*, 82 Fed. Reg. 4867 (Jan. 17, 2017).

⁶⁹Notice of Decision, *California State Nonroad Engine Pollution Control Standards; Commercial Harbor Craft Regulations*; Notice of Decision, 82 Fed. Reg. 6500 (Jan. 19, 2017).

⁷⁰Notice of Decision, *California State Nonroad Engine Pollution Control Standards; In-Use Diesel-Fueled Transport Refrigeration Units (TRUs) and TRU Generator Sets and Facilities Where TRUs Operate*; Notice of Decision, 82 Fed. Reg. 6525 (Jan. 19, 2017).

OHRV category encompasses a wide variety of vehicles, including off-road motorcycles, all-terrain vehicles (ATVs), off-road sport and utility vehicles, sand cars, and golf carts.⁷¹

On [March 22, 2017](#), the EPA issued a notice of intent to coordinate with the Department of Transportation's National Highway Traffic Safety Administration (NHTSA) in reconsidering EPA's January 12, 2017 "Mid-Term Evaluation of greenhouse gas emissions standards for model year 2022-2025 light-duty vehicles."⁷²

On [June 30, 2017](#), the EPA and the NHTSA issued technical corrections to the Phase 2 Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles.⁷³

On [July 21, 2017](#), the EPA proposed "annual percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel that apply to gasoline and diesel transportation fuel produced or imported in the year 2018."⁷⁴ The EPA also proposed the applicable volume of biomass-based diesel for 2019.

On [August 21, 2017](#), following up on its March 22, 2017 notice of intent, the EPA announced that it was reconsidering its January 12, 2017 "Mid-Term Evaluation of greenhouse gas emissions standards for model year 2022-2025 light-duty vehicles" and invited public comment on the standards for model years 2021 and 2022-2025.⁷⁵

On [August 23, 2017](#), the EPA announced that it would hold a public hearing in Washington, D.C., on September 6, 2017, on the EPA's request for comment on the greenhouse gas emissions standards for model years 2021 and 2022-2025 light-duty vehicles.⁷⁶

On [October 4, 2017](#), the EPA "provide[d] additional data and an opportunity to comment on that data and potential options for reductions in the statutory targets for 2018 biomass-based diesel, advanced biofuel, and total renewable fuel volumes, and/or the 2019 biomass-based diesel volume under the Renewable Fuel Standard (RFS) program."⁷⁷

⁷¹Notice of Decision, *California State Nonroad Engine Pollution Control Standards; Evaporative Emission Standards and Test Procedures for Off-Highway Recreational Vehicles (OHRVs)*; Notice of Decision, 82 Fed. Reg. 6540 (Jan. 19, 2017).

⁷²Notice of Intent, *Notice of Intention To Reconsider the Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light Duty Vehicles*, 82 Fed. Reg. 14,671 (Mar. 22, 2017) (to be codified at 40 C.F.R. pt. 86).

⁷³Correction, *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2*, 82 Fed. Reg. 29,761 (June 30, 2017) (to be codified at 40 C.F.R. pts. 9, 22, 85-86, 600, 1033, 1036-37, 1039, 1042-43, 1065-66, and 1068; and 49 C.F.R. pts. 523, 534-35, and 538).

⁷⁴Proposed Rule, *Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019*, 82 Fed. Reg. 34,206 (July 21, 2017) (to be codified at 40 C.F.R. pt. 80).

⁷⁵Request for Comment, *Request for Comment on Reconsideration of the Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light-Duty Vehicles; Request for Comment on Model Year 2021 Greenhouse Gas Emissions Standards*, 82 Fed. Reg. 39,551 (Aug. 21, 2017) (to be codified at 40 C.F.R. pt. 86).

⁷⁶Announcement of Public Hearing, *Public Hearing for Reconsideration of the Final Determination of the Mid-term Evaluation of Greenhouse Gas Emissions Standards for Model Years 2022–2025 Light-Duty Vehicles; Announcement of public hearing*, 82 Fed. Reg. 39,976 (Aug. 23, 2017).

⁷⁷Availability of Supplemental Information; Request for Further Comment, *Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for*

On [November 16, 2017](#), the EPA proposed a repeal of the emission standards and other requirements for heavy-duty glider vehicles, glider engines, and glider kits based on its proposed interpretation of CAA section 216(3), under which glider vehicles and engines would not constitute “new motor vehicles” or “new motor engines.”⁷⁸

On [November 30, 2017](#), the EPA published notice of its denial of several petitions requesting that EPA initiate a rulemaking process to reconsider or change the CAA regulation⁷⁹ that identifies refiners and importers of gasoline and diesel fuel as the entities responsible for complying with the annual percentage standards adopted under the Renewable Fuel Standard program.⁸⁰

On [December 12, 2017](#), the EPA established “annual percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel that apply to gasoline and diesel transportation fuel produced or imported in the year 2018.”⁸¹ The EPA also established the applicable volume of biomass-based diesel for 2019.

D. *Hazardous Air Pollutants*

On [January 9, 2017](#), the EPA requested public comment on a proposed notice to grant petitions to add n-propyl bromide to the list of hazardous air pollutants under section 112 of the CAA.⁸²

On [January 13, 2017](#), the EPA announced its intent to hold a public hearing and extend the comment period on its proposed amendments to the National Emission Standards for Hazardous Air Pollutants (NESHAP) for the Manufacturing of Nutritional Yeast source category.⁸³

On [January 13, 2017](#), the EPA issued a final rule amending its Risk Management Program under CAA section 112(r). The amendments, made pursuant to Executive Order 13650, included changes to the accident prevention program requirements, as well as enhancements to the emergency response requirements, and improvements to the public availability of chemical hazard information.⁸⁴

2019; *Availability of Supplemental Information and Request for Further Comment*, 82 Fed. Reg. 46,174 (Oct. 4, 2017) (to be codified at 40 C.F.R. pt. 80).

⁷⁸Proposed Rule, *Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits*, 82 Fed. Reg. 53,442 (Nov. 16, 2017) (to be codified at 40 C.F.R. pts. 1037 and 1068).

⁷⁹Denials of Rulemaking Requests, *Notice of Denial of Petitions for Rulemaking To Change the RFS Point of Obligation*, 82 Fed. Reg. 56,779 (Nov. 30, 2017) (to be codified at 40 C.F.R. pt. 80).

⁸⁰*Id.*

⁸¹Final Rule, *Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019*, 82 Fed. Reg. 58,486 (Dec. 12, 2017) (to be codified at 40 C.F.R. pt. 80).

⁸²Notice; Request for Public Comment, *Granting Petitions to Add n-Propyl Bromide to the List of Hazardous Air Pollutants*, 82 Fed. Reg. 2354 (Jan. 9, 2017).

⁸³Proposed Rule; Notice of Public Hearing and Extension of Comment Period, *National Emission Standards for Hazardous Air Pollutants: Nutritional Yeast Manufacturing Risk and Technology Review*, 82 Fed. Reg. 4232 (Jan. 13, 2017) (to be codified at 40 C.F.R. pt. 63).

⁸⁴Final Rule, *Accidental Release Prevention Requirements; Risk Management Programs Under the Clean Air Act*, 82 Fed. Reg. 4594 (Jan. 13, 2017) (to be codified at 30 C.F.R. pt. 68).

On [January 17, 2017](#), the EPA issued a final rule amending the NESHAP for Radon Emissions from Operating Mill Tailings “based on the EPA’s determination as to what constitutes generally available control technology or management practices (GACT) for this area source,” creating a distinction between conventional impoundments used for disposal of tailings and non-conventional impoundments used for evaporation of process waters, “adding new definitions . . . , revising existing definitions, and clarifying that the NESHAP also applies to uranium recovery facilities that extract uranium through the in-situ leach method and the heap leach method.”⁸⁵

On [January 18, 2017](#), the EPA published a Final Rule and a notice of final action on reconsideration to become effective on that date, amending the Ferroalloys Production source category under the NESHAP to “allow existing facilities with positive pressure baghouses to perform visible emissions monitoring twice daily as an alternative to installing and operating bag leak detection systems to ensure the baghouses are operating properly” and also making other revisions and providing guidance.⁸⁶

On [March 16, 2017](#), the EPA issued a final rule announcing a proceeding to reconsider the January 13, 2017 rule amending the Risk Management Program. The rule also delayed the effective date of the January 13 rule for 90 days, until June 19, 2017.⁸⁷ On [April 3, 2017](#), the EPA proposed to further delay the effective date of the rule to February 19, 2019 pending reconsideration of the amendments.⁸⁸ On [June 14, 2017](#), the EPA issued a final rule delaying the effective date until February 19, 2019.⁸⁹

On [April 6, 2017](#), the EPA issued a final rule amending its electronic reporting requirements for the Mercury and Air Toxics Standards (MATS) Rule to allow the continued submission of certain reports in PDF format through June 2018.⁹⁰

On [June 23, 2017](#), the EPA issued a proposed rule to amend the NESHAP for the Portland Cement Manufacturing Industry.⁹¹

On [June 23, 2017](#), the EPA issued a direct final rule to amend the NESHAP for the Portland Cement Manufacturing Industry to temporarily revise the testing and monitoring requirements for hydrochloric acid (HCl) due to the current unavailability of HCl

⁸⁵Final Rule, *Revisions to National Emission Standards for Radon Emissions From Operating Mill Tailings*, 82 Fed. Reg. 5,142 (Jan. 17, 2017) (to be codified at 40 C.F.R. Part 61).

⁸⁶Final Rule; Notice of Final Action on Reconsideration, *National Emission Standards for Hazardous Air Pollutants: Ferroalloys Production*, 82 Fed. Reg. 5401 (Jan. 18, 2017) (to be codified at 40 C.F.R. pt. 63).

⁸⁷Final Rule; Delay of Effective Date, *Accidental Release Prevention Requirements; Risk Management Programs Under the Clean Air Act*, 82 Fed. Reg. 13,968 (Mar. 16, 2017) (to be codified at 40 C.F.R. pt. 68).

⁸⁸Proposed Rule, *Accidental Release Prevention Requirements; Risk Management Programs Under the Clean Air Act*, 82 Fed. Reg. 16,146 (Apr. 3, 2017) (to be codified at 40 C.F.R. Part 68).

⁸⁹Final Rule; Delay of Effective Date, *Accidental Release Prevention Requirements; Risk Management Programs Under the Clean Air Act, Further Delay of Effective Date*, 82 Fed. Reg. 27,133 (June 14, 2017) (to be codified at 40 C.F.R. pt. 68).

⁹⁰Final Rule, *Mercury and Air Toxics Standards (MATS) Electronic Reporting Requirements*, 82 Fed. Reg. 16,736 (Apr. 6, 2017) (to be codified at 40 C.F.R. pt. 63).

⁹¹Proposed Rule, *National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry: Alternative Monitoring Method*, 82 Fed. Reg. 28,616 (June 23, 2017) (to be codified at 40 C.F.R. pt. 63).

calibration gases used for quality assurance purposes”.⁹² On [August 22, 2017](#), the EPA removed the provisions added by the direct final rule,⁹³ and issued a [proposed rule](#) to revise the testing and monitoring requirements for HCl due to the unavailability of HCl calibration gases used for quality assurance purposes.⁹⁴

On June 29, 2017, the EPA issued a [direct final rule](#)⁹⁵ and a [proposed rule](#)⁹⁶ proposing to approve the Tennessee Department of Environment and Conservation’s request to implement and enforce State permit terms and conditions that substitute for the NESHAP from Plating and Polishing Operations with respect to the operation of the Ellison Surface Technologies, Inc. facility in Morgan County, Tennessee.

On July 27, 2017, the EPA issued a [direct final rule](#)⁹⁷ and a [proposed rule](#)⁹⁸ to amend the NESHAP for flame attenuation lines in the wool fiberglass manufacturing industry to provide an additional year for affected sources to comply with the emission limits for flame attenuation lines. On [August 24, 2017](#), the EPA withdrew the direct final rule.⁹⁹

On [August 7, 2017](#), the EPA proposed amendments to NESHAP for Off-Site Waste and Recovery Operations (OSWRO). The proposed amendments would remove the additional monitoring requirements for pressure relief devices (PRDs) on containers because EPA has determined that they are not necessary.¹⁰⁰

On [August 24, 2017](#), the EPA issued a proposed rule to amend the NESHAP for the Manufacture of Amino/Phenolic Resins. The EPA proposed to revise the maximum achievable technology (MACT) standards for continuous process vents at existing affected

⁹²Direct Final Rule, *National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry: Alternative Monitoring Method*, 82 Fed. Reg. 28,562 (June 23, 2017) (to be codified at 40 C.F.R. pt. 63).

⁹³Final Rule, *National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry: Alternative Monitoring Method*, 82 Fed. Reg. 39,671 (Aug. 22, 2017) (to be codified at 40 C.F.R. pt. 63).

⁹⁴Proposed Rule, *National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry: Alternative Monitoring Method*, 82 Fed. Reg. 39,712 (Aug. 22, 2017) (to be codified at 40 C.F.R. pt. 63).

⁹⁵Direct Final Rule, *Approval of Section 112(l) Authority for Hazardous Air Pollutants; Equivalency by Permit Provisions; National Emission Standards for Hazardous Air Pollutants; Plating and Polishing Operations*, 82 Fed. Reg. 29,432 (June 29, 2017) (to be codified at 40 C.F.R. pt. 63).

⁹⁶Proposed Rule, *Approval of Section 112(l) Authority for Hazardous Air Pollutants; Equivalency by Permit Provisions; National Emission Standards for Hazardous Air Pollutants; Plating and Polishing Operations*, 82 Fed. Reg. 29,470 (June 29, 2017) (to be codified at 40 C.F.R. pt. 63).

⁹⁷Direct Final Rule, *National Emission Standards for Hazardous Air Pollutants for Wool Fiberglass Manufacturing; Flame Attenuation Lines*, 82 Fed. Reg. 34,858 (July 27, 2017) (to be codified at 40 C.F.R. pt. 63).

⁹⁸Proposed Rule, *National Emission Standards for Hazardous Air Pollutants for Wool Fiberglass Manufacturing; Flame Attenuation Lines*, 82 Fed. Reg. 34,910 (July 27, 2017) (to be codified at 40 C.F.R. pt. 63).

⁹⁹Withdrawal of Direct Final Rule, *National Emission Standards for Hazardous Air Pollutants for Wool Fiberglass Manufacturing; Flame Attenuation Lines*, 82 Fed. Reg. 49,132 (Oct. 24, 2017) (to be codified at 40 C.F.R. pt. 63).

¹⁰⁰Proposed Rule, *National Emission Standards for Hazardous Air Pollutants: Off-Site Waste and Recovery Operations*, 82 Fed. Reg. 36,713 (Aug. 7, 2017) (to be codified at 40 C.F.R. pt. 63).

sources and proposed requirements for storage vessels at new and existing sources during periods when an emission control system used to control vents on fixed roof tanks is undergoing planned routine maintenance.¹⁰¹

On [August 29, 2017](#), the EPA proposed amendments to previous proposals to the NESHAP for the Wool Fiberglass Manufacturing source category.¹⁰² The EPA proposed to readopt existing emission limits for formaldehyde, to establish emission limits for methanol, and to establish a work practice standard for phenol emissions from bonded rotary spin lines at wool fiberglass manufacturing facilities. In addition, the EPA proposed amendments to the emission limits promulgated on July 29, 2015 for formaldehyde, methanol, and phenol from flame attenuation lines at wool fiberglass manufacturing facilities.

On [September 21, 2017](#), the EPA issued a proposed rule to amend the NESHAP for the Portland Cement Manufacturing Industry to address the results of the residual risk and technology review that the EPA conducted in accordance with section 112 of the CAA.¹⁰³ The EPA found risks due to emissions of air toxics to be acceptable from this source category with an ample margin of safety, identified no new cost-effective controls under the technology review to achieve further emissions reductions, and therefore proposed no revisions to the numerical emission limits based on these analyses.

On [September 28, 2017](#), the EPA issued a final rule amending the NESHAP for the Phosphoric Acid Manufacturing and Phosphate Fertilizer Production source categories to revise the compliance date by which affected sources must include emissions from oxidation reactors when determining compliance with the total fluoride emission limits for superphosphoric acid process lines.¹⁰⁴ The EPA also revised the compliance date for the monitoring requirements for low-energy absorbers.

On [October 11, 2017](#), the EPA issued a final determination that the risks from chemical recovery combustion sources at kraft, soda, sulfite, and stand-alone semichemical pulp mills regulated under the NESHAP are acceptable and that the standards provide an ample margin of safety to protect public health.¹⁰⁵ The EPA also finalized amendments to the NESHAP based on developments in practices, processes, and control technologies identified as part of its residual risk and technology review.

On [October 16, 2017](#), the EPA finalized the “residual risk and technology review (RTR) conducted for the Manufacturing of Nutritional Yeast source category regulated”

¹⁰¹Proposed Rule, *National Emission Standards for Hazardous Air Pollutants: Manufacture of Amino/Phenolic Resins*, 82 Fed. Reg. 40,103 (Aug. 24, 2017) (to be codified at 40 C.F.R. pt. 63).

¹⁰²Proposed Rule, *National Emission Standards for Hazardous Air Pollutants for Wool Fiberglass Manufacturing; Rotary Spin Lines Technology Review*, 82 Fed. Reg. 40,970 (Aug. 29, 2017) (to be codified at 40 C.F.R. pt. 63).

¹⁰³Proposed Rule, *National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry Residual Risk and Technology Review*, 82 Fed. Reg. 44,254 (Sept. 21, 2017) (to be codified at 40 C.F.R. pt. 63).

¹⁰⁴Final Rule; Notification of Final Action on Reconsideration, *Phosphoric Acid Manufacturing and Phosphate Fertilizer Production Risk and Technology Review Reconsideration*, 82 Fed. Reg. 45,913 (Sept. 28, 2017) (to be codified at 40 C.F.R. pt. 63).

¹⁰⁵Final Rule, *National Emission Standards for Hazardous Air Pollutants for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills*, 82 Fed. Reg. 47,328 (Oct. 11, 2017) (to be codified at 40 C.F.R. pt. 63).

under NESHAP.¹⁰⁶ The EPA further finalized finalizing other amendments, including revisions to the form of the VOC standards for fermenters, removal of the option to monitor brew ethanol, inclusion of ongoing relative accuracy test audit (RATA), and revisions to other monitoring, reporting, and recordkeeping requirements.

On [October 26, 2017](#), the EPA published a Final Rule “finaliz[ing] the residual risk and technology review conducted for the Publicly Owned Treatment Works (POTW) source category regulated under the National Emission Standards for Hazardous Air Pollutants”; finalizing revisions to names and definitions of the subcategories, applicability criteria, regulatory provisions pertaining to emissions during periods of startup, shutdown, and malfunction (SSM), and the requirements for new Group 1 POTW; adopting initial notification requirements for existing Group 1 and Group 2 POTW and requirements for electronic reporting; and making other miscellaneous edits and technical corrections.¹⁰⁷

E. Title VI - Stratospheric Ozone

On [July 21, 2017](#), the EPA issued a determination listing as acceptable additional substitutes for use in the refrigeration and air conditioning sector and the cleaning solvents sector pursuant to the EPA’s Significant New Alternatives Policy (SNAP) program.¹⁰⁸

On September 28, 2017, the EPA issued a [direct final rule](#)¹⁰⁹ and a [proposed rule](#)¹¹⁰ to clarify that containers holding two pounds or less of non-exempt substitute refrigerants for use in motor vehicle air conditioners that are not equipped with self-sealing valves can be sold to persons that are not certified technicians, provided those small cans were manufactured or imported prior to January 1, 2018.

On December 11, 2017, the EPA issued a [direct final rule](#)¹¹¹ and a [proposed rule](#)¹¹² to modify the use conditions required for use of three flammable refrigerants—*isobutene* (R-600a), *propane* (R-290), and *R-441A*—in new household refrigerators, freezers, and combination refrigerators and freezers under the SNAP program.

¹⁰⁶Final Rule, *National Emission Standards for Hazardous Air Pollutants: Nutritional Yeast Manufacturing Residual Risk and Technology Review*, 82 Fed. Reg. 48,156 (Oct. 16, 2017) (to be codified at 40 C.F.R. pt. 63).

¹⁰⁷Final Rule, *National Emission Standards for Hazardous Air Pollutants: Publicly Owned Treatment Works Residual Risk and Technology Review*, 82 Fed. Reg. 49,513 (Oct. 26, 2017) (to be codified at 40 C.F.R. pt. 63).

¹⁰⁸Determination of Acceptability, *Protection of Stratospheric Ozone: Determination 33 for Significant New Alternatives Policy Program*, 82 Fed. Reg. 33,809 (July 21, 2017) (to be codified at 40 C.F.R. pt. 82).

¹⁰⁹Direct Final Rule, *Protection of Stratospheric Ozone: Refrigerant Management Regulations for Small Cans of Motor Vehicle Refrigerant*, 82 Fed. Reg. 45,202 (Sept. 28, 2017) (to be codified at 40 C.F.R. pt. 82).

¹¹⁰Proposed Rule, *Protection of Stratospheric Ozone: Refrigerant Management Regulations for Small Cans of Motor Vehicle Refrigerant*, 82 Fed. Reg. 45,253 (Sept. 28, 2017) (to be codified at 40 C.F.R. pt. 82).

¹¹¹Direct Final Rule, *Protection of Stratospheric Ozone: Revision to References for Refrigeration and Air Conditioning Sector To Incorporate Latest Edition of Certain Industry, Consensus-Based Standards*, 82 Fed. Reg. 58,122 (Dec. 11, 2017) (to be codified at 40 C.F.R. pt. 82).

¹¹²Notice of Proposed Rulemaking, *Protection of Stratospheric Ozone: Revision to References for Refrigeration and Air Conditioning Sector To Incorporate Latest Edition of Certain Industry, Consensus-Based Standards*, 82 Fed. Reg. 58,154 (Dec. 11, 2017) (to be codified at 40 C.F.R. pt. 82).

F. *Greenhouse Gas Emissions*

On [February 15, 2017](#), the EPA published a Notice of Document Availability for the Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2015, summarizing by source category and sector the annual U.S. emissions of carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFC), perfluorocarbons (PFC), sulfur hexafluoride (SF₆), and nitrogen trifluoride (NF₃) from 1990 through 2015.¹¹³

On [April 3, 2017](#), the EPA announced that it was withdrawing its proposed federal plan to implement its greenhouse gas emission guidelines for existing electric utility generating units (commonly known as the Clean Power Plan), along with its proposed model trading rules for the Plan, its proposed amendments to the regulations implementing CAA section 111(d), and its proposed Clean Energy Incentive Program details.¹¹⁴

On [April 4, 2017](#), the EPA announced that it would undertake a review of the Clean Power Plan and, if appropriate, ultimately “suspend, revise or rescind” it.¹¹⁵

On [April 4, 2017](#), the EPA announced that it is reviewing and, if appropriate, will initiate proceedings to suspend, revise or rescind the Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Generating Units. The review was initiated pursuant to an Executive Order directing agencies to review existing regulations that potentially burden the development of domestic energy resources.¹¹⁶

On [October 16, 2017](#), the EPA proposed to repeal the Clean Power Plan, invited comments on that proposal, and announced that it intended to issue an Advance Notice of Proposed Rulemaking to solicit information for use in considering potential rules to replace the Plan.¹¹⁷

On [November 8, 2017](#), the EPA announced that it would hold a public hearing in Charleston, West Virginia, on November 28 and 29, 2017, on its proposal to repeal the Clean Power Plan, and it extended the deadline for submitting comments on that proposal.¹¹⁸

¹¹³Notice of Document Availability and Request for Comments, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2015*, 82 Fed. Reg. 10,767 (Feb. 15, 2017).

¹¹⁴Withdrawal of Proposed Rules, *Withdrawal of Proposed Rules: Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; and Clean Energy Incentive Program Design Details*, 82 Fed. Reg. 16,144 (Apr. 3, 2017) (to be codified at 40 CFR pt. 60).

¹¹⁵Announcement of Review, *Review of the Clean Power Plan*, 82 Fed. Reg. 16,329 (Apr. 4, 2017) (to be codified at 40 C.F.R. pt. 60).

¹¹⁶Announcement of Review, *Review of the Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Generating Units*, 82 Fed. Reg. 16,330 (Apr. 4, 2017) (to be codified at 40 C.F.R. pt. 60).

¹¹⁷Proposed Rule, *Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 82 Fed. Reg. 48,035 (proposed Oct. 16, 2017) (to be codified at 40 C.F.R. pt. 60).

¹¹⁸Proposed Rule; Notice of Public Hearing and Extension of Comment Period, *Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 82 Fed. Reg. 51,787 (Nov. 8, 2017) (to be codified at 40 C.F.R. pt. 60).

G. Criteria Air Pollutants

On [April 14, 2017](#), the EPA announced the availability of the final document titled *Policy Assessment for the Review of the Primary National Ambient Air Quality Standards for Oxides of Nitrogen*. This final document addresses the adequacy of the current standards and relevant science policies that guided the review.¹¹⁹

On [May 10, 2017](#), the EPA issued “final determinations of attainment by the attainment date and determinations of failure to attain by the attainment date for ten nonattainment areas currently classified as “Moderate” for the 2006 24-hour PM_{2.5} NAAQS.”¹²⁰ Seven areas were designated nonattainment: (1) Chico, California; (2) Imperial County, California; (3) Knoxville- Sevierville-La Follette, Tennessee; (4) Liberty-Clairton, Pennsylvania; (5) Nogales, Arizona; (6) Sacramento, California; and (7) San Francisco Bay Area, California. The EPA also proposed to find that following four nonattainment areas classified as Moderate failed to timely attain the 2006 24- hour PM_{2.5} NAAQS: (1) Fairbanks, Alaska; (2) Logan, Utah-Idaho; (3) Provo, Utah; and (4) Salt Lake City, Utah. The EPA deferred its final determination regarding its proposed determination for the Logan, Utah-Idaho, nonattainment area.

On [May 19, 2017](#), the EPA established air quality designations for the 2012 primary annual fine particle (PM_{2.5}) NAAQS for the remaining undesignated areas in the state of Tennessee.¹²¹

On [June 28, 2017](#), the EPA extended the deadline for promulgating designations for the 2015 ozone NAAQS until October 1, 2018.¹²² On [August 10, 2017](#), the EPA withdrew the one-year extension for promulgating designations.¹²³

On [July 26, 2017](#), the EPA issued a proposed rule that would retain the current primary national ambient air quality standards for nitrogen dioxide (NO₂), without revision.¹²⁴

¹¹⁹Notice of Availability, *Release of the Policy Assessment for the Review of the Primary National Ambient Air Quality Standards for Oxides of Nitrogen*, 82 Fed. Reg. 17,948 (Apr. 14, 2017) (to be codified at 40 C.F.R. pts. 50 and 58).

¹²⁰Final Rule, *Determinations of Attainment by the Attainment Date, Determinations of Failure To Attain by the Attainment Date and Reclassification for Certain Nonattainment Areas for the 2006 24-Hour Fine Particulate Matter National Ambient Air Quality Standards*, 82 Fed. Reg. 21,711 (May 10, 2017) (to be codified at 40 C.F.R. pts. 52 and 81).

¹²¹Final Rule, *Air Quality Designations for the 2012 Primary Annual Fine Particle (PM_{2.5}) National Ambient Air Quality Standard (NAAQS) for Areas in Tennessee*, 82 Fed. Reg. 22,888 (May 19, 2017) (to be codified at 40 C.F.R. pt. 81).

¹²²Extension of Deadline for Promulgating Designations, *Extension of Deadline for Promulgating Designations for the 2015 Ozone National Ambient Air Quality Standards*, 82 Fed. Reg. 29,246 (June 28, 2017).

¹²³Withdrawal of Extension of Deadline for Promulgating Designations, *Withdrawal of Extension of Deadline for Promulgating Designations for the 2015 Ozone National Ambient Air Quality Standards*, 82 Fed. Reg. 37,318 (Aug. 10, 2017).

¹²⁴Proposed Rule, *Review of the Primary National Ambient Air Quality Standards for Oxides of Nitrogen*, 82 Fed. Reg. 34,792 (July 26, 2017) (to be codified at 40 C.F.R. pt. 50).

On [September 5, 2017](#), the EPA posted on its public electronic docket and website and solicited comment on responses to certain state designation recommendations for the 2010 sulfur dioxide primary NAAQS.¹²⁵

On [September 18, 2017](#), the EPA announced that it is finalizing the updates of the Outer Continental Shelf (OCS) Air Regulations proposed in the Federal Register on June 17, 2016 and December 12, 2016. Requirements applying to OCS sources located within 25 miles of States' seaward boundaries must be updated periodically to remain consistent with the requirements of the corresponding onshore area (COA), as mandated by section 328(a)(1) of the CAA. The portions of the OCS air regulations that the EPA is updating pertain to the requirements for OCS sources for which the Santa Barbara County Air Pollution Control District and Ventura County Air Pollution Control District.¹²⁶

On [September 28, 2017](#), the EPA issued a direct final rule clarifying that containers holding two pounds or less of non-exempt substitute refrigerants for use in motor vehicle air conditioners that are not equipped with a self-sealing valve can be sold to persons that are not certified technicians, provided those small cans were manufactured or imported prior to January 1, 2018.¹²⁷

On [September 28, 2017](#), the EPA solicited public comment on its direct final rule clarifying that certain small cans of non-exempt substitute refrigerants for use in motor vehicle air conditioners may be sold to persons that are not certified technicians, provided those small cans were manufactured or imported prior to January 1, 2018. The EPA noted that if it received no adverse comment, it would not take any further action.¹²⁸

On [October 23, 2017](#), the EPA published its annual adjustment factors for the automatic excess emissions penalties imposed (in dollars per ton of excess) on sources that do not meet their annual Acid Rain emissions limitations.¹²⁹

On [November 16, 2017](#), the EPA established initial air quality designations for most areas in the U.S. for the 2015 primary and secondary NAAQS for ozone.¹³⁰

¹²⁵Notification of Availability and Public Comment Period, *EPA Responses to Certain State Designation Recommendations for the 2010 Sulfur Dioxide Primary National Ambient Air Quality Standard: Notification of Availability and Public Comment Period*, 82 Fed. Reg. 41,903 (Sept. 5, 2017) (to be codified at 40 C.F.R. pt. 81).

¹²⁶Final Rule, *Outer Continental Shelf Air Regulations; Consistency Update for California*, 82 Fed. Reg. 43,491 (Sept. 18, 2017) (to be codified at 40 C.F.R. pt. 55).

¹²⁷Direct Final Rule, *Protection of Stratospheric Ozone: Refrigerant Management Regulations for Small Cans of Motor Vehicle Refrigerant*, 82 Fed. Reg. 45,202 (Sept. 28, 2017) (to be codified at 40 C.F.R. pt. 82).

¹²⁸Proposed Rule, *Protection of Stratospheric Ozone: Refrigerant Management Regulations for Small Cans of Motor Vehicle Refrigerant*, 82 Fed. Reg. 45,253 (Sept. 28, 2017) (to be codified at 40 C.F.R. pt. 82).

¹²⁹Annual Adjustment Factors for Excess Emissions Penalty, *Acid Rain Program: Notification of Annual Adjustment Factors for Excess Emissions Penalty*, 82 Fed. Reg. 49,020 (Oct. 23, 2017).

¹³⁰Final Rule, *Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards (NAAQS)*, 82 Fed. Reg. 54,232 (Nov. 16, 2017) (to be codified at 40 C.F.R. pt. 81).

Chapter 3 • ENDANGERED SPECIES 2017 Annual Report¹

The following is a summary of major legislative, administrative, and judicial developments under the Endangered Species Act (ESA) and the implementing regulations promulgated by the United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (also known as National Oceanic and Atmospheric Administration–Fisheries Division, or NOAA-Fisheries) for the calendar year 2017.²

I. LEGISLATIVE DEVELOPMENTS

The following five bills advanced through the House Committee on Natural Resources in October 2017 and may signal upcoming legislative changes to the ESA.

The [Gray Wolf State Management Act](#) would direct the Department of the Interior (DOI) to reissue two final rules that would reinstate the delisting and removal of ESA protections for the gray wolf populations located in Wyoming and in nine states in the western Great Lakes region, including Wisconsin, Michigan, Minnesota, North Dakota, South Dakota, Iowa, Illinois, Indiana, and Ohio. The Act also provides that the mandated rule reissuances that delist these gray wolf populations “shall not be subject to judicial review.”³

The [Listing Reform Act](#) would require the DOI or the Department of Commerce (DOC) to consider economic factors in listing decisions and would authorize the DOI or DOC to not list a species as threatened or endangered based on the likelihood of “significant, cumulative economic effects” of the designation. The Listing Reform Act would also amend the ESA to: (1) allow regulators to consider petitions to list a species as endangered or threatened based on priority, rather than in the order the petitions are received; (2) prohibit regulators from giving general priority to petitions to list a species over petitions to delist a species; and (3) change the time to consider a petition to list or delist from within twelve months to “as expeditiously as possible.”⁴

The [State, Tribal, and Local Species Transparency and Recovery Act](#) would require the DOI or DOC to (1) disclose all data that serves as a basis for designating a species as threatened or endangered to the States affected by the listing, and (2) to consider data provided by affected States, tribes, and local governments as part of the “best available scientific and commercial data” used by the DOI and DOC to make listing determinations.⁵

The [Saving America’s Endangered Species Act](#) or “SAVES Act” would amend the ESA to provide that species in the United States that are “not native to the United States”

¹Compiled by J. B. Ruhl, David Daniels Allen Distinguished Chair in Law, Vanderbilt University Law School; Sarah Wells, Associate, Nossaman LLP; and Court C. VanTassell, Associate, Liskow & Lewis. The principal focus of this report is the Endangered Species Act (ESA), 16 U.S.C. §§ 1531–1544 (2012).

²Developments involving criminal prosecutions and the Convention on International Trade in Endangered Species are not covered in this report unless they have general application to ESA law and practice.

³H.R. 424, 115th Cong. (2017); S. 164, 115th Cong. (2017); *see* Removal of the Gray Wolf in Wyoming from the Federal List of Endangered and Threatened Wildlife, 77 Fed. Reg. 55,530 (Sept. 10, 2012) (codified at 50 C.F.R. pt. 17) (Final rule); Revising the Listing of the Gray Wolf (*Canis lupus*) in the Western Great Lakes, 76 Fed. Reg. 81,666 (Dec. 28, 2011) (codified at 50 C.F.R. pt. 17) (Final rule).

⁴H.R. 717, 115th Cong. (2017).

⁵H.R. 1274, 115th Cong. (2017); *see* S. 735, 115th Cong. (2017).

cannot be treated as endangered or threatened species for the purposes of the ESA, which would, among broader impacts, affect the importation of exotic wildlife and animal trophies.⁶

The [Endangered Species Litigation Reasonableness Act](#) would strike from the ESA the provision permitting the award of costs and attorney's fees to "any party, whenever the court determines such an award is appropriate" and, instead, would limit the award of costs and attorney's fees in accordance with United States Code title 28, section 2412 and would only authorize such an award to the "prevailing party."⁷

II. ADMINISTRATIVE DEVELOPMENTS⁸

FWS and NMFS have embarked upon a busy reform agenda following the transition in administrations. Broad Executive Orders⁹ impacting ESA issues and federal regulatory issues more generally early in the year began to give way to more direct proposals, notices of intent to revise rules and policies, and public comment opportunities to inform a broad array of ESA-related regulatory reforms contemplated by FWS.

In January 2017, in the final days of the Obama administration, FWS issued a Director's Order establishing a new Policy Regarding Voluntary Prelisting Conservation Actions.¹⁰ The policy had previously been formally noticed in the Federal Register, but the final policy was issued via Director's Order rather than formal publication. The policy addresses the crediting of voluntary conservation actions taken for species prior to their listing under the ESA and followed 2016 final rules revising the regulations applicable to Candidate Conservation Agreements with Assurances (CCAAs).

⁶H.R. 2603, 115th Cong. (2017).

⁷H.R. 3131, 115th Cong. (2017); *see* 28 U.S.C. § 2412.

⁸Specific listings of species, designations of critical habitat, development of recovery plans, inter-agency consultations, and issuance of incidental take authorizations are not covered in the portion of this report on administrative developments unless they have general application to ESA law and practice.

⁹*See, e.g.*, [Executive Order 13771](#), "Reducing Regulation and Controlling Regulatory Costs" (Feb. 3, 2017) (establishing that, unless prohibited by law, whenever an executive department or agency publicly promulgates a new regulation, it must identify at least two existing regulations to be repealed); [Executive Order 13781](#), "Comprehensive Plan for Reorganizing the Executive Branch" (Mar. 13, 2017) (seeking proposals for agency reform, program elimination, management reform, and any other ideas for reorganizing the Federal government); [Executive Order 13783](#), "Promoting Energy Independence and Economic Growth" (compelling review of environmental regulations that may burden energy production and rescinding the Obama Presidential Memorandum on mitigation that established the net benefit goal or, at a minimum, no net loss of protected resources); [Executive Order 13777](#), "Enforcing the Regulatory Reform Agenda" (Apr. 28, 2017) (requiring the head of each federal agency to designate a Regulatory Reform Officer and establish a Regulatory Reform Task Force to evaluate existing regulations and make recommendations to the agency head regarding their repeal, replacement, or modification); [Executive Order 13807](#), "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects" (Aug. 18, 2017) (establishing "performance priority goals" for environmental permitting of infrastructure projects and introducing the "One Federal Decision" concept).

¹⁰Director's Order No. 218, "Policy Regarding Voluntary Prelisting Conservation Actions," U.S. FISH & WILDLIFE SERV. (Jan. 18, 2017).

Also in the final days of the Obama administration, the Solicitor of the U.S. Department of the Interior (DOI) issued in January 2017 Solicitor’s Opinion M-37041, explaining and supporting DOI’s longstanding interpretation that the Migratory Bird Treaty Act (MBTA) prohibits incidental, non-purposeful “take” of migratory birds.¹¹ M-37041 was subsequently suspended and temporarily withdrawn in February 2017 by the then-Acting Secretary of the Interior to enable review of the memorandum by the new administration.¹² Ultimately, in December 2017, DOI released a new Solicitor’s Opinion, M-37050, that rescinded and replaced M-37041, announcing a reversal in DOI interpretation of the scope of MBTA liability. M-37050 concluded that the MBTA prohibition on “take” only applies to “affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs.”¹³

DOI Secretarial Order 3353, issued in August 2017, initiated a review of federal plans for the greater sage-grouse that had been finalized in 2015 as well as state conservation plans and programs benefiting the species.¹⁴ The stated purpose of the review was to enhance cooperation and clarify the conservation partnership between DOI and affected western states for the greater sage-grouse. In August 2017, DOI released a report prepared by a Greater Sage Grouse Team in response to Secretarial Order 3353 that provided recommendations for the revision of the greater sage-grouse plans and improvement of their implementation.¹⁵ Then, in October 2017, the Bureau of Land Management announced the reopening of its greater sage-grouse land use plans,¹⁶ as did the Forest Service.¹⁷

In June 2017, DOI announced a general request for public comment on regulatory reform regarding how DOI could improve implementation of regulatory reform initiatives and policies and to identify regulations for repeal, replacement, or modification.¹⁸ Building upon this regulatory reform effort, in October 2017 DOI released a report entitled “Review

¹¹Memorandum from U.S. Dep’t of Interior, Solicitor to U.S. Fish & Wildlife Serv. Dir., [M-37041](#), “Incidental Take Prohibited Under the Migratory Bird Treaty Act” (Jan. 10, 2017).

¹²Memorandum from K. Haugrud, U.S. Dep’t of the Interior Acting Sec’y to U.S. Dep’t of the Interior Acting Solicitor, [“Temporary Suspension of Certain Solicitor M-Opinions Pending Review”](#) (Feb. 6, 2017).

¹³Memorandum from U.S. Dep’t of the Interior Principal Deputy Solicitor to U.S. Dep’t of the Interior Sec’y, Deputy Sec’y, Asst. Sec’y for Land & Minerals Mgmt., Asst. Sec’y for Fish & Wildlife & Parks, [M-37050](#), “The Migratory Bird Treaty Act Does Not Prohibit Incidental Take” (Dec. 22, 2017).

¹⁴[Secretarial Order No. 3353](#), “Greater Sage-Grouse Conservation & Cooperation with Western States,” U.S. DEP’T OF THE INTERIOR (June 7, 2017).

¹⁵[Report in Response to Secretarial Order 3353](#), DOI SAGE GROUSE REVIEW TEAM (Aug. 4, 2017).

¹⁶Notice of Intent to Amend Land Use Plans Regarding Greater Sage-Grouse Conservation & Prepare Associated Environmental Impact Statements or Environmental Assessments, [82 Fed. Reg. 47,248](#) (Oct. 11, 2017) (Notice of intent).

¹⁷Idaho & Southwestern Montana (Beaverhead-Deerlodge, Boise, Caribou-Targhee, Salmon-Challis, & Sawtooth National Forests & Curlew National Grassland); Nevada (Humboldt-Toiyabe National Forest); Utah (Ashley, Dixie, Fishlake, Manti-La Sal, & Uinta-Wasatch-Cache National Forests); Wyoming (Bridger-Teton National Forest); and Wyoming/Colorado (Medicine Bow-Routt National Forest & Thunder Basin National Grassland); Amendments to Land Management Plans for Greater Sage-Grouse Conservation, [82 Fed. Reg. 55,346](#) (Nov. 21, 2017) (Notice of intent).

¹⁸Regulatory Reform, [82 Fed. Reg. 28,429](#) (June 22, 2017) (Request for comment).

of the Department of the Interior Actions that Potentially Burden Domestic Energy,” which specifically discusses a number of ESA-related issues.¹⁹ The report describes DOI progress in implementing the March 2017 Executive Order 13783, “Promoting Energy Independence and Economic Growth.”²⁰

Later in the year, FWS issued a notice of policy review on the revised FWS general mitigation policy and the new FWS ESA compensatory mitigation policy that were finalized less than a year ago.²¹ FWS sought public comment on potential revision of the policies and removal of the policies’ conservation planning goal of achieving a net benefit or, at a minimum, no net loss of natural resources. Relatedly, FWS and NMFS jointly published notices of their review of the regulations²² and policy²³ governing CCAAs under the ESA. FWS and NMFS plan to review and potentially revise the CCAA regulations and policy, including their conservation planning goal of a net benefit or, at a minimum, no net loss of natural resources.

FWS established by a November 2017 internal memorandum the new FWS practice of formally requesting participation of at least two representatives from state government in each science team that develops a Species Status Assessment pursuant to the ESA.²⁴ This enhanced role for the states in ESA analyses of species’ status provides for one representative from the state fish and wildlife agency and the other representative designated by the respective Governor’s office.

III. JUDICIAL DEVELOPMENTS²⁵

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

1. Listings and Delistings

After a portion of the endangered gray wolf population rebounded, the government promulgated a rule designating and delisting a sub-population inhabiting all or portions of nine states in the Western Great Lakes region of the United States. The D.C. Circuit vacated

¹⁹[Final Report: Review of the Department of the Interior Actions that Potentially Burden Domestic Energy](#), U.S. DEP’T OF THE INTERIOR (Oct. 24, 2017).

²⁰[Executive Order 13783](#), *supra* note 11 (compelling review of environmental regulations that may burden energy production).

²¹Mitigation Policies of the U.S. Fish & Wildlife Service; Request for Comments, [82 Fed. Reg. 51,382](#) (Nov. 6, 2017) (Request for comments).

²²Endangered and Threatened Wildlife & Plants; Regulations for Candidate Conservation Agreements with Assurances, [82 Fed. Reg. 55,550](#) (Nov. 22, 2017) (Request for comments).

²³Candidate Conservation Agreements with Assurances Policy, [82 Fed. Reg 55,625](#). (Nov. 22, 2017) (Request for comments).

²⁴Memorandum from U.S. Dep’t of the Interior Principal Deputy Dir. to U.S. Fish & Wildlife Serv. Ass’t Dir. of Ecological Servs., [“State Representation on Species Status Assessment Teams”](#) (Oct. 13, 2017).

²⁵The case discussions presented in this report include significant ESA cases selected by the authors and organized according to an outline of major ESA sections as the statute existed in 2017. All slip opinions are on file with the authors. Decisions from late in the calendar year 2016 may be included if they were not included in the Committee’s 2016 Year in Review Report. Due to space limits, the focus is on appellate and important district court opinions, and only those portions of an opinion presenting significant ESA legal developments are summarized.

the rule on two grounds.²⁶ First, although the court found FWS’s interpretation of ESA to permit the designation of distinct population segments within a listed species that could then be delisted was reasonable, it held that FWS improperly failed to consider the effects of the delisting on the remnant population. Second, although the court found FWS’s interpretation of term “range” to mean the current range of a species was reasonable, it held that FWS improperly failed to include consideration of the species’ lost historical range when considering its status in its current range. The court rejected arguments that FWS’s decision regarding whether wolves in Minnesota should be included in the delisted sub-population was driven by politics rather than science.

In determining that the Cabinet–Yaak grizzly bear was not warranted for listing as an endangered species, FWS applied what it called the “agency’s long-standing interpretation of the statutory phrase ‘in danger of extinction’” as meaning on the brink of extinction and urged the district court to apply *Chevron* deference to the interpretation.²⁷ The district court found that the “on the brink of extinction” standard was a new policy for which FWS had never provided an explanation, and thus was not entitled to *Chevron* or *Skidmore* deference, and vacated the not warranted finding. The court also instructed FWS, to the extent it intends to continue using the “brink of extinction” standard, to show that this new interpretation is permissible under the ESA.

The Ninth Circuit explained that FWS is not required to proceed solely on basis of its Listing Priority Number (LPN) rankings when making “warranted but precluded” findings, in this case for the whitebark pine. FWS must show that it is making expeditious progress in the process of listing and delisting other species, and may consider budget limitations, court orders, and statutory deadlines.²⁸

The Ninth Circuit rejected a claim that FWS ignored climate change as a factor in assessing whether desert eagles are significant to their taxon. The court deemed it sufficient that FWS explained it was “uncertain about the magnitude of the threat posed by climate change . . . However, based on the best information available, we conclude that climate change is not a significant threat” to the eagle, which is “highly adaptable.”²⁹

The D.C. Circuit held that, in delisting the gray wolf in Wyoming transferring the management of the wolf from federal control to state control, it was permissible for FWS to rely on nonbinding and unenforceable representations in the State of Wyoming’s management plan in concluding that the plan was adequate to ensure that the State would maintain the necessary number of breeding pairs and individual wolves required by the delisting rule. The court explained that nothing in the ESA demands that such representations be legally binding, and that FWS could reasonably conclude that they were sufficiently certain to be implemented based on the strength of the State’s incentives.³⁰

2. Critical Habitat Designations

In a lengthy, blistering dissent from a denial of rehearing en banc, a group of Fifth Circuit judges condemned the panel’s ruling that critical habitat can include areas uninhabitable by the species.³¹ The dissent argued that the ESA sets out the following path for the critical-habitat designation process: (1) determine whether the land in question is the species’ habitat; (2) if so, determine whether any portion of that land meets the

²⁶[Humane Soc’y of U.S. v. Zinke](#), 865 F.3d 585 (D.C. Cir. 2017).

²⁷[All. for the Wild Rockies v. Zinke](#), 265 F. Supp. 3d 1161 (D. Mont. 2017).

²⁸[Wildwest Inst. v. Kurth](#), 855 F.3d 995 (9th Cir. 2017).

²⁹[Ctr. for Biological Diversity v. Zinke](#), 868 F.3d 1054 (9th Cir. 2017).

³⁰[Defenders of Wildlife v. Zinke](#), 849 F.3d 1077 (D.C. Cir. 2017).

³¹[Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.](#), 848 F.3d 635 (5th Cir. 2017).

definition of critical habitat; and (3) if so, designate that portion of the species' habitat as its critical habitat.

3. Recovery Plans

A district court held that the manner in which FWS incorporates the elements of recovery plans is discretionary and thus not reviewable under the ESA citizen suit provision, and that recovery plans are not final agency action and thus are not reviewable under the Administrative Procedures Act (APA).³²

4. Five-Year Reviews

There were no significant developments to report.

B. *Section 5: Habitat Acquisition*

There were no significant developments to report.

C. *Section 6: State Cooperative Programs*

There were no significant developments to report.

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

1. Section 7(a)(1) Conservation Duty

In a rare outcome, a district court found that the United States Department of Agriculture (USDA) had not satisfied its ongoing conservation obligations under section 7(a)(1) by simply terminating a beetle release program when it was found to adversely affect the endangered flycatcher.³³ With no other affirmative conservation actions evident in the record, the USDA was in violation of section 7(a)(1).

2. Section 7(a)(2) Jeopardy and Adverse Modification Standard and Consultations

The Ninth Circuit explained that, in reaching a no-jeopardy opinion regarding the effects on endangered turtles of approving increased swordfish fishing, NMFS was entitled to rely on a climate model that could only predict changes in the turtle population for 25 years, and that its conclusions that climate change effects could not be “reliably quantified” nor “qualitatively described or predicted” by the agency at the time were reasonable.³⁴

The Ninth Circuit agreed with FWS that the plain language of the ESA requires that an adverse modification of critical habitat consists of two elements: (1) a “modification” of the habitat that is (2) “adverse,” and on that basis rejected the argument that reduced connectivity resulting from a project’s narrowing of a corridor between two of the desert tortoise’s critical habitat units could constitute adverse modification, because the

³²[Friends of the Wild Swan, Inc. v. Thorson](#), 260 F. Supp. 3d 1338 (D. Ore. 2017).

³³[Ctr. for Biological Diversity v. Vilsack](#), 276 F. Supp. 3d 1015 (D. Nev. 2017).

³⁴[Turtle Island Restoration Network v. U.S. Dep’t of Commerce](#), 878 F.3d 725 (9th Cir. 2017).

construction of the project would not have resulted in any alteration to the critical habitat itself.³⁵

Several cases worked at the intersection of the complex topics of what form and extent of agency discretion is needed to trigger consultation duties and the interplay of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the ESA. The Ninth Circuit, which has developed an almost inscrutable jurisprudence on the discretionary action issue, ruled that although the EPA has an ongoing duty under FIFRA to comply with the ESA, triggering of Section 7 consultation duties is based on an affirmative agency action and thus the retention of discretionary control over previously issued pesticide registrations is not such an ongoing action.³⁶ Elsewhere, a district court in the Ninth Circuit ruled that EPA's decision to convert a FIFRA pesticide registration from conditional to unconditional is sufficiently discretionary to trigger consultation, but that EPA's publication in the Federal Register of applications for new uses of registered pesticides does not.³⁷

Consistent with the Ninth Circuit's opinion on discretionary action described above, as well as with the Circuit's convoluted jurisprudence on the issue generally, a district court in the Ninth Circuit distinguished between the discretion the Bureau of Reclamation exercises in the execution and renewal of water delivery contracts, which does trigger consultation requirements, versus the agency's discretion during the term of the contracts, which did not require reinitiation of the consultations because no contract provisions conferred on the agency authority to modify the contracts for any reason during their terms. The court's opinion—one on a series of trial and appellate decisions in the underlying litigation—provides a commendably thorough and well-reasoned review of the Ninth Circuit's jurisprudence on this issue.³⁸

3. Section 7(d) Prohibition Against Irreversible Commitment of Resources

There were no significant developments to report.

4. Incidental Take Statements

The Forest Services and a ski resort developer entered into a land exchange to allow access to the planned ski resort. The Forest Service expressed concerns about the impacts the development of the base area could have on species habitat in the ski area, but disavowed any involvement with or authority over the ski resort. The Forest Service initially advised the developer that it would conduct section 7 consultation only with regard to land transfer area, for which no take of listed species was anticipated, leaving it to the developer to obtain a section 10 incidental take permit for any impacts at the ski area. But the Forest Service later agreed to include the ski area within the scope of the consultation, and the resulting incidental take statement authorized take of one lynx at the ski area, contained conservation measures, and imposed on FWS, not the Forest Service, the duty to monitor and enforce. The district court expressed skepticism regarding what it called “this use of Section 7 to, in effect, circumvent Section 10 compliance with Section 7 by a non-federal party,” but did not reach that issue as it found the conservation measures

³⁵[Defs. of Wildlife v. Zinke](#), 856 F.3d 1248 (9th Cir. 2017).

³⁶[Ctr. for Biological Diversity v. U.S. Envtl. Prot. Agency](#), 847 F.3d 1075 (9th Cir. 2017).

³⁷[Ellis v. Housenger](#), 252 F. Supp. 3d 800 (N.D. Cal. 2017).

³⁸[Nat. Res. Def. Council v. Norton](#), 236 F. Supp. 3d 1198 (E.D. Cal. 2017).

inadequate and the shifting of ongoing agency oversight from the Forest Service to FWS impermissible.³⁹

E. Section 9: Take Prohibition

After having held that water delivery contracts between the Bureau of Reclamation and Bay-Delta area water users did not contain terms conferring sufficient discretion on the agency to require ongoing reinitiation of consultation (see above), the district court grappled with the issue of whether the agency nonetheless could be held liable for unauthorized takes of listed aquatic species caused by the water deliveries. The court explained the issue to be whether a federal agency acting to implement a non-discretionary duty imposed by a valid contract should be subject to Section 9 liability. The court ruled as a matter of law it should not, stating:

[T]he Court does not believe it is appropriate to impose Section 9 liability on a government agency for take caused by an action over which it has no control. In this case, to do the opposite would require Reclamation to either breach still-valid [contracts], or obtain a Section 10 ITP before implementing any non-discretionary aspect of the SRS Contracts. Accordingly, the Court finds that a federal agency that is legally required to take an action pursuant to federal law, such as by implementing non-discretionary terms in an otherwise valid water delivery contract, that agency cannot be the proximate cause of Section 9 take by undertaking that non-discretionary action. While the concept of proximate cause limits a federal agency's Section 9 liability for actions over which it has no control, such a limit naturally would not apply where the federal agency does retain some degree of control. Accordingly, Section 9 take liability may attach to take otherwise proximately caused by actions over which a federal agency does have control.⁴⁰

Nevertheless, the court reasoned that the level of discretion necessary to trigger section 7 consultation or reinitiation is not necessarily the same as the level of discretion needed to trigger exposure to liability for take under section 9, and that fact issues existed regarding certain aspects of the contracts in this regard, thus denying the government's motion to dismiss.

The Fifth Circuit ruled that plaintiff's theory that barge traffic was taking the endangered sea turtle failed to establish likelihood of success on the merits and thus denied preliminary injunction. The causal theory was that (1) *if* turtles feed on moss on the mooring dolphins *when* mooring operations are taking place; (2) *if* they attempt to flee by diving; and (3) *if* they run out of water and hit the bottom; then there is an *opportunity* for a take to occur. The court explained "that is quintessential speculation. Such speculation built upon further speculation does not amount to a 'reasonably certain threat of imminent harm' to the endangered turtles."⁴¹

³⁹Rocky Mountain Wild v. Dallas, No. 15-cv-01342-RPM, 2017 WL 6350384 (D. Colo. May 19, 2017).

⁴⁰Nat. Res. Def. Council, 236 F. Supp. 3d at 1239 (emphasis in original).

⁴¹[Friends of Lydia Ann Channel v. U.S. Army Corps of Eng'rs](#), 701 F. App'x 352 (5th Cir. 2017).

F. *Section 10: Permits and Experimental Populations*

1. Habitat Conservation Plans (HCPs) and Incidental Take Permits

FWS issued an incidental take permit to the Maine Department of Inland Fisheries and Wildlife authorizing incidental takes of Canada lynx resulting from its state-regulated trapping programs. A district court ruled that it was acceptable for FWS to limit mitigation to its estimated three lethal takes, on the ground that non-lethal takes were minor and did not require mitigation, and that creation of sufficient snowshoe hare habitat to support three additional lynx was adequate mitigation.⁴²

2. Experimental and Reintroduced Populations

There were no significant developments to report.

G. *Section 11: Enforcement, Citizen Suits, Standing, and Jurisdiction Issues*

A wildlife conservation group claimed that acts and omissions by the New York state parks commissioner led to populations of feral cats at a state park that were posing a risk to a threatened bird species. Rejecting an Article III standing challenge, the district court held that although this chain of causation has more than one link, it is neither hypothetical nor tenuous and is “certainly not implausible.”⁴³

The First Circuit held that because the Federal Energy Regulatory Commission (FERC) had incorporated Biological Opinions into its order on dam relicensing, the Federal Power Act precluded direct challenge of the Biological Opinions in district court and required the claims to be brought directly to the D.C. Circuit.⁴⁴

H. *Miscellaneous ESA Topics and Related Federal and State Laws*

Reversing a district court ruling, the Tenth Circuit held that the regulation on nonfederal land of take of the Utah Prairie dog, a purely intrastate species, is a constitutional exercise of congressional authority under the Commerce Clause and, thus Congress could also constitutionally authorize the Secretary of the Interior to promulgate regulations to achieve this end.⁴⁵

In the next installment in the long ongoing Klamath River Basin irrigation district and water user takings claims, the Court of Federal Claims held that none of the claimants established cognizable taking claims: although the court recognized the property interests the claimants had in delivery of water, the takings claims were precluded either by contractual limitations or by the Tribal holders of superior water rights.⁴⁶

⁴²[Friends of Animals v. Phifer](#), 238 F. Supp. 3d 119 (D. Me. 2017).

⁴³[Am. Bird Conservancy v. Harvey](#), 232 F. Supp. 3d 292 (E.D.N.Y. 2017).

⁴⁴[Me. Council of Atl. Salmon Fed’n v. Nat’l Marine Fisheries Serv.](#), 858 F.3d 690 (1st Cir. 2017).

⁴⁵[People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.](#), 852 F.3d 990 (10th Cir. 2017).

⁴⁶[Baley v. U.S.](#), 134 Fed. Cl. 619 (Fed. Cl. 2017).

Chapter 4 • ENVIRONMENTAL DISCLOSURE 2017 Annual Report¹

I. GOVERNMENTAL ACTION

A. SEC Rules and Proposals

2017 was marked by inaction and rollbacks at the Securities and Exchange Commission (SEC) with respect to environmental disclosures. In 2016, the SEC introduced a [Concept Release](#) to seek public comment on modernizing certain business and financial disclosure requirements in Regulation S-K, chief among them disclosure of sustainability-related information.² The Concept Release sought feedback from publicly-traded companies and the public whether sustainability disclosures should be more proscriptive than the current “reasonable investor” standard.³ The SEC [received](#) over 276 non-form comment letters; two thirds of these letters addressed sustainability information in SEC filings with the majority of these supporting improved disclosure of sustainability-related information in SEC filings.⁴ Nevertheless, in 2017, the SEC did not act on these comments.

Similarly, in 2016, the SEC [proposed](#) new requirements and best practices regarding disclosures for the mining industry.⁵ The SEC’s proposed rule on [Modernization of Property Disclosures for Mining Registrants](#), issued June 16, 2016, would have required more environmental risk disclosure.⁶ The SEC [extended](#) the comment period for the proposed rule through September 26, 2016⁷ and comments on the proposed rule were published.⁸ However, the SEC did not issue a final rule in 2017.

Rather, at multiple occasions in 2017, the SEC – and the Trump Administration more broadly – took aim at the Conflict Minerals Disclosure mandated by Section 1502 of the Dodd-Frank Reform and Consumer Protection Act (“Dodd-Frank”), which requires issuers to trace whether their products contain minerals from a war-torn part of Africa. In January, the acting SEC Chairman, Michael Piwowar, [announced plans](#) to reconsider its

¹This summary was prepared by Jim Creech, Student, Elisabeth Haub School of Law at Pace University; Donna Mussio, Special Counsel, Fried, Frank, Harris, Shriver & Jacobson, LLP; Mary Beth Phipps, Associate, Fried, Frank, Harris, Shriver & Jacobson, LLP; Jenny McClister, Compliance and Social Responsibility Counsel, Hewlett Packard, Inc.; and Edward Witte, Attorney, Godfrey & Kahn, S.C.

²Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,916 (Apr. 22, 2016) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240 and 249) (Concept Release).

³*Id.* at 23,916.

⁴BUSINESS AND FINANCIAL DISCLOSURE REQUIRED BY S-K-THE SEC’S CONCEPT RELEASE AND ITS IMPLICATIONS, SUSTAINABILITY ACCOUNTING STANDARDS BD. (Sept. 14, 2016).

⁵Modernization of Property Disclosures for Mining Registrants, 81 Fed. Reg. 41,652 (June 27, 2016) (Proposed rule) (to be codified at 17 C.F.R. pts. 229, 239, and 249).

⁶Madison Condon, [Rules Would Require More Environmental Risk Disclosure in Mining](#), EARTH INST. COLUMBIA U. (Aug. 10, 2016); [SEC Proposes New Mining Disclosure Rules](#), GOODMAN LLP UPDATE (June 27, 2016); [Understanding the SEC’s Proposed New Mining Disclosure Rules: Questions and Answers](#), DORSEY (July 6, 2016).

⁷Extension of Comment Period for Modernization of Property Disclosures for Mining Registrants, 81 Fed. Reg. 58,877 (Aug. 26, 2016) (Proposed rule) (to be codified at 17 C.F.R. pts. 229, 239, and 249).

⁸[Comments on Proposed Rule: Modernization of Property Disclosures for Mining Registrants](#), U.S. SECURITIES & EXCHANGE COMM’N (last updated Mar. 29, 2018).

Conflict Minerals Disclosure rule – Rule 13p-1 – and requested public comment.⁹ In February, a [draft Presidential Memorandum](#) surfaced that indicated the White House may seek to temporarily waive requirements of the SEC’s Conflict Minerals rule on national security grounds.¹⁰ In March, the State Department [issued a request](#) for stakeholder input signaling a potential broader interagency effort to consider alternatives for addressing responsible sourcing of minerals in the Democratic Republic of Congo.¹¹ In April, following the D.C. District Court’s [final judgment](#) in a case that struck down a narrow portion of the Conflict Minerals Disclosure rule,¹² Piwowar [released a statement](#) questioning whether the SEC could reconcile the D.C. Circuit Court’s decision with Congress’s intent in Section 1502.¹³ That same day, the SEC’s Division of Corporate Finance [stated](#) it would “not recommend enforcement action” for companies that do not file a Conflict Minerals Report required by paragraph (c) of the rule.¹⁴ In the end, the Conflict Minerals Rule remained largely intact as of May 31, the filing deadline.

In another move that may curtail requests for increased environmental disclosures, in July, Jay Clayton, President Trump’s SEC Chairman, signaled the need to review the SEC’s shareholder proposal rule in an apparent move to curtail activist shareholder proposals, chief among them proposals to force company disclosures or action regarding the environment and other social issues.¹⁵ Accordingly, on November 1, SEC staff [published new guidance](#) on when issuers can fairly ignore shareholder proposals.¹⁶ Namely, the guidance expands when issuers can disregard shareholder proposals under either the “ordinary business exception” under Rule 14a-8(i)(7) or the “economic relevance exception” under Rule 14a-8(i)(5).¹⁷ Following this guidance, in December, Apple pushed back on shareholder proposals on climate issues and human rights concerns.¹⁸

Congress also passed and proposed legislation rolling back certain SEC rules relating to certain Dodd-Frank requirements. On February 14, 2017, using the

⁹Susan N. Lynch, *Acting SEC Chair Seeks to Scale Back ‘Conflict Minerals’ Rule*, Reuters (Jan. 31, 2017).

¹⁰Draft Memorandum from Donald Trump to Securities & Exchange Comm’n., “Suspension of the Conflict Minerals Rule,” (Feb. 2017).

¹¹Notice of Stake Holder Consultations on Responsible Conflict Mineral Sourcing, 82 Fed. Reg. 15,265 (Mar. 27, 2017) (Notice).

¹²Nat’l Ass’n of Mfrs. v. SEC, No. 13-CF-000635 (D.D.C. Apr. 3, 2017). This case determined that the Securities Exchange Act of 1934 and the Conflict Minerals Rule “violate[d] the First Amendment to the extent that the statute and rule require regulated entities to report to the Commission and to state on their website that any of their products have ‘not been found to be ‘DRC conflict free.’”

¹³Press Release from Acting Chairman Michael S. Piwowar, Securities & Exchange Comm’n, Statement of Acting Chairman Piwowar on the Court of Appeals Decision on the Conflicts Minerals Rule (Apr. 7, 2017).

¹⁴Press Release, SEC Div. of Corp. Fin., Updated Statement on the Effect of the Court of Appeals Decision on the Conflict Minerals Rule (Apr. 7, 2017).

¹⁵Ronald Orol, [SEC’s Clayton Takes Hard Line on Activist Shareholder Proposal](#), THESTREET (July 26, 2017); Lynch, *supra* note 9; Cydney Posner, [Is the noose tightening around the shareholder proposal rules?](#), COOLEY PUBCO (July 28, 2017).

¹⁶Staff Legal Bulletin No. 14I (CF), DIV. OF CORP. FIN., SECURITIES & EXCHANGE COMM’N (Nov. 1, 2017).

¹⁷*Id.*; see David R. Brown, [SEC Issues New Guidance on Shareholder Proposals](#), NIXON PEABODY LLP (Nov. 7, 2017).

¹⁸Ross Kerber, [Apple aims to block climate, rights proposals with quick use of SEC guidance](#), REUTERS (Dec. 11, 2017).

Congressional Review Act, President Trump signed legislation repealing the SEC's [Rule 13q-1](#) regarding transparency for resource extraction companies.¹⁹ The rule was promulgated under Section 1504 of Dodd-Frank and was meant to curb corruption in resource-rich countries by requiring U.S. resource extraction companies to disclose payments made to governments.²⁰ An earlier version of the rule was vacated by the U.S. District Court for the District of Columbia finding that the SEC had overstepped its mandate.²¹ On June 27, 2016, the SEC announced its adoption of the new Rule 13q-1, which it claimed remedied the defects identified by the District Court.²² This revised Rule 13q-1 was repealed by the February 2017 legislation under the Congressional Review Act.

Through the Financial CHOICE Act, which would curtail shareholder proposals, Congress also [attempted to repeal](#) the provisions in Dodd-Frank mandating disclosure of conflict minerals, payments to foreign governments by resource extraction issuers, and mine safety violations.²³ This legislation passed the U.S. House of Representatives in June 2017 but was “dead on arrival” in the Senate.²⁴ Therefore, at the close of 2017, while statutory mandates for disclosure remain intact, the rules implementing disclosure were either threatened or removed. This trend is expected to continue into 2018.

B. ExxonMobil Climate Change Investigation and Litigation

In November 2015, New York Attorney General Eric Schneiderman subpoenaed ExxonMobil seeking documents concerning its knowledge about and research into the science and effects of climate change, specifically focusing on potential harm to investors and whether the company was required to share its information.²⁵ ExxonMobil argued that these documents were protected by accountant-client privilege under Texas state law.²⁶ On September 12, 2017, the New York Court of Appeals, the state's highest court, affirmed the lower court's decision that New York state law applies, which does not recognize an accountant-client privilege.²⁷ As a result, ExxonMobil would be required to produce the documents requested by Schneiderman; however, Exxon continues to fight the probe, arguing in federal court that “the investigation is politically motivated and violates the corporation's federal constitutional rights, including the right to free speech.”²⁸ ExxonMobil's argument is supported by other State Attorneys General, including those from Texas, Louisiana, South Carolina, Alabama, Michigan, Wisconsin, Nebraska, Oklahoma, Utah, Arkansas, Nevada, and Indiana.²⁹

¹⁹Timothy Cama, [Trump signs repeal of transparency rule for oil companies](#), THE HILL (Feb. 14, 2017).

²⁰*Id.*

²¹Press Release, U.S. Securities and Exchange Commission, [SEC Adopts Rules for Resource Extraction Issuers Under Dodd-Frank Act](#) (June 27, 2016).

²²*Id.*

²³Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017).

²⁴Jeff Cox, [House passes Choice Act that would gut Dodd-Frank banking reforms](#), CNBC (June 8, 2017).

²⁵David Hasemyer, [Exxon Loses Bid to Keep Auditor Files Secret in Climate Fraud Investigation](#), INSIDECLIMATENEWS.ORG (Sept. 12, 2017).

²⁶*Id.*

²⁷*Id.*

²⁸Karen Savage, [Healey, Pursuing Exxon Climate Case, Fearlessly Leads the Fight as Mass. AG](#), CLIMATE LIABILITY NEWS (Nov. 13, 2017).

²⁹Erik Larson, [Exxon Gets Backing of GOP-Led States in Fight Over Climate Probe](#), Bloomberg Markets (Apr. 20, 2017).

Additionally, the SEC started to investigate ExxonMobil's accounting methods in September 2016.³⁰ However, at the time of this publication, the SEC has not released any documents to the public or made public statements regarding the investigation.

C. Hydraulic Fracturing Disclosure Rules

In 2016, a U.S. District Judge in Wyoming struck down the Bureau of Land Management's (BLM's) proposed rule on hydraulic fracturing on federal and Indian lands (which included public disclosure for chemicals used in hydraulic fracturing), holding that the BLM does not have the authority to regulate hydraulic fracturing on federal and Indian lands.³¹ BLM appealed this decision to the Tenth Circuit Court of Appeals, which determined that the challenges were "prudentially unripe" because BLM is in the process of rescinding the fracking rule at issue due to the change in Administration.³² Accordingly, the court dismissed the appeal and remanded to the district court with directions to vacate its opinion and dismiss the action without prejudice.³³

II. SHAREHOLDER LITIGATION

Car manufacturers face a number of investor lawsuits relating to allegedly fabricated emissions levels. In 2016, the Arkansas State Highway Employees' Retirement System and the Miami Police Relief and Pension Fund brought an investor lawsuit relating to Volkswagen's diesel emissions scandal on behalf of a proposed class of those who purchased Volkswagen American Depositary Receipts between 2010 and 2016.³⁴ Rejecting Volkswagen's argument that the case should be heard in Germany, U.S. District Judge Charles Breyer found that Volkswagen must face the lawsuit because the securities were purchased in the U.S. and the country has an interest in protecting its investors.³⁵

In June 2016, bondholders brought a separate putative class action against Volkswagen claiming that the company "engaged in a scheme to defraud and made numerous materially false and misleading statements and omission to [b]ondholders" regarding emissions testing which therefore misled the bondholders into believing that the Volkswagen vehicles were compliant with emissions regulations.³⁶ Volkswagen sought to dismiss the suit, arguing that its offering memo never explicitly stated that its vehicles were compliant with all emissions regulations, and that the plaintiffs did not show any reliance on the alleged statements or omissions.³⁷ Judge Breyer partially granted the motion, saying that the bondholders "plausibly alleged that the relevant offering memorandum was misleading, and that at least some (but not all) defendants made statements and omissions

³⁰Jackie Wattles, [SEC is Latest Regulator to Investigate ExxonMobil's Accounting Practices](#), CNN Money (Sept. 20, 2016).

³¹Wyoming v. Jewell, No. 2:15-CV-043-SWS, 2016 WL 3509415 (D. Wyo. June 21, 2016).

³²[Wyoming v. Zinke](#), 871 F.3d 1133 (10th Cir. 2017).

³³*Id.*

³⁴Hazel Bradford, *Pension Funds' Volkswagen Lawsuit May Proceed in U.S., Court Rules*, PENSIONS&INVESTMENTS (Jan. 5, 2017).

³⁵*Id.*

³⁶Demand for Jury Trial, BRS v. Volkswagen AG, No. 3:16-cv-3435 (N.D. Cal. June 20, 2016).

³⁷[Order Granting in Part & Denying in Part Defendants' Motions to Dismiss the Bondholders' Class Action Complaint](#), BRS v. Volkswagen, No. 16-cv-3435 (N.D. Cal. July 19, 2017).

therein with scienter.”³⁸ Judge Breyer also required that plaintiff file an amended complaint in order to address deficiencies described in the opinion.³⁹

Volkswagen is not the only automaker facing shareholder suits as a result of allegedly fabricated emissions levels. In January 2017, the U.S. Department of Justice, the SEC, and several state attorneys general subpoenaed Fiat, seeking information about possible excess diesel emissions from some of its vehicles.⁴⁰ A number of civil lawsuits followed, including a proposed class action filed by investors in New York federal court, asserting that the automaker inflated its stock price by failing to disclose that Volkswagen was using illegal emissions software and not properly implementing recalls and mandated safety compliance protocols.⁴¹ In May 2017, following months of investigations, the EPA filed suit against Fiat Chrysler, accusing it of installing “defeat devices” in 104,000 diesel vehicles.⁴² Fiat has since moved to dismiss this action, alleging that the EPA’s complaint does not “strongly suggest that any of the automaker’s senior executives intentionally misrepresented the vehicles’ emissions compliance,” and that the complaint does not show that executives “knew about any possible noncompliance with U.S. emissions regulations.”⁴³ Most recently, the U.S. Judicial Panel on Multidistrict Litigation ordered that the EPA lawsuit be moved from Michigan to California federal court because the claims are related to multidistrict litigation taking place there.⁴⁴

In October 2016, a proposed class of plaintiffs, led by the Public School Retirement System of the School District of Kansas City, Missouri and consisting of investors, sued Germany-based Daimler AG for allegedly inflating stock prices by lying about using software to cheat emissions tests for certain diesel vehicles.⁴⁵ The investors claim that Daimler inflated its stock prices “by misrepresenting its use of ‘defeat devices’ in Mercedes-Benz vehicles with BlueTec technology . . . that allowed the vehicles to operate more cleanly during emissions testing than on the road.”⁴⁶ Daimler’s defense focused on a lack of jurisdiction in United States court.⁴⁷ On May 31, 2017, U.S. District Judge Otero decided that the court has jurisdiction to hear plaintiff’s claims, that plaintiffs sufficiently backed up their claims about Daimler’s misrepresentations, and that the case will move forward.⁴⁸

During 2017, disclosure lawsuits and enforcement actions against Navistar and its

³⁸*Id.*

³⁹*Id.*

⁴⁰D. Ehterington, *Fiat Chrysler Under Investigation by U.S. Justice Department Over Emissions*, TECHCRUNCH (Jan. 13, 2017).

⁴¹*See, e.g., Complaint*, Ross v. Fiat Chrysler Automobiles NV, No. 1:17-cv-00418 (S.D.N.Y. 2017).

⁴²Press Release, U.S. Dep’t of Justice, [U.S. Files Complaint Against Fiat Chrysler Automobiles for Alleged Clean Air Act Violations](#) (May 23, 2017).

⁴³John Kennedy, [Fiat Investors Say EPA Suit Backs Stock Drop Claims](#), LAW360 (June 2, 2017) (subscription required).

⁴⁴Mike Spector, [U.S. Emissions Suit Against Fiat Chrysler Sent to California Court](#), WALL STREET J. (June 7, 2017).

⁴⁵Consolidated Class Action Complaint for Violations of Federal Securities Laws, [Vancouver Alumni Asset Holdings, Inc. v. Daimler AG](#), No. 2:16-cv-02942 (C.D. Cal. 2016).

⁴⁶Emily Field, [German Prosecutors Probe Daimler Diesel Emissions](#), LAW360 (Mar. 23, 2017) (subscription required).

⁴⁷*Id.*

⁴⁸David Shepardson, [U.S. Judge Lets Investor Diesel Lawsuit Against Daimler Proceed](#), REUTERS (June 1, 2017).

ex-CEO progressed or were settled. The SEC began investigating Navistar in 2012 for disclosure and accounting issues associated with whether the company's engines would meet environmental regulations. The SEC action was settled in March 2016.⁴⁹ The SEC is still pursuing its case against Navistar's ex-CEO Daniel Ustain.⁵⁰ On February 15, 2017, U.S. District Judge Manish S. Shah approved a settlement ending a pair of derivative lawsuits accusing Navistar of misleading shareholders on the ability of its engines to meet emission standards.⁵¹ While the shareholder suits were settled, other lawsuits brought under claims of racketeering and purposeful concealment of product defects continue.⁵²

In another securities lawsuit involving energy efficiency standards, in April 2017 TCP International Holdings, a manufacturer and distributor of energy-efficient lighting products, reached a \$7.2 million settlement resolving a securities class action with respect to alleged false statements about certain products meeting Energy Star standards.⁵³

In June 2017, a U.S. District Judge dismissed an investor lawsuit alleging that Sempra and its subsidiary Southern California Gas Co. (SoCalGas) artificially inflated stock prices by making false statements regarding their commitment to safety prior to the 2015 Aliso Canyon natural gas leak, which caused the temporary relocation of thousands of residents and resulted in criminal charges and penalties.⁵⁴ The suit focused on the fact that a SoCalGas executive admitted that a safety valve on the underground well in question was removed in 1979. The court held that, without showing that the valve was required, the investors' claims could not stand. The court further noted that the well in question was one of 115 wells and agreed with the company that releasing information about each individual well would unnecessarily "bury shareholders in an avalanche of information."⁵⁵

Finally, a few cases under the Employee Retirement Income Security Act (ERISA) involving alleged fraudulent or insufficient environmental disclosure made their way through the courts. In March, a U.S. District Court in Missouri dismissed a putative class suit brought by participants in Peabody Energy Corp.'s retirement plans that invested in company stock prior to its bankruptcy. The suit alleged, in part, that Peabody's climate change disclosure in public filings misstated that it could not predict the impact of regulation on coal consumption. The court rejected this claim based on the high standard for stating a claim against fiduciaries under ERISA.⁵⁶ Participants in ExxonMobil's retirement plan are attempting to avoid a similar fate in their ERISA suit alleging that the company made fraudulent climate change disclosures, which negatively impacted the stock

⁴⁹Press Release, Securities & Exchange Commission, [SEC: Navistar International & Former CEO Misled Investors About Advanced Technology Engine](#) (Mar. 31, 2016).

⁵⁰Matt Sanctis, [Case Alleging Former Navistar CEO Misled Investors Moves Forward](#), SPRINGFIELD NEWS-SUN (Jan. 27, 2017).

⁵¹Jessica Corso, [Judge Greenlights Deal Ending Navistar Derivative Suits](#), LAW360 (Feb. 15, 2017) (subscription required).

⁵²See, e.g., [Complaint](#), Polar Express School Bus, Inc. v. Navistar, Inc., No: 2017-L-010524 (Cir. Ct. Cook Cnty. Ill. Oct. 17, 2017).

⁵³Kat Sieniuc, [\\$7.2M Deal Made In TCP Investor Suit Over False Product Info](#), LAW360 (Apr. 12, 2017).

⁵⁴Order, [Plumley v. Sempra Energy](#), No. 3:16-cv-00512-BEN-AGS (S.D. Cal. June 20, 2017).

⁵⁵*Id.*

⁵⁶Memorandum and Order, [Lynn v. Peabody Energy Corp.](#), No. 4:15CV00916 AGF (E.D. Mo. Mar. 30, 2017).

price after news articles and investigations revealed what the company actually knew.⁵⁷

III. SHAREHOLDER RESOLUTIONS

Although the overall number of shareholder proxy proposals in 2017 were lower than in the previous few years, the number of proposals related to environmental and social issues remained high with a total of more than 443 environmental and social proposals.⁵⁸ As in previous years, climate change related risks and impacts continue to represent the majority of the environmental resolutions filed, with over a dozen such resolutions on the topic – many dealing with the business impact of the Paris Agreement’s 2-degree Celsius limit on global warming – going to a vote at annual meetings in 2017. Shareholder resolutions on these issues passed at ExxonMobil, Occidental Petroleum, and PPL Corp.,⁵⁹ and in December, ExxonMobil agreed to start publishing reports on the possible impact of climate policies on its business, including analysis of the impact of the 2-degree Celsius objective.⁶⁰ These shareholder proposals received significant new support from major institutional investors, such as BlackRock, State Street, Vanguard, and Fidelity, which publicly announced changes to their voting policies resulting in greater support for climate change resolutions.⁶¹ Other topics for shareholder resolutions in 2017 included hydraulic fracturing, renewable energy, recycling, toxic materials, and industrial agriculture (such as antibiotic use in the meat supply chain).⁶²

IV. NONGOVERNMENT ORGANIZATIONS

In October 2016, the Global Reporting Initiative (GRI) launched a new edition of the world’s first global standards for sustainability reporting (GRI Standards). Over the course of 2017, tens of thousands of copies of the reports have been accessed, and according to GRI, more than 3,000 people have had a direct introduction to GRI standards through numerous international launch events.⁶³ GRI also held its first “Reporter’s Summit” in February 2017 for reporters in North America to expand their knowledge of disclosure requirements through workshops.⁶⁴ GRI also launched its publication “Can Corporate Reporting Help End Poverty?”, which is based on a research project analyzing over 100 reports and revealing the role of reporting in poverty alleviation.⁶⁵ Finally, in February 2018, the Global Sustainability Standards Board will develop updates for GRI 303: Water and GRI 403: Occupational Health and Safety.⁶⁶

⁵⁷Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss the Amended Class Action Complaint, [Attia v. Exxon Mobil Corp.](#), No. 4:16-cv-03483 (S.D. Tex. June 5, 2017).

⁵⁸Alexandra Walsh, [Shareholder ESG Proposals on the Rise](#), NATIONAL INVESTOR RELATIONS INSTITUTE (Sept. 2017).

⁵⁹Rob Berridge, [Four Mutual Fund Giants Begin to Address Climate Change Risks in Proxy Votes: How About Your Funds?](#), CERES (Dec. 21, 2017).

⁶⁰Ed Crooks, [ExxonMobil Bows to Shareholder Pressure on Climate Reporting](#), FINANCIAL TIMES (Dec. 11, 2017) (subscription required).

⁶¹*Id.*

⁶²[Proxy Preview 2017](#), PROXYPREVIEW (2017).

⁶³[2017 In Review: the GRI Sustainability Standards One Year On](#), GLOBAL REPORTING INITIATIVE (Dec. 18, 2017).

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶*Id.*

The CDP (formerly the Carbon Disclosure Project) announced an alliance with UL EHS Sustainability to develop a new reporting platform as part of its “Reimagining Disclosure” strategy, which will “ensure more comprehensive reporting for companies, investors, and cities for enhanced peer-to-peer comparison and decision-making.”⁶⁷

The Task Force on Climate-Related Financial Disclosures (TCFD), a task force under the Financial Stability Board, released its 2017 financial disclosure recommendations.⁶⁸ TCFD recommends that companies provide climate-related disclosures in their mainstream financial filings and include how “strategies might change to address potential climate-related risks and opportunities.”⁶⁹ In 2017, a group of global investors launched the Climate Action 100+ Program, which is an initiative that aims to act on climate change by engaging with the world’s largest corporate greenhouse gas emitters.⁷⁰ Under the initiative, investors will work with emitters to “improve governance on climate change, curb emissions, and strengthen climate-related financial disclosures,” including enhanced corporate disclosure in line with TCFD recommendations.⁷¹

Finally, the Sustainability Accounting Standards Board (SASB) announced the creation of the SASB Alliance, a membership program for individuals and organizations that support “more decision-useful, cost-effective sustainability disclosure” by providing education and resources to its members.⁷² SASB also announced that it would create Sector Advisory Groups directed at providing feedback on and further informing SASB’s codified standards.⁷³

⁶⁷Press Release, CDP, [*CDP and UL EHS Announce Strategic Alliance to Future Proof Sustainable Reporting*](#) (Apr. 7, 2017).

⁶⁸[*Final TCFD Recommendations Report: Executive Summary*](#), TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES (2017). Full Report available [here](#).

⁶⁹*Id.*

⁷⁰[*Ceres Joins Forces with Investors and Partner Organizations Worldwide to Launch Climate Action 100+*](#), CERES (Dec. 12, 2017).

⁷¹*Id.*

⁷²[*Announcing the SASB Alliance*](#), SUSTAINABILITY ACCOUNTING STANDARDS BOARD (May 18, 2017).

⁷³[*SASB to Create Sector Advisory Groups, Releases Annual State of Disclosure Report*](#), SUSTAINABILITY ACCOUNTING STANDARDS BOARD (Dec. 6, 2017).

Chapter 5 • ENVIRONMENTAL ENFORCEMENT AND CRIMES 2017 Annual Report¹

I. ENVIRONMENTAL ENFORCEMENT RESULTS

The U.S. Environmental Protection Agency (EPA) and Department of Justice (DOJ) Environmental and Natural Resources Division enforce compliance with environmental laws and regulations through prosecutions and settlement agreements. This year, the agencies focused on enforcing the Lacey Act (prohibiting unlawful trade in animals and plants), prosecuting offshore oil pollution by vessels, ensuring compliance with the Clean Air Act (CAA) and Clean Water Act (CWA), and enforcing compliance with testing and reporting requirements. Major sentencings occurred in the Volkswagen emissions case and the 2012 Black Elk offshore oil rig explosion. The D.C. Circuit issued several cases limiting the EPA's regulatory authority, and the EPA continues with its 2017-2019 annual enforcement initiatives and maintains a focus on Next Generation techniques.²

II. ENVIRONMENTAL ENFORCEMENT INITIATIVES

A. *Reducing Air Pollution from the Largest Sources*

Under this initiative, the EPA intends to eliminate or minimize emissions from coal-fired power, acid, glass, and cement plants, which it has concluded are the largest sources of air pollution emissions.³ To do so, it will focus on ensuring that large industrial facilities install state-of-the-art pollution controls when building new facilities or modifying existing facilities.⁴

B. *Cutting Hazardous Air Pollutants*

The EPA concluded that facilities typically emit more hazardous air pollutants than are reported and that two large sources of these emissions are leaking equipment and improperly operated flares.⁵ As a result, it will target emissions from these sources as well as air emissions from large product storage tanks, and hazardous waste treatment storage and disposal facilities.⁶

¹Prepared by David B. Weinstein and Christopher Torres, shareholders with Greenberg Traurig's Tampa, Florida office, Jill Askren and Ryan Hopper, associates, and Cayla McCrea, resident attorney.

²At the time this chapter was written, summary fiscal year 2017 enforcement and compliance annual results were not published on the EPA's website. The [Enforcement and Compliance History Online](#) at the EPA's website, however, provides users a resource to analyze EPA's enforcement efforts.

³[National Enforcement Initiative: Reducing Air Pollution from the Largest Sources](#), ENVTL. PROT. AGENCY (last updated Nov. 8, 2017).

⁴*Id.*

⁵[National Enforcement Initiative: Cutting Hazardous Air Pollutants](#), ENVTL. PROT. AGENCY (last updated Nov. 8, 2017).

⁶*Id.*

C. *Ensuring Energy Extraction Activities Comply with Environmental Laws*

Natural gas extraction has been identified as a cleaner burning “bridge fuel” by the EPA, which will focus on certain extraction techniques that “pose a significant risk to public health and the environment.”⁷ The EPA will utilize Next Generation technologies and techniques to address incidences of noncompliance in extraction and production activities.⁸

D. *Reducing Pollution from Mineral Processing Operations*

This 2014-2016 initiative will return to base enforcement level in 2017. Under this initiative, the EPA intends to take action to minimize or eliminate risks related to mining and mineral processing facilities and use recent settlements to provide examples for resolving future cases at high risk facilities.⁹

E. *Reducing Risks of Accidental Releases at Industrial and Chemical Facilities*

The EPA recognizes the risk of evacuations, injury and death, and harm to health and the environment posed by the storage of hazardous substances.¹⁰ Through this initiative, the EPA will use innovative accident prevention measures and improved response capabilities to reduce the risk of accidents and resultant harm.¹¹

F. *Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation’s Waters*

This initiative concerns CWA violations by municipal sewer systems.¹² The EPA will focus on raw sewage overflows and inadequately controlled stormwater discharge through monitoring existing long-term agreements with municipalities and adapting agreements to include green infrastructure practices and new technology.¹³

G. *Preventing Animal Waste from Contaminating Surface and Ground Water*

The EPA will focus on concentrated animal feeding operations where feed is brought to animals for 45 days or more during a 12-month period.¹⁴ These facilities generate significant amounts of animal waste, and the EPA will take action to reduce potential pollution by employing innovative monitoring and targeting techniques and promoting technology to reduce pollution.¹⁵

⁷[National Enforcement Initiative: Ensuring Energy Extraction Activities Comply with Environmental Laws](#), ENVTL. PROT. AGENCY (last updated Nov. 8, 2017).

⁸*Id.*

⁹[National Enforcement Initiative: Reducing Pollution from Mineral Processing Operations](#), ENVTL. PROT. AGENCY (last updated May 15, 2017).

¹⁰[National Enforcement Initiative: Reducing Risks of Accidental Releases at Industrial and Chemical Facilities](#), ENVTL. PROT. AGENCY (last updated Nov. 30, 2017).

¹¹*Id.*

¹²[National Enforcement Initiative: Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation’s Waters](#), ENVTL. PROT. AGENCY (last updated Nov. 8, 2017).

¹³*Id.*

¹⁴[National Enforcement Initiative: Preventing Animal Waste from Contaminating Surface and Ground Water](#), ENVTL. PROT. AGENCY (last updated Nov. 8, 2017).

¹⁵*Id.*

H. *Keeping Industrial Pollutants Out of the Nation's Waters*

Certain industrial facilities, such as those used for chemical and metal manufacturing, mining, and food processing have caused nutrient and metal pollution in the nation's water sources, which can degrade water quality and harm drinking water sources.¹⁶ The EPA intends to use water pollution data to decrease illegal pollution and build compliance with CWA discharge permits.¹⁷

III. SUMMARY OF SIGNIFICANT CASES

A. *Criminal Cases*

1. [United States v. Black Elk Energy Offshore Operations, LLC](#)¹⁸

Black Elk Energy Offshore Operations LLC (“Black Elk”) was sentenced on eight felony counts for violating the Outer Continental Shelf Lands Act and one count for violating the CWA.¹⁹ The convictions stem from an explosion that occurred on the company's offshore oil production facility.²⁰ Hot work, such as welding, grinding, and/or any other activity that may produce a spark on an oil platform, is considered a hazardous activity, and the Code of Federal Regulations requires that written permission, or a “hot work permit” be issued before hot work on an oil platform begins.²¹ Contractor Wood Group PSN reassigned issuance of the permits to a less experienced operator and did not ensure performance of all safety precautions, leading to workers cutting a sump line piping.²² This resulted in escaped hydrocarbon vapors which ignited, starting a fire and explosion that killed three people and injured many others.²³ In accordance with a plea agreement, Black Elk will pay a \$4.2 million penalty.²⁴ Several other contractors and individuals face ongoing criminal charges in the Eastern District of Louisiana.²⁵ In connection with the explosion and fire, the contractor, [Wood Group PSN](#), was ordered to pay a fine of \$9.5 million in two separate cases, one involving submitting false reports and the other for negligently discharging oil.²⁶

¹⁶[National Enforcement Initiative: Keeping Industrial Pollutants Out of the Nation's Waters \(Fiscal Years 2017-19\)](#), ENVTL. PROT. AGENCY (last updated Jan. 8, 2017).

¹⁷*Id.*

¹⁸Judgment, Case No. 15-cr-00197-JTM-KWR (E.D. LA. Aug. 31, 2017).

¹⁹*Id.*

²⁰Factual Basis for Plea, *Black Elk*, No. 15-cr-00197-JTM-KWR (E.D. La. May 12, 2017).

²¹*Id.* at 3.

²²*Id.* at 3-7.

²³*Id.* at 8-9.

²⁴Judgment, *Black Elk*, No. 2:15-cr-00197-JTM-KWR (E.D. La. Aug. 31, 2017).

²⁵[Press Release](#), U.S. Dep't of Justice, Black Elk Energy Offshore Operations LLC. Convicted of Worker Safety and Clean Water Act Violations in Connection to Offshore Explosion (Aug. 31, 2017).

²⁶[Press Release](#), U.S. Dep't of Justice, Company to Pay \$9.5 Million for False Reporting of Safety Inspections and Clean Water Act Violations That Led to Explosion in Gulf of Mexico (Feb. 23, 2017).

2. [United States v. Liang](#)²⁷

In March 2017, Volkswagen AG pled guilty to three felony counts arising from designs to cheat U.S. emissions standards.²⁸ The charges were: “(1) conspiracy to defraud the United States, engage in wire fraud, and violate the [CAA]; (2) obstruction of justice; and (3) importation of merchandise by means of false statements.”²⁹ As part of the plea, Volkswagen agreed to pay a \$2.8 billion penalty.³⁰ In August 2017, a Volkswagen [engineer was sentenced](#) to 40 months in federal prison, and a \$200,000 fine for his work in implementing the software designed to cheat the emissions tests.³¹ In December 2017, a [former general manager](#) was sentenced to 84 months in prison and a \$400,000 penalty.³²

3. Disposal of Oil-Contaminated Waste in Open Waters Cases

The DOJ focused on enforcement, related to failure to follow proper oil-contaminated bilge waste disposal procedures and falsifying records. [In February](#) 2017, a federal jury convicted “two chief engineers of the vessel, T/V Green Sky, of falsifying documents in order to conceal illegal discharges of oily bilge waste and obstruction charges . . .”.³³ Evidence showed that Green Sky was regularly pumping contaminated water into open seas through the use of a magic hose system, and then falsifying records to conceal the discharges.³⁴ Green Sky’s operator, Aegean Shipping Management, S.A., also pled guilty to related charges.³⁵ [In March](#), the owner of a fishing vessel was convicted by a jury of discharging oily waste into coastal waters off of Washington state.³⁶ Evidence showed that the ship had multiple long-term problems that created a substantial amount of oil, had at least one illegal pump installed, and the owner had instructed workers to dump waste into the sea.³⁷ [In June](#), “[t]wo shipping companies based in Egypt and Singapore [pled] guilty . . . to violating the Act to Prevent Pollution from Ships (APPS) and obstruction of justice” due to their illegal dumping of oil-contaminated bilge water and garbage into the sea.³⁸ They were sentenced to pay a fine of \$1.9 million and undertake restoration efforts

²⁷No. 2:15cr20394, 2017 WL 1425975 (E.D. Mich. Apr. 21, 2017).

²⁸[Press Release](#), U.S. Dep’t of Justice, Volkswagen AG Sentenced in Connection with Conspiracy to Cheat U.S. Emissions Tests (Apr. 21, 2017).

²⁹*Id.*

³⁰*Id.*

³¹[Press Release](#), U.S. Dep’t of Justice, Volkswagen Engineer Sentenced for His Role in Conspiracy to Cheat U.S. Emissions Tests (Aug. 25, 2017); David Shepardson & Joseph White, [VW Engineer Sentenced to 40-month Prison Term in Diesel Case](#), REUTERS (Aug. 25, 2017).

³²[Press Release](#), U.S. Dep’t of Justice, Volkswagen Senior Manager Sentenced to 84 Months in Prison for Role in Conspiracy to Cheat U.S. Emissions Tests (Dec. 6, 2017).

³³Press Release, U.S. Dep’t of Justice, Two Vessel Engineers Convicted of Environmental and Obstruction Crimes After Trial. Vessel Manger Pleads Guilty to Environmental Crimes and Obstruction of Justice (Feb. 23, 2017).

³⁴*Id.*

³⁵*Id.*

³⁶Press Release, U.S. Dep’t of Justice, Fishing Vessel Owner Convicted of Discharging Oil Waste into the Coastal Waters of the United States Off Washington State (Mar. 30, 2017).

³⁷[Press Release](#), U.S. Dep’t of Justice, Fishing Vessel Owner Convicted of Discharging Oil Waste into the Coastal Waters of the United States Off Washington State (Mar. 30, 2017).

³⁸[Press Release](#), U.S. Dep’t of Justice, Two International Shipping Companies Pay \$1.9 Million for Covering Up Vessel Pollution (June 20, 2017).

in the Gulf of Mexico near east Texas.³⁹ [In August](#), a federal grand jury returned an indictment against a German ship management company on charges related to falsifying records of unlawful discharges of oily wastewater.⁴⁰

4. Operation Crash Cases

The DOJ continued to focus on “Operation Crash,” an ongoing nationwide enforcement action by federal, state, and local law enforcement agencies “to detect, deter and prosecute those engaged in the illegal killing of rhinoceros and the unlawful trafficking of rhinoceros horns.”⁴¹ According to the DOJ, “[a]s of November 2015, Operation Crash [had] resulted in the prosecution and sentencing of nearly 32 subjects and recovery of approximately \$5.6 million through forfeiture and restitution.”⁴² This year, Operation Crash led to a guilty plea by the [head of a wildlife smuggling ring](#) on charges of leading a conspiracy to illegally export “\$700,000 worth of endangered and protected wildlife items made from rhinoceros horn, elephant ivory and coral from the United States to China.”⁴³ Another individual pled guilty to “fraudulently facilitating the transportation and concealment of a [Libation Cup carved from an endangered rhinoceros horn](#) . . . from the United States to Great Britain,” and was sentenced to 18 months’ imprisonment.⁴⁴ A court also sentenced “the [owner of a business](#) specializing in Asian works of art . . . to two years of imprisonment for . . . wildlife trafficking in violation of the Lacey Act for illegally trafficking horns from endangered black rhinoceros.”⁴⁵ Additionally, agents apprehended another individual for “[selling black rhinoceros horns to an undercover agent](#) from the United States Fish and Wildlife Service,” and he was subsequently convicted of “conspiracy to violate the Lacey and Endangered Species Acts and to a violation of the Lacey Act.”⁴⁶

5. [United States v. Powell](#)⁴⁷

A former employee of American Suzuki Motor Corporation was sentenced to one day in prison after pleading guilty to violating the CAA for submitting a false end-of-year report to the EPA.⁴⁸ Suzuki was required to submit reports showing compliance with motorcycle emissions standards, and in 2013, Suzuki submitted an end-of-year report that claimed to use “banked credits” to offset the excess emissions.⁴⁹ Because “Suzuki had not

³⁹*Id.*

⁴⁰[Press Release](#), U.S. Dep’t of Justice, German Ship Management Company and Corporate Vessel Owner Indicted for Falsification of Pollution Records (Aug. 22, 2017).

⁴¹[Press Release](#), U.S. Dep’t of Justice, California Man Convicted for Role in the Illegal Sale of Black Rhinoceros Horn (Sept. 15, 2017).

⁴²*Id.*

⁴³[Press Release](#), U.S. Dep’t of Justice, Head of Wildlife Smuggling Ring Pleads Guilty to Smuggling Carvings Made From Ivory, Rhino Horn and Coral (Oct. 24, 2017).

⁴⁴[Press Release](#), U.S. Dep’t of Justice, Foreign National Pleads Guilty to Smuggling Rhinoceros Horn (Sept. 29, 2017).

⁴⁵[Press Release](#), U.S. Dep’t of Justice, Long Island Man Sentenced to Two Years for Trafficking Rhinoceros Horns (Sept. 18, 2017).

⁴⁶*See* [Press Release](#), U.S. Dep’t of Justice, *supra* note 41.

⁴⁷*United States v. Powell*, Case No. 2:17CR20374 (E.D. Mich. Dec. 14, 2017).

⁴⁸[Press Release](#), U.S. Dep’t of Justice, Former Suzuki Employee Sentenced for Submitting False Report to EPA (Dec. 14, 2017).

⁴⁹*Id.*

participated in the banked credit program,” the EPA informed Suzuki that it could not use banked credits, and the EPA could not accept that report.⁵⁰ Subsequently, the employee submitted a report in which he used false numbers to create a calculation that was within the emission limit.⁵¹ The EPA entered into an administrative settlement with Suzuki in November 2016, while the case continued against the employee involved in creating and submitting the reports.⁵²

6. [United States v. AIREKO Construction Co.](#)⁵³

In May 2012, an AIREKO Construction Company subcontractor illegally removed asbestos-containing materials from the Minillas North Tower in Puerto Rico.⁵⁴ The material was removed without following any of the Asbestos Work Practice Standards required by federal regulation, and much of the material was placed in the trash area behind the building.⁵⁵ When AIREKO employees discovered the material, AIREKO failed to report the release of the asbestos to the National Response Center (NRC) as required by law.⁵⁶ AIREKO was sentenced to pay a fine of \$1.5 million dollars and serve three years of probation for violating the Clean Air Act.⁵⁷ AIREKO was also ordered to pay \$172,020.00 to cover a baseline medical examination and follow up medical examination for victims exposed to asbestos fibers.⁵⁸ AIREKO’s Vice President pled guilty to failing to immediately notify the NRC of the release of asbestos and was sentenced to pay a fine and serve a six month term of probation.⁵⁹

7. [United States v. Young Living Essential Oils, L.C.](#)⁶⁰

Young Living Essential Oils, L.C., (“Young Living”) pleaded guilty to federal charges regarding illegal trafficking of rosewood oil and spikenard oil in violation of the Lacey Act and the Endangered Species Act, after voluntarily disclosing the violations and cooperating with government investigators.⁶¹ According to the plea agreement, several company employees and contractors harvested, transported, and distilled rosewood in Peru and imported some of the resulting oil into the United States, even though the parties had not received authorization from the Peruvian government nor did they have the proper permits under the Convention on International Trade in Endangered Species.⁶² In

⁵⁰*Id.*

⁵¹*Id.*

⁵²*Id.*

⁵³Case No. 3:15cr448 (D.P.R. Aug. 16, 2017).

⁵⁴[Press Release](#), U.S. Dep’t of Justice, Construction Company Sentenced for Clean Air Act Violations in Puerto Rico (Aug. 16, 2017).

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷*Id.*

⁵⁸*Id.*

⁵⁹*See* Press Release, U.S. Dep’t of Justice, *supra* note 54.

⁶⁰Case No. 2:17-cr-00541-DBP (D. Utah Sept. 21, 2017).

⁶¹[Press Release](#), U.S. Dep’t of Justice, Essential Oils Company Sentenced for Lacey Act and Endangered Species Act Violations to Pay \$760,000 in Fines, Forfeiture, and Community Service, and to Implement a Comprehensive Compliance Plan (Sept. 18, 2017).

⁶²*Id.*

September 2017, Young Living was sentenced to pay \$760,000 in fines and forfeiture and to implement a comprehensive compliance plan.⁶³

B. Civil Cases

1. [United States v. Exxon Mobil Corp.](#)⁶⁴

The DOJ, the EPA, and the Louisiana Department of Environmental Quality reached a settlement with Exxon Mobil Corp. and ExxonMobil Oil Corp.⁶⁵ The agreement resolves allegations that ExxonMobil violated the Clean Air Act by failing to operate properly and monitor industrial flares at their petrochemical facilities, which resulted in excess emissions of harmful air pollution.⁶⁶ As a result of the settlement, ExxonMobil will install and operate air pollution control and monitoring technology to reduce harmful air pollution from 26 industrial flares at five ExxonMobil facilities in Texas and three facilities in Louisiana,⁶⁷ and required to pay a \$2.5 million fine.⁶⁸

2. [United States v. Husqvarna AB and Husqvarna Consumer Outdoor Products N.A., Inc.](#)⁶⁹

Swedish company Husqvarna AB and its U.S. affiliate, Husqvarna Consumer Outdoor Products N.A., Inc., have agreed to a settlement regarding alleged violations of the Clean Air Act.⁷⁰ The agreement relates to the company's failure to properly conduct emission tests and provide accurate information to the EPA.⁷¹ Husqvarna is the largest U.S. manufacturer of handheld equipment containing small, spark-ignited nonroad engines, such as leaf blowers and chainsaws.⁷² In order to receive the necessary certificate of conformity for these products, the EPA requires that manufacturers test prototypes of each model to ensure they meet emissions limit.⁷³ Husqvarna failed to test enough engines, perform the tests in the proper manner, and account for failed tests or retests.⁷⁴ It also did not secure a certificate of conformity for an engine family of chainsaws.⁷⁵ As a result, Husqvarna will pay a \$2.85 million civil penalty.⁷⁶

⁶³*Id.*

⁶⁴Case No. 4:17-cv-3302 (S.D. Tex. Oct. 31, 2017).

⁶⁵[Press Release](#), Env'tl. Prot. Agency, Under Agreement with the Justice Department and Environmental Protection Agency, ExxonMobil to Reduce Harmful Air Pollution at Eight U.S. Chemical Plants (Oct. 31, 2017).

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹Case No. 1:17-cv-02597 (D.D.C. Dec. 5, 2017).

⁷⁰[Press Release](#), Env'tl. Prot. Agency, The Justice Department and Environmental Protection Agency Reach Agreement with Husqvarna to Resolve Production Line Test Reporting Violations (Dec. 5, 2017).

⁷¹*Id.*

⁷²*Id.*

⁷³*Id.*

⁷⁴*Id.*

⁷⁵*See* Press Release, Env'tl. Prot. Agency, *supra* note 70.

⁷⁶*Id.*

3. [United States v. Starkist Co.](#)⁷⁷

The DOJ and the EPA reached a revised settlement agreement with Starkist Co., and its subsidiary, Starkist Samoa Co., arising out of environmental violations at Starkist's tuna processing facility in American Samoa.⁷⁸ These CWA and CAA violations are the result of wastewater being discharged into the surrounding harbor without the proper permits and treatment, failure to follow CWA spill prevention regulations, and failure to maintain and operate properly certain chemical systems.⁷⁹ Starkist originally entered into a Consent Decree on September 12, 2017, but after reporting the existence of a storm water pipe discharging additional pollutants into the harbor, the United States filed an amended complaint, leading to this revised Consent Decree.⁸⁰ As a result of the Consent Decree, Starkist agreed to pay a \$6.5 million civil penalty, make various improvements to the facility, and implement a supplemental environmental project involving donations to local emergency first responders.⁸¹

4. [United States v. NVR, Inc.](#)⁸²

In June 2017, the EPA entered into a consent decree with home developer NVR regarding alleged violations of the Clean Water Act.⁸³ NVR is a home developer that constructs, markets, and sells residential properties in New York and New Jersey.⁸⁴ The settlement agreement stems from NVR's failure to obtain coverage under a National Pollutant Discharge Elimination System permit prior to beginning construction activities at 65 sites in New York and New Jersey.⁸⁵ Moreover, even at sites where NVR finally obtained the required permit coverage, EPA inspectors identified inadequately implemented or maintained sediment and erosion controls such as silt fencing, protection at construction entrances and storm drain inlet protection.⁸⁶ As part of the Consent Decree, NVR will implement a storm water compliance program that includes enhanced management oversight, improved training, and additional inspections.⁸⁷ It will also pay a \$425,000 civil penalty.⁸⁸

5. [Mexichem Fluor Inc. v. U.S. Environmental Protection Agency](#)⁸⁹

The D.C. Circuit found that the EPA did not have the authority under a 2015 regulation to regulate the use of hydrofluorocarbons (HFC), which are used in products such as motor vehicle air conditioners, refrigerators, and aerosol spray cans.⁹⁰ The

⁷⁷Case No. 2:17-cv-01190-DSC (W.D. Pa. Dec. 22, 2017).

⁷⁸[Press Release](#), Env'tl. Prot. Agency, U.S. EPA, American Samoa Reach Revised Settlement with Starkist (Dec. 26, 2017).

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹*Id.*

⁸²Case No. 2:17-cv-04346 (D.N.J. June 15, 2017).

⁸³Consent Decree, *NVR*, No. 2:17-cv-04346 (D.N.J. June 15, 2017).

⁸⁴Complaint, *NVR*, No. 2:17-cv-04346 at 2.

⁸⁵Consent Decree, *NVR*, No. 2:17-cv-04346 at 7-17.

⁸⁶Complaint, *NVR*, No. 2:17-cv-04346 at 7-20.

⁸⁷Consent Decree, *NVR*, No. 2:17-cv-04346 at 13-32.

⁸⁸*Id.* at 32.

⁸⁹*Mexichem Fluor, Inc. v. Env'tl. Prot. Agency*, 866 F.3d 451 (D.C. Cir. 2017).

⁹⁰*Id.* at 453-64.

regulation granted the EPA the authority to regulate use of HFCs as ozone-depleting substances under the Clean Air Act and to require companies and manufacturers to use EPA-approved alternatives in place of HFCs.⁹¹ The court found that while the EPA can regulate ozone-depleting substances under the Clean Air Act, HFCs do not qualify as such.⁹² Accordingly, the court vacated the portion of the regulation that allowed the EPA to require companies to replace HFCs with safe substitutes.⁹³

6. [United States v. PDC Energy, Inc.](#)⁹⁴

EPA, the DOJ, and the State of Colorado entered into a settlement with PDC Energy, Inc., to evaluate and improve the vapor control systems at PDC's condensate storage tank batteries.⁹⁵ PDC is an oil and natural gas exploration and production company, and its operations require the use of condensate storage tanks to collect and store liquid hydrocarbons.⁹⁶ The tanks at its Colorado facility have failed to meet the EPA's air quality standards for ground-level ozone.⁹⁷ As part of the settlement over these violations, PDC will ensure its vapor control systems in this area are properly designed, sized, operated, and maintained as well as perform significant environmental mitigation projects at many of its well pads.⁹⁸ It will also pay a \$1.5 million civil penalty.⁹⁹

7. [American Petroleum Institute v. EPA](#)¹⁰⁰

In 2015, the EPA promulgated a rule regarding when certain hazardous materials are considered "discarded" and thus subject to the agency's regulatory authority.¹⁰¹ The purpose was to prevent "sham recycling" whereby companies would claim to reuse materials that they actually discarded.¹⁰² Several industrial groups challenged the regulation.¹⁰³ In a 2-1 decision, the D.C. Circuit vacated portions of the rule, including a component of the legitimacy test that was designed "to prevent recyclers from loading products with hazardous secondary materials that 'provide no recognizable benefit to the product.'"¹⁰⁴ The court found that this factor imposed tasks "tangential to disposal . . . and thus tangential to EPA's authority" and was unreasonable as applied to hazardous secondary material recycling.¹⁰⁵

⁹¹*Id.* at 453.

⁹²*Id.* at 462.

⁹³*Id.* at 464.

⁹⁴Consent Decree, *U.S. v. PDC Energy, Inc.*, No. 1:17-cv-01552-MSK-MJW (D. Colo. Oct. 31, 2017).

⁹⁵*Id.*

⁹⁶*Id.* at 1.

⁹⁷*Id.*

⁹⁸*Id.* at 15-42.

⁹⁹Consent Decree, *PDC*, No. 1:17-cv-01552-MSK-MJW at 43.

¹⁰⁰*Am. Petroleum Inst. v. Env'tl. Prot. Agency*, 862 F.3d 50 (D.C. Cir. 2017).

¹⁰¹*Id.* at 55.

¹⁰²*Id.*

¹⁰³*Id.* at 56.

¹⁰⁴*Id.* at 58-63.

¹⁰⁵*Am. Petroleum Inst.*, 862 F.3d 50 at 58-63.

8. [Lead-Based Paint Cases](#)¹⁰⁶

One of the EPA's focuses this year was enforcing regulations and laws designed to limit lead paint exposure.¹⁰⁷ Lead exposure can lead to a range of health problems, such as nervous system impairments and behavioral problems, to seizures and death, and children six years old and younger are most at risk.¹⁰⁸ During the 2017 fiscal year, the EPA announced 127 federal enforcement actions, with 125 stemming from noncompliance with at least one of the EPA's lead-based paint requirements and the remaining 2 resolving alleged Clean Air Act violations.¹⁰⁹ The EPA worked with the DOJ, state, and local authorities in filing and settling these cases; and the cases collectively settled for \$1,046,891.¹¹⁰ Several cases involved reduced penalties under pilot programs for small lead-based paint businesses, while in other cases, the violators agreed to fund programs to eliminate future lead exposure risks.¹¹¹

¹⁰⁶See [EPA's Lead-Based Paint Enforcement Helps Protect Children and Vulnerable Communities](#), ENVTL. PROT. AGENCY (last updated Dec. 4, 2017).

¹⁰⁷*Id.*

¹⁰⁸*Id.*

¹⁰⁹*Id.*

¹¹⁰*Id.*

¹¹¹EPA's Lead-Based Paint Enforcement, *supra* note 106.

Chapter 6 • ENVIRONMENTAL LITIGATION AND TOXIC TORTS
2017 Annual Report¹

I. COMMON LAW CLAIMS

A. *Statute of Limitations*

In *ExxonMobil v. Lazy R Ranch, LP*, the Texas Supreme Court illustrated Texas’s discovery rule and its limitations.² It held that a cattle ranch owners’ claims related to alleged contamination from long-dormant oil and gas operations were barred by Texas’s statute of limitations, even though the landowner only recently learned of the full extent of the contamination. The court rejected the plaintiffs’ argument that the discovery rule should have tolled the limitations period until the extent of the contamination was known. Under Texas law, the “discovery rule applies when a type of injury is objectively verifiable and inherently undiscoverable within the limitations period.”³ However, the court found that there was nothing “inherently undiscoverable” about the contamination. There was plenty of evidence that the landowners long knew of multiple spills on the property. The court found that the plaintiffs’ claims at the other two sites, which were still in operation during the limitations period, were not barred.

The Texas Supreme Court left unaddressed the important issue of whether the limit on monetary damages for injury to property under Texas law also applies to injunctive relief such as the remediation the plaintiffs here sought. During a trial court hearing on the defendant’s summary judgment motion, the defendant argued the landowners were not entitled to damages that exceeded the difference in the land’s value before and after the alleged contamination. This raised the question of whether a claim for injunctive relief is bound by the same value-loss limitation as a claim for damages, whereby Under Texas law, monetary damages for injury to property are capped at the diminution of property value the injury caused.⁴ However, the court found the issue was not properly before it and therefore declined to address it. This issue is likely to come up in future contaminated property litigation in Texas.

In *Cole v. Marathon Oil Corp.*, the Sixth Circuit interpreted Michigan’s statute of limitations and revived a nuisance suit against a Detroit refinery.⁵ Plaintiffs live near the refinery and brought suit in February 2016 alleging that emissions from the refinery contaminated their properties with hazardous substances and that sounds and smells from the refinery constituted a nuisance. Defendant argued that the suit was barred by Michigan’s three year statute of limitations.⁶ The Eastern District of Michigan held that

¹This report was edited by Graham C. Zorn and Eric L. Klein of Beveridge & Diamond, P.C. The editors wish to thank Beveridge & Diamond, P.C. generally, and specifically Toren Elsen, Dacia Meng, Zaheer Tajani, Shengzhi Wang, Brooklyn Hildebrandt, Jennifer Leech, Tasmaya Lagoo, Katelin Shugart-Schmidt, Katrina Krebs, and Jeff Clare for assistance in compiling the materials for this report. This report summarizes significant decisions, whether published or unpublished, in toxic and environmental tort litigation from 2017, but does not purport to summarize all decisions.

²511 S.W.3d 538 (Tex. 2017).

³*Id.* at 544.

⁴*Id.* at 541. Plaintiffs originally sued for \$6.3 million, the estimated cost of remediation. But they amended their complaint to instead request an injunction ordering remediation instead of damages to pay for remediation. *Id.* at 540.

⁵711 F. App’x 784 (6th Cir. 2017).

⁶*Id.* at 785.

since the refinery had been operating prior to February 2013, the suit was barred by the statute of limitations. On appeal, the Sixth Circuit relied upon *Department of Environmental Quality v. Gomez* for the proposition that under Michigan law each injurious emission “[is] a separate claim with a separate time of accrual.”⁷ Although the Sixth Circuit revived Plaintiff’s claims, they did make clear that any claim tied to a discharge prior to February 2013 would still be barred.

B. *Prospective Tort*

Addressing the relatively uncommon “prospective nuisance” claim in *Whipple v. Village of North Utica*, an Illinois appeals court found a group of landowners pleaded sufficient facts to show that a yet-to-be-built sand mining operation would result in a nuisance if constructed.⁸ The court reversed a trial court’s decision and found that the landowners could proceed with a claim to enjoin construction of the facility.

The Village of North Utica, Illinois, over the objections of nearby landowners, approved the annexation and rezoning of three agricultural land tracts to allow operation of a proposed silica mine. A group of landowners filed suit seeking an injunction against the facility alleging, among other things, prospective nuisance. The landowners alleged that, if constructed and operated as intended, the mine would constitute a nuisance. The trial court dismissed all of the plaintiffs’ claims.⁹

On appeal, the appeals court held that the landowners alleged sufficient facts to state a claim for private nuisance. Relying on the mining company’s own statements, the plaintiffs alleged that the new mining project would result in continuous light and noise from blasting, increased road traffic, effluent pollution in a nearby creek, and dust pollution in the air. The court found that factual allegations of such particularized harm to nearby property supported a claim for private nuisance and reinstated the claim for an injunction.¹⁰

C. *Injunctive Relief*

In *Miller v. Mississippi Resources, LLC*, a Mississippi federal court applied other limits on injunctive relief in the environmental context when it denied a landowner’s request for a temporary restraining order against an oil production company.¹¹ The plaintiff sought a temporary restraining order and preliminary injunction to prohibit the oil company from entering and continuing operations on his property unless the oil company were there for the clean-up, restoration, and/or payment of damages. The court declined to issue the order, finding the plaintiff failed to demonstrate a substantial threat of irreparable harm or that the monetary damages he sought were inadequate.

D. *Other Limitations*

The Fifth Circuit highlighted an important limitation under Louisiana law on suits related to historical contamination from oil and gas operations in *Guilbeau v. Hess Corp.*¹² Defendant Hess Corporation’s predecessors conducted oil and gas operations on the

⁷*Id.* at 786 (citing Dep’t of Env’tl. Quality v. Gomez, 896 N.W.2d 39, 53 (Mich Ct. App. 2016)).

⁸79 N.E.3d 667 (Ill. App. Ct. 2017).

⁹*Id.*

¹⁰*Id.*

¹¹No. 5:17-cv-41-DCB-MTP, 2017 WL 2772097 (S.D. Miss. June 26, 2017).

¹²854 F.3d 310 (5th Cir. 2017).

property in dispute for years, until the early 1970s. Thirty-five years later the plaintiff purchased the property without obtaining from the seller any assignment of rights to bring pre-purchase damage claims. After the purchase, the new owner sued Hess Corporation for contamination allegedly caused decades ago by its oil and gas operations.

Louisiana’s “subsequent purchaser doctrine” bars a property owner from recovering from a third party for damages to property that predates the owner’s purchase of the land without assignment or subrogation of rights from the previous owner. The concept stems from the notion that such a right to sue is a personal right rather than a right that runs with the land. The trial court granted Hess’s summary judgment motion.¹³

On appeal, the plaintiff argued that the Louisiana Supreme Court’s previous rulings on the subsequent purchaser doctrine did not apply to claims involving mineral leases and oil and gas production. The Fifth Circuit disagreed. The court acknowledged that the Louisiana Supreme Court had not directly addressed the issue. However the court looked into cases from three Louisiana intermediate appellate courts after 2011 and found that “a clear consensus ha[d] emerged among all Louisiana appellate courts that have considered the issue, and they ha[d] held that the subsequent purchaser rule does apply to cases, like this one, involving expired mineral leases.”¹⁴

E. Jurisdiction

A federal district court in Montana explored the “federal abstention” doctrine in [*Atlantic Richfield Co. v. Christian*](#) to determine whether it or a state court should hear a particular case.¹⁵ The court there dismissed a former smelter operator’s claim for injunctive relief where a related but separate tort action was pending in state court. Even though the federal court acknowledged it had diversity jurisdiction, it found the state court was better situated to efficiently handle the matter.

Owners of property within the boundaries of a Superfund site around the former Anaconda, Montana smelting facility sued the former operator in Montana state court in 2008. They alleged negligence, nuisance, trespass, constructive fraud, unjust enrichment, and wrongful occupation of property. The operator moved for summary judgment, arguing that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) barred the landowners’ restoration damage claims because the landowners’ proposed plan was inconsistent with the plan the Environmental Protection Agency (EPA) had selected for addressing the Superfund site. Then in 2015, while the operator’s motion was pending in state court, the operator sued the landowners in Montana federal district court, requesting declaratory relief based on the same argument that CERCLA barred the landowners’ tort claims for restoration damages. The landowners moved to dismiss the federal case for lack of subject matter jurisdiction. The federal court held that it had diversity jurisdiction over the case. However, the court declined to exercise the jurisdiction based on the abstention doctrine because the operator’s affirmative arguments in the federal case were virtually identical to its summary judgment arguments in state court. The court held that at least four factors weighed in favor of declining jurisdiction: that the operator filed the federal case long after the commencement of the state court action, raising a forum shopping concern; that the same argument has been litigated in the state court; that prosecution in the federal court may lead to federal-state entanglement; and that the federal

¹³*Id.*

¹⁴*Id.* at 313.

¹⁵No. CV-15-83-BU-BMM, 2017 WL 617924 (D. Mont. Feb. 15, 2017).

case would only resolve the damages issue, not all aspects of the litigation. The court therefore granted the landowners' motion to dismiss ARCO's federal court action.¹⁶

II. MASS TORT & GROUNDWATER CONTAMINATION

Illustrating limitations on common law claims for groundwater contamination, a New York federal court dismissed some tort claims in a cluster of sixteen consolidated lawsuits alleging personal injury and property damage from perfluorooctanoic acid (PFOA) groundwater contamination in Upstate New York.¹⁷ The defendants, Saint-Gobain Performance Plastics Corp. and Honeywell International Inc., owned a facility in Hoosick Falls, New York, that had been using PFOA since the late 1960s. The plaintiffs are local residents who allege discharged PFOA migrated into local soil and groundwater. Most used a municipal water supply; some used private wells. Some plaintiffs rented, while others owned their homes. Most, although not all, plaintiffs claimed that they had elevated level of PFOA in blood. Some plaintiffs asserted specific symptoms.

The plaintiffs alleged negligence, strict liability, trespass, and nuisance. The defendants moved to dismiss each complaint for failure to state a claim. The court first addressed the negligence and strict liability claims, which were brought based on alleged property damages and personal injury. The court dismissed the property damage claims from the renter plaintiffs, holding that "a plaintiff cannot recover for damage to property he does not own."¹⁸ But the court rejected the defendants' argument that a negligence claim in New York could not be premised on groundwater contamination, citing cases holding the opposite. The court found that the plaintiffs' alleged reduction in property values, as well as compensatory damages for remediation and restoration, could support property damage claims. Thus the non-renter plaintiffs' claims survived the motion to dismiss.

The plaintiffs sought medical monitoring as the "central remedy" for the personal injury claims. The court declined to dismiss most of these claims, holding that the alleged accumulation of PFOA in blood was sufficient to permit personal injury claims for medical monitoring. However, two plaintiffs did not claim any elevated blood concentration of PFOA, and the court dismissed their claims with leave to amend. The court further commented that, even if the PFOA accumulation in blood were not a sufficient basis, plaintiffs' medical monitoring requests could still survive because New York law permits medical monitoring as a remedy for "an already existing tort cause of action" concerning property; the plaintiffs here had successfully alleged property torts.¹⁹

The court dismissed the trespass claims of the plaintiffs who were on the municipal water supply, reasoning that they did not have the "possessory interest" to support trespass claims, unlike those with private wells. Specifically, the court emphasized that New York law did not recognize groundwater contamination alone as an "invasion of property interest," but soil contamination, which municipal water plaintiffs did not assert in their complaints, would support trespass. The court therefore granted these plaintiffs leave to amend their complaints.²⁰

The court then addressed the nuisance claims. It held that the plaintiffs could make public—but not private—nuisance claims. Private nuisance is only available when conduct

¹⁶*Id.*

¹⁷See [Benoit v. Saint-Gobain Performance Plastics Corp.](#), No. 1:16-CV-930 (LEK/DJS), 2017 WL 3316132 (N.D.N.Y. Aug. 2, 2017), *appeal filed sub nom.* Baker v. Saint-Gobain Performance Plastics Corp. No. 17-3942 (2d Cir. Dec. 8, 2017).

¹⁸*Id.* at *6.

¹⁹*Id.* at *10.

²⁰*Id.* at *20.

“threatens one person or a relatively few.”²¹ Here plaintiffs allege groundwater contamination affects all residents of Hoosick Falls. However because public nuisance could only be privately actionable if the plaintiffs suffered “special injury” beyond that suffered by the public, the municipal water plaintiffs’ nuisance claims were dismissed. The private well plaintiffs’ claims survived because the court found the costs of repairing or restoring the private wells were adequately alleged as special losses.

III. PUBLIC-ENTITY PLAINTIFFS

A. *State-Led PCB Litigation*

As reported in the 2016 Annual Report, Washington brought the first state-led lawsuit alleging widespread polychlorinated biphenyl (PCB) contamination in waters of the state against Monsanto, the manufacturer of PCBs. The suit sounds in public nuisance, trespass, and strict liability.²² Washington’s approach appears to be modeled after more recent and successful product liability cases brought by state sovereigns against refiners and marketers of methyl ter-butyl ether (MTBE) and gasoline containing MTBE.

A court in Washington thwarted the defendant’s efforts to have the case heard in federal court in [Washington v. Monsanto Co.](#)²³ Monsanto—the only company that manufactured PCBs in the United States from 1935 to 1979—removed the case to federal court in the Western District of Washington, asserting federal officer jurisdiction, which can be invoked by a private party if it is “sued for acts performed while ‘acting under’ a federal agency or officer.”²⁴ In response to the State’s motion for remand to state court, Monsanto argued that certain federal government actions triggered federal officer jurisdiction. In 1941, when Monsanto was unable to produce enough PCBs to support war requirements, the government approved Necessity Certificates for the construction of additional manufacturing facilities. Monsanto’s PCBs were also mentioned by name in numerous military specifications. In the 1970s when Monsanto was contemplating ending the manufacture of PCBs, the government invoked Section 101 of the Defense Production Act of 1950, directing Monsanto to fulfill third-party PCB orders.

The court disagreed that these government actions rose to the level that would support federal officer jurisdiction.²⁵ First, the court rejected Monsanto’s argument that Necessity Certificates demonstrated that their “facilities were ‘essentially nationalized.’”²⁶ Second, the court distinguished that PCBs were “mentioned in a government specification, not produced to government specification.”²⁷ Third, although the government directed Monsanto to deliver PCBs, Monsanto was not directed “to produce PCBs that it had not already, or would not have otherwise, produced.” Although the court used a three-part test for whether federal officer jurisdiction existed, it focused solely on the second prong, finding that no causal nexus existed between the claims brought by Washington and any actions “Monsanto took pursuant to a federal officer’s direction.”²⁸ The court also rejected

²¹*Id.* at *11 (quotation omitted).

²²See Complaint for Damages, [Washington v. Monsanto Co.](#), No. 16-2-29591-6 (King Co. Sup. Ct. Dec. 8, 2016).

²³*Washington v. Monsanto Co.*, 274 F. Supp. 3d 1125, 1128 (W.D. Wash. 2017).

²⁴*Id.* at 1129.

²⁵*Id.* at 1131.

²⁶*Id.* at 1130.

²⁷*Id.* at 1131.

²⁸*Id.*

Monsanto's assertion of federal question jurisdiction, finding that CERCLA does not preempt state law claims. Monsanto appealed the decision to the Ninth Circuit.

B. *Municipality-Led PCB Litigation*

Washington state is not the only public plaintiff pursuing damages for PCB contamination. In [City of Seattle v. Monsanto Co.](#), Seattle alleged public nuisance, defective design, failure to warn, negligence, and equitable indemnity based on the alleged harm to Seattle's land and the alleged cost the city incurred in studying and remediating PCB contamination on its property.²⁹

On Monsanto's motion, the federal court in the Western District of Washington dismissed Seattle's product liability claims under both the defective design and failure to warn theories for lack of standing.³⁰ Such claims could only be brought by a user or consumer, the court held, and Seattle is neither user nor consumer. The court also rejected Seattle's equitable indemnity claims, reasoning that while Seattle alleged that some contamination resulted from Monsanto's actions, Monsanto could not fairly be forced to indemnify Seattle for all damages because other defendants might be responsible for portions of the contamination.³¹

The court allowed other claims to go forward. Most notably, the court upheld Seattle's novel public nuisance claim, noting that "Seattle does not need to own the contaminated water to bring a public nuisance claim" because "Seattle is injured when it suffers financial loss due to toxic contamination," which in this case resulted from chemical deposition upon Seattle's land.³² Seattle properly pleaded causation by alleging that Monsanto knew that PCBs would end up in the environment. The court also upheld the city's negligence claim based on allegations that Monsanto continued to manufacture and sell PCBs with its knowledge of toxicity concerns regarding the chemical.³³

A number of California municipalities—including San Jose, Oakland, Berkeley, and San Diego—have joined the list of cities prosecuting civil actions in federal court alleging damages from PCB contamination. In cases in both the Northern District and Southern District of California, courts held that the municipal plaintiffs sufficiently alleged a legitimate property interest in PCB-contaminated stormwater.³⁴ This property interest, the courts held, was sufficient to maintain the cities' public nuisance claims. These rulings could prove important in cases involving substances other than PCBs.

C. *Other Public Plaintiffs*

While public entities may have advantages over private plaintiffs in some tort cases, other cases present challenges. For example, the U.S. Court of Appeals for the Fifth Circuit upheld dismissal of a Louisiana levee board's claims seeking relief for alleged coastal damage from oil and gas operations off the Gulf Coast.³⁵ The plaintiff levee board is a public entity charged with regional coordination of flood control (the "Board"). It brought

²⁹237 F. Supp. 3d 1096 (W.D. Wash. 2017).

³⁰*Id.* at 1107-08.

³¹*Id.* at 1108-09.

³²*Id.* at 1106.

³³*Id.* at 1108.

³⁴See [San Jose v. Monsanto Co.](#), 231 F. Supp. 3d 357 (N.D. Cal. 2017); [San Diego v. Monsanto Co.](#), No. 15cv578-WQH-AGS, 2017 WL 5632052 (S.D. Cal. Nov. 22, 2017).

³⁵See [Bd. Comm'r Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co.](#), 850 F.3d 714 (5th Cir. 2017).

negligence, strict liability, and nuisance claims, among others, against energy companies in Louisiana state court.

The Board alleged the defendants' canal dredging and other oil and gas exploration and production activities caused land loss, erosion, and submergence in the coastal buffer zone.³⁶ This, the Board contended, increased storm surge risk on the Louisiana coast and caused the Board to incur costs to restore the coastal land and mitigate flooding risk. After the case was removed to federal court, the trial court granted a defense motion to dismiss those claims, and the Board appealed.

On appeal, the Fifth Circuit upheld the trial court's decision to dismiss the Board's negligence claim because the Board could not establish that the defendants owed it a duty of care. The Board argued the federal River and Harbors Act and the Clean Water Act established such a duty. The court disagreed and found that both the River and Harbors Act and the Clean Water Act protect the federal government's interest, not the Board's; and that neither the Coastal Zone Management Act nor other state regulations create a private cause of action.³⁷ The court also upheld the trial court's dismissal of the Board's nuisance claim, because the Board's complaint lacked "specificity." The court found the Board's pleading did little more than restate the legal elements of those claims; the Board did not allege facts sufficient to support those claims.³⁸ As a result, the court affirmed the trial court's decision on the motion to dismiss.

IV. LONE PINE

2017 showed that a *Lone Pine*-style pretrial order remains a viable option in some jurisdictions, although defendants often face an uphill battle in using them to limit exposure. Typically under a *Lone Pine* order, named after a 1986 New Jersey case, a plaintiff must offer something—facts, expert testimony, etc.—in addition to the assertions in the complaint to show the case has merit.

In *Trujillo v. Ametek, Inc.*, a California federal court allowed a toxic tort class action to proceed after plaintiffs' experts showed that "[p]laintiffs' case is not meritless or frivolous."³⁹ The plaintiffs are classes of students and teachers from an elementary school bordering a property once owned by the defendant Ametek, Inc. The plaintiffs alleged that chemicals released on the property migrated into groundwater and air at the school and posed significant health risks to the school's occupants. Plaintiffs seek, among other things, medical monitoring damages.

On Ametek's motion, the court issued a *Lone Pine* case management order ("CMO" or "Lone Pine Order") requiring the plaintiffs to show prima facie evidence of exposure and other evidence supporting their damage claims. The plaintiffs produced their Lone Pine submission along with five experts' opinions on exposure, increased risk of specific injury, and causation with other information responsive to the CMO. Ametek and its co-defendant objected that the submission was insufficient because it failed to establish a prima facie case and to address specific requests from the court. The court disagreed with Ametek. First, the court held that its specific requests within the Lone Pine Order were not based on "individual elements of a *prima facie* case for negligence, but rather, [were] factors that the trier of fact must weigh before concluding that the plaintiffs are entitled to medical monitoring damages."⁴⁰ Therefore, the court said, the requests from the CMO were

³⁶*Id.* at 720.

³⁷*Id.* at 727-29.

³⁸*Id.* at 729-31.

³⁹No. 3:15-cv-01394-GPC-BGS, 2017 WL 3026107, at *3 (S.D. Cal. July 17, 2017).

⁴⁰*Id.* at *4.

“merely a useful tool” to evaluate whether the plaintiffs’ claims of exposure, injury, and causation would “have enough merit to warrant” discovery.⁴¹ The court further reasoned that the only two “narrow, but weighty” questions in dispute were the level of the plaintiffs’ exposure and whether such level was harmful.⁴² The court found that the plaintiffs’ expert case reports answered the two questions with opinions that “[p]laintiffs were exposed to a significant level of chemical toxins that has increased their risk of developing certain health problems.”⁴³ Therefore, even though Ametek objected by citing opposite conclusions on the merits from the state government and by raising evidentiary challenges, the court held that the plaintiffs’ submission satisfied the CMO and that the case should proceed to discovery.

V. PREEMPTION

The Flint water crisis brought about a number of lawsuits, some relying on creative claims to seek recourse from state and local government officials. In one of those cases, [*Boler v. Earley*](#), the U.S. Court of Appeals for the Sixth Circuit revived previously dismissed constitutional claims. Citizens of Flint and consumers of Flint water filed suit against the State of Michigan, the City of Flint, and their respective officials.⁴⁴ The plaintiffs’ claims included, among other things, constitutional claims under Section 1983 of Title 42 of the United States Code. section 1983 is a “vehicle for a plaintiff to obtain damages for violations of the Constitution or a federal statute.”⁴⁵ The district court determined that it lacked subject matter jurisdiction because the plaintiffs’ Section 1983 claims were preempted by the federal Safe Drinking Water Act (SDWA) and dismissed the cases.

On appeal, the Sixth Circuit focused on the congressional intent behind the SDWA to determine whether Congress intended to displace remedies available under constitutional jurisprudence when it passed the SDWA. The court looked at three elements of the statute: statutory text, the remedial scheme of the SDWA, and the types of rights and protections provided by the SDWA.⁴⁶ Regarding the text, the court held that because the SDWA neither uses “language related to constitutional rights” nor codifies “legal standards that appeared in prior cases to enforce rights guaranteed by the Constitution,” the court could find no preclusion.⁴⁷ The court found “no clear inference from either the text of the statute or its legislative history that congress intended for the SDWA’s remedial scheme to displace § 1983 suits enforcing constitutional rights.”⁴⁸ Further, the court did not find the remedial scheme “so comprehensive as to demonstrate congressional intent” to preclude a Section 1983 suit.⁴⁹ Finally, the court analyzed the type of right protected. It presented hypotheticals suggesting that an action may violate the Due Process Clause without violating the SDWA, or vice versa. Such a case provides that the “contours of the rights and protections’ found in the constitutional claims diverge from those provided by the

⁴¹*Id.*

⁴²*Id.* at *5.

⁴³*Id.*

⁴⁴865 F.3d 391 (6th Cir. 2017).

⁴⁵*Id.* at 401.

⁴⁶*Id.* at 403–09.

⁴⁷*Id.* at 404.

⁴⁸*Id.* at 405.

⁴⁹865 F.3d at 406.

SDWA” and therefore, the court held, the SDWA did not preempt the plaintiffs’ constitutional claims.⁵⁰

While the medium of alleged exposure is often an important factor in preemption analysis, the contaminating substance may also be important. A federal court in Missouri dismissed two homeowners’ state law tort claims for property damage against the owners and operators of a neighboring landfill containing radioactive waste from the Manhattan project and the generators and disposers of the waste.⁵¹ The homeowners also brought a claim under the Price-Anderson Act (PAA), a federal law that provides federal jurisdiction over claims that the “hazardous properties of radioactive material caused bodily injury, sickness, or property damage.”⁵² The defendants moved to dismiss the tort claims, arguing that the PAA is the exclusive federal claim available in cases involving a “nuclear incident,” defined in the PAA to include property damage resulting from the hazardous properties of nuclear material.⁵³ The defendants countered that the PAA expressly allows state law claims.

The court held that the PAA preempts state tort claims arising from a nuclear incident. It noted the Eighth Circuit had not yet addressed the issue, but cited decisions from other circuits in which courts have found federal preemption of state law claims for nuclear incidents.⁵⁴ The court acknowledged that the Tenth Circuit had found the PAA allows state law claims for “lesser nuclear occurrences,” which are something less than “nuclear incidents.” But the plaintiffs here pleaded both state law claims and a PAA claim. They could not allege damages from both a nuclear incident and something less than a nuclear incident. The court therefore dismissed the state law tort claims.

VI. CORPORATE OFFICER LIABILITY

[*Cox v. Ametek*](#) illustrates the potential personal liability that a company executive may face if the company ignores its obligation to clean up a contaminated site.⁵⁵ A federal judge in California denied a motion to dismiss a wrongful death action brought by the family of a woman who died of cancer allegedly tied to pollution at a former aircraft component manufacturing facility. Prior owners of the facility in El Cajon, California had stored and disposed of various solvents at the site, resulting in a plume of contaminants running under a residential area and a school. The California Regional Water Control Board issued cleanup and abatement orders in 1998 and 2002 against Ametek, the current owner of the site.

Arla Cox lived above the solvent plume from 1976 until her death in 2001 of kidney cancer. Her family brought suit against Ametek and Thomas Deeny, an Ametek corporate officer, alleging that exposure to solvents caused the kidney tumors and death. The family alleged Deeny’s role in Ametek’s failure to comply with the 1998 abatement order caused additional harm. Deeny argued that the claims against him should be dropped because he did not start relevant work at Ametek until 1998 and so couldn’t plausibly have prevented Cox’s death in 2001. Deeny argued that his actions could not have contributed to the death as exposure began well before he started. The court rejected this, finding that “[i]t is at least

⁵⁰*Id.* at 407-09.

⁵¹[*Dailey v. Bridgeton Landfill, LLC*](#), No. 4:17-CV 24 CDP, 2017 WL 4865916 (E.D. Mo. Oct. 27, 2017).

⁵²*Id.* at *3.

⁵³*Id.*

⁵⁴*Id.* at *4.

⁵⁵No. 17-cv-01211, 2017 WL 4792424 (S.D. Cal. Oct. 24, 2017).

plausible that had Deeney decided to comply with the 1998 [cleanup order] . . . Cox would not have passed away when she did.”⁵⁶

VII. MEDICAL MONITORING

The Third Circuit heard an appeal from a July 6, 2017 decision in a medical monitoring case from the Eastern District of Pennsylvania.⁵⁷ That decision, if affirmed by the Third Circuit, would directly contradict a 1995 Ninth Circuit decision and potentially open the door for Supreme Court review of whether a state law medical monitoring claim is a barred “challenge” to a “removal or remedial action” under CERCLA.⁵⁸

The case involves the Giovanni family and other citizen plaintiffs who allege exposure to perfluoroalkyl substances (PFAS) in groundwater contaminated by two nearby naval bases in eastern Pennsylvania.⁵⁹ Plaintiffs brought claims against the U.S. Navy under Pennsylvania’s Hazardous Sites Cleanup Act in state court seeking medical monitoring, a health assessment, a health effects study, and blood testing for themselves and their minor children. The Navy responded with a notice of removal. Once in federal court, plaintiffs argued that the case should be remanded because the federal courts lacked jurisdiction over the state-law claims in accordance with CERCLA. The Navy argued that CERCLA also barred the claim in state court and moved to dismiss instead of remand.

The district court concluded that “response costs” do not equate to “response” and, therefore, not all “response costs” are “removal and remedial actions” even though “response” includes “removal and remedial actions.”⁶⁰ Based on this reasoning, the court determined that plaintiffs’ sought remedy of medical monitoring was, by definition, a challenge to a removal or remedial action under 42 U.S.C. § 9613(h). The court concluded that the pre-enforcement action would “constitute ‘judicial interference’” and “hinder EPA’s efforts to promptly remediate sites.”

⁵⁶*Id.* at *4.

⁵⁷*Giovanni v. U.S. Dep’t of the Navy*, 263 F. Supp. 3d 532 (E.D. Pa. 2017), *appeal pending*, No. 16-4873 (3rd Cir. 2017).

⁵⁸*See Durfey v. E.I. DuPont De Nemours & Co.*, 59 F.3d 121 (9th Cir. 1995).

⁵⁹[Giovanni v. U.S. Dep’t of the Navy](#), 263 F. Supp. 3d 532 (E.D. Pa. 2017).

⁶⁰*Id.* at 539–40.

Chapter 7 • ENVIRONMENTAL TRANSACTIONS AND BROWNFIELDS
2017 Annual Report¹

I. CONTRACTUAL LIABILITY

In *Dixon Lumber Co. v. Austinville Limestone Co.*,² a Virginia lumber company established on summary judgment that it was not a corporate successor to a mining company and therefore was not under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The parties own adjacent parcels that were mined by a division of Gulf & Western Industries (G&W). Dixon filed this suit claiming that Austinville, as successor to G&W, was liable under CERCLA for reclamation costs arising from limestone tailings on Dixon’s property. The court held that Austinville neither expressly by contract nor impliedly assumed G&W’s CERCLA liabilities.

Nor was Austinville a “mere continuation” of G&W’s operations under the traditional test articulated in *PCS Nitrogen Inc. v Ashley II of Charleston LLC*³ because there was no overlap of stock ownership between the two companies, or under a broader “continuity of enterprise” or “substantial continuity” test that considers: “(1) retention of the same employees; (2) retention of the same supervisory personnel; (3) retention of the same production facilities in the same location; (4) production of the same product; (5) retention of the same name; (6) continuity of assets; (7) continuity of general business operations; and (8) whether the successor holds itself out as the continuation of the previous enterprise.”⁴

In *Noble Energy Inc. v. ConocoPhillips, Co.*,⁵ the Texas Supreme Court held that Noble Energy must indemnify ConocoPhillips for \$63 million in environmental cleanup costs under an indemnification provision in an agreement that was not specifically disclosed when Noble bought oil and gas assets out of Alma’s bankruptcy. Alma’s bankruptcy order provided that any executory contracts not specifically referenced in the reorganization plan were to be assumed and assigned unless rejected at closing. Alma had acquired assets from a ConocoPhillips predecessor in the 1990s through an exchange agreement containing a mutual indemnity clause.

The exchange agreement indemnification was not listed as a liability assumed by Alma in Noble’s asset purchase agreement. Nonetheless, the court held that the exchange agreement was an executory contract under the bankruptcy order and a liability assumed by Noble when it acquired Alma’s assets: “As critical as disclosure in bankruptcy proceedings may be, we think it more critical that parties to bankruptcy proceedings and others have confidence that reorganization plans and court orders will be interpreted and enforced according to their plain terms.”⁶

¹Given the breadth of the topic, this chapter discusses only a few selected cases and regulations issued during 2017. Connie Sue Martin, Eric Larson, and Christina Reichert edited this chapter. This chapter’s authors are Connie Sue Martin, Richard Fil, David E. Roth, Thomas Utzinger, Amy Edwards, Aaron S. Heishman, May Wall, and Elise C. Scott.

²256 F. Supp. 3d 658 (W.D. Va. 2017).

³714 F.3d 161, 173 (4th Cir. 2013).

⁴*Dixon Lumber Co.*, 256 F. Supp. 3d at 676 (quoting *United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992)).

⁵532 S.W. 3d 771 (Tex. 2017).

⁶*Id.* at 783.

II. BANKRUPTCY

In the matter of *In re Taylor*,⁷ two public interest groups brought a citizen suit under the Clean Water Act (CWA) and Resource Conservation and Recovery Act (RCRA) against the operators of a hog farm. That action was automatically stayed after the defendants filed for bankruptcy under Chapter 11. The plaintiffs then filed a complaint in the bankruptcy proceeding to seek a ruling on whether the injunctive relief sought under the citizen suit would constitute “debts” under 11 U.S.C. section 101(12).

The bankruptcy court, relying on precedent, held that the cause of action under RCRA does not authorize a right of payment and so would not give rise to a debt. Similar precedent was not found for CWA, but the bankruptcy court came to the same conclusion based on their similar citizen suit provisions. This decision was rendered as a discretionary “declaratory judgment” to facilitate the bankruptcy proceedings, and was not considered by the court to be a prohibited “advisory opinion,” even though the plaintiffs had not yet received any relief under the citizen suit.⁸

In *Asarco, LLC v. Noranda Mining, Inc.*,⁹ the United States Court of Appeals for the Tenth Circuit reversed the district court’s decision estopping the plaintiff from pursuing a contribution claim. The district court’s decision was based on plaintiff’s prior representations regarding estimated cleanup costs and plaintiff’s fair share of those costs. The Court of Appeals concluded that the variation in estimates was not misleading, and other factors such as litigation risks would affect those estimates.

In *United States v. Land O’ Lakes, Inc.*,¹⁰ the district court rejected the defendant’s assertion that a settlement entered into 30 years earlier between a former operator (Hudson) and the United States precluded this CERCLA action. The earlier settlement was based solely on RCRA to perform corrective action, while this action was brought under CERCLA against a successor to an earlier operator. Closing Hudson’s bankruptcy estate would preclude pre-petition claims against it as debtor, but it had no effect on a claim brought against another creditor.

In *Getty Properties Corp. v. Lukoil Americas Corp.*,¹¹ the parent of a tenant of several gasoline stations diverted its valuable assets to a new subsidiary, and the financially doomed tenant later filed for bankruptcy. Two settlements were reached: one between the bankruptcy trustee and the parent, and one between the trustee and the landlord. The landlord then sought cleanup costs from the parent in this action. The court allowed the landlord’s claims to proceed, noting that the landlord preserved its rights to sue others in its settlement with the trustee. The court noted that “‘non-debtor third party releases’ – by which a non-debtor receives a release from the debtor and third parties pursuant to a settlement – occur only in ‘extraordinary cases.’”¹²

III. LENDER LIABILITY

The intersection of and potential tension between environmental liability and economic development continues to be a focus for environmental practitioners. A number of state legislatures and environmental agencies have enacted laws or published guidance supporting and encouraging redevelopment. In [February 2017](#), for example, the Wisconsin

⁷572 B.R. 592 (Bankr. E.D.N.C. 2017).

⁸*Id.*

⁹844 F.3d 1201 (10th Cir. 2017).

¹⁰No. CIV-16-170-R, 2017 U.S. Dist. LEXIS 24305 (W.D. Okla. Feb. 22, 2017).

¹¹No. 151772/2016, 2017 N.Y. Misc. LEXIS 3099 (N.Y. Sup. Ct. Aug. 14, 2017).

¹²*Id.* at *13.

Department of Natural Resources (DNR) Remediation and Redevelopment Program published guidance on General Liability Clarification (GLC) Letters.¹³

According to the DNR guidance: “[u]pon request, the DNR can assist an individual determine whether he/she is, or may become, liable for the environmental contamination of a property and to issue letters concerning the liability for environmental contamination to a person owning, planning to purchase, or leasing a property.”¹⁴ While GLC Letters do not create legal protection from liability, they do provide “interpretation of a person’s liability at a specific property, given the facts presented to the DNR,”¹⁵ which obviously can provide significant comfort to potential lenders.

As DNR itself notes, lenders customarily request GLC Letters: “General liability clarification letters are usually requested by local governments, lenders, businesses and individuals who are buying, selling or redeveloping brownfield properties.”¹⁶ Given increased competition among local and state jurisdictions to encourage businesses to site facilities within their geographic borders, it is likely those businesses will continue to expect environmental regulatory agencies to facilitate, assist, and support those efforts.¹⁷

IV. BROWNFIELDS LEGISLATIVE UPDATE

A. *Federal Legislation*

On March 28, 2017, Rep. Elizabeth Esty (D-CT) introduced [H.R. 1758](#),¹⁸ the “Brownfields Reauthorization Act of 2017,” which was referred to the House Energy and Commerce Committee and the House Transportation and Infrastructure Committee. The bill was considered by the House Transportation and Infrastructure Committee on July 27, 2017 and was ordered to be reported favorably, with amendments. H.R. 1758 would have amended CERCLA to: (1) clarify the liability of state and local governments that acquire ownership or control of property by virtue of their sovereign status, such as seizure, law enforcement activity, bankruptcy, tax delinquency, abandonment, or other circumstances; (2) relax the funding threshold for Environmental Protection Agency (EPA) evaluations of potential brownfield sites contaminated by petroleum or petroleum products; (3) clarify that leaseholders can qualify as bona fide prospective purchasers; (4) expand the eligibility of non-profit organizations; (5) clarify eligibility of governmental entities to receive a brownfield site characterization and assessment grant or a remediation grant for properties acquired prior to January 11, 2002; (6) increase the amount of grants; (7) establish multipurpose grants; (8) allow some grant amounts to be used to cover administrative costs; (9) authorize appropriations through FY2022; and (10) authorize state response programs through FY2022.

The bill was reported on November 21, 2017 (Report 115-419)¹⁹ but due to an agreement between the two House committees, a similar bill that had been introduced in

¹³WISC. DEP’T OF NAT. RES. REMEDIATION & REDEVELOPMENT PROGRAM, GENERAL LIABILITY CLARIFICATION LETTERS (Feb. 2017).

¹⁴*Id.* at 1.

¹⁵*Id.* at 2.

¹⁶*Id.*

¹⁷For another example of relevant 2017 state regulatory guidance, *see* MD. DEP’T OF THE ENV’T, [FACTS ABOUT: VOLUNTARY CLEANUP PROGRAM INCULPABLE & RESPONSIBLE PERSON STATUS](#) (Aug. 2017).

¹⁸Brownfields Reauthorization Act of 2017, H.R. 1758, 115th Cong. (2017).

¹⁹H.R. REP. NO. 115-419 (2017).

the House of Representatives, H.R. 3017, moved forward for consideration and passage by the House of Representatives.

[H.R. 3017](#),²⁰ which moved forward for consideration in the House of Representatives as a substitute for H.R. 1758, was titled the “Brownfields Enhancement, Economic Redevelopment, and Reauthorization Act of 2017” and was introduced on June 22, 2017 by Rep. David McKinley (R-WV). The bill was reported by the Committee on Energy and Commerce on September 11, 2017 (Report 115-303)²¹ and was passed by the House of Representatives on November 30, 2017. The Senate received the bill on December 1, 2017, concluding legislative action for 2017. The content of H.R. 3017 mirrors that of H.R. 1758 but also provides for the facilitation of renewable energy on brownfield sites and assistance to small communities, Indian tribes, rural areas, and disadvantaged areas.

On March 28, 2017, Rep. Frank Pallone, Jr. (D-NJ) introduced [H.R. 1747](#),²² the “Brownfields Authorization Increase Act of 2017,” which was referred to the House Energy and Commerce Committee and the House Transportation and Infrastructure Committee. The bill would have amended CERCLA to reauthorize and improve the federal brownfields program in several ways, including: (1) qualifying certain nonprofit organizations and community development entities as eligible for funding; (2) increasing funding for remediation; (3) expanding the scope of remediation-related activities eligible for grants and loans; (4) making funding eligible for certain entities that acquired brownfield sites before January 11, 2002; (5) establishing a multipurpose grant program for remediation-related activities; (6) providing grants to perform remediation-related activities on brownfield sites where clean energy projects or other sustainable developments would be located; (7) providing various methods of assistance to small, disadvantaged, or rural communities; (8) authorizing appropriations through FY2022; and (9) authorizing state response programs through FY2022.

On April 4, 2017, Sen. James Inhofe (R-OK) introduced [S. 822](#),²³ the “Brownfields Utilization, Investment, and Local Development Act of 2017,” (BUILD ACT) which was referred to the Senate Committee on Environment and Public Works. S. 822 was reported by the Committee on September 7, 2017 (Report 115-148).²⁴ Under this legislation: (1) certain nonprofit organizations and community development entities would be eligible for funding; (2) the EPA would establish a program to provide multipurpose grants for remediation-related activities at brownfield sites; (3) eligible governmental entities would be authorized to receive grants for properties acquired before January 11, 2002; (4) the cap on grants and loan amounts available for sites would be increased; (5) eligible entities would be able to use a portion of the amount of money made available under grants and loans to cover administrative costs; (6) grants would be provided to small or disadvantaged communities; (7) the EPA would give consideration to brownfield sites located on waterfronts for the purposes of grants; (8) the EPA would be required to provide grants to perform remediation-related activities on brownfield sites where clean energy projects would be located; (9) grants would be provided to states; (10) appropriations would be authorized through FY2020; and (11) existing liability protections for state and local governments as well as property lessees would be expanded.

²⁰Brownfields Enhancement, Economic Redevelopment, and Reauthorization Act of 2017, H.R. 3017, 115th Cong. (2017).

²¹H.R. REP. NO. 115-303 (2017).

²²Brownfields Reauthorization Increase Act of 2017, H.R. 1747, 115th Cong. (2017).

²³S. 822, 115th Cong. (2017).

²⁴S. REP. NO. 115-148 (2017).

The bill also provided for new liability protections for Alaska Native villages or Alaska Native village corporations that received contaminated properties from the U.S. government pursuant to the Alaska Native Claims Settlement Act.²⁵

In addition to legislation aimed at the remediation of contaminated sites, bills introduced by legislators from the State of New York in 2017 sought to address specific contaminants emanating from industrial sites and entering the drinking water supply. Specifically, New York State has several sites that are polluted by “emerging contaminants” (currently unregulated contaminants) such as 1,4-dioxane, perfluorooctanoic acid (PFOA), and perfluorooctanesulfonic acid (PFOS). On March 2, 2017, Sen. Kirsten Gillibrand (D-NY) introduced [S. 519](#), having the extended title of “A bill to amend the Safe Drinking Water Act to require the Administrator of the Environmental Protection Agency to establish maximum contaminant levels for certain contaminants, and for other purposes.”²⁶ The bill was referred to the Senate Committee on Environment and Public Works. S. 519 would amend section 1412(b)(2) of the Safe Drinking Water Act, 42 U.S.C. § 300g-1(b)(2), to require the EPA Administrator to publish Maximum Contaminant Levels for perfluorinated compounds (PFOA and PFOS), 1,4-dioxane, and perchlorate within two years of enactment.

Other legislation addressing emerging contaminants was included in [H.R. 2810](#), which was enacted into law on December 12, 2017 as “the National Defense Authorization Act for Fiscal Year 2018.”²⁷ The Conference Report for H.R. 2810 (Report No. 115-404)²⁸ contained language addressing the study of emerging contaminants, originally proposed by Rep. Sean Patrick Maloney (D-NY) in 2016 as the “Investing in Testing Act of 2016,” (H.R. 6199).²⁹ Section 316 of the H.R. 2810 Conference Report directs the Centers for Disease Control and Prevention and other agencies and departments to commence: (1) a study on the human health implications of “per- and polyfluoroalkyl substances” (including PFOA and PFOS) in drinking water and groundwater; and (2) an exposure assessment related to contamination from per- and polyfluoroalkyl substances at current or former domestic military installations.

B. State Legislation

1. Connecticut

On June 7, 2017, the Connecticut General Assembly passed [House Bill No. 7229](#),³⁰ titled “An Act Concerning the Creation of Connecticut Brownfield Land Banks, Revisions to the Brownfield Remediation and Revitalization Program and Authorizing Bonds of the State for Brownfield Remediation and Development Programs.” The legislation, signed by Governor Dannel Malloy on July 5, 2017, assists municipalities facing challenges with respect to acquiring and redeveloping brownfield sites. Specifically, the legislation creates a program by which qualified non-stock corporations approved by a certification process can acquire, manage, and remediate contaminated properties on behalf of municipalities. Municipalities will be able to control the remediation, transfer, and redevelopment of the

²⁵S. 822.

²⁶S. 519, 115th Cong. (2017).

²⁷The National Defense Reauthorization Act for Fiscal Year 2018, Pub. L. No. 115-91 (2017).

²⁸H.R. REP. NO. 115-404 (2017).

²⁹Investing in Testing Act of 2016, H.R. 6199, 114th Cong. (2016).

³⁰Conn. Pub. Act No. 17-214 (2017).

properties without incurring liabilities and costs commonly associated with actual property ownership.

2. Maine

On May 26, 2017, Maine Governor Paul LePage approved [L.D. 1258](#),³¹ titled “An Act to Modernize the Voluntary Response Action Program Funding Process,” codified as Public Law 2017, chapter 92 and taking effect on January 1, 2018. The law increases the fee for assistance from the Maine Department of Environmental Protection for submitting a voluntary response action plan application. The fee is 1% of the assessed value of the property at the time the application is submitted, not to exceed \$15,000.

3. Michigan

On January 4, 2017, Michigan Governor Rick Snyder signed a package of six laws amending the state’s Brownfield Redevelopment Financing Act³² and several sections of the Natural Resources and Environmental Protection Act.³³ Public Act Nos. 471, 472, 473, 474, 475, and 476 became effective on April 5, 2017. The suite of legislative changes amended certain definitions related to potentially eligible brownfield activities, expanded the list of remedial activities that would become eligible for redevelopment funding, clarified the universe of potentially liable parties that could participate in the brownfields program, streamlined the Tax Increment Financing application process, and created a Clean Michigan Initiative grant and revolving loan program and revised a related bond fund law.³⁴

4. New York

On April 26, 2017, New York State Governor Andrew M. Cuomo signed legislation investing \$2.5 billion in clean water infrastructure and water quality protection measures intended, among other things, to address water contamination from sites polluted by emerging contaminants such as 1,4-dioxane, PFOA, and PFOS. Known as the “Clean Water Infrastructure Act” and included within a 2017-2018 budget bill ([S. 5492](#)),³⁵ the legislation requires all public water systems in New York State to be tested for emerging contaminants, even smaller systems serving fewer than 10,000 residents and not covered by federal regulation. The New York State Department of Health would offer financial assistance to small public water systems demonstrating hardship. The legislation also provides \$5 million for Suffolk County and the Stony Brook Center for Clean Water Technology to develop and evaluate technologies to remove emerging contaminants from drinking water, starting with 1,4-dioxane.

³¹P.L. 2017, ch. 92.

³²Brownfield Redevelopment Financing Act of 1996, MICH. COMP. LAWS §§ 125.2652 to 125.2670 (1996).

³³Natural Resources & Environmental Protection Act of 1994, MICH. COMP. LAWS §§ 324.101 to 324.19508 (1995).

³⁴MICH. PUB. ACT 471 (2017); MICH. PUB. ACT 472 (2017); MICH. PUB. ACT 473 (2017); MICH. PUB. ACT 474 (2017); MICH. PUB. ACT 475 (2017); MICH. PUB. ACT 476 (2017).

³⁵S. 5492, 2017 Sess. (N.Y. 2017).

V. ENVIRONMENTAL INSURANCE

A federal court in Washington held in [*King County. v. Travelers Indemnity Co.*](#)³⁶ that an insurer's duty to defend was triggered by an insured's designation as a potentially responsible party at a CERCLA site. King County tendered its claims to Travelers after it was identified as a potentially responsible party at the Lower Duwamish Waterway and the Harbor Island Superfund sites, and the EPA and the state Department of Ecology demanded that the County enter into orders to perform remedial investigations and feasibility studies. Because under Washington law the duty to defend is based on the potential for liability, and summary judgment on this issue may be granted in favor of the insured if there are any facts that could conceivably impose liability upon the insured within the policy's coverage, the County met its burden of establishing the right to a defense even in the absence of a "suit."

In [*Givaudan Fragrances Corp. v. Aetna Casualty & Surety Co.*](#),³⁷ the New Jersey Supreme Court addressed the issue of whether an anti-assignment clause in an insurance policy bars the assignment of a post-loss claim and concluded, like an overwhelming number of jurisdictions around the country, that restrictions on post-loss claim assignments are void. Givaudan Fragrances Corporation faced environmental liability for discharges into the Passaic River caused by a related corporate entity, which operated a manufacturing facility in Clifton, New Jersey from the 1960s through 1990. Givaudan Fragrances asserted that it was entitled to coverage under liability policies written for affiliate Givaudan Corporation during the relevant years, either as an affiliate of Givaudan Corporation or by an assignment of rights. The insurer argued unsuccessfully that any assignment to Givaudan Fragrances was invalid because the insurer had not consented to the assignment, as was required under the terms of the insurance policies.

The Third Circuit Court of Appeals held in [*Indian Harbor Insurance Co. v. NL Environmental Management Services, Inc.*](#)³⁸ that NL Environmental was not entitled to coverage for claims related to sediment contamination and natural resource damage to the Raritan River, despite the fact that the insurance policy undisputedly and unambiguously covered such claims, because the failure to exclude NL Environmental Management Services from coverage was a scrivener's error. The decision affirmed a June 30, 2016 Summary Judgment Order entered by a federal court in New Jersey granting declaratory relief to Indian Harbor and reformation of the policy.

Insureds should be pleased with the result in [*Travelers Indemnity Co. v. Rogers Cartage Co.*](#),³⁹ in which an insured prevailed in establishing the existence, terms, and conditions of various missing insurance policies allegedly issued in the 1960s. While it was undisputed that Travelers issued Rogers comprehensive general liability (CGL) policies for the policy periods 1960-1961 and 1965-1966, neither party could locate originals or copies of CGL policies for the policy periods between 1961 and 1965. As the insured seeking coverage, Rogers had the burden of establishing by a preponderance of the evidence that the policies existed and the material terms and conditions of the policies. On cross-motions for summary judgment, an Illinois state court concluded that the evidence offered by Rogers - letters written in 2000 by a claims adjuster at Travelers containing a passing reference to secondary evidence of other policies during the missing years, Travelers's commercial account claims records, commercial account register records, an excess 1962 "Certificate of Insurance," the existing 1960-1961 and 1965-1966 CGL

³⁶234 F. Supp. 3d 1074 (W.D. Wash. 2017).

³⁷151 A.3d 576 (N.J. 2017).

³⁸Nos. 16-3262 & 16-3292, 2017 U.S. App. LEXIS 25277 (3d Cir. Dec 14, 2017).

³⁹No. 1-16-0780, 2017 IL App (1st) 160780 (Dec. 29, 2017).

policies, and Travelers’s “specimen” (or standardized) CGL policy forms used between 1961 and 1965 – was sufficient.

VI. INSTITUTIONAL CONTROLS AND OTHER CONTINUING OBLIGATIONS

In 2017, there was no significant federal or state legislation relating to institutional controls (ICs). No states adopted statutes modeled after the Uniform Environmental Covenant Act (UECA), keeping the number of UECA adoptions at 23 states, the District of Columbia, and the U.S. Virgin Islands. However, it was far from a quiet year for ICs. The EPA released several documents summarizing the current status of state voluntary cleanup programs and assembled a task force that recommended greater transparency and publication of ICs in effect at the nation’s Superfund sites to expedite their productive reuse. Several states also made efforts to streamline the process of implementing ICs.

A. *Private Sector Activities*

ASTM approved an update to its “[Standard Guide for Use of Activity and Use Limitations, Including Institutional and Engineering Controls \(E 2091\)](#)”. The guide, which was first published in 2000, was issued in its updated form in early 2018.⁴⁰

The Interstate Technology and Regulatory Council published its [Long-Term Contaminant Management Using Institutional Controls](#). This guidance document, which builds on its 2008 publication, focused on the IC life cycle, including planning, implementation, monitoring and performance evaluation, enforcement, and modification or termination. It encouraged the creation of a registry; data management; stakeholder outreach and communication; and evaluation of costs.⁴¹

B. *Federal Agency Activities*

In February, the EPA published a document to assist state underground storage tank (UST) cleanup programs develop or enhance their long term stewardship programs. Titled [Long Term Stewardship at Leaking Underground Storage Tank Sites with Residual Contamination](#), the document summarizes various approaches that states currently utilize to ensure the effectiveness of ICs and was based on the EPA’s research of the long term stewardship programs in 35 states.⁴²

Upon assuming the helm of the EPA, Administrator Scott Pruitt appointed a Superfund Task Force to review the more than 1,330 Superfund sites across the United States.⁴³ The EPA Superfund Task Force [Recommendations Report](#), published in July, touched upon a number of topics that are relevant to institutional controls and other continuing obligations, including recommendation 21 (encourage Potentially Responsible Parties to fully integrate and implement reuse opportunities into investigations and cleanup of National Priority List sites); recommendation 28 (provide greater “comfort” in

⁴⁰*Standard Guide for Use of Activity & Use Limitations, Including Institutional & Engineering Controls*, ASTM (2018).

⁴¹*Long-Term Containment Management Using Institutional Controls*, INTERSTATE TECH. & REGULATORY COUNCIL (2017).

⁴²ENVTL. PROT. AGENCY, OFFICE OF UNDERGROUND STORAGE TANKS, *LONG TERM STEWARDSHIP AT LEAKING UNDERGROUND STORAGE TANK SITES WITH RESIDUAL CONTAMINATION* (Feb. 2017).

⁴³[Memorandum](#) from E. Scott Pruitt, Adm’r, Env’tl. Prot. Agency, on Prioritizing the Superfund Program (May 22, 2017).

comfort/status letters); recommendation 29 (propose revisions to the Common Elements guidance based on case law and lessons learned); and recommendation 34 (publicize site-specific information to promote community revitalization, utilizing GIS-based maps, information about Institutional Controls/Engineering Controls (ICs/ECs), and site-specific reuse fact sheets).⁴⁴

In November, the EPA published the [State Brownfields and Voluntary Response Programs Report](#), which provides a concise, user-friendly synopsis of each state's unique voluntary cleanup programs, including the types of ICs that can be used to achieve regulatory closure at contaminated sites.⁴⁵

C. State Activities

The Alabama Department of Environment Management published revisions to its [Risk-Based Corrective Action Guidance Manual](#),⁴⁶ last updated in 2008, and its [Environmental Investigation and Remediation Guidance](#),⁴⁷ last updated in 2002, to guide the public through the necessary elements of conducting environmental risk assessments. The Colorado Department of Public Health and Environment released new model environmental use restriction language and model language for environmental covenants.⁴⁸

The Florida Department of Environmental Protection updated its Institutional Controls Procedures Guidance, which provides instructions and form templates for establishing ICs.⁴⁹ The Indiana Department of Environmental Management published environmental restrictive covenant templates for RCRA hazardous waste sites, leaking UST sites, state cleanup sites, and properties in the voluntary remediation program.⁵⁰

The North Carolina Department of Environmental Quality released an updated [Technical Guidance for Risk-Based Environmental Remediation of Sites](#), which explains when ICs and ECs are appropriate to achieve a protective use remedy at a contaminated site.⁵¹ The agency also released a [Brownfields Program Guidelines and Resolutions](#) document to ease the process of navigating the state's brownfields agreement process, including the use of ICs and ECs.⁵²

The Vermont Department of Environmental Conservation adopted a new [Investigation and Remediation of Contaminated Properties Rule](#), which includes provisions for the use of ICs and ECs as corrective action alternatives. The new rule

⁴⁴ENVTL. PROT. AGENCY, SUPERFUND TASK FORCE RECOMMENDATIONS (July 25, 2107).

⁴⁵ENVTL. PROT. AGENCY, STATE BROWNFIELDS & VOLUNTARY RESPONSE PROGRAMS 2017 (Nov. 2017).

⁴⁶ALA. DEP'T OF ENVTL. MGMT., ALABAMA RISK-BASED CORRECTIVE ACTION GUIDANCE MANUAL, REVISION 3.0 (Feb. 2017).

⁴⁷ALA. DEP'T OF ENVTL. MGMT., ALABAMA ENVIRONMENTAL INVESTIGATION & REMEDIATION GUIDANCE (AIERG), REVISION 4.0 (Feb. 2017).

⁴⁸[Environmental Covenants & Use Restrictions](#), COLO. DEP'T OF PUB. HEALTH & ENV'T (2017).

⁴⁹[Institutional Controls Procedures Guidance](#), FLA. DEP'T OF ENVTL. PROT. (Mar. 24, 2017).

⁵⁰[Forms](#), IND. DEP'T OF ENVTL. MGMT. (2017).

⁵¹N.C. DEP'T OF ENVTL. QUALITY, TECHNICAL GUIDANCE FOR RISK-BASED ENVIRONMENTAL REMEDIATION OF SITES (Mar. 2017).

⁵²N.C. Dep't of Env'tl. Quality, Brownfields Program Guidance & Issue Resolution, (Dec. 2017).

requires corrective action alternatives to be assessed for long-term effectiveness.⁵³ Additionally, if ICs or ECs are used, the corrective action plans must have long-term monitoring plans that describe how ECs and ICs will be “monitored and maintained.”⁵⁴

VII. ENVIRONMENTAL INVESTIGATIONS/DUE DILIGENCE

A California appeals court held in *Mao v. PIERS Environmental Services, Inc.*,⁵⁵ that a buyer of contaminated property could not pursue a negligence claim against an environmental consultant hired by the buyer’s lender because there was no privity of contract between the parties. In connection with its due diligence on the proposed loan to Mao, the Bank hired PIERS Environmental Services, Inc. (PIERS) to perform a surface and subsurface environmental assessment of the property. PIERS reported no contamination. In 2005, Mao hired PIERS to perform a limited-scope update of the initial environmental assessment, and PIERS again reported no contamination. After Mao sold the property, petroleum contamination was discovered on the property. The court found that because the consultant contracted with the lender, it did not owe the buyer a duty of care in connection with pre-sale Phase I and II environmental reports prepared for exclusive use of the lender.

VIII. EFFECT OF BUILDING ISSUES ON TRANSACTIONS

Building issues, including vapor intrusion, lead-based paint, and radon continue to require careful evaluation and assessment of potential liability in commercial, industrial, and residential real estate transactions.

A. *Vapor Intrusion Developments*

On [January 9, 2017](#), the EPA issued a final rule adding vapor or water intrusion as a contaminant pathway for placing a site on the National Priorities List.⁵⁶ The Hazard Ranking System (“HRS”), tasked with determining whether sites are placed on the NPL, initially evaluated four potential exposure pathways: ground water, surface water, air, and soil exposure, and the final rule added a “subsurface intrusion” (“SsI”) component.⁵⁷ On January 20, 2017, the White House Chief of Staff issued a memorandum that directed agencies to delay the effective dates of regulations meeting certain criteria by sixty days from the date of the issuance of the memorandum.⁵⁸ Due to this delay, the final rule took effect on May 22, 2017.

⁵³Vt. Admin. Code § 16-3-704A: 35-503(d)(3)(A).

⁵⁴*Id.* at § 35-505(7).

⁵⁵No. H041214, 2017 Cal. App. Unpub. LEXIS 905 (Feb. 8, 2017).

⁵⁶Addition of a Subsurface Intrusion Component to the Hazard Ranking System, 82 Fed. Reg. 2760 (Jan. 9, 2017) (to be codified at 40 C.F.R. pt. 300) (Final rule).

⁵⁷*Id.* at 2766.

⁵⁸Memorandum from Reince Priebus, Asst. to the President & Chief of Staff, to Heads of Exec. Dep’ts and Agencies (Jan. 20, 2017).

B. Lead-Based Paint

On October 27, 2017, the EPA announced over 125 federal enforcement actions completed between October 2016 and September 2017 related to lead-based paint.⁵⁹ During that time, the EPA finalized 121 settlements for alleged violations of one or more of the EPA's three lead-based paint rules: the Renovation, Repair, and Painting (RRP) Rule; the Lead Disclosure Rule; and the Lead-Based Paint Activities Rule for abatements. Significant settlements from fiscal year 2017 include (1) Pike International, LLC, in which Pike agreed to perform an abatement Supplemental Environmental Project costing \$109,264 and to pay a \$12,139 penalty; (2) Haven Homes, Inc., in which Haven paid \$148,618 to settle alleged Lead Disclosure Rule violations; and (3) Cityside Management Corp., in which the company agreed to pay a penalty of \$145,346 to resolve alleged violations of the EPA's RRP Rule. The EPA also reported one criminal prosecution under its lead-based paint rules.

C. Radon

In [August 2017](#), the EPA issued a notice of availability that opened a public comment period on the agency's intention to establish a standard of competence for organizations that credential radon service providers.⁶⁰ The comment period closed in November 2017.⁶¹

⁵⁹Press Release, Env'tl. Prot. Agency, EPA Enforcement Actions Help Protect Vulnerable Communities Across the Country from Lead-Based Paint Health Hazards (Oct. 27, 2017).

⁶⁰Notice of Intent to Establish Voluntary Criteria for Radon Credentialing Organizations, 82 Fed. Reg. 39,993 (Aug. 23, 2017) (Notice).

⁶¹*Id.*

Chapter 8 • PESTICIDES, CHEMICAL REGULATION, AND RIGHT-TO-KNOW 2017 Annual Report¹

I. TOXIC SUBSTANCES CONTROL ACT (TSCA)

A. *Implementation of the Frank R. Lautenberg Chemical Safety for the 21st Century Act*

The U.S. Environmental Protection Agency (EPA) continued furious work to meet the many ambitious deadlines of the 2016 Frank R. Lautenberg Chemical Safety for the 21st Century Act (Lautenberg Act),² which significantly updated TSCA for the first time in 40 years. Most significantly, the EPA proposed and timely completed the three “framework” rules, which implement the Lautenberg Act’s principal change to TSCA and were required by the first anniversary of the Act: one-time requirements for manufacturers to notify EPA of active chemicals on the TSCA Inventory (the [Inventory Reset Rule](#)),³ new procedures for screening and prioritizing chemicals for risk evaluation (the [Prioritization Rule](#)),⁴ and new procedures for conducting chemical risk evaluations (the [Risk Evaluation Rule](#)).⁵ EPA also timely issued guidance to assist interested persons in developing and submitting their own chemical substance risk evaluations to EPA for consideration.⁶

Given the Presidential election results, the change in Administrations, and the hundreds of comments the EPA received on the framework rules as proposed by the EPA under the Obama Administration, the final framework rules issued by the Trump Administration differ from the proposed rules in many respects. And each was judicially challenged by several environmental interest groups in different U.S. Courts of Appeals. Challenges to the Prioritization and Risk Evaluation Rules were consolidated for resolution in the U.S. Court of Appeals for the Ninth Circuit.⁷ A central issue in those cases is expected to be whether or under what circumstances the EPA has the discretion to consider fewer than all current, foreseeable and legacy uses of a substance during prioritization and risk evaluation. The sole challenge to the Inventory Reset Rule will be heard in the D.C. Circuit.⁸ Central issues in that case are expected to include the extent to which confidential business information (CBI) claims for substance identity may be maintained for inactive

¹Lynn Bergeson and Richard Engler, Ph.D., Bergeson & Campbell, P.C.; Mark Duvall, Ryan Carra, and Tim Serie, Beveridge & Diamond, P.C.; Herbert Estreicher, James Votaw and Greg Clark, Keller and Heckman LLP; Emilee Mooney Scott, Robinson & Cole LLP; Judah Prero and Joseph Zaleski, Sidley Austin LLP; Misty A. Sims, Sims & Sims Law, PLLC; and Prof. James O’Reilly, College of Medicine, University of Cincinnati.

²Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448 (2016).

³TSCA Inventory Notification (Active-Inactive) Requirements, 82 Fed. Reg. 37,520 (Aug. 11, 2017) (to be codified at 40 C.F.R. pt. 710) (final rule).

⁴Procedures for Prioritization of Chemicals for Risk Evaluation Under the Toxic Substances Control Act, 82 Fed. Reg. 33,753 (July 20, 2017) (to be codified at 40 C.F.R. pt. 702) (final rule).

⁵Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act, 82 Fed. Reg. 33,726 (July 20, 2017) (to be codified at 40 C.F.R. pt. 702) (final rule).

⁶[Guidance to Assist Interested Persons in Developing and Submitting Draft Risk Evaluations Under the Toxic Substances Control Act; Notice of Availability](#), 82 Fed. Reg. 33,765 (July 20, 2017).

⁷Challenges to the prioritization rule were consolidated under lead case, *Safety Chems. Healthy Families v. EPA*, No. 17-72260 (9th Cir.). Challenges to the risk evaluation rule were consolidated under lead case, *Alliance of Nurses v. EPA*, No. 17-73290 (9th Cir.).

⁸Complaint, *Envtl. Def. Fund v. EPA*, No. 17-1201 (D.C. Cir. Sept. 1, 2017).

substances, and by persons with an interest but who did not assert the original confidentiality claim.

In addition to the high-profile framework rules, the EPA took actions to implement the Lautenberg Act in the several TSCA areas touched by the amendments as noted in following topical discussions.

B. *New Chemicals Program and Significant New Uses*

The Lautenberg Act amended the new chemical premanufacture notice (PMN) and significant new use rule (SNUR) provisions under section 5 of TSCA, including, as a practical matter, removing the 90-day limit for risk reviews and requiring the EPA, *inter alia*, to consider currently unintended but foreseeable future uses of substances, to make affirmative determinations about risk prior to concluding a review, and to issue section 5(e) risk control orders in certain circumstances where, in the past, they had been optional.⁹ Adapting to these new mandates, coupled with a decision to restart reviews of all PMNs pending on the Lautenberg Act's June 22, 2016 effective date, created a significant backlog of PMNs and exemption notices under review, which was not resolved until August 2017.¹⁰ However, the EPA continued to struggle with timely completing section 5 reviews and appropriate risk management actions while also meeting the new procedural mandates of the Lautenberg Act. In late 2017, it initiated a public engagement process, including a public meeting, to provide greater transparency and receive public comment on its evolving decision-making processes and the procedures used to meet Lautenberg Act mandates, which remain controversial.¹¹

The EPA issued SNURs for 38 chemical substances that were the subject of PMNs and for which the EPA completed new chemical review under the "old" TSCA, prior to June 22, 2016.¹² Of these, only six were also subject to prior TSCA section 5(e) orders. The rest were so-called "non-5(e) SNURs," issued where the EPA had risk concerns with foreseeable uses other than those contemplated by the notice submitter. The EPA also issued SNURs for a batch of twenty-nine chemicals that were the subject of PMNs reviewed after the Lautenberg Act.¹³ In contrast to the earlier set, none of the post-Lautenberg Act SNURs were non-5(e) SNURs; the EPA negotiated individual Section 5(e) consent orders for each one of these substances,¹⁴ apparently reflecting the EPA's Lautenberg Act loss of discretion to issue non-5(e) SNURs in certain circumstances.

⁹15 U.S.C. § 2604(a) (2016).

¹⁰Press Release, Env'tl Prot. Agency, [EPA Eliminates New-Chemical Backlog, Announces Improvements to New Chemical Safety Reviews](#) (Aug. 7, 2017).

¹¹New Chemicals Review Program Implementation and Approaches for Identifying Potential Candidates for Prioritization for Existing Chemical Risk Evaluations Under the Amended Toxic Substances Control Act (TSCA); Notice of Public Meetings and Opportunity for Public Comment; [Notice](#), 82 Fed. Reg. 51,415 (Nov. 6, 2017).

¹²Significant New Use Rules on Certain Chemical Substances, [82 Fed. Reg. 44,079](#) (Sept. 21, 2017) (to be codified at 40 C.F.R. Parts 9 and 721) (Direct final rule); Significant New Use Rule on Certain Chemical Substances, [82 Fed. Reg. 45,990](#) (Oct. 3, 2017) (to be codified at 40 C.F.R. Parts 9 and 721) (Final rule).

¹³Significant New Use Rules on Certain Chemical Substances, [82 Fed. Reg. 48,637](#) (Oct. 19, 2017) (to be codified at 40 C.F.R. Parts 9 and 721) (Direct final rule).

¹⁴*Id.*

C. *Regulation of Existing Chemicals*

The EPA advanced work on risk evaluations for the ten chemicals selected in 2016 to undergo the first risk evaluations under the new TSCA section 6(b) procedures,¹⁵ holding a public meeting to gather additional information on current uses and exposure,¹⁶ timely publishing documents defining the scope of the risk evaluations EPA plans undertake for these chemicals,¹⁷ and soliciting further comments on how it should conduct problem formulation for each chemical.¹⁸

In the final TSCA section 6(b) prioritization rule, the EPA opted not to define a process for identifying the order in which candidate substances from the TSCA Inventory would enter the formal prioritization process. The criteria and process for selecting these candidates (so-called “pre-prioritization”) is largely unaddressed by the Lautenberg Act, leaving the agency significant discretion in deciding when particular substances will come up for review. Given the interest and practical significance of these questions, the EPA held a public meeting and solicited public comments on the approach it should take.¹⁹

In the final days of the Obama Administration, the EPA issued three proposed risk management rules under section 6(a) of TSCA. Two would regulate uses of trichloroethylene (TCE), as an aerosol degreaser or for spot cleaning in dry cleaning facilities,²⁰ and for commercial vapor degreasing operations.²¹ The third would regulate methylene chloride and n-methylpyrrolidone (NMP), prohibiting all consumer and most types of commercial paint removal uses.²² These proposals were made under the authority of TSCA section 26(1)(4), which, as amended by the Lautenberg Act, authorizes the EPA to propose risk management rules under section 6(a) for chemicals listed in the 2014 TSCA Workplan for Chemical Assessments without first going through the new section 6(b) prioritization and risk evaluation procedures to the extent the EPA had completed a risk assessment of consistent scope with the proposal for the substance prior to the [Lautenberg Act](#).²³ The EPA under the Trump Administration twice extended the public comment

¹⁵Designation of Ten Chemical Substances for Initial Risk Evaluations Under the Toxic Substances Control Act, 81 Fed. Reg. 91,927 (Dec. 19, 2016).

¹⁶Risk Evaluation Scoping Efforts Under TSCA for Ten Chemical Substances; Notice of Public Meeting, [82 Fed. Reg. 6545](#) (Jan. 19, 2017).

¹⁷Scopes of the Risk Evaluations to be Conducted for the First Ten Chemical Substances Under the Toxic Substances Control Act; Notice of Availability, [82 Fed. Reg. 31,592](#) (July 7, 2017).

¹⁸[Memorandum](#) from Niva Kramek, Assoc. Chief, Existing Chemicals Branch, Chemical Control Div. Authorizing Opening of dockets to receive comments in Regulations.gov: EPA-HQ-OPPT-2016-0723, -0725, -0732, -0733, -0735, -0736, -0737, -0741, -0742, and -0743, EPA Dkt. EPA-HQ-OPPT-2016-0725-0021 (June 9, 2017).

¹⁹See 82 Fed. Reg. 51,415.

²⁰Trichloroethylene; Regulation of Certain Uses Under TSCA § 6(a), 81 Fed. Reg. 91,592 (Dec. 16, 2016) (to be codified at 40 C.F.R. pt. 751) (Proposed rule).

²¹Trichloroethylene (TCE); Regulation of Use in Vapor Degreasing Under TSCA Section 6(a), [82 Fed. Reg. 7432](#) (Jan. 19, 2017) (to be codified at 40 C.F.R. pt. 751) (Proposed rule).

²²Methylene Chloride and N-Methylpyrrolidone; Regulation of Certain Uses Under TSCA Section 6(a); proposed rule, [82 Fed. Reg. 7464](#) (Jan. 19, 2017) (to be codified at 40 C.F.R. pt. 751) (Proposed rule).

²³15 U.S.C. § 2625(1)(4) (2017).

period for these proposed rules,²⁴ but more recently signaled that no formal action will be taken on the proposals in 2018.²⁵

The EPA denied two citizen petitions filed under TSCA section 21 requesting that the EPA issue orders or undertake new rulemaking. The EPA denied a January 2017 petition seeking a test order under TSCA section 4 against manufacturers and processors of chlorinated phosphate esters, finding that the petitioners had not demonstrated either that current information was insufficient to predict environmental effects of these substances or that the particular testing cited in the petitions was necessary.²⁶

The Agency also denied a November 2016 petition seeking the EPA to issue a TSCA section 6(a) risk management rule to prohibit use of fluoridation chemicals as drinking water additives.²⁷ The denial was based on the position that the amended TSCA required section 6(a) risk management actions, whether originating through section 6(b) prioritization or a section 21 petition, to be based on consideration of all known or foreseeable uses of a substance, rather than on single uses as in the petition. The EPA also took the position that, given the prioritized “pipeline” of risk evaluations created by section 6(b), Congress did not intend section 21 as a pathway for individual petitioners to force the EPA to reorder the 6(b) pipeline and conduct expedited risk evaluations on individual chemical uses important to individual petitioners. This rationale is consistent with the Prioritization and Risk Evaluation Rules as proposed by the Obama Administration, but arguably at odds with the final rules, which anticipate that the EPA may consider less than all conditions of use during risk evaluations for high priority and manufacturer-nominated substances. Petitioners filed suit to obtain review of the denial.²⁸ In a subsequent judicial challenge to the denial, the District Court rejected the EPA’s motion to dismiss, finding that, consistent with the final Risk Evaluation rule, TSCA section 21 petitions for 6(a) risk control rules need not address all conditions of use and, indeed, are not subject to section 6(b) risk evaluation procedures, or timelines.²⁹ If followed, this decision appears to open a pathway for individuals to bypass prioritization and broad public input to obtain action on individual uses of particular chemicals of concern to them.

As required by the Lautenberg Act,³⁰ the EPA timely established a new Science Advisory Committee on Chemicals (SACC) and, in the last days of the Obama Administration, appointed eighteen members. Subsequently, the EPA, under the Trump Administration, decided to expand the committee by six to twenty-four members and solicited public comment on sixty-four additional nominees.³¹

²⁴See Trichloroethylene; Regulation of Vapor Degreasing Under TSCA Section 6(a); Methylene Chloride and N-Methylpyrrolidone; Regulation of Certain Uses Under TSCA Section 6(a); Reopening of Comment Periods, [82 Fed. Reg. 20,310](#) (May 1, 2017) (Notice).

²⁵See FALL 2017 REGULATORY PLAN AND UNIFIED AGENDA OF FEDERAL REGULATORY AND DEREGULATORY ACTIONS, AGENCY RULE LIST, LONG-TERM ACTIONS, RINS: 2070-AK03, -AK07, AND AK11 (Nov. 29, 2017).

²⁶Chlorinated Phosphate Ester (CPE) Cluster; TSCA Section 21 Petition; Reasons for Agency Response, [82 Fed. Reg. 17,601](#) (Apr. 12, 2017) (Petition).

²⁷Fluoride Chemicals in Drinking Water; TSCA Section 21 Petition; Reasons for Agency Response, [82 Fed. Reg. 11,878](#) (Feb. 27, 2017) (Petition).

²⁸Food & Water Watch, Inc. v. EPA, No. 3:17-cv-02162-EMC (N.D. Cal. filed Apr. 18, 2017).

²⁹[Order Denying Defendant’s Motion to Dismiss](#), Food & Water Watch, Inc., No. 3:17-cv-02162-EMC (N.D. Cal. Dec. 21, 2017).

³⁰15 U.S.C § 2625(o) (2017).

³¹See Nominations to the Augmented Science Advisory Committee on Chemicals (SACC); Request for Comments; Notice, [82 Fed. Reg. 36,132](#) (Aug. 3, 2017) (Notice).

D. *National Program Chemicals*

In the final days of the Obama Administration, the EPA issued a final rule implementing federal formaldehyde emissions standards for certain wood component products and establishing labeling and a third-party compliance certification process for covered importers, distributors, and manufacturers.³² These rules were required by the 2010 Formaldehyde Standards for Composite Wood Products Act,³³ which set federal emission standards equal to those previously developed by the California Air Resources Board. The EPA subsequently amended the rules to permit labeling of compliant products prior to the applicable compliance date,³⁴ and, in a series of steps, extended the initial product compliance date by one year (until December 2018) and the import certification compliance date by three months.³⁵ These extensions were subsequently challenged in a pending federal action filed by the Sierra Club and others.³⁶ The EPA also proposed to update references to voluntary consensus standards in the rule and authorize an additional testing methodology.³⁷

E. *Confidential Business Information*

The EPA announced its interpretation that TSCA section 14(c)(3) as amended by the Lautenberg Act requires substantiation of non-exempt confidential business information (CBI) claims at the time the information is submitted to the EPA.³⁸ In the past, the EPA generally only has required substantiation at the time when, if ever, the EPA is required to determine whether the claim is valid (e.g., when responding to a Freedom of Information Act (FOIA) request). The notice included a transition period, which was subsequently extended until October 19, 2017.³⁹ Section 14(g)(4) of TSCA, added by the Lautenberg Act, requires the EPA to assign a unique identifier when a CBI claim for a chemical identity is approved.⁴⁰ The EPA solicited comments and held a public meeting to discuss the challenges and approaches to implementing this new required procedure.⁴¹

³²Formaldehyde Emission Standards for Composite Wood Products, 81 Fed. Reg. 89,674 (Dec. 12, 2016) (to be codified at 40 C.F.R. pt. 770) (final rule).

³³15 U.S.C. § 2697 (2017).

³⁴Labeling Relief; Formaldehyde Emissions Standards for Composite Wood Products, [82 Fed. Reg. 31,922](#) (July 11, 2017) (to be codified at 40 C.F.R. pt. 770) (Direct final rule).

³⁵See Compliance Date Extension; Formaldehyde Emission Standards for Composite Wood Products, [82 Fed. Reg. 44,533](#) (Sept. 25, 2017) (to be codified at 40 C.F.R. pt. 770) (Final rule).

³⁶Sierra Club v. EPA, No. 3:17-cv-06293-JSW (N.D. Cal. filed Oct. 31, 2017).

³⁷Voluntary Consensus Standards Update; Formaldehyde Emission Standards for Composite Wood Products, [82 Fed. Reg. 49,302](#) (Oct. 25, 2017) (to be codified at 40 C.F.R. pt. 770) (Proposed rule). A parallel direct final rule was withdrawn. [82 Fed. Reg. 57,874](#) (Dec. 8, 2017) (Direct final rule; withdrawal).

³⁸Statutory Requirements for Substantiation of Confidential Business Information (CBI) Claims Under the Toxic Substances Control Act (TSCA), [82 Fed. Reg. 6522](#) (Jan. 19, 2017) (Notice).

³⁹Compliance Date Extension; Statutory Requirements for Substantiation of Confidential Business Information (CBI) Claims Under the Toxic Substances Control Act (TSCA), [82 Fed. Reg. 43,964](#) (Sept. 20, 2017) (Notice).

⁴⁰15 U.S.C. § 2613(g)(4) (2017).

⁴¹Assignment and Application of the “Unique Identifier” Under TSCA Section 14; Notice of Public Meeting and Opportunity To Comment, [82 Fed. Reg. 21,386](#) (May 8, 2017) (Notice).

F. Reporting

In addition to issuing the final Inventory Reset Rule, the EPA also established a negotiated rulemaking committee for Chemical Data Reporting (CDR) requirements for inorganic byproducts (Reg Neg Committee).⁴² Required by the Lautenberg Act, the EPA was to work with the Reg Neg Committee and “develop and publish . . . a proposed rule providing for limiting the reporting requirements . . . for manufacturers of any inorganic byproducts, when such byproducts . . . are subsequently recycled, reused, or reprocessed.”⁴³ However, the Reg Neg Committee reached an impasse after only three meetings and, in light of the impasse, the EPA determined that no further meetings were warranted.⁴⁴ Nevertheless, the EPA subsequently solicited public comment on approaches that would reduce the burden associated with the CDR reporting for inorganic byproducts without prejudicing the Agency's ability to receive needed exposure information. On August 22, 2017, the EPA's Office of Inspector General (OIG) announced that it planned to begin a review of the CDR program to assess industry compliance and the EPA's use of the collected information.⁴⁵

As required by the Lautenberg Act,⁴⁶ the EPA compiled and published an initial inventory of mercury supply, use, and trade in the United States covering elemental mercury and mercury compounds,⁴⁷ and later proposed mercury reporting requirements to assist the EPA in updating the mercury inventory in the future.⁴⁸

The EPA determined that the standards for classifying manufacturers and processors as small manufacturers and processors for purposes of TSCA reporting obligations under TSCA sections 8(a)(1) and 8(a)(3) should be revised.⁴⁹ The EPA was required to render a determination by Lautenberg Act amendments to TSCA section 8(a)(3)(C).

The EPA issued the first of its two annual implementation reports required by the Lautenberg Act. As required by amended TSCA section 26(m), the [EPA issued its first report to Congress](#) on the Agency's capacity to conduct risk evaluations and promulgate section 6(a) rules.⁵⁰ And as required by amended TSCA section 26(n)(2), the EPA published its initial plan identifying the chemical substances that would undergo risk

⁴²Chemical Data Reporting; Requirements for Inorganic Byproduct Chemical Substances; Notice of Establishment of Negotiated Rulemaking Committee; Notice of Public Meetings; [82 Fed. Reg. 25,790](#) (June 5, 2017) (Notice).

⁴³15 U.S.C. § 2607(a)(6)(A) (2017).

⁴⁴Chemical Data Reporting; Requirements for Inorganic Byproduct Chemical Substances; Notice of Public Meeting; Cancellation and Public Input Opportunity, [82 Fed. Reg. 47,423](#) (Oct. 12, 2017).

⁴⁵[Memorandum](#) from Jeffrey Harris, Dir., Toxics, Chem. Mgmt. and Pollution Prevention Evaluations, Office of Program Evaluation, to Wendy Cleland-Hamnett, Acting Assistant Adm'r, Office of Chem. Safety and Pollution Prevention (Aug. 22, 2017).

⁴⁶15 U.S.C. § 2607(b)(10)(D) (2017).

⁴⁷Mercury; Initial Inventory Report of Supply, Use, and Trade, [82 Fed. Reg. 15,522](#) (Mar. 29, 2017) (Notice).

⁴⁸Mercury; Reporting Requirements for the TSCA Mercury Inventory, [82 Fed. Reg. 49,564](#) (Oct. 26, 2017) (to be codified at 40 C.F.R. pt. 713) (Proposed rule).

⁴⁹TSCA Reporting and Recordkeeping Requirements; Standards for Small Manufacturers and Processors; Final Determination, [82 Fed. Reg. 56,824](#) (Nov. 30, 2017) (Notice).

⁵⁰OFFICE OF CHEMICAL SAFETY AND POLLUTION PREVENTION, INITIAL REPORT TO CONGRESS ON THE EPA'S CAPACITY TO IMPLEMENT CERTAIN PROVISIONS OF THE FRANK R. LAUTENBERG CHEMICAL SAFETY FOR THE 21ST CENTURY ACT (Jan. 18, 2017).

evaluation during the year, chemicals for which risk evaluation would be initiated and those for which risk evaluation would be completed.⁵¹

The U.S. Chemical Safety and Hazard Investigation Board (CSB) is directed by section 112(r)(6)(C)(iii) of the Clean Air Act to promulgate regulations requiring persons to report accidental chemical releases resulting in a fatality, serious injury or substantial property damages.⁵² In 2009, the CSB took initial steps to fulfill this obligation by issuing an advance notice of proposed rulemaking soliciting comments on the need and potential structure of reporting rules,⁵³ but took no further action. In December 2017, a citizen group filed an action seeking to compel the CSB to promulgate accidental release reporting regulations.⁵⁴

II. PESTICIDES AND FIFRA

A. *Endangered Species*

In response to a challenge to the EPA's registration of cyantraniliprole, the U.S. Court of Appeals for the District of Columbia Circuit joined the Ninth Circuit⁵⁵ in holding that, for FIFRA registrations issued after a public comment period, challenges based on the EPA's alleged failure to comply with the Endangered Species Act's (ESA) section 7(a)(2) consultation provisions must be brought in the Courts of Appeals pursuant to the judicial review provisions of FIFRA rather than in the district courts pursuant to the citizen suit provisions of the ESA.⁵⁶ In the case of cyantraniliprole, the court remanded the case to permit the EPA to make the missing initial ESA determination whether the registration "may affect listed species or critical habitat," but did not set a deadline nor, given the acknowledged relative benefits of the product, vacate the registration pending further EPA action.⁵⁷ Judge Randolph dissented, arguing that petitioners lacked Article III standing.

In response to a challenge to a variety of end use product registration actions for the pesticides clothianidin and thiamethoxam, the U.S. District Court of the Northern District of California ruled that converting a conditional registration to an unconditional registration (upon receipt of required data) and conditional approvals for products that are identical or substantially similar to registered products are both agency "actions" that trigger the requirement for the EPA to make the "may affect" determination under section 7(a) of the ESA.⁵⁸ The court rejected the EPA's argument that ESA consultation challenges to such "me too" products constituted improper collateral attacks on earlier registration actions of the predicate products made without ESA consultations.

The National Marine Fisheries Service (NMFS) completed and submitted to the EPA final Endangered Species Act biological opinions for the EPA's registration of chlorpyrifos, diazinon and malathion and potential effects on certain endangered salmon

⁵¹EPA, 2017 ANNUAL REPORT ON RISK EVALUATIONS (Feb. 9, 2017).

⁵²42 U.S.C. § 7412(r)(6)(C)(iii) (2012).

⁵³Chemical Release Reporting; Advance Notice of Proposed Rulemaking, 74 Fed. Reg. 30,259 (June 25, 2009).

⁵⁴Complaint, Pub. Employees for Envtl. Responsibility v. U.S. Chem. Safety and Hazard Investigation Bd., No. 1:17-CV-2608-APM (D.D.C. filed Dec. 7, 2017).

⁵⁵See, e.g., Ctr. for Biological Diversity v. EPA, 847 F.3d 1075, 1089-90 (9th Cir. 2017).

⁵⁶[Center for Biological Diversity v. EPA](#), 861 F.3d 174, 186-188 (D.C. Cir. 2017).

⁵⁷*Id.* at 188.

⁵⁸Order Granting in Part & Denying in Part Plaintiffs Motion for Summary Judgment, Ellis v. Housenger, No. 3:13-cv-01266-MMC (N.D. Cal. May 8, 2017).

nationwide.⁵⁹ NMFS was working to meet a December 2017 judicial deadline.⁶⁰ These opinions are significant because they are the first such nationwide opinions and their methods are expected to serve as templates for future assessments.

B. Pollinators

The EPA released its [final policy](#) to mitigate the acute risk to bees from pesticide products, which provides methods for addressing acute risks to bees from pesticides during contract pollination activities, and which will be implemented by individual product label amendments.⁶¹ Potential pesticide hazards to pollinators in other circumstances will continue to be monitored and managed through state Managed Pollinator Protection Plans (MP3s) and other measures. A [California court ruled](#) that the California Department of Pesticide Regulation (DPR) erred when it approved additional uses for two neonicotinoid pesticides without considering alternatives and the cumulative effects of the approvals as required by the substantive provisions of the California Environmental Quality Act (CEQA).⁶² DPR's own pesticide registration processes were adequate to satisfy CEQA requirements to prepare impact assessment reports, but this did not relieve DPR from complying the additional substantive analyses required by CEQA.

C. Inerts

The EPA received a petition, which seeks to expand the required registration testing in 40 C.F.R Part 158 for whole pesticide formulations and tank mixtures. The purpose of this petition is to better address possible increased toxicity and exposure in end use products due to the presence of inerts and adjuvants, either directly or through synergistic effects with active ingredients.⁶³

D. Cannabis

Reversing a more accommodating 2015 policy of the Obama Administration, the EPA signaled that it would deny any requests for section 24(c) special local needs pesticide registrations for use on cannabis made by states that have approved cannabis cultivation in some respects. In a [notice](#) signed by Administrator Pruitt himself, the agency explains that, because cultivating marijuana is prohibited by federal law as a Schedule 1 controlled substance under the federal Controlled Substances Act, use of the pesticide on cannabis

⁵⁹OFFICE OF PROTECTED RES., NAT'L MARINE FISHERIES SERVI., NOAA, ENDANGERED SPECIES ACT SECTION 7 BIOLOGICAL OPINION; EPA'S REGISTRATION OF PESTICIDES CONTAINING CHLORPYRIFOS, DIAZINON AND MALATHION (Dec. 29, 2017).

⁶⁰Motion to Amend Dkt. No. 50 (Stipulation and order), *Nw. Coal. For Alts. to Pesticides v. Nat'l Marine Fisheries Serv.*, No. 2:07-cv-01791 (W.D. Wash Nov. 9, 2017).

⁶¹OFFICE OF PESTICIDE PROGRAMS, EPA, POLICY TO MITIGATE THE ACUTE RISK TO BEES FROM PESTICIDE PRODUCTS (Jan. 12, 2017).

⁶²*Pesticide Action Network N. Am. v. Cal. Dep't. of Pesticide Reg.*, 224 Cal. Rptr. 3d 591 (Cal. Ct. App. 2017).

⁶³*IN RE CTR. FOR FOOD SAFETY, CITIZEN PET. SEEKING REVISED TESTING REQUIREMENTS OF [SIC] PESTICIDES PRIOR TO REGISTRATION* (July 10, 2017).

would be considered a fundamentally different use pattern, and would facilitate activities that are generally in violation of federal law.⁶⁴

E. Particular Products

The EPA [denied](#) an October 2015 petition⁶⁵ to revoke all food residue tolerances for chlorpyrifos under section 408(d) of the Federal Food, Drug, and Cosmetic Act.⁶⁶ The decision countered the Obama administration's 2015 proposal to restrict the widely used insecticide. In response to a March 2017 judicial deadline to act on the petition, the EPA denied the petition without an ultimate safety finding, because it concluded that the Obama Administration's 2015 proposed tolerance revocation relied on a neurodevelopmental effect study whose application is novel and uncertain to reach its conclusions. The EPA will continue to study the human health effects and reach a conclusion on or before the next chlorpyrifos FIFRA registration review deadline in October 2022. The Ninth Circuit [confirmed](#) the sufficiency of the EPA's response to the petition and other obligations under orders in the underlying deadline suit.⁶⁷

In connection with the registration review of one of the world's most widely used agricultural pesticides, glyphosate, and as part of the ongoing agency response to public concerns about its carcinogenicity, the EPA released a [draft risk assessment for glyphosate](#), finding insignificant evidence of an association between glyphosate and any of several types of cancer. The EPA concluded it needed more information to determine whether there was an association with non-Hodgkin's lymphoma.⁶⁸

Drift from the use of dicamba on dicamba-resistant crops was widely alleged to have caused major damage on neighboring non-resistant crops in the summer of 2017. State and federal regulators searched for a solution to implement ahead of the 2018 growing season to avoid similar issues.⁶⁹ The EPA reached an agreement with certain dicamba manufacturers on measures to reduce the potential for drift damage to neighboring non-target crops and new requirements for "over the top" (application to growing plants) uses of dicamba products.⁷⁰ Minnesota, Missouri, and North Dakota have imposed additional restrictions on dicamba use ahead of the 2018 growing season.⁷¹

⁶⁴E. SCOTT PRUITT, ADMIN., EPA TO B. LEAHY, DIR., CAL. DEPT. PESTICIDE REG., NOTICE OF INTENT TO DISAPPROVE, STATE AND LOCAL NEEDS REGISTRATION NOS. CA170005 TO CA170008 (June 22, 2017).

⁶⁵ENVTL. PROT. AGENCY, PET. TO REVOKE ALL TOLERANCES AND CANCEL ALL REGISTRATIONS FOR THE PESTICIDE CHLORPYRIFOS; NOTICE OF AVAILABILITY, EPA-HQ-OPP-2007-1005-0100 (2007).

⁶⁶Chlorpyrifos; Order Denying PANNA and NRDC's Petition To Revoke Tolerances, 82 Fed. Reg. 16,581 (Apr. 5, 2017) (Order).

⁶⁷Pesticide Action Network N. America v. EPA, 863 F.3d 1131 (9th Cir. 2017).

⁶⁸EPA, OFFICE OF PESTICIDE PROGRAMS, REVISED GLYPHOSATE ISSUE PAPER: EVALUATION OF CARCINOGENIC POTENTIAL (Dec. 12, 2017).

⁶⁹EPA, PESTICIDE PROGRAM DIALOGUE COMMITTEE MEETING, MEETING TRANSCRIPT (Nov. 1–2, 2017).

⁷⁰Press Release, EPA, [EPA & States' Collective Efforts Lead to Regulatory Action on Dicamba](#) (Oct. 13, 2017).

⁷¹[Dicamba Facts](#), MO. DEP'T OF AGRIC. (last visited Feb. 25, 2018); [North Dakota-Specific Protocols Announced for Dicamba](#), N.D. DEP'T OF AGRIC. (last visited Apr. 30, 2018); Press Release, Minn. Dep't of Agric., [MDA Announces New Restrictions on Use of Dicamba Herbicide](#) (Dec. 12, 2017).

F. *Pesticide Applicator Protections*

In the last days of the Obama Administration, the EPA published a final rule revising rules for certified applicators of restricted use pesticides (RUPs).⁷² In a series of steps, the Trump Administration [deferred the effective date](#) of those rules by over a year, to May 22, 2018, in order to give the new administration an opportunity to conduct a substantive factual, legal and policy review of the rule, and to develop and rollout substantive implementation guidance.⁷³ Implementation dates for certifying authorities to submit revised certification plans were not changed.

G. *State Preemption of Local Pesticide Ordinances*

In Maryland's Montgomery County Circuit, a judge [struck down](#) the county's general pesticide ban.⁷⁴ The 2015 county law, the Healthy Lawns Act,⁷⁵ would ban residents from using certain registered pesticides not on the County's approved list. The court determined the county's ban was preempted by State law because it prohibited products and conduct that had been affirmatively approved and licensed by the State, flouted the State primacy in ensuring safe pesticide use, and undermined its system of comprehensive and uniform product approval and regulation.⁷⁶

H. *Significant Guidance and Science Consultations*

The Office of Pesticide Products [released](#) two new Pesticide Registration Notices (PRNs) related to resistance management labeling, education, training, and stewardship,⁷⁷ and proposed significant amendments to PRN 98-10, its longstanding guidelines for streamlined registration and labeling modifications and minor formulation amendments.⁷⁸ The EPA also issued new guidelines for bed bug pesticide efficacy testing (OCSPP Test Guideline 810.3900)⁷⁹ and updated 14 test guidelines for assessing chemical effects on sediment dwelling fauna and aquatic organisms.⁸⁰ The EPA convened FIFRA Scientific

⁷²Pesticides; Certification of Pesticide Applicators, 82 Fed. Reg. 952 (Jan. 4, 2017) (to be codified at 40 C.F.R. pt. 171) (final rule).

⁷³See Pesticides; Certification of Pesticide Applicators; Delay of Effective Date, 82 Fed. Reg. 25,529–30 (June 2, 2017) (to be codified at 40 C.F.R. pt. 171) (final rule).

⁷⁴Complete Lawn Care, Inc. v. Montgomery County, Maryland, Civil Action No.: 427200-V (Slip Op. Aug. 3, 2017) (“Complete Lawn Care, Inc.”).

⁷⁵Montgomery County (Maryland) Bill 52-14, codified at Montgomery County Code, Ch. 33B, §33B-1 (Oct. 6, 2015).

⁷⁶Complete Lawn Care, Inc., at 14.

⁷⁷Pesticides; Final Guidance for Pesticide Registrants on Two Pesticide Registration Notices Related to Resistance Management, 82 Fed. Reg. 44,406 (Sep. 22, 2017) (Notice of availability) (PRN NO. 2017-1, GUIDANCE FOR PESTICIDE REGISTRANTS ON PESTICIDE RESISTANCE MANAGEMENT LABELING, and PRN NO. 2017-2, GUIDANCE FOR HERBICIDE RESISTANCE MANAGEMENT LABELING, EDUCATION, TRAINING, AND STEWARDSHIP).

⁷⁸Pesticides; Draft Guidance for Pesticide Registrants on Notifications, Non-Notifications and Minor Formulation Amendments, 82 Fed. Reg. 42,094 (Sept. 6, 2017) (Notice of availability).

⁷⁹[Final Test Guideline](#); Product Performance Test Guidelines; OCSPP 810.3900 Laboratory Product Performance Testing Methods for Bed Bug Pesticide Products; Notice of Availability, 82 Fed. Reg. 27,254 (June 14, 2017) (Notice).

⁸⁰Final Test Guidelines; OCSPP Series 850 Group A—Ecological Effects Guidelines; Notice of Availability, 81 Fed. Reg. 95,989 (Dec. 29, 2016) (Notice).

Advisory Panels (SAP) to consider and advise the EPA on pesticide science policy issues, including modeling to address pharmacokinetic differences between and within species,⁸¹ and developing high-throughput screens to determine endocrine disruption potential.⁸²

III. BIOTECHNOLOGY

The White House Office of Science and Technology Policy (OSTP) issued a final document updating the 1986 Coordinated Framework for the Regulation of Biotechnology. The [2017 update](#) among other things includes a comprehensive table that summarizes the current responsibilities and the relevant coordination across the EPA, the FDA, and United States Department of Agriculture (USDA) for the regulatory oversight of an array of biotechnology product areas.⁸³

Unlike new chemical substances derived from synthetic chemistry, the EPA has had no difficulty making the requisite, “not likely to present an unreasonable risk” finding under TSCA section 5(a)(3)(C) for genetically modified microorganisms (GMOs) notified to the Agency as new chemicals in pre-manufacture Microbial Commercial Activity Notices (MCANs) submissions. Forty-one MCANs have cleared review since the enactment of the Lautenberg Act without noticeable delay.⁸⁴ This is no doubt due to the rigorous containment procedures that will be employed in the production and use of the GMOs that have been notified, and avoiding use of pathogenic strains as recipient microorganisms, or using antibiotic markers or other problematic genetic sequences in the introduced genetic modifications. The EPA has not issued the anticipated update to its 1997 guidance document for submitting MCANs or TSCA Experimental Release Applications (TERA).⁸⁵ When available, the updated guidance is expected to address considerations for risk assessments for intergeneric cyanobacteria, eukaryotic microalgae, and their products by application of genetic engineering approaches.⁸⁶

The United States Food and Drug Administration (FDA), in consultation with the EPA, issued final Guidance for Industry (GFI) #236, which clarifies that mosquito-related products intended to function as pesticides for mosquito population control purposes, and that are not intended to cure, mitigate, treat or prevent a disease in mosquitos are not “drugs” under the Federal Food, Drug, & Cosmetic Act (FFDCA), and will be regulated by the EPA under FIFRA.⁸⁷ With the issuance of this final guidance a pending application to FDA for a genetically engineered mosquito claimed to control the population of wild-

⁸¹[FIFRA Scientific Advisory Panel](#); Notice of Public Meeting; Request for Ad Hoc Expert Nominations; Notice, 82 Fed. Reg. 26,097 (June 6, 2017) (Notice).

⁸²[FIFRA Scientific Advisory Panel](#); Notice of Public Meeting; Request for Ad Hoc Expert Nominations; Notice, 82 Fed. Reg. 26,086 (June 6, 2017).

⁸³ENVTL PROT. AGENCY, FOOD & DRUG ADMIN., U.S. DEPT. AGRIC., MODERNIZING THE REGULATORY SYSTEM FOR BIOTECHNOLOGY PRODUCTS: FINAL VERSION OF THE 2017 UPDATE TO THE COORDINATED FRAMEWORK FOR THE REGULATION OF BIOTECHNOLOGY, (Jan. 4, 2017).

⁸⁴[Microbial Commercial Activity Notices \(MCANs\) Table](#), OFFICE OF POLLUTION PREVENTION AND TOXICS (last updated Dec. 23, 2017).

⁸⁵ENVTL. PROT. AGENCY, OFFICE OF POLLUTION PREVENTION & TOXICS, POINTS TO CONSIDER IN THE PREPARATION OF TSCA BIOTECHNOLOGY SUBMISSIONS FOR MICROORGANISMS (June 2, 1997).

⁸⁶Notice of Public Meeting and Opportunity for Public Comment on EPA’s Draft Algae Guidance for the Preparation of TSCA Biotechnology Submissions, 81 Fed. Reg. 70,419 (Oct. 12, 2016) (Notice).

⁸⁷[Clarification of the Food and Drug Administration and Environmental Protection Agency Jurisdiction Over Mosquito-Related Products; Guidance for Industry](#), 82 Fed. Reg. 46,500 (Oct. 5, 2017) (Notice of availability).

type *aedes aegypti* mosquitoes, now falls under the EPA's regulatory authority. However, EPA regulations currently exempt non-plant pesticidal living macro-organisms from all requirements of FIFRA because the EPA has determined, in accordance with FIFRA section 25(b)(1), that they are adequately regulated by another Federal agency.⁸⁸ In order to regulate genetically engineered pesticidal mosquitos or other pesticidal living non-plant, macro-organisms as a consequence of the FDA GFI #236, the EPA will need to amend its regulations.⁸⁹

The EPA registered a unique mosquito biopesticide – bacterium *Wolbachia* ZAP (also known as wPip) strain, contained within the Asian Tiger mosquito (*Aedes albopictus*), a public health pest. *Wolbachia* is a bacterium that occurs in certain mosquito species. Male *Aedes albopictus*, were physically inoculated with a strain of *Wolbachia* found in the common house mosquito (*Culex pipiens*). When these altered males mate with wild type, female *Aedes albopictus*, carrying the standard *Wolbachia* strain, the resulting offspring die in their early life stages. This is a time-limited (five year) registration, and allows sale only in twenty-one jurisdictions.⁹⁰

The USDA's Animal and Plant Health Inspection Service (APHIS) under the Trump Administration withdrew⁹¹ a proposed rule published in the last days of the Obama Administration⁹² that would revise the APHIS's biotechnology regulations, explaining that it would re-engage with stakeholders to determine the most effective, science-based approach for regulating the products of modern biotechnology while protecting plant health.

On November 14, 2017, the Senate Committee on Health, Education, Labor, and Pensions held a hearing titled, "Gene Editing Technology: Innovation and Impact".⁹³

IV. HYDRAULIC FRACTURING

The Bureau of Land Management (BLM) formally rescinded a 2015 rule governing fracking operations on federal and tribal lands, including rules requiring fracking fluid chemical ingredient disclosure.⁹⁴ Regarding chemical disclosure, the BLM explained that a federal disclosure rule would not significantly increase the amount of chemical information available as state disclosure rules in states representing 99% of well completions on federal and tribal lands already required such disclosures to public databases or state regulators.⁹⁵ In anticipation of action on the proposed rule, the Tenth

⁸⁸40 C.F.R. § 152.20(a)(1) (2017).

⁸⁹*Id.* § 152.20(a)(2).

⁹⁰Press Release, EPA, EPA Registers the *Wolbachia* ZAP Strain in Live Male Asian Tiger Mosquitos (Nov. 7, 2017).

⁹¹[Importation, Interstate Movement, and Environmental Release of Certain Genetically Engineered Organisms](#), 82 Fed. Reg. 51,582 (Nov. 7, 2017) (to be codified at 7 C.F.R. pt. 340) (Proposed rule; withdrawal).

⁹²[Importation, Interstate Movement, and Environmental Release of Certain Genetically Engineered Organisms](#), 82 Fed. Reg. 7008 (Jan. 19, 2017) (to be codified at 7 C.F.R. pt. 340) (Proposed rule).

⁹³*Gene Editing Technology: Innovation & Impact Before the S. Comm. on Health, Educ., Labor, & Pensions*, 115th Cong. (2017) (statement of Katrine S. Bosley, Chief Exec. Officer & President, Editas Med., Inc.).

⁹⁴[Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule](#), 82 Fed. Reg. 61,924 (Dec. 29, 2017) (to be codified 43 C.F.R. pt. 3160) (Final rule).

⁹⁵*Id.* at 61,934.

Circuit dismissed as unripe a pending appeal from a 2016 District Court of Wyoming decision invalidating the 2015 rules as *ultra vires*.⁹⁶

In contrast, [Maryland](#) joined New York in enacting legislation permanently banning hydraulic fracturing.⁹⁷ The new ban became effective on the October 1, 2017 expiration date of a temporary ban enacted in 2015.⁹⁸ Similarly, the Delaware River Basin Commission (DRBC) proposed to ban hydraulic fracturing in areas within its jurisdiction.⁹⁹ The DRBC is an interstate and federal compact agency created jointly by the States of Delaware, New Jersey, and New York, the Commonwealth of Pennsylvania and the United States to jointly manage the water resources of the Delaware River Basin. The proposal follows a federal District Court decision earlier this year dismissing on the merits a challenge to the DRBC's legal authority to impose such a ban, currently on appeal to the Third Circuit.¹⁰⁰

Environmental interest groups challenged the Montana Board of Oil and Gas Conservation's denial of a rulemaking petition seeking to liberalize the chemical disclosure provisions of Montana's hydrofracturing rules, seeking, inter alia, to require fracking fluid chemical ingredient disclosure before fracking commences, and to require operators to substantiate chemical identity "trade secret" claims that exempt such chemicals from disclosure.¹⁰¹

V. NANOTECHNOLOGY

After nearly a decade of debate, the EPA published a final rule establishing reporting requirements for existing chemical substances when manufactured or processed in nanoscale form to exploit a unique and novel size-related property.¹⁰² Current and future manufacturers, importers and processors are each required to make a separate one-time report for each discrete form of each covered nanoscale material handled. The information to be reported is similar in content and extent to the information required for a TSCA section 5 PMN. Those handling covered materials at any time in the three years prior to the effective date must report by August 14, 2018. Future manufactures and processors of covered materials generally must report at least 135 days before commencing manufacture, import or processing. The agency has issued "[working guidance](#)" for reporting after a public comment period.¹⁰³

The U.S. Court of Appeals for the Ninth Circuit vacated the EPA's second registration of a nanoscale pesticide.¹⁰⁴ The nanoscale silver product, NSPW-L30SWS, had been conditionally registered as a new active ingredient under FIFRA section

⁹⁶[Wyoming v. Zinke](#), 871 F.3d 1133 (10th Cir. 2017).

⁹⁷MD. CODE ANN., ENVIR. § 14-107.1 (2015).

⁹⁸*Id.*

⁹⁹[Administrative Manual and Special Regulations Regarding Natural Gas Development Activities; Additional Clarifying Amendments](#), 83 Fed. Reg. 1586 (Jan. 12, 2018) (to be codified at 18 C.F.R. pts. 401, 440) (Proposed rule; notice of public hearing).

¹⁰⁰[Wayne Land & Mineral Group, LLC v. Del. River Basin Comm'n](#), 247 F. Supp. 3d 477 (M.D. Pa. 2017) (appeal filed Apr. 7, 2017).

¹⁰¹[Complaint for Declaratory Relief](#), *Mont. Env'tl. Info. Ctr. v. Mont. Bd. of Oil & Gas Conservation* (filed Jan. 17, 2017, Mont. 1st Judicial Dist. Court, Lewis & Clark Cty.).

¹⁰²[Chemical Substances When Manufactured or Processed as Nanoscale Materials; TSCA Reporting and Recordkeeping Requirements](#), 82 Fed. Reg. 3641 (Jan. 12, 2017) (to be codified at 40 C.F.R. pt. 704) (final rule).

¹⁰³OFFICE OF POLLUTION PREVENTION & TOXICS, [WORKING GUIDANCE ON EPA'S SECTION 8\(A\) INFORMATION GATHERING RULE ON NANOMATERIALS IN COMMERCE](#) (2017).

¹⁰⁴[Nat'l Res. Def. Council v. U.S. Ent'l Prot. Agency](#), 857 F.3d 1030 (9th Cir. 2017).

3(c)(7)(C)¹⁰⁵ to give antimicrobial functionality to fabrics and plastics. Petitioners challenged the sufficiency of the “public interest” finding necessary for conditionally registering new active ingredients. The court rejected the EPA’s determination that the registration was in the public interest as an alternative to comparable silver products that release more silver to the environment. The court held that the mere potential for lower silver release was insufficient and the agency was obligated instead to show by substantial evidence that users would in fact substitute the new, lower emitting product for existing silver products.

VI. EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW (EPCRA)

In the final days of the Obama Administration, the EPA issued a proposed rule to require natural gas processing (natural gas liquid extraction) facilities to conduct annual Toxic Release Inventory (TRI) reporting, expected to include twenty-one different TRI-listed chemicals, including n-hexane, hydrogen sulfide, toluene, benzene, xylene, and methanol.¹⁰⁶ However, the Trump Administration determined to abandon that rulemaking effort, identifying it as “inactive” on the Spring 2017 semi-annual regulatory agenda. The EPA proposed to update the list of North American Industry Classification System (NAICS) codes subject to TRI reporting in response to the Office of Management and Budget (OMB) 2017 NAICS code revision.¹⁰⁷

The D.C. Circuit vacated a 2008 rule (the “Farm Rule”) that exempted most farm waste releases (other than from concentrated animal feeding operations) from EPCRA emergency reporting.¹⁰⁸ While the EPA argued reporting farm releases was unnecessary because the EPA was unlikely to respond to such reports, the court disagreed. The mandate that farms begin reporting has been stayed until January 22, 2018 to allow the EPA to develop guidance to help farms come into compliance.¹⁰⁹ The EPA has indicated that it interprets EPCRA to exclude farms that use substances in “routine agricultural operations” and that it intends to conduct a rulemaking to clarify its interpretation.¹¹⁰

VII. GREEN CHEMISTRY

The California Department of Toxic Substances Control (DTSC) published its first regulation under the Safer Consumer Products program, identifying foam-padded sleeping products containing tris(1,3-dichloro-2-propyl) phosphate (TDCPP) or tris(2-chloroethyl) phosphate (TCEP) as Priority Products.¹¹¹ DTSC held a public meeting on a second proposed Priority Product: spray polyurethane foam with unreacted methylene

¹⁰⁵ U.S.C. § 136a(c)(7)(C) (2017).

¹⁰⁶ [Addition of Natural Gas Processing Facilities to the Toxics Release Inventory \(TRI\)](#), 82 Fed. Reg. 1651 (Jan. 6, 2017) (to be codified at 40 C.F.R Part 372) (Proposed rule).

¹⁰⁷ [Community Right-To-Know; Adopting 2017 North American Industry Classification System \(NAICS\) Codes for Toxics Release Inventory \(TRI\) Reporting](#), 82 Fed. Reg. 39,101 (Aug. 17, 2017) (to be codified at 40 C.F.R. Part 372) (Proposed rule).

¹⁰⁸ See [Waterkeeper Alliance v. Env'tl. Prot. Agency](#), 853 F.3d 527 (D.C. Cir. 2017).

¹⁰⁹ [Waterkeeper Alliance v. Env'tl. Prot. Agency](#), No. 09-1017 (D.C. Cir. Nov. 22, 2017) (per curiam order).

¹¹⁰ See, e.g., [CERCLA and EPCRA Reporting Requirements for Air Releases of Hazardous Substances from Animal Waste at Farms](#), ENVTL. PROT. AGENCY (updated Dec. 3, 2017).

¹¹¹ Cal. Code Regs. tit. 22, § 69511.1 (2017).

diisocyanate (MDI),¹¹² and solicited public comment on a proposal to list paint or varnish strippers containing methylene chloride as Priority Products.¹¹³

At the federal level, the Trump Administration proposed eliminating green chemistry and related pollution prevention programs in its Fiscal Year 2018 budget for EPA. The programs targeted for termination include the Green Chemistry Program, the Presidential Green Chemistry Challenge, and Design for the Environment/Safer Choice.¹¹⁴ Also targeted for cuts are EPA's Chemical Safety and Sustainability and Science to Achieve Results (STAR) grants programs.¹¹⁵

VIII. CONSUMER PRODUCT SAFETY COMMISSION ACTION ON CHEMICALS

In response to a citizen petition on halogenated flame retardants, the U.S. Consumer Product Safety Commission (CPSC) rejected a staff recommendation to deny the petition¹¹⁶ and voted to form an advisory panel and begin drafting a rule to restrict the use of halogenated flame retardants in four consumer product categories: (1) children's products; (2) furniture; (3) mattresses; and (4) the casing of electronics,¹¹⁷ and issued guidance encouraging retailers and consumers to avoid selling or purchasing such products containing halogenated flame retardants.¹¹⁸ The CPSC finalized a rules that will tighten existing federal phthalate restrictions in children's toys and child care articles effective on April 25, 2018, including restrictions of four phthalate not regulated by any other country — DIBP, DPENP, DHEXP, and DCHP — and to end the interim Consumer Product Safety Improvement Act restrictions on two other phthalates, DIDP and DnOP.¹¹⁹

¹¹²Proposed Regulations: Spray Polyurethane Foam Systems with Unreacted Methylene Diphenyl Diisocyanates as a Priority Product (proposed Mar. 24, 2017) (to be codified at Health and Safety Code § 69511.2).

¹¹³Proposed Regulations: Paint or Varnish Strippers Containing Methylene Chloride (proposed Nov. 17, 2017) (to be codified at Health and Safety Code § 69511.3).

¹¹⁴ENV'T'L PROT. AGENCY, [FISCAL YEAR 2018, JUSTIFICATION OF APPROPRIATION ESTIMATES FOR THE COMMITTEE ON APPROPRIATIONS, TAB 04: ENVIRONMENTAL PROGRAMS AND MANAGEMENT](#), EPA-190-K-17-002 (May 2017).

¹¹⁵*Id.* at 98.

¹¹⁶U.S. CONSUMER PROD. SAFETY COMM'N, [STAFF BRIEFING PACKAGE IN RESPONSE TO HP15-1, REQUESTING RULEMAKING ON CERTAIN PRODUCTS CONTAINING ORGANOHALOGEN FLAME RETARDANTS](#) (May 24, 2017).

¹¹⁷U.S. CONSUMER PROD. SAFETY COMM'N, [MINUTES OF COMMISSION MEETING](#) (Sept. 20, 2017).

¹¹⁸[Guidance Document on Hazardous Additive, Non-Polymeric Organohalogen Flame Retardants in Certain Consumer Products](#), 82 Fed. Reg. 45,268 (Sept. 28, 2017).

¹¹⁹[Prohibition of Children's Toys and Child Care Articles Containing Specified Phthalates](#), 82 Fed. Reg. 49,938 (Oct. 27, 2017) (to be codified at 16 C.F.R. pt. 1307) (final rule).

**Chapter 9 • SUPERFUND AND NATURAL RESOURCE DAMAGES
LITIGATION
2017 Annual Report¹**

I. SUPERFUND: ADMINISTRATIVE AND REGULATORY DEVELOPMENTS

Congress enacted no changes to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) during 2017.

On January 11, 2017, the Environmental Protection Agency (EPA) [proposed](#) to establish financial responsibility requirements under section 108(b) of CERCLA for classes of facilities in the hard rock mining industry at an estimated cost to affected mining industry sectors between \$111 and \$171 million per year.² In a controversial December decision expected to be challenged in court, the EPA announced that no rule was necessary.³ The EPA noted that mine reclamation and bonding regulation by the states and other federal agencies had significantly improved since the enactment of CERCLA, so there was far less risk that such mining operations would leave the EPA with unfunded cleanup obligations. The EPA [adopted](#) a binding schedule to decide whether financial assurance is needed for facilities in the chemical, petroleum and electric power industries.⁴

The EPA also:

- (a) Added seven sites to the National Priorities List (NPL), deleted five, and proposed four more to the NPL;⁵
- (b) Changed the Hazard Ranking System (HRS) to add vapor intrusion as a contaminant pathway to evaluate in deciding whether a site belongs on the NPL;⁶

¹Russell V. Randle, Miles & Stockbridge, P.C. Washington, DC; John Barkett, Shook Hardy & Bacon, LLP Miami, FL. This chapter reviews significant 2017 CERCLA decisions and developments. The views expressed are the authors own and not necessarily those of their firms or clients. The authors thank Van P. Hilderbrand, Jr. of Miles & Stockbridge PC in Washington, D.C. for his able editorial help.

²*CERCLA* 108(b) Hard Rock Mining Financial Assurance Proposed Rule, 82 Fed. Reg. 3388 (Jan. 11, 2017) (to be codified at 40 C.F.R. pt. 320) (EPA acted pursuant to the consent order approved by the Court of Appeals in [In re Idaho Conservation League](#), 811 F.3d 502 (D.C. Cir. 2016)).

³Financial Responsibility Requirements Under CERCLA Section 108(B) for Classes of Facilities in the Hardrock Mining Industry (Dec. 1, 2017) (to be codified at 40 C.F.R. pt. 320).

⁴Financial Responsibility Requirements for Facilities in the Chemical, Petroleum and Electric Power Industries, 82 Fed. Reg. 3512 (Jan. 11, 2017) (to be codified at 40 C.F.R. pt. 320).

⁵National Priorities List, [82 Fed. Reg. 36,095](#) (Aug. 3, 2017) (to be codified at 40 C.F.R. pt. 300) (adding seven final sites); [82 Fed. Reg. 36,106](#) (Aug. 3, 2017) (to be codified at 40 C.F.R. pt. 300) (proposing four sites); National Priorities List Deletions, [82 Fed. Reg. 60,901](#) (Dec. 26, 2017) (to be codified at 40 C.F.R. pt. 300) (deleting one site); [82 Fed. Reg. 56,890](#) (Dec. 1, 2017) (to be codified at 40 C.F.R. pt. 300) (deleting one site); [82 Fed. Reg. 44,529](#) (Sept. 25, 2017) (to be codified at 40 C.F.R. pt. 300) (deleting one site); [82 Fed. Reg. 31,281](#) (July 6, 2017) (to be codified at 40 C.F.R. pt. 300) (deleting one site); [82 Fed. Reg. 14,149](#) (Mar. 17, 2017) (to be codified at 40 C.F.R. pt. 300) (deleting one site).

⁶Addition of a Subsurface Intrusion Component to the Hazard Ranking System, [82 Fed. Reg. 2760](#) (Jan. 9, 2017) (to be codified at 40 C.F.R. pt. 300).

- (c) Changed the standard for All Appropriate Inquiries (AAI) to recognize a standard for large parcels of forested or rural lands;⁷ and
- (d) Increased maximum penalties for CERCLA violations.⁸

II. SUPERFUND: JUDICIAL DEVELOPMENTS

A.-C. *Constitutional Issues, Jurisdiction, and Standing*

There were no reported decisions involving constitutional challenges to CERCLA or to EPA actions under that law.

In [*Giovanni v. U.S. Department of the Navy*](#),⁹ the district court departed from decisions by several other federal courts and dismissed a medical monitoring claim against the Navy for lack of jurisdiction in a case involving groundwater contamination. The judge reasoned that the relief sought (medical monitoring, blood testing, a health assessment, and a health effects study) were in fact a challenge to the remedy chosen by the EPA, which is not permitted by CERCLA section 113(h). Since district courts have original jurisdiction over CERCLA claims, the court declined to remand the case to state court, and instead dismissed the case for lack of jurisdiction.

In three cases involving challenges to plaintiffs' standing, the courts held that plaintiffs had alleged sufficient injury in fact and redressability to establish standing needed for federal jurisdiction. In [*Waterkeeper Alliance v. EPA*](#),¹⁰ the environmental group plaintiffs challenged the EPA's regulation exempting agricultural operations from the duty to report releases of reportable quantities of two hazardous substances emanating from manure: hydrogen sulfide and ammonia. The D.C. Circuit held that plaintiffs' allegation that the rule reduced the reporting of important information to these groups and the public about such releases (which allegedly could cause significant physical injuries) was a sufficient injury to confer standing.¹¹ The panel invalidated the EPA's exemption of these agricultural operations in a decision likely to have widespread effects on concentrated animal feeding operations (CAFOs).

In [*City of Lake Elmo v. 3M Co.*](#), the court rejected a standing challenge where the defendants, who allegedly contaminated the City's water supply, were not allowed redress under CERCLA because the reported contaminant levels were cleaner than standards required.¹² The court referenced the EPA's position that there is no minimum threshold for possible injury from such contamination.¹³ In [*Rolan v. Atlantic Richfield Co.*](#), the risk of contamination and exposure to lead and arsenic dust in plaintiffs' homes from defendants' nearby operations was held sufficient to confer standing on the plaintiffs.¹⁴ The defendants sought dismissal based on lack of injury, traceability to the defendants' actions, and causation.

⁷Amendment to Standards & Practices for All Appropriate Inquiries Under CERCLA, [82 Fed. Reg. 43,310](#) (Sept. 15, 2017) (to be codified at 40 C.F.R. pt. 312).

⁸Civil Monetary Penalty Inflation Adjustment Rule, [82 Fed. Reg. 3633](#) (Jan. 12, 2017) (to be codified at 40 CFR pt. 19).

⁹263 F. Supp. 3d 532 (E.D. Pa. 2017).

¹⁰[853 F.3d 527 \(D.C. Cir. 2017\)](#).

¹¹*Id.* at 533.

¹²237 F. Supp. 3d 877 (D. Minn. 2017).

¹³*Id.* (citing to *Johnson v. James Langley Operating Co.*, 226 F.3d 957, 962 (8th Cir. 2000)).

¹⁴2017 WL 3191791 at *5 (N.D. Ind. July 26, 2017).

D. *Elements of Liability*

1. Facility Definition

In [*New York v. General Electric Co.*](#), the district court held that adjacent properties did not constitute a single facility where there was no common owner of the two properties and they were not operated as a single facility.¹⁵

2. Release Reporting

The D.C. Circuit held in [*Waterkeeper Alliance v. EPA*](#) that the EPA did not have the authority under section 103(b) to exempt agricultural releases of ammonia and hydrogen sulfide from mandatory release reporting.¹⁶ The panel noted that the information provided would assist local regulators in responding and that these emissions also had important worker safety implications.¹⁷ In [*United States v. Gibson Wine Co.*](#), the release of anhydrous ammonia from a refrigeration system killed an employee, which resulted in civil charges claiming that these unreported releases violated both the Emergency Planning and Community Right-to-Know Act (EPCRA) and CERCLA release reporting obligations.¹⁸ The judge denied a motion to strike because the reporting duties were different under each law and served different purposes in protecting the public and potentially mobilizing federal and local responses.¹⁹

3. Hazardous Substance Definition

In [*Citizens Development Corp. Inc. v. County of San Diego*](#),²⁰ the judge denied a motion to dismiss based on claims that agricultural releases of phosphorous and ammonia were exempt from CERCLA. A land developer was required by the Regional Water Quality Control Board to begin addressing problems at a nutrient impaired lake. The developer brought CERCLA claims against nearby landowners whose property drained into the lake. These claims alleged that ammonia nitrogen and phosphorous releases were causing the developer to incur response costs to address those problems. The judge rejected claims that such releases to the water were not CERCLA releases, given the EPA's listing of phosphorous and ammonia as hazardous substances.²¹

4. Punitive Damages and Penalties Under Section 106

In [*United States v. Dico, Inc.*](#) the district court, after a trial, assessed punitive damages under section 106(c)(3) of CERCLA against the defendant because the defendant had, "without sufficient cause," violated the terms of the unilateral administrative order (UAO) by selling a building contaminated with polychlorinated biphenyls (PCBs).²² The district court determined the amount of response costs that the EPA had incurred were in consequence of the defendant's failure to comply, and imposed substantial punitive damages.²³

¹⁵2017 WL 1239638 at *21 (N.D.N.Y. Mar. 31, 2017).

¹⁶853 F.3d 527, 537 (D.C. Cir. 2017).

¹⁷*Id.*

¹⁸2017 WL 1064658 (E.D. Cal. Mar. 20, 2017).

¹⁹*Id.* at *10.

²⁰2017 WL 1089549 (S.D. Cal Mar. 23, 2017).

²¹*Id.* at *5-6.

²²265 F. Supp. 3d 902, 967-970 (S.D. Ia. 2017).

²³*Id.* at 969-970.

By contrast, in [*Emhart Industries, Inc. v. New England Container Co.*](#), the district court held that a challenge to a UAO was pursued in objective good faith and that the company had “sufficient cause” for not complying, excusing punitive damages and penalties. The court also found that several critical aspects of the EPA’s chosen remedy were arbitrary, and the defendant had repeatedly objected to them during the cleanup process.²⁴

E. *Liability of Particular Parties*

1. Owners and Operators

In [*El Paso Natural Gas Co. LLC v. United States*](#), the court held that the United States’ ownership of tribal lands as a fiduciary gave it sufficient control over the land to make the United States liable as an owner under CERCLA in connection with remedial work at abandoned uranium mines on Navajo Nation tribal lands.²⁵ The court deferred until trial the consideration of the United States’ specific defenses as a fiduciary under section 107(n) of CERCLA.²⁶

Four district court decisions addressed the kind of activities and level of control necessary to hold a party liable as an operator. Active operation of an agricultural irrigation system handling contaminated discharges from a mine was held sufficient to subject an irrigation operator to operator liability where such operations included transporting such contaminated sediments.²⁷ Similarly, negligent demolition of a building contaminated with radioactive material was sufficient to give rise to liability where the radioactive material was spread around the site during road building.²⁸ Likewise, operation of a wastewater treatment plant gave rise to operator liability at a site where there had been spills and releases of hazardous substances at that location during sixty-five years of operation.²⁹ In contrast, a church whose volunteers had spread contaminated fill dirt at a soccer field did not have sufficient control over day-to-day operations to be liable as a CERCLA operator of that park facility.³⁰

2. Generators, Transporters, Arrangers

In [*United States v. Dico, Inc.*](#), on remand from the Court of Appeals, the court held that sale of a building known to be contaminated with PCBs qualified the seller as an “arranger” for disposal of hazardous substances.³¹ In determining whether Dico had the requisite intent to dispose of hazardous substances, as opposed to selling a useful product, the court considered the seller’s knowledge of the building’s contamination, the costs avoided by the sale (protecting the building from vandals and homeless inhabitation), the need to dismantle and remove contaminated insulation from the beams, and compared the sale procedures to the procedures ordinarily followed in connection with the sale of a

²⁴2017 WL 3535003 at *37 (D.R.I. Aug. 17, 2017).

²⁵2017 WL 3492993 at *6-7 (D. Ariz. Aug. 15, 2017).

²⁶*Id.* (considering 42 U.S.C. § 9607(n) (2002)).

²⁷[*Diamond X Ranch LLC v. Atl. Richfield Co.*](#), 2017 WL 4349223 at *17 (D. Nev. Sept. 29, 2017).

²⁸[*105 Mt. Kisco Assoc. LLC v. Carrozza*](#), 2017 WL 1194700 at *20 (S.D.N.Y. Mar. 30, 2017).

²⁹[*USOR PRP Group v. A&M Contractors, Inc.*](#), 2017 WL 3310942 at *14-15 (S.D. Tex. Aug. 2, 2017).

³⁰[*Town of Islip v. Datre*](#), 245 F. Supp. 3d 397, 426-27 (E.D.N.Y. 2017).

³¹265 F. Supp. 3d 902, 966-67 (S.D. Ia. 2017) (appeal filed Nov 13, 2017).

significant asset. Factors favoring the arranger finding included failures to appraise the building, advertise, seek bids, or to seek board approval of the sale.³²

In *105 Mt. Kisco Associates LLC v. Carrozza*, the judge held that a transporter liability claim must contain allegations distinct from arranger liability, holding that negligent removal and disposal of contaminated soil stated a claim for arranger liability, but not transporter liability.³³ And in *Town of Islip v. Datre*, the court held that arranger liability under CERCLA requires an allegation that the defendant arranging for the disposal of material knew or should have known the material contained hazardous substances, which was not alleged in that case, resulting in dismissal.³⁴ Another court dismissed a claim of arranger liability at another site, holding that the liable party must have arranged for disposal through another party, distinguishing arranger liability from operator liability.³⁵

3. Parent/Shareholder and Successors

In *Garrett Day LLC v. International Paper Co.*,³⁶ an asset purchaser failed to persuade the district court to dismiss a *de facto* merger successor-liability claim. Plaintiff did not allege continuity of corporate personnel or continuity of shareholders (i.e., a sale of assets in exchange for stock), typical hallmarks of a *de facto* merger.³⁷ However, applying Ohio law, the judge held that “no single factor is determinative” and that the following allegations plausibly stated a *de facto* merger claim: (a) defendant “took over” the entire business of the asset seller; (b) it used the same trade name, retained employees, used the same production process, and made the same product which it sold to the same customers; and (c) the purchaser assumed the asset seller’s contractual obligations except for environmental liabilities which were “almost certainly known” to the parties.³⁸ Allegations that the asset seller signed a noncompetition agreement and remained in business, and that successors to the asset seller were named defendants in the litigation “may ultimately prove dispositive on a motion for summary judgment,” but were not dispositive for a motion to dismiss.³⁹

In *Dixon Lumber Co., Inc. v. Austinville Limestone Co.*,⁴⁰ plaintiff unsuccessfully alleged successor liability based on an express or implied assumption of liabilities, or a “mere continuation” or “continuity of enterprise” theory. The judge rejected the former theory as inconsistent with the asset purchase agreement and unsupported by letters exchanged among the buyer, the seller, and a state environmental agency.⁴¹ The “mere continuation” test requires overlap in ownership between the asset seller and purchaser, but none existed. The purchaser was also primarily an agricultural limestone miner while the seller engaged in zinc and lead mining.⁴² Finally, the court cited to *United States v. Bestfoods*,⁴³ which cautioned against creating new common law doctrines, in holding that substantial continuity was no longer a viable successor liability theory.

³²*Id.* at 964.

³³2017 WL 1194700 at *20-21 (S.D.N.Y. Mar. 30, 2017).

³⁴245 F. Supp. 3d 397, 424-25 (E.D.N.Y. 2017).

³⁵*Dixon Lumber Co. v. Austinville Limestone Co.*, 2017 WL 4933053 at *2-4 (W.D. Va. Oct. 31, 2017).

³⁶No. 3:15-cv-36, 2017 WL 633467 (S.D. Ohio Feb. 15, 2017).

³⁷*Id.* at *6-7.

³⁸*Id.* at *4, 6-7.

³⁹*Id.* at *7.

⁴⁰256 F. Supp. 3d 658 (W.D. Va. 2017).

⁴¹*Id.* at 673-76.

⁴²*Id.* at 675.

⁴³[524 U.S. 51 \(1998\)](#).

F. *Private Cost Recovery*

1. Contribution (section 113) v. Cost Recovery (section 107)

In *Asarco, LLC v. Noranda Mining, Inc.*,⁴⁴ the Tenth Circuit reversed a summary judgment awarded to a contribution defendant. Noranda had successfully argued in the district court that Asarco was barred by judicial estoppel from bringing a contribution claim because of representations made to a bankruptcy court, and that, in any event, Asarco did not pay more than its fair share in settling an EPA cost recovery claim. The court of appeals rejected the application of judicial estoppel and held that there were disputed issues of fact on the latter issue. After the remand, in *Asarco, LLC v. Noranda Mining, Inc.*,⁴⁵ Noranda obtained a stay of the litigation until the EPA issued a Record of Decision for the site in issue. The court reasoned that without the actual cleanup costs, there would be too much uncertainty in attempting to determine whether Asarco had paid more than its fair share when Asarco settled its site liability with the United States in the bankruptcy proceeding.⁴⁶ In *City of Bethany, Oklahoma v. Rockwell Automation*,⁴⁷ the City successfully argued that Rockwell's cost recovery counterclaim for costs Rockwell incurred under a consent order had to be dismissed because Rockwell was limited to a contribution action.⁴⁸

2. Effect of Settlement

In *United States v. NCR Corp.*,⁴⁹ the judge approved a consent decree to resolve two companies' (NCR and Appvion) CERCLA liabilities for PCB contamination of sediments in the Fox River in Wisconsin. One upriver paper mill (Glatfelter) objected, arguing that the settlement was inconsistent with prior court rulings and was also procedurally and substantively unfair because the allocation method used to justify the settlement lacked sufficient evidentiary support and ignored evidence presented in evidentiary hearings.⁵⁰ The former argument was rejected because the court's prior rulings were vacated by the Seventh Circuit, and the latter argument because the allocation (i.e., substantive fairness) took into account the court's prior opinions on NCR's knowledge of PCB's toxicity and persistence in the environment.⁵¹

In *United States v. Doe Run Resources Corp.*,⁵² the judge entered a consent decree to resolve the liability of two mining companies and the Department of the Interior (DOI) at the Tar Creek Superfund Site in Oklahoma, a former zinc and lead mining area. Another mining company, Asarco, unsuccessfully objected. Asarco had previously settled its liability at the site, but retained contribution rights that would be extinguished by the decree. The court held that Asarco had no right to be included in settlement negotiations with the settling parties and that its intervention in the matter and full consideration of its objections ensure procedural fairness.⁵³ Asarco produced no evidence of collusion and "the parties' conduct in prior litigation gives the Court no reason to believe that the settlement was not the result of an arms-length negotiation."⁵⁴ As to substantive fairness, the court

⁴⁴844 F.3d 1201 (10th Cir. 2017).

⁴⁵Case No. 2:12-cv-527 DN, 2017 WL 2963381 (D. Utah July 11, 2017).

⁴⁶*Id.* at *5.

⁴⁷No. CIV-16-1005-D, 2017 WL 3741556 (W.D. Okla. Sept. 1, 2017).

⁴⁸*Id.* at *5.

⁴⁹No. 10-C-910, 2017 WL 3668771 (E.D. Wis. Aug. 22, 2017).

⁵⁰*Id.* at *6.

⁵¹*Id.* at *6-8.

⁵²No. 15-CV-0663-CVE-JFJ, 2017 WL 4270526 (N.D. Okla. Sept. 26, 2017).

⁵³*Id.* at *6.

⁵⁴*Id.*

analyzed the role of the private settling parties at various operable units covered by the settlement and determined that, given litigation risk and the uncertainty in the historic waste disposal evidence, the EPA made reasonable apportionment decisions and fairly took into account the likely future costs of remedial action in reaching those decisions.⁵⁵ As to the DOI, it paid \$5 million to resolve its liability at three operable units where it held land “in “restrictive status” for the benefit of Native Americans.⁵⁶ This figure apparently represented a 30% share of response costs on the restricted parcels based on the DOI’s argument that it did not own the land or engage in mining on the restricted parcels, while the mining companies were primarily responsible for any contamination.⁵⁷ The court accepted the substantive fairness of the DOI settlement amount because there was “substantial uncertainty” over, and “substantial litigation risks” associated with proving, DOI’s liability as an owner or operator.⁵⁸ The court found that the settlement amounts were reasonable “in light of the amount of contamination that can be tied to the historical mining activities of defendants’ predecessor and the risks associated with litigation.”⁵⁹

G. Allocation and Indemnification

After a trial, the judge in *Gavora v. City of Fairbanks*⁶⁰ allocated CERCLA response costs between the City/former owner and the current owner/former master tenant of a property contaminated by former dry cleaner site operators. The City was allocated 55% of approximately \$174,000 in response costs because it knew or “should have learned” of the dry cleaner contamination no later than 1999, and failed to inform Gavora or any regulatory agency then, or at the time of the sale to Gavora in 2002, or “at any other time, thereby potentially endangering the health of Fairbanks’ citizens and visitors.”⁶¹ It also failed to pay “anything toward the remediation.” Gavora was assigned 45% of the response costs because it bought the property “as is” without any environmental due diligence, but “made substantial efforts to remediate upon learning of the contamination, and “as the current owner, obtains a far greater benefit from the remediation of the Property than the City.”⁶²

The consent decree approved in *United States v. NCR Corp.*⁶³ describes a qualitative allocation devised by the Government. The allocation contained a scoring system based on four categories: (1) Knowledge, Culpability, and Benefit (representing 40%); (2) PCB Mass Discharge (representing 40%); (3) Geographic Considerations and Litigation Exposure (representing 10%); and (4) Non-Cooperation with the Government (representing the remaining 10%).⁶⁴ Prior settlers had already agreed to bear 11% of the response costs, so the Government’s allocation assigned the remaining 89% to NCR/Appvion and Glatfelter, as well as a third settling party, Georgia Pacific, which did not pursue its initial objection to the consent decree.⁶⁵ The total of each party’s points resulted in percentages of 55-59% for NCR/Appvion, Georgia Pacific with 12-14%, and 18-20% for Glatfelter.⁶⁶ Since NCR/Appvion agreed to pay 65% of response costs, the

⁵⁵*Id.* at *8-10.

⁵⁶*Id.* at *10.

⁵⁷2017 WL 4270526 at *10.

⁵⁸*Id.* at *9-10.

⁵⁹*Id.* at *12.

⁶⁰No. 4:15-cv-00015-SLG, 2017 WL 3161626 (D. Alaska July 25, 2017).

⁶¹*Id.* at *9.

⁶²*Id.* at *8-9.

⁶³No. 10-C-910, 2017 WL 3668771 (E.D. Wis. Aug. 22, 2017).

⁶⁴*Id.* at *9.

⁶⁵*Id.*

⁶⁶*Id.* at *10.

court held that the settlement was substantively fair.⁶⁷ The court acknowledged that the allocation was a qualitative one, but determined that it was not unreasonable under the factual circumstances presented that included “two trials, three appeals, and almost ten years of litigation.”⁶⁸

In *San Diego Unified Port District v. General Dynamics Corporation*,⁶⁹ the court approved an allocation of responsibility in a private settlement agreement as substantively fair. Two former tenants at the Port, Lockheed Martin and General Dynamics, shouldered most of the costs under the settlement, but they were also responsible for the contamination. The Port did not contribute to the contamination, but still was involved as a landlord. The court did not convert the parties’ settlement obligations into percentages, but, instead, determined that the dollar commitments of each settling party fairly related to their responsibility.⁷⁰

Under CERCLA, parties can allocate environmental liability by contract. That was the holding in *Greyhound Lines Inc. v. Viad Corp.*,⁷¹ where the court absolved an asset seller from responsibility for environmental liabilities allocated by contract to the asset purchaser.

In *United States v. NCR Corp.*,⁷² the United States was successful in its motion *in limine* to prevent one of the defendants from arguing that the Government’s response cost claim should be reduced by a greater sum under Section 113(f)(2) because prior settlements of both response costs and natural resource damages under-allocated the amount paid for response costs. The court held that prior settlements are not subject to relitigation.⁷³

*TDY Holdings LLC v. United States*⁷⁴ involved a contribution claim against the United States for releases of hazardous substances at an aircraft manufacturing plant supplying aircraft and aircraft parts to the U.S. military during World War II and the Cold War until 1999 when the plant was closed. The U.S. was the primary customer of the plant: 99% of work between 1942 and 1945, and 90% of the work thereafter was conducted under military contracts. From 1939 to 1979, the U.S. also owned some of the equipment at the site.⁷⁵ Three hazardous substances were released during site operations, and two of them (chromium and PCBs) were required to be used under the U.S. military contracts.⁷⁶ Between the early 1970s and 1999, TDY billed the Government for environmental remediation costs at the plant and a nearby lagoon. The government paid these costs.⁷⁷ Because of new cleanup standards, TDY was required to expend over \$11 million in response costs after the plant closed in 1999. After a 12-day trial, the district court allocated 100% of the costs to TDY. The Ninth Circuit reversed. The court of appeals explained that in its two prior controlling decisions, “the government either required the use of the hazardous substances to ensure the final product met quality standards, or mandated that production proceed in a certain manner to increase output, resulting in the generation of hazardous waste.”⁷⁸ While noting that some deviation from the allocation results in these two cases was appropriate here because the Government exercised greater control in one

⁶⁷*Id.* at *15.

⁶⁸2017 WL 3668771 at *11-12.

⁶⁹No. 07-cv-01955-BAS-WVG; 16-cv-02026-BAS-KSC, 2017 WL 2655285 (S.D. Cal. June 20, 2017).

⁷⁰*Id.* at *8.

⁷¹260 F. Supp. 3d 1181, 1197 (D. Ariz. 2017).

⁷²No. 10-C-910, 2017 WL 25467 (E.D. Wis. Jan. 3, 2017).

⁷³*Id.* at *2.

⁷⁴872 F.3d 1004 (9th Cir. 2017).

⁷⁵*Id.* at 1006.

⁷⁶*Id.*

⁷⁷*Id.* at 1006-07.

⁷⁸*Id.* at 1009.

case and there was an indemnity in the other, the Court held that TDY “should bear some of the cleanup costs,”⁷⁹ but not 100%, given that the Government required use of two of the three contaminants, and given TDY’s compliance with prevailing environmental standards.

H. Defenses

1. Act or Omission of Third Party: Innocent Landowner

Holding that the third party defense must be construed narrowly, the court in *Diamond X Ranch LLC v. Atl. Richfield Co.*,⁸⁰ found the defense inapplicable where contaminated sediments in an irrigation ditch were transported to the property. The involvement of the site owner and its operator was substantial, including sediment disposal, some of which occurred after notice that the water was contaminated.

2. Necessary and Consistent with the National Contingency Plan (NCP)

In *Diamond X Ranch LLC v. Atlantic Richfield Co.*,⁸¹ the court explained that duplicative costs are not “necessary” costs of response and that “generally” investigative costs incurred after EPA has initiated a remedial investigation are duplicative costs. Where the EPA did not approve of response actions taken by Diamond X or Diamond X’s proposed remedial action, Diamond X’s investigatory costs incurred after EPA included the study area in question in EPA’s remedial investigation were duplicative costs and thus not recoverable.⁸²

The court in *SPS Limited Partnership LLLP v. Sparrows Point, LLC*⁸³ held that costs to operate a water treatment plant within the conditions of an National Pollutant Discharge Elimination System (NPDES) permit were not “necessary” costs of response since they were incurred for business purposes (to be able to operate a “graving dock”).⁸⁴

In *City of Spokane v. Monsanto Co.*,⁸⁵ the district court held that sampling and analytical costs incurred by Monsanto were not sufficient to state a counterclaim under CERCLA since (1) Monsanto did not plead “facts from which the Court could plausibly conclude that Monsanto’s alleged response costs were necessary to the actual containment and cleanup of hazardous releases;” (2) there were no facts alleged that costs were incurred consistent with the National Contingency Plan (NCP), and (3) Monsanto “has not alleged any facts that plausibly show that it has incurred ‘response costs’ other than for the purpose of defending against the claims brought against it by Spokane.”⁸⁶

In an alternative holding in *Greyhound Lines Inc. v. Viad Corp.*,⁸⁷ the district court rejected a CERCLA claim where plaintiff had not demonstrated consistency with the NCP because a feasibility study was not conducted before the remedy was selected.⁸⁸

In contrast, in *Roosevelt Irrigation District v. Salt River Project Agricultural Improvement & Power District*,⁸⁹ the court determined that a groundwater treatment

⁷⁹872 F.3d at 1009-10.

⁸⁰No. 3:13-cv-00570-MMD-WGC, 2017 WL 4349223 (D. Nev. Sept. 29, 2017).

⁸¹*Diamond X Ranch LLC*, 2017 WL 4349223, at *14.

⁸²*Id.* at *15.

⁸³No. JFM-14-589, 2017 WL 3917153 (D. Md. Sept. 6, 2017).

⁸⁴*SPS Limited Partnership LLLP*, 2017 WL 3917153, at *8-9.

⁸⁵237 F. Supp. 3d 1086, 1093-95 (E.D. Wash. 2017).

⁸⁶*Id.* at 1094-95.

⁸⁷260 F. Supp. 3d 1181 (D. Ariz. 2017) (appeal filed, 9th Cir. June 30, 2017).

⁸⁸*Id.* at 1198.

⁸⁹No. 2:10-CV-00290 DAE-BGM, 2017 WL 2712879 (D. Ariz. Mar. 14, 2017).

remedy selected before the remedial investigation or a feasibility study (FS) was completed and without completion of a human health risk assessment or consideration of the “no-action alternative”⁹⁰ nonetheless was consistent with the NCP because plaintiff considered cost-effectiveness and implementability in its after-the-fact FS and vetted its chosen remedial action numerous times.⁹¹ The court also held that treatment of extracted groundwater to drinking water standards for use as irrigation water was “cost effective” under the NCP.⁹² An after-the-fact FS that evaluated the same remedial alternative, but involving fewer or greater irrigation wells was viewed by the court as representing multiple remedial alternatives.⁹³ However, the court did reserve for later determination whether any of plaintiff’s costs were “necessary.”⁹⁴

3. Statutes of Limitation

*Asarco LLC v. Atlantic Richfield Co.*⁹⁵ involved the three-year limitations period to bring a contribution action under Section 113(f)(3)(B) of CERCLA for response costs associated with a lead smelter site. Asarco entered into a Resource Conservation and Recovery Act (RCRA) Consent Decree in 1998 to conduct corrective action. It failed to do so, and later filed for bankruptcy. In 2009, Asarco entered into a CERCLA Consent Decree that resulted in funding by Asarco of a custodial trust through which the site remedial action would be undertaken. Within three years later, Asarco sued Atlantic Richfield seeking contribution for Asarco’s payment to the trust. Atlantic Richfield obtained summary judgment, but the court of appeals reversed. It held that corrective measures undertaken under the 1998 RCRA Consent Decree represented a response action under Section 113(f)(3)(B).⁹⁶ In so doing, the Ninth Circuit aligned itself with the Third Circuit⁹⁷ instead of the Second Circuit.⁹⁸ The court then interpreted the phrase “resolved its liability,”⁹⁹ and applying its interpretation, held that the text of the 1998 Decree did not resolve Asarco’s liability for the site;¹⁰⁰ hence the limitations period was not triggered. The 2009 CERCLA

⁹⁰The NCP, 40 C.F.R. §300.430(e)(6) expressly requires consideration of the no-action alternative in a feasibility study.

⁹¹*Roosevelt Irrigation District*, 2017 WL 2712879 at *14-15.

⁹²40 C.F.R. § 300.430(f)(1)(ii)(D) (2011).

⁹³*Roosevelt Irrigation District*, 2017 WL 2712879, at *8, 12.

⁹⁴*Id.* at *5.

⁹⁵866 F.3d 1108 (9th Cir. 2017).

⁹⁶*Id.* at 1121.

⁹⁷*Trinity Industries, Inc. v. Chicago Bridge & Iron Co.*, 735 F.3d 131 (3d Cir. 2013) (for purposes of Section 113(f)(3)(B), a non-CERCLA expenditure of environmental investigation or cleanup costs may give rise to a contribution action under CERCLA).

⁹⁸*Consolidated Edison Co. of N.Y., Inc. v. UGI Utilities, Inc.*, 423 F.3d 90, 95 (2d Cir. 2005) (investigative or cleanup costs incurred under a state law settlement does not give rise to a contribution action under Section 113(f)(3)(B)).

⁹⁹*Asarco LLC*, 866 F.3d at 1125 (9th Cir. 2017) (After surveying the circuit case law, the Ninth Circuit panel held: “[A]n examination of § 113(f)(3)(B)'s plain language, with due consideration for CERCLA's structure and purpose, leads us to the conclusion that a PRP “resolve[s] its liability” to the government where a settlement agreement decides with certainty and finality a PRP's obligations for at least some of its response actions or costs as set forth in the agreement. A covenant not to sue or release from liability conditioned on completed performance does not undermine such a resolution, nor does a settling party's refusal to concede liability. Whether this test is met depends on a case-by-case analysis of a particular agreement's terms.” 866 F.3d at 1125).

¹⁰⁰*Id.* at 1126 (The decree actually preserved all of the United States’ CERCLA rights).

decree did resolve Asarco's liability¹⁰¹ and because suit was brought within three years of that decree, the action was timely.

*Diamond X Ranch LLC v. Atlantic Richfield Co.*¹⁰² involved the "federal commencement date," CERCLA Section 309, which preempts a state limitations period "if a state statute of limitations provides a commencement date for claims resulting from a release of contaminants that is earlier than the federal commencement date."¹⁰³ Saying that the federal rule requires "both that the plaintiff be aware of her injury and that an inquiry into the cause of the injury would give her notice of her claim,"¹⁰⁴ the court held that various state tort claims were still untimely.¹⁰⁵ However, a continuing tort claim for nuisance survived summary judgment where there were disputed material facts on whether contamination was continuing and whether abatement of the contamination was reasonable.¹⁰⁶

In *105 Mt. Kisco Associates LLC v. Carozza*,¹⁰⁷ the court addressed a limitations argument for a remedial action at a site used for the Manhattan Project that was contaminated with radium and uranium residues. There was no dispute that a remedial action had taken place at the property in the 1960s, long before plaintiffs became current owners or operators at the site. Based on Second Circuit precedent, the court held that "there can only be a single remedial action per facility, and the statute of limitations to recover for that action began six years after its initiation."¹⁰⁸ Because remedial work had been undertaken in the 1960s, and even though plaintiffs did not own the site until decades later, the court held that "any claims alleged to recover response costs for remedial actions are barred."¹⁰⁹

Whether response actions with differing limitation periods represented a removal or remedial action was the central issue in *New York v. GE Company*.¹¹⁰ The court held that an excavation, a capping exercise, and a recapping exercise taking place between 1979 and 1984 represented a removal action because it was undertaken to minimize or mitigate contamination and the cost was relatively modest (\$500,000).¹¹¹ Hence, the limitations period did not begin to run until six years after initiation of the remedial action that began twenty years later.¹¹²

In *Blankenship v. Consolidated Coal*,¹¹³ a coal company dewatered a mine from 1994 to 2003. In 2011 and 2013, lawsuits were brought asserting state tort claims for alleged property damage due to the dewatering. Plaintiffs argued that under CERCLA Section 309,¹¹⁴ Virginia's limitations statute was preempted and their actions were timely. The district court rejected the argument and the court of appeals affirmed. The preemptive

¹⁰¹*Id.* at 1128.

¹⁰²No. 3:13-cv-00570-MMD-WGC, 2017 WL 4349223 (D. Nev. Sept. 29, 2017).

¹⁰³*Id.* at *4.

¹⁰⁴*Id.* at *5.

¹⁰⁵*Id.* at *5-6.

¹⁰⁶*Id.* at 7.

¹⁰⁷No. 15 Civ. 5346 (NSR), 2017 U.S. Dist. LEXIS 47855, 2017 WL 1194700 (S.D.N.Y. Mar. 30, 2017).

¹⁰⁸*Id.* at *9.

¹⁰⁹*Id.*

¹¹⁰No. 1:14-CV-747 (CFH), 2017 U.S. Dist. LEXIS 50026, 2017 WL 1239638 (N.D.N.Y. Mar. 31, 2017).

¹¹¹2017 WL 1239638 at *15.

¹¹²*Id.* (The court did add that this delay in developing a permanent remedy "may go to the issue of whether the State complied with the National Contingency Plan or whether it is liable under Sections 107(a) and 113(f) for costs associated with the clean up").

¹¹³850 F.3d 630 (4th Cir. 2017).

¹¹⁴42 U.S.C. § 9658 (2002).

effect of the federal commencement date established by Section 309 only applies if CERCLA provides a plaintiff with a cause of action.¹¹⁵ However, a CERCLA cause of action could not be brought because, among other reasons, plaintiffs had not incurred any cleanup costs and the dewatering was a federally permitted release, which does not trigger liability under 42 U.S.C. Section 9607(j).¹¹⁶ *Blankenship* was followed in [Arnold v. United States Pipe & Foundry Co., LLC](#),¹¹⁷ where the Court held that where plaintiff could not allege a CERCLA claim, state law tort claims were not preserved by section 309.¹¹⁸

4. Other Defenses and Challenges

In [Hobart Corp. v. Dayton Power & Light](#),¹¹⁹ a paint company (Sherwin-Williams) argued that it did not dispose of more than 110 gallons of liquid materials at the landfill in question and thus qualified for the *de micromis* exemption from liability under 42 U.S.C. Section 9607(o)(4). Plaintiff, however, produced evidence of multiple deliveries over a period of seven years. Thus, the court determined, “a reasonable factfinder could conclude that the 110-gallon threshold was met.”¹²⁰

The district court in *Hobart* also rejected an argument that a settlement by an alleged successor of an alleged predecessor’s liability at a different site should be admitted to prove successor liability at the site in issue, demonstrating the importance of Fed. R. Evid. 408: “[M]aking the content of prior settlement agreements available for use in related litigation contravenes the very purpose of Rule 408 and reduces the likelihood of settlements in CERCLA cases.”¹²¹

In [Dixon Lumber Co. Inc. v. Austinville Limestone Co., Inc.](#),¹²² the district court refused to strike these defenses in a contribution action: failure to state a claim; failure to mitigate; contributory negligence; damages were costs plaintiff was contractually obligated to pay; and quantum meruit. The court held that the plaintiff had to state a claim to be entitled to relief, and the other defenses went to the question of allocation.¹²³

The decision in [SPS Limited Partnership LLLP v. Sparrows Point, LLC](#)¹²⁴ involved groundwater migration of benzene from a steel mill to adjacent property referred to as the Shipyard site. The Shipyard plaintiffs brought a cost-recovery claim, among other claims, against the purchaser of the steel mill out of bankruptcy (Sparrows Point), and subsequent owners. The bankruptcy court order protected Sparrows Point from any claims arising out of prior steel mill operations, which the district court enforced with respect to benzene transport prior to the purchase.¹²⁵ Sparrows Point also obtained a summary judgment for the period while it owned the steel mill, successfully arguing that passive migration of benzene in this time period does not represent a “disposal” for purposes of former owner liability.¹²⁶

The applicability of the petroleum exclusion to an oily waste discharge was rejected in [USOR Site PRP Group v. LEI Rone Engineers, Ltd.](#)¹²⁷ Holding that the exclusion applies

¹¹⁵*Blankenship*, 850 F.3d at 636.

¹¹⁶*Id.* at 637-38.

¹¹⁷No. 2:15-cv-02049-KOB, 2017 WL 1196883 (N.D. Ala. Mar. 31, 2017).

¹¹⁸*Id.* at *4.

¹¹⁹No. 3:13-cv-115, 2017 WL 5956911 (S.D. Ohio Nov. 29, 2017).

¹²⁰*Id.* at *16.

¹²¹*Id.* at *21.

¹²²No. 7:16-cv-00130, 2017 WL 4933053 (W.D. Va. Oct. 31, 2017).

¹²³*Id.* at *5.

¹²⁴No. JFM-14-589, 2017 WL 3917153 (D. Md. Sept. 6, 2017).

¹²⁵*Id.* at *5.

¹²⁶*Id.* at *12.

¹²⁷No. 4:14-CV-2241, 2017 WL 2840018 (S.D. Tex. June 29, 2017).

to oil spills and not to releases of oil infused with hazardous substances, the court determined that “[t]he fuel discharged was introduced into a petroleum product used in machines that allowed for the transfer of heavy metals into the water.”¹²⁸

In *Emhart Industries, Inc. v. New England Container Co. Inc.*, the district court found that a chemical manufacturer had met its burden of establishing, on the administrative record, that certain critical EPA decisions regarding the development of the selected remedial action violated CERCLA and the NCP, and were arbitrary, capricious, or otherwise not in accordance with the law. The court stayed the UAO issue with the company to implement the remedial action until the EPA resolved the aspects of the selected remedy the court found to be arbitrary and capricious.¹²⁹

I. Recoverable Response Costs (Including Attorney’s Fees)

In *Charter Township of Lansing v. Lansing Board of Power and Light*,¹³⁰ the court denied a motion to dismiss a CERCLA cost recovery action where plaintiff was seeking to recover the apportioned costs of a \$12 million drain designed to address run-off problems in Lansing Township. The drain ran through the North Lansing Landfill (NLL). Pursuant to state law, the Township was assigned 49.5 percent of the cost of the drain and defendant was assigned 30.0846 percent.¹³¹ Plaintiffs alleged that the drain increased in cost from \$600,000 to \$12 million primarily because of releases or a threat of releases from the landfill and because of construction of a slurry wall at the landfill to contain the contamination. But for contaminant releases, plaintiffs alleged, the drain would have been unnecessary.¹³² Plaintiffs sought the Drain Assessment Costs they and a putative class of landowners would incur arguing that without the drain, defendant’s remediation plan for the landfill would fail.¹³³ The court held that these were sufficient allegations of “necessary response costs” to withstand a motion to dismiss.¹³⁴

Plaintiffs also withstood a motion to dismiss based on the failure to incur response costs in *105 Mt. Kisco Associates LLC v. Carozza*,¹³⁵ where the allegation that they incurred environmental sampling and analysis costs was sufficient to state a CERCLA claim.¹³⁶

In *Valbruna Slater Steel Corp. v. Joslyn Manufacturing*,¹³⁷ defendant challenged the recoverability of several costs. After a trial, the court held the following costs to be recoverable: (a) an escrow contribution Valbruna made to buy the site under a prospective purchaser agreement with the Indiana Department of Environmental Management; (b) two environmental due diligence assessments; (c) removal of a passivation sump; and (d) excavation and disposal of contaminated soil at a steel ingot storage area.¹³⁸ The court rejected the compensability of the following costs: (a) demolition of an old melt shop; (b) installation of a vapor barrier under a new building at the old melt shop site which was installed to protect worker safety, not to address an environmental threat; (c) radiological

¹²⁸*Id.* at *4.

¹²⁹No. 06-218 S, No. 11-023 S, 2017 WL 3535003 (D.R.I. Aug. 17, 2017).

¹³⁰No. 1:14-cv-514, 2017 WL 66328 (W.D. Mich. Jan. 1, 2017).

¹³¹*Id.* at *1.

¹³²*Id.*

¹³³*Id.* at *1, 7.

¹³⁴*Id.* at *8.

¹³⁵No. 15 Civ. 5346 (NSR), 2017 WL 1194700 (S.D.N.Y. Mar. 30, 2017).

¹³⁶*Id.* at *22.

¹³⁷260 F. Supp. 3d 988 (N.D. Ind. 2017).

¹³⁸*Id.* at 993-1001.

contamination surveys conducted to protect workers' safety; and (d) removal and disposal of a PCB transformer and bunker oil tanks where there was no evidence of leaks.¹³⁹

In [*Rolan v. Atlantic Richfield Co.*](#)¹⁴⁰ the court denied motions to dismiss a CERCLA action brought by a class of residents against defendants alleged to have released lead and arsenic that was found in the soils of the residents' properties. The court held that plaintiffs' allegations of specific response costs that they incurred (investigation of whether their current residences were contaminated and considerations of temporary housing) were sufficient to state a claim.¹⁴¹ It further held that plaintiffs' allegations were sufficient to demonstrate that this investigative work was not duplicative of the EPA's work at the site, especially because of mixed messages sent by the EPA about its plans for the site as well as conflicting statements made by local government officials.¹⁴² Finally, the court held that a claim for temporary relocation costs would be allowed under the unique facts presented even though the EPA's notice to residents contemplated temporary relocation.¹⁴³

J. *Claims against the Government, Including Section 106(b) Actions*

In [*MRP Properties v. United States*](#),¹⁴⁴ a case involving cleanup claims from World War II refinery operations, the district court allowed plaintiffs to join claims about twelve sites in seven states in a single venue. The government had argued that the claims did not arise out of the same transaction or occurrence and did not present "predominantly the same question of law or fact," as required by Fed. R. Civ. P. 20(a)(1), and even if they did, fairness and practicality favored transfer of venue to each jurisdiction where the refineries were located.¹⁴⁵ Considering only the allegations of an amended complaint,¹⁴⁶ the court disagreed. There was a "substantial evidentiary overlap" in the facts, and there were sufficient common questions of law and fact alleged in the amended complaint to justify joinder of the claims in a single venue.¹⁴⁷ As to fairness, the court evaluated the convenience of witnesses, the location of documents, the convenience of the parties, the locus of operative facts, the reach of subpoena power, the relative means of the parties, the presumption in favor of a plaintiff's choice of forum, the public interest, and trial efficiency, in deciding to permit joinder of the claims in one forum.¹⁴⁸

K. *Preemption*

A district court addressed preemption issues in connection with claims of nuisance, negligence, and trespass arising from the cleanup of Lake Ononadaga in [*Bartlett v. Honeywell International, Inc.*](#)¹⁴⁹ These claims allegedly arose from emissions of mercury and other hazardous substances, as well as serious odor problems from dredged sediment. The emissions were claimed to have caused personal injury and property damage. The judge held that the claims were preempted by CERCLA section 122(e)(6) because, in

¹³⁹*Id.* at 996-97, 1001-02.

¹⁴⁰No. 1:16-CV-357-TLS, 2017 WL 3191791 (N.D. Ind. July 26, 2017).

¹⁴¹*Id.* at *5.

¹⁴²*Id.* at *9.

¹⁴³*Id.* at *11.

¹⁴⁴No. 17-cv-11174, 2017 WL 5732912 (E.D. Mich. Nov. 28, 2017).

¹⁴⁵*Id.* at *3.

¹⁴⁶*Id.* at *6, 8 (the court did leave open the possibility of transfer: "The Court's perspective regarding venue transfer could change as the case develops further.").

¹⁴⁷*Id.* at *4-7.

¹⁴⁸*Id.* at *7-10.

¹⁴⁹260 F. Supp. 3d 231 (N.D.N.Y. 2017), *appeal filed*, No. 17-1907 (2d Cir. June 16, 2017).

essence, they were complaints that the remedial work as laid out in the approved CERCLA consent decree was inadequate.

L. Miscellaneous

In *United States v. Parish Chemical Co.*, the district court interpreted the CERCLA lien provision in section 107(l)(1) and (2), ruling that a challenged EPA lien substantially complied with the purposes and substance of the Utah lien law so that the challenging party's later purchase of an easement over the remediated property was subordinated to EPA's lien.¹⁵⁰

III. NATURAL RESOURCE DAMAGES

In *United States v. E.I. Du Pont de Nemours and Co.*, the district court considered objections from the public to the settlement of a complex federal and state natural resource damage claim involving the Shenandoah River. The claims arose from releases of mercury from Du Pont's long-closed Waynesboro, Virginia manufacturing plant.¹⁵¹ The challenged settlement was negotiated over several years, based on scientific studies of the river and related ecosystems, studies conducted pursuant to an earlier settlement.

The judge considered objections made by the public at a hearing where they objected to the failure to develop a trout fishery and argued that the monetary recovery was inadequate. After that hearing, the court ordered the parties to report the estimated range of costs for natural resource restoration.¹⁵² Those estimates ranged from around \$27 million to as much as \$118 million.¹⁵³

The court applied case law from the review of settlements for remedial work.¹⁵⁴ The court found the monetary settlement adequate since the trustees faced a significant litigation risk from the fact of a 1984 state settlement with Du Pont, as well as the uncertainties of a lengthy trial.¹⁵⁵ The court deferred to the Trustees' judgment on the trout fishing issue, noting the absence of a strong link to mercury contamination in trout.¹⁵⁶

¹⁵⁰No. 2:09-cv-804-CW, 2017 WL 4857547 (D. Utah Oct. 24, 2017).

¹⁵¹No. 5:16-cv-00082, 2017 WL 3220449 (W.D. Va. July 28, 2017) (*DuPont*).

¹⁵²*Id.* at *8.

¹⁵³*Id.* at *8-9.

¹⁵⁴*Id.* at *14.

¹⁵⁵*Id.* at *15-17.

¹⁵⁶*DuPont*, 2017 WL 3220449 at *16-17.

Chapter 10 • WASTE AND RESOURCE RECOVERY 2017 Annual Report¹

I. LITIGATION AND ENFORCEMENT DEVELOPMENTS

A. *D.C. Circuit Court Shrinks EPA's 'Sham Recycling' Rule*

In a decision likely to affect a range of industrial sectors that deal with hazardous residual materials, on July 7, 2017 the D.C. Circuit [struck down](#) portions of the U.S. Environmental Protection Agency's (EPA or USEPA) regulatory definition of solid waste.² Originally, released in 2015, the USEPA's ["sham recycling" rule](#) utilized several factors as part of a "legitimacy test" for determining if material was solid waste or being legitimately recycled.³ Various industry groups and environmental groups challenged the sham recycling rule. The D.C. Circuit, in a 2-1 decision, rejected the challenges brought by the environmental groups and granted portions of the challenges brought by the industry groups.

First, the decision vacated one of the so-called "legitimacy factors" used to determine when material was being legitimately recycled and thus excluded from the definition of solid waste. The factor that was vacated by the decision is commonly referred to as "Factor 4." Factor 4 stated that for recycling to be legitimate, the product of the process must be analogous to a comparable product or intermediate. If the allegedly recycled product contained concentrations of hazardous constituents that were not comparable to or lower than the levels of the hazardous constituents in an analogous product then it was solid waste – unless it could be shown not to pose a significant environmental risk.

The decision held that Factor 4 cast too wide of a net and inevitably captured materials that are not truly hazardous and imposed overly "draconian" procedures for establishing the absence of significant environmental risk. As a result, the decision vacated Factor 4 and reverted to a 2008 EPA rule. The decision also vacated and amended several other portions of the "legitimacy test."

In October 2017, the environmental groups requested that the D.C. Circuit reconsider the decision.⁴ The environmental groups claimed that to the extent the D.C. Circuit found any issues with the 2015 rule, it should have simply remanded it to the EPA, not vacated portions of the rule. Similarly, the environmental groups claimed that the decision's reinstatement of a prior version of the rule harms health and environmental protections and violates the EPA's rulemaking authority.

The industry groups also requested reconsideration of the decision.⁵ They claimed that the decision only vacated Factor 4 as it applies to all hazardous secondary materials,

¹This report was authored by Emily Deans, Robinson & Cole LLP; Emily McKinney, Frost Brown Todd LLC; Peggy Otum, Arnold & Porter, LLP; Meghan Quinn, Edgcomb Law Group, LLP; and Jon Schaefer, Robinson & Cole LLP. This report was edited by Emily McKinney, Vice Chair for *The Year in Review*, with the assistance of the student editors at the University of Tulsa College of Law. This report summarizes significant developments and decisions, whether published or unpublished, in waste and resource recovery from 2017, but does not purport to summarize all developments and decisions.

²Am. Petroleum Inst. v. EPA, 862 F.3d 50 (D.C. Cir. 2017).

³Definition of Solid Waste, 80 Fed. Reg. 1694 (Jan. 13, 2015) (codified at 40 C.F.R. pts. 260-61) (Final rule).

⁴Env'tl. Petitioners' and Env'tl. Intervenors' Petition for Panel Rehearing, Am. Petroleum Inst. v. EPA, No. 09-1038 (D.C. Cir. Oct. 20, 2017).

⁵Petition for Panel Rehearing by Petitioners Am. Chemistry Council & Freeport-McMoran, Inc., Am. Petroleum Inst. v. EPA, No. 09-1038 (D.C. Cir. Oct. 20, 2017); Petitioner Am.

but should have encompassed all recycling activities. The EPA also requested further clarification from the D.C. Circuit as to what version of Factor 4 is currently in effect.⁶ The D.C. Circuit has not yet ruled on any of the requests for reconsideration or clarification.

B. Intent Not Required for RCRA Criminal Conviction

In *United States v. Spatig*,⁷ the Court of Appeals of the Ninth Circuit affirmed the defendant's conviction and sentence for storage of hazardous waste in violation of the Resource Conservation and Recovery Act (RCRA) Section 6928(d)(2)(A), which criminalizes "knowingly treat[ing], stor[ing], or dispos[ing] of any hazardous waste . . . without a permit."⁸ The defendant was charged and convicted under RCRA section 6928(d)(2)(A) for storing approximately 3,400 containers of hazardous waste in his yard without a permit. On appeal, the defendant challenged the district court's refusal to allow evidence of his diminished capacity, arguing that the crime was one of specific, as opposed to general, intent. In analyzing the text of the statute, the panel wrote

Thus, § 6928(d)(2)(A) fits within a class of general-intent crimes that protect public health, safety, and welfare. For these crimes, a less exacting mental state is justified by the particularly strong countervailing interest in protecting the public at large and the defendant's likely awareness that his actions are regulated.⁹

The panel also noted that section 6928(d)(2)(A) "does not explicitly or implicitly contain . . . an intent element" and that "statute is agnostic to the defendant's aim."¹⁰ Finding the crime one of general intent, the panel held that the district court properly refused to allow evidence of the defendant's diminished capacity.¹¹ The panel also held that the district court also did not abuse its discretion in applying a four-level sentencing enhancement under U.S.S.G. Section 2Q1.2(b)(3) for cleanup that required a substantial expenditure given the magnitude of the quantity of hazardous materials in the defendant's yard and the cost of \$498,562 to clean them up.¹²

C. Environmental Interest Group has Standing to Challenge Chemically Treated Utility Poles under RCRA

The Court of Appeals for the Ninth Circuit held in *Ecological Rights Foundation v. Pacific Gas & Electric Co.*¹³ that an environmental organization had standing to bring a citizen suit under RCRA, and that RCRA's anti-duplication provision did not bar RCRA's application because its application did not contradict a specific mandate imposed under the Clean Water Act (CWA). The Ecological Rights Foundation (EcoRights) filed suit against Pacific Gas & Electric Co. (PG&E) under the citizen suit provisions of the CWA¹⁴ and

Petroleum Inst. Petition for Panel Rehearing Am. Petroleum Inst. v. EPA, No. 09-1038 (D.C. Cir. Oct. 20, 2017).

⁶ EPA's Petition for Panel Rehearing As To Remedy, Am. Petroleum Inst. v. EPA, No. 09-1038 (D.C. Cir. Oct. 20, 2017).

⁷ 870 F.3d 1079 (2017).

⁸ 42 U.S.C. § 6928(d)(2)(A) (2017).

⁹ *Spatig* at 1083-1084.

¹⁰ *Id.* at 1084.

¹¹ *Id.*

¹² *Id.* at 1085.

¹³ 874 F.3d 1083 (2017).

¹⁴ *See* 33 U.S.C. § 1365(a) (2017).

RCRA,¹⁵ alleging that the methods used by PG&E facilities to service chemically treated utility poles allowed wood treatment chemicals onto the ground, which were then carried into San Francisco and Humbolt Bays via indirect and direct stormwater discharges.

The panel first determined that EcoRights had standing to sue PG&E because EcoRights members had attested to “concrete and particularized harm” to their own uses and enjoyment of the San Francisco Bay.¹⁶ Next, the panel held that EcoRights had a valid RCRA claim. The panel’s analysis focused on the wording of the RCRA’s anti-duplication provision and whether the CWA¹⁷ imposed a permitting requirement on PG&E’s activities. RCRA’s anti-duplication provision provides that RCRA can overlap with four named statutes (including the CWA) to the extent that its application is “not inconsistent with the requirements” of those other statutes.¹⁸ The CWA allows, but does not require, the EPA to require permits for the type of stormwater discharges at issue. The panel found that the EPA exercised its discretion not to require permits for those discharges. The panel determined that, for RCRA’s anti-duplication provision to apply, the relevant CWA provision must require actual regulation. In this case, RCRA’s anti-duplication provision did not bar RCRA’s application because its application did not contradict a specific mandate imposed under the CWA.¹⁹

The panel went on to conclude that no inconsistent municipal storm sewer system permit requirements for PG&E’s stormwater discharges were shown,²⁰ and that the evidence did not support a speculative assertion that contaminants might have traveled on vehicle tires. The court reversed and remanded to the Northern District of California for consideration of whether the wastes are “solid wastes” and whether PG&E’s actions present an imminent and substantial endangerment to health or the environment under RCRA.²¹

D. USEPA Region 6 Reaches Settlement with Macy’s for RCRA Violations

On October 25, 2017, the USEPA [announced](#) a settlement with Macy’s Retail Holdings, Inc. concerning violations of hazardous waste regulations at 44 Macy’s department stores in Region 6.²² After a two-year investigation, the USEPA found that, from 2012 through 2015, the locations identified in the settlement had generated thousands of pounds of hazardous waste, making the stores small quantity generators (SQGs), but Macy’s failed to notify the USEPA or the appropriate state authority. Macy’s also failed to meet the conditions for SQG status, and did not complete appropriate manifests. Under the [settlement agreement](#), Macy’s will correct the violations, pay a \$375,000 civil penalty, and implement a supplemental environmental project (SEP) that requires Macy’s to develop a training program that can be used to train more than 400 retailers in Oklahoma and Texas, and to conduct third-party audits of eleven of its largest stores in Louisiana, New Mexico, Oklahoma, and Texas.

The hazardous waste at issue consisted primarily of “liquid and semi-liquid cosmetic and fragrances” that had been returned by customers or were otherwise unsaleable. The USEPA determined these items to be hazardous because they exhibit the characteristics of ignitability and/or corrosivity. In 2016, the USEPA announced its intent

¹⁵See 42 U.S.C. § 6972(a)(1)(B) (2017).

¹⁶*Ecological Rights Found.*, 874 F.3d at 1092-1093.

¹⁷33 U.S.C. §§ 1251-1388 (2017).

¹⁸42 U.S.C. § 6905(a) (2017).

¹⁹*Ecological Rights Found.*, 874 F.3d at 1095.

²⁰*Id.* at 1099-1100.

²¹*Id.* at 1101-1102.

²²Press Release, EPA, EPA Announces Settlement with Macy’s over Hazardous Waste Violations (Oct. 25, 2017).

to develop a policy to address customer returns, termed “reverse distribution” or “reverse logistics,” for the retail sector as a whole, with an emphasis on when products moving through reverse logistics are properly deemed to be “discarded” and thus become solid wastes.²³ The USEPA has yet to publish this policy.

II. REGULATORY DEVELOPMENTS

A. *USEPA Developing E-Manifest System for Hazardous Waste*

In accordance with the 2012 [Hazardous Waste Electronic Manifest Establishment Act](#), the USEPA is nearing the launch of its national system for tracking hazardous waste shipments electronically. This system should ease the burden on hazardous waste handlers and state regulators, who must currently use and maintain paper tracking documents. The system is also designed to create more accurate and complete records of hazardous waste shipments, including what the waste is, how much is being shipped, where it came from, where it is going. The USEPA has scheduled the launch of the full e-manifest system for June 30, 2018.

The authorizing Act requires that the costs of developing and operating the new system be recovered through reasonable user fees. In December 2017, the USEPA issued its [final rule](#) setting the methodology for calculating user fees for the system.²⁴ The final rule imposes per-manifest user fees on the recipient of hazardous waste designated on a manifest. Generators will not have to pay fees to use the system, nor will regulators and members of the public wishing to access documents. While user fees will likely be passed on to generators by the receiving facilities, the USEPA determined that collecting fees from the receiving facilities rather than generators would be simpler and less expensive to implement.

The USEPA “strongly encourages” the use of e-manifests, but participation in the new system will be optional, as the statute mandates that paper manifests still be allowed. However, receiving facilities who submit signed manifests to the USEPA as paper copies will pay higher fees than those who submit electronically. The USEPA has stated that it will consider banning paper manifests in the future, with a goal of going “paperless” by five years after the system launches.²⁵

B. *CCR Rule and WIIN Act Implementation, Litigation, and Reconsideration*

Multiple avenues of legal challenges and intervening legislation have created considerable uncertainty over the future of the EPA’s [Coal Combustion Residuals \(CCR\) Rule](#),²⁶ all while utilities must continue to comply with the Rule’s numerous deadlines and requirements. The CCR Rule, which became effective in 2015, establishes minimum national criteria for the disposal of CCR, a by-product of the operation of coal-fired power plants, in landfills and surface impoundments. The CCR Rule establishes detailed design,

²³USEPA, [Strategy for Addressing the Retail Sector under RCRA's Regulatory Framework](#) (Sept. 12, 2016).

²⁴Hazardous Waste Management System; User Fees for the Electronic Hazardous Waste Manifest System & Amendments to Manifest Regulations, 83 Fed. Reg. 420 (Jan. 3, 2018) (to be codified at 40 C.F.R. pts. 260, 262-65, 271) (Final rule).

²⁵EPA noted that it will still be necessary to carry a printed copy of the e-manifest in the transport vehicle during shipments subject to Department of Transportation hazardous materials regulations. Hazardous Waste Management System; Modification of the Hazardous Waste Manifest System; Electronic Manifests, 79 Fed. Reg. 7518, 7526 (Feb. 7, 2014) (codified at 40 C.F.R. pts. 260, 262-65, 271) (Final rule).

²⁶40 C.F.R. §§ 257.50-257.107 (2017)

operating, monitoring, corrective action, closure, and post-closure requirements for CCR landfills and impoundments in order to manage environmental and safety risks of CCR disposal. The rule sets out significant recordkeeping and reporting requirements, as well as a requirement for utilities to make this information available on a publicly-accessible website. Under the provisions of Subtitle D of RCRA that were applicable at the time the CCR Rule was promulgated, the requirements of the rule are self-implementing, meaning they apply directly to regulated facilities and not through federal or EPA-approved state permit programs, and can only be enforced via citizen suits.

Several key compliance deadlines of the CCR Rule took place in 2017, the most significant of which relate to the development of a groundwater monitoring program to determine whether a release of constituents associated with CCR has occurred. Meanwhile, a lawsuit filed in 2015 is still pending,²⁷ in which utility industry groups and citizen groups are challenging various provisions of the CCR Rule. On December 16, 2016, Congress enacted the [Water Infrastructure Improvements for the Nation \(WIIN\) Act](#),²⁸ which fundamentally changed the EPA's authority to regulate CCR. The Act allows states to develop permit programs that involve issuance of individual facility permits that would operate in lieu of the technical requirements of the CCR Rule, provided the EPA determines that the state program is at least as protective as the minimum national criteria in the Rule. In the absence of an approved state permit program, the EPA is required to develop a federal permit program, subject to Congressional appropriation. Finally, the Act grants the EPA direct enforcement authority for violations of state or federal requirements for CCR Units.

In May 2017, industry group Utility Solid Waste Activities Group (USWAG) and a Puerto Rico utility filed petitions²⁹ asking the EPA to reconsider certain provisions of the CCR Rule that they are challenging in the D.C. Circuit litigation (“Reconsideration Petitions”), based primarily on the intervening WIIN Act. The petitions seek reconsideration of twelve specific provisions of the Rule, including provisions that prohibit use of risk-based groundwater protection standards, regulate inactive surface impoundments, define what activities constitute beneficial use of CCR, and regulate CCR piles. On September 14, 2017, the EPA [announced](#) that it would grant the two petitions, finding it “appropriate and in the public interest” to reconsider the specified provisions of the Rule in light of the agency’s new statutory authority created by the WIIN Act. The agency emphasized that it is not committing to changing any part of the Rule or agreeing with the merits of the petitions, and that any revisions to the Rule would only be done through notice and comment rulemaking.

On November 7, 2017, the EPA filed a [motion](#) seeking remand without vacatur of five specific subsections of the CCR Rule that the industry petitioners are challenging and the agency agreed to reconsider, and one subsection challenged by environmental petitioners.³⁰ In a November 15, 2017 [status report](#), the EPA identified and proposed a

²⁷*Utility Solid Waste Activities Group v. USEPA*, No. 15-1219 (D.C. Cir., Petition for Review filed July 15, 2015).

²⁸S. 612, 114th Cong. (2016).

²⁹[Utility Solid Waste Activities Group Petition for Rulemaking](#) to Reconsider Provisions of the Coal Combustion Residuals Rule, 80 Fed. Reg. 21,302 (Apr. 17, 2015), and Request to Hold in Abeyance Challenge to Coal Combustion Residual Rule, No. 15-1219, et al. (D.C. Cir.) (Env'tl. Prot. Agency) (filed May 12, 2017); [AES Puerto Rico LP's Petition for Rulemaking](#) to Reconsider Provisions of the Coal Combustion Residuals Rule, 80 Fed. Reg. 21,302 (Apr. 17, 2015), and Request to Hold in Abeyance Challenge to Coal Combustion Residual Rule, No. 15-1219, et al. (D.C. Cir.) (Env'tl Prot. Agency) (filed May 31, 2017).

³⁰Respondent's Motion for Voluntary Remand of Six Specific Provisions of the Final Rule, *Util. Solid Waste Activities Grp. v. EPA*, No. 15-1219 (D.C. Cir. Nov. 7, 2017).

timeline for the agency's reconsideration of those subsections, as well as others that were not included in USEPA's remand motion.³¹ The EPA plans to complete its reconsideration in two rulemaking phases, with proposed rules expected by March and September 2018, respectively. On November 20, 2017, the U.S. Court of Appeals for the D.C. Circuit heard over two hours of oral argument by environmental groups, industry petitioners, and the EPA on the challenged provisions of the CCR Rule, as well as the EPA's request to hold the litigation in abeyance while the agency conducts its reconsideration.

In August 2017, the EPA issued an [interim guidance document](#)³² to assist states in developing CCR permit programs under the WIIN Act that would allow consideration of site-specific conditions. The guidance describes the EPA's interpretations of the provisions of the WIIN Act and the way in which the agency intends to review state permit programs. It includes over 200 pages of checklists to assist states in demonstrating that any alternative requirements are "at least as protective" as the provisions of the CCR Rule. In addition to technical requirements, state programs must also contain provisions allowing state regulators to effectively monitor facilities' compliance with permits, and enter sites for inspections, sampling, or to review facility records. The EPA encourages states who are or may be considering submitting a CCR permit program for approval to consult with the agency early in the process. Once a state submits its CCR program, the EPA has 180 days to act on the submission, and must provide public notice and an opportunity for comment prior to approval. To date, two states have submitted CCR permit programs to the EPA: Georgia and Oklahoma.

C. *California Takes Numerous Steps to Shore Up Waste Diversion Programs*

With the adoption of AB-341 in 2011, California established a statewide solid waste diversion goal of 75% by 2020. California already has the highest recycling rate in the United States at 44%, but as 2020 approaches, the state is taking steps to close the gap between the current diversion rate and the State goal.

In 2017, the California Department of Resources Recycling and Recovery ("CalRecycle"), the State agency responsible for solid waste and recycling regulatory programs, increased enforcement efforts against stewardship organizations involved in implementing its extended producer responsibility (EPR) programs. For example, on March 10, 2017, CalRecycle filed an [accusation document](#)³³ and fined the Carpet America Recovery Effort ("CARE") \$3.3 million for failing to make "sufficient continuous and meaningful improvement toward the goals in [its] approved Plan" under the California Product Stewardship for Carpets Law ("Carpet Law").³⁴ CARE is a stewardship organization through which carpet manufacturers in the state meet their obligations under the Carpet Law to improve landfill diversion and recycling of postconsumer carpet. According to media outlets, CARE is appealing the fines. A legislative expansion of the Carpet Stewardship Program will go into effect January 1, 2018.³⁵

CalRecycle also took steps in 2017 towards establishing a policy model for the diversion of packaging, which comprises approximately 25% of California's total disposal stream. After determining that voluntary reductions by manufacturers would not meet the

³¹Status Report, *Util. Solid Waste Activities Grp. v. EPA*, No. 15-1219 (D.C. Cir. Nov. 15, 2017).

³²Release of Interim Final Guidance for State Coal Combustion Residuals Permit Programs; Comment Request, 82 Fed. Reg. 38,685 (Aug. 15, 2017) (Notice of availability; request for comment).

³³*In re Carpet America Recovery Effort ("CARE")*, Accusation (Cal. Dept. of Resources Recycling and Recovery Mar. 10, 2017).

³⁴CAL. PUB. RES. CODE §§ 42970-983 (2017).

³⁵[AB-1158](#), 2017-2018 Reg. Sess. (Cal. 2017).

goal of reducing the amount of packaging sent to landfills by 50% by 2020, CalRecycle held workshops to solicit input from stakeholders on mandatory reduction programs. The agency is developing individual management strategies for separate types of packaging, with an emphasis on “priority packaging” such as aseptic containers and cartons, pouches, film plastic, uncoated corrugate, and waxed cardboard. Policy tools under consideration include product packaging sales bans, landfill bans, increased tipping fees, advanced recycling fees, and mandating recyclable or compostable design. CalRecycle is expected to propose draft recommendations in early 2018, which could serve as a framework for new legislation in 2018 and beyond.

In October, CalRecycle held a workshop to gather stakeholder input on its Advanced Disposal Fee (ADF) for electronic waste (“e-waste”). The main topic of discussion centered on weighing the potential merits and pitfalls of the current ADF model versus a full-blown product stewardship model, which is more common in other states. Also discussed was expansion of the current ADF program to keep pace with changes in electronic devices and ensure that phones, tablets, and e-readers are not disposed of in municipal landfills. Legislation would be required to expand the current ADF program to cover devices beyond the program’s current scope.

Additional enforcement actions and regulatory developments are likely in 2018, as California attempts to achieve its lofty 75% diversion goal.

III. DEVELOPMENTS IN ELECTRONIC WASTE

A. *Enforcement and Litigation*

1. Dollar General Settles Allegations of Improper E-Waste Disposal

In April 2017, the parent company of Dollar General Stores [settled](#) an action brought by 32 district attorneys in the state of California accusing the retailer of illegally handling and disposing of hazardous waste, including electronic waste (“e-waste”), throughout the state.³⁶ According to the complaint, Dollar General stores throughout the state unlawfully handled and disposed of toxic materials at local landfills that were not able to handle such waste over a five-year period. The alleged unlawful activity was discovered through a series of undercover inspections conducted by district attorney offices and environmental regulators statewide. Employee hazardous waste training at the stores was also found to be inadequate or incomplete. To resolve the claims, the company agreed to pay \$1.125 million, which includes \$500,000 in civil penalties, \$375,000 in reimbursement of the investigation costs, \$112,000 in funding of environmental projects, and \$138,000 in enhanced compliance projects.

2. Kentucky Recycler Indicted for Improper CRT Disposal

On October 12, 2017, the former owner and operator of Global Environmental Services, LLC (“GES”), an e-waste recycling company in Kentucky, was [indicted](#) on one count of conspiracy and seven counts of environmental crimes.³⁷ Specifically, the owner was charged with violating RCRA by illegally storing, transporting, and disposing of hazardous waste, including cathode ray tubes (CRTs). According to the [U.S. Department of Justice](#), GES began recycling CRTs in 2013, but it received more CRTs than it could process, and allegedly transported the excess CRTs to a landfill that did not have a permit

³⁶Press Release, Office of the District Attorney County of Tulare, Dollar General Stores to Pay \$1.12 Million Settlement in Hazardous Waste Disposal Case (Apr. 18, 2017).

³⁷Indictment, United States v. Gravitt, No. 5:17-cr-00121-KKC-REW (Joint Ky. Oct. 12, 2017).

to handle hazardous waste, stored ground-up CRT glass that contained excessive amounts of lead in large, open, outdoor piles, and placed thousands of CRTs and glass in a large hole behind the landfill facility.³⁸

B. Federal Legislative Developments

On February 7, 2017, U.S. Representative Paul Cook introduced [H.R. 917, The Secure E-Waste Export and Recycling Act](#). The bill seeks to prevent e-waste from becoming a “source of counterfeit goods that may reenter military and civilian electronics supply chains in the United States.” The proposed bill prohibits a person or entity from exporting or re-exporting e-waste unless that person or entity is registered, files the specified electronic export information required for each transaction, is in compliance with existing export laws, and fulfills export declaration requirements. The bill was referred to the House Committee on Foreign Affairs on the day it was introduced, but there has been no further action.

C. State Legislative Developments

1. New Jersey

On January 9, 2017, [New Jersey Senate Bill 981](#) was enacted, revising many provisions of the state’s Electronic Waste Management Act. Manufacturers of covered electronic devices (“CEDs”) are now required to provide for the collection, transportation, and recycling of its market share in weight (as opposed to its return share) of all CEDs collected in a program year. The definition of consumer has been amended to include state entities, school districts, and local government units, and CEDs now also include fax machines and printers. The definition of CRT has been expanded to include a CRT that is broken, damaged, or separated from its host television or device, and certain handheld telephone devices have been excluded from the definition of CEDs. The amendments allow for the New Jersey Department of Environmental Protection (“DEP”) to establish a statewide program to collect, transport, and recycle CEDs. Authorized recyclers that do not have a class D recycling center permit from the DEP are required to register with the DEP and pay an annual \$15,000 registration fee, and operators of collection agencies are now required to report semiannually.

2. California

On March 16, 2017, an [emergency rulemaking](#) filed by the California Department of Resources Recycling and Recovery (“CalRecycle”) and approved by the California Office of Administrative Law (OAL) became effective that amended existing regulations related to designated approved collectors.³⁹ [According to the agency](#), the rulemaking is intended to establish a clearer connection between local governments and designated approved collectors and ensure that all necessary information is available for local governments to complete annual reporting requirements.

On August 1, 2017, OAL approved [readopted emergency rules](#) that modify the requirements related to the management of CRT residuals.⁴⁰ Specifically, these rules

³⁸Press Release, U.S. Attorney’s Office, E. Dist. of Ken., Former Owner of Environmental Services Company Indicted for Illegally Disposing of Hazardous Waste (Feb. 3, 2017).

³⁹Notice of Approval of Emergency Regulatory Action, OAL Matter No. 2017-0309-02 (Cal. Dept. of Res. Recycling & Recovery Mar. 16, 2017).

⁴⁰Notice of Approval of Emergency Regulatory Action, OAL Matter No. 2017-0724-01EE (Cal. Dept. of Res. Recycling & Recovery Aug. 1, 2017).

eliminate existing prohibitions on CRT disposition and allow for all otherwise lawful dispositions. Further, the new rules improve documentation requirements and place time limits on the ultimate disposition of residual CRTs.

On August 28, 2017, OAL approved [readopted emergency rules](#) related to assessing civil liabilities for violations of the Electronic Waste Recycling Act.⁴¹ The rules impose civil penalties for false statements for representations in information or documentation provided to the CalRecycle.

3. Indiana

The governor of Indiana signed into law [Indiana House Bill 1495](#) on April 26, 2017, which amends the state's environmental management law.⁴² Specific to provisions on recycling of e-waste, the law was amended by requiring manufacturers of video display devices to submit an annual registration by March 1 of each year and to provide a report by the same date with the total weight (in pounds) of CEDs that the manufacturers collected and recycled during the previous program year.

4. Illinois

On May 4, 2017 and June 22, 2017, [Illinois Senate Resolution 170](#) and [Illinois House Resolution 161](#), respectively, were adopted. These resolutions urge Sustainable Electronics Recycling International and the R2 Technical Advisory Committee "to amend the R2 Standard to create an option for management of CRT glass through beneficial use" such as through landfill construction aggregate and placement of CRT glass into a retrievable storage cell in a permitted disposal facility.⁴³

The governor of Illinois signed into law bill [Senate Bill 1417](#) on August 25, 2017, which amends the state's Electronic Products Recycling and Reuse Act.⁴⁴ The amendments allow for a retailer, or a municipality, township, or other unit of local government acting as a collector, to collect a fee for each covered or eligible electronic device collected. Accordingly, existing provisions stating that consumers shall not be charged a fee for bringing covered or eligible electronic devices to a collection site have been stricken.

Also on August 25, 2017, [Illinois House Bill 1955](#) was signed into law.⁴⁵ This bill amends many provisions of the Consumer Electronics Recycling Act by virtue of Senate Bill 1417 becoming law, including adding the definition of covered electronic device category, adjusting the dates when reports are due to the Illinois Environmental Protection Agency ("IEPA"), amending provisions concerning collection sites and one-day collection events, changing the annual registration fee for manufacturers from \$3,000 to \$5,000, increasing the civil penalty from \$1,000 to \$7,000 per violation of the Act, and providing that any person who makes a false or fraudulent statement to IEPA has committed a Class 4 felony.

5. Rhode Island

Rhode Island passed [House Bill 6112](#) and [Senate Bill 888](#) on October 5, 2017, which amend various provisions of the state's Electronic Waste Prevention, Reuse and

⁴¹Notice of Approval of Emergency Regulatory Action, OAL Matter No. 2017-0817-01 (Cal. Dept. of Res. Recycling & Recovery Aug. 28, 2017).

⁴²HB 1495, 120th Gen. Assemb., 1st Reg. Sess. (Ind. 2017).

⁴³S. Res. 170, 100th Gen. Assemb. (Ill. 2017); H. Res. 161, 100th Gen. Assemb. (Ill. 2017).

⁴⁴S.B. 1417, 100th Gen. Assemb. (Ill. 2017).

⁴⁵H.B. 1955, 100th Gen. Assemb. (Ill. 2017).

Recycling Act.⁴⁶ The bills amend the definition of covered electronic products to include portable computers (e.g., tablets), and printers, if the total amount of printers exceeds twenty percent by weight of the total returned covered electronics. The amendments also include updates to manufacturers' reporting requirements and responsibilities, including a requirement for manufacturers who have a return share or a market share but do not sell units in the state for three years or more to continue to register with the Department of Environmental Management, although they would no longer have to pay the \$5,000 registration fee.

D. International Developments

1. European Commission

On April 18, 2017, the European Commission adopted a [Waste Electrical & Electronic Equipment \("WEEE"\) package](#).⁴⁷ This included implementation of Regulation 2017/699 (establishing a common methodology for calculating the weight of electrical and electronic equipment), adopting a report on the review of the scope of Directive 2012/19/EU, adopting a report on the re-examination of WEEE recovery targets, and adopting a report on the exercise of power to adopt delegated acts conferred upon the European Commission.

2. Interpol

In August 2017, it was [reported](#) that Interpol seized more than 1.5 million tons of illegal waste during a global operation targeting illegal shipments and disposal of waste.⁴⁸ The majority of the illegal waste was e-waste and metal waste, but also included industrial, construction, household, and medical waste. The operation, led by Interpol's Pollution Crime Working Group, worked with police, customs, and border and environmental agencies from 43 countries, and reported 226 waste crimes and 413 administrative violations. It was reported that Asia and Africa were the primary destinations for the illegal waste exported from Europe and North America.

3. International E-Waste Management Network

In October 2017, the [seventh annual meeting](#) of the International E-waste Management Network was co-hosted by the U.S. Environmental Protection Agency, Taiwan EPA, and Indonesia's Ministry of Environment and Forestry.⁴⁹ The theme of the meeting, held in Jakarta, Indonesia, was "Taking the Next Step in Advancing E-Waste Management," and was attended by over 40 participants from 14 countries. The meeting focused on recent policy innovations, regional e-waste management trends, and engaging the informal sector.

⁴⁶H.B. 6112, 2017 Gen. Assemb., Jan. Sess. (R.I. 2017); S.B. 888, 2017 Gen. Assemb., Jan. Sess. (R.I. 2017).

⁴⁷*Waste Electrical & Electronic Equipment (WEEE)*, EUROPEAN COMM'N (last updated Jan. 15, 2018).

⁴⁸Press Release, Interpol, Hazardous Materials Seized in Largest Global Operation Against Illegal Waste (Aug. 8, 2017).

⁴⁹*Cleaning Up Electronic Waste (E-Waste)*, EPA (last visited Mar. 15, 2018).

4. Canada

It was [reported](#) in November 2017 that amendments to Saskatchewan's regulations will expand the electronic products the province will accept for recycling beginning in May 2018.⁵⁰ Specifically, the province will begin recycling countertop microwave ovens, scanners, floor-standing printers, external storage drives and modems, video game consoles and peripherals, e-book readers, and GPS devices.

5. Latin America and the Caribbean

On November 3, 2017, the Regional Platform for Electronic Residues in Latin America and the Caribbean [released](#) a practical guide for the systemic design of policies for the management of WEEE in developing countries.⁵¹

⁵⁰Press Release, Gov't of Sask., Expanded List of Electronic Products Will Be Accepted for Recycling in Spring 2018 (Nov. 29, 2017).

⁵¹Practical Guide for the Systemic Design of Policies for the Management of WEEE in Developing Countries, Regional Platform for Electronic Residues in Latin America and the Caribbean (Nov. 3, 2017).

Chapter 11 • WATER QUALITY AND WETLANDS 2017 Annual Report¹

I. JUDICIAL DEVELOPMENTS

A. *Clean Water Act (CWA) Section 303—Water Quality Standards*

On June 19, the United States Court of Appeals for the Eleventh Circuit [affirmed](#) the dismissal of a lawsuit filed against the United States Army Corps of Engineers (Corps) and Florida administrative agencies.² Plaintiffs alleged the Corps operates water control structures in South Florida in violation of the state's water quality standards (WQS). The Eleventh Circuit held that the South Florida Water Management District (SFWMD), local sponsor of the water control projects and the Corps' co-manager, was an indispensable party. SFWMD, however, could not be joined because it invoked its sovereign immunity, so the suit was dismissed.

On February 21, Northwest Environmental Advocates (NWEA) filed a suit seeking an order requiring the U.S. Environmental Protection Agency (EPA) to respond to a 2013 rulemaking petition related to Washington's WQS.³ Prior to NWEA's recent filing, in 2016, the EPA received Washington's submission of updated water quality criteria for the protection of human health. The EPA approved some criteria, disapproved others, and promulgated criteria for those it had disapproved. NWEA alleges the EPA failed to grant or deny the 2013 petition on the following bases: 1) lack of EPA action with respect to Washington's proposed human health criteria for arsenic, dioxin, and thallium, and that criteria for those toxics remain outdated; and 2) Washington's toxics criteria for human health fail to protect aquatic species. On June 12, the court dismissed the case based on a stipulation filed by the parties.⁴

On February 15, a district court [granted](#) the summary judgment motions of the EPA and intervening Florida administrative agencies, and affirmed the EPA's partial approval of Florida's updated list of impaired waters issued in 2014.⁵ In 2015, after issuing its partial approval, the EPA denied a petition that challenged the determination that a new or revised anti-degradation standard was necessary. The EPA's denial explained that states have the primary role to review, establish, and revise WQS and that, even if the plaintiffs' environmental concerns were valid, the EPA preferred to rely on new federal anti-degradation regulations providing a structured process rather than conduct a separate rulemaking for Florida or another individual state. The court held that the EPA's explanation survived highly deferential judicial review.

¹This report was compiled and edited by Susan Kirsch of Bergeson & Campbell, PC, Washington, D.C.; Joan E. Drake of Modrall Sperling, Albuquerque, N.M.; and Donald Wiggins Jr. of Artesian Spring Consulting Group, Columbus, Ohio. Contributing authors include Albert P. Barker of Barker Rosholt & Simpson LLP, Boise, Idaho; Trent Dougherty of The Ohio Environmental Council, Columbus, Ohio; John B. King of Breazeale, Sachse & Wilson, LLP, Baton Rouge, La.; Nathaniel H. Hunt of Kaplan, Kirsch & Rockwell LLP, Denver, Colo.; Margaret C. Hupp, Laura Kerr & Meredith Weinberg of Perkins Coie LLP, Seattle, Wash.; and Andrew C. Sifton of Beveridge & Diamond, PC, Washington, D.C.

²*Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 859 F.3d 1306 (11th Cir. 2017).

³Complaint for Declaratory and Injunctive Relief, *Nw. Env'tl. Advocates v. EPA*, No. 2:17-cv-00263 (W.D. Wash. Feb. 21, 2017).

⁴Order Entering Stipulated Dismissal with Prejudice, *Nw. Env'tl. Advocates v. EPA*, No. 2:17-cv-00263 (W.D. Wash. June 12, 2017).

⁵*Fl. Wildlife Fed'n v. McCarthy*, No. 8:14-cv-3204-T-23JSS, 2017 WL 625720 (M.D. Fla. Feb. 15, 2017).

On February 7, a district court [denied](#) the EPA’s motion to dismiss an action claiming the agency failed to review California’s revisions to WQS for two water plans in the San Francisco Bay area.⁶ The suit alleges the state temporarily relaxed WQS for flow and salinity several times without EPA approval. The EPA argued the case was moot because the temporary revisions expired, but the court held it was the EPA’s non-discretionary duty to oversee the state’s implementation of the CWA. In March, the EPA moved to stay the litigation and requested time to consider whether California’s decision to relax flow and salinity WQS during a drought were revised rules subject to EPA review.

B. CWA Section 303(d)—Total Maximum Daily Loads (TMDLs)

In [Ohio Valley Environmental Coalition v. McCarthy](#),⁷ where environmental groups filed suit over EPA’s failure to disapprove the West Virginia Department of Environmental Protection’s (WVDEP) section 303(d) impaired waters list, the court [partially approved and partially denied](#)⁸ cross-motions for summary judgment. The issues before the court were: 1) whether the EPA violated its nondiscretionary duty under the CWA to disapprove WVDEP’s actual or constructive submissions of no biological impairment TMDLs for biologically impaired waterbodies, and to establish those undeveloped TMDLs; and 2) whether the EPA violated the Administrative Procedure Act (APA) by approving WVDEP’s 303(d) list for certain waterbodies, which included no ionic toxicity TMDLs despite those waterbodies’ state of ionic impairment. In partially approving the environmental groups’ motion, the court held that it was “clear and unambiguous that WVDEP has decided not to submit TMDLs for biologically impaired bodies of water” resulting in a complete abdication of the state’s duties under the CWA.⁹ The court found WVDEP’s “utter lack of a plan to comply with those duties” resulted in a constructive submission of no TMDLs for all biologically impaired waterbodies, and the EPA had a nondiscretionary duty to approve or disapprove of the constructive submission.¹⁰ On the APA claim, the court ruled it does not have authority to require the EPA to develop the TMDLs without the EPA first disapproving WVDEP’s constructive submission.

C. CWA Sections 304 and 306—Criteria and Guidelines, and Performance Standards

In [Environmental Integrity Project v. EPA](#),¹¹ the United States Court of Appeals for the District of Columbia reaffirmed that CWA section 308(b), which requires the EPA to make available public records, reports, and information obtained during the development of effluent limitations guidelines (ELG), does not preempt the Freedom of Information Act’s protection of confidential business information.

In [Louisville Gas & Elec. Co. v. Kentucky Waterways Alliance](#),¹² the Supreme Court of Kentucky upheld a permit writer’s decision not to impose technology-based effluent limits on mercury, arsenic and selenium discharged from a power plant’s flue gas desulfurization processes. The 1982 ELGs, applicable to the facility at the time the permit was issued, acknowledged concerns about toxic pollutants, “but deferred establishing limits for any of them because . . . the technology for effectively reducing the small

⁶NRDC v. McCarthy, 231 F. Supp. 3d 491 (N.D. Cal. 2017).

⁷No. 3:15-0271, 2016 WL 4744164 (S.D.W. Va. Dec. 14, 2015).

⁸Ohio Valley Envntl. Coal. v. McCarthy, No. CV 3:15-0271, 2017 WL 600102 *19 (S.D.W. Va. Feb. 14, 2017).

⁹*Id.* at *18.

¹⁰*Id.*

¹¹864 F.3d 648 (D.C. Cir. 2017).

¹²517 S.W.3d 479 (Ky. 2017).

amounts in which they occurred was not yet sufficiently developed.”¹³ The court concluded that the permitting agency was not obligated to use best professional judgment to set effluent limits for these pollutants because the 1982 guideline reflected an affirmative decision by the EPA not to set limits for these toxics. Accordingly, the permit at issue did not require removal of dissolved mercury, arsenic, and selenium.

D. CWA Section 309—Enforcement

In *United States v Bingham Fox*,¹⁴ the defendant was found guilty of violating the CWA by discharging oily water from his boat without a functioning system to separate oily water from discharged water. The defendant filed a motion for new trial based on the insufficiency of the evidence.¹⁵ To prove a CWA violation, the government had to show that the defendant knowingly discharged oil or a hazardous substance into the sea, or directed others to do so, and that the defendant knew that the discharged substance was oil or a hazardous substance. Photographs showed the amount of leaked oil inside the bilge. The bilge pump, although submerged, would have sucked up oily water for discharge. The defendant purchased oil-absorbent pads and enzyme-based detergent, suggesting that the defendant was aware of oil contamination in the bilge water. Finally, the ship’s log book contained entries regarding continuous problems with leaking oil in the engine room. The court held that “circumstantial evidence supports the inference that defendant knew that the crew’s efforts to mop up the oil were only partially successful, and in turn that defendant knew that the submersible pumps in the bilge were pumping overboard illegal quantities of oil emulsified in the bilge water,” and denied the defendant’s motion for a new trial.¹⁶

In *United States v. Acquest Transit, LLC*,¹⁷ a defendant contested a lengthy privilege log produced by EPA in response to discovery requests. The defendant’s main focus was on several documents created by the EPA during its investigation of potential CWA violations regarding construction activities in wetlands. In April 2007, a witness observed earth-moving/construction activities at the site. In October 2007, the EPA requested and was denied access to conduct an inspection. The EPA submitted several requests for information to the defendant between October 2007 and January 2008, and subsequently began issuing cease and desist orders. After the defendant failed to comply, the EPA obtained an injunction against additional activities. The defendant contended that there was no work-product protection available for any documents created at the request of EPA counsel prior to the cease and desist order. Relying on *United States v. Adlman*,¹⁸ the court held that work-product protection can extend to documents which can fairly be said to have been prepared or obtained because of the prospect of litigation. The court found the ‘prospect’ of litigation arose as early as April 2007 with observations of suspected unlawful activity and when the EPA was denied access in October 2007. The court found persuasive the argument of EPA counsel that when an owner refuses access, litigation will likely result. The defendant also argued that the work-product protection did not extend to documents created by non-attorney employees of the agencies. The court found that where staff are supervised by, or acting at the direction of agency counsel, the relevant documents are protected if prepared in anticipation of litigation.

¹³*Id.* at 481.

¹⁴No. CR16-100RSL, 2017 WL 2634210 (W.D. Wash. June 9, 2017).

¹⁵*Id.* at *1.

¹⁶*Id.* at *5-6.

¹⁷319 F.R.D. 83 (W.D.N.Y. 2017).

¹⁸134 F.3d 1194 (2d Cir. 1998).

On January 30, EMD Millipore Corporation entered into a [consent decree](#)¹⁹ regarding its discharges into a publicly owned treatment works (POTW). EMD discharged into the POTW pursuant to an industrial user permit. These discharges, however, caused “pass through and/or interference” resulting in the POTW violating its permit. EMD introduced high strength organic waste to the POTW that hindered the POTW’s biological treatment systems, which led to excessive amounts of ammonia nitrogen and/or carbonaceous biochemical oxygen demand (BOD) in its discharge to the Contoocook River in New Hampshire. EMD also introduced wastewaters to the POTW with a pH outside the federal limit on numerous occasions over a three and a half-year period. EMD agreed to pay a \$385,000 penalty and to upgrade its own wastewater management and treatment system. The upgrades will result in reductions in discharges to the POTW of 17,520 pounds of total suspended solids and 29,930 pounds of BOD.

On June 15, NVR, Inc. (NVR) entered into a [consent decree](#) regarding stormwater discharges at its construction sites in New York and New Jersey.²⁰ NVR failed to obtain coverage under a National Pollutant Discharge Elimination System (NPDES) permit prior to commencing construction at 65 sites. After obtaining the required permit coverage, NVR failed to comply with permit requirements at several sites. EPA inspectors identified inadequate sediment and erosion controls. NVR agreed to pay a \$452,000 penalty, and to implement a company-wide stormwater compliance program, which includes: designating trained compliance representatives, as well as division and corporate level employees responsible for compliance at each site; conducting quarterly management oversight inspections; and submitting national compliance reports to the EPA on an annual basis.

E. CWA Section 401—State Certification

In [Delaware Riverkeeper Network v. Federal Energy Regulatory Commission \(FERC\)](#),²¹ Transco applied for certification for a gas pipeline project. Before the state acted on the application, FERC issued a Certificate Order *conditionally* approving the project. The court of appeals held the conditional approval did not violate the CWA because FERC has the authority to issue a Certificate Order with the condition that the applicant obtain state 401 certification.

In [Constitution Pipeline Co., LLC v. New York State Department of Environmental Conservation](#),²² the pipeline company petitioned for review of denial of certification. The Second Circuit held that it did not have jurisdiction to consider the company’s argument regarding the state agency’s failure to timely act on a 401 certification within the required time period because the Natural Gas Act vested exclusive jurisdiction over failures to act with the D.C. Circuit. The Second Circuit upheld the certification denial because the company failed to provide relevant information despite repeated requests.

In [Berkshire Environmental Action Team, Inc. v. Tennessee Gas Pipeline Co., LLC](#),²³ the state granted conditional water quality certification of a proposed project subject to further proceedings. Under the Natural Gas Act, the court could only review a final agency action, and the conditional certification was not a final action.

In [Millennium Pipeline Co., LLC v. Seggos](#),²⁴ a pipeline company requested certification for a natural gas pipeline project, but the state agency took no action for over a year. The company filed a petition for review seeking to compel action on the application. The court dismissed the petition holding that the pipeline company lacked standing to

¹⁹United States v. EMD Millipore Corp., No. 17-0034 (D.N.H. Jan. 30, 2017).

²⁰United States v. NVR, Inc., No. 17-04346 (D.N.J. June 15, 2017).

²¹857 F.3d 388 (D.C. Cir. 2017).

²²868 F.3d 87 (2d Cir. 2017).

²³851 F.3d 105 (1st Cir. 2017).

²⁴860 F.3d 696 (D.C. Cir. 2017).

challenge the agency's failure to act. If the agency did not act in a timely fashion under the CWA, it would have waived its right to issue a 401 certification. The court suggested that the pipeline company's remedy would be to proceed directly to FERC to present evidence of state certification waiver and seek project approval.

In *Ohio v. United States Army Corps of Engineers*,²⁵ the Corps, as part of a project to dredge the Cleveland Harbor, applied for certification. Ohio issued the certification with a condition requiring dredged materials be disposed of in a Confined Disposal Facility (CDF). The Corps stated it would not bear the cost of CDF disposal and refused to proceed with the entire project unless the state paid for the CDF disposal. The Corps concluded that open water disposal was the least costly disposal method that complied with the CWA. The district court issued an order compelling the Corps to complete the entire project and to utilize the CDF. The court held that the Corps exceeded its authority by treating its own standards as governing over the state's 401 conditions.

F. *CWA Section 402—National Pollutant Discharge Elimination System (NPDES) Permitting*

1. Discharges via Groundwater

In *Tennessee Clean Water Network v. Tennessee Valley Authority*,²⁶ the court held the Tennessee Valley Authority (TVA) liable for multiple CWA violations arising from discharges from a series of coal ash ponds. The court rejected TVA's argument that certain dewatered ponds could not be considered regulated point sources because there was no evidence "that the dewatering process would change the fact that the former ash pond system is discernible, discrete, and confined."²⁷ The court also found that leakage from the ponds, which migrated to the Cumberland River, constituted discharges regulated by the CWA. Specifically, plaintiffs demonstrated that TVA's coal ash contaminants "migrated [through groundwater] along a generally traceable, direct connection to the waters of the United States ..."²⁸ Defendants failed to show they were entitled to protection under section 402(k); the leaks were not within the scope of releases contemplated by the state when it issued TVA's NPDES permit.

In *Flint Riverkeeper v. Southern Mills, Inc.*,²⁹ the court denied a motion to dismiss a citizen suit alleging that the defendant's land application system for treating process wastewater caused unpermitted discharges. The court first concluded that pollutants reaching navigable waters through hydrologically connected groundwater are discharges subject to the CWA, consistent with the "majority of district courts addressing this issue."³⁰ Plaintiffs also sufficiently alleged that defendants conveyed pollutants from a point source by identifying in their complaint discrete conveyances, including ditches and the spray heads that make up the land application system. Finally, the court held that these discharges of process wastewater were not authorized by the defendant's NPDES permit, which covered only stormwater discharges.

In *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*,³¹ a district court dismissed a citizen suit against a pipeline operator because the alleged discharge neither came from a point source nor a navigable water. Plaintiffs alleged that a pipeline leak constituted an unpermitted discharge to nearby creeks and wetlands. The court held that a

²⁵259 F. Supp. 3d 732 (N.D. Ohio 2017).

²⁶No. 3:15-cv-00424, 2017 WL 3476069 (M.D. Tenn. Aug. 4, 2017).

²⁷*Id.* at *47.

²⁸*Id.* at *57.

²⁹No. 5:16-CV-435, 2017 WL 2059659 (M.D. Ga. May 12, 2017).

³⁰*Id.* at *5.

³¹252 F. Supp. 3d 488 (D.S.C. 2017).

discharge from a point source requires *direct* addition of pollutants from the putative point source to the relevant navigable waters.³² The court also held that plaintiffs' allegation of petroleum passively migrating through soil and groundwater constituted nonpoint source pollution. The court further found that groundwater that is hydrologically connected to navigable waters is not a navigable water, such that plaintiffs' allegations of discharges to groundwater were not violations of the CWA.

In *Sierra Club v. Virginia Electric & Power Co.*,³³ the court held a power plant liable for CWA violations based on unpermitted discharges of arsenic from coal ash piles and lagoons to groundwater and, ultimately, surface water. The court found that arsenic from the piles and lagoons entered groundwater that was hydrologically connected to surface waters, but that the arsenic discharges posed no threat to human health or the environment. In holding the defendant liable, the court first concluded "that discharges to groundwater [that is] hydrologically connected to surface water are covered by the CWA."³⁴ Defendant's ash piles also constituted point sources because they channeled pollutants to groundwater. The court found defendant not liable for two counts arising from the facility's state-issued permit, deferring to the state agency's determination that defendant had not violated the permits' terms.

2. Permit Shield and Collateral Attacks on Permits

In *Coosa Riverkeeper, Inc. v. Oxford Water Works & Sewer Board*,³⁵ the court rejected a defendant POTW's attempt to invoke the permit shield to ward off a citizen suit over discharges not covered by its NPDES permit. Plaintiff had alleged that the defendant POTW discharged formaldehyde, a constituent that the permit did not authorize defendant to discharge. The POTW argued that communications with the state permitting authority concerning a significant industrial user whose indirect discharges contained formaldehyde constituted sufficient disclosure of the POTW's formaldehyde discharges. The court held that the permit shield did not bar plaintiff's claims, stating that the POTW's communications were too vague and attenuated from the permitting process to ensure that discharges at issue were "within the reasonable contemplation" of the permitting agency, such that permit shield would apply.

In *Ohio Valley Environmental Coalition v. Fola Coal Co.*,³⁶ plaintiffs alleged that ion and sulfate discharges from the defendant coal mine violated two narrative WQS. The court held that the NPDES permit provision prohibiting discharges that cause violations of WQS was unambiguous and applied to defendant's discharges. The defendant, therefore, could not claim permit shield protection because the allegations concerned violations of the permit's express terms.

In *Conservation Law Foundation, Inc. v. Pease Development Authority*,³⁷ plaintiff alleged that the defendant was required to hold a small Municipal Separate Storm Sewer System (MS4) permit, not the individual industrial NPDES permit under which it had been operating. The defendant moved to dismiss, claiming protection under the permit shield provision. The court denied the motion, concluding that controversy over what types of discharges were contemplated at the time of the permit's issuance implicated facts beyond the scope of the complaint.

³²*See id.* at 493 (citing *Sierra Club v. BNSF Ry. Co.*, No. C13-967-JCC, 2016 WL 6217108 (W.D. Wash. Oct. 25, 2016)).

³³247 F. Supp. 3d 753 (E.D. Va. 2017).

³⁴*Id.* at 761-62.

³⁵No. 2:16-cv-01737, 2017 WL 2619087 (N.D. Ala. June 16, 2017).

³⁶845 F.3d 133 (4th Cir. 2017).

³⁷No. 16-cv-493, 2017 WL 4310997 (D.N.H. Sep. 26, 2017).

In *Kleinman v. City of Austin*,³⁸ the court denied cross motions for summary judgment in a citizen suit alleging that stormwater discharges from maintenance projects in a park violated the CWA. The court rejected the defendant’s argument that the case concerned wholly-past violations based on plaintiff’s expert’s testimony that material would continue to wash into the receiving water. The court also held that the permit shield did not protect defendant from liability because the discharges at issue in the suit were not authorized by the relevant MS4 permit and construction stormwater general permit. Factual issues concerning whether discharges were ongoing and traceable to defendant precluded granting plaintiff’s motion for summary judgment.

In *Center for Environmental Law & Policy v. U.S. Fish & Wildlife Service*,³⁹ the court held that the U.S. Fish and Wildlife Service (FWS) violated the CWA by discharging pollutants from a hatchery without a permit. Plaintiffs alleged that the hatchery’s NPDES permit had expired in 1979, such that all of its discharges since that time violated the CWA. The hatchery did not file a timely renewal application prior to the 1979 expiration of its original permit and received a letter from the EPA in 1981 purporting to extend its permit. The court found FWS liable under the CWA because it had no valid NPDES permit—administratively extended or otherwise—covering its discharges to navigable waters.

In *Schneider v. Donaldson Funeral Home, P.A.*,⁴⁰ a district court granted motions to dismiss a citizen suit alleging CWA violations caused by unpermitted discharges from the construction of a funeral home.⁴¹ Although construction of the funeral home commenced without appropriate permits, the court held that plaintiffs failed to allege any current or ongoing violations necessary to sustain a citizen suit because the defendant funeral home ultimately obtained coverage under a state general permit prior to the complaint being filed. The court determined that the complaint only alleged what were effectively defects in the state’s permitting process, making the citizen suit a collateral attack on the permit over which the court could not assert jurisdiction.

3. State NPDES Program Litigation

In *Eastern Oregon Mining Ass’n v. Department of Environmental Quality*,⁴² the court upheld the Oregon Department of Environmental Quality’s (ODEQ) authority to issue NPDES permits governing discharges of turbid water from small suction dredge mining. Petitioners challenged ODEQ’s authority on the basis that these discharges consisted of dredged material subject exclusively to CWA section 404. The court acknowledged that the dredged material is subject to section 404, but found that turbid wastewater in those same discharges was a pollutant subject to section 402. The court also held that the resuspension of streambed sediment that occurs as a result of suction dredge mining is an “addition” of a pollutant subject to the NPDES permitting.

In *Coastal Environmental Rights Foundation v. California Regional Water Resources Control Board*,⁴³ a California appellate court denied a challenge to a regional NPDES general permit for displays of fireworks over surface waters. In affirming the permit’s use of visual—as opposed to more onerous—monitoring methods, the court employed a deferential standard that gave the agency “wide discretion in developing and imposing monitoring requirements . . .”⁴⁴ The agency’s decision to impose less stringent

³⁸1:15-cv-497, 2017 WL 3585792 (W.D. Tex. Aug. 18, 2017).

³⁹228 F. Supp. 3d 1152 (E.D. Wash. 2017).

⁴⁰No. JFM-16-2843, 2017 WL 68644 (D. Md. Jan. 6, 2017).

⁴¹*Id.* at *1 (The court also denied motions seeking a temporary restraining order and a preliminary injunction intended to stop construction).

⁴²398 P.3d 449 (Or. Ct. App. 2017).

⁴³218 Cal. Rptr. 3d 596 (Cal. Ct. App. 2017).

⁴⁴*Id.* at 609.

requirements on smaller fireworks displays also withstood scrutiny. These smaller displays contributed drastically lower levels of pollutants to waters than the displays put on by Sea World, the entity with the largest displays covered by the general permit.

In *Puget Soundkeeper Alliance v. Washington Department of Ecology*,⁴⁵ plaintiffs challenged two aspects of an auto shredding and recycling facility's NPDES permit: (a) the method required for testing PCBs in stormwater; and (b) effluent limits for stormwater discharges of copper and zinc based on levels taken from a general permit in lieu of setting water quality based effluent limits (WQBELs) for these pollutants. The court found that the agency chose the appropriate testing method because it had been approved and listed in 40 C.F.R. part 136. The court, however, found the agency violated the CWA and applicable state law by failing to set WQBELs for copper and zinc because the general permit limits used by the agency were insufficient to protect water quality.

In *Minnesota Center for Environmental Advocacy v. City of Winsted*,⁴⁶ a Minnesota appellate court rejected a series of challenges to a NPDES permit issued for a city's wastewater treatment plant. The court first concluded that the state permitting agency was entitled to deference in not assuming, as part of its reasonable potential analysis, that the receiving water violated a eutrophication WQS in the absence of evidence to the contrary. The court held that the CWA does not prohibit the permitting agency from issuing a permit if it has not gathered a full set of data to assess whether a receiving water is impaired. The court found that the permitting agency's method for estimating the background concentration of phosphorous, based on the agency's data from other receiving waters, was supported by substantial evidence.

4. Stormwater

In *Waste Action Project v. Astro Auto Wrecking, LLC*,⁴⁷ a court held an auto wrecking, recycling, and storage facility liable for NPDES permit violations. The court found that measures taken by the facility to divert and capture stormwater were not as effective as the best management practices (BMPs) required by its stormwater pollution prevention plan (SWPP); that the facility exceeded its copper effluent limit; failed to submit Discharge Monitoring Reports (DMRs); and failed to sample its discharges on multiple occasions.

In *Conservation Law Foundation v. EPA*,⁴⁸ environmental organizations sued the EPA to require NPDES permits for stormwater discharges along a river for which the EPA had issued a TMDL. The court agreed with EPA's position that identifying stormwater discharges in a TMDL is not necessarily an exercise of the agency's residual designation authority (RDA) to identify sources of stormwater discharges that must obtain NPDES permits. The court buttressed this conclusion by referencing how TMDLs themselves generally create no legally enforceable obligations. The court also found that the TMDLs at issue in the case "evince no intention to exercise the RDA."⁴⁹

In *California Sportfishing Protection Alliance v. The Shiloh Group, LLC*,⁵⁰ the court held that the owner of an industrial park who leased lots to other businesses could potentially be liable for its tenants' stormwater discharges and denied the owner's motion to dismiss. Plaintiffs alleged that the defendant owned and operated infrastructure that collected stormwater and conveyed it to a navigable water. Analyzing Ninth and Tenth 129

⁴⁵No. 48267-3-II, 2017 WL 702504 (Wash. Ct. App. Feb. 22, 2017).

⁴⁶890 N.W.2d 153 (Minn. Ct. App. 2017).

⁴⁷No. C15-0796-JCC, 2017 WL 1229186 (W.D. Wash. Apr. 4, 2017).

⁴⁸223 F. Supp. 3d 124 (D. Mass. 2017).

⁴⁹*Id.* at 131.

⁵⁰268 F. Supp. 3d 1029 (N.D. Cal. 2017).

Circuit precedent, the court concluded that entities that merely convey pollutants--as opposed to generating *and* conveying them--are subject to liability under the CWA.

5. Existence of a Point Source

In *Ohio Valley Environmental Coalition, Inc. v. Shepard Boone Coal Co.*,⁵¹ a district court denied cross motions for summary judgment disputing whether a portion of a valley fill—a disposal area for mining operations—was a point source that should have had an NPDES permit. Plaintiffs alleged that the defendant mine violated the CWA by failing to obtain a permit for releases of selenium from a portion of the valley fill to a nearby pond. Plaintiffs asserted three discrete portions of the valley fill constituted point sources. The defendant countered that water was seeping from many locations in the valley fill, making any releases too diffuse for there to be a discrete point source. The court found a general factual dispute over whether the valley fill was a discrete conveyance precluded summary judgment.

6. Water Transfers

In *Catskills Mountain Chapter of Trout Unlimited v. EPA*,⁵² a divided Second Circuit panel upheld EPA's 2008 rule (the "Water Transfers Rule") excluding from the NPDES program transfers of water from one waterbody to another when there is no intervening commercial, industrial, or municipal use. In its *Chevron* analysis, the court first concluded that the CWA did not speak clearly to whether NPDES permits are required for water transfers.⁵³ At *Chevron* step two, the court held that the Water Transfers Rule was valid because EPA provided a "sufficiently reasoned explanation for its interpretation of the [CWA]."⁵⁴ In reaching its conclusion, the court credited EPA's consideration of a variety of factors, including decades of Congressional acquiescence to EPA's failure to generally require NPDES permits, and the potential for permitting to impose substantial burdens on water transfer operations.

7. Violations of Water Quality Standards

In *Ohio Valley Environmental Coalition v. Fola Coal Co.*,⁵⁵ a district court held a defendant liable for permit violations based on discharges of ionic pollution in violation of *narrative* WQS. The court found that the defendant's discharges of pollutants to two receiving waters caused high levels of conductivity harmful to macroinvertebrates.⁵⁶ The court, however, concluded that the evidence was insufficient to hold defendant liable for causing impairment of the creek into which the two receiving waters flow, in part due to discharges from other mining operations in the area.

⁵¹No. 2:15-cv-01488, 2017 WL 662119 (S.D. W. Va. Jan. 30, 2017).

⁵²846 F.3d 492 (2d Cir. 2017).

⁵³*Id.* at 519 (citing *Chevron U.S.A., Inc. v. Nat. Res. Defense Council*, 467 U.S. 837 (1984)).

⁵⁴*Id.* at 524-25.

⁵⁵No. 2:15-1371, 2017 WL 2312478 (S.D. W. Va. May 26, 2017).

⁵⁶*Id.* at *16.

In *Orchard Hill Building Co. v. United States Army Corps of Engineers*,⁵⁷ a developer challenged the Corps' assertion of jurisdiction over 13 acres of undeveloped property as "wetlands." The Corps independently determined that the Corps had jurisdiction over the property based on several factors under the *Rapanos* "significant nexus" test. The Corps found that the wetlands significantly affect the *physical* integrity of the river by considerably reducing peak flows; have a significant *chemical* impact on the river because they filter, slow, and retain pollutants that would otherwise flow to the river; and significantly affect the *biological* integrity of the waters because species of fish and wildlife use the parcel, and disturbing the wetlands would remove a portion of upstream habitat. The court held that the Corps' findings were reasonable in establishing a significant nexus and correctly asserted its CWA jurisdiction. The court rejected the argument that the property fell within the "prior converted cropland" exemption from permit requirement because past agricultural activities had been abandoned.

In *Foster v. United States Environmental Protection Agency*,⁵⁸ Foster Farms challenged a CWA Administrative Compliance Order alleging that the streams referred to in the order were not jurisdictional waters. In an extensive discussion regarding the meaning of navigable waters under the CWA, the court stated the Corps could establish jurisdiction under either the *Rapanos* plurality test ("relatively permanent flow") or "significant nexus" test. Ultimately, the court found genuine issues of material fact precluded summary judgment on whether a stream was a "water of the United States" (WOTUS) under either test, and denied motions for summary judgment.

In *City Club of New York v. United States Army Corps of Engineers*,⁵⁹ City Club of New York challenged the Corps' issuance of a permit modification authorizing the construction of a pier in the Hudson River to serve as a park and performance space. City Club contended that the Corps violated section 404(b)(1) Guidelines in finding that a proposed pier was not within a "special aquatic site" and in defining the "basic purpose" of the project as water dependent. Under the Guidelines, if a project is located within a special aquatic site and the basic project purpose is not water dependent, there is a presumption that practicable alternatives to the project exist. The court found that the project was within a special aquatic site because it would be located within a sanctuary designated by New York law to be managed "principally" for the preservation and use of fish and wildlife resources. The court determined that the Corps defined the project's basic purpose so narrowly as to mandate that the Corps also find the project to be water dependent. However, the court held a "project whose fundamental goal is to provide [a] park and performance space is not water dependent, regardless of whether the Trust prefers to build such space on a pier."⁶⁰ Accordingly, the court found that the Corps had violated the Guidelines and vacated the permit.

In *Hawkes Company v. United States Army Corps of Engineers*,⁶¹ Hawkes sought judicial review of a jurisdictional determination covering 150 acres of wetlands based on a significant nexus with nearest traditional navigable water. Hawkes argued that a revised jurisdictional determination was arbitrary and capricious because it was based on the same

⁵⁷No. 15-CV-06344, 2017 WL 4150728 (N.D. Ill. Sept. 19, 2017) (citing *Rapanos v. United States*, 126 S. Ct. 2208 (2006)).

⁵⁸No. CV 14-16744, 2017 WL 3485049 (S.D. W. Va. Aug. 14, 2017).

⁵⁹246 F. Supp. 3d 860 (S.D.N.Y. 2017).

⁶⁰*Id.* at 870.

⁶¹No. CV 13-107 ADM/TNL, 2017 WL 359170 (D. Minn. Jan. 24, 2017) (The case was on remand from United States Supreme Court's decision in *United States Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), which upheld the Eighth Circuit's holding that a revised jurisdictional determination is a final appealable decision).

administrative record that the Corps' own review officer had previously found to be insufficient for supporting a finding of CWA jurisdiction. The court held that the information added to the revised jurisdiction determination failed to remedy the deficiencies in the initial determination. The court set aside the determination and enjoined the Corps from asserting jurisdiction over the wetlands.

In *Defenders of Wildlife v. United States Army Corps of Engineers*,⁶² a district court granted a preliminary injunction sought by plaintiffs to halt construction of a dam that would allegedly harm the endangered pallid sturgeon. Defenders challenged the Corps' analysis of the "least environmentally damaging practicable alternative" under CWA section 404(b)(1) guidelines. The court determined that the Corps failed to determine that the least environmentally damaging practicable alternative was infeasible given the Corps' finding that "all alternatives 'were found to be potentially practicable.'"⁶³

In *Quad Cities Waterkeeper v. Ballegeer*,⁶⁴ environmental groups sued defendant for releasing fill materials from a levee created in the Green River. The court found that the defendant had violated the CWA and conducted a bench trial to determine a remedy. The court found that although the CWA intended to impose deterrent civil penalties, "a large penalty is not necessary to deter other nonindustrial rural landowners from building levees out of inappropriate material."⁶⁵ The court assessed a civil penalty of \$4,750, which was the estimated cost for applying for a permit that defendant had avoided. The court denied environmental groups request for injunctive relief requiring restoration, finding that an after-the-fact permit sufficiently addressed the groups' harms.

In *Duarte Nursery, Inc. v. United States Army Corps of Engineers*,⁶⁶ plaintiff moved for reconsideration of an order granting the Corps' motion for summary judgment regarding plaintiff's plowing of a wheat field in wetlands without a CWA permit. In ruling for the Corps, the court held that the term "plowing" did not include the redistribution of soil, rock, and other materials in a manner which changed a WOTUS to dry land. The record before the court showed that plaintiff's tilling did not avoid WOTUS on plaintiff's property and resulted in filling of WOTUS. The court also rejected plaintiff's argument that the "significant nexus" test established by Justice Kennedy in *Rapanos* was not binding on the court because it was established in a concurring opinion. Applying the "significant nexus" test was consistent with Supreme Court precedent that where there is a plurality opinion, the holding "may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."⁶⁷ Following the Ninth Circuit's ruling in *North California River Watch v. City of Healdsburg*,⁶⁸ Justice Kennedy's test in his *Rapanos* concurrence is the narrowest test and applicable.

H. CWA Section 505—Citizen Suits

1. Diligent Prosecution

In *Godfrey v. Upland Borough*,⁶⁹ a district court ruled that the CWA's citizen suit provision's diligent prosecution bar precluded plaintiff homeowners' suit against a Pennsylvania county's water control authority. Plaintiffs alleged conspiracy to obtain illegal easement and install water control infrastructure on homeowners' property which

⁶²No. CV-15-14-GF-BMM, 2017 WL 2869415 (D. Mont. July 5, 2017).

⁶³*Id.* at *11.

⁶⁴No. 4:12-CV-4075-SLD-JEH, 2017 WL 2152366 (C.D. Ill. Mar. 28, 2017).

⁶⁵*Id.* at *7.

⁶⁶No. 2:13-cv-02095-KJM-DB, 2017 WL 3453206 (E.D. Cal. Aug. 11, 2017).

⁶⁷*Id.* at *5.

⁶⁸496 F.3d 993 (9th Cir. 2007).

⁶⁹246 F. Supp. 3d 1078 (E.D. Pa. 2017).

resulted in sewage overflow flooding on the property – a CWA violation. Defendant EPA argued that due to an earlier consent decree between the county, the EPA, and the Pennsylvania Department of Environmental Protection, the plaintiff’s suit was barred. Even though the consent decree provided the county with a rather lengthy 20-year timeline for compliance, since the consent decree required the county to eliminate sanitary sewer overflows which were the basis of citizen suit, the court deemed the consent decree a diligent prosecution bar to plaintiff’s suit.

2. Failure to Provide Notice

In *Conservation Law Foundation, Inc. v. EPA*,⁷⁰ a district court granted the EPA’s motion to dismiss an environmental group’s suit for lack of subject matter jurisdiction. The court ruled that the plaintiffs failed to provide notice to the EPA Administrator of the Administrator’s alleged failure to respond to citizen petition requesting that the EPA exercise its authority over commercial, industrial, and institutional “non-de minimis” stormwater discharges. Plaintiffs asserted the notice of suit that authorized the filing of its case satisfied the notice requirement. That notice alleged that the EPA had failed to render a final decision on a petition plaintiffs submitted in February of 2009. The court ruled the 2009 notice was insufficient because it did not reference a 2013 petition on similar issues that plaintiffs filed and included in the complaint in this case.

3. Claim Preclusion

In *Center for Environmental Law & Policy v. U.S. Fish & Wildlife Service*,⁷¹ FWS argued that plaintiffs were barred from initiating a citizen suit under claim preclusion because the organizations were in privity in an earlier 2005 action. FWS claimed that privity extends to all members of the public in an action brought under the citizen suit provision. The court ruled that plaintiff’s current case was not barred by claim preclusion as a result of prior action that was dismissed with prejudice regarding claims by predecessor to one of the organizations. The court reasoned that accepting this bar of claim preclusion “would risk defeating the purpose of the [citizen suit] provision to permit an individual to settle with the government and thereby preclude other citizens from bringing the same claim.”⁷²

4. Standing

In *Sierra Club v. Virginia Elec. & Power Co.*,⁷³ a district court ruled that plaintiff environmental organization had standing to pursue citizen suit against defendant coal power plant operator, alleging that the operator violated CWA by discharging arsenic into surrounding surface waters. The court granted Sierra Club organizational standing because members of the organization had standing to sue in their own right based on their interest in use of the surface waters surrounding the power plant and their fear of the effects of the water pollution.

⁷⁰223 F. Supp. 3d 124 (D. Mass. 2017); *See also* Section I.F.4., *supra* note 47.

⁷¹228 F. Supp. 3d 1152 (E.D. Wash. 2017); *See also* Section I.F.2, *supra* note 38.

⁷²*Id.* at *1160.

⁷³247 F. Supp. 3d 753 (E.D. Va. 2017).

5. Subject Matter Jurisdiction

In *Deschutes River Alliance v. Portland General Electric*,⁷⁴ a district court ruled against defendant utility's claim that the CWA's citizen suit provision does not allow a civil action challenging compliance with *conditions* contained in a water quality certification issued under CWA section 401. The Utility (PGE) moved to dismiss the lawsuit asserting that *only* the licensing entity (in this case FERC) has authority to enforce certification conditions because "any condition that a state includes in a water quality certification is incorporated into the license or permit."⁷⁵ PGE argued the plaintiff may only seek relief by petitioning FERC to enforce the permit conditions. The ruling denying PGE's motion to dismiss turned on the court's interpretation of the clear language of the definition of "effluent standard" and "limitation" under the citizen suit provision, which includes certifications under section 401.

II. ADMINISTRATIVE DEVELOPMENTS

A. CWA Section 303—Water Quality Standards

On July 14, the EPA [approved](#)⁷⁶ new water quality criteria for mercury developed by the California State Water Resources Control Board (California). California developed the new criteria for inland surface waters and enclosed bays and estuaries to account for tribal cultural use and subsistence fish consumption. A related compliance schedule gives cities and industrial plants up to ten years from their permitting date to meet the lower numerical criteria for mercury.

B. CWA Section 303(d)—TMDLs

In May, the EPA [approved](#)⁷⁷ Ohio Environmental Protection Agency's (Ohio) list of impaired waters following a CWA [citizen suit](#)⁷⁸ filed by a number of environmental organizations for the EPA's failure to approve or deny Ohio's list of impaired waters in the required 30 days. Groups criticized Ohio's omission of the open waters of the Western Lake Erie Basin (WLEB) from its impaired waters list despite ongoing issues with harmful algal blooms. In contrast, the EPA previously approved the Michigan's list of impaired waters, which lists the open waters in its portion of the WLEB. In its May 2017 approval letter, the EPA states "[i]n reaching its decision, EPA has deferred to the State's Judgment not to assess the open waters of the [WLEB] for the 2016 list" and cites Ohio's efforts to control nutrient pollution in those waters.⁷⁹ Environmental groups involved in initial lawsuit have since challenged the approval.⁸⁰

On June 30, the EPA provided its [interim evaluations](#) to the seven Chesapeake Bay jurisdictions on each jurisdiction's progress toward meeting 2016-2017 milestones and Watershed Implementation Plan (WIP) goals.⁸¹

⁷⁴249 F. Supp. 3d 1182 (D. Or. 2017).

⁷⁵*Id.* at *1185.

⁷⁶Letter from Tomas Torres, Dir. of Water Div.: EPA Region 9, to Felicia Marcus, Chair of Cal. State Water Res. Control Bd. (July 14, 2017).

⁷⁷Letter from Christopher Korleski, Dir. of Water Div., EPA Region 5, to Craig Butler, Dir. of Ohio EPA (May 19, 2017).

⁷⁸Complaint, Nat'l Wildlife Fed'n v. Pruitt, No. 1:17-cv-00756 (D.D.C. Apr. 25, 2017).

⁷⁹Korleski letter, *supra* note 77.

⁸⁰Petition, Env'tl. Law & Policy Ctr. v. EPA, No. 3:17-cv-01514 (N.D. Ohio July 18, 2017).

⁸¹*EPA Interim Evaluation of 2016-2017 Milestone Progress in the Chesapeake Bay Watershed*, ENVTL. PROT. AGENCY (last visited Apr. 30, 2018).

C. *CWA Sections 304 and 306—Criteria and Guidelines, and Performance Standards*

On June 14, the EPA [published](#) technology-based pretreatment standards to reduce discharges of mercury-containing amalgam from dental offices into POTWs.⁸² Under the rule, facilities that perform dentistry will be required to install, operate, and maintain amalgam separators, or similar amalgam removal devices, that achieve 95 percent removal efficiency. Facilities must also implement certain BMPs and submit a one-time compliance report certifying that the facility installed a control device and implemented BMPs. Dental offices must comply with the rule by July 14, 2020.

On April 12, EPA Administrator Pruitt [published](#) a letter announcing that the EPA would reconsider portions the final rule published on November 3, 2015 amending the ELGs and standards for the Steam Electric Power Generating Point Source Category (Final Rule).⁸³ On April 25, the EPA [announced](#) that it would postpone the compliance dates of the Final Rule, and its intention to petition the U.S. Court of Appeals for the Fifth Circuit to hold the litigation challenging the Rule in abeyance while the EPA reconsidered the Rule.⁸⁴ On April 24, the Fifth Circuit granted a stay in *Southwestern Electric Power Co. v. EPA*.⁸⁵ On August 22, the Fifth Circuit held in abeyance all judicial proceedings related to the portions of the Final Rule being reconsidered.⁸⁶

D. *CWA Section 309—Enforcement*

On October 16, [EPA Administrator Scott Pruitt's issued a directive](#)⁸⁷ aimed at ending the practice of regulation through litigation, also known as “sue and settle.” Specifically, the decree sets up procedures for the EPA to follow before and during participation in a consent decree and settlement agreement in lawsuits against the EPA, including: prohibiting the EPA from entering into a consent decree with terms that the court would have lacked the authority to order if the parties had not resolved the litigation; excluding the payment of plaintiff’s attorney’s fees/costs as part of a settlement; and requiring public notice-and-comment, and possibly a public hearing, if the EPA considers entering into a consent decree with a citizen suit plaintiff.

E. *CWA Section 401—State Certification*

[Idaho Power Co.](#)⁸⁸ filed an application to relicense its Hells Canyon hydroelectric project on the Snake River that borders Idaho and Oregon. Oregon state law requires fish passage at dams, unless passage is preempted by federal law. Idaho law prohibits fish passage above the Hells Canyon project. Idaho Power filed a petition with FERC asking

⁸²Effluent Limitations Guidelines and Standards for the Dental Category, 82 Fed. Reg. 27,154 (June 14, 2017) (to be codified at 40 C.F.R. pt. 441).

⁸³See Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005 (Apr. 25, 2017) (to be codified at 40 C.F.R. pt. 423).

⁸⁴See *id.*

⁸⁵Order on Motion for Stay, *Sw. Elec. Power Co. v. EPA*, No. 15–60821 (5th Cir. Apr. 24, 2017).

⁸⁶Order on Motion to Extend Stay, *Sw. Elec. Power Co. v. EPA*, No. 15–60821 (5th Cir. Aug. 22, 2017).

⁸⁷Press Release, Office of the Administrator E. Scott Pruitt, Env’tl. Prot. Agency, Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements (Oct. 16, 2017).

⁸⁸*Idaho Power Co.*, 158 FERC ¶ 61,048 (2017).

FERC to declare the Oregon fish passage statute was preempted by *First Iowa* and the Federal Power Act. FERC dismissed the petition on the grounds that the petition was premature. FERC concluded that regardless of the Oregon fish passage statute it would have to consider the effect of the state's respective CWA 401 certifications and could not do so on the record, because only draft certifications (albeit conflicting) had been issued. FERC did not explain how it would resolve conflicting 401 certifications.

In [*Tennessee Gas Pipeline Co., LLC*](#),⁸⁹ FERC authorized construction and operation of a gas pipeline project, conditioned on receipt of all necessary permits or waivers under section 401 before construction could begin. An environmental group alleged FERC violated CWA by issuing a certificate before the state issued its section 401 certification. FERC held that the CWA does not prohibit approval of a project application conditioned upon obtaining the state's certification.

F. CWA Section 402—NPDES Permitting

On January 19, all ten EPA regions issued the final [NPDES general permit](#) for stormwater discharges associated with construction activities.⁹⁰ The new permit went into effect on February 16, 2017. The 2017 permit bore substantial similarities with the 2012 permit that it replaced. Permit updates included: streamlining language to make it more readable, and a requirement for operators to post information for the public on how to obtain a copy of the operator's SWPP.

G. CWA Section 404—Wetlands

On March 6, the EPA and the Corps [announced](#) their intention to review and rescind or revise the 2015 Clean Water Rule (CWR).⁹¹ On July 27, as part of a two-step process, the Corps and the EPA [proposed](#) to re-codify the regulatory text that appeared in the Code of Federal Regulation before the promulgation of the CWR while the agencies re-evaluate the WOTUS definition.⁹² In this first step, the WOTUS definition would be implemented in accordance with Supreme Court decisions, agency guidance, and longstanding practice existing before the CWR. The agencies state that re-codifying the regulations existing before the CWR will provide “continuity and certainty for regulated entities, the States, agency staff, and the public.”⁹³ In the second step, the agencies will conduct a separate rulemaking to propose a new, revised definition of WOTUS.

On November 22, the Corps and the EPA [proposed](#) to amend the 2015 CWR to add an applicability date two years from the date of a final action on the proposed addition.⁹⁴ By delaying applicability of the CWR, the agencies “intend to provide, for an interim period, greater regulatory certainty about the definition of [WOTUS] in effect while they continue to work on the two-step rulemaking process.”⁹⁵

⁸⁹160 FERC ¶ 61,027 (2017).

⁹⁰Notice of Final Permit Issuance, 82 Fed. Reg. 6534 (Jan. 17, 2017).

⁹¹Intention To Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12,532 (Mar. 6, 2017).

⁹²Definition of “Waters of the United States” – Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (July 27, 2017).

⁹³*Id.*

⁹⁴Definition of “Waters of the United States” – Addition of an Applicability Date to 2015 Clean Water Rule, 82 Fed. Reg. 55,542 (Nov. 22, 2017).

⁹⁵*Id.*

III. LEGISLATIVE DEVELOPMENTS

A. *CWA Section 401—State Certification*

In November, the House passed [H.R. 3043](#), a bill that would amend the Federal Power Act to streamline hydropower approvals.⁹⁶ Among other provisions, H.R. 3043, if enacted, would require: 1) FERC to establish timetables for review and analysis, and require the certifying agencies to adhere to those timetables; 2) certifying agencies to identify “issues of concern” with the application early on, and enter into a Memorandum of Understanding (MOU) with FERC to facilitate resolution of those issues; 3) FERC to promulgate a scheduling rule that implements the deadlines; and 4) all environmental decisions to be made on one consolidated record before FERC. The bill expressly preserves the authority of the state and tribal entities under the CWA, including section 401.

B. *CWA Section 402—National Pollutant Discharge Elimination System (NPDES) Permitting*

On May 24, the House passed a [bill](#) that would exempt from the CWA’s requirement to obtain a NPDES permit discharges of pesticides or pesticide residues resulting from pesticide applications performed consistent with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).⁹⁷ The Senate began consideration of a similar NPDES exemption [bill](#) for FIFRA-compliant pesticide applications.⁹⁸

C. *CWA Section 505—Citizen Suits*

On February 16, Rep. Tom Rice (R-SC) introduced the Discouraging Frivolous Lawsuits Act, [H.R.1179](#).⁹⁹ The bill aims to amend CWA section 505(d) to revise requirements concerning citizen suits, specifically in regard to the award of litigation costs to prevailing parties. It would also place restrictions on orders and settlements concerning compensatory mitigation.

On May 25, Rep. Duncan Hunter (R-CA) introduced [H.R. 2693](#),¹⁰⁰ which would amend the CWA to limit the amount that may be awarded for the costs of litigation in citizen suits. The bill would also bar the commencement of a citizen suit if the EPA or a state has commenced and is diligently prosecuting a civil or criminal action through the issuance of a compliance order. The bill also provides for certain affirmative defenses for a person who may be liable for the unlawful discharge of a pollutant under the CWA.

⁹⁶Hydropower Policy Modernization Act of 2017, H.R. 3043, 115th Cong. (2017).

⁹⁷Reducing Regulatory Burdens Act of 2017, H.R. 953, 115th Cong. (2017).

⁹⁸Sensible Environmental Protection Act of 2017, S. 340, 115th Cong. (2017).

⁹⁹Discouraging Frivolous Lawsuits Act, H.R. 1179, 115th Cong. (2017).

¹⁰⁰H. R. 2693, 115th Cong. (2017).

Chapter 12 • ENERGY MARKETS AND FINANCE 2017 Annual Report¹

I. FERC INITIATES NEW PROCEEDING AFTER CONSIDERING PROPOSED DOE GRID RESILIENCY RULE

On September 28, 2017, the Secretary of Energy submitted to the Federal Energy Regulatory Commission (FERC or Commission) for final action a proposed Grid Resiliency Pricing Rule (Proposed Resiliency Rule).² The Proposed Resiliency Rule “directed the Commission to consider requiring certain RTOs [Regional Transmission Organizations] and ISOs [Independent System Operators] to establish a tariff mechanism providing for: (1) the purchase of energy from an eligible ‘reliability and resilience resource;’ and (2) the recovery of costs and a return on equity for such resources (i.e., a ‘resilience rate’)”.³ The Proposed Resiliency Rule stated that “eligible reliability and resilience resources must be: (1) located in an RTO/ISO with an energy and capacity market; (2) be able to provide essential reliability services; and (3) have a 90-day fuel supply on-site.”⁴ The Secretary directed the FERC to “take final action on the Proposed Resiliency Rule within 60 days . . . or, alternatively, to issue the DOE’s proposed rule as an interim final rule immediately, with provision for later modification after consideration of public comments.”⁵

In response, the FERC initiated a rulemaking proceeding to consider the Proposed Resiliency Rule, inviting comments and requesting information.⁶ The FERC received comments and responses from “a wide variety of interested stakeholders.”⁷ After requesting, and receiving, a thirty-day extension to address the Proposed Resiliency Rule, on January 8, 2018, the FERC issued an order terminating the rulemaking proceeding initiated in Docket No. RM18-1-000 and initiated a new proceeding in Docket No. AD18-7-000 “to specifically evaluate the resilience of the bulk power system in the regions operated by RTOs and ISOs.”⁸ The FERC stated that, despite the fact that it was

¹This chapter was created by the Energy Markets and Finance Committee. Editors include Shereen Jennifer Panahi, *Vice-Chair of Year in Review*, Miles Kiger, *Committee Co-Chair*. Authors by section include: I. Miles Kiger (“FERC Initiates New Proceeding After Considering Proposed DOE Grid Resiliency Rule”) (*Any views expressed are those of the editor/author, and not necessarily that of FERC, the Commissioners, of the Federal Government); II. Shereen Jennifer Panahi (“Impact of the Tax Cuts and Jobs Act on Electricity Markets”); III. Heather Rosmarin (“California Energy and Climate Law and Policy Update”); IV. Keith Casto (“California’s Cap and Trade Extension Legislation”); V. Shereen Jennifer Panahi (“Kentucky Power Suspends Activity in Demand Side Management Programs”).

²[Notice of Proposed Rulemaking](#), *Grid Resiliency Pricing Rule*, 82 Fed. Reg. 46,940 (Oct. 10, 2017) (to be codified at 18 C.F.R. pt. 35).

³[Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures](#), *Grid Resilience in Regional Transmission Organizations and Independent System Operators*, 162 F.E.R.C. ¶ 61,012 at P 2 (2018) [hereinafter *Grid Resilience in RTOs and ISOs*].

⁴*Id.* at P 2.

⁵*Id.* at P 4.

⁶Request for Information, *Grid Reliability and Resilience Pricing*, Docket No. RM18-1-000 (F.E.R.C. Oct. 2, 2017).

⁷*Grid Resilience in RTOs and ISOs* at P 5.

⁸*Id.* at P 1.

terminating the Proposed Resilience Rule proceeding, it was “not ending [its] work on the issue of resilience,” hence the new proceeding in Docket No. AD18-7-000.⁹

In discussing its reasons for terminating the rulemaking proceeding, the FERC stated “[t]he FPA [Federal Power Act] is clear: in order to require RTOs/ISOs to implement tariff changes as contemplated by the Proposed [Resiliency] Rule, there must be a demonstration that the specific statutory standards of section 206 of the FPA are satisfied[, i.e.,] that the existing RTO/ISO tariffs are unjust, unreasonable, unduly discriminatory or preferential.”¹⁰ The FERC explained that the Proposed Resiliency Rule failed to meet the statutory requirements of the FPA because the allegation of grid reliability or resilience issues due to the retirement of particular resources does not demonstrate the unjustness or unreasonableness of the existing RTO/ISO tariffs.¹¹ As support, the FERC stated that the comments of the RTOs and ISOs themselves did not point to any threats to grid resilience due to generator retirements.¹²

The FERC also explained that section 206 of the FPA requires that any proposed remedy must be shown to be just, reasonable, and not unduly discriminatory or preferential, as well.¹³ The FERC pointed out that the Grid Resilience Rule “would allow all eligible generation resources to receive a cost-of-service rate regardless of need or cost to the system,”¹⁴ but that neither the record nor the Grid Resilience Rule itself demonstrate that such an outcome would be just and reasonable and would not be unduly discriminatory or preferential.¹⁵ The FERC found that there was an inadequate explanation as to why the existence of an on-site 90-day fuel supply is a reasonable basis to pay a cost-of-service rate to eligible resources, as well as a failure to address the concern that an eligible resource located in a constrained area actually may not assist with the resilience of the bulk power system.¹⁶ The FERC further found that the on-site 90-day fuel supply requirement appears to “permit only certain resources to be eligible for the rate, thereby excluding other resources that may have resilience attributes.”¹⁷

Despite its termination of the rulemaking proceeding, the FERC concluded that the Proposed Rule and the record “shed additional light on resilience more generally and on the need for further examination by the Commission and market participants of the risks that the bulk power system faces and possible ways to address those risks in the changing electric markets.”¹⁸ Therefore, the FERC initiated a new proceeding “to take additional steps to explore resilience issues in the RTOs/ISOs,” with the goal of the proceeding to: “(1) to develop a common understanding among the Commission, industry, and others of what resilience of the bulk power system means and requires; (2) to understand how each RTO and ISO assesses resilience in its geographic footprint; and (3) to use this information to evaluate whether additional Commission action regarding resilience is appropriate at this time.”¹⁹ The FERC directed “each RTO and ISO to submit specific information

⁹*Id.* at P 13.

¹⁰*Id.* at P 14 (citing [Emera Maine v. FERC](#), 854 F.3d 9, 25 (D.C. Cir. 2017); [FirstEnergy Serv. Co. v. FERC](#), 758 F.3d 346, 353 (D.C. Cir. 2014)).

¹¹*Id.* at P 15.

¹²*Grid Resilience in RTOs and ISOs* at P 15.

¹³*Id.* at P 16.

¹⁴*Id.* (noting “the Commission typically has approved as just and reasonable cost-of-service rates through out-of-market arrangements in very limited circumstances and when there is a demonstrated reliability need.”)

¹⁵*Id.*

¹⁶*Id.* at n.27.

¹⁷*Grid Resilience in RTOs and ISOs* at P 16.

¹⁸*Id.*

¹⁹*Id.* at P 18.

regarding the resilience of its respective region within 60 days,” with reply comments due within 30 days of those submissions.²⁰

With respect to the FERC’s goal of developing a common understanding of what resilience of the bulk power system means and requires, the FERC stated that it understands resilience to mean “[t]he ability to withstand and reduce the magnitude and/or duration of disruptive events, which includes the capability to anticipate, absorb, adapt to, and/or rapidly recover from such an event.”²¹ The FERC stated that “resilience could encompass a range of attributes, characteristics, and services” that basically requires (1) the determination of which risks to the grid to protect against, and (2) the identification of the steps, if any, needed to ensure those risks are addressed.²²

In terms of understanding how each RTO and ISO assesses resilience in its geographic footprint, the FERC directed the RTOs/ISOs to address a lengthy list of questions on this issue and “to highlight any unique resilience challenges that exist in their respective regions.”²³ Finally, the FERC asked the RTOs/ISOs to describe how they mitigate threats to resilience and sought comment on several questions.²⁴

In conclusion, the FERC stated “the topic of the new proceeding - resilience of the bulk power system - will remain a priority of the Commission and we expect to review the additional material and promptly decide whether additional Commission action on this issue is warranted.”²⁵

II. IMPACT OF THE TAX CUTS AND JOBS ACT ON ELECTRICITY MARKETS

In the last few weeks of 2017, Congress passed the largest [tax reform bill](#) in thirty years.²⁶ Among the reforms are a reduction in the corporate income tax rate from 35% to 21%, an allowance of full and immediate expensing of certain capital costs for five years, and an increase in the capital costs expensing cap to \$1 million.²⁷ These changes could free up funds that could be used as a source of zero cost financing for much needed infrastructure investments, or be used to other offset large, unusual expenses.²⁸ The availability of these funds, however, are already being challenged.

Fearing that electric utilities will bypass their duty to ensure just and reasonable rates for customers in exchange for lining their coffers, consumer advocacy groups in states such as Delaware, Massachusetts, and Kansas have already filed petitions with their state public utility commissions to amend current rates to prevent electric utility companies from reaping a windfall from the recent tax cuts.²⁹ These petitioners seek to ensure that

²⁰*Id.* at PP 18-19.

²¹*Id.* at P 23 (stating that this definition is generally based on the National Infrastructure Advisory Council’s *Critical Infrastructure Resilience Final Report and Recommendations* at 8 (Sept. 8, 2009)).

²²*Grid Resilience in RTOs and ISOs* at P 24.

²³*Id.* at P 25 (listing question (a) through (s)).

²⁴*Id.* at P 27 (listing question (a) through (e)).

²⁵*Id.* at P 28.

²⁶David Morgan & Amanda Becker, [House Gives Final Approval to Tax Bill, Delivering Victory to Trump](#), THOMSON REUTERS (Dec. 19, 2017).

²⁷*Id.*; see Pet. of the Del. Div. of the Pub. Advocate to Reduce the Rates of Regulated Utils. as a Result of the Tax Cuts and Jobs Act of 2017’s Reduction in Corporate Income Tax and Other Tax Changes, PSC Docket No. 17-1240 (Dec. 27, 2017).

²⁸[How the GOP Tax Overhaul Could Affect the Power Sector](#), UTILITYDIVE (Dec. 18, 2017); [Montana Regulators Ask Utilities to Account for Tax Cuts](#), ASSOCIATED PRESS (Dec. 27, 2017).

²⁹See, e.g., Petition of the Delaware Division of the Public Advocate to Reduce the Rates of Regulated Utilities as a Result of the Tax Cuts and Jobs Act of 2017’s Reduction in

ratepayers receive the benefits of the new tax reform law, either in an immediate reduction off their monthly bills, or over the long term through mitigating the increase in rates in the future.³⁰ Since federal corporate income tax expenses are included in an electric utility's calculation of its "cost of service" expense, which is then used to determine an electric utility's total revenue requirement, a decrease in the federal corporate income tax will result in a lower total revenue requirement.³¹ On this basis, consumer advocacy groups argue that customers are owed the difference in the tax liability of their electric utilities from the current law and the new tax reform law. Thus, consumer advocacy groups claim that current rates reflect the utilities' recoupment of a 35% federal corporate income tax rate, yet will only be required to pay 21% of that tax for the 2017 tax year.³²

In other states, such as Montana and Kentucky, public utility commissions have begun directing their regulated utilities to calculate the change in tax liability they expect under the new law, and submit proposals for how the utilities would apply the savings.³³ The primary impetus for issuing such orders before the end of the year is for the state commissions to preserve their authority to determine how those additional revenues will be spent.³⁴ While these orders require for-profit utilities to begin tracking their income tax savings immediately, state public service commissions recognize that the exact amount of savings cannot be determined with precision at this time, as the actual benefits have not yet been realized by their regulated utilities.³⁵ Some states, such as Kentucky, have gone as far as directing their utilities to submit testimony concerning the impacts of the federal tax cuts on their financial planning or even ordering an accounting audit.³⁶ However, in light of the petitions filed by public advocacy groups seeking immediate revenue and rate reductions, some utilities have requested an extension to submit testimony in order to first address complainants' petitions.³⁷

Corporate Income Tax and Other Tax Changes, PSC Docket No. 17-1240 (Dec. 27, 2017); Nick Viviani, [KCC Exploring How Tax Reform Could Affect Utility Rates; Kobach Calls for Cuts](#), ASSOCIATED PRESS (Dec. 29, 2017); [Press Release](#), Mass. Office of the Atty. Gen. Maura Healey, AG Healey Calls for Corporate Windfall to Go to Customers, Not Eversource (Dec. 21, 2017).

³⁰Notice of Comm'n Action, *In the Matter of the Investigation of Federal Tax Reform Impacts on Public Utility Revenue Requirements*, Docket No. N2017.12.94 Dept. of Pub. Serv. Regulation before the Pub. Serv. Comm'n of the State of Montana (Dec. 29, 2017); Order, *In the Matter of: An Investigation of the Impact of the Tax Cuts and Jobs Act on the Rates of Atmos Energy Corp., et al.*, Case No. 2017-00481, 2017 WL 6730075 (Ky. P.S.C.), Slip Copy (Dec. 27, 2017).

³¹See Attachment B, Order, *In the Matter of: Ky. Indus. Utility Customers, Inc. v. Ky. Utilities Co., et al.*, Case No. 2017-00477, Ky. Pub. Serv. Comm'n (Dec. 27, 2017).

³²*Id.*

³³Notice of Comm'n Action, *In the Matter of the Investigation of Federal Tax Reform Impacts on Public Utility Revenue Requirements*, Docket No. N2017.12.94 (Mont. Pub. Serv. Comm'n Dec. 29, 2017); Order, *In the Matter of: An Investigation of the Impact of the Tax Cuts and Jobs Act on the Rates of Atmos Energy Corp., et al.*, Case No. 2017-00481, 2017 WL 6730075 (Ky. P.S.C.), Slip Copy (Dec. 27, 2017); [Press Release](#), Ky. Pub. Serv. Comm'n, PSC to Determine Rate Reductions Resulting from Federal Corporate Tax Cut (Dec. 28, 2017).

³⁴[Montana Regulators Ask Utilities to Account for Tax Cuts](#), ASSOCIATED PRESS (Dec. 27, 2017).

³⁵[Press Release](#), Ky. Pub. Serv. Comm'n, PSC to Determine Rate Reductions Resulting from Federal Corporate Tax Cut (Dec. 28, 2017).

³⁶*Id.*

³⁷*Id.*

Yet other public utility commissions have not taken action, and may elect to wait until their regulated utilities submit applications for deferred accounting of benefits associated with the new tax law in future ratemaking proceedings.³⁸ This has occurred in Oregon, where a number of regulated utilities have filed deferred accounting applications with the Oregon Public Utility Commission on the basis that a deferral will “minimize the frequency of rate changes and/or match appropriately the costs borne by and benefits received by customers” that may otherwise occur in response to the lengthy and complex federal tax law.³⁹

Whether the Oregon Public Utility Commission and other states will grant these deferral requests remains an open question. Regardless of the route each state’s public utility regulators choose to follow, the key question going forward for state regulators will be deciding whether all of the new tax savings should be returned to customers, or whether a portion should be used to offset future rate increases through infrastructure investments. While updates to the nation’s electricity infrastructure are sorely needed, it is likely that state regulators will favor granting rate reductions for ratepayers under their applicable “just and reasonable rates” mandate. With the new tax law going into effect on January 1, these challenging questions are likely to dominate the public utility rate cases throughout 2018.

III. CALIFORNIA ENERGY AND CLIMATE LAW AND POLICY UPDATE

A. *Introduction*

California’s notable 2017 energy and climate law and policy developments included legislation to extend the state’s cap-and-trade market program and to encourage deployment of energy storage technologies and renewable microgrids. Significant non-legislative policy actions in 2017 included the adoption by the California Air Resources Board (CARB) of an updated strategy for reducing the state’s greenhouse gas emissions to 40% below 1990 levels by 2030 and approval of significant infrastructure investment for zero emission vehicles. Below are summaries of developments in key legal frameworks that influence California’s energy markets.

B. *Renewable Electricity Market*

Renewables Portfolio Standard: California’s Renewables Portfolio Standard (RPS) requires the state’s load-serving entities (LSEs) to procure a specific percentage of electricity from renewable resources.⁴⁰ The current procurement targets, codified by [Senate Bill 350](#) in 2015, are 33% of retail sales by 2020 and 50% by 2030.⁴¹ In December 2017, the California Energy Commission (CEC) reported that California’s LSEs are ahead of schedule with “about 30 percent of 2017 retail electricity sales in California ... served by renewable energy facilities, such as wind, solar, geothermal, biomass, and small hydroelectric.”⁴² The CEC also estimates that “wind and solar together account for more than 67 percent of all renewable electricity generation, with geothermal, biomass, and small hydroelectric generators accounting for the remainder.”⁴³

³⁸See, e.g., Petition, *In the Matter of the Application of Portland General Electric Company for an Order Approving the Deferral of 2018 Net Benefits Associated with the U.S. Tax Reconciliation Act* (Ore. Pub. Util. Comm’n Dec. 29, 2017).

³⁹*Id.*

⁴⁰Cal. Energy Comm’n, [Renewables Portfolio Standard \(RPS\)](#) (last visited Apr. 30, 2018).

⁴¹Clean Energy and Pollution Reduction Act of 2015, SB 350, 2015-16 Sess. (Cal. 2015).

⁴²CAL. ENERGY COMM’N, [Tracking Progress: Renewable Energy](#) 1 (2017).

⁴³*Id.* at 2.

In 2017, an ambitious proposal to establish a 100% RPS by 2045 passed the State Senate but stalled in the State Assembly.⁴⁴ Thus, California’s RPS did not change in 2017, but the proposal to increase the state’s RPS policy to 100% may return in 2018.

Renewable Distributed Generation: Progress towards California’s renewable distributed generation goal of 12,000 megawatts (MW) by 2020⁴⁵ is advancing through a dynamic combination of state and local policy mechanisms.⁴⁶ “As of November 1, 2017, almost 10,520 MW of distributed generation capacity was operating or installed in California, with an additional 440 MW pending,” including about 5,900 MW of behind-the-meter solar, according to the CEC.⁴⁷

Microgrids: In 2017, California took several important steps to incentivize commercialization of microgrids. For example, the state offered grants totaling \$44.7 million for commercial microgrid designs that can be standardized and replicated at a diverse array of sites.⁴⁸ State policy specifically aims to encourage microgrids that integrate clean energy technologies: [Assembly Bill 1400](#), passed in 2017, prohibits microgrid deployment projects developed with funding from certain state programs from using the funds to purchase fossil fuel generators.⁴⁹ In a statement, Assembly member Laura Friedman, the bill’s sponsor, noted that the bill’s purpose is to reduce dependence on fossil fuels because “[w]hile the microgrids typically incorporate renewable sources of energy, many also rely on diesel generators for back-up power.”⁵⁰ Also in 2017, the CEC, the California Public Utilities Commission, and the California Independent System Operator held multiple workshops and hearings to develop a Roadmap for the Commercialization of Microgrids in California.⁵¹

Community Choice Aggregators: The rise of community choice aggregators (CCAs) is one of the factors driving “unprecedented change” in California’s retail electricity market, according to a 2017 analysis by California Public Utilities Commission (CPUC) staff.⁵² This analysis found that “[b]etween rooftop solar, Community Choice Aggregators (CCAs) and Direct Access providers (ESPs), as much as 25% of Investor Owned Utility (IOU) retail electric load will be effectively unbundled and served by a non-IOU source or provider sometime later this year.”⁵³ CCAs are governmental entities formed by cities and counties to serve the aggregated electricity demand (or “load”) of their local residents and businesses while the existing utility remains responsible for transmission, distribution, and billing. At the end of 2017, eight CCAs were collectively serving more than 900,000 customers in California, and seven new CCAs are projected to

⁴⁴[SB 100](#), Reg. Sess., 2017-18 Sess. (Cal. 2017).

⁴⁵BROWN, EDMUND G., JR., [Clean Energy Jobs Plan](#) 3 (2011). See also CAL. ENERGY COMM’N, *supra* note 42, at 3-5 (discussing progress towards Governor Brown’s goal of 12,000 MW of renewable distributed generation).

⁴⁶Heather Rosmarin, Exec. Dir., InterAmerican Clean Energy Inst., [California’s Experience With Decentralized Clean Energy Systems: An Overview of State and Local Policies](#), Presentation at the International Public Policy Association 3rd International Conference on Public Policy (June 30, 2017).

⁴⁷CAL. ENERGY COMM’N, *supra* note 42, at 5.

⁴⁸Elisa Wood, [California Releases \\$44.7 Million for Microgrid Grants; Applications Due Oct. 31](#), MICROGRID KNOWLEDGE (Aug. 7, 2017).

⁴⁹[AB 1400](#) Reg. Sess., 2017-2018 Sess. (Cal. 2017).

⁵⁰Press Release, [Cal. State Assembly Democratic Caucus, Asm. Friedman’s Clean Energy Bills Pass the Assembly](#) (May 30, 2017).

⁵¹Cal. Energy Comm’n, [California Microgrid Roadmap](#) (last visited Apr. 30, 2018).

⁵²CAL. PUB. UTIL. COMM’N, [STAFF WHITE PAPER: CONSUMER AND RETAIL CHOICE, THE ROLE OF THE UTILITY, AND AN EVOLVING REGULATORY FRAMEWORK](#) at 3 (2017).

⁵³*Id.*

launch in 2018.⁵⁴ CCAs often offer electricity customers more renewable energy than is required by the state RPS.

C. 2017 Climate Change Scoping Plan Update

In 2017, the CARB approved an updated scoping plan for reducing GHG (greenhouse gas) emissions (Scoping Plan).⁵⁵ The Scoping Plan outlines a strategy for achieving statewide reduction of GHG emissions to 40% below 1990 levels by 2030 in compliance with [Senate Bill 32](#) (SB 32).⁵⁶ SB 32, adopted in 2016, extended the goal of [Assembly Bill 32](#)⁵⁷ (AB 32), adopted in 2006. AB 32 required the state to reduce emissions to 1990 levels by 2020, a target that California is projected to meet early.⁵⁸

The Scoping Plan contains a portfolio of regulatory and market-based strategies designed to cap California's GHG emissions at 260 MMTCO_{2e} per year by the end of 2030.⁵⁹

[The] Scoping Plan projects that these and other 'direct' regulatory strategies will take the State of California 62% of the way towards achieving SB 32's mandated GHG emission reductions by 2030 [and] relies on an expanded cap-and-trade program, covering California industries responsible for 80% of the state's overall GHG emissions, to achieve the remaining 38% of the emission reductions needed to reach the 40% 2030 emission reduction targets required under SB 32.⁶⁰

The Scoping Plan specifically identifies the following legislative policies as key elements of the state's climate change program:

40% reduction in GHG emissions by 2030; 50% renewable electricity; Double energy efficiency savings; Support for clean cars; Integrate land use, transit, and affordable housing to curb auto trips; Prioritize direct reductions; Identify air pollution, health, and social benefits of climate policies; Slash "super pollutants"; Protect and manage natural and working lands; Invest in disadvantaged communities; and Strong support for Cap-and-Trade.⁶¹

In addition, California continues to play a leading role on climate policy nationally and internationally through such mechanisms as the Under2 Coalition, a group of subnational governments that have signed a memorandum of understanding to reduce GHG emissions.⁶² In 2017, California's Governor Edmund G. (Jerry) Brown, Jr. co-founded the U.S. Climate Alliance, a bi-partisan alliance of U.S. states and territories committed to

⁵⁴CAL. ENERGY COMM'N, *supra* note 42, at 8.

⁵⁵CAL. AIR RES. BD., [CALIFORNIA'S 2017 CLIMATE CHANGE SCOPING PLAN: THE STRATEGY FOR ACHIEVING CALIFORNIA'S 2030 GREENHOUSE GAS TARGET](#) (2017).

⁵⁶[California Global Warming Solutions Act of 2006: emissions limit, SB 32, Reg. Sess., 2015-16 Sess. \(Cal. 2016\)](#).

⁵⁷Air pollution: greenhouse gases: California Global Warming Solutions Act of 2006, AB 32, Reg. Sess., 2005-06 Sess. (Cal. 2006).

⁵⁸Richard Frank, [California Doubles Down on Its Commitment to Reduce State Greenhouse Gas Emissions](#), LEGALPLANET (Dec. 14, 2017).

⁵⁹CAL. AIR RES. BD., *supra* note 55, at 27.

⁶⁰Frank, *supra* note 58.

⁶¹CAL. AIR RES. BD., *supra* note 55, at ES6.

⁶²UNDER2 COALITION, <http://under2mou.org/coalition/> (last visited Apr. 30, 2018).

achieving the GHG reduction goals of the Paris Agreement.⁶³ The U.S. Climate Alliance was formed in response to the Trump Administration’s announcement of its intent to withdraw the United States from the Paris Agreement.⁶⁴ Governor Brown also announced in 2017 that California will host an international Global Climate Action Summit in 2018.⁶⁵

D. Emissions Trading System (Cap and Trade)

In 2017, California passed [Assembly Bill 398](#) (AB 398),⁶⁶ which authorized continuation of the CARB’s cap-and-trade program through December 31, 2030 with modifications, described further in Section IV below “California’s Cap and Trade Extension Legislation.”⁶⁷ Cap-and-trade is a market-based mechanism designed to reduce GHGs by setting a firm limit, or “cap,” on GHG emissions. The cap declines over time, and trading of emissions allowances between regulated entities on the carbon market establishes a price on carbon. California’s cap-and-trade system is the fourth largest in the world⁶⁸ and applies to approximately 450 electricity generators, large industrial facilities, and distributors of transportation fuels and natural gas.⁶⁹ Since inception, the cap-and-trade program has been controversial with some in the business and environmental communities.⁷⁰ In an attempt to address environmental justice concerns, [Assembly Bill 617](#)⁷¹ was also passed in 2017 as a companion to AB 398 “to strengthen air quality monitoring and reduce air pollution at a community level, in communities affected by a high cumulative burden of exposure to pollution.”⁷²

E. Energy Storage Mandates and Incentives

In 2017, California, which has the largest energy storage market in the United States⁷³ and already requires utilities to procure more than 1.3 gigawatts (GW) of energy storage by 2020,⁷⁴ passed two new bills to encourage further deployment of energy storage

⁶³UNITED STATES CLIMATE ALLIANCE, <https://www.usclimatealliance.org/> (last visited Apr. 30, 2018).

⁶⁴Michael D. Shear, [Trump Will Withdraw U.S. From Paris Climate Agreement](#), N.Y. TIMES (June 1, 2017).

⁶⁵GLOBAL CLIMATE ACTION SUMMIT, <https://globalclimateactions summit.org/> (last visited Apr. 30, 2018).

⁶⁶California Global Warming Solutions Act of 2006: market-based compliance mechanisms: fire prevention fees: sales and use tax manufacturing exemption, AB 398, Reg. Sess., 2017-18 Sess. (Cal 2017).

⁶⁷CAL. AIR RES. BD., *supra* note 55, at 26.

⁶⁸[California Cap and Trade](#), CTR. FOR CLIMATE & ENERGY SOLUTIONS (last visited Apr. 30, 2018).

⁶⁹CAL. ENVTL. PROT. AGENCY | AIR RES. BD., [Overview of ARB Emissions Trading Program](#) at 1 (2015).

⁷⁰Dale Kasler, [California’s Cap-and-Trade Program Is Costly, Controversial. But How Does It Work?](#), THE SACRAMENTO BEE (July 19, 2017).

⁷¹Nonvehicular air pollution: criteria air pollutants and toxic air contaminants, AB 617, Reg. Sess. 2017-18 Sess. (Cal. 2017).

⁷²CAL. AIR RES. BD., *supra* note 55, at 26.

⁷³CAL. ENERGY COMM’N, [TRACKING PROGRESS: ENERGY STORAGE](#) at 1 (2017).

⁷⁴[Energy Storage](#), CAL. PUB. UTIL. COMM’N (last visited Apr. 30, 2018). *See also* Heather Rosmarin, [California Proposes First-in-Nation Grid-Scale Energy Storage Targets](#), BERKELEY ENERGY AND RESOURCES COLLABORATIVE (Sept. 23, 2013) (discussing California’s energy storage targets and timelines).

technologies.⁷⁵ [Assembly Bill 546](#)⁷⁶ is intended to streamline the approval process for new storage installations by requiring, *inter alia*, cities and counties to accept online submissions of storage project applications.⁷⁷ [Senate Bill 801](#)⁷⁸ requires publicly owned utilities in the Los Angeles Basin to support deployment of distributed energy resources and energy storage and reduce the region's reliance on gas-fired generation. The CEC reports that, as of February 2017, California utilities have procured more than 475 MW of energy storage.⁷⁹ Energy storage technologies are a priority for the state because they improve grid flexibility and reliability and are particularly important for integrating high levels of intermittent renewable energy such as wind and solar. In 2017, the CPUC allocated about 80% of Self-Generation Incentive Program funding to energy storage.⁸⁰

F. Zero Emission Vehicles

As of May 2017, nearly 300,000 zero-emission vehicle (ZEV) and plug-in hybrid electric vehicles (PHEV) have been sold in California, approximately half of the 600,000 ZEVs and PHEVs in the United States.⁸¹ By executive order, California's goal is that "[o]ver 1.5 million zero-emission vehicles will be on California roads" by 2025.⁸²

Electric Vehicle Infrastructure: ZEV electric infrastructure in California now includes more than 10,000 Level 2 and 1,500 direct current fast charger connectors.⁸³ In 2017, the CEC awarded \$2.1 million in grants for regional readiness planning "to streamline the permitting process for future ZEV infrastructure, promote regional coordination through the establishment of ombudsman positions, conduct siting analysis, establish best practices for 'ZEV-ready' building and public works guidelines, and provide public ZEV education and outreach."⁸⁴

2017 Volkswagen (VW) Settlement Fund Investment Plan: As part of a settlement⁸⁵ in connection with VW's diesel vehicle emission control tampering, California will receive about \$1.2 billion for air pollution reduction and ZEV advancement projects from VW, including \$800 million that VW will invest in ZEV-related programs.⁸⁶ The ZEV program investment will occur over a 10-year period, and eligible projects include fueling infrastructure consumer awareness campaigns, and car-sharing programs.⁸⁷ VW will submit four ZEV investment plans, valued at up to \$80 million per year, to the CARB. In July 2017, the CARB approved the first of the four plans.⁸⁸

2017 ARFVTP Investment Plan: The CEC's Alternative and Renewable Fuel and Vehicle Technology Program (ARFVTP) is a "competitive grant program that provides as

⁷⁵CAL. ENERGY COMM'N, *supra* note 73, at 1.

⁷⁶Land use: local ordinances: energy systems, AB 546, Reg. Sess., 2017-18 Sess. (Cal. 2017).

⁷⁷Peter Maloney, [California Energy Storage Siting Bill Signed Into Law](#), UTILITYDIVE (Oct. 4, 2017).

⁷⁸SB 801, Reg. Sess., 2017-18 Sess. (Cal. 2017) (Amending Cal Gov't Code § 972).

⁷⁹CAL. ENERGY COMM'N, *supra* note 73 at 1.

⁸⁰*Id.* at 2.

⁸¹CAL. ENERGY COMM'N, [TRACKING PROGRESS: ZERO-EMISSION VEHICLES AND INFRASTRUCTURE](#) at 4 (2017).

⁸²[Cal. Exec. Order No. B-16-2012](#) (Mar. 23, 2012).

⁸³CAL. ENERGY COMM'N Zero-Emission, *supra* note 81 at 4.

⁸⁴*Id.* at 17.

⁸⁵CAL. AIR RES. BD., [Volkswagen Settlement Implementation](#) (Sept. 28, 2017).

⁸⁶CAL. AIR RES. BD., [Volkswagen Settlement – California ZEV Investments](#) (Dec. 11, 2017).

⁸⁷CAL. ENERGY COMM'N, *supra* note 81 at 3.

⁸⁸CAL. AIR RES. BD. ZEV Inv., *supra* note 86.

much as \$100 million annually towards innovative transportation and fuel technologies that help California meet its energy, clean air, and climate-change goals.”⁸⁹ With funds collected from registration, license plate, and smog-abatement fees, the ARFVTP provides up to \$100 million per year for projects that will “transform California’s fuel and vehicle types to help attain the state’s climate change policies.”⁹⁰ In April 2017, the CEC adopted the *2017-2018 Investment Plan Update for the Alternative and Renewable Fuel and Vehicle Technology Program*, which identifies the funding priorities for the coming fiscal year.⁹¹

IV. CALIFORNIA’S CAP AND TRADE EXTENSION LEGISLATION

[The California Global Warming Solutions Act of 2006](#) (otherwise known as “AB 32”) established a system of market-based annual aggregate emissions limits for categories of sources that emit greenhouse gases (“GHGs”).⁹² Carbon credits in the form of allowances for regulated sources and offsets for unregulated sources such as forestry and agriculture were then sold through auctions with the resulting revenue being used by the state for a variety of purposes designed to advance the reduction of GHGs and the development of renewable energy.

By its terms, this program was set to expire in 2020. However, by executive orders issued by both Governors Arnold Schwarzenegger and Jerry Brown, this program was extended to 2020.⁹³ In addition, this was legislatively extended in 2016 by [Senate Bill 32](#) and [Assembly Bill 197](#).⁹⁴ However, these bills were passed by a bare majority, thereby preserving the constitutional argument raised by the California Chamber of Commerce and others in litigation that the auction proceeds of the cap and trade program constituted an illegal tax because it lacked the necessary two-thirds legislative support. This argument was still pending on appeal to the California Supreme Court after a State intermediate appellate court decision in 2017 in favor of the California Air Resources Board (“CARB”).⁹⁵ In July 2017, after intense negotiation by a number of environmental, industrial and local and regional governmental stakeholders, Governor Jerry Brown signed into law a comprehensive “grand bargain” package of environmental legislation designed to address both the extension of the cap and trade program and environmental justice concerns about the local impacts of air pollution on economically disadvantaged communities.⁹⁶ This compromise legislation encompassed a series of tradeoffs and checks and balances in order to gain the signoff of all or most of the involved stakeholders.

The package was comprised of three separate bills, including a state constitutional amendment. Taken as a whole, it extended and revised California's far reaching cap and trade climate change regulatory program, enacted a new community based regulatory approach for toxic air contaminants and criteria pollutants, and created a constitutional

⁸⁹[California’s Alternative & Renewable Fuel & Vehicle Technology Program](#), CAL. ENERGY COMM’N (last visited Apr. 30, 2018).

⁹⁰CAL. ENERGY COMM’N, [Lead Commissioner Report 2017-2018 Investment Plan Update for the Alternative and Renewable Fuel and Vehicle Technology Program](#) (Mar. 2017).

⁹¹CAL. ENERGY COMM’N, [Commission Report 2017-2018 Investment Plan Update for the Alternative Fuel and Vehicle Technology Program](#) (May 2017).

⁹²SB 32, Reg. Sess., 2015-16 Sess. (Cal. 2016) (Adding Cal Gov’t Code § 38566).

⁹³[California Climate Change Executive Orders](#), CAL. CLIMATE CHANGE (last visited Apr. 30, 2018).

⁹⁴SB 32, *supra* note 56; AB 197, Reg. Sess., 2015-16 Sess. (Cal. 2016).

⁹⁵[Cal. Chamber of Commerce v. State Air Res. Bd.](#), 216 Cal. Rptr. 3d 694, 730 (Cal. Ct. App. 2017).

⁹⁶[Governor Brown Signs Landmark Climate Bill to Extend California's Cap-and-Trade Program](#), Office of Governor of California (July 25, 2017).

vehicle for approval of future uses of the proceeds of auctions of carbon credits. Since the legislation was passed by a two-thirds, somewhat bipartisan, vote of the legislature (eight Republicans voted for passage), the pending litigation challenging the cap and trade program on statutory and state constitutional bases was effectively mooted.

One bill, [AB 398](#), extended the California cap and trade program from 2020 to 2030 on basically the same terms as the original program with the addition of price ceilings and price containment points designed to prevent price spikes which would destabilize carbon markets.⁹⁷ AB 398 also extended the current free allowance methodology and provided for industry assistance factors in order to prevent over-allocation of allowances. Any unsold allowances would be transferred to Allowance Price Containment Reserve. AB 398 did alter the rules for offsets somewhat by mandating the increase of offset projects with direct environmental benefits to the State while prioritizing certain stakeholders: economically disadvantaged communities, Native American or tribal lands, and rural and agricultural regions. Finally, AB 398 limited the authority of local air districts to regulate carbon dioxide for sources which are already regulated by the cap and trade program.

[AB 617](#) is designed to address the concerns of the environmental justice advocacy groups about economically disadvantaged communities which may be disproportionately impacted by toxic air contaminants and criteria pollutants.⁹⁸ Traditionally, criteria pollutants in California have been regulated in accordance with the ambient air quality control region approach of the federal [Clean Air Act](#). AB 617 now approaches both criteria pollutants and toxic air contaminants on a local receptor-based approach which focuses on impacts to the local community. AB 617 uses local air district and CARB emissions databases and enhanced community-focused “fence line” air quality monitoring to establish community emission reduction plans with a particular focus on highly impacted communities and sensitive receptors such as hospitals, schools and day care centers.

AB 617 requires air districts in ambient air quality nonattainment areas to implement expedited schedules for best available retrofit control technology (“TBARCT”) for industrial sources subject to the cap and trade program with the highest priority for those permitted units that have not modified emissions-related permit conditions for the greatest period of time. CARB is required to establish and maintain a statewide clearinghouse that identifies TBARCT for criteria pollutants and toxic air contaminants. Finally, AB 617 significantly increases civil penalties for violations of applicable regulatory emission limits.

The last part of the package is Assembly Constitutional Amendment No. 1 which would require appropriations of certain cap and trade auction proceeds to pass by two-thirds vote.⁹⁹ California has vigorously pursued formal strategic cap and trade program alliances with other states, Canadian provinces such as Quebec and Ontario, and Mexican states through the Western Climate Initiative. Informally, California has also entered into an informal relationship with a number of international subnational units through the “Under Two MOU” to develop reciprocal informational and technology development initiatives to implement the goals of the Paris Climate Change Agreement notwithstanding the formal withdrawal of the United States from the Agreement.¹⁰⁰ This unique and creative package is designed to address these global concerns as well as the local concerns of highly impacted communities in California.

V. KENTUCKY’S SUSPENSION OF ACTIVITY IN DEMAND SIDE MANAGEMENT PROGRAMS

⁹⁷AB 398, Reg. Sess., 2017-18 Sess. (Cal. 2017).

⁹⁸AB 617, Reg. Sess., 2017-18 Sess. (Cal. 2017).

⁹⁹A. Constitutional Amendment 1, Reg. Sess., 2017-18 Sess. (Cal. 2017).

¹⁰⁰[Memorandum of Understanding \(MOU\)](#), Global Climate Leadership (2017).

Over the course of last year, significant changes have occurred in relation to the Kentucky Public Service Commission’s (“PSC” or “Commission”) demand-side management (DSM) programs serving a region facing declining load and whose price spikes have exacerbated financial strains on the area’s low-income customers. After the PSC opened an investigation into the reasonableness of Kentucky Power Company’s DSM programs in February, the Commission ultimately decided to suspend the programs until further notice.¹⁰¹

The investigation was opened in response to Kentucky Power’s approximately 2,000% increase during 2016 in the residential DSM rates charged to customers, and “in light of the worsening economic conditions in its service territory.”¹⁰² During 2016, the monthly average DSM rate grew from \$0.51 to \$10.61 after the Commission approved a series of DSM program modifications and rates for Kentucky Power Company.¹⁰³ Aware of the price sensitivity of Kentucky Power’s approximately 168,000 customers located in Eastern Kentucky – a region experiencing a shaky transition from coal power to alternative power sources – the PSC determined that an immediate review of the efficacy of existing DSM programs was necessary to ensure that they are serving their purpose in mitigating the impact of price fluctuations associated with the move away from coal power.¹⁰⁴ In an area where 30.2% of residents living in Kentucky Power’s service territory live below the poverty line, the PSC’s intervention represents a proactive step in the state’s effort to ensure electricity and heating rates remain affordable for consumers.¹⁰⁵

Part of the motivation for Kentucky Power’s price increases came in response to suffering the loss of thousands of customers and substantial electric load during the past 15 years.¹⁰⁶ Over the next 15 years, Kentucky Power expects its energy demands to decrease at a rate of 0.2% per year, and its peak demand to decline at a rate of 0.3% per year.¹⁰⁷ At the same time, Kentucky Power has increased its annual spending on DSM over 100% in the past three years in accordance with a non-unanimous stipulation agreement with Kentucky Industrial Utility Customers, Inc., and the Sierra Club, among others, to acquire an interest in a nearby West Virginia plant to replace generation that had been lost from the retirement of another unit.¹⁰⁸ The stipulation agreement at issue provided that Kentucky Power’s DSM spending would increase from \$3 million in 2013 to \$6 million by 2018.¹⁰⁹ Although the PSC acknowledged that “DSM programs may benefit some customers by reducing their total electricity bills,” it recognized that funding DSM programs may not be necessary during periods of declining load, where those funds may better serve the public interest by remaining in consumers’ pockets.¹¹⁰

In early November, the Commission issued an order providing for the release of existing third-party residential DSM contracts upon their expiration date, relieving Kentucky Power of “any obligation to renew, extend, or replace the contracts, or enter into

¹⁰¹Order, *In the Matter of: Electronic Investigation of the Reasonableness of the Demand Side Management Programs and Rates of Kentucky Power Company*, Case No. 2017-00097 (Ky. Pub. Serv. Comm’n Feb. 23, 2017) (hereafter “Ky. Power Order”).

¹⁰²*Id.* at 1.

¹⁰³*Id.* at 1-2.

¹⁰⁴*Id.* at 3-4.

¹⁰⁵*Id.* at 4.

¹⁰⁶Ky. Power Order, at 4.

¹⁰⁷*Id.* at 4-5.

¹⁰⁸*Id.* at 5.

¹⁰⁹*Id.*

¹¹⁰*Id.* at 6.

other DSM contracts” pursuant to maintaining the stipulated \$6 million spending levels.¹¹¹ Kentucky Power, in turn, filed its notice to the Commission a few weeks later indicating its intent to suspend all new activity in connection with its DSM programs, as well as its intent to evaluate its 2017 to-date DSM spending, incentives, and lost revenues.¹¹² However, given the time delay “between acceptance or approval of a customer’s project in a DSM program and the reimbursement of DSM costs or payment rebates,” in its latest order, the Commission clarified its approval of permitting Kentucky Power’s continued spending “for those projects that were already in progress or accepted” prior to the date of its suspension order.¹¹³ This continuation of spending does not extend to those projects merely on Kentucky Power’s “waitlist,” unless Kentucky Power can demonstrate that those “customers were actually notified that their respective projects were accepted or approved for reimbursement” prior to the Commission’s order.¹¹⁴

The PSC’s decision to suspend Kentucky Power’s DSM program will have a significant impact on Eastern Kentucky consumers. For those low-income customers who hoped to rely on DSM programs as a means of mitigating the impact of future energy costs, the suspension represents a substantial setback and creates uncertainty over how to cope with future price fluctuations. In a region deeply impacted from national market’s shift away from coal to other power sources, the suspension of DSM programs demonstrates the difficulty coal states continue to face in administering programs aimed at mitigating the effects of a changing market. With Kentucky often cited as leading the transition, other coal states may wish to keep an eye on the extent of the impacts of the PSC’s decision on its Eastern Kentucky residents in the coming year.

¹¹¹Order, *In the Matter of: Electronic Investigation of the Reasonableness of the Demand Side Management Programs and Rates of Kentucky Power Company*, Case No. 2017-00097 at 3 (Ky. Pub. Serv. Comm’n Nov. 2, 2017).

¹¹²*Id.* at 2-3.

¹¹³Order, *In the Matter of: Electronic Investigation of the Reasonableness of the Demand Side Management Programs and Rates of Kentucky Power Company*, Case No. 2017-00097 at 2 (Ky. Pub. Serv. Comm’n Dec. 21, 2017).

¹¹⁴*Id.* at 3.

Chapter 13 • ENERGY AND NATURAL RESOURCES LITIGATION 2017 Annual Report¹

The ABA Section of Environment, Energy, and Resources has formed a distinct committee for each area of energy and resources law. The legal developments in the substantive law areas of the other energy and resources committees are covered by their separate annual recent developments reports contained in the *Year in Review*. Since the Energy and Natural Resources Litigation Committee’s underlying areas of substantive law—energy and resources—overlap with the other energy and resources committees of the Section, this report is intended to avoid duplicate coverage of the developments noted in the separate reports of the other Committees. The discussion below will, by design, focus on only a sampling of the 2017 court decisions that should be of interest to energy and natural resources litigators, with the number of cases covered being dictated by the page limitation applicable to this report. In the interest of providing an accurate description of the factual background and specific rulings in each case, most of the text in the below case summaries is taken directly from the wording of the courts in the cited opinions.

I. DOMESTIC JUDICIAL DEVELOPMENTS

A. *Tenth Circuit Court of Appeals addresses objections to district court approval of class settlements in the so-called “hot fuel” litigation.*

Proposed class action lawsuits continue to play a significant role in the energy and resources litigation field. In [*In re Motor Fuel Temperature Sales Practices Litigation*](#),² the court was presented with multiple proposed class action suits in multiple states (later consolidated as multidistrict litigation) filed on behalf of consumers who purchased gasoline. The suits alleged that the defendant retailers of gasoline failed to control for, or at least disclose, the effects of temperature on the energy value of a gallon of gasoline purchased at the gas pump. Several of the parties entered into class settlements approved by the district court. The present appeals focused on the district court’s approval of the settlement agreements and its interpretation of one of the agreements. While the page limitations on this paper do not allow for a summary of the entire lengthy opinion of the Tenth Circuit, a number of the court’s rulings are of particular interest.

First, in addressing an interpretational argument, the court considered the meaning and effect of the commonly-used phrase “including, without limitation.” With respect to the use of that phrase in the paragraph of the settlement agreement at issue with one of the appellants’ arguments, the Tenth Circuit found:

Under [*State v. Larson*, 184 Wash.2d 843, 365 P.3d 740 (2015)], we conclude that Section 4.7’s use of the phrase “including, without limitation” indicates that [the listed contract types provide] “illustrative examples” of the types of agreements that will trigger Section 4.7, “rather than an exhaustive list” of the agreements that will do so, 365 P.3d at 743. But, under *Larson*, we likewise conclude that Section 4.7’s list of “illustrative examples” nevertheless demonstrates an “inten[t] to limit the scope of”

¹This report was written by Mark D. Christiansen, an energy and natural resources litigation attorney with the Oklahoma City office of McAfee & Taft. The 2017-2018 Co-Chairs of the Energy and Natural Resources Litigation Committee are Carlos Evans, Senior Assistant Regional Counsel, U.S. Environmental Protection Agency, Dallas, TX, and John McDermott, an environmental, products liability and toxic tort litigation attorney with the Archer law firm’s Haddonfield, NJ office.

²872 F.3d 1094 (10th Cir. 2017).

Section 4.7 to agreements that are “similar” to those examples. 365 P.3d at 743. And, under *Larson*, we reach that conclusion despite the fact that Section 4.7 prefaces its list of illustrative examples with the phrase “including, without limitation.”³

Second, the court recognized the general rule that non-settling co-defendants have no standing to object to a proposed class settlement, because “they lack ‘a legally protected interest in the settlement’ and therefore can’t satisfy Article III’s injury-in-fact requirement.”⁴ However, the court found that “[c]ourts have recognized a limited exception to this rule where nonsettling parties can demonstrate they are ‘prejudiced’ by a settlement.”⁵ The court noted that prejudice, in this context, “means ‘plain legal prejudice’ as when the settlement strips the party of a legal claim or cause of action.”⁶ The Tenth Circuit concluded that plain legal prejudice had not been shown by the nonsettling appellants who made that assertion in this case.

Third, an appellant presented a novel argument regarding the inclusion of go-forward provisions in the class settlements. Appellant objected to the settlement agreements’ release provisions that enjoined settlement class members from suing the defendants for future actions taken by the defendants that were authorized or required by the settlement agreements. The appellant argued that if a plaintiff tried to sue defendants today alleging that their gasoline sales practices in future years would violate consumer law, the complaint would be dismissed as unripe. But here, by calling the document a settlement agreement rather than a complaint, appellant contended that the court’s approval of the settlement agreements with their future-conduct releases constituted an improper advisory opinion violative of Article III standing principles. The court declined to consider this argument for reasons described in the opinion.⁷

As a final example of issues of interest discussed in the Tenth Circuit’s decision, appellants objected to provisions in certain settlement agreements under which defendants “agreed to convert pumps at its existing gas stations in certain states to Automatic Temperature Control (ATC) pumps, and to install ATC pumps at its new gas stations in certain states.”⁸ Appellants argued:

(1) regulators and policymakers have long debated requiring or authorizing ATC at retail but have ultimately “chosen not to,” . . . ; (2) selling gas by the gallon is lawful; (3) deciding whether to use ATC is a policy decision best left to the legislature; (4) the district court made an impermissible policy judgment about ATC when it found that class members would derive some benefit from the settlements to the extent that the settlements will increase the odds of conversion to ATC; (5) what the plaintiffs actually seek here is a change in the existing law, which is a political remedy, not a judicial one; and (6) the district court lacked authority to provide that political remedy under Article III.⁹

The Tenth Circuit rejected this objection and noted that the lower court’s approval of the settlement agreements did not order states to require, or even to allow, conversion to ATC. Rather, that decision remains in the hands of state lawmakers. The district court’s approval

³*Id.* at 1106.

⁴*Id.* at 1110.

⁵*Id.*

⁶*Id.*

⁷*Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d at 1115.

⁸*Id.* at 1103.

⁹*Id.* at 1115.

of the class settlements did not usurp the legislature's role.

The court affirmed the district court's approval of the ten settlement agreements at issue in this appeal.

B. Court finds that county ordinance prohibiting storage and permanent disposal of wastewater was preempted by state law.

Under the facts presented in *EQT Production Company v. Wender*,¹⁰ EQT operated one underground injection control well (UIC) located in Fayette County, West Virginia. The well was used to dispose of wastewater generated by hundreds of conventional vertical producing oil and gas wells operated by EQT both within and outside the county.¹¹ EQT injected the wastewater underground into a confined, underground formation for permanent disposal. EQT's operation of the UIC well was subject to state regulations, and was authorized by a state-issued permit to inject wastewater. Further, in the interest of protecting underground sources of drinking water, EQT's disposal operations were also subject to federal regulation (administered by the state) under the Safe Drinking Water Act, 42 U.S.C. sections 300f to 300j-26 which imposes certain regulations on injection wells.

Notwithstanding the state and federal regulations, Fayette County enacted a blanket ban on all permanent disposal of wastewater within the county.¹² The Ordinance also banned the storage of wastewater at conventional well sites.¹³ The Ordinance stated that the ban would "specifically apply to injection wells for the purpose of permanently disposing of natural gas waste and oil waste."¹⁴ On January 13, 2016, EQT filed suit in the United States District Court for the Southern District of West Virginia to enjoin key aspects of the Ordinance as being preempted by state and federal law. The district court granted summary judgment to EQT and permanently enjoined the challenged provisions of the Ordinance.¹⁵ The defendants appealed.

In reviewing the preemption issues presented in this appeal, the Fourth Circuit described one of the first questions to be addressed as being the following:

Under West Virginia law, may the County prohibit EQT from engaging in precisely the activity—permanent disposal of wastewater at the UIC well—that has been sanctioned by a state permit, effectively nullifying the license issued by West Virginia's DEP pursuant to state statutory authority? . . . We need only determine whether a West Virginia county is authorized to take aim at the permitted activity itself, enacting a blanket prohibition on conduct specifically licensed by the state.¹⁶

The court observed that counties of the State have only the limited powers granted to them by the West Virginia Constitution and the Legislature. The court noted that it would make no sense to assume that the State would delegate to a county, a creature of the State, the power to undo the State's permitting scheme.¹⁷ Finding that all local law in the State is subject to the implied condition that the law may not be inconsistent with state law and must yield to the predominant power of the state, the court held that the Ordinance's ban

¹⁰870 F.3d 322 (4th Cir. 2017).

¹¹*Id.* at 327.

¹²*Id.* at 328. (The ordinance was entitled "Ordinance Banning the Storage, Disposal, or Use of Oil and Natural Gas Waste in Fayette County, West Virginia.")

¹³*Id.* at 336.

¹⁴*Id.* at 328.

¹⁵*EQT Prod. Co. v. Wender*, 191 F. Supp. 3d 583 (S.D. W. Va. 2016).

¹⁶*EQT Prod. Co.*, 870 F.3d at 332.

¹⁷*Id.* at 333.

on the operation of EQT's UIC well was preempted by state law.

The County argued that the savings clause of the West Virginia Water Pollution Control Act,¹⁸ which governs the state's permitting of UIC wells, recognized that the County had the authority to enact ordinances for the elimination of hazards to the public health and to abate anything the commission determined to be a public nuisance. The court found that the County's argument proposed an unreasonably broad interpretation of the Water Pollution Control Act's savings clause. The court concluded that a more logical reading would be to view the clause as providing clarification that the possession of a state permit would not preclude all local regulation touching on the licensed activity. For example, the County might bring a common law action for public nuisance with respect to state-permitted UIC wells. The Fourth Circuit noted that "[a] county has the 'power to abate nuisances, not to determine what shall be considered nuisances.'"¹⁹ The court concluded that the Ordinance's prohibition on all disposal of wastewater in UIC wells was preempted by state law.

The court then reviewed the Ordinance's restriction on the storage of wastewater at conventional well sites. Having already found that the Ordinance's core prohibition on permanent wastewater disposal was preempted, the court noted that there was little left to discuss concerning the ancillary storage restriction. Considered separately, the Ordinance's restriction on storage was found to be inconsistent with the state Oil and Gas Act and was preempted. The Oil and Gas Act vests the state Department of Environmental Protection with "exclusive authority over regulation of the state's oil and gas resources, including in 'all matters' related to the 'development, production, storage and recovery of this state's oil and gas.'"²⁰ The court found that the DEP's authority extended to the regulation of the storage of wastewater at conventional production well sites.

The Fourth Circuit affirmed the judgment of the district court in all respects.

C. *Court holds that wind energy developer's excavation work in construction of wind turbines constituted "mining" under federal regulations applicable to the Indian lands.*

The case of [*U.S. v. Osage Wind, LLC*](#),²¹ involved a 2010 lease by Osage Wind of solely *surface rights* to approximately 8,400 acres of private fee land in Osage County, Oklahoma. Osage Wind leased the land for the purpose of building a commercial wind farm—a facility that collects and stores wind-generated electricity. The court described the proposed project as follows:

The planned wind-farm involved the installation of eighty-four wind turbines secured in the ground by reinforced concrete foundations, underground electrical lines running between the turbines and a substation, overhead transmission line, meteorological towers, and access roads. These structures would occupy around 1.5 percent of the total acreage of leased surface land. In September 2011, OMC [Osage Mineral Council] and the United States expressed concern that the planned project would interfere with oil and gas production by blocking access to the mineral estate.²²

¹⁸See W. VA. CODE § 22-11-27 (2017) (which provides in part: "[N]othing herein contained shall abridge or alter rights of action or remedies . . . , nor shall any provisions . . . be construed as estopping the state, municipalities, public health officers, or persons . . . in the exercise of their rights to suppress nuisances or to abate any pollution")

¹⁹*EQT Prod. Co.*, 870 F.3d at 336.

²⁰*Id.*, W. VA. CODE § 22-6-2(c)(12) (2017).

²¹871 F.3d 1078 (10th Cir. 2017).

²²*Id.* at 1083.

In light of the foregoing concern, the OMC filed suit in October 2011 to prevent Osage Wind from constructing the proposed wind farm.²³ In that lawsuit, OMC alleged “that the planned wind farm would unlawfully deprive OMC’s oil-and-gas lessees of reasonable use of the surface estate.”²⁴ The court ruled against OMC in that case because there was no evidence that the oil and gas lessees were planning to use the surface estate in a manner that would conflict with Osage Wind’s proposed use of the land.

In October 2013, Osage Wind began site preparation and road construction for the wind farm. Excavation work for the wind turbines had begun by September 2014.

Each turbine required the support of a cement foundation measuring 10 feet deep and up to 60 feet in diameter. . . This process involved the extraction of soil, sand, and rock of varying sizes—all of which was of a common mineral variety, including limestone and dolomite. Rock pieces smaller than 3 feet were crushed into even smaller sizes.²⁵

In November 2014, the United States, as trustee for the mineral estate on behalf of the Osage tribe, sued Oklahoma Wind to halt the excavation work. In that lawsuit, the U.S. ultimately sought damages based on the alleged unauthorized extraction of reserved minerals. In particular, the U.S. asserted that the sand, soil and rock extraction activities of Osage Wind “was ‘mining’ under 25 C.F.R. § 211.3 and thus required a mineral lease under 25 C.F.R. § 214.7.”²⁶ The district court granted summary judgment in favor of Osage Wind and ruled that the excavation work did not constitute mining under Section 211.3, with the result that the leasing requirement was not triggered under Section 214.7.

On the final day of the appeal deadline, the United States advised OMC that it did not intend to appeal the district court’s ruling. Although the OMC was not a party to the proceedings before the district court, the Tenth Circuit allowed OMC to appeal the summary judgment. It found that OMC had a “unique interest in this case entitling it to appeal without having intervened below.”²⁷

The Tenth Circuit began its review of the liability issues in the case by describing its assessment of what it perceived to be key underlying facts:

Osage Wind engaged in large-scale mineral excavation work to install wind turbines. It first removed rock sediment and soil from the ground, creating large holes into which it could pour a cement foundation for each turbine. Next, it sorted the extracted rock material into small and large pieces, and then crushed the smaller pieces so they would be the proper size for backfilling the holes. Finally, it positioned the bigger rock pieces adjacent to the backfilled excavation sites. All of this was done to add structural support to the large wind turbines installed deep in the ground. The question here is whether this excavation work—digging, sorting, crushing, and

²³See *Osage Nation ex rel. Osage Minerals Council v. Wind Capital Grp., LLC*, No. 11-CV-643-GKF-PJC, 2011 WL 6371384 (N.D. Okla. Dec. 20, 2011).

²⁴*Osage Wind*, 871 F.3d at 1083.

²⁵*Id.*

²⁶*Id.*

²⁷*Id.* at 1086. (The court emphasized that “[a] generalized interest in vindicating a legal right is not enough to trigger our unique-interest exception. An interested person must have a particularized and significant stake in the appeal, and must further demonstrate cause for why he did not or could not intervene in the proceedings below. OMC’s interest here is particularized and significant because the Osage Nation *owns* the beneficial interest in the mineral estate at issue.”)

backfilling—constitutes “mining” under 25 C.F.R. § 211.3.²⁸

The district court below “held that the definition of mining *necessarily* involves the commercialization of mineral materials, *i.e.*, the sale of minerals.”²⁹ The Tenth Circuit disagreed and found that the text of Section 211.3 “does not indicate that mining is confined to commercializing extracted minerals or relocating them offsite—instead it refers merely to the ‘science, technique, and business of mineral development.’”³⁰ The court also rejected Osage Wind’s contention that other regulations suggest that Section 211.3 contemplates that “mining” involves the sale of minerals.

The Tenth Circuit additionally recognized “the long-established principle that ambiguity in laws designed to favor the Indians ought ‘to be liberally construed’ in the Indians’ favor.”³¹

Importantly, the court agreed that “merely encountering or incidentally disrupting mineral materials would not trigger § 211.3’s definition,” and that “the simple removal of dirt does not constitute mining.”³² However, the court noted that Osage Wind did not merely dig holes in the ground but went further:

After Osage Wind removed the rock materials from each hole, it acted upon the minerals by altering their natural size and shape in order to take advantage of them for a structural purpose. Osage Wind needed to stabilize these tall wind turbines, and “develop[ed]” the removed rock in such a way that would accomplish that goal.³³

The Tenth Circuit concluded that “there is ambiguity in the scope of ‘mineral development’ and the extent to which that phrase includes the sorting and crushing of minerals for the purpose of backfilling and stabilization.”³⁴ Citing again the rule that ambiguous laws designed to favor the Indians are to be liberally construed in the Indians’ favor, the court held that Osage Wind’s excavation work constituted mining under Section 211.3 and that the company was required to secure a federally-approved lease from OMC under Section 214.7. The summary judgment ruling in favor of Osage Wind was reversed and the case was remanded for further proceedings.

D. Court addresses dispute over whether a binding contract to sell oil and gas properties was formed as a result of e-mail negotiations and communications.

The court’s ruling in [*Le Norman Operating LLC v. Chalker Energy Partners III, LLC*](#),³⁵ is certain to be criticized by those who favor certainty in contracting. The *Le Norman* case addresses several issues that can easily arise, and lead to litigation, in energy and resources transactions. It illustrates the complications and resulting litigation risks associated with (a) negotiating the more-detailed terms of a transaction by e-mail, (b) engaging in communications and negotiations governed by the Uniform Electronic Transactions Act, *infra*, and (c) attempting to contract with (or as a part of) a group of counter-parties aligned in the transaction but with each having its own individual decision whether to accept or reject the final proposals.

²⁸*Osage Wind*, 871 F.3d at 1087.

²⁹*Id.* at 1089.

³⁰*Id.*

³¹*Id.* at 1090.

³²*Id.* at 1091.

³³*Osage Wind*, 871 F.3d at 1091-92.

³⁴*Id.* at 1092.

³⁵No. 01-15-01099-CV, 2017 WL 4366265 (Tex. App. Oct. 3, 2017).

The Chalker Energy parties (Sellers) desired to sell their interests in certain oil and gas properties located in the Texas panhandle. They engaged the Raymond James firm to conduct the sale process. The group of Sellers also designated Chalker Energy Partners (Chalker Energy) to function as their designated agent in conducting the sale. Remora, one of the Sellers, monitored the sales efforts and reported back to the other Sellers. “The Sellers entered into the ‘Chalker Engagement Agreement,’ which set out the process by which potential sales of [the assets] would be considered.”³⁶

In August 2012, Raymond James sent an e-mail to potential buyers announcing the sale of the assets and advising as to the person to whom interested parties should direct their inquiries. Le Norman was one of the parties who received that e-mail and decided to engage in the bidding process. On September 30, 2012, Le Norman and Chalker signed a confidentiality agreement so that Le Norman could view the information in the virtual data room concerning the assets and participate in the bid process. A form Purchase and Sale Agreement was available in the data room for potential buyers to review.³⁷ In addition to confidentiality provisions, the confidentiality agreement provided in relevant part, in section 18:

No Obligation. The Parties hereto understand that unless and until a definitive agreement has been executed and delivered, no contract or agreement providing for a transaction between the Parties shall be deemed to exist and neither Party will be under any legal obligation of any kind whatsoever with respect to such transaction by virtue of this or any written or oral expression thereof, except, in the case of this Agreement, for the matters specially agreed to herein. For purposes of this Agreement, the term “definitive agreement” does not include an executed letter of intent or any other preliminary written agreement or offer, unless specifically so designated in writing and executed by both Parties.³⁸

The confidentiality agreement further stated that Chalker Energy

reserves the right, in its sole discretion, to: ... (c) discontinue consideration of a transaction at any time; (d) reject any and all proposals made by any party with regard to a transaction; (e) terminate discussions and negotiations with [Le Norman] or any party at any time for any reason; and (f) conduct the process relating to a possible transaction in any manner it deems appropriate or change the procedure for conducting that process.³⁹

Raymond James made a presentation to potential bidders, which Le Norman attended, advising as to the bid procedure and the use of the virtual data room containing detailed information regarding the assets and other materials. The potential bidders were instructed to include with their bids a marked copy of the proposed form of purchase and sale agreement provided in the data room, indicating additions or deletions required by the bidder in order to sign the document as a definitive purchase and sale agreement. The bidders were advised that, once Chalker Energy received bids, each member of the Sellers group “shall be given 24 hours to elect to sell their interest once the purchase price has been determined.”⁴⁰ The presentation further advised potential bidders that, “[u]pon the negotiation of the PSA, each [Seller] shall be given 48 hours to elect to accept the terms of

³⁶*Id.* at *2.

³⁷*Id.* at *3.

³⁸*Id.* at *2.

³⁹*Id.*

⁴⁰*Le Norman Operating LLC*, 2017 WL 4366265 at *3.

the PSA and execute the appropriate documents.”⁴¹

The data room presentation provided a further disclaimer to Le Norman and the other potential bidders, stating:

[Chalker Energy] reserves the right to negotiate with one or more prospective parties at any time and to enter into a definitive agreement for a transaction without prior notice to you or to other prospective parties. [Chalker Energy] also reserves the right to terminate, at any time, further participation in the due diligence and proposal process by any party and to modify any procedures without providing any reason therefore. [Chalker Energy] intends to conduct its business in the ordinary manner during the evaluation and offer period; however, [it] reserves the right to take any action, whether in or out of the ordinary course of business, which in its sole discretion it deems necessary or prudent in the conduct of such business.⁴²

On November 5, 2012, Le Norman submitted a bid via e-mail offering \$322 million for 100% of the assets (*i.e.*, requiring that all members of the Seller group agree to sell under the proposed terms). Le Norman’s bid stated that it was subject to the execution by the parties of a mutually acceptable Purchase and Sale Agreement. Le Norman also included with its bid a redlined copy of the proposed form of purchase and sale agreement showing the changes required by Le Norman. Chalker Energy and Remora both indicated that the changes of Le Norman were insignificant.

“Upon receipt of the first round of bids, Raymond James asked the two highest bidders, [Le Norman] and Jones Energy, to increase their bids.”⁴³ Le Norman revised its bid to \$345 million for 100% of the assets, and Le Norman again included a proposed purchase and sale agreement based on the form provided by the Sellers in the virtual data room. Chalker Energy selected Le Norman’s bid to present to the other Sellers and gave them 24 hours to respond. When the elections of the other Sellers resulted in only 82% of the assets being committed to Le Norman’s offer, the parties continued their negotiations and made several offers and counter-offers. Those negotiations were ultimately unsuccessful. On November 14, 2012, Le Norman informed Chalker Energy by e-mail that it would no longer pursue the transaction, however it left open the possibility that some agreement might be reached in the future.

On November 19, 2012, in response to a new offer from the Sellers for a smaller percentage of the assets, Le Norman sent an e-mail to Raymond James proposing new terms. The e-mail subject line stated, “RE: Counter Proposal.”⁴⁴ Among a total of seven deal points, Le Norman offered \$230 million for 67% of the assets and provided that it was subject to a “PSA similar to what we returned with the above caveats,”⁴⁵ and also required the execution by the parties of a joint operating agreement (to be attached to the purchase and sale agreement) and a non-compete agreement. Unlike Le Norman’s prior bids, this counter proposal did not make any reference to the bid procedure and it advised Raymond James that Le Norman would not accept any changes to the proposal and would not extend the deadlines stated in its proposal.

On November 20, 2012, Raymond James replied to Le Norman’s counter proposal, stating: “We have the group on board to deliver 67% subject to a mutually agreeable PSA. We are calling to discuss next steps and timing. Chalker et al. will be turning a PSA tonight

⁴¹*Id.*

⁴²*Id.*

⁴³*Id.* at *4.

⁴⁴*Id.*

⁴⁵*Le Norman Operating LLC*, 2017 WL 4366265 at *4.

to respond to your last draft. Please give me a call to discuss scheduling and timing.”⁴⁶ On the same date, Chalker Energy sent an e-mail to the other members of the Seller group advising of the e-mail sent earlier in the day to Le Norman, discussing the uncertain timing, and asking that the Sellers “monitor your e-mail for updates and/or any requests that may be necessary to complete the preparation of agreements for the sale.”⁴⁷ The parties continued to work toward finalizing the purchase and sale agreement. The parties needed to complete key exhibits to that agreement, as well as an escrow agreement, non-compete agreement and a joint operating agreement. “[E]-mails continued to pass between the parties including an e-mail from Chalker Energy to [Le Norman] discussing the Assets and referring to them as ‘what is being sold to Le Norman.’”⁴⁸ At the end of the day on November 21st (the day before Thanksgiving Day), Chalker Energy e-mailed Le Norman an updated draft of the purchase and sale agreement and stated that it would not expect to hear from Le Norman until Monday, November 26th.

Also, on November 21st, a representative from Jones Energy sent a new offer to Chalker Energy that Chalker viewed as providing benefits that the Le Norman deal did not offer. On November 23rd, Chalker submitted ballots to the Sellers to determine if they were willing to negotiate a sale of the assets to Jones Energy, and the Sellers responded in the affirmative. Chalker and Jones Energy negotiated final terms for the purchase and sale agreement.⁴⁹

On November 28, 2012, the Sellers and Jones Energy finalized and signed their purchase and sale agreement. On the same day, Le Norman delivered a purchase and sale agreement to Chalker Energy. Upon learning of the deal reached between the Sellers and Jones Energy, Le Norman sent several letters demanding that the Sellers “honor the contract they had entered into on November 19-20.”⁵⁰ The purchase and sale transaction with Jones Energy proceeded forward and the sale of assets closed on December 12, 2012. However, when Jones Energy learned of the claims and demands of Le Norman, it refused to release the escrowed funds and asserted that the Sellers’ failure to disclose Le Norman’s demands was a breach of the Jones Energy purchase and sale agreement.

Le Norman sued the Sellers asserting that they breached their agreement to sell a 67% interest in the assets for \$230 million. Le Norman also sued Jones Energy for tortious interference with Le Norman’s alleged contract, but that suit was later settled. The trial court granted summary judgment in favor of the Sellers finding, among other things, that the Sellers had not reached a binding contract to sell any part of the assets to Le Norman. However, the trial court specifically denied Sellers’ motion for summary judgment on the grounds of (a) the statute of frauds, with the Sellers contending that there was a failure to include sufficient property descriptions, and (b) Sellers’ assertion that there was no acceptance of the alleged offer. The parties appealed.⁵¹

In addressing Le Norman’s assertion on appeal that a contract had been reached with the Sellers, certain of the key holdings of the Texas Court of Appeals were as follows:

First, the court described some of the pertinent rules of Texas contract law relating to the formation of contracts:

An enforceable and legally binding contract exists if it is sufficiently definite, certain, and clear in its essential terms. A binding agreement may exist when parties agree on some terms sufficient to create a contract, leaving other provisions for later negotiation. When an agreement leaves

⁴⁶*Id.* at *5.

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹ *Id.* at *6.

⁵⁰ *Le Norman Operating LLC*, 2017 WL 4366265 at *6.

⁵¹ *Id.* at *1.

essential (or material) matters open for future negotiation and those negotiations are unsuccessful, however, the agreement ‘is not binding upon the parties and merely constitutes an agreement to agree. The question of what terms are essential to a contract is determined on a contract-by-contract basis, depending on the subject matter of the contract at issue. The parties must have a meeting of the minds and must communicate consent to the essential terms of the alleged agreement, which is determined based on an objective standard of what the parties said and did rather than on their subjective states of mind.’⁵² [citations omitted]

Second, the court found that the confidentiality agreement provided that a letter of intent or preliminary agreement was not a definitive agreement. However, the confidentiality agreement did not describe what constituted a definitive agreement. After reviewing the facts in this case in detail, including examples of specific members of the Seller group who stated that they intended to enter a binding agreement with Le Norman before a definitive agreement was reached, the court concluded that “a fact issue existed as to whether the November 19-20 e-mail chain and subsequent written elections were sufficient to constitute a definitive agreement for the sale of the assets.”⁵³ Thus, the court of appeals concluded that the trial court erred in granting summary judgment in favor of the Sellers.

Third, the court reversed the trial court’s entry of summary judgment in favor of the Sellers based on the Uniform Electronic Transactions Act (UETA) and the trial court’s finding that the parties did not agree to conduct business electronically, and because the e-mail lacks an electronic signature. The court first reviewed the pertinent elements of the UETA:

Under the UETA, a legal requirement of a writing can be satisfied with an electronic record, and a legal requirement of a signature can be satisfied by an electronic signature. TEX. BUS. & COM. CODE ANN. § 322.007(c), (d) (West 2015). The UETA applies “only to transactions between parties each of which has agreed to conduct transactions by electronic means.” *Id.* § 322.005(b) (West 2015). Contrary to the Sellers’ argument, the UETA does not require an explicit agreement to conduct transactions by electronic means, but instead provides, “Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties’ conduct.”⁵⁴

The court reviewed the facts and circumstances presented in this lawsuit and concluded that “the conduct of the parties here in engaging in negotiations and other relevant business via electronic means constitutes at least some evidence that the parties agreed to conduct some of their transactions electronically.”⁵⁵ The trial court’s summary judgment ruling against Le Norman on this issue was reversed.

After addressing other issues in the appeal, the court of appeals affirmed in part and reversed in part the judgment below and remanded the case for further proceedings.

⁵²*Id.* at *11.

⁵³*Id.* at *12.

⁵⁴*Id.* at *15.

⁵⁵*Le Norman Operating LLC*, 2017 WL 4366265 at *16.

- E. *Widely-followed rulings of the Bankruptcy Court in In re Sabine Oil & Gas Corp., allowing the debtor to reject midstream services contracts, are affirmed by the district court.*

In 2017, the United States District Court for the Southern District of New York was presented in [*In re Sabine Oil & Gas Corp.*](#)⁵⁶ with the appeal of three highly-publicized rulings of the bankruptcy court in the Chapter 11 proceedings of Sabine Oil & Gas Corp. Those rulings determined that “appellants’ agreements with Sabine to provide gathering services did not run with the land under Texas property law,”⁵⁷ The court therefore granted Sabine’s motion to reject the agreements as executory pursuant 11 U.S.C. Section 365(a). In reviewing the bankruptcy court’s rulings, the district court recognized at the outset:

[I]t is not possible for a debtor to reject a covenant that “runs with the land,” since such a covenant creates a property interest that is not extinguished through bankruptcy. The parties here agree on the foregoing, and therefore their dispute comes down to whether the Agreements run with the land and therefore cannot be rejected pursuant to § 365(a).⁵⁸

After a detailed review of pertinent case law and the United States Bankruptcy Code, the court rejected the appellants’ assertion that the gathering services agreements dedicated the oil and gas leases of Sabine to the contracts in a way that conveyed a property interest in the lands. Rather, the court concluded that the agreements granted to appellants “merely [the] contractual right to be the exclusive providers of certain services for gas and condensate produced in certain areas.”⁵⁹ Since the agreements did not touch and concern the land, the bankruptcy court did not err in holding that the agreements did not run with the land as real covenants.

The court also rejected the appellants’ argument that agreements constituted equitable servitudes under Texas law. The district court found that the appellants’ agreements did not satisfy the requirements for being equitable servitudes since, among other reasons, the agreements did not “limit Sabine’s use of its property interests in the Dedicated Areas. Moreover, the Agreements benefit only appellants, not their land.”⁶⁰

The district court affirmed the orders of the bankruptcy court.

- F. *Court resolves venue issues of lawsuit relating to injection wells permitted by the Texas Railroad Commission.*

The case of [*Ring Energy v. Trey Resources, Inc.*](#),⁶¹ presented the *first impression* question of “whether a trial court outside of Travis County has the jurisdiction to enjoin a party with a valid permit from developing and using an injection well based on the claims that the injection well will cause imminent and irreparable injury to the complaining party.”⁶²

Trey applied to the Texas Railroad Commission for nine permits to inject fluids into designated wells located in Andrews County, Texas. On January 17, 2013, the Commission granted the applications without any formal hearing. “On September 23,

⁵⁶567 B.R. 869 (S.D.N.Y. 2017).

⁵⁷*Id.* at 871.

⁵⁸*Id.* at 874.

⁵⁹*Id.* at 875.

⁶⁰*Id.* at 877.

⁶¹No. 08-15-00080-CV, 2017 WL 192911 (Tex. App. Jan. 18, 2017).

⁶²*Id.* at *1.

2013, and before any injection operations began, Ring sued Trey in Andrews County.”⁶³ Ring first alleged that the Commission permits were void *ab initio* due to an alleged failure to give proper notice to Trey’s predecessor. Ring further alleged that fluid injection would cause substantial damage to Ring’s mineral interest and result in waste, and it sought damages and equitable relief under section 85.312 of the Texas Natural Resources Code. Finally, Ring asserted “that its interests were in imminent danger of irreparable harm, and sought a temporary restraining order, and a temporary and permanent injunction.”⁶⁴

Trey moved to dismiss Ring’s lawsuit for lack of subject matter jurisdiction.⁶⁵ Trey argued that Ring Failed to exhaust its administrative remedies before the Commission, and that any appeal of the Commission’s order(s) must be filed in Travis County, the county in which the Texas state capitol, and the Commission, are located. Both sides agreed that damages would be available if the injection wells did in fact cause injury, and that Ring could seek pre-damage injunctive relief in Travis County. However, Trey maintained that any suit outside of Travis County would be a collateral attack on a permit issued by the Commission. The trial court granted the motion to dismiss. Ring appealed.

In rejecting Trey’s arguments and reversing the trial court’s order dismissing Ring’s lawsuit, the Texas Court of Appeals emphasized in part the following findings:

First, the general venue provisions in Texas permitted a suit to be filed where all or a substantial part of the events giving rise to the claim occurred.⁶⁶ That venue would often be a county other than Travis County.⁶⁷

Second, the court rejected Trey’s argument that the Texas Railroad Commission held exclusive jurisdiction over injection wells until all administrative avenues had been exhausted. Under the Texas Constitution,⁶⁸ “[d]istrict courts are courts of general jurisdiction and generally have subject matter jurisdiction absent a showing to the contrary.”⁶⁹

Finally, with respect to Trey’s assertion that Ring’s lawsuit was a collateral attack on an order of the Commission, the court distinguished cases relied upon by Trey as involving specific findings of the Commission that were in conflict with the lawsuit in question. In this case, there were no specific findings by the Commission that might provide the court with confidence “that the Commission’s expertise was actually applied to the waste potential for the nine wells at issue.”⁷⁰

For another lawsuit raising other issues with regard to claims by one operator against another alleging that several injection wells were damaging the plaintiff’s interests, see *In re Discovery Operating, Inc.*⁷¹

G. *Court finds that the transportation of liquid propane is not an ultrahazardous activity for purposes of strict liability.*

The case of [*Elmore v. Dixie Pipeline Co.*](#),⁷² involved an appeal of the trial court’s summary judgment rulings in favor of Dixie, as well as an appeal of the court’s ruling that the testimony of plaintiff’s expert was inadmissible as to the standard of care for pipeline operators and related issues. Dixie operates a pipeline extending approximately 1,100 miles

⁶³*Id.* at *2.

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶ TEX. CIV. PRAC. & REM. CODE ANN. § 15.002 (West 2002).

⁶⁷*Ring Energy*, 2017 WL 192911 at *8.

⁶⁸TEX. CONST. art. V, § 8.

⁶⁹*Ring Energy*, 2017 WL 192911 at *8.

⁷⁰*Id.* at *12.

⁷¹216 S.W.3d 898 (Tex. App. 2007).

⁷²No. 2015-CA-01499-COA, 2017 WL 4386686 (Miss. Ct. App. Mar. 6, 2017).

from Texas to North Carolina. Liquid propane is transported through the pipeline. On November 1, 2007, the pipeline ruptured at a location approximately 1.1 miles from Elmore's home. Elmore sued Dixie, as operator of the pipeline, asserting that "her house suffered structural damage as a result of the shockwaves from the explosion."⁷³ Elmore asserted claims of negligence, strict liability and punitive damages.

Prior to trial, the circuit court granted summary judgment in favor of Dixie as to Elmore's claims for strict liability, punitive damages and negligence. The court also excluded the testimony of Elmore's expert witness Dr. Clarke, a metallurgical engineer. Elmore appealed.⁷⁴

As a foundational matter, the court recognized that the National Transportation Safety Board (NTSB) investigated the pipeline rupture at issue in this case and reached certain conclusions. "Importantly, the NTSB concluded that the following were not factors in the rupture: corrosion, excavation damage, the controller's actions, or the operating conditions of the pipeline."⁷⁵ The NTSB ultimately concluded that "the probable cause" of the subject pipeline rupture "was the failure of a weld that caused the pipe to fracture along the longitudinal seam weld, a portion of the upstream girth weld, and portions of the adjacent pipe joints."⁷⁶

The court of appeals addressed the exclusion of Dr. Clarke's proposed testimony regarding the standard of care of pipeline operators and the alleged breach of that standard by Dixie. The court evaluated the proposed expert testimony under Rule 702 of the Mississippi Rules of Evidence⁷⁷ and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁷⁸ After reviewing in detail the materials relied upon by Dr. Clarke, certain materials he did not review and rely on, the information and opinions that would be relevant to the plaintiff's claims and conflicts between the NTSB's report and the opinions of Dr. Clarke, the court affirmed the circuit court's exclusion of his testimony. The court found in part: "Since Dr. Clarke lacked familiarity with or understanding of the federal regulations and standards, the circuit court properly excluded his ability to opine as to the standard of care for pipeline operators or any violation of that standard of care by Dixie."⁷⁹

Turning to the circuit court's dismissal of Elmore's strict liability claims, the court considered the six factors set forth in the Restatement (Second) of Torts section 520:

- (a) existence of a high degree of risk of some harm to the person, land[,] or chattels of others,
- (b) likelihood that the harm that results from it will be great,
- (c) inability to eliminate the risk by the exercise of reasonable care,
- (d) extent to which the activity is not a matter of common usage,
- (e) inappropriateness of the activity to the place it was carried on, and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.⁸⁰

⁷³*Id.* at *1.

⁷⁴*Id.*

⁷⁵*Id.*

⁷⁶*Id.*

⁷⁷*Elmore*, 2017 WL 4386686, at *3 (Rule 702 stated at the time of these proceedings: "If scientific, technical or other specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is a product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.").

⁷⁸*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993).

⁷⁹*Elmore*, 2017 WL 4386686 at *4.

⁸⁰*Id.* at *6.

The court noted that the transportation of liquid propane is a regulated commercial activity, subject to state and federal regulations. Moreover, it found that “the transportation of liquid propane is of great value to commerce and local, regional, and nationwide communities.”⁸¹ The court concluded that, overall, the transportation of liquid propane does not constitute an ultrahazardous activity.

With respect to the lower court’s dismissal of the plaintiff’s negligence claim, in light of the exclusion of her expert’s testimony, Elmore asserted on appeal that the doctrine of *res ipsa loquitur* should have been applied. However, the court of appeals concluded that this doctrine was not available to the plaintiff because the second element of the doctrine (*i.e.*, “the injury must be such that in the ordinary course of things it would not occur if those in control of the instrumentality used proper care”⁸²) was not demonstrated by the plaintiff. Rather, the court reviewed particular aspects of the evidence presented to the circuit court and found that “there is simply no evidence that in the ordinary course of things, the pipeline would not have ruptured had Dixie used proper care.”⁸³

Finally, the court concluded that its affirmance of the dismissal of the plaintiff’s claims of strict liability and negligence rendered moot any consideration of the circuit court’s dismissal of the claim for punitive damages.⁸⁴

H. Court affirms dismissal with prejudice of plaintiffs’ suit against operator of horizontal well for alleged damages to plaintiffs’ older vertical wells, and discusses important principles of limitations as a defense.

The case of [*Max Oil Co. Inc. v. Range Production Co. LLC*](#),⁸⁵ involved a suit by the owners of certain producing vertical oil and gas wells against Range. The plaintiffs alleged that Range’s oil and gas drilling operations permanently damaged their nearby wells. More specifically, prior to December 2013, the plaintiffs’ wells were profitable and capable of producing 130,000 cubic feet of natural gas per day and over 4 barrels of oil per day. On December 10, 2013, Range completed a well with a hydraulic fracture treatment. On that date, plaintiffs discovered that one of their wells began producing a great deal of water which restricted its flow of oil and gas. On March 6, 2014, Range completed a second well with a hydraulic fracture treatment. On that same date, plaintiffs discovered that two of their “wells began producing a great deal of water which restricted the flow of oil and gas from” those wells.⁸⁶ After observing (a) the proximity in time of the increased water production from the plaintiffs’ wells to the fracture treatments on Range’s wells, and (b) that the water production increased substantially when the pumps for Range’s wells were not operating, the plaintiffs concluded that the fracture treatment completions of Range’s wells encroached into the formations being produced in the plaintiffs’ wells.⁸⁷

When the plaintiffs’ attempts to informally settle their damage claims with Range failed, the plaintiffs retained an attorney. On September 8, 2015, the attorney wrote Range accusing it of damaging the plaintiffs’ wells. On December 15, 2015, plaintiffs tested the integrity of the plug and cement job in order to disprove certain explanations or defenses offered by Range in response to their demand. On April 25, 2016, the plaintiffs sued Range alleging negligence, trespass, nuisance and conversion.⁸⁸

⁸¹*Id.* at *7.

⁸²*Id.* at *8.

⁸³*Id.*

⁸⁴*Elmore*, 2017 WL 4386686 at *8.

⁸⁵681 F. App’x 710 (10th Cir. 2017) (applying Oklahoma substantive law).

⁸⁶*Id.* at 713.

⁸⁷*Id.* at 712.

⁸⁸*Id.* at 712-13.

Range filed a motion to dismiss asserting, in part, that the plaintiffs' claims were time-barred under the applicable two-year statute of limitations.⁸⁹ Range argued that the plaintiffs' complaint showed on its face that the plaintiffs knew, or with reasonable diligence should have known, the basis of their claims by December 10, 2013, and March 6, 2014, with the result that plaintiffs had until March 6, 2016, at the latest, in which to file their lawsuit. The district court agreed and dismissed the suit with prejudice.⁹⁰ The plaintiffs appealed. While they made other claims below, their arguments on appeal were limited to the claims of trespass and nuisance.⁹¹

The Tenth Circuit first addressed the plaintiffs' contention on appeal that the limitations period did not commence to run on their trespass claim until December 15, 2015, when plaintiffs reached their conclusion that Range was the cause of the alleged damages. Plaintiffs argued that, prior to that time, whether Range's operations caused the damages was speculative because plaintiffs had not eliminated the plugging or cementing of their own wells as the possible cause of the damages. However, after reviewing the alleged facts the plaintiffs knew and the dates on which the plaintiffs knew them, the court concluded that their suit was filed beyond the two-year limitations period.⁹²

In reaching that over-arching conclusion, the Tenth Circuit addressed a number of ancillary procedural and legal issues, including the following: First, with respect to the plaintiffs' assertion that they would have been subject to sanctions under Fed. R. Civ. P. 11(b)(3) if they had filed their suit without adequate investigation of the facts, the court noted that statutes of limitation are in part designed to allow a plaintiff adequate time to investigate and prepare to litigate its claims, while preventing prejudice to the defendant by delay.⁹³ The court noted that, if doubt remained near the end of the limitations period as to whether the defendant's actions were the cause of the alleged damages, "the proper course would have been for [plaintiffs] to file suit and state in [their] petition that [their] factual contentions are made on 'information and belief.'"⁹⁴ If further investigation showed that plaintiffs could not support the contention made, plaintiffs could have simply not persisted with that contention or, if necessary, dismissed the lawsuit.

Second, with regard to the plaintiffs' contention that the dismissal of their lawsuit with prejudice punishes them for attempting to settle with Range and avoid litigation, the Tenth Circuit again noted that limitations periods are in part designed to provide parties with an opportunity to settle potential lawsuits before the expiration of the deadline for filing suit. The court added that, while it commended the plaintiffs for first attempting to settle with Range rather than immediately pursuing litigation, settlement efforts do not generally prevent the running of limitations periods.⁹⁵

Third, plaintiffs argued that they should have been allowed to amend their complaint, to prevent dismissal on limitations grounds, by removing Range's

⁸⁹OKLA. STAT. tit. 12, § 95(3).

⁹⁰*Max Oil Co.*, 681 F. App'x at 713.

⁹¹*Id.*

⁹²*Id.* at 114.

⁹³*Id.*

⁹⁴*Id.*

⁹⁵*Max Oil Co.*, F. App'x at 115. The court did, however, note that a party may be estopped from raising statutes of limitations under certain circumstances where (a) it gave the opposing party "some assurances reasonably calculated to lull the plaintiff into a sense of security to delay action beyond the statutory period," or (b) provided "an express and repeated admission of liability in conjunction with promises of payment, settlement or performance," or (c) engaged in "false, fraudulent or misleading conduct or some affirmative act of concealment to exclude suspicion and preclude inquiry which induced the other party to refrain from timely bringing an action." *Id.* (quoting *Jarvis v. City of Stillwater*, 732 P.2d 470, 472-73 (Okla. 1987)).

encroachment as part of its continuing trespass claim, thereby taking advantage of a 15-year limitations period under 12 O.S. §93(4). However, the court found that plaintiffs had only, at the conclusion of plaintiffs' opposition to the motion to dismiss, essentially stated that if the district court should determine that the complaint contains defects, plaintiffs then request leave to amend the complaint prior to dismissing the case in order to correct the perceived flaws. The Tenth Circuit observed that cursory, non-specific requests of this type are ineffective and that they do not rise to the level of a proper motion for leave to amend.⁹⁶

Finally, the plaintiffs asserted that their nuisance claim should have survived the limitations challenge because they alleged a continuing and ongoing nuisance claim. In particular, the plaintiffs contended that they complained of how Range's wells continued to water out the plaintiffs' wells. The Tenth Circuit noted that, under Oklahoma law, to the extent damages caused by a nuisance are temporary in nature (*i.e.*, damages reasonably capable of abatement), the two year limitations period allows a plaintiff to bring successive actions each time the wrong occurs. Limitations would only bar recovery for damage occurring more than two years prior to the filing of the suit. However, the court found that the plaintiffs in the present case had alleged that the nuisance and its damages were permanent. The statute of limitations as to a permanent nuisance begins to run when it becomes obvious that the damage is of a permanent character.⁹⁷

The Tenth Circuit Court of Appeals affirmed the district court's judgment *dismissing the case with prejudice*.

I. Court finds that plaintiff-town's claims for trespass and nuisance with respect to natural-gas compressor stations and metering station were barred by limitations.

In another 2017 decision, [*Town of Dish v. Atmos Energy Corp.*](#),⁹⁸ the town filed suit on February 8, 2011, against the defendant-owners of four natural gas compressor stations and a metering station located just outside the town. The town asserted claims for injuries based upon trespass and nuisance. The evidence in the case showed that the residents of the town began complaining about the noise and odor emanating from those facilities as early as 2006, although arguments were made as to whether the operative facts that would begin the running of the limitations period occurred as early as 2006.

The trial court granted summary judgment in favor of the defendants based on the two-year statute of limitations.⁹⁹ The Texas Supreme Court affirmed, finding that the defendant energy companies had "proven that any legal injury the residents suffered commenced, at the latest, in May 2008."¹⁰⁰ As a result, the two-year statute of limitations barred the town's claims.

J. Tenth Circuit, in a criminal case, finds that Congress never properly disestablished the Creek Reservation, leaving broad potential implications for most sectors of the business community and other tribes.

On August 8, 2017, the United States Court of Appeals for the Tenth Circuit reached findings and conclusions in the case of [*Murphy v. Royal*](#)¹⁰¹ that are of substantial concern to the energy and resources industries, as well as broader communities. The rulings were made in the context of the appeal of a defendant's conviction for an alleged brutal crime. Murphy, a member of the Muscogee (Creek) Nation, asserted in his criminal

⁹⁶*Id.*

⁹⁷*Id.* at 716-17.

⁹⁸519 S.W.3d 605 (Tex. 2017).

⁹⁹*Id.* at 607.

¹⁰⁰*Id.* at 614.

¹⁰¹866 F.3d 1164 (10th Cir. 2017).

conviction that he was wrongly prosecuted and convicted in the Oklahoma state courts for a crime that occurred in Indian country (as defined in 18 U.S.C. § 1151) over which the federal courts had exclusive jurisdiction. The state district court rejected this argument, finding that the crime had occurred on state land. In a 126-page opinion addressing the issues on appeal, the Tenth Circuit held that, under the principles of *Solem v. Bartlett*,¹⁰² Congress never *disestablished* the Creek Reservation. The case has been remanded to the district court to issue a writ of habeas corpus vacating Murphy's conviction and sentence.¹⁰³

In a brief commentary summarizing the import of this decision, prepared by Lynn Slade of the law firm Modrall Sperling in New Mexico, which is well-known for its expertise on tribal land issues impacting the energy and resources industries, Mr. Slade described the Tenth Circuit's decision as follows:

The recent decision of the Court of Appeals for the Tenth Circuit in *Murphy* hold that the original Muscogee (Creek) Reservation still exists as an Indian reservation notwithstanding that the federal government issued numerous "trust" allotments to individual tribal members and most of the land within the reservation boundaries is owned in fee, primarily by non-members of the Muscogee (Creek) Nation (MCN)—and the crime in this case occurred on non-Indian fee land within the reservation area. Under a federal statute, all lands within a reservation are "Indian country," and certain crimes must be prosecuted by the United States, not the state. This decision holds that, because the reservation still exists, the crime occurred within Indian country and the state prosecution was invalid. Although the Tenth Circuit stated in a 2010 decision that there are "no reservations in Oklahoma," *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010), the decision will certainly strengthen MCN's view of its jurisdiction and may lead to contentions by other Oklahoma tribes that their reservations remain intact and expanded jurisdictional claims over industry.

However, the conclusion that a tribe retains a reservation, does not necessarily translate to tribal regulation or taxation of oil and gas activities within the reservation boundaries, particularly as to fee lands operations. Whether a tribe retains tax, regulatory, and court jurisdictions over non-members on fee lands requires considerations of whether agreements subject the non-member to tribal jurisdiction or whether its activities pose such an extreme threat to tribal welfare that tribal jurisdiction is required. *Montana v. United States*, 450 U.S. 544 (1981). For example, in 2016, the Supreme Court split 4-4 on whether a tribe had court jurisdiction over a company for activities under a lease on tribal lands within its reservation. *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 579 U.S. ____ (2016). Companies should consider the land status, whether tribal, allotted, or fee in structuring their activities in the many areas that once were reservations for Oklahoma's 37 Indian tribes.¹⁰⁴

Many in the energy and resources industries are following with great interest the future appellate developments in this appeal. At the time of the submission of this paper for publication, a petition for certiorari was pending with the United States Supreme Court.

¹⁰²*Id.* at 1173-75; *Solem v. Bartlett*, 465 U.S. 463, 470-71 (1984).

¹⁰³*Murphy*, 866 F.3d at 1233.

¹⁰⁴This advisory note of Mr. Slade appears in an emailed Advisory Newsletter of the Oklahoma Oil & Gas Association, issued August 15, 2017.

Chapter 14 • ENERGY INFRASTRUCTURE, SITING, AND RELIABILITY 2017 Annual Report¹

INTRODUCTION

As with other issues addressed in the Year-in-Review, it would be impossible to cover what was an exceptionally busy year in just a few short pages. Rather, this Annual Report highlights the reasons why 2017 was such a pivotal year for energy infrastructure and identifies the underlying drivers of change at play through highlights.

I. PART ONE: WHY IS RESILIENCY SO IMPORTANT?

The debate over what *resiliency*² means for energy infrastructure and whether it poses a conflict to *reliability* of the grid took on a renewed urgency in 2017, driven by a slew of costly and tragic natural disasters as well as an energy marketplace struggling to respond to rapidly evolving technologies, opportunities, and regional needs. These forces have increasingly pitted federal policymakers against state and local governments, and incumbents against new market participants. Which of these forces will dominate, how resiliency is ultimately defined and valued in the power sector, and the methods used to calculate and compensate that value will shape our energy infrastructure in years to come.

A. *Part One: Main Issues*

1. Security of the Grid

The nation's system of power generation and distribution ("the grid") is a vast and complex structure, largely privately owned and operated, of over 9,000 electric generation units, 600,000 miles of high-voltage transmission lines, and 10,000 substations covering the continental United States and parts of Canada.³ Section 1211 of the [Energy Policy Act of 2005](#) gives the Federal Energy Regulatory Commission (FERC) authority to oversee the reliability of the grid,⁴ including authority to approve mandatory cybersecurity reliability standards, although the Department of Energy (DOE) has served as the lead agency for federal resiliency efforts in the energy sector since 2013.⁵

¹This summary was prepared by: Lena Golze Desmond, Feller Law Group, PLLC; Emerson Hilton, Beveridge & Diamond; Jehmal Hudson, Federal Energy Regulatory Commission; Manisha Patel, WSP-USA, Inc.; Misty Sims, Sims & Sims Law; and Daniel Spitzer, Hodgson Russ.

²Press Release, The White House Office of the Press Secretary, Presidential Policy Directive -- Critical Infrastructure Security and Resilience (Feb. 12, 2013). (While there have been calls for a "National Resilience Scorecard" or similar standard, none yet exists. In lieu of such measurement, 2013's [Presidential Policy Directive/PPD 21](#) defines resilience as "the ability to prepare for and adapt to changing conditions and withstand and recover rapidly from disruptions. Resilience includes the ability to withstand and recover from deliberate attacks, accidents, or naturally occurring threats or incidents.")

³[Grid Modernization and the Smart Grid](#), DEPT. OF ENERGY (last visited Apr. 30, 2018).

⁴Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 941 § 1211 (2005) (codified at 42 U.S.C. § 15801 (2017)).

⁵Presidential Policy Directive, *supra* note 2. (Directing federal agencies to work with owners and operators of critical infrastructure and state, local, tribal, and territorial governments to take proactive steps to manage risk and strengthen the security and

There is widespread acceptance that this grid is vulnerable to the growing menace of deliberate attacks. Indeed, the [Department of Energy's Quadrennial Energy Report](#) stated that a cyberattack on the grid is "imminent."⁶ Such an attack could have catastrophic implications, yet a report published in 2017 by the Government Accountability Office (GAO) found that federal grid resiliency efforts were largely fragmented.⁷ Agencies have reported progress since the GAO report, including development of technologies such as rapidly-deployable high-power transformers and improved coordination between federal government and industry, but challenges remain.⁸

In October, Representative Bera (D-CA) introduced [H.R. 4120](#).⁹ This bill would require DOE to develop an initiative to mitigate the consequences on the electric grid from the results of cyberattacks by increasing cybersecurity capabilities of the electricity sector. As of January 2018, the bill has been referred to the House Subcommittee on Cybersecurity and Infrastructure Protection, and is awaiting further action.¹⁰ [Some states](#) have also begun considering additional security measures,¹¹ although whether these will complement existing standards or duplicate efforts remains to be seen.

2. Changing Energy Production Paradigms & Market Participants

The challenges of securing the grid, in a world where cyberwarfare plays an increasingly prominent role, are indeed daunting. In many ways, however, market forces - spurred by deregulation of markets previously dominated by utility monopolies - have potential to be just as disruptive to the status quo.

Although still a small share of the energy picture, storage has continued to grow with projections that 295 MW of storage would be deployed in 2017, up from 231MW in 2016.¹² Residential energy storage surged in 2017, led by California's Self-Generation Incentive Program and Hawaii's Customer Self-Supply Program, with reported growth up 202% over the prior year.¹³ Equally important is development of new business models, further distancing the supply of energy from its traditional centralized model, spurring a new class of "prosumers" who are able to access real-time data about their energy usage.¹⁴ The increased ability of individuals and businesses to go 'off-grid' pose significant

resilience of critical infrastructure including natural disasters, cyberattacks, and acts of terrorism.)

⁶DEPT. OF ENERGY, [TRANSFORMING THE NATION'S ELECTRICITY SYSTEM: THE SECOND INSTALLMENT OF THE QER](#) (2017).

⁷GOV'T ACCOUNTABILITY OFF., [ELECTRICITY: FEDERAL EFFORTS TO ENHANCE GRID RESILIENCE](#) (2017).

⁸*Id.*

⁹GRID CYBERSECURITY RESEARCH AND DEVELOPMENT ACT, H.R. 4120, 115TH CONG. (2017).

¹⁰[H.R. 4120 Grid Cybersecurity Research and Development Act](#), LIBRARY OF CONGRESS (last visited Apr. 30, 2018).

¹¹Order Establishing Oversight Framework and Uniform Business Practices for Distributed Energy Resource Suppliers, In the Matter of Regulation and Oversight of Distributed Energy Resource Providers and Products, Case No. 15-M-1080 (N.Y. Pub. Serv. Comm'n Oct. 19, 2007).

¹²[US Energy Storage Deployments Up 46 Percent Annually in Q3 2017](#), GREENTECH MEDIA (last visited Apr. 30, 2017).

¹³*Id.*

¹⁴Zachary Basu, [If Power Start-up Drift Can Make it in New York, it may be Lights Out for Traditional Utilities](#), CNBC.COM (Sept. 8, 2017).

challenges to traditional utility business models and has raised concerns about an impending “death spiral.”¹⁵

B. Part One: Snapshots & Highlights

1. Natural Disasters

2017 was a devastating year in terms of natural disasters. While such disasters inevitably trigger legal and regulatory disputes over causation and compensation,¹⁶ the unprecedented scale of damage calls into question whether interconnected grids can *ever* be made completely resilient, and the degree to which we should focus instead on micro-grids and smaller self-sustaining resources.¹⁷

One regulatory directive to watch in 2018 is the Order to Preserve Evidence issued by the California Public Utilities Commission to Pacific Gas and Electric Company.¹⁸ The Order seeks to preserve information related to the potential liability of downed power lines in igniting blazes in Northern California. These fires were part of the deadliest fire season in California history, with impacts to its economy in the billions.¹⁹

Several catastrophic hurricanes made landfall in 2017. In August, Hurricane Harvey made landfall in Texas, leaving in its wake some of the worst flooding ever experienced in Houston.²⁰ Hurricane Irma then hit Florida with peak winds of 185 mph (295 km/h), one of the strongest Atlantic storms on record.²¹ Days later, Hurricane Maria demolished Puerto Rico and devastated the island’s electric grid. As of January 2018, over half of Puerto Rico is [still without power](#).²² The impacts of these storms, and who bears responsibility for rebuilding the infrastructure in these communities, will be subject to ongoing contention through 2018.

2. Transmission & Pipeline Controversies

2017 was a challenging year for transmission projects, which faced steep opposition by state and local entities. However, the appointment by the Trump Administration of four of the five FERC Commissioners may clear the way for the greenlighting of similar projects in 2018.

In August 2017, a three-judge panel for the U.S. Circuit Court of Appeals for the Second Circuit found that the New York State Department of Environmental Conservation had the authority to deny the water permit for [Constitution Pipeline Project](#).²³ Under the

¹⁵Leanna Garfield, [Fears of a Utility ‘Death Spiral’ Could be Slowly Killing Solar Power](#), BUS. INSIDER (July 11, 2017).

¹⁶See, e.g., [Natural Disasters](#), AM. BAR ASSOC. (last visited Apr. 30, 2018).

¹⁷NAT’L ACADEMIES OF SCIS., ENG’G, AND MED., [ENHANCING THE RESILIENCE OF THE NATION’S ELECTRICITY SYSTEM](#).

¹⁸Cal. Pub. Util. Comm’n., Order to Preserve Evidence (Oct. 25, 2017).

¹⁹Priya Krishnakumar, [Why the 2017 Fire Season has been One of California’s Worst](#), L.A. TIMES (Dec. 5, 2017).

²⁰Catherine Garcia, [Houston Experiencing Worst Flooding in its History](#), THE WEEK (Aug. 27, 2017).

²¹Molly Rubin, [All of the Meteorological Records Irma has Broken So Far](#), QUARTZ (Sept. 11, 2017).

²²Frances Robles & Jess Bidgood, [Three Months After Maria, Roughly Half of Puerto Ricans Still Without Power](#), N.Y. TIMES (Dec. 29, 2017).

²³Constitution Pipeline Co. v. N.Y. State Dep’t of Envtl. Conservation, 869 F.3d 87, 91 (2d Cir. 2017).

[U.S. Natural Gas Act](#), FERC approves the construction of interstate natural gas pipelines. However, [Section 401 of the Clean Water Act](#) requires that certain federally licensed projects gain state-issued permits. The court noted that *Constitution* failed to address certain water resource impacts during state environmental review, and that Congress intended the states to retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval.

FERC was, however, successful in defending its practice of tolling orders. In [New Jersey Conservation Foundation v. FERC](#)²⁴ the plaintiff sought to challenge FERC's practice of issuing an order for limited purposes of further consideration if it could not reach a final decision with the standard thirty (30) day time frame. The crux of the issue is that subsequent legal challenges to these Orders often fail on grounds that the plaintiff had not exhausted all administrative remedies.²⁵ The suit claimed FERC had failed to prove that interstate natural gas pipeline projects were necessary for the public good and had therefore violated the Fifth Amendment requirement that any eminent domain be made for public use.²⁶ Without reaching the merits, the Third Circuit found that the relevant agencies had not acted arbitrarily or capriciously.

II. PART TWO: HOW DO WE VALUE RESILIENCY & RELIABILITY?

As clearly as potential weaknesses of the grid against cybersecurity threats and natural disasters were brought into focus in 2017, so too were the stark the differences among policymakers in how to address these challenges. Several energy policy debates in 2017 involved questions of the resiliency and reliability attributes of electric generating resources. These debates pitted traditional, large-scale grid resources on one end with newer, small-scale and distributed resources on the other. The shift in the Obama and Trump Administration priorities, however, is only part of the story; rapidly emerging technologies and new energy markets also contributed to create many new fault lines in the resiliency and reliability debate.

A. Part Two: Main Issues

One of the major unresolved issues in 2017 was resource compensation: how should markets compensate resources for their contributions to grid reliability and resiliency? And should policymakers be involved in with setting such compensation in the electricity sector?

A baseload compensation rule proposed by the DOE (discussed below), for example, was opposed by a unique coalition that included renewable energy advocates as well as oil and natural gas industries; the coal industry also strongly opposed efforts by nuclear advocates to obtain subsidies for carbon-free baseload generation.²⁷

Existing federal tax benefits for renewable resources appear to have survived Congress' 2017 tax overhaul largely intact. Yet, while proponents of renewables, energy storage, and distributed generation argued that they provide critical benefits through reduction in peak demand and risk of fuel supply interruption, traditional baseload

²⁴Complaint for Declaratory and Injunctive Relief, *N.J. Conservation Found. v. FERC*, No. 3:17-cv-11991-FLW-TJB (3d Cir. Nov. 22, 2017).

²⁵Ellen M. Gilmer, *Enviros Take FERC Tolling Orders to Court*, ENERGYWIRE, E&E NEWS (Nov. 15, 2017).

²⁶Michael Sol Warren, [N.J. Environmentalists Use New Legal Strategy to Fight Pipelines](#), NJ.COM (Dec. 3, 2017).

²⁷See Docket Sheet, Proposed Grid Resiliency Pricing Rule, F.E.R.C. Docket No. RM18-1-000 (available via FERC Online).

resources found renewed support at the federal level, arguing that true grid reliability and resiliency require large-scale generating resources that can store significant onsite fuel.²⁸ Coal plant operators and upstream coal mining companies are now seeking capacity payments tied to their ability to store fuel on site and ramp up generation, and the nuclear industry has worked to piggyback on renewable energy policies by seeking to qualify for preferential tax treatment and other benefits for carbon-free generation.²⁹

B. Part Two: Snapshots & Highlights

1. DOE's Request for a Notice of Proposed Rulemaking (NOPR)

For the first time in almost 40 years, the DOE invoked its authority to propose a rule for FERC action.³⁰ DOE's Notice of Proposed Rulemaking (NOPR), "Grid Pricing Reliability Rule," directed FERC to take action on the rule within 60-days from publication in the Federal Register (i.e. by December 11, 2017). Based on the premise that grid reliability is threatened by the planned retirements of a substantial number of baseload generators, the proposed rule would modify the pricing mechanisms used in Regional Transmission Organization (RTO) and Independent System Operator (ISO) wholesale electricity markets in order to ensure that the "reliability and resiliency" attributes of such generation resources receive full value in those markets.³¹ The proposed rule generated considerable controversy because, as a practical matter, it provides cost recovery to coal and nuclear power generators.

2. Compensating Nuclear & "Zero Emissions" Generation

Although FERC Commissioners ultimately (and unanimously) [voted against](#) the proposal in early January 2018,³² two of the other more noteworthy cases in 2017 seem to bode well for regulatory resource compensation mechanisms. Both the [Village of Old Mill Creek v. Star](#)³³ and [Coalition for Competitive Electricity v. Zibelman](#)³⁴ challenged Zero Emission Credit (ZEC) programs by Illinois and New York regulators to support nuclear facilities facing [financial difficulties](#).³⁵

²⁸*Id.*

²⁹*Id.*

³⁰[Grid Resiliency Pricing Rule](#), 82 Fed. Reg. 46,940 (Oct. 10, 2017) (to be codified at 18 C.F.R. pt. 35) (Notice of proposed rulemaking) (Secretary Perry used section 403(a) of the Department of Energy Organization Act (42 U.S.C. § 7173), which authorizes the Secretary of Energy to propose rules for FERC action regarding certain Commission functions, including its electricity rate-related functions under sections 205 and 206 of the Federal Power Act, and to set reasonable time limits of the proposed action).

³¹U.S. DEP'T OF ENERGY, STAFF REPORT TO THE SECRETARY ON ELECTRICITY MARKETS AND RELIABILITY (Aug. 23, 2017).

³²Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures, *Grid Reliability & Resilience Pricing*, 162 F.E.R.C. ¶ 61,012 (Jan. 8, 2018).

³³*Vill. of Old Mill Creek v. Star*, Nos. 17-CV-1163 & 17-CV-1164, 2017 WL 3008289 at *1 (N.D. Ill. July 14, 2017).

³⁴*Coal. for Competitive Elec. v. Zibelman*, No. 16-CV-8164, 2017 WL 3172866 at *1 (S.D.N.Y. July 25, 2017).

³⁵Jim Poison, [More Than Half of America's Nuclear Reactors Are Losing Money](#), BLOOMBERG (June 14, 2017) (showing most American nuclear plants were losing money, with states considering financial support programs).

In both cases, the courts rejected the plaintiffs' argument that the ZEC programs violated the dormant commerce clause and contradicted recent Supreme Court decisions³⁶ (which struck down similar programs on the basis that they impermissibly intruded upon FERC's jurisdiction to establish wholesale rates).

The court in *Star* went further to hold that there is *no* private cause of action in federal court under the FPA for injunctive relief on the basis of preemption.³⁷ Moreover, it held that the Illinois ZEC program was permissible under the FPA because a) it did not require participation in FERC-regulated electricity markets the program and thus b) it was not "tethered" to those markets in the manner described by the Supreme Court in *Hughes*. In *Zibelman* the court similarly found that New York's ZEC program was not "tethered" to FERC-regulated markets and was therefore permissible under the FPA.³⁸

Both cases have been appealed. They join a third 2017 case, [*Allco Finance Ltd. v. Klee*](#),³⁹ upholding a state's ability to enter into wholesale energy contracts with winning auction bidders. In rejecting the plaintiffs' claims, the court found that, unlike in *Hughes*, the Connecticut program did not require generators to participate in, or clear, any organized market in order to be selected under the RFP, and that, in *Hughes*, the Supreme Court still recognized that states "may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain."⁴⁰

3. New Methodologies for Calculating "Value"

While the DOE's NOPR sought to define reliability in terms of traditional baseload generation, New York State's sprawling and ambitious "Reforming the Energy Vision" (REV) initiative takes a different approach.⁴¹ Reliability of the grid, under REV, must be achieved through disruption of existing paradigms, improving resiliency and decentralization mechanisms (though not necessarily market growth).

One example of this paradigm shift is New York's new "Value Stack" (VDER) tariff.⁴² Rolled out in late 2017, VDER is designed to compensate distributed energy resources based on specific contributions to grid reliability rather than traditional net metering (which compensates resources feeding into the grid on a set amount per kWh). An eligible resource's⁴³ compensation will be calculated based on its location on the grid (i.e. alleviating a bottleneck zone vs. located in a zone with already sufficient generation), its ability to contribute during times of peak demand, and its environmental value.⁴⁴ This more granular methodology, the New York Public Service Commission (NYPSC) argues,

³⁶See *Hughes v. Talen Energy*, 136 S. Ct. 1288 (2016) (struck down a Maryland program because it guaranteed generators participating in the wholesale market a rate that was effectively distinct from the market-clearing price set by the auction, and improperly intruded upon FERC's jurisdiction by "adjusting an interstate wholesale rate.).

³⁷*Old Mill Creek*, 2017 WL 3008289 at *9.

³⁸*Zibelman*, 2017 WL 3172866 at *18.

³⁹861 F.3d 82 (2d Cir. 2017).

⁴⁰*Hughes*, 136 S. Ct. at 1298.

⁴¹[*Reforming the Energy Vision*](#), N.Y. STATE (last visited Feb. 2, 2018).

⁴²Order on Phase One Value of Distributed Energy Resources Implementation Proposals, Cost Mitigation Issues, and Related Matters, *In the Matter of the Value of Distributed Energy Resources*, No. 15-E-0751, at 3 (N.Y. Pub. Serv. Comm'n Sept. 14, 2017).

⁴³*Id.* at 1-2. (Eligible resources currently include: Solar PV; wind; micro-hydro; farm waste less than 2MW, fuel cells, and CHP less than 10kW).

⁴⁴Groups have also proposed adding an environmental justice (EJ) 'layer' to the value stack Case 15-E-0751 et al, *Staff Report on Low-Income Community Distributed Generation Proposal* (Dec. 15, 2017).

will provide the market with more accurate price signals and, in turn, improve resiliency and reliability of the grid.

Other examples of REV's vision include significant investment in energy storage R&D,⁴⁵ rollout of community choice aggregation and community distributed generation programs,⁴⁶ and a growth of the DER and "prosumer" marketplace.

III. PART THREE: WHOSE VISION WILL DECIDE WHAT RESILIENCY MEANS?

Part Two presented very different approaches and methodologies in determining how grid resiliency and reliability should be defined, valued, and prioritized. The approach that emerges as dominant will likely have a significant effect on the future of the grid.

A. *Part Three: Main Issues*

1. Resiliency Through the Status Quo

Through a series of Executive Orders and regulatory actions in 2017, the Trump Administration signaled its policy for securing the grid through a) development of traditional baseload resources like oil and coal and b) through the processes of regulatory rollback and streamlining favored by proponents of traditional utility business models. The preference for using existing regulatory structures is seen on the state-level as well.⁴⁷ Both New York and Illinois have successfully introduced programs to subsidize their struggling nuclear industries. And New York's Department of Public Service Staff has also made clear, through New York's ongoing Retail Market Proceeding, that they believe utilities, with their mandate to provide just and reasonable rates to the public, are better suited to be the main gatekeepers to oversee and implement new programs.⁴⁸

2. Resiliency Through Technological & Regulatory Disruptors

Unlike New York, [Nevada's Public Utilities Commission](#) (PUCN) seems poised to reverse its [previous course](#)⁴⁹ and open up its markets to encourage net metering, distributed generation, and alternative energy suppliers.⁵⁰ The FERC has also looked to promote integration of distributed energy resources into the wholesale market and [directed](#) Regional Transmission Operators (RTOs) to work with state commissions to incorporate distributed energy resources into the wholesale grid.⁵¹ While such integration is very much a [work in](#)

⁴⁵[2015 New York State Energy Plan](#), N.Y. STATE.

⁴⁶*In the Matter of the Value of Distributed Energy Resources*, No. 15-E-0751 at 55; Press Release, N.Y. Pub. Serv. Comm'n, PSC Approves Third Community Choice Aggregation Plan for Upstate New York, Providing New Options for Clean and Affordable Energy (Jan. 18, 2018).

⁴⁷[Illinois and New York Rescue Nuclear Plants; Other States May Follow](#), INST. FOR ENERGY RESEARCH (last visited Apr. 30, 2018).

⁴⁸[Prepared Testimony of the Staff Panel](#), *In the Matter of Eligibility Criteria for Energy Service Companies*, Case 15-M-0127 at 18 (N.Y. Pub. Serv. Comm'n Sept. 15, 2017).

⁴⁹Dan Hernandez, *Nevada Solar Industry Collapses After State Lets Power Company Raise Fees*, THE GUARDIAN (Jan. 13, 2016).

⁵⁰Comments of the Nat'l Energy Marketers Ass'n, *Energy Choice Initiative Investigation & Workshop*, Docket No. 17-10001 at 2-3 (Nev. Pub. Utils. Comm'n Oct. 11, 2017).

⁵¹Notice of Proposed Rulemaking, *Electric Storage Participation in Markets Operated by Regional Transmission Organizations & Independent System Operators*, Nos. RM-16-23-000 & AD16-20-000, 157 F.E.R.C. ¶ 61,121 (Nov. 17, 2016).

[progress](#),⁵² the NOPR signals a willingness by federal regulators to explore the possibility of significant alterations to our system of energy infrastructure.

B. Part Three: Snapshots & Highlights

1. Federal vs. State Authority to Regulate

In keeping with its position that it has authority over all wholesale market activity, FERC recently issued an [Order](#)⁵³ preventing retail electric regulators (i.e., states) from barring low-cost energy efficiency resources competing in the wholesale electricity market without express authority from FERC. The Order responded to a petition by AEE (Advanced Energy Economy) that sought a declaratory ruling that FERC has exclusive jurisdiction to regulate the participation of energy efficient resources (EER) in wholesale markets. FERC confirmed it has such jurisdiction, but that it may choose to delegate such authority to state utilities. With this finding, it affirmed the right of the Kentucky Public Service Commission to continue to regulate EERs in the PJM Wholesale Market.

2. Federal Regulation

The Trump Administration has said that American energy infrastructure is a [top priority](#),⁵⁴ and has issued a whirlwind of Executive Orders and regulatory efforts to that end. For example, [Executive Order 13807](#) and [Executive Order 13766](#)⁵⁵ both seek to streamline National Environmental Policy Act (NEPA) and federal environmental review processes. Key provisions include directives to complete the environmental review process under NEPA for major infrastructure projects within two (2) years and for federal agencies to establish a “One Federal Decision Policy” for issuing all federal permit decisions within 90-days of the completion of Record of Decision (ROD).

In March 2017, President Trump signed an [executive order](#) halting the federal government’s enforcement of climate regulations;⁵⁶ federal agencies are to no longer consider climate change when evaluating infrastructure projects. The Order also directs the EPA to withdraw and revise the Clean Power Plan, although, pursuant to the [2009 Agency Finding](#) greenhouse gas emissions threatened “public health and welfare,” the EPA is still legally required to draft a regulation similar to the Clean Power Plan.⁵⁷ The Administration has also [sought to pause and/or roll back](#) several other Obama-era regulations that would disincentivize construction of new energy infrastructure,⁵⁸ although a number of those

⁵²Report, N.Y. Indep. Sys. Operator, Distributed Energy Resources Roadmap For New York’s Wholesale Electricity Markets (Jan. 2017).

⁵³Order on Petition for Declaratory Order, *Advanced Energy Economy*, No. EL17-75-000, 161 F.E.R.C. ¶ 61,245 (Dec. 1, 2017).

⁵⁴Melanie Zanona, *Trump’s Infrastructure Plan: What we know*, THE HILL (Jan. 13, 2017).

⁵⁵Exec. Order No. 13807, 82 Fed. Reg. 40,463 (Aug. 15, 2017); Exec. Order No. 13766, 82 Fed. Reg. 18 (Jan. 24, 2017).

⁵⁶Exec. Order 13783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

⁵⁷Endangerment and Cause or Contribute Findings for Greenhouse Gases under the Section 202(a) of the Clean Air Act, ENVTL. PROT. AGENCY (Dec. 7, 2009).

⁵⁸*Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements*, 82 Fed. Reg. 46,458 (Oct. 5, 2017) (to be codified at 43 C.F.R. pts. 3160 & 3170) (Proposed rule).

efforts have faced vigorous opposition by states and environmental groups, as well as several high-profile setbacks in court.⁵⁹

CONCLUSION & LOOKING AHEAD TO 2018

2017 may well be remembered as the year energy storage and related technologies finally achieved their promise as grid-changing technologies, but it also highlighted the vulnerability of the grid with tragic force and suggested the onset of a new normal. Thus, in 2018, perhaps the most pressing issue for grid operators will be clearly defining which attributes of energy resources deserve compensation. Should resources be compensated for environmental benefits or resiliency benefits – or both? And what resources actually are required to ensure grid resiliency and reliability in an era of rapidly evolving technology?

⁵⁹Order Granting Plaintiffs' Motions for Summary Judgment, *California v. U.S. Bureau of Land Mgmt.*, No. 3:17-cv-03804-EDL, 2017 WL 4416409 (N.D. Cal. Oct. 4, 2017).

Chapter 15 • FOREST RESOURCES 2017 Annual Report¹

I. DEVELOPMENTS IN FEDERAL LITIGATION

A. *National Forest Roadless Area Management*

Litigation over the validity of the 2001 Roadless Area Conservation Rule (Roadless Rule)² continued in 2017 with the United States District Court for the District of Columbia rejecting the State of Alaska's (Alaska) challenges to the Roadless Rule in [*Alaska v. U.S. Department of Agriculture*](#), which is currently on appeal to the D.C. Circuit Court of Appeals.³ In rejecting Alaska's challenge, the court held *inter alia* that the Roadless Rule did not violate the Tongass Timber Reform Act's mandate that the United States Forest Service (Forest Service) consider and seek to meet market demand for timber from the Tongass National Forest and that the Forest Service had considerable discretion to balance market demand for timber with other competing land uses.⁴ The court also rejected Alaska's claims that the Roadless Rule was an unlawful withdrawal of public land in violation of the Alaska National Interest Lands Conservation Act (ANILCA), explaining that the Roadless Rule explicitly allowed new mineral leases in inventoried roadless areas and did not exempt roadless areas from the operation of the mineral leasing laws.⁵ Finally, the court rejected Alaska's claims that the Forest Service violated the National Environmental Policy Act (NEPA),⁶ finding that (1) a supplemental environmental impact statement (EIS) was not required; (2) the Forest Service appropriately focused on mitigating the rule's impact on the timber industry in the Tongass National Forest; (3) the purpose and need statement in the EIS was reasonable; (4) the EIS properly considered cumulative, social, and economic impacts; and (5) there were no procedural irregularities in the public comment process.⁷

Meanwhile, Alaska United States Senator Lisa Murkowski and others have been pursuing federal legislation to exempt both the Tongass and Chugach National Forests in Alaska from the Roadless Rule. In November 2017, an exemption provision was included in the United States Senate's (Senate) draft version of the Fiscal Year 2018 Interior [appropriations draft bill](#).⁸ However, as of the date of this report, the Senate Appropriations Committee had not yet voted on the Fiscal Year 2018 Interior appropriations bill, and instead passed a [continuing resolution](#) to extend temporary appropriations through January

¹Author contributors to this report were Jacob Aronson, Christopher Parker, and Christian Termyn of Perkins Coie LLP, San Francisco, California, Robert A. Maynard of Perkins Coie LLP, Boise, Idaho, and David J. Townsend of Perkins Coie LLP, Washington D.C. Robert A. Maynard, Erika E. Malmen, and Stephanie M. Regenold of Perkins Coie LLP, Boise, Idaho, edited this report, and paralegal Amy Jarrell of Perkins Coie LLP, Anchorage, Alaska assisted the authors. This report covers many (but, due to space constraints and to avoid duplication with other chapters, not all) of the significant developments in forest management law in 2017. Any opinions of the authors in this report should not be construed to be those of Perkins Coie LLP.

²36 C.F.R. §§ 294.10–294.14 (2005).

³273 F. Supp. 3d 102 (D.D.C. 2017), *appeal docketed*, No. 17-5260 (D.C. Cir. Nov. 27, 2017).

⁴*Id.* at 122-124.

⁵*Id.* at *124-25.

⁶42 U.S.C. §§ 4321–70 (2017).

⁷*Alaska*, 2017 WL 4221057 at *8–11, 14–15.

⁸S. Comm. on Appropriations, 115th Cong., Department of the Interior, Environment, and Related Agencies Appropriations Act, 2018, § 509 (Comm. Print Nov. 17, 2017).

19, 2018.⁹ It therefore remains to be seen whether federal legislation containing an Alaska exemption will be enacted in 2018.

Idaho and Colorado are not subject to the Roadless Rule because they have promulgated state-specific rules.¹⁰ The Forest Service reinstated the North Fork Coal Mining Area exception to the Colorado Roadless Rule, which took effect on April 17, 2017, following a temporary 60-day delay at the beginning of the Trump Administration.¹¹

B. Federal Court Cases

In *Center for Biological Diversity v. Ilano*,¹² the District Court for the Eastern District of California rejected a challenge to (1) the Forest Service's designation of 5.3 million acres of National Forest System lands in California as landscape-scale areas where insect and disease treatment was needed to improve forest health, and (2) the Forest Service's decision to proceed with the Sunny South Insect Treatment Project to combat disease and beetle infestation involving 2,700 acres in the Tahoe National Forest under section 602 of the Healthy Forests Restoration Act enacted as part of the 2014 Farm Bill.¹³ In rejecting the environmental group's challenge to the designation of landscape-scale areas for insect or disease treatment, the court explained that a designation has only potential or contingent effects on the environment and Congress clearly intended to create an expedited process for insect and disease treatment that would not be subject to NEPA analysis.¹⁴ As to the specific project, the court held that the categorical exclusion established by the Farm Bill for forest treatments conducted within designated treatment areas was applicable to the project, and no extraordinary circumstances existed to preclude use of a categorical exclusion.¹⁵ Instead, the Forest Service had adequately explained why the project's effects on the northern spotted owl were not significant enough to rise to the level of an extraordinary circumstance.¹⁶ The case is currently on appeal to the Ninth Circuit.¹⁷

In *Rocky Mountain Wild v. Dallas*,¹⁸ the District Court for the District of Colorado set aside the Forest Service's approval of a land exchange that would provide access to private land for development of a ski resort entirely surrounded by National Forest lands within the Rio Grande National Forest, finding that the agency violated NEPA, the access provision of ANILCA,¹⁹ and the Endangered Species Act (ESA).²⁰ Under the proposed land exchange, approximately 177 acres of the private owner's existing parcel would be exchanged for approximately 205 acres of federal land to provide direct access to the

⁹Continuing Appropriations Act, 2018, Pub. L. No. 115-96, 131 Stat. 2044 (2017).

¹⁰Idaho Roadless Area Management, 36 C.F.R. §§ 294.20–294.29 (2017); Colorado Roadless Area Management, 36 C.F.R. §§ 294.40–294.49 (2017).

¹¹See 36 C.F.R. § 294.43(c)(1)(ix); 82 Fed. Reg. 9,973–74 (Feb. 9, 2017).

¹²261 F. Supp. 3d 1063 (E.D. Cal. 2017), *appeal docketed*, No. 17-16760 (9th Cir. Sept. 1, 2017).

¹³16 U.S.C. § 6591a (2017).

¹⁴*Ctr. for Biological Diversity*, 261 F. Supp. 3d at 1065-69.

¹⁵*Id.*

¹⁶*Id.*

¹⁷No. 17-16760 (9th Cir. docketed Sept. 1, 2017).

¹⁸Order Setting Aside Agency Action (“Order”), *Rocky Mtn. Wild v. Dallas*, No. 1:15-cv-1342-RPM (D. Colo. May 19, 2017), ECF No. 67, *appeal docketed*, No. 17-1366 (10th Cir. Oct. 16, 2017).

¹⁹16 U.S.C. § 3210 (2017).

²⁰16 U.S.C. §§ 1531–1544.

private land.²¹ In holding that the Forest Service violated NEPA, the court found that based on the Forest Service’s prior actions concerning the same property, there was no basis for the Forest Service’s assertion that it had no power to regulate future development of a ski resort on the federal exchange parcel and related private land after approving the land exchange.²² As a result, the court set aside the Forest Service’s Record of Decision (ROD) approving the land exchange based on the Forest Service’s express refusal to consider any possible federal restrictions on the federal exchange parcel to protect the public interest.²³ The court further found that even if the Forest Service determined that the private owner’s reasonable use and enjoyment of the property was for a year-round resort requiring access under ANILCA and Forest Service regulations, the Forest Service’s “categorical refusal to consider restrictions on the federal exchange parcel based on ANILCA was arbitrary, capricious, and contrary to law.”²⁴ Moreover, the biological opinion incorporated into the final EIS and ROD expressly recognized endangered species would be adversely impacted by development resulting from approval of the land exchange and these documents failed to address the minimum statutory requirements to protect the species, according to the court.²⁵ The case is currently on appeal to the Tenth Circuit.²⁶

In *Alliance for the Wild Rockies v. Bradford*,²⁷ the Ninth Circuit affirmed the Forest Service’s compliance with the National Forest Management Act (NFMA),²⁸ ESA, and NEPA in connection with the Forest Service’s decision to construct 4.7 miles of new roads to permit access to a timber sale project in Montana’s Kootenai National Forest under the Kootenai Forest Plan.²⁹ In particular, environmental group plaintiffs claimed the new roads violated the NFMA, ESA, and NEPA by increasing the linear miles of road in violation of certain amendments to the Kootenai Forest Plan regarding motor vehicle access and impacts to grizzly bears that generally forbids “net permanent increases in linear miles of total roads” in the project area.³⁰ However, the Ninth Circuit rejected the plaintiff’s claims on the basis that the Forest Service had authority and was entitled to deference in determining whether the new roads were permissible under the forest plan amendments and a forest plan standard which would allow “[t]emporary increases . . . in linear miles” if new roads are “closed immediately upon completion of activities” with a “berm, guardrail or other measure that effectively prevents motorized access.”³¹ Accordingly, the Ninth Circuit held that the Forest Service could conclude that roads closed by motorized access by berms or barriers did not count toward the “linear miles of total roads” metric in the forest plan, and was therefore consistent with the plan.³²

In *In re Big Thorne Project*,³³ a split panel of the Ninth Circuit held that the Forest Service did not violate the NFMA when it determined that the Big Thorne logging project was consistent with the Alaska Tongass National Forest Plan (Tongass Forest Plan) and would “safeguard the continued and well-distributed existence of the Alexander

²¹Order, *Rocky Mtn. Wild*, No. 1:15-cv-1342-RPM, ECF No. 67 at 8.

²²*Id.* at 22–26.

²³*Id.* at 25.

²⁴*Id.* at 26–27.

²⁵*Id.* at 32–38.

²⁶No. 17-1366 (10th Cir. docketed Oct. 16, 2017).

²⁷856 F.3d 1238 (9th Cir. 2017).

²⁸16 U.S.C. §§ 1600–87.

²⁹*Bradford*, 856 F.3d at 1239–40.

³⁰*Id.* at 1242.

³¹*Id.* at 1242.

³²*Id.* at 1243.

³³857 F.3d 968 (9th Cir. 2017).

Archipelago wolf.”³⁴ In this case, environmental plaintiffs asserted that (1) the “wolf provision” of the Tongass Forest Plan mandated maintenance of a “sustainable” wolf population and not just a “viable” population under a superseded NFMA regulation incorporated into the Tongass Forest Plan, and (2) under a sustainability standard, the Forest Service failed to meet its obligations.³⁵ Although the environmental plaintiffs argued that the Tongass Forest Plan failed to provide any enforceable mechanism to protect the wolf in violation of the NFMA, the court held that no NFMA authority compels the agency to set a specific benchmark for ensuring the viability of a species not protected by the ESA.³⁶ Instead, the court pointed out that unlike the ESA, the NFMA serves “fundamentally different” and multiple interests, including commerce and recreation, and entrusts the balancing of these competing policy goals to the Forest Service.³⁷ Consequently, under the NFMA, while the Forest Service may consider protecting sustainable populations of wolf “where possible,” if this goal conflicts with other appropriate forest goals, “the [Forest] Service has discretion to pursue those goals instead.”³⁸ It was therefore sufficient under the forest plan and within the Forest Service’s discretion to approve the project and outline strategies expected to support wolf viability, including the reduction of road density and preservation of prey habitat, and to ensure the wolf’s viability for the forest “as a whole” under a comprehensive approach and not just the wolf’s viability in the project area.³⁹

II. DEVELOPMENTS IN STATE COURTS

In [*Redcedar, LLC v. CML-GA Social Circle, LLC*](#),⁴⁰ the Georgia Court of Appeals affirmed the lower court’s decision that a third-party timber cutter, Redcedar, LLC (Redcedar), was liable to a secured lender for the value of trees removed from undeveloped collateralized land, but not for the reduction in the land’s value, under Georgia’s timber conversion law, which establishes liability for anyone who “buys, sells, cuts, removes . . . or otherwise converts” trees without written consent from the landowners and secured lenders.⁴¹ In this case, without the knowledge or consent of the secured party, a company owned by the landowner’s son contracted with Georgia Timber, LLC (Georgia Timber) for the clear-cut removal of timber.⁴² Georgia Timber secured a harvest permit and hired Redcedar to cut and haul the timber, and Redcedar was paid for its services, but neither sold nor purchased the timber.⁴³ The secured lender sued both Georgia Timber and Redcedar under Georgia’s conversion statute for the lost value of the land, which it claimed was now inadequate security for the landowner’s debt based on the removal of the timber, which diminished the fair market value of the real property.⁴⁴ Although Redcedar did not dispute that it had cut and removed timber from the property without the secured lender’s consent, Redcedar argued that it was not liable because it was not a party to the timber removal contract, did not obtain the harvest permit, neither purchased nor sold the timber, and only functioned as Georgia Timber’s contractor. The Court of Appeals nonetheless

³⁴*Id.* at 974.

³⁵*Id.* at 974.

³⁶*Id.* at 974–75.

³⁷*In re Big Thorne Project*, 857 F.3d at 975.

³⁸*Id.* at 976.

³⁹*Id.* at 975 n.4.

⁴⁰798 S.E.2d 334 (2017).

⁴¹*Id.* at 337.

⁴²*Id.* at 336.

⁴³*Id.* at 337-38.

⁴⁴*Id.*

held that Georgia’s conversion statute created “broad, strict liability” for anyone who converts timber without written consent.⁴⁵ Accordingly, the Georgia Court of Appeals found that it was not error for the trial court to find that Redcedar was liable to the secured lender for conversion. However, the court found that the plain language of the statute did not permit recovery of the diminished value of the land, though it could be used to establish the secured lender’s right to attorneys’ fees and punitive damages.⁴⁶

In *M/V Resources LLC v. Louisiana Hardwood Products LLC*,⁴⁷ the Louisiana Court of Appeals interpreted a 1950 deed as evidence that the original landowners intended a sale of the then-existing timber coupled with a leasehold interest to grow and cut timber into the future.⁴⁸ In particular, the 1950 deed sold “[a]ll of the timber and trees of every kind and species (as hereinafter more specifically defined), being, standing, lying, growing and to grow” on certain enumerated tracts and granted the right to grow, cut, and remove timber from the lands for a period of 50 years, which was amended to a 99 year term and transferred to other parties over the years.⁴⁹ The present owner of the land subject to the 1950 deed petitioned the court for a declaratory judgment that the deed constituted a sale of the timber and trees existing at the time of the deed with a term set to expire upon removal, and did not include any continuing rights, or the right to use the tract for the purposes of growing and harvesting timber for a 99 year term. The Court of Appeals rejected the present owner’s claim, finding that the intent of the original parties broadly conveyed the timber then-existing on the property, in addition to the right to grow and cut timber from the premises for the specified term.⁵⁰ Furthermore, the court held that the deed “gave [grantee] and its successors various rights, which are not merely accessorial to a timber vendee,” including the free rights of ingress and egress; the right to build roads, bridges and tramways; the right to build and erect sawmills and other equipment; the right to build houses to house its employees; and, most importantly for the court, the right during the 99 year period to enter the land at any time, and for as many times as necessary, for the purpose of timber management.⁵¹

In *Herring v. Pelayo*,⁵² the Washington Court of Appeals addressed, as a matter of first impression, whether “a landowner’s legal authority extends to trimming the branches of a tree standing on a common property line in a manner that a defendant knows will kill the tree.”⁵³ The Herrings brought an action against their adjoining neighbors, the Pelayos, for timber trespass, alleging that a boundary tree located on their common property line died after the Pelayos removed the remaining branches of the tree. The trial court concluded that the Pelayos were liable under Washington’s timber trespass statute, RCW 64.12.030, after finding, *inter alia*, that the Pelayos believed that removing the remaining branches would kill the tree. On appeal, the Washington Court of Appeals upheld the trial court ruling, rejecting the Pelayos’ argument that liability under RCW 64.12.030 requires a specific finding of willfulness regarding the defendants’ conduct.⁵⁴ Instead, the Court held that, “in recognition of the long recognized lawful authority to trim overhanging vegetation, the lawful authority to use and maintain property held in common with a

⁴⁵*Redcedar, LLC*, 798 S.E.2d at 338.

⁴⁶*Id.* at 339.

⁴⁷225 So.3d 1104 (La. Ct. App. 2017).

⁴⁸*Id.* at 1112-13.

⁴⁹*Id.* at 1110.

⁵⁰*Id.* at 1111-12 (finding the deed expressly included the right “to grow” contemplating future growth and thus an interest of the grantee beyond then-existing trees).

⁵¹*Id.* at 1111.

⁵²397 P.3d 125 (Wash. Ct. App. 2017).

⁵³*Id.* at 128.

⁵⁴*Id.* at 129.

cotenant, and the plain language of the timber trespass statute,” “where a tree stands on a common property line, the common owners of the tree may lawfully trim vegetation overhanging their property but not in a manner that the common owner knows will kill the tree.”⁵⁵

III. DEVELOPMENTS IN FEDERAL LEGISLATION, DIRECTIVES AND POLICY

In last year’s edition, we reported on the Bureau of Land Management’s (BLM) “Planning 2.0” rule, including proposed amended regulations to 43 C.F.R. Part 1600.⁵⁶ On December 12, 2016, BLM released its final rule in this process, issuing sweeping new regulations regarding the procedures used to prepare, revise and amend land use plans pursuant to the Federal Land Policy and Management Act.⁵⁷ The 115th Congress, however, reacted swiftly with a [joint resolution](#) under the Congressional Review Act to repeal the BLM rule, which President Trump signed into law on March 27, 2017.⁵⁸

A. *Federal Policy on the Carbon Neutrality of Forest Bioenergy*

The \$1 trillion Omnibus Appropriations bill for Fiscal Year 2017, signed into [law](#) on May 5, 2017, included a policy rider calling for federal recognition of forest bioenergy carbon neutrality. This rider directs the Secretaries of Energy and Agriculture and the United States Environmental Protection Agency Administrator to jointly ensure consistency in federal policy relating to forest bioenergy across federal departments and agencies in an effort to recognize “the full benefits of the use of forest biomass for energy, conservation, and responsible forest management.”⁵⁹ The policy directs these officials to establish “clear and simple policies for the use of forest biomass as an energy solution, including policies that . . . reflect the carbon-neutrality of forest bioenergy and recognize biomass as a renewable energy source, provided the use of forest biomass for energy production does not cause conversion of forests to nonforest use.”⁶⁰ Finally, the policy directs the officials to “encourage private investment throughout the forest biomass supply chain, including in— (i) working forests; (ii) harvesting operations; (iii) forest improvement operations; (iv) forest bioenergy production; (v) wood products manufacturing; or (vi) paper manufacturing.”⁶¹

B. *Congressional Actions Related to Forest Fires*

In the wake of a particularly destructive wildfire season, Congress proposed legislation geared towards resolving the ongoing debate over how the federal government funds wildfire suppression. On November 1, 2017, the United States House of Representatives passed the [Resilient Federal Forests Act of 2017](#), which was received by

⁵⁵*Id.* at 130.

⁵⁶Resource Management Planning, 81 Fed. Reg. 9674 (Feb. 25, 2016) (Proposed Rule).

⁵⁷Resource Management Planning, 81 Fed. Reg. 89,580 (Dec. 12, 2016) (to be codified at 43 C.F.R. pt. 1600) (Final Rule).

⁵⁸Joint Resolution Disapproving the rule submitted by the Department of the Interior relating to Bureau of Land Management regulations that establish the procedures used to prepare, revise, or amend land use plans pursuant to the Federal Land Policy and Management Act of 1976, H.J. Res. 44, Pub. L. No. 115-12, 131 Stat. 76 (2017) (enacted).

⁵⁹Consolidated Appropriations Act of 2017, Pub. L. No. 115-31, § 428, 131 Stat. 135, 501 (2017).

⁶⁰*Id.*

⁶¹*Id.*

the Senate and referred to the Senate Committee on Agriculture, Nutrition, and Forestry on November 2, 2017.⁶² The proposed legislation would allow the President to declare major wildfires a natural disaster, making emergency funding available for fire suppression and would also expedite environmental analysis and expand the availability of categorical exclusions for hazardous fuels reduction projects such as timber sales. The House and the Senate also included provisions aimed at addressing wildfire expenses and disaster spending in their respective draft appropriations legislation. In particular, the Senate's Fiscal Year 2018 [appropriations draft bill](#) proposes a provision to end the fire borrowing practice, proposing to transfer emergency wildfire expenses above 100% of the 10-year average to disaster spending and out of annual appropriations bills.⁶³ The House Fiscal Year 2018 [appropriations bill](#) does not include similar fire-borrowing language as the Senate's proposed legislation, but does approve almost identical fire-fighting appropriations as the Senate draft, which would include \$2.9 billion in fire money for the Forest Service and \$956 million for the United States Department of the Interior.⁶⁴

In the last few years, both Republicans and Democrats have unsuccessfully called on Congress to transfer wildfire suppression costs above the 10-year average out of agency appropriations bills and into disaster spending, and as of the date of this report, it remains to be seen what legislation, if any, will be passed in the upcoming year.

C. United States - Canada Softwood Lumber Trade Dispute

As the year closed, the United States International Trade Commission (ITC) cleared the final hurdle for significant antidumping and countervailing duties to continue imports of softwood lumber from Canada. Earlier in the year, the United States Department of Commerce made affirmative findings that Canadian producers received unfair subsidies and engaged in unfair pricing on sales to the United States.⁶⁵ This resulted in imports being subject to deposits of antidumping and countervailing duties. These duty rates are quite high, ranging from 10-24 percent cumulatively. The rate that applies to a particular import varies by Canadian producer. Although the ITC decision finalized the investigation under U.S. law, Canada had already begun initiating disputes under the North American Free Trade Agreement and at the World Trade Organization. These disputes could alter the duty rates imposed on lumber imports from Canada, or conceivably result in withdrawal altogether of duties.

⁶²Resilient Federal Forests Act of 2017, H.R. 2936, 115th Cong. (2017).

⁶³S. Comm. on Appropriations, 115th Cong., Department of the Interior, Environment, and Related Agencies Appropriations Act of 2018, § 501, (Comm. Print Nov. 17, 2017).

⁶⁴Interior and Environment, Agriculture and Rural Development, Commerce, Justice, Science, Financial Services and General Government, Homeland Security, Labor, Health and Human Services, Education, State & Foreign Operations, Transportation, Housing and Urban Development, Defense, Military Construction and Veterans Affairs, Legislative Branch, and Energy and Water Development Appropriations Act, 2018, H.R. 3354, 115th Cong. (2017).

⁶⁵Certain Softwood Lumber Products From Canada: Final Affirmative Determination of Sales at Less Than Fair Value & Affirmative Final Determination of Critical Circumstances, 82 Fed. Reg. 51,806 (Nov. 8, 2107); Certain Softwood Lumber Products From Canada: Final Affirmative Countervailing Duty Determination, & Final Negative Determination of Critical Circumstances, 82 Fed. Reg. 51,814 (Nov. 8, 2017).

Chapter 16 • HYDRO POWER 2017 Annual Report¹

I. JUDICIAL DEVELOPMENTS

A. *Second Circuit Reinstates Water Transfers Rule*

On January 18, 2017, the United States Court of Appeals for the Second Circuit (“Second Circuit”) issued a [decision](#) which reinstated the Environmental Protection Agency’s (EPA) Water Transfers Rule.² The Rule, adopted in 2008,³ codifies the EPA’s longstanding policy that water transfers between navigable waters that do not subject the water to an intervening industrial, municipal, or commercial use do not constitute an “addition of pollutants” to navigable waters and are not subject to National Pollutant Discharge Elimination System (NPDES) permits under section 402 of the Clean Water Act (CWA).⁴ Under the “Unitary Waters” theory adopted in the Rule, all water bodies in the United States constitute a single, unitary entity, and even if a water transfer between navigable waters conveys water in which pollutants are present, it does not result in the addition of a pollutant to navigable waters.

Shortly after EPA released the Rule, several environmental organizations and state, provincial, and tribal governments filed complaints under the CWA and the Administrative Procedure Act⁵ challenging EPA’s promulgation of the Rule. On March 28, 2014, the U.S. District Court for the Southern District of New York granted summary judgment in favor of the plaintiffs.⁶ Applying the U.S. Supreme Court’s two-part test under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁷ for judicial review of an agency’s formal interpretation of a statute administered by the agency, the district court found under *Chevron* step one that the CWA is ambiguous as to whether Congress intended the NPDES program to apply to water transfers. In deciding whether the agency should be afforded deference in its interpretation of the statute, the court found under *Chevron* step two that the Rule was an unreasonable interpretation of the CWA because the EPA failed, under the Supreme Court’s standard for evaluating agency action under *Motor Vehicle Manufacturers Ass’n of the U.S. v. State Farm Mutual Automobile Insurance Co.*,⁸ to give a reasoned explanation for its interpretation exempting water transfers from the NPDES program. The district court vacated the Rule and remanded it to the EPA for further consideration.

On January 18, 2017, a divided Second Circuit panel reversed the district court’s decision and reinstated the Rule.⁹ While the court agreed with the district court that the CWA is ambiguous as to whether Congress intended the NPDES program to apply to water transfers, the court found that the Water Transfers Rule “represents a reasonable policy

¹This report, which covers significant decisions in the area of hydropower during 2017, was authored by Sharon L. White and Robert Conrad, attorneys at Van Ness Feldman, LLP, and Eli Daniels, law clerk at Van Ness Feldman, LLP.

²*Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 512 (2d Cir. 2017), *petition for cert. filed*, New York v. EPA, No. 17-418 (Sept. 19, 2017).

³National Pollutant Discharge Eliminations System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. § 122.3).

⁴33 U.S.C. § 1342 (2012).

⁵5 U.S.C. §§ 551-59 (2012).

⁶*Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 630 F. Supp. 2d 295, 304 (S.D.N.Y. 2009).

⁷467 U.S. 837 (1984).

⁸463 U.S. 29 (1983).

⁹*Catskill Mountains Chapter of Trout Unlimited, Inc.*, 846 F.3d at 512.

choice” and should be afforded deference under the second prong of the *Chevron* test.¹⁰ The Second Circuit held that the more searching *State Farm* standard applied by the district court does not apply to judicial review of an agency’s interpretative rule.¹¹ Applying the more deferential *Chevron* step two test, the Second Circuit found that the EPA offered a sufficient explanation for adopting the Rule, and the Rule itself is a reasonable interpretation of the CWA.¹² In upholding the Rule, the court noted that the CWA “does not require that water quality be improved whatever the cost or means, and the Rule preserves state authority over many aspects of water regulation, gives regulators flexibility to balance the need to improve water quality with the potentially high costs of compliance with an NPDES permitting program, and allows for several alternative means for regulating water transfers.”¹³ The Second Circuit’s opinion also expressly preserved longstanding precedent that hydropower dams are generally not subject to NPDES permits.¹⁴

After the Second Circuit denied requests for rehearing and rehearing en banc of its decision,¹⁵ a group of states and several environmental organizations each filed petitions for certiorari with the U.S. Supreme Court to review the decision, which remain pending. Responses to the petition are due on January 19, 2018.¹⁶

B. *D.C. Circuit Affirms FERC Order on Credits for Past Overpayment of Headwater Benefits Charges*

On December 22, 2017, the U.S. Court of Appeals for the D.C. Circuit [affirmed](#) a Federal Energy Regulatory Commission (FERC) order denying a downstream licensee’s request for credits for past overpayments of headwater benefits where the licensee had already resolved the dispute with the upstream operator by contract.¹⁷ The case involved a longstanding dispute over charges assessed by an upstream hydropower operator against a downstream hydropower operator for benefits from the regulated flow caused by the upstream dam, also known as headwater benefits. Under section 10(f) of the Federal Power Act (FPA),¹⁸ when an upstream operator alters the natural flow of a river in such a way as to allow a downstream hydroelectric facility to generate more electric power than would otherwise be possible, FERC is authorized to collect headstream benefits payments from the downstream licensee to reimburse the upstream operator for an equitable share of its interest, maintenance, and depreciation costs related to the power function of the project. In the case, prior to 2006, the upstream operator, Hudson River-Black River Regulating District (“District”), assessed headwater benefits charges against the downstream operator, Erie Boulevard Hydropower, LP (“Erie”), pursuant to New York state law. After Erie challenged the District’s headwater benefits charges assessed from 2000 to 2006 in state court, the parties reached a headwater benefits settlement (“Settlement”). Under the terms of the Settlement, Erie received immediate and future monetary benefits, in return for releasing all its claims arising out of the District’s assessments for 2000-06 and future challenges to charges to be assessed for 2006-09.

¹⁰*Id.* at 507.

¹¹*Id.* at 523-24.

¹²*Id.*

¹³*Id.* at 501.

¹⁴*Catskill Mountains Chapter of Trout Unlimited, Inc.*, 846 F.3d at 529-30.

¹⁵Juan Carlos Rodriguez, [2nd Circ. Won’t Reconsider EPA Water Transfer Rule Ruling](#), LAW360, (Apr. 18, 2017).

¹⁶*New York v. EPA*, No. 17-418 (U.S.).

¹⁷Opinion, *Erie Blvd. Hydropower, LP v. FERC*, No. 16-1015 (D.C. Cir. Dec. 22, 2017).

¹⁸16 U.S.C. § 803(f) (2012).

In a separate case, another downstream licensee, Albany Engineering Corporation (“Albany”), challenged the District’s headwater benefits charges assessed on it by the District before FERC. Albany argued that section 10(f) of the FPA preempted all state headwater benefits assessments as a matter of law. FERC agreed, in part, finding that section 10(f) preempts state law to the extent the state law authorizes charges for interest, maintenance, and depreciation.¹⁹ On appeal, the D.C. Circuit instead found that section 10(f) preempts in its entirety any state law that authorizes headwater benefits charges.²⁰ While the Court did not address FERC’s authority to order refunds for Albany’s past payments to the District, it suggested that FERC had the authority to provide some remedy for downstream licensees’ state overpayments.²¹ On remand, Albany requested FERC to order the District to refund the authorized state law assessments it had previously paid under state law. FERC declined, but suggested that, after a headwater benefits investigation, it could establish a crediting system under which Albany’s overpayments could be offset against the District’s future headwater benefits assessments.²² FERC conducted an investigation between 2009 and 2012 with respect to the Erie and Albany projects. In 2012, it issued an order determining headwater benefits, and directed the downstream licensees to contact the District and attempt to settle the outstanding charges based on FERC’s calculations.²³ FERC also established a policy of crediting downstream licensees for their past overpayments to the District.²⁴

After Erie and the District were unable to settle the dispute, Erie notified FERC that it had paid over \$9 million in headwater benefits between 2002 and 2008, and after subtracting section 10(f) assessments of over \$1.8 million, it was entitled to over \$7 million in credits towards future District assessments. In August 2015, FERC issued an order denying Erie’s requests for credits, because the 2006 Settlement had resolved the dispute with respect to payments through 2009.²⁵ Erie filed a petition for review, arguing among other things that the District’s collection of state headwater benefits assessments violated the FPA, notwithstanding the fact that Erie had settled its challenges to the assessments by Settlement in 2006.

The Court denied Erie’s petition and affirmed FERC’s determination not to issue the requested credits.²⁶ The Court found that its 2008 *Albany* decision finding the state headwater benefits assessments are preempted by the FPA does not affect Erie’s contractual obligations under the Settlement.²⁷ It further found that under New York law, “a change in the law does not render an agreement void.”²⁸ Thus, the court found that the 2006 Settlement was enforceable notwithstanding its *Albany* decision in 2008. With respect to FERC’s crediting system, the Court found that section 10(f) of the FPA grants FERC the equitable authority to establish a policy of crediting downstream licensees for their state

¹⁹*Fourth Branch Assocs. (Mechanicsville) v. Hudson River-Black River Regulating Dist.*, 117 F.E.R.C. ¶ 61,321 (2006), *order on reh’g*, 119 F.E.R.C. ¶ 61,141 (2007).

²⁰*Albany Eng’g Corp. v. FERC*, 548 F.3d 1071, 1073 (D.C. Cir. 2008).

²¹*Id.* at 1080.

²²*Albany Eng’g Corp. v. Hudson River-Black River Regulating Dist.*, 127 F.E.R.C. ¶ 61,174 at P 19 (2009).

²³*Hudson River-Black River Regulating Dist.*, 140 FERC ¶ 62,089 (2012).

²⁴*Id.* at PP 43-49.

²⁵*Hudson River-Black River Regulating Dist.*, 152 FERC ¶ 62,124, *order on reh’g*, 153 FERC ¶ 61,218 (2015).

²⁶Opinion, *Erie Blvd. Hydropower, LP*, No. 16-1015.

²⁷*Id.* at 16.

²⁸*Id.* at 18-19 (quoting *Anita Founds., Inc. v. ILGWU Nat’l Ret. Fund*, 902 F.2d 185, 189 (2d. Cir. 1990)).

overpayments to an upstream operator.²⁹ It also found that FERC properly enforced the waiver provisions of the Settlement, under which Erie waived its claims against the District for assessments through 2009, by denying Erie's request for credits for overpayments in that timeframe.³⁰

II. ADMINISTRATIVE DEVELOPMENTS

A. *FERC Revises License Term Policy*

On October 19, 2017, FERC issued a [policy statement](#) revising its longstanding policy on establishing the length of license terms for hydroelectric projects.³¹ Section 6 of the FPA extends broad authority to FERC to establish license terms of up to 50 years. The policy statement generally establishes a default license term of 40 years for original and new licenses for hydropower projects located at non-federal dams, with certain exceptions discussed below.³² The revised policy ends FERC's longstanding practice of setting the length of terms for new licenses between 30 and 50 years based on the amount of redevelopment, new construction, new capacity, and environmental mitigation and enhancement measures required under the license.³³

While FERC's revised policy generally established a default 40-year license term, FERC will consider a longer or shorter term under three circumstances.³⁴ First, FERC will establish a shorter or longer term if necessary to coordinate license terms for projects located in same river basin.³⁵ Second, FERC will defer to a shorter or longer term explicitly agreed upon in a generally-supported comprehensive settlement agreement, provided such term does not conflict with the coordination of other license terms for projects in the river basin.³⁶ Third, FERC will consider a longer license term when an applicant specifically requests a longer license term based on significant measures expected to be required under the new license or significant measures implemented during the prior license term that were not required by that license or other legal authority and for which FERC has not already given credit through an extension of the prior license term.³⁷ FERC will consider on a case-by-case basis measures and actions that enhance non-development project purposes (i.e., environmental, project recreation, water supply), and those that enhance power and developmental purposes, together with the cost, to determine whether they warrant a longer license term.³⁸ Maintenance measures and measures taken to support the licensing process will not qualify.³⁹ The Policy Statement provides guidance on measures that will warrant a longer license term, including construction of pumped storage facilities, fish passage facilities, fish hatcheries, substantial recreation facilities, dams, and powerhouses.⁴⁰ The policy statement appears to leave unchanged FERC's longstanding practice of granting 50-year terms for new and original licenses for projects located at federal dams.

²⁹*Id.* at 17-18.

³⁰*Id.* at 20.

³¹*Policy Statement on Establishing License Terms for Hydroelectric Projects*, 161 F.E.R.C. ¶ 61,078 (2017).

³²*Id.* at P 14.

³³*See, e.g., Consumers Power Co.*, 68 F.E.R.C. ¶ 61,077, at p. 61,384 (1994).

³⁴*Policy Statement*, *supra* note 31, at P 15.

³⁵*Id.*

³⁶*Id.*

³⁷*Id.* at P 16.

³⁸*Id.*

³⁹*Policy Statement*, *supra* note 31, at P 16.

⁴⁰*Id.*

The revised policy will provide a number of benefits to licensees over FERC's prior policy. For example, the default 40-year license term, as opposed to the prior minimum term of 30 years, affords a licensee needed time to recoup the costs to implement a new license.⁴¹ It also defers the high costs of the next round of relicensing, which can be in the tens of millions of dollars.⁴² The revised policy could incentivize capacity upgrades and new resource protection measures during the license term, which were not credited in the new license term under FERC's previous policy.⁴³ The new policy also should strengthen FERC's policy of encouraging settlements in licensing proceedings.⁴⁴

B. FERC Issues Report to Congress on Two-Year Licensing Process

On May 31, 2017, FERC submitted its [report](#) and recommendations to Congress on the effectiveness of the two-year pilot hydropower licensing process.⁴⁵ The report was a mandatory requirement under section 6 of the Hydropower Regulatory Efficiency Act of 2013,⁴⁶ which required FERC to: (1) investigate the feasibility of a two-year licensing process for hydropower development at non-powered dams and closed-loop pumped storage projects, and (2) prepare a report describing the outcome of its efforts in implementing a two-year pilot licensing process.⁴⁷ FERC issued its first and only license under the two-year pilot process on May 5, 2016, for the Kentucky River Lock & Dam No. 11 Hydroelectric Project No. 14276.⁴⁸ Subsequently, on March 30, 2017, FERC held a workshop to solicit public comment on the effectiveness of the pilot program, as well as the feasibility and practicability of implementing the process on a permanent basis.⁴⁹

In its 127-page analysis, FERC indicated that it believes it is feasible under current regulations for developers to complete the licensing (or small hydro exemption) process in two years by refining tools and resources that are presently offered rather than amending the FPA or FERC's authority.⁵⁰ FERC states that the most essential components for ensuring a project is approved expeditiously are site selection, a well-defined project proposal, thorough pre-filing consultation, and a complete license application.⁵¹ According to the report, certain other project characteristics could further increase the likelihood that a two-year process would be feasible. These include: (1) the project's design characteristics, where the project would not alter existing flow regimes or cause significant impoundment fluctuations, and would involve minimal land clearing;⁵² (2) environmental characteristics, where the project would involve few or only minor environmental concerns, including changes to water quality or flow regime, little or no potential effects

⁴¹*Id.* at P 17.

⁴²*Id.*

⁴³*Id.* at P 18.

⁴⁴*Policy Statement, supra* note 31, at P 18.

⁴⁵FERC, REPORT ON THE PILOT TWO-YEAR HYDROELECTRIC LICENSING PROCESS FOR NON-POWERED DAMS AND CLOSED-LOOP PUMPED STORAGE PROJECTS AND RECOMMENDATIONS PURSUANT TO SECTION 6 OF THE HYDROPOWER REGULATORY EFFICIENCY ACT OF 2013 (May 2017).

⁴⁶127 Stat. 493, 495 (2013); 16 U.S.C. § 797 notes.

⁴⁷127 Stat. at 495; 16 U.S.C. § 797 notes.

⁴⁸Michael Harris, [FERC Offer Recommendations After Pilot Two-Year Hydropower Plant Licensing Program](#), HYDROWORLD (June 6, 2017).

⁴⁹*Id.*

⁵⁰FERC, *supra* note 45, at 46.

⁵¹*Id.*

⁵²*Id.*

on migratory fish, and no adverse effects on federally listed species and/or habitat;⁵³ and (3) if sufficient existing information exists about environmental and cultural resources at the project.⁵⁴ Early and frequent stakeholder consultation on protection, mitigation, and enhancement measures (PM&Es) also would be necessary to address project impact, and the applicant should include pre-negotiated PM&E measures in its license application.⁵⁵

However, FERC noted that it is also aware of actions it can take to further aid applicants in the site selection, pre-filing, and post-filing process.⁵⁶ FERC committed to update and improve the small and low-impact hydropower portions of its website, in addition to providing more frequent processing updates and additional clarity and certainty in the licensing process.⁵⁷

⁵³*Id.* at 47.

⁵⁴*Id.*

⁵⁵FERC, *supra* note 45, at 47.

⁵⁶*Id.* at iii.

⁵⁷Harris, *supra* note 48.

Chapter 17 • MARINE RESOURCES 2017 Annual Report¹

The Marine Resources Committee is immersed in diverse disciplines focused on the marine environment and its uses. The geographic scope of that focus embraces thousands of miles of national coastline, internal and territorial waters, and Exclusive Economic Zones, as well as estuarine, outer continental shelf, and international waters. Issues range from the development, management, and protection of these waters and their resources to jurisdiction and management over United States flagged vessels across the world's oceans. The 2017 review is meant to discuss the more significant events during 2017 across the full spectrum of the Committee's responsibilities, but it is not meant to be all-inclusive or exhaustive due to page limitations.

I. FISHERIES

A. *Judicial Developments*

In [*Coastal Conservation Ass'n v. U.S. Department of Commerce*](#),² the Fifth Circuit, once again, had red snapper on the bench. Several private anglers and the Association appealed the district court's dismissal of their lawsuit which challenged Amendment 40 to the Reef Fishery Management Plan and the final rule implementing the Amendment.³ Starting in 1990, the Council had implemented continually smaller catch quotas and shortened seasons to rebuild the declining stocks of red snapper; however, this goal was frustrated by the recreational sector exceeding the set quotas for practically every year from 1991 through 2014.

The Council kept shortening the length of the fishing season in federal waters (the 2014 season was 9 days), but the states of Alabama, Florida, Mississippi, Texas, and Louisiana increased their seasons to 21 days, 52 days, 21 days, 365 days, and 286 days respectively. This situation was further complicated because private recreational anglers could fish in state waters while recreational anglers fishing from federally chartered vessels had to obey the shorter federal seasons. In 2003, a moratorium on the issuance of charter vessel permits was implemented, but there was never a limit placed on the number of private anglers fishing from private boats. To correct this situation, the Secretary of Commerce issued a Final Rule in 2015, establishing two components within the

¹This report was prepared by the Marine Resources Committee and edited where necessary by Peter H. Flournoy, International Law Offices of San Diego, and Ashley Stilson, John A. Knauss Fellow with U.S. Fish and Wildlife Service. In addition to the Editors, contributors to the report include: Joan Bondareff, Blank Rome LLP; Noe Hamra, Blank Rome LLP; Lynn Long, Department of Interior; and John G. Cossa, Beveridge & Diamond, PC. Nothing in this review represents the views of the contributors' employers or their clients.

²846 F.3d 99 (5th Cir. 2017).

³The Magnuson Stevens Act (MSA), 16 U.S.C. § 1801 (2007), first passed by Congress in 1976 to manage United States fisheries, established eight Regional Fishery Management Councils (Councils) each tasked with preparing Fisheries Management Plans (FMPs) for the conservation and management of fisheries under their geographic jurisdiction. The Councils develop the FMPs and regulations to enforce FMP provisions through a series of meetings of federal, state, Native American, and territorial fishery management officials, scientists, economists, harvesting constituents, ENGOs, and members of the general public, for approval by the Secretary of Commerce. Once approved or modified by the Secretary and put through a public notice and comment period by the National Marine Fisheries Service (NMFS or Agency), NMFS enforces the regulations.

recreational sector: charter and private angling. The stated rationale for the rule was to provide increased flexibility within the recreational sector to reduce quota over runs, which could negatively impact the rebuilding of the red snapper stocks.⁴

Plaintiffs challenged Amendment 40 on the grounds that setting separate categories for charter anglers and private anglers violated a provision of the MSA, which specified the Council’s red snapper FMP should set two quotas -- recreational and commercial -- not three.⁵ The court opined that the quota for charter anglers was not a separate category but merely a sub-category of recreational anglers, dividing recreational anglers into private and charter. The court also dismissed plaintiffs’ arguments that the Secretary had failed to assess and analyze the economic and social impacts of the Amendment under 16 U.S.C. section 1583(a)(9). Finally, the court determined the Secretary had not acted arbitrarily or capriciously in choosing the periods of catch data upon which to base allocations.⁶

*Territory of American Samoa v. National Marine Fisheries Service*⁷ is an interesting case involving not only the MSA but also the legal interpretation of American Samoa’s Deeds of Cession executed on April 17, 1900 and July 14, 1904. Plaintiff challenged a final rule, which permitted large longline vessels to fish within 12 nautical miles of various islands of American Samoa, when previously they had to stay outside 50 nautical miles. The rule was issued pursuant to the MSA under which the federal government exercises “sovereign rights and exclusive fishery management authority over all fish, and Continental Shelf fishery resources, within the exclusive economic zone”⁸ extending from the shore of each island seaward for 200 nautical miles. The plaintiff asserted this rule was inconsistent with and did not address the rights and guarantees contained in the Deeds of Cession. Specifically, the U.S. had agreed “to safeguard and respect the property rights of the native people of American Samoa according to their customs and practices, which include cultural fishing practices”, and this rule would inhibit the small American Samoa vessels (alias) from fishing free from conflict with the longline vessels 50 feet and larger.⁹

Plaintiff contended the rule was not consistent with “applicable law” thus violating both the MSA and the Administrative Procedure Act (APA).¹⁰ After dismissing the defendant’s arguments that American Samoa lacked standing and was barred by the United States’ sovereign immunity, the court bore down on one of the key questions – one of first impression – what is the meaning of “any other applicable law” in the MSA, which states that any regulation issued must be consistent with the fishery management plan, national standards contained in the MSA, and with “any other applicable law”, the latter phrase remaining undefined. The court held that the Deeds of Cession did constitute “any other applicable law” under §1854(c)(7).¹¹

⁴*Coastal Conservation*, 846 F.3d 99.

⁵16 U.S.C. § 1883(d) (2017).

⁶*Coastal Conservation*, 846 F.3d 99. The irony behind the red snapper cases is that Secretary of Commerce Wilbur Ross increased the season for recreational private anglers from 3 to 42 days, allegedly leading to overfishing of the stock by 6 million pounds. Samuel Hill, *Department of [Commerce Encouraged Overfishing of Red Snapper](#)*, NAT’L FISHERMAN (Oct. 17, 2017). Another red snapper case heard this year is [Guindon v Pritzer](#), [240 F. Supp. 3d 181 \(D.D.C. 2017\)](#).

⁷No. CIVIL-16-00095 LEK, 2017 WL 1073348 (D. Haw. Mar. 20, 2017).

⁸16 U.S.C. §1811(a) (2017). The Exclusive Economic Zone is defined in Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983).

⁹*American Samoa*, 2017 WL 1073348, at *7.

¹⁰5 U.S.C. §§ 551-59.

¹¹*American Samoa*, 2017 WL 1073348 at *14.

The defendants argued that the Deeds of Cession only related to American Samoan land, not the surrounding waters. The court, taking guidance from Ninth Circuit Indian treaty cases, found the language in the Deeds, – “any land or any other thing” – taken together, included fishing rights, even though these were not expressly identified. It concluded that because the National Marine Fisheries Service (NMFS) failed to consider whether the rule was consistent with the Deeds of Cession, the government was arbitrary and capricious in promulgating the rule, and it was, therefore, invalid.¹²

One of the most important continuing issues for fishermen is the question of whether the government or commercial fishermen should pay for the cost of at-sea monitors (observers) required to accompany them on fishing trips. Unfortunately, while the question was raised, it was not resolved in [Goethel v. U.S. Department of Commerce](#).¹³ The First Circuit Court of Appeals found: “Because we agree with the district court that Goethel’s suit was not timely, we AFFIRM the grant of summary judgment in favor of the government, and do not reach the question of whether the industry funding requirement contravenes the edicts of the relevant statutes or the Constitution.”¹⁴

The MSA requires regulation challenges be filed within 30 days of their promulgation or when the action is published in the Federal Register.¹⁵ In *Goethel*, the Agency issued a proposed rule on March 9, 2015 and a Final Rule on May 1, 2015 indicating the observers’ costs would shift from the government to the fishermen. However, it wasn’t until November 10, 2015 that the Agency announced a date certain of January 1, 2016 when the fleet would have to start paying, not in the Federal Register, but merely by email. Goethel filed his lawsuit on December 9, 2015, more than 30 days after the publication in the Federal Register of the Final Rule but within 30 days of the email announcement. Plaintiff argued the 30-day deadline did not apply to “pre-enforcement” challenges, citing no authority. He also argued that under the APA, the November 2015 email, which set a specific date for the funding shift, was an “action” and the consummation of the agency’s decision making process. The court disagreed, stating that an action “for purposes of administrative law generally ‘includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.’ 5 U.S.C. §551(13)”, and the email, by contrast, was only an “update”.¹⁶

In [Turtle Island Restoration Network v. U.S. Department of Commerce](#)¹⁷ two environmental groups challenged NMFS’s decision to allow a swordfish fishery to increase its efforts, which could result in unintended deaths of endangered sea turtles. The groups also challenged a U.S. Fish and Wildlife Service (FWS) decision to issue a “special purpose” permit to NMFS authorizing the fishery to incidentally kill migratory birds. The Ninth Circuit panel reversed the district court by holding the issuance of the “special purpose” permit was arbitrary and capricious, *inter alia*, violating the plain language of the FWS’s own regulation. The Ninth Circuit panel also reversed the lower court’s decision by finding the climate based model used in the Agency’s biological opinion predicted the increase in the swordfish fishery would exacerbate the loggerhead’s decline, but NMFS failed to incorporate this information into its “no jeopardy finding.”

¹²*Id.* at *15.

¹³854 F.3d 106 (1st Cir. 2017). See Samuel Hill, [Supreme Court Decides Not to Hear Monitoring Case](#), NAT’L FISHERMAN (Oct. 5 2017).

¹⁴*Goethel*, 854 F.3d at 109.

¹⁵16 U.S.C. §§ 1855(f)(1)-(2) (2017).

¹⁶*Goethel*, 854 F.3d at 116.

¹⁷878 F.3d 725 (9th Cir. 2017).

II. MARINE MAMMALS AND THE MARINE MAMMAL PROTECTION ACT (MMPA)

A. *Judicial Developments*

In [*California Sea Urchin Commission v. Bean*](#),¹⁸ plaintiff trade groups representing fishermen asked the court to hold unlawful and set aside the action of the FWS, which, *inter alia*, eliminated a regulation immunizing fisherman who accidentally harm California sea otters on San Nicholas Island. Public Law No. 99-625, enacted in 1986, had authorized FWS to establish a California sea otter experimental population program, and the implementing regulations provided an exemption from liability for incidentally harming the sea otters under the MMPA and the Endangered Species Act (ESA). In 2012, FWS terminated the program, eliminating the exemption. On cross-motions for summary judgment, the court found under a *Chevron* deference analysis that FWS's interpretation of Public Law No. 99-625 was reasonable, deferring to FWS's interpretation that it had the discretion to terminate the program. The court granted FWS's motion for summary judgment.

B. *Legislative Developments*

Representative Adam Schiff (D-CA) introduced the [Orca Responsibility and Care Advancement Act](#) to amend the MMPA to prohibit the taking, importation, and exportation of Orcas and Orca products.¹⁹

Senator Dan Sullivan (R-AK) introduced the [Allowing Alaska Ivory Act](#) to amend the MMPA "to protect the cultural practices and livelihoods of producers of Alaska Native handicrafts and traditional mammoth ivory products."²⁰

Representatives Mike Johnson (R-LA) and Steve Scalise (R-LA) each introduced bills that would, *inter alia*, amend the MMPA to reduce unnecessary permitting delays for take.²¹

Senator James Risch (R-ID) and Representative Jaime Herrera Beutler (R-WA) each introduced the Endangered Salmon and Fisheries Predation Prevention Act, which would amend the MMPA to reduce predation by sea lions on endangered Columbia River salmon and other non-listed species.²²

Senator Bill Nelson (D-FL) introduced the [Florida Manatee Research and Recovery Act](#) "[t]o authorize research and recovery activities to provide for the protection, conservation, and recovery of the Florida manatee."²³

C. *Administrative Developments*

NMFS issued three final rules: 1) listing the [Maui dolphin](#) (*Cephalorhynchus hectori maui*) as endangered, 2) listing the South Island Hector's dolphin (*C. hectori hectori*) as threatened, and 3) reclassifying the [West Indian manatee](#) (*Trichechus manatus*) from endangered to threatened.²⁴

¹⁸239 F. Supp. 3d 1200 (C.D. Cal. 2017).

¹⁹H.R. 1584, 115th Cong. (2017).

²⁰S. 1965, 115th Cong. (2017).

²¹[SEA Act](#), H.R. 3133, 115th Cong. (2017); [SECURE American Energy Act](#), H.R. 4239, 115th Cong. § 110 (2017).

²²[S. 1702](#), 115th Cong. (2017); [H.R. 2083](#), 115th Cong. (2017).

²³S. 1747, 115th Cong. (2017).

²⁴Final Rule, *Final Rule to List the Maui Dolphin as Endangered & the South Island Hector's Dolphin as Threatened Under the Endangered Species Act*, 82 Fed. Reg. 43,701

NMFS issued three proposed rules: 1) designating critical habitat for the [Main Hawaiian Islands insular false killer whale](#) (*Pseudorca crassidens*) distinct population segment; 2) listing the [Taiwanese humpback dolphin](#) (*Sousa chinensis taiwanensis*) as an endangered species; and 3) establishing a [whale protection zone in the San Juan Islands](#) to support endangered Southern Resident killer whale recovery.²⁵

III. POLAR BEARS, SEA TURTLES, SALMON, AND THE ENDANGERED SPECIES ACT (ESA)

A. *Judicial Developments*

In [Sierra Club & South Carolina Wildlife Federation v. Kolnitz](#),²⁶ two environmental organizations challenged the use of wave dissipation devices (“sea walls”) alleging they interfered with various endangered sea turtle breeding patterns, causing a “take” under the ESA. Defendants sought to dismiss the case under the *Burford* abstention doctrine,²⁷ arguing that the case should be dismissed in light of the pending state administrative actions.²⁸ The court declined to dismiss, finding that abstention is not a “license for free-form ad hoc judicial balancing of the totality of state and federal interests,” particularly when the case arises under and can be fully resolved by federal law.²⁹ On plaintiff’s motion for a preliminary injunction requiring the removal of the existing sea walls and prohibiting future sea wall development, the court found that plaintiffs proved each of the four *Winter* factors³⁰ and were, therefore, entitled to preliminary injunctive relief, ordering the immediate removal of all sea walls.³¹ In [Friends of Lydia Ann Channel v. U.S. Army Corps of Engineers](#),³² the district court granted a preliminary injunction to stop the operations of a barge fleeting facility because of the alleged imminent danger to two turtle species found in the channel.³³ On appeal, the Fifth Circuit found that under an

(Sept. 19, 2017) (to be codified at 50 C.F.R. pts. 223-24); Final Rule, *Endangered & Threatened Wildlife and Plants; Reclassification of the West Indian Manatee from Endangered to Threatened*, 82 Fed. Reg. 16,668 (May 5, 2017) (to be codified at 50 C.F.R. pt. 17).

²⁵Proposed Rule, *Endangered & Threatened Wildlife and Plants: Proposed Rulemaking to Designate Critical Habitat for the Main Hawaiian Islands Insular False Killer Whale Distinct Population Segment*, 82 Fed. Reg. 51,186 (Nov. 3, 2017) (to be codified at 50 C.F.R. pts. 224, 226); Proposed Rule, *Endangered & Threatened Wildlife and Plants; Proposed Endangered Listing Determination for the Taiwanese Humpback Dolphin Under the Endangered Species Act (ESA)*, 82 Fed. Reg. 28,802 (June 26, 2017) (to be codified at 50 C.F.R. pt. 224); Request for Comment, *Endangered & Threatened Species; Petition for Rulemaking to Establish a Whale Protection Zone for Southern Resident Killer Whales*, 82 Fed. Reg. 4276 (Jan. 13, 2017) (to be codified at 50 C.F.R. pts. 223-24).

²⁶No. 2:16-cv-03815-DCN, 2017 U.S. Dist. LEXIS 128462 (D.S.C. Aug. 14, 2017).

²⁷*Burford v. Sun Oil Co.*, 319 U.S. 315, 334 (1943) (The Supreme Court held that a federal court sitting in diversity jurisdiction may abstain from hearing a case where (1) the state courts likely have greater expertise in a particularly complex and unclear area of state law which is of special significance to the state, (2) there is a comprehensive state administrative or regulatory procedure, and (3) the federal issues cannot be decided without delving into state law).

²⁸*Sierra Club*, 2017 U.S. Dist. LEXIS 128462, at *9.

²⁹*Id.* at *13 (quoting *Martin v. Stewart*, 499 F.3d 360, 364 (4th Cir. 2007)).

³⁰*Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

³¹*Sierra Club*, 2017 U.S. Dist. LEXIS 128462 at *25.

³²701 F. App’x 352 (5th Cir. 2017).

³³No. 2:15-CV-0514, 2017 U.S. Dist. LEXIS 35237 (S.D. Tex. Mar. 13, 2017).

ESA analysis, plaintiffs failed to show turtle takes occurred and there was a reasonably certain threat of imminent harm.³⁴ Under a National Environmental Policy Act (NEPA) analysis, the court found a NEPA challenge “c[ould] only be maintained under the [APA] because NEPA confers no private right of action.”³⁵ Subsequently, the Fifth Circuit vacated the preliminary injunction dismissing the suit as moot.³⁶

In [*Maine Council of the Atlantic Salmon Federation v. National Marine Fisheries Services*](#), defendants “sought to modify the terms of existing licenses to operate four hydropower dams on the Kennebec River,” a traditional Atlantic salmon spawning waterway.³⁷ Because the salmon are protected under the ESA, the Federal Energy Regulatory Commission (FERC) obtained biological opinions (BiOps) from NMFS. The BiOps found that the proposed modifications would not jeopardize the species’ survival but would result in the incidental take of individual fish. Plaintiffs objected claiming the BiOps were arbitrary and capricious. The district court dismissed the case for lack of subject matter jurisdiction because “FERC granted the license modifications by orders adopting the terms of the BiOps” while the case was pending.³⁸ The First Circuit upheld the district court decision finding that once FERC issued the order, it was subject to the Federal Power Act’s provision for direct appellate jurisdiction of the courts of appeals.³⁹ Thus, an action challenging the BiOps must be filed directly in the appellate court.

In [*Hoopa Valley Tribe v. National Marine Fisheries Services*](#), plaintiff Tribes argued defendants failed to “reinitiate formal consultation following two years of record rates of disease among Coho salmon in the Klamath River” and sought an injunction to put protective water flows in place to reduce disease rates while the formal consultation process occurred.⁴⁰ The court granted the Tribes’ motion for a partial summary judgment and preliminary injunction finding defendants failed to comply with ESA Section 7.

Plaintiff environmental groups in [*Natural Resources Defense Council v. Norton*](#),⁴¹ alleged FWS and the Bureau of Reclamation (Bureau) failed to reinitiate consultation on the impact of the contracts on ESA-listed winter-run and spring-run Chinook salmon and the contractors had unlawfully taken winter-run and spring-run Chinook in violation of ESA Section 9. Defendants brought 12(b)(6) motions to dismiss both claims. The court found the applicable Incidental Take Statement (ITS) did not provide Section 9 liability protection to the defendants, but it nevertheless agreed with defendants’ legal interpretation and found the agency could not be the proximate cause of a take that results from non-discretionary action. However, the court noted that there was a question of fact regarding whether the Bureau did retain some discretion over the source of diversions under one of the contracts, and directed plaintiffs to proceed on that ground. Further, the court found the agency’s ability to approve transfers of contract water constituted sufficient “discretion” to

³⁴*Friends of Lydia Ann Channel*, 701 F. App’x at 355-56.

³⁵*Id.* at 357.

³⁶*Id.* at 359.

³⁷858 F.3d 690, 691 (1st Cir. 2017).

³⁸*Me. Council of the Atl. Salmon Fed’n v. Nat’l Marine Fisheries Serv. of the Nat’l Oceanic & Atmospheric Admin.*, 203 F. Supp. 3d 58, 86 (D. Me. 2016).

³⁹*Me. Council*, 858 F.3d at 693 (referring to 16 U.S.C. § 8251(b)).

⁴⁰230 F. Supp. 3d 1106, 1111 (N.D. Cal. 2017) (this opinion addressed the parallel motions in the related case, *Yurok Tribe v. Bureau of Reclamation*, 231 F. Supp. 3d 450 (N.D. Cal. 2017)).

⁴¹236 F. Supp. 3d 1198 (E.D. Cal. 2017), *granted in part, denied in part sub nom.*, [*NRDC v. Zinke*](#), No. 1:05-cv-01207 LJO-EPG, 2017 U.S. Dist. LEXIS 138172 (E.D. Cal. Aug. 28, 2017).

trigger Section 9 liability and allowed plaintiffs to proceed on the ground that such approval proximately caused the alleged take.⁴²

The Ninth Circuit in [*San Luis & Delta-Mendota Water Authority v. Haugrud*](#),⁴³ found the Bureau had authority under 1955 legislation to order additional water releases to the Trinity River from the Lewiston Dam beyond the amount designated in an official release schedule, where necessary to protect downstream fish populations, including salmon and steelhead populations. The Court held the general language in the 1955 Act trumped later legislation that seemed to prescribe, or at least authorize, more limited releases. However, on the allegation that defendants violated the ESA by implementing a flow augmentation release without conducting a formal Section 7 consultation, the court determined plaintiffs failed to establish standing because “they failed to establish a ‘reasonable probability of the challenged action’s threat to [their] concrete interest,’ and because section 7 was not designed to protect their asserted economic interest.”⁴⁴

B. *Legislative Developments*

Several bills were introduced in both the Senate and House that would amend the MMPA to allow the importation of polar bear parts taken legally in Canadian sport hunts.⁴⁵

Representative Bill Posey (R-FL) introduced the [*Seismic Moratorium Act*](#), which would prevent any person from conducting geological or geophysical activities off the Florida coastline, allowing the moratorium to be terminated only if impacts to people and populations of marine mammals, sea turtles, and fish were minimal.⁴⁶

Senator Bill Nelson (D-FL) and Representative Debbie Wasserman Schultz (D-FL) each introduced the Marine Oil Spill Prevention Act, which would, *inter alia*, require an assessment of NOAA’s ability to respond to oil spill impacts on marine sanctuaries, monuments, other protected areas, marine mammals, fish, corals, sea turtles, other protected species, and efforts to rehabilitate these species.⁴⁷

Senator James Risch (R-ID) and Representative Jaime Herrera Beutler (R-WA) each introduced the Endangered Salmon and Fisheries Predation Prevention Act, which would amend the MMPA to reduce predation on endangered Columbia River salmon and other non-listed species.⁴⁸

Senator Lisa Murkowski (R-AK) and Representative Don Young (R-AK) each introduced the Genetically Engineered Salmon Labeling Act to ensure that consumers can make informed decisions when purchasing salmon.⁴⁹

Representative Don Young (R-AK) introduced the [*Prevention of Escapement of Genetically Altered Salmon in the United States Act*](#).⁵⁰

⁴²*Id.* at 1240.

⁴³848 F.3d 1216 (9th Cir. 2017).

⁴⁴*Id.* at 1234 (quoting *Hall v. Norton*, 266 F.3d 969 (9th Cir. 2001)).

⁴⁵See Hunting Heritage and Environmental Legacy Preservation for Wildlife Act, [S. 1514](#), 115th Cong. (2017); [S. 1395](#), 115th Cong. (2017); [S. 1066](#), 115th Cong. (2017); [H.R. 6936](#), 115th Cong. (2017); Polar Bear Conservation and Fairness Act, [H.R. 3668](#), 115th Cong. (2017); [H.R. 1054](#), 115th Cong. (2017); Restoration of the U.S.-Russia Polar Bear Conservation Fund Act, [H.R. 225](#), 115th Cong. (2017); and Polar Bear Conservation and Fairness Act, [H.R. 224](#), 115th Cong. (2017).

⁴⁶H.R. 2469, 115th Cong. (2017).

⁴⁷[S. 74](#), 115th Cong. (2017); [H.R. 2261](#), 115th Cong. (2017).

⁴⁸[S. 1702](#), 115th Cong. (2017); [H.R. 2083](#), 115th Cong. (2017).

⁴⁹[S. 1528](#), 115th Cong. (2017); H.R. 204, 115th Cong. (2017).

⁵⁰H.R. 206, 115th Cong. (2017).

In response to [*Yurok Tribe v. Bureau of Reclamation*](#),⁵¹ Representative Jared Huffman (D-CA) introduced the [Yurok Tribe Klamath River Chinook Salmon Emergency Disaster Assistance Act of 2017](#) to provide appropriations to mitigate the economic losses to the Tribe.⁵²

C. Administrative Developments

NMFS issued two proposed rules: (1) to [withdraw certain regulations](#) around fishery-related activities “to reduce incidental bycatch and mortality of sea turtles in the southeastern U.S. shrimp fisheries and to aid in the protection and recovery of listed sea turtle populations;” and (2) to [observe identified fisheries](#) “to learn more about sea turtle interactions in a given fishery , evaluate measures to prevent or reduce sea turtle takes and to implement the prohibition against sea turtle takes.”⁵³

NMFS requested comments on: [draft guidelines for marine mammal response](#) in northern Alaska in an effort to increase preparedness for wildlife response under the Oil Pollution Act of 1990; and the [Navy’s request “for authorization to take marine mammals incidental to Ice Exercise 2018 . . . activities](#) proposed within the Beaufort Sea and Arctic Ocean north of Prudhoe Bay, Alaska.”⁵⁴

NMFS issued a [notice](#) proposing to conduct a study to assess the extent of interactions between recreational anglers on piers and other shore-based fishing structures and sea turtles.⁵⁵

FWS issued two notices: 1) the availability of the [Polar Bear Conservation Management Plan](#), stating the [U.S.-Russia Polar Bear Commission](#) “unanimously agreed to maintain the annual taking limit adopted in 2010 for the Alaska-Chukotka polar bear population;” and 2) the availability of “[draft revised marine mammal stock assessment reports](#) for two stocks of polar bears” and requesting comments ⁵⁶

The Department of Interior (DOI) [announced](#) the availability of the [Final Report: Review of the Department of the Interior Actions that Potentially Burden Domestic Energy](#) prepared pursuant to Executive Order 13783, “Promoting Energy Independence and Economic Growth.” The report, *inter alia*, reviewed the Chukchi Sea marine mammal incidental take regulations, expiring in 2018.⁵⁷

⁵¹231 F. Supp. 3d 450 (N.D. Cal. 2017).

⁵²H.R. 2330, 115th Cong. (2017).

⁵³Proposed Rule, *Sea Turtle Conservation; Shrimp Trawling Requirements*, 81 Fed. Reg. 91,097 (Dec. 16, 2016) (to be codified at 50 C.F.R. pt. 223); Proposed Rule, *2018 Annual Determination to Implement the Sea Turtle Observer Requirements*, 82 Fed. Reg. 48,674 (Oct. 19, 2017) (to be codified at 50 C.F.R. pt. 222).

⁵⁴Notice, *Draft Arctic Marine Mammal Disaster Response Guidelines*, 82 Fed. Reg. 3293 (Jan. 11, 2017); Request for Comments, *Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to U.S. Navy 2018 Ice Exercise Activities in the Beaufort Sea & Arctic Ocean*, 82 Fed. Reg. 48,683 (Oct. 19, 2017).

⁵⁵Notice, *Proposed Information Collection; Comment Request; Recreational Angler Survey of Sea Turtle Interactions*, 82 Fed. Reg. 32,790 (July 18, 2017).

⁵⁶Notice, *Endangered & Threatened Wildlife & Plants; Notice of Availability of Polar Bear Conservation Management Plan*, 82 Fed. Reg. 2392 (Jan. 9, 2017); Notice, *U.S.-Russia Polar Bear Commission; Maintenance of Annual Taking Limit for the Alaska-Chukotka Polar Bear Population*, 82 Fed. Reg. 17,445 (Apr. 11, 2017); Notice, *Marine Mammal Protection Act; Stock Assessment Reports*, 82 Fed. Reg. 28,526 (June 22, 2017).

⁵⁷Final Report, *Final Report: Review of the Department of the Interior Actions that Potentially Burden Domestic Energy*, 82 Fed. Reg. 50,532 (Nov. 1, 2017) (to be codified

IV. DEEP SEABED MINING, CONTINENTAL SHELF DELINEATION, THE ARCTIC, AND OTHER ISSUES UNDER THE 1982 LAW OF THE SEA CONVENTION

A. *Deep Seabed Mining*

The International Seabed Authority (ISA) held its 23rd annual session in Kingston, Jamaica from August 8-18, 2017. The Assembly discussed, *inter alia*, the final report on the first periodic review of the ISA pursuant to Article 154 of the United Nations Convention on the Law of the Sea (UNCLOS) and reviewed the ISA's draft regulations on the exploitation of marine minerals on the international seabed. The Secretariat released the draft regulations as submitted to the ISA Legal and Technical Commission, which convened from July 31-August 9, 2017.⁵⁸

As of August 9, 2017, three new contracts were signed since the 22nd session of the ISA, and one more is expected to be signed before the end of 2017; four agreements were signed for a five-year extension of exploration contracts with two more expected to be signed by the end of 2017.⁵⁹ The total number of exploration contracts for polymetallic sulphides is now 17 with two contracts for cobalt-rich ferromanganese crusts.⁶⁰

One of the new exploration contracts was signed on May 12, 2017 between the ISA and China Minmetals Corporation for 15 years.⁶¹ China is also sponsoring another contractor for exploration of polymetallic nodules in the Clarion Clipperton Zone, for which a five-year extension was signed.⁶²

In January 2017, the ISA issued a discussion paper to advance stakeholder discussion in connection with the development and drafting of Regulations on Exploitation for Mineral Resources in the Area (Environmental Matters).⁶³ On August 25, 2017, the ISA released its "Draft regulations on exploitation of mineral resources in the Area" for stakeholder comments with a deadline of December 20, 2017.⁶⁴

B. *Continental Shelf Delineation*

The Commission on the Limits of the Continental Shelf (the Commission) held its 43rd session at United Nations Headquarters from January 30 to March 17, 2017.⁶⁵ The purpose of the Commission is to make recommendations to coastal states on matters relating to the establishment of the outer limits of their continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, based on information submitted to the Commission by coastal states. As of March 1, 2017,

at 25 C.F.R. chs. I-III, V-VII, 30 C.F.R. chs. II, IV-V, VII, XII, 36 C.F.R. ch. I, 43 C.F.R. subtitles A-B, 50 C.F.R. chs. I, IV).

⁵⁸[Summary of the Twenty-Third Annual Session of the International Seabed Authority: 8-18 August 2017](#), EARTH NEGOTIATIONS BULLETIN, Vol. 25, No. 151 (Aug. 21, 2017).

⁵⁹*Id.*

⁶⁰[Fact Sheet, Contractors for Seabed Exploration](#), INT'L SEABED AUTH.

⁶¹[China Minerals Corporation Signs Exploration Contract with the International Seabed Authority](#), INT'L SEABED AUTH. (May 12, 2017).

⁶²*Id.*

⁶³[ISA Issues Discussion Paper on the Development of "Environmental Regulations" for the Exploitation in the Area](#), INT'L SEABED AUTH. (Jan. 25, 2017).

⁶⁴[Draft Regulations on Exploitation of Mineral Resources in the Area](#), INT'L SEABED AUTH. (Aug. 25, 2017).

⁶⁵[Press Release](#), United Nations, Commission on Limits of Continental Shelf Concludes Forty-Second Session (Dec. 6, 2016).

sixty-seven coastal states made eighty-three submissions, including seven joint submissions, several partial submissions, and five revised submissions based on Commission recommendations. To date, the Commission issued twenty-six recommendations, two of which were for revised submissions.⁶⁶

The Commission considered submissions made by: the Russian Federation, for the Arctic Ocean; Brazil, for the Brazilian Southern Region; Uruguay; the Cook Islands, for the Manihiki Plateau; Norway, for Bouvetoya and Dronning Maud Land; South Africa for the mainland of the territory of the Republic of South Africa; the Federated States of Micronesia, Papua New Guinea and Solomon Islands, jointly, for the Ontong Java Plateau; France and South Africa, jointly, for the area of the Crozet Archipelago and the Prince Edward Islands; Kenya; Mauritius, in the region of Rodrigues Island; Nigeria; Seychelles, for the Northern Plateau Region; France for Reunion and the Saint-Paul and Amsterdam Islands; Cote d'Ivoire; and Sri Lanka.⁶⁷ The Commission approved five recommendations: the submissions made by Argentina; Uruguay; the Cook Islands, for the Manihiki Plateau; South Africa for the mainland territory of the Republic of South Africa; and the Federated States of Micronesia, Papua New Guinea and Solomon Islands, jointly, for the Ontong Java Plateau.⁶⁸ As of April 17, 2017, the Commission had 12 submissions under active consideration.⁶⁹ To date, the U.S. has made no formal submission to the Commission.⁷⁰

C. *Arctic Developments*

On May 11, 2017, Secretary of State Rex Tillerson chaired the 10th Arctic Council Ministerial Meeting in Fairbanks, Alaska. Representatives from the eight Arctic nations convened to review and approve work completed under the two-year U.S. chairmanship to improve sustainable development and environmental protection in the Arctic.⁷¹ The Arctic nations were joined by delegations from the Council's indigenous permanent participation organizations and observers. At the conclusion of the meeting, the U.S. transferred the chairmanship of the Council to Finland. Member states expressed their concerns to the Secretary that the U.S. was pulling out of the Paris Climate Agreement.⁷²

According to the State Department, under U.S. leadership, the Council completed an assessment of gaps in telecommunication capabilities across the region; created a new tool, the Arctic Ship Traffic Database, to track shipping routes in anticipation of increased activity; and concluded a landmark scientific cooperation agreement, through negotiations led by the U.S. and Russia, which is intended to "usher in a new era of Arctic science by breaking down the barriers to research and exploration in the region."⁷³

On October 25-26, 2017, the Arctic Council met in Oulu, Finland for the first Senior Arctic Officials' meeting held during the Chairmanship of Finland.⁷⁴ The meeting opened

⁶⁶*Id.*

⁶⁷UNCLOS Meeting of States Parties, [Letter dated 17 April 2017 from the Chair of the Commission on the Limits of the Continental Shelf addressed to the President of the twenty-seventh Meeting of States Parties](#) (Apr. 17, 2017).

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰*Id.*

⁷¹[10TH ARCTIC COUNCIL MINISTERIAL MEETING](#), U.S. DEP'T OF STATE (MAY 10-11, 2017).

⁷²Yereth Rosen, [U.S. Ends Arctic Council Chairmanship with Reluctance on Climate Action](#), ALASKA DISPATCH NEWS (May 11, 2017).

⁷³David A. Balton, [The Arctic Council: Fostering Cooperation, Preservation, & Prosperity in the Far North](#), DIPNOTE (May 10, 2017).

⁷⁴[Senior Arctic Officials Gather for First Meeting During Finland's Arctic Council Chairmanship](#), ARCTIC COUNCIL (Oct. 18, 2017).

with the appointment of Nina Buvang Vaaja as the new director of the Arctic Council Secretariat.⁷⁵ The Council focused on its work on black carbon and methane, plans for an Arctic Resilience Forum to take place in September 2018 in Rovaniemi, Finland, and the ratification of the 2017 scientific cooperation agreement.⁷⁶

Domestically, President Trump moved to repeal Obama-era executive orders that would bar oil and gas drilling in the Arctic to open up the coastal plain of the Arctic National Wildlife Refuge (ANWR) for drilling. On April 28, 2017, President Trump signed Executive Order 13795 to roll back restrictions on oil and gas development in the Arctic, Chukchi and Beaufort Seas, as well as the Northern Bering Sea Climate Change Resilience strategy put into place by President Obama in December 2016.⁷⁷ Secretary of the Interior Ryan Zinke said it would take about two years to decide what new areas could be put up for auction in the Arctic.⁷⁸ Meanwhile, Congress is working on legislation, as part of its budget reconciliation process, to open sections of ANWR to oil and gas development. Sponsored by Senator Lisa Murkowski, S. 49 allows up to 2,000 acres of the coastal plain of ANWR to be developed with wells and support facilities.⁷⁹ Congress included language opening sections of the coastal plain of ANWR to oil and gas development in the final days of the first session of the 115th Congress as part of the “Tax Cuts and Jobs Act of 2017.”⁸⁰

Finally, the Coast Guard has partnered with the Marine Exchange of Alaska to develop a program to provide critical navigational safety information to Arctic mariners via digital means, in recognition of the fact that the “Arctic coast of the United States is not conducive to the traditional types of Aids to Navigation used elsewhere in the country,” according to Dave Series of the 17th Coast Guard District.⁸¹

D. *Implementation of the Polar Code*

The International Code for Ships Operating in Polar Waters (Polar Code) entered into force on January 1, 2017. Coast Guard policy guidance of December 12, 2016 stated the goal of the Code is to provide for safe ship operation and the protection of the polar environment by addressing risks present in Polar Waters, which are not adequately mitigated by other International Maritime Organization regulations.⁸²

On September 21, 2017, the Coast Guard issued its final rule adding the Polar Ship Certificate, valid for five years, to the list of certificates needed by certain U.S. and foreign-flag ships if they engage in international voyages in polar waters.⁸³ The Coast Guard estimates (1) the new requirement will affect twenty-three U.S.-flagged vessels; (2) a

⁷⁵[Arctic Council Meets in Finland, Addresses Pollution Prevention & Education](#), ARCTIC COUNCIL (Oct. 26, 2017).

⁷⁶*Id.*

⁷⁷Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (May 3, 2017).

⁷⁸Juliet Eilperin, [Trump Signs Executive Order to Expand Drilling Off America’s Coasts: ‘We’re opening it up’](#), WASH. POST (Apr. 28, 2017).

⁷⁹Chris D’Angelo & Nick Visser, [Lisa Murkowski Introduces Bill to Open Arctic Wildlife Refuge to Oil Drilling](#), HUFFINGTON POST (Nov. 9, 2017).

⁸⁰[Pub. L. 115-97 \[H.R. 1\]](#), 131 Stat 2054.

⁸¹Loretta Haring, [Research, Development, Testing and Evaluation: Arctic Navigational Safety Information System](#), COAST GUARD COMPASS (Nov. 14, 2017).

⁸²[Letter](#), Implementation of the Int’l Code for Ships Operating in Polar Waters (Polar Code), U.S. DEP’T OF HOMELAND SEC. (Dec. 12, 2016).

⁸³Final Rule, *Adding the Polar Ship Certificate to the List of SOLAS Certificates and Certificates Issued by Recognized Classification Societies*, 82 Fed. Reg. 44,108 (Sept. 21, 2017) (to be codified at 42 C.F.R. pts. 2, 8).

classification society can issue the certificate; and (3) the certificate must be in place by the first renewal or intermediate examination of the vessel after January 1, 2018.⁸⁴

E. 1982 Law of the Sea Convention

The States Parties to UNCLOS met at United Nations headquarters from June 12-15, 2017. The meeting was attended by representatives of States Parties to UNCLOS and observers, including the International Seabed Authority, the Commission on the Limits of the Continental Shelf, and the International Tribunal for the Law of the Sea.⁸⁵ The United States is not a party to UNCLOS and participated as an observer. There is no indication the Trump Administration will ask the Senate to accede to UNCLOS.

At the meeting, delegations reaffirmed UNCLOS sets out the legal framework within which all activities in the oceans and seas must be carried out.⁸⁶ Several delegations highlighted UNCLOS's role in maintaining international peace and security, reinforcing friendly relations among States, protecting and preserving the marine environment and ensuring the sustainable use of the oceans and marine resources.⁸⁷

On November 6, 2017, nations agreed to recommend to the United Nations General Assembly elements that would be considered in the development of a new treaty on marine biodiversity of areas beyond national jurisdiction.⁸⁸ A comprehensive global assessment of the marine environment released in 2015 found widespread evidence of particularly strong negative trends in marine biodiversity.⁸⁹ The General Assembly will decide when to convene an intergovernmental conference to work on the new treaty, which would fall under UNCLOS. Many countries want the conference to start in 2018.⁹⁰

On September 23, 2017, a Special Chamber of the International Tribunal for the Law of the Sea delivered its judgment on the dispute concerning delimitation of the maritime boundary between Ghana and Cote d'Ivoire in the Atlantic Ocean.⁹¹ It found it has jurisdiction to delimit the maritime boundary between the Parties in the territorial sea, in the exclusive economic zone, and on the continental shelf both within and beyond 200 nautical miles. The Chamber also found that there is no tacit agreement between the Parties to delimit these boundary limits and rejected Ghana's claim that Cote d'Ivoire is estopped from objecting to the "customary equidistance boundary."⁹² The Chamber, while setting the precise maritime boundary between the two nations, found that Ghana did not violate the sovereign rights of Cote d'Ivoire.⁹³

The maritime boundary dispute between China and the Philippines, adjudicated in 2016 by a panel of the International Tribunal, continues to fester in the South China Sea. While seeking greater economic relations with China, President Rodrigo Duterte of the Philippines has chosen not to enforce the ruling of the Tribunal, which held on all accounts

⁸⁴*Id.* at 44,112.

⁸⁵[Annual Report of the International Tribunal for the Law of the Sea for 2016](#), SPLOS/304 (June 12-16, 2017).

⁸⁶*Id.* at 14-15.

⁸⁷*Id.*

⁸⁸[Countries Agree to Recommend Elements for New Treaty on Marine Biodiversity of Areas Beyond National Jurisdiction](#), UNITED NATIONS (July 24, 2017).

⁸⁹*Id.*

⁹⁰*Id.*

⁹¹[Press Release](#), Int'l Tribunal for the Law of the Sea, Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire, U.N. Doc. ITLOS/Press 264 (Sept. 23, 2017).

⁹²*Id.* at 3.

⁹³*Id.* at 3-4.

for the Philippines and against China on its claim to sovereignty in seven man-made islands in the South China Sea.⁹⁴ China continues to construct runways, surface-to-air missiles, and radar systems on the islands.⁹⁵ At a November 10-12, 2017 meeting of Southeast Asian leaders in Vietnam, President Trump offered to mediate the dispute over territorial claims in the South China Sea.⁹⁶ No one seems to be taking him up on the offer.

V. COASTAL ZONE MANAGEMENT ACT AND MARINE SPATIAL PLANNING

A. *Judicial Developments*

In [*Board of Commissioners of the Southeast Louisiana Flood Protection Authority-East v. Tennessee Gas Pipeline Company, LLC*](#),⁹⁷ the Fifth Circuit ruled on March 3, 2017 against the Board's claim for damages to coastal lands and increased flood protection costs because the standard of care found in federal regulatory schemes, including the Coastal Zone Management Act of 1972 (CZMA), while giving rise to federal jurisdiction over the complaint, did not create a duty on defendants to protect the Board from increased flood protection costs that arise out of coastal erosion allegedly caused by defendants' dredging activities. In deciding against the Board, the court affirmed the district court's ruling that the issuance of permits licensing oil and gas exploration activities under the CZMA does not impose private duties to prevent environmental damage.⁹⁸

B. *Administrative Developments*

There is a proposed rule, pending since November 2016, for changes to regulations for the review of changes to state coastal programs.⁹⁹ The timing of that rule is dependent upon the development of the new website to support the new review process, but the final rule is expected to be published this fiscal year.

C. *Marine Spatial Planning Developments*

On January 17, 2017, representatives of six New England states and six tribes entered into an agreement with the Federal Government to create the Northeast Ocean Plan.¹⁰⁰ The purpose of the Plan and its accompanying Ocean Data Portal is to promote healthy ocean ecosystems, enable more effective decision making, and pursue compatibility among ocean uses in New England waters.¹⁰¹ The Plan was developed pursuant to Executive Order 13547, "Stewardship of the Ocean, Our Coasts, and the Great Lakes."¹⁰² It remains to be seen whether the Trump Administration will continue the ocean planning work under this Executive Order.

⁹⁴[Phil. v. China](#), PCA Case No. 2014-19 (Perm. Ct. Arb. 2016).

⁹⁵[Trump Offers to Mediate on South China Sea](#), MAR. EXEC. (Nov. 12, 2017).

⁹⁶*Id.*

⁹⁷850 F.3d 714 (5th Cir. 2017).

⁹⁸*Id.* at 727-28.

⁹⁹Proposed Rule, *Changes to the Coastal Zone Management Act Program Change Procedures*, 81 Fed. Reg. 78,514 (Nov. 8, 2016) (to be codified at 15 C.F.R. Pt. 923).

¹⁰⁰[The Northeast Ocean Plan](#), NE. REG'L PLANNING BODY (last visited Apr. 30, 2018).

¹⁰¹*Id.*

¹⁰²Exec. Order No. 13,547, 75 Fed. Reg. 13,547 (July 19, 2010).

The five member states of the Mid-Atlantic Regional Ocean Action Plan, finalized in December 2016, began to pivot in 2017 to its implementation.¹⁰³ The focus will be on maintaining the health of the region's ocean ecosystem; identification of priority science and research needs for the region; and continued collaboration and communication on ocean issues between the federal government, states and tribes.

The Commissioner of New York's Department of Environmental Conservation announced the [New York Ocean Action Plan](#) on January 23, 2017.¹⁰⁴ The Plan will cover the ten-year period of 2017-2027, with the goal of achieving better-managed and healthier ocean ecosystems that will benefit people, communities, and the natural world.¹⁰⁵ The Plan contains four goals that will guide New York's priorities, including (1) ensure the ecological integrity of the ocean ecosystem; (2) promote economic growth, coastal development and human use of the ocean in a manner that is sustainable; (3) increase resiliency associated with climate change; and (4) empower the public to participate in decision making and ocean stewardship.¹⁰⁶

On October 13, 2017, Washington State released its draft marine spatial plan for its Pacific Coast, which was open for comments until December 12, 2017.¹⁰⁷ The draft plan provides information on ocean uses and resources and a framework for evaluating new ocean uses on Washington's Pacific Coast.¹⁰⁸ A draft programmatic environmental impact statement (EIS) accompanies the draft plan.¹⁰⁹

VI. OFFSHORE WIND ENERGY

A. *Judicial Developments*

1. [Fisheries Survival Fund v. Jewell](#)

In December 2016, a coalition of fishing advocates; local towns; and municipalities in New Jersey, New York, and Rhode Island brought the first ever legal challenge to the DOI Bureau of Ocean Energy Management's (BOEM) offshore wind leasing program in the Federal District Court for the District of Columbia.¹¹⁰ Plaintiffs are challenging BOEM's February 2017 issuance of a commercial wind lease to Statoil Wind US, LLC approximately 11 miles off the coast of New York, alleging BOEM failed to adequately solicit input from the fishing industry and other affected stakeholders regarding the proposed site's suitability for wind development and identify potential alternative lease locations. Plaintiffs also allege NEPA requires BOEM to prepare a full EIS considering potential wind project effects on the lease area prior to issuing a lease, which BOEM did not do. Cross-motions for summary judgment were filed in September and October 2017 and are awaiting the court's decision.

¹⁰³[Mid-Atlantic Regional Ocean Action Plan Focus Shifts to Implementation](#), MID-ATLANTIC REGIONAL COUNCIL ON THE OCEAN (Mar. 10, 2017).

¹⁰⁴[New York Ocean Action Plan](#), N.Y. DEP'T OF ENVTL. CONSERVATION, (last visited Apr. 30, 2018).

¹⁰⁵*Id.* at 2.

¹⁰⁶*Id.* at 18-79.

¹⁰⁷[Washington State Releases Draft Marine Spatial Plan](#), WASH. MARINE SPATIAL PLANNING (Oct. 13, 2017).

¹⁰⁸*Id.*

¹⁰⁹*Id.*

¹¹⁰236 F. Supp. 3d 332 (D.D.C. 2017).

2. Public Employees for Environmental Responsibility, IBLA No. 17-____ (Filed Nov. 21, 2017).

On December 1 2017, Cape Wind Associates, LLC submitted an application to BOEM to relinquish its 46 square mile federal wind energy lease off the coast of Massachusetts, officially ending the company's 16-year effort to build the 130MW Cape Wind energy project in Nantucket Sound.¹¹¹ BOEM [recently reaffirmed its 2011 Cape Wind project approval](#) in response to a 2016 D.C. Circuit Court of Appeals decision invalidating BOEM's Cape Wind EIS.¹¹² On November 21, 2017, project opponents, including plaintiffs in the D.C. Circuit case, appealed BOEM's decision to re-affirm the project to the Interior Board of Land Appeals, challenging the validity of [BOEM's August 2017 Supplemental EIS](#). That appeal will likely be withdrawn. The Cape Wind project was first proposed in 2001 and has faced opposition almost from the start, including numerous legal challenges seeking to terminate the federal lease the company obtained in 2010.

B. Federal and State Project Updates

1. Maryland Renewable Energy Credits Awarded

On May 11, 2016, the Maryland Public Service Commission (PSC) [awarded a total of \\$1.8 billion in offshore renewable energy credits \(OREC\)](#) to two prospective offshore wind developers: US Wind, Inc., a subsidiary of Italian developer Renexia, which holds a federal lease offshore Ocean City, Maryland and Skipjack Offshore Energy, LLC, a unit of Deepwater Wind Holdings LLC, which holds a federal lease offshore Delaware through its subsidiary, GSOE I, LLC. Authorized by the [2013 Maryland Offshore Wind Energy Act \("Act"\)](#),¹¹³ the ORECs guarantee the developers a levelized price of \$131.93 per megawatt-hour (MW/h) generated for a term of 20 years, beginning January 2021 for U.S. Wind and 2023 for Skipjack.

2. North Carolina Commercial Wind Energy Lease Issued

On October 10, 2017, BOEM [issued a commercial wind energy lease](#) offshore Kitty Hawk, North Carolina for \$9,066,650 to Avangrid Renewables, LLC, a subsidiary of Spanish public electric utility, Iberdola. Avangrid has 4.5 years to submit its plans to BOEM to develop its lease.¹¹⁴

3. BOEM Approves Site Assessment Plans on Leases Offshore Rhode Island, Massachusetts, and Virginia

In 2017, BOEM approved three Site Assessment Plans (SAP) authorizing the installation and operation of meteorological buoys on the following federal offshore wind leases: (1) [Lease OCS-A 0486, offshore Rhode Island and Massachusetts](#) (a.k.a. "Revolution Wind," owned by Deepwater Wind New England, LLC), SAP approved

¹¹¹[It's Over: Cape Wind Ends Controversial Project](#), CAPE COD TIMES (Dec. 1, 2017)

¹¹²[Pub. Emps. for Env'tl. Responsibility v. Hopper](#), 827 F.3d 1077 (D.C. Cir. 2016).

¹¹³See [Maryland Public Service Commission Starts Reviewing Offshore Wind Applications](#), OFFSHORE WIND (Nov. 22, 2016).

¹¹⁴Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf Issued to Avangard Renewables, LLC, Dept. of Interior, Bureau of Ocean Mgmt. (Oct. 4, 2017).

October 12, 2017¹¹⁵; (2) [Lease OCS-A 0500, offshore Massachusetts](#) (owned by Bay State Wind LLC, subsidiary of Danish energy company Ørsted), SAP approved June 29, 2017¹¹⁶; and (3) [Lease OCS-A 0483, offshore Virginia](#) (owned by Dominion Virginia Power), SAP approved October 12, 2017¹¹⁷.

4. Revolution Wind Responds to Massachusetts Request for Proposals to Supply Renewable Energy

On March 31, 2017, Massachusetts electric distribution companies Unitil, National Grid, and Eversource, in coordination with the Massachusetts Department of Energy Resources, issued a [Request for Proposals \(RFP\) for Long-term Contracts for Clean Energy Projects](#) that specifically solicits proposals from offshore wind developers.¹¹⁸ Deepwater Wind New England, LLC submitted a [proposal](#) to supply 288 MW, 144MW, or 96 MW to the Massachusetts grid based on three possible development scenarios for its “Revolution Wind” project, which is contemplated for federal lease [OCS-A 0486](#) offshore Rhode Island and Massachusetts.¹¹⁹ Each version of the project incorporates a 40MW/h battery component engineered by Tesla to ensure consistent power output. The electric distribution companies are anticipated to select winning bids in July 2018.

¹¹⁵*Commercial Wind Leasing Offshore Rhode Island and Massachusetts*, BUREAU OF ENERGY MGMT. (last visited Feb. 7, 2018).

¹¹⁶*Commercial Wind Leasing Offshore Massachusetts*, BUREAU OF ENERGY MGMT. (last visited Feb. 7, 2018).

¹¹⁷*Commercial Lease for Wind Energy Offshore Virginia*, BUREAU OF ENERGY MGMT. (last visited Feb. 7, 2018).

¹¹⁸Request for Proposals for Long-Term Contracts for Clean Energy Projects, Mass. Dep’t of Energy Res. (Mar. 31, 2017).

¹¹⁹Proposal for the Sale of Energy and RECs from the Revolution Wind Project, REVOLUTION WIND (July 27, 2017).

Chapter 18 • MINING AND MINERAL EXTRACTION 2017 Annual Report¹

I. REGULATORY DEVELOPMENTS

A. *U. S. Army Corps of Engineers Reissues CWA Section 404 Nationwide Permits*

Effective March 19, 2017, the United States Army Corps of Engineers (USACE) reissued its Clean Water Act (CWA) section 404 nationwide permits (NWP). The nationwide permits authorize “activities that have no more than minimal individual and cumulative adverse environmental effects.”² NWP 21 relates to surface coal mining activities. Previously, NWP 21 was used to authorize the construction of valley fills but the authorization for valley fills was challenged and subsequently disapproved under NWP 21. The main change is the removal of the grandfather provision found in the 2012 version of NWP 21 that continued the authorization of activities approved under the 2007 NWP 21. Therefore, only activities specifically allowed by the 2017 NWP 21 will now be authorized by it.

B. *1983 SMCRA Stream Buffer Zone Rule – Reinstated Again?*

In the past decade, two administrations have failed to amend the Office of Surface Mining Reclamation and Enforcement’s (OSMRE) stream buffer zone rule that has been in effect since 1983.³ As summarized before in these pages, the stream buffer zone rule created a 100-foot buffer around perennial and intermittent streams where disturbance from surface coal mining was prohibited. The regulatory authority can waive the buffer requirements if the mining activities “will not cause or contribute to the violations of . . . water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream.”⁴ This rule was ultimately interpreted as preventing the placement of excess spoil from coal mining activities to construct valley fills in perennial and intermittent streams.⁵

In 2008, a Republican administration revised and finalized a new stream buffer zone rule, partially in response to *Bragg*, to specifically authorize the construction of valley fills.⁶ An environmental group challenged the 2008 revisions to the rule, which was sustained by the district court in 2014.⁷ This resulted in the 2008 rule being vacated and the 1983 rule being reinstated.⁸

¹Editor and Author: Joseph L. Jenkins, Lewis Glasser PLLC, Charleston, West Virginia.

²[Issuance & Reissuance of Nationwide Permits](#), 82 Fed. Reg. 1860 (Jan. 6, 2017) (to be codified at 33 C.F.R. ch. 2) (Final rule).

³[Surface Coal Mining & Reclamation Operations Permanent Regulatory Program; Stream Buffer Zones & Fish, Wildlife, and Related Environmental Values](#), 48 Fed. Reg. 30,312 (June 30, 1983) (codified at 30 C.F.R. pts. 816 and 817).

⁴30 C.F.R. §§ [816.57](#), [817.57](#) (2016).

⁵*Bragg v. Robertson*, 72 F. Supp. 2d 642 (S.D. W. Va. 1999).

⁶[Excess Spoil, Coal Mine Waste, & Buffers for Perennial & Intermittent Streams](#), 73 Fed. Reg. 75,814 (Dec. 12, 2008) (codified at 30 C.F.R. pts. 780, 784, 816 and 817).

⁷*Nat’l Parks Conservation Ass’n v. Jewell*, 62 F. Supp. 3d 7 (D.D.C. 2014).

⁸[Excess Spoil, Coal Mine Waste, Diversions, and Buffer Zones for Perennial and Intermittent Streams](#), 79 Fed. Reg. 76,227 (Dec. 22, 2014) (codified at 30 C.F.R. pts. 780, 784, 816 and 817).

In response, the OSMRE went back to the drawing board and issued a final rule re-titled the “[Stream Protection Rule](#).”⁹ As its name implies, the new rule increased the protection of streams by, in addition to maintaining the 100-foot buffer around perennial and intermittent streams, providing numerous regulatory revisions including defining “material damage to the hydrologic balance outside the permit area” and increasing baseline data collection and monitoring.¹⁰ The OSMRE believes the expansive rule will “better protect . . . streams, fish, wildlife, and related environmental values from the adverse impacts of surface coal mining[.]”¹¹ Conversely, industry, and many in Congress, have complained that the rule is a significant burden on coal mining, particularly in Appalachia.

Congressional sentiment regarding the burden of the rule on coal mining eventually won out. By using the rarely invoked Congressional Review Act,¹² Congress passed a joint resolution disapproving of the Stream Protection Rule.¹³ The newly inaugurated President signed the resolution on February 16, 2017, which meant the Stream Protection Rule no longer had any force or effect.

Having failed to enact changes to the stream buffer zone rule on two occasions, the 1983 rule lives to fight another day. The reimplemention of the 1983 rule also brings up the question of the renewed validity of the *Bragg* decision that ultimately found valley fills could not be constructed under this rule. In some ways, this could pose a greater burden on the coal industry which was clearly not Congress’s intent.

C. *U.S. Department of the Interior’s Effort to Limit Coal Mining Halted*

The U.S. Department of the Interior (DOI) had taken a significant step toward limiting mining on federal land. The DOI Secretary [issued an order](#) calling on the BLM to prepare a programmatic environmental impact statement (PEIS) to comprehensively review the federal coal program.¹⁴ The goal is to modernize and improve the federal coal program by examining leasing, fair return to the public, climate and socio-economic impacts, exports and energy needs.¹⁵ Until the PEIS has been prepared by the BLM, no new leases for thermal coal will be issued, unless an exclusion applies.¹⁶

On March 29, 2017, the new DOI Secretary [issued an order](#) revoking the previous Secretary’s order. The order halted all work on the PEIS and resumed leasing for coal mining on public lands.¹⁷ This order was immediately challenged by several environmental groups and the Northern Cheyenne Tribe, in a consolidated case before the United States District Court for the District of Montana.¹⁸

D. *Coal Ash Disposal*

⁹81 Fed. Reg. 93,066 (Dec. 20, 2016) (to be codified at 30 C.F.R. pts. 700, 701, 773, 774, 777, 779, 780, 783, 784, 785, 800, 816, 817, 824, and 827).

¹⁰*Id.* at 93,066.

¹¹*Id.*

¹²[5 U.S.C. §§ 801-08](#) (2016).

¹³[Disapproving the rule submitted by the Department of the Interior known as the Stream Protection Rule](#), H.J. Res. 38, 115th Cong. (2017) (enacted).

¹⁴Sally Jewell, Sec’y, Dep’t of the Interior, [Order No. 3338](#) (Jan. 15, 2016).

¹⁵*Id.* at 7-8.

¹⁶*Id.* at 8-10.

¹⁷Sec’y of the Dep’t of the Interior, Order No. 3348 (Mar. 29, 2017).

¹⁸Complaint for Declaratory & Injunctive Relief, *Citizens for Clean Energy v. U.S. Dep’t of Interior*, Case No. 4:17-cv-00030-BMM (D. Mont. Mar. 29, 2017).

After the U.S. Environmental Protection Agency (EPA) declined to regulate coal combustion residuals (coal ash) as hazardous waste in 2015,¹⁹ the Water Infrastructure Improvements for the Nation (WIIN) Act was enacted.²⁰ The WIIN Act provides states the opportunity to submit programs for the regulation of coal ash as solid waste to the EPA for review and approval. The EPA has issued [interim final guidance](#) to assist states in the submission of their programs and to facilitate the review and approval of the state programs.²¹

¹⁹[Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities](#), 80 Fed. Reg. 21,302 (Apr. 17, 2015) (codified at 40 C.F.R. pts. 257, 261).

²⁰[WIIN Act](#), Pub. L. No. 114-322, 130 Stat. 1628 (2016) (amending 42 U.S.C. § 6954).

²¹Release of Interim Final Guidance for State Coal Combustion Residuals Permit Programs; Comment Request, 82 Fed. Reg. 38,685 (Aug. 15, 2017) (Notice).

Chapter 19 • NATIVE AMERICAN RESOURCES 2017 Annual Report¹

This year's major developments tended to involve questions of tribal jurisdiction and the nuances of sovereign immunity, although there were significant developments in long-running cases concerning treaty rights covering fishing, water and land use issues.

I. JUDICIAL DEVELOPMENTS

A. *United States Supreme Court*

1. *Lewis v. Clarke*²

On April 25, 2017, the U.S. Supreme Court held that a suit brought against a Mohegan Tribal Gaming Authority employee in his individual capacity did not implicate the Mohegan Tribe's sovereign immunity.³ The Court further held that “an indemnification provision does not extend a tribe’s sovereign immunity where it otherwise would not reach.”⁴

The plaintiffs filed suit against the employee, William Clarke (“Clarke”), and the Mohegan Tribe (“Tribe”) in state court following an automobile involving a limousine driven by Clarke in the performance of his job.⁵ Plaintiffs ultimately dismissed the Tribe from the case amending it to name Clarke in his individual capacity.⁶ Clarke filed a motion to dismiss for lack of subject matter jurisdiction, based on the premise that he was acting in his official capacity as a tribal employee when the accident occurred, and was, therefore, shielded by tribal sovereign immunity.⁷ The trial court denied the motion, and Clarke appealed.⁸

The Connecticut Supreme Court reversed, holding that Clarke could not be sued in his individual capacity because he “was acting within the scope of his employment when the accident [that injured the plaintiffs] occurred” and, as an employee, the Tribe’s sovereign immunity extended to him.⁹ Plaintiffs appealed to the U.S. Supreme Court.

The Supreme Court began its analysis by asking whether the suit against Clarke in his individual capacity amounted to seeking a remedy against the Tribe.¹⁰ Ultimately, the Court found that recovery against Clarke would “not require action by the sovereign or disturb the sovereign's property.”¹¹ The Court further found that, although an indemnity agreement between Clarke and the Tribe might require the Tribe to reimburse Clarke, “[t]he

¹This Chapter, which addresses the year's significant cases and developments in Native American Resources, was prepared by attorneys and staff of Hobbs, Straus, Dean & Walker, LLP, Oklahoma City, OK: William R. Norman, Jr., Michael D. McMahan, Randi D. Hardin, and Zachary T. Stuart.

²137 S. Ct. 1285 (2017).

³*Id.* at 1288.

⁴*Id.*

⁵*Id.* at 1289.

⁶*Lewis v. Clarke*, 135 A.3d 677, 678 n. 2. (Conn. 2017).

⁷*Id.* at 678- 79.

⁸*Id.*

⁹*Id.* at 685-86.

¹⁰*Lewis*, 137 S. Ct. at 1291 (quoting *Larson v. Domestic and Foreign Commerce Corp.*, 377 U.S. 682, 687 (1949)).

¹¹*Id.*

critical inquiry is who may be legally bound by the court's adverse judgment, not who will pick up the tab.”¹² Thus, the court concluded that “[a]n indemnification provision cannot extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak.”¹³

2. *Patchak v. Jewell* (now *Patchak v. Zinke*)

On May 1, 2017, the Supreme Court granted certiorari in *Patchak v. Jewell*.¹⁴ This matter originated in 2009, when David Patchak (“Patchak”) challenged the Department of Interior's authority to place a tract of land (the Bradley Property), located near Patchak's home, into trust. The District Court dismissed the case for lack of standing, but the Court of Appeals reversed. In 2012, the Supreme Court granted review, [holding](#) Patchak had standing, sovereign immunity had been waived, and that the suit may proceed.¹⁵

In 2014, before the case was resolved, Congress enacted the Gun Lake Trust Land Reaffirmation Act,¹⁶ which directed that any pending (or future) case relating to the Bradley Property be “promptly dismissed” but did not otherwise amend any substantive law bearing on the case. Patchak sought Supreme Court review to determine whether the statute violated the Fifth Amendment's Due Process Clause or the Constitution's Separation of Powers Clause. The Supreme Court heard oral arguments on November 7, 2017.

3. *Matal v. Tam* and the “Redskins” Case

“On June 19, 2017, the U.S. Supreme Court ruled 8-0 in *Matal v. Tam*¹⁷ that the disparagement clause of the Lanham Act is an unconstitutional burden on free speech and, therefore, the U.S. Patent and Trademark Office (PTO) may not refuse to register a disparaging mark.”¹⁸ This decision directly affected the National Football League Washington Redskins’ (“Redskins”) case, *Pro-Football v. Blackhorse*,¹⁹ which was on hold in the Fourth Circuit Court of Appeals.²⁰

In *Blackhorse*, five Native Americans sought revocation of the Redskins trademarks before the PTO on disparagement grounds under Section 2 of the Lanham Act.²¹ The PTO agreed and, in 2014, revoked six of the football team's trademarks. The team sued to overturn the decision in the U.S. District Court for the Eastern District of Virginia, which ultimately upheld the PTO's revocation. After the District Court issued its opinion, the Fourth Circuit placed the case on hold pending the outcome of *Tam* before the Supreme Court. Once the *Tam* decision was issued, “the Blackhorse defendants and the United States as intervenor in the case wrote separate letters to the Fourth Circuit Court of

¹²*Id.* at 1292-93.

¹³*Id.* at 1287.

¹⁴*Patchak v. Zinke*, 137 S. Ct. 2091 (2017).

¹⁵*Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 132 S. Ct. 2199, 2203 (2012) (*Patchak I*).

¹⁶Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 (Sept. 26, 2014).

¹⁷*Matal v. Tam*, 137 S. Ct. 1744 (2017).

¹⁸Hobbs, Straus, Dean & Walker, LLP, General Memorandum 17-036 1 (June 29, 2017).

¹⁹*Pro-Football Inc. v. Blackhorse*, 709 F. App'x 182 (4th Cir. 2018).

²⁰*Id.*

²¹*Id.* at 183.

Appeals stating that they agreed that the *Tam* decision controlled the outcome of the case and the court should grant the football team’s request.”²²

4. *Myers v. Oneida Tribe of Indians of Wisconsin*

On March 20, 2017, the Supreme Court denied certiorari, leaving intact a Seventh Circuit decision in favor of the Oneida Tribe of Indians of Wisconsin (“Tribe”) on sovereign immunity grounds. Plaintiff had filed a putative class-action lawsuit alleging violations of the Fair and Accurate Credit Transaction Act (FACTA)²³ after he made purchases at two stores owned by the Tribe and received receipts that violated the FACTA’s rules concerning printing credit card information.²⁴ The District Court dismissed the case based on the Tribe’s sovereign immunity, and the Seventh Circuit affirmed. The Circuit Court rejected the plaintiff’s argument that FACTA’s “definition of ‘person’ which includes ‘any . . . government,’ is broad enough to include Indian tribes,” noting “Congress has demonstrated that it knows full well how to abrogate tribal immunity.”²⁵

B. *Appellate Opinions*

1. *Murphy v. Royal*²⁶

The Tenth Circuit issued a landmark decision concerning state criminal jurisdiction over former allotted lands. Patrick Dwayne Murphy, an enrolled member of the Muscogee (Creek) Nation, was convicted of murder and sentenced to death following a jury trial in Macintosh County, Oklahoma. Both his conviction and sentence were affirmed on appeal. Murphy then filed unsuccessful petitions for a writ of habeas corpus in the United States District Court for the Eastern District of Oklahoma,²⁷ after which he appealed to the Tenth Circuit Court of Appeals.

In his appeal, Murphy noted that the murder occurred on former allotment land within the boundaries and former reservation of the Muscogee (Creek) Nation.²⁸ Murphy argued that Congress never disestablished the Muscogee (Creek) Nation’s reservation and, therefore, the State of Oklahoma lacked jurisdiction to convict him.²⁹ In response, the State of Oklahoma cited various acts, policies and demographic evidence for the proposition that Congress had effectively disestablished the reservation.³⁰

²²Hobbs, Straus, Dean & Walker, LLP, *supra* note 18, at 1.

²³Pub. L. No. 108-159, 117 Stat. 1952 (2003).

²⁴*Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 820 (7th Cir. 2016).

²⁵*Id.* at 824 (comparing FACTA to the Safe Water Drinking Act, 42 U.S.C. §§ 300j–9(i)(2)(A), 300f(10), 300f(12) (defining person to include municipality and municipality to include an Indian tribe); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901, 6903(13)(A), 6903(15); Fair Debt Collection Procedures Act, 28 U.S.C. §§ 3002(7), 3002(10) (defining “person” to include “a natural person (including an individual Indian) ... or an Indian tribe.”)).

²⁶866 F.3d 1164 (10th Cir. 2017).

²⁷*Id.* at 1173.

²⁸*Id.* at 1188-89.

²⁹*Id.*

³⁰*Id.* at 1190.

Applying the analysis from *Solem v. Bartlett*,³¹ the Tenth Circuit agreed with Murphy,³² concluding that Congress had not disestablished the Muscogee (Creek) Nation Reservation and, therefore, the murder occurred in Indian country.³³ Because the murder occurred in Indian country and Murphy is an Indian for purposes of the Major Crimes Act, the federal court had exclusive jurisdiction over the matter.³⁴

On November 9, 2017, the Tenth Circuit [denied](#) rehearing en banc.³⁵ Chief Judge Tymkovich filed a concurrence, stating that “this challenging and interesting case makes a good candidate for Supreme Court review.”³⁶ The State of Oklahoma has expressed its intention to seek certiorari.³⁷

2. [Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District](#)³⁸

On November 27, 2017, the U.S. Supreme Court declined to hear the appeal by two water agencies in their groundwater dispute with the Agua Caliente Band of Cahuilla Indians (“Tribe”). In *Agua Caliente*, the Tribe sought declaratory injunctive relief against two water agencies.³⁹ The Tribe claimed a reserved right and an aboriginal right to groundwater underlying its reservation. The United States intervened as a plaintiff and also alleged that the Tribe had a reserved right to the groundwater.⁴⁰ The U.S. District Court for the Central District of California held that the reserved rights doctrine did apply to groundwater and that the United States reserved appurtenant groundwater when it established the Tribe's reservation.⁴¹ The water agencies appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit began its review by explaining the *Winters*⁴² doctrine, which provides that “federal reserved water rights are directly applicable ‘to Indian reservations and other federal enclaves, encompass[ing] water rights in navigable and nonnavigable streams’[,]” and are superior to other water rights.⁴³ The Ninth Circuit held that the United States implicitly reserved a right to water when it created the Aqua Caliente Reservation.⁴⁴

The next issue was whether the *Winters* doctrine, and the Tribe's reserved water right, extended to the groundwater underlying the reservation.⁴⁵ The court, for the first

³¹465 U.S. 463 (1984).

³²*Murphy*, 866 F.3d at 1205 (10th Cir. 2017).

³³*Id.* at 1233.

³⁴*Id.*

³⁵*Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017).

³⁶*Id.* at 968.

³⁷Jessica McBride, [Tenth Circuit Court of Appeals Denies Panel Rehearing in *Murphy v. Royal*](#), MVSKOKEMEDIA (Nov. 9, 2017).

³⁸849 F.3d 1262 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 468 (2017).

³⁹*Id.* at 1267.

⁴⁰*Id.*

⁴¹*Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, No. EDCV 13-883-JGB, 2015 WL 13309103, at *11 (C.D. Cal. Mar. 24, 2015), *aff'd*, 849 F.3d 1262 (9th Cir. 2017).

⁴²*Winters v. United States*, 207 U.S. 564, 575-77 (1908) (examining tribal rights to water associated with the Fort Belknap Reservation located in what would later become Montana).

⁴³*Agua Caliente Band of Cahuilla Indians*, 849 F.3d at 1268.

⁴⁴*Id.* at 1270.

⁴⁵*Id.*

time, expressly held that the *Winters* doctrine does indeed apply to groundwater.⁴⁶ In reaching its decision, the court noted that groundwater was just as appurtenant as surface water because it is relied on by populations across the United States as their only viable water source, and it is necessary for survival when surface water is minimal or entirely lacking.⁴⁷

The court then addressed the water agencies' argument that the Tribe did not need the federal reserved right because (1) the Tribe had a correlative right to groundwater under California law; (2) the Tribe had not drilled for groundwater; and (3) the Tribe was entitled to surface water from the Whitewater River Decree.⁴⁸ The court concluded that (1) state water rights were preempted by federal reserved rights; (2) a historical lack of access to the groundwater did not destroy the Tribe's right to groundwater now; and (3) whether water was currently needed was irrelevant to the question of whether water was envisioned as necessary for the reservation's purpose.⁴⁹

3. [Window Rock Unified School District v. Reeves](#)⁵⁰

Plaintiffs, public school districts that operate schools on land leased from the Navajo Nation ("Nation"), sought declaratory and injunctive relief against the Navajo Nation Labor Commission ("Commission").⁵¹ A group of current and former employees of the school districts filed complaints before the Commission alleging the Districts owed them merit pay under Arizona law, and others alleged that the Districts "violated their rights under the Navajo Preference in Employment Act."⁵² In the tribal proceedings, the school districts moved for dismissal for lack of jurisdiction.⁵³ The Commission stated it could resolve the jurisdictional issue only through an evidentiary hearing after appropriate discovery.⁵⁴ But before the Commission could hold its evidentiary hearing, Plaintiffs sought relief in the U.S. District Court for the District of Arizona.⁵⁵

The district court concluded that the Nation had no regulatory or adjudicative jurisdiction over the Plaintiffs' employment-related decisions because it "plainly lacked" jurisdiction.⁵⁶ Accordingly, the court granted the school districts' motions for summary judgment and request for injunctive relief.

The Ninth Circuit Court of Appeals ruled in favor of the Navajo Nation, reversing the decision of the district court.⁵⁷ It affirmed the principle that a tribe's right to exclude non-tribal members from its land imparts regulatory and adjudicative jurisdiction over conduct on that land, at least with regard to civil jurisdiction. In doing so, it rejected the notion that the Supreme Court's decision in *Nevada v. Hicks*⁵⁸ eliminated the right-to-

⁴⁶*Id.*

⁴⁷*Id.* at 1271.

⁴⁸*Agua Caliente Band of Cahuilla Indians*, 849 F.3d at 1272.

⁴⁹*Id.*

⁵⁰861 F.3d 894 (9th Cir. 2017).

⁵¹*Id.* at 896-97.

⁵²*Id.* at 896.

⁵³*Id.*

⁵⁴*Id.*

⁵⁵*Woodrow Rock Unified Sch. Dist.*, 861 F.3d at 896.

⁵⁶*Id.* at 897.

⁵⁷*Id.* at 896.

⁵⁸*Nevada v. Hicks*, 533 U.S. 353 (2001).

exclude framework. The court cited a previous decision wherein it stated that *Hicks* was limited to the question of tribal-court jurisdiction over state officers enforcing state law.⁵⁹

Thus, the Ninth Circuit required exhaustion in the tribal forum because (1) the conduct at issue occurred on tribal land over which the Navajo Nation has a right to exclude non-members; (2) state criminal law enforcement interests were not present; and (3) tribal jurisdiction is at least colorable or plausible, that is to say, tribal jurisdiction was not plainly lacking. The Ninth Circuit concluded, a “[t]ribal adjudicative body generally must have [the] first opportunity to evaluate its jurisdiction over [a] matter pending before it.”⁶⁰

The School Districts have filed a petition for writ of certiorari, which is currently pending.⁶¹

4. *Kansas v. Zinke*

In response to a request from the Quapaw Tribe (“Tribe”), the National Indian Gaming Commission (NIGC) “acting General Counsel issued a legal opinion letter stating that the Tribe’s Kansas trust land was eligible for gaming under the Indian Gaming Regulatory Act (IGRA).”⁶² The State of Kansas and the Board of County Commissioners of the County of Cherokee, Kansas, filed suit, arguing that the letter was arbitrary, capricious, and erroneous as a matter of law. The district court concluded that the letter did not constitute reviewable final agency action under IGRA or the Administrative Procedure Act (“APA”).⁶³ Plaintiffs appealed to the Tenth Circuit Court of Appeals.

On June 27, 2017, the Tenth Circuit [affirmed](#), holding that “IGRA’s text, statutory scheme, legislative history, and attendant regulations demonstrate congressional intent to preclude judicial review of legal opinion letters.”⁶⁴ The court further held that the Acting General Counsel’s letter did not constitute final agency action under the APA because it only expressed a non-binding advisory opinion and did not actually determine any rights.⁶⁵ Plaintiffs appealed to the United States Supreme Court, which denied their petition on December 11, 2017.⁶⁶

5. *Great Plains Lending, LLC v. Consumer Financial Protection Bureau*

Several consumer lending entities owned and operated by various tribes (Chippewa Cree, Tunica Biloxi, and Otoe Missouri Tribes (collectively, “Tribes”) were the subjects of an investigation by the federal Consumer Financial Protection Bureau (Bureau). The Tribes directed their respective entities not to respond to the investigative demands, arguing the Bureau lacked jurisdiction to investigate lending entities created and operated by tribes.

⁵⁹*Window Rock Unified Sch. Dist.*, 861 F.3d at 898-99.

⁶⁰*Id.* at 895.

⁶¹*Window Rock Unified Sch. Dist. v. Reeves*, No. 17-447 (Petition for Certiorari filed Sept. 25, 2017) (pending as of Dec. 14, 2017).

⁶²*Kansas ex rel. Schmidt v. Zinke*, 861 F.3d 1024, 1027 (10th Cir. 2017).

⁶³*Id.* at 1028.

⁶⁴*Id.* at 1027.

⁶⁵*Id.*

⁶⁶*Kansas ex rel. Schmidt*, 861 F.3d 1024 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 571 (2017) (Mem.).

Instead, the tribes offered to cooperate with the Bureau as co-regulators – an offer the Bureau declined, after which it sought to enforce its demands in federal court.⁶⁷

The United States District Court for the Central District of California held that, while the law underlying the Bureau's civil investigative authority was silent as to whether Indian tribes may be subject to investigative demands, “the legislative environment in which the provision appears indicates that Congress likely intended for tribally-owned businesses like Respondents to be subject to the Bureau's investigatory authority.”⁶⁸ Accordingly, the court granted the Bureau's request, but agreed to stay the effectiveness of the ruling pending appeal.⁶⁹

On appeal, the Ninth Circuit Court of Appeals [held](#) that “generally applicable laws apply to Native American tribes unless Congress expressly provides otherwise.”⁷⁰ The court further noted that “Indian tribes do not . . . enjoy sovereign immunity from suits brought by the federal government.”⁷¹ The tribal lenders appealed to the United States Supreme Court, which denied their petition on December 11, 2017.⁷²

6. [United States v. Washington](#) (Culverts Case)

On January 12, 2018, the United States Supreme Court granted the State of Washington's (“Washington”) request for certiorari review⁷³ of the Ninth Circuit's recent decision in *United States v. Washington*, also known as the “Culverts Case.” The Ninth Circuit affirmed the decision of the district court to issue a permanent injunction ordering Washington to correct culverts violating the Stevens Treaties.⁷⁴ The Stevens Treaties authorized local tribes to continue to take fish from streams and rivers in the area. Many of the tribes relied on fish returning to their freshwater birthplaces to spawn the next generation. The fish are fewer in number due, in some part, to Washington's construction of culverts related to road construction over streams and rivers. Some of these culverts completely bar upstream passage to the fish's spawning waters.

The Ninth Circuit reaffirmed the reserved rights doctrine.⁷⁵ It summarily rejected Washington's argument that the Stevens Treaties do not prohibit complete obstruction of the waters. Washington appeared to rely on the strict language of the Treaties that simply would have allowed tribes in the area to take fish from the waters, and that they did not impose any duty on the State to protect the fish supply.

7. [United States v. Lummi Nation](#)⁷⁶

⁶⁷Consumer Fin. Prot. Bureau v. Great Plains Lending, LLC, No. CV-14-2090-MWF-(PLAX), 2014 WL 12685941 (C.D. Cal. May 27, 2014), *aff'd*, 846 F.3d 1049 (9th Cir. 2017).

⁶⁸*Id.* at *14.

⁶⁹*Id.* at *19.

⁷⁰Consumer Fin. Prot. Bureau v. Great Plains Lending, LLC, 846 F.3d 1049, 1058 (9th Cir. 2017).

⁷¹*Id.* at 1056 (quoting *E.E.O.C. v Karuk Tribe Hous. Auth.* 260 F.3d 1071, 1075 (9th Cir. 2001)).

⁷²*Consumer Fin. Prot. Bureau*, 846 F.3d 1049, No. 17-184, *cert. denied*, 138 S. Ct. 555 (2017) (Mem.).

⁷³853 F.3d 946 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 735 (2018) (Mem.).

⁷⁴*Id.* at 954 (9th Cir. 2017).

⁷⁵*Id.*

⁷⁶876 F.3d 1004 (9th Cir. 2017).

The Ninth Circuit's reversal in *United States v. Lummi Nation* (“Lummi”) also dealt with fishing rights in the state of Washington. The issue in *Lummi* was whether a treaty had reserved to the Lummi Nation the right to fish the ocean waters west of Whidbey Island, Washington, located in Puget Sound. The Ninth Circuit in reversing the decision of the district court held that the Lummi did have a reserved right to fish the waters.

The Circuit had previously held that the Lummi had a reserved right to fish the waters directly south of the waters currently at issue, between the Lummi's original home is in Seattle, Washington. The court used the same reasoning in its determination here: the reserved fishing rights to those waters was present because the Lummi would have used those waters to travel from its home in the San Juan Islands (north) to its present-day home of Seattle (south).

C. District Court Opinions

1. [*Cherokee Nation v. Nash*](#)⁷⁷

Plaintiff, Cherokee Nation (“Tribe”), and Defendants, descendants of Cherokee slaves, the Department of Interior, and the Secretary of the Interior, filed motions for summary judgment in the U.S. District Court for the District of Columbia. The Cherokee Nation brought the action seeking declaratory relief that descendants of freed non-Indian slaves no longer had rights to citizenship in the Tribe.

The determinative legal issue was whether the descendants of non-Indian freedmen on the Dawes Rolls possessed a right to equal citizenship in the Cherokee Nation under the Treaty of 1866 (“Treaty”), which provided that certain freedmen and their descendants would have “all the rights of native Cherokees.”

The court first concluded that the Treaty of 1866 guaranteed the right to citizenship to qualifying freedmen.⁷⁸ The court next dismissed the notions that the relevant section of the Treaty was subject to time and place restrictions, or that it was abrogated by Oklahoma statehood or the Five Tribes Act.⁷⁹ The court found no “explicit statutory language” abrogating the Treaty.⁸⁰ Ultimately, the Court affirmed the Cherokee Nation's sovereign right to determine its membership, albeit limited by the Cherokee Nation's treaties.⁸¹ The court concluded that, pursuant to the Treaty of 1866, the Cherokee freedmen had “a present right to citizenship in the Cherokee Nation that is coextensive with the rights of native Cherokees.”⁸²

2. [*Comanche Nation of Oklahoma v. Zinke*](#)⁸³

Plaintiff Comanche Nation of Oklahoma sought to prevent the opening of a Chickasaw Nation casino that was being built on land recently taken into trust by the Chickasaw Nation.⁸⁴ The Comanche Nation brought claims against the Secretary of the Interior (“Interior”) for the decision to take the land into trust.⁸⁵ The crux of Plaintiff's

⁷⁷267 F. Supp. 3d. 86 (D.D.C. 2017).

⁷⁸*Id.* at 139-40.

⁷⁹*Id.* at 140.

⁸⁰*Id.* at 131-32.

⁸¹*Id.* at 140.

⁸²*Cherokee Nation*, 267 F. Supp. 3d at 140.

⁸³*Comanche Nation of Okla. v. Zinke*, No. CIV-17-887-HE (W.D. Okla. Nov. 13, 2017).

⁸⁴*Id.* at 1.

⁸⁵*Id.*

argument was that Interior did not require the Chickasaw Nation to demonstrate the tribe's governmental jurisdiction over the land.⁸⁶ The court noted, however, that the “Oklahoma Exception” to the definition of reservation in the regulations includes lands in Oklahoma constituting the former reservation of the tribe, and does not require the tribe to have governmental jurisdiction.⁸⁷ Plaintiff sought to avoid the use of the exception, citing the Tenth Circuit's recent decision in *Murphy v. Royal*.⁸⁸ See Part B.1., supra. The court was not persuaded, noting that if Congress had not disestablished the reservation, then “the Chickasaw Nation ‘reservation’ would be treated like any other formal reservation, and would hence be within the scope of [the Interior's regulations].”⁸⁹

3. Ongoing Challenges to the Indian Child Welfare Act

On March 16, 2017, the U.S. District Court for the District of Arizona [dismissed](#) a case challenging the validity of the Indian Child Welfare Act (ICWA) for lack of jurisdiction and lack of standing.⁹⁰ The case is now on appeal to the Ninth Circuit Court of Appeals.⁹¹ The case, also known as the “Goldwater Litigation” because it was filed and funded by the Goldwater Institute, challenges ICWA on the theory that it is an unconstitutional race-based law.

Meanwhile, on October 30, 2017, the United States Supreme Court denied certiorari in an Arizona state court case that, in part, argued ICWA violates children's constitutional due process and equal protection guarantees.⁹² The Arizona Court of Appeals had [ruled](#):

[T]hat the additional requirements ICWA imposes on severance of a parent's rights to an Indian child are based not on race, but on Indians' political status and tribal sovereignty, and that those requirements are rationally related to the federal government's desire to protect the integrity of Indian families and tribes.⁹³

D. State Court Opinions

1. [Coeur d'Alene Tribe v. Johnson](#)⁹⁴

The Coeur d'Alene Tribe (“Tribe”) filed suit in its tribal court to enforce a tribal statute that “requires a permit for docks on the St. Joe River within the Reservation.”⁹⁵ Defendants did not appear and a default judgment was entered against them. “The judgment imposed a civil penalty of \$17,400 and declared that the Tribe was entitled to

⁸⁶*Id.* at 6-7.

⁸⁷*Id.* at 8.

⁸⁸*Comanche Nation of Okla.*, No. CIV-17-887-HE, at 8.

⁸⁹*Id.* at 9.

⁹⁰*A.D. v. Washburn*, No. 2:15-cv-01259-PHX-NVW, 2017 WL 1019685 (D. Ariz. Mar. 16, 2017) *appeal docketed, rev'd sub nom.* *Carter v. Washburn*, No. 17-15839 (9th Cir. Apr. 26, 2017).

⁹¹*Id.*

⁹²*S.S. v. Stephanie H.*, 388 P.3d 569 (Ariz. Ct. App. 2017), *cert. denied sub nom.* 138 S. Ct. 380 (U.S. 2017) (No. 17-95).

⁹³*Id.* at 576.

⁹⁴405 P.3d 13 (Idaho 2017).

⁹⁵*Id.* at 15.

remove the dock and pilings.”⁹⁶ Thereafter, “the Tribe filed a petition to have the Tribal Court judgment recognized in Idaho pursuant to the Enforcement of Foreign Judgments Act. I.C. §§ 10-1301, et seq. Following a hearing, the district court held that the Tribal Judgment was valid and enforceable.”⁹⁷

On appeal, the Idaho Supreme Court overruled prior case law and held that tribal court judgments are not entitled to full faith and credit, but are “entitled to recognition and enforcement under principles of comity.”⁹⁸ The court reiterated “that a party attacking the validity of a tribal court's judgment bears the burden of proving its invalidity.”⁹⁹

2. *Wilkes v. PCI Gaming Authority*

Plaintiffs sued a tribal employee, the Poarch Band of Creek Indians and the Tribe's casino following an automobile accident. The trial court granted summary judgment for the defendants based on tribal sovereign immunity.¹⁰⁰ The Alabama Supreme Court [reversed](#), stating that “a contrary holding would be contrary to the interests of justice, especially inasmuch as the tort victims in this case had no opportunity to negotiate with the tribal defendants for a waiver of immunity.”¹⁰¹

II. LEGISLATIVE AND EXECUTIVE DEVELOPMENTS

A. *Legislative Developments*

1. [Indian Employment, Training and Related Services Consolidation Act of 2017](#)¹⁰²

The Indian Employment, Training and Related Services Consolidation Act of 2017, was formally presented to President Trump for signature on December 6, 2017. The legislation is an amendment to the Indian Employment, Training and Related Services Demonstration Act of 1992, that is codified at 25 U.S.C. Sections 3401-3417 and is more commonly referred to as PL 477. The amendment makes the PL 477 program permanent, expands the range of programs and funds eligible for integration of PL 477 plans, clarifies the plan approval process and makes other improvements to strengthen tribal employment and training programs.

The PL 477 program allows tribal organizations to combine formula-funded federal grants that come from varied sources but pertain to employment, training, or related services into a single plan with a single budget and reporting system.¹⁰³ The PL 477 program allows tribal organizations more flexibility in deciding how to spend their federal funds. Tribal organizations are able to design programs that are more successful based on the unique needs of their own community members. It also allows them to streamline

⁹⁶*Id.*

⁹⁷*Id.*

⁹⁸*Id.* at 13.

⁹⁹*Coeur d'Alene Tribe*, 405 P.3d at 17.

¹⁰⁰*Wilkes v. PCI Gaming Auth.*, No. 1151312, 2017 WL 4385738, at *1-2 (Ala. Oct. 3, 2017).

¹⁰¹*Id.* at *4 (citing *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 766, 118 S. Ct. 1700, 1708, 140 L. Ed. 2d 981 (1998) (Stevens, J., dissenting)).

¹⁰²25 U.S.C. §§ 3401-3407, 3409- 3413, 3416-3417 (2017).

¹⁰³Pub. L. No. 115-93, 131 Stat. 2026 (2017).

administrative processes, including program applications and federal reporting, thereby lowering administrative costs and making more funds available for direct services.

2. [Attempt to Abrogate Sovereign Immunity in Patent Cases](#)¹⁰⁴

On October 5, 2017, Senator Clair McCaskill (D-MO) introduced a bill “to abrogate sovereign immunity of Indian tribes as a defense in *inter partes review* [(“IPR”)] of patents.”¹⁰⁵ The bill has not progressed and has no cosponsors. The bill followed the pharmaceutical company Allergan's attempt to shield review of its drug patent by selling it to a federally-recognized tribe.¹⁰⁶ In exchange for owning the patent and licensing it back to Allergan, the Tribes would receive substantial payments. *Inter partes review* is a process used to review challenges to the patentability of one or more claims.¹⁰⁷ In December 2016, the U.S. Patent Office granted IPR concerning some Allergan's patents.¹⁰⁸ In response, Allergan agreed to transfer the patents on its highly-profitable product Restasis, which is used for the treatment of dry eyes, to the Saint Regis Mohawk Tribe. State universities, by virtue of 11th Amendment immunity, have been ruled to be shielded from the IPR process.

3. [Oregon Tribal Economic Development Act](#)¹⁰⁹

The Senate passed the Oregon Tribal Economic Development Act. The bill allows Oregon tribes to lease, sell, convey, warrant, or transfer their real property that is not held in trust by the United States. An identical bill is in the U.S. House of Representatives and has been referred to the House Committee on Natural Resources.

4. [Southeast Alaska Regional Health Consortium Land Transfer Act of 2017](#)¹¹⁰

This bill directs the Department of Health and Human Services to convey to the Southeast Alaska Regional Health Consortium in Sitka, Alaska, all U.S. interest in certain property for use in connection with health and social services programs. An identical bill in the U.S. House of Representatives has been referred to the House Committee on Natural Resources.

5. [AMBER Alert in Indian Country Act of 2017](#)¹¹¹

The Senate introduced and passed the AMBER Alert in Indian Country Act of 2017. The bill modifies the Amber Alert grant program to make Indian tribes eligible for AMBER Alert grants, permit the use of grant funds to integrate state or regional AMBER

¹⁰⁴S.1948, 115th Cong. (2017).

¹⁰⁵*Id.*

¹⁰⁶Michael Erman, [Senator McCaskill Draft Bill in Response to Allergan Patent Maneuver](#), REUTERS (Oct. 5, 2017).

¹⁰⁷35 U.S.C. § 311 (2013).

¹⁰⁸Erman, *supra* note 107.

¹⁰⁹S. 1285, 115th Cong. (2017) (passed Senate); *see also* H.R. 3225, 115th Cong. (2017) (identical bill).

¹¹⁰S. 825, 115th Cong. (2017) (passed Senate); *see also* H.R. 1901, 115th Cong. (2017) (identical bill).

¹¹¹S. 772, 115th Cong. (2017) (passed Senate); *see also* H.R. 2666, 115th Cong. (2017) (identical bill); H.R. 3147, 115th Cong. (2017) (identical bill)

Alert communication plans with an Indian tribe, and allow the waiver of the matching funds requirement for grants awarded to Indian tribes. The bill has been referred to the House Subcommittee on Crime, Terrorism, Homeland Security, and Investigations.

6. [Columbia River In-Lieu and Treaty Fishing Access Sites Improvement Act](#)¹¹²

This bill allows the Bureau of Indian Affairs (BIA) to assess sanitation and safety conditions on land set aside to provide Columbia River Treaty tribes access to traditional fishing grounds. It allows the BIA to enter into contracts with tribes to improve sanitation, safety conditions, and access to electricity, sewer, and water infrastructure. The bill has been referred to the House Subcommittee on Indian, Insular, and Alaska Native Affairs.

7. [RESPECT ACT](#)¹¹³

This bill repeals outdated provisions regarding treatment of Native Americans, including provisions on hostile tribes, alcohol, work requirements, penalties for truancy, and placement of youth in reform school without the consent of a parent or guardian. The bill was passed by the Senate on November 29, 2017, and was sent to the House of Representatives, where it has been referred to the House Subcommittee on Indian, Insular, and Alaska Native Affairs.

8. [Indian Tribal Energy Development and Self-Determination Act Amendments of 2017](#)¹¹⁴

This bill passed the Senate and will provide tribes with the ability to better develop their energy resources. It amends the Energy Policy Act of 2005 to allow for a more streamlined process for energy resource development, encourage the formation of tribal-industry venture, and direct the Federal Energy Regulatory Commission to treat Indian tribes similar to States and municipalities with regard to preferences, permits, and licensing. The bill was passed by the Senate on November 29, 2017, and was sent to the House of Representatives, where it has been referred to the House Subcommittee on Energy and Mineral Resources.

9. [John P. Smith Act](#)¹¹⁵

This bill would streamline environmental review for tribal transportation projects. It allows for the expedited review and approval of tribal transportation safety projects. Also, certain transportation projects on Indian reservations may qualify under the bill as a categorical exclusion from National Environmental Policy Act requirements. The bill was passed by the Senate on November 29, 2017, and was sent to the House of Representatives, which has yet to take any action on the bill.

¹¹²S. 3222, 114th Cong. (2016); *see also* H.R. 5811, 114th Cong. (2016) (identical bill).

¹¹³S. 343, 115th Cong. (2017) (passed Senate).

¹¹⁴S. 245, 115th Cong. (2017) (passed Senate); *see also* Energy and Natural Resources Act of 2017, S. 1460, 115th Cong. (2017) (related bill).

¹¹⁵S. 302, 115th Cong. (2017) (passed Senate).

10. [Esther Martinez Native American Languages Preservation Act](#)¹¹⁶

This bill amends the Native American Programs Act of 1974.¹¹⁷ It reduces the minimum number of enrollees for grant-funded, Native American language education programs from ten (10) to five (5); increases the maximum duration of grants, and reauthorizes the program through fiscal year 2023. The bill was passed by the Senate on November 29, 2017, and sent to the House of Representatives, where it has been referred to the Committee on Education and Workforce.

B. Regulatory Actions

In October 2017, the Department of the Interior (DOI) held a listening session on a “consultation draft” of revisions to the regulations governing acquisitions of land in trust for Indian tribes.¹¹⁸ In response to comments from tribal officials and intertribal organizations, DOI scheduled a series of regional consultation sessions in January and February 2018.

C. Executive Actions

1. Dakota Access Pipeline

On January 24, 2017, President Trump [signed](#) his second executive order¹¹⁹ and [issued](#) a memorandum regarding construction of the Dakota Access Pipeline.¹²⁰ The executive order expedites environmental reviews and approval for high priority infrastructure projects while the memorandum orders the Secretary of the Army to expedite approval of the Dakota Access Pipeline.

2. Bears Ears National Monument

On December 4, 2017, President Trump issued a proclamation reducing the size of Bears Ears National Monument.¹²¹ That same day, multiple tribes filed suit in the United States District Court for the District of Columbia¹²² alleging that the President is not authorized to “revoke, replace, or diminish” national monuments once designated so by the President under the Antiquities Act. Environmental groups have also challenged the reduction. President Trump reduced the monument less than a year after its establishment by President Obama in December 2016. The area contains hundreds of archaeological sites and Native American artifacts of a number of tribes in the area.

¹¹⁶S. 254, 115th Cong. (2017) (passed Senate); *see also* H.R. 1169, 115th Cong. (2017) (identical bill).

¹¹⁷*Id.*

¹¹⁸25 C.F.R. pt. 151.

¹¹⁹Exec. Order No. 13,766, 82 Fed. Reg. 8657 (Jan. 24, 2017).

¹²⁰Memorandum Regarding Construction of the Dakota Access Pipeline, 82 Fed. Reg. 8661 (Jan. 24, 2017).

¹²¹Proclamation No. 9682, 82 Fed. Reg. 58,089 (Dec. 8, 2017).

¹²²Hopi Tribe v. Trump, Case No. 1:17-cv-02590 (D.D.C. Dec. 4, 2017).

Chapter 20 • NUCLEAR LAW
2017 Annual Report¹

I. JUDICIAL DEVELOPMENTS

A. *Spent Fuel Litigation* – [*Duke Energy Progress, Inc. v. United States*](#)²

On November 17, 2017, the U.S. Court of Federal Claims (Judge Wheeler) issued its decision in a “round three” spent fuel case covering the damages period January 1, 2011, through December 31, 2013, for Duke’s Harris, Robinson, Crystal River, and Brunswick nuclear plants. The decision was significant for two reasons.

First, the court rejected a new government argument that Duke profited from the government’s partial breach of the 1983 Standard Contract for Disposal of Spent Nuclear Fuel. The government sought a damages reduction of \$1.5 million on the basis that the government had paid for various spent fuel storage assets through prior damage awards and those assets were included in the asset base used to set permissible utility prices. The government argued that it should receive a credit for revenues realized on those assets. The court found that although the government deserved “some credit for creativity,” its claim was “too far removed from [Department of Energy] DOE’s breach to result in an offset recovery,” and that “no existing case law” supported the government’s claim.³

Second, the court held that costs for certain items purchased for cask loading constituted recoverable storage cask loading costs under *System Fuels v. United States*, 818 F.3d 1302 (Fed. Cir. 2016). The government argued that *System Fuels* applied only to internal labor costs for storage cask loading. In its decision, the court made clear that the rationale of *System Fuels* also applied to consumables used during storage cask loading (e.g., handheld radios, dosimeters, wrenches).⁴

B. *Price-Anderson* – [*McMunn v. Babcock & Wilcox Power Generation Group, Inc.*](#)⁵

On August 23, 2017, the U.S. Court of Appeals for the Third Circuit affirmed a district court holding that the defendants were entitled to summary judgment as a matter of law on the plaintiffs’ Price-Anderson “public liability” claims. The court held that the plaintiffs failed to show that there was a genuine dispute of material fact as to the elements of duty, breach, and damages. The plaintiffs asserted that they developed cancer after exposure to excessive radiation emissions from a Nuclear Material and Equipment Company facility in Apollo, Pennsylvania. The district court concluded that the plaintiffs’ common-law claims were preempted by the Price-Anderson Act and granted summary judgment to defendants on the Price-Anderson claims. In affirming the district court’s judgment, the Third Circuit held that the plaintiffs failed to raise an issue of fact that would allow a reasonable jury to find that the defendants breached their duty to the plaintiffs and that plaintiffs’ expert report would not allow a reasonable jury to find that the defendants’ radiation was a substantial factor in causing the plaintiffs’ cancers.⁶

¹Contributors include Jonathan Rund, Nuclear Energy Institute, and Stephen Burdick and Jane Accomando, Morgan, Lewis & Bockius LLP. Any questions or comments may be addressed to Mr. Burdick at stephen.burdick@morganlewis.com.

²135 Fed. Cl. 279 (Fed. Cl. 2017).

³*Id.* at 295.

⁴*Id.* at 291-92.

⁵869 F.3d 246 (3d Cir. 2017).

⁶*Id.*

C. *Preemption – [McNelis v. Pennsylvania Power & Light Co.](#)*⁷

On August 15, 2017, the U.S. Court of Appeals for the Third Circuit affirmed a district court grant of summary judgment in favor of the defendant, plaintiff's former employer. The plaintiff worked as an armed security officer at defendant's nuclear power plant until he was fired for failing a fitness for duty examination. The plaintiff claimed that his termination violated the Americans with Disability Act (ADA) because he was erroneously regarded as having a disability in the form of alcoholism, mental illness, and/or illegal drug use, which was a motivating factor in his termination. The court agreed with the defendant that the plaintiff could not perform the essential function of his job and, therefore, could not establish a prima facie case under the ADA.⁸

D. *Preemption – [Cox v. Duke Energy, Inc.](#)*⁹

On November 20, 2017, the U.S. Court of Appeals for the Fourth Circuit affirmed a federal district court's decision to dismiss several state tort-law claims brought against a nuclear plant operator after finding the claims were preempted by federal law. The case stems from a 2012 incident where the plaintiff, Mr. Fleming, flew his glider over the H.B. Robinson Nuclear Power Plant and circled the facility repeatedly. Finding the glider's presence suspicious, plant security notified the County Sheriff's Office, Federal Aviation Administration, and Shaw Air Force Base. Responding Sheriff's deputies ordered Fleming to land the glider at the airport, took him into custody, and arrested him for misdemeanor breach of the peace. Fleming was held overnight and released the next day on bond. Fleming later agreed to waive any possible civil claims that he might have against the Sheriff's Office in exchange for dismissal of the criminal charge. Nonetheless, Fleming later filed a civil suit against Duke Energy, Duke Energy's site vice president at Robinson, and the Sheriff's Office. Fleming alleged several state claims, including false imprisonment.¹⁰

In granting the defendants' motion for summary judgment, the district court held that Fleming's state law claims were preempted by the Atomic Energy Act. On appeal, the Fourth Circuit agreed, observing that the heart of Fleming's state law claims related to Duke Energy reporting an unidentified plane circling its nuclear facility. As the court explained, "Duke Energy's conduct, even if tortious, was responsive to the safety concerns governed exclusively by federal law, . . . and imposing liability based on such claims would have a 'direct and substantial effect' on decisions designed to ensure the facility's safety."¹¹ The risks at issue, noted the court, "included an intentional impact with the facility and the resulting release of radiation or possible surveillance in furtherance of a terrorist plot — especially salient threats in the aftermath of 9/11."¹²

⁷No. 16-3883, slip op. (3d Cir. Aug. 15, 2017).

⁸*Id.* at 2-3.

⁹876 F.3d 625 (4th Cir. 2017).

¹⁰*Id.* at 627-28.

¹¹*Id.* at 636.

¹²*Id.*

E. *Preemption – [Virginia Uranium, Inc. v. Warren](#)*¹³

On February 17, 2017, the U.S. Court of Appeals for the Fourth Circuit issued a 2-1 decision in *Virginia Uranium, Inc. v. Warren*, upholding Virginia’s ban on uranium mining. The court concluded that the Atomic Energy Act does not preempt state regulation of conventional uranium mining. It found that uranium mining is not a Nuclear Regulatory Commission (NRC) regulated “activity” under section 274(k) of the Atomic Energy Act and therefore, the state may regulate traditional uranium mining even out of concerns for radiological safety.¹⁴

The majority recognized that uranium milling and tailings storage are “activities” under section 274(k). The court emphasized that the Virginia ban does not cover those activities and was not willing to look at the legislative motives for enacting the mining ban to determine whether its actual purpose was to target those NRC-regulated activities. In reaching this conclusion, the court distinguished cases where a state law directly covers an NRC-regulated activity such as operating a nuclear power reactor, explaining that it is necessary to examine the purpose of such state laws to determine whether the purpose is to address radiological hazards. But in cases where the state law does not directly cover an NRC-regulated activity, the law will not be preempted if it does not specifically mention an NRC-regulated activity (*e.g.*, the Virginia mining ban).¹⁵

F. *New Plant Licensing – [Beyond Nuclear, Inc. v. U.S. Nuclear Regulatory Commission](#)*¹⁶

In a November 27, 2017 per curiam judgment, the U.S. Court of Appeals for the D.C. Circuit denied a petition for review by Beyond Nuclear challenging the NRC’s issuance of the combined license for Fermi Unit 3. Beyond Nuclear challenged several NRC decisions associated with its unsuccessful attempts to litigate the environmental impacts of the offsite transmission corridor, as well as the Commission’s decision upholding the Atomic Safety and Licensing Board’s merits ruling in applicant’s favor on a quality assurance contention.¹⁷

The D.C. Circuit rejected all of Beyond Nuclear’s challenges. It found that the NRC did not err in finding that Beyond Nuclear’s environmental contention was untimely. The court also found that the NRC did not “abuse its discretion in deciding that the issue presented by the contention was not so ‘serious’ as to warrant sua sponte review in a contested hearing.”¹⁸ In support of this finding, the court noted that “the [environmental impact statement (EIS)] did consider the issues presented by the contention and because the NRC had already scheduled a hearing to review the overall sufficiency of the EIS.”¹⁹ Additionally, the court rejected Beyond Nuclear’s claim that the NRC improperly accepted the applicant’s quality-assurance program, finding that the regulations “expressly permit” the applicant’s approach.²⁰

¹³848 F.3d 590 (4th Cir. 2017).

¹⁴*Id.* at 596.

¹⁵*Id.* at 614.

¹⁶No. 15-1173, 2017 WL 6553376 (D.C. Cir. Nov. 27, 2017) (unpublished, per curiam).

¹⁷*Id.* at *1.

¹⁸*Id.* at *1.

¹⁹*Id.*

²⁰*Id.*

II. ADMINISTRATIVE DEVELOPMENTS

A. *Commission Makeup*

The overall makeup of the Commission remained the same throughout 2017. President Trump, however, designated Kristine L. Svinicki as the Chairman of the NRC on January 23, 2017. The [current Commission](#) includes Chairman Svinicki and Commissioners Jeff Baran and Stephen G. Burns.²¹ President Trump nominated Commissioner Baran for a new term (current term ends on June 30, 2018), and selected David Wright (a former chairman of the South Carolina Public Service Commission) and Annie Caputo (a senior policy adviser to Senator John Barrasso (R-WY)) to fill the remaining open Commissioner positions, but they have yet to be confirmed by the Senate.²²

B. *New Facility Licenses and Applications*

Although not as active as 2016, this past year continued to see developments related to new facility licenses and applications. On the new reactor front, the NRC issued a combined license (COL) authorizing the construction and operation of one new commercial nuclear power reactor in Virginia for [North Anna Power Station, Unit 3](#) in June 2017.²³ This action followed the Commission mandatory hearing on the COL application, and issuance of [Order CLI-17-08](#).²⁴ The Commission also recently held the mandatory hearing for COLs for new commercial nuclear power reactors in Florida for Turkey Point, Units 6 and 7.²⁵ This hearing typically represents one of the final steps before issuance of a COL.²⁶

Three design certification applications for large light water reactors also remain pending before the NRC. These [applications](#) are for AREVA's U.S. EPR; Mitsubishi Heavy Industries, Ltd.'s U.S. Advanced Pressurized-Water Reactor (US-AWPR); and Korea Hydro & Nuclear Power Company's Advanced Power Reactor 1400 (APR1400).²⁷ The NRC further continues to review an application for renewal of the US-ABWR design certification that was submitted by GE-Hitachi.²⁸

This past year has seen further licensing activities for small modular reactors. The NRC continues to review the Tennessee Valley Authority's (TVA's) [Early Site Permit application](#) for the Clinch River site near Oak Ridge, Tennessee.²⁹ Additionally, in March

²¹*The Commission*, U.S. NUCLEAR REGULATORY COMM'N (last updated Sept. 5, 2017).

²²Press Release, U.S. Senate Comm. on Env't & Pub. Works, Barrasso Statement on NRC Nominations (May 22, 2017).

²³*North Anna Power Station, Unit 3*, U.S. NUCLEAR REGULATORY COMM'N, (last updated Aug. 8, 2017).

²⁴*Dominion Va. Power* (North Anna Power Station, Unit 3), CLI-17-08, 85 NRC ___, slip op. (May 31, 2017).

²⁵Press Release, U.S. Nuclear Regulatory Comm'n, NRC to Hold Mandatory Hearing on Turkey Point New Reactor Application (Nov. 28, 2017).

²⁶*Fact Sheet on Nuclear Power Plant Licensing Process*, U.S. NUCLEAR REGULATORY COMM'N (last updated Aug. 5, 2015).

²⁷*Design Certification Applications for New Reactors*, U.S. NUCLEAR REGULATORY COMM'N (last updated Sept. 13, 2017).

²⁸*Id.*

²⁹*Early Site Permit Application - Clinch River Nuclear Site*, U.S. NUCLEAR REGULATORY COMM'N (last updated Dec. 8, 2017).

2017 the [NRC docketed](#) and began formal review of the NuScale Power [design certification application](#) for its small modular reactor design.³⁰

There has been continued interest in advanced reactor projects. The NRC has made [progress](#) and continues to tackle licensing and policy issues affecting advanced reactors.³¹ These projects encompass a large variety of technologies, such as molten salt reactors, high temperature gas reactors, pebble bed reactors, and fusion reactors.

The NRC has [renewed the operating licenses](#) for an additional twenty years of operation at a total of eighty-nine reactor units at fifty-four nuclear power plants, including most recently the operating licenses for South Texas Project, Units 1 and 2 in September 2017.³² Currently, License Renewal Applications for seven units at five plants are under review.³³ Entergy submitted the most recent application for River Bend in May 2017.³⁴ The NRC also published final guidance documents to support “[subsequent license renewal](#)” (*i.e.*, renewal for a second 20 additional years),³⁵ and received the first such application in 2018.³⁶

C. Significant NRC Adjudicatory Developments

The overall number of Commission decisions was down this year with a total of twelve decisions, as compared to twenty decisions in 2016 and twenty-seven decisions in 2015.³⁷ The following paragraphs summarize a few of the significant decisions in 2017.

On April 4, 2017, in [Order CLI-17-05](#), the Commission affirmed a decision by the Atomic Safety and Licensing Board that rejected a hearing request submitted by the Bellefonte Efficiency & Sustainability Team / Mothers Against Tennessee River Radiation challenging TVA’s extended power uprate request for the three Browns Ferry units from 3,458 MWt to 3,952 MWt.³⁸ Petitioners alleged that the application was deficient because the “Baker-Just” calculation used for reactor emergency core cooling system performance criteria was non-conservative.³⁹ The Licensing Board denied the hearing request because, among other reasons, the proposed contentions impermissibly challenged NRC regulations, which specifically require in Appendix K to 10 C.F.R. Part 50 that certain

³⁰*Application Review Schedule for the NuScale Design*, U.S. NUCLEAR REGULATORY COMM’N (last updated Oct. 24, 2017).

³¹*Advanced Reactors (non-LWR designs)*, U.S. NUCLEAR REGULATORY COMM’N (last updated Dec. 27, 2017).

³²*Status of License Renewal Applications and Industry Activities*, U.S. NUCLEAR REGULATORY COMM’N (last updated Nov. 15, 2017).

³³*Id.*

³⁴*Id.*

³⁵*Subsequent License Renewal*, U.S. NUCLEAR REGULATORY COMM’N (last updated Dec. 7, 2017).

³⁶ Press Release No. 18-009, *NRC Makes Available First Subsequent License Renewal Application From Turkey Point Nuclear Power Plant*, U.S. NUCLEAR REGULATORY COMM’N (Mar. 22, 2018).

³⁷*Commission Orders for 2017*, U.S. NUCLEAR REGULATORY COMM’N (last updated Dec. 11, 2017); *Commission Orders for 2016*, U.S. NUCLEAR REGULATORY COMM’N (last updated Dec. 23, 2016); *Commission Orders for 2015*, U.S. NUCLEAR REGULATORY COMM’N (last updated Mar. 15, 2017).

³⁸*Tenn. Valley Auth.* (Browns Ferry Nuclear Plant Units 1, 2, and 3), CLI-17-05, 85 NRC ___, slip op. at 1-2, 11 (Apr. 4, 2017).

³⁹*Id.* at 2-3.

calculations be performed using the Baker-Just equation.⁴⁰ Petitioners also argued that the NRC staff acted in bad faith by unreasonably delaying action on a Petition for Rulemaking related to the contested regulations.⁴¹ On appeal, the Commission agreed that the hearing request improperly challenged NRC regulations without a waiver under 10 C.F.R. § 2.335 to do so, and found that the staff had not constructively denied the Petition for Rulemaking, but had made consistent progress on the review and carefully considered the claims.⁴²

Just a couple of days later on April 6, 2017, the Commission issued [Order CLI-17-06](#), which rejected a hearing request submitted by Pilgrim Watch and several co-petitioners challenging a request to relax certain deadlines in an NRC post-Fukushima order (EA-13-109) regarding the Pilgrim Nuclear Power Station and hardened containment vent systems.⁴³ Entergy notified the NRC in 2015 that Pilgrim would permanently cease power operations, and subsequently in 2016 Entergy requested that the NRC extend certain deadlines until after shutdown for good cause based on completed actions that meet the primary objectives of EA-13-109.⁴⁴ Petitioners primarily asserted that the extension request is “‘in reality’ a license amendment request” that is subject to NRC hearing rights.⁴⁵ The Commission disagreed, concluding that the requested extension was not a license amendment triggering hearing rights under the Atomic Energy Act, but instead represents enforcement discretion and does not formally alter the terms of EA-13-109 or the Pilgrim license.⁴⁶

A few months later on June 9, 2017, the Commission issued [Order CLI-17-09](#) addressing similar challenges related to the FitzPatrick Nuclear Power Plant.⁴⁷ Entergy notified the NRC in 2015 that it would cease power operations at FitzPatrick, but subsequent policy changes later prompted the sale of the plant, and resulted in the need to extend certain deadlines in post-Fukushima orders EA-13-109, EA-12-049 (mitigation strategies for beyond-design-basis external events), and EA-12-051 (reliable spent fuel pool instrumentation).⁴⁸ Beyond Nuclear and The Alliance for a Green Economy New York filed a hearing request with the Commission raising issues similar to those in the *Pilgrim* case, contending the requests were license amendments that provide an opportunity for hearing.⁴⁹ The Commission rejected the hearing request, concluding that the issues raised by the hearing request were “legally indistinguishable” from those addressed in its April 2017 decision in the *Pilgrim* case (CLI-17-06) and fail for the same reasons.⁵⁰

⁴⁰*Id.* at 5.

⁴¹*Id.* at 5 n.15.

⁴²*Id.* at 7-11.

⁴³*Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-17-06, 85 NRC ___, slip op. at 1, 15 (Apr. 6, 2017).

⁴⁴*Id.* at 3-4.

⁴⁵*Id.* at 5.

⁴⁶*Id.* at 5-9.

⁴⁷*Entergy Nuclear FitzPatrick, LLC & Entergy Nuclear Operations, Inc.* (James A. FitzPatrick Nuclear Power Plant), CLI-17-09, 85 NRC ___, slip op. (June 9, 2017).

⁴⁸*Id.* at 2-4.

⁴⁹*Id.* at 4-6.

⁵⁰*Id.* at 6.

Chapter 21 • OIL AND GAS 2017 Annual Report¹

As a preliminary comment, the ongoing growth of legal challenges and activity in the oil and gas industry has led to a significant increase in the number of new legal developments occurring each year. In view of space limitations, the state updates included in this report are not exhaustive.

I. ALASKA

A. *Legislative Developments*

The Alaska State Legislature enacted [H.B. 111](#), which builds on the passage of [H.B. 247](#) in 2016. Among other things, this new legislation phases out cashable exploration tax credits to oil and gas companies operating in Alaska. It also retroactively ends cash payments from the State of Alaska to oil companies starting July 1, 2017, changes the interest rate on production taxes, allows oil companies to carry forward losses for either 10 or 7 years, and limits the time companies can hold deductions at full value. The legislation took effect on January 1, 2018.²

B. *Judicial Developments*

In *In re Aurora Gas, LLC*, a buyer sought approval from the Alaska Oil and Gas Conservation Committee (AOGCC) to purchase several of a bankruptcy debtor's oil and gas well leases. The AOGCC conditioned approval of the transfer on the buyer assuming the debtor's obligations to plug and abandon certain gas wells which were not being purchased. The United States Bankruptcy Court for the District of Alaska held that, by conditioning the approval of the lease sale upon the buyer's assumption of the debtor's obligations to plug and abandon wells, the AOGCC violated both the bankruptcy code's

¹The lead editor for this report is Mark D. Christiansen of McAfee & Taft, Oklahoma City, OK. The contributors of the state reports are: George R. Lyle and Adam D. Harki of Guess & Rudd P.C., Anchorage, AK; Thomas A. Daily of Daily & Woods, P.L.L.C., Fort Smith, AR; John J. Harris of Locke Lord LLP, Los Angeles, CA; Jean Feriancek of Holland & Hart LLP, Denver, CO; Charles C. Steincamp and Joseph A. Schremmer, Depew Gillen Rathbun & McIneer, LC, Wichita, KS; April L. Rolan-Ogden and Michael H. Ishee of Liskow & Lewis, Lafayette, LA; Andrew J. Cloutier, Hinkle Shanor LLP, Roswell, NM; Timothy J. Cole, Ilya Batikov and Gregory D. Russell of Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Mark D. Christiansen of McAfee & Taft, Oklahoma City, OK (Part A) and Susan Dennehy Conrad of the Oklahoma Corporation Commission, Oklahoma City, OK (Part B); Nicolle R. Snyder Bagnell, Kevin C. Abbott, Thomas J. Galligan, and Jennifer M. Thompson, Reed Smith LLP., Pittsburgh, PA; Jolisa Dobbs, Conrad Hester, Gaye Lentz and Arthur J. Wright of Thompson & Knight LLP, Dallas and Austin, TX; Matthew S. Tyree of Jackson Kelly PLLC, Morgantown, WV; and Walter F. Eggers, III and Sami Falzone of Holland & Hart LLP, Cheyenne, WY. The 2017-2018 Co-Chairs of the Committee are Vic Pyle, III, Counsel, Environmental and Safety Law Department of ExxonMobil Corporation, Spring, TX, and Nora R. Pincus of Parsons Behle & Latimer, Salt Lake City, UT.

²H.B. 111, 30th Leg., 1st Reg. Sess. (Alaska 2017).

automatic stay and its prohibition against discriminatory treatment of bankruptcy debtors. The court struck down the AOGCC decision.³

C. *Administrative Developments*

In April of 2017, the President signed an [Executive Order](#) aimed at expanding offshore drilling in the Arctic and Atlantic Oceans and assessing whether energy exploration can take place in marine sanctuaries in the Pacific and Atlantic Oceans.⁴ These lands were made eligible for oil and gas leasing only four months after the prior administration issued both a [Presidential Memorandum](#) withdrawing 125 million acres of the Arctic Ocean (and its estimated 27 billion barrels of oil) from disposition by leasing for an indefinite period and an [Executive Order](#) creating the Northern Bering Sea Climate Resilience Area and withdrawing 112,300 square miles in Norton Sound, Alaska and near St. Lawrence Island, Alaska from future oil and gas leasing.⁵

In May of 2017, the Secretary of the Interior signed a secretarial order requiring, among other things, a review of the Obama Administration's plan for managing the National Petroleum Reserve – Alaska (NPR-A). The order is intended to revitalize energy production in the NPR-A and to update resource assessments for portions of Alaska's North Slope, including part of the Arctic National Wildlife Refuge (ANWR).⁶

In December of 2017, the President signed into law the national Tax Cuts and Jobs Act of 2017. The bill opens a portion of ANWR to oil drilling and other energy development which had been closed to exploration for over 40 years, and requires the federal government to hold two lease sales within seven years.⁷

II. ARKANSAS

A. *Legislative Developments*

[Act No. 514](#) of 2017⁸ changed a portion of Arkansas' procedure for collection of delinquent ad valorem taxes on mineral interests. Under prior law, each county collector was required to publish a list of delinquencies in a legal newspaper as a prerequisite of the forfeiture process. Act No. 514 removed that requirement with respect to tax-delinquent severed mineral interests, substituting the posting of notice of delinquencies as to those interests on a web site to be created and maintained by the Association of Arkansas Counties. The collector is now merely required to publish a legal notice referring mineral taxpayers to that website. It appears likely that this procedural change will be challenged as providing insufficient due process prior to forfeiture of a property right.⁹

³2017 Bankr. LEXIS 3278 (Bankr. D. Alaska Sept. 26, 2017).

⁴Executive Order No. 13795, Implementing an America-First Offshore Energy Strategy, 82 Fed. Reg. 20,815 (Apr. 28, 2017).

⁵Memorandum from the President of the U.S. to the Sec'y of the Interior (Dec. 20, 2016); Executive Order, Northern Bering Sea Climate Resilience (Dec. 9, 2016).

⁶Press Release, Dept. of the Interior, Secretary Zinke Signs Order to Jump-Start Alaskan Energy (May 31, 2017).

⁷Tax Cuts and Jobs Act of 2017, Pub. Law No. 115-97 (2017).

⁸S.B. 114, 91st Gen. Assemb., Res. Sess. (2017).

⁹See *Jones v. Flowers*, 547 U.S. 220 (2006).

B. *Judicial Developments*

In *JS Interests, Inc. v. Hafner*¹⁰ the court twice interpreted the parties' 1982 A.A.P.L. Form 610 Operating Agreement to require a unit's operator to pay overriding royalties to parties burdening a non-operating owner who was non-consent in the wells in question. Such interests appear to be "subsequently created interests" under the agreement's Article III.D and would thus be required to be borne by the party whom the interests burdened, regardless of its non-consent status. However, the court held that since the assignments creating the overriding royalties had been recorded prior to execution of the operating agreement, they were thus disclosed in writing to all parties, causing them to then burden the consenting parties who had acquired the non-consenting interest. The court first so held in an order denying the operator's motion to dismiss and again denying its summary judgment motion. The second of those opinions was subsequently withdrawn by the court pursuant to a settlement agreement which terminated the litigation.¹¹ The court's conclusion is highly questionable and, if correct, effectively guts the agreement's Article III.D, since virtually all assignments of overriding royalty interests are recorded, long before execution of the operating agreement.

*Lipsev v. SEECO, Inc.*¹² was a putative federal class action seeking to certify a class of royalty owners who allegedly suffered damaged due to belated post-period price adjustments correcting btu mismeasurements at the wellhead. Plaintiffs offered a wide array of theories as to why they should be permitted to pursue such claims. However, in a detailed opinion, the district court granted summary judgment to the defendants on all such claims and denied plaintiffs leave to amend holding that no amended complaint could survive a similar summary judgment motion.

In *Ouachita Watch League v. United States Forest Service*¹³ the federal appeals court dismissed an appeal prosecuted by the plaintiff society and several individuals challenging the Forest Service's resource management plan which permitted oil and gas drilling within portions of the Ozark National Forest. The district court had entered summary judgment for the Forest Service. However, rather than dealing with the district court's ruling, the appeals court dismissed the appeal, holding that the society lacked standing to challenge the Forest Service's management plan.

In *Hill v. Southwestern Energy Co.*¹⁴ the federal appeals court reversed a district court's ruling granting summary judgment to Southwestern. Plaintiffs had sued, alleging underground trespass, claiming that Southwestern's hydraulic fracturing of wells caused waste material to encroach beneath their unleased tracts. The opinion of the Court of Appeals, while skeptical, held that there was possible evidence upon which a jury could find that trespass occurred, thus precluding summary judgment.

*Talley v. Peedin*¹⁵ involved a complex dispute between the children of the former wife of a mineral owner and his current widow. While married to the appellants' mother, Veta Poff Moon, Dr. Nathan Poff, Sr. acquired, in his name alone, the surface and fractional mineral interest within approximately 300 acres in the heart of the Fayetteville Shale area. Dr. Poff later conveyed that land by warranty deed which Veta joined, purporting to reserve to the Grantors one-half of all oil, gas and minerals rights which they own. Appellants

¹⁰No. 4:16CV00586 BSM, 2017 WL 5653873 (E.D. Ark. Feb. 10, 2017); [No. 4:16CV00586 BSM](#), 2017 WL 3612857 (E.D. Ark. Aug. 22, 2017).

¹¹*JS Interests, Inc. v. Hafner*, No. 4:16CV00586 BSM, 2017 WL 6459566 (Oct. 27, 2017).

¹²No. 4:16CV00149 JLH, 2017 WL 2662977 (June 20, 2017).

¹³858 F.3d 539 (8th Cir. 2017).

¹⁴858 F.3d 481 (8th Cir. 2017).

¹⁵515 S.W.3d 611 (Ark. Ct. App. 2017).

contended that the above reservation language vested Veta with a fee interest in the reserved minerals. In affirming the trial court's ruling favoring Dr. Poff's widow, Carolyn Peedin, the appeals court avoided holding whether the purported reservation in favor of Veta was a void stranger reservation, and whether Arkansas recognizes the spousal exception to the rule that a reservation in favor of a stranger is void.¹⁶ The court instead held that the above language only reserved minerals "owned" by the grantors and that Veta owned only an inchoate dower interest at the time of the reservation.

*Duvall v. Carr-Pool*¹⁷ came about through a complex set of facts. Here is the sequence of deeds at issue: (1) Hawkins and wife deeded to Cargile, reserving all oil, gas and other minerals. (2) Cargile deeded the surface back to Hawkins. That deed stated that all oil, gas and other minerals were reserved by Cargile, but Cargile never owned any minerals in the first place, since they were reserved by Hawkins and wife in deed 1. (3) Hawkins deeded to Duvall, predecessor to the Plaintiff, Carr-Pool. That deed stated that it was understood that all oil, gas, and minerals in or under or that may be produced from said land have been previously reserved or conveyed. (4) After numerous conveyances within the Hawkins family, any interest which was effectively reserved by Hawkins passed to Carr-Pool. The court of appeals held that Carr-Pool owned a disputed mineral interest because the above quoted language was an effective mineral reservation. The court found that there are no magic words needed for a mineral reservation to become effective. Its result was reached by simply construing the "four corners" of the instrument. However, this writer suggests that perhaps a better reason for the same result could have been that the language was ambiguous, thus permitting inquiry into the parties' subjective intent. Facts recited by the appeals court indicated both sides had previously behaved consistent with the court's interpretation.

III. CALIFORNIA

A. *Legislative Developments*

The California Legislature made a number of amendments in 2017 to the California Public Resources Code regarding the regulation of oil and gas operations by the Division of Gas and Geothermal Resources of the California Department of Conservation (DOGGR). [Senate Bill No. 724](#)¹⁸ extended the period to commence well operations after DOGGR approval from one to two years.¹⁹ The bill also amended the idle well requirements under Public Resources Code section 3206. Public Resources section 3237, which had previously had only specifically authorized DOGGR to order the plugging and abandonment "deserted wells," was amended to authorize DOGGR to also order the decommissioning of a "production facility."²⁰ Public Resources section 3237 was further amended to allow an abandonment or decommissioning order to issue whether or not any damage is occurring or threatened by reason of that deserted well or production facility.

¹⁶An issue discussed but left undecided by the Arkansas Supreme Court in *Haynes v. Metcalf*, 759 S.W.2d 542 (Ark. 1988).

¹⁷509 S.W.3d 661 (Ark. Ct. App. 2016).

¹⁸S.B. 724, 2017-2018 Reg. Sess. (Cal. 2017).

¹⁹CAL. PUB. RES. CODE § 3203(a) (West 2017).

²⁰"Production facility" is defined in California Pub. Resources Code, §3010 as "any equipment attendant to oil and gas production or injection operations including, but not limited to, tanks, flowlines, headers, gathering lines, wellheads, heater treaters, pumps, valves, compressors, injection equipment, and pipelines that are not under the jurisdiction of the State Fire Marshal pursuant to Section 51010 of the Government Code."

The bill also increased funding for DOGGR to abandon “idle-deserted” and “hazardous wells”²¹ and directed DOGGR to provide a report on such wells to the Legislature.

Public Resources Code section 3100 was amended by Senate Bill No. 809²² to give the Director of the Department of Conservation and DOGGR’s Supervisor the authority to redefine DOGGR’s districts as needed to ensure efficient administration after soliciting public input. The bill also amended Public Resources Code section 3008 to clarify that an “idle well” does not include an “active observation well”.

The California State Water Resources Control Board and the Regional Water Quality Control Boards were authorized by new Water Code Section 13267.5 to require an operator or its supplier to furnish information relating to all chemicals in discharged wastewater when one of the board conducts a water quality investigation regarding the discharge of wastewater produced from an oil or gas field.²³

Section 38592.5 was added to the Health and Safety Code²⁴ to require the California Air Resources Board in its implementation of the California Global Warming Solutions Act of 2006 to update its scoping plan to achieve the greenhouse gas emissions reductions to designate a market-based compliance mechanism as the rule for petroleum refineries and oil and gas production facilities.

B. *Judicial Developments*

In [*Southern California Gas Co. v. Superior Court*](#),²⁵ the court held that the operator of a natural gas storage facility did not owe a duty to prevent economic losses to local businesses based on alleged negligent conduct related to the leak of natural gas the facility. The ruling reinforces California’s “economic loss rule,” which bars plaintiffs from recovering pure economic losses under a negligence theory without personal injury, property damage or a special relationship. The decision may not affect claims for actual personal injuries or physical damage to property directly resulting from a leak at a gas storage facility or other oil and gas production, transportation or storage facilities. However, the court’s affirmation of the bar on the recovery of solely economic damages may limit the scope of potential negligence claims by persons and businesses whose only injury resulting from a leak or spill was economic, such as lost revenues or a decrease in property value.

The court in [*Ass’n of Irrigated Residents v. Department of Conservation*](#)²⁶ reversed the sustaining of a demurrer on *res judicata* grounds. The lawsuit was filed by environmental groups challenging the challenging DOGGR’s issuance of drilling permits for new wells on the basis of a categorical exemption or negative declarations under the California Environmental Quality Act (CEQA),²⁷ since the prior judgment of dismissal was not based on the merits, but on mootness and unripeness.

The district court in [*State of California v. United States Bureau of Land Management*](#)²⁸ held that the Bureau of Land Management (BLM) violated the federal Administrative Procedures Act²⁹ when, as part of the Department of Interior’s

CAL. PUB. RES. CODE § 3258 (West 2017).

²²[S.B. 809](#), 2017-2018 Reg. Sess. (Cal. 2017).

²³[A.B. 1328](#), 2017-2018 Reg. Sess. (Cal. 2017).

²⁴[A.B. 398](#), 2017-2018 Reg. Sess. (Cal. 2017).

²⁵18 Cal. App. 5th 581 (Cal. Ct. App. 2017).

²⁶11 Cal. App. 5th 1202 (Cal. Ct. App. 2017).

²⁷CAL. PUB. RES. CODE, §§ 21000-21189.57 (2017).

²⁸No. 17-CV-03804-EDL, 2017 WL 4416409 (E.D. Cal. 2017).

²⁹5 U.S.C. §§ 551-59 (2017).

implementation³⁰ of [Executive Order No. 13783](#),³¹ the BLM postponed the compliance dates for certain sections of the Bureau’s Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule relating to the venting, flaring, and royalty-free use of gas, after the rule’s effective date had already passed.³²

The court in [Committee to Protect our Agricultural Water v. Occidental Oil & Gas Corp.](#)³³ dismissed a complaint that alleged that large California oil and production companies had conspired with Governor Edmund G. Brown, Kern County and DOGGR to “illegally increase oil production and maximize profits and tax revenue by allowing oil companies to inject salt water into fresh water in violation of the SDWA.”³⁴ The court concluded that the claims against the government official-defendants were barred by the Eleventh Amendment of the U.S. Constitution, that the plaintiffs did not have standing to assert their RICO claims and that the plaintiffs failed to properly allege either a RICO enterprise or conspiracy or a pattern of racketeering activity under RICO or federal civil rights claims.

C. *Administrative Developments*

Although not completed in 2017, DOGGR pursued a number of substantial rulemaking initiatives, including updating its Idle Wells Regulations,³⁵ as required by AB 2729,³⁶ and its gas pipeline regulations,³⁷ as required by Assembly Bill No. 1420.³⁸ DOGGR’s most significant current effort is its permanent rulemaking to modify its regulations implementing the Division’s Underground Injection Control (UIC) Program³⁹ to cover not only water injection and disposal wells, but also steam injection wells, which are essential for the production of the heavy crude oil produced in the Central Valley. In response to the gas leak at the 2015 Aliso Canyon gas storage facility, DOGGR adopted emergency regulations in 2016 that required gas storage facilities in California to meet new safety and reliability measures. DOGGR is developing permanent regulations to build on the emergency regulations.⁴⁰

IV. COLORADO

A. *Judicial Developments*

³⁰[Order 3349](#), Sec’y of the Dep’t of the Interior (Mar. 29, 2017).

³¹82 Fed. Reg. 16,093 (Mar. 28, 2017).

³²Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Date, [82 Fed. Reg. 27,430](#) (June 15, 2017) (to be codified at 43 C.F.R. pt. 3170) (Notification).

³³235 F. Supp. 3d 1132 (E.D. Cal. 2017).

³⁴*Id.* at 1150.

³⁵[Requirements for Idle Well Testing & Management](#), CAL. CODE REGS. tit. 14, §§ 1760, 1772 (June 29, 2017) (Discussion draft).

³⁶A.B. 2729, 2015-2016 Reg. Sess. (Cal. 2016).

³⁷[Requirements for Oil & Gas Pipelines](#), CAL. CODE REGS. tit. 14, §§ 1770, 1774 (June 14, 2017) (Discussion draft); [Requirements for Mapping Active Gas Pipelines](#), CAL. CODE REGS. tit. 14, §§ 1774.3 (June 14, 2017) (Discussion draft).

³⁸A.B. 1420, 2015-2016 Reg. Sess. (Cal. 2015).

³⁹[Underground Injection Control Update – Permanent Rulemaking](#), CAL. DEP’T OF CONSERVATION (last visited Feb. 28, 2018).

⁴⁰[Underground Gas Storage – Permanent Rulemaking](#), CAL. DEP’T OF CONSERVATION (last visited Feb. 28, 2018).

The decision in [*Martinez v. Colorado Oil & Gas Conservation Commission*](#)⁴¹ could potentially change the focus of the Colorado Oil and Gas Conservation Commission (COGCC). In that case, the court rejected the COGCC's assertion that its role under Colorado's Oil and Gas Conservation Act⁴² is to balance oil and gas development with other public interests such as public health, safety, and welfare. In 2013, members of Earth Guardians petitioned for a rulemaking, proposing that the COGCC

not issue any permits for the drilling of a well for oil and gas unless the best available science demonstrates, and an independent, third party organization confirms, that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado's atmosphere, water, wildlife, and land resources, does not adversely impact human health and does not contribute to climate change.⁴³

After receiving written comments and holding a hearing, the COGCC denied the petition, finding that the proposed rule mandated action that was beyond the limited statutory authority delegated to the COGCC in the Act. Petitioners appealed to district court, which affirmed the COGCC's denial of the petition. The appellate court reversed the district court in a 2-1 split decision. The court cited language in the Act stating that it is in the public interest to "[f]oster the responsible, balanced development, production, and utilization of ... oil and gas ... in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources."⁴⁴ Focusing on the phrase "in a manner consistent with" and modifications to the Act over time, the court concluded that the Act does not establish a test under which the COGCC is to *balance* oil and gas production with other public interests, but instead sets out a condition that must be fulfilled. The court held that "the clear language of the Act ... mandates that the development of oil and gas in Colorado be regulated subject to the protection of public health, safety and welfare, including protection of the environment and wildlife resources."⁴⁵ The Colorado Attorney General appealed this decision to the Colorado Supreme Court over the objection of Colorado's governor. As of the date of this writing, the court has not determined whether to accept certiorari.

[*Bill Barrett Corp. v. YMC Royalty Co., LP*](#)⁴⁶ involved a suit by the operator to recover a non-operator's share of the cost of drilling two oil and gas wells in Weld County. A representative of the non-operator had signed Authority for Expenditure (AFE) proposal letters electing to participate in each of the wells and had signed and initialed the AFEs. However, the parties had not agreed on the terms of, and thus had not executed, a joint operating agreement. In the context of cross motions for summary judgment by the parties, the federal district court rejected the non-operator's claim that, absent a joint operating agreement, the operator can recover its drilling costs only from production from the wells. The court rejected the claim that AFEs cannot form a binding contract as a matter of law, and that the proposal letters and AFEs were fatally incomplete as contracts because they are silent regarding when the obligation to pay arises, how and when payment is to be

⁴¹No. 16CA0564, 2017 WL 1089556 (Colo. App. Mar. 23, 2017).

⁴²COLO. GEN. STAT. §§ 34-60-101 to 34-60-130 (2017).

⁴³*Martinez*, 2017 WL 1089556, at *2.

⁴⁴*Id.* at *5; COLO. GEN. STAT. § 34-60-102(1)(a)(I) (2017).

⁴⁵*Martinez*, 2017 WL 1089556, at *7.

⁴⁶No. 15-cv-02177, 2016 WL 8310098 (D. Colo. Dec. 23, 2016).

made, and the terms of payment. Since the wells already had been drilled, the court found those payment terms to be “of no apparent consequence” to the lawsuit.

In *Maralex Resources, Inc. v. Jewell*,⁴⁷ the court held that the Interior Board of Land Appeals’ (IBLA) finding that the Federal Oil and Gas Management Act of 1982 (FOGRMA)⁴⁸ authorizes Bureau of Land Management (BLM) representatives to conduct warrantless, unannounced inspections of oil wells on the plaintiffs’ fee land was not arbitrary, capricious or otherwise contrary to law. The fee oil and gas leases covering plaintiffs’ land had been committed by the lessee to a communitization agreement, and the IBLA had concluded that nothing in FOGRMA “precludes BLM ... from inspecting non-Federal/non-Indian lease sites, for the purpose of determining whether oil or gas production from ... [said] lands is being accurately recorded and reported ... when that production is properly attributable to Federal or Indian lands, under ... communitization agreements.”⁴⁹ While the inspection directive in FOGRMA⁵⁰ refers only to “lease sites on Federal or Indian lands,” the court cited the fact that production from any lease site subject to a communitization agreement is deemed to occur on each lease site within the communitization agreement. The court also concluded that the BLM’s access did not violate plaintiffs’ right to be free from unreasonable searches and seizure, given the limited purposes for which BLM was granted access to their land.⁵¹

*A-W Land Co., LLC v. Anadarko E&P Co., LP*⁵² addressed issues relating to the surface use reservation in deeds to surface owners by Union Pacific Railroad Company (Union Pacific). After Anadarko acquired Union Pacific’s reserved mineral interest and the Colorado Supreme Court decided *McCormick v. Union Pacific Resources Co.*,⁵³ Anadarko discontinued Union Pacific’s practice of negotiating surface owner’s agreements under which surface owners received royalty payments on minerals extracted under their lands. Plaintiffs, which represented a class of surface owners within the Wattenberg oil field in northeastern Colorado, sued alleging that Anadarko’s use of the surface of their lands to access the subsurface minerals exceeds the scope of the surface reservation in the underlying deeds, and thus constitutes trespass under Colorado law. The court ruled that the language “convenient or necessary” contained in the deed clause relating to use of the land was to be construed from the mineral owner’s point of view only.⁵⁴ The court indicated that it had resolved the issues that were capable of resolution on a class-wide basis and dissolved the plaintiff class but did not grant summary judgment. Thus, the various plaintiffs could proceed to trial on liability and damages individually. In advance of a jury trial involving the claims of surface owners Marvin and Mildred Bay, the court addressed in a separate opinion objections by the parties to anticipated expert testimony.⁵⁵ The case is now on appeal to the Tenth Circuit.

Two cases involved claims that a producer failed to comply with the terms of a prior settlement of a royalty class action. The dispute in *EnCana Oil & Gas (USA), Inc. v.*

⁴⁷No. 15-cv-01893, 2017 WL 6033694 (D. Colo. Oct. 19, 2017).

⁴⁸30 U.S.C. §§ 1701-59 (2017).

⁴⁹*Maralex*, 2017 WL 6033694, at *4.

⁵⁰30 U.S.C. § 1718(b) (2017).

⁵¹*Maralex*, 2016 WL 8310098, at *6.

⁵²No. 09-cv-02293-MSK-MJW, 2017 WL 1023375 (D. Colo. Mar. 16, 2017).

⁵³14 P.3d 346 (Colo. 2000) (holding that a reservation “all coal and other minerals” contained in the Union Pacific deeds included oil and gas).

⁵⁴*A-W Land Co.*, 2017 WL 10233375, at *6.

⁵⁵*A-W Land Co., LLC v. Anadarko E&P Co. LP*, No. 09-cv-02293-MSK-MJW, 2017 WL 4161278 (D. Colo. Sept. 20, 2017).

*Miller*⁵⁶ arose out of a 2008 settlement of a royalty class action,⁵⁷ which, among other things, established the methodology the producer would use for future royalty payments and included an arbitration clause. After approving the settlement agreement, the district court had dismissed the suit with prejudice. In 2016, certain royalty owners filed a demand for arbitration alleging that the producer had underpaid royalties owed to members of the class in violation of the 2008 settlement agreement. The producer filed suit, asserting that the class had ceased to exist when the prior case was dismissed with prejudice in 2008, and that the settlement agreement did not authorize arbitration on a class-wide basis. The district court ruled for the royalty owners, and the court of appeals affirmed. The court determined that the class survived the 2008 dismissal, since compliance with the settlement order became part of the order of dismissal and the district court retains jurisdiction to give effect to it, and because the settlement agreement continues for the lives of the applicable leases.⁵⁸ Analyzing the language of the settlement agreement as a whole, the court also concluded that the producer's claim that the settlement agreement should be interpreted to require bilateral, as opposed to class-wide, arbitration was contrary to the plain meaning of that agreement.

The second case, *Phelps Oil & Gas, LLC v. Noble Energy, Inc.*,⁵⁹ arose after the producer audited DCP Midstream, LP (DCP), which provides post-wellhead services for the producer under percentage of proceeds (POP) agreements. In the audit, the producer initially identified \$34 million of potential underpayments. It then entered into a settlement agreement with DCP that modified the terms of the POP agreements and included DCP's agreement to commit \$17.5 million to make improvements to its gas processing and transportation infrastructure. A party to a 2007 royalty class action settlement with the producer sued on behalf of the class claiming that it was entitled to royalties on the full amount claimed by the producer in the DCP audit. The court held that there was no basis to conclude that the royalty owner was entitled to a royalty on the full \$34 million asserted by the producer in the DCP audit but not paid to it by DCP. However, the court refused to grant the producer's summary judgment motion on the royalty owner's breach of contract claim that related to DCP's promise to invest \$17.5 million in infrastructure primarily for the benefit of the producer, concluding that genuine issues of fact remain as to whether that is the basis for a payment of royalties to the royalty owner.

In *Crichton v. Augustus Energy Resources, L.L.C.*,⁶⁰ the court rejected a producer's motion to dismiss a royalty class action against it on the grounds that the plaintiffs had failed to exhaust administrative remedies before the COGCC prior to filing the case. The court found that the dispute was contractual in nature, and cited language in the Act providing that the COGCC is "precluded from exercising jurisdiction over any controversy involving bona fide dispute regarding contract interpretation."⁶¹ The court also affirmed that language in the Act stating that the COGCC must "make a determination of whether a bona fide contract dispute exists before exercising jurisdiction" does not require a COGCC determination that the dispute is contractual in nature before a dispute may be filed in district court.⁶²

⁵⁶405 P.3d 488 (Colo. App. 2017).

⁵⁷*Miller v. EnCana Oil & Gas (USA), Inc.*, No. 05CV2753 (City & Cty. of Denver Dist. Ct. Aug. 26, 2008).

⁵⁸*EnCana*, 405 P.3d at 499.

⁵⁹No. 14-cv-2604-REB-CBS, 2017 WL 4333298 (D. Colo. Sept. 26, 2017).

⁶⁰No. 15-cv-00835-KLM, 2017 WL 4838735 (D. Colo. Oct. 26, 2017).

⁶¹*Id.* at *2.

⁶²*Id.* at *4.

Finally, there were two oil and gas tax cases. In *Kinder Morgan Co₂ Co., L.P. v. Montezuma County Board of Commissioners*,⁶³ the Colorado Supreme Court held that the Colorado statute authorizing retroactive taxation of oil and gas leaseholds when “taxable property has been omitted from the assessment roll”⁶⁴ allows retroactive taxation when a leaseholder correctly reported the volume of oil or gas sold but underreported the wellhead selling price of the oil or gas. In an unpublished decision in *Oxy USA Inc. v. Mesa County Board of Commissioners*,⁶⁵ the Colorado Supreme Court held that the statute authorizing abatement of taxes for any overvaluation⁶⁶ allows abatement even when the overvaluation is caused by taxpayer error.

B. *Administrative Developments*

Following a home explosion in April 2017 caused by an abandoned oil and gas flowline connected to an active well that killed two people and injured a third person, COGCC issued a notice requiring operators to inspect systematically their inventory of existing flowlines and verify that any existing flowline not in active use is abandoned.⁶⁷ The notice also required operators to document the location of all existing flowlines located within 1000 feet of a building unit and ensure and document that those lines have integrity.⁶⁸ At the request of Governor Hickenlooper, COGCC undertook a three-month review of oil and gas operations in Colorado after the home explosion. On August 22, 2017, the Governor announced seven policy initiatives growing out of this review.⁶⁹ Two of these initiatives (strengthening COGCC’s flowline regulations and enhancing the 8-1-1 “one call” program) are to be implemented through a COGCC rulemaking. COGCC is in the process of a rulemaking to implement changes to its flowline and safety rules.

V. KANSAS

A. *Judicial Developments*

A long-running dispute in *Northern Natural Gas Company v. L.D. Drilling, Inc.*⁷⁰ has clarified Kansas rules relating to gas storage. This case arises out of Northern Natural’s condemnation pursuant to the federal Natural Gas Act⁷¹ of approximately 9,000 acres for its natural gas storage operation. The court appointed a commission to determine the compensation due to the owners of rights in the condemned subsurface area. The court directed the commission that K.S.A. 55-1210 vested the subsurface owners with title to gas that Northern Natural placed in storage beneath their land as of the time of the condemnation.⁷² The Tenth Circuit, in reviewing the district court’s ruling adopting the

⁶³396 P.3d 657 (Colo. 2017).

⁶⁴COLO. REV. STAT. § 39-5-125(1) (2017).

⁶⁵405 P.3d 1142 (Colo. 2017).

⁶⁶COLO. REV. STAT. § 39-10-114(1)(a)(I)(A) (2017).

⁶⁷COLO. OIL & GAS CONSERVATION COMM’N, NOTICE TO OPERATORS STATEWIDE, FLOWLINES OR PIPELINES (May 2, 2017).

⁶⁸*Id.*

⁶⁹Press Release, Colo. Governor’s Office, [Gov. Hickenlooper Announces State’s Response Following Review of Oil & Gas Operations](#) (Aug. 22, 2017).

⁷⁰862 F.3d 1221 (10th Cir. 2017).

⁷¹15 U.S.C. §§ 717-717z (2017).

⁷²*N. Nat. Gas Co. v. Approximately 9,117 in Pratt, Kingman, and Reno Ctys., Kan.*, 2 F. Supp. 3d 1174 (D. Kan. 2014).

compensation report of the commission, reversed the decision. The Circuit Court awarded compensation to surface owners for Northern Natural's gas in place beneath their land as of the date of the taking which was March 30, 2012, and for any right to produce the gas from their land after the "date of certification" of the area for gas storage, which was June 2, 2010.⁷³ This decision is consistent with the holding in *Union Gas Systems Inc. v. Carnahan*.⁷⁴ The district court did not follow the *Union Gas* case because the decision predated the enactment of K.S.A. 55-1210. The court in *Union Gas* noted that prior to the certification of an area for gas storage, the subsurface owners' basic property right is the exercise of its right to capture and extract migrating storage gas. Once the area is certified as a gas storage area, the capture rights end and the gas storage condemnation statutes as interpreted by *Union Gas* do not require compensation for the migrating storage gas. The court confirmed the award for the acreage acquired as a storage area buffer zone for Northern Natural's existing gas storage and also affirmed the district court's refusal to award attorneys' fees finding that the tendered statutory basis for fees did not apply.

In the case of *LCL, LLC v. Falen*,⁷⁵ Falen had in June 2007 listed land for sale with Rice Abstract instructing that the seller would retain all mineral rights. The land was subject to a producing oil and gas lease. In November of that year, Falen entered into a contract to sell the land, which provided that the seller would retain all mineral rights for twenty years after production ceases. Rice Abstract issued a title commitment to the buyer that did not list the excepted mineral interest. In January 2008, Rice Abstract drafted and filed the deed of record to complete the sale. The deed did not contain the mineral exception. Because Falen continued to receive royalties under the existing oil and gas lease, the error was not discovered immediately. Falen made purported conveyances of the minerals to others in 2008, 2010 and 2012. In 2014, the grantee sold its interest in the land to LCL. A member of LCL stated that they understood the mineral rights did not go with the property. Rice Abstract provided title insurance and acted as the closing agent for the sale. When the sale was closed, there was no mention of the mineral interests in the deed or the title commitment. LCL later inquired about the minerals and Rice Abstract discovered its errors. In 2014, LCL asserted a right to the mineral rights under its title insurance policy. Falen did not discover the failure to except the mineral interests in the 2008 conveyance until 2014. LCL sued to quiet title to the mineral interests. Falen counterclaimed to quiet its title to the mineral interests and also filed a third party suit against Rice Abstract for negligence, breach of implied contract and breach of fiduciary duty. LCL and Falen reached a settlement. The district court found that all claims against Rice Abstract were barred by the statute of limitations. In a set of findings too lengthy to describe in this brief case summary, the court of appeals concluded that certain of the claims against Rice Abstract were not barred by statutes of limitation.

In *In re Protest of Barker*⁷⁶ the issue was whether ad valorem tax may be assessed on oil and gas equipment that is associated with a lease that is exempt from tax under Kansas' low-production exemption. In Kansas, oil and gas leases are classified as personal property for the purpose of ad valorem tax.⁷⁷ K.S.A. 79-201t(a) provides an exemption from ad valorem taxes for all oil leases, other than royalty interests therein, the average daily production from which is three barrels or less per producing well or five barrels or less per producing well which has a completion depth of 2,000 feet or more.⁷⁸ Kansas

⁷³*N. Nat. Gas Co.*, 862 F.3d 1221.

⁷⁴774 P.2d 962 (Kan. 1989).

⁷⁵390 P.3d 571 (Kan. Ct. App. 2017).

⁷⁶398 P.3d 870 (Kan. Ct. App. 2017).

⁷⁷[KAN. STAT. ANN. § 79-329 \(2015\)](#).

⁷⁸[KAN. STAT. ANN. 79-201t\(a\) \(2009\)](#).

construes exemptions from taxation strictly against the taxpayer. The court of appeals found that ad valorem taxation seeks to value the oil and gas lease by determining the present worth of the lease's future production. Therefore, the issue of first impression was whether equipment used in the production of oil is considered part of an "oil lease" for purposes of tax exemption. The court found that there is nothing in the statutory scheme or case law expressly stating that equipment is included in the definition of "oil lease" for the purposes of tax exemption. Instead, various statutes suggest that equipment is not included in that definition. The court concluded that the equipment is not considered part of an "oil lease" as that term is used in K.S.A. 2016, Supp. 79-201t.

The case of *In re Estate of Bush*⁷⁹ considered the effect of K.S.A. 58-2202, which provides "every conveyance of real estate shall pass all estate of the grantor therein, unless the intent to pass a less estate shall expressly appear or be necessarily implied in the terms of the grant."⁸⁰ In this case, one daughter, Debbie, inherited eighty acres in fee from her father. In order to carry out her father's wishes, Debbie conveyed forty acres to her sister, Judy, and also conveyed an undivided one-half interest in the oil and gas in the entire eighty acres while retaining a one-half interest in herself. The producing wells were not distributed equally throughout the eighty acre tract. The intent was to allow both daughters to share equally in the production from the eighty acres. Debbie later gifted her interest in the land to Bush using a deed that conveyed the entire eighty acres but excepted the forty acre tract previously conveyed to Judy. There was no mention of Debbie's undivided one-half interest in the eighty acres. Bush then conveyed the property to himself and Debbie as joint tenants using the same deed language. Bush survived Debbie, however, Judy, as her sole heir, asserted that the one-half mineral interest in the eighty acre tract was not affected by the conveyance to Bush. The district court found that once the one-half mineral interest had been created in the eighty acre tract, a conveyance would not encompass the mineral interest unless it was expressly referenced in the deed. The court of appeals reversed holding that the settled rule in Kansas states that severed mineral interests are transferred with the land unless they have been specifically identified in the deed and excluded from the transfer. Therefore, the deeds included all of Debbie's ownership in the eighty acre tract excluding the forty acres owned by Judy.

The case of *Lewis v. Kansas Production Co.*⁸¹ involved a 1972 oil and gas lease. In 1994, the lessee, Roberts, assigned the rights below the then producing formation to McCann with the lessee retaining the shallow rights. In 2005, the lessor sued McCann, the owner of the deep rights, to terminate McCann's rights to the lease. In 2009, the court gave McCann the option to explore the deep rights or terminate the lease. In 2010, McCann drilled the required well which did not produce. In 2013, the lessors filed the lawsuit at issue in this matter asserting a breach of the implied covenant to explore and develop, a claim the lease was not maintained by Roberts' production and for attorneys' fees under K.S.A. 55-201 and 55-202. Prior to 2015, Roberts ceased producing and relinquished his leasehold interest in the upper formations. At trial in 2015, the Court held that McCann had breached the implied covenant to develop and explore, that the lease terminated and that the lessors were entitled to statutory attorney fees. The parties had stipulated that the Deep Horizons Act⁸² applied and that McCann, as the holder of the deep rights, had the burden of proving reasonable exploration and development by a preponderance of the evidence. In analyzing the implied covenant to explore or develop, the court found that compliance could only relate to the time frame from the district court's July, 2009, order to the time

⁷⁹No. 115,850 & No. 115,851, 2017 WL 1105397 (Kan. Ct. App. Mar. 24, 2017).

⁸⁰KAN. STAT. ANN. § 58-2202 (2015).

⁸¹No. 115,174, 2017 WL 3575551 (Kan. Ct. App. Aug. 18, 2017).

⁸²KAN. STAT. ANN. §§ 55-223 to 55-229 (2017).

the suit was filed in November, 2013.⁸³ The court held that the lessee's obligation to develop would be suspended since the lessor had filed suit to challenge its lease. The court was not impressed by the actions of McCann, the owner of the deep rights, who waited until demand was made by the lessors to cause the well drilled in 2010, to be logged and analyzed by an expert. The court found that this was "too little, too late to satisfy the implied covenant to explore and develop as imposed in the Deep Horizons Act."⁸⁴ The court of appeals found that the district court had the discretionary authority to terminate the assigned portion of the lease under K.S.A. 55-226.

In the case of *Jenkins v. Chicago Pacific Corp.*,⁸⁵ the court affirmed the rule which has existed in Kansas since approximately 1905, that when a railroad company acquires a strip of land for a right-of-way, it generally takes only an easement. This is the rule whether the strip is acquired by condemnation or by deed. When the railroad abandons the right-of-way, the estate reverts to the original landowners. This rule applies when the deed shows that the property was conveyed for use as right-of-way for a railroad.

VI. LOUISIANA

A. *Judicial Developments*

Louisiana law defines a mineral servitude as "the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership."⁸⁶ In *Smith v. Andrews*, there is an in-depth discussion about the nature of mineral servitudes, and what kind of factual evidence will be sufficient to find that a mineral servitude has not prescribed for non-use.⁸⁷ While the facts are somewhat complicated, the basic dispute revolved around a claim by the Andrews parties to be the mineral owners of the subject property in the wake of the Haynesville Shale boom. After a bench trial, the district court concluded that the testimony of Mr. Andrews was "completely lacking in credibility and ruled in favor of the servitude owners" (the Smith parties).⁸⁸ This ruling was upheld on appeal, and the Louisiana Supreme Court denied review of the matter. The court explained that "Mr. Andrews gave several inconsistent versions of what he contended happened to Rogers No. 1 Well."⁸⁹ In ruling on various issues, the court confirmed that the servitude owners bore the burden of establishing maintenance of the servitude. The court concluded the servitude owners met their burden of proof that the servitude had been maintained. The court found the servitude owners met this burden by virtue of the assignee's testimony that any actions he undertook on the property were done with the intent to act not only for himself, but also for the servitude owners.

In *Gladney v. Anglo-Dutch Energy, L.L.C.*,⁹⁰ the court examined how a lease royalty should be paid after the conditional allowable was granted but before the effective date of the Commissioner of Conservation's unitization order granting such an allowable.

⁸³This is likely to be incorrect. The last appropriate time frame would be from the date the last well was drilled exploring the deep rights which was in 2010, until the suit was filed in November 2013.

⁸⁴*Lewis*, 2017 WL 3575551, at *6 (citing KAN. STAT. ANN. § 55-223 (2017)).

⁸⁵403 P.3d 1213 (Kan. 2017).

⁸⁶*See* LA. STAT. ANN. 31:21 (2017).

⁸⁷215 So. 3d 868 (La. Ct. App. 2017), *writ denied*, 220 So. 3d 749 (La. 2017).

⁸⁸*Id.* at 874.

⁸⁹*Id.*

⁹⁰210 So. 3d 903 (La. Ct. App. 2016), *writ denied*, 218 So. 3d 120 (La. 2017).

The lease at issue provided for a 1/5 royalty. The lessee drilled a well and then applied for the creation of a compulsory unit with Office of Conservation, along with a conditional allowable. The conditional allowable was granted on May 17, 2012. Pursuant to the allowable, revenue from first production, subject to the outcome of the unit application, was to be disbursed based upon the results of the unitization proceeding. The unit order was also issued “effective on and after October 30, 2012.”⁹¹ The Louisiana Third Circuit concluded that the lessee was obligated to pay the 1/5 lease-basis royalty on all production, as opposed to paying the royalty on production from a unit-tract basis, from the date of first production to the effective date of the unit. The court cited testimony from the presiding officer of the unitization hearing who expressly stated that a conditional allowable does not prejudice the contractual rights as between the lessor and lessee. The trial court decision was reversed in favor of the lessor.

Multiple courts have recently interpreted Louisiana Revised Statutes 30:103 to 103.2, which is a reporting statute with an accompanying penalty. That statutory regime creates rights and obligations as between an operator of a unit well and certain unleased interests included within a “force pooled” oil and gas unit.⁹² Specifically, in *TDX Energy* the court held that La. R.S. 30:103 to 103.2 applies only to tracts included in a unit that are not subject to an oil and gas lease, whether by the operator of the well or any other third party.⁹³ However, Louisiana’s Third Circuit court of appeal in *XXI Oil & Gas* found that other working-interest owners were “unleased” vis-a-vis the operator of the unit well and thus, have a right to make demand under La. R.S. 30:103 to 103.2.⁹⁴ Both of these decisions were the subject of appeal. Writ of Certiorari was denied by the Louisiana Supreme Court in *XXI Oil & Gas*.⁹⁵ In *TDX Energy*, the Fifth Circuit reviewed the Western District’s earlier decision in light of the Louisiana Supreme Court’s writ denial in *XXI Oil & Gas*. Initially, the Fifth Circuit noted the absence of a controlling decision from the Supreme Court of Louisiana. Accordingly, the court attempted to determine how the highest court of the state would resolve the issue by deferring to the intermediate Louisiana courts. In an opinion that embraced the rationale in *XXI Oil & Gas*, the court concluded that the only logical reading of the statute’s plain language provides rights under La. R.S. 30:103 to 103.2 to any oil and gas interest owners that do not have a lease with the operator.⁹⁶

In *Guilbeau v. Hess Corp.*,⁹⁷ the Fifth Circuit had occasion to examine the subsequent purchaser doctrine in the context of an oilfield legacy case. The defendants conducted oil and gas operations on the plaintiff’s property until 1971, and the oil and gas lease at issue expired in 1973. Subsequently, in 2007, plaintiff purchased the property at issue, and the sale did not contain any express assignment of the personal rights to sue for pre-purchase damages. Plaintiff filed suit, alleging claims of environmental contamination from historic oil and gas operations. In response, defendant filed a motion for summary judgment, claiming that plaintiff’s claims were barred by the subsequent purchaser doctrine. The court rejected plaintiff’s argument that the Louisiana Supreme Court decision in *Eagle Pipe & Supply Inc. v. Amerada Hess Corp.* and its progeny created any uncertainty in the law.⁹⁸ Instead, the Fifth Circuit found there was a clear consensus among Louisiana

⁹¹*Id.*

⁹²[LA. STAT. ANN. § 30:103 to 103.2](#) (2011).

⁹³*TDX Energy, LLC v. Chesapeake Operating, Inc.*, No. 13-1242, 2016 WL 1179206 (W.D. La. Mar. 24, 2016).

⁹⁴*XXI Oil & Gas, LLC v. Hilcorp Energy Co.*, 206 So. 3d 885 (La. Ct. App. 2016).

⁹⁵*XXI Oil & Gas, LLC v. Hilcorp Energy Co.*, 216 So. 3d 814 (La. 2017).

⁹⁶*T D X Energy, L.L.C. v. Chesapeake Operating, Inc.*, 857 F.3d 253 (5th Cir. 2017).

⁹⁷854 F.3d 310 (5th Cir. 2017).

⁹⁸*Id.* at 312-15.

appellate courts applying *Eagle Pipe* to expired mineral leases. Thus, pursuant to *Eagle Pipe* and Louisiana appellate court decisions, the subsequent purchaser doctrine barred plaintiff's claims for damages related to conduct prior to the assignment in favor of plaintiff.

In [*Sweet Lake Land & Oil Co. v. Oleum Operating Co., L.C.*](#),⁹⁹ an oilfield legacy suit, the court addressed *res nova* issues relating to the interpretation of La. R.S. 30:29, commonly referred to as "Act 312". This decision resulted from a supervisory writ application by the defendants who were cast in judgment for remediation by an earlier jury verdict. After the judgment ordered the defendants to submit a remedial plan to the regulatory agency, Louisiana Department of Natural Resources (LDNR), the LDNR held a public hearing and issued what it considered to be the Most Feasible Plan (the LDNR Most Feasible Plan). The defendants moved to adopt the LDNR Most Feasible Plan as the final plan under Act 312. The trial court, however, rejected the LDNR Most Feasible Plan and instead ordered LDNR to perform additional work because the plan was only partially a remediation plan. The issue on appeal was whether the trial court can order LDNR to re-submit a plan for remediation when the judgment called for such a plan and the originally submitted plan still requires evaluation. This required interpretation of Act 312 and consideration of "several *res nova* issues regarding the authority and roles of the trial court and LDNR after LDNR files its most feasible plan in the trial court record."¹⁰⁰ The court held there was no error in the trial court's order requiring LDNR to submit a plan for remediation of issues instead of further testing where the judgment called for a remediation plan. The court relied on *dicta* from a Louisiana Supreme Court decision which indicated that "[t]hroughout the remediation process, the court remains the gatekeeper to ensure the purpose of the Act is accomplished – remediation of the property to the extent of the public's interest."¹⁰¹

VII. NEW MEXICO

A. *Judicial Developments*

In *T.H. McElvain Oil & Gas LP v. Benson-Montin-Greer Drilling Corp.*,¹⁰² the court refused to set aside a 1948 final judgment in a quiet title case. Plaintiffs were the successors to three joint tenants who reserved all of the oil and gas underlying a 160-acre tract when conveying that tract in 1931. In 1948, the 1931 grantee's successor sought to quiet fee simple title to a larger tract which included the 160 acres. The court file from the 1948 action revealed a complaint verified by the plaintiff and an affidavit from the New Mexico county sheriff both averring that various defendants, including the three joint tenants or their unknown heirs, could not be located after a due and diligent search. There was no description of any efforts undertaken in that search. Plaintiffs proved that, in 1948, the surviving joint tenant still resided in the same California city recited in the 1931 deed, although under her married name, and could have been located with a truly diligent search. Judgment was entered by default in 1948 after notice by publication. The court found that the court file did not reveal any constitutionally defective effort at searching for parties, that the number of plaintiffs varies as to how a diligent search could have located the surviving joint tenant in 1948, that many of those efforts were more appropriate to modern

⁹⁹229 So. 3d 993 (La. Ct. App. 2017).

¹⁰⁰*Id.* at 1001.

¹⁰¹*Id.* at 1001-02 (quoting *Louisiana v. La. Land & Exploration Co.*, 110 So. 3d 1038 (La. 2013)).

¹⁰²388 P.3d 240 (N.M. 2016), *cert. denied* 137 S. Ct. 1584 (2017).

technology and availability of information, and that plaintiffs did not provide evidence of a “direct path” under which the 1948 plaintiff could have ascertained the “identity and whereabouts” of the surviving joint tenant to persuade the court of an obvious lack of diligence.¹⁰³ The court cited a policy to protect reliance interests in property transactions created by old quiet title judgments.

In *Abraham v. WPX Energy Production, LLC*,¹⁰⁴ the plaintiff sought to certify a class action for royalty and overriding royalty owners related to WPX’s alleged practice of paying royalty and overriding royalty on a wellhead BTU value rather than paying on the value of natural gas liquids subsequently taken from the gas stream. The plaintiff proposed a class consisting of all overriding royalty and royalty owners paid by WPX from August 2006 forward with two subclasses: those covered by “proceeds” instruments and those covered by “market value” instruments.¹⁰⁵ The court ruled that the proposed class lacked commonality and that common issues would not predominate. Commonality was not present first because the plaintiff could not demonstrate that the language in form oil and gas leases was substantively the same as the language in overriding royalty instruments which are not generally reserved on preprinted preexisting forms. Second, the court found that the duty of good faith and fair dealing and breach of implied covenant to market claims were not common because the court would be required to examine the language of individual instruments to determine whether there was a duty to pay royalties on extracted NGLs. Third, the court found that civil conspiracy claims lacked commonality because the division of all instruments into the simple categories of “proceeds” and “market value” was insufficient to describe legal relationships between the parties. Finally, the court held that, while there were some common issues, they would not predominate finding that evidence regarding lease language variation would likely consume most time at a trial.

In *XTO Energy, Inc. v. Furth*,¹⁰⁶ XTO sought restitution for overpayments it had made on a production payment reserved in 1964 covering 920-acres of land at \$1,000.00 per acre. In 1985, the production payment was bequeathed to three testamentary trusts for the benefit of the owner’s daughters. The prior operator paid approximately one-half of the production payment and that XTO paid an additional \$1.9 million dollars on the production payment before it fully realized its mistake. The defendants argued that the restitution claim was barred by XTO’s negligence. The court found that the overpayments could have been avoided by an exercise of due diligence, but that no bar existed because the voluntary payment rule required actual knowledge that the production payment had been satisfied when the payments occurred. However, the court denied plaintiff complete summary judgment as equitable considerations, namely that the beneficiary of the trusts were elderly women who rely on the trusts for financial support and medical care and that the trusts assets were less than the amount of restitution claimed, so that a trial was needed on the equities as to the amount, if any, of restitution.

The bankruptcy case of *In re Franco*¹⁰⁷ concerned a debtor and her husband who had conveyed to their son a portion of a tract of land under which they owned an undivided half interest in the minerals. The deed was not clear as to whether minerals were conveyed or reserved. The widow filed for bankruptcy protection. The son’s surviving wife sued the widow to quiet title to the minerals and obtained a state court judgment. The bankruptcy court held that the automatic stay rendered the judgment void and declined to annul the automatic stay as it would remove a “potentially valuable asset” from the estate.

¹⁰³*Id.*

¹⁰⁴2017 WL 4402398 (D.N.M. Sept. 30, 2017).

¹⁰⁵*Id.*

¹⁰⁶2017 WL 5891740 (D.N.M. Nov. 27, 2017).

¹⁰⁷574 B.R. 730 (Bankr. D.N.M. 2017).

B. *Administrative Developments*

The New Mexico Oil Conservation Division issued a [Notice](#) to operators on May 5, 2017 specifying that oil gathering lines are subject to health and safety regulations that previously were understood to apply to gas gathering lines.¹⁰⁸ The Division also eliminated New Mexico's requirement of an individual form for reporting of the hydraulic fracturing content used in well completion. Effective September 26, 2017, New Mexico operators are required to file with the [FracFocus Chemical Disclosure Registry](#).¹⁰⁹

VIII. OHIO

A. *Judicial Developments*

As in prior years, the Supreme Court of Ohio remained engaged with oil and gas issues in 2017. The case of [Bohlen v. Anadarko E&P Onshore, L.L.C.](#),¹¹⁰ involved the lessors' claim that delayed rental payments and minimum royalty payments under their lease were functional equivalents such that the failure to pay a minimum royalty resulted in the lease's automatic termination. Disagreeing, the court held that the clauses operated independently of one another and that a shortfall in the lessor's minimum royalty did not cause the lease to expire.

Ohio's appellate courts also heard a number of oil and gas related cases this year. In [Paulus v. Beck Energy Corp.](#),¹¹¹ the court addressed, as a matter of first impression, a number of issues concerning Ohio's standard for determining whether an oil and gas lease is producing in paying quantities. The court found, among other things, that (i) the determination of the period of time used to measure paying quantities is made by examining the totality of the circumstances and requires consideration of the good faith of the lessee; (ii) royalties paid to the lessor must be deducted either from the lessee's gross income or included as operating expenses when determining profitability; and (iii) that while an individual lessee's own labor is not an operating expense when the lessee made no direct expenditure from gross receipts for his labor, the same is not true for the labor of a corporate lessee's salaried employee. Such labor is a direct operating expense to be subtracted from the lessee's income.

In a decision that garnered significant attention within the industry, the court in [Dundics v. Eric Petroleum Corp.](#) ruled that landmen in Ohio were required to obtain real estate broker's licenses in order to be entitled to compensation for brokering deals with landowners on behalf of oil and gas companies.¹¹² There, the plaintiff landmen alleged that they were not compensated by the defendant oil and gas company for their work in assisting the company with negotiating and obtaining oil and gas leases in Ohio. The company moved to dismiss the lawsuit, asserting that the landmen were not licensed Ohio real estate brokers, and therefore, were barred from recovering under a state statute that precluded the recovery of compensation for "real estate. . . brokerage transaction[s]" unless the person

¹⁰⁸Notice to Oil & Gas Operators; Oil Gathering Lines, N.M. Energy, Minerals & Nat. Res. Dep't (May 5, 2017).

¹⁰⁹N.M. CODE R. § 19.15.16.19 (2017).

¹¹⁰80 N.E.3d 468, 469 (Ohio 2017).

¹¹¹No. 16 MO 0008, 2017 Ohio App. LEXIS 2750, at *1 (Ohio Ct. App. June 16, 2017).

¹¹²79 N.E.3d 569 (Ohio Ct. App. 2017), *appeal accepted* No. 2014-0448 (Ohio Nov 1, 2017).

brokering the transactions is a licensed real estate broker.¹¹³ Agreeing with the lower court, the appellate court held that “real estate,” for purposes of the statute, was broadly defined to include “leaseholds as well as any and every interest or estate in land”—which, under Ohio law, includes oil and gas rights.¹¹⁴ And so, to be entitled to compensation for brokering in oil and gas rights, the landmen needed to be licensed. The court disagreed that the statute was inapplicable because oil and gas was different from traditional real property, noting that “the fact that oil and gas rights are different does not excuse third parties who ask the courts to enforce their engagement with either owners of surface real estate or those who wish to extract subsurface oil and gas from the real estate broker’s license requirement at issue here.”¹¹⁵

A pre-civil war reservation was the subject of *Sheba v. Kautz*, which held that a deed executed in 1848 reserving “all of the minerals and coal” did not reserve oil and gas.¹¹⁶ In reaching its decision, the court turned to ordinary principles of contract interpretation and drew upon the decision in *Detlor v. Holland*,¹¹⁷ to conclude that the parties to the deed did not intend to reserve oil and gas because the deed predated the development of oil and gas in Ohio. The court specifically noted that there was no indication that oil and gas were being produced in the immediate vicinity or in the general area or elsewhere when the deed was executed.

In *Barclay Petroleum, Inc. v. Bailey*,¹¹⁸ the current owners of property covered by a lease originally executed in 1985 sought to terminate the lease, alleging it had expired for lack of commercial production some years earlier, before the current owners had acquired the property. During that period of non-commercial production, the lessee continued to operate and maintain the well on the property, which also provided household gas. The evidence showed that the prior owners of the property were content with the supply of household gas, that household gas was continually supplied without any pronged interruption and that the lessee properly remedied any issue with the household gas supply. The lessee contended, among other things, that the prior owners had agreed that the supply of household gas would be sufficient to hold the lease, and that the doctrines of modification, waiver and estoppel barred the current owners from claiming that the lease expired. Reversing the trial court’s finding in favor of the lessee, the court of appeals determined that the lease had expired on its own terms and that no affirmative action was necessary on the part of the lessors to formally cause the lease’s termination. Additionally, the court found that the lease was not modified by the parties’ course of performance or by oral agreement because the change in the parties’ understanding regarding the lessee’s obligations was not supported by independent consideration. Finally, the court rejected the equitable defenses of estoppel and waiver, finding that the supply of household gas was a benefit under the lease, and that the prior owners’ acceptance of benefits was not inconsistent with the (subsequent) owners’ position that the lease had expired.

*Rudolph v. Viking International Resources Co.*¹¹⁹ involved a claim that an oil and gas lease expired under its habendum clause due to an interruption in production. One of the issues before the court was which statute of limitations applied: the 21-year statute pertaining to the recovery of real property, or the 15-year statute pertaining to actions on a written contract. The court found that it was the 21-year statute, concluding that because

¹¹³See OHIO REV. CODE ANN. § 4735.21 (West 2011).

¹¹⁴*Dundics*, 79 N.E.3d at 575.

¹¹⁵*Id.*

¹¹⁶No. 15 BE 0008, 2017 Ohio App. LEXIS 4032, at *36 (Ohio Ct. App. Sept. 18, 2017).

¹¹⁷49 N.E. 690 (Ohio 1898).

¹¹⁸No. 16CA14, 2017 Ohio App. LEXIS 3878, at *1 (Ohio Ct. App. Aug. 18, 2017).

¹¹⁹84 N.E.3d 1066, 1069 (Ohio Ct. App. 2017).

an oil and gas lease is regarded as a fee simple determinable interest, its expiration does not necessarily give rise to a cause of action for a breach of the lease. Instead, the appropriate action is one for a declaratory judgment that the lease has expired, which is a claim in “the nature of an action to recover title to or possession of real property” to which Ohio’s statute of limitations for recovery of real property was applicable.¹²⁰ But the court determined that on the particular facts before it, the 21-year limitations period had not yet lapsed. The court also went on to repudiate its earlier statements in [Schultheiss v. Heinrich Enterprises, Inc.](#),¹²¹ where it suggested that no statute of limitations ever applied to a lease expiration claim.

[Blackstone v. Moore](#)¹²² interpreted a statutory exception to “marketable record title” under Ohio’s Marketable Title Act (OMTA), Ohio Rev. Code sections 5301.47 to 5301.55. The court held that whether a reference to an interest inherent in the muniments of the chain of record title is “specific”—and thus not extinguished by the OMTA, or general, depends upon four factors: (1) does the reference state the type of mineral right created; (2) does the reference state the nature of the encumbrance (an estate, profit, lease, or easement); (3) does the reference state the original owner of the interest; and (4) does the reference identify the instrument creating the interest. In so holding, the court expressly rejected the decision of another appellate district in [Duvall v. Hibbs](#),¹²³ which held that a reference to an interest inherent in the muniments of the chain of record title is specific only if it recites the volume and page number of the instrument creating the interest.

Ohio courts continued to hear cases involving Ohio’s Dormant Mineral Act (ODMA), Ohio Rev. Code section 5301.56. In a decision of first impression, the court in [Devitis v. Draper](#) held that oil and gas royalty interests may be abandoned under the ODMA.¹²⁴ The court looked to its prior decision in [Pollock v. Mooney](#),¹²⁵ which found that royalty interests are subject to extinguishment under the OMTA. In [Pollock](#), the court relied on broad language in the OMTA that applied the act’s provisions to all interests, claims, or charges whatsoever. While noting that the language of the ODMA is different than the OMTA, the [Draper](#) court found that parallels can be drawn between the two statutes because the ODMA’s definition of “mineral interest” was also broad, and included the catch-all phrase “regardless of how the interest is created and of the form of the interest.”¹²⁶ Moreover, the court found that conceptually, a royalty interest is simply one stick within the bundle of attributes comprising the mineral estate, and that it may be separately transferred. Therefore, a royalty interest fell within the definition of a “mineral interest” under the ODMA. Ultimately, the court went on to find that the particular royalty interest at issue, while potentially subject to abandonment under the ODMA, was preserved through the timely filing of a claim of preservation.

Courts also wrestled with the issue of whether certain parties were “holders” under the ODMA, and therefore, were entitled to assert claims to a severed mineral interest. In [M&H Partnership v. Hines](#),¹²⁷ the court interpreted the term “holder” to include the heirs and devisees of the record owner of the severed mineral interest that succeeded to the severed mineral interest by intestacy or devise. In a follow-up decision, [Warner v. Palmer](#),¹²⁸ the

¹²⁰*Id.* at 1078.

¹²¹57 N.E.3d 361, 367–368 (Ohio Ct. App. 2016).

¹²²No. 14 MO 0001, 2017 Ohio App. LEXIS 2739, at *1 (Ohio Ct. App. June 29, 2017).

¹²³No. CA-709, 1983 Ohio App. LEXIS 13042, at *4–5 (Ohio Ct. App. July 8, 1983).

¹²⁴No. 13 MO 0017, 2017 Ohio App. LEXIS 1131, at *26 (Ohio Ct. App. Mar. 20, 2017).

¹²⁵No. 13 MO 9, 2014 Ohio App. LEXIS 4350, at *21–22 (Ohio Ct. App. Sept. 30, 2014).

¹²⁶[Devitis](#), 87 N.E.3d at 659.

¹²⁷No. 14 HA 0004, 2017 Ohio App. LEXIS 921, at *37 (Ohio Ct. App. Mar. 13, 2017).

¹²⁸No. 14 BE 0038, 2017 Ohio App. LEXIS 1047, at *25 (Ohio Ct. App. Mar. 22, 2017).

same court further clarified that a “holder” includes heirs of the record holder of a severed mineral interest, even if such heirs did not acquire their interest through a chain of title of conveyances or probate estates that specifically transmitted the mineral interest.

Finally, in [Lutz v. Chesapeake Appalachia, L.L.C.](#),¹²⁹ the court concluded, as a matter of first impression, that Ohio state courts would adopt the “at the well” rule regarding the deduction of post-production costs. In *Lutz*, the plaintiff-lessors had filed a class action complaint, alleging the lessee underpaid gas royalties under the terms of their oil and gas leases by allocating to the lessors their share of post-production costs when calculating royalties. One of the lease forms at issue contained “at the well” royalty language, which the lessee argued permitted the deduction of post-production costs from the downstream sales price of natural gas to work back to the price of the gas “at the well” when calculating royalties. The lessors, however, urged the court to adopt the “marketable product rule,” (specifically, West Virginia’s formulation of the rule) which may require that certain downstream costs, such as costs for compression, dehydration, processing, and transportation of gas, be borne solely by the lessee. In April 2015, the district court certified the question of whether Ohio follows the “at the well” rule or the marketable product rule to the Ohio Supreme Court. Although the court accepted the certified question, it ultimately declined to answer it, concluding that oil and gas leases are contracts and the “the rights and remedies of the parties are controlled by the specific language of their lease agreement[.]”¹³⁰

Back at the district court, the lessee then filed a motion for partial summary judgment as to the “at the well” lease form, which the district court granted. Holding that the “at the well” language in the lease was clear and unambiguous, the district court found that it referred to the “location at which the gas is valued for purposes of calculating a lessor’s royalties”—*i.e.*, at the well.¹³¹ Conversely, applying the marketable product rule, as urged by the plaintiffs, “runs the risk of giving the lessor the benefit of a bargain not made.”¹³²

B. *Administrative Developments*

In the summer of 2017, the Division issued revised guidelines for statutory unitization applications.¹³³ Among other things, the guidelines now provide for a Division review of applications on a rolling basis, and require that applications include pre-filed testimonies by a geologist, engineer, and landman, as well as six specific exhibits, including one that lists properties within the proposed unit subject to pending ownership litigation.

IX. OKLAHOMA

A. *Judicial Developments*

In [Kamo Electric Cooperative v. Nichols](#),¹³⁴ Kamo appealed a judgment awarding the landowners \$30,715 for an easement across 3.9 acres of rural land used primarily for

¹²⁹No. 4:09-cv-2256, 2017 U.S. Dist. LEXIS 176898, at *20 (N.D. Ohio Oct 25, 2017).

¹³⁰*Lutz v. Chesapeake Appalachia, L.L.C.*, 71 N.E.3d 1010, 1011 (Ohio 2016).

¹³¹*Lutz*, 2017 U.S. Dist. LEXIS 176898 at *18.

¹³²*Id.* (citation omitted).

¹³³[Unitization Application Procedural Guideline](#), Ohio Dep’t of Nat. Res. Div. of Oil & Gas Res. Mgmt. (Revised Aug. 4, 2017).

¹³⁴406 P.3d 36 (Okla. Civ. App. 2017).

cattle. The parties were in agreement that the price for the outright sale of fee simple title to similar agricultural land was \$2,000 per acre. However, the expert appraiser for the landowners testified that “the 3.9 acres taken was worth approximately \$8,000 per acre, based on the negotiated acquisition price of similar easements by public utilities in the area.”¹³⁵ The jury returned a verdict for \$30,615 (approximately \$7,800 per acre). Kamo appealed. The court of appeals concluded that a transaction involving the purchase of an easement on property that will be taken by condemnation, if negotiations are not successful, is not a transaction between willing sellers and buyers without compulsion, and is not reflective of the market value of the property taken. As a consequence, such transactions are generally inadmissible as comparable sales to demonstrate the value of similar property in condemnation proceedings. The court reversed and remanded.

The case of *Strack v. Continental Resources, Inc.*¹³⁶ was filed on November 4, 2010, with a plaintiff mineral owners asking the district court to certify a class of royalty owners with respect to claims of alleged royalty underpayments, insufficient reporting and failure to receive the best price by the defendant. On January 12, 2015, Strack filed an amended motion to certify class, seeking a “hybrid, issue class action under 12 O.S. 2011 and Supp. 2013, § 2013(B)(1) and/or (B)(2) and § 2023(C)(6)(a).”¹³⁷ More specifically, in the words of the court, plaintiffs sought certification on approximately 48 legal issues. In objecting to this approach to class certification, the defendant complained that Oklahoma courts had never certified a hybrid or issue class, and that the plaintiffs were essentially requesting 48 advisory opinions on issues which would not resolve the underlying claims, and on those issues irrelevant to numerous prospective class members. The district court granted Strack’s motion to certify class. The court of appeals reversed, observing at the outset of its decision that this is an issue of first impression, as no Oklahoma court has ever approved a hybrid class action or utilized Section 2023(C)(6)(a) to uphold a class action. In a lengthy opinion, the court of appeals concluded that the requirements for class certification under Section 2023 were not met and it reversed the class certification order of the district court.

The *Strack* decision is one of at least four court of appeals royalty law decisions recognizing that the Oklahoma Supreme Court has never provided a definition of the critical term “marketable product,” as used in its landmark 1998 *Mittelstaedt* decision.¹³⁸ *Mittelstaedt* addresses circumstances in which oil and gas lessees may include in the computation of royalty payments a proportionate share of certain post-production costs.¹³⁹ Consequently, oil and gas producers, royalty owners and the lower Oklahoma courts have no clear guidance as to what is required for gas to be considered a “marketable product” under *Mittelstaedt*.

¹³⁵*Id.* at 38.

¹³⁶405 P.3d 131 (Okla. Civ. App. 2017).

¹³⁷*Id.* at 133.

¹³⁸*Id.* at 140; *See also* Tipton Home, Tr. v. Burlington Res. Oil & Gas Co., L.P., No. IN-111,735, 20 (Okla. Civ. App. Nov. 24, 2015) (not for publication) (“The question of where and when particular gas is marketable is not settled in Oklahoma.”); *Fitzgerald v. Chesapeake Operating, Inc.*, No. 111,566, 8 (Okla. Civ. App. Feb. 14, 2014) (not for publication) (“The question of where and when particular gas is marketable is not settled in Oklahoma.”); *Pummill v. Hancock Expl., LLC*, No. DF-114,703 (Okla. Civ. App. Jan. 5, 2018) (similar observation made, but decision still pending on efforts of further review at the time of the submission of this paper).

¹³⁹*Mittelstaedt v. Santa Fe Minerals, Inc.*, 954 P.2d 1203 (Okla. 1998).

In contrast to the outcome in *Strack*, the case of *Naylor Farms, Inc. v. Chaparral Energy, LLC*,¹⁴⁰ resulted in an order granting certification of a limited class. *Naylor Farms* brought a putative class action suit on behalf of royalty owners in certain Oklahoma wells seeking to recover for underpayment of royalties by Chaparral. The court described the lawsuit as “similar to several other lawsuits filed by royalty owners claiming that well operators (or non-operators which marketed the gas) have underpaid royalties in violation of Oklahoma law by improperly deducting certain costs incurred in making the gas marketable.”¹⁴¹ In commenting on how courts have previously denied class certification in certain cases where a remarkable variety of royalty provisions were presented in the case, the court observed there were “several distinctions between this case and those in which classes were not certified or in which the certification orders were vacated.”¹⁴² After substantial further discussion of the particular attributes perceived to be present in the *Naylor Farms* case, the court granted class certification, but excluded the fraud claims from the class and limited the certification order to a specified type of oil and gas lease. On June 7, 2017, the Tenth Circuit granted Chaparral’s petition for permission to appeal under Fed. R. App. P. 5 and Fed R. Civ. P. 23(f).¹⁴³ The case remained on appeal at the time this paper was submitted for publication.

In *Blair v. Natural Gas Anadarko Co.*,¹⁴⁴ the plaintiff mineral owners (Blair) contended that, following three specific 90-day spans of time, the well did not cumulatively produce in paying quantities. Blair argued that, during the three “90-day periods, the total lifting costs at the end of those periods exceeded the value of the oil sold, causing the cessation of production clause to terminate the lease.”¹⁴⁵ The court of appeals found the case of *Pack v. Santa Fe Minerals, Inc.*,¹⁴⁶ to be dispositive, and further found that the trial court erred in concluding that production had ceased during the 90-day time periods relied upon by Blair. The court found that the well’s demonstrated production “capability” caused the lease to persist under the habendum clause, although defendants did not “market” production at certain times. The court observed that “the cessation of production clause did not spring into operation because ‘the well was capable of production in commercial quantities at all times’”, and remanded the case with instructions to enter summary judgment in favor of the defendants.¹⁴⁷

The case of *Newkumet Exploration v. Saxet Corp.*¹⁴⁸ involved oil and gas leases of Newkumet burdened by an overriding royalty interest held by Saxet. Newkumet released the leases because of alleged issues concerning the validity of the leases and uncertainties as to ownership. Newkumet acquired new leases and took the position that Saxet’s overriding royalty interest terminated by its terms when the original leases were released. Saxet asserted that there was no justification for the release and that Newkumet released the leases to extinguish Saxet’s override. The trial court entered summary judgment in favor of Newkumet. Saxet appealed. The court of appeals reviewed its prior decision in *Olson v. Continental Resources, Inc.*¹⁴⁹ The court observed that, as in *Olson*, it was undisputed here that the original leases contained a specific provision allowing the lessee to surrender and

¹⁴⁰No. CIV-11-0634-HE, 2017 WL 187542 (W.D. Okla. Jan. 17, 2017).

¹⁴¹*Id.* at *1.

¹⁴²*Id.* at *4.

¹⁴³*Chaparral Energy, LLC v. Naylor Farms, Inc.*, No. 17-6146 (10th Cir. June 20, 2017).

¹⁴⁴406 P.3d 580 (Okla. Civ. App. 2017).

¹⁴⁵*Id.* at 582.

¹⁴⁶869 P.2d 323 (Okla. 1994).

¹⁴⁷*Blair*, 406 P.3d at 585.

¹⁴⁸No. 114,794, 87 OBJ 2673 (Okla. Civ. App. 2016).

¹⁴⁹109 P.3d 351 (Okla. Civ. App. 2005).

release the leases *at any time*. Additionally, the assignment of overriding royalty interest in favor of Saxet did not contain a provision stating that the override applied to extensions and renewals of the original leases. The court noted that the assignment of an overriding royalty interest does not, by itself, create a fiduciary relationship between assignor and assignee. However, such a relationship may arise from other factors. The court concluded that there were no facts supporting the existence of a fiduciary relationship between Saxet and Newkumet, which might have prevented the termination of the override. The court affirmed the trial court's decision in favor of Newkumet.

The case of *Max Oil Co. Inc. v. Range Production Co. LLC*,¹⁵⁰ involved a suit by the plaintiff owners of certain producing oil and gas wells against Range. The plaintiffs alleged that Range's oil and gas hydraulic fracture operations permanently damaged their nearby producing oil and gas wells. The plaintiffs sued Range alleging negligence, trespass, nuisance and conversion. Range filed a motion to dismiss asserting, in part, that the plaintiffs' claims were barred under the two-year statute of limitations under OKLA. STAT. ANN. tit. 12 § 95(3) (2017). The arguments on appeal were limited to the claims of trespass and nuisance. However, after reviewing the alleged facts the plaintiffs knew and the dates on which the plaintiffs knew them, both the district court and the 10th Circuit concluded that their suit was filed beyond the two-year limitations period.

In *Stephens Production Co. v. Tripco, Inc.*,¹⁵¹ the issue before the court was whether the statutory Pugh Clause in OKLA. STAT. ANN. tit. 52 section 87.1(b) (2017) applies to a secondary recovery unit formed under the Unitization Act, OKLA. STAT. ANN. tit. 52 sections 287.1 to 287.15 (2017). The answer to that question, in the context of the present case, would determine *which* oil and gas leases were in effect as to the unitized field at issue in this case. Specifically, Stephens argued that the statutory Pugh Clause had operated to extinguish Tripco's lease as to right outside a specified tract. The trial court granted summary judgment in favor of Tripco, followed by an appeal by Stephens. In its review of the pertinent statutes, the court of appeals emphasized the repeated references in the statutory Pugh Clause to "spacing units" created under Section 87.1. The court of appeals agreed that the Pugh Clause in § 87.1 does not apply to the field-wide enhanced recovery units created by the Unitization Act of 52 O.S. sections 287.1 to 287.15. The court of appeals affirmed the decision of the trial court, found that the statutory Pugh Clause did not apply in this case, and that the Tripco lease was valid as a result of being held by production from the secondary recovery unit formed under OKLA. STAT. ANN. tit. 52 sections 287.1 to 287.15 (2017).

The court in *Bebout v. Ewell*¹⁵² was presented with an attempt to set aside a district court order entered some 32 years earlier distributing assets in the probate of an estate. Two grandsons of the decedent alleged that the final order in the estate was void on the face of the judgment roll and sought to quiet title to certain mineral interests in the grandsons. The district court found that the final order was void for lack of required notice to the grandsons. The court of appeals affirmed and the Oklahoma Supreme Court granted certiorari. The grandsons contended that, in probate proceedings, a "failure to send copies of the final account to known 'heirs (or beneficiaries)' providing notice of the personal representative's adverse demands upon the estate, violated due process."¹⁵³ However, the court found that the wording in the notice sent to the grandsons was sufficient. It informed the grandsons of the date, time, and place of the hearing, and apprised them that their grandfather's estate was to be settled at the hearing and that all persons interested had to appear to dispute the

¹⁵⁰681 F. App'x 710 (10th Cir. 2017).

¹⁵¹389 P.3d 365 (Okla. Civ. App. 2016).

¹⁵²392 P.3d 699 (Okla. 2017).

¹⁵³*Id.* at 703.

proposed distribution. Critically, the notice informed the grandsons that the final account and petition with will annexed were on file with the court and that the account would be settled and allowed, putting the Grandsons on further inquiry notice. Had they investigated the matter by either inspecting the documents in the court file or attending the hearing, they could have easily ascertained that the entire estate was to be distributed to others and that nothing would be left to either of them. The final order was not void for a lack of proper notice.

In [*Vance v. Enogex Gas Gathering, L.L.C.*](#),¹⁵⁴ Enogex appealed the trial court's judgment on a jury verdict in favor of the plaintiff-landowners in a suit alleging oil field pipeline leakage and pollution. Enogex witnesses testified at trial that they repaired a pinhole leak in the pipeline and did not hear any complaints from the landowners until two years later when the lawsuit was filed. Enogex's expert testified that he then investigated the claim and again found no groundwater pollution and only a very small amount of soil contamination. The landowners presented certain evidence in support of their claims and requested damages in the amount of \$400,000.00 for diminution in the value of their property and punitive damages. The jury returned a verdict in favor of the landowners for \$25,000.00 in damage to the property, but awarded no damages on landowners' claims for personal inconvenience, annoyance and discomfort. The jury also found clear and convincing evidence that Enogex acted in reckless disregard of the rights of the landowners and returned a verdict for \$25,000.00 in punitive damages. Enogex appealed the judgment only as to the award of punitive damages and did not challenge the \$25,000.00 compensatory award. After reviewing in detail the aspects of the trial court's rulings that were complained of on appeal, the court affirmed the judgment below.

In [*Stephens Production Co. v. Larsen*](#),¹⁵⁵ Stephens filed a condemnation action against the defendant landowners under Oklahoma's underground gas storage statutes that provide certain condemnation rights. Stephens sought to condemn underground gas storage easements and surface easements to complete a natural gas storage facility on and underneath some 900 acres of property. Approximately 140 defendants were originally named in Stephens' petition. Upon issuance of the report of the commissioners, all defendants except Larsen settled with Stephens. Larsen owned an 80-acre tract within the 900-acre area. The commissioners valued Larsen's property that would be taken, and the damage to the remainder of his lands, as being \$12,400.00. The case proceeded to a non-jury trial. Larsen's expert witness testified that \$419,000.00 would be just compensation to Larsen. Stephens' expert testified that \$9,000.00 would be just compensation. The trial court determined that \$9,000.00 represented just compensation. Larsen appealed. The court of appeals affirmed the trial court's decision. The Oklahoma Supreme Court granted Larsen's petition for certiorari. The court noted that Larsen's expert's valuation of \$419,000—which constituted more than eight times the fee simple value of the entire 80-acre parcel—was premised on the value of the property upon the completion and operation of an underground gas storage facility. Yet, the evidence at trial indicated that there was no active market for underground storage in the area at issue in this case. The court affirmed the district court's valuation of \$9,000.00, stating in part:

[W]ithout any evidence from Mr. Larsen regarding the reasonable probability of combination or the market demand for underground gas storage in the area, the highest and best use of the property was the use to which it was subject at the time of the taking--natural resource, agricultural,

¹⁵⁴393 P.3d 718 (Okla. Civ. App. 2017).

¹⁵⁵394 P.3d 1262 (Okla. 2017).

and recreational use. The record supports the trial court's valuation of just compensation at \$9,000.00.¹⁵⁶

The court further observed that the law does not permit the court to fix speculative, boom, or fancy values on condemned property.

The case of *Sierra Club v. Chesapeake Operating, LLC*,¹⁵⁷ involved a lawsuit by the Sierra Club for declaratory and injunctive relief under the citizen suit provision of the Solid Waste Disposal Act, amended as the Resource Conservation and Recovery Act. The plaintiff alleged in its complaint “that the deep injection of liquid waste from oil and gas extraction activities by defendants . . . has contributed, and continues to contribute, to an increase in earthquakes throughout the State of Oklahoma and in southern Kansas.”¹⁵⁸ The defendants filed multiple motions to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The defendants asserted multiple grounds for their motions including abstention and primary jurisdiction doctrines, and plaintiff’s failure to join in the suit every company disposing of liquid wastes from oil and gas extraction activities into injection wells. After a lengthy discussion of certain of the underlying facts and applicable law, the court granted the motions to dismiss under the *Burford* abstention doctrine and the primary jurisdiction doctrine. The substantial work of the Oklahoma Corporation Commission in addressing the earthquake-related issues asserted in the complaint was described in detail in the court’s ruling.

B. *Administrative Developments*

Documents filed in the rulemakings referred to below can be viewed on the Oklahoma Corporation Commission’s (Commission’s) [website](#).

Amendments to Title 165, Chapter 10 of the Oklahoma Administrative Code (OAC), which comprises the Commission’s *Oil & Gas Conservation Rules*, were addressed in Cause RM No. 201600019. Following is a brief summary of certain of the amendments that became effective on September 11, 2017:

OAC 165:10-1-4 was amended to update the list of effective dates for OAC 165:10 rulemakings; OAC 165:10-1-7 to update the list of Oil and Gas Conservation Division prescribed forms and to add new forms; OAC 165:10-3-10 regarding the use of diesel fuel as the base fluid for hydraulic fracturing operations and reporting of impacts of hydraulic fracturing operations on other wells; OAC 165:10-3-25 concerning Completion Reports and amended Completion Reports; OAC 165:10-5-5 with respect to applications for approval of enhanced recovery injection and disposal operations; OAC 165:10-5-6 regarding testing and monitoring requirements for enhanced recovery injection wells and disposal wells; OAC 165:10-5-7 concerning monitoring and reporting requirements for enhanced recovery injection wells, disposal wells and storage wells, and to include a reference to OKLA. STAT. ANN. tit. 17 § 52 and provisions appearing therein; OAC 165:10-5-10 with respect to transfer of authority to inject concerning underground injection wells; OAC 165:10-5-15 regarding reporting requirements for simultaneous injection wells, and OAC 165:10-7-19 was amended concerning land application of water-based fluids from earthen pits, tanks and pipeline construction.¹⁵⁹

¹⁵⁶*Id.* at 1269.

¹⁵⁷248 F. Supp. 3d 1194 (W.D. Okla. 2017).

¹⁵⁸*Id.* at *1198.

¹⁵⁹Notice of Proposed Rulemaking, In the Matter of a Permanent Rulemaking of the Oklahoma Corporation Commission Amending OAC 165:10, Oil and Gas Conservation,

OAC 165:10-7-26 was amended with respect to land application of contaminated soils and petroleum hydrocarbon based drill cuttings; OAC 165:10-9-1 concerning use of commercial pits; OAC 165:10-9-3 regarding commercial disposal well surface facilities; OAC 165:10-11-3 with respect to plugging of wells; OAC 165:10-11-6 regarding plugging and plugging back procedures for wells.¹⁶⁰

An emergency rulemaking was filed in Cause RM No. 201700009 regarding OAC 165:10-3-28.¹⁶¹ Amendments to the rule were needed on an emergency basis so that the Commission's Oil and Gas Conservation rules set forth in the Oklahoma Administrative Code (OAC) 165:10 would conform to provisions in Senate Bill No. 867-the Oklahoma Energy Jobs Act of 2017-which became effective August 25, 2017. The proposed changes to OAC 165:10 were to address changes to OKLA. STAT. ANN. tit.52 § 87.1 and OKLA. STAT. ANN. tit.52 §§ 87.1 and 87.6 through 87.9. The changes include the addition of definitions for new terms, deletion of definitions for other terms, and adding references to 1,280-acre horizontal well units.

Amendments to Title 165, Chapter 5 of the Oklahoma Administrative Code, which comprises the Commission's *Rules of Practice*, were addressed in Cause RM No. 201700001. Following is a brief summary of certain of the amendments which became effective on September 11, 2017:

OAC 165:5-1-3 was amended concerning definitions; OAC 165:5-1-4 with respect to filings with the Court Clerk; OAC 165:5-1-5 regarding filing of documents; OAC 165:5-1-9 concerning telephonic and videoconferencing testimony; OAC 165:5-1-26 concerning receipt of pollution complaints; OAC 165:5-1-27 with respect to review of pollution complaints; OAC 165:5-1-28 regarding closure of pollution complaints; OAC 165:5-1-29 concerning pollution complaint resolution; OAC 165:5-1-30 with respect to reporting of pollution complaints.¹⁶²

OAC 165:5-5-1 was amended regarding dockets; OAC 165:5-7-1 with respect to application and notice requirements; OAC 165:5-7-15 is revoked regarding tertiary crude oil recovery project certification; OAC 165:5-7-30 was amended with respect to amendment of existing orders or permits authorizing injection for enhanced recovery, saltwater disposal or LPG storage wells; OAC 165:5-7-60 concerning reciprocity of final orders between states with respect to electric companies; OAC 165:5-21-3.1 is a new rule regarding applications to permanently close underground storage tanks in place; Appendix J concerning a witness identification form was revoked and a new Appendix J promulgated with respect to a witness identification form for presentation of testimony by telephone or videoconferencing connection.¹⁶³

An emergency rulemaking was filed in Cause RM No. 201700008 regarding OAC 165:5-7-6, OAC 165:5-7-6.1, OAC 165:5-7-6.2 and OAC 165:5-7-7.¹⁶⁴ Amendments to the rules were needed on an emergency basis so that the Commission's Rules of Practice set forth in the Oklahoma Administrative Code (OAC) 165:5 would conform to provisions in Senate Bill No. 867-the Oklahoma Energy Jobs Act of 2017-which became effective

RM No. 201600019 (Okla. Corp. Comm'n Sept. 11, 2017) (to be codified at OKLA. ADMIN. CODE § 165 (2017)).

¹⁶⁰*Id.*

¹⁶¹*Id.*

¹⁶²Notice of Proposed Rulemaking, In the Matter of a Permanent Rulemaking of the Oklahoma Corporation Commission Amending OAC 165:5, Rules of Practice, RM No. 201600019 (Okla. Corp. Comm'n Sept. 11, 2017) (to be codified at OKLA. ADMIN. CODE § 165 (2017)).

¹⁶³*Id.*

¹⁶⁴*Id.*

August 25, 2017. The proposed changes to OAC 165:5 were to address changes to OKLA. STAT. ANN. tit.52 § 87.1 and OKLA. STAT. ANN. tit.52 §§ 87.1 and 87.6 through 87.9. The changes include modification of terms regarding applications requesting the issuance of orders concerning horizontal well unitizations and multiunit horizontal wells in targeted reservoirs, addressing authorizations for expenditure regarding applications for pooling orders, as well as requirements for horizontal spacing units.

X. PENNSYLVANIA

A. *Legislative Developments*

The House of Representatives passed [House Bill 674](#),¹⁶⁵ the fiscal code bill for 2017, on October 24, 2017. The bill was presented to Governor Wolf on October 25, 2017 and approved by the Governor on October 30, 2017. Section 1610-E of the bill, entitled “Temporary Cessation of Oil and Gas Wells,” establishes that a lessor shall be deemed to acknowledge that a period of nonproduction under an oil and gas lease is a temporary cessation insufficient to terminate the lease, and the lessor may not allege that the lease is terminated if either of the following occur: (1) before the lessor claims that the lease has expired, the lessee restarts production from the lease and the lessor accepts a royalty payment; or (2) the lessee drills a new well on the lease after giving the lessor 90 days to object.¹⁶⁶

On March 21, 2017, Governor Wolf [announced](#) that the Department of Environmental Protection launched an e-submissions public review tool to allow the public to more quickly and easily view documents submitted by unconventional oil and gas operators.¹⁶⁷ The public review tool enables citizens to search for documents by various parameters, including well site and operator, and houses documents including well development impound registrations, well completion reports, and post-drilling site restoration reports.

B. *Judicial Developments*

On October 8, 2016, the Environmental Quality Board passed final rulemaking on regulations related to surface activities associated with the development of unconventional oil and gas wells, which amended Chapter 78 (relating to oil and gas wells) and added Chapter 78a (relating to unconventional wells).¹⁶⁸ Prior to this final rulemaking, the surface activity requirements in Chapter 78 had not been updated since 2001.

The rules set performance standards governing surface activities associated with the development of unconventional well sites. For example, Section 78a.68a requires pipeline operators conducting horizontal directional drilling beneath a body of water or a watercourse to notify the Department of Environmental Protection (DEP) at least 24 hours before beginning said drilling.¹⁶⁹ The rules also implement more stringent requirements for the storing of wastewater at impoundments, and in large part prohibit any disposal of drill cuttings at well sites. Section 78a.56 prohibits the use of pits for temporary storage on unconventional well sites, and Section 78a.59a establishes requirements for impoundment

¹⁶⁵H.B. 674, 2017-2018 Leg., 2017 Reg. Sess. (Pa. 2017).

¹⁶⁶*Id.* § 1610-E.

¹⁶⁷Press Release, Pa. Office of the Governor, Governor Wolf Announces Launch of Oil and Gas Electronic Submissions Review for Accelerated Public Access (Mar. 21, 2017).

¹⁶⁸25 PA. CODE Chs. 78 and 78a; *see also* 46 Pa. Bull. 6431 (Oct. 8, 2016).

¹⁶⁹25 PA. CODE § 78a.68a.

embankments.¹⁷⁰ Section 78a.59b sets requirements for registration of new and existing well development impoundments, including standards for the location and construction of well development impoundments.¹⁷¹

The court enjoined certain provisions of the Chapter 78a regulations on November 8, 2016.¹⁷² First, the court enjoined portions of certain provisions that mandated that unconventional operators must provide certain information to listed public resource agencies within a specified distance of a proposed well, including a plat and proposed measures to mitigate potential damage to public resources. The court also enjoined Chapter 78a provisions that required unconventional operators to identify and monitor and possibly remediate active, inactive, orphan, abandoned, or plugged wells under certain conditions. The court held that these requirements were problematic because a well operator could be required to monitor and even plug wells that may be inaccessible to the operator or off-lease. The court also enjoined the imposition of new construction standards for existing impoundments that were built pursuant to permits and the DEP's view of the law at the time, finding that if these provisions were not enjoined, the Marcellus Shale Coalition would be unable to recover hundreds of thousands to millions of dollars to retrofit existing impoundments.

Finally, the court enjoined the provisions of Chapter 78a regarding well site restoration standards and found that there was a legal question as to whether the new well site restoration standards impose requirements in excess of what is required by the Clean Stream Laws. Currently, Act 13 provides that erosion and sediment control regulations must comply with the Clean Streams Law, and the court was persuaded that there was a substantial legal question as to whether Section 78a.65(d) abrogates any requirements or exemptions in the Clean Streams Law. The DEP has appealed the court's injunction to the Pennsylvania Supreme Court.¹⁷³

The Commonwealth Court issued a published opinion interpreting the impact fee provision in Act 13.¹⁷⁴ In *Snyder Brothers v. Pennsylvania Public Utility Commission*, the issue on appeal was the statutory interpretation of the definition of "stripper well" in Act 13, which is not required to pay impact fees. The court was tasked with determining whether the General Assembly intended the word "any" to mean "one" or "every." The court held that the phrase "any" meant "any" or "one" and not "all" or "every" based on the plain language of Act 13, thus a stripper well is not required to pay an impact fee if it is a well that produces less than 90,000 cf of gas in at least one month. On October 18, 2017, the Pennsylvania Supreme Court granted the Pennsylvania Public Utility Commission's petition for allowance of appeal.¹⁷⁵

Federal courts in Pennsylvania have been wrestling with the question of arbitrability in royalty class action disputes involving oil and gas leases with arbitration provisions. In *Chesapeake Appalachia, L.L.C. v. Scout Petroleum LLC*,¹⁷⁶ the court held that courts, and not arbitrators, decide questions of class arbitrability absent clear and

¹⁷⁰25 PA. CODE § 78a.56; 25 PA. CODE § 78a.59a.

¹⁷¹25 PA. CODE § 78a.59b.

¹⁷²See *Marcellus Shale Coalition v. Dept. of Env'tl. Prot.*, No. 573 M.D. 2016, 2016 Pa. Commw. Unpub. LEXIS 830 (Pa. Commw. Ct. Nov. 8, 2016).

¹⁷³See *Marcellus Shale Coalition v. Dept. of Env'tl. Prot.*, No. 115 MAP 2016.

¹⁷⁴157 A.3d 1018 (Pa. Commw. Ct. 2017).

¹⁷⁵Order Granting Petition for Allowance of Appeal, *Snyder Bros. v. Pa. Public Utility Comm'n*, No. 166, WAL 2017, 172 A.3d 1119 (Pa. Oct. 18, 2017).

¹⁷⁶809 F.3d 746 (3d Cir. 2016) ("*Scout I*").

unmistakable evidence otherwise.¹⁷⁷ Following the decision by the Third Circuit in *Scout I*, the trial court judge was tasked with resolving the second issue raised in the complaint, which involved whether the contracts permitted class arbitration, or whether only individual or bilateral arbitration was permitted.¹⁷⁸ The court noted that the *Chesapeake Appalachia, L.L.C. v. Ostroski*¹⁷⁹ court held that class arbitration was not permitted in a similar lease provision, which provided that, in the event of a disagreement between lessor and lessee concerning the lease, the resolution of all such disputes would be determined in accordance with the rules of the American Arbitration Association. The district court judge adopted the reasoning in *Ostroski* and held that the leases only permitted individual or bilateral arbitration rather than class arbitration. Scout Petroleum filed an appeal to the Third Circuit on May 9, 2017.¹⁸⁰

In [*Valley Rod & Gun Club v. Chesapeake Appalachia, L.L.C.*](#), Chesapeake constructed a natural gas well pursuant to an oil and gas lease which granted Chesapeake “such exclusive rights as may be necessary or convenient for Lessee, at its election, to explore for, develop, produce, measure and market production from the premises....”¹⁸¹ The oil and gas was severed from the surface of the property, and the surface owners filed suit alleging misappropriation and conversion of the rock, fill, mulch, and other surface material that Chesapeake used to build a well pad on its property. The district court granted summary judgment to Chesapeake, finding that both the lease and Pennsylvania law allow for a lessee to use as much of the surface property as is “reasonably necessary” to extract the oil and gas. Because Chesapeake is the exclusive owner of the oil and gas underlying the property, Chesapeake has the right to use as much of the surface as is reasonably necessary to develop and produce the gas underlying the surface tract. Valley Rod filed an appeal to the Third Circuit on May 1, 2017.¹⁸² The appeal was dismissed on September 8, 2017.¹⁸³

In [*Cardinale v. R.E. Gas Development, LLC*](#), plaintiffs brought a breach of contract class action alleging that the defendants failed to pay pre-paid rental or bonus payments under leases purportedly executed with the plaintiffs.¹⁸⁴ The leases were substantially identical in all material respects except for the name of the lessor, the description of the leased area, and the amount of payment because the amount depended on the acreage covered by the lease. The leases provided that payment was supposed to occur within 60 days of the receipt of the executed lease and order for payment. The defendants’ obligation to pay the bonus payments was subject only to the inspection, approval of the surface, and geology/title of the leased premises. The court found that class certification was proper because there common questions predominated over individual questions, including: (1) whether the defendants entered into a contract with each class member; (2) at what point

¹⁷⁷See also *Chesapeake Appalachia, L.L.C. v. Brown*, 2016 WL 815571 (M.D. Pa. Mar. 2, 2016); *Chesapeake Appalachia, L.L.C. v. Ostroski*, 199 F. Supp. 3d 912 (M.D. Pa. 2016) (granting a motion for summary judgment filed by Chesapeake Appalachia, L.L.C. declaring that the lease at issue did not permit class arbitration, agreeing with Chesapeake that because the lease was silent on the issue of class arbitration, it was not permissible).

¹⁷⁸ *Chesapeake Appalachia, L.L.C. v. Scout Petroleum LLC*, 2017 WL 1541659 at *1 (M.D. Pa. Apr. 28, 2017).

¹⁷⁹199 F. Supp. 3d 912 (Penn. 2016).

¹⁸⁰*Chesapeake Appalachia, L.L.C. v. Scout Petroleum LLC*, No. 17-2037 (3d Cir. Aug. 4, 2017).

¹⁸¹No. 3:13-CV-0725, 2017 WL 1173930, at *1 (M.D. Pa. Mar. 29, 2017).

¹⁸²*Valley Rod & Gun Club v. Chesapeake Appalachia, L.L.C.*, No. 17-1951 (3d Cir. 2017).

¹⁸³*Id.* at *1.

¹⁸⁴154 A.3d 1275 (Pa. Super. Ct. 2017).

the contract was executed; (3) when the defendants were obligated to pay the bonus payments to class members; (4) whether defendants' obligation to pay the bonus payments was contingent only upon the three reasons stated in the contract; (5) whether the bonus payments absolute at the expiration of the sixty days; and (6) whether the sixty days ran by calendar days or banking days.

In [*EQT Production Company v. Borough of Jefferson Hills*](#), the Borough of Jefferson Hills appealed a trial court decision reversing the Borough Council's denial of a conditional use application by EQT Production Company (EQT) to construct and operate a natural gas production facility.¹⁸⁵ The Council denied the application on the basis that EQT had failed to satisfy a zoning ordinance which provided that the use shall not endanger the public health, safety or welfare nor deteriorate the environment, as a result of being located on the property where it is proposed. The trial court reversed the Council's decision, and the Council appealed. The Commonwealth Court held EQT had successfully established compliance with specific requirements of the ordinance, and that the burden shifted to the Borough to prove that there was a high degree of probability that the conditional use will constitute a detriment to the public health, safety, and welfare exceeding that ordinarily to be expected from the proposed use. The court concluded that the Borough did not meet its burden because the evidence provided by the Borough was speculative, and the lay and expert testimony was not specific to the site proposal at issue. The court concluded that "given the fact that there has been a legislative decision that the particular use is presumptively consistent with the health, safety, and welfare of the community," the Borough's testimony was insufficient to satisfy its burden.¹⁸⁶

The Pennsylvania Supreme Court issued a landmark decision¹⁸⁷ addressing the issue of whether certain statutory enactments related to funds generated from the leasing of forest and park lands owned by the Commonwealth for oil and gas exploration and extraction were constitutional under Article I, Section 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment.¹⁸⁸ The Pennsylvania Environmental Defense Foundation (PEDF) filed a declaratory judgment action against the Commonwealth challenging budget-related decisions from 2009 to 2015 related to leasing lands owned by the Commonwealth for oil and gas development and the use of the monies in the Oil and Gas Lease Fund, and whether these actions violated the Amendment.¹⁸⁹ On appeal, the court held that the proper standard of review was described in the text of the Amendment as based on the underlying principles of Pennsylvania trust law in effect at the time of its enactment. The court noted that the Amendment granted two rights to the people of the Commonwealth: 1) the right to clean air, water, and the preservation of natural values of the environment, and 2) a public trust pursuant to which natural resources are the corpus of the trust, the Commonwealth the trustee, and the people the named beneficiaries. The court concluded that because the Amendment creates a trust, the proceeds that the Commonwealth generates by selling its oil and gas reserves remain in the corpus of the trust. Second, the court determined that the assets of the trust should be used for conservation and maintenance purposes because the Amendment provided that the trust should be used for the benefit of all of the people. Thus, the court held that the statutes at issue that diverted oil and gas sale proceeds to programs other than those for conserving and maintaining public natural resources were unconstitutional.

¹⁸⁵162 A.3d 554, 556 (Pa. Commw. Ct. 2017).

¹⁸⁶*Id.* at 563.

¹⁸⁷[*Pa. Envntl. Def. Found. v. Pennsylvania*](#), 161 A.3d 911 (Pa. 2017).

¹⁸⁸PA. CONST. art. I, § 27.

¹⁸⁹*Pa. Envntl. Def. Found. v. Pennsylvania*, 108 A.3d 140 (Pa. Commw. Ct. 2015).

XI. TEXAS

A. *Judicial Developments*

In [*Wenske v. Ealy*](#),¹⁹⁰ a divided 5-4 decision, the Texas Supreme Court analyzed the difference between the language “a reservation from” and an “exception to” in a conveyance of minerals. The Wenskes bought a 55-acre mineral estate. The two grantors each reserved a 1/8th Non-Participating Royalty Interest (NPRI) for a period of 25 years, resulting in a combined 1/4th NPRI over all the oil, gas and other minerals produced from the property. Subsequently, the Wenskes sold the property to the Ealys by Warranty Deed. After reviewing lengthy provisions in the deed providing for new reservations to the Wenskes and referring to the prior reservations, the trial court granted summary judgment that the Ealys and Wenskes must share the NPRI’s burden according to the proportion of their interests. Noting that neither party argued that the deed was ambiguous, the Texas Supreme Court agreed and proceeded to review the intent expressed in the wording of the deed. The court held that there was not a clear expression of intent that the Ealys interest should hold the sole interest subject to the NPRI, and that the parties should share the NPRI burden in proportion to each of their interests. The practical result of this holding is to avoid an unintended result where the buyer exclusively bears the NPRI. The Court further noted that it did not hold that all conveyances of a fractional mineral interest subject to an NPRI will automatically result in the various fractional interest owners being responsible for paying an NPRI.

In [*Carrizo Oil & Gas, Inc. v. Barrow-Shaver Resources Co.*](#), a farmout agreement provided that the rights granted to a party “may not be assigned, subleased or otherwise transferred in whole or in part, without the express written consent” of the granting party.¹⁹¹ The court held that the contract allowed the granting party to withhold consent and that it had no obligation to act reasonably. In making its determination, the court found persuasive evidence showing that in the course of negotiations of the contract, qualifying language providing that consent could not be unreasonably withheld was deleted from the contract.

The court in [*Greer v. Shook*](#)¹⁹² construed a 1927 deed that basically conveyed an undivided one-sixteenth interest in all minerals that may be produced, but then added that the grantee was purchasing one-half of the royalty, one-half of the minerals produced. The deed also provided that the sale covered and included one-half of all the oil and gas royalty due and to be paid under a then-existing lease. The issue on appeal was whether this language conveyed a floating one-half royalty interest or a fixed one-sixteenth royalty. The court applied the estate misconception doctrine to harmonize the conveyance’s inconsistent fractions, finding that the grantor used “1/16” as a shorthand for one-half of what he believed to be his remaining one-eighth mineral interest. The court therefore held that the deed unambiguously conveyed a floating one-half royalty, noting that there was nothing in the deed to indicate that grantor intended to convey a one-half royalty under the existing lease which would result in a substantially reduced one-sixteenth royalty under all future leases.

[*Reed v. Maltsberger/Storey Ranch, LLC*](#)¹⁹³ resolved contradictory language in a deed. A 1942 deed said it conveyed an undivided one-fourth interest in and to all of the oil, gas and other minerals in and under and that may be produced from certain lands. The deed stated that the described lands were subject to an existing oil and gas lease. The deed

¹⁹⁰521 S.W. 3d 791 (Tex. 2017).

¹⁹¹516 S.W.3d 89, 93 (Tex. App. 2017).

¹⁹²503 S.W.3d 571 (Tex. App. 2016).

¹⁹³No. 04-16-00231-CV, 2017 WL 1683717 (Tex. App. May 3, 2017).

limited certain rights normally given to mineral-interest owners. Although certain wording in the deed suggested the conveyance of a royalty interest, the court only looked at what was stated in the wording of the deed and did not otherwise consider the grantor's intentions. Further, the court did not give controlling weight to the fact that the document was titled "Royalty Deed". The court explained that the deed conveyed a mineral interest since it stated that it conveyed an interest in and to all of the oil, gas and other minerals in and under the described lands.

In *BNSF Railway Co. v. Chevron Midcontinent, L.P.*,¹⁹⁴ the court considered whether a deed that contained ambiguous language granted only an easement or a fee simple interest in the land. The granting clause of the deed purported to grant an easement by granting a right of way in a certain strip of land, while the habendum clause contemplated granting an interest in fee simple. The court held that the overall intent of a grantor must be gleaned from within the four corners of the deed. Following the principle in *Texas Electric Railway*,¹⁹⁵ the court held that the language in the granting clause controls. Because the overall language in the deed evidenced an intent to grant only an easement and the granting clause contemplated a right of way, while the habendum clause purported to grant a fee simple, the court upheld the decision that the deed granted to BNSF only an easement. Thus, BNSF had no rights to the mineral estate. The court did not reconcile the two grants by holding that there was a grant of an easement in perpetuity.

In *Samson Exploration, LLC v. T.S. Reed Props., Inc.*,¹⁹⁶ the court refused to reform the agreement based upon an assertion that the lessee mistakenly agreed to pay royalties twice by virtue of overlapping pooled units. A lessee of three wells maintained two pooled units. The second unit was maintained by the second and third wells. The lessee later amended the second unit to include only the second well and created a third unit to encompass the third well. During this process, however, the lessee mistakenly created the second and third units in a manner that caused the underlying rights to overlap, and subjected the lessee to the duty to pay royalties on the wells twice—once to those in the second unit and once to those in the third unit. When the lessee failed to pay the appropriate amount of royalties, the royalty owners in the units brought suit to recover the unpaid royalties. Arguing defense of impossibility, the lessee asserted that it was impossible to cross-convey the same pooled lands, substances and depths twice at the same time. Rejecting this argument, the court noted that there was no impediment from enforcement of the royalty obligations against the lessee, even if there was no effective conveyance of title. The lessee additionally sought reimbursement from the second unit for any royalty obligation paid to it that was actually owed to those in the third unit. Rejecting this request, the court stated that the lessee must bear its contractual obligation to pay royalties out of its working interest rather than seeking reimbursement from owners of the second unit as the lessee's economic consequences of its actions were of its own making.

In *Norhill Energy LLC v. McDaniel*,¹⁹⁷ an oil and gas lessee brought suit against its lessor alleging breach of contract and the equitable claim of money "had and received." These actions arose out of lessor's failure to provide \$50,000 to lessee under the lease contract which stipulated that the subject lease would be assigned back to the lessor at which time the lessor would pay lessee \$50,000. The trial court rendered judgment in favor of lessor, lessee appealed and the court of appeals reversed and rendered. The appeals court overruled lessee's breach of contract claim because, although lessee established the element of breach at trial, it did not demonstrate how it was entitled to \$50,000 in damages

¹⁹⁴528 S.W.3d 124 (Tex. App. 2017).

¹⁹⁵*Tex. Elec. Ry. Co. v. Texas*, 252 S.W.2d 451 (Tex. 1952).

¹⁹⁶521 S.W.3d 766 (Tex. 2017).

¹⁹⁷517 S.W.3d 910 (Tex. App. 2017).

for the breach. However, the court did uphold lessee's claim for money had and received. Lessor argued that the claim for money had and received was barred because the express contract between the parties precluded the claim and the lessee had an adequate remedy at law. However, the court noted that the Texas Supreme Court has not ruled on whether an action for money had and received is barred when the money in dispute is part of a valid contract that would otherwise provide an adequate remedy at law. Although the court went on to note that equitable claims are generally barred when there is an express contract covering the issue, it also noted that the general rule is not absolute. The court concluded that the facts in this case did not preclude lessee's claim for money had and received because it was not inconsistent with the express agreement.

In *Crystal River Oil & Gas, LLC v. Patton*,¹⁹⁸ the court determined whether the trial court erred when it limited "reworking operations," under an oil and gas lease, to activities on "producing wells." Crystal River owned and operated wells on the oil and gas lease in question. The oil wells produced about twenty barrels of salt water for each barrel of oil produced, so Crystal River operated a disposal well on the lease to manage the salt water production. The disposal well broke down, and while Crystal River was repairing the well it shut in its oil wells for more than sixty days. Believing that the lapse in production terminated the lease, Patton obtained an oil and gas lease covering the same lands. Thereafter, Patton sued Crystal River to establish his title. Crystal River's lease provided that, if production should cease after the primary term, the lease would not terminate if the lessee commenced additional drilling or reworking operations within sixty days. The case was submitted to the jury, and the jury was given the following questions: "Did the Defendants fail to commence drilling or reworking activities on the *producing wells in question* within 60 days after the wells ceased to produce oil and gas?"¹⁹⁹ The jury answered yes, and Crystal River appealed. The court of appeals reversed and remanded, holding that the trial court erred in restricting "reworking operations" to activities "on the producing wells", as such restriction was not expressly so stated in the Crystal River lease.

In *BP America Production Co. v. Laddex, Ltd.*,²⁰⁰ top lessee Laddex brought suit against BP arguing BP's bottom lease had terminated for failure to produce in paying quantities. In turn, BP argued that Laddex's top lease was void as it violated the Rule Against Perpetuities. Laddex's top lease specified that it would commence on (1) the date when written releases of BP's bottom lease were filed or (2) the date a judgment terminating BP's lease became final and non-appealable. The trial court determined that the Rule did not void Laddex's lease, and the jury found that BP's lease terminated for its failure to produce in paying quantities over a reasonable time period. The court of appeals affirmed that the Rule did not invalidate Laddex's lease, but determined that the jury was improperly instructed on the production in paying quantities analysis. The Supreme Court affirmed. In so doing, the court determined that Laddex's lease conveyed to it a "partial alienation" of lessors' possibility of reverter pursuant to BP's bottom lease—an interest that had already vested. Turning to the jury instruction issue, the court determined that the instruction asking whether the well at issue produced in paying quantities during a specific 15-month time period was error. The court noted that narrowing the question of paying production to any particular time period was arbitrary. Thus, although the parties were free to argue their views regarding what would be a reasonable time period, the charge to the jury may not instruct the jury as to the time period to consider. The Texas Supreme Court affirmed the intermediate appellate court and remanded the matter for a new trial.

¹⁹⁸510 S.W.3d 226 (Tex. App. 2016).

¹⁹⁹*Id.* at 228 (emphasis in original).

²⁰⁰513 S.W.3d 476 (Tex. 2017).

In *Hardin Simmons University v. Hunt Cimaron LP*,²⁰¹ the lessor sued the lessee, claiming the lease terminated at the conclusion of the primary term because the lessee failed to develop any new wells or convert any existing wells to producing wells during that term. Evidence showed that the lessee began reworking operations on ten existing wells prior to the end of the primary term. The trial court entered a take nothing judgment against the lessor. On appeal, the appellate court reviewed the lease contract, specifically the Pugh, retained acreage, reworking, and continuous development clauses. The court interpreted the reworking clause to mean the lease only continued with respect to the ten existing wells being reworked and the retained acreage associated with those wells. The court's decision turned on the difference in language between the continuous development and reworking provisions. The continuous development clause kept the lease in effect regarding "all lands and all depths" whereas the reworking clause only continued the lease "in accordance to its terms." The court ruled that because of the language referring to the terms of the lease, the reworking clause incorporated the Pugh and retained acreage clauses. The result was the termination of the lease with respect to the land not producing or being reworked. However, the lease remained in effect as to the ten wells being reworked and forty acres around each of those wells.

In *Westlake Ethylene Pipeline Corp. v. Railroad Commission of Texas*,²⁰² the court ruled on the enforceability of the tariff of Westlake Ethylene Pipeline Corporation, a common carrier and the owner and operator of a pipeline that solely transports liquified ethylene and runs between Mont Belvieu and Longview, Texas. In 2013, Eastman Chemical Company filed a complaint with the Railroad Commission, asserting that Westlake's tariff was discriminatory, and therefore unenforceable. The tariff canceled two services that were previously offered by Westlake—backhaul services and exchange services. To backhaul is to cause the flow of product in the opposite direction from the usual direction of flow.²⁰³ Exchange services refer to the transfer of "custody of a specific quantity or volume of a fungible product such as ethylene" from one location to another "so that no physical movement of the product is necessary."²⁰⁴ Eastman claimed that these cancellations provided an unreasonable preference to Westlake Longview Corp., an affiliate of Westlake, because elimination of the backhaul and exchange services cut off access to the Mont Belvieu market and unduly required other shippers to conduct business with Westlake Longview Corp. The issue was initially brought before the Railroad Commission, which found that the tariff was unenforceable. Westlake challenged that ruling, and the district court ruled in favor of Eastman. The court of appeals affirmed the Railroad Commission's decision, holding that discrimination includes not only disparate treatment of similarly situated shippers but also the granting of an undue or unreasonable preference or advantage to a particular shipper. Here, there was a reasonable basis for the Commission's finding that the tariff was discriminatory.

In *ExxonMobil v. Lazy R Ranch*,²⁰⁵ a landowner sought damages and injunctive relief to remedy a continuing nuisance caused by soil and groundwater contamination from an oil and gas lease. The Texas Supreme Court agreed with the trial court that claims concerning two of the four contaminated sites were barred by the statute of limitations. As to the other two sites, active operations were still being conducted when suit was filed. Consequently, the court found the evidence conflicting as to when the contamination had occurred and reversed the trial court's summary judgment ruling as to those two sites. The

²⁰¹No. 07-15-00303-CV, 2017 WL 3197920 (Tex. App. July 25, 2017).

²⁰²506 S.W.3d 676 (Tex. App. 2016).

²⁰³*Id.* at 688 n.2.

²⁰⁴*Id.* at 688 n.3.

²⁰⁵511 S.W.3d 538 (Tex. 2017).

court reiterated that the “discovery rule” does not apply to delay the commencement of the limitations period when conditions on the ground are objectively verifiable. Additionally, the court affirmed Texas’ economic feasibility exception to the measure of damages for contamination of land. However, even though the court cited with approval prior cases holding that limitations is not a defense to abate a continuing nuisance, the court declined to address the plaintiffs’ claims for injunctive relief. The court found that Exxon failed to address the injunctive claims in its original summary judgment motion, and the plaintiffs’ claims for injunctive relief evolved over the course of the case and muddled the issue further.

*Lightning Oil Company v. Andarko E&P Onshore, LLC*²⁰⁶ involved a claim against one mineral lessee by an adjoining mineral lessee for tortious interference with contract and trespass. Lightning sought an injunction and restraining order to prevent Anadarko from siting a well on the surface of Lightning’s lease and drilling through that tract to produce a well bottomed on the adjacent lease. The court held that the drilling from the adjacent lease could be enjoined or prevented by the lessee of the drill site tract. Such drilling would not constitute tortious interference with the contractual rights of the Plaintiff lessee. The court noted that that drilling of wells from one lease to an adjacent lease is surface use for accommodation doctrine purposes. The court further found that when land is leased for oil and gas purposes, the surface owner owns and controls the earth underground his surface and the mineral owner has the exclusive right to possess, use, and appropriate oil and gas. The mineral estate is the “dominant estate” in that the lessee has the right to use the surface as is reasonably necessary to remove and produce the leased mineral. A trespass includes the unauthorized interference with the rights of the property holder as well as unauthorized interference with the physical property. However, the court noted that the right to drill, explore and produce the mineral does not include the right to possess the specific space where the minerals are located. A trespass as to minerals only occurs if there is an interference with the ability of the lessee to exercise its right. The loss of minerals by such drilling activity would be small and is outweighed by interests of the industry and society to maximize oil and gas recovery. The court found that the surface owner’s action in allowing Anadarko to drill from the adjacent tract did not constitute a tortious interference.

In *Noble Energy, Inc. v. ConocoPhillips Co.*,²⁰⁷ the court held that Noble assumed certain liability when its predecessor purchased a lease from Alma Energy Corp., a debtor in bankruptcy. ConocoPhillips had assigned Alma Energy a lease (the Lease), which assignment was governed by an exchange agreement. Under the exchange agreement, Alma Energy agreed to indemnify ConocoPhillips for all claims arising out of waste materials or hazardous substances arising under the Lease, among other properties. A few years later, Alma Energy declared bankruptcy. Noble’s predecessor in title acquired the Lease, which Alma Energy did not specifically reject during the bankruptcy proceedings. Thereafter, ConocoPhillips settled a \$63 million claim related to the Lease. ConocoPhillips sought indemnity from Noble pursuant to the exchange agreement, which it claimed Noble had assumed. Noble contended that it never specifically assumed the exchange agreement. Noble also argued that the boilerplate language in the bankruptcy plan, which provided that “any Executory Contract or lease not referenced above shall be assumed and assigned,” did not reflect Noble’s intent to assume the exchange agreement.²⁰⁸ Nonetheless, the court

²⁰⁶520 S.W.3d 39 (Tex. 2017).

²⁰⁷523 S.W.3d 771 (Tex. 2017).

²⁰⁸*Id.* (quoting *Noble Energy, Inc. v. ConocoPhillips Co.*, 462 S.W.3d 255, 269 (Tex. App. 2015)).

found in favor of ConocoPhillips, stating that the language in the plan was sufficient to provide Noble's predecessor with notice that the exchange contract was assumed.

Crawford v. XTO Energy, Inc.²⁰⁹ centered on whether Texas Rule of Civil Procedure 39 required joinder of the lessor's neighboring landowners as parties to the suit. The plaintiff-lessor claimed an interest in a narrow strip of land based on a 1964 mineral reservation. XTO, the lessee's successor, apportioned all royalties on the strip to other adjacent landowners under the common law strip-and-gore doctrine. The lessor sued XTO for royalties without joining the abutting landowners. The trial court dismissed the case because of the absence of the adjacent owners, reasoning that they were necessary parties under Rule 39. The appellate court held this was an abuse of discretion. Rule 39 requires joinder of a party who *claims* an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may as a practical matter impair or impede his ability to protect that interest. While XTO claimed these surrounding landowners had such an interest under the common law strip-and-gore doctrine, the surrounding landowners themselves made no such claim. The court explained that Rule 39 does not require joinder of persons who potentially could claim an interest in the subject of the action; it only requires joinder of those parties who claim such an interest. Accordingly, the surrounding landowners were not necessary parties under Rule 39.

In Jarzombek v. Ramsey,²¹⁰ the court determined that the "discovery rule" is not applicable in cases in which the terms of the deed differ from the terms in the associated real estate contract. The Jarzombeks owned the surface estate to two tracts of land. They owned 100% of the mineral interest to one tract and a one-sixteenth royalty interest to the second tract. In the real estate contract, Ramsey purchased the surface estate and one-half of the mineral and royalty interest then owned by the Jarzombeks for both tracts. The warranty deed conveyed both tracts to Ramsey, reserving an undivided one-thirty-second royalty interest to the two tracts for twenty years. Almost seven years later, the Jarzombeks sued for deed reformation, alleging the suit was timely because the discovery rule tolled the statute of limitations. The appellate court affirmed the trial court's order of summary judgment on this issue, holding that the deed unambiguously reserved only a one-thirty-second interest in both tracts. Because this fact was evident on the face of the deed, the Jarzombeks had actual knowledge of what the deed included as of the date the deed was signed. Therefore, the statute of limitations began to run upon execution of the deed and the discovery rule did not apply.

In FLST, Ltd. v. Explorer Pipeline Co.,²¹¹ the court declined to determine for purposes of the "discovery rule" whether plaintiffs were reasonably diligent in their investigation of certain property that they had purchased. Plaintiffs filed suit against defendant for damages resulting from a reduction in the subsequent sale price of plaintiffs' property that was due to defendant's pipeline that ran underneath plaintiffs' property. Defendant argued that plaintiffs were on constructive notice of the pipeline before purchasing the property and thus should not be afforded the benefit of the discovery rule because, among other pieces of evidence, gas pipeline markers were present and visible on the property when plaintiffs purchased it. Although plaintiffs were aware of the gas pipeline markers, they provided at least some evidence that contradicted the fact that a pipeline ran beneath plaintiffs' property. That is, the easement allowing the pipeline to run beneath the property had been amended by a prior owner to purportedly relocate the easement off the property. In fact, the pipeline was never actually relocated. The court held that it could not, as a matter of law, decide whether plaintiffs were reasonably diligent for

²⁰⁹509 S.W.3d 906 (Tex. 2017).

²¹⁰534 S.W.3d 534 (Tex. App. 2017).

²¹¹No. 4:16-CV-00017-KPJ, 2017 WL 1956796 (E.D. Tex. May 11, 2017).

purposes of the discovery rule because defendant did not establish that plaintiffs' could not rely on the contradicting evidence.

In *Cabot Oil & Gas Corp. v. Newfield Exploration Mid-Continent Inc.*,²¹² the court highlighted the potential pitfall of a vaguely worded reservation. Cabot purported to reserve an interest in a mineral lease in an assignment executed by Cabot. Newfield was the operator of the lease and argued that the Texas statute of frauds voided the portion of the reservation pertaining to "the 160 acre proration unit surrounding said well" due to an inability to accurately identify the acreage.²¹³ The court agreed and held that such a description is insufficient because such language does not identify with reasonable certainty the acres that are to be included in the reservation. The court emphasized that a proration unit relating to the well had yet to be designated, and no particular geographic proration unit was named in the assignment or identified in any writing to which the assignment alluded. The court went on to explain that merely identifying the property as some specific quantum of acreage surrounding a well does not meet the demands of the statute of frauds and thus held the reservation void. Cabot also raised judicial and quasi estoppel arguments. In rejecting those arguments, the court explained that no contractual right existed for Cabot to enforce by barring Newfield from questioning its existence through estoppel. The court reiterated the rule that estoppel cannot be used to create a contract or supply essential terms of a contract.

In *Texas Outfitters Ltd., LLC v. Nicholson*,²¹⁴ the court reaffirmed the rule that an executive owner can breach its duty of good faith and fair dealing by refusing to lease either arbitrarily or when "motivated by self interest to the non-executive's detriment."²¹⁵ After purchasing both surface rights and executive mineral rights from the Carter family, Texas Outfitters received two lease offers for the mineral rights. It declined both offers, reasoning that it wanted to protect its surface level hunting business. The court determined that the record contained sufficient evidence to establish a breach. First, the owner of Texas Outfitters stated that there would be no lease despite purchasing the Carters' executive rights with the purpose of further developing the mineral estate. Second, Texas Outfitters proposed to resell the surface and mineral rights to the Carters at an unfavorable price. Third, Texas Outfitters proposed restrictive covenants that would effectively preclude a mineral lease. Finally, the court rejected Texas Outfitters' contention that it was holding out for a better offer because none of the surrounding landowners had received an offer better than that made to Texas Outfitters.

In *Mzyk v. Murphy Exploration & Production Co.-USA*,²¹⁶ the court explained the limits of the "reasonably prudent operator" standard with respect to offset well obligations. Under the lease, if a neighboring operator drilled a well within 467 feet of the lease line, the lessee agreed to drill such offset well or wells on the lease as a reasonably prudent operator would drill given the same or similar circumstances. A number of wells were drilled adjacent to the lessor's property within 467 feet. The lessee decided that drilling on the lease would not be profitable and that a reasonably prudent operator would not have drilled the lease. The lessor sued for breach of the offset-well provision, arguing the provision established *how* the lessee was to drill an offset well, not whether to drill at all. Affirming summary judgment for the lessee, the court explained that the lease provision expressly adopted the "reasonably prudent operator" standard, which generally applies to

²¹²No. 07-16-00125-CV, 2017 WL 2622773 (Tex. App. June 13, 2017).

²¹³*Id.* at *1.

²¹⁴534 S.W.3d 65 (Tex. App. 2017).

²¹⁵*Id.* at 71 (quoting *Lesley v. Veterans Land Bd. of State*, 352 S.W.3d 479, 491 (Tex. 2011)).

²¹⁶No. 04-15-00677-CV, 2017 WL 2797479 (Tex. App. June 28, 2017).

the lessee's determination of whether to drill an offset well at all, not just to how the lessee would drill an offset well, as the lessor argued. Because the lessor offered no evidence that a reasonably prudent operator would have drilled an offset well, the court affirmed summary judgment for the lessee.

XII. WEST VIRGINIA

A. *Legislative Developments*

The West Virginia Legislature passed the West Virginia Safer Workplaces Act, [H.B. 2857](#), which expands the circumstances under which employers may conduct drug and alcohol testing.²¹⁷ Previously, employees could be tested under two circumstances: (1) if a reasonable suspicion existed to justify the test; or (2) if the employee held a safety sensitive position. Now, drug and/or alcohol testing may be performed for a variety of reasons (e.g., deterrence of illicit drug use, investigating accidents in the workplace or possible individual employee impairment). Under the new law, testing may even occur where there are no indications of individual, job-related impairment. Thus, the new law greatly expands an employer's ability to test employees.

The West Virginia Legislature passed [H.B. 2811](#), which amends the Aboveground Storage Tank Act (ASTA) by exempting tanks used to store brine and other gas industry waste liquids.²¹⁸ The bill exempts an estimated 2,300 tanks. The exemption only applies to tanks located inside the "zone of peripheral concern," which is an area between five and ten hours upstream of a drinking water intake. Tanks are exempted that have a capacity of 210 barrels, which is 8,850 gallons, and contain brine water or other fluids produced in connection with hydrocarbon production activities. These tanks will have to register with the West Virginia Department of Environmental Protection but are not covered under other parts of the ASTA.

The West Virginia Legislature passed [S.B. 505](#), which provides a five-year reclamation period following completion of well pads for horizontal wells.²¹⁹

B. *Judicial Developments*

In [Leggett v. EQT Production Co.](#),²²⁰ the court found that the use of the language "at the wellhead" in West Virginia's Flat Rate Royalty Statute allows the use of the "net back" method to calculate royalties. In doing so, the court found that the *Estate of Tawney v. Columbia Natural Resources, L.L.C.* case did not apply or control. The court was tasked with determining whether the holding in *Tawney*, which did not allow post-production expense deductions when calculating royalty, applied when royalties are paid on old, flat rate leases converted to a one-eighth royalty by application of Flat Rate Royalty Statute. The statute provides that royalties are to be paid "at the wellhead." *Tawney* held that "at the wellhead" language in a lease was ambiguous, and deductions could not be taken unless expressly authorized in the lease in detail as to the type and method of calculation.²²¹ In *Leggett*, the court held that the rules of contract construction used to decide *Tawney* did not apply when interpreting a statute. The ruling in this case indicated the court's potential

²¹⁷H.B. 2857, 2017 Leg., Reg. Sess. (W. Va. 2017).

²¹⁸H.B. 2811, 2017 Leg., Reg. Sess. (W. Va. 2017).

²¹⁹S.B. 505, 2017 Leg., Reg. Sess. (W. Va. 2017).

²²⁰800 S.E.2d 850 (W. Va. 2017).

²²¹*Id.* at 860-63.

willingness to reconsider *Tawney*, which would impact royalty calculations for West Virginia production.

In *Bowyer v. Wyckoff*,²²² the court held that a party seeking a partition of property by allotment or by sale under W. Va. Code section 37-4-3 must strictly follow the prerequisites in the statute. In *Bowyer*, a party was seeking to partition the surface of property in kind or by sale. A counterclaim was brought, however, seeking to partition both the surface and the mineral interests either through by allotment or by sale, allegedly because the party wanted to develop the shallow natural gas under the property. The court rejected partition by sale of the surface and mineral interests because the challenging party had not otherwise proven entitlement to partition by sale under section 37-4-3. The Court maintained the following rationale for rejecting sale by partition:

The forced sale of oil and gas minerals precludes the owner of the benefit of lease consideration and the prospect of production proceeds, which represent the primary and perhaps the exclusive value which such ownership vests. Therefore, the public interest will not be promoted by sale.²²³

Under this rationale, any partition for sale or by allotment under section 37-4-3 can be forestalled by a single interest holder who does not wish to sell his or her interest—which undercuts the entire purpose of the partition statute and results in a “forced” sale of a person’s property interest, whether the partition be by sale or by allotment. The Court’s implicit acceptance of the notion that any “forced sale of oil and gas interests” precludes partition is likely to hamper efforts of oil and natural gas producers to use the partition statute to develop minerals.

C. *Administrative Developments*

The West Virginia Department of Environmental Protections (WVDEP) issued a Final Interpretive Rule, 33 CSR 1A, “Disposal of Completion or Production Waste.”²²⁴ One amendment involved modifying the proposed term “Completion Waste” to instead be termed as “Completion and Production Waste.”²²⁵ The change of the term to include the words “Production Waste” supports landfills in accepting production waste streams in addition to the completion waste streams. Further, Section 3.1 was amended to clarify that the permittee should obtain a minor permit modification prior to accepting or disposing of completion waste in the landfill.²²⁶ The WVDEP has changed the language in subsection 3.3 to clarify the radiation monitoring requirements that apply are from subsection 3.5 of the proposed rule.²²⁷ Subdivisions 3.4.a and 3.4.b were combined to clarify the waste profiling requirements needed to obtain a minor permit modification.²²⁸ Subdivision 3.4.b was amended to ensure that if the combined concentration in the waste was equal to fifty picocuries per gram (50pCi/gr.), the facility could also accept the waste for disposal.²²⁹

²²²796 S.E.2d 233 (2017).

²²³*Id.* at 239.

²²⁴Disposal of Completion or Production Waste, 33 CSR 1A (W. Va. Dep’t of Env’tl. Prot. 2017) (Final Interpretive Rule).

²²⁵*Id.* § 33-1A-2.

²²⁶*Id.* § 33-1A-3.1.

²²⁷*Id.* § 33-1A-3.3.

²²⁸*Id.* § 33-1A-3.4(a-b).

²²⁹33 CSR 1A § 33-1A-3.4(b).

XIII. WYOMING

A. *Legislative Developments*

The legislature addressed two issues related to Wyoming's *ad valorem*/gross products tax on oil and gas and other mineral production. First, the legislature required the Wyoming Department of Revenue to conduct a study on a potential discounted cash flow valuation method for *ad valorem* production taxes.²³⁰ Second, the legislature clarified that when a producer properly withholds royalties to pay taxes, fees, or penalties on behalf of a royalty or overriding royalty owner, *ad valorem* tax liens will not attach to the property of the royalty or overriding royalty owner.²³¹

The legislature authorized the Governor to use Wyoming's Federal Natural Resource Policy Account to facilitate mineral development permitting and to address related issues.²³²

Finally, the legislature extended the sunset or expiration date of Wyoming's sales and use tax exemption on sales or leases of machinery used in the state for manufacturing (including certain oil refining operations) from December 31, 2017 to December 31, 2027.²³³

B. *Judicial Developments*

In *Questar Exploration & Production v. Rocky Mountain Resources*,²³⁴ the Wyoming Supreme Court distinguished an earlier opinion, *Ultra Resources v. Hartman*,²³⁵ and determined an oil and gas lease did not constitute a renewal, substitute, or new lease, when compared to earlier leases for similar areas. As such, royalty interests established in the older leases did not transfer to the newer lease.²³⁶

*Anadarko Land Corp. v. Family Tree Corp.*²³⁷ involved complicated and competing chains of title to oil and gas interests. One chain of title originated from disputed production taxes assessed by a Wyoming county in 1911. While the court determined the production taxes were improperly assessed, it concluded the county's action was not a clear jurisdictional error. The resulting tax sale and deed were merely voidable and because the assessments were not challenged within the statutory limitations period, the court concluded deeds based on the assessment and tax sale were valid.

In *Wyoming v. Zinke*,²³⁸ the court set aside the Bureau of Land Management's (BLM) March 2015 hydraulic fracturing regulation.²³⁹ Supporters of the regulation

²³⁰[H. Enrolled Act 85](#), 2017 Leg., 64th Gen. Sess. (Wyo. 2017).

²³¹WYO. STAT. ANN. §§ 39-13-108(d)(vi)(B) and (O); [H. Enrolled Act 74](#), 2017 Leg., 64th Gen. Sess. (Wyo. 2017).

²³²WYO. STAT. ANN. § 9-4-218(c); [S. Enrolled Act 53](#), 2017 Leg., 64th Gen. Sess. (Wyo. 2017).

²³³WYO. STAT. ANN. §§ 39-15-105(a)(viii)(O); 39-16-105(a)(viii)(D); [S. Enrolled Act 80](#), 2017 Leg., 64th Gen. Sess. (Wyo. 2017).

²³⁴388 P.3d 523 (Wyo. 2017).

²³⁵226 P.3d 889 (Wyo. 2010).

²³⁶388 P.3d at 532.

²³⁷389 P.3d 1218 (Wyo. 2017).

²³⁸871 F.3d 1133 (10th Cir. 2017).

²³⁹*Id.* at 1139 (citing *Wyoming v. United States*, Nos. 2:15-CV-041-SWS, 2:15-CV-043-SWS, 2016 U.S. Dist. LEXIS 82132, 2016 WL 3509415, at *3-*10 (D. Wyo. June 21, 2016)).

appealed the court's decision to the Tenth Circuit. However, before the appeal was decided, the BLM asked the Tenth Circuit to hold the case in abeyance based on Executive Orders issued by the President.²⁴⁰ On September 21, 2017, the Tenth Circuit dismissed the appeals as prudentially unripe.²⁴¹

Bear Peak Resources, LLC v. Peak Powder River Resources, LLC,²⁴² concerned a mineral acquisition and development agreement between two parties. The agreement applied to a specific Area of Mutual Interest (AMI). When one of the parties acquired mineral interests without compensating the other party, that second party sued for breach of contract, breach of implied covenant of good faith and fair dealing, accounting, negligent misrepresentation, breach of fiduciary duty, and unjust enrichment. A state district court entered summary judgment in favor of the defendant and dismissed the lawsuit. On appeal, the court affirmed the summary judgment order on the breach of implied covenant, accounting, and breach of fiduciary duty claims. However, the court reversed the district court's decision on the interpretation and status of the AMI agreement, and remanded to the district court with instructions to reconsider those issues.

C. Administrative Developments

In early 2017, the Wyoming Oil and Gas Conservation Commission revised its rules to set specific limits for natural gas flaring and venting.²⁴³ The new rules allow for emergency flaring and venting, and recognize that flaring and venting may occur during well purging, evaluation, or production tests.²⁴⁴

²⁴⁰871 F.3d at 1140.

²⁴¹*Id.* at 1146.

²⁴²403 P.3d 1033 (Wyo. 2017).

²⁴³055-0001-3 WYO. CODE R. § 39(b)(iv) (LexisNexis 2017).

²⁴⁴*Id.* at § 39(b)(i)-(iii).

Chapter 22 • PUBLIC LAND AND RESOURCES 2017 Annual Report¹

The year 2017 saw the nullification of BLM’s recently-promulgated land use planning rule, and the Trump Administration’s reduction in size of the Bear’s Ears and Grand Staircase-Escalante National Monuments. 2017 also saw the issuance of numerous judicial opinions that considered federal statutes affecting federal public lands not otherwise covered by specific articles in this YIR issue, including: land use decisions made by the Bureau of Land Management (BLM) under the Federal Land Policy Management Act (FLPMA); agency land use decisions as takings; R.S. 2477; the Quiet Title Act; and the Wild Horse Act.

I. NULLIFICATION OF BLM’S PLANNING 2.0 RULE

Under FLPMA, BLM shall, “with public involvement and consistent with the terms and conditions of [FLPMA], develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands.”² In 1983, BLM issued regulations governing land use plans; these regulations are found at 43 C.F.R. Part 1600.³ These regulations address, among other things, resource management planning guidance;⁴ public participation;⁵ coordination with state and local governments and Indian tribes;⁶ development of planning criteria;⁷ alternatives;⁸ monitoring and evaluation;⁹ plan approvals;¹⁰ and protest procedures.¹¹

In February 2016, the BLM proposed a rule to revise the procedures by which FLPMA land use plans are developed, more commonly referred to as “Planning 2.0.”¹² On December 12, 2016, the BLM issued the final Planning 2.0 rule.¹³ Among other things, the Planning 2.0 rule would have revised the procedures regarding: public involvement; relationships with Indian tribes and other governmental entities; planning assessment; planning frameworks; plan boundaries and responsibilities; and protests.¹⁴

¹This report was prepared by Stan N. Harris, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, New Mexico, and Christine M. Kelly, JD Candidate, Class of 2019, University of Wyoming College of Law. The report attempts to cover significant development 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.

²43 U.S.C. § 1712(a) (2009).

³See 43 C.F.R. §§ 1601.1-8 (1983).

⁴43 C.F.R. § 1610.1 (1983).

⁵43 C.F.R. § 1610.2 (1983).

⁶43 C.F.R. § 1610.3 (1983).

⁷43 C.F.R. § 1610.4-2 (1983).

⁸43 C.F.R. §§ 1610.4-5 to 4-7 (1983).

⁹43 C.F.R. § 1610.4-9 (1983).

¹⁰43 C.F.R. §§ 1610.5 to 5.1(1983).

¹¹43 C.F.R. § 1610.5-2 (1983).

¹²See Resource Management Planning, 81 Fed. Reg. 9674 (Feb. 25, 2016) (to be codified at 43 C.F.R. pt. 1600) (Proposed rule).

¹³See Resource Management Planning, 81 Fed. Reg. 89,580 (Dec. 12, 2016) (to be codified at 43 C.F.R. pt. 1600) (Final rule).

¹⁴*Id.* at 89,581 to 583.

However, pursuant to the federal Congressional Review Act,¹⁵ recently-promulgated agency regulations may be nullified in certain circumstances through a joint resolution passed by Congress and signed by the President.¹⁶ On March 27, 2017, Congress passed, and President Trump signed, a joint resolution disapproving the final Planning 2.0 rule, and declaring the rule to have no force or effect.¹⁷ Since that nullification, Interior Secretary Zinke has [requested](#) “ideas and input on how the [BLM] can make its land use planning procedures and environmental reviews timelier and less costly, as well as ensure its responsiveness to local needs.”¹⁸

II. REDUCTION IN SIZE OF BEARS EARS AND GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENTS

Under the 1906 Antiquities Act,¹⁹ “[t]he 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.”²⁰ The President may reserve portions 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.”²¹ 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 1996.²² 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 2016.²³ These large designations have proven controversial, with opponents arguing that they should be eliminated or reduced. Although the Antiquities Act gives a President the discretion to declare a national monument, it remains unsettled whether a President may revoke or reduce an existing national monument.²⁴

On April 26, 2017, President Trump issued an [executive order](#) for Interior Secretary Zinke, among other things, to review all Antiquities Act designations made since January 1, 1996, where the designation covers more than 100,000 acres, and to make recommendations regarding those designations.²⁵ Secretary Zinke [submitted](#) a draft report

¹⁵ 5 U.S.C. §§ 801-08 (1996).

¹⁶ 5 U.S.C. § 802 (1996).

¹⁷ See Pub. L. No. 115-12 (2017).

¹⁸ Press Release, U.S. Dep’t. of Interior, BLM Requests Input for Future Planning Efforts and Environmental Reviews (July 3, 2017).

¹⁹ 54 U.S.C. § 320301 (2016).

²⁰ 54 U.S.C. § 320301(a) (2016).

²¹ 54 U.S.C. § 320301(b) (2016).

²² Establishment of the Grand Staircase-Escalante National Monument, 61 Fed. Reg. 50,223, 50,225 (Sept. 24, 1996).

²³ Establishment of the Bears Ears National Monument, 82 Fed. Reg. 1139, 1143 (Dec. 28, 2016).

²⁴ Compare John Yoo and Todd Gaziano, [Presidential Authority to Revoke or Reduce National Monument Designations](#), AEI (Mar. 29, 2017) with Mark Squillace et.al., [Presidents Lack the Authority to Abolish or Diminish National Monuments](#), 103 VA. L. REV. ONLINE 55 (2017).

²⁵ Exec. Order 13,792, Review of Designations Under the Antiquities Act, 82 Fed. Reg. 20,429 (May 1, 2017).

to President Trump on August 24, 2017.²⁶ The draft report indicated that the Secretary was reviewing eight national monuments, including Grand Staircase-Escalante and Bears Ears.²⁷ On December 4, 2017, President Trump issued a [proclamation](#) reducing Bears Ears by approximately 1.15 million acres.²⁸ Also on December 4, 2017, President Trump issued a [proclamation](#) reducing Grand Staircase-Escalante by approximately 860,000 acres, and identifying the remaining monument as three separate units (to be known as Grand Staircase, Kaiparowits, and Escalante Canyons).²⁹ In so doing, President Trump stated that, even without a national monument designation, the lands at issue would still be protected by numerous federal, cultural, and archaeological resources laws.³⁰ The proclamations [resulted](#) in the filing of legal challenges asserting that such reductions are not authorized by the Antiquities Act.³¹ As of the date of writing, those challenges are still pending in federal court.

III. BLM LAND USE DECISIONS UNDER FLPMA

FLPMA provides for the management of federal public lands under the principles of multiple use and sustained yield.³² 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.³³ 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.³⁴ All BLM decisions must in turn be made in accordance with the National Environmental Policy Act (NEPA), which requires federal agencies to make a thorough evaluation of potential environmental impact before they may take a major federal action significantly affecting the quality of the human environment.³⁵

In [Wildearth Guardians v. United States BLM](#),³⁶ two environmental groups (appellants) challenged BLM’s approval of four Wyoming Powder River Basin coal mining leases issued pursuant to BLM’s authority under FLPMA and the Mineral Leasing Act.³⁷ BLM prepared an environmental impact statement on the leases following NEPA regulations, which regulations require consideration of a “no action” alternative to an

²⁶Press Release, U.S. Dep’t of the Interior, Secretary Zinke Sends Monument Report to the White House (Aug. 24, 2017).

²⁷*Id.*

²⁸Presidential Proclamation, Presidential Proclamation Modifying the Bears Ears National Monument (Dec. 4, 2017).

²⁹Presidential Proclamation, Presidential Proclamation Modifying the Grand Staircase-Escalante National Monument (Dec. 4, 2017)

³⁰*See, e.g., Presidential Proclamation Modifying the Bears Ears National Monument, supra* note 28, (citing, inter alia, the Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm (1979); the National Historic Protection Act, 16 U.S.C. §§ 1600-87 (1976); and the Native American Graves Protection Act, 25 U.S.C. §§ 3001-13 (1990)).

³¹*See, e.g., Hopi Tribe v. Trump*, No. 1:17-cv-02590 (D.D.C. 2018) (consolidating several challenges into one action).

³²43 U.S.C. § 1732(a) (1988).

³³*See* 43 U.S.C. § 1732(a) (1988); *see also Norton v. Utah Wilderness All.*, 542 U.S. 55, 58 (2004).

³⁴43 U.S.C. § 1712(a) (1988).

³⁵*See* 42 U.S.C. § 4332(2)(C) (1970).

³⁶870 F.3d 1222 (9th Cir. 2017).

³⁷*Id.* at 1226-27; *see also* 30 U.S.C. §§ 181-287 (2012).

agency's proposed action.³⁸ In so doing, BLM had considered carbon dioxide emissions and impacts on climate change, and concluded that, "even if it did not approve the proposed leases, the same amount of coal would be sourced from elsewhere, and thus there was no difference between [the impacts of] the proposed action [to approve the leases] and the no action alternative."³⁹ On appeal, plaintiffs argued that this "perfect substitution assumption [was] arbitrary and capricious" because (1) it lacked support in the administrative record and ignored basic supply and demand principles; and (2) it ignored readily available tools to measure the market impact of such a contraction in the nation's coal supply, amounting to a failure to acquire information essential to a reasoned choice among alternatives.⁴⁰ The Tenth Circuit Court of Appeals agreed, holding the BLM's environmental impact statement (EIS) and resulting records of decision (RODs) were arbitrary and capricious.⁴¹ The court remanded the matter with instructions to require BLM to revise its EIS and RODs; the court did not, however, vacate the resulting leases.⁴²

In a concurring opinion in the case, one panel member concluded that the majority opinion had improperly commented on the merits of climate science, which the judge believed was not necessary to the disposition of the appeal.⁴³

In *Backcountry Against Dumps v. Jewell*,⁴⁴ environmental groups (appellants) challenged BLM's grant of a right-of-way to a company to construct and operate a wind energy facility (Project).⁴⁵ In granting the right-of-way, BLM had amended its previously-issued land use plan to designate the area where the facility was to be located as suitable for the Project.⁴⁶ BLM had prepared an EIS for the Project, which appellants contended was inadequate in several respects. In particular, appellants alleged that BLM had "failed to take a 'hard look' at the Project's impacts on peninsular bighorn sheep";⁴⁷ that BLM failed to consider the visual impacts of the Project; that BLM "failed to consider the health effects of the low-frequency noise ('LFN') and infrasound that would be produced by the [Project's] wind turbines"; and that the EIS did not adequately discuss the reasonable alternatives to the Project.⁴⁸ The Ninth Circuit Court of Appeals disagreed, holding that BLM had adequately considered all of these issues in preparing the EIS, and that BLM's decision accordingly did not violate NEPA.⁴⁹

In *Southern Utah Wilderness Alliance v. United State DOI*,⁵⁰ several environmental groups challenged "BLM's decision to lease four parcels of land and eventually approve one of those parcels for natural gas development."⁵¹ The BLM had previously issued an EIS for the a resource management plan for the area at issue, and then issued less-stringent environmental assessments (EA) under NEPA for the leases and approval.⁵² With regard to the leases, the plaintiffs argued that BLM violated NEPA by failing adequately to

³⁸870 F.3d at 1227-28; *see also* 40 C.F.R. § 1502.14 (1977).

³⁹870 F.3d at 1228.

⁴⁰*Id.* at 1233-34.

⁴¹*Id.* at 1240.

⁴²*Id.*

⁴³*Id.* at 1241-42 (Baldock, J., concurring).

⁴⁴674 F. App'x 657 (9th Cir. 2017).

⁴⁵*Id.* at 659.

⁴⁶*Id.*

⁴⁷*Id.* at 660-61.

⁴⁸*Id.* at 660-62.

⁴⁹674 F. App'x at 660-62.

⁵⁰250 F. Supp. 3d 1068 (D. Utah 2017).

⁵¹*Id.* at 1075.

⁵²*Id.* at 1075-76.

consider reasonable alternatives proposed by plaintiffs in the drafting of the EA.⁵³ The court disagreed with these arguments, holding that BLM had properly rejected one proposed alternative,⁵⁴ and that it was not required to consider another alternative.⁵⁵ The court also held that, even if BLM's rejection of the proffered alternatives was erroneous, plaintiffs had failed to demonstrate that such rejection compromised the EA so severely as to render BLM's decision arbitrary and capricious.⁵⁶ With regard to the approval, BLM had issued an amendment to its previous decision, suspending the approval until the completion of further NEPA analysis,⁵⁷ thereby rendering plaintiffs' claims moot.⁵⁸

FLPMA also delegates to the Secretary of the Interior (Secretary) the power to make withdrawals of tracts of public lands from mineral extraction, under certain circumstances.⁵⁹ This provision in FLPMA provides that Congress retains legislative veto power over any withdrawal over 5,000 acres.⁶⁰ In *National Mining Ass'n v. Zinke*,⁶¹ mining companies and local organizations (appellants) challenged the Secretary's withdrawal from new uranium mining claims of approximately one million acres of public lands near the Grand Canyon National Park for a period of up to twenty years.⁶² Among other things, appellants argued that the legislative veto within FLPMA was both unconstitutional and non-severable, and that as a result there was no statutory basis for the Secretary's large-tract withdrawal authority.⁶³ Applying Supreme Court precedent, the Ninth Circuit Court of Appeals agreed that FLPMA's legislative veto provision was unconstitutional in that it did not require presentment of such a veto to the President.⁶⁴ However, in light of FLPMA's desire for executive withdrawal authority, coupled with a general severability clause contained in FLPMA,⁶⁵ the court found no indication that Congress would have preferred no statute at all to a version with the legislation severed.⁶⁶ As a result, the court held that the unconstitutional veto embedded in FLPMA is severable from the large-tract withdrawal authority delegated to the Secretary, and that "invalidating the legislative veto provision [did] not affect the Secretary's withdrawal authority."⁶⁷ In a related case released the same day as *National Mining Ass'n*, the Ninth Circuit [rejected](#) challenges brought by an Indian tribe and several environmental organizations to a Forest Service determination that an energy company had a valid existing right to operate a uranium mine on land within the withdrawal area.⁶⁸

⁵³*Id.* at 1078-84.

⁵⁴*Id.* at 1081.

⁵⁵250 F. Supp. 3d at 1083.

⁵⁶*Id.* at 1084.

⁵⁷*Id.*

⁵⁸*Id.* at 1092.

⁵⁹43 U.S.C. § 1714 (2014).

⁶⁰43 U.S.C. § 1714(c)(1) (2014).

⁶¹No. 14-17350, 2017 U.S. App. LEXIS 25072 (9th Cir. Dec. 15, 2017).

⁶²*Id.* at *8-9.

⁶³*Id.* at *23-24.

⁶⁴*Id.* at *24-25 (citing *I.N.S. v. Chadha*, 462 U.S. 919, 953-55 (1983)).

⁶⁵FLPMA § 707, 90 Stat. at 2794 (codified at notes to 43 U.S.C. § 1701).

⁶⁶2017 U.S. App. LEXIS 25072, at *32-33.

⁶⁷*Id.* at *35.

⁶⁸*Havasupai Tribe v. Provencio*, 876 F.3d 1242, 1247 (9th Cir. Dec. 12, 2017).

IV. AGENCY LAND USE DECISIONS AS TAKINGS

In *Sacramento Grazing Ass'n v. United States*,⁶⁹ a cattle grazer (SGA) filed a complaint for an adjudication of its right to the beneficial use of stock water resources within a national forest that pre-dated federal control. Since 1885, the SGA and its predecessors had grazed cattle in what is now the Sacramento Allotment of the Lincoln National Forest pursuant to federal grazing permits.⁷⁰ SGA's grazing permits are administered by the United States Forest Service (USFS). In 1983, the United States Fish and Wildlife Service (USFWS) proposed designating the Sacramento Mountains Thistle as a threatened species under the federal Endangered Species Act,⁷¹ and subsequently began mitigation efforts by fencing enclosures around twenty-nine water bodies designated as critical habitat.⁷² These water bodies were also used by SGA's cattle, and after various subsequent disputes over SGA's right to access water for its cattle, SGA filed its complaint to establish a beneficial use right to the water.⁷³

After first determining that the statute of limitations had not run on SGA's claims and that SGA had the required standing,⁷⁴ the court considered whether SGA had established a property right to beneficial use of the stock water resources at issue. The court held that, under New Mexico law, SGA had established a *prima facie* right to beneficial use of the stock water at issue through the filing of a declaration of ownership of water rights perfected prior to the creation of the national forest,⁷⁵ and that SGA had also established at trial that it had made beneficial use of the water.⁷⁶ In so doing, the court also held that New Mexico law does not require diversion to establish the right to beneficial use of stock water.⁷⁷

The court then considered whether the government's actions constituted a taking under the United States Constitution.⁷⁸ The court held that a taking occurs when (1) it is determined that the interest at issue is a legally protected property right, and (2) if the governmental action at issue amounts to a compensable taking of that property interest.⁷⁹ In this regard, the court also held that a "physical taking occurs if the Government denies an owner all access to a property interest."⁸⁰ Applying these standards, the court held that the USFS's actions effected a taking of SGA's right to beneficial use of the stock water resources at issue.⁸¹ The court withheld a determination of the just compensation due to allow the parties to ascertain whether alternative water sources could be made available to SGA.⁸²

V. R.S. 2477 ROADS

⁶⁹2017 U.S. Claims LEXIS 1381 (Fed. Cl. Nov. 3, 2017).

⁷⁰*Id.* at *7-9.

⁷¹16 U.S.C. §§ 1531–1544 (2011).

⁷²2017 U.S. Claims LEXIS 1381, at *10.

⁷³*Id.* at *32.

⁷⁴*Id.* at *54-57.

⁷⁵*Id.* at *59-61.

⁷⁶*Id.* at *61-73.

⁷⁷2017 U.S. Claims LEXIS 1381, at *73-84.

⁷⁸*See* U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

⁷⁹2017 U.S. Claims LEXIS 1381, at *96.

⁸⁰*Id.* at *97.

⁸¹*Id.* at *98-99.

⁸²*Id.* at *99.

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.⁸³ R.S. 2477 presented a free right-of-way that takes effect when it is accepted by a state.⁸⁴ Although repealed in 1976 by the passage of FLPMA, any valid, existing R.S. 2477 rights-of-way are preserved.⁸⁵

In *Thomas v. Zachry*,⁸⁶ certain county land in Nevada was taken out of public ownership and turned into a subdivision. Part of the land included a dirt road commonly known as “Sutro Springs Road.”⁸⁷ The paved portion of the road terminated at a landowner’s property, with a visible dirt road continuing onto the landowner’s property.⁸⁸ The landowner put up barriers on the road where her property and the dirt road began, and the county approved a project to remove the barriers.⁸⁹ The landowner filed a lawsuit and requested a preliminary injunction to enjoin the county from removing the barriers.⁹⁰

The court considered whether the road, as it crossed the landowner’s property, was a valid and existing R.S. 2477 road when the property was transferred from public to private ownership.⁹¹ The court noted that Nevada had passed legislation accepting and acknowledging the creation of R.S. 2477 roads throughout the state.⁹² The court then held that the historical evidence showed that the road crossing the landowner’s property had been in continuous use since the 1880s, and that county citizens had used the road prior to and after the land transfer.⁹³ The court thus held that the overwhelming evidence in the case established the road as a public road, and the landowner therefore was not likely to succeed on the merits of her claims.⁹⁴

VI. THE QUIET TITLE ACT

The United States is generally immune from suit absent a waiver of sovereign immunity.⁹⁵ One such waiver is the federal Quiet Title Act (“QTA”),⁹⁶ which is the exclusive means by which a plaintiff may name the United States as a defendant in a civil action to adjudicate a disputed title to real property in which the United States claims an interest.⁹⁷ The QTA contains limitations periods within which an action must be commenced; otherwise, the action will be barred. For states bringing an action with respect to lands on which the United States has conducted substantial activities, the action must be commenced within twelve years after the date the State received notice of the federal claims

⁸³43 U.S.C. § 932 (repealed).

⁸⁴*See, e.g.*, *Mills v. United States*, 742 F.3d 400 (9th Cir. 2014).

⁸⁵*Id.* at 403, n.1.

⁸⁶256 F. Supp. 3d 1114 (D. Nev. 2017).

⁸⁷*Id.* at 1117.

⁸⁸*Id.*

⁸⁹*Id.* at 1117-18.

⁹⁰*Id.* at 1118.

⁹¹256 F. Supp. 3d, at 1120.

⁹²*Id.* at 1119.

⁹³*Id.* at 1120-21.

⁹⁴*Id.* at 1121.

⁹⁵*See, e.g.*, *Hart v. United States*, 630 F.3d 1085, 1088 (8th Cir. 2011).

⁹⁶*See* 28 U.S.C. § 2409a (1972).

⁹⁷*Block v. North ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286 (1983).

to the lands.⁹⁸ For all others, the action must be commenced within twelve years of the date upon which the plaintiff knew or should have known of the federal claim.⁹⁹

In *North Dakota ex rel. Stenehjem v. United States*,¹⁰⁰ the state of North Dakota and four state counties sued the federal government under the QTA to quiet title to their claims of rights-of-way and roads located in several national grasslands.¹⁰¹ The district court considered whether the claims had been timely brought under the QTA's limitations periods. With regard to the state, the court concluded that federal development of recreational facilities, development of well sites by federal lessees, and federal range improvements were substantial activities that triggered the twelve-year statute of limitations for states.¹⁰² The court then considered governmental actions pertaining to the state's claimed lands, and ruled that the state had received notice of the United States' claims more than twelve years prior to the commencement of the action, thereby barring the state's claims and the court's jurisdiction over the matter.¹⁰³ The court likewise found that the counties knew or should have known of the United States' claims to the lands at issue more than twelve years prior to the action, thereby barring their QTA claims, as well.¹⁰⁴

VII. THE WILD FREE-ROAMING HORSES AND BURROS ACT ("WILD HORSES ACT")

The Wild Free-Roaming Horses and Burros Act ("Wild Horses Act" or "Act")¹⁰⁵ protects unbranded and unclaimed horses and their descendants found on federal public lands that were identified in 1971 as having been used by a wild herd.¹⁰⁶ BLM (which administers the Act) is obligated to maintain a current inventory of such animals, and to define appropriate management population levels of such animals.¹⁰⁷

In *Friends of Animals v. BLM*,¹⁰⁸ BLM proposed a removal of wild horses known as a "gather" from a range in Utah's Cedar Creek mountains. An animal welfare organization, Friends of Animals (Friends), sought a preliminary injunction to enjoin the gather on the grounds that BLM had not adequately considered the environmental consequences of the operation and that it had not properly determined that an overpopulation of horses existed.¹⁰⁹

After considering and rejecting Friends' environmental arguments,¹¹⁰ the Federal District Court for the District of Columbia considered whether BLM failed to make a proper "excess" population determination, as required by the Act.¹¹¹ Friends asserted that BLM did not properly account for current range conditions, current herd size, and the wild horse population's role in maintaining an ecological balance.¹¹² The district court

⁹⁸28 U.S.C. § 2409a(i) (1972).

⁹⁹28 U.S.C. § 2409(g) (1972).

¹⁰⁰257 F. Supp. 3d 1039 (D.N.D. 2017).

¹⁰¹*Id.* at 1043-44.

¹⁰²*Id.* at 1060.

¹⁰³*Id.* at 1082.

¹⁰⁴*Id.* at 1083.

¹⁰⁵16 U.S.C. §§ 1331-1340 (2011).

¹⁰⁶*See* *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1433 (10th Cir. 1986).

¹⁰⁷*See* 16 U.S.C. § 1333(b)(1) (2011).

¹⁰⁸232 F. Supp. 3d 53, 56 (D.D.C. 2017).

¹⁰⁹*Id.*

¹¹⁰*Id.* at 60-63.

¹¹¹*Id.* at 63; *see also* 16 U.S.C. § 1333(b)(2) (2011).

¹¹²232 F. Supp. 3d at 63.

disagreed, however, ruling that the BLM's findings in its record of decision supported the gather.¹¹³ The court thus found that it was unlikely that Friends would succeed on the merits of its claim.¹¹⁴

¹¹³*Id.* at 63-64.

¹¹⁴*Id.* at 64.

**Chapter 23 • RENEWABLE, ALTERNATIVE, AND DISTRIBUTED ENERGY
RESOURCES
2017 Annual Report¹**

**I. STATES ADDRESS RENEWABLE ENERGY PRIORITIES THROUGH THE PUBLIC UTILITY
REGULATORY POLICIES ACT**

In 2017, multiple state public utility commissions reduced avoided cost calculations and/or contract lengths for Public Utility Regulatory Policy Act (PURPA) qualifying facilities.

Throughout 2017, the Michigan Public Service Commission (MPSC) issued a series of orders updating the state’s implementation of Section 210 of PURPA.² PURPA requires electric utilities to purchase energy and capacity from qualifying renewable energy facilities (“QFs”), and the rates are based on the utility’s avoided costs.³ Congress enacted PURPA to “encourage the development of [QFs]”⁴ because it “believed that increased use of these sources of energy would reduce the demand for traditional fossil fuels.”⁵ PURPA removes barriers for non-utility generation where such generation is cost-effective, thereby increasing competition and creating a downward pressure on future energy costs.⁶

In its [May 31, 2017 Order](#), [July 31, 2017 Order](#), and [November 21, 2017 Order](#), the MPSC laid out the framework for its new PURPA policy. The three key elements of the policy are: (1) a new methodology to calculate avoided costs, (2) an updated standard offer tariff allowing QFs with a nameplate capacity of up to two megawatts execute a standard contract, and (3) a new standard contract that allows QFs to select a contract term length of up to twenty years.⁷

The MPSC’s new framework could spur new development of solar energy facilities in Michigan. First, the new avoided cost methodology in Michigan allows QFs to select avoided costs based on the levelized cost of a proxy plant or on forecasted market prices

¹This section was edited by Christina Reichert, Associate Attorney, Southern Environmental Law Center, Nashville, Tennessee, and Eric Larson, General Counsel, Saint Paul Port Authority, Saint Paul, Minnesota. The submissions were written by Margarethe Kearney, Senior Attorney, and Jeffrey Hammons, Associate Attorney, Environmental Law & Policy Center; Aaron Levine, Senior Legal and Regulatory Analyst, National Renewable Energy Laboratory; Eric Larson; and Christina Reichert.

²16 U.S.C. § 824a-3 (2017).

³*Id.* § 824a-3(d).

⁴*Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 404 (1983).

⁵*FERC v. Mississippi*, 456 U.S. 742, 750 (1982).

⁶*See In re Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities*, 75 F.E.R.C. ¶ 61,080, at § III.C (1996) (“Congress recognized that the rising costs and decreasing efficiencies of utility-owned generating facilities were increasing rates and harming the economy as a whole.”); *see also FERC v. Mississippi*, 456 U.S. at 750–51.

⁷*Opinion & Order, In the matter, on the Commission’s own motion, establishing the method & avoided calculation for Consumer Energy Co. to fully comply with the PURPA*, Case No. U-18090 (Mich. Pub. Serv. Comm’n May 31, 2017); *Opinion & Order, In the matter, on the Commission’s own motion, establishing the method & avoided calculation for Consumer Energy Co. to fully comply with the PURPA*, Case No. U-18090 (Mich. Pub. Serv. Comm’n July 31, 2017); *Opinion & Order, In the matter, on the Commission’s own motion, establishing the method & avoided calculation for Consumer Energy Co. to fully comply with the PURPA*, Case No. U-18090 (Mich. Pub. Serv. Comm’n Nov. 21, 2017).

in MISO. For the proxy plant method, the avoided energy cost proxy is a natural gas combined cycle unit (NGCC), and the avoided capacity cost proxy is a natural gas combustion turbine unit (NGCT). Second, by allowing QFs with a nameplate capacity of two megawatts or less to use the standard offer tariff, the MPSC intends to allow larger facilities to participate in the state's implementation of PURPA. The MPSC recognized that allowing larger QFs to receive standard rates reduces transaction costs, and reduced transaction costs could promote greater development of QFs in Michigan. Third, the MPSC chose a twenty-year term because it will allow QFs in Michigan to attain necessary financing. The MPSC's reasoning follows a Federal Energy Regulatory Commission (FERC) opinion that PURPA contract term lengths "should be long enough to allow QFs reasonable opportunities to attract capital from potential investors."⁸

On December 20, 2017, the Commission [stayed](#) the policy pending decision on rehearing petitions, which should conclude during quarter one in 2018.

In Montana, the Public Service Commission (PSC) [cut](#) avoid cost rates for solar projects up to three MW by 40% and reduced contract lengths from twenty-five years to five years, with an option to negotiate for an additional five years.⁹ However, in a subsequent PSC vote, solar projects up to three megawatt (MW) [became](#) eligible for a maximum fifteen-year contract.¹⁰ Towards the end of December 2017, solar advocates filed a [lawsuit](#) against the Montana PSC and Northwestern Energy over the PSC's orders.¹¹

In North Carolina, following the passage of [HB 589](#), which lowered the eligibility for standard offer contracts under PURPA from five MW to one MW or less and shortened contract lengths from fifteen years to ten years, the North Carolina Public Utilities Commission (PUC) [ordered](#) utilities to recalculate avoided costs rates paid to PURPA qualifying facilities, which will reduce the amount paid to qualifying facilities.^{12,13}

II. ENERGY STORAGE TARGETS IN THE NORTHEAST

As variable renewable energy generation continues to grow throughout the United States, some states are setting goals for energy storage to assist integrating these variable sources of energy as well as reduce demand for peak electrical generation.

In Massachusetts, the passage of [An Act Relative to Energy Diversity, Chapter 188 of the Acts of 2016 Section 15\(b\)](#), required the Massachusetts Department of Energy Resources (DOER) to solicit input and determine whether Massachusetts should set an

⁸*Windham Solar LLC and Allco Finance Ltd.*, 157 F.E.R.C. ¶ 61,134, at ¶ 8.

⁹[Final Order](#), *In re NorthWestern Energy's Application for Interim and Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase*, Dkt. D2016.5.39, Order No. 7500c (Mont. Pub. Serv. Comm'n July 21, 2017); Tom Lutey, [Montana Has the Smallest Renewable Energy Incentives in the Region after Regulator's Vote](#), BILLINGS GAZETTE (June 23, 2017).

¹⁰Press Release, Mont. Pub. Serv. Comm'n, [PSC Adopts Request for Longer Energy Contracts](#) (Oct. 5, 2017).

¹¹[Complaint](#), *Vote Solar v. Mont. Dept. Pub. Serv. Reg.*, No. ___, (Mont. 8th D. Ct. Dec. 13, 2017); Robert Walton, [Montana Solar Advocates Sue PSC for Slashing Rates to Small Renewable Developers](#), UTIL. DIVE (Dec. 18, 2017).

¹²H.B. 589, Gen. Assemb., Sess. 2017 (N.C. 2017)

¹³Order Establishing Standard Rates & Contract Terms for Qualifying Facilities, *In re Biennial Determination of Avoided Cost Rates for Electric Utility Purchases from Qualifying Facilities—2016*, Dkt. E-100, SUB 148 (N.C. Pub. Util. Comm'n Oct. 11, 2017); Peter Maloney, [New North Carolina Regulatory Order Trims PURPA Avoided Cost Rates](#), UTIL. DIVE (Oct. 18, 2017).

energy storage target.¹⁴ In 2017, the DOER [set](#) an “aspirational” energy storage procurement target for electric distribution companies of 200 Megawatt hour (Mwh) by 2020.¹⁵

In New York, [AB A6571](#), signed into law in November 2017, established an energy storage deployment program requiring the New York Public Service Commission to commence a proceeding to establish the energy storage program and set an energy storage procurement target for 2030.¹⁶

III. SOLAR AND WIND-ANOTHER STRONG YEAR

The Net Generation and Consumption of Fuels report is updated monthly by the U.S. Energy Information Administration (EIA) and provides detailed data concerning the country’s consumption of electrical energy and the source of the electrical energy. According to the [report](#), the total sales of electricity to ultimate customers for the months of January through October of 2017 dropped 2.7% as compared to January through October of 2016. Noteworthy, comparing the same time periods, as a source of electricity, wind increased 12.6% and solar 51.1%.¹⁷

The last month of data available in October indicates that the trend of flat energy sales along with increased wind and solar as a source of energy continues. The total electric power consumed in October 2017 was 296,077 million kilowatt hours (Kwh), a 0.2% drop from the 296,681 million Kwh consumed in October 2016. And yet, even though the energy consumption was relatively flat as between October 2016 and 2017, the source of the energy consumption for the month of October 2017 when compared to October 2016 increased 21.9% from wind and 50.5% from solar Thermal and Photovoltaic.¹⁸

According to the [American Wind Energy Association](#) (AWEA), the renewable energy Perfection Tax Credit (PTC) and the Investment Tax Credit (ITC) have been keys to increasing wind as a source of energy.¹⁹ Renewable energy tax credits were reported to have been retained in the final tax bill passed Congress and signed into law by President Trump this December 2017.²⁰

IV. OFFSHORE WIND

After the plagued attempts of projects like [Cape Wind](#) off Cape Cod, Massachusetts,²¹ it appears that offshore wind is beginning to break into the American market.²² The United States’ first offshore wind farm off [Block Island](#), Rhode Island,

¹⁴An Act Relative to Energy Diversity, Chapter 188 of the Acts of 2016 Section 15(b), 2016 Sess. (Mass. 2016).

¹⁵[Letter](#) from Ma. Dept. Energy Res. to Mass. Conf. (June 30, 2017); Press Release, Ma. Gov’t, [Energy Storage Target: Summarizes the Newly Created Target for 200 Megawatt Hour \(MWh\) of Energy Storage in Mass. By 2020](#) (2017).

¹⁶ A.B. A6571, 2017-2018 Reg. Sess. (N.Y. 2017).

¹⁷U.S. EIA, *Electric Power Monthly*, Oct. 2017, tbl. ES1.B.

¹⁸*Id.*

¹⁹*Federal*, Am. Wind Energy Ass’n (last visited Apr. 30, 2018).

²⁰Ari Natter, [Tax Compromise Keeps Wind and Electric-Car Credits, Source Says](#), BLOOMBERG POLITICS (Dec. 13, 2017).

²¹Michael Gerrard, [Legal Pathways for a Massive Increase in Utility-Scale Renewable Generation Capacity](#), 47 ENVTL L. REP. 10,591 (2017).

²²Roger Drouin, [After an Uncertain Start, U.S. Offshore Wind is Powering Up](#), YALE ENVIRONMENT 360 (Jan. 11, 2018).

officially began generating electricity in December 2016.²³ The Block Island wind farm has a capacity of thirty MW and consists of five turbines.²⁴ And more projects are on the horizon, with more than twenty-five offshore wind projects with a generating capacity of twenty-four GW being planned off U.S. coastlines.²⁵ In summer 2018, Statoil, a Norwegian energy company, will begin surveying federal waters fifteen miles south of Long Island in preparations for completing a 1.5 GW wind farm, enough energy to power roughly 1 million homes.²⁶ In North Carolina, Avangrid Renewables, an Oregon-based company, plans to build a 1.5 GW wind farm 27 miles off the coast of Kitty Hawk, North Carolina.²⁷

V. PARIS AGREEMENT

On October 5, 2016, 173 nations out of 197 parties to the United Nations Climate Change convention ratified the [Paris Agreement](#). The Agreement went into full force and effect on November 4, 2016.²⁸ The first session of the Conference of the Parties was held November 15–18, 2016, in Marrakech, Morocco.²⁹

The United States signed the Paris Agreement on April 22, 2016, with a ratification acceptance date of September 3, 2016, and enforcement date of November 4, 2016.³⁰ President Donald Trump [announced](#) in June 2017 that the United States would opt out of the Paris Agreement, claiming that it threatened America’s economy and sovereignty.³¹

In a twist, state and local governments are taking the climate change policy lead. Soon after President Trump’s announcement, fourteen U.S. states declared that they would meet or exceed the Paris accord climate change goals.³² 350 mayors have reportedly adopted the Paris Agreement as well.³³

The most recent [UN Climate Change Conference](#) was held in Bonn, Germany, November 6–17, 2017, and was presided over by the Government of Fiji.

VI. REPEAL OF THE CLEAN POWER PLAN AND FEDERAL RENEWABLE ENERGY POLICY

²³Tatiana Schlossberg, [America’s First Offshore Wind Farm Spins to Life](#), N.Y. TIMES (Dec. 14, 2016).

²⁴[Block Island Wind Farm: America’s First Offshore Wind Farm](#), DEEPWATERWIND (last visited Apr. 30, 2018).

²⁵Drouin, *supra* note 22; U.S. Dept. Energy, [4 Emerging Trends in U.S. Offshore Wind Technologies](#), ENERGY.GOV (Aug. 9, 2017).

²⁶Statoil, [Statoil Names New York Offshore Wind Project “Empire Wind”](#), CISION PR NEWSWIRE (Oct. 24, 2017); Drouin, *supra* note 22.

²⁷Drouin, *supra* note 22.

²⁸Paris Agreement (2016). Annex 1, United Nations Doc. FCCC/CP/2015/10 (Jan. 29, 2016).

²⁹*Id.*

³⁰*Id.*

³¹Michael D. Shear, [Trump Will Withdraw U.S. From Paris Climate Agreement](#), NY TIMES (June 1, 2017).

³²Laurie Stern, [Minnesotans in Bonn Say Climate Progress is Up to States](#), PUB. NEWS SERV.(Nov. 10, 2017); Monique El-Faizy, [US Cities, States Vow to Honour Paris Climate Accord Despite Trump’s Withdrawal](#), FRANCE 24 (June 2, 2017); Steven Mufson, [These Titans of Industry Just Broke with Trump’s Decision to Exit the Paris Accord](#), WASH. POST (June 1, 2017) (reporting that “30 states would press ahead with their climate policies”).

³³Alissa Walker, [350 Mayors Adopt Paris Climate Accord After U.S. Pulls Out \(Updated\)](#), CURBED (July 11, 2017).

The U.S. Environmental Protection Agency (EPA) reopened public comment on the proposed repeal of the Clean Power Plan (CPP) through April 26, 2018. On January 11, 2018, the EPA [announced](#) three listening sessions on the proposed repeal of the Clean Power Plan to be held in Kansas City, Missouri on February 21, 2018, in San Francisco, California on February 28, 2018, and Gillette Wyoming on March 27, 2018.³⁴

In October 2017, EPA Administrator Scott Pruitt [announced](#), “The CPP ignored states’ concerns and eroded longstanding and important partnerships that are a necessary part of achieving positive environmental outcomes. We can now assess whether regulatory action is warranted; and, if so, what is the most appropriate path forward, consistent with the Clean Air Act and principles of cooperative federalism.”³⁵

On January 13, 2017, the EPA updated its publication entitled [“Smart Growth Fixes for Climate Adaptation and Resilience: Changing Land Use and Building Codes and Policies to Prepare for Climate Change.”](#) This 94-page document provides policy discussions and recommendations on local government smart growth strategies, increased precipitation and flood potential and management strategies, green building and energy efficiency measures, water conservation, and wildfire management and control.³⁶ The EPA promotes the *Smart Growth* publication as one that “can help local government officials, staff, and boards find strategies to prepare for climate change impacts through land use and building policies.”

VII. MISCELLANEOUS

A. *War on Coal*

In their four-page article, entitled [“Trump Seeks to Uproot the Obama Climate Change Agenda, But Can He Succeed?”](#) authors Jim Rubin and Derek Furstenwerth conclude that given the long-process for rule changes, litigation challenges, and market forces, the Trump Administration’s efforts to end the “war on coal” and to stymie climate change policies and practices “may actually result in a less effective, or at least slower, implementation process.”³⁷

B. *Renewable Fuel Standards*

In their four-page article, entitled [“Renewable Fuel Standards: Marketplace Fraud Leads to Federal Enforcement,”](#) Todd Mikolop and Felicia Barnes opine that the Renewable Fuel Standards (RFS) program will continue to incentivize private efforts to reduce greenhouse gas emissions and, as a result, federal prosecution of renewable fuels fraud cases will continue.³⁸ The RFS program requires renewable fuel producers to generate and assign Renewable Identification Numbers (RIN) to the amount and type of renewable fuel produced and imported. Fuel producers can either blend renewable fuels into transportation fuels or purchase RINs on the open market. The authors note that U.S. Department of

³⁴Press Release, EPA, EPA Schedules Three Listening Sessions on Proposed Repeal of Clean Power Plan (Jan. 11, 2018).

³⁵Press Release, EPA, EPA Takes Another Step to Advance President Trump’s America First Strategy, Proposes Repeal of “Clean Power Plan” (Oct. 10, 2017).

³⁶ *Smart Growth Fixes for Climate Adaptation*, EPA.GOV (last visited Apr. 30, 2018).

³⁷Jim Rubin & Derek Furstenwerth, *Trump Seeks to Uproot the Obama Climate Change Agenda, But Can He Succeed?*, 48 ABA SEER Trends (2017).

³⁸Todd S. Mikolop & Felicia Barnes, *Renewable Fuel Standards: Marketplace Fraud Leads to Federal Enforcement*, 48 ABA SEER Trends (2017).

Justice's (DOJ) Environment and Natural Resources Division's (ENRD) Jeffrey Wood testified before the U.S. House of Representatives that the DOJ will continue to pursue RIN prosecutions.

C. *Carbon Tax*

In his three-page article entitled "[Carbon Tax Rising?](#)," Shi-Ling Hsu noted that although carbon tax is unappealing simply because it is a tax, there are some republicans and prominent conservative economists supporting carbon tax so that the market, not politicians, determine which strategies or technologies are best.³⁹

The Harvard Environmental Law Review published a [series](#) on mechanisms that could increase the price certainty for carbon taxes.⁴⁰ "The pieces in this Symposium describe the uncertainty inherent to carbon taxes, and propose regulatory and legislative solutions that would help mitigate this uncertainty."

D. *Greenhouse Gas Emissions*

In her three-page article, entitled "[The Destiny of Natural Gas: Recent Rulings on the Foreseeability of Downstream Greenhouse Gas Emissions.](#)" Megan Berge describes the uncertainty as to whether and how environmental impact statements (EIS) completed under the National Environmental Policy Act (NEPA) must address downstream greenhouse gas (GHG) emissions.⁴¹ Bergen notes that in a 2-1 decision, on August 22, 2017, the Court of Appeals for the D.C. Circuit in [Sierra Club v. FERC](#) agreed that downstream GHG impacts were "reasonably foreseeable" and, therefore, should have been considered by the Federal Energy Regulatory Commission (FERC) when completing its EIS for a natural gas pipeline.⁴² The Court refrained from deciding whether and Interagency Working Group's estimate of the Social Cost of Carbon (SCC), completed during the Obama Administration, was the appropriate tool for calculating these downstream impacts.⁴³ In response, FERC issued a five-page [draft Supplemental Environmental Impact Statement \(DSEIS\)](#) that notably estimated the net-GHG emissions accounting for displacement of coal/oil-fired generation, without using the SCC.⁴⁴

E. *Property Assessed Clean Energy*

Property Assessed Clean Energy (PACE) is a means of financing energy savings infrastructure investment. The property owner agrees to a special assessment to be placed on its real estate that will then be recorded on its real estate tax statements to be paid along with all the other property owner's real estate taxes. The special assessment pays the loan the property owner borrows to fund the energy savings infrastructure investment, usually a ten- to twenty-year term, at or below competitive market rates. The aim is for utility savings to exceed the payment obligations, such that the investment is a positive cash flow

³⁹Shi-Ling Hsu, *Carbon Tax Rising?*, 48 ABA SEER Trends (2017).

⁴⁰Joseph E. Aldy et al., *Resolving the Inherent Uncertainty of Carbon Taxes*, 41 HARV. ENVTL. L. REV. (ONLINE) (2017).

⁴¹Megan Berge & Kyle Henne, *The Destiny of Natural Gas: Recent Rulings on the Foreseeability of Downstream Greenhouse Gas Emissions*, 49 ABA SEER Trends (2017).

⁴²867 F.3d 1357 (D.C. Cir. 2017).

⁴³*Id.*

⁴⁴FERC, Southeast Market Pipelines Project: Draft Supplemental Environmental Impact Statement (Sept. 27, 2017).

result for the owner.⁴⁵ PACE is only available in those states that authorize the use of special assessments for payment of energy savings infrastructure loans.

States have legislated for commercial or residential PACE programs. Thirty-three states have passed PACE-enabling legislation. Currently, twenty states plus the District of Columbia, have active PACE programs. California, Florida, and Missouri are the only states with residential in addition to commercial PACE programs, although Georgia is interestingly listed as having a commercial/residential PACE program, but not a stand alone residential PACE program.⁴⁶

There have been concerns that residential homeowners have been the unwitting consumer victims of residential PACE programs by over-extending their ability to pay. In December 2017 the Federal Housing Authority (FHA) announced that it will no longer allow PACE for FHA loan properties.⁴⁷ These consumer protection concerns have slowed the passage of residential PACE legislation in the United States, such as Minnesota, which has successful commercial PACE programing.⁴⁸

For 2017, the nation's top three PACE programs are located in California, Connecticut, and Minnesota.⁴⁹

⁴⁵[MinnPACE: Largest Provider of Minnesota PACE Financing](#), MINNPACE (last visited Apr. 30, 2018).

⁴⁶[PACE Programs Near You](#), PACENATION (last visited Apr. 30, 2018).

⁴⁷[PACE News](#), PACENATION (last visited Apr. 30, 2018).

⁴⁸[Residential Property Assessed Clean Energy Consumer Protection Task Force](#), MINN. COMMERCE DEP'T (last visited Apr. 30, 2018).

⁴⁹[PACE Market Data](#), PACENATION (last visited Apr. 30, 2018).

Chapter 24 • WATER RESOURCES
2017 Annual Report¹

I. FEDERAL DEVELOPMENTS

A. *Alaska*

1. Judicial Developments

In *Sturgeon v. Frost*² the United States Court of Appeals for the Ninth Circuit, on remand from the United States Supreme Court,³ found that the [Alaska National Interest Lands Conservation Act](#) (ANILCA)⁴ did not limit the National Parks Service from applying a hovercraft ban on the Nation River because the United States held an implied reservation of water rights, which rendered the river “public lands” under ANILCA.

¹This chapter summarizes significant state and federal developments in water resources in late 2016 and 2017. Editor: Mitra M. Pemberton, [White & Jankowski LLP](#), Denver, Colorado. Co-editors: Rachel S. Anderson, [Fabian VanCott](#), Salt Lake City, Utah; Emily Bergeron, PhD.; Elizabeth P. Ewens, [Ellison, Schneider Harris & Donlan L.L.P.](#), Sacramento, California; Chris Bromley, [McHugh Bromley, PLLC](#), Boise, Idaho; and Elizabeth Newlin Taylor, Taylor & McCaleb, PA, Corrales, New Mexico. The editors were ably assisted by the correspondents listed below who authored the states’ reports. The correspondents are: for Alaska, George R. Lyle and Adam Harki, [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, Craig A. Carnes, Jr., Shawnda M. Grady, and Janelle S.H. Krattiger, [Ellison, Schneider & Harris & Donlan L.L.P.](#), Sacramento, California; for Colorado, Dulcinea Z. Hanuschak, [Brownstein Hyatt Farber Schreck LLP](#), Denver, Colorado; for Idaho, Garrick L. Baxter and Emmi Blades, Deputy Attorneys General, Idaho Department of Water Resources, Boise, Idaho; for Kansas, David M. Traster, [Foulston Siefkin LLP](#), Wichita, Kansas; for Montana, Holly J. Franz, Franz & Driscoll, PLLP, Helena, Montana; for Nebraska, LeRoy W. Sievers, Legal Counsel, Nebraska Department of Natural Resources, Lincoln, Nebraska; for Nevada, Karen A. Peterson, Justin M. Townsend, and Willis M. Wagner of Allison MacKenzie, Ltd. in Carson City, Nevada; for New Mexico, Elizabeth Newlin Taylor, Taylor & McCaleb, PA, Corrales, New Mexico; for North Dakota, Jennifer L. Verleger, Assistant Attorney General, Bismarck, North Dakota; for Oklahoma, Jonathan Allen, Assistant General Counsel, Oklahoma Water Resources Board, Oklahoma City, Oklahoma; for Oregon, Laura A. Schroeder, Lindsay Thane, and Sarah R. Liljefelt, [Schroeder Law Offices, P.C.](#), Portland, Oregon; for South Dakota, Ann Mines, Assistant Attorney General, Sioux Falls, South Dakota; for Texas, Andrew S. “Drew” Miller, [Kemp Smith LLP](#), Austin, Texas; for Utah, Rachel S. Anderson, [Fabian VanCott](#), Salt Lake City, Utah; for Washington, Tadas A. Kisielius and Adam W. Gravley, [Van Ness, Feldman LLP](#), Seattle, Washington; for Wyoming, Jenifer E. Scoggin and Sami L. Falzone, [Holland & Hart LLP](#), Cheyenne, Wyoming; for the Eastern States, Emily Bergeron, PhD.; and for the Great Lakes States, Nicholas J. Schroeck, Director, Transnational Environmental Law Clinic, Assistant Clinical Professor, [Wayne State University Law School](#), Detroit, Michigan.

²872 F.3d 927 (9th Cir. 2017).

³136 S. Ct. 1061, 1062 (2016).

⁴16 U.S.C. § 3103(c) (1980).

B. Arizona

The United States and Mexico in September 2017 agreed in [Minute 323](#)⁵ to update and extend a 2012 agreement regarding conservation and allocation of Colorado River water. Among other things, Minute 323 mandates the following: Sets annual increased amounts of Colorado River water Mexico may receive if Lake Mead exceeds certain high elevations; sets annual delivery reductions to the United States and Mexico if Lake Mead elevations fall below certain low elevations; sets annual savings amounts to avoid shortage through a Binational Water Scarcity Contingency Plan; continues the ability of Mexico to store water in the United States including through a Revolving Account and Intentionally Created Mexican Allocation and defines the conditions of recovery of stored water; sets mutual commitments to provide water for environmental purposes within Mexico; commits the United States to contribute \$31.5 million to Mexico to develop conservation projects, with the water savings being allocated as agreed; and establishes a Binational Projects Work Group to evaluate mutual projects including desalination plants and reuse projects.

In [United States v. Gila Valley Irrigation District](#),⁶ the United States Court of Appeals for the Ninth Circuit Court reviewed the district court's rejection of a number of water rights sever and transfer applications under the Globe Equity Decree.⁷ In addition to a detailed review of issues regarding sever and transfer requirements and abandonment, the Ninth Circuit rejected the lower court's ruling that pre-1919 water rights are not subject to statutory forfeiture.⁸ Since the Arizona Supreme Court held in [San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa](#)⁹ that the Legislature could not retroactively provide protection against statutory forfeiture to pre-1919 water rights that may have already been forfeited to others, the Ninth Circuit reasoned that "the Arizona Supreme Court necessarily held that the 1995 amendment constituted a change in the law" and thus the Arizona Supreme Court "had already found that statutory forfeiture applies to pre-1919 water rights."¹⁰

C. California

In [Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District](#),¹¹ the United States Ninth Circuit Court of Appeal held that the United States impliedly reserved appurtenant water sources, including groundwater, when it created a reservation for the Agua Caliente Band of Cahuilla Indians in the Coachella Valley. The court reasoned that the [Winters](#)¹² doctrine (i.e., when Congress reserves land for a federal purpose, it reserves water appurtenant to the land to the extent necessary to accomplish the purpose) does not distinguish between surface water and groundwater. In July 2017, petitions for

⁵Extension of Cooperative Measures and Adoption of a Binational Water Scarcity Contingency Plan in the Colorado River Basin (Minute 323), International Boundary and Water Commission, U.S.-Mexico, 59 Stat. 1219 (Minute 323 is an additional agreement to the Treaty Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944.).

⁶859 F.3d 789 (9th Cir. 2017).

⁷See *United States v. Gila Valley Irrigation Dist.*, 31 F.3d 1428, 1430-31 (9th Cir. 1994) (brief history of the Globe Equity Decree).

⁸859 F.3d at 806.

⁹972 P.2d at 189-90, 201. (Ariz. 1999).

¹⁰*Id.* at 806-07.

¹¹849 F.3d 1262 (9th Cir. 2017).

¹²207 U.S. 564 (1908).

writ of certiorari were filed with the U.S. Supreme Court. The State of Nevada submitted a [Brief of Amicus Curiae](#) with the Supreme Court of the United States in support of petitions for certiorari.

In [San Luis & Delta Mendota Water Authority v. Haugrud](#),¹³ the United States Ninth Circuit Court of Appeal held that the U.S. Bureau of Reclamation (Reclamation) did not violate the Reclamation Act of 1955, the Central Valley Project Improvement Act (CVPIA), or the Reclamation Act of 1902 when it augmented its scheduled water releases from the Lewiston Dam on the Trinity River in order to protect fish many miles downstream in the lower Klamath River. The court reasoned that the plain language of the Reclamation Act of 1955 gave Reclamation the authority to release water to protect downstream fish. Similarly, the court reasoned that Reclamation's actions to aid fish in the lower Klamath River did not violate provisions of the CVPIA focusing on the Trinity River. Finally, the court reasoned that the releases did not violate California water law, and thus did not violate state water permitting requirements.

D. *Maine*

In [Penobscot Nation v. Mills](#), the First Circuit Court of Appeals ruled in favor of the State of Maine in a case brought in 2012 by the Penobscot Nation.¹⁴ The Nation sued the State after the attorney general issued an opinion that the State possessed the sole authority to stop or regulate paddlers, hunters, and anglers on the Penobscot River. The First Circuit Court of Appeals ruled that the tribe had authority only over the reserved lands on the river and not over the water itself, based on the "plain meaning" of the Maine Implementing Act.¹⁵ The decision went further, holding that the State has not interfered with, nor does it intend to interfere with, the Nation's subsistence fishing rights. The court determined that federal courts lack jurisdiction to adjudicate the question of the Nation's fishing rights because the issue is not ripe and the tribe lacks standing.

E. *Nevada*

On August 30, 2017, the Ninth Circuit Court of Appeals heard oral arguments on nine appeals taken from three separate orders entered by the U.S. District Court for the District of Nevada in [United States v. Walker River Irrigation District](#),¹⁶ relating to the Walker River Decree. Six of the appeals concern (a) whether the Nevada State Engineer and the California State Water Resources Control Board properly considered potential impacts to junior storage rights irrigators when each approved a change in the manner and place of use of senior rights from irrigation to instream; (b) whether state or federal law applies in considering injury to junior rights under a federal decree; and (c) whether Walker Lake is located within the basin of the Walker River for purposes of construing the Walker River Decree.¹⁷ Two of the appeals concern application of the public trust doctrine to the Walker River Decree, and the final appeal concerns federal and tribal requests to establish additional senior federal reserved water rights under the Walker River Decree.

The State of Nevada submitted a [Brief of Amicus Curiae](#) with the Supreme Court of the United States in support of petitions for certiorari filed by [Coachella Valley Water](#)

¹³848 F.3d 1216 (9th Cir. 2017).

¹⁴861 F.3d 324, 338 (1st Cir. 2017).

¹⁵30 ME. REV. STAT. ANN. § 6203(8) (2010).

¹⁶See, e.g., No. 3:73-cv-00125-RCJ-WGC, 2015 WL 3439106 (D. Nev. May 28, 2015).

¹⁷*Id.*

[District](#),¹⁸ a case discussed in more detail in the preceding section.

F. North Dakota

In 2005 the Province of Manitoba sued the Secretary of the Department of the Interior and officials of the Bureau of Reclamation (Bureau), challenging their compliance with the National Environmental Policy Act (NEPA) in approving a project to transfer water between river basins for the Northwest Area Water Supply (NAWS). North Dakota intervened as a defendant. The United States District Court for the District of Columbia, *Government of Manitoba v. Norton*,¹⁹ remanded to the Bureau and subsequently entered an order partially granting Manitoba’s motion for permanent injunction but allowing certain project-related activities to proceed. Following the Bureau’s NEPA analysis, Missouri filed a separate challenge, alleging that the Bureau’s Environmental Impact Statement (EIS) did not properly account for cumulative effects of water withdrawal from the Missouri river. Following consolidation of Missouri’s and Manitoba’s cases, the district court, *Government of Manitoba v. Salazar*,²⁰ again remanded to the Bureau. After completion of further NEPA review, North Dakota moved to modify the injunction, seeking permission to begin the “paper design” of a water treatment plant, a key element of NAWS. The district court denied the motion. North Dakota appealed in [Government of Manitoba v. Zinke](#).²¹ Oral argument was held regarding modification of injunction. The United States Court of Appeals for the District of Columbia Circuit overturned the district Court and remanded with instructions to modify the injunction to allow the water treatment plant design. North Dakota believes this is the first case in which an appellate court has found that the issuance of a Supplemental EIS and Record of Decision constituted changed circumstances worthy of reconsidering the scope of an injunction. North Dakota’s motions for summary judgment were granted on August 10, 2017. The judgment has been appealed.

G. Oregon

In [Central Oregon LandWatch v. Connaughton](#),²² the Ninth Circuit Court of Appeals found the U.S. Forest Service’s issuance of a Special Use Permit (“SUP”) authorizing upgrades to the City of Bend’s intake facility for withdrawing water at a location on the Deschutes National Forest, properly complied with the Federal Land Policy and Management Act, the National Forest Management Act, and the National Environmental Policy Act (NEPA). The court found the Forest Service was not required to set minimum instream flow requirements to meet Inland Native Fish Strategy guidelines because the Forest Service found that doing so would do little to positively impact stream flows in Tumalo Creek, and the decision was therefore not arbitrary and capricious. The court also determined the Environmental Assessment satisfied NEPA when it considered implementation of the project and a “no action” alternative based on the current SUP because it sufficiently explained that groundwater-only options would not allow the City to provide safe and reliable water supply, and would reduce water flows in other areas of the Deschutes River. Finally, the court determined that NEPA did not require the Forest Service to conduct a qualitative analysis of the impact of climate change.

¹⁸Docket 17-40. Coachella Valley Water Dist. v. Agua Caliente Band of Cahuilla Indians, No. 15-55896 (9th Cir. 2017).

¹⁹398 F. Supp. 2d 41 (D.D.C. 2005).

²⁰691 F. Supp. 2d 37 (D.D.C. 2010).

²¹849 F.3d 1111 (D.C. Cir. 2017).

²²696 F. App’x 816 (9th Cir. 2017).

H. Wyoming

1. Judicial

In *Montana v. Wyoming*,²³ which concerns the dispute between the states over the interpretation of the 1950 Yellowstone River Compact, the Special Master issued his [opinion](#) on remedies on December 19, 2016, which (i) granted Wyoming’s motion for summary judgment as to damages, but “subject to Montana’s right to pursue a water remedy instead of monetary damages and to Montana’s right to propose an alternative calculation of pre-judgment interest”; (ii) denied Wyoming’s motion for summary judgment on declaratory relief and granted Montana’s summary judgment motion, finding that “Montana holds an appropriative right, protected by Article V(A) of the Compact to store up to the pre-1950 capacity of the Tongue River Reservoir”; (iii) found injunctive relief inappropriate because of Montana’s inability to show a “cognizable danger of recurrent violation;” and (iv) granted Wyoming’s motion for summary judgment on costs, in part.²⁴

Montana subsequently filed a [proposed judgment](#)²⁵ and decree and brief in support to which Wyoming took issue and submitted its own [proposed decree](#).²⁶ Montana then filed a [response](#) to Wyoming’s proposed decree and brief, along with a revised judgment and decree.²⁷ A [hearing](#) was held on May 1, 2017, by the Special Master on the appropriate form of the final judgment and declaratory relief in the case, and the award of costs.²⁸ The Special Master’s draft report with decree was expected on May 15, 2017.²⁹ However, as of December 6, 2017, no report has been filed with the Supreme Court. After submission of the Special Master’s report and decree, the parties will have one final opportunity to file exceptions to the U.S. Supreme Court.³⁰

II. STATE DEVELOPMENTS

A. Arizona

1. Legislative

In [S.B. 1412](#),³¹ the Arizona Legislature amended a number of statutes in Title 45 relating to the treatment of *de minimis* water uses within surface water adjudication cases that had been determined unconstitutional in *San Carlos Apache Tribe v. Superior Court*

²³552 U.S. 1175 (2008). North Dakota is also named as a defendant because it is a signatory to the Compact, but Montana seeks no relief against North Dakota in this current litigation.

²⁴Opinion of the Special Master on Remedies, *Montana v. Wyoming*, 552 U.S. 1175 (2008) (Dec. 19, 2016).

²⁵Montana’s Proposed Judgment and Decree and Brief in Support, *Montana v. Wyoming*, 552 U.S. 1175 (2008) (Feb. 10, 2017).

²⁶Wyoming’s Proposed Decree and Brief in Support, *Montana v. Wyoming*, 552 U.S. 1175 (2008) (Feb. 27, 2017).

²⁷Montana’s Response to Wyoming’s Proposed Decree and Brief, *Montana v. Wyoming*, 552 U.S. 1175 (2008) (Mar. 13, 2017).

²⁸Hearing Transcript, *Montana v. Wyoming*, 552 U.S. 1175 (May 1, 2017).

²⁹*Id.* at 152.

³⁰*Id.* at 154.

³¹S.B. 1412, 53rd Leg., 1st Reg. Sess. (Ariz. 2017); ARIZ. REV. STAT. ANN. §§ 45-182, 251, 254, 256-58, and 261.

ex rel. County of Maricopa.³² A new definition of “small water use claims” was added that includes stockponds with a capacity of no more than fifteen acre-feet, wells with a maximum pumping capacity of not more than thirty-five gallons per minute, and stockwatering directly from certain sources.³³ The determination of such small water use claims by the court (other than through settlement or as a part of a larger water user’s claims) must be deferred until all other claims in any subwatershed are determined.³⁴

In [H.B. 2482](#),³⁵ the Arizona Legislature amended the assured water supply certificate requirement for new subdivisions located within Active Management Areas to exempt certain owners and lessors of subdivided land from having to seek the assignment of an existing certificate. The Arizona Department of Water Resources offers an application process through which a person who proposes to offer subdivided land for sale or lease may obtain written confirmation of the exemption status for a subdivision.

2. Administrative

On March 27, 2017, the Director of the Department of Water Resources on administrative appeal [upheld](#) the Department’s earlier decision denying an application for an analysis of assured water supply that sought to rely solely on Agua Fria River surface water withdrawn from wells.³⁶ The Director found that the applicant failed to demonstrate surface water would be legally, physically, and continuously available for 100 years. The Director’s decision has been [appealed](#) to the Maricopa County Superior Court.³⁷

B. California

1. Legislative

On October 6, 2017, California Governor Jerry Brown signed [Assembly Bill 574](#).³⁸ The bill encourages the development of the potable reuse of water to mitigate the impact of long-term drought and climate change, and requires that on or before June 1, 2018, the California State Water Resources Control Board (SWRCB) should establish a framework for the regulation of potable reuse projects. The bill requires the SWRCB to adopt uniform water recycling criteria for direct potable reuse through raw water augmentation by December 31, 2023 (subject to extension).

On October 3, 2017, Governor Brown signed [Assembly Bill 1361](#).³⁹ The bill provides municipal water districts with additional authority to provide water service to Indian lands that are not within the district’s service area.

³²972 P.2d 179, 186 (Ariz. 1999).

³³S.B. 1412, *supra* note 31.

³⁴*Id.*

³⁵H.B. 2482, 53rd Leg., 1st Reg. Sess. (Ariz. 2017); ARIZ. REV. STAT. ANN. § 45-576.

³⁶Final Administrative Decision, In the Matter of the Dep’t of Water Res.’ Denial of Yavapai Land Holding, LLC’s Application for Analysis of Assured Water Supply Application No. 28-402259.0000, Case No. 16A-AWS001-DWR (Ariz. Dep’t of Water Res. Mar. 27, 2017, [rehearing denied](#), May 22, 2017).

³⁷Appeal for Judicial Review, Yavapai Land Holding, LLC v. Arizona Dep’t of Water Res., No. LC2017-000227 (Ariz. Super. Ct. Maricopa County filed June 26, 2017).

³⁸A.B. 574, 2017-18 Reg. Sess. (Cal. 2017).

³⁹A.B. 1361, 2017-18 Reg. Sess. (Cal. 2017).

On October 6, 2017, Governor Brown signed [Senate Bill 252](#).⁴⁰ The bill is aimed at protecting critically overdrafted groundwater basins until implementation of the Sustainable Groundwater Management Act (SGMA) is further along in those basins. With some exceptions, the bill requires cities and counties overlying critically overdrafted groundwater basins to require detailed information from applicants for new groundwater wells, and to make said application information available to the public and groundwater sustainability agencies (GSA) in the basin. The bill becomes inoperative on January 30, 2020 and is repealed as of January 1, 2021.

On July 17, 2017, Governor Brown signed [Assembly Bill 321](#).⁴¹ The bill specifically includes farmers, ranchers, and dairy professionals within the definition of agricultural users whose interests must be considered by a GSA under SGMA.

On September 28, 2017, Governor Brown signed [Senate Bill 372](#).⁴² The bill created the San Joaquin River Exchange Contractors Groundwater Sustainability Agency as the exclusive GSA under SGMA for a specified area that covers parts of the Counties of Fresno, Madera, Merced, and Stanislaus. The bill requires the new GSA to develop and implement a groundwater sustainability plan (GSP) to achieve sustainable groundwater management within the boundaries of the agency.

2. Judicial

In [Orange County Water District v. Sabic Innovative Plastics US, LLC](#),⁴³ Division One of the Fourth Appellate District of the California Court of Appeal held that a water district's appropriative water rights in a groundwater basin were insufficient to support a trespass cause of action for contamination of the basin. The court reasoned that because appropriative rights to groundwater are usufructuary and do not confer a right to possess a specific body of water, they cannot support a trespass cause of action that is aimed at protecting possessory property interests. However, because any property interest is sufficient to support a nuisance cause of action, the court found that appropriative water rights were sufficient to support a nuisance cause of action.

In [San Diego County Water Authority v. Metropolitan Water District of Southern California](#),⁴⁴ Division Three of the First Appellate District of the California Court of Appeal held that a water district may lawfully include system-wide transportation costs for use of State Water Project facilities in its water wheeling rates, but may not include a water stewardship rate component designed to fund water conservation programs. The court reasoned that the State Water Project facilities were an integral part of the water district's transportation system for which the water district had to pay certain costs, and said allocable costs were thus recoverable in its wheeling rates. The court rejected the inclusion of the water stewardship rate in the water district's water wheeling rates because it is not a cost of using the conveyance system to wheel water.

In [Central San Joaquin Water Conservation District v. Stockton East Water District](#),⁴⁵ the Third Appellate District of the California Court of Appeal affirmed the trial court's determination that wheeling rates for non-member agencies must be determined on a case-by-case basis taking into consideration the applicable statutory factors and may not be set purely on a pro rata allocation of the wheeling agency's fixed costs. The court

⁴⁰S.B. 252, 2017-18 Reg. Sess. (Cal. 2017).

⁴¹A.B. 321, 2017-18 Reg. Sess. (Cal. 2017).

⁴²S.B. 372, 2017-18 Reg. Sess. (Cal. 2017).

⁴³222 Cal. Rptr. 3d 83 (Cal. Ct. App. 2017).

⁴⁴220 Cal. Rptr. 3d 346 (Cal. Ct. App. 2017).

⁴⁵213 Cal Rptr. 3d 294 (Cal. Ct. App. 2016).

rejected the non-member agency’s assertion that the wheeling agency was limited to charging only the marginal or incremental costs associated with wheeling water.

3. Administrative

On April 7, 2017, Governor Brown issued [Executive Order B-40-17](#)⁴⁶ (“EO B-40-17”), which ended the drought State of Emergency in most of California, while maintaining water reporting requirements and prohibitions on certain practices. EO B-40-17 also directed the SWRCB and several other agencies to continue with actions to establish permanent measures to make conservation a California way of life, as identified in Governor Brown’s [California Water Action Plan](#) (2014) and as required by [Executive Order B-37-16](#) (2016).

In April 2017, the SWRCB and other California agencies issued a final report titled [Making Water Conservation a California Way of Life](#) (“Report”), which outlines the framework for implementing the four primary objectives set forth in Executive Order B-37-16 (2016): (1) use water more wisely; (2) eliminate water waste; (3) strengthen local drought resilience; and (4) improve drought planning and agricultural water use efficiency.

On November 1, 2017, the SWRCB issued a [proposed regulation](#) providing for permanent prohibitions on certain “wasteful” water uses and imposing water conservation directives.

Throughout 2017, the SWRCB held [hearings](#) on the water rights change petition for the [California WaterFix Project](#) (WaterFix), a project that will add points of diversion of water on the Sacramento River (for the State Water Project (SWP) and Central Valley Project (CVP)) to allow the diversion of water around the Sacramento-San Joaquin Delta via two large underground tunnels. Part 1 of the proceedings focused on potential impacts of WaterFix on agricultural and municipal uses and associated legal users of water. Part 2 of the proceeding is scheduled to begin in early 2018 and will focus on potential impacts of the project on fish and wildlife. Relatedly, in 2017: (1) the U.S. National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (FWS) issued biological opinions concluding that WaterFix is not likely to jeopardize the continued existence of or adversely modify the designated critical habitat of listed species ([NMFS Biological Opinion](#); [FWS Biological Opinion](#)); (2) the California Department of Fish and Wildlife issued an [incidental take permit](#) for future operations of the SWP and CVP with the addition of WaterFix; and (3) the California Department of Water Resources certified the [Bay Delta Conservation Plan/California WaterFix Final Environmental Impact Report/Environmental Impact Statement](#).

The SWRCB is engaged in a [multi-phase process](#) to develop and implement an update to its *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary* (Bay-Delta Plan). In 2017, the SWRCB received [public comments](#) on its [draft revised substitute environmental document](#) for [Phase 1](#) (addresses flow requirements in the San Joaquin River watershed for the protection of fish and wildlife and salinity requirements in the southern Delta for the protection of agriculture) of the update. On October 4, 2017, the SWRCB posted the [final scientific basis report](#) for [Phase 2](#) (addresses the reasonable protection of fish and wildlife beneficial uses in the Sacramento River and its tributaries, the Delta, and the Mokelumne, Calaveras, and Cosumnes rivers) of the update.

State and local agencies took a number of actions in 2017 to implement SGMA. Many local agencies have formed [GSAs](#) that will be responsible for managing the basins by establishing [GSPs](#). Other local agencies have submitted [GSP alternative plans](#) to comply

⁴⁶Cal. Exec. Order No. B-40-17 (Apr. 7, 2017).

with SGMA, and DWR is currently reviewing the sufficiency of these plans. Additionally, the SWRCB adopted an [emergency regulation](#)⁴⁷ to implement its responsibilities under SGMA, including the collection of groundwater extraction and reporting fees.

C. Colorado

1. Legislative

[House Bill 17-1289](#)⁴⁸ instructed the water resources review committee, created in C.R.S. section 37-98-102, to study during the 2017 interim session whether the State Engineer should be given statutory authority to promulgate rules to adopt a non-binding, streamlined methodology for calculating historical consumptive use of a water right.

[C.R.S. section 37-90-137](#)⁴⁹ was amended to require the State Engineer to promulgate, by July 1, 2018, rules regarding permitting and using water that is artificially recharged into a nontributary aquifer.

[C.R.S. section 37-92-305](#)⁵⁰ was added to clarify that absolute and conditional water rights decreed as of July 15, 2015 as exempt from the Colorado Supreme Court's interpretation of C.R.S. section 37-92-103(4) in [St. Jude's Co. v. Roaring Fork Club, LLC](#).⁵¹ Such grandfathered rights may be maintained through findings of reasonable diligence and made absolute, and augmentation plans related to such rights may be approved; however, any change of these rights must be limited to changes in the points of diversion.

[C.R.S. section 37-90-115](#)⁵² was amended so that decisions of the Colorado Groundwater Commission or State Engineer on appeal to district court are reviewed *de novo*, and the court may consider only evidence that was introduced during the administrative proceeding, unless the evidence was excluded wrongly from the proceeding or the evidence existed during the time of the proceeding, but was not discovered until after the proceeding and could not have been identified and offered during the proceeding through the exercise of good faith and reasonable diligence.

[C.R.S. section 37-90-113](#)⁵³ allows the Groundwater Commission or its agents to refer a Commission matter to alternative dispute resolution.

[C.R.S. section 37-60-115](#)⁵⁴ was amended to expand the number of agricultural fallowing and leasing pilot projects the Colorado Water Conservation Board may select to a total of fifteen, and increases the number of projects that may be located in any one of Colorado's major river basins. In addition, the statute was amended to require the Board to (1) establish criteria and guidelines that include, at minimum, criteria for selecting pilot

⁴⁷23 Emergency Regulation for Implementation of the Sustainable Groundwater Management Act, Cal. Code. Regs. 23 §§ 1030-1046 (May 16, 2017).

⁴⁸H.B. 17-1289, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017).

⁴⁹H.B. 17-1076, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017) (amending COLO. REV. STAT. § 37-90-137(9)(d)).

⁵⁰H.B. 17-1190, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017) (adding COLO. REV. STAT. § 37-92-305(20)).

⁵¹351 P.3d 442 (Colo. 2015).

⁵²S.B. 17-036, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017) (amending COLO. REV. STAT. § 37-90-115(1)(b)(III)).

⁵³S.B. 17-036, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017) (adding COLO. REV. STAT. § 37-90-113(4)).

⁵⁴H.B. 17-1219, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017) (amending COLO. REV. STAT. § 37-50-115(8)(a), (8)(d)(IX), (8)(i), and (8)(j)).

projects over a period; and (2) submit a final report on the results of the pilot projects to the water resources review committee by a date certain. The amendment repeals C.R.S. § 37-60-115(8) effective September 1, 2035.

[C.R.S. section 37-92-305](#)⁵⁵ was amended so that when the water judge determines the amount of historical consumptive use of a water right, the water judge shall not consider any decrease in consumptive use that results from nonuse or decreased use, for a maximum of five years in any consecutive ten-year period, based on participation in a pre-approved pilot program.

[C.R.S. section 37-87-101](#)⁵⁶ provides that water rights decreed for storage, changed in water court, and for which the historical consumptive use was previously quantified, may be stored in alternate storage locations on the same ditch or diversion system, provided that certain statutory requirements are met. Persons claiming injury to her water rights as a result of the use of the alternate storage location are entitled to a *de novo* hearing before the water court. [C.R.S. section 37-92-103](#) was amended to exclude such changes in storage location from the definition of “change of water right.”

[C.R. S. section 37-92-311](#)⁵⁷ was added to provide that agricultural water rights may be used to grow industrial hemp, and that “industrial hemp” adopts the meaning set forth in C.R.S. § 35-61-101(7).

The [Irrigation District Law of 1921](#)⁵⁸ underwent substantial revision, including amendments and additions to revise voting procedures, contract approval procedures, procedures for maintaining district accounts and payment of general expenses including expenses for maintaining the district’s water infrastructure, and procedures for lease or sale of surplus water.

[House Bill 17-026](#)⁵⁹ updated certain statutory provisions related to the discharge of the duties of the office of the State Engineer. These updates include language modernization, gender-neutral references to the State Engineer, and updates to technological references, such as to telemetry-based monitoring systems.

⁵⁵H.B. 17-1233, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017) (amending COLO. REV. STAT. § 37-92-305(3)(c)).

⁵⁶H.B. 17-1291, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017) (adding COLO. REV. STAT. § 37-87-101(3) and amending COLO. REV. STAT. § 37-92-103, introductory portion and (5)).

⁵⁷S.B. 17-117, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017) (adding COLO. REV. STAT. § 37-92-311).

⁵⁸H.B. 17-1030, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017) (repealing COLO. REV. STAT. § 37-42-106(2); amending COLO. REV. STAT. §§ 37-42-107(1), 37-42-108(1), 37-42-110(2)(b), (3), and (7); repealing COLO. REV. STAT. § 37-42-110(4); amending COLO. REV. STAT. §§ 37-42-111, § 37-42-112, 37-42-113 (1) and (2); adding COLO. REV. STAT. § 37-42-113(4); amending COLO. REV. STAT. §§ 37-42-114 (1) and (3), 37-42-128 (4) and (6); repealing COLO. REV. STAT. §§ 37-42-128 (1),(3), and (5), 37-42-129; amending COLO. REV. STAT. § 37-42-131(2); repealing COLO. REV. STAT. § 37-42-131(1); amending COLO. REV. STAT. §§ 37-42-135, 37-42-137, 37-42-140, and 37-42-141).

⁵⁹H.B. 17-026, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017) (amending COLO. REV. STAT. §§ 37-80-101, 37-80-102(1)(b), (1)(j), (1)(k), (1)(l) and (10), 37-80-105, 37-80-106, 37-80-107, 37-80-108, 37-80-109, 37-80-110(1)(i); repealing COLO. REV. STAT. § 37-80-110(1)(a), (1)(b), (1)(c), (1)(d), (1)(f), (1)(g), (1)(h), and (2); amending COLO. REV. STAT. §§ 37-80-111.5(1)(c) and (3), 37-80-112, 37-80-114, 37-84-117, and 37-87-103; repealing COLO. REV. STAT. § 37-88-102; amending COLO. REV. STAT. §§ 37-88-102, 37-90-116(2), 37-92-308(4)(a)(III), and 37-92-401(1)(b), (1)(c), (2), and (4)).

2. Judicial

In [*Select Energy Services, LLC v. K-LOW, LLC*](#),⁶⁰ the Colorado Supreme Court affirmed the Water Court's determination that based on the language in a simple change decree entered pursuant to C.R.S. section 37-92-305(3.5), the decree unambiguously changed the point of diversion for a surface water right to a point downstream, and thereby extinguished the original diversion point.

In [*Gallegos Family Properties, LLC v. Colorado Groundwater Commission*](#),⁶¹ the Colorado Supreme Court affirmed the Water Court's determination that de-designation of a portion of the Upper Crow Creek Designated Groundwater Basin was not warranted. The Supreme Court found that the Plaintiff failed to satisfy the de-designation standards in C.R.S. section 37-90-106(1)(a) and demonstrate that "future conditions require and factual data justify" redrawing the Basin boundaries because Gallegos did not present evidence that was not before the Groundwater Commission during the Basin designation hearing to show that wells in the Basin had more than a *de minimus* impact on Gallegos's surface water rights based on connectivity between surface and groundwater resources. The Supreme Court also affirmed the lower court's decision to award the well owners their fees as prevailing parties under C.R.C.P. 54(d) in the litigation, reasoning that the owners were necessary parties to the litigation and incurred reasonable expenses, including expert witness fees.

D. Idaho

1. Legislative

[House Bill 319](#)⁶² amended Idaho Code section 42-202A, which governs applications for temporary approval of water use in Idaho. Prior to the amendment, Idaho Code section 42-202A allowed the Director (Director) of the Idaho Department of Water Resources (Department) to issue a temporary approval "for a use not intended to become an established water right . . . [and] [f]or any other use which will not exceed a total diverted volume of five (5) acre feet for the duration of the approval, [which] . . . shall not exceed one (1) year."⁶³ House Bill 319 removes the five acre-feet (AF) limitation for three specific uses: prevention of flood damage, ground water recharge, and ground or surface water remediation.

[House Bills 169](#),⁶⁴ [170](#),⁶⁵ and [171](#)⁶⁶ relate to the Federal Energy Regulatory Commission's process of relicensing Idaho Power Company's Hells Canyon Project on the Idaho-Oregon border. As part of the relicensing process, the State of Oregon has taken the position that Idaho Power Company must "implement fish passage and reintroduction of anadromous fish above Hells Canyon Project."⁶⁷ These three bills reflect Idaho's opposition to reintroduction of anadromous fish above the Hells Canyon Project. [House](#)

⁶⁰394 P.3d 695 (Colo. 2017).

⁶¹398 P.3d 599 (Colo. 2017).

⁶²H.B. 319, 64th Leg., 1st Reg. Sess. (Idaho 2017).

⁶³*Id.*

⁶⁴H.B. 169, 64th Leg., 1st Reg. Sess. (Idaho 2017).

⁶⁵H.B. 170, 64th Leg., 1st Reg. Sess. (Idaho 2017).

⁶⁶H.B. 171, 64th Leg., 1st Reg. Sess. (Idaho 2017).

⁶⁷Statement of Purpose, H.B. 169, 64th Leg., 1st Reg. Sess. (Idaho 2017).

[Joint Memorial 2](#)⁶⁸ provides that the Legislature oppose efforts to introduce or reintroduce aquatic species into Idaho waters without the consent of the State.

[Senate Bill 1111](#) codified the findings of the Idaho Supreme Court in *Joyce Livestock Co. v. United States*⁶⁹ wherein “the court held that agencies of the federal government cannot hold stock water rights unless they put the water to beneficial use by watering livestock owned by the agency.”⁷⁰ Idaho Code section 42-501 now quotes portions of the *Joyce Livestock* decision and states “[i]t is the intent of the Legislature to codify and enhance these important points of law from the *Joyce* case to protect Idaho stockwater right holders from encroachment by the federal government in navigable and nonnavigable waters.”⁷¹

2. Judicial

In [City of Blackfoot v. Spackman](#),⁷² the Idaho Supreme Court affirmed the Department’s denial of a new water right application for the City of Blackfoot. The City filed a new water right application for ground water and proposed to mitigate injury to existing water rights by conducting ground water recharge using a surface water right. The Department denied the City’s application because ground water recharge was not authorized by the relevant decree. The Court agreed by concluding recharge must be included in the purpose of use element before a water right may be used for recharge.

The court also rejected the City’s argument that language in the private settlement agreement referenced in the decree trumps the plain language of the decree, as well as the City’s argument that it may use water right 1-181C as mitigation “because it is undisputed that . . . ‘seepage’ occurs,” in connection with the City’s authorized use of water right 1-181C.⁷³ The court explained that, while it is undisputed such seepage occurs, because the purpose of use element does not contain recharge as a beneficial use, the recharge “is incidental” and cannot be “used as the basis for claim of a separate or expanded water right.”⁷⁴ The court concluded that, if the City wants to use water right 1-181C “for recharge it must file for a transfer” pursuant to Idaho Code section 42-222.⁷⁵

3. Administrative

2017 was the first year for implementation of the settlement agreement between the Surface Water Coalition and the Idaho Groundwater Appropriators, Inc. (IGWA) which was submitted to and approved by the Department in 2016 as a [stipulated mitigation plan](#) to resolve a long-standing water delivery call by the surface water coalition (SWC) on the Eastern Snake Plain Aquifer (ESPA). In the settlement agreement, the SWC and IGWA agreed to, among other things: (1) a total ground water diversion reduction of 240,000 AF annually accomplished by each Ground Water and Irrigation District “reducing their proportionate share of the total annual ground water reduction” or “conducting an equivalent private recharge activity”; (2) annual delivery of 50,000 AF “of storage water through private lease(s) of water from the Upper Snake Reservoir system, delivered to the

⁶⁸H.J.M. 2, 64th Leg., 1st Reg. Sess. (Idaho 2017).

⁶⁹156 P.3d 502 (Idaho 2007).

⁷⁰S.B. 1111, 64th Leg., 1st Reg. Sess. (Idaho 2017) (Statement of Purpose).

⁷¹*Id.*

⁷²396 P.3d 1184 (Idaho 2017).

⁷³*Id.* at 1192.

⁷⁴*Id.*

⁷⁵*Id.*

SWC”; (3) ground water users not irrigating sooner than April 1 or later than October 31; (4) installation of approved closed-conduit flow meters on all ground water diversions by the beginning of the 2018 irrigation season; (5) establishment of a certain ground water level goal and benchmarks to “[s]tabilize and ultimately reverse the trend of declining ground water levels”; (6) contributions by the SWC and IGWA to the state-sponsored managed recharge program; and (7) “[i]f any of the benchmarks or ground water level goal is not met,” implementation of “additional recharge, consumptive use reductions, or other measures[.]”⁷⁶ In IGWA’s first year of implementing the settlement agreement, IGWA [self-reported](#)⁷⁷ reducing ground water diversions by 125,989 AF and recharging 100,499 AF. After reviewing IGWA’s report, the Department determined IGWA reduced ground water diversions by 96,655 AF and recharged 101,274 AF.⁷⁸ IGWA will submit an annual [report](#)⁷⁹ for year two implementation achievements by April 1, 2018. In addition, from October 25, 2016, to July 7, 2017, the Idaho Water Resource Board (IWRB) [recharged](#)⁸⁰ 317,714 AF across all of Idaho. Since August 30, 2017, and as of November 5, 2017, the IWRB has already recharged 85,897 AF.⁸¹

E. Kansas

1. Legislative

The 2017 Legislature amended the procedures for review by the Secretary of Agriculture or by an administrative hearing officer from the Department of Administration of certain orders issued by the Chief Engineer.⁸²

Provisions dealing with impairment were amended to require exhaustion of administrative remedies before filing suit.⁸³

The provision permitting a water right owner or group of owners to enter into a “consent agreement” with the chief engineer to establish a water conservation area was amended to provide for a “management plan” covering a defined area and to close the area to new appropriations.⁸⁴

2. Administrative

The Division of Water Resources (DWR) made significant changes to its civil penalty regulations. The amendments classify various violations and include a penalty

⁷⁶Surface Water Coalition’s and IGWA’s Stipulated Mitigation Plan and Request for Order, In the Matter of IGWA’s Settlement Agreement Mitigation Plan (Idaho Dep’t of Water Res. Mar. 9, 2016) (Section 3.a Consumptive Use Volume Reduction).

⁷⁷Slide 9, Natural Resources Interim Committee, Legislative Water Issues Update: Implementation of the Settlement Agreement and Current Status of the Class II UIC Program, (Nov. 8, 2017) (Slide 9).

⁷⁸*Id.*

⁷⁹Surface Water Coalition’s and IGWA’s Stipulated Mitigation Plan and Request for Order, In the Matter of IGWA’s Settlement Agreement Mitigation Plan (Idaho Dep’t of Water Res. Mar. 9, 2016) (Section 3.a Consumptive Use Volume Reduction).

⁸⁰Idaho Legislature Interim Committee on Natural Resource, Update on Water Supply and ESPA Managed Recharge, Slide 22 (Nov. 8, 2017).

⁸¹*Id.* Slide 28.

⁸²[2017 Kan. Sess. Laws 120-21](#) (amending KAN. STAT. ANN. § 82a-1901).

⁸³*Id.* at 352-53 (amending KAN. STAT. ANN. §§ 82a-716, 82a-717a).

⁸⁴*Id.* at 354-57 amending Kan. Stat. Ann. § 82a-745.

matrix.⁸⁵ A new section establishes a separate civil penalty matrix for over-pumping a water right.⁸⁶ Both the amended and the new sections include provisions codifying DWR's long-held policy that enforcement will be against the owner of a water right even if a tenant or third party was responsible for the violation.

DWR regulations governing the water right change approval process were simplified by establishing a default, county-by-county quantity that can be changed from irrigation to some other type of use without exceeding the original net consumptive irrigation use from the local source of water supply.⁸⁷

DWR amended a regulation that allows it to render diversion works inoperable when it has reason to believe that an order is being violated.⁸⁸

Well spacing requirements in the Western Kansas Groundwater Management District No. 1 were increased from one-half mile to at least four miles.⁸⁹

F. Montana

1. Legislative

[H.B. 48](#)⁹⁰ clarifies that changes in the method of irrigation do not trigger the need to obtain a change authorization from the Department of Natural Resources and Conservation.

[H.B. 49](#)⁹¹ allows water right ownership updates to occur based on information from the Department of Revenue or the Department of Natural Resources and Conservation.

[H.B. 99](#)⁹² eliminates the requirement for an applicant to prove a water use permit will not adversely affect any water right for which the water right owner has filed a written consent for approval of the permit.

[H.B. 110](#)⁹³ amends the process for filing statements of claim for domestic and stock water rights that were exempt from previous filing deadlines in the statewide adjudication and establishes a June 30, 2019 deadline for filing such claims.

[H.B. 124](#)⁹⁴ requires a water commissioner to complete training provided by the Department of Natural Resources and Conservation before distributing water, unless excused by a district court judge.

[H.B. 140](#)⁹⁵ clarifies that owners of 15% of the water rights affected by a decree or the owners of 15% of the flow rate of the water rights affected by a decree may petition a district court for appointment of a water commissioner.

[H.B. 337](#)⁹⁶ requires the Department of Natural Resources and Conservation to review existing state water reservations at least every ten years and provide the Water Policy Interim Committee with a summary of the reviews by 2026.

⁸⁵[36 KAN. REG. 823-24](#) (June 29, 2017) (amending KAN. ADMIN. REGS. § 5-14-10).

⁸⁶*Id.* at 825-26 (enacting KAN. ADMIN. REGS. § 5-14-12).

⁸⁷[36 KAN. REG. 1036-38](#) (Sept. 7, 2017) (amending KAN. ADMIN. REGS. §§ 5-5-9, 5-5-10, 5-5-16).

⁸⁸[Rules and Regulations](#), Kansas Water Appropriation Act at 35 (Sept. 2017).

⁸⁹[36 KAN. REG. 160](#) (Mar. 2, 2017) (amending KAN. ADMIN. REGS. § 5-21-3).

⁹⁰H.B. 48, 65th Leg., Gen. Sess. (Mont. 2016).

⁹¹H.B. 49, 65th Leg., Gen. Sess. (Mont. 2016).

⁹²H.B. 99, 65th Leg., Gen. Sess. (Mont. 2016).

⁹³H.B. 110, 65th Leg., Gen. Sess. (Mont. 2016).

⁹⁴H.B. 124, 65th Leg., Gen. Sess. (Mont. 2016).

⁹⁵H.B. 140, 65th Leg., Gen. Sess. (Mont. 2016).

⁹⁶H.B. 337, 65th Leg., Gen. Sess. (Mont. 2016).

[H.B. 360](#)⁹⁷ Establishes the Surface Water Assessment and Monitoring Program at the Montana Bureau of Mines and Geology.

[H.B. 368](#)⁹⁸ removes the 500-foot setback requirement between sewage lagoons and groundwater wells and allows the Department of Environmental Quality to establish setback requirements.

[H.B. 429](#)⁹⁹ exempts appropriations of water for emergency fire training and emergency fire-related operations from the Department of Natural Resources and Conservation permitting process.

[S.B. 28](#)¹⁰⁰ allows a party aggrieved by a Department of Natural Resources and Conservation decision on a water rights permit or change authorization to appeal to the water court in addition to the district court.

2. Judicial

In [City of Helena v. Community of Rimini](#),¹⁰¹ the Montana Supreme Court found that the 2005 statute¹⁰² creating a presumption of nonabandonment for municipal water rights merely changes the burden of proof and thus is a procedural change rather than an impermissible retroactive change of substantive law.

In [BLM v. Barthelmess](#),¹⁰³ the Montana Supreme Court held that the Bureau of Land Management (BLM) was entitled to appropriate water in its reservoirs for use by grazing permittees even though it is not a public service corporation and does not directly charge money for use of the water. The Court ruled that “[c]harging money for the use of water is not a requirement for perfecting a water right for ‘sale, rental or disposal to others.’”

In [Mack v. Anderson](#),¹⁰⁴ the Montana Supreme Court ruled that a district court has jurisdiction to determine the point of diversion for a ditch involved in an easement dispute despite the water court’s exclusive jurisdiction to adjudicate existing water rights. The Supreme Court’s decision was based on the district court’s jurisdiction to supervise the distribution of water through ditches.

In [Quigley v. Beck](#),¹⁰⁵ the Montana Supreme Court upheld the water court’s decision to disregard the places of use described in pleadings filed by the parties’ common predecessor in a previous decree. The Court ruled that the water court properly determined the water rights at issue were appurtenant to the entirety of the irrigated lands owned by the parties’ common predecessor.

In [Flathead Joint Board of Control v. State of Montana](#),¹⁰⁶ the Montana Supreme Court ruled the Confederated Salish and Kootenai Tribes Compact did not provide any immunity to the State and did not violate the Montana Constitutional provision requiring a 2/3 vote of each house of the Montana legislature to impose sovereign immunity from suit.

⁹⁷H.B. 360, 65th Leg., Gen. Sess. (Mont. 2016).

⁹⁸H.B. 368, 65th Leg., Gen. Sess. (Mont. 2016).

⁹⁹H.B. 429, 65th Leg., Gen. Sess. (Mont. 2016).

¹⁰⁰S.B. 28, 65th Leg., Gen. Sess. (Mont. 2016).

¹⁰¹397 P.3d 1 (Mont. 2017).

¹⁰²2005 MONT. CODE ANN. § 85-2-227 (West 2005).

¹⁰³386 P.3d 952 (Mont. 2016).

¹⁰⁴384 P.3d 730 (Mont. 2017).

¹⁰⁵405 P.3d 627 (Mont. 2017).

¹⁰⁶405 P.3d 88 (Mont. 2017).

In *Danreuther Ranches v. Farmers Cooperative Canal Co.*,¹⁰⁷ the Montana Supreme Court upheld the water court's determination that the objector failed to overcome, by a preponderance of the evidence, the presumption that the contents of a statement of claim are true and correct.

*In re Scott Ranch, LLC*¹⁰⁸ involves land within the Crow Reservation which was held in trust by the United States until 2006 when fee patents were issued. The lands were subsequently conveyed by a tribal member to Scott Ranch, a non-tribal member. The Montana Supreme Court ruled Scott Ranch owned *Walton* rights which are recognized under the Crow Tribal Compact as a water right arising under state law. Additionally, the Supreme Court also ruled that even though Scott Ranch and its predecessor could not have filed water right claims by the deadline, the water court lacks jurisdiction to adjudicate the *Walton* rights because all statements of claim had to be filed by 1996.

G. Nebraska

1. Judicial

In *Frenchman-Cambridge Irrigation District v. Department of Natural Resources*,¹⁰⁹ an irrigation district challenged the joint approval of integrated management plans that allowed a 20% reduction in ground water pumping in the Republican River Basin. The Nebraska Supreme Court found that the irrigation district did not have standing because it failed to show that the integrated management plans caused an injury-in-fact.

In *Estermann v. Bose*,¹¹⁰ Estermann, a landowner, filed a complaint for injunction against board members of the Nebraska Cooperative Republican Platte Enhancement (N-CORPE) project. N-CORPE was created by four local natural resources districts (NRDs) and as such is a state political subdivision to develop a "stream flow augmentation project." Its stated purpose was to assist the NRDs in managing ground water and surface water in the Republican River Basin and to comply with the Republican River Compact. The landowner sought an injunction to prohibit N-CORPE from obtaining an easement across his property. A state district court granted summary judgment for the board members of N-CORPE and Estermann appealed. The Nebraska Supreme Court affirmed, holding, among other things, that the common law does not prohibit N-CORPE from removing ground water from the overlying land. Relying on Neb. Rev. Stat. section 2-3238, the court found that N-CORPE is an "integrated management plan" created by the NRDs, and therefore is authorized to withdraw ground water from a well field to augment the flow of a creek.

In *Medicine Creek LLC v. Middle Republican Natural Resources District*,¹¹¹ Medicine Creek LLC was denied a variance from Middle Republican Natural Resources District's (MRNRD) moratorium on new well drilling. The Nebraska Supreme Court reversed and remanded for application of the *de novo* standard of review.

In *Hill v. State*,¹¹² the Department of Natural Resources (DNR) sent closing notices to a group of appropriators who had surface water permits for natural flow and storage in the Republican River Basin. The appropriators filed suit alleging two regulatory takings claims. The Nebraska Supreme Court affirmed, holding that administration of water rights pursuant to the Republican River Compact, a federal law, constituted reasonable

¹⁰⁷403 P.3d 332 (Mont. 2017).

¹⁰⁸402 P.3d 1207 (Mont. 2017).

¹⁰⁹902 N.W.2d 159 (Neb. 2017).

¹¹⁰892 N.W.2d 857 (Neb. 2017).

¹¹¹892 N.W.2d 74 (Neb. 2017).

¹¹²894 N.W.2d 208 (Neb. 2017).

regulations by the State. The Court also held that “the DNR does not have a duty to regulate ground water, thus a failure by the DNR to regulate . . . does not give rise to a cause of action for inverse condemnation.”

H. Nevada

1. Legislative

In 2017, the Nevada Legislature enacted [Senate Bill 47](#)¹¹³ which requires the “State Engineer to prepare a water inventory for each basin in the State,” declares that “the policy of the State is to manage conjunctively all sources of water in the State,” and requires applications to include volume of water in acre-feet. The Bill also revises the provisions governing forfeiture, and adds criteria the State Engineer must consider in deciding whether to grant or deny under an extension of time to prevent the working of a forfeiture.

[Senate Bill 51](#)¹¹⁴ revises provisions relating to the adjudication of water rights on stream systems. It changes “requirements relating to the notice of a pending determination of certain water rights,” and revises “requirements for hydrological surveys and maps prepared by the State Engineer.” Further, the Bill revises the information that must accompany a proof of appropriation, and alters the time period in which a person may intervene in an adjudication determination.

[Senate Bill 74](#)¹¹⁵ provides that Water Conservation Plan reviews can take up to 120 days, up from the 30 days previously permitted. Water Conservation Plans must also now address certain new criteria.

[Assembly Bill 138](#)¹¹⁶ exempts from permit requirements the “de minimus collection of precipitation from the rooftop of a single-family dwelling for nonpotable domestic use or, under certain circumstances, in a guzzler to provide water to wildlife.”

[Assembly Bill 209](#)¹¹⁷ adds to the list of criteria the State Engineer will consider in review of a request to extend the time to prevent the working of a forfeiture. This Bill also “authorizes the State Engineer to extend the time necessary to work a forfeiture for a period of not more than three years in a basin: (1) where the withdrawals consistently exceed the perennial yield; or (2) in a basin that has been designated as a critical management area.”

[Assembly Bill 270](#)¹¹⁸ creates a deadline for filing claims of vested rights by December 31, 2027. Failure to do so will deem the claim abandoned.

2. Judicial

In [State Engineer v. Eureka County](#),¹¹⁹ the Nevada Supreme Court held a Nevada District Court could vacate on remand water use permits that had been issued to a mining company, after a previous remand.¹²⁰ The mining company and the State Engineer argued the District Court should have remanded to the State Engineer for additional fact-finding. The Supreme Court refused, and held the mining company previously failed to offer sufficient evidence in support of its permit applications.

¹¹³S.B. 47, 79th Leg. Gen. Sess. (Nev. 2017).

¹¹⁴S.B. 51, 79th Leg. Gen. Sess. (Nev. 2017).

¹¹⁵S.B. 74, 79th Leg. Gen. Sess. (Nev. 2017).

¹¹⁶Assemb. B. 138, 79th Leg. Gen. Sess. (Nev. 2017).

¹¹⁷Assemb. B. 209, 79th Leg. Gen. Sess. (Nev. 2017).

¹¹⁸Assemb. B. 270, 79th Leg. Gen. Sess. (Nev. 2017).

¹¹⁹402 P.3d 1249 (Nev. 2017).

¹²⁰*Eureka Cty. v. State Eng’r (Eureka I)*, 359 P.3d 1114 (Nev. 2015).

In [*Bentley v. State Engineer*](#),¹²¹ the Bentleys challenged the State Engineer's imposition of a mandatory rotation schedule on water rights holders in the absence of an agreement between the water right holders. In 2016, the Bentleys had unsuccessfully appealed a substantially identical imposition by the State Engineer on the same water right holders. Following their 2016 loss, the Bentleys sought approval from the State Engineer to change the manner of use of their water rights from irrigation to recreation. The State Engineer approved the request subject to the rotation schedule previously imposed. The Nevada Supreme Court held the doctrine of the law of the case applied and that, because the Nevada Supreme Court had already affirmed the imposition of a rotation schedule on the rights in question, it could not review that decision again and, on that basis, affirmed the State Engineer's decision.

3. Administrative

In 2017, the State Engineer issued [Preliminary Draft Regulations](#)¹²² regarding the Humboldt River Basin, proposing "rules for a Mitigation Program for the Humboldt River and its tributaries as identified in the Humboldt River Decree and hydrologically connected groundwater" as well as "rules for mitigation of conflicts through water replacement or other mitigation measures."

The State Engineer issued an [Order of Determination](#)¹²³ for the waters of Pony Canyon Creek and its tributaries located within the Upper Reese River Valley Hydrographic Basin in Lander County, Nevada.

The State Engineer's Order [#1281](#)¹²⁴ designated the Buffalo Valley Hydrographic Basin in Humboldt, Lander and Pershing Counties, Nevada and State Engineer's Order [#1282A](#)¹²⁵ designated the Grass Valley Hydrographic Basin in Lander and Eureka Counties, Nevada.

The State Engineer issued Order [#1283](#)¹²⁶ and Order [#1284](#)¹²⁷ amending conditions and permit provisions issued to the Cortez Joint Venture in the Crescent Valley Hydrographic Basin in Lander and Eureka Counties, Nevada.

¹²¹387 P.3d 212 (Table) (Nev. 2017).

¹²²STATE ENGINEER'S PRELIMINARY DRAFT REGULATIONS FOR THE CONJUNCTIVE MANAGEMENT OF THE WATERS OF THE HUMBOLDT RIVER BASIN (July 17, 2017).

¹²³STATE ENGINEER'S ORDER OF DETERMINATION (July 17, 2017).

¹²⁴STATE ENGINEER'S ORDER NO. 1281, DESIGNATING AND DESCRIBING THE BUFFALO VALLEY HYDROGRAPHIC BASIN (10-131) WITHIN HUMBOLDT, LANDER AND PERSHING COUNTIES, NEVADA (Mar. 17, 2017).

¹²⁵STATE ENGINEER'S ORDER NO. 1282A, DESIGNATING AND DESCRIBING THE GRASS VALLEY HYDROGRAPHIC BASIN (10-138) WITHIN LANDER AND EUREKA COUNTIES, NEVADA (Mar. 21, 2017).

¹²⁶STATE ENGINEER'S ORDER NO. 1283, AMENDING CONDITIONS AND PROVISIONS OF PERMITS ISSUED TO THE CORTEZ JOIN VENTURE TO APPROPRIATE UNDERGROUND WATER OF THE CRESCENT VALLEY HYDROGRAPHIC BASIN (4-54), LANDER AND EUREKA COUNTIES, NEVADA (May 16, 2017).

¹²⁷STATE ENGINEER'S ORDER NO. 1284, AMENDING CONDITIONS AND PROVISIONS OF PERMITS ISSUED TO THE CORTEZ JOIN VENTURE TO APPROPRIATE UNDERGROUND WATER OF THE CRESCENT VALLEY HYDROGRAPHIC BASIN (4-54), LANDER AND EUREKA COUNTIES, NEVADA (May 16, 2017).

The State Engineer's Order [#1285](#)¹²⁸ and Order [#1286](#)¹²⁹ require water users of the Little Humboldt River and its tributaries and the Humboldt River and its tributaries to install and maintain headgates and measuring devices.

The State Engineer's Order [#1287](#)¹³⁰ further curtails new appropriations of groundwater in the Churchill Valley Hydrographic Basin in Lyon, Churchill, Douglas and Storey Counties, Nevada and Order [#1290](#)¹³¹ curtails new appropriations of groundwater in the Pine Forest Valley Hydrographic Basin.

I. New Mexico

No significant state developments were reported for 2017.

J. North Dakota

1. Legislative

The 2017 Legislature enacted [House Bill No. 1390](#)¹³² amending the requirements of [North Dakota Century Code \(NDCC\) section 61-32-03.1](#) for acquiring permits to install subsurface water management systems comprising eighty acres of land area or more. The legislation was declared to be an emergency measure and became effective April 13, 2017.

The Legislature also enacted [Senate Bill No. 2134](#)¹³³ creating [NDCC ch. 61-33.1](#) defining the ordinary high water mark of the Missouri riverbed to establish state sovereign land mineral ownership and providing a method to review the ordinary high water mark for segments of the riverbed.¹³⁴ The legislation was declared to be an emergency measure and became effective April 21, 2017.¹³⁵

K. Oklahoma

1. Judicial

The Court of Civil Appeals, Division IV, affirmed an order of the Oklahoma Water Resources Board (OWRB) setting the Maximum Annual Yield (MAY) for the Arbuckle-Simpson Groundwater Basin. The OWRB's order embodied the state's first

¹²⁸See, e.g., STATE ENGINEER'S ORDER NO. 1285, REQUIRING WATER USERS OF THE LITTLE HUMBOLDT RIVER AND ITS TRIBUTARIES TO INSTALL AND MAINTAIN HEADGATES AND MEASURING DEVICES (June 8, 2017).

¹²⁹See, e.g., STATE ENGINEER'S ORDER NO. 1286, REQUIRING WATER USERS OF THE LITTLE HUMBOLDT RIVER AND ITS TRIBUTARIES TO INSTALL AND MAINTAIN HEADGATES AND MEASURING DEVICES (June 23, 2017).

¹³⁰STATE ENGINEER'S ORDER NO. 1287, FURTHER CURTAILING NEW APPROPRIATIONS OF GROUNDWATER WITHIN THE CHURCHILL VALLEY HYDROGRAPHIC BASIN (102), LYON, CHURCHILL, DOUGLAS AND STOREY COUNTIES, NEVADA (Aug. 4, 2017).

¹³¹STATE ENGINEER'S ORDER NO. 1290, CURTAILING NEW APPROPRIATIONS OF GROUNDWATER WITHIN THE PINE FOREST VALLEY HYDROGRAPHIC BASIN (029) (Sept. 14, 2017).

¹³²2017 N.D. Sess. Laws ch. 420 § 2.

¹³³2017 N.D. Sess. Laws ch. 426.

¹³⁴*Id.*

¹³⁵*Id.*

implementation of [Senate Bill 288](#),¹³⁶ enacted in 2003. [Senate Bill 288](#) prohibited the OWRB from issuing groundwater permits which would reduce the “natural flow” of springs and streams draining “sensitive sole source groundwater basins.”¹³⁷ Senate Bill 288 was the first act of the Oklahoma Legislature which addressed a connection between groundwater and stream water in Oklahoma's system for administration of rights to the use of groundwater. The Oklahoma Supreme Court had previously rejected a facial challenge to [Senate Bill 288](#) in [Jacobs Ranch, L.L.C. v. Smith](#).¹³⁸

The OWRB's order set the maximum amount of groundwater which may be withdrawn annually under permits from the Arbuckle-Simpson, a sensitive sole source groundwater basin as defined in [82 O.S. section 1020.9A](#). Where temporary permits had previously authorized the withdrawal of up to two acre-feet per acre of land overlying the aquifer,¹³⁹ the OWRB's order limited that amount to 0.2 acre-feet per acre. Those challenging the order argued that such a restriction on the use of groundwater, a private property right in Oklahoma,¹⁴⁰ was a de facto “taking” that required compensation under the Oklahoma and US constitutions. The District Court and Court of Civil Appeals disagreed. A Petition for Writ of Certiorari is pending before the Oklahoma Supreme Court.

2. Administrative

On October 10, 2017, the Oklahoma Water Resources Board (OWRB) issued an [administrative order](#)¹⁴¹ authorizing the appropriation and diversion of 115,000 acre-feet per year of stream water from the Kiamichi River Basin. Pursuant to the terms of the permit, Oklahoma City will release water currently held in Sardis Lake Reservoir where it will travel to one of four authorized diversion points on the Kiamichi River in Pushmataha County, Oklahoma, where the water will be transported to Oklahoma City. The OWRB's administrative order has been appealed.

The authorized inter-basin transfer was the subject of the recent tribal water rights Settlement Agreement¹⁴² reached in the case of [Chickasaw Nation and Choctaw Nation of Oklahoma v. Mary Fallin, ex rel. State of Oklahoma](#).¹⁴³ The settlement agreement allowed Oklahoma City access to water from Sardis Lake and the Kiamichi River (located in the Settlement Area) upon certain conditions; for example, including lake level release and minimum stream flow restrictions designed to protect existing recreational and ecological uses.¹⁴⁴

¹³⁶Codified in 82 O.S. §§ [1020.9A](#), [1020.9B](#), and [1020.9\(A\)\(1\)\(d\)](#).

¹³⁷82 O.S. § [1020.9A\(B\)\(2\)](#); 82 O.S. § [1020.9B\(B\)](#); *see also* 82 O.S. § [1020.9\(A\)\(1\)\(d\)](#).

¹³⁸[2006 OK 34, 148 P.3d 842](#).

¹³⁹*See* 82 O.S. § [1020.11\(B\)\(2\)](#) (“[T]he water allocated by a temporary permit shall not be less than two (2) acre-feet annually for each acre of land owned or leased by the applicant in the basin or subbasin.”).

¹⁴⁰*See* [60 O.S. § 60](#) (“The owner of the land owns water standing thereon, or flowing over or under its surface but not forming a definite stream.”).

¹⁴¹Findings of Fact, Conclusions of Law and Board Order, Application No. 2007-0017, *In the Matter of the Application of the City of Oklahoma City for a Regular Permit to Divert Stream Water In Pushmataha County, Okla.*, Before the Oklahoma Water Resources Board (Oct. 10, 2017).

¹⁴²[State of Oklahoma, Choctaw Nation of Oklahoma, Chickasaw Nation, City of Oklahoma City Water Settlement, August 2016](#) (“Settlement”).

¹⁴³No. CIV-11-927-W (W.D. Okla filed Aug. 8, 2011).

¹⁴⁴Settlement, at pp. 43-60.

L. Oregon

1. Legislative

[House Bill 3051](#),¹⁴⁵ amending ORS 536.021, allows the Oregon Water Resource Department (OWRD) to partner with well owners to fund the installation of devices to measure groundwater use.

[House Bill 2295](#),¹⁴⁶ amending and adding new provisions to ORS chapters 536, 537, and 539, allows for an increase in fees on water right transactions.

[House Bill 2722](#),¹⁴⁷ amending and adding new provisions to ORS chapters 94 and 100, establishes that condominium or community governing documents that impose irrigation requirements may not be enforced during a drought declaration by the Governor or a finding of drought by the Water Resources Commission.

[House Bill 2099](#),¹⁴⁸ amending ORS chapter 537, conditions the approval of a municipal water use permit holder's extension of time to complete beneficial use on OWRD approval of a water management and conservation plan. The holder of the permit may divert the undeveloped portion of the permit only upon OWRD's approval of the water management and conservation plan.

[House Bill 2785](#),¹⁴⁹ amending ORS 196.905, exempts from removal fill requirements lands zoned for exclusive farm use, forest use, or mixed farm and forest use that were established on or before January 1, 2017 under certain conditions.

2. Judicial

In [Willamette Water Co. v. Waterwatch of Or., Inc.](#),¹⁵⁰ the Oregon Court of Appeals reviewed and affirmed a final order of the Water Resources Commission denying Willamette Water Company's application for a permit to divert from the McKenzie River. The court found the statutory public interest presumption was overcome because 1) the Company failed to apply for local government land use approval and 2) water delivery was not anticipated to be needed until a minimum of ten years, well beyond the 5-year statutory completion of beneficial use deadline.

In [WaterWatch v. Oregon Water Resources Department and Warm Springs Hydro](#),¹⁵¹ the Marion County Circuit Court reviewed an order issued by the OWRD granting renewal of an instream lease of a hydroelectric water use right. Oregon Revised Statute 543A.305 requires OWRD to convert a hydroelectric right to an in-stream water use right five years after the use of water under a hydroelectric water right ceases. The Court determined successive instream leases of the hydroelectric water use right constituted "use" of water under Oregon's statutory scheme, and therefore OWRD did not fail to comply with ORS 543A.305 when it did not convert the hydroelectric right to a permanent in-stream right.

¹⁴⁵H.B. 3051, 79th Leg. Assemb., 2017 Reg. Sess. (Or. 2017).

¹⁴⁶H.B. 2295, 79th Leg. Assemb., 2017 Reg. Sess. (Or. 2017).

¹⁴⁷H.B. 2722, 79th Leg. Assemb., 2017 Reg. Sess. (Or. 2017).

¹⁴⁸H.B. 2099, 79th Leg. Assemb., 2017 Reg. Sess. (Or. 2017).

¹⁴⁹H.B. 2785, 79th Leg. Assemb., 2017 Reg. Sess. (Or. 2017).

¹⁵⁰288 Or. App. 778 (2017).

¹⁵¹No. 16-CV-11938 (Marion Cnty. Cir. Court, Letter Opinion, May 9, 2017).

3. Administrative

OWRD adopted new rules and amended the current [Oregon Administrative Rules \(OAR\) chapter 690, division 507](#), classifying the Walla Walla Subbasin as a Serious Water Management Problem Area (“SWMPA”). The rules will limit new uses of groundwater resources to only new exempt uses. Additionally, the establishment of a SWMPA per ORS 540.435 requires that owners of wells that draw water from the basalt aquifer within the SWMPA must meter, measure and report use to OWRD annually.¹⁵²

M. South Dakota

1. Legislative

After the South Dakota Supreme Court issued its opinion in [Duerre v. Hepler](#),¹⁵³ the Department of Game, Fish, and Parks (Department) closed a number of points of public access on nonmeandered water bodies. In response to the decision and the actions of the Department, the South Dakota Legislature appointed a 15-member legislative study committee. The committee held several meetings to gather information and public comment and then proposed legislation, also known as the [Open Waters Compromise](#), and recommended the Governor call a special session.

In June, the Legislature met in special session and passed [H.B. 1001](#),¹⁵⁴ which was subsequently signed into law. The legislation provides that all nonmeandered waters overlying private property are open for recreation unless the landowner marks the area as closed.¹⁵⁵ The Legislature prohibited trapping or hunting on the frozen surface without permission of the landowner.¹⁵⁶ Further, entrance upon the private property or a closed section of water without landowner permission constitutes a criminal trespass.¹⁵⁷ Additionally, landowners are specifically prohibited from receiving financial compensation in exchange for permission to recreate on a nonmeandered water that the landowner has closed.¹⁵⁸ Several specific water bodies, also referred to as Section 8 lakes due to the legislation, were determined to be open for public recreation due to the history of recreational use of those waters and the expenditure of public funds to improve access prior to January 1, 2017, and may only be closed by petition of the landowner to the Game, Fish and Parks Commission (Commission).¹⁵⁹ The Commission was charged with promulgating rules whereby landowners of those Section 8 lakes could petition for the closure of the water to the public.¹⁶⁰ The legislation also delegates authority to the Department to enter into agreements with landowners regarding public access to these waters.¹⁶¹ Finally, the Legislature included an emergency clause making this legislation

¹⁵²OR. ADMIN. R. ch. 690, div. 507.

¹⁵³892 N.W.2d 209 (S.D. 2017).

¹⁵⁴2017s S.D. Sess. Laws.

¹⁵⁵S.D.C.L. § 41-23-5 (2017).

¹⁵⁶S.D.C.L. § 41-23-15 (2017).

¹⁵⁷S.D.C.L. § 41-23-18 (2017).

¹⁵⁸S.D.C.L. § 41-23-6 (2017) (providing that accepting financial compensation in exchange for permission to fish a closed area constitutes a Class 1 misdemeanor).

¹⁵⁹S.D.C.L. § 41-23-7 and § 41-23-8 (2017).

¹⁶⁰S.D.C.L. § 41-23-9 (2017).

¹⁶¹S.D. Codified Laws § 41-23-3 (2017) (authority to enter agreements); § 41-23-12 (2017) (authority to promulgate rules regarding marker standards); § 41-23-13 (2017) (publication

immediately operative and further enacted a sunset provision whereby the statutory scheme is repealed on June 30, 2018.¹⁶²

2. Judicial

In *Duerre v. Hepler*,¹⁶³ the South Dakota Supreme Court affirmed its prior holding that all water in South Dakota is held in trust by the State for the public, and that the South Dakota Legislature must determine if recreation is a permissible use under the public trust doctrine. The case was brought by several landowners whose inundated lands had become popular fishing and hunting grounds, and whom wished to exclude the public without their permission. The circuit court held that because the South Dakota Legislature had not yet recognized recreation as part of the public trust doctrine pursuant to *Parks v. Cooper*,¹⁶⁴ the public had no right to the water for recreation. The court entered an injunction prohibiting public recreational use of the water without the permission of the landowner and also prohibiting the Department from facilitating access to said waters. The South Dakota Supreme Court reversed the injunction with regard to the prohibition of public use, and went on to modify the second provision prohibiting the Department from facilitating access to those waters in the absence of authorization from the Legislature.

N. Texas

1. Legislative

[Senate Bill 864](#) amends the chapter of the Texas Water Code governing surface water rights and permitting to require that special notice be given to a “groundwater conservation district” (GCD) when an applicant for a permit granting a surface water right at the Texas Commission on Environmental Quality (TCEQ) proposes to use groundwater from a well located within the GCD as an alternative source of water.

[Senate Bill 1009](#) amends the chapter of the Texas Water Code governing GCDs to limit what a GCD may require an applicant to include in a permit application to a list of statutory items, plus other information as set forth in a rule which is reasonably related to an issue that the GCD is authorized to consider.

[Senate Bill 1511](#) requires that Texas’ state water plan include implementation information on projects previously deemed “high priority” by the Texas Water Development Board. It also adds representatives of the Texas Soil and Water Conservation Board as *ex officio* members of the regional water planning groups, requires said groups to amend plans to exclude infeasible water management projects, and authorizes a simplified planning cycle if there have been no significant changes to water availability, supply or demand within the area.

[Senate Bill 1430](#) amends the chapter of the Texas Water Code governing surface water rights and permitting to provide an existing surface water rights holder who begins using desalinated seawater with a right to expedited consideration of an application to amend their water rights to add or move a diversion point. It also limits the length of a contested case evidentiary hearing on such an application to 270 days.

of closed areas); §§ 41-23-16 and 17 (2017) (authority to promulgate rules to open portions of closed areas for transportation); and § 41-23-19 (2017) (report to Executive Board).

¹⁶²H.B. 1001 § 21, 2017 Leg. (S.D. 2017).

¹⁶³892 N.W.2d 209 (S.D. 2017).

¹⁶⁴676 N.W.2d 823 (S.D. 2004).

2. Judicial

In [*Upper Trinity Regional Water District v. National Wildlife Federation*](#),¹⁶⁵ a national organization sued TCEQ challenging its decision to grant a permit to a wholesale water provider to allow the inter-basin transfer of water. The court of appeals reversed the trial court, instead affirming TCEQ's order including its findings that: (1) the water provider's conservation plan met the necessary statutory requirements; (2) the water provider implemented its conservation plan; and (3) the water provider's conservation plan included the necessary description of authority by which it would implement and enforce the plan. The court concluded that an assessment of a water conservation plan requires a review of what each individual applicant is capable of successfully accomplishing in its jurisdiction.

In [*Lone Star Groundwater Conservation District v. City of Conroe*](#),¹⁶⁶ the City of Conroe and other entities asserted that the GCD's rules are invalid because they regulate the production of groundwater on a per user basis instead of on a per well or per acre basis. On an interlocutory appeal, the court of appeals reversed the trial court in part, holding that Chapter 36 of the Texas Water Code immunizes GCD board members from claims based on their votes as directors so long as no claim is being made that a director's vote violated laws related to conflicts of interest, abuse of office, or the director's constitutional obligations. The court based its decision in part on an assumption that Chapter 36 allows the rules of a GCD to be challenged in court including through *ultra vires* claims that concern the validity of GCD rules.

In [*R.E. Janes Gravel v. Texas Commission on Environmental Quality*](#),¹⁶⁷ involved review of a decision granting a permit amendment to the City of Lubbock that allowed the city to use a portion of the Brazos River to convey treated effluent to a point downstream where the effluent would be diverted for beneficial use (known as a "bed and banks" permit). A downstream water rights holder had argued that TCEQ may not permit the city to divert the discharged effluent without first protecting the downstream water rights holder's senior rights to that water. The court of appeals concluded that the city's effluent was not "surplus water" which would be subject to appropriation and that the amendment did not increase the amount of water authorized to be diverted (thus requiring that it be granted).

O. Utah

1. Legislative

[H.B. 84](#)¹⁶⁸ clarifies and rewords portions of the nonuse application statute by stating that the approval of a nonuse application excuses the requirement of beneficial use from the date of filing, and that the time the nonuse application is in effect does not count against the seven-year forfeiture period. The approval or filing of a nonuse application does not constitute beneficial use of the water right and does not protect or revive a right that is already subject to forfeiture. A nonuse application, however, does not prevent the user from actually using the water right.

¹⁶⁵514 S.W.3d 855 (Tex. App. 2017).

¹⁶⁶515 S.W.3d 406 (Tex. App. 2017).

¹⁶⁷522 S.W.3d 506 (Tex. App. 2016).

¹⁶⁸H.B. 84, 62nd Leg., Gen. Sess. (Utah 2017).

[H.B. 118](#)¹⁶⁹ amends section 73-2-1 of the Utah Code to officially grant the State Engineer authority to make rules regarding the “duty of water” – i.e. to the quantity of water required to satisfy the water requirements for a given purpose, such as irrigation.

[H.B. 180](#)¹⁷⁰ allows the holder of a pending application to appropriate water to transfer the application to another person. Such transfer using the State Engineer’s form is treated as a Report of Water Right Conveyance when recorded and forwarded to the State Engineer, and title to the unperfected water right will be updated.

[H.B. 181](#)¹⁷¹ makes a technical correction to clarify that the State Engineer is to charge a fee for an application for nonuse of water. Under the list of items for which the State Engineer may charge a fee, the Bill changes the old phrase “extension of time in which to resume use of water” to the more accurate and currently used phrase “application for nonuse of water.”

[H.B. 301](#)¹⁷² modifies the requirements in the Utah Municipal and County Codes that requires municipalities and counties to notify canal companies or canal operators when an application for a subdivision approval is filed on land located within 100 feet of the center line of a canal. This Bill moves the language from the parts of the Utah Code that set forth general land use regulations to more appropriate parts of the Code that specifically govern subdivisions.

[H.C.R. 15](#)¹⁷³ is a Concurrent Resolution of the Legislature and the Governor recognizing that, even though the Utah Department of Environmental Quality (DEQ) has the responsibility to protect Utah’s water and implement the Environmental Protection Agency’s Clean Water Act, publicly owned treatment works and local elected officials should work collaboratively with DEQ in addressing water quality concerns through regulation. The Concurrent Resolution urges that standards should be set based on the best available research and science, recognizing that the cost of complying with new standards could be high. When the costs of compliance are anticipated to be significant, the Concurrent Resolution urges that the Legislature should be informed of the cost and benefits of the compliance standards.

[S.B. 11](#)¹⁷⁴ renames the State Water Development Commission to the Legislative Water Development Commission. The Bill significantly changes the membership of the Commission and takes some control away from the Governor and places it with the Legislative Management Committee.

[S.B. 45](#)¹⁷⁵ expands section 11-8-4 of the Utah Code, which already requires public owners or operators of sanitary sewer facilities to provide an annual disclosure explaining whether the record property owner is responsible for repair and replacement of its sewer lateral, meaning the pipe that connects a property to the sanitary sewer main line (the notice must include the definition of “sewer lateral”). The statute now imposes similar requirements on public providers of retail culinary water, and increases the frequency of the notice from once to at least twice per calendar year.

[S.B. 63](#)¹⁷⁶ revises portions of the Utah Revised Nonprofit Corporation Act as it applies to shares of stock in a water company. First, the Bill provides a default rule that ownership shares of a water company are transferable, unless otherwise provided in the

¹⁶⁹H.B. 118, 62nd Leg., Gen. Sess. (Utah 2017).

¹⁷⁰H.B. 180, 62nd Leg., Gen. Sess. (Utah 2017).

¹⁷¹H.B. 181, 62nd Leg., Gen. Sess. (Utah 2017).

¹⁷²H.B. 301, 62nd Leg., Gen. Sess. (Utah 2017).

¹⁷³H.C.R. 15, 62nd Leg., Gen. Sess. (Utah 2017).

¹⁷⁴S.B. 11, 62nd Leg., Gen. Sess. (Utah 2017).

¹⁷⁵S.B. 45, 62nd Leg., Gen. Sess. (Utah 2017).

¹⁷⁶S.B. 63, 62nd Leg., Gen. Sess. (Utah 2017).

articles of incorporation or bylaws of the company. Any adopted transfer restrictions must be reasonable, adopted in good faith and for a legitimate purpose, adopted in the best interest of the water company and its shareholders, and may not discriminate against any individual shareholder or class of shareholders. Second, the Bill allows a water company to purchase back shares of a shareholder who is delinquent in the payment of shareholder assessments, in accordance with law. Third, the Bill states that, unless otherwise provided, a water company shareholder has an equitable, beneficial interest in the use of the water supply proportionate to the shareholder's shares, and that this interest is an interest in real property.

[S.B. 214](#),¹⁷⁷ as originally introduced, proposed to add public water suppliers to the list of entities that may file an application with the Division of Water Rights for an instream flow, which list currently includes only the Division of Wildlife Resources, the Division of Parks and Recreation, and certain nonprofit fishing groups. The Bill was eventually substituted to simply provide a statement that some public water suppliers have expressed an interest in exploring the possibility of expanding the list of entities that can apply for an instream flow, while recognizing that the issue is very complex and will require thoughtful participation by a number of stakeholders. The Bill encourages the Water Development Commission and the Executive Water Task Force to study the issue and present it to the Legislature before the 2018 General Session.

[S.J.R. 11](#)¹⁷⁸ is a Joint Resolution of the Legislature, to be delivered to Utah's United States congressional delegation, as well as to the Majority Leader of the U.S. Senate and the Speaker of the U.S. House of Representatives, urging the new administration to budget sufficient funds to complete the Central Utah Project (the "CUP"), specifically the Bonneville Unit of the CUP. The CUP is a project that is intended to enable development of a significant portion of Utah's allocated share of the waters of the Colorado River. The U.S. Congress has failed to provide funding in recent years, stalling construction. The Joint Resolution notes that Utah's population is projected to double by the year 2065, and contract purchasers of project water from the Central Utah Water Conservancy District need the CUP water in the immediate future.

2. Judicial

In [Little Cottonwood Tanner Ditch Co. v. Sandy City](#),¹⁷⁹ the Utah Supreme Court affirmed a district court's decision not to reopen a one-hundred-year-old water rights decree to modify the final judgment. In 1910, the Little Cottonwood Morse Decree established water rights for Little Cottonwood Creek in Salt Lake County, Utah. That decree provided that water may be diverted by certain owners so long as monthly payments of \$75.00 were paid to the owners of the water rights. In 2013, said owners filed a post judgment motion to modify the amount of the monthly payment. The district court, as affirmed here by the Supreme Court, denied the motion as inappropriate, stating that, in order to seek the desired relief, the parties would have to file a complaint for a claim of contract reformation.

In [Bresee v. Barton](#),¹⁸⁰ the Utah Court of Appeals discussed, among other things, the right of private parties under [Utah Code Ann. section 73-1-6](#), the right of condemnation for reservoirs, dams, canals, ditches, pipelines, and other water conveyance facilities. The Bresees owned shares in an irrigation company, but had no way to convey the water to

¹⁷⁷S.B. 214, 62nd Leg., Gen. Sess. (Utah 2017).

¹⁷⁸S.J.R. 11, 62nd Leg., Gen. Sess. (Utah 2017).

¹⁷⁹387 P.3d 978 (Utah 2016).

¹⁸⁰387 P.3d 536 (Utah Ct. App. 2016).

their land, except through a mainline owned by the Bartons. Mr. Bresee entered onto the Bartons' property without permission, dug a trench, and installed a T-connection to the Bartons' mainline, running it back to his property. Upon discovery, the Bartons' removed the connection. The Bresees sued arguing, among other things, a private right of condemnation. The district court, as affirmed here by the Court of Appeals, rejected the Bresees' claim, noting that private condemnation is allowed only if the condemnor does not interfere with the rights and use of the [condemnee's] water rights. Among several other procedural errors committed by the Bresees, their affidavit testimony as to the matter of interference of the Bartons' water rights was struck from the evidence due to the affidavit containing legal conclusions, lacking foundation, and including inadmissible hearsay. The Bartons' testimony asserting interference of their water right was, effectively, undisputed, resulting in the ruling in favor of the Bartons.

P. Washington

1. Legislative

While the 2016-2017 state legislative session involved significant activity related to water law, the session is most notable because of the legislature's inaction on those very issues. The session was dominated by legislative proposals in response to the landmark decision in [*Whatcom County v. Hirst \(Hirst\)*](#).¹⁸¹ In that case, the Washington Supreme Court concluded that the Growth Management Act (GMA), the state's primary land use planning statute, requires counties to play an expansive role in the regulation of water availability and water quality. Specifically, the Court held that the GMA imposes an obligation on counties to conduct a pre-approval analysis of permit-exempt withdrawals to confirm they do not impair senior water rights, including instream flows. At the end of the longest session in Washington history, the legislature was unable to reach agreement and no bills passed both houses, despite the fact that Senate Republicans conditioned their approval of the capital budget on resolution of their concerns.

2. Judicial

The surface water rights adjudication¹⁸² in the Yakima River basin marked its 40th year with a proposal to bring the proceeding to conclusion in 2018. In August, the trial court entered a Proposed Final Decree¹⁸³ and initiated a three-month period to file objections. The Department of Ecology (Department) prepared a Draft Schedule of Rights, which compiles the nearly 2,500 confirmed water rights and their key terms and conditions. The Final Decree would incorporate the Final Schedule of Rights by reference and direct the Department to issue certificates of adjudicated water right for each confirmed water right stated in the Schedule of Rights.¹⁸⁴ Objections to the Proposed Final Decree and motions for revision will be heard in 2018 under a schedule to be announced. Issues include whether the court should retain jurisdiction, in whole or part, to administer and enforce the

¹⁸¹381 P.3d 1 (Wash. 2016).

¹⁸²*Dep't of Ecology v. Acquavella*, No. 77-2-01484-5 (Yakima Cty. Super. Ct.).

¹⁸³Proposed Final Decree, *Dep't of Ecology v. Acquavella*, No. 77-2-01484-5 (Yakima Cty. Super. Ct.) (Issued Aug. 10, 2017).

¹⁸⁴*Id.* at §§ 1(a), 5.

final decree or to hear objections or appeals to administrative actions to enforce or administer the final decree.¹⁸⁵

Q. Wyoming

1. Legislative

In 2017, the Wyoming State Legislature [expanded](#) Wyoming Statutes Annotated section 41-4-507 to amend certain application requirements for specified water appropriation projects.¹⁸⁶ Other major revisions to the statutes include a repeal of Wyoming Statutes Annotated section 33-29-801(b) through (d) and its relocation to Title 41.¹⁸⁷ Additionally, Wyoming Statutes Annotated section 41-4-507(f), created by this bill, provides the state engineer authority to adopt rules and regulations allowing for exceptions to certain filing requirements.

2. Administrative

Notice was given by the Wyoming State Engineer of a Pilot System Water Conservation Program [Request For Proposals](#) released October 2, 2017, for consideration of projects to be implemented in 2018.¹⁸⁸ Due to declining levels in Lake Mead and Lake Powell, the Upper Colorado River Commission, the U.S. Bureau of Reclamation, and four water providers who depend on Colorado River Basin supplies have been funding pilot projects to test methods for saving water. The pilot program's purpose is to determine the effectiveness of temporary, voluntary, and compensated measures that could be used to help maintain water levels in Lake Powell above the elevations required to protect Colorado River Compact entitlements and maintain hydroelectric power production. This program was due to expire in 2016, but because of its overall success, has been extended through 2018. Wyoming, a user of the Colorado River, has been invited to submit a proposal describing any conservation opportunity that can be implemented in 2018 under the Pilot Program.

¹⁸⁵*See id.* § 9 (providing for Department enforcement and administration, except as to the Yakama Nation's water right for instream flows for fish and other aquatic life).

¹⁸⁶2017 Wyo. Sess. Laws 43.

¹⁸⁷WYO. STAT. ANN. § 33-29-801(b) was repealed, amended and relocated to [WYO. STAT. ANN. § 41-4-507\(C\)](#) (WEST 2017); WYO. STAT. ANN. § 33-29-801(c) was repealed, amended and relocated to [WYO. STAT. ANN. § 41-4-507\(d\)](#) (WEST 2017); WYO. STAT. ANN. § 33-29-801(d) was repealed, amended and relocated to [WYO. STAT. ANN. § 41-4-507\(e\)](#) (West 2017); and WYO. STAT. ANN. § 33-29-801(e) is substantially repeated at [WYO. STAT. ANN. § 41-4-507\(F\)](#) (West 2017).

¹⁸⁸[Request for Proposal](#), Upper Colo. River Comm'n, Request for Proposals regarding a potential funding opportunity for voluntary participation in a Pilot System Water Conservation Program (Oct. 2, 2017).

R. *Eastern States*

1. Judicial

In [*Conservation Law Foundation, Inc. v. Clear River Energy, LLC*](#),¹⁸⁹ the Superior Court of Rhode Island, Providence County, determined it can consider whether the Town of Johnston could resell water to Clear River Energy that it initially purchased from the Providence Water Supply Board. The plaintiffs sought a declaration that the town had no legal authority to sell the water under Rhode Island law and sought injunctive relief. The company moved to dismiss the action based on lack of standing, a failure to exhaust administrative remedies, jurisdictional issues, and a failure to join indispensable parties. The court determined that the substantial public interest raised compels it to overlook standing and determine the merits of plaintiffs' contentions in a future decision.

2. Legislative

Connecticut passed an [act](#) altering the open records law exemption for certain water company records, allowing the records to remain confidential where there are reasonable grounds that their release could pose a security risk.¹⁹⁰

Maine passed¹⁹¹ a one-time [appropriation](#) for treatment of contaminated private drinking water wells. The State Housing Authority must distribute up to \$500,000 to increase the affordability of water treatment filtration systems for households with contaminated private drinking water wells and household incomes no greater than 120% of the area median income, as determined by the authority.

S. *Great Lakes States*

1. Administrative

Nestlé Waters North America is seeking to increase their pumping for bottled water operations in Michigan and submitted a permit [application](#) to the Michigan Department of Environmental Quality (MDEQ), Drinking Water and Municipal Assistance Division, seeking to increase their large quantity water withdrawal to 400 gallons per minute (gpm) at its PW-101 well at the White Pine Springs Site in Evart, Osceola County. A permit is required for Nestlé to produce bottled drinking water in Michigan pursuant to [Section 17](#) of the Michigan Safe Drinking Water Act, 1976 PA 399, as amended, because the water is from a new or increased large-quantity withdrawal of more than 200,000 gallons of water per day.

Section 17 requires MDEQ to evaluate whether the water is safe to drink and to determine that there are no adverse resource impacts to the watershed from the withdrawal. In determining whether there may be an adverse resource impact, MDEQ evaluates the environmental, hydrological, and hydrogeological conditions that currently exist, and the predicted impacts.

The MDEQ has received over 35,000 public comments on the permit application, and 500 people attended a public hearing on April 18, 2017, with the vast majority arguing in opposition to the proposal. The application is currently [pending](#) and under review.

¹⁸⁹Order on Mot. to Dismiss, *Conservation Law Found., Inc. v. Clear River Energy, LLC*, PC-2017-1037, PC-2017-1039 (R.I. Super. Ct. Providence County, filed June 20, 2017).

¹⁹⁰2017 Conn. Pub. Acts 211.

¹⁹¹L.D. 1263 (Me. 128th Legis. 2018).

2. Judicial

In *Gunderson v. Indiana*, the Indiana Supreme Court is deciding whether property owners along Lake Michigan must allow the public access to the beach, and determining where the public beach begins and where private property ends. Gunderson is an owner of property abutting Lake Michigan. Gunderson contends that Lake Michigan's Indiana beachfront extends to the water's edge and that landowners have the right to limit use of the beaches abutting their private property. Indiana has argued that the state owns the land between the ordinary high water mark and the water's edge and maintains that the beach is part of the public trust. In litigation below, the LaPorte Superior Court had entered a judgment declaring that Gunderson and the State have overlapping property rights relating to land below the ordinary high water mark. The Superior Court further held that Gunderson may not impair the right of the public to use the beach for certain public trust protected purposes. The Court of Appeals affirmed in part and [reversed](#) in part¹⁹². The Indiana Supreme Court granted transfer¹⁹³ of the case and assumed jurisdiction over the appeal. Four of the five justices heard the oral argument on September 28, 2017, as Justice Geoffrey Slaughter recused himself.

¹⁹²67 N.E.3d 1050 (Ind. Ct. App. 2016), *vacated*, 90 N.E.3d (Ind. 2018).

¹⁹³88 N.E. 3d 1079 (Ind. 2017).

Chapter 25 • ALTERNATIVE DISPUTE RESOLUTION 2017 Annual Report¹

Alternative dispute resolution (ADR) played a key role in resolving a variety of environmental disputes in 2017. As always, the courts continued to refine the laws that govern the use of ADR, particularly arbitration. The Trump administration also enacted policies, including actions to reverse Obama-era positions, which could influence environmental ADR and settlements generally.

I. ADR CASES

The Texas Supreme Court demonstrated the need to consider the scope of an arbitrator's authority when crafting arbitration clauses in [*Forest Oil Corp. v. El Rucio Land & Cattle Co., Inc.*](#)² In that case, the parties entered into a settlement agreement and a related surface use agreement that contained an arbitration clause. When the landowner sued the company for environmental contamination and other issues, triggering the arbitration clause, an arbitration panel ruled in the landowner's favor, awarding \$22.7 million in damages and attorney fees. The company then petitioned the court to vacate the award, arguing, among other things, that the panel exceeded its authority by awarding damages not permitted under Texas law. Although the arbitration clause gave the arbitrators authority to award damages where allowed by Texas law, it also provided that disputes over the scope of the arbitration clause would be resolved through arbitration. "Under this provision," the court ruled, "determining what damages Texas law allows is as much within the arbitrators' broad authority as determining the amount to be awarded."³

In [*EnCana Oil & Gas \(USA\), Inc. v. Miller*](#), the Colorado Supreme Court addressed a dispute over whether an arbitration clause in a class action settlement involving oil and gas royalties required class-wide arbitration or bilateral arbitration.⁴ Although the clause was silent on class arbitration, the court ruled:

Where . . . [an] agreement explicitly names all members of a certified class as a party to the agreement, frames the pertinent disputes in class-wide or subclass-wide terms, and gives relief on a class-wide or subclass-wide basis, the arbitration clause's context persuasively demonstrates an agreement to class arbitration rather than bilateral arbitration.⁵

The Fifth Circuit Court of Appeals ruled that disputes must be ripe before a party can ask a court to compel arbitration in [*Lower Colorado River Authority v. Papalote Creek II, L.L.C.*](#)⁶ The case focused on a power purchase agreement that required a reclamation and conservation district to buy all of the energy a wind farm produced at a fixed price for eighteen years. The agreement also included a provision that calculated liquidated damages if the district did not purchase the power and required arbitration for disputes involving the parties' performance. Both parties continued to abide by the agreement, but the district raised a question about the scope of its liability under the agreement, filing suit in court to

¹Nathan Bracken and Devin Bybee authored this chapter. This chapter provides a sampling of key or other notable ADR cases and events from 2017.

²518 S.W.3d 422 (Tex. 2017).

³*Id.* at 432.

⁴405 P.3d 488 (Colo. Ct. App. 2017).

⁵*Id.* at 497.

⁶858 F.3d 916, 924–27 (5th Cir. 2017).

compel arbitration. The district court agreed and compelled arbitration. The Fifth Circuit reversed, finding that the district court lacked subject matter jurisdiction because the dispute was not ripe. In reaching this decision, the Fifth Circuit reasoned that the district was essentially seeking a declaratory judgment in support of its interpretation of the agreement, but that there was no actual breach to trigger arbitration because the district had indicated that there was only a possibility that it would stop taking energy.

The Kansas Court Appeals affirmed a mediated settlement agreement in [*James Colborn Revocable Trust v. Hummon Corp.*](#)⁷ The case involved a mediated agreement in which a landowner gave an oil company an easement to access a well on its property. Although access to the well was the focus of the mediation, the agreement also gave the company an easement to operate an existing pipeline. Later, a dispute arose about the scope of the pipeline easement when the company sought to install additional pipelines. The landowner then filed suit to enforce the agreement. In response, the company argued that the agreement was too vague and indefinite to be enforceable because it did not define the scope of the pipeline easement. The district court ruled that the agreement was enforceable and held that it precluded additional pipelines. The company appealed, arguing that the district court erred in enforcing the agreement and interpreted it too narrowly. The Kansas Court of Appeals affirmed the lower court's ruling, holding that the agreement was enforceable because it disposed of the main issue at the prior mediation; namely, access to the well. It also held that the district court could determine the scope of the pipeline easement because that was not a material issue during the mediation, and that the district court's interpretation was consistent with the agreement's plain language.

II. SETTLEMENT EXAMPLES

ADR and settlement continue to play a role in resolving environmental law disputes. Some non-exhaustive but representative examples are described below.

A. *Air Quality*

In October, the Environmental Protection Agency (EPA) and Colorado regulators reached a \$22 million settlement with PDC Energy, Inc., which owned oil and gas tank batteries that leaked volatile, smog-causing compounds into the air.⁸ Under the settlement, PDC will pay a \$2.5 million settlement, \$18 million in system upgrades, and \$1.7 million to implement environmental mitigation projects.

The EPA and the Department of Justice also announced a Clean Air Act settlement in December with Columbian Chemicals Company to reduce air pollution from two carbon black manufacturing plants in Louisiana and Kansas.⁹ Under the settlement, the company will install \$94 million in pollution control technologies to reduce emissions, pay \$650,000 in civil penalties, and perform \$375,000 in environmental mitigation.

B. *Energy and Mining*

In May, EPA [settled](#) a lawsuit brought by a mining company seeking to develop the proposed Pebble mine near Alaska's Bristol Bay, one of the world's most productive

⁷408 P.3d 987 (Kan. Ct. App. 2017).

⁸Jesse Paul, [EPA, Colorado Reach \\$21 Million-Plus Settlement with Denver-based Oil & Gas Company for Smog-Causing Pollution](#), DENV. POST (Oct. 31, 2017).

⁹[Press Release](#), Env'tl. Prot. Agency, EPA, DOJ Announce Settlement with Carbon Black Producer Columbian Chemicals Company (Dec. 22, 2017).

salmon fisheries.¹⁰ The EPA previously found that the mine would impact the fishery and issued a proposed determination in 2014 under section 404(c) of the Clean Water Act that restricted large scale mining in the area, effectively vetoing the project before the company filed for the necessary permits.¹¹ The company sued, claiming that the EPA lacked the authority to veto a project before the agency received a permit application.¹² Under the new settlement executed by the Trump-era EPA, the agency will initiate the process to withdraw the proposed determination.¹³ Although the settlement gives the company an opportunity to file for a permit, it does not guarantee or prejudice a particular outcome.¹⁴ The EPA has developed a proposal to withdraw its determination, for which it sought comment in July.¹⁵

In December, the Washington Utilities and Transportation Commission approved a multi-party settlement resolving Puget Sound Energy's efforts to increase electricity rates and decrease natural gas rates for its customers.¹⁶ The settlement, which also involves the Montana Attorney General's Office, the Sierra Club, and six other entities, would establish a financing mechanism for remediation and decommissioning efforts following the shut-down of coal-fired facilities in Colstrip, Montana. Among other provisions, the settlement also sets aside money to pay for the shut-down and cleanup costs for other coal units, and includes a \$10 million fund to help the community of Colstrip cope with the transition.

C. *Indian Country*

There were a number of developments in 2017 involving Native American issues, many of which illustrated the time and post-settlement steps needed to implement settlements in Indian Country. This is due, in part, to the fact that many settlements involving Indian issues require Congressional approval because of the federal government's trust responsibility for tribes, the expenditure of federal funds to implement tribal settlements, and the effect of such settlements on other federal interests.¹⁷

For instance, Senator Jerry Moran (R-KS) introduced the [Kickapoo Tribe in Kansas Water Rights Settlement Agreement Act](#) to authorize a [settlement](#) that the Tribe and the State of Kansas approved last year.¹⁸ The legislation would confirm the Tribe's consumptive right of up to 4,705 acre-feet of water annually for any purpose.¹⁹ The Tribe would also have authority to lease tribal water rights on or off its reservation. Kansas would continue to administer all state-issued rights in the Delaware River Basin, among other provisions.²⁰

Other Indian water right developments demonstrate the many steps needed to

¹⁰Tatiana Schlossberg, [In Reversal, E.P.A. Eases Path for a Mine Near Alaska's Bristol Bay](#), N.Y. TIMES (May 12, 2017).

¹¹Timothy Cama, [Pebble Mine Sues EPA](#), THE HILL (May 22, 2014).

¹²*Id.*

¹³[Press Release](#), Env'tl. Prot. Agency, 2017 Settlement Agreement Between EPA and Pebble Limited Partnership (May 11, 2017).

¹⁴*Id.*

¹⁵[Press Release](#), Env'tl. Prot. Agency, EPA Proposes to Withdraw Clean Water Act Restrictions for Pebble Mine in Alaska's Bristol Bay Watershed (July 11, 2017).

¹⁶[Press Release](#), Puget Sound Energy, PSE General Rate Case Settlement Approved (Dec. 5, 2017); [Press Release](#), Puget Sound Energy, Settlement Reached in PSE General Rate Case (Sept. 15, 2017).

¹⁷Annie Snider, [Struggling Tribe Pins Hope on Congress](#), E&E NEWS (Dec. 24, 2015).

¹⁸S. 2154, 115th Cong. (2017).

¹⁹[Press Release](#), Native Am. Rights Fund, NARF Helps Kickapoo Tribe of Kansas Draft Water Settlement Agreement (Sept. 9, 2016).

²⁰*Id.*

finalize and implement settlements after Congress has approved a tribal settlement. For example, the Department of the Interior and the Pechanga Band of Luiseño Mission Indians in California signed the Pechanga Water Rights Settlement Agreement.²¹ Congress authorized the agreement last year as part of the [Water Infrastructure Improvements for the Nation Act](#) and the tribe's water rights claims have been pending since the 1950s.²² In Montana, the Blackfeet Nation approved the [Blackfeet Water Compact](#) and the [Blackfeet Water Rights Settlement Act](#), which Congress passed last year.²³ The Tribe's approval is the final act needed for the compact to become effective,²⁴ following the development of the compact in 2007 and decades of negotiations.²⁵ Similarly, after sixty years of litigation, the U.S. District Court for New Mexico entered a final judgement in [State of New Mexico ex rel. State Engineer v. R. Lee Aamodt](#), approving a settlement agreement that quantifies the water rights of four pueblos in New Mexico, and adjudicates the water rights of other parties.²⁶ Objectors have filed an appeal with the Tenth Circuit Court of Appeals, arguing, among other things, that the state officials who signed the agreement lacked the authority to do so because only the Legislature possesses such authority.²⁷

Elsewhere in Indian Country, the U.S. District Court for the District of Columbia gave claimants until November 27, 2017 to file claims as part of the [Cobell v. Salazar settlement](#). The \$3.4 billion settlement, reached in 2009, resolved a class action lawsuit against the United States for federal mismanagement of Indian trust funds,²⁸ and required mediation to address attorney fee disputes.²⁹ Under the settlement, individual Indians will receive \$1.4 billion in direct payments.³⁰ Although \$1.2 billion has been paid, about 30,000 Indians had not received their share of the settlement when the court set the November deadline in June.³¹ The settlement requires that unclaimed funds be transferred to a scholarship fund.³²

D. *Superfund*

In California, the EPA reached a \$1 million settlement that will require CalMat Corporation to design extraction wells and a treatment system to clean up drinking water and prevent future groundwater contamination at the San Fernando Valley Area 1

²¹[Press Release](#), U.S. Dep't of the Interior, Interior Executes Water Right Settlement Agreement with Pechanga Band of Luiseño Mission Indians (Nov. 29, 2017).

²²Pub. L. No. 114-322, 130 Stat. 1628 (2016).

²³*Id.*

²⁴Beacon Staff, [Blackfeet Nation Approves Water Compact](#), FLATHEAD BEACON (Apr. 21, 2017).

²⁵Blackfeet Nation, [Water Compact: Chronology](#) (2017).

²⁶No. 66-cv-6639, 2017 WL 3822080 (D.N.M. July 14, 2017); Kay Matthews, [Judge Set to Sign Aamodt Adjudication Final Decree When Top of the World Water Rights are Still Contested?](#), LA JICARITA (July 12, 2017).

²⁷Kay Matthews, [Hundreds Sign Onto Appeal of Aamodt Adjudication Settlement](#), LA JICARITA (Nov. 10, 2017).

²⁸[Court Sets Final Deadline for Remaining Payments from Cobell Settlement](#), INDIANZ.COM (June 22, 2017).

²⁹Gale Courey Toensing, [Cobell Lawyers' Fees Sent to Mediation](#), INDIAN COUNTRY TODAY (Mar. 20, 2013).

³⁰INDIANZ.COM, *supra* note 28.

³¹*Id.*

³²*Id.*

Superfund site.³³ The company will also monitor groundwater on- and off-site and complete a remediation program to address contamination.

The EPA has also announced a settlement involving over 40 parties and the cleanup of hazardous waste at the 68th Street Dump/Industrial Enterprises Superfund Site in Maryland.³⁴ Under the settlement, all of the parties will finance and twelve of the parties will perform a \$51.5 million EPA-approved cleanup, pay state and federal trustees \$490,000 for past and future costs associated with the natural resource damages, and \$630,000 for a restoration project, among other obligations. The contamination stems from a number of landfills that accepted industrial and commercial waste containing hazardous materials.

E. Water

In Hawaii, the State Water Commission approved a mediated settlement in April to restore continuous flows in the Waimea River and provide for a possible renewable energy project, farming, and Hawaiian homesteading.³⁵ Although water disputes in Hawaii can take years or decades to resolve, the settlement was reached in little over a year after multi-party mediation began. The Water Commission has indicated that it hopes to use this approach to resolve other water disputes. “We are pleased that this example of multi-party environmental dispute resolution addressed complex issues in a comprehensive manner,” said Suzanne Case, Chair of Hawaii’s Department of Land and Natural Resources.³⁶

Environmental groups in Wisconsin filed a lawsuit in November, challenging a settlement the state Department of Natural Resources reached over large livestock farm regulations.³⁷ The settlement resolved a prior lawsuit the Dairy Business Association filed in July, alleging that the Department improperly blocked farms from using vegetation patches to filter pollution and challenging the Department’s authority to require water pollution permits for industrial livestock operations. Under the settlement, the Department agreed that vegetation patches can be used for pollution-control systems and the association dropped its claims regarding the Department’s permit authority. The environmental groups take issue with the vegetation patches, which they report the EPA has determined to produce contaminated runoff. They further allege that the settlement improperly restricts the Department’s ability to regulate contaminated runoff.

Similarly, Environment America and the Sierra Club announced in November a settlement with Pilgrim’s Pride, the world’s second-largest chicken producer, over alleged violations of the Clean Water Act in Florida’s Suwanee River.³⁸ Under the agreement, the company will upgrade equipment and investigate reducing or eliminating discharges to the river. Pilgrim’s Pride will also pay \$1.43 million in penalties, an amount believed to be the largest Clean Water Act penalty for a citizen enforcement suit in Florida history.

³³[Press Release](#), Env’tl. Prot. Agency, EPA Reaches \$1 Million Settlement for Treatment System at San Fernando Valley Superfund Site (Sept. 19, 2017).

³⁴[Press Release](#), Env’tl. Prot. Agency, U.S. EPA Settles with Parties on Cleanup Plan for 68th Street Superfund Site in Rosedale, Maryland (Oct. 13, 2017).

³⁵[Press Release](#), Haw. Dep’t of Land and Nat. Res., Historic Settlement Reached in West Kaua’i Waimea River Water Dispute (Apr. 18, 2017).

³⁶*Id.*

³⁷[Citizens Group Challenge Settlement in Factory Farm Runoff Case](#), WIS. GAZETTE (Nov. 20, 2017); Colleen Kottke, [Environmental Groups Challenge DNR-DBA Settlement, File Lawsuit](#), WISC. STATE DAIRY FARMER (Nov. 21, 2017).

³⁸[Press Release](#), Env’t Am., Environmental Groups Reach Major Clean Water Settlement with Pilgrim’s Pride (Nov.15, 2017).

III. FEDERAL ACTIONS AFFECTING ADR AND SETTLEMENTS

In October, EPA Administrator Scott Pruitt issued a [directive](#) intended to end the so-called practice of “sue and settle,” in which federal agencies settle environmental disputes and then use the settlements as the basis for new regulations or other action.³⁹ Instead, the agency will now likely fight lawsuits aimed at forcing it to take action. “We will no longer go behind closed doors and use consent decrees and settlement agreements to resolve lawsuits filed against the Agency by special interest groups where doing so would circumvent the regulatory process set forth by Congress,” Pruitt said.⁴⁰ Among other things, the directive prohibits the EPA from entering into settlements that exceed the authority of the courts, excludes attorney fees and litigation costs from settlements stemming from litigation brought against the EPA, requires the EPA to seek concurrence with regulated entities on proposed settlements, and requires public comment on proposed settlements.

Settlements have been a driving force behind some recent and controversial EPA regulations, particularly Clean Air Act regulations such as former President Obama’s Clean Power Plan.⁴¹ According to the Chamber of Commerce, which has criticized “sue and settle” tactics, the EPA settled over 60 lawsuits from 2009 to 2012, resulting in over 100 regulations.⁴² Environmental groups, however, have largely condemned the directive as hindering their right to compel the EPA to fulfill its statutory obligations.⁴³ Fifty-seven former EPA attorneys have also written a [letter](#) to Pruitt criticizing the directive for encouraging litigation at the expense of settlement and giving regulated entities veto power over proposed settlements with no corresponding role for the public.⁴⁴ The letter also points out that the EPA’s recent settlement involving the proposed Pebble Mine in Alaska, discussed previously, did not comply with the directive’s requirements.⁴⁵

Attorney General Jeff Sessions also issued a [memorandum](#) in June prohibiting federal attorneys from negotiating criminal and civil settlements that require companies to donate to nongovernmental or other third parties.⁴⁶ The memo does exempt payments that directly remediate environmental harms, pay for legal or other professional services connected to the case, or have statutory authorization, like restitution and forfeiture.

Sessions’ memo follows Republican complaints that the Obama-era Department of Justice used third-party payments to fund favored projects such as the federal government’s settlement with Volkswagen over its emissions cheating scandal, which required Volkswagen to spend \$2 billion on electric vehicle charging infrastructure after Congress rejected funding requests from the Administration for electric vehicle infrastructure.⁴⁷ Some former EPA attorneys have expressed concern that third-party payments are useful in negotiating settlements because defendants in enforcement actions may be more willing

³⁹[Press Release](#), Env’tl. Prot. Agency, Administrator Pruitt Issues Directive to End EPA “Sue and Settle” (Oct. 16, 2017).

⁴⁰*Id.*

⁴¹Jennifer Dlouhy, [Trump’s EPA to Curb Legal Settlements with Environmentalists](#), BLOOMBERG (Oct. 16, 2017).

⁴²*Id.*

⁴³Amanda Reilly, [Former EPA Lawyers Assail Pruitt’s ‘Sue and Settle’ Directive](#), E&E NEWS (Nov. 13, 2017).

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶[Press Release](#), U.S. Dep’t of Justice, Attorney General Jeff Sessions Ends Third Party Settlement Practice (June 7, 2017); Dlouhy, *supra* note 41.

⁴⁷Amanda Reilly, [Sessions Bars Settlement Funds from Going to Outside Groups](#), E&E NEWS (June 7, 2017).

to pay for outside projects that avoid the appearance of wrongdoing and earn good will rather than paying more in penalties.⁴⁸

⁴⁸*Id.*

**Chapter 26 • CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT, AND
ECOSYSTEMS
2017 Annual Report¹**

President Trump's first year in office represented a sharp reversal of President Obama's climate, sustainability, and conservation legacy. In response to a series of Executive Orders, federal agencies began the process of revising, repealing, or staying climate-related regulations. Most notably, the Environmental Protection Agency (EPA) proposed to withdraw and replace the Clean Power Plan (CPP), commenced review of fuel efficiency / greenhouse gas (GHG) standards for mobile sources, and unsuccessfully stayed New Source Performance Standards (NSPS) for methane from the oil and natural gas industry. Meanwhile, litigation on the CPP, GHG NSPS for Electric Generating Units, and GHG standards for aircraft and medium and heavy-duty vehicles have been stayed pending further administration action. On the international stage, President Trump's announced intent to withdraw from the Paris Agreement leaves the United States as the sole country to choose not to abide by the landmark climate change accord.

In response to the federal government's climate plans, regional, state, local, and private actors increased their commitments to combat climate change, including the formation of several new coalitions and alliances. While Trump administration executive actions reversed many policies to promote climate adaptation and resilience, states and localities continue to incorporate such considerations into planning decisions.

Global ecosystem conservation was largely enhanced in 2017. Pacific nations led the way, helping to raise the share of oceans covered by protected areas to nearly seven percent. China made great strides implementing its national park system, while creating some of the largest terrestrial protected areas in the world. In the U.S., President Trump significantly rolled-back protected area coverage for federal lands and waters in contested moves that will test the President's powers under the Antiquities Act and other laws.

I. CLIMATE CHANGE

A. *Mitigation*

1. International Activities

a. United Nations Framework Convention on Climate Change (UNFCCC)

¹This report was compiled, reviewed, and edited by: Andrew Schatz (Conservation International), Jill Van Noord (Holland & Hart, LLP), Shannon Broome (Hunton & Williams), and Hinal Patel (Northern Illinois University College of Law, J.D. Candidate 2018), and prepared by Committee Chairs: Marisa Martin (Baker McKenzie) and Stephen Smithson (TechLaw Holdings). The following authors contributed: Tanya Abrahamian (Georgetown Climate Center (GCC)); Vicki Arroyo (GCC); L. Margaret Barry (Arnold & Porter); Annie Bennett (GCC); William R. Blackburn (William Blackburn Consulting, Ltd.); James Bradbury (GCC); Shannon Broome; Melissa Deas (GCC); Shannon Martin Dilley (California Air Resources Board); Sarah Duffy (GCC); Ira Feldman (Greentrack); Emily Fisher (Edison Electric Institute); Michael Gerrard (Columbia Law School); Allie Goldstein (Conservation International); Jessica Grannis (GCC); Richard Pavlak (Hunton & Williams); Matthew Sanders (Jeffer Mangels Butler & Mitchell LLP); Andrew Schatz; John Ruple (University of Utah S.J. Quinney College of Law); Alicia Thesing (Stanford Environmental Law Clinic); Jill Van Noord; Romany Webb (Columbia Law School); and George Wyeth (George Washington University Law School).

The Twenty-Third Session of the Conference of the Parties (COP23) to the UNFCCC was held in Bonn, Germany from November 6-17, 2017. Discussions focused on implementation of the [Paris Agreement](#),² which, at year's end, had been ratified by 172 Parties to the UNFCCC.³ The remaining 25 Parties had signed, but had yet to ratify, the Paris Agreement.⁴ Nicaragua and Syria, the only two Parties that failed to sign the Paris Agreement when it was open for signature, acceded in October and November 2017 (respectively).⁵ This leaves the United States (U.S.) as the only Party indicating it will not abide by the Agreement. In August 2017, the U.S. notified the United Nations (UN) Secretary-General that it “intends to exercise its right to withdraw” from the Agreement as soon as it is eligible to do so, which will be on November 4, 2019.⁶

The first meeting of the Parties to the Paris Agreement (CMA1), initiated at the Twenty-Second COP in November 2016, was reconvened at COP23. Discussions focused on establishing a rulebook for implementing the Paris Agreement (consistent with the Paris Agreement [work programme](#)), which would outline detailed rules and guidance on a variety of issues, such as reporting guidelines on countries' Nationally Determined Contributions (NDCs), adaptation communications, the transparency framework, market mechanisms, and the global stocktake.⁷ Parties [agreed](#)⁸ to “accelerate [the work programme's] completion,” such that decisions can be taken at the third session of CMA1 in December 2018.⁹

During the course of 2018, a facilitative dialogue (the [Talanoa dialogue](#)) will be held “to take stock of the collective efforts of Parties” to achieve the Paris Agreement's long-term goal and “inform the preparation of [NDCs] pursuant to” it.¹⁰ The dialogue will be informed by the Intergovernmental Panel on Climate Change's (IPCC) forthcoming Special Report on Global Warming of 1.5°C which is expected to, among other things, identify greenhouse gas (GHG) emissions pathways compatible with limiting the increase in global average temperatures to 1.5°C.¹¹

Parties also agreed to convene stocktaking sessions in 2018 and 2019 to assess mitigation efforts and climate finance flows in the pre-2020 period.¹² Significant uncertainty remains as to the post-2020 framework for climate finance. Several European Union (EU) countries announced funding for other UN bodies, including the IPCC, with France committing to cover any shortfall resulting from President Trump's decision to

²UNFCCC, [Conference of the Parties on its Twenty-First Session, Adoption of the Paris Agreement](#), Decision 1/CP.21, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015).

³[Paris Agreement – Status of Ratification](#), UNFCCC (last visited Apr. 30, 2018).

⁴*Id.*

⁵*Id.*

⁶Press Release, U.S. Dep't of State, [Communication Regarding Intent to Withdraw from Paris Agreement](#) (Aug. 4, 2017); [UN officially notified of US intention to withdraw from Paris climate pact](#), UN NEWS (Aug. 4, 2017).

⁷Don Lehr et al., [An assessment of the Fiji Climate Change Conference COP 23 in Bonn](#), HEINRICH BOELL FOUND. (Nov. 22, 2017).

⁸UNFCCC, [Conference of the Parties on its Twenty-Third Session, Preparations for the implementation of the Paris Agreement](#), Decision 1/CP.23, U.N. Doc. FCCC/CP/2017/L.13 (Advance Version) (Nov. 18, 2017).

⁹*Id.*

¹⁰*Id.* at cl. 10-11 & Annex II.

¹¹*Id.* at Annex II. *See also* [Global Warming of 1.5°C](#), INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (last visited Apr. 30, 2018).

¹²*Id.* at cl. 17-18.

withdraw U.S. funding,¹³ and the United Kingdom agreeing to double its contribution.¹⁴

Negotiators made little progress on setting rules for international carbon market mechanisms pursuant to Paris Agreement articles 6.2 (party-to-party transfer of “mitigation outcomes”) and 6.4 (sustainable development mechanism).¹⁵ Rather, they decided to prepare an “informal document containing the draft elements” of cooperative approaches by May 2018.¹⁶

Commemorating the Paris Agreement’s two year anniversary, French President Macron hosted the “One Planet” summit in Paris, on December 12, 2017.¹⁷ Macron unveiled “[12 One Planet Commitments](#)” aimed at mobilizing public and private climate finance and decarbonizing economies.¹⁸ Much of the focus was on financing climate change adaptation, with summit participants committing US\$3 billion to address extreme weather in the Caribbean, and \$300 million to fight desertification in Africa and abroad.¹⁹

The next COP will be held in Katowice, Poland on December 3-14, 2018.²⁰ The third session of CMA1 will be convened at that time.

b. Montreal Protocol on Substances that Deplete the Ozone Layer

The Twenty-ninth Meeting of the Parties (MOP29) to the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) was held in Montreal, Canada from November 20-24, 2017. The Parties adopted decisions relating to essential-use and critical-use exemptions, energy efficiency, replenishment of the Multilateral Fund, and compliance.²¹ Ecuador will host the thirtieth MOP on November 5-9, 2018.

At year end, twenty-three parties ratified or accepted the [Kigali Amendment](#)²² to the Montreal Protocol, meeting the threshold requirement for the treaty to enter into force, set to occur on January 1, 2019.²³ The Kigali Amendment adds hydrofluorocarbons (HFCs) to the list of controlled substances and establishes a legally binding freeze and gradual phase-down plan for nearly all countries to reduce their HFC consumption to 15-20 percent of baseline levels by mid-century. The Trump Administration announced its support for the Amendment, which will likely require U.S. Senate ratification.²⁴

¹³Matt McGrath, [Europe steps in to cover U.S. shortfall in funding climate science](#), BBC NEWS (Nov. 15, 2017).

¹⁴*Id.*

¹⁵The World Bank, [State and Trends of Carbon Pricing 2017](#). (Nov. 2017).

¹⁶UNFCCC, [Draft Conclusions Proposed by the Chair](#), FCCC/SBSTA/2017/L.27 (Nov. 14, 2017).

¹⁷[One Planet Summit](#), CLIMATE FINANCE DAY 2017 (last visited Apr. 30, 2018).

¹⁸[The 12 #OnePlanet Commitments](#), ONE PLANET SUMMIT (last visited Apr. 30, 2018).

¹⁹*Id.*

²⁰[Calendar](#), UNFCCC (last visited Apr. 30, 2018). *See also* Press Release, UNFCCC, [Katowice Announced as Host Venue of UN Climate Change Conference COP 24 in 2018](#) (June 1, 2017).

²¹[Twenty-Ninth Meeting of the Parties \(Montreal, 20-24 November 2017\)](#), OZONE SECRETARIAT (Nov. 2017).

²²[Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, Kigali](#) (“Kigali Amendment”), Oct. 15, 2016, United Nations, C.N.872.2016.TREATIES-XXVII.2.f (Adoption of amendment).

²³*See* United Nations Environment Programme (UNEP), Ozone Secretariat, [Status of Ratification](#) (last visited Apr. 30, 2018).

²⁴Amy Harder, [Trump Administration Backs Obama-led Climate Effort](#), AXIOS (Nov. 24, 2017).

c. Aviation and Shipping

Following the International Civil Aviation Organization's (ICAO) 2016 adoption of a [scheme](#) to achieve carbon-neutral growth from international aviation starting in 2020, at least 72 States, representing 87.7% of international aviation activity, have announced their intent to voluntarily participate in the Carbon Offsetting and Reduction Scheme for International Aviation (CORSA) from its outset in 2021.²⁵ ICAO is developing standards for determining carbon credits eligible for use under CORSA.

At its 71st session meeting in July 2017, the Marine Environment Protection Committee (MEPC) of the International Maritime Organization (IMO) took two separate actions to address GHG emissions from international shipping. Building on previous work, MEPC developed an initial strategy for GHG emissions reduction from ships, aiming to adopt a final strategy in 2018.²⁶ MEPC also continued to implement the International Convention for the Prevention of Pollution from Ships (MARPOL) Annex I mandatory energy efficiency measures for new and existing ships, with 2,500 new ships being certified to the standards.²⁷

d. Carbon Pricing Programs

Carbon pricing programs – including carbon taxes and emissions trading systems (ETS) – now cover 8 billion tonnes of carbon dioxide equivalent (tCO₂e) or 14.6% of global GHG emissions.²⁸

Several new national carbon pricing policies took effect in 2017: Chile's US\$5/tCO₂e tax on large emitters in the power and industrial sectors²⁹; Colombia's US\$5/tCO₂e tax on fossil fuels³⁰; Alberta, Canada's CA\$20/tCO₂e tax on fossil fuels (going up to CA\$30/tCO₂e in 2018)³¹; and Ontario, Canada's ETS for industry, electricity suppliers, and natural gas distributors.³²

There are also several carbon pricing policies on the horizon. In December 2017, China revealed details about its national ETS, originally expected to go into effect by 2018.³³ The program will begin with the power sector only (1,700 companies with more than 3 billion tonnes of annual emissions³⁴) and will include “mock” trading until 2019 or

²⁵[Carbon Offsetting and Reduction Scheme for International Aviation \(CORSA\)](#), ICAO (last visited Apr. 30, 2018).

²⁶[Marine Environment Protection Committee 71st Session Meeting Summary](#), ICAO (July 7, 2017).

²⁷*Id.*

²⁸[Carbon Pricing Dashboard](#), THE WORLD BANK (last visited Apr. 30, 2018).

²⁹[Ley 20.780 art. 8](#), Reforma Tributaria Que Modifica El Sistema De Tributación De La Renta E Introduce Diversos Ajustes En El Sistema Tributario, Noviembre 29, 2014, Ministerio de Hacienda (Chile); [SMA Dicta Instrucción Para el Reporte de Emisiones de Fuentes Fijas Afectas a “Impuesto Verde”](#), SUPERINTENDENCIA DEL MEDIO AMBIENTE (Mar. 17, 2017) (Chile).

³⁰[Ley 1819](#), Impuesto Nacional de Carbono, Diciembre 29, 2016, El Congreso de Colombia.

³¹[Carbon Levy and Rebates](#), ALTA. GOV'T (last visited Apr. 30, 2018).

³²[Cap and Trade](#), ONT. GOV'T (last visited Apr. 30, 2018).

³³[Full Launch for China Nationwide Carbon Market Seen Early 2018: Govt Researcher](#), REUTERS (Nov. 9, 2017).

³⁴Muyu Xu & Josephine Mason, [China Aims for Emission Trading Scheme in Big Step vs. Global Warming](#), REUTERS (Dec. 19, 2017).

2020 when the ETS is fully implemented.³⁵ Kazakhstan is scheduled to reopen its ETS in 2018 after a temporary suspension in 2016-17.³⁶ Vietnam plans to develop a carbon market by 2018,³⁷ and Singapore plans to implement a carbon tax in 2019.³⁸ In Canada, provinces without carbon pricing policies in place must finalize their plans to implement either a carbon tax or an ETS in 2018, per Prime Minister Justin Trudeau’s directive.³⁹

Several regions also made progress towards linking carbon markets. The leaders of Ontario, Québec, and California signed an agreement that will officially allow Ontario to join the linked California-Québec ETS in 2018.⁴⁰ Chile, Colombia, Mexico, and Peru, known together at the “Pacific Alliance,” signed the Cali Declaration in a move towards a regional (though voluntary) carbon market.⁴¹

e. International Climate Change Litigation

In *Pandey v. India*, Ridhima Pandey, a nine-year-old, filed a petition in March 2017 with the National Green Tribunal of India, arguing that the Public Trust Doctrine, India’s Paris Agreement commitments, and its environmental laws and climate-related policies require India to mitigate climate change.⁴² The plaintiff asked the court to direct India to undertake a variety of measures to mitigate climate change on a national scale.⁴³

In *Greenpeace Southeast Asia et al.*, environmental groups and Filipino citizens petitioned the Philippine Commission on Human Rights to investigate 50 corporations that were alleged to be “Carbon Majors.” The petitioners requested “an investigation into the human rights implications of climate change and ocean acidification and the resulting rights violations in the Philippines, and whether the investor-owned Carbon Majors have breached their responsibilities.”⁴⁴ The Commission’s investigation began and is ongoing.⁴⁵

On July 4, 2017, representatives of the Mataatua District Maori Council filed a claim⁴⁶ in the Waitangi Tribunal in the matter of *Mataatua District Maori Council v. New Zealand*. The claimants allege New Zealand breached its obligations to the Maori by failing to implement policies to address climate change. Because the claim would be heard after 2020, claimants filed an urgency application requesting an earlier hearing and seeking

³⁵Jocelyn Timperley, [Q&A: How will China’s New Carbon Trading Scheme Work?](#), CARBON BRIEF (Mar. 7, 2018).

³⁶[ETS Detailed Information: Kazakhstan Emissions Trading Scheme](#), INT’L CARBON ACTION P’SHIP (last updated Mar. 8, 2018).

³⁷Vietnam, [Plan for Implementation of the Paris Agreement](#) (Aug. 2016).

³⁸Andrea Soh, [Draft of Singapore’s Carbon Pricing Bill Out for Public Consultation](#), THE STRAITS TIMES (Oct. 31, 2017).

³⁹[Pan-Canadian Approach to Pricing Carbon Pollution](#), GOV’T OF CAN. (Oct 3, 2016).

⁴⁰[Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions](#), GOV’T OF CAL.-ONT.-QUE. (Sept. 22, 2017).

⁴¹[Declaración del Cali](#), GOV’T OF CHILE-COLOM.-MEX.-PERU (June 30, 2017).

⁴²[Pandey v. India](#), Original Application No. 187 of 2017 (Nat. Green Trib. Principal Bench New Delhi Mar. 25, 2017).

⁴³*Id.* at 49-51.

⁴⁴[Petition to the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change](#), *In re Greenpeace Southeast Asia et al.*, CHR-NI-2016-0001 (Sept. 22, 2015).

⁴⁵[Press Release](#), Rep. of the Phil. Comm’n on Human Rights, National Inquiry on the Impact of Climate Change on the Human Rights of the Filipino People (Dec. 12, 2017).

⁴⁶[Memorandum of Counsel for the Applicant in Support of Urgency Application](#), *Mataatua Dist. Maori Council v. N.Z.*, WAI 2607 (July 4, 2017).

declaratory relief directing New Zealand to revise its emission reduction targets, adopt different mitigation policies, and adopt policies that facilitate specific adaptation.

2. National Activities

a. United States Environmental Protection Agency (EPA)

i. Clean Power Plan – Clean Air Act § 111(d)

In 2015, the EPA finalized the Clean Power Plan (CPP), the first-ever regulation under the Clean Air Act (CAA) section 111(d) addressing CO₂ emissions from existing fossil-based electric generating units (EGUs).⁴⁷ The CPP was immediately challenged in the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit).⁴⁸ The U.S. Supreme Court order issued a stay of the CPP on [February 9, 2016](#).⁴⁹ Sitting en banc, the court heard argument on September 27, 2016.

President Trump issued [Executive Order \(EO\) 13783](#), *Promoting Energy Independence and Economic Growth*, on March 28, 2017.⁵⁰ Among other things, the EO ordered an immediate review of the CPP and related rules or guidance, including the legal memoranda that accompanied the final CPP.⁵¹ The EO further ordered the EPA to consult with the Attorney General regarding the judicial challenges to the CPP.⁵² Consistent with these mandates, the EPA moved the court to stay the CPP litigation.⁵³ The order granting abeyance directed the EPA to file regular status reports of the Agency’s CPP review and ordered supplemental briefing regarding whether the cases should be remanded to the EPA instead of held in abeyance.⁵⁴ Several of the supplemental briefs argued for abeyance over remand to ensure that the Supreme Court’s stay of the CPP would remain in effect. Some Respondent-Intervenors (including environmental non-governmental organizations (ENGOS) and certain states) urged the court to issue its opinion, notwithstanding the EPA’s statement that it would be changing the rule and possibly repealing it. The challenges to the CPP remained in abeyance at the end of 2017.⁵⁵

The EPA published a [proposal](#) to withdraw the CPP on October 10, 2017,⁵⁶ proposing a change in the legal interpretation as applied to CAA section 111(d) to one the EPA proposed as being consistent with “text, context, structure, purpose, and legislative history, as well as with the Agency’s historical understanding and exercise of its statutory authority.”⁵⁷ Specifically, the EPA proposed to define section 111’s “best system of

⁴⁷Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (codified at 40 C.F.R. pt. 60).

⁴⁸Petition for Review, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Oct. 23, 2015).

⁴⁹Order 15A773, [West Virginia v. EPA](#), No. 15-1363 (U.S. Feb. 9, 2016).

⁵⁰Exec. Order No. 13783, *Promoting Energy Independence & Economic Growth*, 82 Fed. Reg. 16,093 (Mar. 31, 2017).

⁵¹*Id.* at 16,095.

⁵²*Id.*

⁵³[Order](#), *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Apr. 28, 2017).

⁵⁴*Id.*

⁵⁵*See* [Order](#), *West Virginia v. EPA*, No. 15-1363 (Aug. 8, 2017) (extending the abeyance for an additional 60 days); [Order](#), *West Virginia v. EPA*, No. 15-1363 (Nov. 9, 2017) (extending abeyance for an additional 60 days).

⁵⁶*See* *Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 82 Fed. Reg. 48,035 (Oct. 16, 2017) (to be codified at 40 C.F.R. pt. 60) (Proposed rule).

⁵⁷*Id.* at 48,036.

emission reduction” (BSER) term to refer to measures that can be applied to or at the regulated source, as compared with the CPP’s interpretation to define BSER broadly to include any action to reduce emissions that could be taken by an owner or operator of a regulated EGU, whether at the source or outside of it.⁵⁸ Consistent with its consideration of a potential another section 111(d) rule to regulate GHG emissions from existing EGUs, EPA published an [Advanced Notice of Proposed Rulemaking](#) (ANPR) seeking information on BSER consistent with the legal interpretation in the proposed repeal.⁵⁹

ii. New Source Performance Standards for Electric Generating Units – Clean Air Act § 111(b)

Because the EPA can only regulate under section 111(d) if there is a section 111(b) regulation, simultaneous with issuance of the CPP in 2015, the EPA issued a section 111(b) rule regulating CO₂ emissions from new and modified fossil-fuel burning EGUs.⁶⁰ Among other things, the regulations established emissions limits for new coal-fired EGUs predicated on the use of partial carbon capture and storage (CCS) technology.⁶¹ Like the CPP, the section 111(b) regulations were immediately challenged in the D.C. Circuit.⁶²

In *North Dakota v. EPA*, the crux of petitioners’ challenge focused on the EPA’s determination that CCS has been adequately demonstrated for new coal-based EGUs. On March 28, 2017, the EPA filed a [motion](#) to hold the case in abeyance and indicated it may undertake a new rulemaking.⁶³ On April 28, 2017, the court [ordered](#) the case held in abeyance for 60 days,⁶⁴ and on August 10, 2017, [extended](#) the abeyance indefinitely.⁶⁵ The EPA has taken no further action since.

iii. Methane and VOCs from Oil and Gas Sources

On June 3, 2016, EPA issued a final rule revising the New Source Performance Standards (NSPS) for the oil and natural gas industry. The 2016 rule, amended 40 C.F.R. Part 60, Subpart OOOO and added a new Subpart OOOOa (Quad Oa Rule), to curb emissions of volatile organic compounds (VOCs) and methane from new, reconstructed, and modified oil and gas sources.⁶⁶ Numerous parties filed petitions for review challenging the Quad Oa Rule in the D.C. Circuit.⁶⁷ On November 9, 2016, the EPA issued an

⁵⁸*Id.* at 48,039.

⁵⁹State Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, 82 Fed. Reg. 61,507 (Dec. 28, 2017) (to be codified at 40 C.F.R. 60) (Notice).

⁶⁰Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) (codified at 40 C.F.R. pts. 60-71 and 98) (Final rule).

⁶¹*Id.* at 64,536. The EPA noted that “utility boilers have multiple technology pathways available to comply with the actual emission standard.” *Id.*

⁶²Petition for Review of Final Action, *North Dakota v. EPA*, No. 15-1381 (D.C. Cir. Oct. 27, 2015) (challenging the section 111(b) regulations).

⁶³See Notice of Executive Order, EPA Review of Rule and Forthcoming Rulemaking, and Motion to Hold Case in Abeyance, *North Dakota v. EPA*, No. 15-1381 (D.C. Cir. Mar. 28, 2017).

⁶⁴See Order, *North Dakota v. EPA*, No. 15-1381 (D.C. Cir. Apr. 28, 2017).

⁶⁵See Order, *North Dakota v. EPA*, No. 15-1381 (D.C. Cir. Aug. 10, 2017).

⁶⁶Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824 (June 3, 2016) (codified at 40 C.F.R. 60) (Final rule) (hereafter “Quad-Oa Rule”).

⁶⁷Petition for Review, *North Dakota v. EPA*, No. 16-1242 (D.C. Cir. July 15, 2016).

Information Collection Request (ICR) to owners/operators in the oil and gas industry, which it stated was designed to inform the EPA as to how best reduce methane and other harmful emissions from existing sources.⁶⁸ On March 7, 2017, the EPA [withdrew](#) the ICR.⁶⁹

On March 28, 2017, President Trump signed an [Executive Order](#) requiring the EPA to “review” the Quad Oa Rule.⁷⁰ On April 18, 2017, EPA Administrator Pruitt informed industry trade associations that he was granting their petitions for reconsideration for certain issues and that the Agency intended to issue a 90-day stay of the compliance date for the rule’s fugitive emission requirements.⁷¹ The EPA subsequently [moved](#) to hold the Quad Oa litigation in abeyance until it completed its review of the rule.⁷² The court [granted](#) the EPA’s motion and the case remains in abeyance.⁷³

On June 5, 2017, the EPA issued a [notice](#) staying certain requirements of the rule (fugitive emissions, pneumatic pumps, and professional engineer certification) for three months under CAA § 307(d)(7)(B) (Administrative Stay).⁷⁴ That same day, a coalition of environmental groups petitioned for review of the stay in the D.C. Circuit and also filed an emergency motion seeking a stay, or alternatively, summary vacatur of the rule.⁷⁵

On June 16, 2017, the EPA released two proposed rules. The [first](#) would stay for two years the effective date of certain requirements of the rule (fugitive emissions, well site pneumatic pump standards, and professional engineer certification of closed vent systems).⁷⁶ The EPA stated that a two-year stay would give the agency time to complete the reconsideration process, including issuing a proposal, taking public comment, and issuing a final action.⁷⁷ The second [proposed rule](#) would establish a new three-month stay of the 2016 Rule requirements addressed in the two-year proposed stay.⁷⁸

On July 3, 2017, the D.C. Circuit issued an [opinion](#) vacating the Administrative Stay, concluding that the “EPA lacked authority under the Clean Air Act to stay the rule.”⁷⁹ The court made clear that it was not opining on the EPA’s authority to issue the rulemaking-

⁶⁸EPA, [Information Collection Request: Supporting Statement, ICR No. 2548.01: Information Collection Effort for Oil and Gas Facilities](#) (Nov. 9, 2016).

⁶⁹See [Letter](#) from Peter Tsigotis, Dir., Sector Policies & Programs Div., EPA, to ICR Recipients (Mar. 6, 2016); Notice Regarding Withdrawal of Obligation to Submit Information, 82 Fed. Reg. 12,817 (Mar. 7, 2017) (Notice).

⁷⁰Exec. Order No. 13783, 82 Fed. Reg. 16,093 at 16,096 (Mar. 31, 2017).

⁷¹[Letter from Scott Pruitt, Adm’r, EPA, to Shannon S. Broome, Counsel for Texas Oil and Gas Association](#) (Apr. 18, 2017).

⁷²Notice of Exec. Order & Motion to Hold Cases in Abeyance, *Am. Petroleum Inst. v. EPA*, No. 13-1108 (D.C. Cir. Apr. 7, 2017).

⁷³Order, *Am. Petroleum Inst. v. EPA*, No. 13-1108 (D.C. Cir. Nov. 21, 2017).

⁷⁴Oil & Natural Gas Sector: Emission Standards for New, Reconstructed, & Modified Sources; Grant of Reconsideration & Partial Stay, 82 Fed. Reg. 25,730 (June 5, 2017) (to be codified at 40 C.F.R. pt. 60) (Notice).

⁷⁵[Pet. for Review](#), *Clean Air Council v. Pruitt*, No. 17-1145 (D.C. Cir. June 5, 2017); [Emergency Mot. for a Stay or in the Alternative, Summary Vacatur](#), *Clean Air Council v. Pruitt*, No. 17-1145 (D.C. Cir. June 5, 2017).

⁷⁶Oil & Gas Sector: Emission Standards for New, Reconstructed, & Modified Sources: Stay of Certain Requirements, 82 Fed. Reg. 27,645 (June 16, 2017) (to be codified at 40 C.F.R. pt. 60) (Proposed rule).

⁷⁷*Id.*

⁷⁸Oil & Gas Sector: Emission Standards for New, Reconstructed, & Modified Sources: Three Month Stay of Certain Requirements, 82 Fed. Reg. 27,641 (June 16, 2017) (to be codified at 40 C.F.R. pt. 60) (Proposed rule).

⁷⁹*Clean Air Council v. Pruitt*, 862 F.3d 1, 4 (D.C. Cir. 2017).

based stay proposed on June 16, 2017.

iv. Mobile Source Standards

On October 15, 2012, the EPA and the National Highway Transportation Safety Administration (NHTSA) issued a final rule establishing a national GHG emissions standards under the Clean Air Act and Corporate Average Fuel Economy (CAFE) standards for model years (MY) 2017-2025 light-duty vehicles.⁸⁰ The rule also included a regulatory requirement for the EPA to conduct a Midterm Evaluation of the GHG standards established for MY2022-2025.⁸¹ At the end of the Obama Administration, on January 12, 2017, the EPA made a “final determination” to maintain MY2022-2025 GHG standards.⁸² On March 15, 2017, the EPA and the Department of Transportation announced that the EPA intended to reconsider the final determination. The EPA also [requested comment](#) on whether the light-duty vehicle GHG standards established for MY2021 remain appropriate.⁸³

On October 25, 2016, the EPA and NHTSA issued a final rule establishing GHG emissions and fuel efficiency standards for medium and heavy duty engines and vehicles.⁸⁴ Two parties filed petitions for review challenging the rule in the D.C. Circuit.⁸⁵ On May 8, 2017, the court issued an order granting the EPA’s motion to hold the case in abeyance.⁸⁶ In September, the petitioners filed a [motion for stay](#) pending judicial review arguing the EPA lacked authority to regulate trailers.⁸⁷ On October 27, the court issued an order granting the motions to stay and continue to hold the case in abeyance.⁸⁸

On August 15, 2016, the EPA issued a final rule finding GHG emissions from certain classes of engines used in aircraft contribute to the air pollution that causes climate change endangering public health and welfare under CAA Section 231(a).⁸⁹ On October

⁸⁰2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624 (Oct. 15, 2012) (codified at 40 C.F.R. pts. 85-86, 600, 49 C.F.R. pts. 523, 531, 533, 536-37) (Final rule).

⁸¹*Id.* at 62,628.

⁸²EPA, [Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation](#) (Jan. 2017).

⁸³Notice of Intention To Reconsider the Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light Duty Vehicles, 82 Fed. Reg. 14,671 (Mar. 22, 2017) (to be codified at 40 C.F.R. pt. 86, 49 C.F.R. pts. 523, 531, 533, 536-37) (Notice).

⁸⁴Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium-and-Heavy-Duty Engines and Vehicles — Phase 2, 81 Fed. Reg. 73,478 (Oct. 25, 2016) (to be codified at 40 C.F.R. pts. 9, 22, 85-86, 600, 1033, 1036-37, 1039, 1042-43, 1065-66, 1068, 49 C.F.R. pts. 523, 534-35, 538) (Final rule).

⁸⁵Petition for Review, Racing Enthusiasts & Suppliers Coal. v. EPA, No. 16-1447 (D.C. Cir. Dec. 27, 2016); Petition for Review, Truck Trailer Mfrs. Ass’n, Inc. v. EPA, No. 16-1430 (D.C. Cir. Dec. 22, 2016).

⁸⁶Order, Truck Trailer Mfrs. Ass’n, Inc. v. EPA, No. 16-1430, ECF No. 1674238, (D.C. Cir. May 8, 2017).

⁸⁷Motion for Stay, Truck Trailer Mfrs. Ass’n, Inc. v. EPA, No. 16-1430 (D.C. Cir. Sept. 25, 2017).

⁸⁸Order, Truck Trailer Mfrs. Ass’n, Inc. v. EPA, 16-1430 (D.C. Cir. Oct. 27, 2017).

⁸⁹Finding That Greenhouse Gas Emissions From Aircraft Cause or Contribute to Air Pollution That May Reasonably Be Anticipated To Endanger Public Health and Welfare 81 Fed. Reg. 54,422 (Aug. 15, 2016) (to be codified at 40 C.F.R. pts. 87, 1068) (Final rule).

10, 2016, the Biogenic CO₂ Coalition filed a petition for review in the D.C. Circuit.⁹⁰ They also filed an administrative petition for reconsideration on October 14, 2016 asking the EPA to reconsider its failure to distinguish between CO₂ from fossil fuels and biogenic CO₂ from biofuels in the 2016 endangerment finding.⁹¹ On March 30, 2017, the EPA moved for abeyance “to allow time for incoming Administration officials . . . to become familiar with the subject matter and issues presented”⁹² which the court granted.

v. Hydrofluorcarbon Regulations

In *Mexichem Fluor, Inc. v. EPA*,⁹³ manufacturers of HFC-134a, a high global warming potential (GWP) refrigerant, challenged EPA’s 2015 rule⁹⁴ that moved certain HFCs from the list of safe substitutes for ozone-depleting substances to the prohibited list under the EPA’s significant new alternatives policy (SNAP) program. The companies argued that the 2015 rule was based on climate impacts whereas section 612 authority is limited to ozone-depleting substances.⁹⁵ In a 2-1 decision,⁹⁶ the D.C. Circuit vacated the EPA’s 2015 rule to the extent that it requires manufacturers to replace HFCs with a substitute substance. Respondent-Intervenor ENGOs and companies sought re-hearing en banc, but the EPA did not, which remain pending. One effect of the decision is to eliminate what some consider the EPA’s simplest measure to implement the Kigali Amendment to the Montreal Protocol without Senate ratification.

vi. Prevention of Significant Deterioration (PSD)

On October 3, 2016, the EPA proposed to revise its regulations applicable to existing PSD and Title V regulations to ensure that neither PSD nor Title V rules require a source to obtain a permit solely because the source emits or has the potential to emit GHGs above the applicable thresholds.⁹⁷ The EPA has yet to respond to comments. Until the EPA issues a final rule, a significance level of 75,000 tons per year CO₂e applies.

b. Bureau of Land Management Venting and Flaring Rule

The Bureau of Land Management (BLM) issued regulations on November 18, 2016 for Waste Prevention, Production Subject to Royalties, and Resource Conservation

⁹⁰Petition for Review, Biogenic CO₂ Coal. v. EPA, No. 16-1358 (Oct. 14, 2016).

⁹¹Reconsideration of Finding That Greenhouse Gas Emissions From Aircraft Cause or Contribute to Air Pollution That May Reasonably Be Anticipated To Endanger Public Health and Welfare, 81 Fed. Reg. 96,413 (Dec. 30, 2016) (to be codified at 40 C.F.R. pts. 87, 1068) (Notice of final action denying petition for reconsideration).

⁹²Unopposed Motion to Govern Further Proceedings, Biogenic CO₂ Coal. v. EPA, No. 16-1358, ECF No. 1645912 (Mar. 30, 2017).

⁹³*Mexichem Fluor Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017) (consolidated with *Arkema v. EPA*, No. 15-1329).

⁹⁴Protection of Stratospheric Ozone: Change of Listing Status for Certain Substitutes Under the Significant New Alternatives Policy Program, 80 Fed. Reg. 42,870 (July 20, 2015) (to be codified at 40 C.F.R. 82) (Final rule).

⁹⁵42 U.S.C. § 7671k (2017).

⁹⁶*Mexichem Fluor Inc.*, 866 F.3d 451.

⁹⁷Revisions to the Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas (GHG) Permitting Regulations and Establishment of a Significant Emissions Rate (SER) for GHG Emissions Under the PSD Program, 81 Fed. Reg. 68,110 (Oct. 3, 2016) (to be codified at 40 C.F.R. pts. 51-52, 60, 70-71) (Proposed rule).

(Venting and Flaring Rule).⁹⁸ Generally, the Venting and Flaring Rule seeks to “reduce waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities on onshore Federal and Indian . . . leases.”⁹⁹ It became effective on January 17, 2017¹⁰⁰ and survived a repeal attempt under the Congressional Review Act.¹⁰¹

States and industry groups [challenged](#) the rule in District Court in Wyoming.¹⁰² After opening briefs were filed in October,¹⁰³ BLM [filed](#) papers in December seeking dismissal or abeyance for development of a “Revision Rule.”¹⁰⁴

On December 8, 2017, BLM issued a [rule](#) suspending or delaying many of the provisions of the Venting and Flaring Rule until January 17, 2019.¹⁰⁵ This suspension rule was promptly challenged in the U.S. District Court for the Northern District of California,¹⁰⁶ the same district that earlier [invalidated](#) a BLM delay of compliance dates issued under Administrative Procedure Act (APA) Section 705.¹⁰⁷

c. Litigation

i. Youth Climate Change Lawsuit

In *Juliana v. United States*, youths sued the U.S., alleging the government failed to protect them from excessive GHG emissions they claim threaten their future, thereby violating the youngest generation’s constitutional right to life, liberty, and property and failing to protect public trust resources. The government and regulated industry unsuccessfully moved to dismiss, arguing non-justiciable political question, lack of standing, failure to properly assert a public trust claim, and lack of a cause of action to enforce public trust obligations.¹⁰⁸ Defendants unsuccessfully sought interlocutory appeal of the order,¹⁰⁹ and the government petitioned for writ of mandamus.¹¹⁰ Argument was held in the U.S. Court of Appeals for the Ninth Circuit on December 11, 2017.

⁹⁸Waste Prevention, Production Subject Royalties, & Resource Conservation, 81 Fed. Reg. 83,008 (Nov. 18, 2016) (to be codified at 40 C.F.R. pts. 3100, 3160, 3170) (Final rule).

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹Juliet Eilperin & Chelsea Harvey, [Senate unexpectedly rejects bid to repeal a key Obama-era environmental regulation](#), WASH. POST (May 10, 2017).

¹⁰²Motion for Preliminary Injunction, Wyoming v. U.S. Dep’t of the Interior, No. 16-285 (and consolidated case) (D. Wyo. Oct. 27, 2017).

¹⁰³*Id.*

¹⁰⁴Federal Respondents’ Response to Petitioners’ Merits Briefs & Motion to Dismiss, or in the Alternative, for a Stay of Proceedings, Wyoming v. U.S. Dep’t of the Interior, No. 16-285 (and consolidated case) (D. Wyo. Dec. 11, 2017).

¹⁰⁵Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58,050 (Dec.8, 2017) (to be codified at 43 C.F.R. pts. 3160, 3170) (Final rule).

¹⁰⁶See Complaint for Declaratory & Injunctive Relief, Sierra Club v. Zinke, No. 3:17-cv-07187 (N.D. Cal. Dec. 19, 2017); Complaint for Declaratory & Injunctive Relief, California v. U.S. Bureau of Land Mgmt., No. 3:17-cv-07186 (N.D. Cal. Dec. 19, 2017).

¹⁰⁷See California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106 (N.D. Cal. 2017).

¹⁰⁸217 F. Supp. 3d 1224 (D. Ore. 2016).

¹⁰⁹Order, [Juliana v. United States](#), No. 6:15-cv-01517-TC, 2017 WL 2483705 (D. Ore. June 20, 2017).

¹¹⁰Petition for Writ of Mandamus to the U.S. Dist. Court for the Dis. of Ore. & Request for Stay of Proceedings in Dist. Court., [Juliana v. United States](#), No. 17-71692 (9th Cir. June 9, 2017).

ii. California Lawsuits Against GHG Producers

During 2017, five local governments in California sued dozens of oil companies and certain coal companies in California superior courts asserting nuisance claims for climate change-related injuries to their communities. San Mateo County, Marin County, and the City of Imperial Beach each filed a lawsuit (the San Mateo cases) against 37 companies asserting nuisance, strict liability, negligence, and trespass claims.¹¹¹ In October 2017, a Missouri federal bankruptcy court [enjoined](#) the San Mateo cases' plaintiffs from pursuing claims against Peabody Energy Corporation, a coal company that emerged from bankruptcy in April 2017.¹¹² The plaintiffs have appealed the bankruptcy court's ruling. Defendants immediately removed the cases to federal court on the grounds that there was federal question jurisdiction, and plaintiffs moved to remand.¹¹³ On December 22, 2017, Defendants filed their opposition to the motion to remand.

On September 19, 2017, San Francisco and Oakland each filed a public nuisance action against five oil companies seeking funding of climate adaptation programs.¹¹⁴ On December 20, 2017, new cases were filed by the City and County of Santa Cruz.¹¹⁵

iii. Climate Change in NEPA Cases

In 2017, several federal appellate court decisions addressed the consideration of GHG emissions in National Environmental Policy Act (NEPA) reviews. In cases involving Department of Energy (DOE) authorizations of liquefied natural gas (LNG) exports, the D.C. Circuit held that DOE adequately considered potential indirect effects on global GHG emissions by considering upstream and downstream emissions from producing, transporting, and exporting LNG.¹¹⁶ In another case, the D.C. Circuit [held](#) the Federal Energy Regulatory Commission (FERC) should have estimated the carbon emissions an interstate natural gas pipeline project would make possible or explain why a quantitative estimate was not feasible.¹¹⁷ The Tenth Circuit [ruled](#) that BLM's finding that four coal leases would not result in higher national GHG emissions was arbitrary and capricious, finding the record did not support BLM's "perfect substitution assumption" (i.e. same amount of coal would be mined elsewhere if the leases were not approved).¹¹⁸

¹¹¹See Complaint, *City of Imperial Beach v. Chevron Corp.*, No. C17-01227 (Cal. Super. Ct. Aug. 24, 2017); Complaint, *Cty. of Marin v. Chevron Corp.*, No. CV1702586 (Cal. Super. Ct. July 17, 2017); Complaint, *Cty. of San Mateo v. Chevron Corp.*, No. 17CIV03222 (Cal. Super. Ct. July 17, 2017).

¹¹² *In re Peabody Energy Corp.*, No. 16-42529, 2017 WL 4843724 (Bankr. E.D. Mo. Oct. 24, 2017).

¹¹³See Removal of Removal by Defendants, *Cty. of San Mateo v. Chevron Corp.*, Nos. 3:17-cv-04929 et al. (N.D. Cal.).

¹¹⁴See Complaint, *People v. BP P.L.C.*, No. CGC-17-561370 (Cal. Super. Ct. Sept. 19, 2017); Complaint, *People v. BP P.L.C.*, No. RG17875889 (Cal. Super. Ct. Sept. 19, 2017).

¹¹⁵See Complaint, [Cty. of Santa Cruz v. Chevron Corp.](#), No. 17CV03242 (Cal. Super. Ct. Dec. 20, 2017); Complaint, [City of Santa Cruz v. Chevron Corp., No. 17CV03243 \(Cal. Super. Ct. Dec. 20, 2017\)](#).

¹¹⁶[Sierra Club v. U.S. Dep't of Energy](#), 867 F.3d 189 (D.C. Cir. 2017); see also *Sierra Club v. U.S. Dep't of Energy*, Nos. 16-1186, 16-1252, & 16-1253, 703 F. App'x 1 (mem) (D.C. Cir. Nov. 1, 2017).

¹¹⁷*Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017).

¹¹⁸*WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222 (10th Cir. 2017).

iv. State Attorney General Investigations

Massachusetts and New York state attorneys general continued investigating Exxon's climate change disclosures. Exxon litigated disputes over its accounting firm's obligation to respond to attorney general subpoenas, with a New York appellate court [ruling](#) that no accountant-client privilege shielded disclosure.¹¹⁹ In January 2017, a Massachusetts state court granted a request to compel Exxon to respond to a civil investigative demand in the investigation of potential violations of the Massachusetts consumer protection law.¹²⁰ Exxon's appeal has been transferred directly to the Supreme Judicial Court. In March 2017, Exxon's federal lawsuit seeking to bar the attorneys general from pursuing their investigations was transferred from Texas to New York.¹²¹ On November 30, 2017, oral argument was held on motions to dismiss Exxon's action.

d. Executive Action

In his first year in office, President Trump issued a series of Executive Orders (EO) directing the executive branch to reduce the burden on manufacturing and streamline permit processes, several of which implicate climate change issues:

- EO 13771, *Reducing Regulation and Controlling Regulatory Costs*, (Jan. 30, 2017);
- EO 13777, *Enforcing the Regulatory Reform Agenda*, (Feb. 24, 2017);
- EO 13781, *Comprehensive Plan for Reorganizing the Executive Branch*, (Mar. 13, 2017);
- EO 13783, *Promoting Energy Independence & Economic Growth*, (Mar. 28, 2017);
- EO 13795, *Implementing an America-First Offshore Energy Strategy*, (Apr. 28, 2017).

Executive Order 13783, requires, among other things, "Review of Estimates of the Social Cost of Carbon" "for Regulatory Impact Analysis" to ensure "agencies use estimates of costs and benefits in their regulatory analyses that are based on the best available science and economics." The EO also disbanded the Interagency Working Group on Social Cost of GHGs. The EO also withdraws "as no longer representative of governmental policy" a series of technical support documents developed under the prior administration.¹²²

3. Regional Activities

Launched in 2009, the Regional Greenhouse Gas Initiative (RGGI) became the first multi-state cap-and-trade program in the U.S. to for reducing carbon emissions, capping CO₂ emissions from the power sector. Participating states announced on August 23, 2017 agreement on a draft strategy to extend the program through 2030, including a 30 percent tightening of the emissions cap from 2020 to 2030,¹²³ which would reduce the region's

¹¹⁹People v. PriceWaterhouseCoopers, LLP, 52 N.Y.S. 3d 626 (N.Y. App. Div. 2017).

¹²⁰In re Civil Investigative Demand No. 2016-EPD-36, 34 Mass. L. Rptr. 104 (Mass. Super. Ct. Jan. 11, 2017).

¹²¹Exxon Mobil Corp. v. Schneiderman, No. 4:16-cv-00469-K (N.D. Tex. Mar. 29, 2017); *see also* Exxon Mobil Corp. v. Schneiderman, 1:17-cv-02301 (S.D.N.Y.).

¹²²Exec. Order No. 13783 at § 5.

¹²³Press Release, RGGI, Inc., [Regional States Announce Proposed Program Changes: Additional 30% Emissions Cap Decline by 2030](#) (Aug. 23, 2017).

power-sector emissions by 65 percent below 2009 levels.¹²⁴

In response to announcement of the U.S.’s withdrawal from the Paris Agreement, fourteen governors formed the U.S. Climate Alliance, declaring an intent to honor the U.S. Paris Agreement commitments.¹²⁵ Alliance members represent more than \$7 trillion of the U.S.’s \$18.6 trillion GDP, and, if they were a country, would be the third-largest economy in the world. On September 20, the Alliance released a [report](#) finding that member states are on track to meet their portion of the U.S. NDC to the Paris Agreement, which committed to reducing emissions 26 to 28 percent below 2005 levels by 2025.¹²⁶ At COP23 in Bonn, the Alliance announced a new partnership with Canada and Mexico, called the North American Climate Leadership Dialogue, to work together on designing and implementing climate change policies.¹²⁷

On June 5, just four days after U.S.’s Paris Agreement announcement, a cross-sector coalition of businesses, investors, cities, states, universities and other organizations formed the “We Are Still In” coalition, pledging a shared commitment to helping the U.S. meet the Paris Agreement goals.¹²⁸ Membership includes over 2,500 leaders from government, business, and academic institutions, and represents 127 million Americans located in all fifty states, and \$6.2 trillion of the U.S. economy.¹²⁹ State representation includes eight states and attorneys general from 19 states.¹³⁰

In 2017, 34 new members joined the Under2 Coalition, bringing the total membership to 205 jurisdictions.¹³¹ This coalition started in 2015 with an MOU between California and Baden-Wurttemberg (Germany), who agreed to reduce emissions sufficiently to limit global temperature rise to 1.5 degrees Celsius.¹³² The Coalition now represents 1.3 billion people and almost 40 percent of global GDP.¹³³

In October, twelve cities—including London, Los Angeles, Mexico City, and Paris—pledged to procure only zero-emission buses for municipal transit fleets beginning in 2025.¹³⁴

4. State Activities

In 2017, regulators from twelve states wrote the EPA urging retention of the Clean Power Plan, and numerous governors and state officials voiced opposition when the EPA

¹²⁴*Id.*

¹²⁵[Press Release](#), Office of Governor Edmund G. Brown, Jr., CA Governor Brown, NY Governor Cuomo, and WA Governor Inslee Announce Formation of U.S. Climate Alliance (June 1, 2017).

¹²⁶U.S. Climate Alliance, [2017 Annual Report: Alliance States Take the Lead](#) (2017).

¹²⁷[Press Release](#), U.S. Climate Alliance, North American Climate Leaders Statement (Nov. 13, 2017).

¹²⁸[About](#), WE ARE STILL IN.COM (last visited Mar. 4, 2018).

¹²⁹*Id.*

¹³⁰Press Release, N.Y. State Office of the Atty Gen., [A.G. Schneiderman—Part of Coalition of 19 Attorneys General—Joins National “We are Still In” Pledge to Maintain Commitments to The Paris Climate Agreement](#) (June 5, 2017).

¹³¹[Global Coalition of States and Regions Surpasses Landmark 200 Jurisdictions](#), UNDER2 COALITION.COM (updated Nov. 14, 2017).

¹³²[Background](#), UNDER2 COALITION.COM (last visited Mar. 4, 2018).

¹³³*Id.*

¹³⁴Alister Doyle, [Twelve big cities to buy zero emissions buses, extend green areas](#), REUTERS (Oct. 23, 2017).

announced a proposal to repeal the Plan.¹³⁵

California's Governor Brown signed [AB 398](#) to extend California's cap-and-trade program through 2030.¹³⁶ The legislature passed the bill with bipartisan supermajorities in both houses.¹³⁷ The extension date aligns with California's recently codified goal of reducing state emissions 40 percent below 1990 levels by 2030.¹³⁸ The California Air Resources Board (CARB) also adopted final rules¹³⁹ intended to reduce annual methane emissions from the oil and natural gas sector by 1.4 million metric CO₂e tons.¹⁴⁰

In March, CARB voted unanimously to maintain its GHG and zero-emission vehicles (ZEV) standards through 2025¹⁴¹ and to allow the travel provision (which has limited the requirement to sell ZEVs in other states) to sunset as scheduled.¹⁴² The ZEV standards are projected to result in the cumulative sale of 1.2 million ZEVs and plug-in hybrid vehicles in California by 2025.¹⁴³

California's Low Carbon Fuel Standard (LCFS) survived its most recent court challenge largely intact. In [POET, LLC v. State Air Resources Board \(POET II\)](#),¹⁴⁴ the Superior Court of California, County of Fresno issued a writ maintaining carbon intensity targets for diesel and biodiesel fuel at 2017 levels – as opposed to declining in 2018, as for gasoline – until CARB addressed alleged flaws with its California Environmental Quality Act (CEQA) analysis of the rule's impact on NO_x emissions.¹⁴⁵

New York rolled out new incentives for clean cars in March, announcing rebates of up to \$2,000 toward a new plug-in hybrid, all-electric or fuel-cell car.¹⁴⁶ On May 17, Governor Cuomo addressed short-lived climate pollutants, introducing the Methane Reduction Plan to cut methane emissions in the state 40% by 2030 and 80% by 2050 from 1990 levels.¹⁴⁷

Virginia Governor McAuliffe signed an executive directive instructing the Virginia Department of Environmental Quality (VDEQ) to develop and issue regulations to reduce CO₂ emissions from Virginia power plants, including regulation that is "trading-ready" and able to link to RGGI.¹⁴⁸ In December, VDEQ approved a proposed regulation that would impose a carbon cap of 33-34 million short tons starting in 2020, declining three

¹³⁵[States Urge Trump Administration to Move Forward with Clean Power Plan](#), GEORGETOWN CLIMATE CTR. (July 17, 2017); [State Reactions to Trump Repealing the Clean Power Plan](#), GEORGETOWN CLIMATE CTR. (Oct. 10, 2017).

¹³⁶A.B. 398, 2017-2018 Reg. Sess. (Cal. 2017); Anne C. Mulkern, [Lawmakers extend cap and trade, tout climate leadership](#), E&E NEWS (July 18, 2017).

¹³⁷Georgina Gustin, [California Lawmakers Extend Cap-and-Trade to 2030, with Republican Support](#), INSIDE CLIMATE NEWS (July 18, 2017).

¹³⁸SB-32 § 146, 2015-2016 Reg. Sess. (Cal. 2016).

¹³⁹[Press Release](#), Cal. Air Res. Bd., CARB Approves Rule for Monitoring and Repairing Methane Leaks from Oil and Gas Facilities (Mar. 23, 2017).

¹⁴⁰*Id.*

¹⁴¹[Press Release](#), Cal. Air Res. Bd., CARB Finds Vehicle Standards Are Achievable and Cost-effective (Mar. 24, 2017).

¹⁴²Cal. Air Res. Bd., California's Advanced Clean Cars Midterm Review at ES-52 (Jan. 18, 2017).

¹⁴³*Id.* at ES-7.

¹⁴⁴218 Cal. Rptr. 3d 681 (Cal. Ct. App. 2017).

¹⁴⁵Joshua T. Bledsoe & Max Friedman, [Court Rules Against CARB on LCFS, preserves 2017 status quo](#), BIODIESEL MAG. (Apr. 17, 2017).

¹⁴⁶[Electric Vehicle Rebate](#), N.Y. STATE ENERGY RESEARCH AND DEV. AUTH. (2017).

¹⁴⁷N.Y. Dep't of Env'tl. Prot., [Methane Reduction Plan](#) (May 2017).

¹⁴⁸[Press Release](#), Va. Governor, Governor McAuliffe Signs Executive Order to Reduce Carbon Emissions in Virginia (June 28, 2016).

percent annually for ten years.¹⁴⁹

The **Massachusetts** Department of Environmental Protection issued a suite of six regulations strengthening the state's reductions of GHGs.¹⁵⁰ The regulations increased required reductions of short-lived climate pollutants,¹⁵¹ established a Clean Energy Standard,¹⁵² set an annually-declining carbon emission standard for fossil-fuel power plants,¹⁵³ created enforceable carbon emissions standards for the state's passenger vehicle and mobile equipment fleet, and required reporting on statewide surface transportation carbon emissions.¹⁵⁴ The Clean Energy Standard requires utilities and power suppliers to provide at least 16 percent of electricity from clean energy sources (including hydro and nuclear power). The standard increases 2% annually, up to 80% in 2050.¹⁵⁵

Florida Governor Scott signed Senate Bill 90—implementing the Amendment 4 ballot initiative that passed in 2016 with 73% approval¹⁵⁶—that exempts solar or other renewable energy source devices installed on commercial and industrial property from tangible personal property tax assessment.¹⁵⁷ Ultimately, 80% of the assessed value of a renewable energy source device installed on non-residential real property on or after January 1, 2018 will be exempt from ad valorem taxation.¹⁵⁸

Rhode Island adopted several bills bolstering the state's clean energy programs.¹⁵⁹ The bills extend the existing renewable energy growth programs for ten years, streamline the permitting process for solar power and for connecting renewable generation to the grid, allow for renewable energy (RE) development on up to 20% of protected farmland and open space, and make schools, hospitals, and some non-profits eligible to participate in the state's virtual-net-metering program.¹⁶⁰ Also, Rhode Island state agencies completed phase one of the Power Sector Transformation initiative, which aims to design a new regulatory framework for the electric power sector to help enable vehicle electrification, distributed generation, and renewable energy integration.¹⁶¹

Maryland revised its renewable portfolio standard (RPS) to increase the state's electricity from qualified sources of renewable energy from 20 percent by 2022 to 25 percent by 2020.¹⁶² The RPS became law in Maryland after more than three-fifths of the Maryland House of Delegates and the Senate voted to override the governor's earlier veto of the legislation.¹⁶³ Also, the Maryland Public Service Commission launched Public

¹⁴⁹*Id.*

¹⁵⁰[Reducing GHG Emissions Under Section 3\(d\) of the Global Warming Solutions Act](#), MASS.GOV. (last visited Mar. 11, 2018).

¹⁵¹310 MASS. CODE REGS. 7.72 (2017); 310 MASS. CODE REGS. 7.73 (2017).

¹⁵²310 MASS. CODE REGS. 7.75 (2017).

¹⁵³310 MASS. CODE REGS. 7.74(2017).

¹⁵⁴310 MASS. CODE REGS. 60.06 (2017); 310 MASS. CODE REGS. 60.06 (2017).

¹⁵⁵310 MASS. CODE REGS. 7.75 (2017).

¹⁵⁶[Florida Voters Pass Amendment 4; Tax Breaks for Solar Energy](#), CBS MIAMI (Aug. 30, 2016).

¹⁵⁷[S.B. 90](#), 2017 Reg. Sess. (Fla. 2017).

¹⁵⁸*Id.*

¹⁵⁹[Press Release](#), Office of the Governor, Raimondo Signs Bills Supporting Clean Energy Growth (Aug. 9, 2017).

¹⁶⁰*Id.*

¹⁶¹[Power Sector Transformation Initiative](#), R.I. PUB. UTILS. COMM'N (last visited Mar. 11, 2018).

¹⁶²[Maryland increases renewable portfolio standard target to 25% by 2020](#), U.S. ENERGY INFO. ADMIN. (Mar. 24, 2017).

¹⁶³Pamela Wood, [After veto override, renewable energy sourcing accelerates in Maryland](#), BALTIMORE SUN (Feb. 2, 2017).

Conference 44¹⁶⁴ to review electric distribution systems and address rate-related issues affecting deployment of distributed energy resources and electric vehicles.

Hawaii enacted legislation that establishes a Hawaii Climate Change Mitigation and Adaptation Commission to lead and expand the state's efforts to reduce GHG emissions and improve resiliency in line with goals set out in the Paris Agreement.¹⁶⁵

The **Oregon** Department of Environmental Quality released its final report on considerations for designing a cap-and-trade program in the state to reduce GHG emissions in February.¹⁶⁶ The report found that a cap-and-trade program could achieve emissions reductions with a limited economic effect.¹⁶⁷

5. Local Activities

In June, the U.S. Conference of Mayors adopted several resolutions, including one that explicitly recognized the importance of the “Paris Climate Accord, the Clean Power Plan, the Clean Energy Incentive Program, and other efforts that will provide cities the tools they need to combat climate change.”¹⁶⁸ It also adopted resolutions encouraging utilities, the federal government, and others to help accelerate the electrification of the transportation sector, and encouraging cities to pursue a transition to “100 percent clean, renewable energy” by 2035.¹⁶⁹

B. Adaptation

2017 was a record-breaking year of climate-related events. Since 1895, it was the third warmest on record.¹⁷⁰ There were sixteen weather and climate disaster events with losses exceeding \$1 billion, including Hurricane Harvey, Irma, and Maria, wildfires in the West, and flooding in the Midwest, tying the 2011 record.¹⁷¹ 2017 was the most expensive year in history for U.S. disaster events, exceeding \$300 billion in damages.¹⁷²

1. International Activities

A wide range of adaptation activities advanced at the international level in 2017, culminating with COP23 in Bonn. The Paris Agreement acknowledged that adaptation, would now be addressed on a par with mitigation. Thus, most countries are now including an adaptation component in their NDCs.

At COP23, “negotiators made only procedural decisions on the adaptation-related

¹⁶⁴[Transforming Maryland’s Electric Grid \(PC44\)](#), MARYLAND PUBLIC SERVICE COMMISSION (last visited Mar. 11, 2018).

¹⁶⁵[S.B. 559](#), 29th Leg., Reg. Sess. (Haw. 2017).

¹⁶⁶Or. Dep’t of Env’tl. Quality, [Considerations for Designing a Cap-and-Trade Program in Oregon](#) (Feb. 14, 2017).

¹⁶⁷*Id.*

¹⁶⁸[392 US Climate Mayors commit to adopt, honor and uphold Paris Climate Agreement goals](#), MEDIUM (June 1, 2017); Hank Boerner, [U.S. / Global Cities Showing the Way on Climate Change Solutions](#), CLEAN ENERGY INCENTIVE PROGRAM (July 15, 2017).

¹⁶⁹*Id.*

¹⁷⁰[Assessing the Global Climate in October 2017](#), NOAA NAT’L CTRS. FOR ENVTL. INFO. (Nov. 17, 2017).

¹⁷¹[U.S. Billion-Dollar Weather and Climate Disasters](#), NOAA NAT’L CTRS. FOR ENVTL. INFO. (Oct. 2017).

¹⁷²Brian Sullivan, [The Most Expensive U.S. Hurricane Season Ever: By the Numbers](#), BLOOMBERG (Nov. 26, 2017).

mandates of the Paris Agreement.”¹⁷³ Parties agreed that the Adaptation Fund, which currently serves the [Kyoto Protocol](#),¹⁷⁴ “shall” remain in place to serve the Paris Agreement, subject to further decisions to be taken in 2018 regarding governance and operational revisions.¹⁷⁵ To support the continued work of the Adaptation Fund, Germany, Ireland, Italy, Sweden, and the Walloon Region of Belgium pledged a total of an additional US \$93.3 million in funding.¹⁷⁶

Several key adaptation topics were on the table in Bonn as the creation of the Paris Agreement “rulebook” advanced.¹⁷⁷ Discussions focused on the requirement for Parties to report on adaptation under the rubric “adaptation communication.”¹⁷⁸ Parties discussed among other things: a need for both general guidance and NDC-specific guidance for adaptation communication; whether adaptation communication should be folded into the broader consideration of a public registry for NDCs (while noting the desirability of comparability), and whether the IPCC should develop methodologies for aggregating data towards global goals for adaptation.¹⁷⁹

The UNFCCC Adaptation Committee reported to the COP in Bonn on its recent efforts, including the technical examination process for adaptation or “TEP-A.”¹⁸⁰ Due to a heavy workload, the Adaptation Committee was unable to complete work on a mandate to develop methodologies for reviewing adequacy of adaptation and support.¹⁸¹

Loss and damage is now more firmly entrenched as a third topic, separate from mitigation and adaptation, under the Paris Agreement. In Bonn, discussions on loss and damage progressed under the Warsaw International Mechanism (WIM), with a commitment to hold an expert dialogue at the next session of the UNFCCC subsidiary bodies and the creation of a clearinghouse on risk transfer to be known as the Fiji clearinghouse.¹⁸² Even though an official COP decision on WIM includes a mandate to secure financing for it, NGO activists claimed negotiators were “seeking to twist, water down, and delete references to finance from the loss and damage decision text.”¹⁸³

At the COP, the numerous side events offer a window into the state of play of adaptation implementation. There was keen interest in utilizing disruptive technologies, such as blockchain and big data, to advance climate services for adaptation.¹⁸⁴ These technology advances are driving introduction of new tools and methodologies.¹⁸⁵

¹⁷³Paula Caballero, et al., [Despite Some Major Bumps, Bonn Climate Summit Got the Job Done](#), WORLD RES. INST. BLOG (Nov. 20, 2017).

¹⁷⁴U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (UNFCCC), UNFCCC, [Conference of the Parties on its Third Session, Adoption of the Kyoto Protocol](#), Decision 1/CP.3, U.N. Doc. FCCC/CP/1997/7/Add.1 (Mar. 25, 1998).

¹⁷⁵UNFCCC, [Report of the Adaptation Fund Board](#), Decision -/CP.13 (Unedited Advance Version).

¹⁷⁶*Id.* at cl. 4.

¹⁷⁷*See* Lehr, *supra* note 7.

¹⁷⁸Ozone Secretariat, *supra* note 21, at 13-14.

¹⁷⁹*Id.* at 14, 18-19, 30.

¹⁸⁰*Id.* at 9.

¹⁸¹*Id.*

¹⁸²*Id.* at 21; *See also*, Lehr, *supra* note 7.

¹⁸³C. Ruell, [Lost and Damaged Finance for Day 6!](#), CLIMATE ACTION NETWORK INT’L (Nov. 11, 2017).

¹⁸⁴*See, e.g.*, Tom Baumann, [Using Blockchain to Achieve Climate Policy Goals](#), IETA INSIGHTS; *See also*, Gina Lovett, [COP23 explores the role of blockchain in climate action](#), DAILY PLANET (Nov. 2017).

¹⁸⁵[Advancing Law & Governance Contributions to Climate Action under the Paris Agreement](#), CTR. FOR INT’L GOVERNANCE INNOVATION (Nov. 10, 2017).

2. National Activities

Trump administration executive actions reversed many of President Obama's policies to promote adaptation and resilience at federal, state, and local levels.

In March, President Trump's [EO 13783](#),¹⁸⁶ "Promoting Energy Independence and Economic Growth," revoked or rescinded several key directives and documents guiding the integration of climate change resilience into federal agencies' decision-making processes. It rescinded the Obama administration's [President's Climate Action Plan](#)¹⁸⁷ and revoked [EO 13653](#),¹⁸⁸ "Preparing the United States for the Impacts of Climate Change."¹⁸⁹ Together, the Climate Action Plan and EO 13653 had spurred federal adaptation planning and initiatives across all departments, including the launching of a Climate Data Initiative and the creation of a State, Local, and Tribal Leaders Task Force on Climate Preparedness and Resilience. The Trump Executive Order also called for the Council on Environmental Quality to rescind its guidance¹⁹⁰ for federal agencies on how to consider climate change impacts and GHG emissions in environmental reviews under NEPA.¹⁹¹

EO 13783 also revoked the 2016 Presidential Memorandum "[Climate Change and National Security](#),"¹⁹² and the new [National Security Strategy](#) released in December no longer recognizes climate change among the threats to national security.¹⁹³ In contrast, the [National Defense Authorization Act for Fiscal Year 2018](#), enacted in December, includes a requirement for the Department of Defense to report on risks to national security and military installations relating to climate change and sea-level rise.¹⁹⁴

President Trump also [revoked](#) a [2016 executive order](#)¹⁹⁵ that had established the Northern Bering Sea Climate Resilience Area and created a task force to coordinate federal activities in the area and seek input from native communities.¹⁹⁶ Another Trump [executive order \(No. 13807\)](#)¹⁹⁷ revoked the Obama-era [Federal Flood Risk Management Standard](#),¹⁹⁸ which was established to ensure federal investments were designed and sited to consider future flood risks. Although agencies had proposed rules to implement the standard,¹⁹⁹

¹⁸⁶[Exec. Order No. 13783](#), 82 Fed. Reg. 16,093 (Mar. 28, 2017).

¹⁸⁷EXEC. OFFICE OF THE PRESIDENT, [The President's Climate Action Plan](#) (June 2013).

¹⁸⁸[Exec. Order No. 13653](#), 78 Fed. Reg. 66,817 (Nov. 1, 2013).

¹⁸⁹*Id.* § 3.

¹⁹⁰Final 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. 1, 2016).

¹⁹¹Exec. Order No. 13,783 § 3(c).

¹⁹²[Presidential Memorandum on Climate Change and National Security](#), 2016 DAILY COMP. PRES. DOC. 621 (Sept. 21, 2016); Exec. Order No. 13,783 at 13783 §3(a).

¹⁹³EXEC. OFFICE OF THE PRESIDENT, [NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA](#) (Dec. 2017). *See also*, Nick Sobczyk, [Climate to get a bit part in Trump's security plan](#), E&E News (Dec. 18, 2017).

¹⁹⁴[H.R. 2810](#), 115th Cong. (2017).

¹⁹⁵[Exec. Order No. 13754](#), 81 Fed. Reg. 90,669 (Dec. 9, 2016).

¹⁹⁶Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (Apr. 28, 2017).

¹⁹⁷[Exec. Order No. 13,807 § 6](#), 82 Fed. Reg. 40,463, 40,469 (Aug. 15, 2017).

¹⁹⁸[Exec. Order No. 13,690](#), 80 Fed. Reg. 6425 (Jan. 30, 2015).

¹⁹⁹*See* Updates to Floodplain Management and Protection of Wetlands Regulations To Implement Executive Order 13690 and the Federal Flood Risk Management Standard, 81 Fed. Reg. 57,401 (proposed Aug. 22, 2016); Floodplain Management and Protection of Wetlands; Minimum Property Standards for Flood Hazard Exposure; Building to the Federal Flood Risk Management Standard, 81 Fed. Reg. 74,967 (proposed Oct. 28, 2016).

these were not finalized prior to the standard being revoked, and the Department of Housing and Urban Development formally withdrew its proposed rule in December.²⁰⁰

In the fall, federal agencies released drafts of their 2018-2022 strategic plans, many of which de-emphasized or removed references to climate change and the need for resilience-building activities, compared to previous iterations of the agency plans.²⁰¹

In November, the U.S. Global Change Research Program released Volume I of the Fourth National Climate Assessment, the [Climate Science Special Report](#).²⁰² The report makes a strong argument that human-caused climate change is occurring and details the observed and projected physical impacts.

3. State Activities

Many states have continued to assume a leadership role on climate adaptation, including by adopting new plans, laws, and policies to promote state and local adaptation. Several states created new state-level executive positions and inter-agency commissions to help prepare for climate change. **Hawaii** [enacted legislation](#) expanding the state's Interagency Climate Adaptation Committee to create a new Hawaii Climate Change Mitigation and Adaptation Commission charged with understanding vulnerabilities, setting goals and strategies for adaptation and mitigation, and tracking progress on implementing these goals.²⁰³ **Alaska's** Governor Walker created a new climate change advisor position in the state executive branch²⁰⁴ and signed an [administrative order](#) establishing a Climate Action for Alaska Leadership Team, which will be responsible for advising the Governor on adaptation and mitigation strategies.²⁰⁵ In **Rhode Island**, Governor Raimondo issued an [executive order](#) establishing a Climate Resiliency Officer, who will work with the state's existing Climate Change Coordinating Council to develop a statewide Climate Action Plan.²⁰⁶

States took steps to help ensure that governmental decisions are informed by climate science and projections and to support resilient infrastructure projects. **New York** finalized [regulations](#) setting official statewide projections for sea-level rise.²⁰⁷ The projections are intended to be used by state agencies in considering sea-level rise impacts and how they might relate to permits, funding, and other decisions as called for by the state's Community Risk and Resiliency Act.²⁰⁸ **Rhode Island** enacted [legislation](#) requiring members of local planning boards and commissions participate in biannual training on sea-

²⁰⁰Withdrawal of Proposed Rules to Reduce Regulatory and Financial Burden, 82 Fed. Reg. 60,693 (Dec. 22, 2017).

²⁰¹See, e.g., U.S. Env'tl. Prot. Agency, [Draft FY 2018-2022 EPA Strategic Plan](#) (Oct. 2, 2017); U.S. Dep't of Transp., [U.S. Department of Transportation Strategic Plan for FY 2018-2022, Draft for Public Comment](#) (Oct. 19, 2017); see also Brittany Patterson, [Leaked strategic plan touts energy, omits climate](#), ENV'T & ENERGY PUBL'G (Oct. 25, 2017). See Office of Mgmt. and Budget, OMB Circular No. A-11, [Section 230, Agency Strategic Planning](#) (2017).

²⁰²U.S. Global Change Research Program, [Climate Science Special Report: Fourth National Climate Assessment, Volume I](#) (2017).

²⁰³[S.B. 559](#), 29th Leg., 2017 Sess. (Haw. 2017).

²⁰⁴Rachel Waldholz, [Walker administration appoints climate adviser, promises new policy "soon"](#), ALASKA PUB. MEDIA (Sept. 19, 2017).

²⁰⁵[Alaska Admin. Order, No. 289](#), Office of the Governor (Oct. 31, 2017).

²⁰⁶[R.I. Exec. Order, No. 17-10](#) (Sept. 15, 2017).

²⁰⁷N.Y. COMP. CODES R. & REGS. tit. 6, §§ 490.1-490.4 (2017).

²⁰⁸N.Y. ENVTL. CONSERV. LAW § 3-0319 (Consl. 2017).

level rise impacts and the effects of development in the floodplain.²⁰⁹ **California**'s State Water Resources Control Board adopted a [resolution](#) identifying specific actions it will take to better prepare water systems for climate change.²¹⁰ California also enacted [legislation](#) authorizing the establishment of enhanced infrastructure financing districts for the purpose of climate adaptation projects.²¹¹

States have continued to update and implement plans for improving resilience. Using improved sea-level rise projections that anticipate the 2012 plan's "worst case scenario" to now be the "best case scenario,"²¹² the **Louisiana** Coastal Protection and Restoration Authority updated the state's 2017 [Coastal Master Plan](#) that details the state's plans to address sea-level rise and mitigate ongoing and future land loss through protection and nature-based restoration projects.²¹³ **Texas**'s General Land Office developed a [Coastal Resiliency Master Plan](#) to improve the resilience of the coast and coastal communities to threats of sea-level rise, erosion, storm surge, and other environmental hazards.²¹⁴ With input from state agencies, the **Montana** Institute on Ecosystems developed the state's first [climate assessment](#).²¹⁵

In the courts, **Massachusetts** federal district court partially [granted](#) ExxonMobil Corporation's (Exxon) motion to dismiss a Clean Water Act citizen suit alleging Exxon failed to prepare an oil terminal for severe storms and climate change.²¹⁶ The court ruled plaintiff lacked standing for climate change-related injuries that would occur in the "far future" but did have standing for claims based on near-term risks of severe weather.

4. Local/Regional Activities

In Florida, Broward County enacted an [ordinance](#) requiring design of surface water management infrastructure to consider "future conditions"²¹⁷ maps that reflect projected sea-level rise impacts on groundwater levels, so infrastructure can provide flood protection and drainage under future conditions.²¹⁸

Minneapolis, New York City, and Denver initiated efforts to reduce the urban heat island effect by improving greenspace. In April, the Minneapolis City Council approved a [resolution](#) designating "Green Zones," prioritizing green infrastructure, clean energy, green jobs, urban agriculture, and other improvements to address disproportionate health and economic impacts of pollution and climate change.²¹⁹ New York City established [Cool Neighborhoods NYC](#), investing \$106 million to reduce effects of extreme heat through

²⁰⁹[S.B. 1005](#), 2017 Reg. Sess. (R.I. 2017).

²¹⁰Cal. State Water Res. Control Bd., [Resolution No. 2017-0012](#), Comprehensive Response to Climate Change (Mar. 7, 2017).

²¹¹[A.B. 733](#), 2017-2018 Sess. (Cal. 2017).

²¹²State of Louisiana, [Louisiana's Comprehensive Master Plan for a Sustainable Coast](#) 72 (June 2, 2017).

²¹³*Id.*

²¹⁴Tex. Gen. Land Office, [Texas Coastal Resiliency Master Plan](#) (Mar. 2017).

²¹⁵Cathy Whitlock et al., [2017 MONTANA CLIMATE ASSESSMENT](#), Mont. State Univ. & Univ. of Mont., Mont. Inst. on Ecosystems (2017).

²¹⁶Conservation Law Found, Inc. v. ExxonMobil Corp., No. 1:16-cv-11950 (D. Mass. Sept. 13, 2017).

²¹⁷Broward Cty., Fla., [Ordinance No. 2017-16](#) (May 23, 2017).

²¹⁸See Broward Cty., [Groundwater Maps](#).

²¹⁹Minneapolis, Minn., Resolution by Gordon, Cano, and Reich, [Establishing Green Zones in the City of Minneapolis](#) (Apr. 28, 2017); see also [Green Zones Initiative](#), MINNEAPOLIS, MINN. (last visited Apr. 30, 2018).

cool roofs, tree planting, and other approaches.²²⁰ Denver voters approved a green roof mandate to require new or redeveloped commercial buildings over 25,000 square feet to install vegetative features or solar power.²²¹

Cities and regional collaboratives also developed new climate plans. The 2017 [Seattle Climate Preparedness Strategy](#) emphasizes equity, natural solutions, and co-benefits of resilience strategies, and neighboring counties in the larger Puget Sound, Washington region will coordinate on climate action through a new collaborative – the Puget Sound Climate Preparedness Collaborative formed in 2017.²²² Detroit’s first [Climate Action Plan](#) provides mitigation and adaptation goals related to solid waste, public health, businesses, open space, and neighborhoods.²²³ Washington, DC convened a new Commission on Climate Change and Resiliency, pursuant to 2016 [legislation](#), to make recommendations on legislative or regulatory changes to help the District reduce climate change risks.²²⁴ The Southeast Florida Regional Climate Change Compact released its Regional Climate Action Plan 2.0, the second iteration of its regional plan for reducing emissions and adapting to climate change.²²⁵

II. SUSTAINABLE DEVELOPMENT

A. *International Activities*

1. United Nations Initiatives

The United Nations Statistical Commission approved [Resolution 71/313](#)²²⁶ adopting [232 indicators](#) to measure progress on the seventeen UN [global sustainable development goals for 2015-2030](#). The goals and indicators address topics of poverty, hunger, health, education, gender equality, water and sanitation, energy, economic growth and employment, resilient infrastructure, inequality among countries, sustainable cities, sustainable consumption and production, climate change, oceans and marine resources, forest/land degradation, access to justice, and strengthening implementation.

2. CSR/Sustainability Initiatives by Governments & Stock Exchanges

Mimicking the Dodd-Frank law in the U.S., the EU Parliament and Council approved the [European Conflict Minerals Regulation](#),²²⁷ mandating due diligence for importers of conflict minerals from all conflict-affected and high-risk areas (not just central Africa, as under Dodd-Frank). This rule is designed to discourage the flow of gold and other metals used to fund armed conflicts or produced under conditions that violate human

²²⁰City of New York, [Cool Neighborhoods NYC: A Comprehensive Approach to Keep Communities Safe in Extreme Heat](#) 8 (June 2017).

²²¹[The Ordinance](#), Denver Green Roof Initiative (last visited Mar. 8, 2018); *see also* Jon Murray, [It’s official: Denver Green Roof Initiative will take root, affecting city development](#), DENVER POST (Nov. 9, 2017).

²²²City of Seattle, [Preparing for Climate Change](#) (Aug. 2017).

²²³Detroiters Working for Env’tl. Justice, [Detroit Climate Action Plan](#) (Oct. 2017); [The Puget Sound Climate Preparedness Collaborative, Overview and FAQs](#); INST. FOR SUSTAINABLE COMMUNITIES.

²²⁴[B. 21-0369](#), 2016 Sess. (D.C. 2016).

²²⁵[Regional Climate Action Plan 2.0](#), SE. FL. REG’L CLIMATE CHANGE COMPACT (last visited Apr. 30, 2018).

²²⁶[G.A. Res. 71/313](#) (July 6, 2017).

²²⁷[2017 O.J. \(L 130\) 1](#).

rights. Under the new rules, starting on January 1, 2021, almost all of the tin, tungsten, tantalum, gold, and other ores processed in smelters or refiners within the EU will be subject to the due diligence process. Large manufacturers in the EU will be required to report their strategies for monitoring the sources of their minerals.

Seven Nasdaq Nordic and Baltic stock exchanges issued a [reporting guide](#)²²⁸ on environmental, social, and governance (ESG) disclosure for their listed companies. These exchanges are part of the UN's 66-member [Sustainable Stock Exchanges \(SSE\) initiative](#) (along with the U.S.'s NASDAQ and NYSE), which is committed "to promote long term sustainable investment and improved [ESG] disclosure and performance" among exchange companies.

3. Non-governmental Voluntary Initiatives

The Global Reporting Initiative (GRI) issued [new standards](#)²²⁹ under its international Sustainability Reporting Standard for organizations to report on the impacts related to water and for occupational health and safety.

The [Sustainability Accounting Standards Board](#) (SASB), issued an [exposure draft](#) of its sustainability accounting standards for publicly-traded companies to disclose material sustainability issues in financial reports, which it expects to ratify in 2018.²³⁰

The International Standards Organization (ISO) issued [ISO 20400:2017](#)²³¹ *Sustainable Procurement – Guidance*, a guide on how organizations can integrate sustainability into their procurement processes.

B. National Activities

1. Federal Actions

While the Trump Administration took a number of steps aimed at revisiting actions of the Obama Administration focused on climate change, the administration did not rescind EO 13693, on "Planning for Federal Sustainability in the Next Decade."²³² EO 13693 is the most comprehensive sustainability order, directing agencies to set targets for energy and resource efficiency.

In the waning days of the Obama Administration, the Federal Acquisition Regulatory Council [proposed](#) changes to the Federal Acquisition Regulations intended to carry out provisions of EO 13693.²³³ The proposed changes aimed to promote acquisition of sustainable products, services, and construction methods to reduce energy and water consumption, reduce reliance on natural resources, and expand pollution prevention in the federal government. No action has been taken since January 2017.

The Trump Administration's proposed EPA budget for FY2018 recommended terminating several sustainability-related programs, including pollution prevention and

²²⁸ [ESG Reporting Guide](#), NASDAQ (last visited Apr. 30, 2018).

²²⁹ [GRI Standards](#), GLOBAL REPORTING INITIATIVE.

²³⁰ [Exposure Drafts](#), SUSTAINABILITY ACCOUNTING STANDARDS BD. (last visited Apr. 30, 2018).

²³¹ [Sustainable Procurement Guidance](#), INT'L ORG FOR STANDARDIZATION (Apr. 2017).

²³² Exec. Order 13,693, 80 Fed. Reg. 15,871 (Mar. 25, 2015).

²³³ Federal Acquisition Regulation: Sustainable Acquisition, 82 Fed. Reg. 5490 (Jan. 18, 2017) (to be codified at 48 C.F.R. pts. 2, 4, 7, 11, 23, 36, 39, 42, 52) (Proposed rule).

voluntary climate programs like Energy Star.²³⁴ The House rejected the recommendations, and report language specifically recommended continuing some programs.²³⁵

2. Business Initiatives

As of November 2017, shareholder activists had filed many more resolutions for the year on environmental and social issues at U.S. companies than at that point in 2016—a total of 430, just short of the record 433 in 2015. Most addressed climate change or corporate political activity. In response to investor action, ExxonMobil added a climate scientist to its board in January. Ten resolutions called for links between sustainability metrics (mostly regarding climate) and executive pay, while five more at mutual fund companies probed what were claimed to be major inconsistencies between company policies and their proxy voting decisions.

C. State and Local Activities

Sustainability initiatives continued in many states. Texas and Kentucky adopted legislation authorizing “benefit corporations,” which allow companies to go beyond the fiduciary duty of maximizing stockholder value to address social, environmental, and employee benefit. Currently [32 states and Washington D.C.](#) have such laws.²³⁶

The National Governors’ Association launched a “Smart States” initiative to help states use information and communications technology to enhance economic development, sustainability, resilience, and quality of life across urban, suburban, and rural communities.²³⁷

III. ECOSYSTEMS

A. International Activities

The International Union for the Conservation of Nature (IUCN) [reports](#) that intact wilderness areas now cover less than 25% of Earth’s total land surface.²³⁸ Wilderness areas are under severe threat from climate change and continue to be cleared, degraded and fragmented, predominantly by industrial activity, such as oil and gas extraction, mining, logging, agriculture, and road and dam construction.

1. Protected Area Conservation

Overall, 2017 represented a positive year for protected area conservation around the world. Many nations strengthened domestic efforts to conserve existing or establish

²³⁴U.S. EPA, [FY 2018 EPA Budget in Brief](#) at 61 (proposing elimination of pollution prevention program) & 65 (proposing elimination of 15 climate-related voluntary partnership programs) (May 2017).

²³⁵[H.R. REP. NO. 115-115](#) (2017), at 56 (supporting Energy Star program) & 58 (rejecting elimination of the pollution prevention program).

²³⁶[State by State Status of Legislation](#), BENEFIT CORP. (last visited Apr. 30, 2018).

²³⁷See [Experts Roundtable on Creating “Smart States” Initiative](#), NAT’L GOVERNORS’ ASSN. (Aug. 16, 2017).

²³⁸[Wilderness Areas are Fast Declining and World Heritage Can Protect Them, Says IUCN Report](#), IUCN (June 26, 2017).

new protected areas in line with the [UN Sustainable Development Goal \(SDG\) 14](#),²³⁹ and the Convention on Biological Diversity's [Aichi Target 11](#),²⁴⁰ which seeks to conserve 17 percent of inland and terrestrial water and 10 percent of marine and coastal areas as effectively managed protected areas by 2020.

Global marine conservation took significant strides this year. At the [Fourth International Marine Protected Areas Congress](#) (IMPAC4) in Chile, over 80 countries and 1,000 participants affirmed their commitment to meet SDG14, establish well managed Marine Protected Areas (MPAs) inside and outside national jurisdictions, and integrate local/indigenous communities into management approaches.²⁴¹ At the [Our Ocean 2017 Conference](#) in Malta, countries, NGOs, and the private sector announced 437 commitments, pledged EUR 7.2 billion to support sustainable oceans, and 2.5 million square kilometers of additional MPAs.²⁴² IUCN and the United Nations Environment Programme (UNEP) World Conservation Monitoring Centre (MCMC) released the [Marine Protected Planet](#), the most comprehensive tool to date to measure global progress in preserving the marine environment and meeting SDG 14 and Aichi Target 11.²⁴³

Pacific nations led the way in 2017, helping to raise the share of oceans covered by protected areas to 6.96% (or just over 25 million km²).²⁴⁴ The Cook Islands approved legislation creating Marae Moana, the world's largest marine park at 1.9 million km² (about the size of Mexico), covering the entirety of the country's Exclusive Economic Zone (EEZ).²⁴⁵ Chile also announced the creation of three new MPAs: Rapa Nui (Easter Island) Rahui Marine Protected Area (740,000km²), Park Cabo de Hornos e Islas Diego Ramírez (100,000km²), and expansion of the Juan Fernández MPA (450,000km² total).²⁴⁶ The inclusion of these three areas now brings 46% of Chile's EEZ under protection.²⁴⁷ Mexico designated North America's largest marine reserve, the Revillagigedo Archipelago National Park (150,000 km²), located about 240 miles southwest of the tip of Baja California.²⁴⁸

Canada reached an agreement with the Nunavut Government and the Qikiqtani Inuit Association to establish Tallurutiup Imanga - Lancaster Sound National Marine Conservation Area in the Canadian Arctic, now Canada's largest marine protected area at 109,000 km².²⁴⁹ Gabon announced the creation of Africa's largest network of marine protected areas – twenty marine parks and aquatic reserves.²⁵⁰

The twenty-five members of the Commission for the Conservation of Antarctic

²³⁹[Progress Towards the Sustainable Development Goals](#), SUSTAINABLE DEVELOPMENT KNOWLEDGE PLATFORM (last visited Mar. 10, 2018) (SDG's goal is to conserve and sustainably use the oceans, seas, and marine resources for sustainable development).

²⁴⁰[Aichi Biodiversity Targets](#), CONVENTION ON BIOLOGICAL DIVERSITY (2017).

²⁴¹[IMPAC4: Bringing People and the Ocean Together](#), IUCN (Sept. 29, 2017).

²⁴²[Our Ocean Commitments](#), OUR OCEAN CONFERENCE, MALTA, (Oct. 2017).

²⁴³IUCN, *supra* note 241.

²⁴⁴[Explore the World's Marine Protected Areas](#), PROTECTED PLANET (last visited Apr. 30, 2018) (about 1.9% of all MPAs are no-take zones).

²⁴⁵[Cook Islands Creates Huge Pacific Ocean Reserve](#), PHYS.ORG (July 14, 2017); *see also* [Our Ocean Commitments](#), *supra* note 242.

²⁴⁶IUCN, *supra* note 241.

²⁴⁷[Our Ocean Commitments](#), *supra* note 242.

²⁴⁸Mindy Weisberger, [Mexico Designates North America's Largest Ocean Reserve](#), SCI. AM. (Nov. 28, 2017).

²⁴⁹Press Release, Parks Canada, [Tallurutiup Imanga/Lancaster Sound in High Arctic to be Canada's Largest Protected Area](#) (Aug. 14, 2017).

²⁵⁰Laura Parker, [New Ocean Reserve, Largest in Africa, Protects Whales and Turtles](#), NAT'L GEOGRAPHIC (June 5, 2017).

Marine Living Resources (CCAMLR) attended its 36th annual meeting in October. Following last year's establishment of the world's largest MPA (until Marae Moana) in Antarctica's Ross Sea, the EU and Australia sought to establish a one million km² East Antarctic Marine Protected Area in the southern Indian Ocean.²⁵¹ Requiring unanimity, the proposal failed in light of Russian and Chinese opposition.²⁵²

China continued to make good on Xi Jinping's [goal](#)²⁵³ to create a national park system. China released its [plan for the national park system](#), setting forth a top-down design, which will follow the principle of "ecological protection first" to conserve its large ecosystems on land and sea.²⁵⁴ The government ordered all provinces and regions to adopt an ecological "red line" by 2020 that declares designated areas under mandatory and rigorous protection.²⁵⁵ China has established ten pilot program national parks – including Sanjiangyuan (the source of China's three major rivers) and the Great Wall – with plans for more by 2020. The government established the 27,134 km² Giant Panda National Park, spanning three provinces and covering a panda habitat three times the size of America's Yellowstone National Park.²⁵⁶ China also announced the creation of a 14,600 km² national park (60 percent larger than Yellowstone) in the northeast, bordering Russia and North Korea, which will serve as habitat for two critically endangered big cats: the Amur leopard and Siberian (Amur) tiger.²⁵⁷

Despite the year's progress, actions by Australia and the U.S. (see Section III.B.1, *infra*) have caused alarm among conservationists by establishing precedent for scaling back both the scope and coverage of protected areas. Australian Prime Minister Turnbull announced plans to dramatically scale back protections for a network of 42 marine reserves established under the prior Labor-led government in 2012.²⁵⁸

2. United Nations Ocean Conference

The UN held a high-level Conference to Support the Implementation of SDG 14 ("The Ocean Conference") in New York from June 5 - 9, 2017, seeking to promote dialogue, initiatives, and partnerships to reverse the decline in the health of our ocean, while promoting human well-being.²⁵⁹ Following the conference, on July 6, 2017, the UN General Assembly adopted [Resolution 71/312](#): "Our ocean, our future: call for action," which called on all stakeholders to meet SDG14 objectives by, inter alia, strengthen policy cooperation and coordination, multi-stakeholder partnerships, raise awareness of ocean health, reduce marine pollution (especially plastics), increase climate resilient adaptation measures, and end unsustainable fishing practices.²⁶⁰ Attendees made over 1,406 [voluntary](#)

²⁵¹[36th annual meetings of CCAMLR – reports available](#), CCAMLR (Nov. 14, 2017); April Reese, [Plans Rejected for East Antarctic Marine Park](#), NATURE (Oct. 27, 2017).

²⁵²Reese, *supra* note 251.

²⁵³Edward Wong, [With U.S. as a Model, China Envisions Network of National Parks](#), N.Y. TIMES (June 10, 2015).

²⁵⁴Press Release, The State Council, People's Republic of China, [China Unveils Overall Plan for National Park System](#) (Sept. 26, 2017).

²⁵⁵*Id.*; Xinhua, [China to Set Up National Park System](#), CHINA DAILY (Sept. 27, 2017).

²⁵⁶Xinhua, *supra* note 255.

²⁵⁷Jason Daley, [China Approves Massive National Park to Protect its Last Big Cats](#), Smithsonian.com (Mar. 15, 2017).

²⁵⁸Michael Slezak, [Australia's Marine Parks Face Cuts to Protected Areas](#), THE GUARDIAN (July 21, (2017); see also Jessica Meeuwig, [Scientists Speak Out on Plan to Slash Protections for Marine Parks](#), NEWS DEEPLY. (Oct. 6, 2017).

²⁵⁹[About – The Ocean Conference](#), UNITED NATIONS (last accessed Dec. 10, 2017).

²⁶⁰[G.A. Res. 71/312](#), U.N. Doc. A/RES/71/312 (July 14, 2017).

[commitments](#) on measures such as reducing marine pollution, sustainable management of marine and coastal ecosystems, and technology transfer.²⁶¹

B. *State and National Activities*

1. Protected Area Conservation & Monument Review

President Obama designated or expanded almost three dozen national monuments during his time in office, including the [California Coastal](#)²⁶² and [Cascade-Siskiyou](#)²⁶³ national monuments, which he expanded on January 12, 2017.

On April 26, President Trump directed Department of Interior (DOI) Secretary Zinke to review prior national monument designations and expansions for compliance with the Antiquities Act of 1906, and for conformity with administration policy.²⁶⁴ The 27 monuments subject to review were designated after January 1, 1996 and either exceed 100,000 acres in size, or, in the Secretary's opinion, were set aside without adequate public input.²⁶⁵ [Zinke's report](#) recommended boundary and management changes for six national monuments, and management changes only to four additional monuments.²⁶⁶

On December 4, 2017, [President Trump "modified and reduced"](#) the 1996 proclamation creating the Grand Staircase-Escalante National Monument, replacing the monument with three smaller monuments that together encompass about half of the land protected in 1996.²⁶⁷ On the same day, [President Trump "modified and reduced"](#) the Bears Ears National Monument which had been set aside by President Obama less than a year earlier, removing approximately 85% of the land from the monument and replacing Bears Ears National Monument with two smaller monument units.²⁶⁸ Five Native American Tribes that had proposed Bears Ears and multiple conservation organizations immediately sued to invalidate both of President Trump's proclamations, arguing in part that neither the U.S. Constitution nor the Antiquities Act grants the President the power to unilaterally reduce an existing national monument.²⁶⁹ The President has yet to act on the eight other national monuments Secretary Zinke recommended for modification.

On April 28, 2017, [President Trump also directed](#) the Secretary of Commerce to review eleven National Marine Sanctuaries and Marine National Monuments designated

²⁶¹United Nations, Div. for Sustainable Development – Dep't of Econ. & Social Affairs, Advance Copy, [In-Depth Analysis of Ocean Conference Voluntary Commitments to Support and Monitor their Implementation](#) (2017).

²⁶²Proclamation No. 9563, 82 Fed. Reg. 6131 (Jan. 12, 2017).

²⁶³Proclamation No. 9564, 82 Fed. Reg. 6414 (Jan. 12, 2017).

²⁶⁴Executive Order No. 13,792, 82 Fed. Reg. 20,429 § 2 (Apr. 26, 2017).

²⁶⁵*Id.*

²⁶⁶[Memorandum to the President from Sec. of the Interior Ryan Zinke, Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act](#) (2017).

²⁶⁷Proclamation No. 9682, 82 Fed. Reg. 58,089 (Dec. 8, 2017).

²⁶⁸Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 8, 2017).

²⁶⁹[Complaint for Injunctive & Declaratory Relief](#), *The Wilderness Soc'y v. Trump*, 1:17-cv-02578 (D.D.C. Dec. 4, 2017) (Grand Staircase-Escalante); [Complaint for Injunctive & Declaratory Relief](#), *Hopi Tribe v. Trump*, 1:17-cv-02590 (D.D.C. Dec. 4, 2017) (Bears Ears); [Complaint for Declaratory & Injunctive Relief](#), *Grand Staircase Escalante Partners v. Trump*, 1:17-cv-02591 (D.D.C. Dec. 4, 2017) (Grand Staircase-Escalante); [Complaint for Declaratory & Injunctive Relief](#), *Ut. Diné Bikéyah v. Trump*, 1:17-cv-02605 (D. D.C. Dec. 6, 2017) (Bears Ears); [Complaint for Injunctive & Declaratory Relief](#), *Nat. Res. Def. Council v. Trump*, 1:17-cv-02606 (D.D.C. Dec. 7, 2017) (Bears Ears).

pursuant to the Antiquities Act during the prior ten-year period.²⁷⁰ This review assesses the acreage effected by these designations; the cost of managing the designations; the adequacy of consultation with federal, state, and tribal entities prior to designation; and “the opportunity costs associated with potential energy and mineral exploration and production from the Outer Continental Shelf,” plus “any impacts on production in the adjacent region.”²⁷¹ The Secretary of Commerce was not directed to assess compliance with the Antiquities Act. The review was due to the President on October 5, 2017 and has not been released to the public. The President has yet to act on any recommendations.

Congress is also considering [several bills](#) to restrict the President’s authority to designate new national monuments or require states within which monuments are located to approve future monument designations.²⁷² Additionally, members of Utah’s congressional delegation have [introduced legislation](#) to ratify President Trump’s repeal and replacement of the Bears Ears and Grand Staircase-Escalante national monuments.²⁷³ This legislation, if successful, may moot questions regarding the president’s authority to repeal and replace these two monuments.

2. Oil & Gas Exploration in Protected Areas

On April 28, 2017, President Trump issued [EO 13795](#), opening up millions of acres of federal waters in the Arctic and Atlantic Oceans for oil and gas leasing, reversing President Obama’s prior orders under the Outer Continental Shelf Lands Act banning such activity (*see* 2016 Year in Review).²⁷⁴ After decades of trying, Republicans in Congress managed to open Alaska’s Arctic National Wildlife Refuge (ANWR) to oil drilling. As part of tax reform legislation passed in December 2017, the DOI is now mandated to hold lease sales within ANWR.²⁷⁵

3. Waters of the United States Rule

In June 2015, EPA and the Army Corps of Engineers adopted the Clean Water Rule: Definition of “Waters of the United States” (“WOTUS”),²⁷⁶ with the stated purpose of clarifying the geographic scope of the Clean Water Act. The WOTUS Rule has been mired in litigation, winding its way to the Sixth Circuit Court of Appeals where the rule was stayed nationwide pending judicial review.²⁷⁷ The United States Supreme Court then granted a petition for certiorari on the issue of whether the Sixth Circuit, as opposed to a federal district court, is the proper forum to challenge the rule.²⁷⁸ In October 2017, the Supreme Court heard arguments on this jurisdictional issue.

Meanwhile, President Trump signed an Executive Order in February 2017 directing

²⁷⁰[Executive Order No. 13,795](#), 82 Fed. Reg. 20,815 § 4(b) (May 3, 2017).

²⁷¹*Id.* § 4(b)(i).

²⁷²*See e.g.*, H.R. 3990, 115th Cong. (2017); H.R. 1489, 115th Cong. (2017).

²⁷³H.R. 4532, 115th Cong. (2017); H.R. 4558, 115th Cong. (2017).

²⁷⁴[Exec. Order 13,795](#), *supra* note 270; Juliet Eilperin, [Trump signs executive order to expand drilling off America’s coasts: ‘We’re opening it up.’](#), WASH. POST (Apr. 28, 2017).

²⁷⁵Ari Natter & Jennifer A. Dlouhy, [Congress Is About to Allow Oil Drilling in Alaska’s Arctic Wildlife Refuge](#), TIME (Dec. 20, 2017).

²⁷⁶Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015) (codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

²⁷⁷*In re* EPA, 803 F.3d 804, 806 (6th Cir. 2015).

²⁷⁸Writ of Certiorari, Nat’l Assoc. of Mfrs. v. Dep’t. of Def., No. 16-299 (docketed Sept. 7, 2016).

the EPA and the Corps to begin a rulemaking process to rescind or revise the rule,²⁷⁹ which was soon followed by [official notice](#) of the agencies' intent to do so.²⁸⁰ The agencies will "consider" Justice Scalia's opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) in interpreting "navigable waters."²⁸¹ The agencies recently proposed a rule to extend the effective date of the 2015 WOTUS Rule by two years to maintain the current legal status quo while possible WOTUS Rule revisions are considered.²⁸²

4. BLM Landscape-Level Planning

In December 2016, [BLM issued a rule](#) ("Planning 2.0") for developing resource management plans. The rule emphasized landscape-level planning using an "integrative" and "flexible" approach.²⁸³ It was part of a larger DOI push to modernize planning processes and incorporate landscape-level and ecosystem-based management principles. In March 2017, Congress repealed the Planning 2.0 rule in a joint resolution under the Congressional Review Act, which was signed by President Trump the same month.²⁸⁴

Other landscape-level and ecosystem-based policies met a similar fate. BLM has all but abandoned the 2014-2015 Sage-Grouse Resource Management Plan amendments, which avoided listing the bird under the Endangered Species Act by emphasizing widespread habitat conservation through state action plans.²⁸⁵ BLM proposed canceling plans to withdraw 1.3 million-acres from mineral development, which was part of the 2016 Desert Renewable Energy Conservation Plan (DRECP), an Obama-era management plan for large-scale renewable energy development in the California desert.²⁸⁶

5. Klamath Dam Removal

The largest dam removal project in U.S. history—the removal of four dams along the Klamath River in Oregon and California—is proceeding apace.²⁸⁷ In September 2017,

²⁷⁹[Press Release](#), The White House, Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule (Feb. 28, 2017).

²⁸⁰Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12,532 (Mar. 6, 2017) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401) (Notice of intent).

²⁸¹*Id.*

²⁸²Proposed Rule: Definition of "Water of the United States" – Addition of an Applicability Date to 2015 Clean Water Rule, 82 Fed. Reg. 55,542 (Nov. 22, 2017).

²⁸³See Resource Management Planning, 81 Fed. Reg. 89,580 (Dec. 12, 2016) (to be codified at 43 C.F.R. pt 1600) (Final rule); see also BLM, [Fact Sheet: BLM's Proposed Planning Rule](#) (undated).

²⁸⁴[H.J. Res. 44](#), 115th Cong. (2017); Press Release, U.S. Senate Comm. on Nat. Res., [President Trump Signs Measure Repealing BLM Planning 2.0 Rule](#) (Mar. 27, 2017).

²⁸⁵See [Notice of Intent to Amend the Greater Sage-Grouse Resource Management Plan Revisions and Amendment\(s\)](#), BLM (Nov. 8, 2017); [Feds remove protections for 10M acres of sage grouse habitat, including 231,000 in Utah](#), SALT LAKE TRIB. (Oct. 5, 2017).

²⁸⁶See Notice of Proposed Withdrawal; California Desert Conservation Area and Notice of Intent to Prepare an Environmental Impact Statement; California, 81 Fed. Reg. 95,738 (Dec. 28, 2016) (Notice); Scott Streater, [BLM proposal would revive mining in renewable energy zone](#), E&E NEWS (Oct. 5, 2017).

²⁸⁷Jacques Leslie, [Four dams in the West are coming down—a victory wrapped in a defeat for smart water policy](#), L.A. TIMES (Nov. 2, 2017).

a senior official indicated the Trump administration would not oppose the project.²⁸⁸ If FERC approves decommissioning applications, dam removal should begin in 2020.²⁸⁹

²⁸⁸*Id.*

²⁸⁹Klamath River Renewal Corporation, [Klamath River Renewal Corporation Begins Implementation of Klamath Hydroelectric Settlement Agreement](#) (Sept. 23, 2016).

Chapter 27 • CONSTITUTIONAL LAW 2017 Annual Report¹

In 2017, noteworthy decisions at the intersection of constitutional law and environmental, energy, and natural resources law occurred in the areas of standing, the Commerce Clause, preemption, takings, due process, the First Amendment, and the Eleventh Amendment.

I. STANDING

To invoke the jurisdiction of an Article III court, a plaintiff must establish standing by proving: (1) an injury in fact that is concrete and particularized, not hypothetical or conjectural; (2) causation that is fairly traceable to the defendant's actions; and (3) redressability showing that a judicial remedy is likely to fix the injury caused by the defendant. A plaintiff also has to meet the requirements of prudential standing, including the requirement that the plaintiff's alleged injury falls within the zone of interest of the relevant statute.

During 2017, the U.S. Supreme Court issued a ruling addressing whether intervenors of right must meet these standing requirements in *Town of Chester v. Laroe Estates, Inc.*² In *Town of Chester*, intervenors argued that, although they must of course meet the requirements of Federal Rule of Civil Procedure 24 for intervention, it would be inefficient and serve no purpose to also impose standing requirements on them when the original plaintiffs clearly have standing. The Court rejected this argument and held that intervenors must demonstrate standing anytime they seek relief that is different from the relief plaintiffs seek: "For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right."³

II. COMMERCE CLAUSE

The Commerce Clause of the United States Constitution provides that "Congress shall have the Power . . . [t]o regulate Commerce . . . among the several States."⁴ In its positive form, the Commerce Clause is the source of constitutional authority underlying most federal environmental laws. In its negative or "dormant" form, it prevents states from adopting protectionist laws that erect barriers to interstate commerce or attempt to control commerce beyond the state's borders.

The Second Circuit in *Allco Finance Ltd. v. Klee*⁵ examined the threshold question of whether Connecticut's Renewable Portfolio Standard discriminates against interstate commerce by treating out-of-state facilities different from in-state facilities regarding qualification for Renewable Energy Credits (RECs). The State of Connecticut argued that there was no discrimination because Connecticut RECs are a creature of state law and are by definition different products from the RECs that the plaintiff produced in another state. The Second Circuit agreed and held that because the RECs were different products (even though they "also have some underlying similarities"), they could be treated differently without violating the dormant Commerce Clause.⁶

¹Contributing authors were: Norman A. Dupont, Ring Bender LLP; and Kyle H. Landis-Marinello, Vermont Attorney General's Office.

²137 S. Ct. 1645 (2017).

³*Id.* at 1651.

⁴U.S. CONST. art. I, § 8, cl. 3.

⁵861 F.3d 82 (2d Cir. 2017), *petition for cert. filed* (U.S. Nov. 17, 2017) (No. 17-737).

⁶*Id.* at 105.

In 2017, there was also a trio of animal-related U.S. Court of Appeals decisions involving the dormant Commerce Clause:

- In [*New York Pet Welfare Ass'n, Inc. v. City of New York*](#), the Second Circuit held that even though a city ordinance “may make it difficult or impossible for some out-of-state breeders to sell to City pet shops,” there was no discrimination against interstate commerce “so long as others are able to” to still reach the market.⁷ The court also noted that plaintiffs had failed to allege an interstate regulatory conflict, and that the city “identified a number of local benefits that are clearly unrelated to economic protectionism.”⁸
- In [*Park Pet Shop, Inc. v. City of Chicago*](#),⁹ two pet stores and a dog breeder challenged a Chicago ordinance that aimed to crack down on “puppy mills” by placing requirements on where pet stores could obtain animals. The Seventh Circuit held that plaintiffs failed to allege any sort of discrimination that is cognizable under a dormant Commerce Clause claim, and rejected plaintiffs’ claim that the ordinance was a “de facto ban on pets bred out of state.”¹⁰
- In [*Safari Club International v. Becerra*](#), the Ninth Circuit upheld “California’s prohibition on the importation, possession, and transportation of mountain lions” within their state borders.¹¹ In *Safari Club*, a hunting organization claimed that the prohibition discriminated against interstate commerce and “alleged that 140 of its members would make plans to transport already harvested animals into California, hunt mountain lions outside of California, or provide services related to mountain lion hunting outside of California if the Prohibition were lifted.”¹² The court held that these allegations were not enough and “do not provide evidence of a substantial burden on interstate commerce.”¹³

In addition, the Seventh Circuit struck down a state law in [*Legato Vapors, LLC v. Cook*](#)¹⁴ under the extraterritoriality prong of the dormant Commerce Clause. In *Legato*, manufacturers from outside of Indiana challenged an Indiana law that placed specific requirements on the manufacturing process of e-liquids used in e-cigarettes and e-devices sold within Indiana’s borders. The court held that Indiana could not impose of out-of-state manufacturers specific requirements regarding security contracts, the cleanliness of facilities, and auditing and other requirements. The court noted the “obvious risk of inconsistent regulation” among different states and held that Indiana had failed to justify imposing extraterritorial requirements on out-of-state manufacturers.¹⁵

III. PREEMPTION

The circuit courts of appeals in 2017 focused on whether federal energy laws preempted state efforts to foster renewable energy sources and other preemption claims. In 2017, several district court opinions analyzed claims of federal conflict preemption of state

⁷850 F.3d 79, 90 (2017).

⁸*Id.* at 92.

⁹872 F.3d 495 (7th Cir. 2017).

¹⁰*Id.* at 503.

¹¹702 F. App’x 607, 607 (9th Cir. 2017).

¹²*Id.* at 608.

¹³*Id.* (citing *Nat’l Ass’n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1149 (9th Cir. 2012)).

¹⁴847 F.3d 825 (7th Cir. 2017).

¹⁵*Id.* at 834 (citing *Dean Foods Co. v. Brancel*, 187 F.3d 609, 615 (7th Cir. 1999)).

laws under the Federal Energy Act or state tort claims that clashed with the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

The Fourth Circuit's opinion in a state's long-term moratorium of uranium ore mining, [*Virginia Uranium, Inc. v. Warren*](#),¹⁶ may prompt Supreme Court review. A divided panel of the Fourth Circuit held that state regulation of uranium mining was not either expressly or impliedly preempted under the federal Atomic Energy Act. The Commonwealth of Virginia contains "the largest known uranium deposit in the [U.S.]," but its General Assembly imposed a moratorium on all uranium mining until further legislative action.¹⁷ Further legislative action did not occur, which effectively left the moratorium in place and the mine owners sued for declaratory relief based on federal preemption.¹⁸ The majority found that state regulation of uranium mining was not expressly preempted. It reasons that protected "activities" under the Act was limited to only those activities directly regulated by the Nuclear Regulatory Commission and thus did not preempt state regulation of the initial mining of uranium ore.¹⁹ The majority also rejected the claim of preemption based upon "obstacle" or conflict preemption²⁰ of the Atomic Energy Act, noting that even a hypothetical 50-state ban of uranium mining would not impair the development of nuclear energy, since over ninety percent of uranium ore used in this country is imported. Thus, the panel concluded that the general legislative goal of encouraging the peaceful development of nuclear energy would not face an "obstacle" by one state's ban on mining uranium inside of its jurisdiction.²¹

The U.S. Supreme Court called for the views of the Solicitor General on whether certiorari should be granted in this case.²² The Solicitor General's brief should provide an interesting litmus test on whether the [Trump Administration's expressed support](#) for reducing federal regulation of coal mining activities in the various states²³ extends to concerns about federal regulation of uranium mining.

The Second Circuit in [*Allco Finance Ltd. v. Klee*](#)²⁴ examined whether two Connecticut statutes authorizing the conducting of bids for renewable-sourced energy violated the preemption provisions of the Federal Power Act. The court held that plaintiff, a losing bidder in a state-arranged contract system, failed to state a plausible claim that Connecticut's statutory scheme was preempted by the Federal Power Act, noting that it did not compel the regulated utilities to accept the winning bidders.²⁵ The court distinguished Connecticut's regulatory scheme from that imposed under Maryland laws that the Supreme Court struck down as preempted just last year in [*Hughes v. Talen Energy Marketing, LLC*](#).²⁶ In particular, the court noted that unlike preempted provisions in Maryland law, in

¹⁶848 F.3d 590 (4th Cir. 2016), *petition for cert. pending* (U. S. Apr. 21, 2017) (No. 16-1275).

¹⁷*Id.* at 593.

¹⁸*Id.* at 593-94.

¹⁹*Id.* at 597.

²⁰*See generally*, J. MAY, PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW, ch. 7 (2011) (describing various types of preemption including conflict or obstacle preemption, field preemption, and express preemption).

²¹*Va. Uranium, Inc.*, 848 F.3d at 599.

²²Docket Sheet, *Va. Uranium, Inc.*, No. 16-1275 (U.S. Oct. 2, 2017).

²³*See* White House, Statement of Administration Policy on H.J. Res. 38, H.J. Res. 36, H.J. Res. 41, H.J. Res. 40, H.J. Res. 37 (Feb. 1, 2017) (supporting congressional resolution disapproving final Department of Interior rule limiting coal mining impacts to regional waters).

²⁴861 F.3d at 82.

²⁵*Id.* at 97-98.

²⁶*Id.* at 98-101 (citing *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016)).

Connecticut the entry of any contract between a utility and an energy provider was expressly subject to review by the Federal Energy Regulatory Commission.²⁷

The Third Circuit held in *McMunn v. Babcock & Wilcox Power Generation Group, Inc.*²⁸ that a claim of a common law duty to avoid potential radiation exposure was preempted by regulations promulgated by the Nuclear Regulatory Commission which set the limits of the duty of an operator of a uranium fuel processing plant to nearby residents who alleged that exposure led to various cancers. The Third Circuit reiterated its earlier holding in *In re TMI Litigation* that federal law preempted state tort law as to the applicable standard of care of a nuclear power plant operator, and therefore affirmed the district court's summary judgment in favor of defendants.²⁹

The Ninth Circuit in *Aqua Caliente Band of Cahulla Indians v. Coachella Valley Water District*³⁰ found an unusual type of preemption based on two nineteenth-century Executive Orders that created a reservation for the tribe. The court, while conceding that the general purpose of the reservation of rights was "imprecise," nonetheless held that by implication the U.S. must have known that in arid lands water was an essential right for such a reservation.³¹ Thus, it held that the federal law of implied reservation of groundwater rights trumped state water law restricting such rights only to actual users of the groundwater.³²

The Ninth Circuit in *Association des Eleveurs de Canards Et D'oies du Quebec v. Becerra*³³ delivered the *coup de grâce* to efforts to sell forced feeding of ducks and geese to produce *foie gras* in California. The court concluded that California's prohibition of the supplying of fatty duck or geese liver obtained through the forced-feeding of the birds was not preempted by the federal Poultry Products Inspection Act (PPIA). California did not ban the sale of duck or geese livers *per se*, but only prohibited the sale of such livers obtained through what it deemed was the inhumane practice of force-feeding the birds for weeks on end.³⁴ The Ninth Circuit held that the PPIA's regulation of "ingredients" in poultry production did not expressly preempt California's law, holding that the term "ingredients" proscribed only a physical component of the poultry product. Rather, it held that California's statutory provision simply dealt with "how animals are treated long before they reach the slaughterhouse gates," and noting that the U.S. Department of Agriculture disavowed any suggestion that it had under the PPIA the power to regulate the treatment of farm animals prior to their arrival at the slaughterhouse.³⁵

In *Bartlett v. Honeywell International, Inc.*,³⁶ the district court concluded that implementation of a remedy pursuant to a CERCLA consent decree preempted state common law tort claims of negligence, nuisance, and trespass. The court noted that plaintiff's claims were based upon an alleged failure to take additional or different remedial action beyond that approved by the regulatory agencies.³⁷ It held that this created a type of "conflict" preemption because the remediating party (Honeywell) could not have complied

²⁷*Allco*, 861 F.3d at 98-100.

²⁸869 F.3d 246, 250-51 (3d Cir. 2017).

²⁹*Id.* at 263 (*In re TMI*, 67 F.3d 1103, 1107 (3d Cir. 1995).

³⁰849 F.3d 1262 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 468 (2017).

³¹*Id.* at 1270.

³²*Id.* at 1268-1269.

³³870 F.3d 1140 (9th Cir. 2017).

³⁴*Id.* at 1143-1144.

³⁵*Id.* at 1147-1149.

³⁶260 F. Supp. 3d 231 (N.D.N.Y. 2017), *appeal pending*, No. 17-1907 (2d Cir. 2017).

³⁷*Id.* at 240.

with the plaintiff's demands without conflicting with the terms of its consent decree previously approved by the U.S. Environmental Protection Agency.³⁸

The district court in [*In re Western States Wholesale Natural Gas Antitrust Litigation*](#)³⁹ rejected a claim of conflict preemption of state antitrust claims brought against traders of natural gas. The district court noted that the prior claim of field preemption was specifically rejected by the U.S. Supreme Court in [*ONEOK, Inc. v. Learjet, Inc.*](#),⁴⁰ and held that defendant traders failed to establish a true conflict between federal law with respect to the rapid, high-volume trading of natural gas (churning) and any state antitrust or unfair competition laws which limited such churning. It noted that even if the Federal Energy Regulatory Commission (FERC) had determined that such churning was mandated under federal law, that agency determination would not be dispositive, but only "potentially persuasive" evidence.⁴¹

The multi-district litigation district court in [*Schwartz v. Vizio, Inc.*](#)⁴² issued a Solomon-like preemption ruling in a consumer action for alleged misrepresentations about the energy efficiency of Vizio televisions. The alleged misrepresentations were publicly disclosed in a 2016 report issued by the Natural Resources Defense Council and sparked this lawsuit.⁴³ The court held that insofar as Vizio utilized federally mandated labels on its televisions, then plaintiffs' warranty claims were expressly preempted by the Energy Policy and Conservation Act.⁴⁴ On the other hand, the court concluded that Vizio's participation in a federally supervised but still voluntary Energy Star program did not preempt other of plaintiffs' misrepresentation and warranty claims.⁴⁵

The district court in [*Village of Old Mill Creek v. Star*](#)⁴⁶ affirmed Illinois state zero emission [energy] credits that largely benefitted existing nuclear power plants against preemption challenges based upon the Energy Policy and Conservation Act and the Federal Power Act. Although finding that the challenged state law might have some impact on the overall structure of utility rates, the district court cited *Oneok, Inc., supra*, and [*Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas*](#) for the proposition that most any state regulation "might not have at least an incremental effect on the costs of purchasers in some market and contractual situations," and concluded that "*Oneok* and its predecessor cases do not invalidate state regulation merely because the state knew the law would affect the wholesale [power] market."⁴⁷

IV. FIFTH AMENDMENT TAKINGS

During 2017, the U.S. Supreme Court issued an important takings ruling in [*Murr v. Wisconsin*](#).⁴⁸ In regulatory takings cases, courts must assess the economic impact of regulatory actions on a parcel on land, which can only be done after the courts determine how to define the relevant "parcel." In *Murr*, zoning regulations imposed a merger of plaintiffs' Lot E with Lot F when both undersized lots came under the same ownership.

³⁸*Id.* at 245.

³⁹2017 WESTLAW 1243135 (D. Nev. Mar. 30, 2017).

⁴⁰*Id.* at *8 (citing *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015)).

⁴¹*Id.*

⁴²2017 WESTLAW 2335364 (C.D. Cal. May 23, 2017).

⁴³*Id.* at *1; *see also id.* at *2 (detailing NRDC report).

⁴⁴*Id.* at *3-*4.

⁴⁵*Id.* at *4-*6.

⁴⁶2017 WESTLAW 3008289 (N.D. Ill. 2017), *appeal filed*, No. 17-2433 (7th Cir.).

⁴⁷2017 WESTLAW 3008289 at *11 (citing *ONEOK, Inc.*, 135 S. Ct. 1591 and *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493 (1989)).

⁴⁸137 S. Ct. 1933 (2017).

The plaintiffs argued that the parcel for takings purposes included only Lot E and that this parcel had been effectively deprived of all economic value. The government defendants argued that the adjacent Lot F was also part of the parcel, and that Lot F should be included because, among other things, the regulatory merger arguably *increased* the value of Lot F by restricting development on Lot E. The majority decision sided with the government defendants and held that the relevant parcel was the two lots combined, based primarily on the Court's determination that "reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel."⁴⁹

⁴⁹*Id.* at 1938, 1945.

Chapter 28 • INTERNATIONAL ENVIRONMENTAL AND RESOURCES LAW
2017 Annual Report¹

I. ATMOSPHERE AND CLIMATE

A. *Twenty-Third Session of the Conference of the Parties*

The Twenty-Third Session of the Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC) (COP23) was held in Bonn, Germany on November 6-17, 2017. Discussions at COP23 focused on

¹Any views or opinions expressed in this report are those of the authors in their personal capacities and do not represent the views of their organizations, including the Department of State, the Environmental Protection Agency, the National Oceanic and Atmospheric Administration, or the United States Government. This report is jointly submitted on behalf of the International Environmental Law Committee (IELC) of the American Bar Association (ABA) Section on International Law (SIL) and the International Environmental and Resources Law Committee (IERLC) of the Section on Environment, Energy, and Resources Law (SEER) by Co-Chairs, Shannon Martin Dilley and Jonathan Nwagbaraocha. The following authors contributed to the Year-in-Review (YIR) report: Teresa Christopher, Advisor, Ocean Collectiv, contributed on natural resources; Shannon Martin Dilley, Staff Attorney, California Air Resources Board, contributed on atmosphere and climate, and litigation; Renee Dopplick, Attorney and Editor-in-Chief of *International Law News*, contributed on environmental protection and conservation; Michael Gerrard, Professor, Columbia Law School, contributed on atmosphere and climate; Dave Gravallesse, Attorney-Advisor, Office of the Legal Adviser, U.S. Department of State, contributed on environmental protection and conservation; Margaret Holden, Assistant Corporation Counsel, New York City Law Department, Environmental Law Division, contributed on litigation; Richard A. Horsch, Partner, White & Case LLP, contributed on international hazardous management; Angela Huskey, Office of the General Counsel, U.S. Environmental Protection Agency, contributed on international chemicals; Iris Lowery, Attorney-Advisor, Office of General Counsel, NOAA, contributed on trade and environment; Neha Lugo, Attorney-Advisor, Office of the Legal Adviser, U.S. Department of State, contributed on environmental protection and conservation; Maggie MacDonald, Associate, Sive, Paget & Riesel P.C., contributed on natural resources; Jennifer North, Director of Maritime Programs, Charleston School of Law, contributed on trade and the environment; Thomas Parker Redick, Counsel, Global Environmental Ethics, contributed on international hazardous management and natural resources; Jackie Rolleri, Attorney-Advisor, Office of General Counsel, National Oceanic and Atmospheric Administration (NOAA), contributed on trade and environment; Andrew Schatz, Legal Advisor, Ecosystem Finance Division, Conservation International, contributed on atmosphere and climate, and environmental protection and conservation; Misty Sims, Attorney, Sims and Sims Law, contributed on natural resources; Maria Tigre, Senior Attorney, Environment Program, Cyrus R. Vance Center for International Justice, contributed on natural resources; Ole Varmer, Attorney-Advisor, Office of the General Counsel, NOAA, contributed on environmental protection and conservation; and Romany Webb, Climate Law Fellow, Columbia Law School, contributed on atmosphere and climate. The following individuals helped edit the YIR Report: Kathryn E. Dominic Lewis, JD, Masters of Public Policy student at Jacksonville University; and Kevin Haroff, Office Managing Partner, Marten Law.

implementation of the [Paris Agreement](#),² which, at the time of writing, had been ratified by 170 Parties to the UNFCCC.³ Nicaragua and Syria, the only two UNFCCC Parties that failed to sign the Paris Agreement during the period it was open for signature, acceded in October and November 2017, respectively. This leaves the U.S. as the only Party that has indicated it will not abide by the Paris Agreement.⁴

The first meeting of the Parties to the Paris Agreement (CMA1), initiated at the Twenty-Second COP in November 2016, was reconvened at COP23. Discussions focused on the Paris Agreement [work programme](#), with parties [agreeing](#) to “accelerate [its] completion,” so decisions can be taken at the third session of CMA1 in December 2018.⁵

In 2018, a facilitative dialogue (the “[Talanoa dialogue](#)”) will be held “to take stock of the collective efforts of Parties” to achieve the Paris Agreement and “inform the preparation of [their] nationally determined contributions.”⁶ Stocktaking sessions will also be convened to review mitigation efforts and climate finance flows in the pre-2020 period.⁷

Significant uncertainty remains as to the post-2020 framework for climate finance. During COP23, Parties discussed the future role of the Adaptation Fund and agreed that the Fund “shall” continue under the Paris Agreement.⁸ To support the continued work of the Adaptation Fund, Germany, Ireland, Italy, Sweden, and the Walloon Region of Belgium pledged a total of an additional €90 million (US \$93.3 million) in funding therefor.⁹ Several EU countries also announced funding for other UN bodies, including the Intergovernmental Panel on Climate Change (IPCC), with France committing to cover any shortfall resulting from President Trump’s decision to withdraw U.S. funding,¹⁰ and the UK agreeing to double its contribution.

Private and public climate finance was the primary topic of discussion at the “One Planet” summit in Paris, France on December 12, 2017.¹¹ Several significant climate financing initiatives were announced, including a partnership between UN Environment and BNP Paribas that aims to fund \$10 billion worth of sustainable projects in developing countries by 2025, an EU commitment to invest €9 billion in sustainable cities, energy, and agriculture by 2020, and a commitment by French insurance company AXA to invest €12 billion in sustainable projects by 2020.¹² The World Bank Group also announced that it will no longer finance upstream oil and gas development after 2019.¹³

²UNFCCC, [Conference of the Parties on its Twenty-First Session, Adoption of the Paris Agreement](#), Decision 1/CP.21, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015).

³[Paris Agreement – Status of Ratification](#), UNFCCC (last visited Apr. 30, 2018).

⁴*See generally* Press Release, U.S. Dep’t of State, [Communication Regarding Intent to Withdraw from Paris Agreement](#) (Aug. 4, 2017).

⁵UNFCCC, [Conference of the Parties on its Twenty-Third Session, Preparations for the Implementation of the Paris Agreement](#), Decision 1/CP.23, U.N. Doc. FCCC/CP/2017/L.13 (Advance Version) (Nov. 18, 2017).

⁶*Id.* at cl. 10-11 and Annex II.

⁷*Id.* at cl. 17-18.

⁸UNFCCC, [Report of the Adaptation Fund Board](#), Decision -/CP.13 (Unedited Advance Version).

⁹*Id.* at cl. 4.

¹⁰Matt McGrath, [Europe steps in to cover U.S. shortfall in funding climate science](#), BBC NEWS (Nov. 15, 2017).

¹¹[One Planet Summit](#), CLIMATE FINANCE DAY 2017 (last visited Apr. 30, 2018).

¹²Press Release, UNFCCC, [One Planet Summit: Finance Commitments Fire-Up Higher Momentum for Paris Climate Change Agreement](#) (Dec. 12, 2017).

¹³Press Release, The World Bank, [World Bank Group Announcements at One Planet Summit](#) (Dec. 12, 2017).

The next COP will be held in Katowice, Poland on December 3-14, 2018.¹⁴ The third session of CMA1 will be convened at that time.

B. Twenty-Eighth Meeting of the Parties to the Montreal Protocol

The Twenty-Eighth Meeting of the Parties (MOP28) to the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) was held in Montreal, Canada from November 20-24, 2017. As of November 23, 2017, the Kigali Amendment¹⁵ to the Protocol had been ratified by twenty-three parties the threshold number required for the treaty to enter into force. The Kigali Amendment, which will officially take effect on January 1, 2019,¹⁶ adds hydrofluorocarbons (HFCs) to the list of substances controlled under the Montreal Protocol and establishes a freeze and gradual phase-down, legally binding in nearly all countries, of HFC consumption to 15-20 % of baseline levels by mid-century.¹⁷ The thirtieth MOP (MOP30) will be held in Ecuador from November 5-9, 2018.

II. ENVIRONMENTAL PROTECTION AND CONSERVATION

A. Biodiversity Beyond National Jurisdiction - Preparatory Committee

On December 24, 2017, the United Nations General Assembly (UNGA) adopted by consensus [resolution A/RES/72/249](#), “International legally binding instrument 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.”¹⁸ The resolution convenes an intergovernmental conference under the auspices of the United Nations (UN) to elaborate the text of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction (BBNJ). The intergovernmental conference will address the topics identified by the UN in 2011; namely, marine genetic resources, including questions on the sharing of benefits, measures such as area based management tools, including marine protected areas, environmental impact assessments, and capacity-building and the transfer of marine technology. The intergovernmental conference will have a three-day organizational meeting from April 16-18, 2018, followed by its first session from September 4-17, 2018.

¹⁴[Calendar](#), UNFCCC (last visited Apr. 30, 2018). See also [Katowice Announced as Host Venue of UN Climate Change Conference COP 24 in 2018](#), UNFCCC (June 1, 2017).

¹⁵[Adoption of Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, Kigali](#), UNFCCC (Oct. 15, 2016).

¹⁶See [Status of Ratification](#), UNEP.ORG (last visited Apr. 30, 2018) (Montreal Protocol parties that have ratified the Kigali Amendment are listed alphabetically: Australia, Canada, Chile, Comoros, Côte d’Ivoire, Democratic People’s Republic of Korea, Finland, Germany, Lao People’s Democratic Republic, Luxembourg, Malawi, Maldives, Mali, Marshall Islands, Micronesia (Federated States of), Norway, Palau, Rwanda, Slovakia, Sweden, Trinidad and Tobago, Tuvalu and the United Kingdom of Great Britain and Northern Ireland).

¹⁷Decision XXVIII/1: [Further Amendment of the Montreal Protocol](#) (Nov. 18, 2016).

¹⁸UNGA, A/RES/72/249, provisionally available as document A/72/L.7 (Dec. 24, 2017); Press Release, UNGA, [Concluding Main Part of Seventy-Second Session, General Assembly Adopts \\$5.397 Billion Budget for 2018-2019, as Recommended by Fifth Committee](#) (Dec. 24, 2017).

In July 2017, the Preparatory Committee on BBNJ established by UNGA [resolution 69/292](#) held its fourth and final session.¹⁹ Although the Preparatory Committee was unable to reach consensus on elements of a draft text of a legally binding instrument on BBNJ, it sent non-consensus elements to the UNGA for reference purposes, and recommended the UNGA take a decision, as soon as possible, on the convening of an intergovernmental conference.

B. *Protected Area Conservation*

Overall, 2017 represented a positive year for protected area conservation around the world. Many nations strengthened domestic efforts to conserve existing or establish new protected areas in line with [UN Sustainable Development Goal \(SDG\) 14](#) (conserve and sustainably use the oceans, seas and marine resources for sustainable development) and the Convention on Biological Diversity's [Aichi Target 11](#), which seeks to conserve 17% of terrestrial and inland water and 10% of coastal and marine areas as effectively managed protected areas by 2020. The International Union for the Conservation of Nature (IUCN) and the United Nations Environment Programme (UNEP) World Conservation Monitoring Centre released the [Marine Protected Planet](#), the most comprehensive tool to date to measure global progress in preserving the marine environment and meeting SDG 14 and Aichi Target 11.²⁰

In particular, global marine conservation made significant strides this year. At the Fourth International Marine Protected Area Congress (IMPAC4) held September 4-8, 2017, in La Serena, over 80 countries and 1,000 participants affirmed their commitment to meet SDG14, establish well-managed Marine Protected Areas (MPAs) inside and outside national jurisdictions, and integrate local and indigenous communities into management approaches.²¹ Chile announced the designation of three MPAs: (1) Rapa Nui (Easter Island) (740,000km²), which will be managed by its indigenous people, (2) the Juan Fernández Archipelago (480,000km²), and (3) Park Cabo de Hornos e Islas Diego Ramírez (147,000km²).

Several other MPAs were announced at the UN Oceans Conference (New York, June 2017) and Our Oceans Conference (Malta, October 2017). Gabon announced the creation of Africa's largest network of marine protected areas – 20 marine parks and aquatic reserves – which will protect 26% of Gabon's territorial seas and cover 53,000 km².²² A zoned management approach has been used for the sustainable fishing by commercial and artisanal fisherman. On November 29, 2017, Mexico signed a decree creating Mexico's largest marine reserve (150,000 km²) around the [Revillagigedo Archipelago](#), a volcanic archipelago 240 miles southwest of the Baja peninsula. This area is home to 750 animal species and 233 plant species.

The small island nation of Niue created a MPA encompassing 40% of the country's Exclusive Economic Zone (127,000 km²).²³ The MPA includes reefs and atolls that are home to the world's highest density of grey reef sharks. In July, the Cook Islands designated

¹⁹U.N. OCEANS & LAW OF THE SEA, [REPORT OF THE PREPARATORY COMMITTEE ESTABLISHED BY GENERAL ASSEMBLY RESOLUTION 69/292](#), A/AC.287/2017/PC.4/2 (July 31, 2017).

²⁰[IMPAC4: Bringing People and the Ocean Together](#), INT'L UNION FOR CONSERVATION OF NATURE (Sept. 29, 2017).

²¹*Id.*

²²Laura Parker, [New Ocean Reserve, Largest in Africa, Protects Whales and Turtles](#), *Nat'l Geographic* (June 5, 2017).

²³[Niue to create large-scale marine protected area](#), UNITED NATIONS DEV. PROGRAMME (Oct. 20, 2017).

Marae Moana, the world's largest marine park at 1.9 million km², encompassing a vast area of the Pacific Ocean, including half of their EEZ.²⁴ While some seabed mining and fishing will continue, there is a fifty nautical mile exclusion zone surrounding each of the nation's fifteen islands.²⁵

Canada designated the St. Anns Bank MPA, which will protect important habitat in an area of high biological diversity, including habitat for endangered and threatened marine species, such as the leatherback turtle.²⁶ In addition, Parks Canada, the Nunavut Government and the Qikiqtani Inuit Association established the Tallurutiup Imanga - Lancaster Sound National Marine Conservation Area in the Canadian Arctic (109,000km²).²⁷ Oil and gas development, mining and waste disposal are prohibited, while subsistence hunting, fishing and gathering, and other traditional activities of the Inuit will continue to be authorized.²⁸ Park Canada and the indigenous government of Nunatsiavut signed a statement of intent to co-develop a management plan, including MPAs, for a 380,000-km² marine area off northern Labrador, on Canada's Atlantic coast.²⁹

The 25 members of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) attended its 36th annual meeting in October. Following last year's establishment of the world's largest MPA (until Marae Moana) in Antarctica's Ross Sea, the EU and Australia sought to establish a one million km² East Antarctic Marine Protected Area in the southern Indian Ocean.³⁰ Requiring unanimity, the proposal failed in light of Russian and Chinese opposition.³¹

China continued to make good on Xi Jinping's [goal](#) to create a national park system. In September 2017, China released its [plan for the national park system](#), setting forth the top-down design of its national park system, which will follow the principle of "ecological protection first" to conserve its large ecosystems.³² The central government will establish national parks in land, marine, and ocean areas to meet ecological protection and sustainable development goals. The government has also ordered all its provinces and regions to establish an ecological "red line" by 2020 that declares designated regions under mandatory and rigorous protection.³³ To date, China has established ten pilot program national parks – including Sanjiangyuan (the source of China's three major rivers), giant panda protected areas, and the Great Wall – and plans to complete other pilot programs by 2020. In March 2017, the government established the 27,134 km² Giant Panda National Park, spanning three provinces and covering a panda habitat three times the size of

²⁴[Cook Islands creates huge Pacific Ocean reserve](#), AGENCE FRANCE PRESSE (July 14, 2017).

²⁵*Id.*; [Atlas of Marine Protection](#), Cook Islands Marae Moana legislation passed (July 14, 2017) Radio New Zealand.

²⁶Press Release, Gov't of Can., [New Marine Protected Area off Nova Scotia as Canada celebrates World Oceans Day](#) (June 8, 2017).

²⁷Mike Wong, [Canada's newest and largest Marine Protected Area: Tallurutiup Imanga – Lancaster Sound](#), INT'L UNION FOR CONSERVATION OF NATURE (Aug. 31, 2017).

²⁸[Tallurutiup Imanga: a final boundary for Canada's largest protected area at Lancaster Sound in Nunavut](#), PARKS CANADA (last visited Apr. 30, 2018).

²⁹[Co-management coming for marine area off Atlantic Canada](#), MPA NEWS (Oct. 17, 2017).

³⁰[36th annual meetings of CCAMLR – reports available](#), CCAMLR (Nov. 14, 2017); April Reese, [Plans Rejected for East Antarctic Marine Park](#), NATURE (Oct. 27, 2017).

³¹*Id.* (noting that both China and Russia have current or historical fishing interests in the region).

³²Press Release, The State Council, People's Republic of China, [China Unveils Overall Plan for National Park System](#) (Sept. 26, 2017).

³³*Id.*; Xinhua, [China to Set Up National Park System](#), CHINA DAILY (Sept. 27, 2017).

America's Yellowstone National Park.³⁴ That same month, China also announced the creation of a 14,600 km² national park (60% larger than Yellowstone) in the northeast, bordering Russia and North Korea, which will serve as habitat for two critically endangered big cats: the Amur leopard and Siberian (Amur) tiger.³⁵

Despite the year's progress, actions by Australia and the United States (*see* Climate Change, Sustainable Development, and Ecosystems Chapter, Section III.B, *supra*) have caused alarm among conservationists by establishing precedent for scaling back both the scope and coverage of protected areas. In July 2017, Australian Prime Minister Malcolm Turnbull's government announced plans to dramatically scale back protections for a network of forty-two marine reserves established under the prior Labor-led government in 2012. According to [draft management plans](#), the government proposed reducing the no-take (no-fishing) protected area coverage for the [Coral Sea Marine Park](#) (a 1 million km² park in Queensland) by 76%, and downgraded protections off the coast of Western Australia, the Northern Territory, and New South Wales.³⁶

C. *Central Arctic Fisheries Agreement Negotiations*

On November 30, 2017, nine States and the European Union³⁷ completed negotiation of an Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean. Ambassador David Balton of the United States chaired the negotiations, which took place in six rounds over a two-year period. As of this writing, the participating delegations are seeking final approval within their governments to sign the Agreement.

Once in force, the Agreement will prevent unregulated commercial fishing in the high seas portion of the central Arctic Ocean, an area that is roughly 2.8 million square kilometers in size, roughly as large as the Mediterranean Sea. Commercial fishing has not been known to occur in this area, and it is unlikely to occur in the near future. However, given the changing conditions in the Arctic Ocean, including the significant loss of sea ice during much of the year, the governments in question developed this Agreement to forestall commercial fishing until there is adequate scientific information and a regulatory structure to manage such fisheries properly. To that end, the parties to the Agreement will establish and operate a Joint Program of Scientific Research and Monitoring with the aim of improving the understanding of relevant ecosystems and, in particular, of determining whether in the future fish stocks that could be harvested on a sustainable basis might occur in this area. The Agreement is being hailed as a landmark for the Arctic and an unusual example of governments taking steps in advance to prevent an environmental problem.³⁸

³⁴*Id.*

³⁵Jason Daley, [China Approves Massive National Park to Protect its Last Big Cats](#), SMITHSONIAN.COM (Mar. 15, 2017).

³⁶Michael Slezak, [Australia's Marine Parks Face Cuts to Protected Areas](#), THE GUARDIAN (July 21, 2017); *see also* Jessica Meeuwig, [Scientists Speak Out on Plan to Slash Protections for Marine Parks](#), NEWSDEEPLY (Oct. 6, 2017).

³⁷Press Release, U.S. Dep't of State, [Meeting on High Seas Fisheries in the Central Arctic Ocean, 28-30 November 2017: Chairman's Statement](#) (In addition to the E.U, Canada, China, Denmark in respect of Greenland and the Faroe Islands, Iceland, Japan, Norway, Russia, South Korea, and the United States participated in the negotiations).

³⁸Andrew A. Kramer, [Russia, U.S. and Other Nations Restrict Fishing in Thawing Arctic](#), N.Y. TIMES (Nov. 30, 2017); Hannah Hoag, [Nations agree to ban fishing in Arctic Ocean for at least 16 years](#), SCI. (Dec. 1, 2017).

D. *International Arctic Oil & Gas Developments and Restrictions*

In a reversal from last year, the U.S. President changed the Arctic energy policy approach by revoking conservation protections for the Bering Sea and Bering Strait and calling for reconsideration of the ban on offshore drilling in the Arctic and of proposed offshore air quality regulations.³⁹ On December 22, 2017, the President signed a [tax bill](#) that allows for oil development in the Arctic National Wildlife.⁴⁰ The U.S. Government has approved new exploratory drilling in the Arctic waters of the Beaufort Sea.⁴¹ The Government also released a Draft Environmental Impact Statement for a second project in the Beaufort Sea; if that project is approved, it could become the first-ever production facility completely in federal Arctic waters.⁴²

The eight countries of the Arctic Council adopted the [Agreement on Enhancing International Arctic Scientific Cooperation](#) on May 11, 2017.⁴³ This third legally binding instrument of the Arctic Council facilitates scientific research, sharing of scientific data, and scientific cooperation to advance understanding of terrestrial, coastal, atmospheric, and marine environments and their value.

The *International Code for Ships Operating in Polar Waters* (Polar Code), which covers vessels operating in Arctic and Antarctic waters, entered into force on January 1, 2017.⁴⁴ The mandatory Polar Code amends the International Convention for the Safety of Life at Sea (SOLAS)⁴⁵ and the International Convention for the Prevention of Pollution from Ships (MARPOL).⁴⁶ It imposes enhanced safety, environmental, and operational requirements responsive to the extreme weather, environmental, and remoteness challenges of operating in polar environments. Additional personnel, training, safety system, and emergency response requirements in the Polar Code will enter into effect in 2018 as amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) and its Code.⁴⁷

³⁹See Exec. Order No. 13795, [Implementing an America-First Offshore Energy Strategy](#), 82 Fed. Reg. 20,815, 20,816-7 (May 3, 2017); Exec. Order No. 13783, [Promoting Energy Independence and Economic Growth](#), 82 Fed. Reg. 16,093 (Mar. 31, 2017).

⁴⁰H.R. 1, 114th Cong., 1st Sess. (2017).

⁴¹See Press Release, U.S. Dep't of the Interior, Bureau of Safety and Envtl. Enforcement, [BSEE Approves New Drilling Operations in Arctic](#) (Nov. 28, 2017).

⁴²See [Hilcorp Alaska LLC Liberty Project](#), U.S. DEP'T OF INTERIOR, BUREAU OF OCEAN ENERGY MGMT. (last visited Apr. 30, 2018).

⁴³See ARCTIC COUNCIL, [AGREEMENT ON ENHANCING INTERNATIONAL ARCTIC SCIENTIFIC COOPERATION](#) (May 11, 2017).

⁴⁴See INT'L MARITIME ORG. [IMO], MARITIME SAFETY COMM., [INT'L CODE FOR SHIPS OPERATING IN POLAR WATERS, RES. MSC.385\(94\)](#) (Nov. 21, 2014) (entry into force Jan. 1, 2017).

⁴⁵See IMO, MARITIME SAFETY COMM., [AMENDMENTS TO THE INT'L CONVENTION FOR THE SAFETY OF LIFE AT SEA, MSC.386\(94\)](#) (Nov. 21, 2014) (entry into force Jan. 1, 2017) (creating new chapter XIV).

⁴⁶See IMO, MARITIME ENV'T PROT. COMM., [AMENDMENTS TO THE ANNEX OF THE PROTOCOL OF 1978 RELATING TO THE INT'L CONVENTION FOR THE PREVENTION OF POLLUTION FROM SHIPS, 1973, MEPC.265\(68\)](#) (May 15, 2015) (entry into force Jan. 1, 2017) (amending Annexes I, II, IV, and V).

⁴⁷See IMO, MARITIME SAFETY COMM., AMENDMENTS TO THE INT'L CONVENTION ON STANDARDS OF TRAINING, CERTIFICATION & WATCHKEEPING FOR SEAFARERS (STCW), 1978 AS AMENDED, [RES. MSC.416\(97\)](#) (Nov. 25, 2016); IMO, MARITIME SAFETY COMM., AMENDMENTS TO PART A OF THE SEAFARERS' TRAINING, CERTIFICATION &

E. *Cultural Heritage*

On May 5, 2017, President Trump signed into law [Consolidated Appropriations Act, 2017](#).⁴⁸ Section 113 of the Act provides, “no person shall conduct any research, exploration, salvage, or other activity that would physically alter or disturb the wreck or wreck site of the RMS Titanic unless authorized by the Secretary of Commerce per the provisions of the [Agreement Concerning the Shipwrecked Vessel RMS Titanic](#).”⁴⁹ Section 113 directs the Secretary of Commerce to “take appropriate actions to carry out this section consistent with the Agreement.”⁵⁰ Under Article 4 of the Agreement, each party is to take “appropriate actions” to enforce measures taken pursuant to the Agreement against nationals and vessels flying its flag and to prohibit activities in its territory including its maritime ports, territorial sea, and offshore terminals.

III. INTERNATIONAL HAZARDOUS MANAGEMENT

A. *Transboundary Movement of Hazardous Waste*

The thirteenth meeting of the Conference of the Parties (COP13) for the [Basel Convention on the Transboundary Movements of Hazardous Wastes and Their Disposal](#) (Convention)⁵¹ was held from April 24 to May 5, 2017 in Geneva, Switzerland, in conjunction with the meetings of the conferences of the parties to the Rotterdam⁵² and Stockholm⁵³ Conventions. Opening remarks emphasized the importance of enhancing synergies in implementing the three conventions, and supported the inclusion of the [Minamata Convention on Mercury](#)⁵⁴ in the same overall framework as the Basel, Rotterdam, and Stockholm Conventions.⁵⁵

In furtherance of efforts to improve the effectiveness of the Convention,⁵⁶ the Parties adopted practical manuals prepared by the expert working group for the promotion

WATCHKEEPING (STCW) CODE, [RES. MSC.417\(97\)](#) (Nov. 25, 2016) (amending Part A of the STCW Code).

⁴⁸Consolidated Appropriations Act of 2017, [Pub. L. No. 115-31](#), 131 Stat. 135 (2017); [Significant Issues and Developments for 2017](#), NOAA GEN. COUNSEL, INT’L SECTION (last visited Apr. 30, 2018).

⁴⁹[Agreement Concerning the Shipwrecked Vessel RMS Titanic](#) (Agreement will enter into force when more than one country becomes a party to it).

⁵⁰[Consolidated Appropriations Act](#), *supra* note 48.

⁵¹1673 U.N.T.S. 126, 28 I.L.M. 657 (Mar. 22, 1989).

⁵²See U.N. Doc. UNEP/FAO/PIC/CONF/5, [Final Act](#), (Sept. 17, 1998).

⁵³See U.N. Doc. UNEP/POPS/CONF/4, [Final Act](#), U.N. Doc. UNEP/POPS/CONF/4 (June 5, 2001).

⁵⁴The Minamata Convention entered into force on August 16, 2017, 90 days after the fiftieth adoption by a state party or regional economic integration organization. See Minamata Convention on Mercury, Kumamoto, Japan, Oct. 10, 2013, 2013 U.S.T. LEXIS 98 (Aug. 16, 2017).

⁵⁵Basel Convention, [Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on the work of its thirteenth meeting](#), U.N. Doc. UNEP/CHW.13/28 at 2–3, ¶ 9 (Aug. 16, 2017).

⁵⁶See Basel Convention, [Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on the work of its tenth meeting](#), U.N. Doc. UNEP/CHW.10/28 at 31, Annex I at (Nov. 1, 2011) (adopted text of Indonesian-Swiss country-led initiative to improve the effectiveness of the Basel Convention).

of the environmentally sound management (ESM) of wastes;⁵⁷ a revised glossary, intended “to improve the implementation of the Convention and the application of technical guidelines” developed thereunder;⁵⁸ and general, non-binding technical guidelines (or, in some cases, updated technical guidelines) for ESM of wastes consisting of or contaminated with persistent organic pollutants (POPs).⁵⁹

The Parties adopted the Cartagena Declaration on the Prevention, Minimization and Recovery of Hazardous Wastes and Other Wastes (Cartagena Declaration),⁶⁰ and the Parties at COP13 adopted⁶¹ a guidance document developed as part of the “road map” for taking action on the Cartagena Declaration through the development of more efficient waste prevention and minimization strategies.⁶² To address long-standing issues of noncompliance with national reporting requirements under Article 13(3) and Article 9 of the Convention, the COP took steps to enhance the timeliness and completeness of national reporting⁶³ and adopted guidance on the implementation of the Convention’s illegal traffic provisions.⁶⁴ The COP also continued its efforts to harmonize legal instruments addressing the transboundary movement of wastes, specifically, through efforts to facilitate the inclusion in the Harmonized Commodity Description and Coding System of the World Customs Organization, of wastes covered by the Convention.⁶⁵

B. *International Regulation of Agricultural Biotechnology*

The number of nations and acres planted with biotech crops increased by 3% in 2016 after nearly twenty years of increases over 10% annually.⁶⁶ Onerous regulatory approval requirements for biotech crops (both planting and food-feed-processing import approvals) predominated among the 171 nations that are parties to the 2003 [Cartagena Protocol on Biosafety](#) (CPB). The CPB’s parent Convention on Biological Diversity has 196 parties (the entire world, excluding only the United States and Holy See).⁶⁷ The Nagoya Protocol on Access and Benefit-sharing (Nagoya) now has 100 Parties,⁶⁸ while the Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, (NKLS Protocol) had 66 parties after Viet Nam’s [ratification](#). At the CPB in December 2016 in Cancun, Mexico considered whether CPB parties should extend their

⁵⁷See Basel Convention, [Follow-up to the Indonesian-Swiss country-led initiative to improve the effectiveness of the Basel Convention: Addendum: Set of practical manuals for the promotion of the environmentally sound management of wastes](#), U.N. Doc. UNEP/CHW.13/4/Add.1/Rev.1 (Aug. 11, 2017) (advance copy).

⁵⁸Basel Convention, [Follow-up to the Indonesian-Swiss country-led initiative to improve the effectiveness of the Basel Convention: Addendum: Glossary of terms](#), U.N. Doc. UNEP/CHW.13/4/Add.2 at 2, ¶ 1 (Sept. 22, 2016); see also *supra* note 56, at 49, ¶ 18 (Decision BC-13/2).

⁵⁹*Supra* note 56, at 14, ¶¶ 84–85; 53, ¶ 2 (Decision BC-13/4).

⁶⁰See also Basel Convention, [Cartagena Declaration on the Prevention, Minimization and Recovery of Hazardous Wastes and Other Wastes](#) (Oct. 21, 2011).

⁶¹*Supra* note 56, at 52, ¶ 4 (Decision BC-13/3).

⁶²*Supra* note 57, at 20, ¶ 176, 164.

⁶³*Supra* note 56, at 60, ¶ 13 (Decision BC-13/9).

⁶⁴*Id.* at 61, ¶ 15 (Decision BC-13/9).

⁶⁵*Id.* at 57, ¶¶ 1–2 (Decision BC-13/7).

⁶⁶INT’L SERV. FOR THE ACQUISITION OF AGRI-BIOTECH APPLICATIONS, ISAAA BRIEF NO. 52, [GLOBAL STATUS OF COMMERCIALIZED BIOTECH/GM CROPS: 2016](#) (2016).

⁶⁷[List of Parties](#), CONVENTION ON BIOLOGICAL DIVERSITY (last visited Apr. 30, 2018).

⁶⁸[Parties to the Nagoya Protocol](#), CONVENTION ON BIOLOGICAL DIVERSITY (last visited Apr. 30, 2018).

regulatory language to require pre-market approval for biotech organisms created with new genetic editing tools – “synthetic biology” to the CPB. While no decisions were reached on genetic editing, commentators warn that restrictive regulation may soon be forthcoming,⁶⁹ perhaps at the Ninth Meeting of the Conference of the Parties to the Cartagena Protocol on Biosafety (MOP9) from November 10-22, 2018 in Sharm El-Sheikh, Egypt.

IV. INTERNATIONAL CHEMICALS

A. *International Committees on Pollutant Review and Chemical Review*

The thirteenth meeting of the Persistent Organic Pollutants Review Committee (POPRC-13) of the Stockholm Convention on Persistent Organic Pollutants convened in Rome, Italy at the Food & Agriculture Organization of the United Nations (FAO) headquarters from October 17-20, 2017. The POPRC adopted the risk management evaluations for dicofol and pentadecafluorooctanoic acid (PFOA), its salts, and PFOA-related compounds and recommended those chemicals in Annex A without specific exemptions and in Annex A or B with specific exemptions, respectively.⁷⁰ The POPRC also adopted terms of reference for assessment of alternatives to perfluorooctanesulfonic acid (PFOS), its salts and perfluorooctanesulfonyl fluoride (PFOSF). The POPRC-13 also agreed that perfluorohexane sulfonic acid (PFHxS), its salts and PFHxS-related compounds met the screening criteria in Annex D and established an intersessional working group to prepare a draft risk profile.⁷¹

The thirteenth meeting of the Chemical Review Committee of the Rotterdam Convention (CRC-13) met from October 23-26, 2017, at the FAO headquarters in Rome, Italy. At the meeting, the Committee recommended listing acetochlor, hexabromocyclododecane, and phorate in Annex III to the Convention. Upon reviewing notifications of final regulatory action for carbon tetrachloride, chlordecone, endosulfan, hexazinone, pentachlorobenzene, PFOS, its salts and PFOSF, polychlorinated naphthalenes and triazophos, the Committee decided that these chemicals did not meet the criteria of Annex II to the Convention. The Committee also adopted an updated version of its [*Handbook of Working Procedures and Policy Guidance for the Chemical Review Committee*](#).⁷²

B. *Minamata Convention on Mercury*

The Minamata Convention on Mercury entered into force on August 16, 2017, with ratification by over 50 Parties. The first meeting of the Conference of the Parties to the Minamata Convention (COP1) convened in Geneva, Switzerland from September 24-29, 2017. Several guidelines were adopted, including one for the reduction of mercury

⁶⁹[*How are governments regulating CRISPR and New Breeding Technologies \(NBTs\)?*](#), GMO FAQ, GENETIC LITERACY PROJECT (last visited Apr. 30, 2018).

⁷⁰UNEP, [*Report of the Persistent Organic Pollutants Review Committee on the work of its thirteenth meeting, Addendum, Risk management evaluation on dicofol*](#), (Nov. 8, 2017); see also [*Addendum, Risk management evaluation on pentadecafluorooctanoic acid*](#) (CAS No: 335-67-1, PFOA, perfluorooctanoic acid), its salts and PFOA-related compounds, (Nov. 16, 2017).

⁷¹STOCKHOLM CONVENTION CLEARING HOUSE, Overview, [*Thirteenth meeting of the Persistent Organic Pollutants Review Committee \(POPRC.13\)*](#) (last visited Apr. 30, 2018).

⁷²[*Thirteenth meeting of the Chemical Review Committee \(POPRC.13\)*](#), UNEP (last visited Apr. 30, 2018).

emissions from the artisanal gold-mining and one for reducing atmospheric mercury emissions generated by coal-fired plants, waste incineration plants, and cement plants.⁷³ The Conference also adopted Article 3 guidance concerning the identification of mercury stocks and compounds.⁷⁴ In addition, the Conference considered several other issues including reporting cycles, effectiveness evaluation, the financial mechanism, and location of the permanent secretariat.⁷⁵

V. NATURAL RESOURCES

A. *International Regulations of Endangered Species, Invasive Species, and Conservation*

In November 2017, the [Convention on International Trade in Endangered Species of Wild Fauna and Flora](#) (CITES) Standing Committee deferred a decision until 2018 concerning the legality of Japan's North Pacific whaling program, which authorizes the killing of endangered sei whales on the high seas. CITES's definition of international commercial trade prohibits such "introduction from the sea" activity of imperiled Appendix I-listed species, such as sei whales. To clarify and ease some of the rosewood trade regulations imposed in 2016, CITES recommended countries should not require permits from orchestras crossing their borders with shipments of instruments produced with the types of rosewood outlined in the new regulations.⁷⁶

On September 8, 2017, the [Ballast Water Management Convention](#) was implemented. The Convention seeks to halt the spread of potentially invasive aquatic species in ships' ballast water. This significant event coincides with GloBallast Partnerships Project of the Global Environment Facility (GEF), the International Maritime Organisation (IMO), and the United Nations Development Programme (UNDP), which concluded on June 30, 2017.⁷⁷

U.S. Secretary of State, Rex Tillerson, signed an environmental agreement among eight nations adopting the first [Arctic Invasive Alien Species \(ARIAS\) strategy and action plan](#). The purpose behind adopting ARIAS is to encourage prevention, keeping invasive alien species from entering the Arctic, early detection and eradication before an alien species are established, and control populations of alien species to minimize their spread.⁷⁸

At the Sustainable Ocean Summit 2017, held in Halifax, Canada from November 29 – December 1, 2017, the Executive Secretary of the Convention on Biological Diversity (CBD) explained that with "[n]atural disasters, political strife, climate change and mass migration" altering the global landscape, "conservation and sustainable use of biodiversity must [include] opportunities for sustainable economic growth and social inclusion."⁷⁹ On

⁷³Press Release, U.N. Env't, UNEP, [Historic Milestone Reached in Global Fight Against Mercury Pollution](#) (Oct. 2, 2017).

⁷⁴[Summary of the First Conference of the Parties to the Minamata Convention on Mercury](#), 28 EARTH NEGOTIATIONS BULLETIN 47 (Oct. 2, 2017).

⁷⁵*Id.*

⁷⁶Press Release, Convention on Int'l Trade in Endangered Species of Wild Fauna & Flora, CITES Annual Meeting to Tackle Pressing Wildlife Issues & Assess Compliance with International Commitments – Elephants, Musical Instruments, Pangolins, "Specific Whaling" & More on Week Long Agenda (Nov. 23, 2017).

⁷⁷[Ballast Water Management – The Control of Harmful Invasive Species](#), INT'L MAR. ORG. (last visited Apr. 1, 2018).

⁷⁸Arctic Council, *supra* note 43.

⁷⁹United Nations Decade on Biodiversity, [Statement by the Executive Secretary of the Convention on Biological Diversity at the Sustainable Ocean Summit](#) (Nov. 20, 2017).

December 16, 2017, the delegates to the tenth meeting of the Ad Hoc Open-ended Working Group on Article 8(j) and Related Provisions of the CBD agreed on the contribution of traditional knowledge to global biodiversity policy, which will set the stage for achieving the Aichi Biodiversity Targets set for 2011-2020.⁸⁰ These recommendations will be sent to the Conference of the Parties in Sharm El-Sheikh, Egypt from November 10 to 22, 2018, which will once again meet in tandem with its subsidiary conventions (e.g., the Cartagena Protocol on Biosafety) in sequence.

B. Domestic Measures to Combat Wildlife Trafficking

The year began with promising enforcement milestones, marking the continued success of ongoing efforts to disrupt the illegal global wildlife trade. In February 2017, the U.S., in cooperation with the International Consortium to Combat Wildlife Crime,⁸¹ joined enforcement agencies from more than 40 countries in Operation Thunderbird. The 3-week international enforcement operation resulted in the identification of nearly 900 suspects and 1,300 seizures of illicit products worth an estimated US\$5.1 million. The U.S. also continued to see enforcement successes from Operation Crash, its ongoing, multi-year rhino horn and ivory smuggling investigation. Additionally, the Trump Administration gave early signals of its intention to continue efforts to “strengthen enforcement . . . to thwart transnational criminal organizations” highlighting wildlife trafficking as an area of focus in Executive Order No. 13773 (2017).

However, more recent developments have indicated that the Trump Administration may not focus as much energy or resources on combatting wildlife trafficking going forward. Earlier this year, Secretary of the Interior, Ryan Zinke, suspended two of the Federal government’s existing wildlife advisory boards – the Advisory Council on Wildlife Trafficking and the Wildlife and Hunting Heritage Conservation Council. Subsequently, on November 8, 2017, the Department of the Interior announced the establishment of an International Wildlife Conservation Council, charged with “increasing public awareness domestically regarding the . . . economic benefits that result from U.S. citizens traveling to foreign nations to engage in hunting” and “recommending removal of barriers to the importation into the United States of legally hunted wildlife. . . .”⁸²

On October 20, 2017, the Trump Administration published new guidelines and began allowing the import of lion trophies from Zimbabwe and Zambia, with imports from Tanzania, Mozambique, and Namibia still under review. In November 2017, the Department of the Interior announced it was lifting restrictions on the import of elephant trophies from Zimbabwe and Zambia.⁸³ Under section 4(d) of the Endangered Species Act, for the Service to authorize the import of a sport-hunted elephant trophy, the Service must find that the killing of the trophy animal will enhance the survival of the species in the wild (known as an “enhancement finding”).⁸⁴ The Service cited new management plans among

⁸⁰Press Release, U.N. Decade on Biodiversity, [Governments agree on the contribution of traditional knowledge to global biodiversity policy](#) (Dec. 16, 2017).

⁸¹ICCWC is comprised of the Secretariat of CITES, WCO, the United Nations Office on Drugs and Crime and the World Bank - the INTERPOL Wildlife Crime Working Group, the US Fish and Wildlife Service, the UK Border Force, and Environment Canada. [ICCWC Partners](#), CONVENTION ON INT’L TRADE IN ENDANGERED SPECIES OF WILD FAUNA & FLORA (last visited Apr. 1, 2018).

⁸²[International Wildlife Conservation Council Establishment; Request for Nominations](#), 82 Fed. Reg. 51,857 (Nov. 8, 2017) (Notice).

⁸³[Issuance of Import Permits for Zimbabwe Elephant Trophies Taken on or After January 21, 2016, and on or Before December 31, 2018](#), 82 Fed. Reg. 54,405 (Nov. 17, 2017).

⁸⁴[50 C.F.R. § 17.40\(e\)\(3\)\(iii\)\(C\) \(2016\)](#).

other information to support this finding. Days after the announcement, President Trump reversed his Administration's decision and suspended the determination pending further review.

International cooperation to combat this global issue has continued, of note, China's ban on the domestic ivory market came into effect on December 31, 2017, shutting down ivory carving facilities and retail stores.⁸⁵

C. *Multilateral Environmental Agreement Updates: Global Pact for the Environment*

At the 72nd United Nations (UN) General Assembly, which convened on September 2017, French President Emmanuel Macron launched the "Global Pact for the Environment" (Pact).⁸⁶ The newly proposed Pact is an overarching and legally-binding global agreement on environmental issues, which will serve as the basis for a UN treaty to define fundamental environmental rights, as well as broad international environmental legal principles. The goal is to create "an umbrella covenant structure" for the protection of environmental rights within the UN legal framework.⁸⁷

The current draft consists of a preamble and 26 articles, comprising 20 principles.⁸⁸ The text, which was developed by an international Group of Experts for the Pact (GEP), a network of jurists chaired by Laurent Fabius,⁸⁹ and the French think tank Club des Juristes, is based on a series of consultations with global legal experts conducted through open-ended questionnaires.⁹⁰ If approved by the UN General Assembly, the Charter will supplement, unify and form the basis of international environmental law.⁹¹ With binding legal force,⁹² the principles could be invoked in court, constituting a real guarantee of rights, and supplementing the political and symbolic significance of current principles enshrined in previous environmental declarations, such as the 1972 Stockholm Declaration and the 1992 Rio Declaration.⁹³

VI. TRADE AND ENVIRONMENT

A. *World Trade Organization Disputes and Negotiations*

On April 25, 2017, the latest dispute between the United States and Mexico (US –

⁸⁵Rachael Bale, [China Shuts Down Its Illegal Ivory Trade](#), NAT'L GEOGRAPHIC (Dec. 30, 2017).

⁸⁶*Speech by M. Emmanuel Macron, President of the Republic: Summit on the Global Pact for the Environment*, FRANCE DIPLOMATIE (Sept. 19, 2017).

⁸⁷Gary Tabor, [President Macron announces Global Pact for the Environment](#), LEONARDO DICAPRIO FOUNDATION (July 24, 2017).

⁸⁸LE CLUB DES JURISTES, [PROJECT GLOBAL PACT FOR THE ENVIRONMENT](#) (June 24, 2017).

⁸⁹*Id.* at 7.

⁹⁰*Le droit est essentiel pour s'adapter au monde nouveau et pour adapter ce monde nouveau. C'est le but du Pacte mondial pour l'environnement* (Entretien exclusif avec Laurent Fabius, président du Conseil constitutionnel), 28 LA SEMAINE JURIDIQUE 1354 (July 10, 2017).

⁹¹LE CLUB DES JURISTES, REPORT, [INCREASING THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL LAW – DUTIES OF STATES, RIGHTS OF INDIVIDUALS](#) (Apr. 26, 2016).

⁹²LE CLUB DES JURISTES, REPORT SUMMARY, [INCREASING THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL LAW – DUTIES OF STATES, RIGHTS OF INDIVIDUAL](#) (Nov. 2015).

⁹³*Id.*

Tuna II) over the importation of yellowfin tuna was decided by arbitration at the World Trade Organization.⁹⁴ Mexico argued that the U.S. labeling rules, that are intended to protect the unnecessary catch of dolphins, interfered with Mexico's ability to enter the U.S. market. The U.S. has long criticized fishing practices that do not meet its no-kill standards and, as a result, Mexico, and other fishing nations have battled over whether U.S. laws conflict with General Agreement on Tariffs and Trade (GATT)⁹⁵ and Technical Barriers to Trade (TBT).⁹⁶ The U.S. was given an opportunity to bring its regulations into compliance with the trade agreements, but these attempts did not meet WTO standards. Mexico also stated that even though its fishing practices adhered to international standards, it was still refused the dolphin-safe label. Mexico claimed it lost \$472.3 million annually because of the restriction. The WTO arbitrator found in favor of Mexico but determined the loss to be \$163 million per year, far under Mexico's claimed losses, but far exceeding the U.S. assertion of losses of only \$8.5 to \$21.9 million. This decision allows Mexico to recover \$163 million annually from the U.S. in retaliatory measures such as suspending concessions and other obligations.

Following an announcement in late 2016 that thirteen WTO members intended to pursue a plurilateral agreement (*i.e.*, among a subset of WTO members) to prohibit harmful fisheries subsidies,⁹⁷ the WTO's Negotiating Group on Rules began to consider proposals for the development of a multilateral agreement (*i.e.*, among all WTO members) to discipline fisheries subsidies in 2017.⁹⁸ Specific textual proposals were submitted to the Negotiating Group on Rules by New Zealand, Iceland and Pakistan; the European Union; Indonesia; the African, Caribbean, Pacific Group of States; a Latin American group composed of Argentina, Colombia, Costa Rica, Panama, Peru and Uruguay; the Least-Developed Countries (LDCs) Group; and Norway.⁹⁹ The Negotiating Group on Rules held multiple meetings in the second half of 2017 to discuss these proposals, with the goal of reaching an agreed outcome at the WTO's 11th Ministerial Conference (MC11) in Buenos Aires, December 10-13, 2017.¹⁰⁰ Leading up to MC11, discussions particularly focused on proposals for subsidy prohibitions relating to: illegal, unreported, and unregulated (IUU) fishing; overfished stocks; increasing the capacity of fishing fleets (thereby contributing to overcapacity and overfishing); and special and differential treatment for developing members and LDCs.¹⁰¹ In November 2017, the United States and China each introduced

⁹⁴Decision by the Arbitrator, [U.S. – Measures Concerning the Importation, Marketing & Sale of Tuna & Tuna Products – Recourse to Article 22.6 of the DSU by the United States](#), WT/DS381/ARB (Apr. 25, 2017).

⁹⁵[The General Agreement on Tariffs and Trade \(GATT 1947\)](#), WORLD TRADE ORG. (last visited Apr. 30, 2018).

⁹⁶[Agreement on Technical Barriers to Trade](#), WORLD TRADE ORG. (last visited Apr. 30, 2018).

⁹⁷Press Release, WTO, [Sustainable Fishing, Climate Change Among Issues Aired at Trade and Environment Committee](#) (June 20, 2017); Press Release, WTO, [Joint Statement Regarding Fisheries Subsidies](#) (Sept. 14, 2016).

⁹⁸Press Release, WTO, [Compilation of Seven Fisheries Subsidies Proposals Circulated to WTO Members](#) (July 28, 2017).

⁹⁹*Id.*

¹⁰⁰[Fisheries Subsidies New Archives](#), WORLD TRADE ORG. (last visited Apr. 30, 2018).

¹⁰¹[WTO Rules on Fisheries Subsidies: Progress and Prospects](#), INT'L CTR. FOR TRADE & SUSTAINABLE DEV. (Nov.30, 017); Press Release, WTO, [Members Streamline Texts on Subsidy Prohibitions for IUU fishing and Overfished stocks](#) (Nov. 13, 2017).

new proposals for the draft agreement on fisheries subsidies, focusing on enhanced transparency and IUU fishing, respectively.¹⁰²

WTO members did not reach a final agreement on fisheries subsidies during MC11 in December 2017. However, WTO members concluded the conference with a commitment to (1) continue to engage in fisheries subsidies negotiations, with the goal of adopting a comprehensive agreement on fisheries subsidies by the end of 2019, and (2) improve reporting of existing fisheries subsidies programs.¹⁰³

B. North American Free Trade Agreement (NAFTA) Negotiations

On May 18, 2017, the Trump administration informed Congress that the President intended to commence negotiations with Canada and Mexico on the [North American Free Trade Agreement](#) “to support higher-paying jobs in the United States and to grow the U.S. economy by improving U.S. opportunities under NAFTA.”¹⁰⁴ The Office of the U.S. Trade Representative sought public comments on matters relevant to the modernization of NAFTA in order to inform U.S. negotiating positions. On November 21, 2017, the three countries conclude round five of seven rounds of negotiations, with the sixth round scheduled for January 23-28, 2018, in Montreal, Canada.¹⁰⁵ The Trump administration continues to indicate that the U.S. may announce an intention to withdraw from the Agreement if negotiations are unsuccessful. Such an announcement would trigger a six-month waiting period mandated by Article 2205 of NAFTA.¹⁰⁶

VI. LITIGATION

A. Chevron Litigation

Ecuadorian indigenous peoples have been engaged in a long-standing dispute with Chevron over pollution in the Amazon rainforest allegedly resulting from oil exploration activities that took place from the 1960s through the 1990s. In 2011, the indigenous group obtained an \$8.646 billion judgment against Chevron in an Ecuadorian court.¹⁰⁷ Chevron later brought suit in the U.S. District Court for the Southern District of New York, alleging that the attorney who had represented the indigenous peoples had obtained the judgment through fraud, civil conspiracy, and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO).¹⁰⁸ The district court held in favor of Chevron and concluded

¹⁰²Press Release, WTO, [New Proposals Submitted for Draft Agreement on Fisheries Subsidies](#) (Nov. 3, 2017).

¹⁰³Press Release, WTO, [Ministerial Ends with Decisions on Fish Subsidies, E-commerce Duties; Ongoing Work Continues](#) (Dec. 13, 2017); WTO, Draft Ministerial Decision on Fisheries Subsidies, WT/MIN(17)/W/5 (Dec. 13, 2017).

¹⁰⁴[Request for Comments on Negotiating Objectives Regarding Modernization of the North American Free Trade Agreement with Canada and Mexico](#), 82 Fed. Reg. 23,699 (May 23, 2017) (Request for comments).

¹⁰⁵Press Release, U.S. Office of the Trade Rep., [Trilateral Statement on the Conclusion of the Fifth Round of NAFTA Negotiations](#) (Nov. 21, 2017).

¹⁰⁶[Final NAFTA negotiating round in 2017 leads to little progress on key issues](#), LEXOLOGY (Dec. 7, 2017).

¹⁰⁷The original judgment awarded the plaintiffs \$8.646 billion in compensatory damages, plus the same amount in punitive damages, but the punitive damages were stricken on appeal.

¹⁰⁸*Chevron Corp. v. Donziger*, [974 F. Supp. 2d 362](#) (S.D.N.Y. 2014).

that the Ecuadorian judgment was unenforceable. Last year, the Second Circuit affirmed the district court,¹⁰⁹ and in June 2017, the United States Supreme Court denied certiorari.

Three recent efforts to enforce the multi-billion dollar judgment in other countries have also been rejected. In January 2017, the Ontario Superior Court of Justice ruled that the judgment cannot be enforced in Canada against Chevron's subsidiary, Chevron Canada, because they are separate entities.¹¹⁰ In November 2017, an Argentinian court and a Brazilian court likewise rejected attempts to enforce the judgment in their respective jurisdictions.¹¹¹

B. *Climate Change Litigation*

On November 24, 2015, Peruvian farmer and mountain guide Saúl Luciano Lliuya filed [Lliuya v. RWE AG](#), a case against a German electric utility in a Regional Court in Essen, Germany. Lliuya claimed that RWE AG has caused climate change, which is causing the glacial lake in Lliuya's area to grow and flood nearby lands.¹¹² Lliuya sought payment from RWE AG for preventative measures at the lake in accordance with RWE AG's contribution to climate change.¹¹³ The Regional Court dismissed the suit on December 15, 2016, finding no linear causal connection between RWE AG's actions and the rising water levels in the lake. Lliuya appealed to the Higher Regional Court in Hamm, Germany, which has scheduled the matter for hearing.

In [Juliana v. United States](#), twenty-one young plaintiffs ages 8 to 19 sued the federal government, alleging that, in allowing excessive amounts of greenhouse gases to be emitted in the U.S., the government violated their generation's constitutional rights to life, liberty, and property, and breached its duty to protect public resources.¹¹⁴ The plaintiffs sought declaratory relief and an order directing the government to develop a plan to reduce carbon emissions. The government and industry trade groups, which intervened in the case, filed motions to dismiss, arguing that the plaintiffs' claims raised a non-justiciable political question, that the plaintiffs lacked standing, and that the plaintiffs failed to state substantive due process or public trust claims. The court rejected these arguments and denied both motions on November 10, 2016.¹¹⁵ The government moved for leave to file an interlocutory appeal of the order, but that motion was also denied.¹¹⁶ The government then petitioned the U.S. Court of Appeals for the Ninth Circuit for a writ of mandamus,¹¹⁷ and oral arguments were heard on December 11, 2017.

In [Pandey v. India](#), Ridhima Pandey, a nine-year-old from India, filed a [petition](#) with the National Green Tribunal of India. Pandey argues that India is required to take action to mitigate the effects of climate change, pursuant to the Public Trust Doctrine, India's commitments under the Paris Agreement, and India's environmental laws and

¹⁰⁹[Chevron Corp. v. Donziger](#), [833 F.3d 74](#) (2d Cir. 2016), *cert. denied*, 137 S. Ct. 2268 (2017).

¹¹⁰[Yaiguaje v. Chevron Corp.](#), [2017 ONSC 135, No. CV-12-9808-00CL](#) (July 22, 2016). The judge did not dismiss the case in its entirety; some pleadings will proceed to trial.

¹¹¹[Brazil's High Court Rejects Attempt to Enforce Fraudulent Ecuadorian Judgment Against Chevron](#), BUSINESS WIRE (Nov. 30, 2017).

¹¹²[Lliuya v. RWE Ag](#), [No. 20285/15](#) (Essen Reg. Court 2015).

¹¹³[Saúl Versus RWE – The Case of Huaraz](#), GERMAN WATCH (Nov. 24, 2016).

¹¹⁴217 F. Supp. 3d 1224 (D. Or. 2016).

¹¹⁵*Id.*

¹¹⁶[Juliana v. United States](#), No. 15-1517, 2107 WL 2483705 (D. Or. June 8, 2017).

¹¹⁷[Petition for Writ of Mandamus to the United States District Court for the District of Oregon and Request for Stay of Proceedings in District Court](#), [United States v. U.S. Dist. Court for the Dist. of Or.](#), No. 17-71692 (9th Cir. June 9, 2017).

climate-related policies.¹¹⁸ Pandey seeks a court order directing the Indian government to (1) require that climate change be considered in the course of environmental impact assessments, (2) prepare a national greenhouse gas emissions inventory, and (3) adopt a time-bound national climate recovery plan that includes a national carbon budget against which particular projects' emissions impacts can be assessed.¹¹⁹

In *Greenpeace Southeast Asia et al.*, environmental groups and Filipino citizens filed a [petition](#) with the Philippine Commission on Human Rights, requesting that the commission investigate fifty “Carbon Majors,” defined as producers of crude oil, natural gas, coal, and cement that are allegedly responsible for the majority of global carbon dioxide and methane emissions since the onset of the industrial revolution.¹²⁰ The petitioners further request that the Commission investigate “the human rights implications of climate change and ocean acidification” and whether “the investor-owned Carbon Majors have breached their responsibilities . . . by directly or indirectly contributing to current or future adverse human rights impacts through the extraction and sale of fossil fuels.”¹²¹

On July 4, 2017, representatives of the Mataatua District Maori Council filed [Mataatua District Maori Council v. New Zealand](#)¹²² in New Zealand’s Waitangi Tribunal. The claimants allege that the New Zealand government breached its obligations to the Maori by failing to implement policies that will address climate change, and seek an order directing New Zealand to revise its emission reduction targets and adopt better mitigation and adaptation policies. Upon learning that the claim would not be heard until after 2020, the claimants have application to expedite hearing. To date, the hearing has not been hld.

C. *Hydrofluorocarbon Litigation*

In [Mexichem Fluor, Inc. v. Environmental Protection Agency \(EPA\)](#),¹²³ manufacturers of HFC-134a, a refrigerant with high global warming potential, challenged a [2015 EPA regulation](#)¹²⁴ that added HFC-134a and other HFCs that were, until that time, considered acceptable substitutes for ozone-depleting substances to the agency’s list of prohibited ozone-depleting substances. The case was argued before the D.C. Circuit, with the manufacturers arguing that the EPA (1) had acted arbitrarily and capriciously, and (2) exceeded its authority under section 612 of the Clean Air Act, which requires manufacturers to replace ozone-depleting substances with safe substitutes.¹²⁵ In a 2-1 decision, the court granted in part and denied in part Mexichem Fluor, Inc.’s petition.¹²⁶ Although it rejected Mexichem Fluor, Inc.’s arbitrary-and-capricious challenge, the court agreed with the manufacturers that the EPA did not have the authority to require replacement of HFCs under section 612 because HFCs are not ozone-depleting substances, and vacated EPA’s 2015 rule to the extent that it requires replacement of HFCs.

¹¹⁸Original Application, Pandey v. India (Nat’l Green Tribunal-New Delhi 2017).

¹¹⁹*Id.* at 49-51.

¹²⁰Petition, Greenpeace Se. Asia (Comm’n on Human Rights of the Phil. (Sept. 22, 2015).

¹²¹*Id.* at 3, 5.

¹²²Memorandum of Counsel for the Applicant in Support of Urgency Application, Mataatua Dist. Maori Council v. New Zealand, No. WAI 2607 (Waitangi Tribunal July 4, 2017).

¹²³866 F.3d 451 (D.C. Cir. 2017) (consolidated with *Arkema v. EPA*, Case No. 15-1329).

¹²⁴[Protection of Stratospheric Ozone: Change of Listing Status for Certain Substitutes Under the Significant New Alternatives Policy Program](#), 80 Fed. Reg. 42,870 (July 20, 2015) (to be codified at 40 C.F.R. pt. 82) (Final rule).

¹²⁵42 U.S.C. § 7671k (2017).

¹²⁶*Mexichem Fluor Inc.*, [866 F.3d 451](#).

Respondents Natural Resources Defense Council (NRDC), Honeywell, and Chemours Company FC, LLC petitioned for re-hearing *en banc*. Several states, the California Air Resources Board, and a group of administrative law professors filed amicus briefs. EPA did not file a brief. The D.C. Circuit asked the manufacturers to respond to the petition for rehearing, which they did on October 18, 2017. Respondents filed a response brief on October 23, 2017.

Chapter 29 • SCIENCE AND TECHNOLOGY 2017 Annual Report¹

The Science and Technology Committee evaluates scientific and technological issues and trends in litigation, federal and state regulatory regimes, and legislative developments in practice areas across the spectrum of environmental, energy, and natural resources law. This year's annual report covers two topics in which there were developments in 2016. Part I provides a summary of the U.S. Environmental Protection Agency's (EPA) updates to and progress relating to the Toxic Substances Control Act. Part II discusses current climate change science and litigation concerning the same.

I. DEBATING CLIMATE ON TV—SOMETHING NEW IN 2017²

Like its complete solar eclipse, the year 2017 saw another rare scientific event: scientific issues in the environmental field made front page news.

EPA Administrator Scott Pruitt grabbed national headlines by suggesting a formal debate over the science supporting the role of humans in changing global climate. Pruitt discussed the possibility of a scientific debate in the course of a press interview to Reuters in July 2017. Pruitt told Reuters that there were a lot of “unanswered questions” about the causes of climate change and suggested that: “Who better to do that than a group of scientists . . . getting together and having a robust discussion for all the world to see. . . .”³ Administrator Pruitt also suggested that perhaps this debate could be televised so that the American people could watch directly.⁴ The debate concept apparently adopted the red team/blue team model of the U.S. military used to assess operational vulnerabilities and question underlying assumptions. A theoretical physicist and former undersecretary of the Department of Energy, Steve Koonin, initially suggested this “red team” to challenge basic assumptions plan in an op-ed piece published in *The Wall Street Journal*.⁵ It appears that the “red team” approach of testing climate science assumptions also gathered the support of at least a portion of the coal industry, which hoped that such a debate might be the first step in revising or revoking the EPA's prior finding that greenhouse gas emissions created an “endangerment” requiring further regulation.⁶

In a December 7, 2017 hearing before the House Committee on Commerce and Energy, Subcommittee on the Environment, Pruitt again indicated that the EPA hoped to proceed with such a debate and that the initial launch could be “imminent” in 2018. Pruitt, however, did indicate that work on the debate project was still “ongoing.”⁷

¹This chapter was edited by Vice Chair, Lindsey C. Moorhead, Jackson Walker, L.L.P. Houston, Texas.

²This report is authored by Norman A. Dupont. Mr. DuPont is a partner in the Orange County, California office of Ring Bender LLP, where he practices environmental law and litigation. Norm is currently a Council member of SEER and regularly contributes articles to Section publications.

³Valerie Volcovici, *EPA chief wants scientists to debate climate on TV*, REUTERS (July 12, 2017).

⁴*Id.*

⁵Steve Koonin, *A “Red Team” Exercise would strengthen climate science*, WALL ST. J. (Apr. 20, 2017).

⁶See Scott Waldman, *Pruitt 'guaranteeing' debate on climate science soon*, E&E NEWS (Dec. 1, 2017) (quoting Bob Murray of Murray Energy Corp. on his discussions with Administrator Pruitt).

⁷See Kevin Bogardus, *EPA's Pruitt promises controversial 'red team' climate debate could come soon*, SCI. NEWS (Dec. 7, 2017).

The lead Democratic representative on the committee, Paul Tonko of New York, directly challenged the EPA's position on science in his opening statement at the December 7, 2017 hearing: "Despite this scientific consensus, EPA has begun to roll back rules at the behest of special interests to address greenhouse gas emissions which have been developed over many years, backed by science, and include economic impact studies."⁸

In response to a question posed by Rep. Joe Barton at the same December 7th hearing, Pruitt sharply criticized the EPA's prior process for arriving at an endangerment finding in 2009, calling it "short-shrifted" and involving what the Administrator termed a "breach of process."⁹

Despite the drumbeat of publicity and the Administrator's positive discussion at a congressional hearing, the Trump Administration is now backing away from the "red team" debate idea, at least at this time. According to unspecified sources, after a meeting held approximately one week after the December 7th hearing, William Wehrum, the recently approved EPA Assistant Administrator for Air and Radiation,¹⁰ met with EPA deputy chief of staff Rick Dearborn and the special assistant to the President on environmental and energy issues, Michael Catanzaro, to discuss the proposed debate. The result, according to news sources, was that the debate proposal was deferred. To use a weather-derived analogy, the red team debate concept was put "on ice."¹¹ Although a formal explanation was not given for this decision to proceed in a glacial manner, news sources reported that there were still many "issues" to be resolved about such a debate.

Many officials in the Trump administration, including Mr. Catanzaro and Administrator Pruitt, clearly challenge the human contribution to climate change and are frequently labeled as "climate skeptics."¹² Perhaps the task of announcing a new primetime television program—"EPA debates technical scientific issues"—proved too much of a snoozer for the media savvy administration. Alternatively, perhaps the red team debate will, like some ancient vampire, arise from its current moribund state and stalk climate change scientists throughout the country. But, at this juncture one of the much touted ideas to publicly challenge scientific evidence for climate change remains buried.

II. AN UPDATE ON THE TOXIC SUBSTANCES CONTROL ACT¹³

In 2017, the Environmental Protection Agency ("EPA") began implementing key provisions of the Frank R. Lautenberg Chemical Safety for the 21st Century Act ("Lautenberg Act"), which amended the Toxic Substances Control Act ("TSCA") to

⁸[Preliminary Transcript of U.S. House of Representatives](#), Commerce & Energy Comm., Env'tl. Subcomm. Hearing, "The Mission of the U.S. Environmental Protection Agency" at p. 11 (Dec. 7, 2017) (opening statement of Rep. Tonko).

⁹*Id.* at p. 49 (question by Mr. Barton and answer by Administrator Pruitt).

¹⁰Mr. Wehrum was nominated for the assistant administrator's position in September and was formally confirmed by the Senate on November 9, 2017. [PN994 – William L. Wehrum – Env'tl. Prot. Agency](#), CONGRESS.GOV (last updated Nov. 9, 2017).

¹¹Robin Bravender, *EPA Climate science debate 'on hold' after White House meeting*, E&E NEWS (Dec. 15, 2017).

¹²See Steve Horn, [Before Becoming Trump's Top Energy Aide, Mike Catanzaro Peddled Climate Change Denial as a Writer](#), DESMOGBLOG (Feb. 23, 2017); Phil McKenna, [EPA Head Pruitt Denies the Basic Science of Climate Change](#), INSIDE CLIMATE NEWS (Mar. 9, 2017) (reporting on CNBC interview of Administrator Pruitt and his comments on climate change).

¹³This Report is authored by Ken Rumelt. Mr. Rumelt is a Professor of Law and Senior Attorney at the Vermont Law School's Environmental and Natural Resources Law Clinic.

address weaknesses in the 40-year-old statute's ability to regulate toxic chemicals.¹⁴ During the year, the EPA promulgated three "framework" rules for implementing the revised TSCA. These rules govern a reset of the EPA's chemical inventory to define the universe of "existing" chemicals, a risk-based process for determining which chemicals are a "high-priority," and the procedures for determining whether high-priority and other chemical substances create an "unreasonable risk" under their "conditions of use."

A. *Prioritized Risk Evaluation of "Existing" Chemicals*

The Lautenberg Act amended TSCA to address several shortcomings, including the need to address thousands of chemicals grandfathered under the original Act that never underwent any TSCA review. The Lautenberg Act addresses these chemicals by resetting its [Chemical Substance Inventory](#) to determine whether chemicals are "active" or "inactive."¹⁵ Chemicals that are "inactive" may not be made or processed until EPA receives notification that the chemicals are "active."¹⁶ In addition, the Lautenberg Act establishes a two-step process for prioritizing and then evaluating existing chemicals. First, the EPA prioritizes chemicals into two categories: high-priority and low-priority using a risk-based process and criteria it establishes by rule.¹⁷ Second, chemicals that are deemed "high-priority" and undergo a risk evaluation to determine whether they present "an unreasonable risk of injury to health or the environment, without consideration of costs or other no risk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation by the Administrator, under the conditions of use."¹⁸ The risk evaluation also applies to chemicals for which manufacturers request a risk evaluation, subject to certain requirements discussed below.

During 2017, the EPA promulgated rules governing each of these processes. This update will refer to these as the Inventory Reset Rule, the Prioritization Rule, and the Risk Evaluation Rule. Environmental groups filed petitions challenging each rule during the year.

1. The Inventory Reset Rule

The EPA published the [Inventory Reset Rule](#) on August 11, 2017.¹⁹ The rule contains retrospective reporting requirements and prospective reporting requirements for chemical manufacturers and processors. The former requirements apply to chemical substances listed on the Inventory that were manufactured for nonexempt commercial purposes during a 10-year "lookback" period ending on June 21, 2016. The latter applies to substances listed in the Inventory as "inactive" that are to be reintroduced into U.S. commerce.

This Rule also exempts from retrospective reporting requirements those chemical substances for which the EPA already has an equivalent notice.²⁰ These are chemical substances that (1) are on the interim list of active substances, which is comprised of chemicals reported in 2012 and 2016 under the Chemical Data Reporting rule (CDR), 40

¹⁴Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448 (2016) (codified at 15 U.S.C. §§ 2602-697 (2016)).

¹⁵15 U.S.C. § 2607(b)(4)(A) (2016).

¹⁶*Id.* § 2605(b)(5) (2016).

¹⁷*Id.* § 2605(b)(1)(A) (2016).

¹⁸*Id.* § 2605(b)(4)(A) (2016).

¹⁹TSCA Inventory Notification (Active-Inactive) Requirements, 82 Fed. Reg. 37,520 (Aug. 11, 2017) (to be codified at 40 C.F.R. pt. 710) (final rule).

²⁰*Id.*

C.F.R. part 71; (2) were added to the Inventory during the “lookback” period pursuant to a Notice of Commencement; and (3) a manufacturer has a Central Data Exchange (CDX) receipt documenting the EPA’s receipt of a Notice of Activity (NOA) form A from another manufacturer. These exemptions do not apply to manufacturers or processors of a chemical substance on the confidential portion of the Inventory that was added before June 22, 2016. Chemical substances added to the Inventory on or after June 22, 2016 are deemed active.

Manufacturers have 180 days from the publication of the Inventory Reset Rule to report to the EPA; processors have 420 days.²¹

The Inventory Reset Rule also governs how claims of confidential business information (“CBI”) are handled. Under the Rule, manufacturers and processors may claim CBI protections for information other than specific chemical identity pursuant to new requirements under the Lautenberg Act.²² These include a certifying statement and substantiation at the time of submission. This Rule also allows requests to maintain existing CBI claims for chemical identity. However, the Rule does not require these requests to substantiate CBI claims for chemical identities.

2. The Prioritization Rule

On June 11, 2017, the EPA published its [Prioritization Rule](#) for classifying active chemical substances as high-priority or low-priority.²³ High-priority substances will undergo risk evaluation pursuant to the third framework rule, discussed in greater detail below.

The EPA crafted this Rule to take a risk-based approach to prioritizing chemicals for further assessment, focusing on those substances that have “the greatest hazard and exposure potential first,” to conserve EPA resources for the actual risk evaluation.²⁴ The first step in the prioritization process is selection of chemical substances as candidates for a High-Priority Substance designation. TSCA requires the EPA to give preference to certain chemical substances listed in the [2014 update of the TSCA Work Plan for Chemical Assessments](#) (“2014 Update”) that are persistent and bioaccumulative; that are known human carcinogens; that are highly toxic; or some combination thereof. The Rule also requires the EPA to identify enough prioritization candidates from the 2014 Update to ensure it can meet the TSCA’s requirement to conduct at least 50% of risk evaluations (not to be confused with risk-based prioritization) are being conducted from the 2014 Update.

The EPA will then screen candidate chemical substances against seven criteria: (1) hazard and exposure potential; (2) persistence and bioaccumulation; (3) potentially exposed or susceptible populations; (4) storage of the candidate near significant drinking water sources; (5) conditions of use or significant changes in conditions of use; (6) production volume or significant changes in production volume; and (7) other risk-based criteria the EPA deems relevant.²⁵ The EPA will propose the candidate’s designation in reference to its “conditions of use,” which does not necessarily include “every activity” involving the chemical.

Throughout the candidate selection and screening review process, the EPA will rely on “reasonably available information,” defined as information the EPA possesses or “can reasonably generate, obtain and synthesize for use,” considering TSCA’s deadlines for

²¹*Id.*

²²*Id.* at 37,527.

²³Procedures for Prioritization of Chemicals for Risk Evaluation Under the Toxic Substances Control Act, 82 Fed. Reg. 33,753 (July 20, 2017) (to be codified at 40 C.F.R. pt. 702) (final rule).

²⁴*Id.*

²⁵*Id.*

prioritization and risk evaluation.²⁶ This includes CBI. If the EPA determines that insufficient information exists for purposes of prioritization, it “generally expects” to obtain the information prior to initiating the screening process using its authorities under TSCA. If information remains insufficient to designate the candidate chemical substance a Low-Priority Substance, the EPA will propose its designation as a High-Priority Substance.

TSCA requires this process to take a minimum of nine months and a maximum of twelve months to complete once it initiates the process for a chemical substance.²⁷

3. The Risk Evaluation Rule

The EPA also published the [Risk Evaluation Rule](#) on June 11, 2017,²⁸ which establishes the process for determining whether a chemical “presents an unreasonable risk of injury to health or the environment, without consideration of costs or other non-risk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation by the Administrator under the conditions of use.”²⁹

The TSCA, as amended, creates minimum components the EPA must include in any risk evaluation: within six months after initiating a risk evaluation, the EPA must “publish the scope of the risk evaluation to be conducted, including the hazards, exposures, conditions of use, and the potentially exposed or susceptible subpopulations the Administrator expects to consider”³⁰ Each risk evaluation must also:

- Integrate and assess available information on hazards and exposures for the conditions of use of the chemical substance, including information on specific risks of injury to health or the environment and information on potentially exposed or susceptible subpopulations;
- Describe whether aggregate or sentinel exposures were considered and the basis for that consideration;
- Take into account, where relevant, the likely duration, intensity, frequency, and number of exposures under the conditions of use;
- Describe the weight of scientific evidence for the identified hazards and exposure;³¹ and
- Must not consider costs or other non-risk factors.³²

The Risk Evaluation Rule also defines several key terms in the TSCA, three of which are controversial.³³ The EPA defined “conditions of use” to mean “the circumstances, as determined by the Administrator, under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of.”³⁴ The definition does not include what the EPA termed “legacy uses” (circumstances associated with activities that do not reflect ongoing or prospective manufacturing, processing, or distribution), “associated disposal” (future

²⁶*Id.* at 33,757.

²⁷15 U.S.C. § 2605(b)(1)(C) (2016).

²⁸Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act, 82 Fed. Reg. 33,726 (July 20, 2017) (to be codified at 40 C.F.R. pt. 702) (final rule).

²⁹15 U.S.C. § 2605(b)(4)(A) (2016).

³⁰*Id.* § 2605(b)(4)(D) (2016).

³¹*Id.* § 2605(b)(4)(F)(i), (iii)–(v) (2016).

³²*Id.* § 2605(b)(4)(F)(ii) (2016).

³³Risk Evaluation Rule, 82 Fed. Reg. at 33,748.

³⁴*Id.*

disposal of a chemical that is no longer manufactured, processed, or distributed), or “legacy disposal” (a chemical substance currently in a landfill or in groundwater).³⁵ The EPA, however, did not rule out considering background exposures from these exclusions as part of an aggregate exposure assessment resulting from a non-legacy use.

The Rule defines two additional key terms, “best available science” and “weight of scientific evidence” that were not in the proposed rules.³⁶ The Rule also defines several other key terms for risk evaluation under TSCA section 6. The EPA borrowed language from the Safe Drinking Water Act (SDWA) and TSCA section 26(h) to define “best available science” generally to mean “science that is reliable and unbiased,” a determination guided by considerations such as relevance, clarity and completeness of documentation, evaluation and characterization of variability and uncertainty, and independent verification or peer review.³⁷

There are three categories of chemicals subject to risk evaluation: (1) ten chemical substances that Congress required the EPA to identify from the 2014 Update within 180 days of the Lautenberg Act’s enactment;³⁸ (2) chemical substances the EPA identifies as High-Priority Substances; and (3) manufacturer-requested risk evaluations. The Rule adopts the statutory timeframe for completing risk evaluations—a maximum of three and one-half years.³⁹

The Risk Evaluation Rule also establishes the form, manner, and criteria for chemical manufacturers to request an EPA risk evaluation.⁴⁰ Requests must identify conditions of use that are of interest to the manufacturer, the chemical identity, all information required for a risk evaluation for the conditions of use, and substantiation of CBI claims.⁴¹ The Rule establishes a process for public notice and no less than a 45-day comment period. Within sixty days after the end of the comment period, the EPA will determine whether to grant or deny the request. If granted, the chemical will undergo the same review as high-priority chemicals, and will not receive expedited or special treatment, on payment of a statutorily mandated fee. The EPA will give preference to requests, however, where state action has the “potential to have a significant impact on interstate commerce or health or the environment”⁴²

B. *Legal Challenges*

1. Framework Rules

Several environmental groups filed petitions in several circuit courts to challenge each of the three framework rules discussed above. Although the petitions do not identify the legal claims with precision, news accounts indicate several concerns. One is the EPA’s

³⁵*Id.* at 33,729–30.

³⁶[*Environmentalists Sidestep D.C. Circuit in First Suits Over EPA’s TSCA Rules*](#), INSIDE EPA WKLY. REP., Vol. 38 (Aug. 25, 2017).

³⁷Risk Evaluation Rule, 82 Fed. Reg. at 33,731.

³⁸Designation of Ten Chemical Substances for Initial Risk Evaluations Under the Toxic Substances Control Act, 81 Fed. Reg. 91,927 (Dec. 19, 2016) (Notice) (EPA identified these chemicals: asbestos; 1-bromopropane, carbon tetrachloride; 1,4 dioxane, cyclic aliphatic bromide cluster (HBCD); methylene chloride; n-methylpyrrolidone; perchloroethylene; pigment violet 29; and trichloroethylene).

³⁹15 U.S.C. § 2605(b)(4)(G) (2016).

⁴⁰One benefit to manufacturers requesting a risk review is preemption of state restrictions on a chemical substance that EPA finds does not present an unreasonable risk.

⁴¹Risk Evaluation Rule, 82 Fed. Reg. at 33,736.

⁴²*Id.* at 33,737; 15 U.S.C. § 2605(b)(4)(E)(iii) (2016).

definition of “conditions of use.” The National Resources Defense Council (NRDC), one of the petitioners, stated that the TSCA requires the EPA to consider all “intended, known, and reasonably foreseeable uses” whereas the EPA’s final rules “allow EPA to pick and choose which uses to consider.” There is also a possibility of an Administrative Procedure Act (APA) claim over the definitions of “best available science” and “weight of the evidence,” which were not included in the proposed rules.⁴³

2. Section 21 Petition

In [February 2017](#), the EPA rejected a petition by environmental groups to ban drinking water fluoridation on the grounds that the petition did not address all conditions of use.⁴⁴ On April 18, 2017, these groups sued the EPA in the Federal District Court for the Northern District of California.⁴⁵ The EPA then moved to dismiss the lawsuit on the same grounds as its petition denial. The court denied the motion, finding instead that section 21 of the TSCA does not require petitions to address every “condition of use.”⁴⁶ The case is notable because it may lead to additional section 21 petitions and because the EPA’s position on “conditions of use” seems contrary to the definition in its Risk Review Rule.⁴⁷

⁴³[EPA’s Early TSCA Rules Ripe for Suits from Environmentalists, Industries](#), INSIDE EPA WKLY. REP. (July 20, 2017)

⁴⁴Fluoride Chemicals in Drinking Water; TSCA Section 21 Petition; Reasons for Agency Response, 82 Fed. Reg. 11,878, 11,880 (Feb. 27, 2017) (to be codified at 40 C.F.R. ch. I) (Petition; reasons for Agency response).

⁴⁵Complaint, Food & Water Watch v. EPA, No. 3:17-cv-02162-JSC, 2017 WL 2489984 (N.D. Cal. Apr. 18, 2017).

⁴⁶[Order Denying Defendant’s Motion to Dismiss](#), Food & Water Watch, No. 17-CV-02162-EMC, 2017 WL 6539923, at *1 (N.D. Cal. Dec. 21, 2017).

⁴⁷[Fluoride Case Ruling May Spur More TSCA Petitions, Attorneys Say](#), INSIDE EPA WKLY. REP. (Jan. 12, 2018).

Chapter 30 • ETHICS AND THE PROFESSION 2017 Annual Report¹

This chapter reports on activities of the American Bar Association's Standing Committee on Ethics and Professional Responsibility, state bar association and other disciplinary boards, and emerging issues relevant to the intersection of legal ethics and environmental law. The rules of ethics apply to all lawyers, including lawyers who practice in the areas of environment, energy, and resources, and all lawyers should be aware of and maintain compliance with the rules of their jurisdictions. The potential risks to public health and safety from violations of environmental law makes the stakes high for environmental lawyers concerned about ethics rules.

While state-specific ethics rules apply to SEER's lawyers by virtue of their memberships in various state bars, the ABA's Model Rules of Professional Conduct provide the template for the rules which control in forty-nine states, the District of Columbia and the Virgin Islands (California is the only non-adopting state). Thus the Model Rules provide a logical starting place for understanding the ethics laws that govern lawyers. Agency rules and executive orders also impact the ethical obligations of lawyers and may (like statutory law) supersede particular ethics rules. Finally, ethics decisions by courts and disciplinary boards are directly applicable to lawyers practicing within or before the issuing jurisdiction, and courts and boards often rely on the decisions of other jurisdictions as persuasive authority.

I. SEER BOOK PROJECT

In 2017, SEER's Special Committee on Ethics and Professionalism continued its work in support of education on issues of legal ethics for SEER members by developing ethics CLE content for panels at SEER conferences. Additionally, two of the committee's members (Irma S. Russell and Vicki J. Wright) edited and released a new book, *Ethics and Environmental Practice: A Lawyer's Guide*.²

II. AMENDMENT TO MODEL RULES

A. *Proposed Amendments*

On December 21, 2017, the ABA's Standing Committee on Ethics and Professional Responsibility released a Working Draft of proposed amendments to the Model Rules of Professional Conduct concerning lawyer advertising.³ The Working Draft proposes changes to Model Rules (or Comments to Rules) 1.0 (Terminology), 7.1 (Misleading Communications/Consumer Protection), 7.2 (Specific Rules for Advertising and Gifts, Referrals, and Recommendation), 7.3 (Solicitation), and 7.4 (Fields of Practice and Specialization). The Standing Committee's plan is to present a final recommendation and proposal to the ABA House of Delegates at the August 2018 annual meeting.

¹The author is the Chair of SEER's Special Committee on Ethics and Professionalism. Please address questions about this chapter to the author at kwhitby@spencerfane.com.

²See *ETHICS & ENVIRONMENTAL PRACTICE: A LAWYER'S GUIDE* (Irma Russell & Vicki Wright, eds., 2017) (explores cases of application of principles of legal ethics to the environmental context).

³[Model Rules of Prof'l Conduct rr. 1.0, 7.1-7.5](#) (proposed Dec. 21, 2017). The Working Draft will be the subject of a public forum on February 2, 2018 at the ABA's Midyear Meeting in Vancouver, Canada.

B. *State Bar Adoption of Amended Rule 8.4*

In an order dated July 14, 2017, the Vermont Supreme Court adopted anti-discrimination and harassment amendments to its version of Rule 8.4(g) based on the new model Rule 8.4(g) (Misconduct) and new comments [4], [5], and [6]. The revised Vermont Rule of Professional Conduct 8.4(g) became effective September 18, 2017.⁴ In addition, the Rules of Professional Conduct for American Samoa, the Northern Mariana Islands, and the U.S. Virgin Islands specify that model rules adopted by the ABA House of Delegates are deemed adopted by these jurisdictions upon enactment, subject to the jurisdiction later indicating another disposition for the revised or new model rule.⁵

For the remainder of the states and jurisdictions, amended Model Rule 8.4 is not directly applicable. If an instance of potential lawyer misconduct arises which could be susceptible to new section (g), however, the relevant disciplinary tribunal may elect to take the new misconduct provision into account.

III. ABA ETHICS OPINIONS

The ABA's Standing Committee on Ethics and Professional Responsibility ("Standing Committee") released three ethics opinions in 2017. One (Formal Opinion 478) concerns independent factual research by judges using the Internet and is not addressed here. The other two are summarized below.

A. *Formal Opinion 477 – Securing Communication of Protected Client Information (May 11, 2017)*

Under Model Rules of Professional Conduct 1.1 and 1.6,⁶ lawyers have a duty to provide competent representation, including (since 2012) competency regarding the risks and benefits of relevant technology,⁷ and to protect client confidential information, including making "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information related to the representation of a client."⁸

In Formal Opinion 413 (issued in 1999), the Standing Committee confirmed that lawyers could reasonably expect privacy when using e-mail, even without encryption, and that sending or receiving e-mail and data over the Internet did not breach the duty to maintain client confidentiality.⁹ New Formal Opinion 477 updates this 1999 guidance, and reconsiders it in light of bring-your-own-devices, cloud storage, and the ubiquity of smartphones and telecommuting, given a world with phishing attacks, ransomware, and cybersecurity concerns.¹⁰

Formal Opinion 477 determines that lawyers may (and indeed likely must) continue to use computer-based technology to store client information and communicate with clients, but while doing so, lawyers must "exercise reasonable efforts" to protect the information and communications, and, more importantly:

⁴VT. RULES OF PROF'L CONDUCT r. 8.4 (2017).

⁵See N. MARI. I. RULES OF ATTORNEY DISCIPLINE & PROCEDURE r. 3 (2015); V.I. RULES OF PROF'L CONDUCT (2014).

⁶MODEL RULES OF PROF'L CONDUCT (2017) ("Model Rules" or "Model Rule").

⁷Model Rule 1.1 cmt. 8.

⁸Model Rule 1.6(c).

⁹ABA Committee on Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999).

¹⁰ABA Committee on Ethics & Prof'l Responsibility, Formal Op. 477 (2017) (revised).

What constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors. In turn, those factors depend on the multitude of possible types of information being communicated (ranging along a spectrum from highly sensitive information to insignificant), the methods of electronic communications employed, and the types of available security measures for each method.¹¹

Formal Opinion 477 declines to establish bright-line rules about what is or is not reasonable, but suggests the following considerations as guidance:

1. Understand the nature of the threat.
2. Understand how client confidential information is transmitted and where it is stored.
3. Understand and use reasonable electronic security measures.
4. Determine how electronic communications about client matters should be protected.
5. Label client confidential information.
6. Train lawyers and nonlawyer assistants in technology and information security.
7. Consider due diligence on vendors providing communication technology.¹²

The Formal Opinion concludes with the caution that under Model Rule 1.4, the duty to communicate may require the lawyer to specifically communicate with the client about the risks of email when highly sensitive confidential client communications are involved, and confirms that clients may require communication methods with security protections either more or less stringent than those normally used by the lawyer.¹³

B. Formal Opinion 479 – The “Generally Known” Exception to Former-Client Confidentiality (December 15, 2017)

Under Model Rule 1.9(c), a lawyer may not use information related to a former client’s representation to the client’s disadvantage, absent the client’s informed consent, implicit authorization, or as otherwise allowed by the Model Rules, unless the information is “generally known.”¹⁴

Formal Opinion 479 gives guidance about the “generally known” standard, and explains that it does not equate to “publicly available,” on the “public record,” as a “matter of public record,” or “available to be known if members of the general public choose to look where the information is to be found.”¹⁵ Rather, the Formal Opinion indicates that “generally known” means: “(a) it is widely recognized by members of the public in the relevant geographic area; or (b) it is widely recognized in the former client’s industry, profession, or trade.”¹⁶ And of course, the information must not have been revealed by the

¹¹*Id.* at 4, 4 n.11.

¹²*Id.* at 6-10.

¹³*Id.* at 11.

¹⁴Model Rule 1.9(c).

¹⁵ABA Committee on Ethics & Prof’l Responsibility, Formal Op. 479 at 2-3 n.6.

¹⁶*Id.* at 5.

lawyer or his or her agents – such disclosure is prohibited, even as to former clients, by Model Rules 1.6(b) and 1.9(c)(2).

IV. SURVEY OF DEVELOPMENTS

A search of the on-line databases revealed no ethics case or disciplinary opinion specifically addressing the practice of environmental, energy, or resources law in 2017. Nevertheless, some developments in 2017 deserve the attention of the environmental practitioner from an ethics perspective.

A. *Unlicensed Practice of Law*

On January 29, 2017, the U.S. District Court for the Central District of California entered an order denying summary judgement sought by an attorney-defendant in litigation seeking restitutionary disgorgement of more than \$12 million in attorney's fees paid to him following settlement of Nevada state court class action litigation involving a failed condominium development.¹⁷ The attorney in question, defendant Obenstine, had not been identified as class counsel or co-counsel to the court in the Nevada litigation, and never applied for admission *pro hac vice*. Members of the Nevada case's plaintiff class brought suit in California federal district court for common law professional malpractice, breach of fiduciary duty, and fraud; statutory violations of the California Business & Professions Code covering unfair completion and the California Consumers Legal Remedies Act; and breach of contract concerning a retainer agreement.

In denying Obenstine summary judgment, the court found that Obenstine had entered into a joint venture with several Nevada-based attorneys to pursue the Nevada class action. The various counsel entered into written fee-sharing arrangements, and pursuant to these contracts, Obersteine was paid from the attorney's fees collected by the other joint venture counsel. The court determined that plaintiffs were entitled to pursue the majority of their claims against Obersteine (it denied any right to money damages under the Consumers Legal Remedies Act because plaintiffs failed to provide 30 days' pre-claim notice), and specifically approved the concept of restitutionary disgorgement of the \$12 million in attorney's fees. In so finding, the court focused special attention on Obersteine's 1) misleading a judicial officer and unethical fee sharing, and 2) unlicensed practice of law in Nevada.¹⁸

The potential implications of this order for SEER members who practice law as plaintiffs' counsel (particularly class action counsel) are clear: do not hide co-counsel representation or fee-sharing arrangements from clients or a court. In addition, defense counsel similarly may be subject to an unhappy client's attempt to recapture attorney's fees paid for work in a state where counsel is not licensed.

B. *Receipt of Confidential Information Intentionally Disclosed by Third Parties*

Model Rule 4.4(b) requires lawyers who inadvertently receive documents or information relating to the representation of a client to promptly notify the sender of that inadvertent receipt.¹⁹ The question arises, though – what about information intentionally (as opposed to inadvertently) sent to a lawyer? This question was addressed by the U.S. District Court for the District of Kansas in the wrongful termination case [Raymond v. Spirit](#)

¹⁷[Estakhrian v. Obenstine](#), 233 F. Supp. 3d 824 (C.D. Cal. 2017).

¹⁸*Id.* at 841-42.

¹⁹Model Rule 4.4(b).

[*Aerosystems Holdings, Inc.*](#) According to that court, the answer is the same – the recipient lawyer must disclose receipt of confidential information to opposing counsel.²⁰

In the Spring of 2014, counsel for the *Spirit Aerosystems* plaintiffs received two separate, anonymous packets of documents – one slipped through the mail slot of the labor union representing many of the plaintiffs, and the second delivered by mail direct to counsel. Both packets contained defendant Spirit’s internal documents concerning Spirit’s plans for a 2013 reduction in force (“RIF”) which had been implemented several weeks prior to a second RIF that impacted plaintiffs. Some of the anonymously-provided documents were stamped “privileged,” while others which were marked “Spirit Confidential” or “Spirit Proprietary.” Defense counsel had her paralegal sort through the documents and separate out those marked “privileged,” which went into a sealed envelope and were not reviewed or used by plaintiffs’ counsel.²¹

The rest of the documents (the majority of those received) were reviewed by the lawyers, and information contained in the documents was used, along with independently-derived information, as a basis for a complaint filed against Spirit in July 2016, as well as plaintiffs’ September 2016 initial discovery requests. Plaintiffs’ counsel did not disclose the existence of the documents to Spirit’s lawyers until October 2016, six days prior to the first in-person status conference with the court, during which conference she planned to seek the court’s guidance regarding the documents. Counsel’s rationale for waiting so long to disclose was that she had consulted four different, independent ethics counsel, including the deputy disciplinary administrator for the State of Kansas, and that they all advised that Rule 4.4 of the Kansas Rules of Professional Conduct (identical to Model Rule 4.4) only requires notice to a sender of the inadvertent transmittal of confidential documents. Two of the experts suggested that she raise the documents’ existence with the court as part of the first scheduling conference.²²

The *Spirit Aerosystems* court was not pleased to learn of plaintiffs’ receipt, retention, segregation, and use of the documents. The court engaged in an extensive analysis of Rule 4.4; ethics opinions issued by the ABA both prior to and after the 2002 insertion of the inadvertent delivery provision to Model Rule 4.4;²³ the Kansas Bar Association’s *Pillars of Professionalism* (2012);²⁴ and what the court denominated as “illustrative caselaw.”²⁵ By the end, the court confessed itself:

[S]eriously baffled that out of all the legal minds which reviewed these facts, not one appeared to put themselves in the shoes of the opposing counsel or Defendants.... KRPC 4.4 does not distinguish between privileged or confidential materials, but relates to information merely “relating to the representation of the lawyer's client” that a receiving lawyer “knows or reasonably should know were inadvertently sent.” Likewise, here, receiving counsel knew both that the documents related to representation of their clients, and knew—from the markings on the documents themselves and from their prior dealings with Spirit—that the documents were not intended for disclosure outside Defendants’ business. Therefore, the Court finds Plaintiffs’ counsel had a duty to, at minimum,

²⁰No. 16-1282-JTM-GEB, 2017 WL 2831485 (D. Kan. June 30, 2017).

²¹*Id.*

²²*Id.*

²³ABA Committee on Ethics & Prof’l Responsibility, Formal Ops. 94-382 (1994, *withdrawn*, 2006), 06-440 (2006), and 11-460 (2011).

²⁴[*Pillars of Professionalism*](#), Kan. Bar Ass’n (Oct. 2012).

²⁵*Spirit Aerosystems Holdings, Inc.*, 2017 WL 2831485, at *10-13.

immediately notify Defendants of the disclosure, regardless of its intentional nature.²⁶

The *Spirit Aerosystems* court went on to consider defendant's request for sanctions, including dismissal of all or part of plaintiffs' action, disqualification of counsel, exclusion of evidence (including return of the documents and exclusion of all information "related to" the documents), and an award of attorney's fees. The court ultimately required return of the documents, certification that any use of information "related to" topics covered by the documents had been independently discovered, and an award of attorney's fees and costs "caused" by plaintiffs' retention of the documents.²⁷

Again, the potential implications of this decision (and the ones cited by the court in reaching the *Spirit Aerosystems* results) for SEER members are clear: the Golden Rule is alive and well and can be applied to attorneys even in the absence of express ethics rules or opinions.

²⁶*Id.* at *16 (footnote omitted).

²⁷*Id.*